

9.2.3 DEVELOPMENT APPLICATION 2023/415 - ALTERATIONS AND ADDITIONS TO EXISTING DWELLING AT 6 BRENNAN DRIVE, KELSO. APPLICANT: ROSS CLARKE. OWNER: NICOLE CLARKE

File No: 2023/415

RECOMMENDATION:

That Council:

- (a) as the consent authority, grant consent pursuant to Section 4.16 of the Environmental Planning and Assessment Act 1979 to Development Application No. 2023/415, subject to conditions able to be imposed pursuant to Section 4.17 of the Environmental Planning and Assessment Act 1979, as amended and including conditions to the effect that:
 - (i) Prior to issue of any Construction Certificate or Building Information Certificate the applicant is to submit amended plans illustrating the vertical aluminium blade screen as proposed in the applicant's response to submissions.
 - (b) notify those that made submissions of its decision; and
 - (c) call a division.
-

REPORT:

The Site

Council has received a Development Application (DA) for alterations and additions to an existing two storey dwelling at 6 Brennan Drive, Kelso, described as Lot 138, DP 1245624. The dwelling house is currently under construction. The proposed alterations include the construction of a new balcony and roof off the first floor of the dwelling.

An aerial location plan is provided at **Attachment 1**.

The site is a battle axe shaped allotment accessed from Brennan Drive. The site is bounded by residential allotments on all sides, with the exception of the south east which consists of a Council drainage reserve.

The land slopes to the south which gives it a prominent position in the locality. The properties to the south fronting Wentworth Drive are located at a lower level. The rear yards of 100 and 102 Wentworth Drive directly adjoin the property.

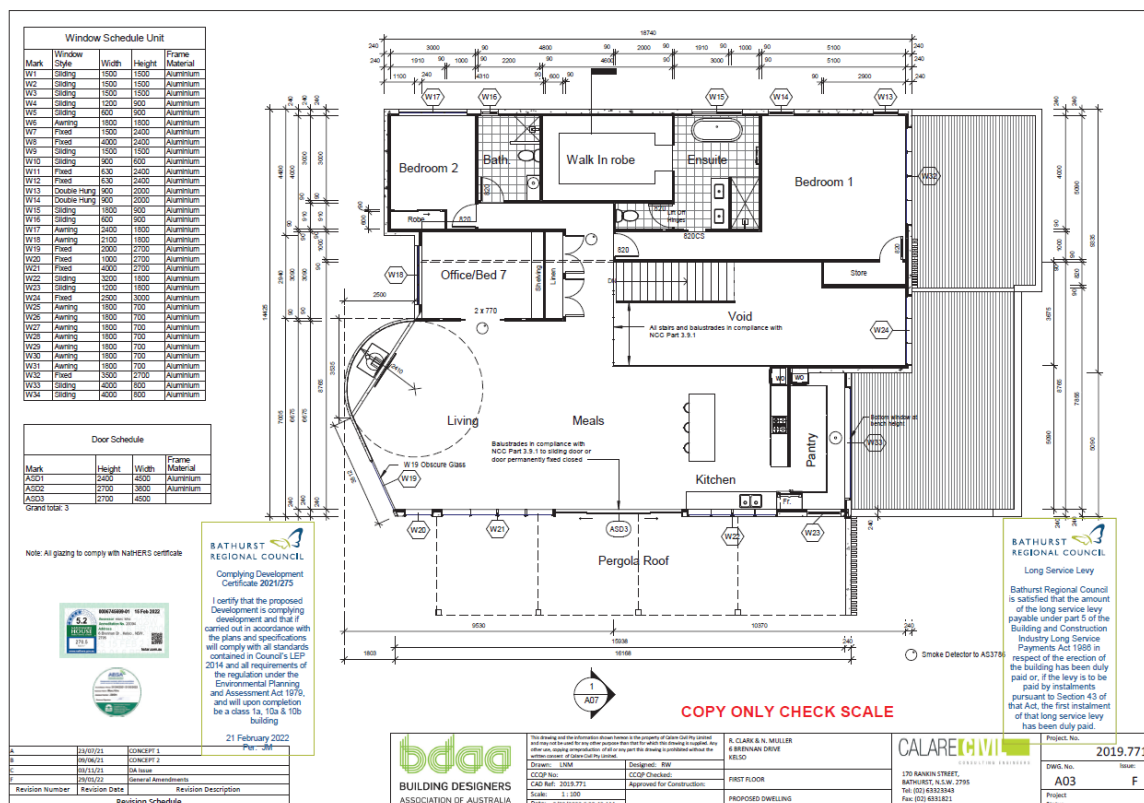
The site has an area of 1122m².

The proposal

The proposal involves the construction of alterations and additions to the dwelling by way of a new balcony and roof off the first floor of the dwelling. The works are on the southern side of the existing dwelling adjoining 100 and 102 Wentworth Drive.

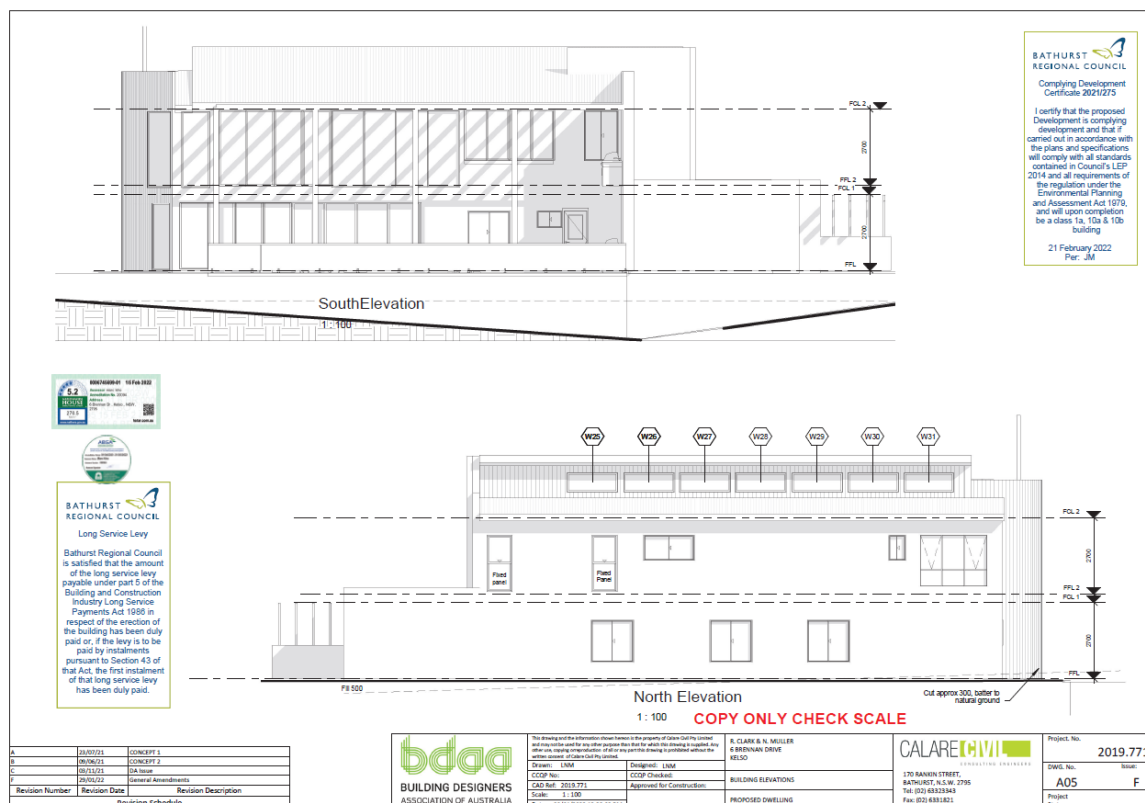
The dwelling under construction on the property was approved under the Complying Development provisions of Council's LEP in February 2022 following withdrawal of a Development Application and amended plans being lodged. The balcony now proposed did not form part of the Complying Development Certificate. Had it been, the development would not have been capable of being considered under the Complying Development provisions; i.e. the whole of the dwelling would have required a Development Application. Note the reference to "complying development" refers to the approval pathway not whether a proposal complies with Council's other adopted development standards.

Under the Complying Development Certificate, the first floor area of the dwelling contains kitchen, meals and living areas on the southern side adjoining the properties in Wentworth Drive (see 1st floor plan below). Whilst it has sliding doors on the southern elevation there is currently no external balcony or similar approved, the sliding doors containing either a balustrade or being permanently fixed closed as noted on the plans.



At ground level there is currently an elevated podium and swimming pool area which extends to within approximately 3m of the common boundary with 100 and 102 Wentworth Drive.

Externally there is currently a pergola approved over the proposed balcony. The current southern elevation is provided below.



The current proposal involves:

- The construction of a colorbond roof over the balcony (in lieu of the pergola approved under the current plans).
- Construction of a balcony at first floor level (adjoining the existing living areas). The balcony will extend along the majority of the southern side of the dwelling.
- A glassed panel balustrade is proposed around the balcony. The materials proposed to be used on the balustrade are discussed further in the applicant's response to the public submission.

For the purposes of assessment, the impacts are limited to those associated with the proposed balcony and roof; that is, the existing dwelling is not the subject of the application having previously been approved under the Complying Development provisions of Council's LEP.

Also of note is that works on the balcony and roof commenced without the benefit of development consent. The works undertaken to date involve the installation of decking within the balcony and the roof in lieu of the open pergola. The owner has been requested to cease works pending consideration of this Development Application.

Photos of 6 Brennan Drive are provided at **Attachment 2**.

Plans of the development are provided at **Attachment 3**.

Attachments

1	Aerial location plan
2	Photos of 6 Brennan Drive

3	Plans of the development
4	Submissions
5	Applicant's response to submissions

Planning Context

Bathurst Regional Local Environmental Plan 2014

The subject site is zoned R1 General Residential under the provisions of the Bathurst Regional Local Environmental Plan 2014. A balcony, being ancillary to the dwelling, is permissible with consent. The proposal is consistent with the objectives of the zone.

Clause 4.3 Height of buildings

The Height of Buildings Map indicated that the maximum building height for the subject property is 9 metres.

The proposed balcony and roof are less than the current approved height of the dwelling. The development therefore complies with Clause 4.3 Height of buildings.

Bathurst Regional Development Control Plan 2014

Clause 4.4 – General Siting Considerations

Section 4.4.1 of the DCP outlines the general siting considerations for all residential development. The objectives outlined in Section 4.4.1 include:

- *To enhance and/or maintain residential streetscape and character and to provide for landscaping in front of buildings.*
- *To provide access and fire protection, to maximise solar access and privacy, to minimise possible adverse impacts on adjoining properties, and to facilitate flexible site planning.*
- *To reduce the visual dominance of garages, vehicle access, carports and parking spaces in streetscape.*

Streetscape and character

The balcony and roof are located on a battle-axe block and behind the established building lines to Brennan Drive and Wentworth Avenue. The property is highly visible from surrounding streets due to its elevated position. The dwelling is visually prominent within the area. The balcony and roof do not substantially alter the impact of the development in terms of the residential streetscape or character of the area. The impact on the streetscape and character of the neighbourhood has already been established by the dwelling which is consistent with the Complying Development provisions of Council's LEP.

Privacy / overlooking.

The proposal is to construct a balcony and roof adjoining the first floor living areas of the existing dwelling. The capacity to minimise the degree of overlooking and maintain privacy particularly as it relates to the Wentworth Drive properties is influenced by a number of factors including:

- the elevated position of the site;
- the two-storey nature of the dwelling;

- the battle axe nature of the site meaning it is located “behind” other allotments; and
- the properties located to the south in Wentworth Drive are located at a lower level.

Council’s DCP has little in the way of numerical or quantitative standards to measure overlooking and privacy. Accordingly, a qualitative assessment relative to the objectives is required.

The Land and Environment Court has well established planning principles in respect of assessing impact on neighbouring properties (*Davies v Penrith City Council (2013 NSWLEC 1141)*), protection of visual privacy (*Meriton v Sydney City Council (2014 NSWLEC 313)*) and the use of landscaping to protect privacy (*Super Studio v Waverly Council (2014 NSWLEC 91)*).

Davies v Penrith City Council (2013 NSWLEC 1141)	
PRINCIPLE	COMMENT
How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?	<p>The affected properties in this case are those to the south notably 100 and 102 Wentworth Drive.</p> <p>When viewed from the rear of 100 and 102 Wentworth Drive the balcony and roof will be a dominant feature. To a certain extent for the reasons noted above the existing dwelling on 6 Brennan Drive similarly represents a dominant feature when viewed from the Wentworth Drive properties.</p> <p>Similarly, the near views from 6 Brennan Drive towards the south are into the rear yards of the properties in Wentworth Drive. As noted in the submission from the owners of 102 Wentworth this includes views into the rear yard and swimming pool area and into outdoor and indoor living areas of the dwelling on that property.</p> <p>The extent to which this results in a “change” in the amenity of the Wentworth Drive properties is however debatable. To a certain extent the degree of overlooking and the resulting loss of privacy is already a feature of the properties for the reasons noted above.</p> <p>Views into the rear of 100 and 102 Wentworth Drive are currently available from the elevated podium and pool areas and from the first floor level of the dwelling at 6 Brennan. From the first floor level the current views would not unreasonably be said to be a grandstand view from areas of most common usage directly into the rear yard and rear living areas of the Wentworth Drive properties.</p> <p>It is suggested in the response to the submission that the addition of a balcony reduces the views from the first floor living areas by reducing the capacity to view directly down into the Wentworth Drive properties from within the dwelling itself.</p>

	<p>There is limited additional impact in terms of sunlight, overshadowing beyond that already associated with the dwelling. As is noted in the submission from the adjoining owner of 102 Wentworth Drive <i>“although the building and verandah do not substantially block sun light to adjoining properties, there is overshadowing in the sense of it towering above adjoining property”</i>.</p>
How reasonable is the proposal causing the impact?	<p>The proposal involves the construction of a balcony and roof on the first floor of the property. Should it not proceed, the property would nonetheless continue to have a similar impact upon privacy of the adjoining properties.</p> <p>It is considered that the provision of outdoor living areas at first floor level is not unreasonable under the circumstances.</p>
How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?	<p>The adjoining properties in Wentworth Drive are highly vulnerable to overlooking and privacy because of:</p> <ul style="list-style-type: none"> • the elevated position of the adjoining land; • the two-storey nature of the dwelling being a development consistent with Council’s adopted planning controls; • the battle axe nature of the site meaning it is located “behind” other allotments; • that the properties located to the south in Wentworth Drive are located at a lower level. • The practice of “cutting” as has occurred in the Wentworth Drive properties heightens these impacts. <p>The proposal involves the construction of a balcony on the first floor of the property. Should it not proceed, the property would nonetheless continue to have a similar impact upon privacy of the adjoining properties.</p> <p>Views into the Wentworth Avenue properties are currently available from the living areas of the existing dwelling. The existing window arrangements on the southern side of 6 Brennan include full length windows adjoining the meals area and lounge. The windows adjoining the kitchen are not full height.</p>
Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?	<p>Under the current approval the first floor area contains kitchen, meals and living areas on its southern side adjoining the properties in Wentworth Drive. Whilst it has sliding doors on the southern elevation there is currently no external balcony or similar approved as part of the Complying Development Certificate. The sliding doors containing either a balustrade or being permanently fixed closed as noted on the plans.</p>

	<p>The proposed balcony and roof does not increase the amount of internal floor space but rather provides access to outdoor living areas at this level. It is considered that the provision of outdoor living areas at first floor level is not unreasonable under the circumstances.</p> <p>Whilst there may be options to reduce the size of the deck (for example only extending in front of the living and dining areas as opposed of the full length) this is not likely to result in a significant reduction in the overall impact.</p> <p>The applicant has noted in their response to the public submissions that part of the glass balustrade will be replaced with a section of vertical aluminium blades for the section adjoining 102 Wentworth Drive. This will generally correspond with the existing pantry window.</p>
Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?	The proposal complies with the standards adopted by Council in the Development Control Plan.
Meriton v Sydney City Council (2014 NSWLEC 313)	
PRINCIPLE	COMMENT
The ease with which privacy can be protected is inversely proportional to the density of development. At low-densities there is a reasonable expectation that a dwelling and some of its private open space will remain private. At high-densities it is more difficult to protect privacy.	<p>As noted in the decision <i>"when visual privacy is referred to in the context of residential design, it means the freedom of one dwelling and its private open space from being overlooked by another dwelling and its private open space. Most planning instruments and development control plans acknowledge the need for privacy, but leave it to be assessed qualitatively"</i>.</p> <p>The area is generally considered to be a lower residential area characterised by single dwellings with some forms of medium density dispersed in the neighbourhood. Residential development is predominantly a mixture of single and two storey developments commensurate with the 9m height of building standard which applies to the zone.</p> <p>In this regard there is a reasonable expectation that a dwelling and some of its private open space will remain private.</p>
Privacy can be achieved by separation . The required distance depends upon density and whether windows are at the same level and directly facing each other. Privacy is hardest to achieve in developments that face each other at the same level. Even in high-density development it is unacceptable to have windows at the same level close to each other. Conversely, in a low-density area, the <i>objective</i> should be to achieve separation between windows that exceed the numerical standards above. (Objectives are, of	<p>The scenario here is that there is separation between the respective properties. This is not a case of window to window impacts.</p> <p>The balcony is set back 6.555m from the common boundary with 100 and 102 Wentworth Drive.</p> <p>The dwelling at 102 Wentworth Drive is set back 11.1 metres from the rear boundary.</p>

course, not always achievable.)	
The use of a space determines the importance of its privacy. Within a dwelling, the privacy of living areas, including kitchens, is more important than that of bedrooms. Conversely, overlooking from a living area is more objectionable than overlooking from a bedroom where people tend to spend less waking time.	<p>As noted in the submission from the owners of 102 Wentworth views will be into the rear yard and swimming pool area and into outdoor and indoor living areas of the dwelling on that property.</p> <p>The views from 6 Brennan Drive are from an external balcony adjoining the kitchen and living areas.</p> <p>As noted in the applicant's response to the submission, one of the potential benefits of the balcony is that it removes direct line of sight from the living areas of 6 Brennan Drive from the Wentworth Drive properties.</p>
Overlooking of neighbours that arises out of poor design is not acceptable. A poor design is demonstrated where an alternative design, that provides the same amenity to the applicant at no additional cost, has a reduced impact on privacy.	The overlooking cannot be said to be the result of poor design.
Where the whole or most of a private open space cannot be protected from overlooking, the part adjoining the living area of a dwelling should be given the highest level of protection.	An attempt has been made to reduce the level of overlooking by inclusion of vertical aluminium blades to the part of the balcony directly adjoining 102 Wentworth Drive.
Apart from adequate separation, the most effective way to protect privacy is by the skewed arrangement of windows and the use of devices such as fixed louvres, high and/or deep sills and planter boxes. The use of obscure glass and privacy screens, while sometimes being the only solution, is less desirable.	Vertical aluminum blades have been proposed adjoining 102 Wentworth Drive.
Landscaping should not be relied on as the sole protection against overlooking. While existing dense vegetation within a development is valuable, planting proposed in a landscaping plan should be given little weight.	The proposal does not rely upon landscaping as means of mitigation.
In areas undergoing change, the impact on what is likely to be built on adjoining sites, as well as the existing development, should be considered.	The adjoining properties to the south are already established.
Super Studio v Waverly Council (2014 NSWLEC 91)	
PRINCIPLE	COMMENT
The first is that the acceptability of an impact depends not only on the extent of the impact but also on reasonableness of, and necessity for, the development that causes it. For example, the privacy impact of a second-storey side window in an area of two-storey buildings should be accorded a higher threshold of acceptability than the impact of a second-storey balcony in a house that already has three other balconies.	The area is predominantly a mixture of single and 2 storey dwellings. The impact of the development is limited to that of the new balcony to the first floor of the dwelling.
The second principle is that where proposed landscaping is the main safeguard against overlooking, it should be given minor weight. The effectiveness of landscaping as a privacy screen depends on continued maintenance, good climatic	The proposal does not rely upon landscaping as means of mitigation.

conditions and good luck. While it is theoretically possible for a council to compel an applicant to maintain landscaping to achieve the height and density proposed in an application, in practice this rarely happens.	
The third principle relates to the extent to which an approval for this application would be used as a precedent in favour of approving other applications for roof terraces. The possibility that an approval may constitute a precedent has not been a factor in my decision. Other roof terraces would have different impacts from those of the current proposal.	This does not form any particular precedent for future balconies in a residential zone.

Public Notification

In accordance with the Community Participation Plan 2019 the Development Application was notified to adjacent property owners from 8 March 2024 to 18 March 2024. Following the notification period one submission was received (**Attachment 4**).

Issues raised in the submission included:

- Views to and from surrounding land
- Privacy of surrounding land
- Visual impact on the streetscape

A copy of the submission was provided to the applicant for comment (see response at **Attachment 5**).

The owner has addressed the issues raised in the submission and proposed to replace part of the proposed glass balustrade with vertical blade screen being the portion of the deck directly behind 102 Wentworth Drive to provide privacy to the residents.

CONCLUSION:

Council has received a Development Application for additions to dwelling at 6 Brennan Drive, Kelso. The proposal was notified in accordance with Community Participation Plan 2019. The proposal is consistent with the objectives of the zone. It is therefore recommended the Development Application be granted.

FINANCIAL IMPLICATIONS:

N/A

BATHURST COMMUNITY STRATEGIC PLAN – OBJECTIVES AND STRATEGIES:

Objective 4: Sustainable and balanced growth.

Strategy 4.6 Plan for, assess and regulate development activity.

Objective 6: Community leadership and collaboration.

Strategy 6.4 Meet legislative and compliance requirements.

COMMUNITY ENGAGEMENT:

02 **Consult** - to obtain public feedback on alternatives and/or decisions

ATTACHMENTS:

1. Aerial location plan [9.2.3.1 - 1 page]
2. Photos of 6 Brennan Drive [9.2.3.2 - 3 pages]
3. Plans of development [9.2.3.3 - 10 pages]
4. Submissions [9.2.3.4 - 4 pages]
5. Applicants response to submissions [9.2.3.5 - 6 pages]

Cr I North declared a significant non pecuniary interest and left the room.
REASON: Close and personal family friend.

MINUTE

RESOLUTION NUMBER: ORD2024-88

MOVED: Cr W Aubin SECONDED: Cr M Hogan

That Council:

- (a) as the consent authority, grant consent pursuant to Section 4.16 of the Environmental Planning and Assessment Act 1979 to Development Application No. 2023/415, subject to conditions able to be imposed pursuant to Section 4.17 of the Environmental Planning and Assessment Act 1979, as amended and including conditions to the effect that:
 - (i) Prior to issue of any Construction Certificate or Building Information Certificate the applicant is to submit amended plans illustrating the privacy treatments to all balustrades in response to submissions.
- (b) notify those that made submissions of its decision; and
- (c) call a division.

On being **PUT** to the **VOTE** the **MOTION** was **CARRIED**

The result of the division was:

In favour of the motion - Cr W Aubin, Cr K Burke, Cr B Fry, Cr J Jennings and Cr M Hogan

Against the Motion - Nil

Absent - Cr G Hanger, Cr I North, Cr A Smith and Cr R Taylor

Abstain - Nil