

**SUBJECT: BC0092/14 - 1186 Barrenjoey Road, Palm Beach NSW 2108
- additions/alterations to existing restaurant**

Meeting: Development Unit

Date: 13 August 2015

SUMMARY OF RECOMMENDATION

Issue Building Certificate

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| REPORT PREPARED BY: | Rebecca Englund and Wal Dover |
| APPLICATION SUBMITTED ON: | 29 October 2014 |
| APPLICATION SUBMITTED BY: | VAUGHAN MILLIGAN DEVELOPMENT CONSULTING PTY LTD |
| OWNER(S): | MALCOLM J URRY & JENNIFER M KING |

RECOMMENDATION OF DEVELOPMENT OFFICER / PLANNER

That Council as the consent authority pursuant to Section 149 of the Environmental Planning and Assessment Act 1979 issue Building Certificate BC0092/14 for additions/alterations to existing restaurant at 1186 Barrenjoey Road, Palm Beach NSW 2108 subject to the following:

- All as-built variations to the building and restaurant premises, including the floor plan layout, be certified by a structural engineer where appropriate, as structurally adequate
- Certification provided from a suitably qualified professional in relation to the installation and operation of the fireplace and flue, and compliance with relevant Australian Standards
- Certification provided from a suitably qualified professional in relation to the construction and finish detail of the bar, and compliance with relevant Australian Standards
- Completion of all works referred to in the BCA Compliance Report (prepared by GRS Building Reports Pty Ltd, dated 20 October 2014), and
- The upgrade of the eastern external wall of the building, to achieve a 60/60/60 Fire Resistance Level of construction.

Report prepared by
Rebecca Englund, Executive Planner

Andrew Pigott
MANAGER, PLANNING & ASSESSMENT

**BC0092/14 – Building Certificate Application for whole of property
1186 Barrenjoey Road, Palm Beach (Lot 1 DP 1050253)**

Determination Level: Development Unit

SUMMARY OF RECOMMENDATION: Issue Building Certificate

REPORT PREPARED BY: Rebecca Englund and Wal Dover
APPLICATION SUBMITTED ON: 29 October 2014
APPLICATION SUBMITTED BY: Vaughan Milligan Development Consulting P/L
OWNERS: Malcom Urry and Jennifer King-Urry

1. INTRODUCTION

This assessment has been undertaken following the lodgement of a Building Certificate Application relating to unauthorised works at the subject site. The assessment is made pursuant to Section 149 of the *Environmental Planning and Assessment Act*, and also considers objections and comments received in response to the notification of the Building Certificate Application.

2. SITE DETAILS

The site is legally described as Lot 1 in Deposited Plan 1050253, and is commonly referred to as 1186 Barrenjoey Road, Palm Beach and also known as 1 Beach Road, Palm Beach. The site is a corner block with a frontage to both Beach Road (north) and Barrenjoey Road (west), with a total area of approximately 922m². A single storey structure is located on the site, with a parking area to the south (accessed from Barrenjoey Road). The site is currently occupied by "Cranky Fins" restaurant.

3. PROPOSAL

A Building Certificate Application has been lodged in relation to the whole property, including as-built unauthorised works, as follows;

- Relocation of an internal bar;
- Installation of a servery style window on the southern elevation of the existing kitchen;
- Replacement of bi-fold doors with louvre windows along the western elevation;
- Installation of a fireplace and flue;
- Demolition of a non-structural internal wall in the vicinity of the bathrooms and storerooms;
- Conversion of a single doorway to a double doorway on the southern elevation;
- The construction of timber access stairs at the rear of the site between the rear access doorway and the carpark; and
- The installation of a doorway and steps between the carpark and the kitchen.

4. STATUTORY AND POLICY CONSIDERATIONS

Section 149D(1) of the *Environmental Planning and Assessment Act 1979* provides that Council must issue a building certificate if it appears that:

- (a) *there is no matter discernible by the exercise of reasonable care and skill that would entitle the council, under this Act or the Local Government Act 1993:*
 - (i) *to order the building to be demolished, altered, added to or rebuilt, or*

- (ii) to take proceedings for an order or injunction requiring the building to be demolished, altered, added to or rebuilt, or*
- (iii) to take proceedings in relation to any encroachment by the building onto land vested in or under the control of the council, or*
- (iv) there is such a matter but, in the circumstances, the council does not propose to make any such order or take any such proceedings.*

It is important to note that a Building Certificate is not a form of Development Consent, and does not act to modify any existing approval. A Building Certificate is issued in relation to the structural efficacy of building works and compliance with the provisions of the BCA, and with the exception of determining the class of the building, does not relate to the use of the premises.

In accordance with Section 149E of the Act;

1. *A building certificate operates to prevent the council:*
 - (a) from making an order (or taking proceedings for the making of an order or injunction) under this Act or the Local Government Act 1993 requiring the building to be repaired, demolished, altered, added to or rebuilt, and*
 - (b) from taking proceedings in relation to any encroachment by the building onto land vested in or under the control of the council,*
in relation to matters existing or occurring before the date of issue of the certificate.
2. *A building certificate operates to prevent the council, for a period of 7 years from the date of issue of the certificate:*
 - (a) from making an order (or taking proceedings for the making of an order or injunction) under this Act or the Local Government Act 1993 requiring the building to be repaired, demolished, altered, added to or rebuilt, and*
 - (b) from taking proceedings in relation to any encroachment by the building onto land vested in or under the control of the council,*
in relation to matters arising only from the deterioration of the building as a result solely of fair wear and tear.
3. *However, a building certificate does not operate to prevent a council:*
 - (a) from making order No 6 in the Table to section 121B, or*
 - (b) from taking proceedings against any person under section 125 with respect to that person's failure:*
 - i. to obtain a development consent with respect to the erection or use of the building, or*
 - ii. to comply with the conditions of a development consent.*
4. *An order or proceeding that is made or taken in contravention of this section is of no effect.*

5. HISTORY OF THE SITE

26 November 2003

Development Consent N0700/03 for "internal fit-out, alterations and additions" at the subject site was issued by Council.

27 January 2004

Construction Certificate CC0054/04 was issued in relation to N0070/03.

5 December 2004

Council received a copy of the Notice of Commencement relating to CC0054/04.

13 September 2005

Development Consent N0332/05 for “alterations and additions to the existing Beach Road Restaurant” at the subject site was issued by Council.

7 November 2005

Construction Certificate CC0609/05 was issued in relation to N0332/05.

11 November 2005

Council received a copy of the Notice of Commencement relating to CC0609/05.

13 July 2006

A Final Occupation Certificate was issued in relation to N0332/05 and CC0609/05.

16 January 2014

An investigation of the site was undertaken by Council's Compliance Department following a complaint from a nearby resident, resulting in the service of a Notice of Order NOT0015/14 in relation to;

- Seating capacity;
- Landscaping;
- Relocation of the internal bar;
- The installation of a servery style window on the southern elevation of the existing kitchen; and
- The installation of a timber deck in the north-west corner of the site.

2 April 2014

Modification Application N0332/05/S96/1 was lodged with Council in relation to the as-built changes at the subject premises.

15 April 2014

An investigation of the site was undertaken by Council's Compliance Department following a complaint from a nearby resident, resulting in the service of a Notice of Order NOT0114/14 in relation to;

- Landscaping; and
- The installation of a window on the western elevation.

An Order was also served in relation to NOT0015/14 as the works required had not been completed.

29 July 2014

A letter to confirm satisfactory completion of the works required in the Notice of Order NOT0114/14 was sent to the applicant and objector.

9 September 2014

Modification Application N0332/05/S96/1 was withdrawn by the applicant.

17 October 2014

An investigation of the site was undertaken by Council's Compliance Department following a complaint from a nearby resident, resulting in the service of a Notice of Order NOT0250/14 in relation to;

- Landscaping;
- The installation of windows on the southern elevation;
- The installation of a doorway and steps between the carpark and the kitchen;
- Conversion of a single doorway to a double doorway on the southern elevation;

- Lack of suitable garbage enclosure;
- Lack of stormwater infrastructure;
- Replacement of bi-fold doors with louvre windows along the western elevation.

6. HISTORY OF THE APPLICATION

The subject Building Certificate Application was lodged with Council on 29 October 2014. The Application was notified to adjoining property owners for a period of fourteen (14) days, commencing on 14 November 2014.

The application was reviewed by Council's Senior Building Surveyor, who subsequently requested additional information in relation to the submissions received. A response was received from the applicant on 4 June 2015.

7. NOTIFICATION

The application was notified to adjoining property owners. Submissions in objection to the development were received from and on behalf of one (1) adjoining property owner at 3 Waratah Road, Palm Beach, with regard to the following;

- Permissibility of the development and potential impact upon Existing Use Rights provisions;
- Compliance with Development Consent N0332/05;
- Impacts associated with the "unauthorised" use of the site;
- Inadequacies in the information presented to accompany the Building Certificate Application.

8. DISCUSSION OF ISSUES

Compliance with the BCA

The application was supported by a BCA Compliance Report (prepared by GRS Building Reports Pty Ltd, dated 20 October 2014). The report was reviewed by Council's Senior Building Surveyor, who has recommended that the items identified in the report be satisfied prior to further consideration of the issuance of the Building Certificate.

Council's Senior Building Surveyor has identified that the eastern external wall of the restaurant, being of combustible construction and less than 3m from a Fire Source Feature (the boundary of the allotment), is not compliant and is to be provided with a 60/60/60 Fire Resistant Level of construction prior to the issue of a Building Certificate.

These works are requested prior to the issue of a Building Certificate, pursuant to clause 149D(5) of the Act, as follows;

5. *Nothing in this section prevents the council from informing the applicant of the work that would need to be done before the council could issue a building certificate or from deferring its determination of the application until the applicant has had an opportunity to do that work.*

Compliance with previous Development Consent

The subject Building Certificate Application was lodged in response to a series of Notice of Orders and Orders that were issued upon the property owner by Council. Whilst a number of matters raised by Council have since been rectified, the applicant seeks to maintain the remainder of the existing as-built works, including;

- Relocation of an internal bar;

- Installation of a servery style window on the southern elevation of the existing kitchen;
- Replacement of bi-fold doors with louvre windows along the western elevation;
- Installation of a fireplace and flue;
- Demolition of a non-structural internal wall in the vicinity of the bathrooms and storerooms;
- Conversion of a single doorway to a double doorway on the southern elevation;
- The construction of timber access stairs at the rear of the site between the rear access doorway and the carpark; and
- The installation of a doorway and steps between the carpark and the kitchen.

It is these matters that differ from the plan submitted to accompany the Final Occupation Certificate that was issued in relation to Development Consent N0332/05 and Construction Certificate CC0609/05.

The primary consideration for Council is the structural adequacy of the building works or structures erected without consent. The as-built development has been reviewed by Council's Senior Building Surveyor in this regard, who has raised no concerns subject to the following;

- All as-built variations to the building and restaurant premises, including the floor plan layout, be certified by a structural engineer where appropriate, as structurally adequate;
- Certification be provided from a suitably qualified professional in relation to the installation and operation of the fireplace and flue, and compliance with relevant Australian Standards;
- Certification be provided from a suitably qualified professional in relation to the construction and finish detail of the bar, and compliance with relevant Australian Standards;

However, the subject Building Certificate Application cannot address the following matters raised in the Notice of Orders and Orders issued by Council;

- Seating capacity;
- Lack of suitable garbage enclosure;
- Lack of stormwater infrastructure;

These have been identified as matters that are inconsistent with the conditions of Development Consent N0332/05, and will still be required to be addressed regardless of the outcome of the subject Building Certificate Application. In accordance with subsection 3b(ii) of Section 149E of the Act, the issuance of a Building Certificate does not operate to prevent Council from taking proceedings against any person under section 125 of the Act with respect to that person's failure to comply with the conditions of a development consent.

The submissions received from and on behalf of the property owners at 3 Waratah Road raise continued concern in relation to non-compliance with the conditions of Development Consent N0332/05, specifically in relation to stormwater management and garbage disposal. This will be continued to be investigated by Council's Compliance Department.

Use of the Site

The most recent approval issued in relation to the site, being Development Consent N0332/05, was for alterations and additions to the existing restaurant premises. The approval was issued under the provisions of Existing Use Rights, as the use of the site as a restaurant was prohibited under the provisions of PLEP 1993 (the environmental planning instrument in force at the time of the approval).

Submissions received from and on behalf of the property owners of 3 Waratah Road put forward that the use of the premises has changed over time, and the premises is now being used as both a restaurant and a "small bar" or "licensed bar". The submissions suggest that the new "unauthorised" use of the premises works against the approval issued by Council in 2005 pursuant to Existing Use Rights, and that the Building Certificate should not be issued on this basis.

However, as accurately pointed out by the objector in their own submissions, a Building Certificate Application relates to building works alone, and the use of the premises cannot be addressed by the issuance of a Building Certificate.

Whilst the location of the internal bar does form part of the subject Building Certificate Application, it is not a new addition to the site, but rather relocation from one part of the premises to another. Subject to clarification that the bar has been constructed/installed in accordance with relevant Australian Standards for food preparation areas, no concern is raised in this regard.

Any further ongoing concerns relating to the use of the site should be forwarded to Council's Compliance Department for investigation. However, it is noted that complaints relating to the use of the site for the purpose of a "small bar" or "licensed bar" have been separately investigated by the NSW Government Office of Liquor, Gaming and Racing and the matter has been closed.

Impacts upon amenity of adjoining residential properties

The submissions received from and on behalf of the property owners of 3 Waratah Road raise concerns in relation to impacts upon amenity, including, but not limited to, the following;

- Excessive noise radiating from the premises;
- Excessive noise from patrons leaving the venue;
- Offensive noise from patrons leaving the venue;
- Anti-social behaviour of patrons after they leave the venue;
- Unpleasant smells and odours radiating from the venue;
- Increased parking and traffic congestion;
- Noise of patrons' children screaming;
- Visual amenity; and
- Operating outside approved hours.

The majority of the issues raised by the objector are associated with the alleged unauthorised use of the site as a "small bar" or "licensed premises", and have been separately investigated by the NSW Government Office of Liquor, Gaming and Racing. However, it is appreciated that some of the building works, including changes to openings and the installation of the fireplace, may be seen to be associated with these concerns.

The application seeks to maintain one new window on the southern elevation and the louvre windows on the western elevation which replaced the approved bi-fold doors. It is noted that the Liquor License applicable to the site has further conditions relating to acoustic impacts as follows;

1. *The LA10* noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) by more than 5dB between 7:00am and 12:00 midnight at the boundary of any affected residence.*

The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz – 8kHz inclusive) between 12:00 midnight and 7:00am at the boundary of any affected residence.*

**Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 7:00am.*

2. *From 8:00pm until close on every trading night, the licensee must ensure that all windows, window louvres, and doors of the licensed premises are kept closed except to allow for the reasonable access for patrons to enter and leave the premises.*

The installation and use of the fireplace may be associated with complaints relating to unpleasant smells and odours. However, subject to certification that the fireplace has been installed in accordance with relevant Australian Standards, no concern is raised in this regard. Any further complaints regarding odours associated with cooking should be directed to Council's Health Department, who can undertake a separate inspection of the mechanical exhaust system.

Overall, the physical as-built works the subject of the Building Certificate Application are considerably minor, do not result in the intensification of the site, and are not seen to result in any unreasonable impacts upon the amenity of adjoining properties, any more so than the outcome anticipated in the approval of N0332/05.

Inconsistencies in information provided

The submissions received on behalf of the property owners of 3 Waratah Road raise concern with the level of detail provided by the applicant to support the application. It is agreed that further information relating to the structural integrity of the building is required and the issuance of a Building Certificate will hinge upon the production of such information.

9. CONCLUSION

Section 149 of the Environmental Planning and Assessment Act requires Council to issue a Building Certificate for as-built works unless there is a valid reason for Council to require the structures to be demolished, altered, added to or rebuilt. Subject to the production of additional certification and minor rectification works, assessment of the subject application has found no valid reason as to why a Building Certificate should not be issued.

RECOMMENDATION OF PLANNER

That Council as the consent authority, pursuant to Section 149 of the *Environmental Planning and Assessment Act 1979*, issue the subject Building Certificate BC0092/14 for the whole of the property at 1186 Barrenjoey Road, Palm Beach subject to the following;

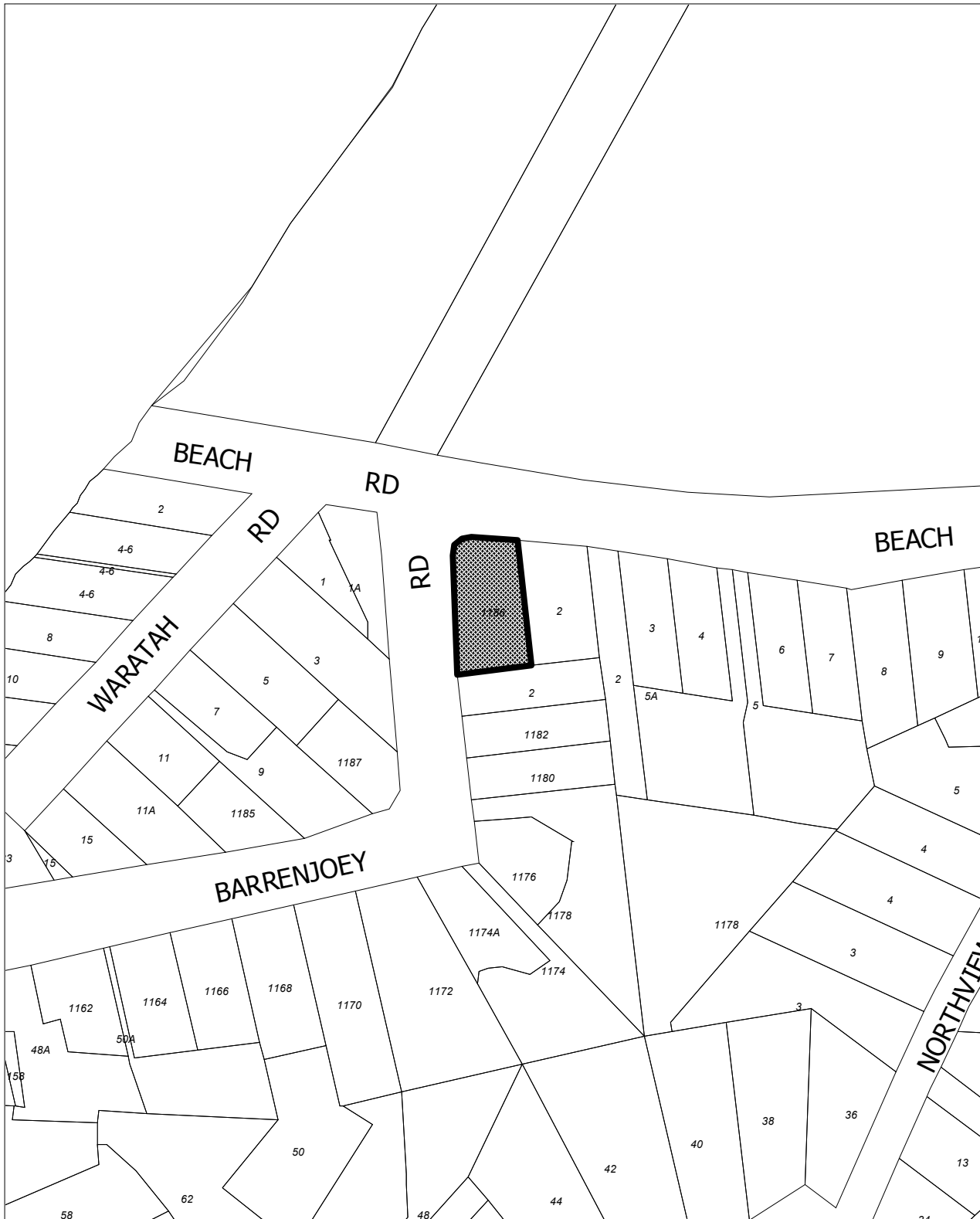
- All as-built variations to the building and restaurant premises, including the floor plan layout, be certified by a structural engineer where appropriate, as structurally adequate;
- Certification provided from a suitably qualified professional in relation to the installation and operation of the fireplace and flue, and compliance with relevant Australian Standards;
- Certification provided from a suitably qualified professional in relation to the construction and finish detail of the bar, and compliance with relevant Australian Standards;
- Completion of all works referred to in the BCA Compliance Report (prepared by GRS Building Reports Pty Ltd, dated 20 October 2014); and
- The upgrade of the eastern external wall of the building, to achieve a 60/60/60 Fire Resistance Level of construction.

Report prepared by

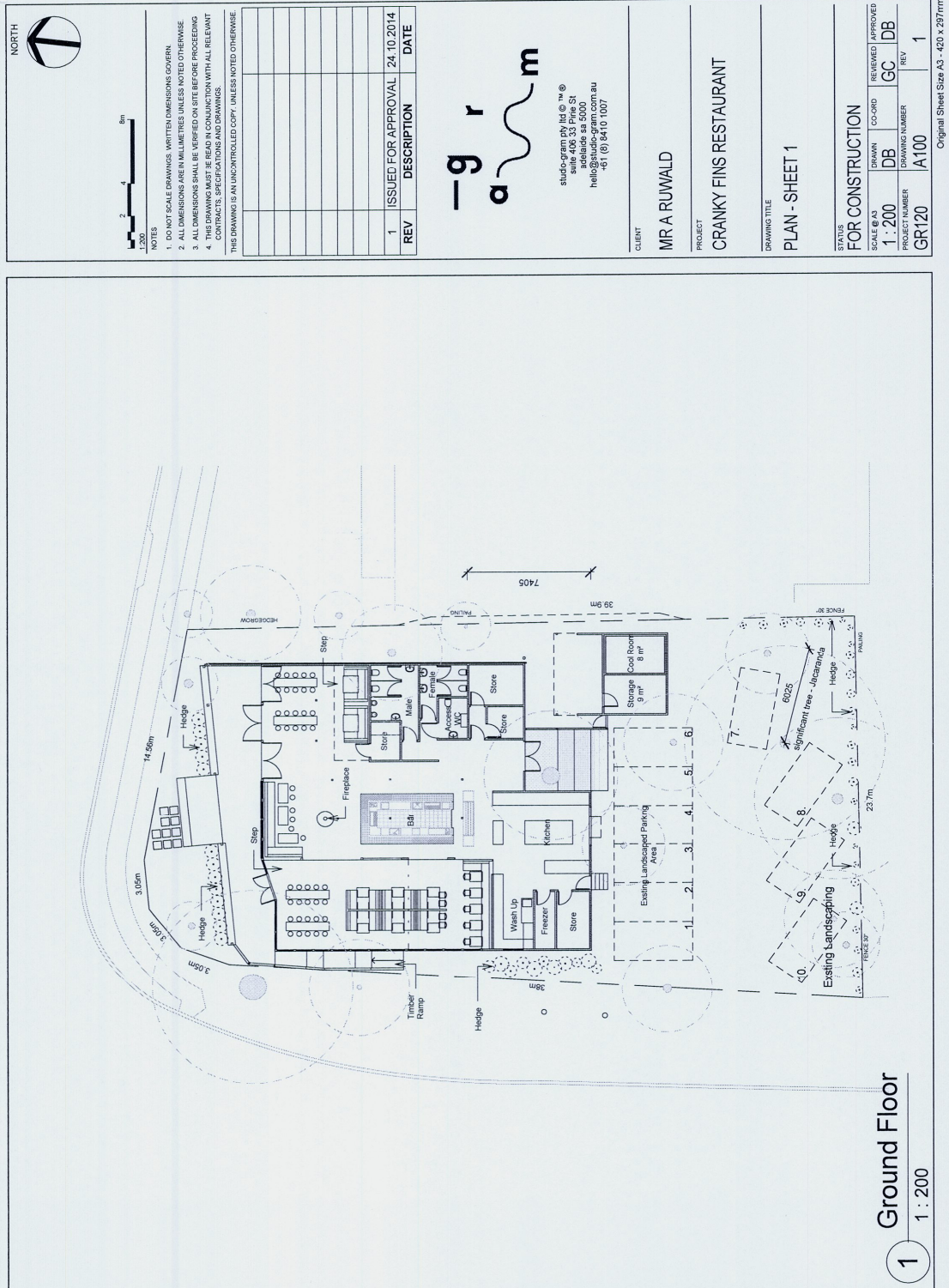
Rebecca Englund
EXECUTIVE PLANNER

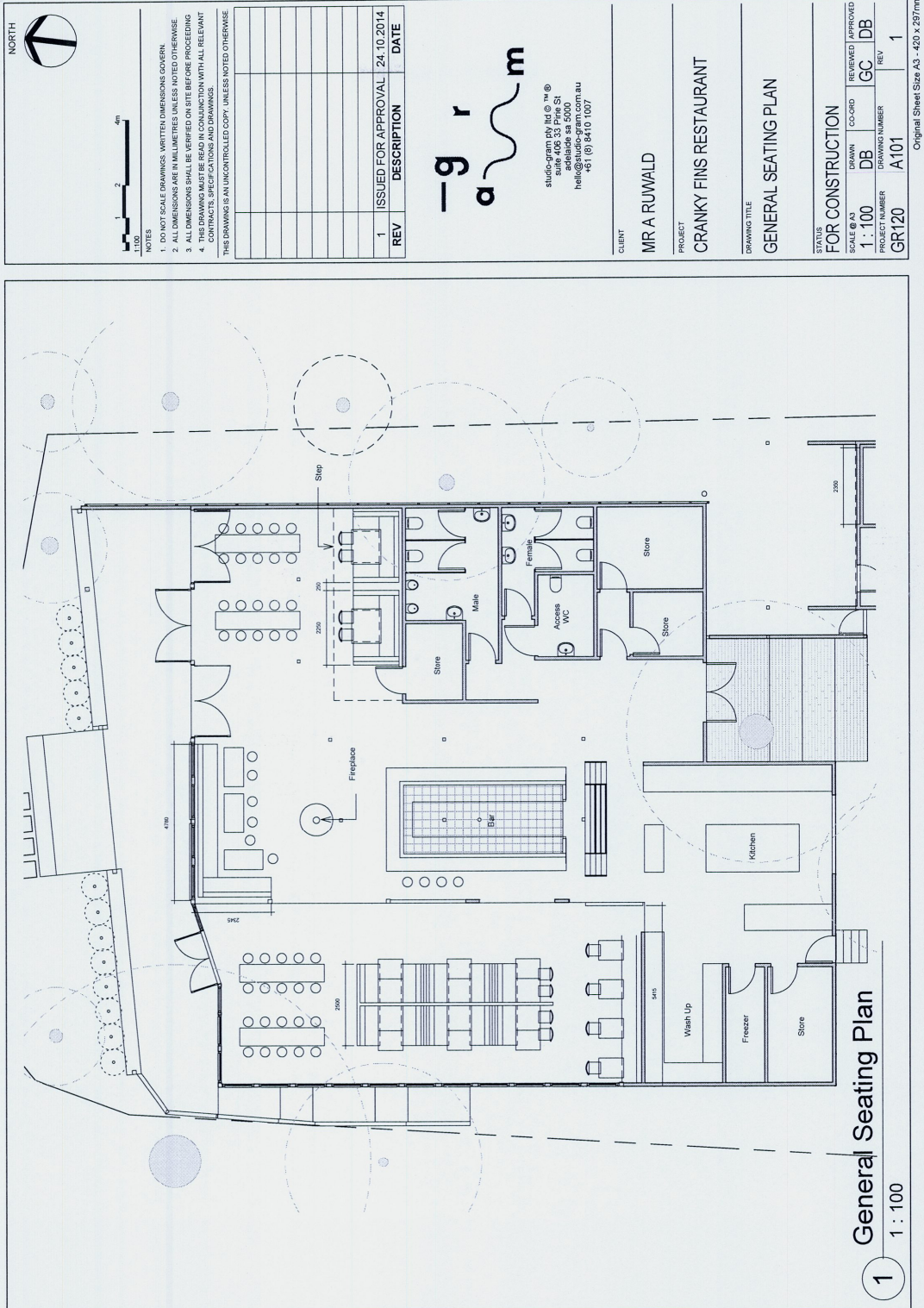
Date of Report: 5 August 2015

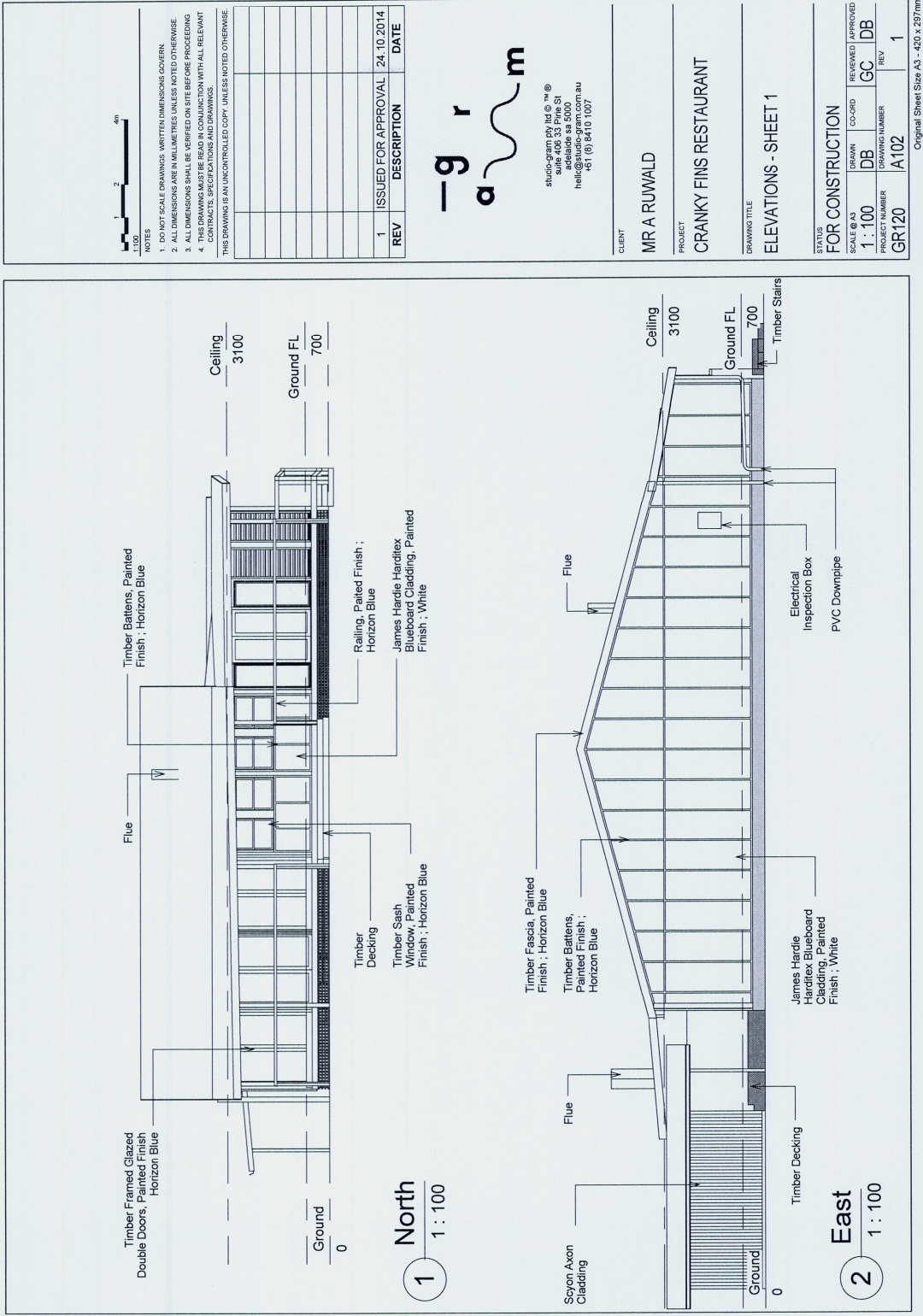
LOCALITY MAP

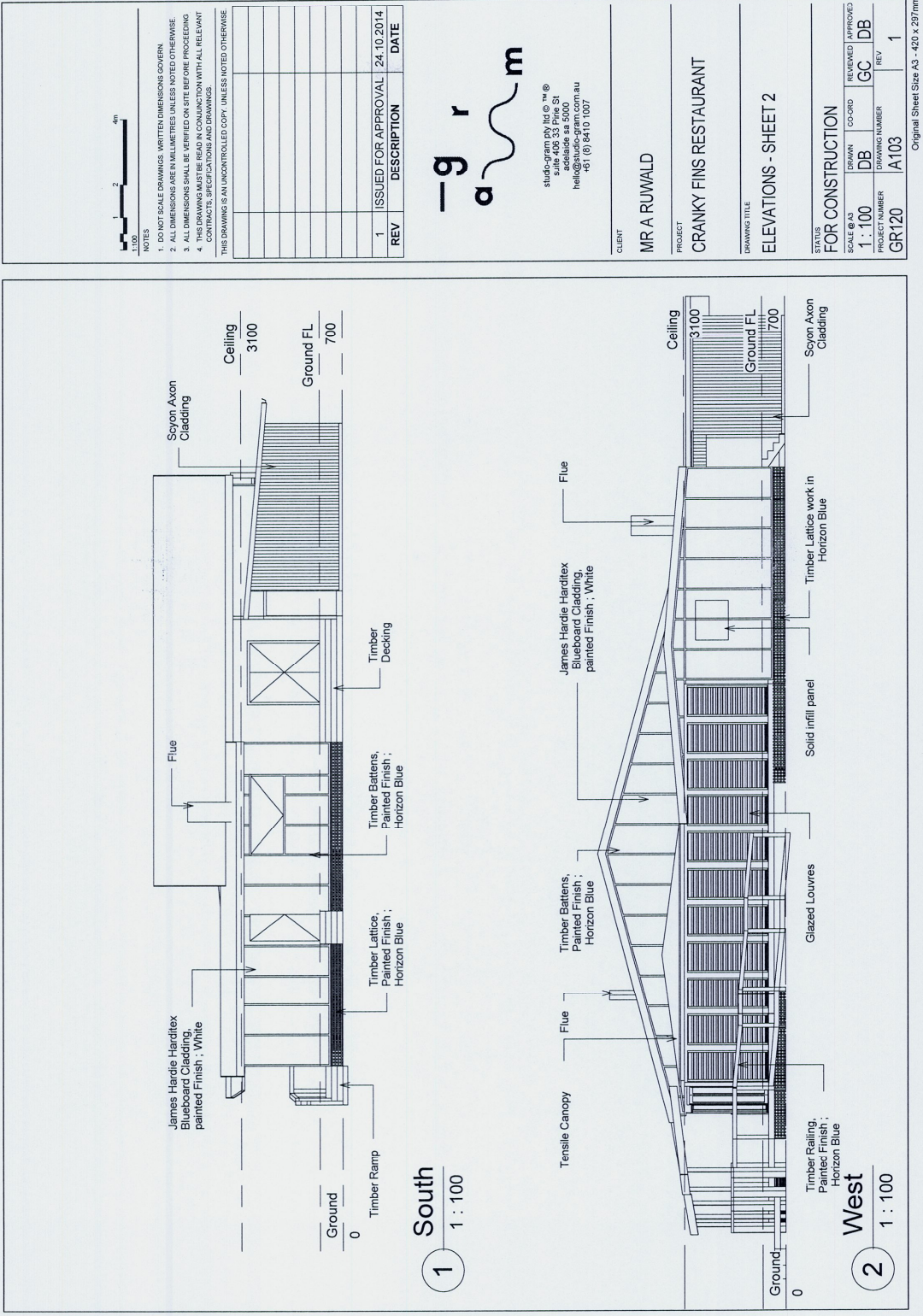


NOTIFICATION PLANS









NOTES
1. DO NOT SCALE DRAWINGS. WRITTEN DIMENSIONS GOVERN.
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| REV | DESCRIPTION | DATE |
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| 1 | ISSUED FOR APPROVAL | 24.10.2014 |

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CLIENT: MR A RUWALD
PROJECT: CRANKY FINS RESTAURANT
DRAWING TITLE: ELEVATIONS - SHEET 2
STATUS: FOR CONSTRUCTION
SCALE @ A3: 1:100
PROJECT NUMBER: GR120
DRAWING NUMBER: A103
DRAWN: DB
CHECKED: GC
REVIEWED: DB
APPROVED: DB
REV: 1

Original Sheet Size A3 - 420 x 297mm

