
Bayside Planning Panel

24/10/2017

Item No	5.2
Application Type	Development Application
Application Number	S82-2017/8
Lodgement Date	16 June 2017
Property	40A Stoney Creek Road Bexley
Owner	Mr T Younnan
Applicant	Mr T Younnan
Proposal	Review of Determination - Adaptive reuse and additions and alterations including first floor to convert to residential dwelling.
No. of Submissions	Nil
Cost of Development	\$80 000
Report by	Fiona Prodromou, Senior Assessment Planner

Officer Recommendation

That Development Application S82A-2017/8 for the adaptive reuse and additions and alterations including first floor to convert to residential dwelling at 40A Stoney Creek Road Bexley be REFUSED pursuant to Section 80(1)(b) of the Environmental Planning and Assessment Act 1979, for the following reasons:

- 1 Pursuant to the provisions of Section 79C(1)(c) of the Environmental Planning and Assessment Act 1979, the subject site is of insufficient overall site area and frontage and is not deemed suitable for the proposed residential development given its significant constraints.
- 2 Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the provisions or objectives of Clause 4.4 - Floor Space Ratio or Clause 4.6 - Exception to Development Standards of Rockdale Local Environmental Plan 2011 (as amended).
- 3 Having regard to the above non-compliance and pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is unsatisfactory and represents an overdevelopment of the subject site.
- 4 Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the zone objectives of the R2 Low Density Residential Zone, as per Rockdale Local Environmental Plan 2011 (as amended).
- 5 The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as it does not comply with the following objectives and / or requirements of Rockdale Development Control Plan 2011:

- a Part 4.1.9 - Lot Size and Site Consolidation
 - b Part 4.2 - Streetscape and Site Context
 - c Part 4.3.1 - Open Space and Landscape Design
 - d Part 4.3.2 - Private Open Space
 - e Part 4.4.1 - Energy Efficiency Residential
 - f Part 4.4.2 - Solar Access
 - g Part 4.4.5 - Visual Privacy
 - h Part 4.6 - Parking Rates - Dwelling House
 - i Part 4.7 - Site Facilities
 - j Part 5.1 - Low and Medium Density Residential
- 6 Pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is unsatisfactory in terms of its standard of design and would adversely impact upon the existing and future desired character of the locality.
- 7 Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of State Environmental Planning Policy - BASIX, as no valid BASIX certificate was submitted with the application.
- 8 Having regard to the previous reasons noted above, pursuant to the provisions of Section 79C(1)(e) of the Environmental Planning and Assessment Act 1979, approval of the development application is not in the public interest.
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Attachments

- 1 Assessment Report
 - 2 Site Plan, Ground and First Floor Plans
 - 3 Section AA
 - 4 Elevations
 - 5 Shadow Diagrams
 - 6 Clause 4.6 Submission
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Location Plan



Fig 1 – Location Plan

BAYSIDE COUNCIL

Planning Assessment Report

Application Details

Application Number:	S82-2017/8
Date of Receipt:	16 June 2017
Property:	40 A Stoney Creek Road, BEXLEY (Lot 1 DP 713595)
Owner(s):	Ms Hannan Abi-Raad Mr Tony Manuel Younan
Applicant:	Mr Tony Younan
Proposal:	Review of Determination - Adaptive reuse and additions and alterations including first floor to convert to residential dwelling
Recommendation:	Refused
No. of submissions:	Nil
Author:	Fiona Prodromou
Date of Report:	11 October 2017

Key Issues

The proposal is inconsistent with the objectives of the R2 Low Density and further seeks to exceed the maximum 0.55:1 FSR standard on site by 62%. This is not supported for the reasons outlined within clause 4.6 of this report.

The proposal is inconsistent with numerous provisions and objectives of the Rockdale DCP 2011, including but not limited to lot size, setbacks, streetscape design, private open space and car parking provision. Matters of relevance have been discussed within this report.

The proposal was publicly notified in accordance with the provisions of DCP 2011, nil submissions were received.

The proposal is recommended for Refusal given the issues raised within the planning report.

Recommendation

A. That Development Application S82A-2017/8 for the adaptive reuse and additions and alterations including first floor to convert to residential dwelling at 40A Stoney Creek Road Bexley be REFUSED pursuant to Section 80(1)(b) of the Environmental Planning and Assessment Act 1979, for the following reasons:

1. Pursuant to the provisions of Section 79C(1)(c) of the Environmental Planning and Assessment Act 1979, and contrary to the provisions of Part 4.1.9 - Lot Size and Site Consolidation of Rockdale DCP 2011, the subject site is of insufficient overall site area and frontage and is not deemed suitable for the proposed residential development given its significant constraints.
2. Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the provisions or objectives of Clause 4.4 - Floor Space Ratio or Clause 4.6 - Exception to Development Standards of Rockdale Local Environmental Plan 2011 (as amended).
3. Having regard to the above non-compliance and pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is unsatisfactory and represents an overdevelopment of the subject site.
4. Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development does not satisfy the zone objectives of the R2 Low Density Residential Zone, as per Rockdale Local Environmental Plan 2011 (as amended).
5. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as it does not comply with the following objectives and / or requirements of Rockdale Development Control Plan 2011:
 - a. Part 4.2 - Streetscape and Site Context
 - b. Part 4.3.1 - Open Space and Landscape Design
 - c. Part 4.3.2 - Private Open Space
 - d. Part 4.4.1 - Energy Efficiency Residential
 - e. Part 4.4.2 - Solar Access
 - f. Part 4.4.5 - Visual Privacy
 - g. Part 4.6 - Parking Rates - Dwelling House
 - h. Part 4.7 - Site Facilities
 - i. Part 5.1 - Low and Medium Density Residential
6. Pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is unsatisfactory in terms of its standard of design and would adversely impact upon the existing and future desired character of the locality.
7. Having regard to the previous reasons noted above, pursuant to the provisions of Section 79C(1)(e) of the Environmental Planning and Assessment Act 1979, approval of the development application is not in the public interest.
8. Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, the proposed development is inconsistent with the provisions of State Environmental Planning Policy - BASIX, as no valid BASIX certificate was submitted with the application.

Background

History

10th May 1972

Letter to Council & DA form to advise of proposed internal alterations of existing food premises / shop. *(Zone at the time was Residential 2(a) under the Rockdale Planning Scheme, property was subject to existing use rights)*

DA-652 - Approved 17 February 1983

Proposed use of vacant shop as milk bar. *(Zone at the time was Residential 2(a) under the Rockdale Planning Scheme, property was subject to existing use rights)*

15th May 1985

Registration of land subdivision by the then owner.

DA-1985/97 - Approved 23 May 1985

Showroom for fireplaces. *(Zone at the time was Residential 2(a) under the Rockdale Planning Scheme, property was subject to existing use rights)*

DA-1988/306 - Approved 22 December 1988

Proposed display and sale of electronic equipment.

DA-2017/128 - Refused 26 May 2017

Adaptive reuse and additions and alterations including first floor to convert to residential dwelling.

S82-2017/8 - Submitted to Council on 16 June 2017

Review of Determination - Adaptive reuse and additions and alterations including first floor to convert to residential dwelling.

Proposal

The proposal seeks to undertake alterations and additions for the adaptive reuse of the existing commercial building including a new first floor and conversion to a residential dwelling.

The proposal is as follows:

- a) Change the use of the site from commercial to residential purposes.
- b) Ground Level - bathroom, laundry, 1 x bedroom with rear glass sliding door to 0.9m setback planted area, internal bin storage, proposed study with operable windows to front façade of premises and access to the first floor.
- c) First Floor - Balcony to Stoney Creek Road, adjoining lounge room, stair access from ground, kitchen and dining room to rear.

The proposal does not include any on site car parking or useable ground level open space. Access to the site will be pedestrian only with access to the front door directly from Stoney Creek Road. The building currently occupies the full site (boundary to boundary) and the proposed dwelling will retain this situation.

Site location and context

The subject site is known as Lot 1 in DP 713595, at 40A Stoney Creek Road Bexley. The site is a rectangular shape with front and rear boundary widths of 4.62m and 4.56 metres. The side boundaries are 12.22m deep. The total site area is 56.09sq/m. The topography of the site is such that it is

relatively flat.

The subject site contains a one-storey commercial building of masonry and metal roof construction. The building occupies the full site on all boundaries and includes a metal awning overhanging the street. The site is located on the northern side of Stoney Creek Road between Medway and Eton Streets, Bexley. The subject site has been recently renovated and occupied by a new tenant and is now operating as a beautician / hair dresser.



Aerial Context

The subject site directly adjoins the following properties:

- 40 Stoney Creek Road to the west, a two storey attached dual occupancy.
- Stoney Creek Road to the south with an existing bus stop in front of the site.
- 1 Medway Street, to the east, a single storey commercial building with numerous temporary storage structures in the rear yard. Currently used as a ceramic and craft centre.
- 3 Medway Street, to the north, a single storey residential dwelling with rear private open space.



Subject Site

Further to the north within Medway Street, the area is characterised by single storey detached residential dwellings. Opposite the site lies the vehicular entrance to St Gabriel's Church, located on the opposite side of Stoney Creek Road. A mix of one storey and two storey residential buildings are located within close proximity to the subject property along Stoney Creek Road. There are no trees on

the subject site or within the front nature strip along Stoney Creek Road.

Statutory Considerations

Environmental Planning and Assessment Act, 1979

An assessment of the application has been undertaken pursuant to the provisions of the *Environmental Planning and Assessment Act, 1979*.

S.82A - Review of Determination

The relevant matters to consider under S82A are detailed below.

(1) This subclause allows Council to review its determination unless the determination relates to a complying development certificate, designated development, integrated development or the determination relates to an application made by the Crown.

Comment: The proposal does not relate to any of the above exceptions.

(2) & (2A) The request for the review of determination must be made within 6 months from the date on the notice of determination.

Comment: The request was made within the 12 month period set out by this clause.

(3) The applicant must pay the prescribed fee.

Comment: The applicable fee was paid at the time of lodging the review of determination.

(3A) The applicant may make amendments to the development described in the original application subject to 4(c) below.

Comment: The applicant has not substantially amended the application.

(4) The council may review the determination if:

(a) it has notified the request for review in accordance with:

(i) the regulations, if the regulations so require, or

(ii) a development control plan, if the council has made a development control plan that requires the notification or advertising of requests for the review of its determinations, and

Comment: The application has been notified in accordance with the requirements of Council's Development Control Plan 2011 from 27 June - 12 July 2017.

(b) it has considered any submissions made concerning the request for review within any period prescribed by the regulations or provided by the development control plan, as the case may be, and

Comment: No submissions were received in relation to the proposed development.

(c) in the event that the applicant has made amendments to the development described in the original application, the consent authority is satisfied that the development, as amended, is substantially the same development as the development described in the original application.

Comment: The development is considered to be substantially the same development as shown on the original application.

S.79C(1) - Matters for Consideration - General

S.79C(1)(a)(i) - Provisions of Environmental Planning Instruments

The following Environmental Planning Instruments are relevant to this application:

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The submitted S82A application was not accompanied by a revised valid BASIX certificate. The BASIX certificate submitted with the original DA which was Refused is no longer valid as it was issued on Wednesday, 21, September 2016 and is no longer valid 3 months following the issue date. The proposal thus does not satisfy the provisions of the SEPP.

State Environmental Planning Policy (Infrastructure) 2007

Clause 101 - Development with frontage to classified road

The proposed development is located on land with a frontage to a classified road i.e. Stoney Creek Road. In this regard, clause 101- Development with frontage to a classified road, of the SEPP must be considered by the consent authority.

The subject site does not as existing, or proposed comprise vehicular access to the site via the classified road, nor is a traffic generating development. As such the proposal is satisfactory with respect of this clause.

Clause 102 - Impact of road noise or vibration on non-road development,

The proposed development is for a dwelling house that is on land in or adjacent to the road corridor for a freeway, a tollway or a transit way or any other road with an annual average daily traffic volume of more than 40,000 vehicles (based on the traffic volume data published on the website of the RMS) and that the consent authority considers is likely to be adversely affected by road noise or vibration.

Accordingly, for a residential use the consent authority must be satisfied that appropriate measures will be taken to ensure that the following LAeq levels are not exceeded:

(a) in any bedroom in the building - 35 dB(A) at any time between 10 pm and 7 am,

(b) anywhere else in the building (other than a garage, kitchen, bathroom or hallway)-40 dB(A) at any time.

The S82A application was not accompanied by an Acoustic Report, yet the Acoustic Report prepared by Acoustic Consulting Engineers, dated Thursday 6 October 2016 and submitted with DA-2017/128 which was Refused, was considered as part of this assessment.

The aforementioned report concludes that the development will satisfy the noise level requirements as outlined in the SEPP, should the recommendations in the report be incorporated into construction. Accordingly, the proposal satisfies the provisions of this clause.

Rockdale Local Environmental Plan 2011

Relevant clauses	Compliance with objectives	Compliance with standard/provision
2.3 Zone R2 Low Density Residential	No - see discussion	No - see discussion
2.7 Demolition requires consent	Yes	Yes - see discussion
4.3 Height of buildings	Yes	Yes - see discussion
4.4 Floor space ratio - Residential zones	No - see discussion	No - see discussion
4.6 Exceptions to development standards	No - see discussion	No - see discussion
5.10 Heritage conservation	Yes	Yes - see discussion
6.1 Acid Sulfate Soil - Class 5	Yes	Yes - see discussion
6.2 Earthworks	Yes	Yes - see discussion
6.4 Airspace operations	Yes	Yes - see discussion
6.7 Stormwater	Yes	Yes - see discussion
6.12 Essential services	Yes	Yes

2.3 Zone R2 Low Density Residential

The subject site is zoned R2 - Low Density Residential under the provisions of Rockdale Local Environmental Plan 2011 (RLEP 2011). The proposal is defined as a dwelling house which constitutes a permissible development only with development consent. The objectives of the zone are:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.*

The proposed development is inconsistent with the third objective stated above. The proposal seeks to convert the existing commercial premises and site to a two bedroom residential dwelling. The design of the proposed dwelling has the potential to result in adverse impacts upon the established character and amenity of the area and is not supported on this basis. Accordingly, the proposal is inconsistent with the objectives of this clause.

2.7 Demolition requires consent

The proposed development seeks consent for the demolition of some internal walls of the existing building to allow alterations and additions to the building. As such, the proposal seeks consent for the demolition component and satisfies the provisions of this Clause.

4.3 Height of buildings

A maximum height of 8.5m applies to the subject site. The proposal has a maximum height of 6.75m and complies with the provisions of this clause.

4.4 Floor space ratio - Residential zones

As per the provisions of this clause a maximum 0.55:1 FSR applies to the subject site. This equates to a maximum permissible gross floor area of 30.8sq/m. The proposal comprises a total gross floor area of 65.7 square metres which is equivalent to an FSR of 1.17:1. This indicates a 34.9sq/m gross floor area variation which is a 62% exceedance to the maximum permitted FSR for the site.

The applicant has submitted a clause 4.6 variation to development standard in relation to the proposed above exceedance. The above has been addressed within Clause 4.6 of this report. The proposal is deemed to be inconsistent with the objectives of clause 4.4 FSR for the reasons outlined within Clause 4.6.

4.6 Exceptions to development standards

Clause 4.6 allows a variation to a development standard subject to a written request by the applicant justifying the variation by demonstrating:

- (3)(a) that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and*
- (3)(b) that there are sufficient environmental planning grounds to justify the variation.*

In considering the applicant's submission, the consent authority must be satisfied that:

- (i) the applicant's written request is satisfactory in regards to addressing subclause (3) above, 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 of the relevant zone.*

- 5(a) The consent authority must also consider whether contravention of the development standard raises any matter of significance for State or Regional environmental planning, and*
- 5(b) the public benefit of maintaining the development standard.*

The variation to the FSR standard has been assessed below.

The proposal has further been assessed against the principles established by the Land and Environment court judgement *Four2Five v Ashfield Council* [2015] NSWLEC 90, where it was established that justification was required in order to determine whether the development standard was unreasonable or unnecessary on grounds other than whether the development achieved the objectives of the development standard. Consideration is to be given to the particular site circumstances of the site and development.

Variation Sought - FSR

The subject site has a maximum 0.55:1 FSR. Given the site area, this is equivalent to a maximum gross floor area of 30.8sq/m. The proposal comprises an overall gross floor area of 65.7sq/m and thus a resultant floor space of 1.17:1. This indicates a 34.9sq/m gross floor area variation which is a 62% exceedance to the maximum permitted FSR for the site.

Applicants FSR Justification

A summary of the key arguments of the applicant's clause 4.6 arguments in respect of the FSR development standard are as follows;

- It would be unreasonable to require compliance with clause 4.4(2A) because to do so would limit the proposed dwelling house to 30.8 square metres, which is too small for a reasonable or viable dwelling house.
- The proposed development facilitates the adaptive reuse of the existing building, which is desirable from the perspective of ecologically sustainable development.
- The proposed contravention also achieves the “orderly and economic use” of the subject site by facilitating the cessation of the non-conforming use and establishing a conforming use. The benefit of that action extends to enhancing the viability of nearby commercial centres.
- The site is fully built up and the streetscape outcome is established by the subdivision. The proposed upper level is stepped back and, whilst it will be visible from the side, it will not be visually dominant compared to the already established streetscape outcomes and compared to the existing development on the subject site.
- The site is on the northern side of Stoney Creek Road and overshadowing is caused mainly to the roadway, where it doesn't matter. Overshadowing to the adjoining property to the east affects areas such as outbuilding areas that are not sensitive to impact, further to which those areas receive good sunlight during the morning. Overshadowing to the west is substantially to a driveway area and does not discernibly affect living areas or private open space areas.
- The proposal does not cause unreasonable visual privacy impacts. The only window that could cause a loss of visual privacy is the rear dining room window – however, a condition may be imposed to require fixed external louvres to that window so as to prevent overlooking.
- In relation to internal amenity for the proposed dwelling, the unusual circumstances of the site lead to the dwelling a standard of amenity more comparable to an apartment's amenity than to a dwelling house's amenity. However, that outcome is better than the current circumstances in which there is a non-conforming use, and is not broadly unacceptable from a social perspective. The dwelling will not be inconsistent with general societal expectations in terms of amenity.
- The upper level front balcony is similar to balconies in apartments, which are not considered to be inhumane or socially unacceptable.
- The proposed contravention is necessary for a reasonable dwelling house because a compliant dwelling house would be non-feasible.
- There are sufficient environmental planning grounds to justify contravention of the development standard.
- The proposal in this particular instance, not unreasonable in terms of the density expectations for the locality. If the subject lot size or similar was commonly encountered in the R2 zone, then there would be a greater total impact from allowing dwelling houses on all of those lots. However, the subject lot size or similar is uncommon. Therefore, approval of the proposal will not lead to a significant total impact in terms of the availability of infrastructure and the generation of traffic, or in terms of the character of Rockdale.
- The subject site cannot in this instance accommodate a parking space. However, that arises from the unusual circumstances of the subject lot and in this instance the impact is acceptable because the residents will be able to park nearby on the street. That will not lead to significant problems in the R2 zone generally because the present circumstances are unusual. Furthermore, the dwelling is small and there is a bus stop directly in front of the site. Therefore, the residents might not need to own a car and might be able to rely on buses. In any case, the non-provision of parking is acceptable in this instance.
- The development is not antipathetic to the maintenance of a low density residential environment because the small allotment already exists and the wider locality will continue to be characterised by low density residential development notwithstanding the development of the particular allotment for a dwelling house.

FSR Discussion

The applicant's written request has appropriately addressed clause 4.6(3). Following a review of the application, the FSR variation as proposed is not supported for the following reasons:

- a) The subject site is an anomaly which is severely constrained. The proposal seeks to maximise gross floor area upon the subject site, at the expense of appropriate amenity, including adequate on site car parking and private open space areas for future occupants. The proposal results in a sub standard residential dwelling with poor amenity.
- b) Given (a) above, the subject site should be consolidated with 1 Medway Street Bexley adjoining to the east should a residential dwelling be proposed. This would facilitate a greater site area, ensure that appropriate residential amenity can be provided along with adequate on site parking and private open space provision. Consolidation with the neighbouring property would further enable Councils FSR and setbacks requirements to be realised and the consolidated site would reinstate consistency with the established subdivision pattern within the subject street block.
- c) The proposal is inconsistent with the objectives of the R2 low density residential zone. The design of the proposed dwelling has the potential to result in adverse impacts upon the established character and amenity of the area and is not supported on this basis
- d) The proposed bulk and scale of the development does not provide an appropriate response within the established context of the site. The lack of proposed setbacks and excessive density results in a building form which is uncharacteristic within the context of the site. The proposal is inconsistent with objective (c) of Clause 4.4 - FSR which states *'to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation'*.
- e) The proposal does not achieve a better outcome on the subject site than a development which complies in full with the relevant FSR standard. The proposal is thus inconsistent with the objectives of clause 4.6.
- f) The proposal has the potential to set a significant undesirable precedent with respect to the FSR standard and is not in the public interest.

Despite the arguments presented by the applicant, the FSR variation as sought is not supported. The applicable FSR standard referred to above is deemed reasonable and necessary in this instance.

5.10 Heritage conservation

The proposed development is located in the vicinity of a heritage item which is the St Gabriel's Church being a post war American Colonial design building built in 1952 (item I158) and is located at 55 Stoney Creek Road Bexley. The historic church is located on the opposite side of Stoney Creek Road and two lots further along to the east. The Statement of Environmental Effects submitted with the application contends that the site is over 100m away from the church and the proposal will have minimal impact on the heritage item. The subject site is 26m away from the land upon which the church is located and 96m away from the front steps of the church building.

Given the nature and scale of the proposal, and the physical separation of the site from the heritage

listed church building, the proposed development is not considered to adversely impact upon the integrity or character of the heritage item. The qualities that therefore make the heritage item and its setting significant will not be diminished.

The proposal is consistent with the provisions of this clause.

6.1 Acid Sulfate Soil - Class 5

Acid Sulfate Soils (ASS) – Class 5 affects the property. However, development consent is not required as the site is not within 500 metres of adjacent Class 1, 2, 3 or 4 that is below 5 AHD.

6.2 Earthworks

The proposal does not involve any earthworks on site.

6.4 Airspace operations

The proposed development is affected by the 51AHD Obstacle Limitation Surface (OLS). The building height is proposed at 6.75m (55.12RL) and therefore will penetrate the OLS by 4.12m. Therefore, the application sought approval under the Airports (Protection of Airspace) Regulations 1996, for the intrusion of the proposed development into the airspace, which under the regulations, is prescribed airspace for Sydney Airport.

The proposal was referred to Sydney Airports for comment. Sydney Airports have raised no objection to the protrusion subject to the imposition of specific conditions of consent which are to be imposed in the event the proposal is supported for approval.

6.7 Stormwater

The proposal seeks to utilise the existing on site drainage system and is satisfactory with respect of the provisions of this clause.

S.79C(1)(a)(ii) - Provisions of any Draft EPI's

No relevant proposed instruments are applicable to this proposal.

S79C(1)(a)(iii) - Provisions of any Development Control Plan

The following Development Control Plan is relevant to this application:

Rockdale Development Control Plan 2011

The application is subject to Rockdale DCP 2011. A compliance table for the proposed development is provided below:

Relevant clauses	Compliance with objectives	Compliance with standard/provision
4.1.1 Views and Vista	Yes	Yes
4.1.2 Heritage Conservation - Vicinity of Heritage Item	Yes	Yes
4.1.3 Water Management	Yes	Yes
4.1.9 Lot size and Site Consolidation - Dwelling	No - see discussion	No - see discussion
4.2 Streetscape and Site Context - General	No - see discussion	No - see discussion
4.3.1 Open Space & Landscape Design - Low & medium density residential	No - see discussion	No - see discussion

Relevant clauses	Compliance with objectives	Compliance with standard/provision
4.3.2 Private Open Space - Low density residential	No - see discussion	No - see discussion
4.4.1 Energy Efficiency - Residential	No - see discussion	No - see discussion
4.4.2 Solar Access - Low and medium density residential	No - see discussion	No - see discussion
4.4.3 Natural Lighting and Ventilation - Residential	Yes	Yes - see discussion
4.4.5 Visual privacy	No - see discussion	No - see discussion
4.4.5 Acoustic privacy	Yes	Yes
4.6 Parking Rates - Dwelling House	No - see discussion	No - see discussion
4.7 Air Conditioning and Communication Structures	No - see discussion	No - see discussion
4.7 Waste Storage and Recycling Facilities	No - see discussion	No - see discussion
4.7 Laundry Facilities and Drying Areas	No - see discussion	No - see discussion
5.1 Storey Height and Setbacks - Dwelling house and Attached Dwellings	No - see discussion	No - see discussion
5.1 Building Design - General	No - see discussion	No - see discussion

4.1.9 Lot size and Site Consolidation - Dwelling

As per the provisions of this clause, a minimum lot size of 450m² and minimum width of 15m at the front building alignment is required for dwelling house development. This clause further stipulates that a dwelling house may be erected on a parcel of land which existed as a separate parcel on 30 March 1973.

A search of Council records has identified that the land subdivision was registered on the 15th May 1985. As such the lot did not exist as a separate parcel on 30 March 1973.

The subject site contains a site area of 56sq/m. This illustrates a 394sq/m site area deficiency and 10.4m width frontage shortfall.

Given the above, the proposal is inconsistent with the requirements of this clause and is not supported on this basis.

Further to the above, the proposal is deemed to be inconsistent with the following objectives of this clause:

C. To ensure allotment size is sufficient for development and associated provision of landscaping, parking, vehicular and pedestrian access.

D. To maintain amenity in relation to overshadowing, privacy and views by having sensitive layout of buildings.

4.2 Streetscape and Site Context - General

The subject site is located within the R2 low density residential zone. The immediately surrounding area is predominantly characterised by single and two storey residential dwellings and dual occupancy developments on larger allotments with generous frontages and appropriately dimensioned front, side and rear setbacks. Several commercial uses within single storey buildings are also positioned nearby, with a church opposite.

The proposal seeks to convert the existing small commercial building into a dwelling house with a new

first floor, which incorporates a balcony adjoining the front property boundary.

The proposed development is inconsistent with the existing streetscape in terms of site frontage, lot size, existing and proposed building setbacks and overall density. The proposal further lacks appropriate landscape provision on site, in particular within the front of the property, as is characterised by nearby residential properties.

The proposed development does not respond or sensitively relate to the broader urban context or predominant streetscape qualities, proposing inappropriate building setbacks and density on the subject site. The proposal is an overdevelopment of the property.

The proposal is unsatisfactory in this regard.

4.3.1 Open Space & Landscape Design - Low & medium density residential

As per the provisions of this clause 25% (14sq/m) of the site is to be retained as 'landscaped area', with the provision of a private open space area of minimum 60sq/m for a dwelling house with a total floor area of less than 125sq/m.

The proposal provides as follows:

a) Landscaped Area - 4.23sq/m (7.5%) 0.9m depth x 4.7m width, adjoining the rear boundary of the site. This illustrates a 9.77sq/m (17.5%) deficiency, which given the overall site area is a substantial amount.

b) Private Open Space - Proposed first floor south facing balcony fronting Stoney Creek Road, 8.69sq/m total useable area with dimensions of 3.95m width x 2.2m depth.

The applicant argues that as the site area is less than the minimum level of private open space as required by the provisions of this clause, an *"appropriate assessment standard for this unusual site is whether an area of private open space is provided that would be anticipated for a one bedroom dwelling"*. The applicant argues that the above two areas are sufficient for the proposed dwelling.

The assessing officers counter argument is that the areas provided above are insufficient for the proposed development as their useability is limited and amenity is poor, in particular given the southerly orientation of the first floor balcony space proposed as the principle private open space area. Additionally concern is raised in relation to the proposed 0.9m x 4.7m landscaped area. Details in relation to proposed planting have not been provided with the submitted Statement of Environmental Effects stating this detail would be provided as part of any Construction Certificate. It is noted that this space is inaccessible from anywhere on site other than the proposed bedroom and the ability of future occupants to maintain this area would be limited and difficult.

The proposal is inconsistent with the requirements and objectives of this clause and further the proposal has the potential to result in adverse privacy impacts to the eastern neighbour at 1 Medway Street given the lack of any screening proposed to the eastern side of the proposed private open space area.

Given the above, it is reiterated that there is inadequate private open space for the proposed dwelling and that the proposed shortfall has the potential to result in adverse amenity impacts for future occupants. The inability of the site and proposed development to provide the required level of private open space and anticipated amenity as per the provisions of this clause, further demonstrates in the assessing officers view the unsuitability of the site and proposed development for residential use.

4.3.2 Private Open Space - Low density residential

Refer to 4.3.1 for discussion.

4.4.1 Energy Efficiency - Residential

As noted within SEPP - BASIX, a revised BASIX certificate as required by the provisions of this clause was not submitted with the subject application. The proposal is thus inconsistent with the requirements and objectives of this clause.

4.4.2 Solar Access - Low and medium density residential

As per the provisions of this clause, 'dwellings within the development site and adjoining properties should receive a minimum of 3 hours direct sunlight in habitable rooms and in at least 50% of the private open space between 9am and 3pm in mid winter'

Shadow diagrams submitted with the subject application illustrate that the proposal does not result in adverse overshadowing impacts to directly adjoining neighbours. Given the northerly aspect afforded to the proposed bedroom and kitchen, these areas within the development will obtain ample solar access.

The first floor living area is oriented to the south, as is the private open space area, as previously discussed in this report. The applicant seeks to provide an operable skylight *'within the roof over the proposed lounge area. A closing device would be provided to that skylight so that it could be closed when desired. That skylight will allow solar penetration into the lounge area, and also onto the proposed balcony through the front windows'*.

Details illustrating the nature of glazing proposed to the skylight i.e. clear, obscure etc. and the level of solar access able to be achieved as a result of the aforementioned were not submitted with the application. Further given the proposed dimensions of the skylight 0.67m x 0.86m it is unclear as to whether the proposal would achieve suitable levels of solar access as required by the provisions of this clause.

Given the above it cannot be stated that the proposal complies with the objectives and requirements of this clause.

4.4.3 Natural Lighting and Ventilation - Residential

Plans illustrate the provision of 2.7m floor to ceiling heights at ground and first floors as required by the provisions of this clause.

4.4.5 Visual privacy

As previously referred to in this report, the proposal has the potential to result in adverse privacy impacts to the eastern neighbour at 1 Medway Street given the lack of any screening proposed to the eastern side of the proposed private open space area. The proposal is unsatisfactory in this regard.

4.6 Parking Rates - Dwelling House

As per the provisions of this clause, one (1) parking space is required to be provided for the proposed dwelling. Nil parking is proposed on site. The proposal does not comply with this requirement nor the objectives of this clause and does not accommodate sufficient or convenient on site parking for future occupants.

4.7 Air Conditioning and Communication Structures

Details regarding any proposed air conditioning units have not been submitted for assessment. It is unclear if the proposed dwelling is to be air conditioned.

4.7 Waste Storage and Recycling Facilities

This clause required that waste storage areas/facilities be appropriately located so that they are easily accessed by tenants and do not have negative impacts on the streetscape or the residential amenity of occupants and neighbours with regards to smell, visual appearance or noise disturbance.

Plans illustrate the provision of a long term indoor waste storage area adjoining the corridor and bathroom of the proposed residential dwelling. This waste cupboard is proposed to be mechanically ventilated. The retention of substantial residential waste internally within a residential dwelling until the normal weekly collection is considered to be unsatisfactory and irrespective of the provision of proposed mechanical ventilation, has the potential to result in offensive odours internally. This as a consequence may have the potential to result in bins being stored externally within the public domain at the front of the site as a result by future occupants.

The proposal is unsatisfactory in this regard.

4.7 Laundry Facilities and Drying Areas

The provisions of this clause stipulate that drying areas should be screened from public view and should allow residents to hang clothes to dry in an open and preferably sunny part of the site.

Plans do not illustrate a designated clothes drying area, yet the submitted SEE states that *"a clothes drying rack could be placed on the upper level balcony, and would receive adequate solar access from the proposed skylight. The proposed level of clothes drying provision is adequate given that the premises would be likely to accommodate a single person or couple."*

It is reiterated that the proposed first floor balcony is south facing and nil documentation has been provided in which to demonstrate the actual level of solar access achieved to this area with the inclusion of the proposed skylight. Additionally, the addition of a clothes drying area to the already deficient proposed private open space area on site would further restrict the size and useability of this non compliant space.

The proposal is unsatisfactory in this regard.

5.1 Storey Height and Setbacks - Dwelling house and Attached Dwellings

As per the provisions of this clause, dwelling house development is to provide a front setback which is consistent with prevailing street setbacks in the street, minimum 0.9m side setbacks at ground level, 1.2m side setbacks at first floor level and whilst normally a 3m - 6m rear setback is required, special consideration is to be given with respect to rear setbacks for buildings on shallow depth allotments.

The proposed development seeks to retain the existing single storey building, which is built to the front and side boundaries and as such does not comply with the above. This is an existing non compliance given the established commercial building on site, which is not sought to be further varied.

Further, a first floor level is also proposed to be constructed to both side boundaries, is positioned 0.9m

from the rear boundary and setback 2.7m from the front property boundary. This is inconsistent with the requirements of this clause.

The proposed setbacks, building form and overall bulk are inconsistent with the requirements and objectives of this clause. The proposal is unsatisfactory in this regard.

5.1 Building Design - General

The provisions of this clause require that *'building design and architectural style is to interpret and respond to the positive character of the locality, including the dominant patterns, textures and compositions of buildings'*.

The proposal incorporates a first floor addition built entirely to side boundaries and extending almost the entire depth of the subject site, albeit 2.7m recessed from the front boundary and 0.9m setback from the rear.

The proposed building form does not relate to the established low density residential character of the area within context of the site, which comprise one and two storey residential dwellings with appropriate front, side, rear setbacks, private open space areas to the rear of the site and adequate on site parking provision.

The proposed development is inconsistent with the existing and future desired character of the area and has the potential to set a significant undesirable precedent.

The proposal is unsatisfactory with regards to this clause.

S.79C(1)(a)(iv) - Provisions of regulations

All relevant provisions of the Regulations have been taken into account in the assessment of this proposal.

S.79C(1)(b) - Likely Impacts of Development

The likely impacts of the proposed development have been detailed within this report.

Discrepancies

Further to the above and matters raised previously within this report, the following discrepancies were identified in the information submitted to Council:

- a) SEE states the proposal seeks to *"remove an existing awning that extends over the footpath"*.
- b) Plans are inconsistent with (a) above and illustrate the retention of the existing awning.
- c) Schedule of colours / finishes has not been submitted for review.
- d) Details in relation to proposed planting and levels within the rear 0.9m setback as proposed have not been submitted for assessment. It is unclear how this proposed landscaped area is to be maintained.

Whilst the assessing officer sought to undertake a thorough assessment of the proposal, given the discrepancies identified above, concern is raised that further issues may not have been identified or fully explored.

S.79C(1)(c) - Suitability of the site

The relevant matters pertaining to the suitability of the site for the proposed development have been considered in the assessment of the proposal. The subject site is not considered suitable for the proposed residential development for the reasons outlined within this report.

Whilst the site is currently zoned R2 - Low Density Residential, the site was also previously zoned for low density residential purposes by previous planning instruments. The site has consistently relied upon existing use rights to maintain what was a commercial use on the subject property since prior to 1972.

The site is an anomaly and is severely constrained given its frontage and overall site area. The proposal to change the use of the site to residential purposes, whilst removing a non conforming use, in the assessing officers view would result in a sub standard residential dwelling which is unsuitable on the site given its constraints and potential impacts to future occupants and neighbours.

It is the assessing officers view that the subject site should be consolidated with 1 Medway Street Bexley adjoining to the east should a residential dwelling be proposed. This would facilitate a greater site area, ensure that appropriate residential amenity can be provided along with adequate on site parking and private open space provision. Consolidation with the neighbouring property would further enable Councils FSR and setbacks requirements to be realised. The consolidated site would reinstate consistency in the established subdivision pattern within the subject street block and accommodate a site which is suitable for residential redevelopment.

As such, the site is not suitable in its current form or configuration, for the proposed development.

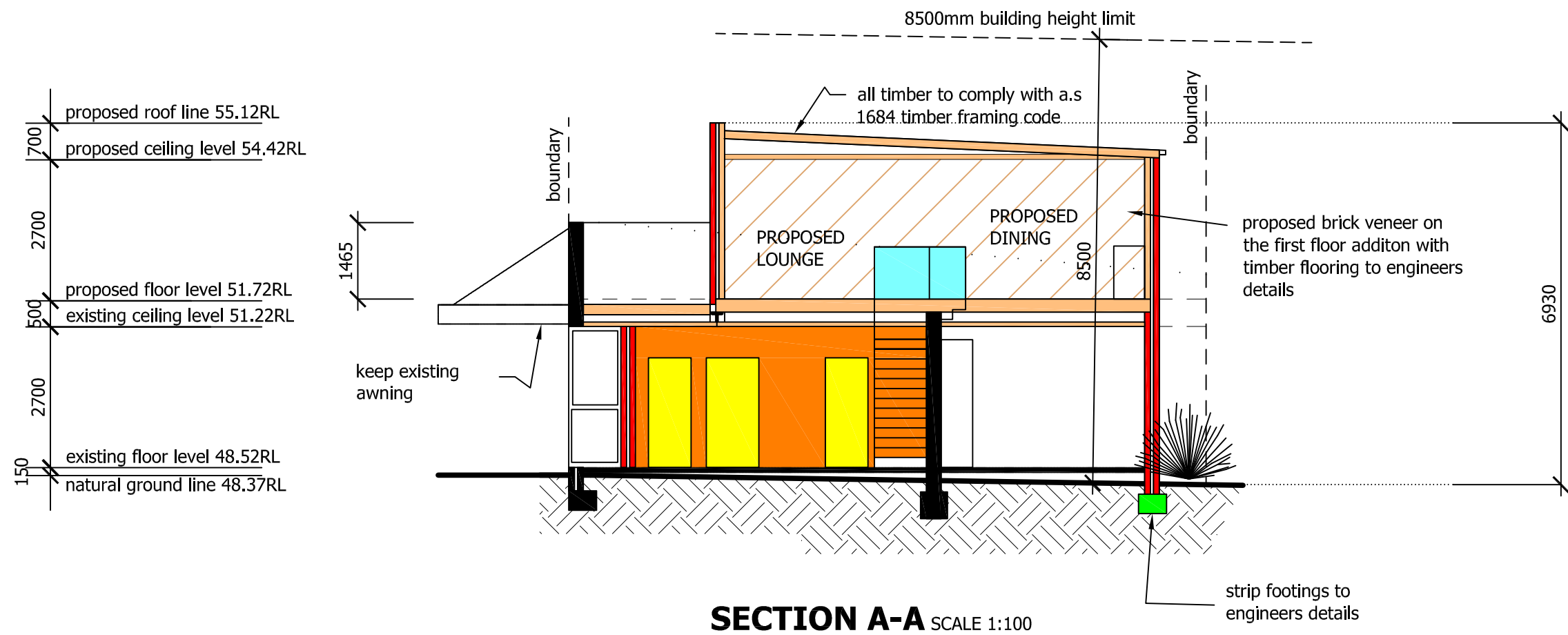
S.79C(1)(d) - Public submissions

The development has been notified in accordance with the provisions of Rockdale DCP 2011. Council did not receive any submissions on this proposal.

S.79C(1)(e) - Public interest

The proposal is not considered to be in the public interest for the reasons previously detailed within this report.

Schedule 1 - Draft Conditions of consent



NOTES

- * TERMITE RISK MANAGEMENT COMPLYING WITH PART 3.1.3 NCC VOL 2, COMPRISING
 - (A) TERMITE BARRIER OR COMBINATION OF BARRIERS INSTALLED IN ACCORDANCE WITH
 - (i) AS 3660.1:OR
 - (ii) PART 3.1.3.3 OF NCC FOR CONCRETE SLABS ON GROUND
 - (iii) PART 3.1.3.4 OF THE NCC FOR SUSPENDED FLOORS
 - (B) INSTALLATION OF A DURABLE NOTICE PERMANENTLY FIXED TO THE BUILDING IN A PROMINENT LOCATION(METER BOX) INDICATING
 - (i) THE METHOD OF TERMITE RISK MANAGEMENT
 - (ii) THE DATE OF INSTALLATION OF THE SYSTEM AS LISTED ON THE NATIONAL AUTHORITY LABEL
 - (iii) WHERE A CHEMICAL BARRIER IS USED ITS LIFE EXPECTANCY
 - (iv) THE INSTALLERS OR MANUFACTURERS RECOMMENDATIONS FOR FUTURE INSPECTIONS
- * DRAINAGE COMPLYING WITH PART 3.1.2 NCC VOL 2, AND AS/NZS 3500, INCLUDING
- * FOOTING AND SLAB PREPARATION, STEELWORK, CONCRETE AND CONSTRUCTION COMPLYING WITH PART 3.2 AND 3.11 NCC VOL 2
- * INSTALL A CONTINUOUS WATERPROOF MEMBRANE TO ANY SLAB CONSTRUCTION FOR A HABITABLE BUILDING BETWEEN THE CONCRETE SLAB CONSTRUCTION AND SURFACE TO CLAUSE 3.2.2.6 NCC VOL 2

NOTES :

1. Builder to check all Building and Boundary Dimensions Prior to Commencement of work so that the work can be carried out in accordance to Australian Authorities.
2. All Building work to comply with Australian Building codes and Local Council Requirements.
3. All Dimensions shown are Theoretical only and are subject to Site Measure during Construction.
4. Do not Scale Of Drawings.
5. Site Boundary Survey to be provided where necessary to confirm Boundary Position in Accordance with Adjoining Properties and Services.

SPECIAL NOTES :

All Dimensions to be Site Checked Prior to any Commencement of Building Works by Builder

NOT FOR CONSTRUCTION-

(These plans shall not be used other than for the sole purpose for the Consultant to prepare their works . No responsibility will be taken by the author if these plans are altered in any way)

- * TIMBER FRAMING CONSTRUCTION COMPLYING WITH PART 3.4.3 NCC VOL 2 INCLUSIVE OF REQUIREMENTS FOR MEMBER SIZES, SPACES, BRACING, SPANS, LOCATIONS AND STRESS GRADES, WHERE ROOF TRUSSES ARE TO BE USED, PROVIDE FULL DETAILS OF SAME PRINCIPAL CERTIFYING AUTHORITY BEFORE ERECTION OF THE ROOF FRAME, INCLUDING BRACING DETAILS
- * SARKING MATERIALS USED IN THE ROOF OF THE CLASS 1 BUILDING MUST HAVE A FLAMMABILITY INDEX OF NOT MORE THAN 5 COMPLYING WITH CLAUSE 3.7.1.9 NCC VOL 2 AND BE SUITABLE FOR WEATHERPROOFING
- * MASONRY CONSTRUCTION COMPLYING WITH PART 2.2 NCC VOL 2
- * GLAZING COMPLYING WITH PART 3.6 NCC VOL 2
- * INSTALLATION OF SMOKE DETECTORS TO COMPLY WITH PART 3.7.2.2 NCC VOL 2, INCLUDING SMOKE ALARMS
- * STAIR CONSTRUCTION TO COMPLY WITH PART 3.9.1 NCC VOL 2 INCLUDING GEOMETRY AND CONSTRUCTION REQUIREMENTS
- * BALUSTRADES / BARRIERS TO COMPLY WITH PART 3.9.2 NCC VOL 2
- * WATERPROOFING OF WET AREAS INCLUDING BATHROOMS, SHOWERS, LAUNDRIES, SANITARY COMPARTMENTS AND THE LIKE COMPLYING WITH PART 3.8.1 NCC VOL 2 AND AUSTRALIAN STANDARD 3740
- * TIMBER FRAMEWORK COMPLYING WITH ALL RELEVANT PROVISIONS OF AUSTRALIAN STANDARD 1684—PARTS 2 & 4 INCLUSIVE OF REQUIREMENTS FOR MEMBER SIZES, SPACES, BRACING, SPANS, LOCATIONS AND STRESS GRADES.
- * AUSTRALIAN STANDARD AS 3500 PLUMBING AND DRAINAGE AND PART 5 DOMESTIC INSTALLATIONS
- * CEILING INSULATION TO COMPLY WITH NSW PARTS 3.12.1 BUILDING FABRIC
- * BUILDING SEALING TO COMPLY WITH NCC PART 3.12.3
- * SERVICES TO COMPLY WITH NCC PART 3.12.5
- * STAIRS TO COMPLY WITH NCC PART 3.9.1.3

SITE AREA : 56.09m²

EXISTING GROUND FLOOR : 48m²

PROPOSED FIRST FLOOR ADDITION : 32m²

TOTAL FLOOR AREA : 80m²

F.S.R = 1.43 : 1

WINDOW SCHEDULE

W1 = 0.9 X 2.4 SOUTH

W2 = 3.6 X 2.4 (DOOR) NORTH - external louvre/blind (adjustable)

W3 = 3.6 X 0.9 NORTH - external louvre/blind (adjustable)

W4 = 3.6 X 2.4 (GLASS DOOR) SOUTH

standard aluminium, single toned, (or U-value: 7.57, SHGC: 0.57)

SK1 = 0.855 X 0.66 SKY LIGHT -

ACRYLIC DOME SKYLIGHT

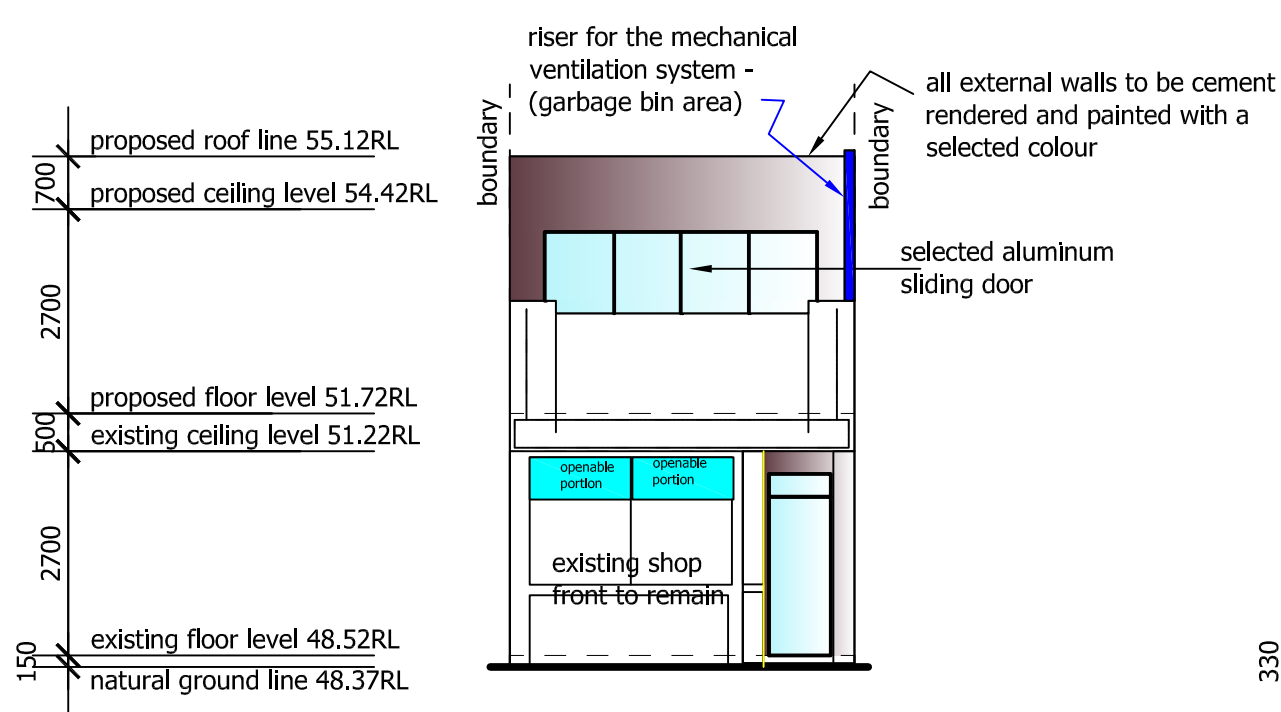
M.B.E.D.

**MOSHONIS BUILDING
DESIGNERS & ENGINEERS**
Suite3F - 1, 4 Belgrave Street
Kogarah N.S.W. 2217
Tel: 95538777
Mob: 0411035824
Fax: 95537177
Email : john@mbed.com.au

PROPOSED ALTERATIONS AND ADDITIONS

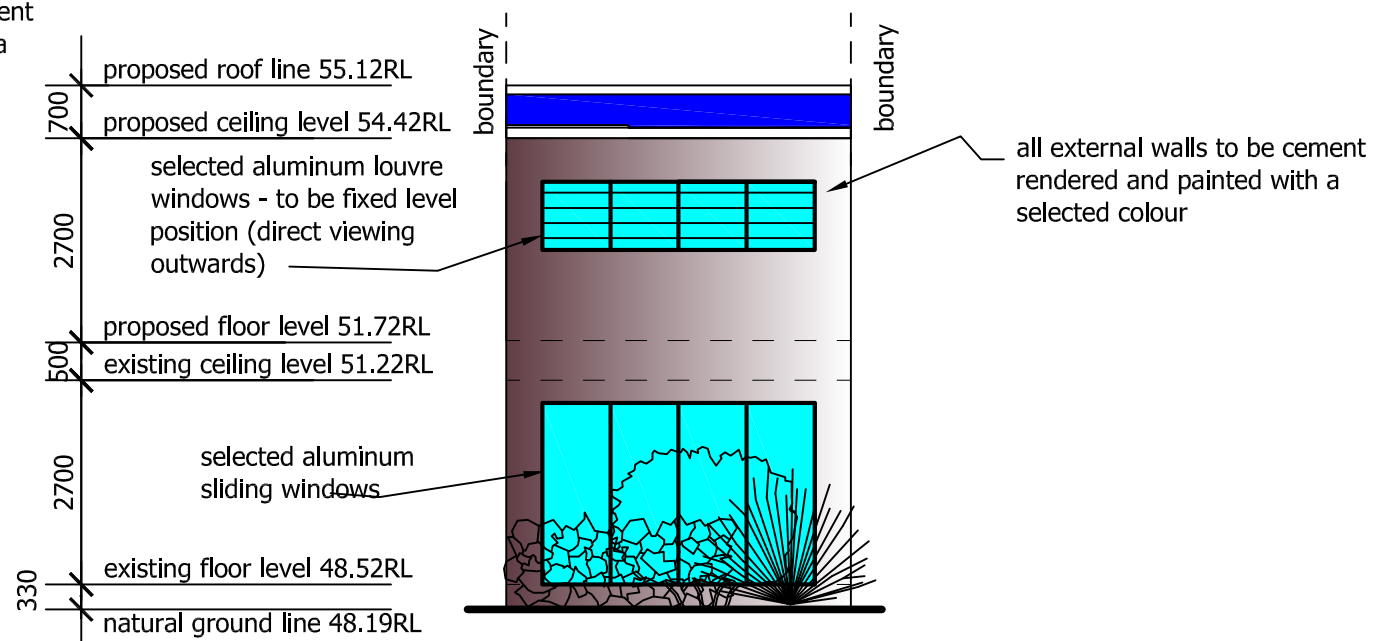
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FOR : Clientel Developments
DRAWN BY : JM SCALE 1:100
DATE: September' 16 22
DRAWING No.7580/16 SHEET : 3

AMENDMENTS - CHANGE THE FLOOR
PLAN - 6/06/17



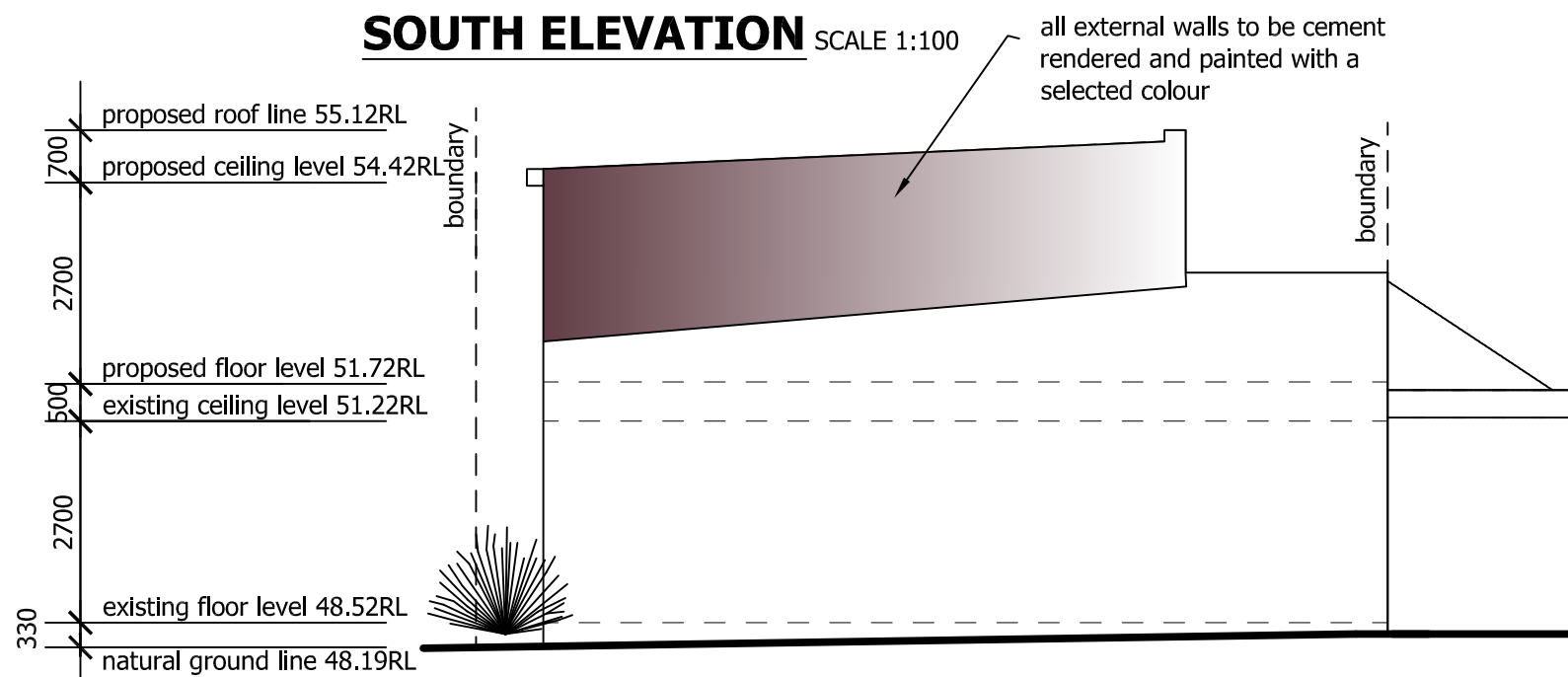
SOUTH ELEVATION

SCALE 1:100



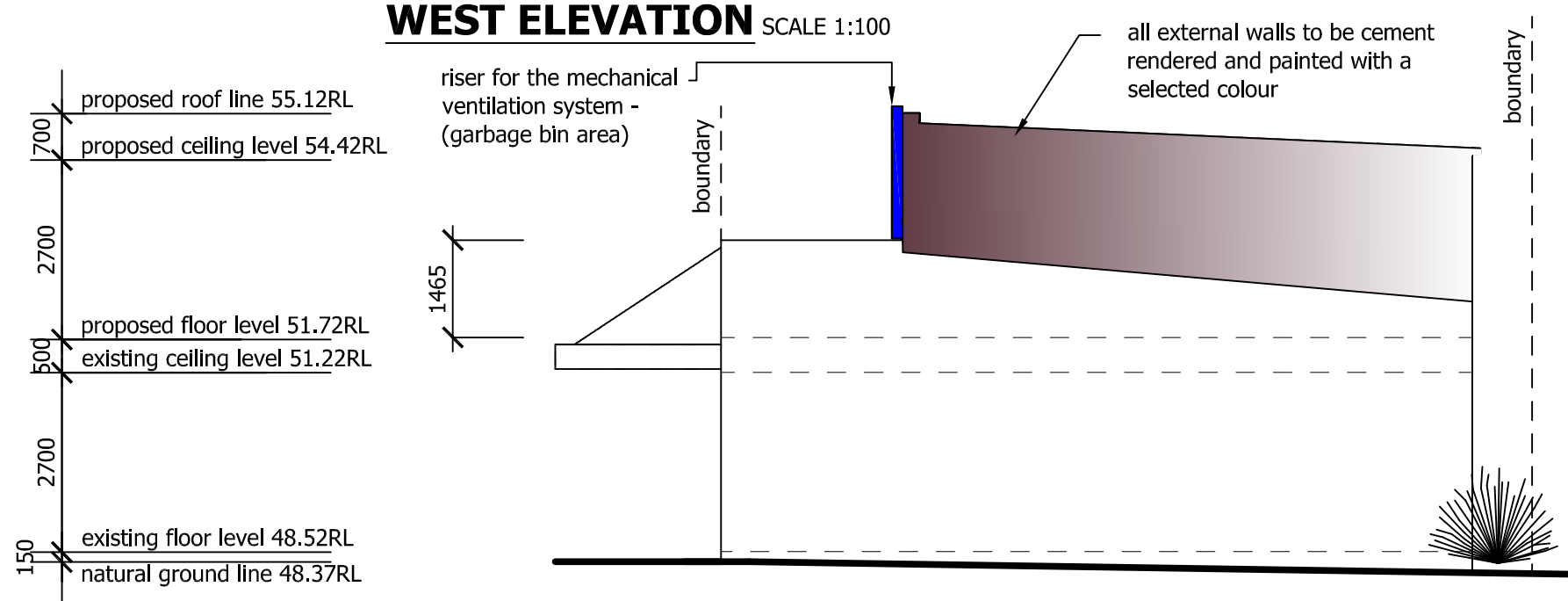
NORTH ELEVATION

SCALE 1:100



WEST ELEVATION

SCALE 1:100



EAST ELEVATION

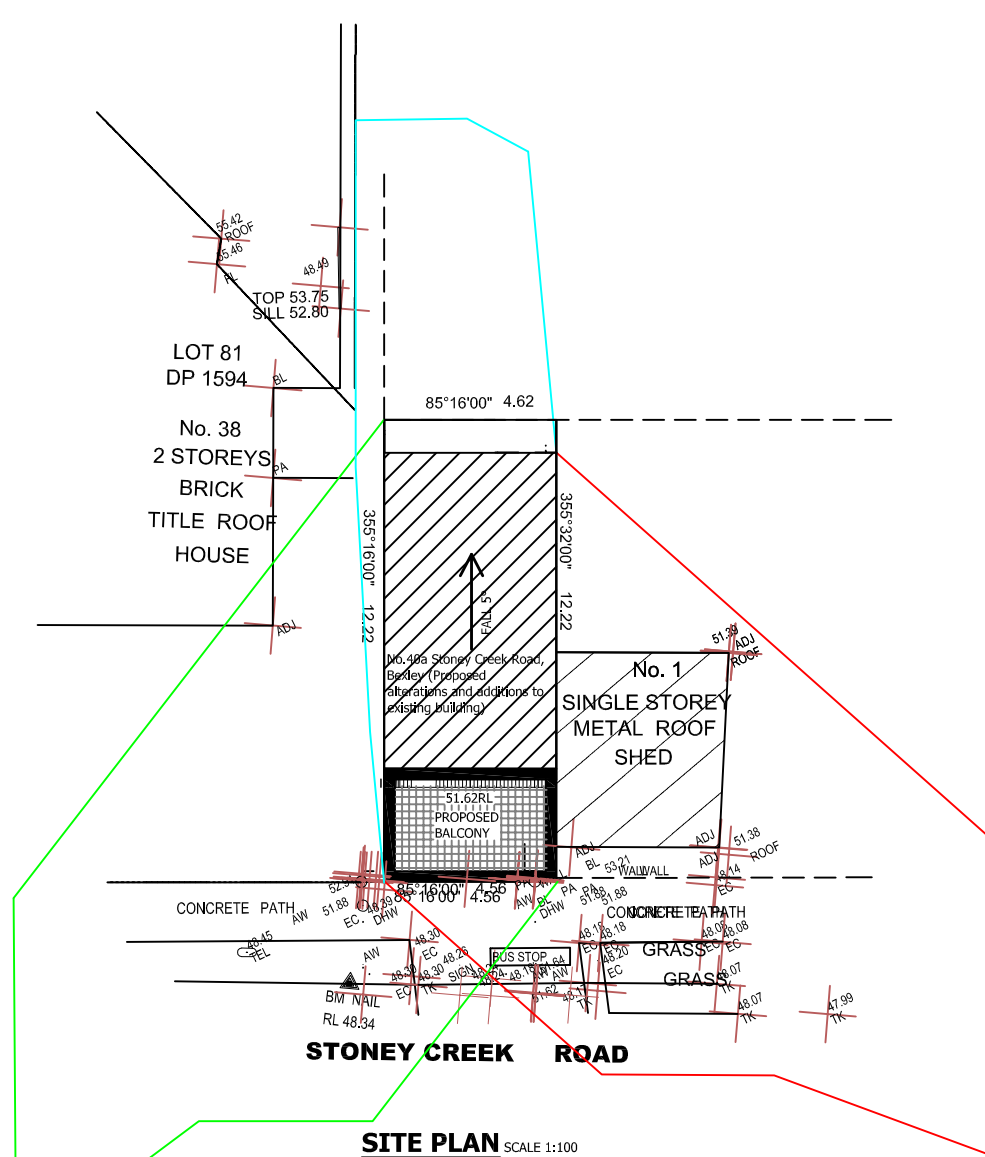
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AMENDMENTS - CHANGE THE FLOOR PLAN - 6/06/17

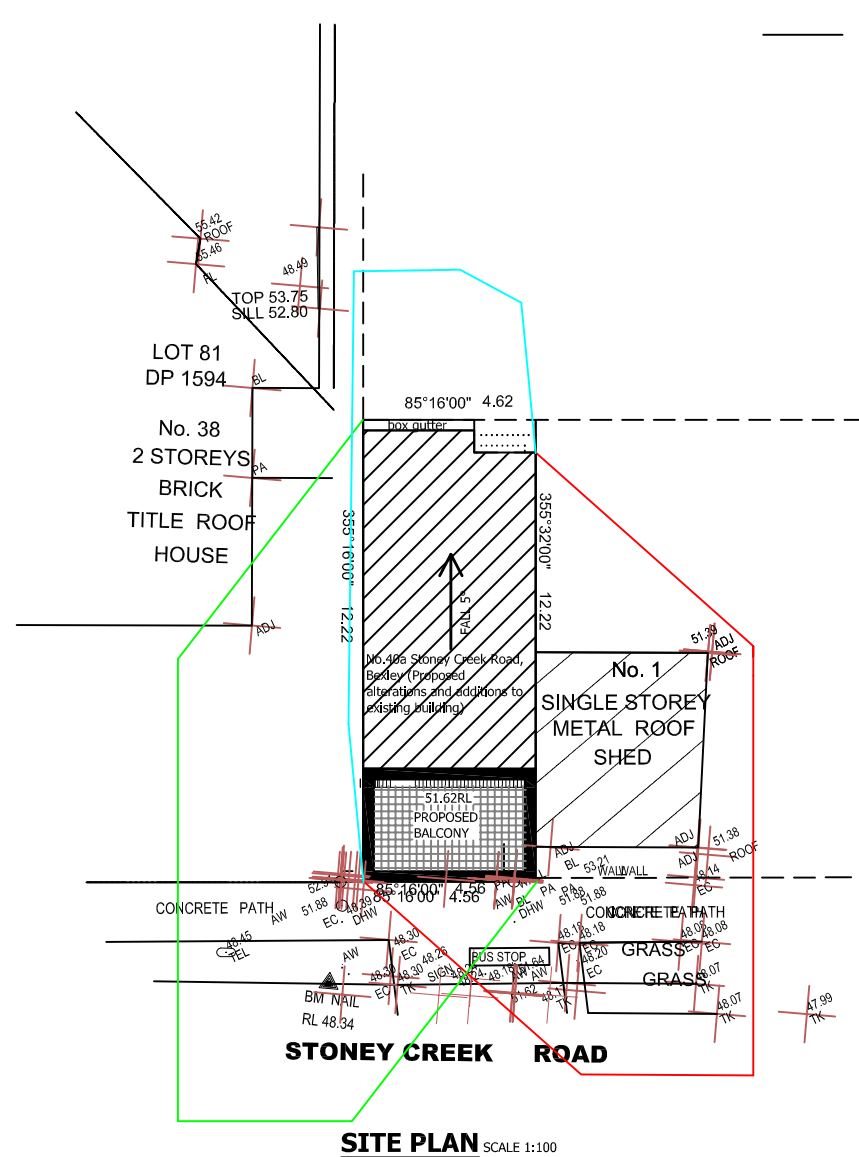
M.B.E.D.
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Tel: 95538777
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Email : john@mbed.com.au

PROPOSED ALTERATIONS AND ADDITIONS

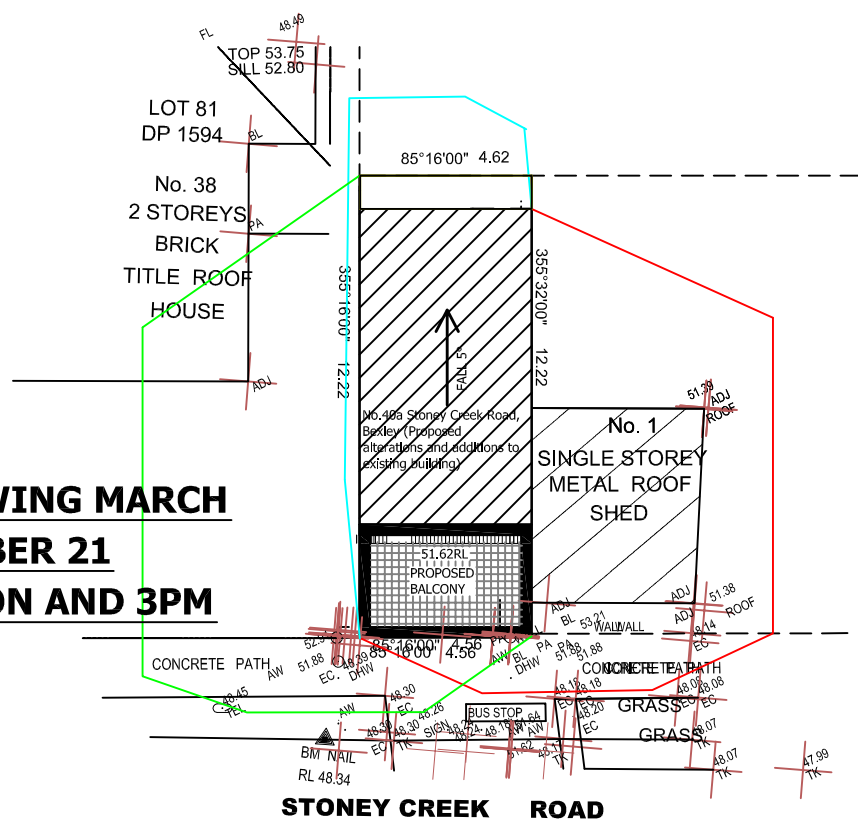
AT : 40a Stoney Creek Road, Bexley
 FOR : Clientel Developments
 DRAWN BY : JM SCALE 1:100
 DATE: September' 16 23
 DRAWING No.7580/16 SHEET : 2



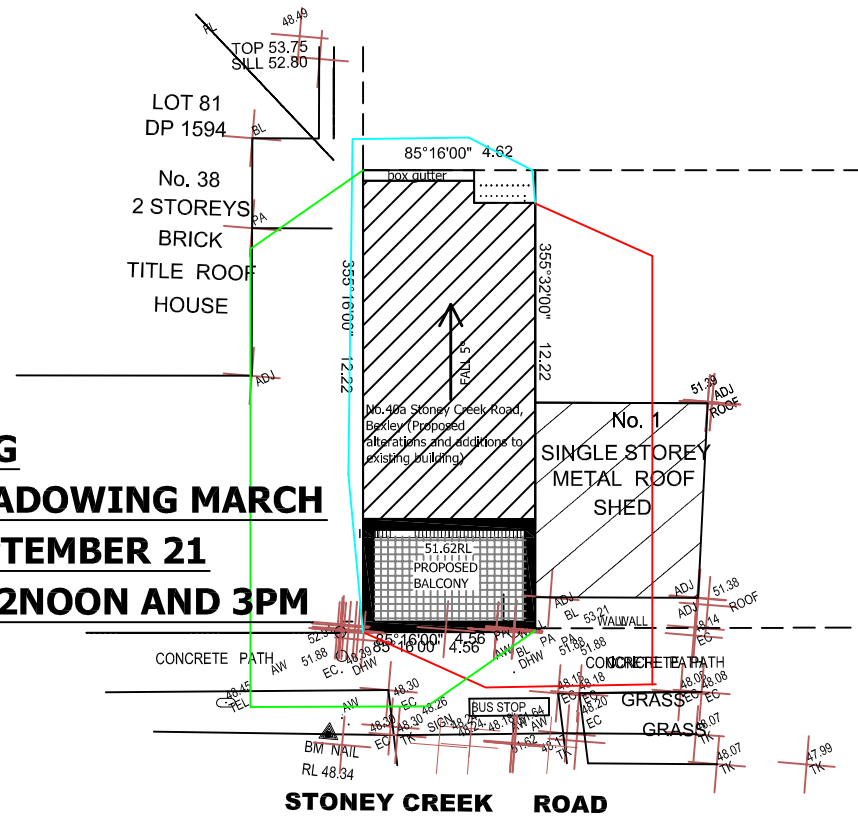
PROPOSED OVERSHADOWING JUNE 21
@9AM, 12NOON AND 3PM SCALE 1:200



EXISTING OVERSHADOWING JUNE 21
@9AM, 12NOON AND 3PM SCALE 1:200



PROPOSED
OVERSHADOWING MARCH
21 & SEPTEMBER 21
@9AM, 12NOON AND 3PM
SCALE 1:200



EXISTING
OVERSHADOWING MARCH
21 & SEPTEMBER 21
@9AM, 12NOON AND 3PM
SCALE 1:200

LEGEND

- 9AM OVERSHADOW LINE
- 12 noon OVERSHADOW LINE
- 3PM OVERSHADOW LINE

AMENDMENTS - CHANGE THE FLOOR
PLAN - 6/06/17

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PROPOSED ALTERATIONS AND ADDITIONS

AT : 40a Stoney Creek Road, Bexley
FOR : Clientel Developments
DRAWN BY : JM SCALE 1:100
DATE: September' 16 24
DRAWING No.7580/16 SHEET : 5



40a Stoney Creek Road
BEXLEY NSW

Proposed alterations and additions to existing commercial building
for adaptive reuse as a dwelling house plus associated works

**Submission providing justification under clause 4.6(3) of
Rockdale Local Environmental Plan 2011 for exception to
clause 4.4(2A) of that instrument**

Prepared for Clientel Developments Pty Ltd
Issue A - J17103
14 June 2017

MB Town Planning Pty Ltd ACN 161 704 927 as Trustee for the Durney Benson Family Trust trading as MB Town Planning
Suite 10, 895 Pacific Highway, PYMBLE NSW 2073 | PO Box 415, GORDON NSW 2072
www.mbtownplanning.com | mb@mbtownplanning.com | (02) 9144-7968

A. Introduction

1. This written request provides justification for contravention of clause 4.4(2A) of *Rockdale Local Environmental Plan 2011* (RLEP2011) in response to clause 4.6(3) of that instrument in relation to a Section 82A review application for development proposal that has been refused.
2. The development application that has been refused is DA2017/128, as submitted to Bayside Council. DA2017/128 was for “adaptive reuse and additions and alterations including first floor to convert to residential dwelling” at 40a Stoney Creek Road, Bexley.
3. MB Town Planning was not involved in providing advice, design development, lodgement services or documentation in relation to the development application. The development application was lodged by Mr T Younan on 12 October 2016.
4. The development application was accompanied by:
 - Survey by East and West Surveyors dated 28 August 2016;
 - Architectural details by Moshonis Building Designers and Engineers, dated September 2016 including site plan, ground floor plan, first floor plan, elevations, sections, soil and water management plan, BASIX requirements and shadow diagrams;
 - Statement of Environmental Effects by John Robert Boers dated October 2016; and
 - Acoustic report by Acoustic Consulting Engineers, dated 6 October 2016.
5. A Section 82A Review application is being made, based on amended plans by Moshonis Building Designers and Engineers, dated 6 June 2017. The amendments include:
 - The formerly proposed ground level bedroom adjacent to Stoney Creek Road becomes a study. Furthermore, the existing shopfront form is to be retained, although the windows will be replaced with aluminium-framed openable windows;
 - Additional internal walls are constructed within the front room to create a separate waste bin cupboard, which will be capable of storing two bins. The enclosure will be mechanically ventilated;
 - There is proposed to be demolition of the rear of the existing building across the full width of the property sufficient to allow the building to have a 900mm rear setback. A glass sliding door is to be provided to the bedroom facing the rear setback area and the rear area is to be planted with shrubs to provide an outlook for the bedroom. The intention is for that rear setback area to facilitate the ability to provide a landscaped outlook and natural light and ventilation, rather than intending to provide an outdoor sitting area or the like;

- The first floor level is amended to reflect the ground level setback, with the kitchen modified accordingly. Additionally, the kitchen window is to be fitted with fixed horizontal louvres to limit overlooking impacts;
 - The gross floor area of the development is 65.7 square metres. The originally submitted application was stated in the originally submitted SEE to have a gross floor area of 82 square metres, although scaling off of the originally submitted drawings actually indicates a gross floor area of 76.2 square metres.
6. The present clause 4.6(3) written request addresses the first item and also sets out how the proposed contravention of clause 4.4(2A) may be varied.
 7. Part B of this written request describes the site and its locality and the proposed development.
 8. Part C of this written request sets out the relevant town planning controls, including how the proposal departs from Clause 4.4(2A).
 9. Part D of this written request explains why the proposal may be approved under clause 4.6 notwithstanding provisions within clause 4.6(8).
 10. Part E of this written request addresses clause 4.6(3)(a).
 11. Part F of this written request addresses clause 4.6(3)(b).
 12. Part G of this written request addresses clause 4.6(4) and (5).
 13. Part H of this written request provides concluding comments.

B. The site and its locality, the proposed development and the proposed non-compliance

14. The site is 40a Stoney Creek Road, Bexley (Figure 1) and has the real property description of Lot 1, DP713595. The lot is approximately rectangular and has an area of 56.09 square metres, with a width of between 4.56 and 4.62 metres. The site was subdivided from 1 Medway Street in 1983.
15. There is no significant change in level within the site. The site is on the northern side of Stoney Creek Road and has no other boundary to a road. The section of Stoney Creek Road in front of the site is State classified but does not carry in excess of 20,000 vehicles AADT.
16. Existing on the site is a single storey commercial building (Figure 2) with nil setbacks, excepting a 400mm by 1000mm area in the northeast corner and an entry recess in the southeast corner adjacent to Stoney Creek Road.
17. The most recent development approval for the site is consent C148/88 issued on 22 December 1988, being for “proposed display and sale of electronic equipment”, meaning a shop. Retail uses have occurred on the site since then and the premises are in a suitable condition and form for use as a shop or business premises.



Figure 1: Subject site, highlighted in yellow (Source: Six Maps)



Figure 2: Existing building on the subject site viewed from Stoney Creek Road

18. The site is within an area characterised by a mix of uses but being predominantly low density residential.
19. To the east of the property is 1 Medway Street, which addresses Medway Street and backs onto the subject site. That property contains a single storey shop. There are outbuildings within that property adjacent to its rear boundary, being adjacent to the eastern side boundary of the subject site.
20. To the north of 1 Medway Street and to the north of the subject site is 3 Medway Street, containing a single storey dwelling house. Part of the rear yard area of that dwelling house is adjacent to the north of the subject site.
21. To the west of the subject site is 40 Stoney Creek Road, containing a two storey dual occupancy development of recent construction. The front setback of that development is between around 6.5 and 12.5 metres, with there being a carparking area within the front setback (Figure 3).



Figure 3: Part of the front setback area of 40 Stoney Creek Road, with the side wall of the existing building on the subject site visible

22. The proposed development is for alterations and additions to the existing building and associated works and for use of the building as a dwelling house.

23. The originally proposed works include:

- demolish the existing shopfront and remove an existing awning that extends over the footpath;
- block up a gap within an existing internal wall and provide a new opening in that wall;
- demolish the part of the rear wall that is recessed 400mm from the rear boundary;
- demolish the existing roof;
- construct a new front wall with a slightly different configuration, being a solid wall with two vertically proportioned front windows;
- construct a new rear wall in the northeastern area of the site, set back 900mm from the rear boundary and being 1619mm wide. That wall is to have a rear-facing window;
- construct two new internal ground level walls;
- construct a new first floor level, including a stair from within the ground floor level to that new level;
- the new first floor level is to be set back 2710mm from the front property boundary. There will be a balcony across the full width of the building within that setback area, behind the parapet;
- the new first floor level is to match the proposed ground floor rear wall configuration, including a 900mm setback in the northeastern area with a window in that setback;
- the upper level will have a single plane roof form sloping moderately from front to rear; and
- the roof drainage will connect to pipes going under the building and connecting to the street drainage.

24. The proposed modifications include:

- The formerly proposed ground level bedroom adjacent to Stoney Creek Road becomes a study. Furthermore, the existing shopfront form is to be retained, although the windows will be replaced with aluminium-framed openable windows;
- Additional internal walls are constructed within the front room to create a separate waste bin cupboard, which will be capable of storing two bins. The enclosure will be mechanically ventilated;
- There is proposed to be demolition of the rear of the existing building across the full width of the property sufficient to allow the building to

have a 900mm rear setback. A glass sliding door is to be provided to the bedroom facing the rear setback area and the rear area is to be planted with shrubs to provide an outlook for the bedroom. The intention is for that rear setback area to facilitate the ability to provide a landscaped outlook and natural light and ventilation, rather than intending to provide an outdoor sitting area or the like;

- The first floor level is amended to reflect the ground level setback, with the kitchen modified accordingly. Additionally, the kitchen window is to be fitted with fixed horizontal louvres to limit overlooking impacts;
- The gross floor area of the development is 65.7 square metres. The originally submitted application was stated in the originally submitted SEE to have a gross floor area of 82 square metres., although scaling off of the originally submitted drawings actually indicates a gross floor area of 76.2 square metres.

25. It is proposed that there is one bedroom at ground floor level and a bathroom and study. There will be an open plan kitchen/living area upstairs, with the kitchen being towards the rear.

C. The town planning controls and the proposed contravention of clause 4.4(2A)

26. The principal environmental planning instrument that is relevant to the site is *Rockdale Local Environmental Plan 2011*. The site is zoned R2 Low Density Residential under that instrument.

27. Dwelling houses, amongst other things, are permissible with the consent of Council in the R2 zone.

28. “Dwelling house” is defined in the Dictionary to RLEP2011 as:

...a building containing only one dwelling.

29. The proposed development would comprise a dwelling house and is permissible in the R2 zone with consent.

30. The current use of the property is as a “shop”, which is defined under RLEP2011 as a sub-category of “retail premises”, which is defined under RLEP2011 as a sub-category of “commercial premises”. All of those uses are prohibited in the R2 zone.

31. The current use of the premises benefits from the existing use rights provisions of the *NSW Environmental Planning and Assessment Act, 1979* and the associated regulations. Those provisions allow the continuation of the use even though it is prohibited in the R2 zone. Those provisions also allow for certain alterations and changes of use within the “commercial premises” category with development consent. For the purposes of a development application under those provisions, any provisions that derogate from certain provisions within the regulations which, amongst other things, allow the making of a development application for the otherwise prohibited use, would have no effect.

32. A use that is normally prohibited but which comes under the “existing use rights” provisions is known as a “non-conforming use”.
33. The development application is for a “conforming use”. If the development application is approved, the use of the property will no longer come under the existing use rights provisions of the Act and regulations.
34. RLEP2011 includes various development standards. Amongst other things, those relate to the heights of buildings. The proposal complies with that standard. RLEP2011 also includes heritage provisions. The site is not a heritage item and is not within a heritage conservation area for the purposes of those provisions.
35. Clause 4.4(2A) of RLEP2011 establishes a maximum permissible floor space ratio of 0.55:1 for land zoned R2 (amongst other specified residential zones) that has an area 460 square metres. The subject site has an area of 56.09 square metres and therefore is subject to the 0.55:1 standard.
36. The proposed development under the Section 82A review application has a gross floor area of 65.7 square metres, based on measurements scaled off the submitted drawings. That figure is a downwards revision from the figure of 82 square metres provided in the SEE.
37. The proposed floor space ratio is 1.17:1, which exceeds the maximum permissible floor space ratio by 113 percent of a compliant amount. The proposal gross floor area is 65.7 square metres, whereas a compliant floor space ratio would be 30.8 square metres.

D. Consideration of clause 4.6(8) of RLEP2011

38. Clause 4.6 of RLEP2011 makes provisions allowing for approval of a development notwithstanding the contravention of a development standard.
39. Clause 4.6(8) provides that clause 4.6 does not allow contravention of clause 4.4(2A) “unless it is for a demonstrable public benefit, such as the provision of pedestrian links”.
40. Annexure A to this written request is an opinion by Scott Nash – Barrister. He provides the opinion that the conversion of a non-conforming use to a conforming use may potentially be in the category of a “demonstrable public benefit” for the purposes of clause 4.6(8). That opinion includes the Act and regulations:

...inherently operate to help bring ‘existing uses’ to a natural death, whether it be, for example, via the abandonment provisions...or the prohibition on the change of an existing use to another non-conforming use...

41. That opinion also observes that:

The ‘public’ necessarily ‘benefits’ from such an outcome in certain circumstances, because the process of strategic land use planning, which involves extensive community consultation and investigation, seeks in an

economic and orderly fashion, consistent with the objects in s 5 of the EPA Act, to geographically separate land uses from other land uses, usually due to the potential for land use conflict. This is reflected in the zoning provisions of the relevant local environmental plan. The private enjoyment of existing use rights is an anathema to that idea,

42. In this instance, the subject building is constructed as a commercial building, including a shopfront, and was last approved for that use. The applicant asserts that the premises benefit from existing use rights. There is nothing to indicate that there has been any abandonment of those existing use rights. Should Council require further evidence, the applicant will provide any such further evidence as may be required.
43. The proposal would change that non-conforming use to a conforming use. That constitutes a public benefit because the conforming use will be in accordance with Council's land use planning instrument, insofar as land use is concerned.
44. The proposed contravention of the floor space ratio standard is necessary for there to be a feasible dwelling house on the subject site. That is because the site is only 4.56 metres wide and, if the building is limited to a single storey then it would not be feasible to provide a separate living space from a bedroom space whilst providing adequate natural light and ventilation. By allowing a first floor addition, it becomes feasible to provide an adequate amenity. Furthermore, the maximum permissible gross floor area of 30.8 square metres is insufficient for a dwelling house. The proposed gross floor area, being 65.7 square metres, is relatively small for a dwelling house but is at least sufficient to provide a viable dwelling. A compliant proposal would provide insufficient floor space for a dwelling house development of the site to be feasible – in which case the site would continue to be used as commercial premises contrary to the intent of the town planning controls.
45. Therefore, the proposed contravention facilitates a change from a non-conforming to a conforming use and therefore facilitates a demonstrable public benefit.
46. Therefore, clause 4.6(8) does not preclude Council from considering a clause 4.6(3) written request and approving the proposed development notwithstanding its contravention of clause 4.4(2A).

E. Consideration of clause 4.6(3)(a) of RLEP2011

47. Clause 4.6(3)(a) of RLEP2011 provides as follows:

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...*

48. The NSW Land and Environment Court case *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 has established principles relevant to the preparation of clause 4.6(3) justification submissions that may be summarised as:

- The justification must demonstrate (amongst other things) that circumstances exist particular to circumstances of this proposed development on the subject site;
- The justification must demonstrate that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case by reference to other ways or matters that set out in clause 4.6(4)(a)(ii), meaning other than that the proposal achieves the objectives of the development standard and the objectives of the zone.

49. It would be unreasonable to require compliance with clause 4.4(2A) because to do so would limit the proposed dwelling house to 30.8 square metres, which is too small for a reasonable or viable dwelling house.

50. Furthermore, the proposed development facilitates the adaptive reuse of the existing building, which is desirable from the perspective of ecologically sustainable development. A development that complied with clause 4.4(2A) would involve much more substantial demolition and would cause a waste of building work. Such a development would be inconsistent with the “orderly and economic use and development of land”, which is one of the objects of the Act set out in Part 5(a)(ii). By allowing the proposed contravention of the development standard, a viable dwelling may be achieved that would represent the “orderly and economic use” of the subject site.

51. The proposed contravention also achieves the “orderly and economic use” of the subject site by facilitating the cessation of the non-conforming use and establishing a conforming use. The benefit of that action extends to enhancing the viability of nearby commercial centres. The proposal therefore assists in the achievement of the aims of RLEP2011 as set out in clause 1.2(2), including in particular:

(d) to promote economic activity within Rockdale through the facilitation of commercial, employment generating and tourism opportunities

The proposal assists in the achievement of that aim by removing a commercial use from an area that is not appropriately zoned, and thereby enhancing (on a cumulative basis) the viability of commercial zones.

52. It is also unnecessary to require compliance with the development standard, because the development standard is intended principally to maintain residential amenity to surrounding properties and to maintain an appropriate streetscape character. In the circumstances of the subject site, those outcomes are achieved because:

- The site is fully built up and the streetscape outcome is established by the subdivision. The proposed upper level is stepped back and, whilst it will be visible from the side, it will not be visually dominant compared to the already established streetscape outcomes and compared to the existing development on the subject site;
- The site is on the northern side of Stoney Creek Road and overshadowing is caused mainly to the roadway, where it doesn't matter. Overshadowing to the adjoining property to the east affects areas such as outbuilding areas that are not sensitive to impact – further to which those areas receive good sunlight during the morning. Overshadowing to the west is substantially to a driveway area and does not discernibly affect living areas or private open space areas;
- The proposal does not cause unreasonable visual privacy impacts. The only window that could cause a loss of visual privacy is the rear dining room window – however, a condition may be imposed to require fixed external louvres to that window so as to prevent overlooking; and
- In relation to internal amenity for the proposed dwelling, the unusual circumstances of the site lead to the dwelling a standard of amenity more comparable to an apartment's amenity than to a dwelling house's amenity. However, that outcome is better than the current circumstances in which there is a non-conforming use, and is not broadly unacceptable from a social perspective. The dwelling will not be inconsistent with general societal expectations in terms of amenity. The upper level front balcony is similar to balconies in apartments, which are not considered to be inhumane or socially unacceptable.

53. Demonstration that compliance with the development standard is unnecessary is somewhat related to achievement of the objectives of the standard. However, demonstration that a requirement for compliance with the development standard is unreasonable is based on matters that are beyond just compliance with the objectives of the zone or the development standard. Clause 4.6(3)(a) requires it to be demonstrated that compliance is unreasonable *or* unnecessary, not unreasonable *and* unnecessary. It is demonstrated that a requirement for compliance is unreasonable, and it is so demonstrated consistently with the Four2Five judgement. The proposal therefore satisfies clause 4.6(3)(a).

F. Consideration of clause 4.6(3)(b) of RLEP2011

54. Clause 4.6(3)(b) of RLEP2011 provides as follows:

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)...

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

55. As set out in relation to clause 4.6(3)(a) above, the proposed contravention facilitates the proposed change of use from a non-conforming use to a conforming use. The same grounds as that a requirement for compliance would be unreasonable and unnecessary are the grounds upon which there are environmental planning grounds justifying the contravention. However, clause 4.6(3)(a) relates to that matter in a different way. Under clause 4.6(3)(a), the proposed contravention is necessary for a reasonable dwelling house because a compliant dwelling house would be non-feasible. Under clause 4.6(3)(b), a dwelling house is an appropriate land use for the site and helps achieve aim 1.2(2) of RLEP2011 and helps achieve the orderly and economic use of land.

56. The requirement that it is demonstrated that there are sufficient environmental planning grounds to justify contravention of the development standard is therefore satisfied.

G. Consideration of clause 4.6(4) and (5) of RLEP2011

57. Clause 4.6(4) of RLEP2011 provides as follows:

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 proposed development is to be carried out, and

(b) the concurrence of the Secretary has been obtained.

58. The matters in item (a)(i) are addressed elsewhere in this written request.

59. In relation to (a)(ii), the objectives of the particular standard are set out in clause 4.4(1) and are considered as follows.

60. Objective 4.4(1)(a) is "to establish the maximum density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale". On a more typical site in the R2 zone, it would be necessary to limit the density to between 0.50:1 and 0.55:1 in accordance with clause 4.4 and in accordance with typical densities in the R2 zone. However, in this instance the site area is only 56.09 square metres. The allotment was lawfully created, in 1983, and there is a reasonable expectation that it can accommodate a viable, separate land use. For the

R2 zone, an appropriate and permissible land use is a dwelling house. The proposal accommodates a dwelling house, containing one large bedroom and a small bedroom (which might also be used as a study). The proposal therefore accommodates a modest example of a permissible land use on the site and is reasonable in that regard.

61. The proposal is therefore, in this particular instance, not unreasonable in terms of the density expectations for the locality. If the subject lot size or similar was commonly encountered in the R2 zone, then there would be a greater total impact from allowing dwelling houses on all of those lots. However, the subject lot size or similar is uncommon. Therefore, approval of the proposal will not lead to a significant total impact in terms of the availability of infrastructure and the generation of traffic, or in terms of the character of Rockdale.
62. The subject site cannot in this instance accommodate a parking space. However, that arises from the unusual circumstances of the subject lot and in this instance the impact is acceptable because the residents will be able to park nearby on the street. That will not lead to significant problems in the R2 zone generally because the present circumstances are unusual. Furthermore, the dwelling is small and there is a bus stop directly in front of the site. Therefore, the residents might not need to own a car and might be able to rely on buses. In any case, the non-provision of parking is acceptable in this instance.
63. Objective 4.4(1)(b) is “to minimise adverse environmental effects on the use and enjoyment of adjoining properties”. In that regard, the acceptability of the proposal in terms of its amenity impacts is set out elsewhere in this written request. The circumstances of the site are that the development will not cause unreasonable overshadowing because most shadowing falls onto the roadway. There is only one window with the potential to cause a loss of privacy, and that is addressed by fixed louvres.
64. Objective 4.4(1)(c) is “to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.
65. The visual impacts of the proposed development are addressed elsewhere in this written request and are acceptable. There is already a nil setback building on the site and the proposed upper level will not substantially change the streetscape perceptions of the development on the site – particularly having regard to the stepping back of the proposed upper level from the front building line. It is also recognised that the proposal removes the existing rather bulky awning over the street.
66. The proposal is therefore not antipathetic to the objectives of the development standard notwithstanding the proposed contravention of that development standard.
67. The objectives of the R2 zone are considered as follows.

68. The first objective is to “provide for the housing needs of the community within a low density residential environment”. The proposal better achieves that objective than the existing development on the site because it replaces a shop with a dwelling. The development is not antipathetic to the maintenance of a low density residential environment because the small allotment already exists and the wider locality will continue to be characterised by low density residential development notwithstanding the development of the particular allotment for a dwelling house.
69. The second objective is to “enable other land uses that provide facilities or services to meet the day to day needs of residents”. That is relevant to certain other permitted uses in the zone including child care centres, community facilities, educational establishments (meaning “schools”, “TAFE establishments” or universities), health consulting rooms and respite day care centres. The existing premises are too small to satisfactorily accommodate those uses and those uses would generate more parking than the proposed dwelling house. Therefore, the second objective is not relevant to the use of the site.
70. The third objective is to “ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area”. Those matters are addressed elsewhere in this written request.
71. The proposal therefore satisfies the zone objectives.
72. Clause 4.6(4)(b) provides that the concurrence of the Secretary must be obtained. Clause 4.6(5) provides that the Secretary must consider (a) whether the contravention raises matters of State or regional significance; (b) the public benefit of maintaining the standard; and (c) any other specified matters.
73. Regarding (a), the proposal is too small to generate State or regional issues.
74. Regarding (b), maintaining the development standard would prevent the achievement of a conforming use on the site, which would be a public disbenefit. There is therefore no public benefit in maintaining the standard.
75. There are no relevant additional matters relevant to (c) – or if there are then the Secretary may address those.

H. Conclusion

76. Upon the above grounds, it is considered that the proposal satisfies the criteria for the proposed variation to be supported.



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MB Town Planning - Clause 4.6 written request – 40a Stoney Creek Road, Bexley

14 June 2017