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Boston Blyth Fleming
Town Planners

9th August 2022

Updated clause 4.6 variation request – Height of buildings
New dwelling house
55 Woolgoolga Street, North Balgowlah

1.0 Introduction

In the preparation of this updated clause 4.6 variation request consideration has been given to the following amended Architectural plans prepared by Ursino Architects:

A101	BASIX REQUIREMENTS	B	01.02.2022
A201	SITE ANALYSIS	A	20.09.2021
A202	SITE PLAN	E	07.08.2022
A203	DEMOLITION PLAN	A	20.09.2021
A301	GARAGE FLOOR PLAN	E	07.08.2022
A302	SECOND FLOOR PLAN	E	07.08.2022
A303	FIRST FLOOR PLAN	E	07.08.2022
A304	GROUND FLOOR PLAN	E	07.08.2022
A305	REAR YARD PLAN	B	01.02.2022
A306	ROOF PLAN	E	07.08.2022
A307	POOL PLAN	A	20.09.2021
A401	SECTION AA	E	07.08.2022
A402	SECTION BB	E	07.08.2022
A403	SECTION CC	A	20.09.2021
A501	NORTH ELEVATION	B	01.02.2022
A502	SOUTH ELEVATION	E	07.08.2022
A503	WEST ELEVATION	B	01.02.2022
A504	EAST ELEVATION	E	07.08.2022
A601	CALCULATIONS	E	07.08.2022
A602	CONSTRUCTION MANAGEMENT PLAN	E	07.08.2022
A701	SHADOW DIAGRAMS - JUNE 21 - 9AM	E	07.08.2022
A702	SHADOW DIAGRAMS - JUNE 21 - 9.30AM	E	07.08.2022
A703	SHADOW DIAGRAMS - JUNE 21 - 10AM	E	07.08.2022
A704	SHADOW DIAGRAMS - JUNE 21 - 10.30AM	E	07.08.2022
A705	SHADOW DIAGRAMS - JUNE 21 - 11AM	E	07.08.2022
A706	SHADOW DIAGRAMS - JUNE 21 - 11.30AM	E	07.08.2022
A707	SHADOW DIAGRAMS - JUNE 21 - 12PM	E	07.08.2022
A708	SHADOW DIAGRAMS - JUNE 21 - 12.30AM	E	07.08.2022
A709	SHADOW DIAGRAMS - JUNE 21 - 1PM	E	07.08.2022
A710	SHADOW DIAGRAMS - JUNE 21 - 1.30PM	E	07.08.2022
A711	SHADOW DIAGRAMS - JUNE 21 - 2PM	E	07.08.2022
A712	SHADOW DIAGRAMS - JUNE 21 - 2.30PM	E	07.08.2022
A713	SHADOW DIAGRAMS - JUNE 21 - 3PM	E	07.08.2022
A720	BUILDING ENVELOPE STUDY	E	07.08.2022
A721	CUT AND FILL PLAN	E	07.08.2022
A722	HEIGHT PLANE ANALYSIS	E	07.08.2022
A801	PERSPECTIVES	A	20.09.2021
A802	PERSPECTIVES	A	20.09.2021
A901	MATERIALS & WINDOW SCHEDULES	E	07.08.2022

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe)* at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *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.

2.0 Warringah Local Environmental Plan 2011 (WLEP)

2.1 Clause 4.3 - Height of buildings

Pursuant to Clause 4.3 of Warringah Local Environmental Plan 2011 (WLEP) the height of a building on the subject land is not to exceed 11 metres in height. The objectives of this control are as follows:

a) *to ensure that buildings are compatible with the height and scale of surrounding and nearby development,*

b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access,*

c) *to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,*

d) *to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.*

Building height is defined as follows:

Building height is defined as follows:

> ***building height*** *(or* ***height of building****) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like*

Ground level existing is defined as follows:

> ***ground level (existing)*** means the existing level of a site at any point.

It has been determined that the southern edge of the entrance pathway awning breaches the 8.5 metre height of building standard by between 300mm (3.5%) and 870mm (10.2%) with the southern edge of the garage, entry foyer, lift and stairs breaching the standard by between 600mm (7%) and 2.370 metres (27.8%).

Further, the south-eastern corner of the second floor roof form also breaches the height standard by a maximum of 360mm (4.2%) however this is limited to a small and constrained area of the building located above a natural depression in the landform as depicted on the building envelope blanket diagram at Figure 1 below.

Figure 1 - Building height plane blanket (in yellow) showing the breaching elements above the 8.5 metre height standard.

The balance of the development sits comfortably below the 8.5 metre building height standard.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of WLEP provides:

(1) The objectives of this clause are:

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

The decision of Chief Justice Preston in Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal *in RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

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 the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of WLEP provides:

> *(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.*

This clause applies to the clause 4.3 WLEP Height of Buildings Development Standard.

Clause 4.6(3) of WLEP provides:

> *(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.

The proposed development does not comply with the height of buildings provision at 4.3 of WLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of WLEP provides:

(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 Director-General has been obtained.

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 18-003 issued on 5th May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of WLEP provides:

(5) In deciding whether to grant concurrence, the Director-General must consider:

(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 Director-General before granting concurrence.

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act.

Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3 of WLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

18. A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].

19. A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].

20. A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].

21. A fifth way is to establish that the zoning of the particular land on which the development is proposed to 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 circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.

22. These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. 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 relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3 of WLEP a development standard?

2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

   (a) compliance is unreasonable or unnecessary; and

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

3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development for in the zone?

4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3 of WLEP?

4.0 Request for variation

4.1 Is clause 4.3 of WLEP a development standard?

The definition of “development standard” at section 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

Clause 4.3 WLEP prescribes a height provision that seeks to control the height of certain development. Accordingly, clause 4.3 WLEP is a development standard.

4.2 Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in Wehbe v Pittwater Council [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

(a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

Comment: Development within the site's visual catchment is characterised by 1, 2 and 3 storey detached style dwelling houses within landscape settings. Buildings on steeply sloping sites generally step down the landform in response to topography with some properties on steeply sloping sites clearly breaching the 8.5 metre height standard consistent with the built form outcome established by the immediately adjoining property to the west No. 57 Woolgoolga Street.

The consideration of building compatibility is dealt with in the Planning Principle established by the Land and Environment Court of New South Wales in the matter of *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*. At paragraph 23 of the judgment Roseth SC provided the following commentary in relation to compatibility in an urban design context:

> *22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.*

The question is whether the building height breaching elements contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development.

That is, will the non-compliant building height breaching elements result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate and jarring in a streetscape and urban design context.

The proposed development presents as a single storey building form to the street before stepping down the site over a series of levels which have a predominant 2 storey presentation as viewed from surrounding properties. In this regard, the building height breaching elements will not be readily discernible in a streetscape context and will not be perceived as inappropriate or jarring having regard to the height and scale of the immediately adjoining properties at No's 53 and 57 Woolgoolga Street. I note that letters of support have been received from both immediately adjoining Woolgoolga Street fronting properties copies of which are at Attachment 1.

In this regard, I have formed the considered opinion that the non-compliant building elements will not contribute to the height and scale of the development to the extent that the resultant building forms will be incompatible with the height and scale of surrounding and nearby development. That is, the non-compliant building height breaching elements will not result in a built form which is incapable of coexisting in harmony with surrounding and nearby development to the extent that it will appear inappropriate or jarring in a streetscape and broader urban context.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development, withstanding the building height breaching elements, offensive, jarring or unsympathetic in a streetscape and urban context.

In this regard, it can be reasonably concluded that notwithstanding the building height breaching elements the development is compatible with surrounding and nearby development and accordingly the proposal achieves this objective.

(b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,

Comment: Having attended the site and determined potential view lines over the site, I have formed the considered opinion that the height of the development, and in particular the non-compliant building height elements, will not give rise to unacceptable visual or view loss impacts.

In forming this opinion, I note that the building presents as a compliant single storey structure to the street with the compliant portions of the development obscuring the non-compliant building edges as viewed from the north with the non-compliant building elements sitting back behind the rear building alignment established by the 2 immediately adjoining properties such as to not project into available view lines.

I am also of the opinion that the building height breaching elements will not give rise to unacceptable visual privacy impacts particularly given that the only habitable floor space located above the 8.5 m height standard is located at the garage/entry-level where the development immediately adjoins the dwelling houses at No's 53 and 57 Woolgoolga Street with the design and juxtaposition of development in this location ensuring the maintenance of appropriate visual privacy between principal living and private open space areas.

In relation to solar access, I rely on the shadow diagrams at Attachment 2 which demonstrate that the non-compliant building height elements will not give rise to unacceptable loss of solar access with the highly articulated and modulated building design ensuring that significant portions of the development sit well below the 8.5 metre height standard and in doing so minimising associated shadowing impacts.

Notwithstanding the non-compliant building height elements, I am satisfied that the development minimises visual impact, disruption of views, loss of privacy and loss of solar access to surrounding development and the public domain and to that extent achieves this objective.

(c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,

Comment: The non-compliant building height elements will not be discernible as viewed from any coastal or bushland environments. This objective is achieved withstanding the building height breaching elements proposed.

(d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

Comment: For the reasons previously outlined I am satisfied that the non-compliant building height elements will not be visually prominent as viewed from the street or any public area. Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development, in particular the non-compliant portions of the building, offensive, jarring or unsympathetic in a streetscape context.

Having regard to the above, the non-compliant component of the building will achieve the objectives of the standard to at least an equal degree as would be the case with a development that complied with the building height standard. Given the developments consistency with the objectives of the height of buildings standard strict compliance has been found to be both unreasonable and unnecessary under the circumstances.

Consistency with zone objectives

The subject property is zoned R2 Low Density Residential zone pursuant to WLEP 2011. The developments consistency with the stated objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*

Response: The proposed development reinstates a single dwelling house on the site reflecting a low-density residential outcome/ environment for the site which will provide for the housing needs of the community. The proposal achieves this objective notwithstanding the building height breaching elements.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Response: N/A

- *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.*

Response: The development maintains the majority of significant trees on the site ensuring that the dwelling house sits within a landscaped setting in harmony with the natural environment of Warringah. The proposal achieves this objective notwithstanding the building height breaching elements.

The proposed development, notwithstanding the height breaching elements, achieve the objectives of the zone.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

4.3 Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. 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.

24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.

The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

Sufficient Environmental Planning Grounds

In my opinion, there are sufficient environmental planning grounds to justify the building height variation as outlined below.

Ground 1 – Topography of the site

The site falls approximately 12 metres across its surface in a southerly direction towards its rear boundary making strict compliance with the 8.5 m height standard difficult to achieve while striking a balance between the provision of appropriately sized floor plates, excavation and building height.

The highly articulated and modulated building form steps down the site in response to topography with the breaching elements confined to the southern edges of the upper level floor plates as the site falls away steeply within the proposed building footprint.

Strict compliance at the garage/ entry level would significantly compromise the disabled access arrangement associated with the development which requires the provision of both internal stair and lift access from the same level as the garaging which is set back into the site 6.5 metres to comply of the front building line setback. In this regard, the lift would need to be relocated to within the side boundary setback adjacent to the garage where it would have a greater visual impact as viewed from the street than the design currently proposed.

Such outcome would compromise the disabled access and amenity outcomes for the site without any measurable benefit in terms of reduced streetscape or residential amenity impacts. This would represent poor design.

Ground 2 - Objectives of the Act

Objective (c) to promote the orderly and economic use and development of land

Approval of the building height variation will achieve this objective given the contextually appropriate nature of the building form and the compatibility of the dwelling with the height and scale of surrounding and nearby development.

Objective (g) to promote good design and amenity of the built environment

Approval of the variation of the building height standard will facilitate safe and convenient disabled access to the site and promote good contextually appropriate design which will facilitate enhanced amenity outcomes to and from the development.

The building is of good design quality with the variation facilitating a height and floor space that provides for contextual built form compatibility consistent with objective (g) of the Act.

It is noted that in *Initial Action,* the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test.

The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

That said, I note that the proposed revised clause 4.6 provisions as recently identified by the NSW Department of Planning indicates that the clause 4.6 provisions may be changed such that the consent authority must be directly satisfied that the applicant's written request demonstrates the following essential criteria in order to vary a development standard:

- *the proposed development is consistent with the objectives of the relevant development standard and land use zone;* ***and***
- *the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened. In deciding whether a contravention of a development standard will result in an improved planning outcome, the consent authority is to consider the public interest, environmental outcomes, social outcomes or economic outcomes.*

In this particular instance, I am satisfied that the proposed development is consistent with the objectives of the relevant development standard and land use zone and the contravention of the standard will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.

There are sufficient environmental planning grounds to justify contravening the development standard.

4.4 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3 and the objectives of the R2 Low Density Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

> *"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.*
>
> *It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."*

As demonstrated in this request, the proposed development is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.5 Secretary's concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a nonnumerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

(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.

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

Boston Blyth Fleming Pty Limited

Greg Boston
B Urb & Reg Plan (UNE) MPIA

Director

Attachment 1 Letters of support from immediately adjoining property owners

Attachment 2 Shadow diagrams

Attachment 1 Letters of support from immediately adjoining property owners

53 Woolgoolga Street

NORTH BALGOWLAH

NSW 2093

To whom it may concern

RE: Development Application for 55 Woolgoolga Street North Balgowlah

Since moving into Woolgoolga Street in 2011 we have come to know Martin and Andrea Pryor as neighbours and friends. We are pleased to support this Development Application as it will greatly assist Martin in his battle with Parkinson's' and help ensure they can stay in the street amongst their friends, adding to the 35+ years they have spent there.

David McDermott

Adrienne McDermott

Date 11/9/21

57 Woolgoolga Street
North Balgowlah
NSW 2093

To whom is may concern

Development Application re 55 Woolgoolga Street North Balgowlah

Having known Martin and Andrea Pryor as neighbours and friends since 1987, we are delighted to support this Development Application. Not only will it greatly improve Martin's quality of life as he lives with Parkinson's, it will enable them as a couple to stay in the cul de sac, amongst their friends and support structures.

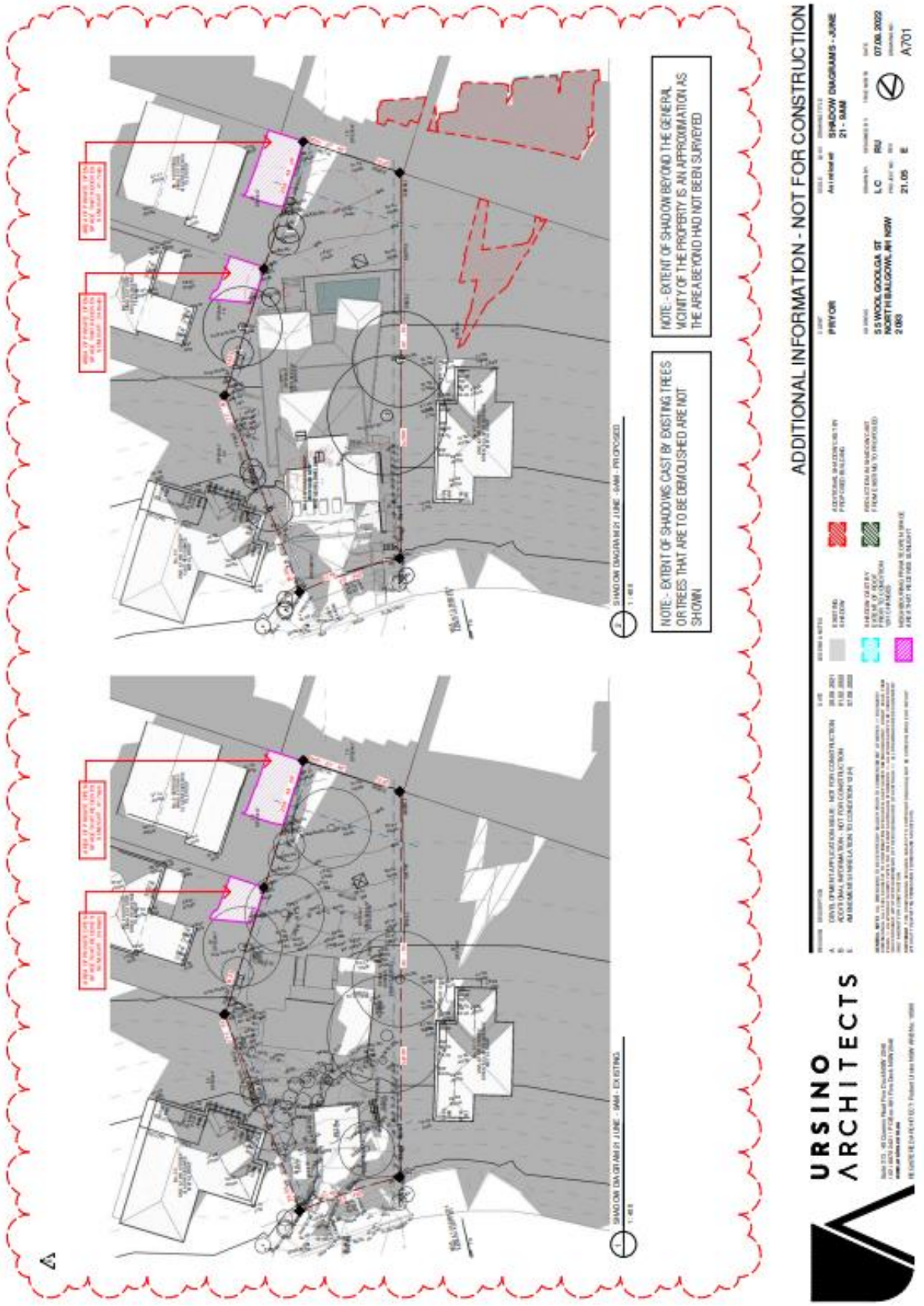
Yours faithfully

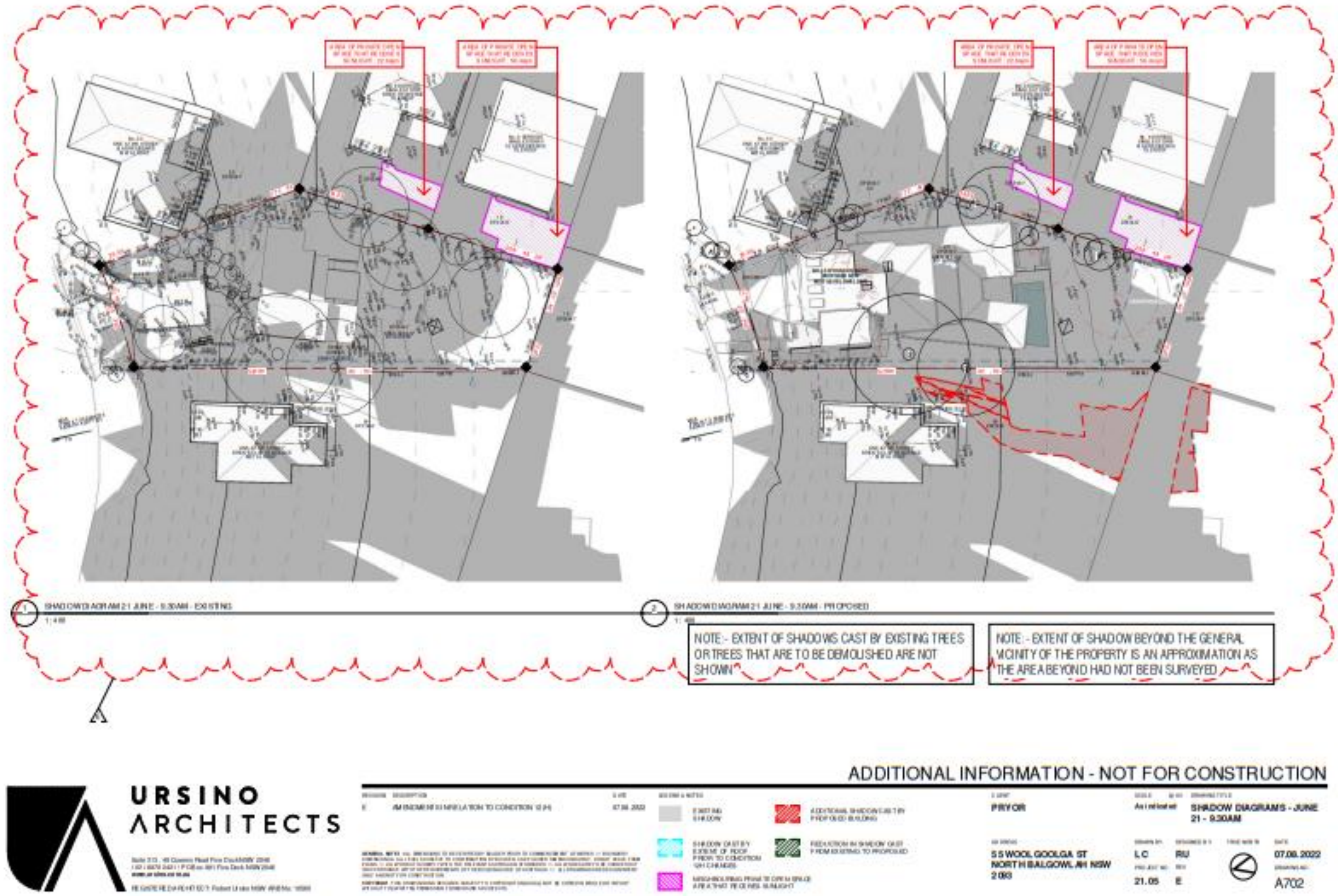
Andrew Snell

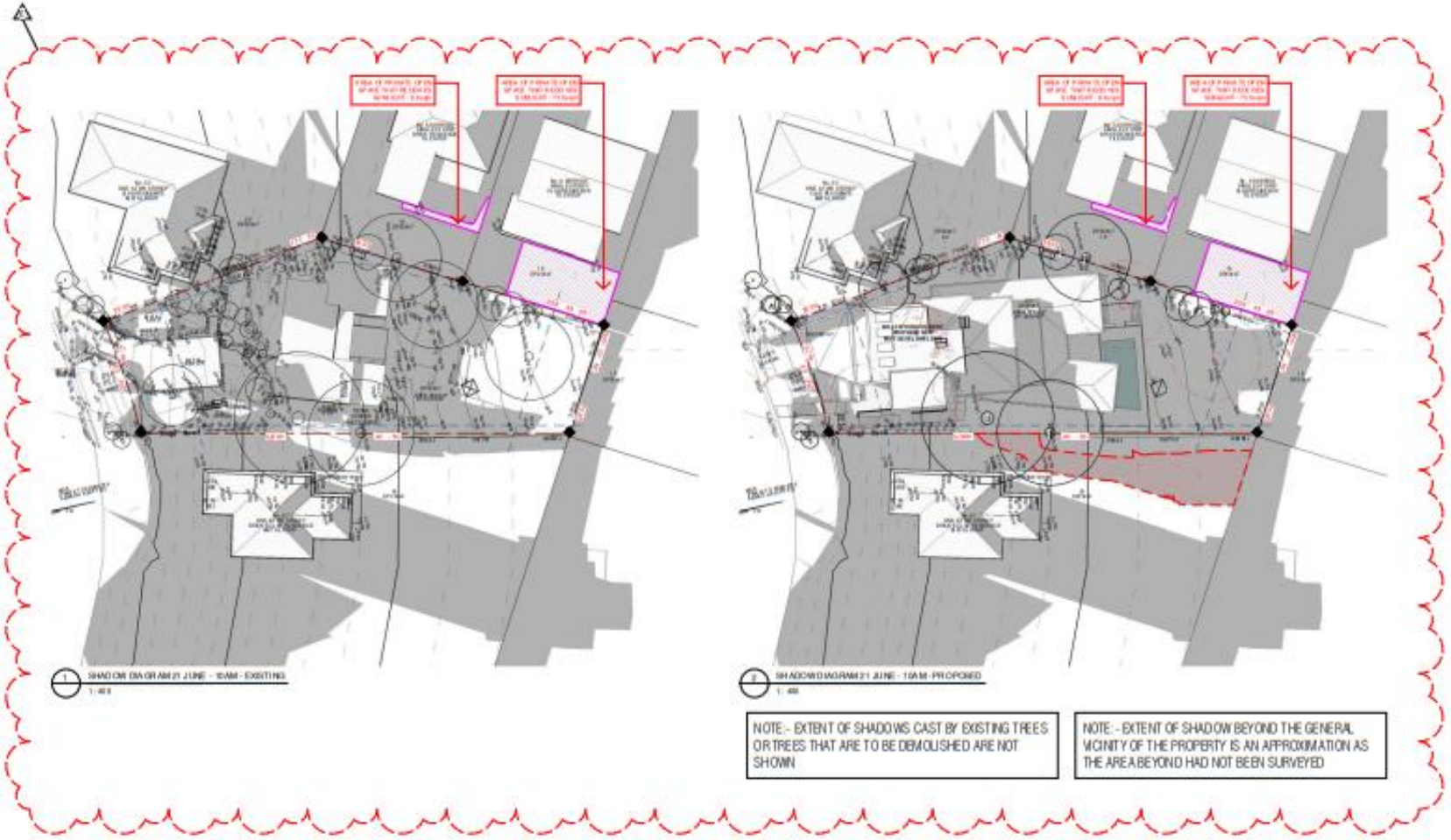
Hilary Snell

Date 13/9/2021

Attachment 2 Shadow diagrams




SHADOW DIAGRAM 21 JUNE - 9.30AM - EXISTING
SHADOW DIAGRAM 21 JUNE - 9.30AM - PROPOSED
NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN
NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
URSINO ARCHITECTS
PRYOR
5 S WOOLGOOLGA ST NORTH BALGOWLAH NSW 2093
SHADOW DIAGRAMS - JUNE 21 - 9.30AM
LC
RU
21.05
E
07.08.2022
A702



ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

A	DEVELOPMENT APPLICATION ISSUE - NOT FOR CONSTRUCTION	20.09.2021
B	ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION	01.02.2022
E	AMENDMENTS IN RELATION TO CONDITION 12 (H)	07.06.2022

EXISTING SHADOW
ADDITIONAL SHADOW CAST BY PROPOSED BUILDING
SHADOW CAST BY EXTENT OF ROOF PRIOR TO CONDITION 12(H) CHANGES
REDUCTION IN SHADOW CAST FROM EXISTING TO PROPOSED
NEIGHBOURING PRIVATE OPEN SPACE AREA THAT RECEIVES SUNLIGHT

CLIENT: PRYOR

SITE ADDRESS: 55 WOOL GOOLGA ST NORTH BALGOWLAH NSW 2093

SCALE: As indicated

DRAWING TITLE: SHADOW DIAGRAMS - JUNE 21 - 10AM

DRAWN BY: LC

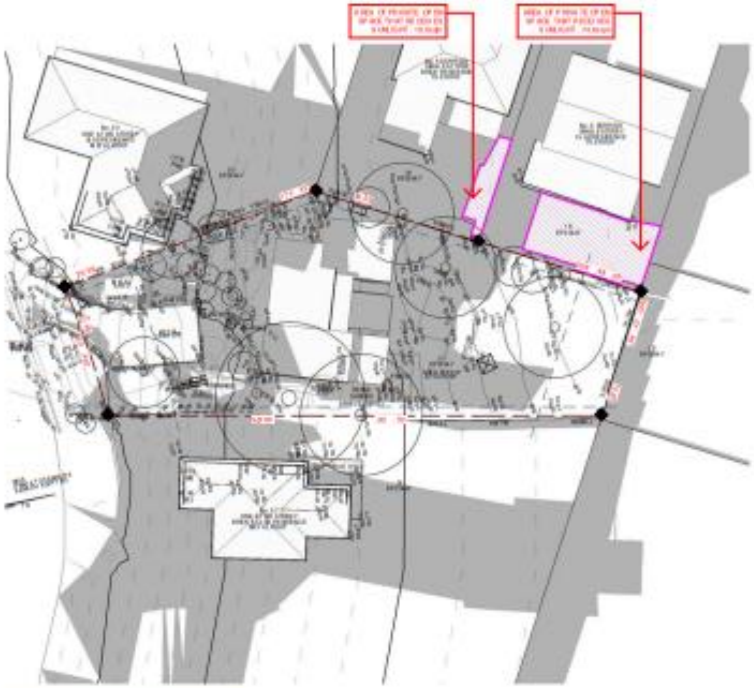
DESIGNED BY: RU

PROJECT NO: 21.05

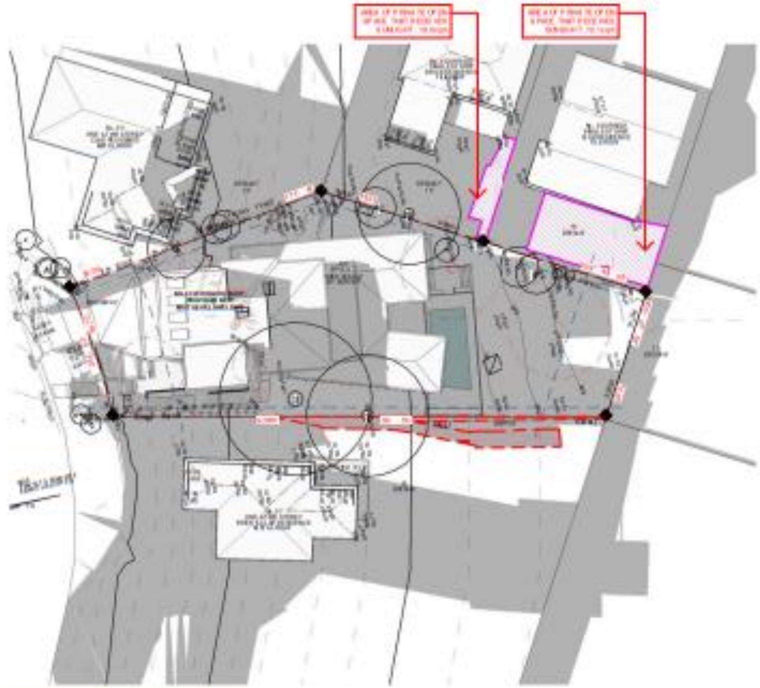
REV: E

DATE: 07.06.2022

DRAWING NO: A703



SHADOW DIAGRAM 21 JUNE - 10:30AM - EXISTING
1:400



SHADOW DIAGRAM 21 JUNE - 10:30AM - PROPOSED

NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN

NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED

ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

Revision	Description	Date
E	AMENDMENTS IN RELATION TO CONDITION 12 (H)	07.08.2022

Legend:
- EXISTING SHADOW
- ADDITIONAL SHADOW CAST BY PROPOSED BUILDING
- SHADOW CAST BY EXTENT OF ROOF PRIOR TO CONDITION 12H CHANGES
- REDUCTION IN SHADOW CAST FROM EXISTING TO PROPOSED
- NEIGHBOURING PRIVATE OPEN SPACE AREA THAT RECEIVES SUNLIGHT

Client: PRYOR

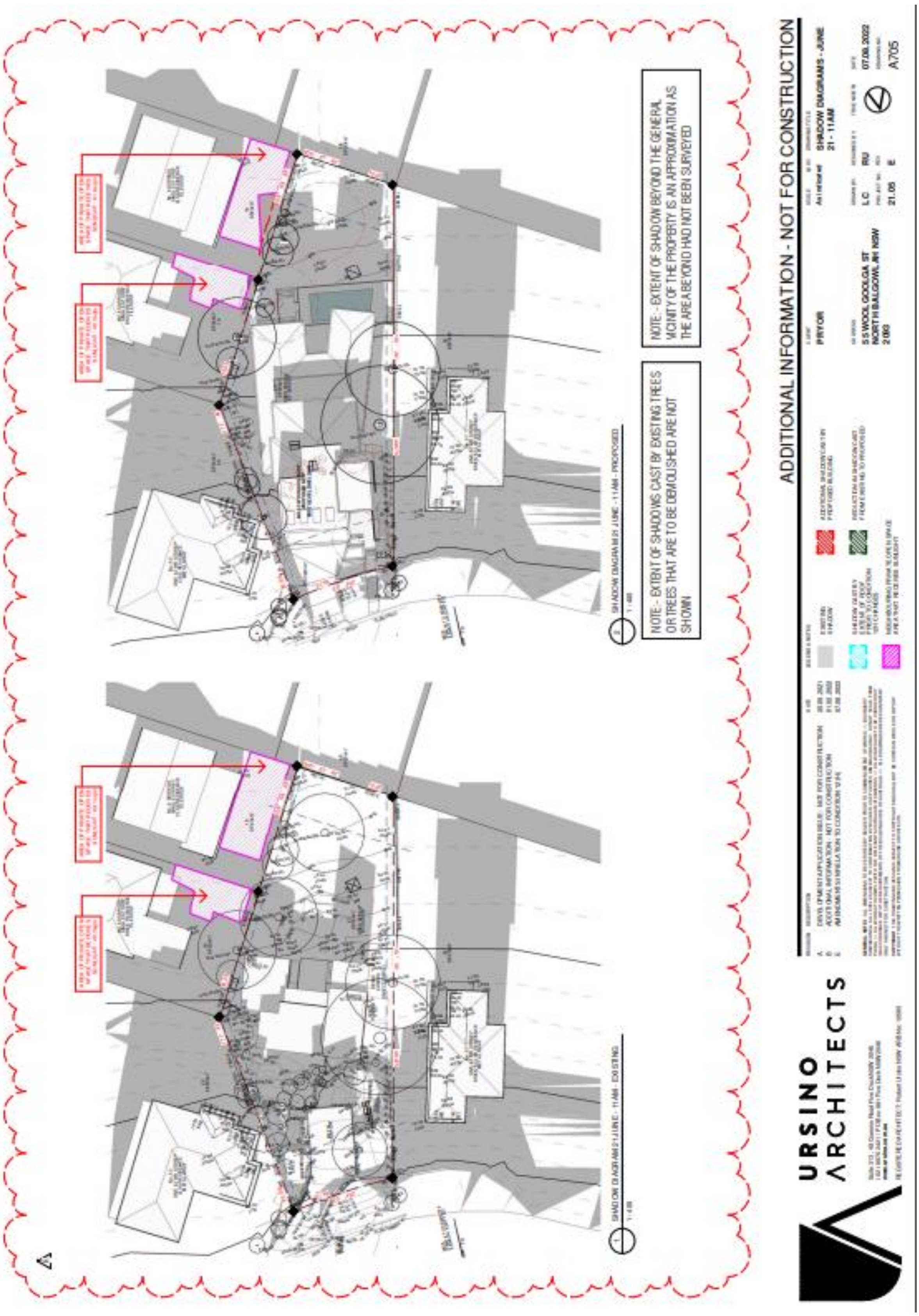
Address: 5 SWOOL GOOLGA ST NORTH BALGOWLAH NSW 2093

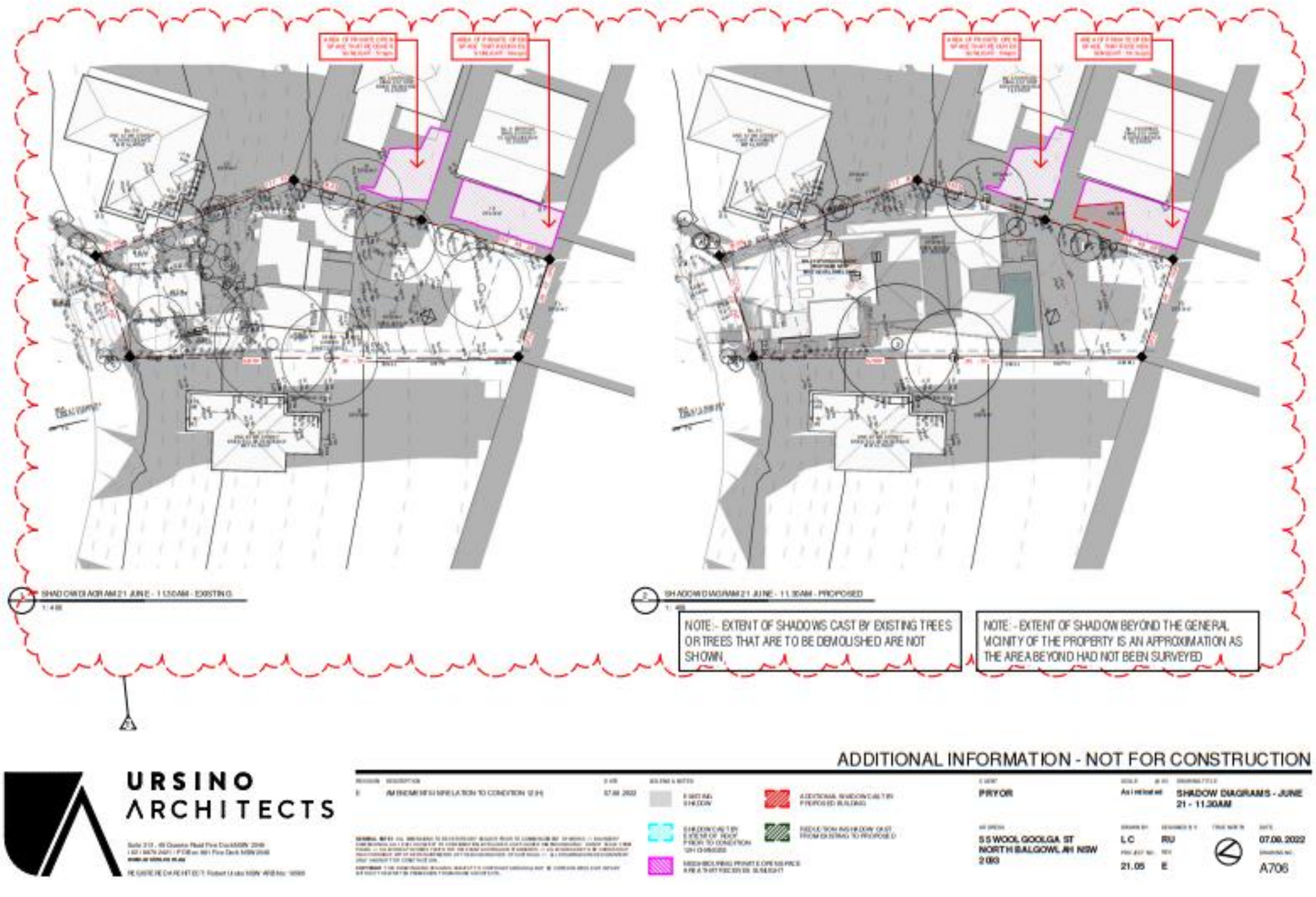
Scale: As indicated

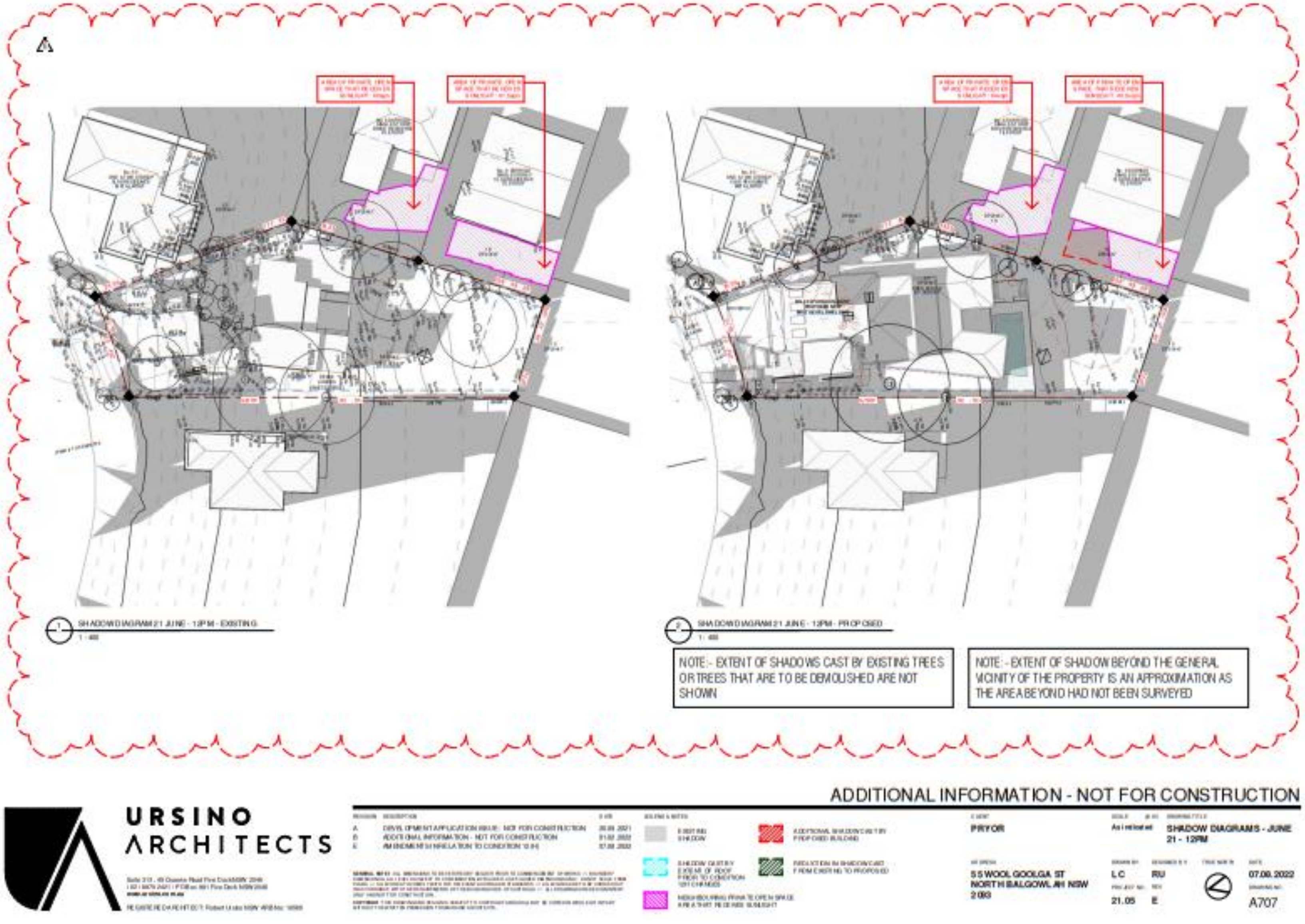
Drawing title: SHADOW DIAGRAMS - JUNE 21 - 10:30AM

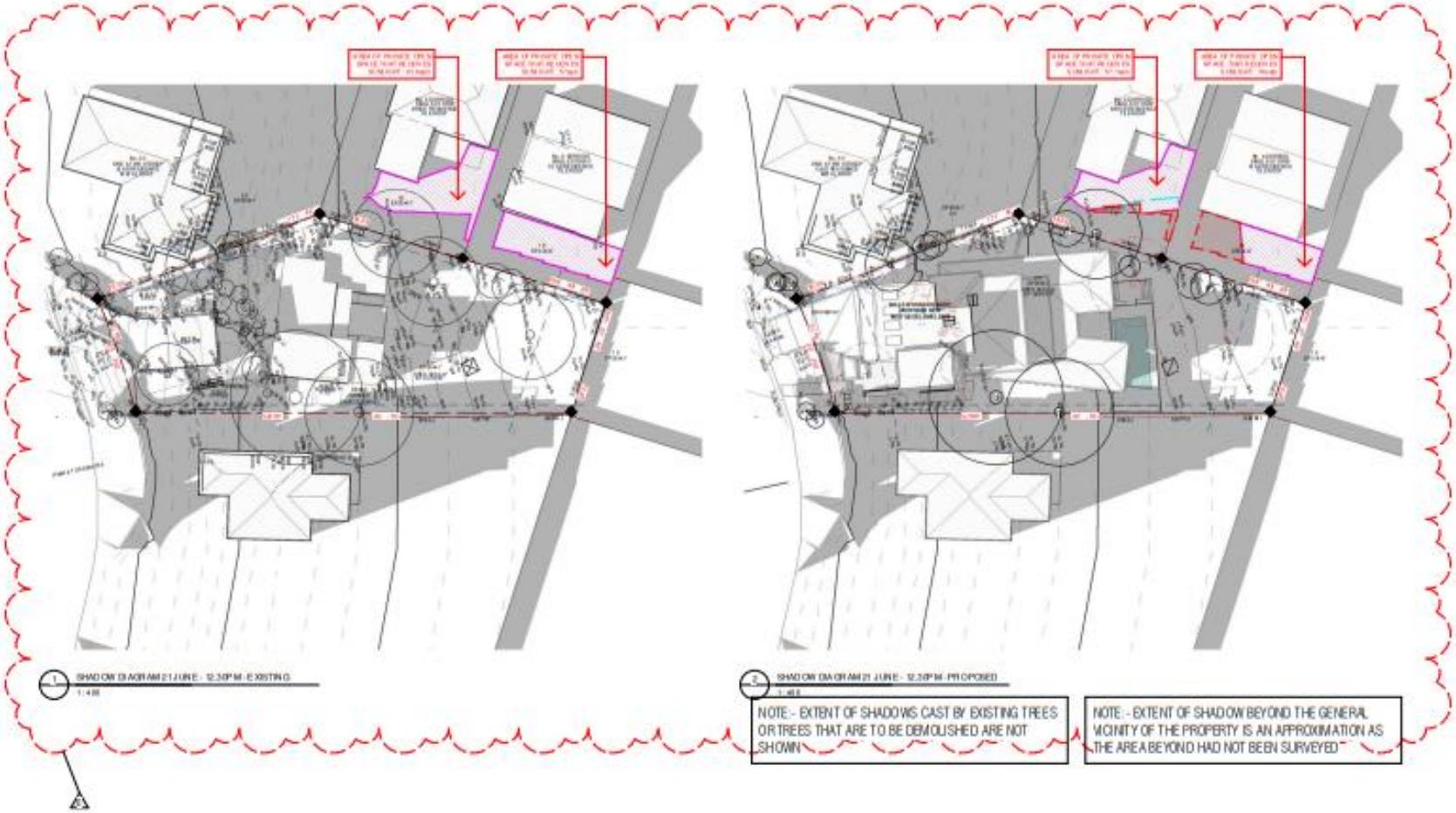
Drawn by: LC | Designed by: RU | Date: 07.08.2022

Project no.: 21.05 | Rev: E | Drawing no.: A704


SHADOW DIAGRAM 21 JUNE - 11AM - EXISTING
SHADOW DIAGRAM 21 JUNE - 11AM - PROPOSED
NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN
NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
URSINO ARCHITECTS
PRYOR
55 WOOLGOOLGA ST NORTH BALGOWLAH NSW 2093
SHADOW DIAGRAMS - JUNE 21 - 11AM
LC
RU
21.05
E
07.09.2022
A705


SHADOW DIAGRAM 21 JUNE - 11.30AM - EXISTING
1 : 400
SHADOW DIAGRAM 21 JUNE - 11.30AM - PROPOSED
NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN.
NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED
URSINO
ARCHITECTS
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
PRYOR
SHADOW DIAGRAMS - JUNE 21 - 11.30AM
55 WOOLGOOLGA ST
NORTH BALGOWLAH NSW 2093
LC
RU
21.05
E
07.09.2022
A706


SHADOW DIAGRAM 21 JUNE - 12PM - EXISTING
SHADOW DIAGRAM 21 JUNE - 12PM - PROPOSED
NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN
NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
URSINO ARCHITECTS
PRYOR
55 WOOLGOOLGA ST NORTH BALGOWLAH NSW 2093
As indicated
SHADOW DIAGRAMS - JUNE 21 - 12PM
LC
RU
07.09.2022
21.05
E
A707



ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

E	AMENDMENTS IN RELATION TO CONDITION 12 (H)	07.06.2022

PRYOR

55 WOOL GOOLGA ST NORTH BALGOWLAH NSW 2093

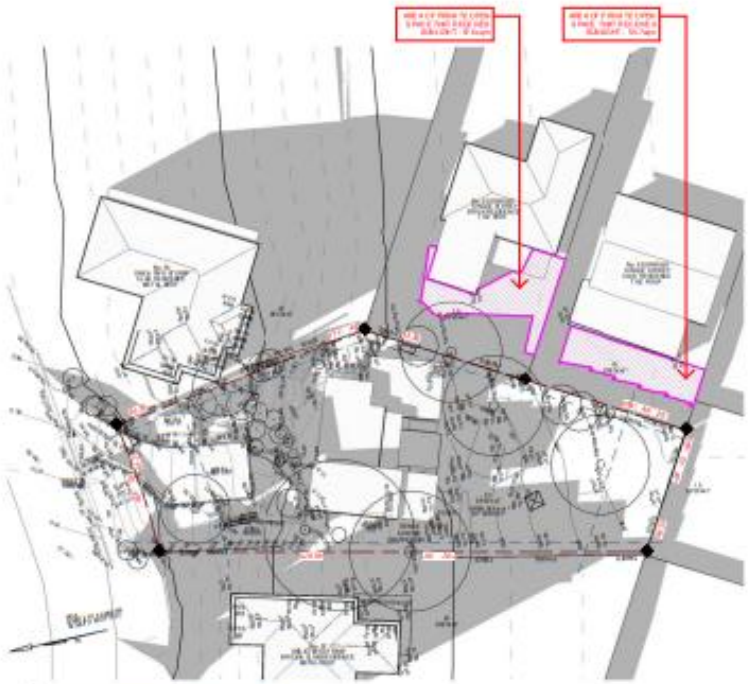
SHADOW DIAGRAMS - JUNE 21 - 12.30AM

As indicated

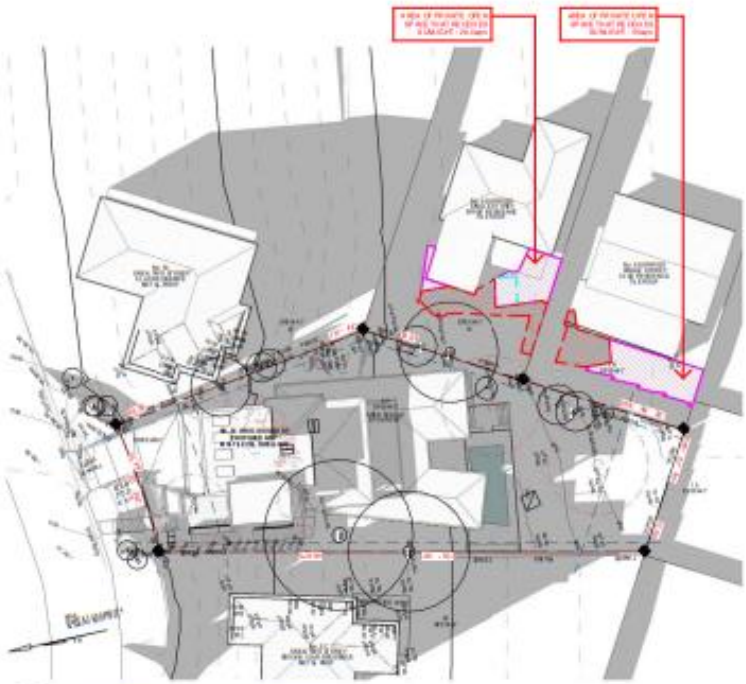
LC | RU | 21.05 | E

07.06.2022

A708



1 SHADOW DIAGRAM 21 JUNE - 9PM - EXISTING
1 : 400



2 SHADOW DIAGRAM 21 JUNE - 1PM - PROPOSED
1 : 400

NOTE:- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN

NOTE:- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED

ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

A	DEVELOPMENT APPLICATION ISSUE - NOT FOR CONSTRUCTION	28.05.2021
B	ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION	01.02.2022
C	AMENDMENTS IN RELATION TO CONDITION 1 (1H)	07.06.2022

EXISTING SHADOW
ADDITIONAL SHADOW CAST BY PROPOSED BUILDING
SHADOW CAST BY EXTENT OF ROOF FROM TO CONDITION '1H' CHANGES
INDICATES IN SHADOW CAST FROM EXISTING TO PROPOSED
NEIGHBOURING PRIVATE OPEN SPACE ARE IS THAT RECEIVES SUNLIGHT

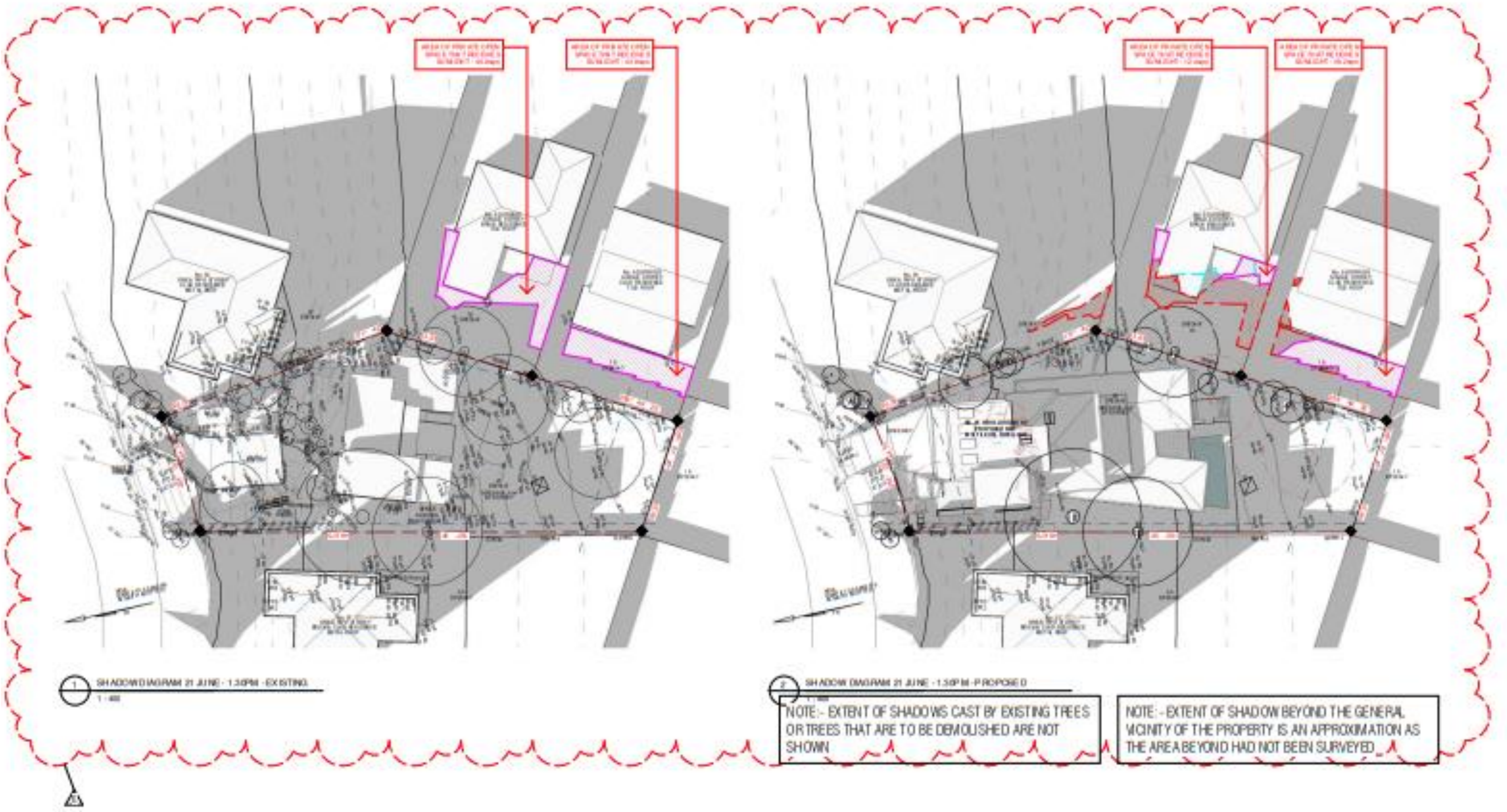
CLIENT: PRYOR

ADDRESS: 55 WOOLGOOLGA ST NORTH BALGOWLAH NSW 2093

SCALE @ A1: As indicated

DRAWING TITLE: SHADOW DIAGRAMS - JUNE 21 - 1PM

DRAWN BY: LC	DESIGN BY: RU	TRUE NORTH	DATE: 07.06.2022
PROJECT NO: 21.05	REV: E		DRAWING NO: A709

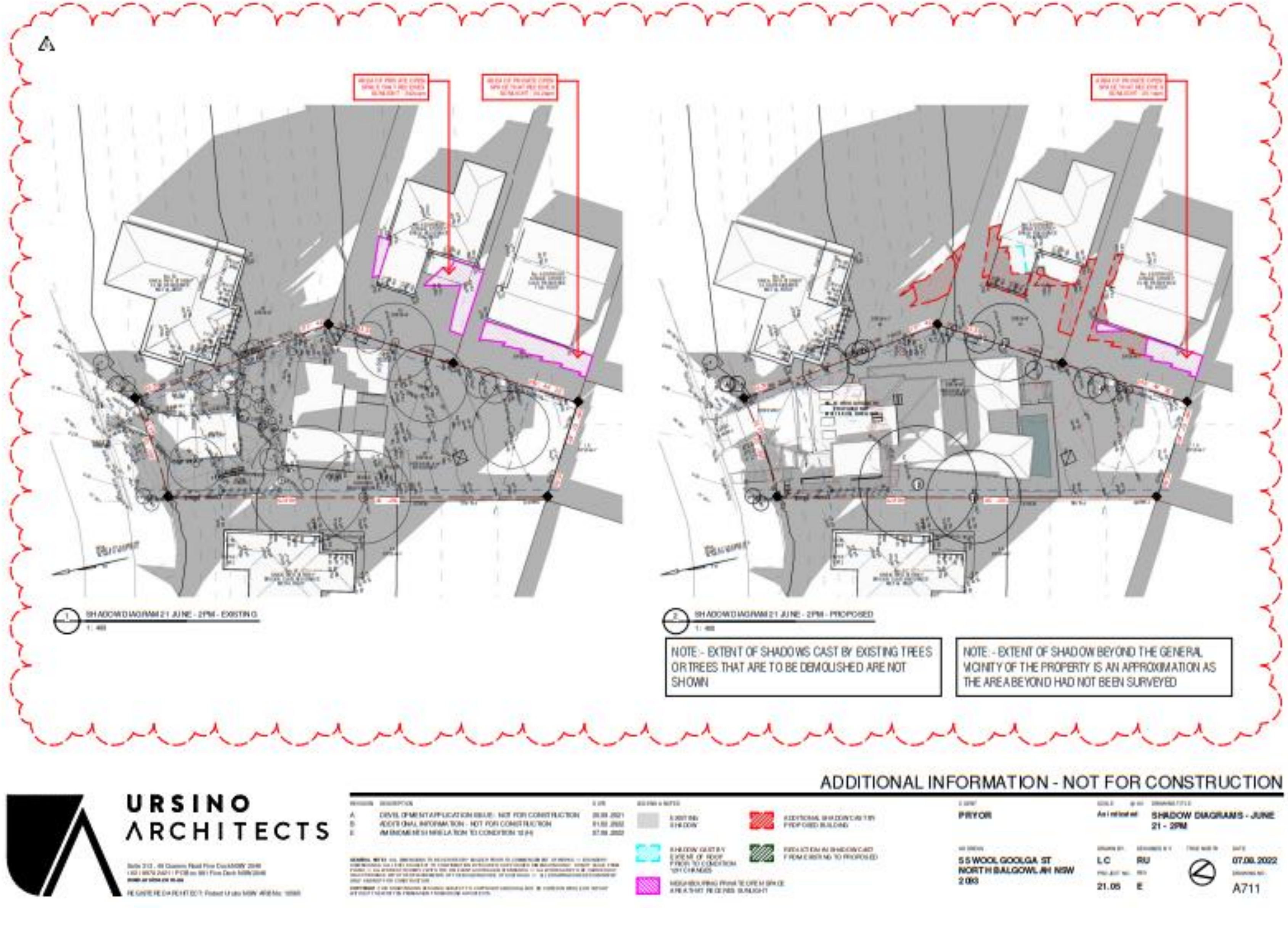


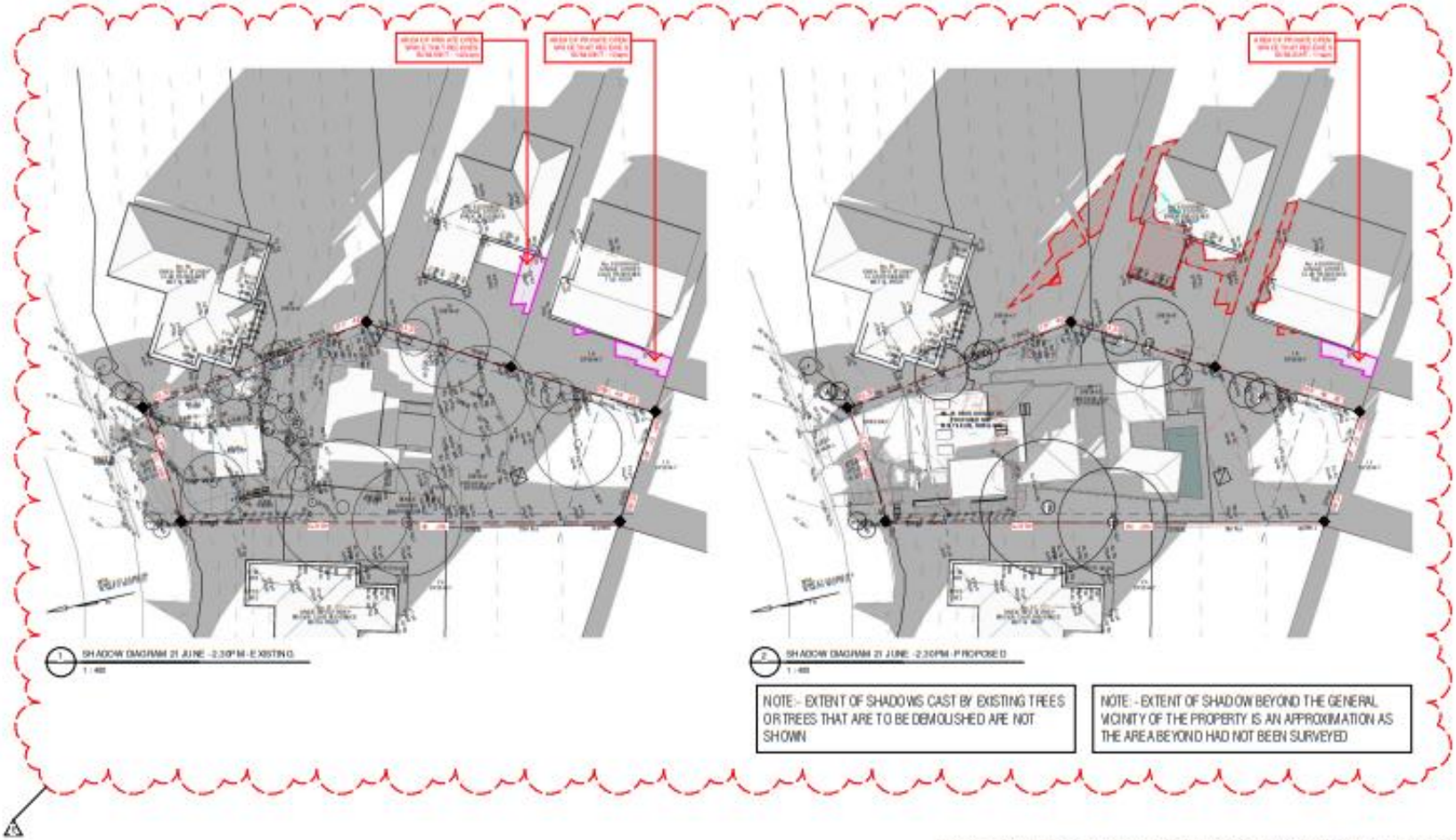
URSINO ARCHITECTS

ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

Revision	E
Description	AMENDMENTS IN RELATION TO CONDITION 12 (H)
Date	07.09.2022
Client	PRYOR
Address	55 WOOLGOOLGA ST NORTH BALGOWLAH NSW 2093
Scale	As indicated
Drawing title	SHADOW DIAGRAMS - JUNE 21 - 1.30PM
Drawn by	LC
Checked by	RU
Project no.	21.05
Rev	E
Date	07.09.2022
Drawing no.	A710

Legend:
- EXISTING SHADOW
- SHADOW CAST BY EXTENT OF ROOF PRIOR TO CONDITION 12H CHANGES
- NEIGHBOURING PRIVATE OPEN SPACE AREA THAT RECEIVES SUNLIGHT
- ADDITIONAL SHADOW CAST BY PROPOSED BUILDING
- REDUCTION IN SHADOW CAST FROM EXISTING TO PROPOSED


SHADOW DIAGRAM 21 JUNE - 2PM - EXISTING
SHADOW DIAGRAM 21 JUNE - 2PM - PROPOSED
NOTE: - EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN
NOTE: - EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
URSINO
ARCHITECTS
DEVELOPMENT APPLICATION ISSUE - NOT FOR CONSTRUCTION
ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION
PRYOR
5 S WOOL GOOLGA ST
NORTH BALGOWLAH NSW
2093
SHADOW DIAGRAMS - JUNE
21 - 2PM
LC
RU
21.05
E
07.09.2022
A711



ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

Suite 313 , 49 Queens Road Five Dock NSW 2046
(02) 9572 2521 | PO Box 361 Five Dock NSW 2046

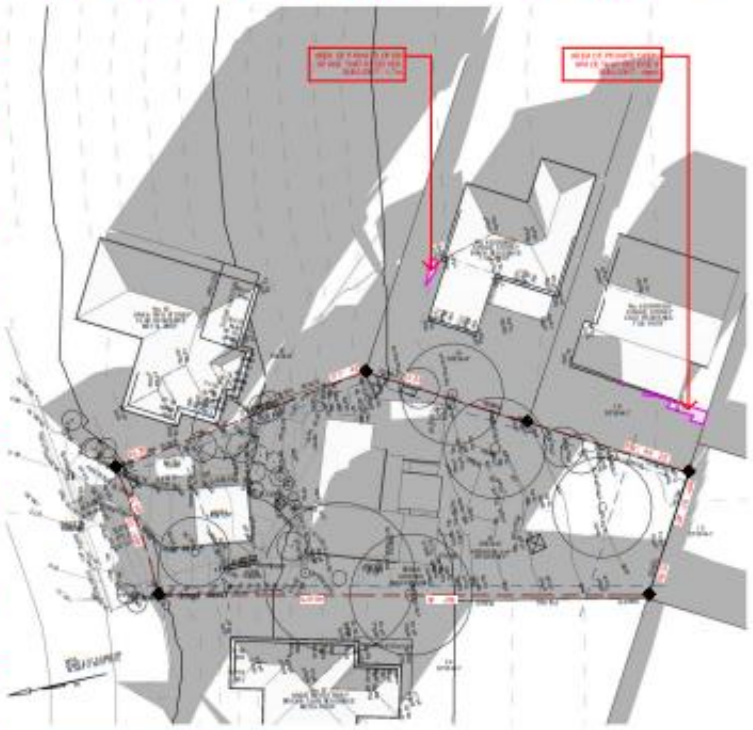
REGISTERED ARCHITECT: Robert Ursino NSW ARB No. 10595

E	AMENDMENTS IN RELATION TO CONDITION 12 (A)	07.06.2022

PRYOR

55 WOOL GOOLGA ST
NORTH BALGOWLAH NSW
2093

As indicated		SHADOW DIAGRAMS - JUNE 21 - 2.30PM			
L C	RU		07.06.2022		
21.05	E		A712		



1 SHADOW DIAGRAM 21 JUNE - 3PM - EXISTING
1 : 400

2 SHADOW DIAGRAM 21 JUNE - 3PM - PROPOSED
1 : 400

NOTE :- EXTENT OF SHADOWS CAST BY EXISTING TREES OR TREES THAT ARE TO BE DEMOLISHED ARE NOT SHOWN

NOTE :- EXTENT OF SHADOW BEYOND THE GENERAL VICINITY OF THE PROPERTY IS AN APPROXIMATION AS THE AREA BEYOND HAD NOT BEEN SURVEYED

ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION

URSINO ARCHITECTS

REV	DESCRIPTION	DATE
A	DEVELOPMENT APPLICATION ISSUE - NOT FOR CONSTRUCTION	29.09.2021
D	ADDITIONAL INFORMATION - NOT FOR CONSTRUCTION	01.02.2022
E	AMENDMENTS IN RELATION TO CONDITION 12 (H)	07.09.2022

EXISTING SHADOW
ADDITIONAL SHADOW CAST BY PROPOSED BUILDING
SHADOW CAST BY EXTREME OF ROOF PRIOR TO CONDITION "12H" CHANGES
REDUCTION IN SHADOW CAST FROM EXISTING TO PROPOSED
NEIGHBOURING PRIVATE OPEN SPACE ABLE TO GET REQUIRED SUNLIGHT

CLIENT: PRYOR

SITE ADDRESS: 55 WOOLOOLOA ST NORTH BALGOWLAH NSW 2093

SCALE @ A1: As indicated

DRAWING TITLE: SHADOW DIAGRAMS - JUNE 21 - 3PM

DRAWN BY: LC
CHK'D BY: 21.05
DESIGNED BY: RU
REV: E
ISSUE NOTE:
DATE: 07.09.2022
DRAWING NO: A713