
Bayside Planning Panel

13/02/2018

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| Item No | 6.4 |
| Application Type | Development Application |
| Application Number | DA-2017/501 |
| Lodgement Date | 05/10/2017 |
| Property | 41 Lynesta Avenue, Bexley North, NSW 2207 |
| Owner | Thanh Quach Trang Quach |
| Applicant | Mr.Thanh Quach |
| Proposal | Demolition of existing structures and construction of a two (2) storey attached dual occupancy and Torrens Title subdivision |
| No. of Submissions | Nil. |
| Cost of Development | \$758,022 |
| Report by | Teresita Chan- Student Planner Marta M. Gonzalez-Valdes- Coordinator of Development assessment |

Officer Recommendation

- 1 That the Bayside Planning Panel does not support the variation to Clause 4.1(3B) in accordance with the Clause 4.6 justification provided by applicant; and,
- 2 That the development application DA-2017/501 for the demolition of existing structures and construction of a two (2) storey attached dual occupancy and Torrens Title subdivision at 41 Lynesta Avenue, Bexley North be REFUSED pursuant to Section 80(1)(a) of the Environmental Planning and Assessment Act 1979 for the following reasons:
 - i) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, it is considered that the proposed development does not satisfy the objectives contained in Part 2.3 of the R2 zone under Rockdale Local Environmental Plan 2011, to enable that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.
 - ii) 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 numerical provisions of Clause 4.1- Minimum subdivision lot size under Rockdale Local Environmental Plan 2011 as the resulting lots from the subdivision are less than 350 sq.m.
 - iii) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, it is considered that the CI4.6 submission by the applicant is not supported.
 - iv) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, Dwelling 1 on Allotment A fails to satisfy

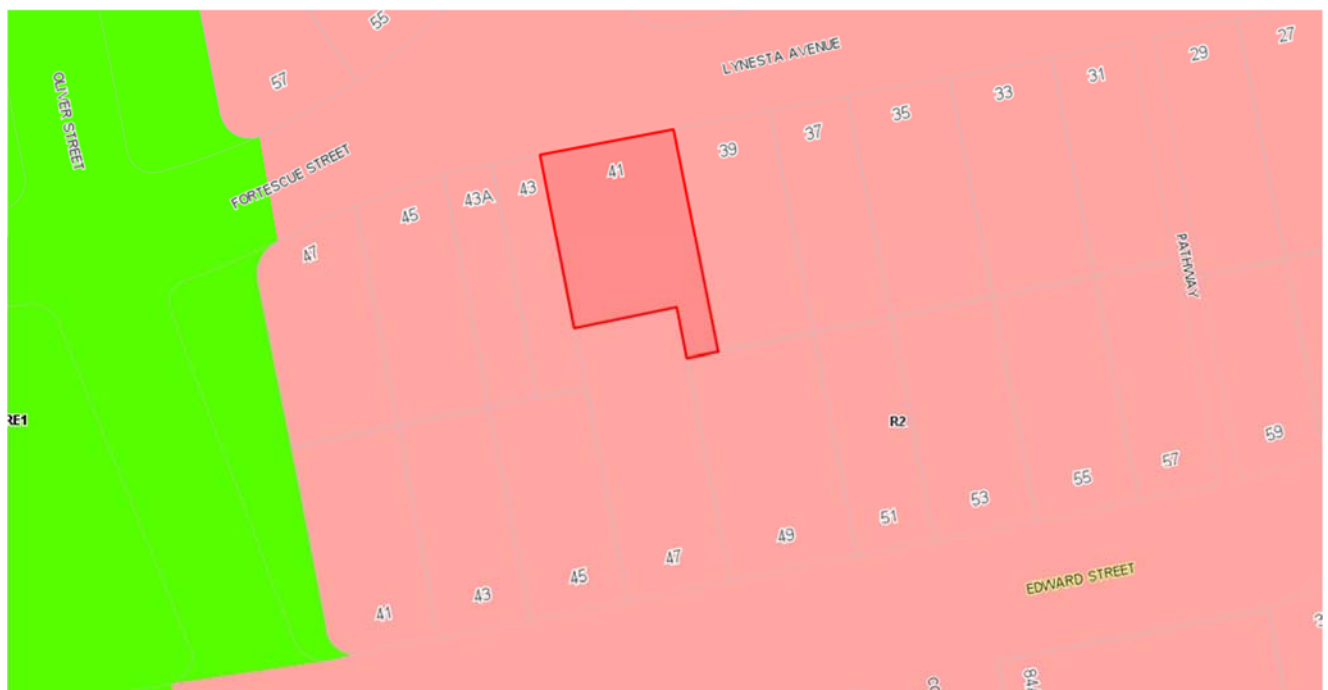
the controls contained in Clause 4.4 under Rockdale Local Environmental Plan 2011, to achieve the FSR requirement of 0.5:1.

- v) 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 numerical controls of Council's Technical Specification in Part 4.6- Driveway Width of Rockdale Development Control Plan 2011.
- vi) Pursuant to the Provisions of Section 79C(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development is not in the public interest.

Attachments

1. Planning Assessment Report
 2. Architectural Site Analysis Plan
 3. Roof Plans
 4. Elevations
 5. Torrens Title Plan
 6. Amended Clause 4.6 Variation
 7. Site Plan
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Location Map



BAYSIDE COUNCIL

Planning Assessment Report

Application Details

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| Application Number: | DA-2017/501 |
| Date of Receipt: | 5 October 2017 |
| Property: | 41 Lynesta Avenue, BEXLEY NORTH (Lot 18 DP 35230) |
| Owner(s): | Mr Thanh Duc Quach Mrs Trang Thi Thu Quach |
| Applicant: | Mr Thanh Duc Quach |
| Proposal: | Demolition of existing structures and construction of a two (2) storey attached dual occupancy and Torrens Title subdivision |
| Recommendation: | Refused |
| No. of submissions: | Nil |
| Author: | Teresita Chan |
| Date of Report: | 20 December 2017 |

Key Issues

The proposal in its current form fails to comply with the numerical provisions of Clause 4.1(3B) of Rockdale Local Environmental Plan 2011 (RLEP 2011) in regard to subdivision lot size for a dual occupancy development. The minimum lot size required is 350sq.m. per lot. The proposal seeks to create two new lots with sizes 276.21sq.m and 311.99sq.m. The applicant has submitted a Clause 4.6-Exception to development standards seeking a variation to the minimum lot size requirement under Clause 4.2A, however, this Clause applies to attached and semi-detached dwellings in the R2 Zone. The proposal is defined as a dual occupancy development and as such the relevant Clause in RLEP 2011 in regard to subdivision is Clause 4.1(3B).

Nevertheless, as the minimum lot size of 350sq.m. applies to both development types (semi-detached dwellings and dual occupancies), the Clause 4.6 justification provided by the applicant has been assessed. For the reasons outlined in this report, the proposed variation to the lot size is considered to be significant and not supported.

In addition, whilst the overall Floor Space Ratio (FSR) for the site complies with the maximum 0.5:1 FSR required under Clause 4.4 of RLEP 2011, the proposed FSR for Dwelling 1 on Allotment A is 0.53:1 and does not comply. This non compliance results in excessive bulk and amenity impacts. A Clause 4.6 has not been submitted for this proposed variation.

For the above reasons the proposal is not supported and as such the development application is recommended for Refusal.

Recommendation

1. That the Bayside Planning Panel does not support the variation to Clause 4.1(3B) in accordance with the Clause 4.6 justification provided by applicant; and,

2. That the development application DA-2017/501 for the demolition of existing structures and construction of a two(2) storey attached dual occupancy and Torrens Title subdivision at 41 Lynesta Avenue, Bexley North be REFUSED pursuant to Section 80(1)(a) of the Environmental Planning and Assessment Act 1979 for the following reasons:

i) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, it is considered that the proposed development does not satisfy the objectives contained in Part 2.3 of the R2 zone under Rockdale Local Environmental Plan 2011, to enable that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.

ii) 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 numerical provisions of Clause 4.1- Minimum subdivision lot size under Rockdale Local Environmental Plan 2011 as the resulting lots from the subdivision are less than 350 sq.m.

iii) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, it is considered that the C14.6 submission by the applicant is not supported.

iv) Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, Dwelling 1 on Allotment A fails to satisfy the controls contained in Clause 4.4 under Rockdale Local Environmental Plan 2011, to achieve the FSR requirement of 0.5:1.

(v) 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 numerical controls of Council's Technical Specification in Part 4.6- Driveway Width of Rockdale Development Control Plan 2011.

(vi) Pursuant to the Provisions of Section 79C(1)(e) of the Environmental Planning and Assessment Act 1979, the proposed development is not in the public interest.

Background

History

Council's records show that the following application was previously lodged:

- An application under the Infrastructure SEPP (ISP-2012/1) for demolition of the existing dwellings, removal of trees and the construction of six(6) new dwellings with associated four(4) parking spaces, which included the subject site and adjacent site at 39 Lynesta Street Bexley North.

Timeline of the assessment process is stated as follows:

- The development application was lodged on 05/10/2017
- The notification period ended on 19/10/2017
- Letter to Applicant requesting withdrawal of the application sent on 12/10/2017
- Meeting with Council's Manager Development Services and applicant on 16/11/2017
- Amended Statement and Environmental Effects (SEE) and a legal opinion letter submitted on 15/12/2017

Proposal

Council is in receipt of a development application DA-2017/501 at 41 Lynesta Avenue, Bexley North, which seeks consent to carry out demolition of existing structures and construction of a two(2) storey attached occupancy and Torrens Title subdivision.

Specifically, the proposal consists of:

Dwelling 1 on Allotment A

Ground floor:

- One(1) Lounge area
- One(1) Dinning area, comprising with an open kitchen
- One(1) Laundry room
- One(1) powder room
- A driveway

First Floor:

- Two(2) bedrooms with robes
- One(1) master bedroom with en-suite and robes
- One(1) bathroom
- A balcony

Dwelling 2 on Allotment B

Ground floor:

- One(1) Lounge area
- One(1) Dinning area, comprising with an open kitchen
- One(1) Laundry room
- One(1) powder room
- A driveway

First Floor:

- Two(2) bedrooms with robes
- One(1) master bedroom with en-suite and robes
- One(1) bathroom
- A balcony

Torrens Title Subdivision

The proposal proposes to subdivide the land into two(2) parcels- 41 and 41A Lynesta Avenue. The size of the resulting allotments are stated as follows:

Allotment A (Dwelling A): 276.21 sq.m

Allotment B (Dwelling B): 311.99 sq.m

Fencing

There is no boundary fences on the existing site, and no boundary fences are proposed nor stated in the Statement of Environmental Effect.

Use of materials and finishes

The use of materials and finishes of the proposed development are primarily rendered masonry, comprising of painted finishes , fixed and openable glass windows and colour-bond roof.

Trees and vegetation

The proposal does not involve any removal of trees.

Site location and context

The subject site is known Lot 18 DP 35230, 41 Lynesta Avenue, Bexley North. The site is an irregular hexagon shaped with front boundary widths of 20.115 m, and rear boundary width of 15.24 m, and 4.88 metres. The side boundaries are 27.385 m deep. The total site area is 588.2 sq.m. The topography of the site is such that it is falling gradually from the rear to the front by approximately 3 metres.

The subject site contains a single(1) storey residential dwelling, with a detached metal shed at the rear. The site is located on the south eastern side of Lynesta Avenue, between Edward Street and Lynesta Avenue. Adjoining development to the sides includes a two storey dual occupancy approved in 2006 on a site with an area of approximately 560sq.m. and a one(1) storey residential dwelling. A two(2) storey residential dwelling is situated on the rear property. There is a mix of one to two storey residential dwellings and dual occupancies along Lynesta Avenue.

The subject site is located within 150 metres radius of Gilchrist Park and Bexley Bowling Club.

There is onexeight(8) m high Jacaranda tree located in the South East corner of the site, which is to be retained in the proposal. No removal of trees have been proposed.

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.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 applicant has submitted a multi dwelling BASIX Certificate for the proposed development. The Certificate number is 854934M.

The commitments made result in the following reductions in energy and water consumption:

Reduction in Energy Consumption 54%
Reduction in Water Consumption 41%
Thermal Comfort Pass

In this regard, the proposal satisfies the provision and objectives of this SEPP.

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 |
| 2.6 Subdivision - consent requirements | Yes | Yes - see discussion |
| 2.7 Demolition requires consent | Yes | Yes - see discussion |
| 4.1 Minimum subdivision lot size | No - see discussion | No - see discussion |
| Dual occupancy | No - see discussion | No - see discussion |
| 4.3 Height of buildings | Yes | Yes - see discussion |
| 4.4 Floor space ratio - Residential zones | Yes | Yes - see discussion |
| 4.6 Exceptions to development standards | No - see discussion | No - see discussion |
| 5.9 Preservation of trees or vegetation | Yes | Yes - see discussion |
| 6.2 Earthworks | Yes | Yes - see discussion |
| 6.4 Airspace operations | Yes | Yes - see discussion |
| 6.12 Essential services | Yes | Yes - see discussion |

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 Dual occupancy 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 considered to be inconsistent with one of the objectives of this Clause as follows:

- *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.*

Comments: The subject site has an area of 588.2 sq.m. The proposal is seeking Council's approval

for subdividing the existing lot into two allotments of 276.21 sq.m and 311.99 sq.m in size. Given the constrained lot size, the proposed Floor Space Ratio (FSR) of Dwelling 1 on Allotment A fails to comply with the minimum FSR requirement, creating an overdevelopment of the land and impacting on the character and amenity of the surroundings.

Whilst the proposed development is permissible within the R2- Low Density Residential zone, the intensification of the site will impact on existing and envisaged subdivision patterns and will potentially create impacts on the amenity of the area. The proposal is not considered to be satisfactory with regard to zone objective 3.

2.6 Subdivision - consent requirements

The development application is seeking Council's approval for the Torrens Title Subdivision of the lots. In accordance with Clause 2.6(1) - Subdivision of Rockdale Local Environmental Plan 2011 (RLEP 2011), *'Land to which this Plan applies may be subdivided, but only with development consent.'*

Hence, the subject site can only be subdivided with development consent.

2.7 Demolition requires consent

The proposed development seeks consent for the demolition of all existing structures on site. Hence satisfies the provisions of this Clause.

4.1 Minimum subdivision lot size

Clause 4.1(3B)(a) requires a minimum subdivision lot size of 350sq.m. for dual occupancies. The proposal results in subdivision lot sizes of 276.21 sq.m and 311.99 sq.m and does not comply with this clause. The applicant has submitted a Clause 4.6 justification, which is not supported. Details are written in the later part of the report.

Dual occupancy

The proposed variation of each allotment has been calculated as follows:

Allotment A

276.21 sq.m = 21.08% under the 350 sq.m minimum subdivision lot size

Allotment B

311.99 sq.m = 10.86% under the 350 sq.m minimum subdivision lot size

To achieve the 350sq.m. lot size required under this clause, the overall lot size should be 700sq.m. The existing lot is 588.2sq.m., which represents 111.8 sq.m deficiency of the required 700 sq.m to permit subdivision.

The proposed variation exceeds 10% of the required minimum subdivision lot size. Approval of the subject application would permit a form of development not supported by the RLEP 2011. This will set an undesirable precedent as this significant variation has not been supported by Council in the past since the adoption of RLEP 2011. Further, the proposal demonstrates the inability of the lot size to accommodate a dual occupancy housing development. Details of the impacts will be discussed in the later part of the assessment report.

4.3 Height of buildings

The height of the proposed building is 7.9 m and therefore does not exceed the maximum 8.5m height

shown for the land on the Height of Buildings Map.

The proposal complies with the development standard and therefore satisfies this Clause.

4.4 Floor space ratio - Residential zones

The Gross Floor Area (GFA) has been calculated as follows:

Allotment A(Dwelling 1): Site area= 276.21 sq.m

Ground Floor:

75.2 sq.m

First Floor:

70sq.m

Total GFA: 145.2 sq.m

FSR of Dwelling1 (GFA of Dwelling 1/ Size of allotment A): 0.53:1

Allotment B (Dwelling 2): Site area= 311.99 sq.m

Ground Floor:

75.2sq.m

First Floor:

69.6 sq.m

Total GFA: 144.8 sq.m

FSR of Dwelling 2 (GFA of Dwelling 2/ Size of allotment B): 0.46:1

The Gross floor area of the proposed development has been calculated as 284.8 sq.m over a site area of 588.2 sq.mn. In this regard, the proposed overall floor space ratio (FSR) for the building is 0.49:1 and therefore does not exceed the maximum FSR for the land 0.5:1 as shown on the Floor Space Ratio Map.

Nevertheless, the proposed floor space ratio of Dwelling 1 on Allotment A will not be complying with the maximum FSR numerical control of 0.5:1 on the proposed new lot. The resultant FSR is 0.53:1. A Clause 4.6 justification has not been provided and the proposal is not supported.

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.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) 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.

Development Standard to be varied

The applicant seeks variation to Clause 4.1(3B)- Minimum subdivision lot size, which states:

(3B) Despite sub clause (3), development consent may be granted to the subdivision of a lot on which there is an existing dual occupancy, or on which a dual occupancy is proposed, if:

- (a) the area of each lot resulting from the subdivision is equal to or greater than 350 square metres, and
- (b) each of the lots will have one of the dwellings on it.

The subject site has a lot size area of 588.4 sq.m and the subdivided resulting allotments are 311.99 sq.m and 276.21 sq.m. Both allotments fail to satisfy the 350 sq.m minimum subdivision lot size by 10.86% and 21.08% respectively.

Justification for the variation

The applicant has provided a justification to the variation at lodgement of the development application, followed by an updated CI 4.6 submission and legal advice.

In addressing Clause 4.6(3)(a), the applicant makes reference to the Four2Five Pty Ltd case and the necessity to demonstrate that there are sufficient environmental planning grounds particular to the circumstances of the proposed development of the site and that it is necessary to demonstrate that there is something more than achieving the objectives of the standard. It is stated that rather than being satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, the commissioner had to be satisfied that the applicant's written request has adequately addressed the matters in subclause 3(a) that compliance with the development standard is unreasonable and unnecessary. Based on case law, the applicant argues that the objectives of the standard are achieved notwithstanding the non compliance with the standard. In doing so, the applicant makes reference to the objectives of clause 4.2A. It is noted that Clause 4.2A provides controls for attached and semi-detached dwellings in Zone R2. The proposal is defined as a dual occupancy development, not a semi-detached dwelling. The objectives relevant to the proposal are stated in clause 4.1(1) as follows:

- 4.1(1) (a) to ensure that subdivision reflects and reinforces the predominant subdivision pattern of the area,
- (b) to minimise any likely impact of subdivision, and development on subdivided land, on the amenity of neighbouring properties,
- (c) to ensure that lot sizes and dimensions are able to accommodate development consistent with relevant development controls.

As stated above, the applicant has failed to identify and address the above objectives. In the

submission, the applicant goes further to argue that clause 4.1A of the RLEP 2011 is not relevant. However, in addressing clause 4.2A, the applicant made the following statement, which is relevant to the assessment:

The proposed development is consistent with the zoning objectives.

The proposal 'encourages diversity in lot sizes and built form, and provides increased opportunity for housing affordability.'

'It would be unreasonable and unnecessary to require strict compliance with the development standard as the site is not unduly constrained by its size or shape to accommodate the proposed development which is permissible and meets the objectives of the site.'

The proposal complies with all other controls such as landscaping, setbacks etc.

'Low density is a matter of perception viewed from the street and the architectural plans accord with the visual characteristics of "low density".'

In regard to demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard, the applicant argues:

- The existing area supports a varied outcome of allotments and built form and the proposed development is consistent with an established precedent in the immediate vicinity of the site, as well as in the surrounding Bexley North Locality. There are two semi detached dwellings already approved and built in Lynesta Avenue:
43 and 43A Lynesta Avenue- two storey semi detached dwellings on 278 sq.m allotments
19 and 19A Lynesta Avenue- two storey semi detached dwellings on 273 sq.m allotments
- Subdivision patterns and density evolve over time. An analysis of 57 allotments in the area bound by Lynesta Avenue, Edwards Street, Oliver Street and New Illawarra Road, shows that the prevalent lot size is between 373 sq.m and 420 sq.m, with examples of smaller lot sizes of 273 sq.m which occupy dual occupancy development. In the general vicinity there are examples of dual occupancy development on smaller allotments than the subject allotment.
- The proposed development is compatible with the existing and evolving streetscape character of the area, one which contains two storey dwellings noting that 15 properties out of 46 properties in Lynesta Avenue are two storey.
- The subject site has a land parcel shape which is an anomaly when considered in the context of the surrounding subdivision pattern, as well as in the broader Bexley North Locality. The surrounding subdivision pattern comprises rectangular shaped allotments of consistent depth but with varied widths. The subject site is irregular in shape in that south east portion of the site has historically been truncated and forms part of the allotment directly to the south at 47 Edward Street. If the truncated portion of land was applied to the site area, the resultant allotment would be 705 sq.m, thereby meeting the numeric requirement of 350 sq.m for each semi- detached dwelling.
- There are examples in the vicinity of the subject site of dual occupancy development on smaller lots, including the one adjacent to the west at 43 Lynesta Avenue.
- The subject site has a frontage of 20.12m, which is significantly wider than other properties in Lynesta Avenue which has an average frontage of between 12.5 metres to 14.6 metres. The wider frontage of the subject site ensures an appropriate streetscape outcome particularly as the design of the dwellings and landscaping is of high quality in terms of design and presentation.
- Where the built form is determined to be an appropriate outcome for the site, subdivision is a secondary consideration.
- The allotment is a suitable size and shape to support the semi- detached dwellings and the landscape area provided exceeds Council's minimum requirements by 21%. This results in a compensating effect when considered against the site area shortfall. The landscape treatment to

the street is also of high quality and will result in a high quality streetscape.

- A development that strictly complied with the minimum lot size would not be discernible in the streetscape. The lack of depth across the entire rear/ southern boundary could not be appreciated from the street. Likewise the numeric non-compliance would not be comprehended other than on paper. The non-compliance is therefore an abstract notion, and in this instance compliance is unnecessary and unreasonable particularly as a highly compliant physical development will be achieved at the Site which is a more tangible measure of acceptability within the streetscape.
- The proposal development remains consistent with the objectives of the R2- Low Density Residential zone despite the numerical non-compliance with the minimum lot size.
- A compliant proposal, one that would have 350 sq.m allotment would produce a poor streetscape outcome than the proposed development application as the resultant building would be larger and bulkier and would have a more dominant visual impact in the street.
- The proposed development will not result in significant adverse impacts upon the locality or adjacent residential properties by way of overshadowing, view loss, privacy, bulk and scale, regardless of whether the land was subdivided or not. Therefore strictly adhering to the minimum lot size control would serve no planning purpose where it is a direct function of a complying built form.
- The proposed development does not result in the loss of public or private views.

In demonstrating that the proposal is in the public interest and consistent with the objectives of the zone (Clause 4.6(4)(ii)), the applicant states that the proposed development will satisfy the zone objectives as it will provide for the housing needs of the community, it minimises impacts on the character and amenity of the area as it is fully compliant with the height, FSR and setback controls; the design of the building is of a high quality and the proposed development 'represents an efficient and appropriate use of land that is compliant with the environmental capacity of the site and its R2-Low Density Residential zoning.'

Assessment Comments

An assessment of the information provided by the applicant has been carried out to ascertain whether the proposal satisfies clause 4.6(4)(a) as far as to allow the Bayside Planning Panel to issue development consent. In this regard it is considered that the applicant has adequately addressed the matters in subclause (3). However, the applicant has failed to address the objectives of the development standard as set out in clause 4.1(1), but rather made reference to clause 4.2A. Nevertheless, even when assessing the arguments put forward to justify the undersized site area, the proposal has been found to be inconsistent with the objectives of the standard and inconsistent with at least one of the zone objectives. Compliance with the development standard is considered to be reasonable and necessary in this case and in the public interest for the following reasons:

Reference to existing subdivisions approved under previous planning controls is not valid. If the intent and vision for the R2 - Low Density Zone was to encourage the subdivision of smaller lots, those previous controls would have been adopted by current policies. Council made a conscious decision to only allow subdivision in lots greater than 700sq.m. (to achieve a minimum 350sq.m.) and therefore clause 4.1(3B) was introduced into RLEP 2011. This requirement is further supported by clause 4.2A, which adopts similar controls for similar development types such as detached and semi-detached dwellings.

Since the introduction of the RLEP 2011, Council has consistently applied this control, but only allowing very marginal variations in the range of 10sq.m. maximum.

Approving the proposed development will create an undesirable precedent for this and similar development types. Smaller subdivision patterns as the one proposed are uncharacteristic of the R2 Low density area. This is contrary to objective (a) of the standard.

One of the lots does not comply with the maximum FSR requirement; which demonstrates that the proposal is an overdevelopment of the land. This is inconsistent with objective (c) of the standard. The proposal has potential for creating impacts to the character and amenity of the area as the intensification of the use as proposed, if extended to the R2 Low density area will impact on the future character of the R2 Zone. This is inconsistent with objective 3 of the R2 Zone.

The proposal does not show excellence in design so as to achieve a positive contribution to the streetscape and character of the area.

5.9 Preservation of trees or vegetation

The site contains trees that are subject to approval by Council under clause 5.9 of RLEP 2011 conferred by:

- (a) development consent, or
- (b) a permit granted by Council.

No removal of trees and vegetation have been proposed in the proposal.

6.2 Earthworks

Earthworks including excavation are required on site for footings and slabs. The objectives and requirements of Clause 6.2 of RLEP 2011 have been considered in the assessment of this application. It is considered that the proposed earthworks and excavation will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.

6.4 Airspace operations

The proposed development is affected by the Obstacle Limitation Surface (OLS) which is set at 100 metres to Australian Height Datum (AHD). The proposed building height is at 7.6 metres to AHD, with RL 35.428 and in this regard, it is considered that the proposed development will have minimal adverse impact on the OLS and hence is acceptable with regards to this Clause.

6.12 Essential services

Services will generally be available on the site.

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 |
|------------------|----------------------------|------------------------------------|
|------------------|----------------------------|------------------------------------|

| | | |
|--|---------------------|----------------------|
| 4.1.3 Flood Risk Management | Yes | No - see discussion |
| 4.1.4 Soil Management | Yes | Yes - see discussion |
| 4.1.7 Tree Preservation | Yes | Yes - see discussion |
| 4.1.9 Lot size and Site Consolidation - Dual Occupancy | No - see discussion | No - see discussion |
| 4.2 Streetscape and Site Context - General | No - see discussion | Yes - see discussion |
| 4.3.1 Open Space & Landscape Design - Low & medium density residential | Yes | Yes - see discussion |
| 4.3.2 Private Open Space - Low density residential | Yes | Yes - see discussion |
| 4.4.2 Solar Access - Low and medium density residential | Yes | Yes - see discussion |
| 4.4.3 Natural Lighting and Ventilation - Residential | No - see discussion | No - see discussion |
| 4.6 Parking Rates - Dual Occupancy | Yes | Yes - see discussion |
| 4.6 Car Park Location and Design | Yes | Yes |
| 4.6 Driveway Widths | No - see discussion | No - see discussion |
| 4.7 Air Conditioning and Communication Structures | Yes | Yes |
| 4.7 Waste Storage and Recycling Facilities | Yes | Yes |
| 4.7 Laundry Facilities and Drying Areas | Yes | Yes |
| 5.1 Storey Height and Setbacks - Dual occupancy & Semi-detached dwelling | Yes | Yes - see discussion |
| 5.1 Residential Subdivision | Yes | Yes - see discussion |

4.1.3 Flood Risk Management

The subject site is classified as being affected by the 1% Annual Exceedance Probability (A.E.P) flood. The submitted floor plan demonstrates compliance with the required minimum habitable floor level. However, the proposed FFL of the alfresco and garage were not indicated in the floor plans. Further information would be required in this regard if the application is recommended for approval.

4.1.4 Soil Management

The Soil & Water Management Plan has been submitted and general erosion and sediment control strategies are proposed to ensure that the potential for impact on adjoining land and surrounding waterways is minimised.

In this regard, the proposed development is considered to satisfy this clause.

4.1.7 Tree Preservation

The development proposal does not involve any removal of trees and vegetation. Council's Tree Management Officer has recommended the protection and retention of existing Jacaranda tree located at the rear of the site and trees adjoining the site.

4.1.9 Lot size and Site Consolidation - Dual Occupancy

The proposal seeks the Torrens Title Subdivision of the dual occupancy development into two(2) parcels, with the resultant lots having an area of 312 sq.m and 276 sq.m, which fails to satisfy the numerical control of this Clause. A minimum lot size of 700 sq.m and a minimum site frontage of 15 metres is required for a dual occupancy development. The subject lot has an area of 588.2 sq.m, and it is 111.8sq.m under the required 700 sq.m to permit subdivision. The subject site has a street frontage of 20.115 m and complies with the minimum frontage requirement.

4.2 Streetscape and Site Context - General

The proposal is located in a R2- Low Density Residential Zone. The immediate context is relatively low scale, consisting of single(1) storey and two (2) storey residential dwellings.

Given the large street frontage and the need to fit two dwellings on the lot, there is limited opportunity to articulate the buildings to achieve a pattern more sympathetic to the existing streetscape. There is an attempt to match the streetscape by the incorporation of materials and finishes consistent with existing dwellings in Lynesta Street, however the buildings appear bulky as seen from the street. As such the proposal is not considered to present an optimal response to the existing and future character of the street. The proposal fails to comply with the objectives of the Clause.

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

The proposal includes a landscaped area of 168. 7 sq.m. The proposed open space and landscape design satisfy the minimum 25% landscaped area on site, hence complies with the Clause.

4.3.2 Private Open Space - Low density residential

The proposal has a proposed private open space of 120 sq.m, which satisfies the minimum private open space of 80 sq.m. Thus, complies with objectives and controls of the Clause.

4.4.2 Solar Access - Low and medium density residential

The applicant has submitted a set of shadow diagrams, showing the overshadowing impacts of March 22 and June 22 from 9 a.m to 3 p.m. The proposed dual occupancy development will be overshadowing the property on 43 & 43A Lynesta Avenue and 39 Lynesta Avenue. The detailed description of the overshadowing impacts are illustrated as follows:

At 9 a.m- June 22

The proposed development will be overshadowing 1/2 of the two(2) storey dual occupancy dwelling and the private open space of 43 & 43A Lynesta Avenue.

The impacted windows are located on the Eastern elevation and Southern elevation of the building.

At 12 p.m- June 22

There are no adverse impacts on the adjoining buildings.

At 3 p.m- June 22

The proposed development will be overshadowing one(1) window on the western elevation of the single(1) storey residential dwelling on 39 Lynesta Avenue. In addition, 80% of the private open space of 39 Lynesta Avenue will receive inadequate solar access as well.

Whilst there are overshadowing impacts on the adjoining dwellings, properties on 43& 43A Lynesta Avenue and 39 Lynesta Avenue will be able to receive a minimum of three(3) hours direct sunlight in habitable rooms and at least 50% of the private open space between 9am and 3pm in mid winter. Therefore, the proposal is considered to have minimal impact on the level of sunlight currently received by adjoining properties and complies with the Clause.

4.4.3 Natural Lighting and Ventilation - Residential

A minimum ceiling height of 2.7m is required for habitable rooms. The ceiling height of the proposed development have been stated as follows:

Ground Floor: 3.2 metres

First Floor:

Discrepancies were found between the CL of the proposed first floor between North & South elevations plan and East & West elevations plans. Amended information will be required if this development application is recommended for approval.

4.6 Parking Rates - Dual Occupancy

The development will have minimal impact on access, parking and traffic in the area. Two carparking spaces are proposed per dwelling in accordance with Council's DCP 2011. The proposal is satisfactory in regards to traffic and parking.

4.6 Driveway Widths

The proposal involves two individual access driveways of width 3 metres each at the boundary, and a separation width of 0.25 metres. This represents a combined single driveway of 6.25m. In accordance with Rockdale Technical Specification- Traffic, Parking and Access, a minimum of 6 metres separation width between two(2) individual access driveways is required. Alternatively, a combined single driveway with a maximum 5m width at the boundary is to be proposed.

The proposal fails to comply with the numerical provisions, hence does not comply with the objectives and controls of the Clause. Amendments to the plans would be required if the development application is recommended for approval.

5.1 Storey Height and Setbacks - Dual occupancy & Semi-detached dwelling

The setbacks have been measured as follows:

Side setbacks

Ground Floor: 0.9m

First Floor: 1.5m

Rear Setbacks

Ground floor: 6.3 m

First floor: 8.4 m

Front setback

6.8m for ground floor and first floor. This is considered to be consistent with the predominant setbacks in Lynesta Avenue.

The proposed setbacks comply with DCP2011.

5.1 Residential Subdivision

The subject site has a street frontage of 20.115 m.

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

Clauses 92-94 of the Regulations outline the matters to be considered in the assessment of a development application. Clause 92 requires the consent authority to consider the provisions of AS 2601:1991 - *Demolition of Structures* when demolition of a building is involved. No conditions will be imposed in the Notice of Determination as this development application is subject to refusal.

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

proposal.

Clause 92 EP&A Regulation 2000 – Additional Matters

This development application is recommended for refusal. No conditions of consent will be imposed to ensure compliance with the standard.

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

The likely impacts resulting from the proposed development on the natural and built environments have been assessed and are considered to be inconsistent with the planning controls for the site.

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. A thorough assessment of the proposal's impacts on the natural and built environment has been undertaken. The subject site has been identified as not being suitable to accommodate Torrens Title subdivision and dual occupancy development, thus recommended for refusal.

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

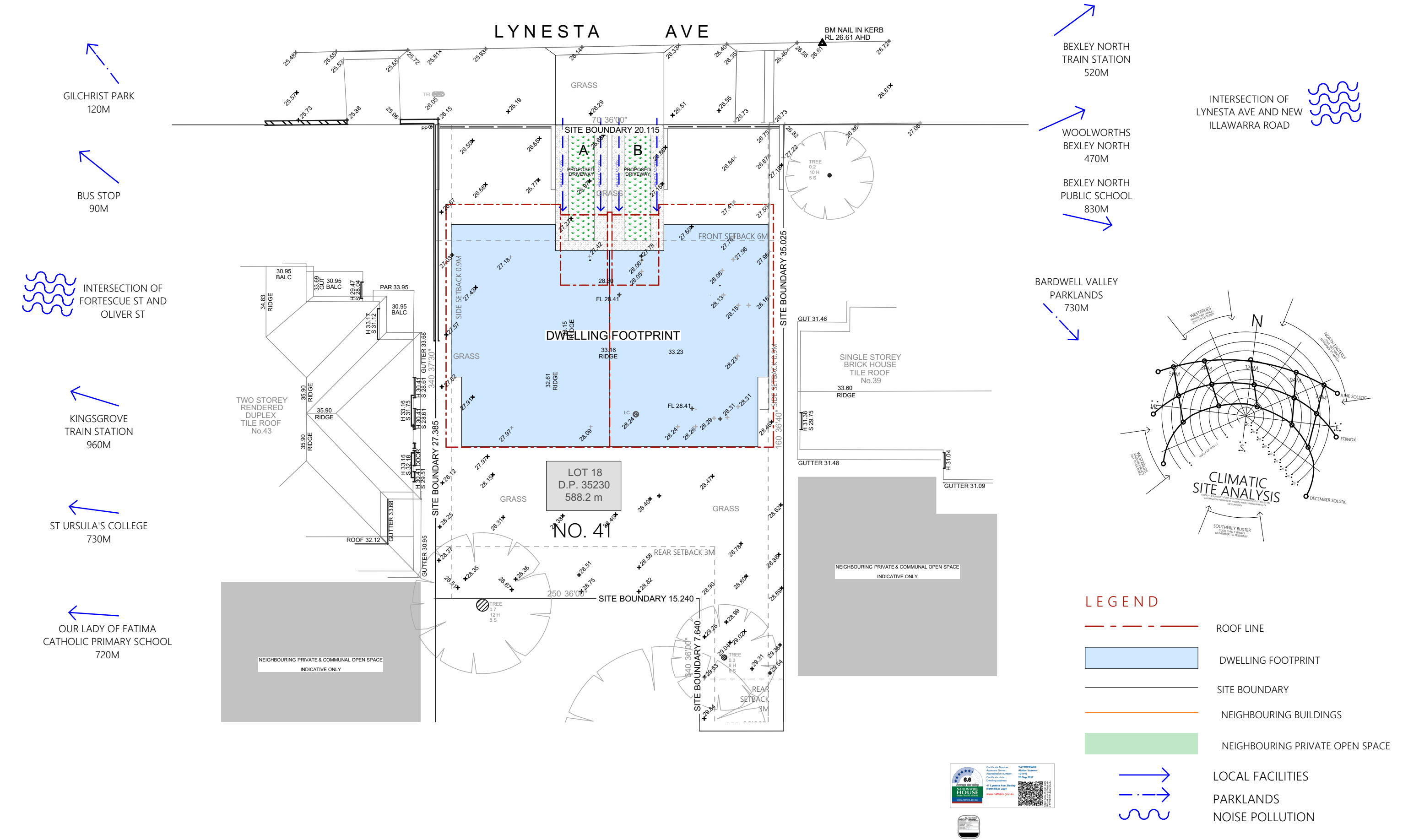
An opportunity exists to develop the site in its own right for a dwelling house development. This option is considered to be a reasonable and suitable planning outcome, consistent with the Rockdale Local Environmental Plan (RLEP 2011), and would enable the orderly development of the land in accordance with the objects of the EP&A Act 1979.

The proposal has been assessed against the relevant planning policies applying to the site having regard to the objectives of the controls. As demonstrated in the assessment of the development application, the proposal is not considered to be in public interest because it would permit a form of development on land not contemplated by the RLEP 2011. The proposal will create an undesirable precedent. For the reasons outlined in this report, the proposal is not considered to be in the public interest.

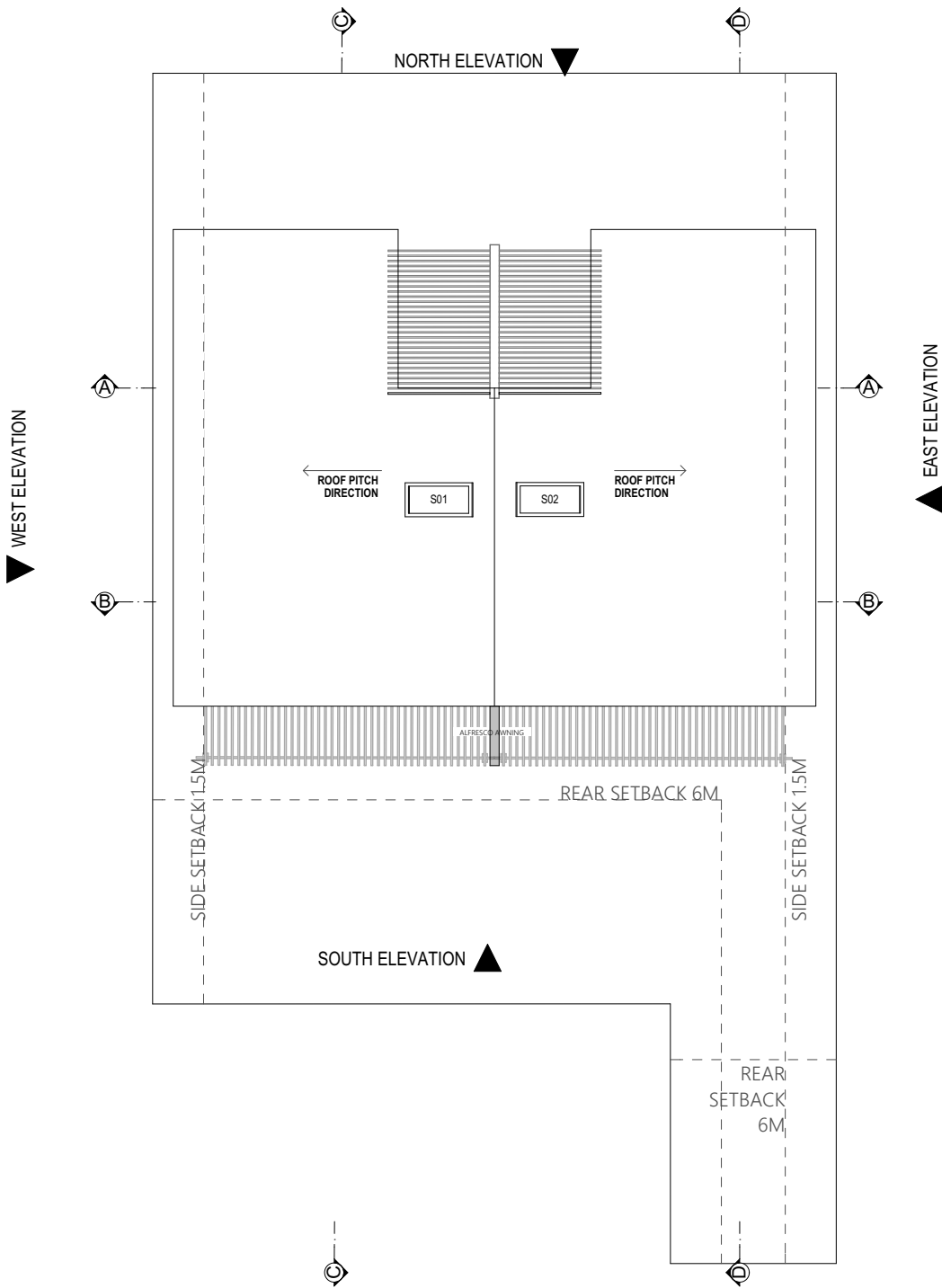
S94A Fixed development consent levies

Section 94A of the Environmental Planning and assessment Act 1979 (as amended) is not applicable to dual occupancy developments.

Schedule 1 - Draft Conditions of consent



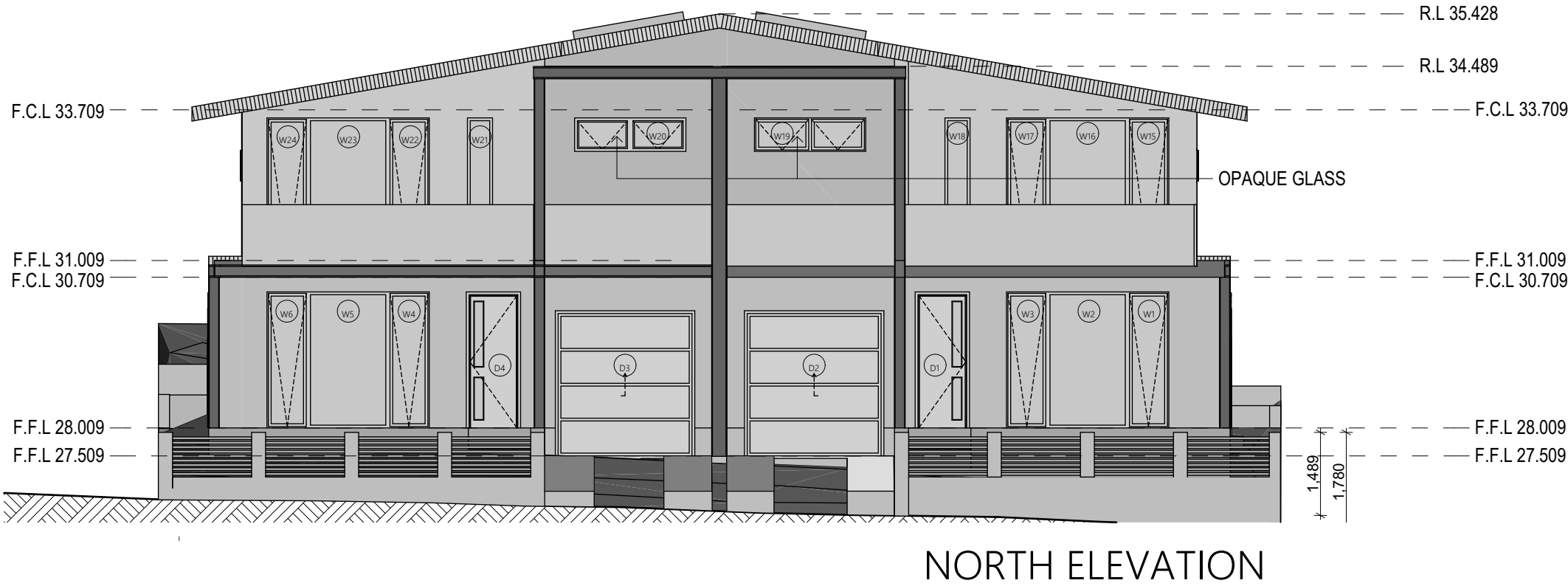
BASIX CERTIFICATE



| Summary of Thermal component of BASIX assessment for '41 Lynesta Avenue, Bexley North, NSW' | |
|--|---|
| For full detail of BASIX commitments refer to BASIX certificate | |
| The following Specifications are the basis of the thermal performance values achieved and subsequently indicated on the Assessor certificate. If they vary from drawings or other specifications these Specification shall take precedence. If only one specification is detailed for a building element, that specification must apply to all instances of that element for the whole project. If alternate specifications are detailed, the location and extent of the alternate specifications are detailed in the table below and / or clearly indicated on referenced documentation. | |
| Once the development is approved by the consent authority, these specifications will become a condition of consent and must be included in the built works. | |
| Building fabric | The external walls are Double Brick on ground floor with R2.0 insulation and Hebel wall on first floor with R2.5 insulation. Internal walls are stud type and are without insulation. |
| Floor construction | Ground floor slab is concrete slab on ground 'CSOG' & first floor slab is timber framed type. |
| Floor coverings | Floating Timber on living and bedroom areas of Ground floor, tiles in kitchen, laundry and powder room. Carpet on bedrooms, WIR and hallway areas of first floor and tiles on ensuites and bathrooms. No floor covering in garage |
| Windows | Window types and dimensions are as shown on the window schedule, Sliding windows are G. James make "GJA-013-25 A Type 131 Aluminium sliding Window SG 6EA" with U value of 4.44 and SHGC of 0.63, Fixed windows are G. James make "GJA-012-21 A Type 131 Series Fixed Window SG 6EA" or equivalent with U value of 4.23 and SHGC of 0.65 Sliding doors are G. James make "GJA-070-25 A Type 245" or equivalent with U value of 4.41 and SHGC of 0.6, Bi-fold doors are G. James make"GJA-090-21 A Type 477 Aluminium Bi-Fold Door SG 6EA" or equivalent with U value of 4.47 and SHGC of 0.55, Obscured type awning windows are G. James make "GJA-001-27 A Type 048 Series Awning Window SG 6EcAAB" or equivalent with U value of 4.89 and SHGC of 0.29 |
| Skylight | Double opal type, shaft is insulated with the same level of insulation as the ceiling. The shaft reflectance is 0.75 and the openability is 10% |
| Roof | All exposed roofs are to be metal sheet type and R1.0 Insulation under the roof, reflective sarking facing downwards, air space and R3.0 insulation on ceiling . Exposed roof on ground floor is with R1.0 insulation on the underside of the roof and reflective sarking facing downwards. |
| Color | Roof and external walls are medium color. Internal walls are Medium colored. |
| Ceiling insulation loss | All lights are surface mounted LED type. Hence no loss of ceiling insulation is allowed in the design and thermal calculations. The loss of insulation is due to the exhaust fans only and it is to be less than 180mmX180mm The exhaust fans are modeled for all toilets, ensuites, kitchen and laundry. |
| Lighting types | Surface mounted LED type. |
| Ventilation fans: | Kitchen, laundry, bathrooms and ensuites are all with exhaust fans. For full details please refer to BASIX report. |
| Notes: | 1. The dwelling design should allow for insulation to be installed in compliance with the National Construction Code Part 3.12.1.1. |
| | 2. The dwelling design should allow for the requirements of the National Construction Code Part 3.12.5 for the design, location and insulation of services to be met. |
| | 3. Windows to be sealed with weather stripped. |

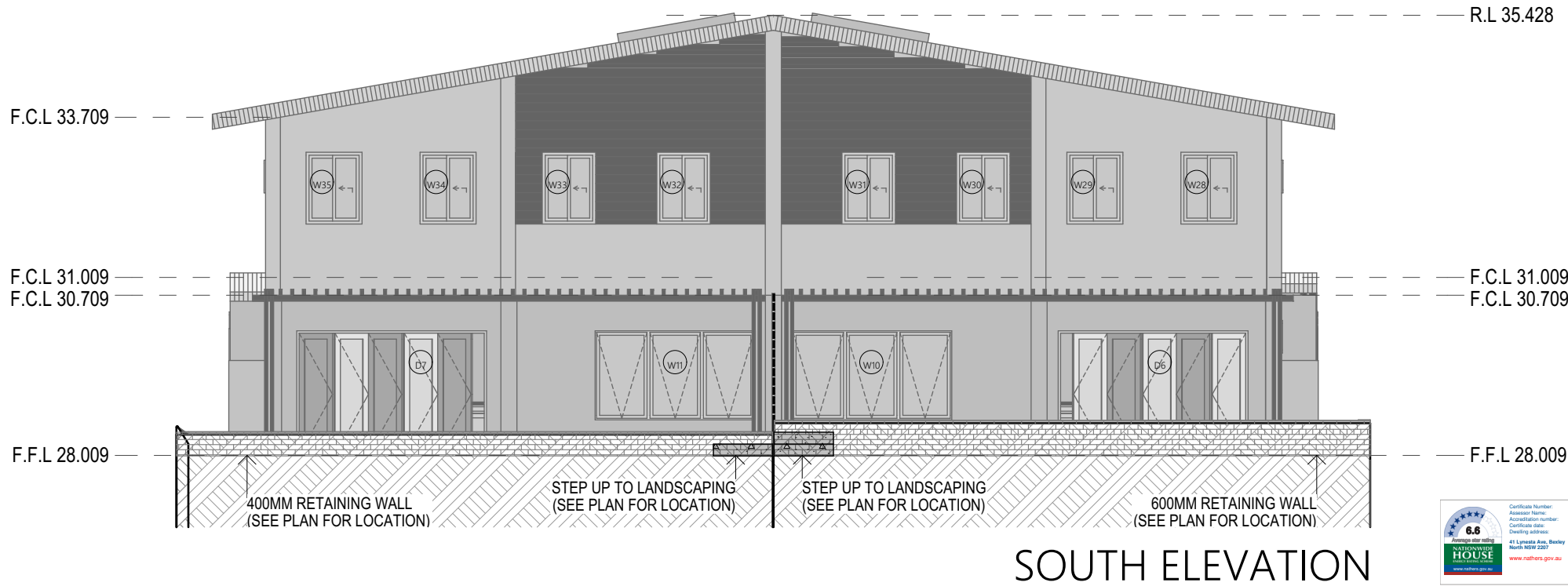


FOR D.A SUBMISSION



WINDOW SCHEDULE

| NUMBER | WIDTH X HEIGHT (mm) | ORIENTATION |
|--------|------------------------|-------------|
| W1 | 730 X 2437 | NORTH |
| W2 | 1450 X 2437 | NORTH |
| W3 | 730 X 2437 | NORTH |
| W4 | 730 X 2437 | NORTH |
| W5 | 1450 X 2437 | NORTH |
| W6 | 730 X 2437 | NORTH |
| W7 | 1800 X 1500 | EAST |
| W8 | 750 X944 | EAST |
| W9 | 1810 X 600 | EAST |
| W10 | 2700 X 1500 | SOUTH |
| W11 | 2700 X 1500 | SOUTH |
| W12 | 1810 X 600 | WEST |
| W13 | 750 X 944 | WEST |
| W14 | 1800 X 1500 | WEST |
| W15 | 730 X 2555 | NORTH |
| W16 | 1450 X 2555 | NORTH |
| W17 | 730 X 2555 | NORTH |
| W18 | 450 X 2155 | NORTH |
| W19 | 1995 X 600 | NORTH |
| W20 | 1995 X 600 | NORTH |
| W21 | 450 X2155 | NORTH |
| W22 | 730 X 2555 | NORTH |
| W23 | 1450 X 2555 | NORTH |
| W24 | 730 X 2555 | NORTH |
| W25 | 1800 X 600 | EAST |
| W26 | 1700 X 600 | EAST |
| W27 | 1700 X 600 | EAST |
| W28 | 944 X 1210 | SOUTH |
| W29 | 944 X 1210 | SOUTH |
| W30 | 900 X 1210 | SOUTH |
| W31 | 900 X 1210 | SOUTH |
| W32 | 900 X 1210 | SOUTH |
| W33 | 900 X 1210 | SOUTH |
| W34 | 944 X 1210 | SOUTH |
| W35 | 944 X 1210 | SOUTH |
| W36 | 1800 X 600 | WEST |
| W37 | 1700 X 600 | WEST |
| W38 | 1800 X 600 | WEST |
| D1 | 900 X 2400 | NORTH |
| D2 | 2500 X 2600 | NORTH |
| D3 | 2500 X 2600 | NORTH |
| D4 | 900 X 2400 | NORTH |
| D5 | 900 X 2100 | EAST |
| D6 | 3200 X 2100 | SOUTH |
| D7 | 3200 X 2100 | SOUTH |
| D8 | 900 X 2100 | WEST |
| D9 | 1500 X 2100 | EAST |
| D10 | 1500 X 2100 | WEST |
| S1 | 1000 X 2000 | - |
| S2 | 1000 X 2000 | - |



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Figured dimensions to be used in preference to scaled dimensions.

MAI DESIGNS PTY LTD

278
15A BELMORE STREET
BURWOOD 2134

ph: 8385 6145
e: info@maidesigns.com.au

| ISSUE | AMEDMENTS | DATE |
|-------|----------------|------------|
| A-E | PRELIMINARY | 7/09/2017 |
| F | D.A SUBMISSION | 11/09/2017 |
| | | |
| | | |

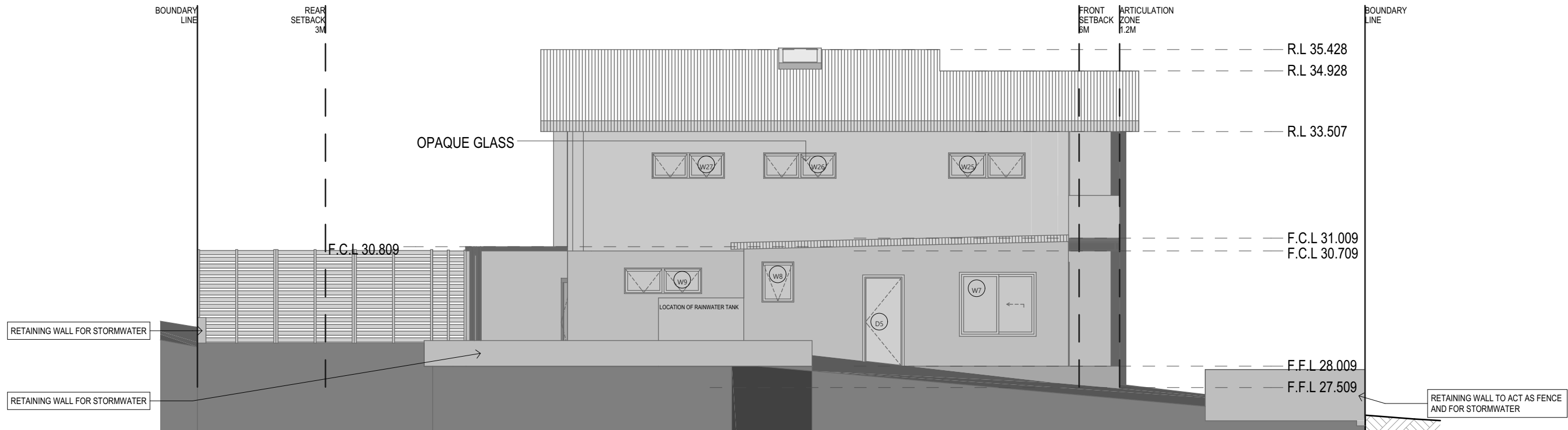
PROJECT
SEMI-DETACHED DWELLINGS

41
LYNESTA AVENUE
BEXLEY NORTH

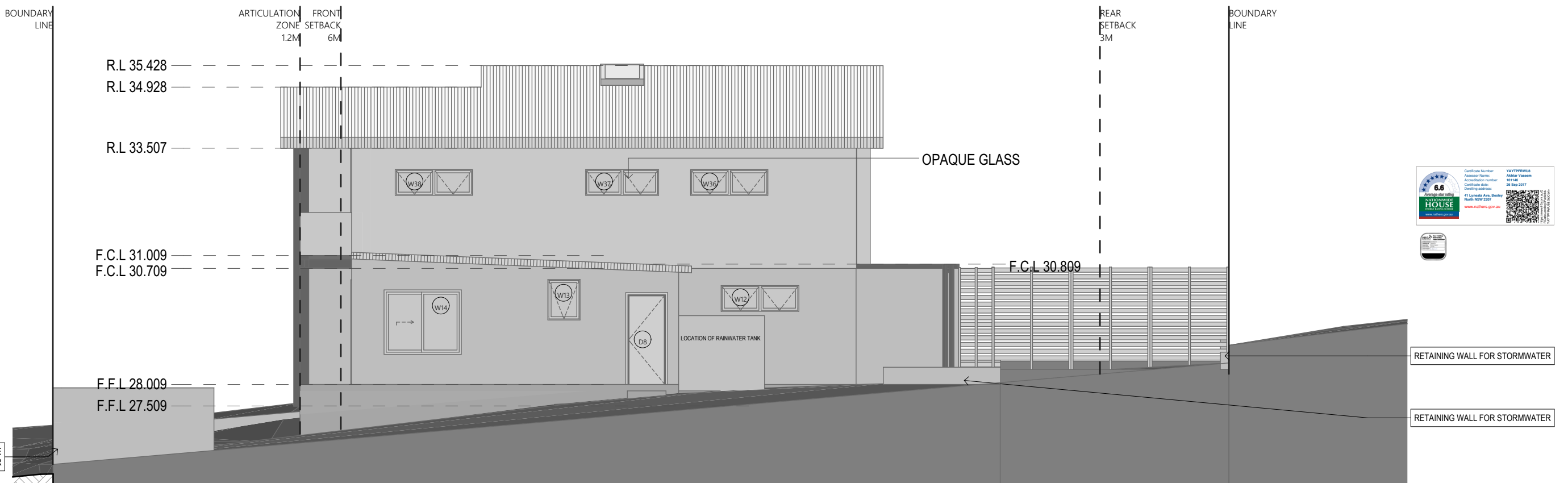
THANH QUACH

FOR D.A SUBMISSION

| TITLE | | | DRAWING NO. |
|--------------------------|---------|------------|-------------|
| NORTH & SOUTH ELEVATIONS | | | |
| SCALE | 1:100 | A3 | |
| DRAWN | CHECKED | DATE | |
| C.L. | D.M. | 11/09/2017 | |
| | | | CD-06 |




EAST ELEVATION



WEST ELEVATION

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278
15A BELMORE STREET
BURWOOD 2134

ph: 6385 6145
e: info@maidesigns.com.au

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| ISSUE | AMEDMENTS | DATE |
|-------|----------------|------------|
| A-E | PRELIMINARY | 7/09/2017 |
| F | D.A SUBMISSION | 11/09/2017 |

PROJECT

SEMI-DETACHED DWELLINGS

41
LYNESTA AVENUE
BEXLEY NORTH

SCALE 1:100 A3

| DRAWN | CHECKED | DATE |
|-------|---------|------------|
| C.L. | D.M. | 11/09/2017 |

DRAWING NO.

CD-07

TITLE

EAST & WEST ELEVATIONS

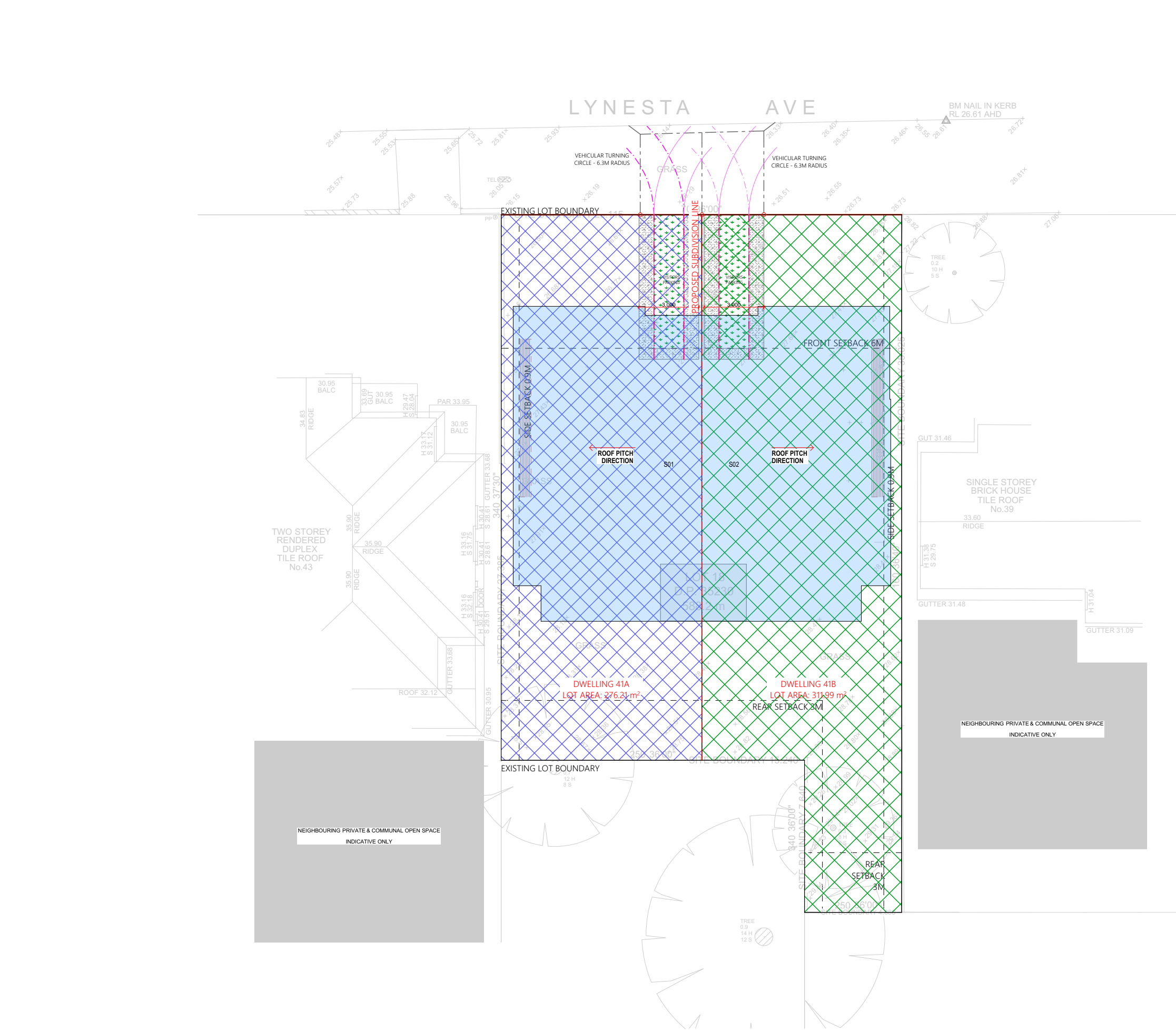
THANH QUACH



Professional Engineer (PE)
No. 151148
State of NSW, Australia



Professional Engineer (PE)
No. 151148
State of NSW, Australia



| | |
|--------------|------------------------------------|
| SITE AREA: | |
| DWELLING 41A | 276.21m |
| DWELLING 41B | 311.99m |
| TOTAL | 588.20m |
| LEGEND: | |
| | EXISTING LOT BOUNDARY |
| | SUBDIVISION LINE |
| | PROPOSED DWELLING |
| | PROPOSED LOT BOUNDARY (DWELLING A) |
| | PROPOSED LOT BOUNDARY (DWELLING B) |

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278 15A BELMORE STREET BURWOOD 2134

ph: 8385 6145
e: info@maidesigns.com.au

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| A-E | PRELIMINARY | 7/09/2017 |
| F | D.A SUBMISSION | 11/09/2017 |
| | | |
| | | |
| | | |

PROJECT

SEMI-DETACHED DWELLINGS

41

LYNESTA AVENUE

BEXLEY NORTH

THANH QUACH

| | | | |
|--------------------|---------|------------|--------------|
| TITLE | | | |
| TORRENS TITLE PLAN | | | |
| SCALE | 1:200 | A3 | DRAWING NO. |
| DRAWN | CHECKED | DATE | CD-17 |
| C.L. | D.M. | 11/09/2017 | |

FOR D.A SUBMISSION



41 LYNESTA AVENUE BEXLEY NORTH

PROPOSED DEMOLITION OF EXISTING DWELLING,
CONSTRUCTION OF TWO X TWO STOREY SEMI-DETACHED
DWELLINGS AND TORRENS TITLE SUBDIVISION



DECEMBER 2017

**CLAUSE 4.6 EXCEPTION TO DEVELOPMENT
STANDARD STATEMENT**





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CLAUSE 4.6 STATEMENT 41 LYNESTA AVENUE BEXLEY NORTH

15 December 2017

Author/s:

EG Property Group Pty Ltd

Diana Brajuha, Head Planner, EG

BTP (Hons), M Pro Dev, MPIA

Prepared on behalf of: Mr Thanh Quach

Prepared for:

Bayside Council

Project:

Development Application for the demolition of existing dwelling, construction of two semi-detached dwellings and Torrens Title subdivision.

| Report Stage | Date | Author | Reviewed |
|---------------------|-------------|---------------|-----------------|
| Version 1 | 05/09/2017 | DB | SG |
| Final | 19/09/2017 | DB | CH |
| Updated | 15/12/2017 | DB | DB |

1. Introduction

This Clause 4.6 Exception to a Development Standard is submitted to Bayside Council in support of a Development Application for the proposed demolition of the existing dwelling, construction of two x two-storey semi-detached dwellings and subsequent Torrens Title subdivision at 41 Lynesta Avenue Bexley North.

The Standard Instrument Local Environmental Plan contains its own variation clause (Clause 4.6) to allow an appropriate degree of flexibility to particular development and to achieve improved outcomes for and from development by allowing development standards to be varied. Given that *Rockdale Local Environmental Plan 2011 (RLEP 2011)* was prepared under the Standard Instrument, an objection to vary is made under Clause 4.6 of *RLEP 2011*. *RLEP 2011* was gazetted on 5 December 2011.

This Statement has been prepared in accordance with “Varying Development Standards- A Guide” prepared by the then Department of Planning and Infrastructure (now Department of Planning and Environment), dated August 2011, and has incorporated as relevant Land and Environment Court judgements which have established a series of questions to be addressed in variations lodged under Clause 4.6. The following judgements are relevant:

1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
2. Wehbe v Pitwater Council [2007] NSWLEC 827
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (“Four2Five No.1”)
4. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (“Four2Five No.2”)
5. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 (“Four2FiveNo.3”)
6. Micaul Holdings Pty Limited v Randwick Council (2015) NSWLEC 1386
7. Randwick City Council v Micaul Holdings Pty Ltd (2016) NSW LEC 7

This Statement should be read in conjunction with the submitted Statement of Environmental Effects prepared by EG Property Group dated September 2017.

2. Development Standard to be Varied

2.1 Clause 4.2A of Rockdale Local Environmental Plan 2011

The Environmental Planning Instrument to which this objection relates is *RLEP 2011*.

The development standard to be varied is the Minimum Lot Size contained in Clause 4.2A of *RLEP 2011*, as semi-detached dwellings are proposed. The Clause is as follows:

(1) *The objectives of this clause are as follows:*

4.2A *Minimum lot size for attached and semi-detached dwellings in Zone R2*

(1) The objective of this clause is to ensure that the size of lots for attached dwellings or semi-detached dwellings on land in Zone R2 Low Density Residential Zone is consistent with the zoning objective of providing for the housing needs of the community within a low density residential environment.

(2) Development consent must not be granted to the erection of an attached dwelling or a semi-detached dwelling on a lot comprising land in Zone R2 Low Density Residential unless the area of the lot is at least 350 square metres.

(3) A reference in this clause to a lot does not include a reference to any lot comprising common property (within the meaning of the Strata Schemes (Freehold Development) Act 1973) or association property (within the meaning of the Community Land Development Act 1989).

(Emphasis added)

The subject site is located within the R2-Low Density Residential Zone and given that semi-detached dwellings are proposed, Clause 4.2A(2) of *RLEP 2011* requires that the area of the lot be at least 350 square metres.

The subject site has an area of 588.2 m² and after subdivision, will result in two allotments:

- Lot 41a- 275.32 m²
- Lot 41b- 312.63 m²

The extent of the variances as percentages respectively are:

- Lot 41a- 21.4 % (given the unique lot configuration)
- Lot 41b- 10.7 %

The R2- Low Density Residential Zone permits the following range of residential uses which includes Attached Dwellings, Dual Occupancies, Dwelling Houses, Semi-detached Dwellings and Seniors Housing.

The subject site is located within an established residential area. The predominant built-form in Lynesta Avenue and in the vicinity of the site is characterised by single and double-storey houses including several semi-detached dwellings, consistent with the type of residential development permissible within the R2- Low Density Residential Zone.

The majority of dwellings are located on allotments varying in size from 373 m² to 420 m² with semi-detached development situated on 272 m² and 378 m² sized allotments. There are 46 properties in Lynesta Avenue, of which 15 properties are two-storey (33%). The proposed development is therefore consistent with the existing built form of Lynesta Avenue. It fully complies with all development controls applicable to the site, apart from the Minimum Lot Size control including Floor Space Ratio, Height, Building Setbacks, Open Space and Landscape Requirements.

A development that strictly complied with the Minimum Lot Size would not otherwise be discernible in the streetscape. The non-compliance is an abstract notion as the lack of depth across the entire rear/southern boundary can not be appreciated from the street, and would not be noticed other than on paper. The development is otherwise fully compliant with other controls which is a tangible measure of consistency of built form within the R2- Low Density Residential Zone streetscape.



2.2 Development Standards

“Development Standards” has the following definition under Section 4(1) of the *Environmental Planning and Assessment Act, 1979 (EP&A Act, 1979)*:

“Development standards means the provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*
- (m) the provision of services, facilities and amenities demanded by development,*
- (n) the emission of pollution and means for its prevention or control or mitigation, and*
- (o) such other matters as may be prescribed”.*

As this Clause 4.6 objection relates to a departure from the below numerical standard:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*

it is considered that Clause 4.2A of *RLEP 2011* is a development standard and not a 'prohibition' in respect to development, thereby requiring a variation pursuant to Clause 4.6 of the *RLEP 2011* to enable the granting of consent to the development application.

2.3 Clause 4.6 Framework

The objective of Clause 4.6 is to allow flexibility in the application of numeric development standards. The relevant objectives of Clause 4.6(1) of *RLEP 2011* are:

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

Clause 4.6(2) states that:

- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

(Onus on Applicant)

Clause 4.6(3) states that:

- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

(Satisfaction of Consent Authority)

Clause 4.6(4) states that:

- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the Consent Authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

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

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

It is up to the discretion of the Consent Authority, in this case Bayside Council, to be satisfied with this written request made pursuant to Clause 4.6(ii) and to form a view with respect to the Public Interest, consistent with the objectives of the standard and the objectives of the zone. The Consent Authority typically has assumed concurrence of the Secretary.

It is intended that this written request will satisfy Bayside Council in formulating its views pursuant to Clause 4.6(4)(a)(i) and (ii).

3. Justification for Contravention of Development Standard

3.1 Clause 4.6(3)(a): Compliance with the Development Standard is unreasonable and unnecessary in the circumstances of the case

The NSW Land and Environment Court established a series of questions to be addressed in variations to development standards through the judgement of Justice Lloyd in *Winten Property Group v North Sydney Council* [2001] NSW LEC 46 which was later rephrased by Chief Justice Preston in *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*). In *Wehbe*, CJ Preston expressed the view that there are five different ways (“5 Part Test”) in which an objection to a development standard might be shown as unreasonable *or* unnecessary and is therefore well founded.

Additional principles were established in the decision by Commissioner Pearson in *Four2Five Pty Limited v Ashfield Council* 2015 NSW LEC 248 (*Four2Five Pty Limited No.3*), which was upheld by Justice Pain on appeal as well as in a decision of the Chief Judge of the NSW Land and Environment Court in an appeal against a decision of Commissioner Morris in *Micaul Holdings Pty Limited v Randwick Council* [NSW LEC 7] (*Micaul*).

In the *Four2Five Pty Ltd* case, Commissioner Pearson found that due to the consistency in language used in both *State Environmental Planning Policy (SEPP 1)- Development Standards* and Clause 4.6, that when determining whether compliance with a development standard is unreasonable or unnecessary under Clause 4.6 that the consideration provided in the *Wehbe* case (which applied to *SEPP 1- Development Standards*) may be of assistance. Note that a key principle that resulted from the *Four2Five Pty Ltd* case was whether there are sufficient environmental planning grounds to the circumstances of the proposed development to the site, and that it is necessary to demonstrate that there is something more than achieving the objective of the standard.

The 5 Part Test established in the *Wehbe* case is as follows:

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard.*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.*
4. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.*

5. *The compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of that particular land. That is, that particular parcel of land should not have been included in the zone.*

More recently in the Micaul Holdings case (which is a decision of the Chief Judge of the Land and Environment Court) in an appeal against a decision of Commissioner Morris) discerned that Clause 4.6 imposed four (4) tests:

1. *That compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case;*
2. *There are sufficient environmental planning grounds to justify contravening the development standard;*
3. *That the applicant's written request has adequately addressed the matters required to be demonstrated by sub-clause (3) and;*
4. *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 with the zone in which the development is proposed to be carried out. In addition, satisfaction of those matters that must be granted by the Secretary in determining whether concurrence should be granted is required.*

While the Miccaul judgment did not directly overturn the **Four2Five Pty Limited** case an important issue emerged. The Chief Judge noted that one of the Consent Authority's obligations is to be satisfied that *"the applicant's written request has adequately addressed...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard."* He held that this means:

"The Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".

(emphasis added)

The effect of the Miccaul judgement lessens the force of the Court's earlier judgement in Four2Five and demonstrates discretion at work.

Consistent with the decision in Four2Five, in *Moskovich v Waverley Council* [2016] NSWLEC 1015, the Commissioner agreed that the Public Interest Test (in Clause 4.6(4)(a)(ii)) is different to the "unreasonable or unnecessary in the circumstances of the case" test (in Clause 4.6(3)(a)). The Court said that *"the latter, being more onerous,*

would require additional considerations such as the matters outlined by Preston CJ in *Wehbe* at [70-76]”.

In light of the tests established in relevant case law, the following section of the report (Section 3.2) addresses the matters in Clause 4.6(3)(a) and in particular how the objectives of the development standard are achieved notwithstanding the non-compliance with the numerical control, consistent with the first test as outlined in the *Wehbe* case.

3.2 The objectives of the Development Standard are achieved notwithstanding non-compliance with the standard

The following provides a response to the assumed objectives of Clause 4.2A within *RLEP 2011*.

(1) The objective of this clause is to ensure that the size of lots for attached dwellings or semi-detached dwellings on land in Zone R2 Low Density Residential is consistent with the zoning objective of providing for the housing needs of the community within a low density residential environment.

(2) Development consent must not be granted to the erection of an attached dwelling or a semi-detached dwelling on a lot comprising land in Zone R2 Low Density Residential unless the area of the lot is at least 350 square metres.

(3) A reference in this clause to a lot does not include a reference to any lot comprising common property (within the meaning of the Strata Schemes (Freehold Development) Act 1973) or association property (within the meaning of the Community Land Development Act 1989).

The proposed development is for two semi-detached dwellings which is a permissible use within the R2 Low-Density Residential zone. This is a type of development that is contemplated by the zoning and the objective of Clause 4.2A except that the resulting lots will be less than 350 square metres. Nonetheless, the proposed development is consistent with the zoning objective of providing for the housing needs of the community within a low-density residential environment. The proposed development is entirely appropriate and consistent with the objective. The proposal also encourages diversity in lot sizes and built form, and provides increased opportunity for housing affordability.

It would be unreasonable and unnecessary to require strict compliance with the development standard as the site is not unduly constrained by its size or shape to accommodate the proposed development which is permissible and meets the objectives of the site. Note that Clause 4.1A of *RLEP 2011* is not relevant to semi-detached dwellings.

The built form is provided as part of the Development Application as it allows for an assessment to be made of whether the proposed development is consistent with a Low Density Residential Zone despite the non-compliance. In this case it is clear that the key

planning controls applicable to the proposed use and the zone (building height, setbacks, minimum open space and landscape requirements) are all fully complied with.

Low density is also a matter of perception viewed from the street and the architectural plans accord with the visual characteristics of “low density” as analysed at Section 2.1

3.3 Clause 4.6(3)(b): Environmental Planning Grounds to justify contravening the Development Standard

There are several environmental planning grounds to justify a flexible approach to the application of the Minimum Lot Size development standard contained in Clause 4.2(a) of *RLEP 2011*, as follows:

- The existing area supports a varied outcome of allotments and built form and the proposed development is consistent with an established precedent in the immediate vicinity of the site, as well as in the surrounding Bexley North locality. There are two semi-detached dwellings already approved and built in Lynesta Avenue:
 - Development at 43 and 43A Lynesta Avenue- two semi-detached dwellings on 278 m² allotments.
 - Development at 19 and 19A Lynesta Avenue- two semi-detached dwellings on 273 m² allotments.

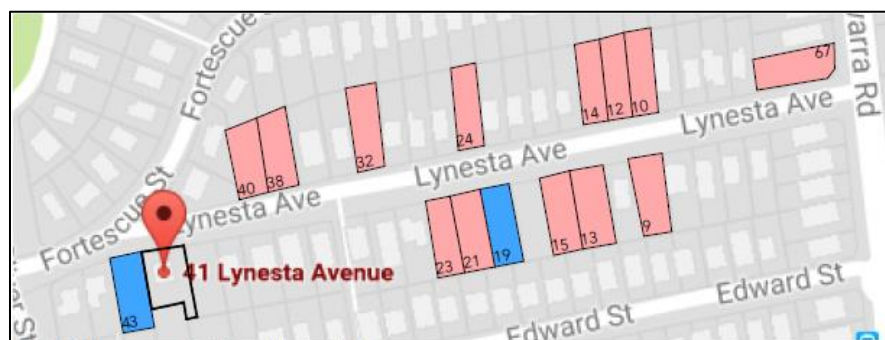
A streetscape analysis coupled with an investigation of existing semi-detached dwellings in the area, has revealed that there are ten such developments located in a 550 m radius of the subject site. These occurrences are significant in the landscape by quantum and readily recognised as part of the streetscape. The examples are shown in an Analysis prepared by Mai Designs and submitted as part of this development application, refer to **Figure 10** below.



Source: Mai Designs

Figure 10- Semi-detached development located within 550m radius of the site.

- The proposed development is compatible with the existing and evolving streetscape character of the area, one which contains two-storey dwellings noting that 15 properties out of 46 properties (33%) in Lynesta Avenue are two storey. Refer to Figure 11 below.

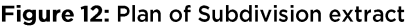


Source: Mai Designs



Figure 11- Semi-detached development located within 550m radius of the site.

- The subject site has a land parcel shape which is an anomaly when considered in the context of the surrounding subdivision pattern, as well as in the broader Bexley North locality. The surrounding subdivision pattern comprises rectangular shaped allotments of consistent depth with varied widths. The subject site is irregular in shape in that the south-east portion of the site has historically been truncated and forms part of the allotment directly to the south at 47 Edward Street. If the truncated portion of land was applied to the site area (refer to **Figure 12** and **Figure 13**), the resultant allotment would be 705 m² thereby meeting the numeric requirement of 350 m² for each semi-detached dwelling.
- Subdivision patterns and density evolve over time. An analysis of 57 allotments in the area bound by Lynesta Avenue, Edward Street, Oliver Street and New Illawarra Road, shows that the prevalent lot size is between 373 m² and 420 m², with examples of smaller lot sizes of 273 m² which occupy dual occupancy development. In the general vicinity there are examples of dual occupancy development on smaller allotments than the subject allotment. The proposed development is situated on proposed allotments of 313 m² and 276 m² which are larger or consistent in size with the property to its immediate west at 43 Lynesta Avenue which supports semi-detached dwellings on 278 m² allotments as well as the property at 19 and 19A Lynesta Avenue on 273 m² allotments.



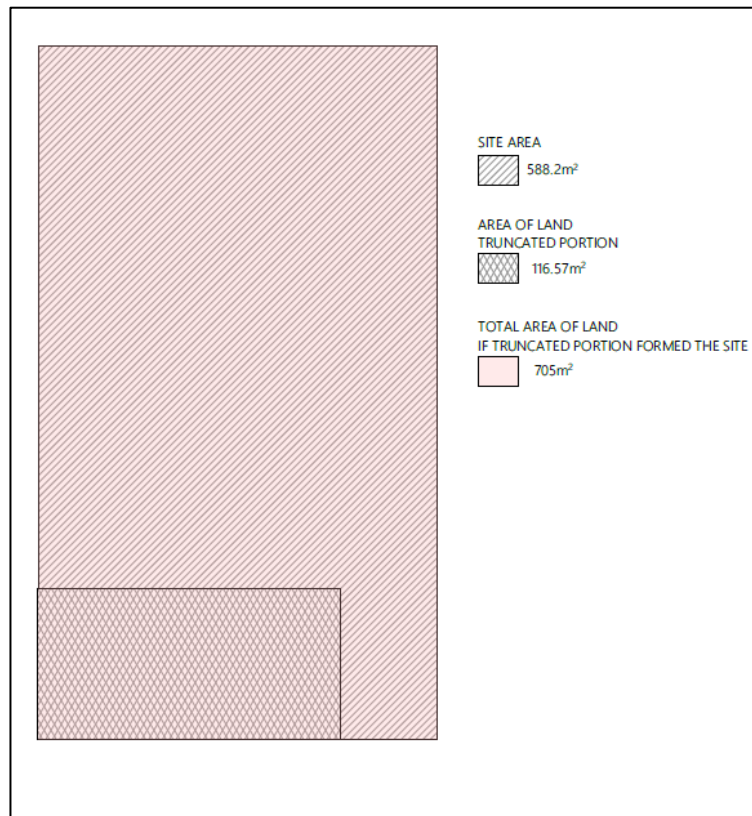


Figure 13: Land Parcel area with truncated part Source: Mai Designs

- The subject site has a frontage of 20.12 m, which is significantly wider than other properties in Lynesta Avenue which have an average frontage of between 12.5 m to 14.6 m. It can readily accommodate the development of semi-detached dwellings. Arguably the site accommodates semi-detached dwellings development better than on narrower allotments on Lynesta Avenue (as in the case of 19/19A and 43/43A Lynesta Avenue which have frontages of approximately 15 m). The wider frontage of the subject site ensures an appropriate streetscape outcome particularly as the design of the dwellings and landscaping is of high quality in terms of design and presentation.

It is noted that the majority of properties on the northern side of Lynesta Avenue (numbered from 2 to 30) have a consistent width of 12.19 m, while the southern side of Lynesta Avenue provides a greater variety of allotment widths. Refer to **Table 1** and **Table 2** below.

Table 1- Width of properties on the northern side of Lynesta Avenue

| Width of properties on the northern side | | | |
|--|---------|----|---------|
| 2 | 12.19 m | 22 | 12.19 m |
| 4 | 12.19 m | 24 | 12.19 m |
| 6 | 12.19 m | 26 | 12.19 m |
| 8 | 12.19 m | 28 | 12.19 m |
| 10 | 12.19 m | 30 | 12.19 m |
| 12 | 12.19 m | 32 | 13.54 m |
| 14 | 12.19 m | 34 | 13.53 m |
| 16 | 12.19 m | 36 | 15.57 m |
| 18 | 12.19 m | 38 | 14.35 m |
| 20 | 12.19 m | 40 | 15.27 m |

Table 2- Width of properties on the southern side of Lynesta Avenue

| Width of properties on the southern side | | | |
|--|---------|----|---------|
| 5 | 12.8 m | 27 | 13.82 m |
| 7 | 14.02 m | 29 | 13.11 m |
| 9 | 16.46 m | 31 | 12.8 m |
| 11 | 13.11 m | 33 | 16.15 m |
| 13 | 15.85 m | 35 | 16.15 m |
| 15 | 15.28 m | 37 | 12.5 m |
| 17 | 14.63 m | 39 | 15.24 m |
| 19 | 14.63 m | 41 | 20.12 m |
| 21 | 14.63 m | 43 | 15.24 m |
| 23 | 12.8 m | 45 | 15.39 m |
| 25 | 15.34 m | 47 | 12.52 m |

- Where a built form is determined to be an appropriate outcome for the site, subdivision is a secondary consideration. The proposed development complies with the height, bulk, minimum frontage, setbacks, landscape and open space controls contained in *RDCP 2011*. 46% of the subject site is built upon.

- The allotment is a suitable size and shape to support the semi-detached dwellings and the landscape area provided exceeds Council's minimum requirements by 21% (46% is provided instead of the required 25%). This results in a compensating effect when considered against the site area shortfall. The landscape treatment to the street is also of high quality and will result in a high quality streetscape. Refer to the analysis prepared by Mai Designs and submitted as part of this development application.
- A development that strictly complied with the minimum lot size would not be discernible in the streetscape. The lack of depth across the entire rear/southern boundary could not be appreciated from the street. Likewise the numeric non-compliance would not be comprehended other than on paper. The non-compliance is therefore an abstract notion, and in this instance compliance is unnecessary and unreasonable particularly as a highly-compliant physical development will be achieved at the Site which is a more tangible measure of acceptability within the streetscape.
- The proposed development remains consistent with the objectives of the R2-Low Density Residential zone despite the numerical non-compliance with the minimum lot size.
- A compliant proposal, one that would have 350 m² allotments would produce a poorer streetscape outcome than the proposed development application as the resultant building would be larger and bulkier (complying with Council's planning controls) and would have a more dominant visual impact in the street.
- The proposed development will not result in significant adverse impacts upon the locality or adjacent residential properties by way of overshadowing, view loss, privacy, bulk and scale regardless of whether the land subdivided or not. In this regard strict adherence to the minimum lot size serves no planning purpose, where it is in this case, a direct function of an acceptable built form.
- The proposed development does not result in the loss of public or private views.

There would be no purpose served if a variation cannot be accommodated under these circumstances. The site is clearly capable of supporting the intended development being fully compliant with all other relevant development standards and controls.

3.4 Clause 4.6(4)(a)(ii): In the Public Interest because it is consistent with the Objectives of the Zone and Development Standard

3.41 Compliance with the Objectives of the Development Standard

The proposed development is consistent with the objectives of the Minimum Lot Size standard, for the reasons set out in Section 3.2 of the report. As noted in Section 3.2 of this Report, the proposed development is for semi-detached dwellings which is a permissible use within the R2- Low Density Residential Zone. The proposed development is consistent with the objectives of the development standard as it provides for the housing needs of the community within a low density residential environment.

3.42 Consistency with the Objectives of the Zone

Objectives of zone

- *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 will satisfy the zone objectives for the following reasons:

- The proposed development is envisaged within the zone as demonstrated through its permissibility. The development will provide for the housing needs of the community and is therefore consistent with the objective.
- The second objective is not relevant as it relates to non-residential development uses that are permissible within the zone.
- The proposed development minimizes impact on the character and amenity of the area as it is fully compliant with the height, floor space ratio and setback controls, consistent with relevant development controls and desired character. The building design will result in a high quality development that is consistent with the emerging character of Lynesta Avenue. The proposed development will not result in unreasonable amenity impacts.
- The proposed development represents an efficient and appropriate use of land that is compliant with the environmental capacity of the site and its R2- Low Density Residential zoning.

4. Other Matters for Consideration

Pursuant to Clause 4.6 (5) of *RLEP 2011*, in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (a) whether non-compliance with the development standard raises any matter of significance for State or regional planning;*
- (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument; and*
- (c) Any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are dressed in detail below.

4.1. Clause 4.6 (5)(a): Whether contravention of the Development Standard raises any matter of significance for State or Regional Environmental Planning

The numeric non-compliance with Clause 4.2(A) of *RLEP 2011* does not raise any matter of significance for State and Regional Planning, nor does it conflict with any State Planning Policies or Ministerial Directions.

4.2. Clause 4.6 (5)(b): The Public Benefit of maintaining the Development Standard

The public benefit is best served by the proposed development complying with the objectives of the Minimum Lot Size control rather than strictly complying with the numeric standard of the control.

The public benefits of the proposed departure from the Minimum Lot Size control can be summarised as follows:

- The social and economic welfare of the community would not be promoted as it would prevent the construction of new high-quality housing;
- The co-ordination of the orderly and economic use and development of land would be discouraged as it would hinder the development of a well-designed modern semi-detached dwellings on a suitable sized allotment, with access to existing services, transport and infrastructure.
- The proposed development would result in public benefit through positive urban design outcomes, the provision of additional housing stock with good residential amenity within walking distance to good public transport.

4.3. Clause 4.6(5)(c): Any other matters required to be taken into consideration by the Secretary before granting concurrence

There are no other matters that require consideration by the Secretary.

The Five Part Test of the Land and Environment Court Matters for Consideration states that the Consent Authority must be of the opinion that granting consent to the development application would be consistent with the Policy's aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the *EP&A Act, 1979*.

- (a) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment, and*
- (b) the promotion and co-ordination of the orderly and economic use and development of land.*

This is clearly the case for 41 Lynesta Avenue Bexley North.

5. Conclusion

This Clause 4.6 Exception to a Development Standard has demonstrated that it would be unreasonable for strict compliance with the Minimum Lot Size development standard contained in Clause 4.2A of *RLEP 2011* to be enforced in this particular case as there are sufficient planning grounds to justify contravening the standard. The proposed development satisfies the stated and underlying objectives of the Minimum Lot Size standard and the broader zoning objectives for the locality such that:

- The proposed development for semi-detached dwellings is permissible and is consistent with the objectives of the R2- Low-Density Residential Zone;
- The proposed development is consistent with an established precedent of semi-detached dwellings in the immediate vicinity of the site and is compatible with the character of the area and is consistent with the objective of the Clause 4.2(a) Minimum Lot Size standard without impacting upon the amenity of the area;
- The proposal is consistent with all objectives, provisions and performance criteria contained in the *RDCP 2011*.
- The subject site has a land parcel shape which is an anomaly when considered in the context of the surrounding subdivision pattern, as well as in the broader Bexley North locality. The south-east portion of the site has historically been truncated and forms part of the allotment directly to the south at 47 Edward Street. If the truncated portion of land were applied to the site area the resultant allotment would be 705 m² which would meet the numeric requirement of 350m² for each semi-detached dwelling. The lack of depth across the whole rear boundary would not be comprehended from the street;
- The site has a wide frontage of 20.12 m, which is significantly wider than the vast majority, if not all of the remaining properties in Lynesta Avenue which have an average frontage of 12.5 m to 14 m and can readily accommodate the development of semi-detached dwellings. The wider frontage ensures an appropriate streetscape outcome particularly as the design of the dwellings and landscaping is of high quality in terms of design and presentation.
- Strict adherence to the development standard will not result in a better planning outcome for the land as it will prevent the logical subdivision of an otherwise fully compliant and meritorious development application;
- The proposed development is of high quality development that will add visual interest to the streetscape and provides a high level of amenity for its occupants without adversely compromising the amenity of adjoining properties; and



- The proposed development on balance does not result in adverse impacts on the surrounding development.

REZONE REFURBISH REPOSITION REDEVELOP RESONATE

SYDNEY

Governor Phillip Tower
Level 21, 1 Farrer Place
Sydney NSW 2000
Australia

MELBOURNE

Kurrajong House
Suite 2, Level 7
175 Collins Street
Melbourne VIC 3000
Australia

T. +61 2 9220 7000
E. contact@eg.com.au
www.eg.com.au

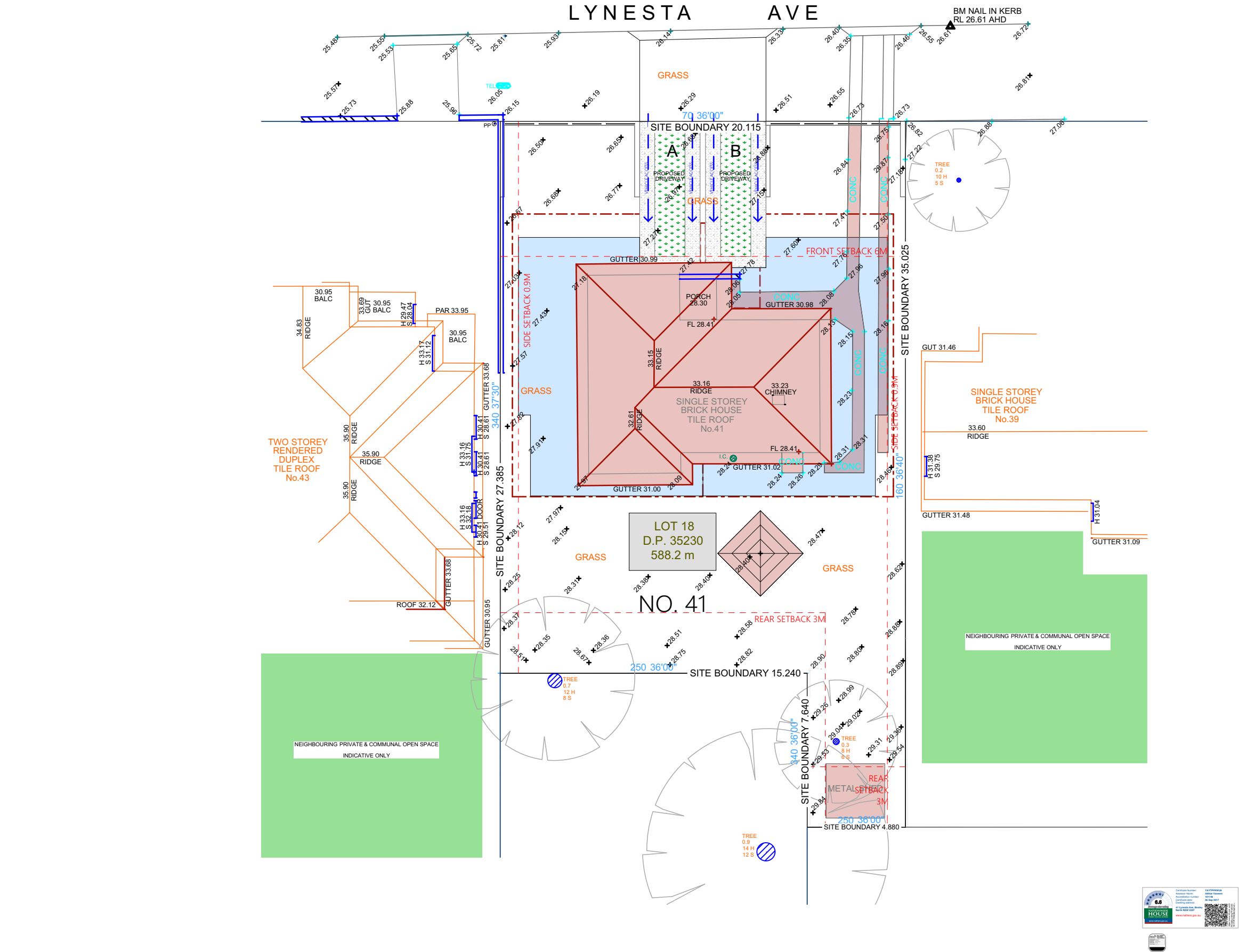
SYDNEY

Governor Phillip Tower
Level 21, 1 Farrer Place
Sydney NSW 2000
Australia

MELBOURNE

Kurrajong House
Suite 2, Level 7
175 Collins Street

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SIXMAPS IMAGE

LEGEND

- EXISTING BUILDING & ELEMENTS
- ROOF LINE
- DWELLING FOOTPRINT
- SITE BOUNDARY
- NEIGHBOURING BUILDINGS
- NEIGHBOURING PRIVATE OPEN SPACE

FOR D.A SUBMISSION