





 DEVELOPMENT ASSESSMENT REPORT	
Application No.	REV/2022/0014
Address	28 Empire Street HABERFIELD NSW 2045
Proposal	S8.2 Review of Development Application (DA/2021/0716) to retain unapproved skylights.
Date of Lodgement	25 May 2022
Applicant	John Boers
Owner	Mr Samir Hodzic Mrs Simone L Houghton
Number of Submissions	2 submissions from 1 neighbouring property
Value of works	Nil
Reason for determination at Planning Panel	Review of a decision under delegated authority upheld.
Main Issues	<ul style="list-style-type: none"> • Lack of power to approve application as works are already constructed. • Heritage impacts • Inconsistent with DCP controls for the Haberfield HCA
Recommendation	Refusal
Attachment A	Reasons for refusal
Attachment B	Plans of proposed development
Attachment C	Conditions in the event that the panel approves the application
	
LOCALITY MAP	
Subject Site	   N
Notified Area	 
	Objectors
	Supporters

1. Executive Summary

This report is an assessment of the application submitted to Council for a S8.2 Review of Development Application to retain unapproved skylights at 28 Empire Street Haberfield.

The application was notified to surrounding properties and 2 submissions from one adjoining property were received in response to the notification.

The main issues that have arisen from the application include:

- No power to grant consent to works already constructed through a development application under the *Environmental Planning and Assessment Act 1979*.
- The heritage impacts of the skylights.
- The proposal being inconsistent with the DCP controls for Haberfield.

The application is therefore recommended for refusal.

2. Proposal

The application seeks a review of determination DA/2021/0716 dated 27 September 2021 under section 8.2 of the *Environmental Planning and Assessment Act 1979*.

DA/2021/0761 sought consent for the following:

- Construction of a new carport
- Change use part attic storage to study
- Retain existing unapproved roof skylights
- Demolish existing garage and build new garage with attached pool cabana.

The application for review states that;

“This s8.2 review Application seeks the re-consideration of and the retention of the six existing roof skylights only, as part of a reduced proposal.”

3. Site Description

The subject site is located on the western side of Empire Street, bounded by Martin Street to the north and Ramsay Street to the south. The site area is approximately 588.1 square metres. An existing dwelling house, garage and swimming pool is located on the site. Surrounding development comprises of residential dwellings and Algje Park. Surrounding land uses are predominantly residential.



Figure 1 Aerial Photo with site identified



Figure 2 Site Photo – Empire Street frontage

4. Background

4(a) Site history

Previous relevant building and development applications submitted to Council for the subject site include:

Application No.	Proposal	Decision
10.2014.279	Alterations and additions to a dwelling house	Approved
10.2014.279.2	Retain seven skylights installed to the dwelling without the prior consent of Council	Refused
10.2014.279.3	Modify the approved plans to include a revised internal reconfiguration of attic space.	Approved
DA/2021/0716	New Carport, Change use part attic storage to study Retain existing unapproved roof skylights Proposed rebuild existing garage with attached pool cabana	Refused

4(b) Application history

The following table outlines the relevant history of the subject application.

Date	Discussion / Letter / Additional Information
14/7/2022	Applicant phoned and advised that there is no power to approve the application.
14/7/2022	Letter sent to applicant advising to withdraw the application as there is no power to grant approval.
25/7/2022	Received phone call from applicant advising that they have lodged a building information certificate for the works (BIC/2022/0087) and that they still want the application determined by the IWLPP.

5. Assessment

Power to grant consent

The review is of a development application and the power to grant consent is therefore limited to the power of a development application.

It is well established that a grant of development consent under a development application can only occur for works that have not been constructed as per judgements; *Tennyson Textile Mills Pty Ltd v Ryde Municipal Council* (1952) 18 LGR (NSW) 231; *Lowe v Mosman Municipal Council* (1953) 19 LGR (NSW) 193; *Waverley Municipal Council v Parker* (1960) 77 WN (NSW) 243; 5 LGRA 241; *Roeder v Marrickville Municipal Council* [1972- 73] LGATR 298; *Longa v Blacktown City Council* (1985) 54 LGRA 422; cf *Steelbond (Sydney) Pty Ltd v Marrickville Municipal Council* (1994) 82 LGERA 192.

The review of the development application is therefore unable to grant development consent as the works sought have already been constructed.

The following is a summary of the assessment of the application in accordance with Sections 4.15 and 8.2 of the *Environmental Planning and Assessment Act 1979*.

Section 8.2 Review

The application was lodged under Section 8.2 of the *Environmental Planning and Assessment Act 1979*.

A development application for DA/2021/0716 (original proposal) was refused by delegation under Development Application No. DA/2021/0716 on 27 September 2021 for the following reasons:

12. *The proposal is inconsistent with the aims set out in clause 1.2(2) of the Ashfield Local Environmental Plan 2013 as the proposal does not protect the urban character and environmental heritage of Haberfield.*
13. *The proposal is inconsistent with the aims set out in clause 5.10(4) of the Ashfield Local Environmental Plan 2013 as the proposal does not conserve the localities environmental heritage, settings, fabric or views. Acceptance of the current proposal would have a significant and lasting impact on the heritage significance of a locality.*
14. *The proposal is inconsistent with the aims set out in clause 6.5(1) of the ALEP 2013 which outlines that developments within this HCA are to maintain a single storey appearance. The proposed request to allow 6 skylights within the roof plane is non-compliant with this clause and results in a noticeable and evident second storey, when viewed from the public domain.*
15. *The proposal is contrary to clause 2.3(b) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as proposed garage, cabana structure results in a pattern of development in-consistent with the original garden suburb pattern of development.*
16. *The proposal is contrary to clause 2.32(f) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as proposed carport is not freestanding.*
17. *The proposal is contrary to clause 2.5(i) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as the proposal results in an over intensification of the attic space.*
18. *The proposal is contrary to DS4.5 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 as the garage is not setback a minimum 450mm from the boundary.*

19. *The proposal is contrary to DS13.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 as the proposal does not maintain a minimum 3 hours solar access to neighbouring private open space.*
20. *The proposal is contrary to DS14.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 the proposal does not minimise windows to side elevations and results in privacy impacts.*
21. *The proposal is contrary to DS19.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 the proposal does not outline sufficiently how stormwater is to be managed.*

The original application sought consent for the following works:

- New Carport
- Retain existing unapproved roof skylights
- Change use part attic storage to study
- Proposed rebuild existing garage with attached pool cabana

The s8.2 Review is supported by plans and a statement that seeks to amend the proposal that was previously considered to just the retention of the existing unauthorised skylights.

Before the consent authority can accept the amendments to the application with the review, section 8.3(3) requires the consent authority to be satisfied that the proposal is substantially the same development as the modification that was originally proposed in the application that is the subject of the review. In this instance the proposal is the same as the original proposal but in a form that removes the elements of the proposal that sought works not already constructed.

The application is supported by a statement of environmental effects that addressed the reasons for refusal and argues that Councils should grant consent to the works.

1. ***The proposal is inconsistent with the aims set out in clause 1.2(2) of the Ashfield Local Environmental Plan 2013 as the proposal does not protect the urban character and environmental heritage of Haberfield.***

“Applicants Response: The Statement of Heritage Impact (SHI) below concludes that the existing skylights would not reduce the relative contribution of No. 28 Empire St to the street, and would not be detrimental to the significance of the Haberfield Heritage Conservation Area.”

Council Assessment: Council’s Heritage advisor disagrees with the applicant’s assessment and does not support the proposal due to its heritage impact.

- “2. **The proposal is inconsistent with the aims set out in clause 5.10(4) of the Ashfield Local Environmental Plan 2013 as the proposal does not conserve the localities environmental heritage, settings, fabric or views. Acceptance of the current proposal would have a significant and lasting impact on the heritage significance of a locality.**”

Applicants Response: “The skylights, as already set out above, would not impact upon the localities environmental heritage, setting or fabric. It would have no impact upon any views. Indeed, as detailed above, they are neither prominent nor even visible.”

Council Assessment: The skylights are visible from the street. Council’s Heritage advisor disagrees with the applicant assessment and does not support the proposal due to its heritage and associated streetscape impact.

- “3. **The proposal is inconsistent with the aims set out in clause 6.5(1) of the ALEP 2013 which outlines that developments within this HCA are to maintain a single storey appearance. The proposed request to allow 6 skylights within the roof plane is non-compliant with this clause and results in a noticeable and evident second storey, when viewed from the public domain.**”

Applicants Response: “The skylights do not give the house other than a single storey appearance, such as this house in figure 6 directly opposite the site at No. 21 Empire St. This is compared to figures 8 and 9 below.”

Council Assessment: The proposal does not alter the apparent number of storeys.

- “4. **The proposal is contrary to clause 2.3(b) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as proposed garage, cabana structure results in a pattern of development in-consistent with the original garden suburb pattern of development.**”

Applicants Response: “Figure 7 below is an extract of the roof plan, showing all existing skylights and the six to which approval is sought bordered in red. As shown below, the north and south roof elevations containing skylights are divided into two planes- the forward planes (in yellow and blue) being the original of the house roof and the rear planes (in green and red) at a shallower pitch signifying the later addition.

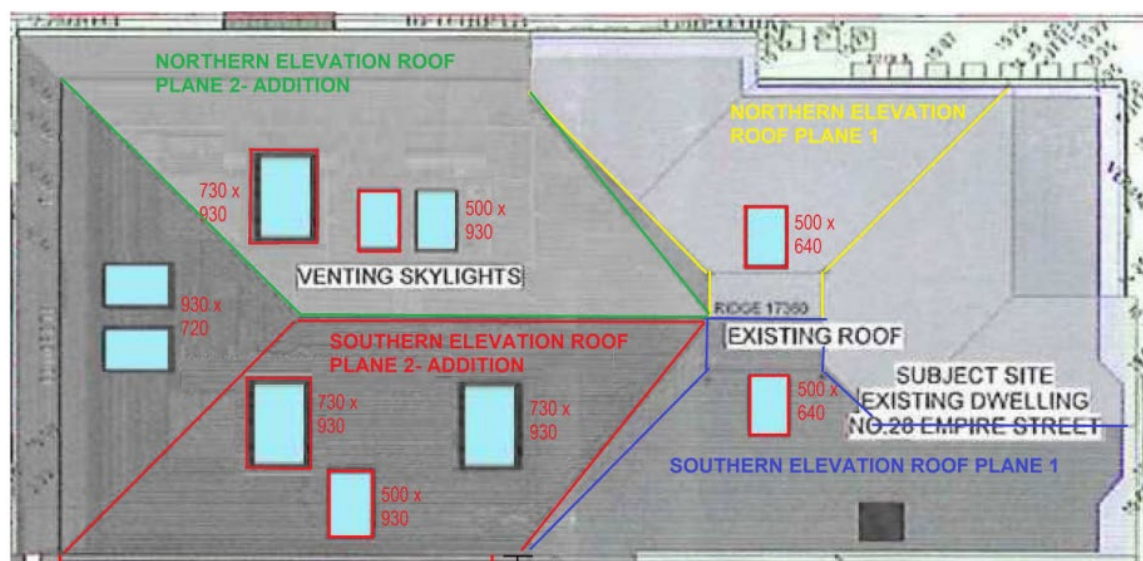


Figure 7- Roof Planes and Skylights

Further evaluation of the skylights against the Comprehensive Inner West DCP 2016 is detailed below.

Comprehensive Inner West Development Control Plan 2016

*Chapter E2- Haberfield Heritage Conservation Area**Part 2.6 'Building Form'**Control 2.6 K) states:**k) Where attics are permitted, their windows shall be located in rear gable ends or gables. They shall be discreet in scale and appearance and cannot be visible from a public place. Where extensions to existing roofs are being undertaken, modest sized in-line skylights may be considered in the side and rear planes of the extension only, and limited to one such window per roof plane.**As such this is a proposal for one skylight each on the original roof northern and southern side planes, and for an additional two skylights (being total three) on the rear northern and southern side planes.**Variation is sought for control 2.6 k) for the following non-compliance:**...modest sized in-line skylights may be considered in the side and rear planes of the extension only, and limited to one such window per roof plane.**In this instance it is considered that the following relevant objectives of Chapter E2- Haberfield Heritage Conservation Area are met:**□ To keep the qualities which contribute to the heritage significance of the historic suburb of Haberfield;**Evaluation: The following Figure 8 shows the skylights on the southern roof elevation from its most prominent position on Empire St. It shows the skylights to be not visually prominent, indeed hardly visible at all.**This elevation is dominated by more prominent and significant fabric- which has been reconstructed on this house, being the chimney, terracotta tile roof, and face bricks, as shown in figures 8 and 9 below."*

Council Assessment: The skylights are visible in the street and do not comply with the development controls in 2.6(k) of IWDCP 2016 in that they are visible from the street and exceed the number that is allowed per roof plane.

The statement of environmental effects does not respond to the remaining reasons for refusal.

- 5. The proposal is contrary to clause 2.32(f) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as proposed carport is not freestanding.**

Council Assessment: This reason for refusal is no longer relevant as the carport is no longer proposed.

- 6. The proposal is contrary to clause 2.5(i) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 as the proposal results in an over intensification of the attic space.**

Council Assessment: The proposal seeks to retain skylights that have been constructed in an area approved as storage. The reason for refusal remains applicable to the proposed development.

- 7. The proposal is contrary to DS4.5 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 as the garage is not setback a minimum 450mm from the boundary.**

Council Assessment: This reason for refusal is no longer relevant as the carport is no longer proposed.

8. ***The proposal is contrary to DS13.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 as the proposal does not maintain a minimum 3 hours solar access to neighbouring private open space.***

Council Assessment: This reason for refusal is no longer relevant as the works causing the impact are no longer proposed.

9. ***The proposal is contrary to DS14.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 the proposal does not minimise windows to side elevations and results in privacy impacts.***

Council Assessment: This reason for refusal has not been addressed. While the adjoining site has obtained approval for works that lessen the impact it has not been demonstrated that visual privacy to the adjoining site is no longer an issue. As the works have already been constructed and there is no power to grant a consent imposing conditions of consent to address any potential privacy issue.

10. ***The proposal is contrary to DS19.1 of Chapter F – Development Category Guidelines of the Comprehensive Inner West Development Control Plan 2016 the proposal does not outline sufficiently how stormwater is to be managed.***

Council Assessment: This reason for refusal is no longer relevant as the works causing the impact are no longer proposed.

5(a) *Environmental Planning Instruments*

The application has been assessed against the relevant Environmental Planning Instruments listed below:

- *State Environmental Planning Policy (Resilience and Hazards) 2021*

The following provides further discussion of the relevant issues:

5(a)(i) *State Environmental Planning Policy (Resilience and Hazards) 2021*

Chapter 4 Remediation of land

Section 4.16(1) of the SEPP requires the consent authority not consent to the carrying out of any development on land unless:

*“(a) it has considered whether the land is contaminated, and
(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.”*

In considering the above, there is no evidence of contamination on the site.

There is also no indication of uses listed in Table 1 of the contaminated land planning guidelines within Council's records. The land will be suitable for the proposed use as there is no indication of contamination.

5(a)(ii) Inner West Local Environment Plan 2022

The *Inner West Local Environment Plan 2022* (IWLEP) was gazetted on the 12th of August 2022. As per Section 1.8A – Savings provisions, of this plan, as the subject development application was made before the commencement of this Plan, the application is to be determined as if the IWLEP 2022 had not commenced.

Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* requires consideration of any Environmental Planning Instrument (EPI), and (1)(a)(ii) also requires consideration of any EPI that has been subject to public consultation. The subject application was lodged on 25 May 2022, the IWLEP was a draft EPI, which had been publicly exhibited and was considered imminent and certain.

The amended provisions contained in the IWLEP 2022 do not alter the applicable controls except there are some amendments to the control 6.10 that relate to Development on land in Haberfield Heritage Conservation Area

“6.10 Development on land in Haberfield Heritage Conservation Area

(1) The objective of this clause is to maintain the single storey appearance of dwellings in the

Haberfield Heritage Conservation Area.

(2) This clause applies to land identified as “C-12-42” on the Heritage Map.

(3) Development consent must not be granted to development for the purpose of alterations and /or additions to an existing dwelling house on land to which this clause applies unless the consent authority is satisfied that:

(a) if the development involves alterations or additions above the ground floor level of the existing dwelling:

(i) the development will be contained entirely within the roof space of the dwelling; and

(ii) the development will not involve the installation of dormer or gablet windows; and/or

(b) if the development involves alterations or additions below the existing ground floor level of the dwelling:

(i) the floor area below the existing ground floor level will not exceed 25% of the gross floor area of the existing ground floor; and

ii) the development will not involve excavation in excess of 3 metres below the existing ground floor level of the dwelling; and

(c) at least 50% of the site will be landscaped area.”

The proposal is not impacted by the amended wording of the clause.

5(a)(iii) *Ashfield Local Environment Plan 2013 (ALEP 2013)*

The application was assessed against the following relevant clauses of the *Ashfield Local Environmental Plan 2013*:

- Clause 1.2 - Aims of Plan
- Clause 2.3 - Land Use Table and Zone Objectives
- Clause 5.10 - Heritage Conservation
- Clause 6.5 - Development on land in Haberfield Heritage Conservation Area

(i) Clause 1.2 - Aims of Plan(ii) Clause 2.3 - Land Use Table and Zone Objectives

The site is zoned AR2 under the *ALEP 2013*. The *ALEP 2013* defines the development as:

“dwelling house means a building containing only one dwelling.”

The development is permitted with consent within the land use table. The development is consistent with the objectives of the R2 zone.

Clause 5.10 - Heritage Conservation

The application was referred to Councils' heritage officer who provided the following comments regarding the proposal's compliance with the provisions of Clause 5.10 of *ALEP 2013*:

“The importance of the single storey configuration of Haberfield’s important housing stock, crucial. In the significance of the suburb and the HCA which protects it, has been central to the strategies of the LEP and DCP which protect the Area. As a concessionary device the DCP, established in 1994, incorporated tolerance for single skylights to be built, one on each of the rear roof planes of houses or on the carefully composed additions encouraged by the guidelines provided within the DCP. Composed to suit the attic rooms possible (and controlled) through the DCP, and limited in size, placement and number by the DCP and BCA/NCC controls. The necessary balance of planning, building and heritage controls serves to achieve heritage objectives. The DCP deals with skylights in Part 2.6 (k), page 10.

The original proposal for No. 28 received a generous consent from Council in acceding to one more skylight than would have been permissible in a strict compliance with the DCP. The skylights for which retrospective consent is now sought were refused by Council and built without consent. They represent a non-compliance with one of the key conservation measures in Haberfield which have been strenuously pursued and applied by Council since the DCP’s inception. The retention of the contested skylights is unacceptable.

Recommendations

The proposed formalisation and retention of the skylights built without consent cannot be supported.

The skylights should be removed in order to conform to the DCP and to remove their apparent non-compliance which is confusing to the public and residents, and dismissive and detrimental to the successful administration of planning in the suburb and HCA.”

The proposal is therefore considered to have a detrimental impact on the heritage significance of the Haberfield HCA and is therefore not supported in accordance with clause 5.10(4) of the ALEP 2013.

Clause 6.5 - Development on land in Haberfield Heritage Conservation Area

Clause 6.5 states:

- “(1) The objective of this clause is to maintain the single storey appearance of dwellings in the Haberfield Heritage Conservation Area.*
- (2) This clause applies to land identified as “C42” on the [Heritage Map](#).*
- (3) Development consent must not be granted to development for the purpose of a dwelling house on land to which this clause applies unless the consent authority is satisfied that—*
 - (a) if the development involves an existing building—*
 - (i) the gross floor area above the existing ground floor level will not exceed the gross floor area of the existing roof space, and*
 - (ii) the gross floor area below the existing ground floor level will not exceed 25% of the gross floor area of the existing ground floor, and*
 - (b) the development will not involve excavation in excess of 3 metres below ground level (existing), and*
 - (c) the development will not involve the installation of dormer or gablet windows, and*
 - (d) at least 50% of the site will be landscaped area.”*

The amended proposal complies with the clause.

5(b) Draft Environmental Planning Instruments

The application has been assessed against the relevant Draft Environmental Planning Instruments listed below:

Draft Environmental Planning Instruments	Compliance
Draft State Environmental Planning Policy (Environment) 2018	Yes
Draft State Environmental Planning Policy (Remediation of Land) 2018	Yes
Draft State Environmental Planning Policy (Environment) 2017	Yes

5(c) Development Control Plans

The application has been assessed and the following provides a summary of the relevant provisions of Inner West Comprehensive Development Control Plan (DCP) 2016 for Ashbury, Ashfield, Croydon, Croydon Park, Haberfield, Hurlstone Park and Summer Hill .

IWCDCP2016	Compliance
Section 2 – General Guidelines	
A – Miscellaneous	
1 - Site and Context Analysis	Yes
2 - Good Design	No
E2 – Haberfield Heritage Conservation Area	
1 – Preliminary	No – see discussion
2 – Detailed Planning measures for Residential properties	No – see discussion
F – Development Category Guidelines	
1 – Dwelling Houses and Dual Occupancy	No – see discussion

Good Design

The design standard for aesthetics requires compliance with the other section of the DCP and the performance criteria requires consideration of appropriate materials. It is considered that the provision of skylights that are visible to the street on the roof plane a lack of provision of suitable materials in the Haberfield HCA.

Haberfield Heritage Conservation Area

Detailed Planning measures for Residential properties

The applicable controls are as follows:

Control 2.6(i) in Section 2 of Chapter E2 of the DCP states:

- “i) Attic rooms can be built within the main roof shape where they do not involve alteration of the roof shape. They are to be modest in scale and comprise one (1) or at the most two (2) rooms capable of habitation. **Attic windows in the front or side faces of the main roof are not permitted.**”*

The application seeks to retain the unauthorised side attic windows that are constructed on the side faces of the main roof. The proposal is inconsistent with this control.

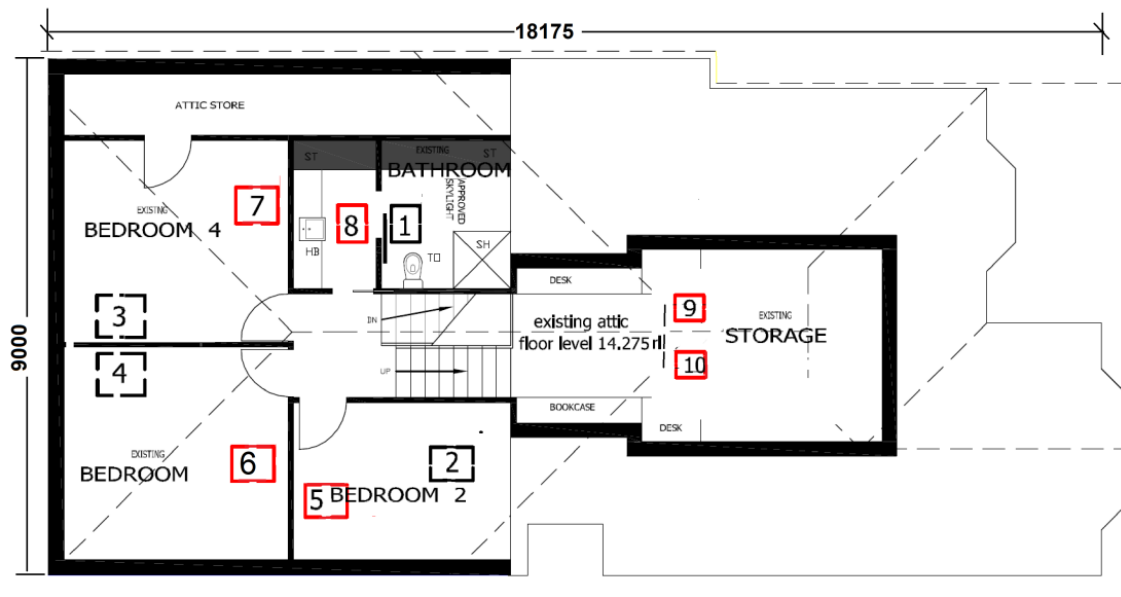
Control 2.6(i) in Section 2 of Chapter E2 of the DCP states:

- k) Where attics are permitted, their windows shall be located in rear gable ends or gablets. They shall be discreet in scale and appearance and **cannot be visible from a public place**. Where extensions to existing roofs are being undertaken, modest sized in-line skylights may be considered in the side and rear planes of Chapter E2 – Haberfield Heritage Conservation Area Comprehensive Inner West DCP 2016 page 11 the extension only, and **limited to one such window per roof plane**.*

The side skylight windows are visible from the street and therefore do not comply with the control.

There is no definition of roof plane within the DCP. However, in the context of the words “*side and rear planes*” within the same control it is clear that the intent of the control is to allow only a single side window in circumstances where it is not visible from the street. Despite the applicants’ assertion that there are two side roof planes per side the development, it is

assessed as being non-compliant with the control. The proposal seeks to retain 10 skylights on the roof. The room use of below rooms in the attic is shown below:



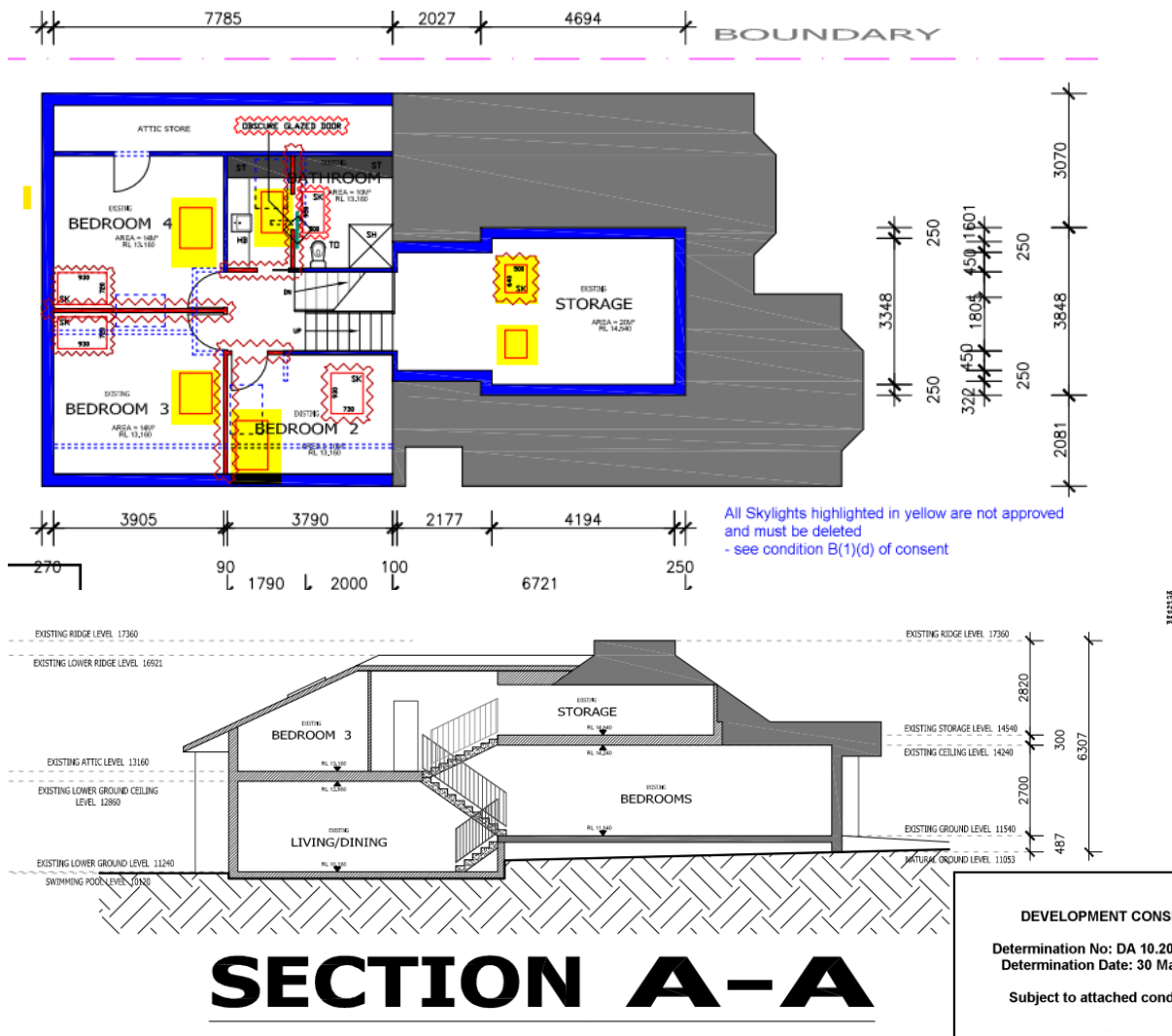
The proposed development includes two skylights that are visible from the street in an area that is approved for storage. No justification has been provided as to why the storage areas require skylights.

The applicable objectives to consider in relation to a variation to the above controls in Control 2.6 in Section 2 of Chapter E2 are those within the section 1 preliminary of Chapter E2 of the DCP which are as follows:

- *“To keep the qualities which contribute to the heritage significance of the historic suburb of Haberfield;*
- *To allow necessary change, but only where it will not remove or detract from those special qualities;*
- *To ensure that necessary change, such as alterations and extensions to existing buildings, will respect the contribution of those buildings to the heritage significance of Haberfield and will have no ill effect on the heritage significance of Haberfield as a whole;*
- *To ensure that where new buildings can be constructed, they are carefully designed to fit in with the heritage significance and character of Haberfield as a whole;*
- *To encourage the removal and reversal of those components which detract from the heritage significance of Haberfield.”*

In considering the above, the qualities that contribute to the heritage significance of the historic suburb of Haberfield, Council’s Heritage advisor does not support the application for the reasons listed elsewhere in the report. They are visible form the public domain and detrimental to the heritage values of the Haberfield HCA.

The additional sky lights are considered unnecessary as each room already has a sky light with the exception of the store room. The image below shows the approved layout and section of the previous development consent indicating the upper level as storage (with the new skylights highlighted in yellow).

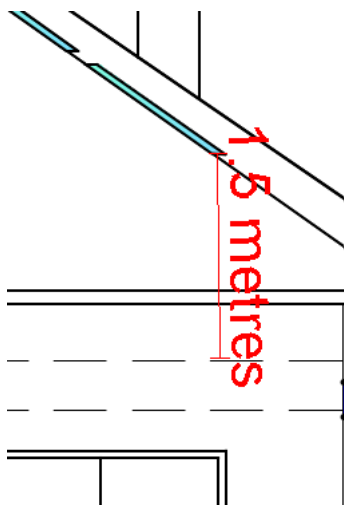


The two skylights located closest to the street are not a necessary change for the function of the storage area.

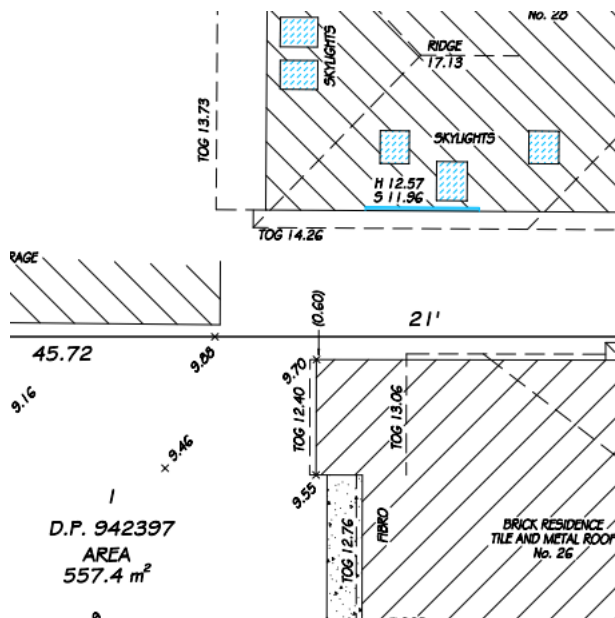
Based on the above the proposed development is not consistent with the objectives for Haberfield Heritage Conservation Area within

Dwelling Houses and Dual Occupancy - Visual Privacy

Proposed skylight 5 is located in the side at a height that allows for direct overlooking of the adjoining private open space of the adjoining dwelling at 26 Empire Street Haberfield. Scaling from the plans provided on the original development application that is being reviewed indicate the height of the skylight is in the order of 1.5m.



Originally skylight 5 represented a visual privacy issue with the adjoining site as it allowed for direct overlooking into the adjoining property's at 26 Empire Streets' private open space.



Number 26 has subsequently sought and gained approval for rear extensions in DA 10.2018.00000112.001.

As a result of these changes that are as a result of the works approved at No 26 it is not considered that the skylight will result in visual privacy impacts that could not be addressed by conditions of consent if the consent authority had the power to impose them. However, as the works are already constructed there is no power to issue a consent.

5(d) The Likely Impacts

The works result in a negative impact on the heritage values of the conservation area.

5(e) The suitability of the site for the development

The site is located within the Haberfield HCA and negatively impacts the heritage values of the Haberfield HCA. The site is therefore not suitable for the proposed development.

5(f) Any submissions

The application was notified in accordance with the Community Engagement Framework for a period of 14 days to surrounding properties.

2 submissions were received in response to the initial notification from 1 neighbour.

The submissions raised the following concerns which are discussed under the respective headings below:

Issue: Impact on visual privacy

Comment: The impact on visual privacy from the skylights would be able to be addressed by conditions of consent if the consent authority had the power to grant a consent.

Issue: Previously refused but built anyway

Comment: As addressed above, there is no jurisdictional power to grant consent for works retrospectively that have already been constructed through a development application.

Issue: Impact on heritage values of the Haberfield HCA

Comment: The proposal is not supported on heritage grounds.

Issue: Inconsistent with the development controls for Haberfield

Comment: The proposal does not comply with the development controls for Haberfield and is not supported.

Issue: SEE and Heritage report contain incorrect and misleading statements

Comment: The SEE and Heritage report have been considered and are not agreed with.

Issue: 5th attempt to gain approval for these skylights

Comment: Previous attempts to gain consent does not preclude future applications.

Issue: Owners have not complied with Council order to remove the skylights.

Comment: The order is the subject of current legal proceedings.

5(g) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

The proposal is contrary to the public interest as the works are already constructed and development consent is sought retrospectively in the absence of any power under the *EP and A Act 1979* to grant consent.

6 Referrals

6(a) Internal

The application was referred to the following internal section and issues raised in that referral have been discussed in section 5 above.

- Heritage

8. Conclusion

As the works are already constructed and that is all the application seeks, the consent authority has no power under the *Environmental Planning and Assessment Act 1979* to grant development consent. As a result, consideration of the merits of the application is not required.

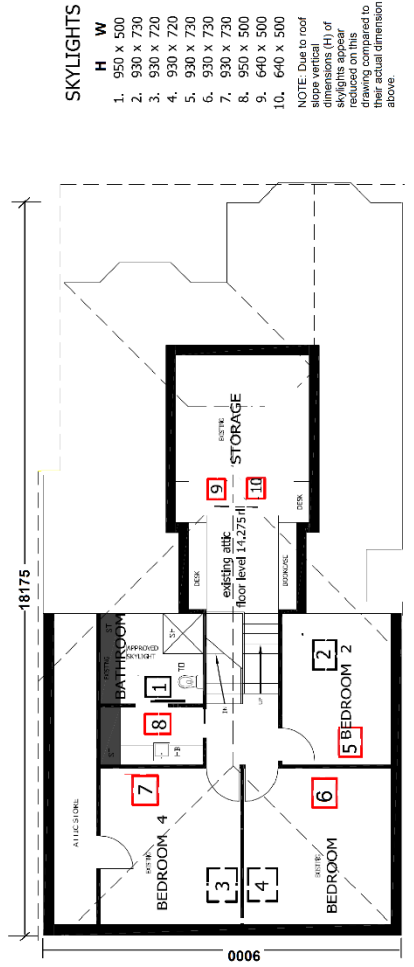
The application is unsupportable and refusal of the application is recommended.

9. Recommendation

- A. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, refuse Development Application No. REV/2022/0014 Review of Development Application (DA/2021/0716) to retain unapproved skylights at 28 Empire Street, Haberfield the following reasons shown in Attachment A.

Attachment A – Recommended reasons for refusal

1. There is no power to grant development consent under a development application under the *Environmental Planning and Assessment Act 1979* as all the works sought have already been constructed.
2. The proposal is not in the public interest as the works have already been constructed without approval and a grant of retrospective consent is inconsistent with the Section 1.3 object of the *Environmental Planning and Assessment Act 1979* that seeks orderly development.
3. The proposal is inconsistent with the aims set out in clause 5.10(4) of the *Ashfield Local Environmental Plan 2013* as the proposal does not conserve the localities environmental heritage, settings, fabric or views. Acceptance of the current proposal would have an adverse impact on the heritage significance of the locality.
4. The proposal is contrary to controls 2.6(i) and 2.6(k) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 and the applicable objectives in the preliminary section of Chapter E2.



SKYLIGHTS

- | H | W |
|---------------|---|
| 1. 950 x 500 | |
| 2. 930 x 730 | |
| 3. 930 x 720 | |
| 4. 930 x 720 | |
| 5. 930 x 730 | |
| 6. 930 x 730 | |
| 7. 930 x 730 | |
| 8. 950 x 500 | |
| 9. 640 x 500 | |
| 10. 640 x 500 | |
- NOTE: Due to roof slope vertical dimension of skylights appear reduced on this drawing compared to their actual dimension above.

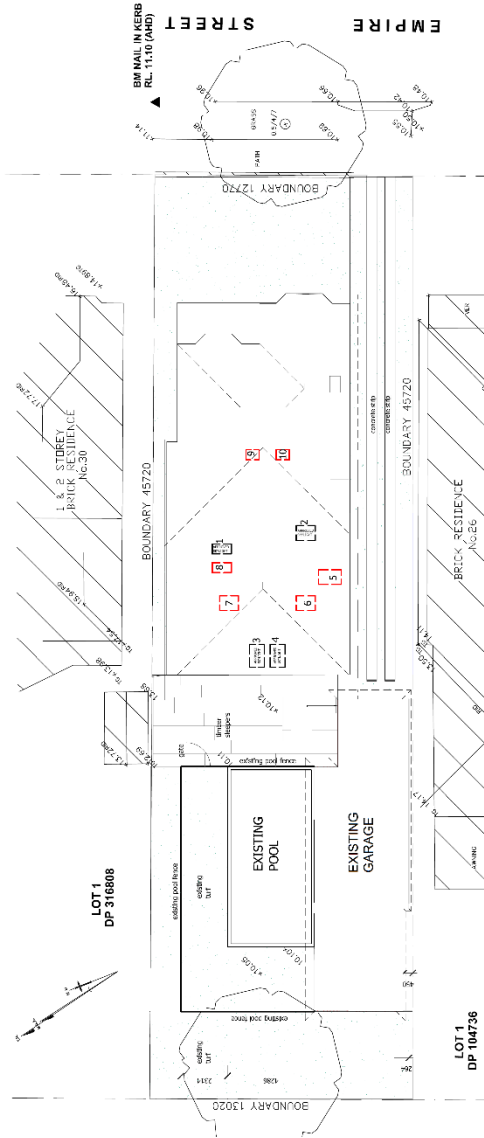
FIRST FLOOR AND ROOF PLAN

Works Executed Without Consent

M GROUP
 Solicitors - L. 4 Belgrave Street
 Kogarah N.S.W. 2217
 Tel: 95538777

John Hodzic
 Architectural Practitioner - Lic No. 266
 Accreditation Number: 2325
 All members of the NSW Planning Institute
 Membership Number: 10951497

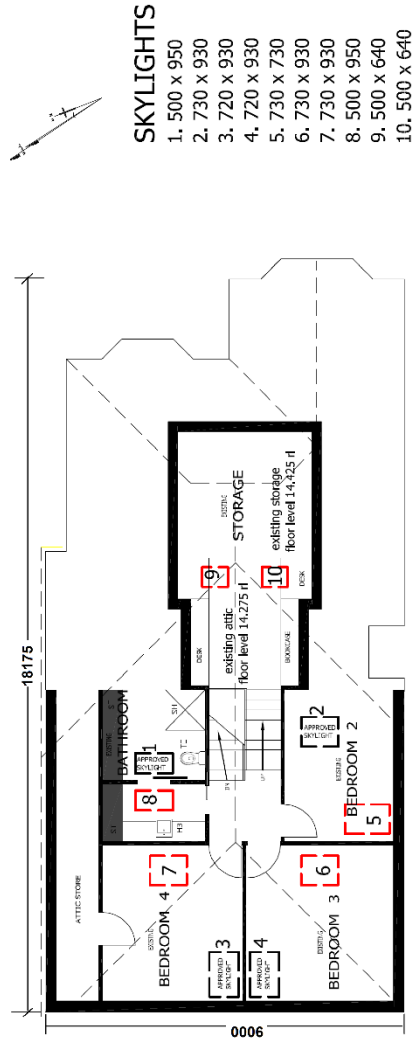
RETAIN EXISTING ROOF SKYLIGHTS	28 Empire St, Haberfield
Drawn by: JM	SHEET 2 - 1st Floor and Roof Plan
For: Hodzic	Scale 1:100 Date: May 2020



 Works Executed Without Consent **SITE AND ROOF PLAN**

M GROUPE
 Suite 3F - 1, 4 Belgrave Street
 Kogarah N.S.W. 2217
 Tel: 95538777
 John Hodzic
 Accredited Professional Designer - LDP 086
 Accreditation Number: 1216
 Association: Sydney Builders
 Association of Australia
 Membership Number: 208147

RETAIN EXISTING ROOF SKYLIGHTS	28 Empire St, Haberfield
Drawn by: JM	SHEET 1- Site and Roof Plan
For: Hodzic	Scale 1: 200 Date: May 2020



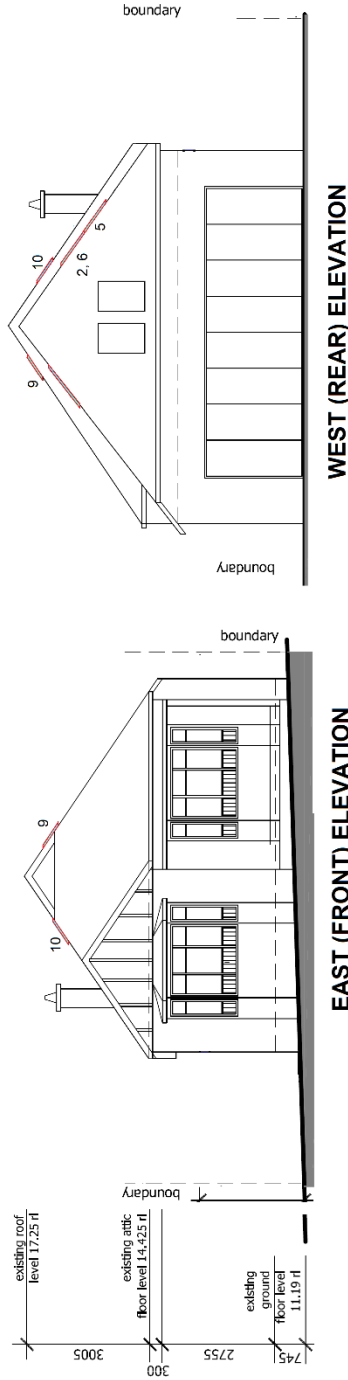
1st FLOOR AND ROOF PLAN

 Works Executed Without Consent

M GROUP
 Salford - 1, 4 Belgrave Street
 Koperah N.S.W. 2217
 Tel: 95538777

John Hodzic
 Architectural Practitioner - Lic No. 166
 Accreditation Number: 2325
 All members of the NSW Building Occupiers
 Membership Number 1095459

RETAIN EXISTING ROOF SKYLIGHTS	28 Empire St, Haberfield
Drawn by: JM	SHEET 2 - 1st Floor and Roof Plan
For: Hodzic	Scale 1:100 Date: May 2020



~~Works Executed Without Consent~~

M GROUPE, a Macquarie Street
 Suite 1 - 1, Macquarie Street
 Sydney NSW 2000
 Tel: 95538777
 Fax: 95538777
 John Hodzic
 Accredited Building Designer - Low Rise
 Full Member with the Building Designers
 Association of NSW (08)427

SKYLIGHTS

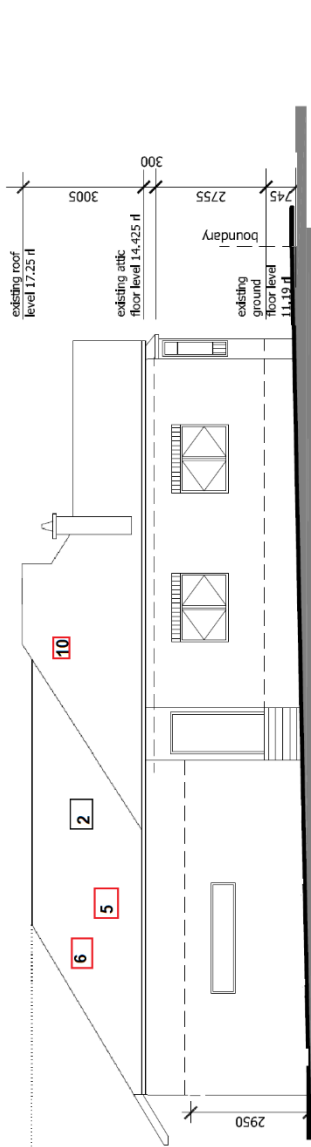
- | | H | W |
|-----|-----------|---|
| 1. | 950 x 500 | |
| 2. | 930 x 730 | |
| 3. | 930 x 720 | |
| 4. | 930 x 720 | |
| 5. | 930 x 730 | |
| 6. | 930 x 730 | |
| 7. | 930 x 730 | |
| 8. | 950 x 500 | |
| 9. | 640 x 500 | |
| 10. | 640 x 500 | |

RETAIN EXISTING ROOF SKYLIGHTS	28 Empire St, Haberfield
Drawn by: JM	SHEET 4- FRONT & REAR ELEVATIONS
For: Hodzic	Scale 1: 100 Date: May 2020

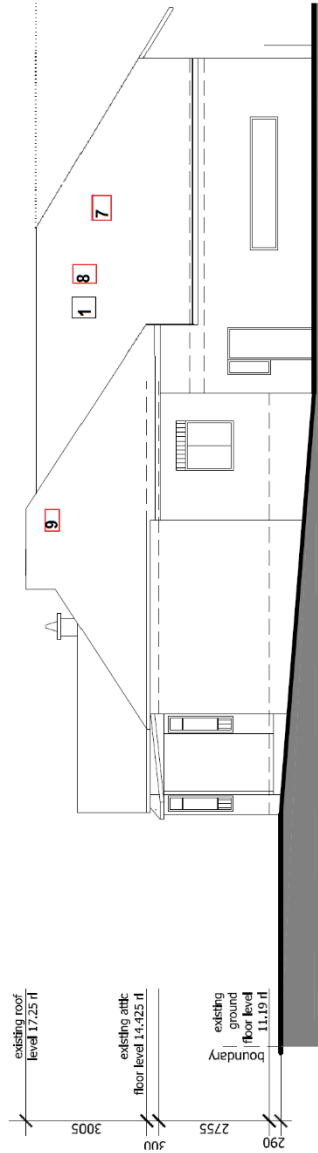
SKYLIGHTS

H	W
1. 950 x 500	
2. 930 x 730	
3. 930 x 720	
4. 930 x 720	
5. 930 x 730	
6. 930 x 730	
7. 930 x 730	
8. 950 x 500	
9. 640 x 500	
10. 640 x 500	

NOTE: Vertical dimensions (H) of skylights are based on RLs and so on this sloped roof appear less than on this actual dimension



NORTH ELEVATION



SOUTH ELEVATION

Works Executed Without Consent

RETAIN EXISTING ROOF SKYLIGHTS	28 Empire St, Haberfield
Drawn by: JM	SHEET 3- SIDE ELEVATIONS
For: Hodzic	Scale 1:100 Date: May 2020

M GROUP
 Suite 3F - 1, 4 Ridgeway Street
 Haberfield NSW 1585
 Tel: 95533777
 Fax: 95533777
 2014 Products
 Accredited Member of the
 Australian Institute of Architects
 Member of the NSW
 Architects Registration Board
 Membership Number 22916-02

Attachment C- Conditions in the event that the panel approves the application

CONDITIONS OF CONSENT

DOCUMENTS RELATED TO THE CONSENT

1. Documents related to the consent

The development must be carried out in accordance with plans and documents listed below:

Plan, Revision and Issue No.	Plan Name	Date Issued	Prepared by
Sheet 3	Side Elevations	May 2020	M Groupe
Sheet 2	1st Floor and Roof Plan	May 2020	M Groupe
Sheet 1	Site and Roof Plan	May 2020	M Groupe

As amended by the conditions of consent.

GENERAL CONDITIONS

2. Works Outside the Property Boundary

This development consent does not authorise works outside the property boundaries on adjoining lands.

3. Skylight 5 to be amended

Skylight 5 must provide obscure glazing up to a height of 1.7m above the finished floor level.

4. Building Certificate

The person acting on, or having benefit of this consent is required to obtain a Building Certificate from Council in order to regularise the unauthorised building works undertaken at the existing premises within thirty (30) days of the date this Determination.

DURING DEMOLITION AND CONSTRUCTION

5. Construction Hours – Class 1 and 10

Unless otherwise approved by Council, excavation, demolition, construction or subdivision work are only permitted between the hours of 7:00am to 5.00pm, Mondays to Saturdays (inclusive) with no works permitted on, Sundays or Public Holidays.

ADVISORY NOTES**Prescribed Conditions**

This consent is subject to the prescribed conditions of consent within clause 98-98E of the *Environmental Planning and Assessment Regulations 2021*.

Other Approvals may be needed

Approvals under other acts and regulations may be required to carry out the development. It is the responsibility of property owners to ensure that they comply with all relevant legislation. Council takes no responsibility for informing applicants of any separate approvals required.

Failure to comply with conditions

Failure to comply with the relevant provisions of *the Environmental Planning and Assessment Act 1979* and/or the conditions of this consent may result in the serving of penalty notices or legal action.

Other works

Works or activities other than those approved by this Development Consent will require the submission of a new Development Application or an application to modify the consent under Section 4.55 of the *Environmental Planning and Assessment Act 1979*.

Obtaining Relevant Certification

This development consent does not remove the need to obtain any other statutory consent or approval necessary under any other Act, such as (if necessary):

- a. Application for any activity under that Act, including any erection of a hoarding;
- b. Application for a Construction Certificate under the *Environmental Planning and Assessment Act 1979*;
- c. Application for an Occupation Certificate under the *Environmental Planning and Assessment Act 1979*;

- d. Application for a Subdivision Certificate under the *Environmental Planning and Assessment Act 1979* if land (including stratum) subdivision of the development site is proposed;
- e. Application for Strata Title Subdivision if strata title subdivision of the development is proposed;
- f. Development Application for demolition if demolition is not approved by this consent; or
- g. Development Application for subdivision if consent for subdivision is not granted by this consent.

National Construction Code (Building Code of Australia)

A complete assessment of the application under the provisions of the National Construction Code (Building Code of Australia) has not been carried out. All building works approved by this consent must be carried out in accordance with the requirements of the National Construction Code.

Permits from Council under Other Acts

Where it is proposed to occupy or carry out works on public roads or Council controlled lands, the person acting on this consent must obtain all applicable Permits from Council in accordance with Section 68 (Approvals) of the *Local Government Act 1993* and/or Section 138 of the *Roads Act 1993*. Permits are required for the following activities:

- a. Work zone (designated parking for construction vehicles). Note that a minimum of 2 months should be allowed for the processing of a Work Zone application;
- b. A concrete pump across the roadway/footpath;
- c. Mobile crane or any standing plant;
- d. Skip bins;
- e. Scaffolding/Hoardings (fencing on public land);
- f. Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.;
- g. Awning or street verandah over footpath;
- h. Partial or full road closure; and
- i. Installation or replacement of private stormwater drain, utility service or water supply.

Contact Council's Road Access team to ensure the correct Permit applications are made for the various activities. A lease fee is payable for all occupations.

Noise

Noise arising from the works must be controlled in accordance with the requirements of the *Protection of the Environment Operations Act 1997*.

Lead-based Paint

Buildings built or painted prior to the 1970's may have surfaces coated with lead-based paints. Recent evidence indicates that lead is harmful to people at levels previously thought safe. Children particularly have been found to be susceptible to lead poisoning and cases of acute child lead poisonings in Sydney have been attributed to home renovation activities involving the removal of lead based paints. Precautions should therefore be taken if painted surfaces are to be removed or sanded as part of the proposed building alterations, particularly where children or pregnant women may be exposed, and work areas should be thoroughly cleaned prior to occupation of the room or building.

Dial before you dig

Contact "Dial Prior to You Dig" prior to commencing any building activity on the site.

Useful Contacts

BASIX Information	1300 650 908 weekdays 2:00pm - 5:00pm www.basix.nsw.gov.au
Department of Fair Trading	13 32 20 www.fairtrading.nsw.gov.au Enquiries relating to Owner Builder Permits and Home Warranty Insurance.
Dial Prior to You Dig	1100 www.dialprior toyoudig.com.au
Landcom	9841 8660 To purchase copies of Volume One of "Soils and Construction"
Long Service Corporation	Payments 131441 www.lspc.nsw.gov.au
NSW Food Authority	1300 552 406 www.foodnotify.nsw.gov.au

NSW Government	www.nsw.gov.au/fibro www.diysafe.nsw.gov.au Information on asbestos and safe work practices.
NSW Office of Environment and Heritage	131 555 www.environment.nsw.gov.au
Sydney Water	13 20 92 www.sydneywater.com.au
Waste Service - SITA Environmental Solutions	1300 651 116 www.wasteservice.nsw.gov.au
Water Efficiency Labelling and Standards (WELS)	www.waterrating.gov.au
WorkCover Authority of NSW	13 10 50 www.workcover.nsw.gov.au Enquiries relating to work safety and asbestos removal and disposal.

REASONS FOR REFUSAL

1. There is no power to grant development consent under a development application under the *Environmental Planning and Assessment Act 1979* as all the works sought have already been constructed.
2. The proposal is not in the public interest as the works have already been constructed without approval and a grant of retrospective consent is inconsistent with the Section 1.3 object of the *Environmental Planning and Assessment Act 1979* that seeks orderly development.
3. The proposal is inconsistent with the aims set out in clause 5.10(4) of the *Ashfield Local Environmental Plan 2013* as the proposal does not conserve the localities environmental heritage, settings, fabric or views. Acceptance of the current proposal would have an adverse impact on the heritage significance of the locality.

4. The proposal is contrary to controls 2.6(i) and 2.6(k) of Chapter E2 – Haberfield Heritage Conservation Area of the Comprehensive Inner West Development Control Plan 2016 and the applicable objectives in the preliminary section of Chapter E2.