

OUR REF: 20208 – S4.55(8)

14 September 2023

Waverley Council
The General Manager
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Attention: Bridget McNamara

Dear Bridget,

**RE: SECTION 4.55(8) MODIFICATION FOR DEVELOPMENT APPLICATION (DA NO. 7/2022/A)
NO. 129 DOVER ROAD, ROSE BAY**

This Section 4.55(8) Modification has been prepared for Sophie Spartalis and Michael Orphanides by George Karavanas Planning Pty Ltd – (hereafter referred to as GSA Planning). On behalf of the applicant, we hereby seek Council approval for a Section 4.55(8) modification of the approved development at the abovementioned site (DA No. 7/2022/A). The approval relates to the demolition of the existing structures and construction of a new dwelling with basement car parking accessed from Dover Road, and a new garage with a studio above accessed from Beaumont Street.

This application seeks to modify three conditions of the consent to reflect the revised architectural drawings. The proposed modifications relate to design refinements to the approved dwelling including an extension of the front rear glazing line, which will provide additional internal space whilst retaining the approved building footprint, bulk and scale. Minor internal layout changes and external amendments to the front and rear terraces on the first-floor level are proposed to rationalise the changes to the glazing lines. The proposed modifications will be within the approved building envelope, ensuring that approved levels of privacy, solar access and views for surrounding properties and the public domain are preserved.

Minor modifications to the basement are proposed, which will ensure that the necessary services equipment can be accommodated in compliance with the minimum requirements of the Australian Standards. These changes will support the functionality of the approved dwelling as per the Service Consultant's Advice, detailed in the documentation prepared by JR Engineering Group.

The modification will maintain the overall bulk, scale and character of the approved building, when viewed from Dover Road and Beaumont Street. The development will remain compliant with the building height development standard. The approved setbacks, wall height, landscaped area and open space will be retained. This will ensure that the amenity of surrounding properties and the streetscape is preserved.

The proposed development is the subject of a Section 4.55(8) modification and not a new development application. This is because the proposal is substantially the same as the approved development and generally retains the overall built form of the approved development.

This report includes an assessment of substantially the same; a brief site analysis; a brief background to the proposal; the conditions of development consent requested to be modified; a description and justification of the proposed modifications; an environmental planning assessment; and a conclusion.

1.0 SUBSTANTIALLY THE SAME ASSESSMENT

An application can be considered a modification under Section 4.55(8) if it is ‘substantially the same’ ‘qualitatively’, ‘quantitatively’ and ‘essentially’. This is in accordance with relevant case law, including:

- *Moto Projects (No. 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; and
- *Chidiac v Canterbury City Council* [2012] NSWLEC 1335

The proposal relates to minor refinements to the dwelling and adjustments to the approved basement level. The works have been carefully designed to maintain the amenity of surrounding properties.

1.1 Qualitative and Quantitative Assessment

In **quantitative terms**, the proposed modifications will retain the same number of bedrooms, living areas, levels, storeys and car parking spaces. The building height, external setbacks, wall height, open space and landscaped area will remain as approved.

In **qualitative terms**, the proposed modifications will not alter the building type, or substantially change the external appearance when viewed from the street or surrounding properties. The development will continue to present as a well-articulated contemporary dwelling house to Dover Road, with a carport and studio at the rear from Beaumont Street. Importantly, the modifications will continue to preserve the amenity of neighbouring properties.

In both **quantitative and qualitative terms**, the proposed modifications are minor in nature and relate to design refinements, which enhance the functionality and amenity of the approved dwelling. The approved use is maintained as a dwelling house with a basement, car parking, studio, swimming pool and landscaping. The development as modified is thus substantially the same as the development for which consent was originally granted.

1.2 Land and Environment Court Cases Related to ‘Substantially the Same’

There are numerous examples of Section 4.55 and Section 4.56 Modifications approved by many Councils, including Waverley, which have involved a far greater degree of modification. Such modifications that have passed the test of Section 4.55 and 4.56 and have involved changes including the following, inter alia:

- Changes to the facades and external appearance;
- Changes to the envelope and profile of the development;
- Increases in floor space;
- Increases in height (in metres);
- Increases in number of storeys;
- Additional basement levels; and
- Increases in number of dwellings.

While such examples may be helpful in understanding the threshold that has been applied by Councils, consideration should also be given to applications for modification determined by the Court. There have been numerous appeals where “substantially the same” has been shaped and informed by Court decisions. Two of these cases will now be discussed.

Moto Projects (No. 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council*, the Court was not satisfied the proposed modifications were “substantially the same development” as the approved development of the North Sydney Club, with the deletion of an access ramp from Warringah Expressway.

Bignold J considered the separate ingress to be: ‘a material and essential physical element of the approved development’ [59]. In his assessment Bignold J, referred to the Council Planning Report which he said ‘places undue reliance upon the modification representing “only a fraction of the overall development, inter alia:

52. *That opinion [Council's Planning Report] appears to involve some form of numeric or quantitative evaluation of the modification as a particle of the whole, without attempting any qualitative assessment. With respect, I think this approach is legally flawed and I am entirely unable to accept it...*
55. *The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is “essentially or materially” the same as the (currently) approved development.*
56. *The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).*

The quantitative and qualitative aspects of the modifications have been outlined in Section 1 of this letter. As indicated, the proposed modifications will continue to provide a contemporary dwelling house across two levels and a basement. The changes will not be readily discernible from surrounding properties or the public domain, because they are within the approved building envelope or are internal. The modifications have been carefully designed to ensure they preserve approved levels of amenity for adjacent dwellings, in respect of privacy, solar access and views. Accordingly, the proposal is considered to be qualitatively the same as the approved development and therefore satisfies the elements raised in *Moto Projects (No. 2) Pty Ltd*.

Hrsto v Ku-Ring-Gai Council [2011] NSWLEC 1169

This case considered significant alterations whereas, the proposed modifications could be considered minor. In *Hrsto v Ku-Ring-Gai Council*, the modifications proposed various changes including an increase in the number of units from 51 to 66, a reduction in the number of car parking spaces from 96 to 92, an increase in floor area from 5304m² to 5520m², an increase in floor space ratio (FSR) from 1.25:1 to 1.3:1, a decrease in the building footprint from 2114m² to 1907m², an increase in deep soil are and; a reduction in the basement volume by 500m³ to 11,700m³. The proposed modifications listed were accepted as substantially the same development, inter alia:

- *The proposed development is consistent with State Environmental Planning Policy No. 65 – Design of Residential Flat Buildings and the Residential Flat Design Code;*
- *The overall mass and volume of the development is generally the same, notwithstanding the variation in the FSR, which forms the basis of an improved internal design and amenity and overall improved internal planning;*
- *The impact on neighbours is generally the same or improved and there is no significant change to the relationship to adjoining properties;*
- *The materials proposed are generally the same;*
- *The height above natural ground level is essentially the same;*

- The height in storeys is the same, there is no apparent or visual change to the streetscape, the proposed residential nature is unchanged, or in the alternative there is no significant change to the nature or intensity of the residential use;
- There is no significant change in the architectural appearance and character of the proposed development, the modulation detailing proportion and finishes remain generally the same;
- The building length and setbacks, envelope and footprint remain generally unchanged and are in accordance with the existing approval, the location of the car park entrance remains the same; and
- The location, scale, size, shape and appearance of the proposed development generally and essentially remain the same, creating minimal environmental impacts.

In accepting the proposed amendments as listed above, the Court determined the modification was 'essentially or materially' the same as the previous approval. The Court considered the proposal to be qualitatively, of little change to the appearance of the proposed building.

The proposed modifications can be considered substantially the same in qualitative terms, as accepted by Brown C in Hrsto. The external envelope, materials and finishes and setbacks are the same as the approval. The modifications have been carefully designed to preserve the amenity of neighbouring properties, as approved. From this, we consider the proposed modifications to be consistent with the original approval.

As the proposal is quantitatively, qualitatively and essentially substantially the same as approved development, the modifications can be considered under Section 4.55(8).

2.0 SITE ANALYSIS

The Site

The subject site is located approximately 6.4km east of the Sydney CBD, 3.2km from Bondi Junction and is within the Local Government Area (LGA) of Waverley (see **Figure 1**). The site is located on the southern side of Dover Road, between Old South Head Road and Bangalla Road and is known as No. 129 Dover Road, Rose Bay, described as Lot 1 in DP101101.

The site is an irregularly shaped parcel of land. It has a northern frontage to Dover Road of 11.28 metres, an eastern boundary of 57.38 metres, a curved southern frontage to Beaumont Street of 14.80 metres, and a western boundary of 48.225 metres, providing a total site area of 583.7m² (see Survey Plan submitted with the DA).



Source: SIX Maps

Subject Site

Figure 1: Location Plan

The site is occupied by a two-storey rendered dwelling with a pitched tiled roof. It comprises six bedrooms and living areas. Externally, there is a large deck, a detached cabana and swimming pool at the rear of the site (see **Photograph 1**).

The site has vehicle access from both street frontages. A driveway from Dover Road allows vehicle access to hardstand parking in the front setback and along the western boundary. A driveway at Beaumont Street leads to a single garage structure with a hipped roof built to the boundary (see **Photograph 2**). Pedestrian access is from Dover Road, with a pathway leading to the main entry of the dwelling at the eastern side.

The site has a landscaped area of 109.2m². Landscaping consists of a lawn, shrubs and hedges at the Dover Road frontage, dense hedges along the eastern side boundary and a lawn at the rear of the site. The remaining open space consists of paved areas, the driveway and a swimming pool (see **Photographs 3 & 4**).



Photograph 1: The subject site, as viewed from Dover Road



Photograph 2: The subject site, as viewed from Beaumont Street



Photograph 3: The subject site, as viewed from the rear, looking north



Photograph 4: Dense existing hedging along the eastern boundary

The Surrounds

The surrounding area is characterised by large dwelling houses and dual occupancies. Dwellings typically range between two and three storeys high and consist of a mix of 20th century and contemporary architectural styles. Some properties along Dover Road have a secondary frontage to Beaumont Street, and typically have garage structures built to the boundary. The area has a sloping topography and there are City and water views available towards the west.

Development to the North

To the north, at the corner of Dover Road and Victory Street, is No. 96 Dover Road, a two storey rendered dwelling with a hipped tiled roof (see **Photograph 5**). Also to the north is No. 94 Dover Road, a one storey rendered dwelling with a pitched tiled roof (see **Photograph 6**). Further to the north are more two storey dwelling houses along Strickland Street.



Photograph 5: No. 96 Dover Road, as viewed from Dover Road



Photograph 6: No. 94 Dover Road, as viewed from Dover Road

Development to the East

To the east is No. 131 Dover Road, a one storey dwelling with a hipped tiled roof (see **Photograph 7**). Further to the east is No. 38 Beaumont Street, a two storey contemporary dwelling with a flat roof (see **Photograph 8**). Beyond is No. 133 Dover Road, a two storey timber clad dwelling with a hipped tiled roof; and No. 135 Dover Road, a two storey contemporary dual occupancy with basement parking (see **Photograph 9**).



Photograph 7: No. 131 Dover Road, as viewed from Dover Road



Photograph 8: No. 38 Beaumont Street, as viewed from Beaumont Street



Photograph 9: Nos. 133 & 135 Dover Road, as viewed from Dover Road

Development to the South

To the south are Nos. 1/49A and 2/49A Beaumont Street, which are contemporary dwellings with flat roofs (see **Photograph 10**). Also to the south is No. 51 Beaumont Street, a part one part two storey rendered dwelling with a hipped tiled roof, and more dwellings along Beaumont Street (see **Photograph 11**).



Photograph 10: Nos. 1/49A & 2/49A Beaumont Street, as viewed from Beaumont Street



Photograph 11: Development to the south along Beaumont Street

Development to the West

To the west is No. 127 Dover Road, a two storey rendered dwelling with a hipped tiled roof (see **Photograph 12**). Further to the west is No. 125 Dover Road, a two storey contemporary dwelling with a flat roof and roof terrace, which is not readily visible from the street due to dense planting along the front boundary (see **Photograph 13**).



Photograph 12: No. 127 Dover Road, as viewed from Dover Road (Source: Google Maps)



Photograph 13: No. 125 Dover Road, as viewed from Dover Road

3.0 BACKGROUND

On **11 January 2022**, a Development Application (DA No. 7/2022) was lodged with Waverley Council for the demolition of the existing structures and construction of a new dwelling with basement car parking and storage accessed from Dover Road, and a new garage with a studio above accessed from Beaumont Street at No. 129 Dover Road, Rose Bay. On **17 November 2022**, the application was approved by the Land and Environment Court (LEC No: 2022/203518) subject to various conditions of consent.

On **9 March 2023**, a Section 4.56 Modification Application (DA No. 7/2022/A) was lodged with Waverley Council for alterations to the basement, internal layout, windows, addition of an external courtyard and various other alterations. On **14 June 2023**, the application was approved subject to conditions of consent.

4.0 REQUESTED MODIFICATIONS TO DEVELOPMENT CONSENT

As indicated, this submission proposes modification to three conditions of consent for DA No. 7/2022/A. This will be discussed below:

4.1 Condition 1 - Approved Plans and Documentation

Condition 1 of the development consent relates to the approved architectural plans and documentation. It is proposed to modify this condition to reflect the proposed design changes which form part of this modification. The existing condition is as follows:

Existing Condition:

(a) Architectural Plans prepared by Cera Stribley Project 21195 including the following:

Plan Number and Revision	Plan description	Plan Date
TP.0200 rev F	Demolition Plan	22 February 2023
TP.1000 rev F	Proposed Site Plan	22 February 2023
TP.1090 rev F	Basement Plan	22 February 2023
TP.1100 rev F	Ground Floor Plan	22 February 2023
TP.1101 rev F	Level 01 Plan	22 February 2023
TP.1110 rev F	Roof Plan	22 February 2023
TP.2000 rev F	Streetscape Elevation 01	22 February 2023
TP.2100 rev F	Proposed Elevations (North & South)	22 February 2023
TP.2101 rev F	Proposed Elevations (East & West)	22 February 2023
TP.3000 rev F	Sections (AA & BB)	22 February 2023
TP.3001 rev F	Sections (CC & DD)	22 February 2023
TP.3003 rev F	Overlooking Section	22 February 2023

(b) Job No 21-45, Issue C, Drawing No 1, Landscape Concept Plan prepared by Outside Living dated 20 October 2022.

(c) BASIX & NaTHERS Certificates dated 16 November 2022

(d) Preliminary Geotechnical Assessment: 129 Dover Road, Rose Bay (P2108482JR01V02) prepared by Martens Consulting Engineers and dated December 2021 and Supplementary Geotechnical Assessment – Impact of Earthworks: 129 Dover Road, Rose Bay (P2108482JC02V02) prepared by Martens Consulting Engineers, dated 5 April 2023 and received by Council 6 April 2023

(e) The Site Waste and Recycling Management Plan (SWRMP) Part 1.

Except where amended by the following conditions of consent.

It is proposed to amend the table to reference the drawings of the proposed modification, as follows:

Proposed Condition:

(a) Architectural Plans prepared by Cera Stribley Project 21195 including the following:

Plan Number and Revision	Plan description	Plan Date
TP.0001 rev G	GFA Plans	3 August 2023
TP.0002 rev G	Height Blanket	3 August 2023
TP.0010 rev G	Site Plan – Predominant Setback	3 August 2023
TP.0200 rev G	Demolition Plan	3 August 2023
TP.1000 rev G	Proposed Site Plan	3 August 2023
TP.1090 rev G	Basement Plan	3 August 2023
TP.1100 rev G	Ground Floor Plan	3 August 2023
TP.1101 rev G	Level 01 Plan	3 August 2023
TP.1110 rev G	Roof Plan	3 August 2023
TP.2000 rev G	Streetscape Elevation 01	3 August 2023
TP.2100 rev G	Proposed Elevations (North & South)	3 August 2023
TP.2101 rev G	Proposed Elevations (East & West)	3 August 2023
TP.3000 rev G	Sections (AA & BB)	3 August 2023
TP.3001 rev G	Sections (CC & DD)	3 August 2023
TP.3003 rev G	Overlooking Section	3 August 2023
TP.3004 rev G	Overlooking Section	3 August 2023

(b) Job No 21-45, Issue C, Drawing No 1, Landscape Concept Plan prepared by Outside Living dated 20 October 2022.

(c) BASIX & NaTHERS Certificates dated 14 September 2023

(d) Preliminary Geotechnical Assessment: 129 Dover Road, Rose Bay (**P2108482JR01V03**) prepared by Martens Consulting Engineers and dated **February 2023**

(e) The Site Waste and Recycling Management Plan (SWRMP) Part 1.

Except where amended by the following conditions of consent.

4.2 Condition 2(b) – General Modifications

Condition 2 of the development consent relates to general modifications. It is proposed to delete Condition 2(b) to reflect the amendments to the basement level which form part of this modification. The existing condition is as follows:

Existing Condition Proposed to be Deleted :

- (b) *The basement level is to be setback a minimum of 30m from the southern rear boundary. The 30m rear setback is to be measured from the outer south eastern edge of the basement to the rear southern boundary. The section of the basement level that contains the pool equipment may be retained as shown on TP.1090, rev F.*

Reason:

It is proposed to delete Condition 2(b) to allow the essential service equipment to be properly accommodated within the basement, in compliance with the Australian Standards and BCA/NCC. In particular, enforcing Condition 2(b) would result in the deletion a majority of the A/C room. The Services Spatial Compliance Statement prepared by JR Engineering Group provides a detailed explanation of the requirements for equipment provided in the basement, inter alia:

We confirm that the services spatial layouts have been reviewed by JR Engineering Group within the basement area. JR Engineering Group have reviewed all locations and have assisted the design team to minimize services plant equipment to the absolute minimum requirements. The minimum spatial requirements sized on the architectural plans are governed by a number of factors such as, Australian Standard, Authority, Manufacture, Access and Clearance, Maintenance, Safety in Design, OHS/WHs and Services coordination requirements.

We note, Waverly Council's Development Control Plan 2022, Clause B13 (c) states the following:

(c) The maximum volume of excavation permitted for a plant room is the minimum required to meet Australian Standards, accommodate typical dimensions of equipment required and the associated circulation space to access the equipment for maintenance. DA plans should show the approximate location and size of equipment within the plant room.

With the above been stipulated, we confirm this has been adhered to, hence why the services spatial allocations have driven the basement size as proposed.

Please note that it may appear the spatial layouts exceed Councils expectation, however this is not a standard residential house, and the services required are at a commercial scale due to the size and footprint. Our original spatial requirements had exceeded the current proposed layout submitted to Council; however, we reduced this by minimising the areas to an absolute minimum.

See detailed summary below on why this development requires the minimum services spatial requirements as follows:

AC Plant Room

The mechanical plant room indicated has mechanical plant for the nominated AC units, that require minimum separation. This separation is required to ensure cold and hot air in and out the AC units do not interfere with the adjacent AC units. If the minimum separations are not achieved the AC units will not only malfunction and cause a nuisance to the property owner, but they will also not be warranted by the manufacturers. Consideration is also required for access to the AC units for future and ongoing servicing.

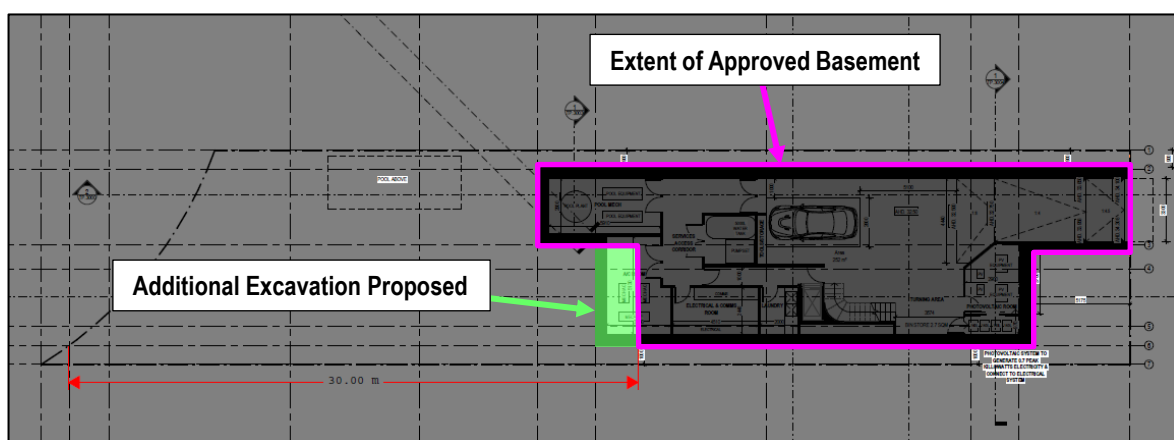
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The schedule below outlines the services plant/equipment and location as follows:

SERVICE	PLANT/EQUIPMENT	LOCATION	STANDARD(S)/REQUIREMENTS
Mechanical	Mechanical AC & Plant	Basement (Internal)	AS 1668.1-2015, AS 1668.2-2012, AS 4254 BCA/NCC 2019 Amendment 1, Part E2, NSW F4.5(b), F4.9, F4.11, F4.12 & J5 Manufacture Maintenance, Clearance & Access Requirements Safety In Design Requirements Services Coordination Requirements

Enforcing Condition 2(b) would necessitate the deletion of the majority of the A/C room. As a consequence, that mechanical A/C equipment would have to be relocated above-ground, as they could not be accommodated in a compliant location in the basement. This would give rise to adverse amenity impacts to the residents of both the adjacent properties and the subject site, in terms of acoustic privacy impacts. The visibility of the A/C equipment above-ground would also adversely affect the appearance of the dwelling, when viewed from the public domain.

As shown in **Figure 2**, the extent of additional excavation sought by this application is relatively minor, with an area of only 11.9m². This equates to an additional volume of approximately 34.9m³. For the sake of only 34.9m³ of additional excavation, we believe it is a much better planning outcome to provide the mechanical A/C equipment in the basement, for Australian Standards and BCA compliance, and to mitigate the adverse amenity impacts that would otherwise arise if the equipment were above-ground.



Source: Cera Stribley

Figure 2: Proposed Basement Floor Plan Showing Additional Proposed Excavation

4.3 Condition 6(a) – Floor Space Ratio

Condition 6(a) of the development consent relates to floor space ratio. It is proposed to modify this condition to reflect the FSR proposed as part of this modification. The existing condition is as follows:

Existing Condition:

The following applies to Floor Space Ratio:

- (a) *The Floor Space Ratio must not exceed 0.5:1 unless otherwise approved by modification or other application made pursuant to the Act calculated in accordance with Waverley Local Environmental Plan 2012. For the purposes of the calculation of FSR, the Gross Floor Area is 291.8sqm.*

It is proposed to amend this condition to reflect the proposed gross floor area and floor space ratio.

Proposed Condition (text to be deleted shown in ~~strike through~~, text to be added shown in **bold**):

The following applies to Floor Space Ratio:

- (b) *The Floor Space Ratio must not exceed ~~0.5:1~~ **0.585:1** unless otherwise approved by modification or other application made pursuant to the Act calculated in accordance with Waverley Local Environmental Plan 2012. For the purposes of the calculation of FSR, the Gross Floor Area is ~~291.8sqm~~ **341.2sqm**.*

The proposed FSR is discussed further in Section 6.0 of this report.

5.0 DESCRIPTION & RATIONALE OF MODIFICATIONS

The proposed modifications relate to amendments to the approved basement, glazing lines, associated internal changes and amendments to the terraces. A floor by floor description is provided below. Further details of the proposed development are contained in the architectural drawings, separately submitted.

Basement Floor Level

The Basement Floor Level is at RL 32.50 AHD (as approved). The proposed modifications include a small area of additional excavation to accommodate a sufficiently sized mechanical A/C and plant room (see **Figure 3**).

The proposed excavation has been discussed in detail in Section 4.2 of this Report. When considering the mechanical A/C room specifically, the following is concluded by JR Engineering Group:

Room required to be a minimum internal size of 5130l x 3300w x 2400h. Plant and equipment required to have a minimum of 600mm clearance around, for future access and maintenance. Dual doors and access corridor required for installation and future removal of plant. Plant room layout has been reduced to the minimum size, to comply with the relevant governing standards and manufacture requirements. Refer to spatial compliance statement outlining particular standards.

The proposed excavation works will be carried out in accordance with the recommendations of the approved Geotechnical Assessment, prepared by Martens Consulting Engineers (separately submitted).

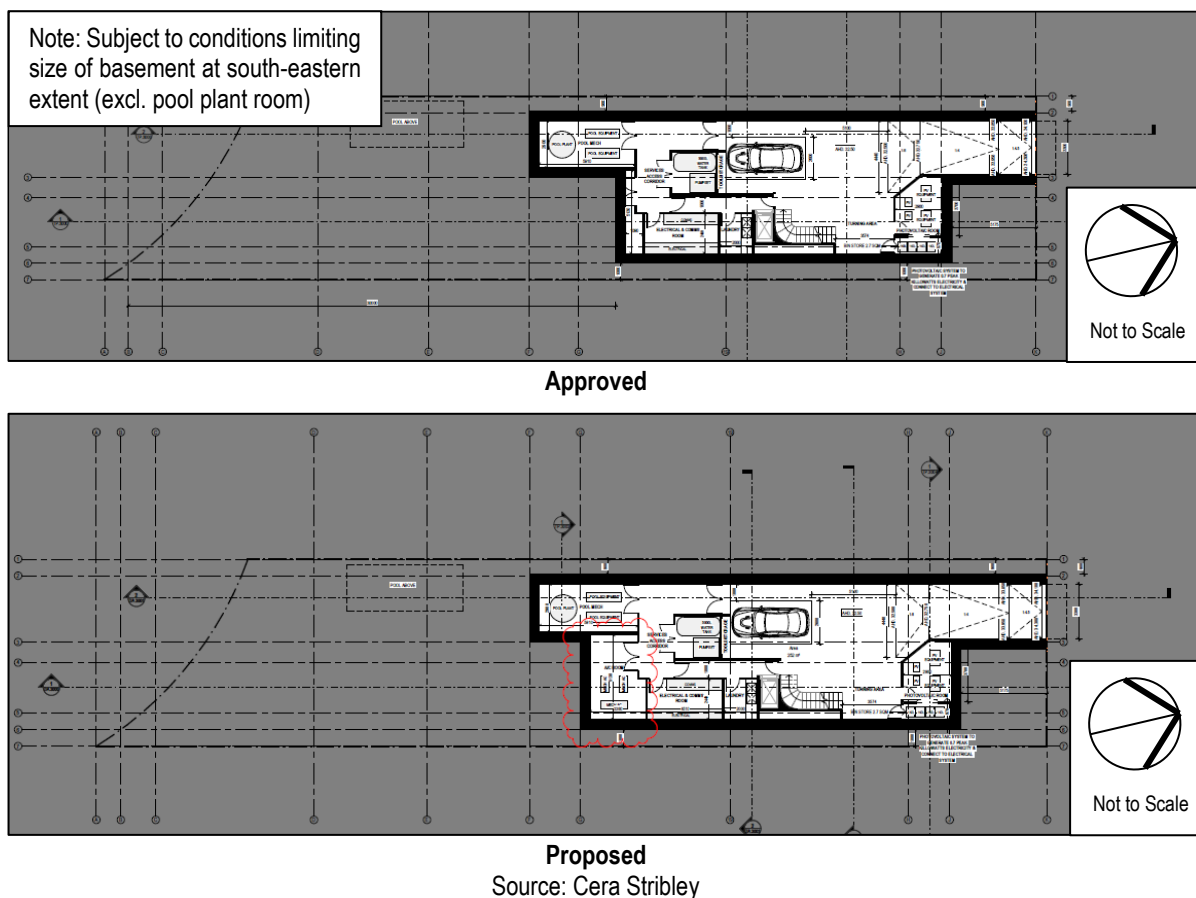
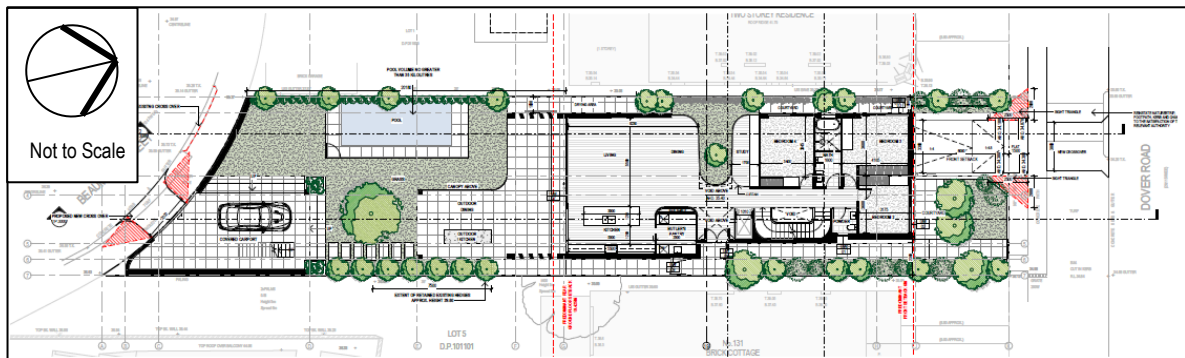


Figure 3: Approved and Proposed Basement Floor Plan

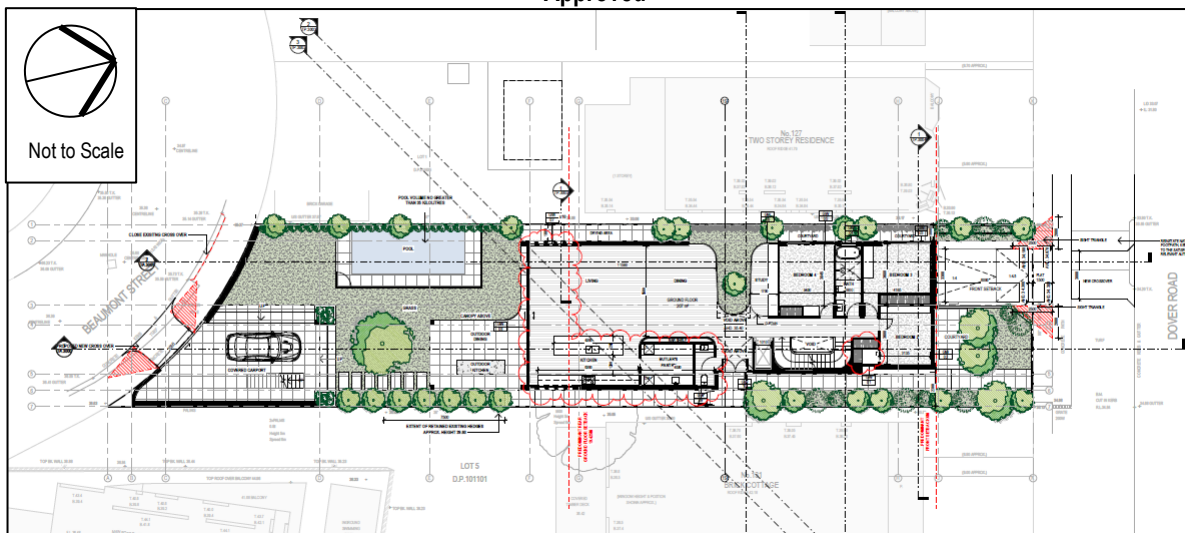
Ground Floor Level

The Ground Floor Level is at RL 35.40 AHD (as approved). The proposed modifications include:

- Replacement of one powder room with a walk-in-robe; and
- Extension of the rear glazing line and added glazing to the approved blade walls at both side elevations to accommodate a new power room, expansion of the butler's pantry and a larger living, dining, and kitchen area (see **Figure 4**).



Approved



Proposed

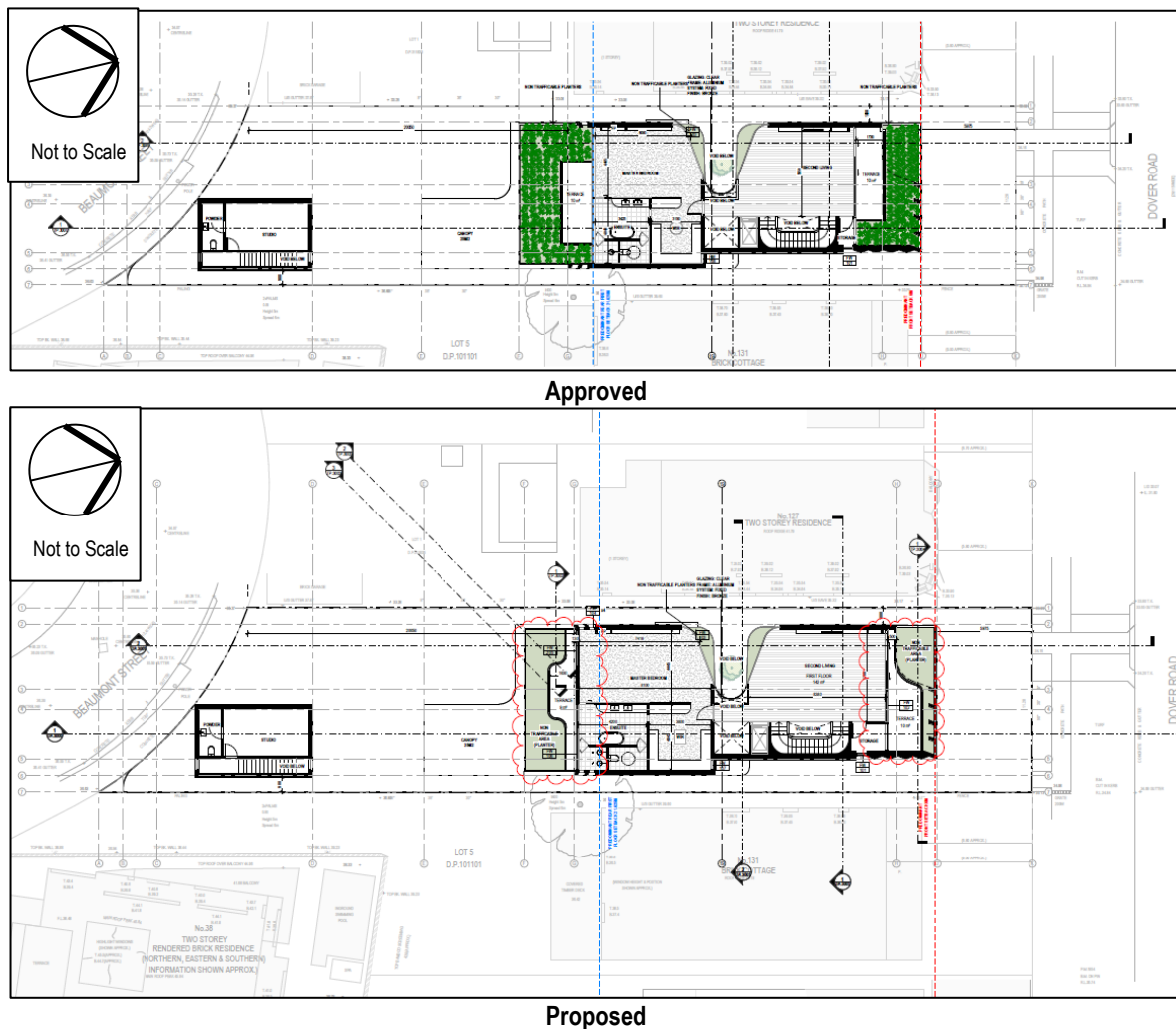
Source: Cera Stribley

Figure 4: Approved and Proposed Ground Floor Plan

First Floor Level

The First Floor Level is at RL 38.90 AHD (as approved). The proposed modifications include:

- Slight extension of the front glazing line, resulting in a larger living room and storage room, and an amended front terrace layout. The terrace is reshaped to remain at 10m² as approved and to preserve privacy for the adjacent residences; and
- Extension of the rear glazing line and added glazing to the approved blade walls at both side elevations, resulting in a larger master bedroom, ensuite and walk-in-robe, and an amended rear terrace layout. The terrace will reduce in size from 10m² to 9m² (see **Figure 5**).



Source: Cera Stribley

Figure 5: Approved and Proposed First Floor Plan

Rationale

The proposed modifications will improve the functionality of the approved dwelling and are also a result of design development. The proposed amendment to the basement level is necessary to accommodate the required mechanical A/C equipment in a compliant location.

The extension of the rear glazing line at the ground and first floor level will not result in changes to the approved bulk and scale of the development, as the extension is in line with the approved blade walls to both side elevations. Glazing is proposed between the approved blade walls to discretely enclose the new internal spaces, meaning there is no visible change to the development when viewed from Nos. 127 or 131 Dover Road. Additionally, the extension at the ground floor aligns with the first-floor level directly above. As such, there approved levels of amenity will be preserved for the adjacent properties.

The extension of the front glazing line at the first-floor level will similarly result in no changes to the approved bulk and scale, as the extension is contained within the approved external envelope and walls to both side elevations. The amended front terrace will be the same size as the approved, and the reshaped design will site it further away from No. 127 Dover Road, likely providing an improvement in terms of privacy. The amended rear terrace will be 1m² less than approved and will extend to align with the edge of the approved dwelling. Privacy will be preserved for neighbouring properties, as approved, as confirmed in the sightline sections prepared by CeraStribley.

The remaining proposed amendments to the internal layout of the dwelling are minor in nature and will not be noticeable from surrounding sites or the public domain. Overall, the proposed modifications will provide a better outcome for the approved residence, while also preserving the amenity of surrounding residences and the streetscape.

6.0 ENVIRONMENTAL PLANNING ASSESSMENT

This section deals with the proposal's consistency with the various statutory and non-statutory provisions. It also addresses the relevant matters for consideration under Section 4.15(1)(b) to (e) of the Environmental Planning and Assessment Act 1979.

6.1 Waverley Local Environmental Plan (LEP) 2012

The subject site is zoned R2 Low Density Residential under the LEP, which commenced operation on 26 October 2012. The proposal is permissible with development consent. The subject site is not identified as a heritage item and is not within a heritage conservation area pursuant to the LEP.

Building Height

Council's LEP prescribes a maximum building height of 8.5m. The proposed modification does not alter the approved building height, which will remain compliant with the LEP.

Floor Space Ratio (FSR)

Council's LEP prescribes a maximum FSR of 0.5:1. The approved dwelling has a Gross Floor Area (GFA) of 291.8m² and FSR of 0.5:1. The modifications proposed in this application will increase the GFA to 341.2m² and FSR to 0.585:1. This varies from the development standard by 49.4m² (17%).

Importantly, while there is an increase in FSR, the additional GFA is located within the approved external building envelope. This ensures the overall bulk and scale of the dwelling is as approved, approved levels of amenity for surrounding residents is preserved and the development remains consistent with the desired future character of the area.

One of the key considerations in supporting this proposal and indeed any other proposals that breach a control is to ensure consistency with the objectives of that control. In our opinion, the proposed modification is consistent with the relevant objectives of the FSR controls. An assessment against these objectives is provided as follows:

Objective: *To ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs,*

Response: N/A – Site is not within the Bondi Junction Centre.

Objective: *To provide an appropriate correlation between maximum building heights and density controls,*

Response: The development will continue to constitute a two storey dwelling with basement parking and a studio, consistent with the approval. The dwelling's density will not be altered. The approved building height will be retained and will remain compliant with the LEP. The additional FSR will not be readily noticeable because the external envelope will be the same as the approval, when viewed from the public domain. Therefore, the development as modified will continue to provide an appropriate correlation between maximum building heights and density controls.

Objective: *To ensure that buildings are compatible with the bulk and scale of the desired future character of the locality,*

Response: The bulk and scale of the buildings, when viewed from both Dover Road and Beaumont Street, will be maintained as approved. The Court has been satisfied that the building is compatible with the desired future character of the locality, in the approval of DA No. 7/2022. As the modification retains the approved built form, the building will remain compatible with the bulk and scale of the desired future character of the locality.

The proposal has been skilfully designed to ensure there is no visible change to the appearance of the dwelling, when viewed from Nos. 127 and 131 Dover Road. This has been achieved by locating the additional GFA within the approved external envelope, with clear glazing provided between the approved blade walls to discretely enclose the new internal spaces.

Objective: *To establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and the locality.*

Response: Environmental amenity comprises a number of elements including privacy, solar access and views. The proposed modifications have been designed to preserve approved levels of environmental amenity for neighbouring properties and the locality. This has been achieved by carefully locating all additional GFA within the approved building envelope, ensuring there are no increases to the overall bulk and scale of the development. The shadow diagrams (separately submitted) demonstrate there are no additional overshadowing impacts from the modifications. All approved privacy measures will be retained and the reshaped terraces are designed to ensure there are no direct sightlines to the adjacent properties. Accordingly, approved levels of environmental amenity will be preserved for neighbouring properties and the locality.

In summary, the proposed modifications will result in an increase to the FSR above the development standard. However, all additional GFA will be contained within the approved building envelope, improve the internal amenity of the development and will preserve approved levels of environmental amenity for neighbouring properties and the locality. Accordingly, the FSR remains consistent with the objectives of the standard. On this basis, the additional FSR which varies from the standard is considered reasonable.

The following **Figures 6 & 7** show the areas of additional GFA in comparison to the approval.

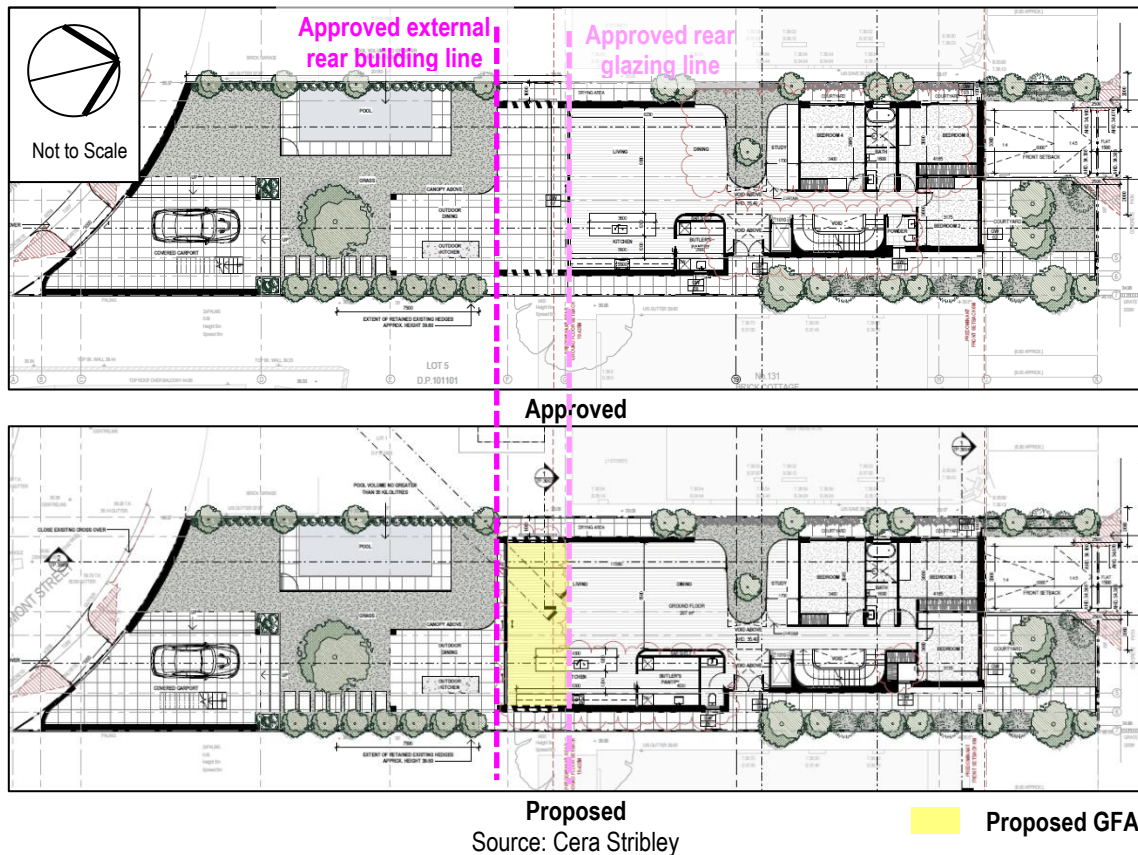


Figure 6: Approved and Proposed Ground Floor Plan

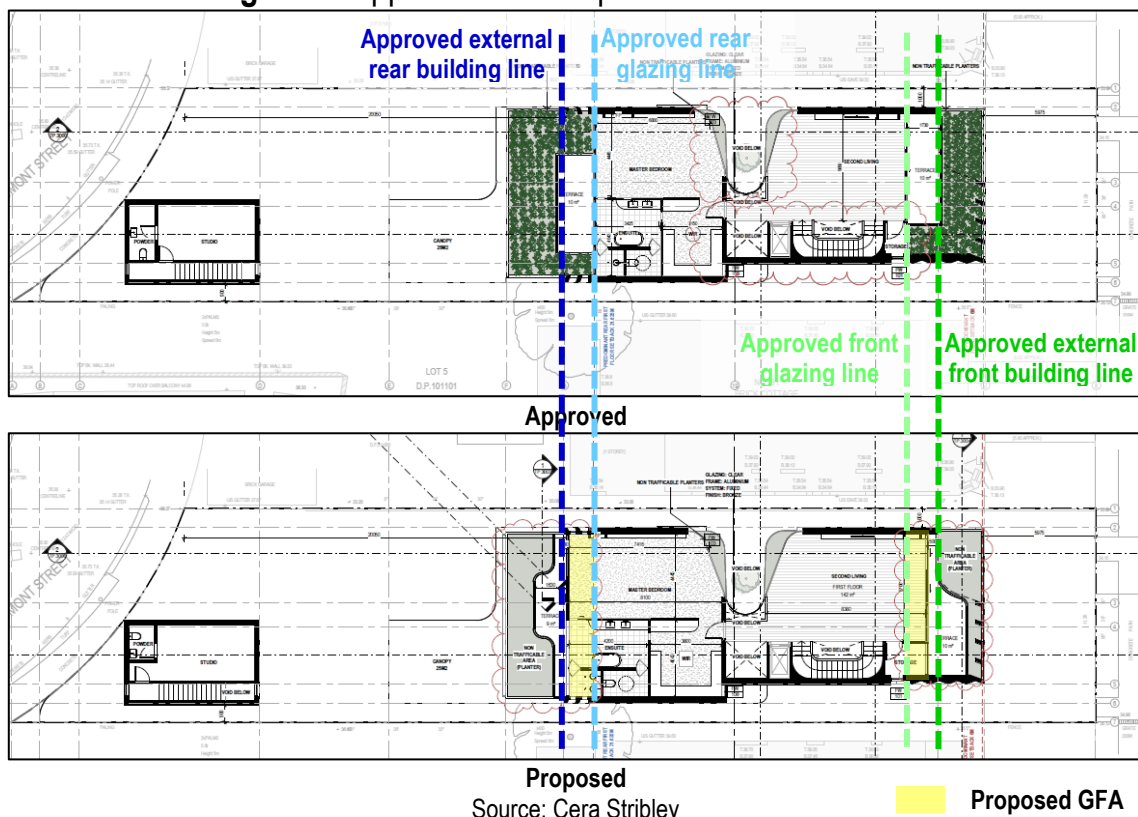


Figure 7: Approved and Proposed First Floor Plan

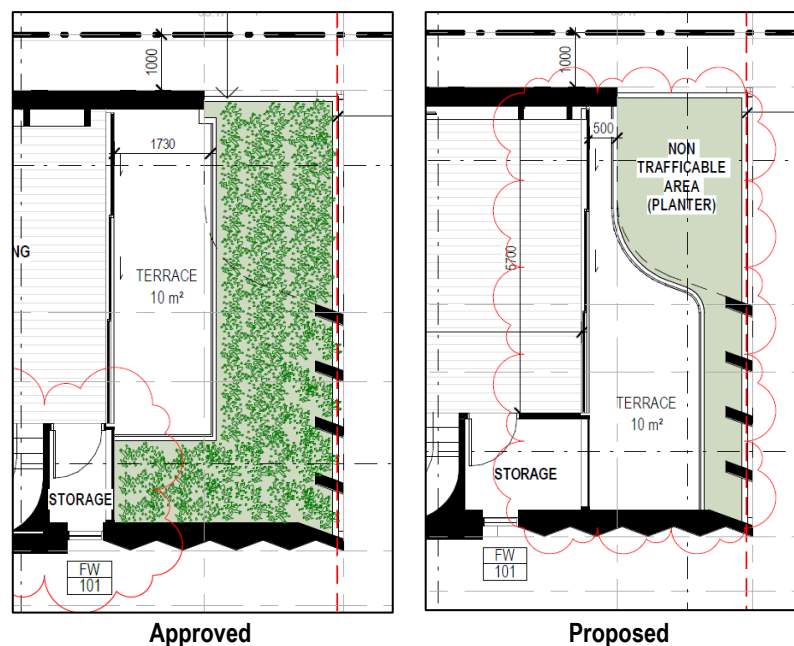
6.2 Waverley Development Control Plan (DCP) 2022

The DCP came into force on 9 December 2022 and applies to the site and the proposed development. It should be noted that the approved development was lodged and assessed under the Waverley DCP 2012 (Amendment 9), which came into effect on 1 October 2020.

The proposed modification retains approved levels of compliance with the majority of the relevant DCP provisions. This includes wall height, external setbacks, fencing, car parking, swimming pool and dual frontage development provisions. The landscaping and open space areas also remain compliant with DCP controls. Our consideration of the proposed modifications to the first-floor level front terrace, the rear setback and additional excavation is provided below.

Visual and Acoustic Privacy

Part C1 of the DCP contains visual and acoustic privacy controls, including that balconies should have a maximum depth of 1.5m. The rear balcony/elevated terrace on the first-floor level has an approved depth of 1.63m which was deemed acceptable by the Court. It is proposed to reduce the depth to between 0.6m and 1.63m, which is an improvement compared to the approved depth. The front balcony/elevated terrace on the first-floor level has an approved depth of 1.73m, a variation that was deemed acceptable by the Court. It is proposed to increase the depth slightly to a maximum of 2m (see **Figure 8**).



Source: Cera Stribley

Figure 8: Approved and Proposed Front Balcony

This change is a result of design development, resulting in a reshaped balcony layout. Importantly, the redesigned front balcony locates the balcony further away from No. 127 Dover Road, in order to ensure there are no direct lines of site to the windows of this neighbouring development. This preserves and enhances privacy for both the residents of the neighbouring property and the subject site.

The proposed changes achieve the relevant objectives of the control, as detailed below:

- (a) To ensure that development does not unreasonably impact upon existing residential or other properties due to unacceptable loss of privacy or generation of noise.*
- (c) To ensure that development provides residents with a reasonable level of acoustic and visual privacy.*

The front facing balcony will preserve privacy to neighbouring properties. The balcony is proposed to be narrow (0.5m deep) toward the west, and 2m deep toward the east. The approved solid blade wall at the east elevation obstructs any views to No. 131 Dover Road, while the reshaped extent of the terrace prevents sightlines to the angled window at No. 127 Dover Road. The size of this balcony remains as approved at 10m², and as such, noise generation is not anticipated to change from what was approved.

The proposed design changes will continue to afford reasonable acoustic and visual privacy to residents. Finally, the proposal remains compliant with the building height development standard and front setback control. The proposed changes are unlikely to result in visual or acoustic privacy impacts and will not be noticeable from the streetscape when compared to the approved balcony.

Accordingly, the increased depth to the front facing balcony is deemed acceptable in this instance, noting that the Court accepted a variation to this control in the original DA (DA No. 7/2022).

Rear Setbacks

Part C1 of the DCP specifies that new buildings are to extend no further than the rear predominant building line. The proposal retains the external setbacks of the approved dwelling, as measured to the outer face of the protruding elements (including the terraces and roofs at the front and rear of the dwelling). As indicated, the rear setbacks as measured to the glazing line at the ground and first floor levels are proposed to extend further than what was approved. While this is technically beyond the predominant rear building line, it does not extend any further than the approved external rear setbacks.

Notably, the proposed modification retains the approved side blade screens, with clear glazing provided behind these screens to discretely enclose the new internal spaces. This design approach ensures there is no change to the visible bulk, scale or setbacks of the development when viewed from Nos. 127 and 131 Dover Road, in comparison to the approval (see **Figure 9** on the following page).

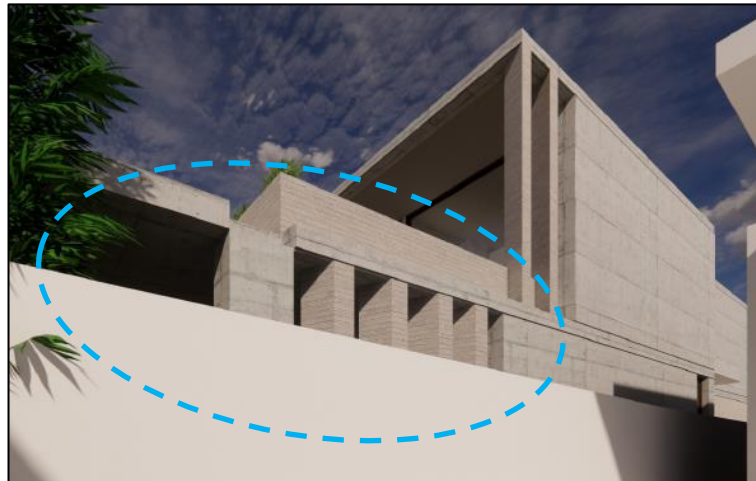
The proposal continues to achieve the objectives of the control, as detailed below:

- (a) To ensure that the bulk and appearance of the proposed development is appropriate to the streetscape.*
- (b) To set a rhythm and character to residential streets.*
- (c) To ensure the distance between buildings on adjacent properties allows adequate solar access, ventilation and privacy.*
- (d) To ensure that the amenity of rear yards, their function as private open space, and their visual and landscape contribution to the surrounding area is protected and enhanced.*
- (e) To accommodate flexibility in the siting of buildings, where appropriate.*
- (f) To ensure the front and rear setbacks of buildings are consistent with surrounding buildings and do not visually detract from the streetscape.*
- (g) To ensure significant views and view corridors available from the public domain and existing properties are considered as part of the local context of any development. Refer to Part C1.10 Views.*

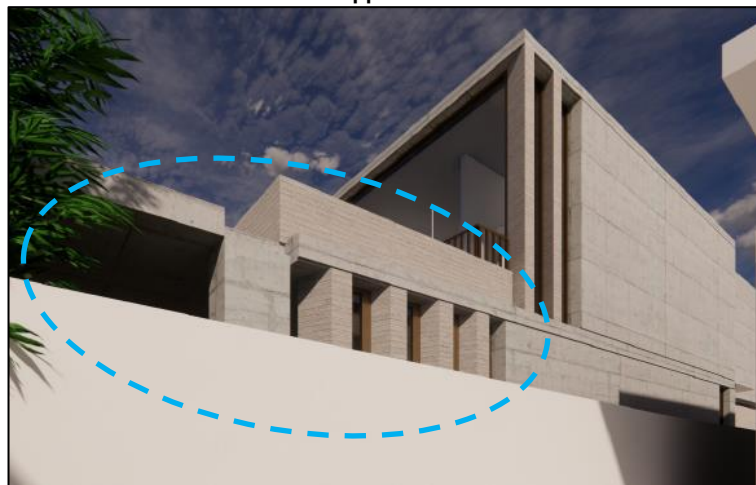
The proposed changes are at the rear and will have no impact on the approved dwelling when viewed from the streetscape. As indicated, the bulk and appearance of the development when viewed from neighbouring dwellings will remain as approved. The blade walls are proposed to be in-filled with glazing, which will not be readily visible when viewed from these neighbouring dwellings.

The extensions to the internal areas will not result in any additional impacts to neighbouring dwellings, as all approved privacy measures are maintained, and the approved external envelope is retained. The shadow diagrams submitted with this application confirm approved levels of solar access will be retained.

The development remains compliant with private open space and landscaping controls. Whilst the proposal has a greater FSR than the development standard of the LEP, the objectives of the clause are met as discussed in Section 6.1 of this report. The proposal remains compliant with the building height development standard and side setback controls and will retain all approved vegetation and landscaping. As such, the modified rear glazing line is deemed acceptable in this instance.



Approved



Proposed

Source: Cera Stribley

Figure 9: Approved and Proposed View from Neighbouring Development, Demonstrating No Discernible Change from the Approval

Excavation

Part B13 of the DCP introduces maximum volume of excavation of 166.72m³. As discussed in detail in Section 5.4 of this report, the proposed modification seeks to delete Condition 2(b) of the consent to accommodate a minor extent of additional excavation for the mechanical A/C plant room. The extent of additional excavation sought by this application is relatively minor, with an area of only 11.9m². This equates to an additional volume of approximately 34.9m³.

For the sake of only 34.9m³ of additional excavation, we believe it is a much better planning outcome to provide the mechanical A/C equipment in the basement, for Australian Standards and BCA compliance, and to mitigate the adverse amenity impacts that would otherwise arise if the equipment were above-ground. This additional volume is confined to the basement level and is sited within the approved building footprint. This ensures there is no change the visible bulk and scale of the development, nor is there any impact on landscaping.

The proposal achieves the objectives of the excavation control, as detailed below:

Objective: To set maximum acceptable volumes of excavation which achieve the following objectives.

Response: The DA was approved prior to the introduction of a maximum volume of excavation control. The proposed modification involves a minor increase in basement excavation, which will achieve the following objectives.

Objective: To minimise the impact of excavation on the natural environment, neighbouring properties, and streetscape.

Response: This application is accompanied by the approved Geotechnical Assessment, prepared by Martens Consulting Engineers (separately submitted). The proposed excavation will be carried out in accordance with the recommendations of the Geotechnical Report, which will minimise the impact on the natural environment, neighbouring properties and the streetscape.

Objective: To ensure the physical environment is preserved and enhanced through minimal site disturbance and the geotechnical stability of landfill and excavations.

Response: The additional excavation is located entirely within the approved building footprint, which minimises site disturbance. The geotechnical stability of landfill and excavation will be preserved through the implementation of the Geotechnical Engineer's recommendations.

Objective: To minimise cut and fill on sloping sites.

Response: The proposal is not on a substantially sloping site.

Objective: To encourage good quality internal environments including natural light and ventilation.

Response: The proposal locates all habitable areas above existing ground level, which encourages good quality internal environments including natural light and ventilation.

Objective: To prevent use of subterranean spaces as habitable rooms.

Response: No subterranean spaces will be used as habitable rooms.

Objective: To prevent development exceeding the maximum car parking controls.

Response: The development complies with the maximum car parking controls of the DCP.

Objective: To ensure excavation does not adversely impact land stabilisation, ground water flows and vegetation.
To minimise structural risks to adjoining structures.

Response: The works will be carried out in accordance with the recommendations of the updated Geotechnical Report and Council's standard conditions of consent, to minimise effects on land stabilisation, ground water flows, vegetation and adjoining structures.

Accordingly, the proposed excavation is considered acceptable in this instance, and has been supported from an engineering perspective by JR Engineering Group and Martens Consulting Engineers (as per the documents submitted separately).

6.3 Appearance of the Building and Landscape Considerations

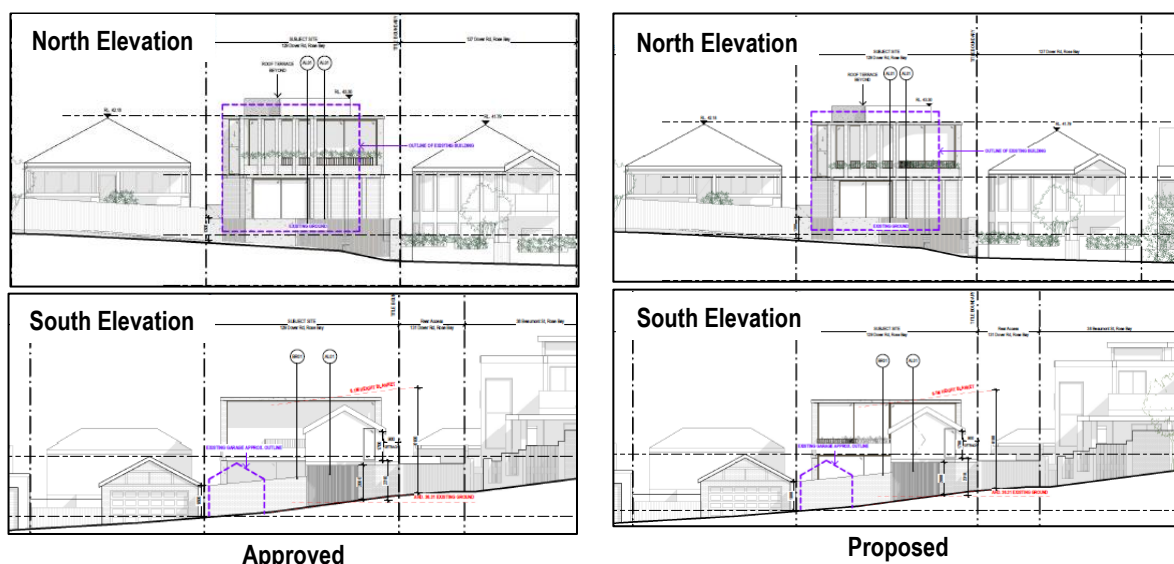
The approved development replaced the existing building with a high-quality contemporary dwelling house, across two levels and a basement. The proposal will retain the scale and form of the approved building. It will continue to present as two storeys with a basement level at Dover Road. No changes are proposed to the approved carport and studio. Therefore, the approved presentation to Beaumont Street will remain unaltered.

The proposed modifications retain the approved building footprint. All modifications are within the approved external envelope, which ensures the overall bulk and scale of the development remains compatible with surrounding development, and the character of the streetscape. The development therefore continues to achieve the desired future character of the area.

The external detailing and contemporary architectural design intent of the approval is maintained. The subtle refinements to the shaping of the terraces do not significantly alter the approved appearance of the building, when viewed from the north and south (see **Figure 10**). As indicated, by providing clear glazing behind the approved side blade screens, the proposal ensures the enclosure internal spaces does not alter the presentation of the dwelling when viewed from Nos. 17 and 131 Dover Road.

All approved deep soil landscaping is retained at the ground floor level. In addition, planting continues to be provided within the rooftop garden areas, surrounding the terraces. This will continue to soften the appearance of the built form.

Accordingly, in our opinion, the proposal will remain consistent with the existing and desired future character of the area.



Source: Cera Stribley

Figure 10: Approved and Proposed North and South Elevations

6.4 Relationship to Surrounding Development

The proposed modifications have been designed to preserve approved levels of visual and acoustic privacy, views and solar access for neighbouring developments. This has been achieved by locating all modifications within the approved building envelope.

There will be no changes to the approved external setbacks, principal private open space areas or landscaping. The approved privacy measures will be retained. This will ensure an appropriate relationship is maintained with surrounding properties. The proposal will not affect views as the approved envelope is entirely maintained.

Revised plan form and elevational shadow diagrams for the modification have been prepared by CeraStribley at hourly intervals between 9am and 3pm on 21 June (separately submitted). These diagrams demonstrate the approved levels of solar access for the subject site and surrounding properties will be retained, and there will be no additional overshadowing impacts in this applications.

Accordingly, the proposed development will preserve approved levels of amenity for surrounding properties.

6.5 The Suitability of the Site

The proposed modifications are relatively minor and will improve the overall function of the development, when compared to the approved. The intensity of the approval as a two storey, four-bedroom dwelling house with a basement level and detached studio will be retained. The modifications will not increase traffic generation or the likelihood of hazards such as landslip, bushfire or flooding. The proposal maintains the approved number of car spaces which complies with Council's car parking requirements and is likely to satisfy the parking demand.

6.6 The Public Interest

The proposed modifications will not result in any adverse social or economic effects in the locality. The proposal will retain the approved residential use and will continue to provide an elegant and contemporary new dwelling house, which will be compatible with the surrounding R2 Low Density Residential Zone. The proposed works have been designed to preserve approved levels of privacy, solar access and views of adjoining properties.

The minor modifications will enhance the amenity of the dwelling to meet the needs of the future residents and will not be readily discernible from neighbouring dwellings or the public domain. In addition, the proposal will provide short term employment opportunities during demolition and construction. Importantly, the proposal will remain consistent with the objectives of the zone.

Accordingly, in our opinion, the proposed modifications remain compatible with the area's character, preserves amenity, and are in keeping with the public interest.

7.0 CONCLUSION

We hereby request that Council modify Conditions 1, 2 and 6 of DA No. 7/2022 to reflect the proposed modifications to the approved dwelling house at No. 129 Dover Road, Rose Bay. The application is supported by amended architectural plans prepared by CeraStribley, the updated BASIX certificate and the previously submitted services engineering letter by JR Engineering Group.

The proposal is substantially the same as the approval qualitatively, quantitatively and materially. The proposed modifications will maintain the approved use as a two storey dwelling house with a basement level, detached studio, swimming pool and landscaping. This letter demonstrates the proposal is substantially the same as the approval. The proposed modifications have been considered both qualitatively and quantitatively, with reference to Land and Environment Court cases relating to modifications to consent. We noted Modification applications with a greater degree of change and impact have been approved by other NSW Councils and the Land and Environment Court.

As detailed in this letter, the proposed modifications are contained within the approved building envelope and do not significantly alter the approved appearance of the development. The proposal will enhance amenity for the future residents and will be consistent with character of the approved development and the surrounding area, while also preserving the amenity of neighbouring properties. Accordingly, we believe the proposed modifications are appropriate for the site and the locality.

Council can be satisfied that the proposed modifications to development consent DA No. 7/2022 can be assessed as a Section 4.55(8) modification to consent.

We trust this information is of assistance to you. Should you require further information, please do not hesitate to contact our office on (02) 9362 3364.

Yours faithfully,



George Karavanas
MANAGING DIRECTOR