

Customer Service
Environment, Planning and Sustainable Development Directorate
ACEPDcustomerservices@act.gov.au

Dear Mr Ponton

RE DA 202037990s197B – reconsideration – Block: 9 Section: 33 – 18 Darke St Torrens (1,104m2)

Thank you for the opportunity to comment on this DA which seeks reconsideration of the refusal to retrospectively amend DA202037990s197B under s191 of the *Planning and Development Act 2007*. While the amending DA was refused on the grounds that it did not comply with the Multi Unit Housing Development Code (MUHDC) and the Residential Zones Development Code (RZDC), it is now clear that residence 1 is Fundamentally Non-Compliant and the reconsideration DA does not comply with the *Planning and Development Regulation 2008*, *Building Act 2004*, and the *Building (General) Regulation 2008*.

The proposal consists of two new two-storey detached dwellings with garages and two new verge crossings off Darke Street. The dual occupancy development is subject to the rules and conditions of a surrendered Mister Fluffy Block in a RZ1 zone.

The neighbour's concerns

The concerns the neighbours have with the proposal are around the poor process and the bad outcomes that is impacting on our well-being:

- overlooking and lack of privacy – creates unreasonable negative impacts on the neighbours
- side setbacks- height of parts of the building foundations are over 1.8m are not setback 6 metres
- landing – encroachment (over 1m but now ground level lifted), unscreened and invades privacy
- landscaping – deciduous trees inadequate for boundary screening and canopy cover
- Fencing – will not create privacy
- desired character – not achieved for the RZ1 area.

The process has not looked after the privacy and rights of the neighbours. The timeline of events is at **Attachment A**. To summarise:

- the ACT Government submitted a non-compliant DA
- the ACT Government approved the non-compliant DA
- the building certifier issued a Building Approval certificate without taking all reasonable steps to check the dimensions and elevations of the proposal
- the building certifier issued a Building Commencement Notice without dimensions being verified by a surveyor or the certifier prior to commencement of any work as required by the original DA
- The footings were certified on 20 September 2021 without the elevation levels being checked. At this time the increase in level by 340mm was known because the certifier's letter (dated 24 March 2023) stated that that upon hitting rock the excavation was halted and the planning tolerances were applied - this led to a second storey being created and the building becoming fundamentally non-compliant under the *Building Act 2004* and the *Building (General) Regulation 2008*. Under s17A(h) of the Building Act 2004 the certifier's function is to tell the planning and land authority if the certifier suspects there is non-compliant site work.
- The DA for two pools and decks 2.5m above the ground were refused due to the detriment they caused to the neighbours' privacy

It is not clear who is ensuring the government, the developer and the certifier comply with the law and deliver good outcomes. Two DAs have been refused however the material detriment to the neighbours has not been resolved.

The developer's reconsideration application

The developer's application for reconsideration states:

- 'So the amendments have been correctly listed, a letter from the Certifier has been attached stating prior amendments have been approved. The rear setbacks of the alfersco's comply to two storey rules, side setbacks encroach by 3.0m as they are higher than 1.8m 1.8m high screens have been provided both side neighbours with privacy measures. The amenity of the neighbour with the screens in place has now not been affected at all'

Sadly, the developer fails to understand that the overwhelming size and scale of the development is completely out of character with the RZ1 zone objectives and the surrounding suburban area and has led to a material detriment that has adversely affected the neighbours' use and enjoyment of their land.

The amendments proposed in the Reconsideration application in response to the reasons for refusal of the original S197B DA are: 1. Landscaping altered, 2. Stairs altered, 3. Privacy screen added, 4. Retaining wall added, 5. Balustrade altered, 6. Alfresco FFL altered, 7. Residence 1 Alfresco stairs altered, 8. Residence 2 Alfresco stairs altered.

The certifier has provided a letter stating that upon hitting rock the excavation was halted and the planning tolerances were applied. However, the certifier should have checked the dimensions and elevations before issuing the Building Approval and certifying the footings. See timeline at **Attachment A**.

The certifier is relying on the 340mm tolerance in schedule 1A.11 in the subordinate *Planning and Development Regulation 2008*. Unfortunately, the certifier does not reference:

- 1A.11(3)(b)(iii) - compared to the approved development or exempt development, the building or structure does not do any of the following:
 - (iii) change the number of stories in the building or structure.

It is clear that the number of stories has changed for the deck and living areas in residence 1. The evidence is shown in the decision to refuse the amending DA as follows:

The reasons for refusal of the amending DA were:

- **The amended finished floor levels for residence 1 results in the windows for the family and dining rooms being higher than 1.8m above datum ground level. As such these windows are upper floor level windows by definition.** The windows would require a 6-metre setback to be rule compliant, as this setback is not provided Rule 30 is not met. Similar to the external stair these windows offer a direct line of site over the adjacent boundary fence with no design elements or measures in place to ensure the privacy of adjoining residential blocks. As such the privacy of the adjoining development is not maintained and Criteria 30 is not satisfied.
- Privacy: Rule and Criteria 60 –
 - As outlined above the new external stair and the family/ dining room windows of residence 1 which are considered unscreened elements offer a direct line of sight into neighbouring PPOS areas. This direct line of sight extends to more than 50% of the neighbouring PPOS with no evidence of a design solution provided to ensure the privacy of the adjoining residential block. As such the development does not comply with Rule or Criteria 60 of the MUHDC
- Zone objectives in the territory Plan and s120 of the *Planning and Development Act 2007*,
 - the development and associated amendments negatively impact neighbouring properties through impacting and reducing the privacy of these blocks. Due to the above factors this application was assessed as being inconsistent with objective d) of the RZ1 zone objectives

These issues around privacy and the detriment to the neighbours' have not been resolved.

100% overlooking is a bad outcome and does not comply with the law.



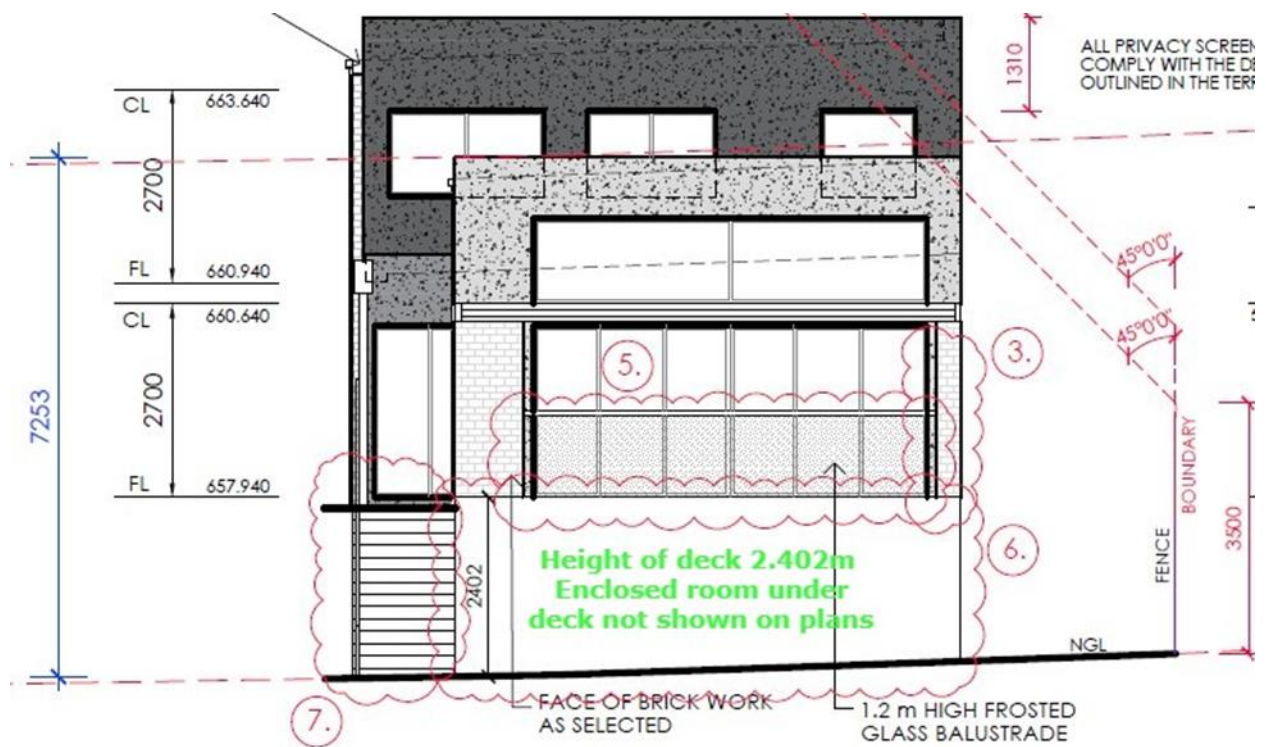
This development imposes a material detriment to the neighbours from the huge windows that facilitate overlooking and an invasion of privacy causing an adverse impact on the enjoyment of our dwellings and private open space.

Bad outcomes for the neighbours' as the huge windows 100% overlook our private open space



- The new fence is 1.8m however the unscreened windows are above this level.
- The large windows run down the side of the development.
- A retaining wall has been installed to lift the ground level by the external stairs
- The deck is not enclosed in the plans.
- Neither the deck nor the room below are included in the plot ratio.
- The deck is up to 2.4 m and is an upper storey.

The deck is 2.4m above natural ground level – the plans do not enclose the deck or state what this space will be used for



Planning and Development Act 2007

Section 50 requires that the Territory, the Executive, a Minister or a territory authority must not do any act, or approve the doing of an act, that is inconsistent with the territory plan.

The Territory Plan

Number of Storeys – does not comply

The reconsideration DA claims the living areas is one storey and acknowledges the deck is above the height allowed for one storey. However, under the Territory Plan definitions the living room area is also above 1.8m from datum ground level and is therefore defined as an upper floor level. The room under the deck creates a lower floor level and a storey which are not mentioned in the DA and so no approval is sought for them.

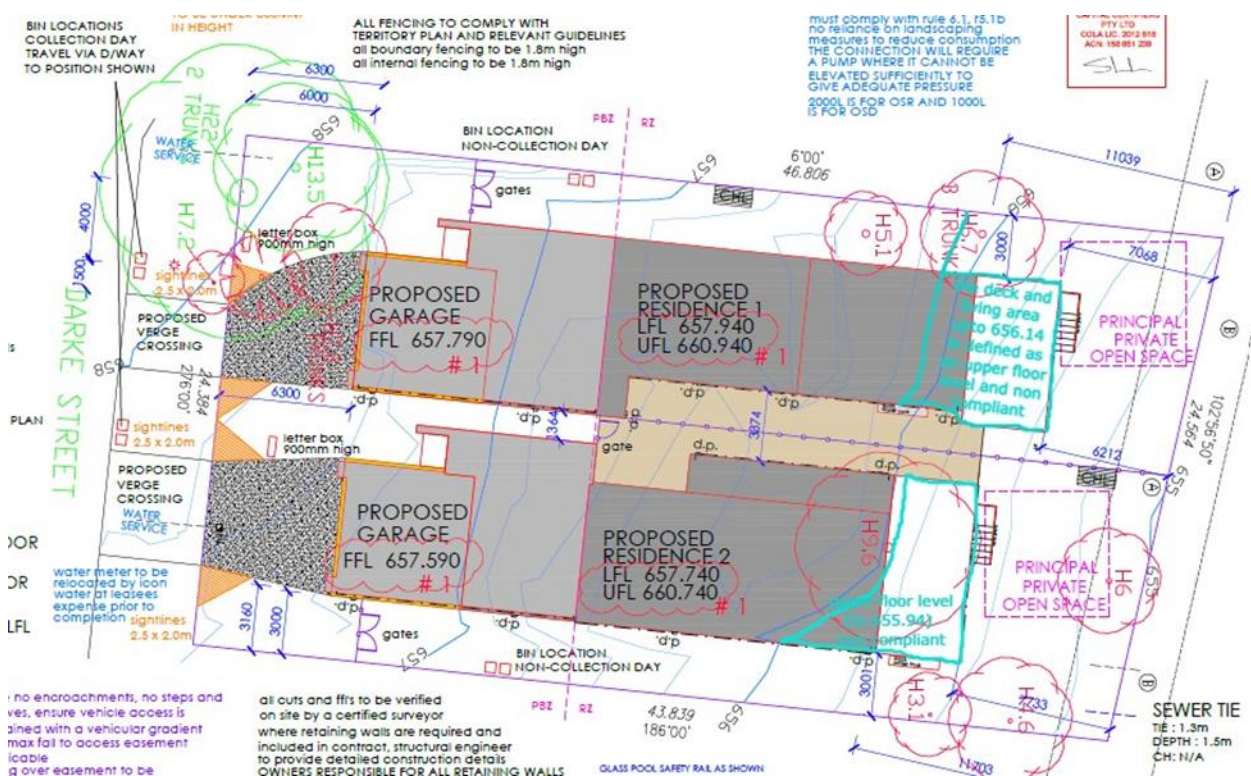
- ffl = 657.94 – 1.8 = **656.14** (the ffl is an upper floor level).

Territory Plan definitions:

- the deck and living areas are Upper Floor Level (UFL) which means a finished floor level, which is greater than 1.8 metres above datum ground level at any point
- The floor of the room below the deck is a Lower Floor Level (LFL) which means a finished floor level which is 1.8 metres or less above datum ground level at any point.
 - **A room has been built under the deck creating a lower floor level, this is not in the plans**
- Storey means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor level above, the ceiling or roof above but does not include an attic or a basement – **This means this is a lower storey and an upper storey and is non-compliant with the approved and reconsideration DA.**

This diagram shows the contours and the non-compliant upper floor levels

- the building is an Upper Floor Level (UFL) because the finished floor level is greater than 1.8 metres above datum ground level at any point.



Plot Ratio – does not comply

The submission claims to have a plot ratio of 49.76% however including the deck and room under the deck brings the plot ratio **to 61.1%**.

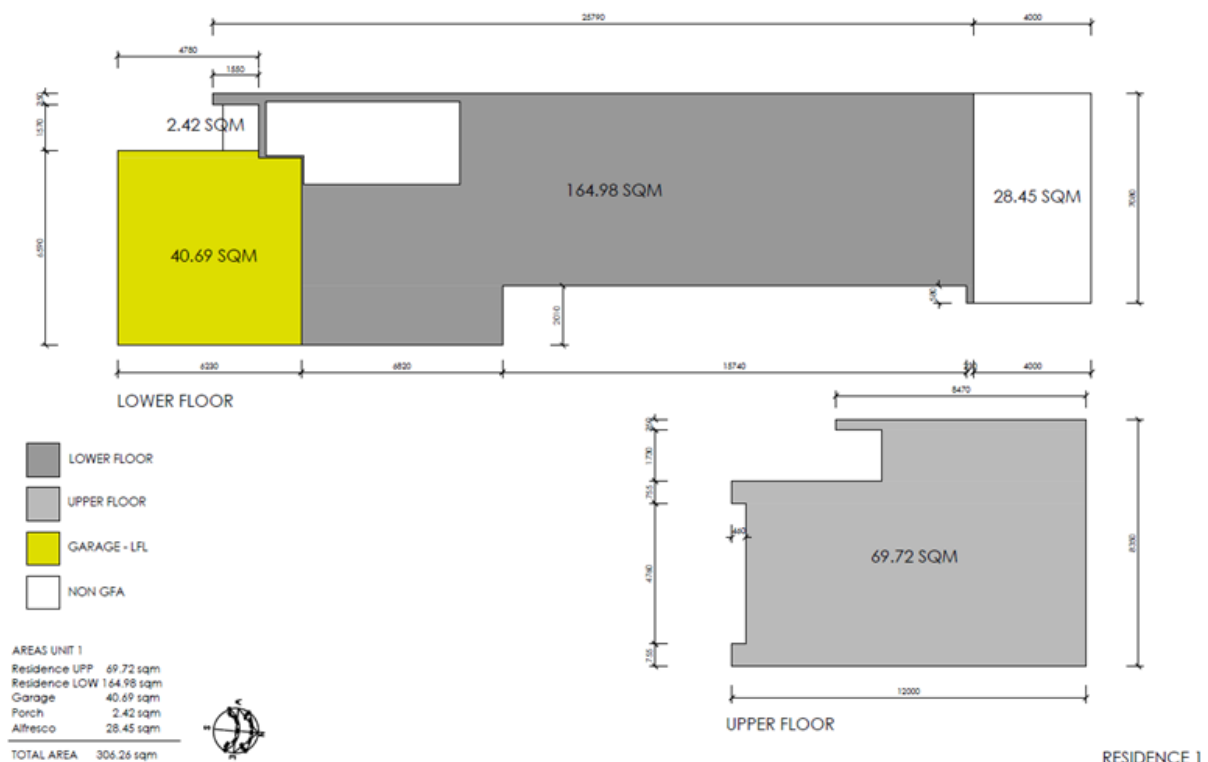
Territory Plan - MUHDC Rule 7 requires a **plot ratio of 50%**

Definitions

- **Plot ratio** means the gross floor area in a building divided by the area of the site.
- **Building line** means a line drawn parallel to any front boundary along the front face of a building or through the point on a building closest to the front boundary. A terrace, landing, porch, balcony, deck or veranda that is more than 1.5 metres above finished ground level or is covered by a roof is deemed to be part of the building – **the deck is part of the building and is required to be included in the plot ratio**
- **Gross floor area (GFA)** means the sum of the area of all floors of the building – **includes the floor in the room under the deck**

Calculation

- Residence 1 – 40.69 + 164.98 + 69.72 + 28.45 (deck) + 28.45 (room below deck) = 332.29
- Residence 2 – 40.69 + 164.14 + 69.72 + 34.03 (deck) + 34.03 (room below deck) = 342.61
- Plot Ratio = (332.29+342.61) / 1,104 = **61.1%** - **does not comply – over 50% max plot ratio**



Building envelope

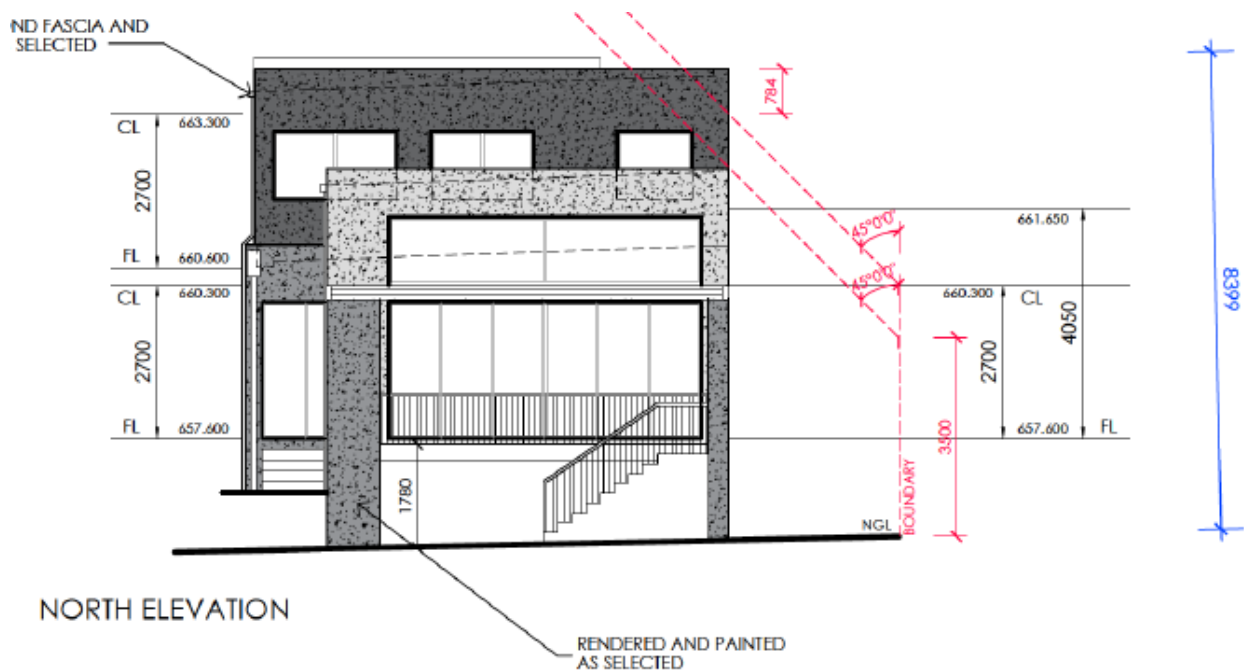
The assessment of the original DA found that the building envelope encroachment would not have a significant perceptible impact on adjoining residential properties in terms of solar access or privacy compared with a compliant building design. (see page 8 of Attachment A).

Territory Plan - MUHDC Rule 25 – **Building envelope – 45 degrees** from 3.5m fence

- The DA claims that they have utilised the 340mm tolerance allowed under the *Planning and Development Regulation 2008* however parts of the deck are over 600mm higher than the original DA.
- The increase in height increases the building envelope encroachment.

I have lost morning sun in my driveway and the car is frozen. The windows 100% overlook my property and my privacy is significantly impacted by this non-compliant design. The building does not comply with Criteria 25 because it does not achieve all of the following:

- a) consistency with the desired character
- b) reasonable levels of privacy for dwellings on adjoining residential blocks and their associated private open space.



3.24 Allowable encroachments – setbacks

R31 – the DA is still over 1m from datum ground level. The developer has raised the ground level which now means there is more overlooking from the side path. It will not achieve the outcomes sought for criteria C31.

- a) consistency with the **desired character**
- b) **reasonable levels of privacy** on adjoining residential blocks for dwellings and their associated private open space

Setbacks

The upper floors non-compliant setbacks are a major problem with this building because they significantly add to the problems with privacy and the material detriment experienced by the neighbours from the huge windows along the boundary that overlook our dwellings and private open space.

Territory Plan - MUHDC Rule 30 – Side and rear boundary **Setbacks**

- **Upper floor level** – external wall – **3m**
- **Upper floor level** – unscreened element – **6m**
 - While the reconsideration DA includes a screen for the deck, the huge unscreened upper floor level windows (in the living room) with 3m setbacks remain unscreened.
- **Criteria 30** - Buildings and other structures are sited to achieve all of the following:
 - a) consistency with the desired character
 - b) reasonable separation between adjoining developments
 - c) reasonable privacy for dwellings on adjoining residential blocks
 - d) reasonable privacy for principal private open space on adjoining residential blocks
 - e) reasonable solar access to dwellings on adjoining residential blocks and their associated principal private open space.
 - The spirit of this criteria has not been complied with

Privacy

Privacy is a major problem causing material detriment to the neighbours from the huge windows that facilitate overlooking and an invasion of privacy causing an adverse impact on the enjoyment of our dwellings and private open space.

Territory Plan - MUHDC Rule 60 – **Privacy**

- A person with an eye height of 1.5m standing at any point on the extremity of an unscreened element of one dwelling shall not have a direct line of sight to more than 50% of the minimum principal private open space of any other dwelling.
- Criteria 60 –
 - Evidence is provided demonstrating that reasonable privacy of principal private open space of each dwelling is achieved through design solution. Note: this does not include installing high sill windows, obscured glass, and/or angled louvres

This development fails this rule and criteria.

Zone objective - RZ1 – Suburban zone - d) Ensure development respects valued features of the neighbourhood and landscape **character** of the area and does not have **unreasonable negative impacts on neighbouring properties**

Planning and Development Regulation 2008 – subordinate legislation

The certifier is relying on permitted construction tolerances under Part 1A.11(3)(a)(i) of the *Planning and Development Regulation 2008* which allows 340mm above or below where the applicable height criteria. However,

- the height the deck at 2.402m exceeds the 1.8m +340mm tolerance and does not comply
- part of 1A.11 (3)(b)(iii) does not allow a change to the number of storeys in the building or structure compared to the approved development – **the height of the deck and living area is defined as an upper floor level therefore the height of the building does not comply with the 1A.11(3)(b)(iii) of the regulations.**
- part of 1A.11 (4)(b) - If the planning and land authority makes an exemption declaration that extends a permitted height criterion of a dwelling, the distance of 340mm mentioned in subsection (3)(a)(i) is reduced—
 - (a) if the criterion is extended by not more than 290mm—by the extended distance stated in the exemption declaration for the criterion; or
 - (b) if the criterion is extended by more than 290mm—by 290mm.
 - **657.94 (living area floor level) - .29 (tolerance) – 1.8 (foundation) = 655.85 (definition of upper floor level starts which is from the north east part of the living area and further to the north through the deck)**
 - **The living area is defined as an upper floor level and requires a 6m side setback.**

Building Act 2004

Significantly Different

Under s32 the certifier must approve the amended plans and amend the building approval only if

- (2)(c) a building built to the amended plans would not be significantly different from a building built to the unamended plans.
- (4) The regulations may prescribe when a building built to amended plans is significantly different from a building built to unamended plans.

s30A of the *Building (General) Regulation 2008* provides the regulations - a building (the new building) built to amended plans is significantly different from a building (the old building) built to the unamended plans if:

- (a) the floor area, roof area or volume of the new building has **changed by more than 1% from the old building**; or
 - **The plot area is 61.1%, > than 1% different to the old building and the 50% plot area allowed**
 - Significantly different
- (d) any dimension of the perimeter of the new building, including the perimeter of the building's footprint or an elevation, has **changed by more than 1% from the old building**; or

Height - Deck

- **deck – (2,402 amended DA) - (1,780 original height) = 622**
- **change in deck height 622 which is > than (17.8 = 1%)**
 - Significantly different

Height – Front

- **front - (7,019 amended DA) - (6,895 original height) = 124**
- **change in front height 124 which is > than (68.9 = 1%)**
 - Significantly different
 - **If the whole building was increased by 340 why are the height increases between the front and the back of the building different.**
- (e) the number of storeys or buildings in the new building is different from the number in the old building.
 - **Upper floor level at the back (amended) instead of one storey (original)**
 - Significantly different

Fundamentally noncompliant

s50 Notification by certifier of contraventions of building and development approvals—building work

- **(1) A certifier commits an offence if—**

- (b) the certifier does not tell the construction occupations registrar about the contravention or conduct—
 - (i) for a contravention in relation to building work that is **fundamentally noncompliant**—not later than the next working day after the day the contravention comes to the certifier’s attention; or
 - (ii) in any other case—within 21 days after the day the contravention or conduct comes to the certifier’s attention.

- (4) A regulation may prescribe when building work is fundamentally noncompliant.

column 1 Item	column 2 element of building work	column 3 when building work is fundamentally noncompliant
2	A floor Residence 2	(b) the total floor area exceeds the total floor area shown on the approved plans that relate to the building work by more than 10% <ul style="list-style-type: none"> • The plans do not include the room under the deck (28.45m²) which is > 10% of the 3112m²
4	A room	(b) the number of rooms is more than the number shown on the approved plans that relate to the building work The rooms under the deck have the potential to be used as home theatres
6	Height of a building	(b) the vertical distance from the ground to any point on the building is more than 500mm greater than shown on the approved plans that relate to the building work Residence 1 <ul style="list-style-type: none"> • deck – 622mm difference to original plan
7	number of storeys of a building	the number of storeys is more than the number shown on the approved plans that related to the building work <ul style="list-style-type: none"> • the deck and the living room are defined as upper floors
9	useless space in a building	the approved plans that relate to the building work do not show a use for a space in the building and the space is constructed in a way that it could be reasonably used for human occupation example - Approved plans show a space between the ground and a floor above the ground (the subfloor area) but do not show a use for the subfloor area. The subfloor area is constructed in a way that it could reasonably be used as a home theatre. <ul style="list-style-type: none"> • The area below the deck has been enclosed with a door to a 2.4m ceiling that can easily be converted to a habitable room.
10	Door or window	(a) the number of external doors or windows is more than the number shown on the approved plans that relate to the building work (b) a door or window is located in an external wall even though the approved plans that relate to the building work shows no part of a door or window to be located in the wall <ul style="list-style-type: none"> • The door and room under the deck are not on the original plans
11	An enclosure	(a) a wall or roof encloses or partly encloses a building or space shown on the approved plans for the building work not to be enclosed or partly enclosed with the wall or roof; (b) a wall or roof has an area of more than 2m ² <ul style="list-style-type: none"> • The walls enclosing the area under the deck are not on the original plans

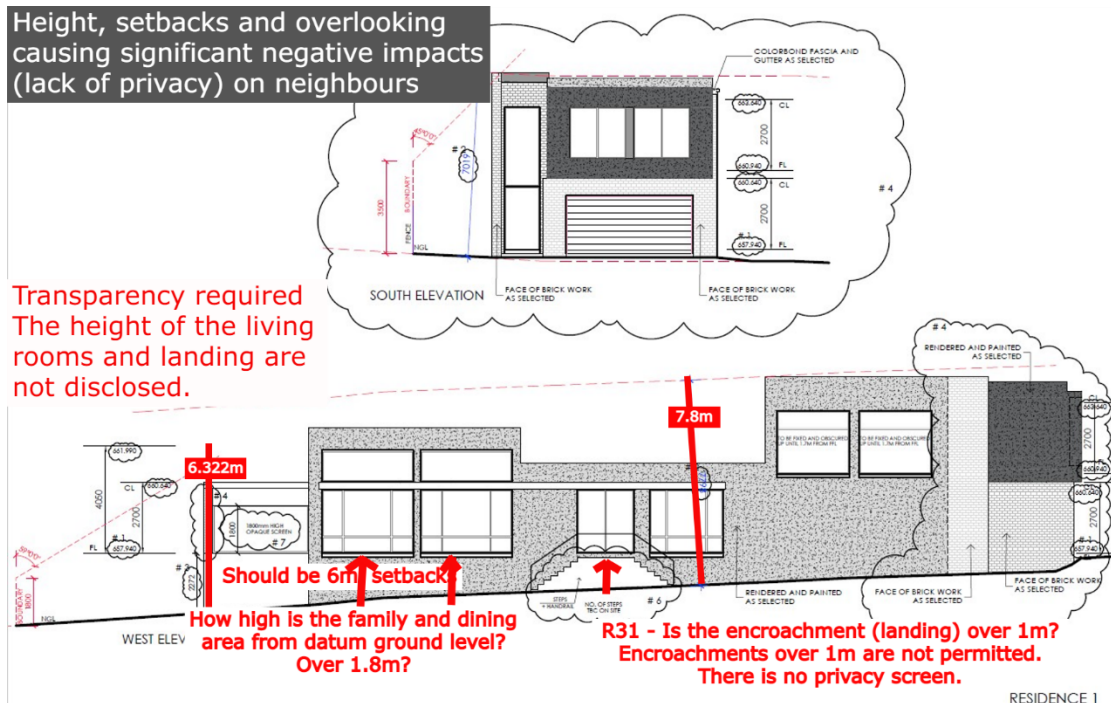
- s50A Notification by certifier of possible noncompliant site work
 - **(1) A certifier must tell the planning and land authority if—**
 - (a) the certifier suspects that—
 - (i) site work does not comply with, or is likely to produce a building that does not comply with, approved building plans; and

Section 50A requires the certifier to tell the planning and land authority if the certifier suspects that site work does not comply with, or is likely to produce a building that does not comply with, approved building plans.

Work that does not comply with the approved building plans

- The deck is 622mm higher than the original plan (significantly different and fundamentally noncompliant)
- The height of the deck and the living room create an upper floor level which is not on the original plan
- The setbacks for the upper floor level encroach by 3m which is not identified on the original plan
- The room under the deck is not on the original plan
- the deck and the room under it are not included in the plot ratio

Transparency



Transparency required about the height of the foundation from datum ground level

Conclusion

The proposal to retrospectively approve this non-compliant development does not respect the valued features of the neighbourhood and the privacy of the neighbouring dwellings and private open spaces.


This is not a good outcome or gentle urbanism as advocated by the Chief Minister. The rights of the neighbours to enjoy their property with reasonable privacy has not been considered by the developer in the pursuit of extracting as much value as possible from the block.

The planning laws were not applied correctly and the regulation of the certifier failed.

This DA cannot be approved, and the building should be removed.

This is a situation where the community needs the Government to apply the law, approve good outcomes and protect them from the negative impacts of overdevelopment.

Yours sincerely

A handwritten signature in black ink that reads "Fiona Carrick". The signature is written in a cursive, slightly slanted style.

Fiona Carrick
6 July 2023

Attachment A

Timeline of events

Date	Document	Note
22-Nov-20	Original DA submitted by ACT Government	<p>DA site plan includes:</p> <ul style="list-style-type: none"> - 'the ffl's are subject to change and are up to the builder's discretion to be verified on site, maximum change to be under 340mm' and that the 'building setbacks, easements and dimensions to be verified by surveyor and certifier prior to commencement of any work'. <p><i>Comment - the dimensions were not verified by a surveyor or the certifier before work commenced</i></p> <p><i>Comment - Plans were not compliant with Territory Plan:</i></p> <ul style="list-style-type: none"> - overlooking and privacy laws, the deck was not included in the plot ratio, the building envelope was imposed on and the building did not mee the character of the area
30-Mar-21	DA approved with conditions	<i>Comment - The ACT Government approved non-compliant ACT Government plans</i>
9-Jun-21	Appointment of a Certifier and Application for Building Approval	<i>Comment - The project item description for the deck is a pergola? It does not have the characteristics of a pergola .</i>
22-Jul-21	Certifier letter re BA	<p>Any variations from the Engineering drawings require written approval from the Engineer and the amended plans to be forwarded to Capital Certifiers for an amendment prior to approval to pour is granted.</p> <p><i>Comment - the variations in height (the additional 340mm which increased the building to an upper floor level creating a second floor without the appropriate setbacks), were not checked or approved prior to pour</i></p>
22-Jul-21	Building Approval issued by certifier under Building Act 2004	<p><i>Comment - the certifier did not check the ffl relative to site datum prior to issuing the BA - this is a breach of s28(2) of the Building Act 2004 where the certifier must—</i></p> <p><i>(a) take all reasonable steps to get the information the certifier reasonably needs to decide the application;</i></p> <p><i>(b) if satisfied on reasonable grounds that the plans meet each applicable approval requirement under section 29 issue the BA</i></p> <p><i>Building (General) Regulation 2008 - the certifier has not complied with this section s17 (2) - The plans must contain sufficient information about the proposed finished dimensions</i></p> <p><i>(a) a certifier to work out if a building erected or altered in accordance with the plan would contravene the Act; and</i></p>
26/07/2021	Application for Building Commencement Notice	<i>Comment - the building setbacks, easements and dimensions were not verified by surveyor and certifier prior to commencement of any work as required by the original DA</i>
26/07/2021	Building Commencement Notice	<i>Comment - building setbacks, easements and dimensions were not verified by surveyor and certifier prior to commencement of any work as required by the original DA</i>
20/09/2021	Inspection record – Footings p78	<p>Certifier certify's that the building work complies with s42 (Requirements for carrying out building work) of the ACT Building Act 2004 (subject to comments that are not about the height)</p> <ul style="list-style-type: none"> - s42(2) refers to the Building (General) Regulation 2008 s32 looks at whether the work has been carried out in a proper and skilful way and refers to schedule 3 - Fundamentally non-compliant building work <p><i>Comment - The concrete pour took place without the levels being checked.</i></p> <p><i>At this time the increase in level by 340mm was known because the certifier's letter stated that that upon hitting rock the excavation was halted and the planning tolerances were applied - this is not a proper and skilful way to conduct work</i></p> <p><i>Under s17A(h) of the Building Act 2004 the certifier's function is to) tell the planning and land authority if the certifier suspects there is non-compliant site work</i></p>
3/11/2021	Inspection record – Core filled block work p79	Certifier certify's that the building work complies with s42 of the ACT Building Act 2004 (subject to comments that are not about the height)
2/03/2022	Survey – Scott McNiven	Surveyor provides ffl 340mm above approved DA plans

5/04/2022	Amending DA for elevated pools and decks	<i>Comment - These pools were to be 2.5m above the ground and significantly overlook the neighbours. The developers knew the height of the deck and showed no concern for the rights of the neighbours</i>
8/07/2022	Email to Ben Ponton	<i>this email highlights the excessive nature of the development at the expense of the neighbours' privacy and right to enjoy their property, and the environment.</i>
18/08/2022	DA for pools refused	DA Conclusion - 'The proposal for two elevated pools with upper floor level decks within the side and rear setbacks is not considered to respect the valued features and privacy of the neighbouring single dwellings. It will also negatively impact on the privacy of the individual dwellings in the approved dual occupancy on the subject block'
25/08/2022	Inspection record - Presheet p81	<i>Comment - Certifier does not certify that the building work complies with s42 of the ACT Building Act 2004 (Certifier acknowledges additional height). Comment - this is 12 months after the builder hit rock and applied the tolerances and nearly 6 months after the surveyor identified the additional height. Under s17A(h) of the Building Act 2004 the certifier's function is to tell the planning and land authority if the certifier suspects there is non-compliant site work</i>
26/09/2022	Inspection record - Presheet	<i>Comment - presheet approved - who protects the neighbours?</i>
14/12/2022	Application for amendment	Retrospective approval sought for the building that is fundamentally non-compliant with the original DA
17-Feb-23	Refusal of DA	DA - 'the development and associated amendments negatively impact neighbouring properties through impacting and reducing the privacy of these blocks'
20-Apr-23	Reconsideration DA	Unfortunately the developer still does not understand the impact he is having on the neighbours and does not appear to care. It is the ACT Government's job to regulate the industry and look after the residents of Canberra.