

Rosebery Estate Covenant – Housing Code (delay) submission by City of Sydney Council

It is **misleading** (by omission) to **reference some** of the “**Rosebery Covenant**” **restrictions**, but **ignore other elements and non compliance** - in our view.

A copy of the Covenant should have been included for public consultation. It should have been more accurately summarised and presented in context.

Sourcing this document has delayed our input, but now we have it we make the **following observations**:

Most properties appear to breach this old Building and Materials Covenant.

Steel Roofing is used in most of the Estate, **weatherboard** also exists

2 storey buildings, units, shops exist, in addition to the new 2 storey homes under complying development

Additional Residences are common, whether created explicitly through strata plan or Torren’s subdivision, Granny Flat addition or garage conversion (by stealth).

The **Registrar General** notes building and materials covenants are typically valid for only **12 years**

A **copy of the covenant** and its **elements** are appended to this letter, along with a multitude of compliance anomalies.

If we are going to discuss Covenant restrictions, lets review it through clear lenses, in context.

Council selectively advocates height restrictive elements that delay better and more efficient use of our land. The Housing Code has already been delayed two years. **Why?**

Green Square has 50,000 additions within a postcode. Racecourse land has become high density apartment development with pressure on neighbouring public lands.

Where are the Manor Houses, Terraces and Duplexes? Where is the missing middle? Where do growing families, or shrinking families, live in this community?

Rosebery is not heritage listed – so why constrain it to century old design, heights, and material limitations?

The agenda to limit height, control and stylistically limit the estate has dominated and actively misdirected this public debate.

Let’s have some transparency, certainty, responsibility and balanced debate in the differences between State and Council.

Let us use our properties efficiently and build with clarity / certainty. We abut 5 & 6 storey development, it makes sense to transition to low density at the edges.

Council are clearly seeking to stall a change they wish was under their control – again.

Covenant

Covenant **B573206** was registered by the Town Planning Company of Australia (**in liquidation**) on 12 December 1927 for our land. A copy is attached.

Building materials, height and use restrictions impact the Rosebery Estate Deposited Plans **9717, 9858** and **7534**.

Most residences in Rosebery appear to breach the 93 year old Covenant, as illustrated in the following local anomalies.

The Registrar General considers obsolete materials covenants removal after 12 years.

https://rg-guidelines.nswlrs.com.au/land_dealings/dealing_requirements/covenants/extinguishment_obsolete_restrictive_covenant

Extract

6. ~~AND IN CONSIDERATION of the foregoing transfer the Transferree for himself~~
~~And the transferree covenants with the transferor~~
and so as to bind not only the Transferree his executors administrators and assigns but also the lands hereby transferred and the respective successive owners and tenants of each Lot thereof covenants with the Transferor and its assigns that he or they will not erect or cause or allow to be erected on the lands comprised in the within Transfer any weatherboard or other wooden residence but will erect on each such Lot only a double fronted cottage residence of one storey and shall not erect more than one such residence upon each such Lot which residence shall have a front elevation of brick or stone or brick and stone with slate or tile roofing and shall stand back at least twenty feet from the alignment of the Street to which the respective Lots front and shall cost not less than Four hundred pounds.

AND for the purposes of Section 89 of the Conveyancing Act 1919 it is hereby further agreed and declared that:-

(a) The lands to which the benefit of the above covenant is intended to be appurtenant is as regards deposited Plan 9717 the whole of the lands comprised therein other than the land hereby transferred; and as regards Deposited Plan 7534 the whole of the lands comprised therein other than the land hereby transferred; and as regards Deposited Plan 9858 the whole of the lands comprised therein other than the land hereby transferred.

(b) The lands which are to be subject to the burden of the above covenant are the lands comprised herein.

(c) The above covenant may be released varied or modified with the consent of the Transferor ENCUMBRANCES, &c., REFERRED TO its successors or assigns.

7. ~~AND the Transferree doth hereby request the Registrar General to note on any Certificate of Title to issue for the land hereby transferred the foregoing covenant and condition.~~

Restrictions

- **Weatherboard** and timber restricted
- **One storey** residence
- **One residence per lot**
- **Brick** or **stone** front elevation
- **Tile** or **slate** roof
- **Set back** minimum
- Min **cost** of 400 pounds

DPs 9717, 9858 and 7534 and successors in title.

Other covenants may affect other stages of the Rosebery Estate, though DPs references have changed significantly during subdivision, clouding its application.

Compliance

i. **Timber** or weatherboard restriction

Timber residences exist, despite the restriction, though brick is most commonly used.

Weatherboard cladding and fascia cladding is uncommon but does exist.

A weatherboard clad residence with a metal roof exists in Asquith Street, as appended.

ii. **One Storey** residences

Many 2 storey buildings have been constructed in Rosebery.

5 and 6 storey buildings abut low density residences to the North of the Rosebery Estate

2 and 4 storey buildings face Gardeners Rd.

Some are older shops and apartment and some new homes built under SEPP as complying development, as appended..

iii. **One residence per lot**

This restriction is regularly breached. Additional residences, attached dual occupancy residences, combined shops / residences, granny flats and second dwellings are common in the area. Garages are often used as second residences also, breaching by stealth.

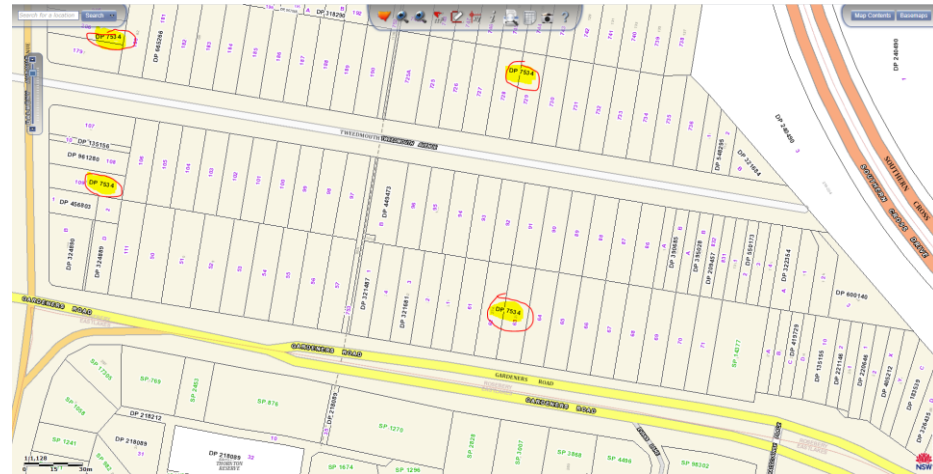
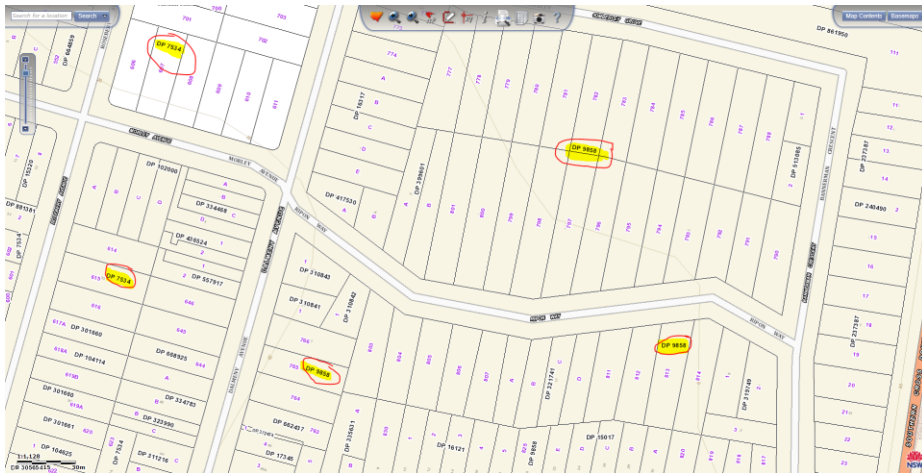
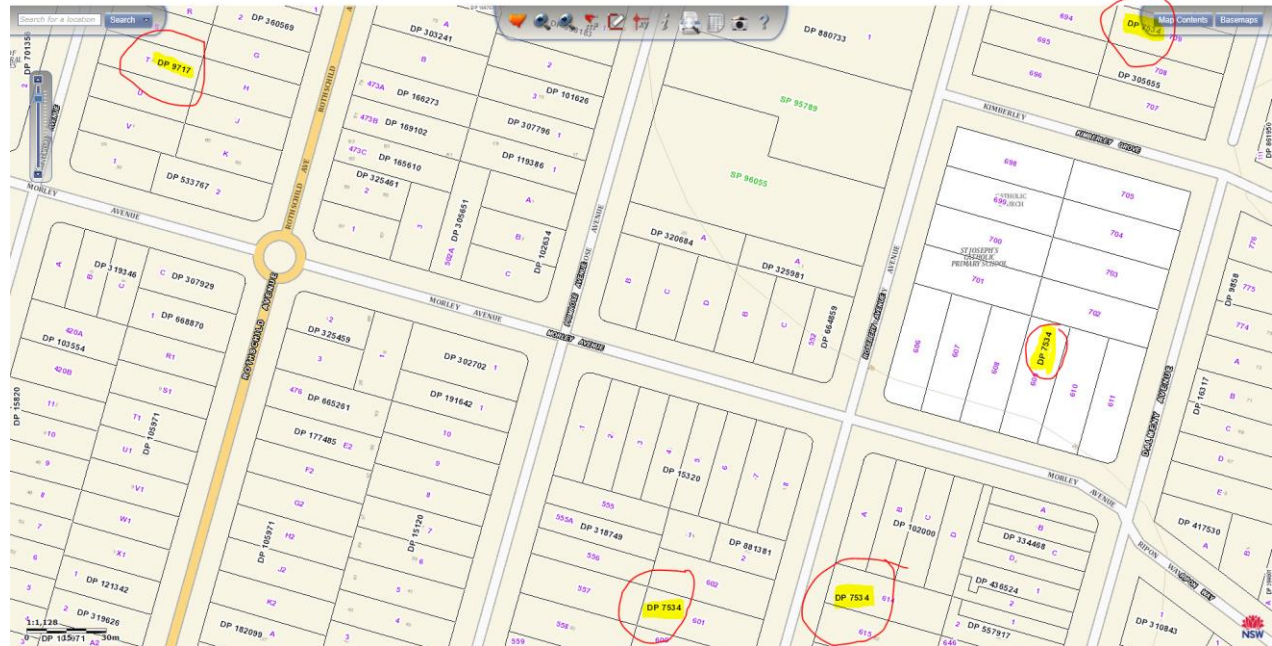
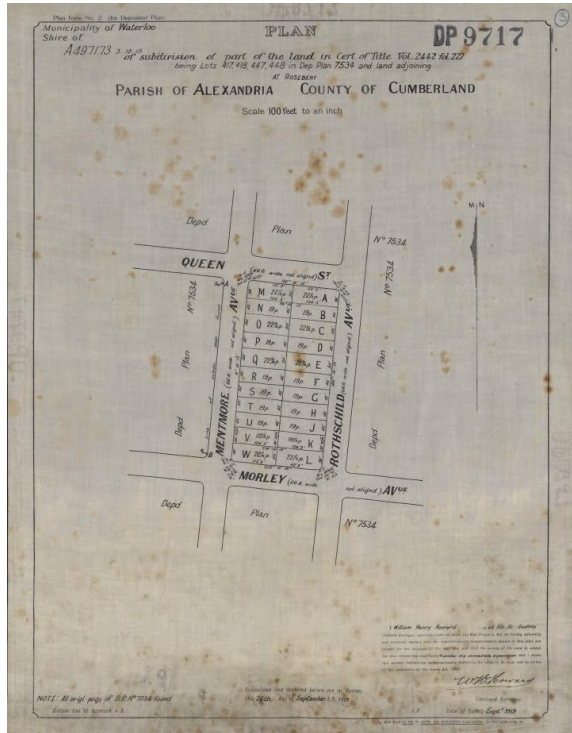
Subdivision patterns have significantly changed over the 93 years to date. Deposited Plan sizes, shapes and descriptions vary significantly from the initial Plans in the covenant. These changes have added a significant number of dwellings to the original DPs, despite the restriction.

iv. **Brick** or **Stone** frontage

Buildings are typically brick, though a weatherboard residence is located within Asquith Street. Several use timber cladding to upper floors or as fascia cladding.

- v. **Tile or slate roofing**
Metal roofing is very common in the area, typically for awnings, garages, house extensions and possibly replacement after significant storm damage in the late 90's. (see Satellite Image). Most houses breach this Covenant provision in the Rosebery Estate.
- vi. **400 Pound min cost of dwelling**
Clearly this element is outdated.
- vii. **Set back of 20 feet**
This limitation is highly value destructive if planning rules permit greater development in time. We note properties immediately North of this area are not set back.
- viii. **Lots 9717, 9858 and 7534 "benefit"**
*Many subdivisions and changes have occurred over nine decades.
We question the benefit any lots enjoy with these value destructive restrictions.*

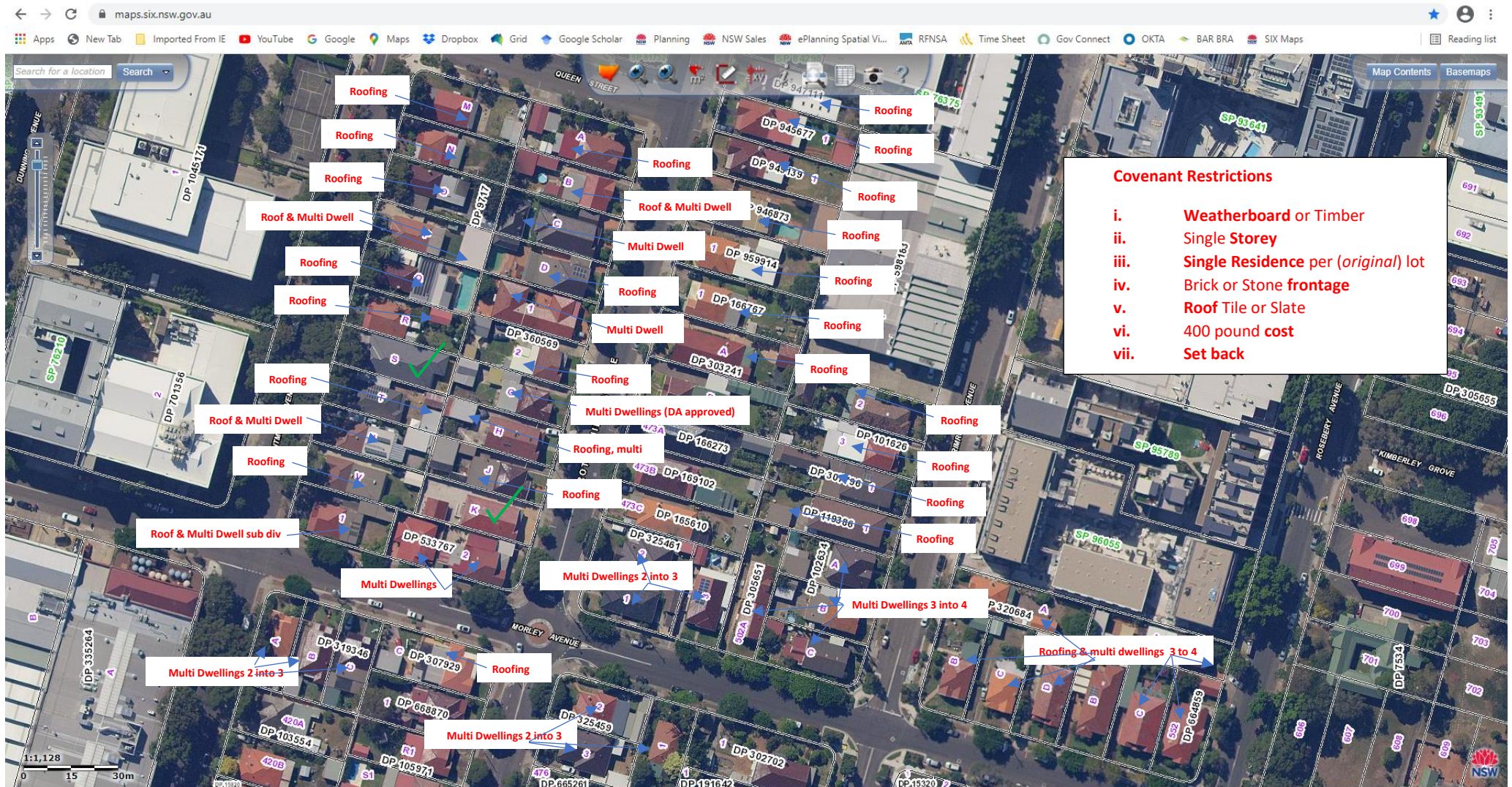
Subdivision and Deposited Plan changes



DPs noted in Covenant have been impacted by subdivision and title changes in many areas

Breaches of Covenant – Sample.

48 of 50 appear to breach.



Roofing commonly include **metal** sections, despite Covenant limitations.

Height is greater than a single storey in numerous instances. **Timber** materials have also been used.

Residence additions are also common - explicitly through subdivision, strata division or by use with granny flats and building modification.

Materials Anomalies



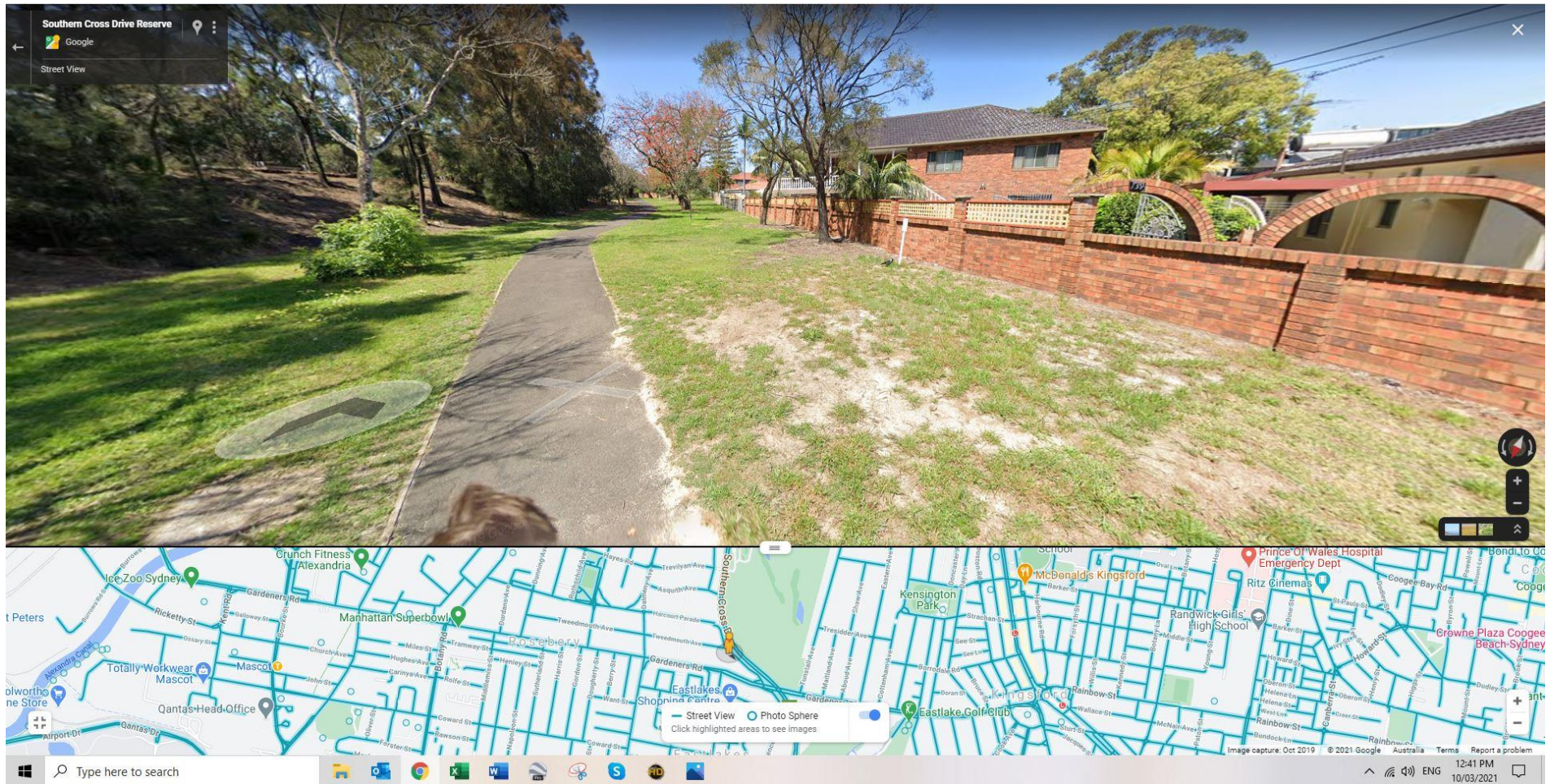
Metal Roofing Sample Satellite Image – there are too many to list individually

Height Anomalies



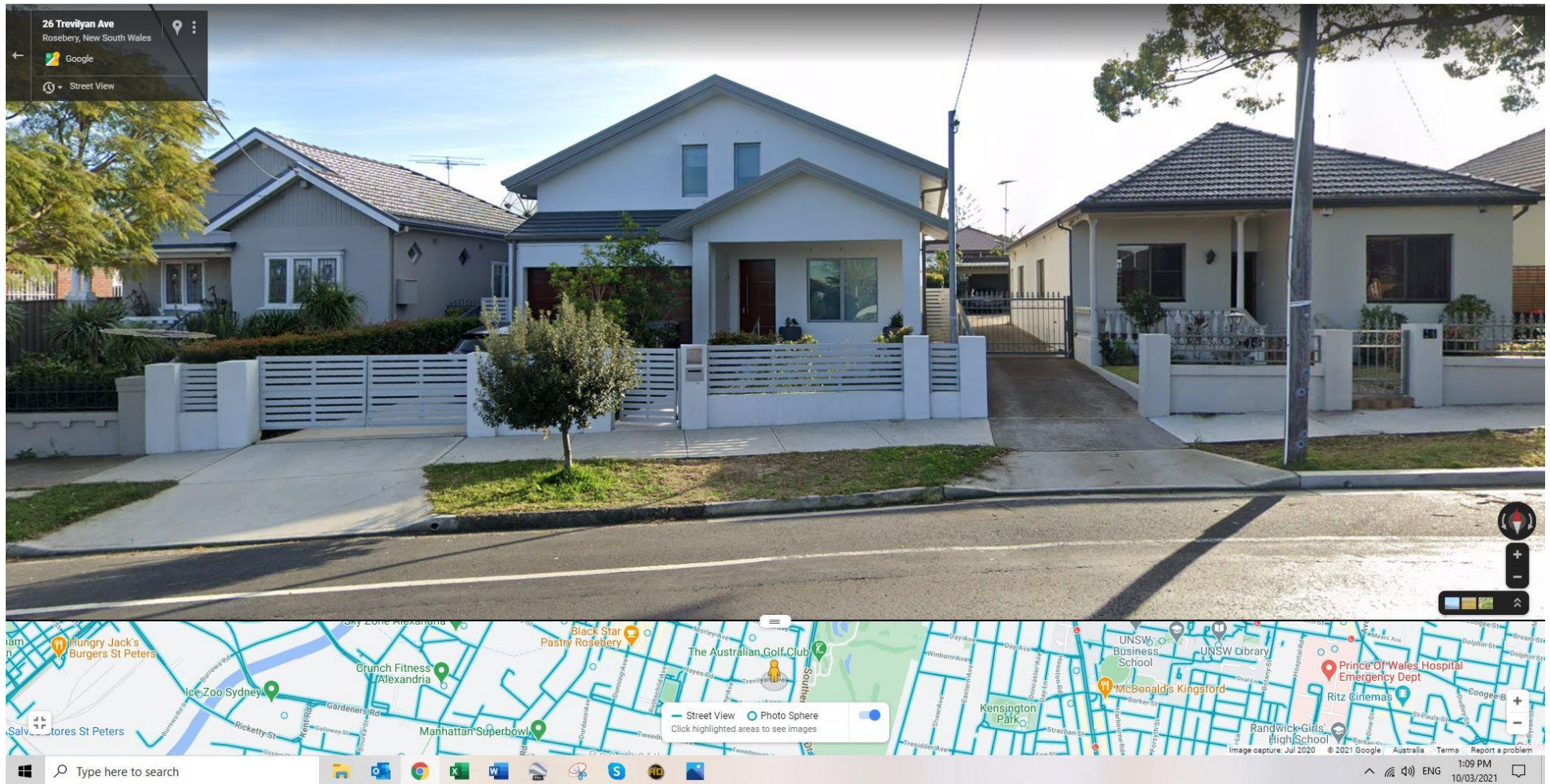
2 storey to rear

Height Anomalies



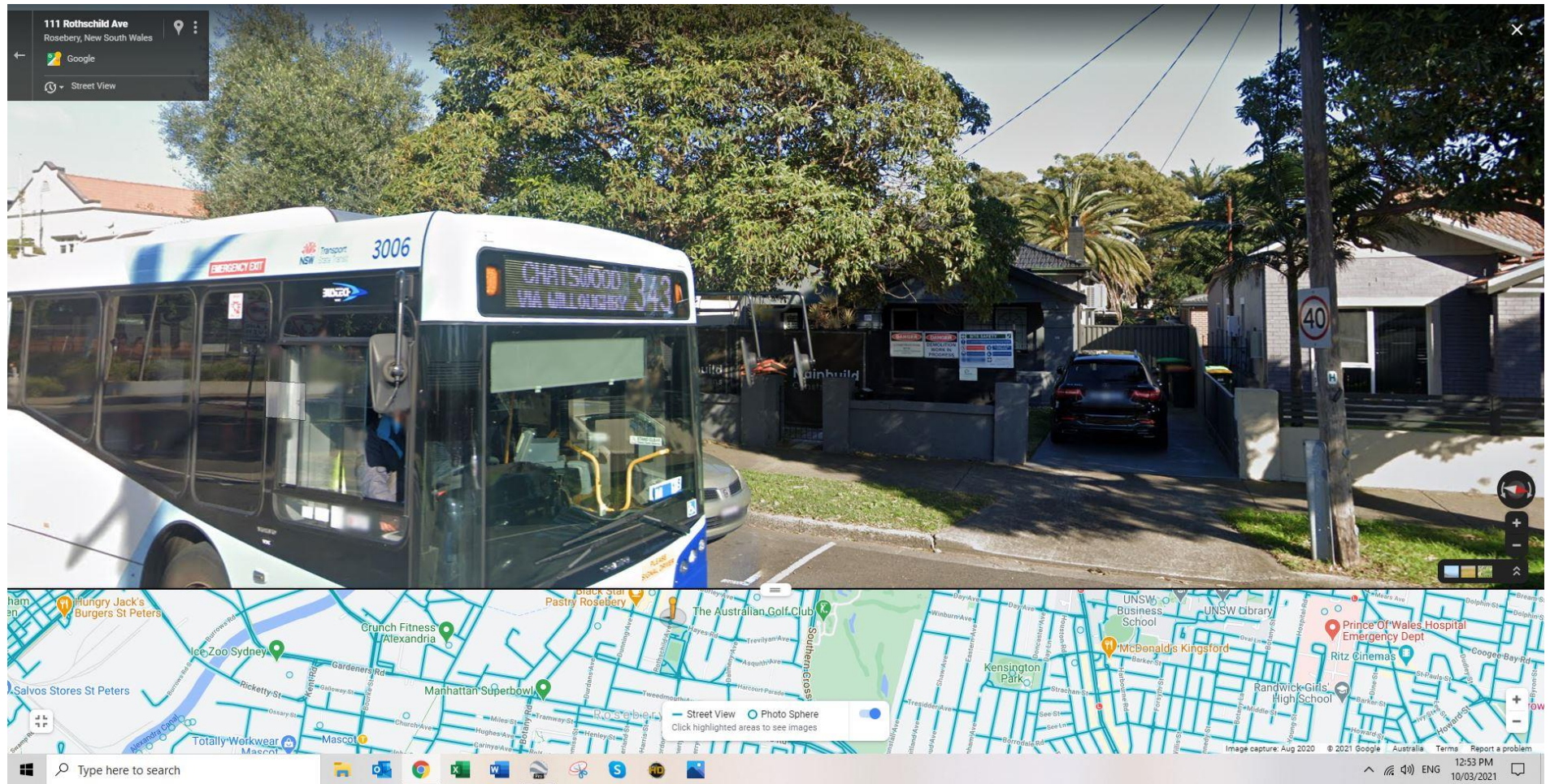
2 storey

Height Anomalies



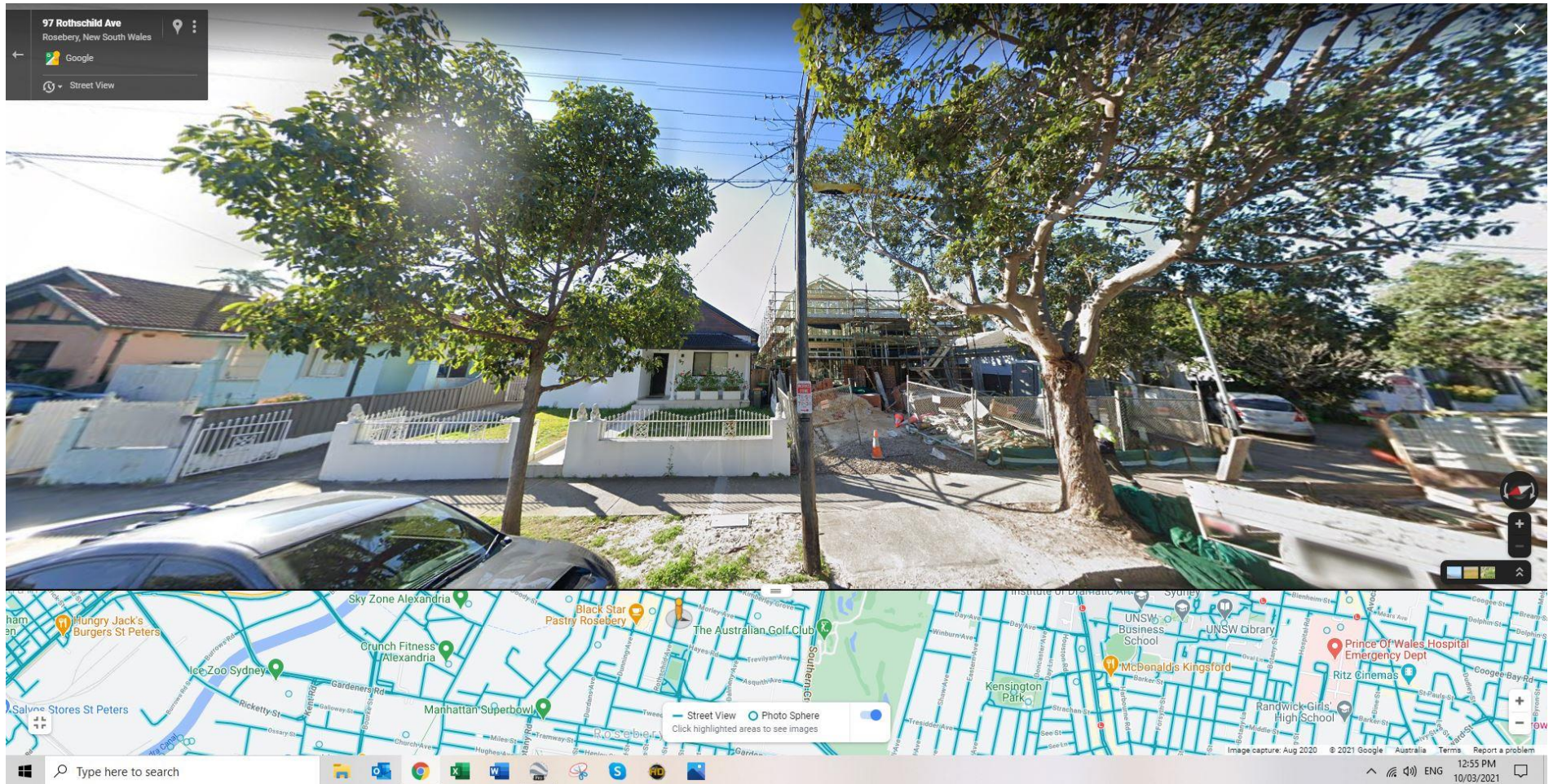
2 storey

Height Anomalies



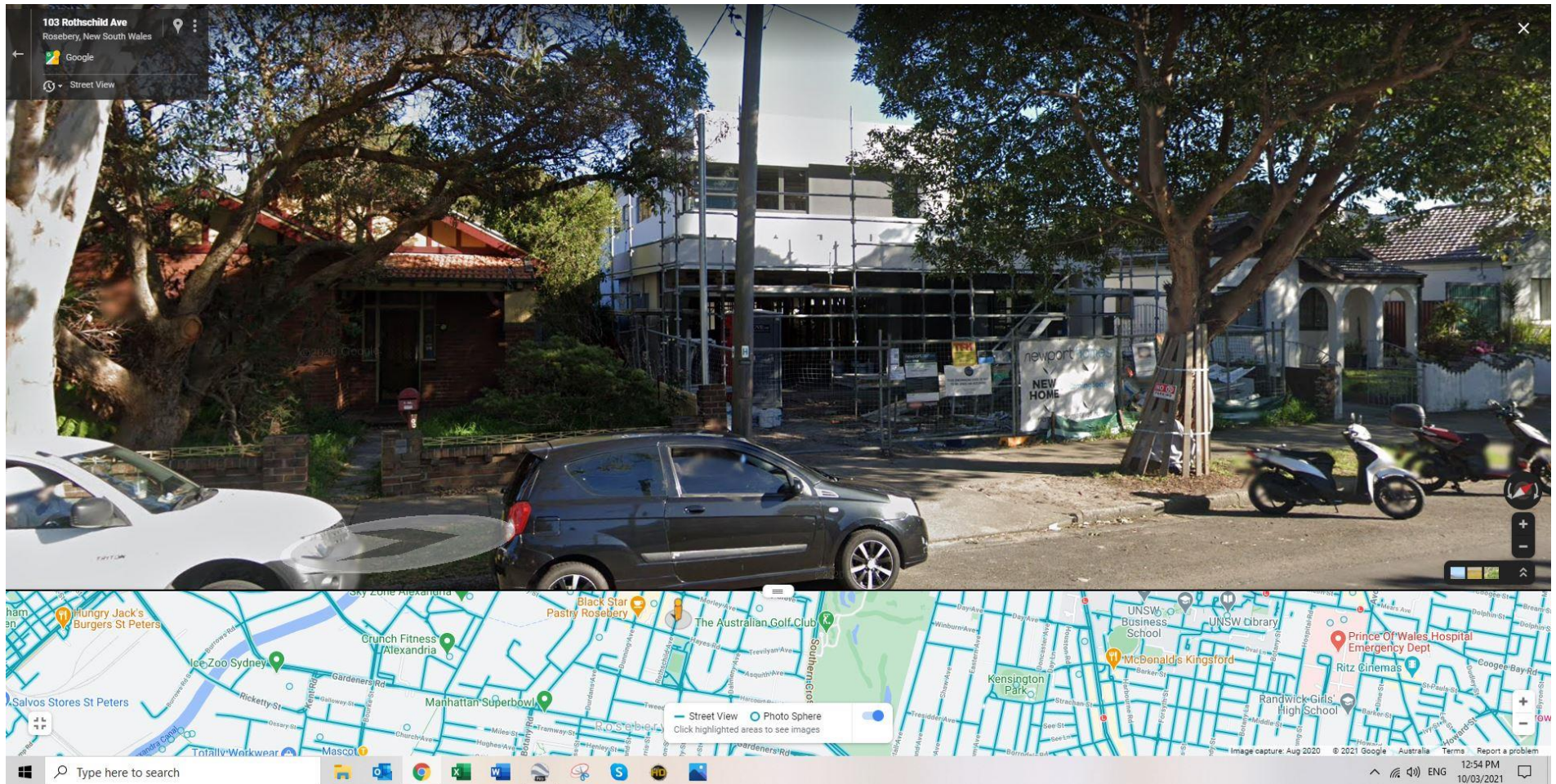
2 storey (in construction)

Height Anomalies



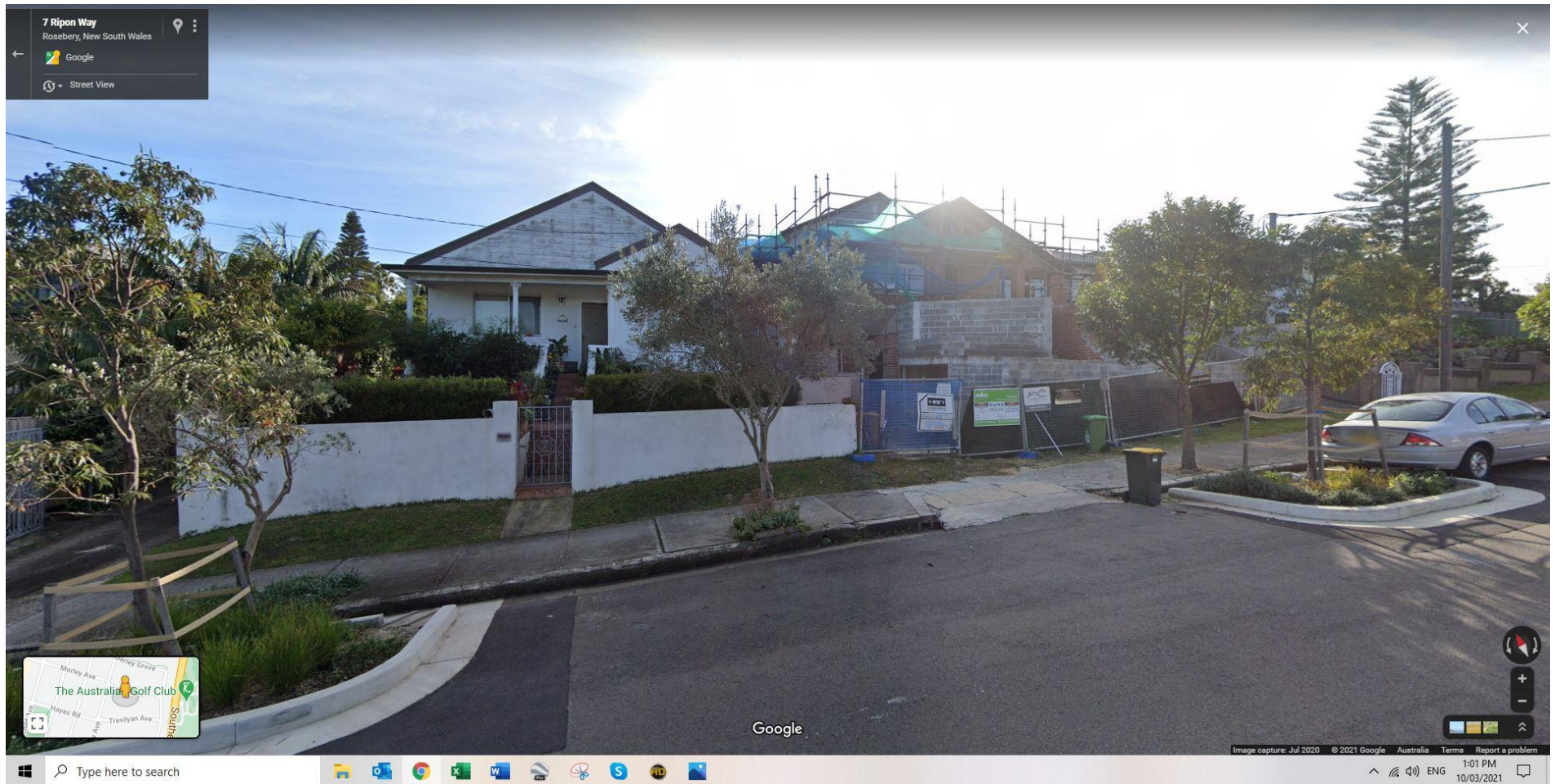
2 storey (in construction)

Height Anomalies



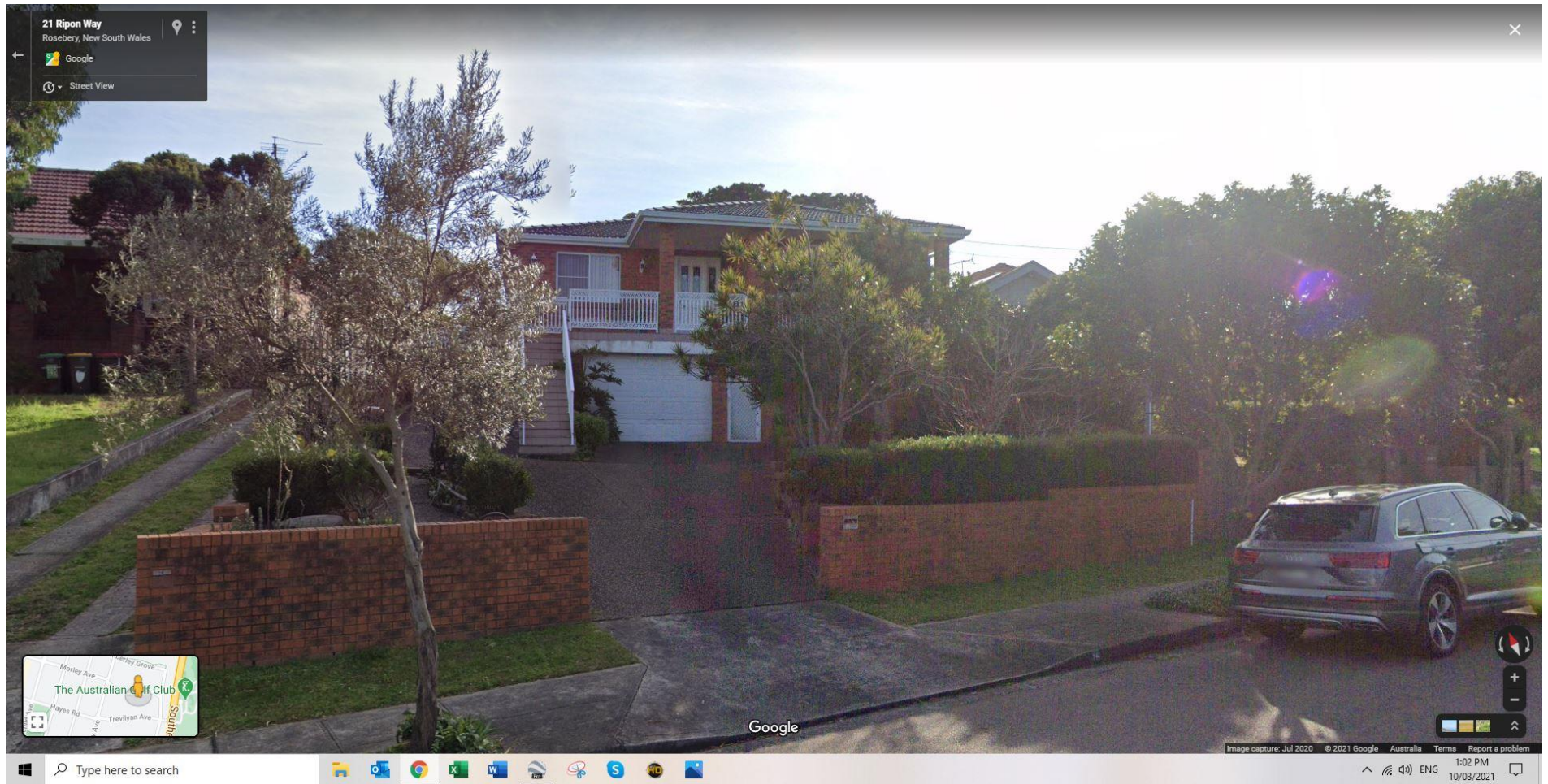
2 storey (in construction)

Height Anomalies



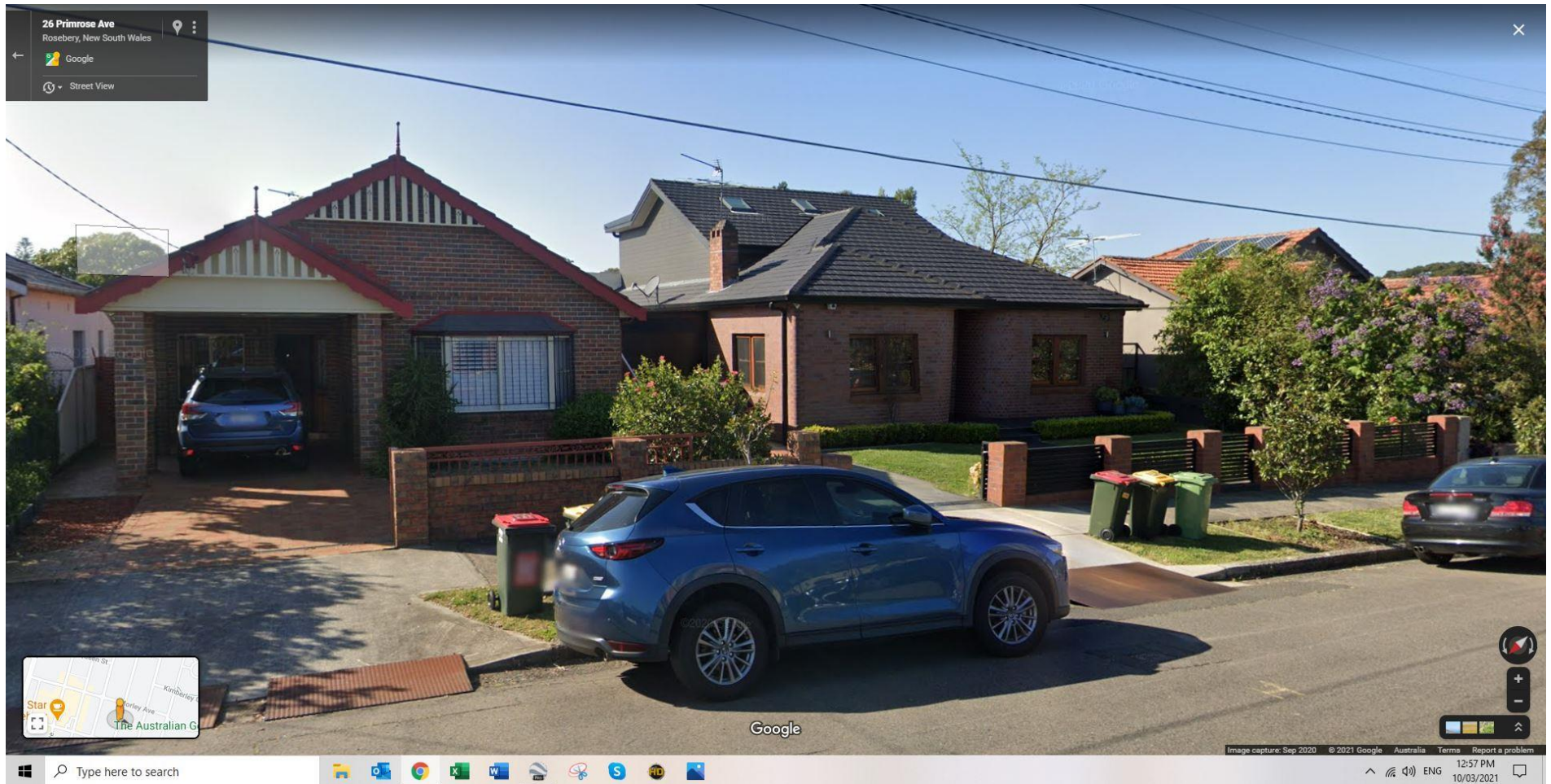
2 storey (in construction)

Height Anomalies



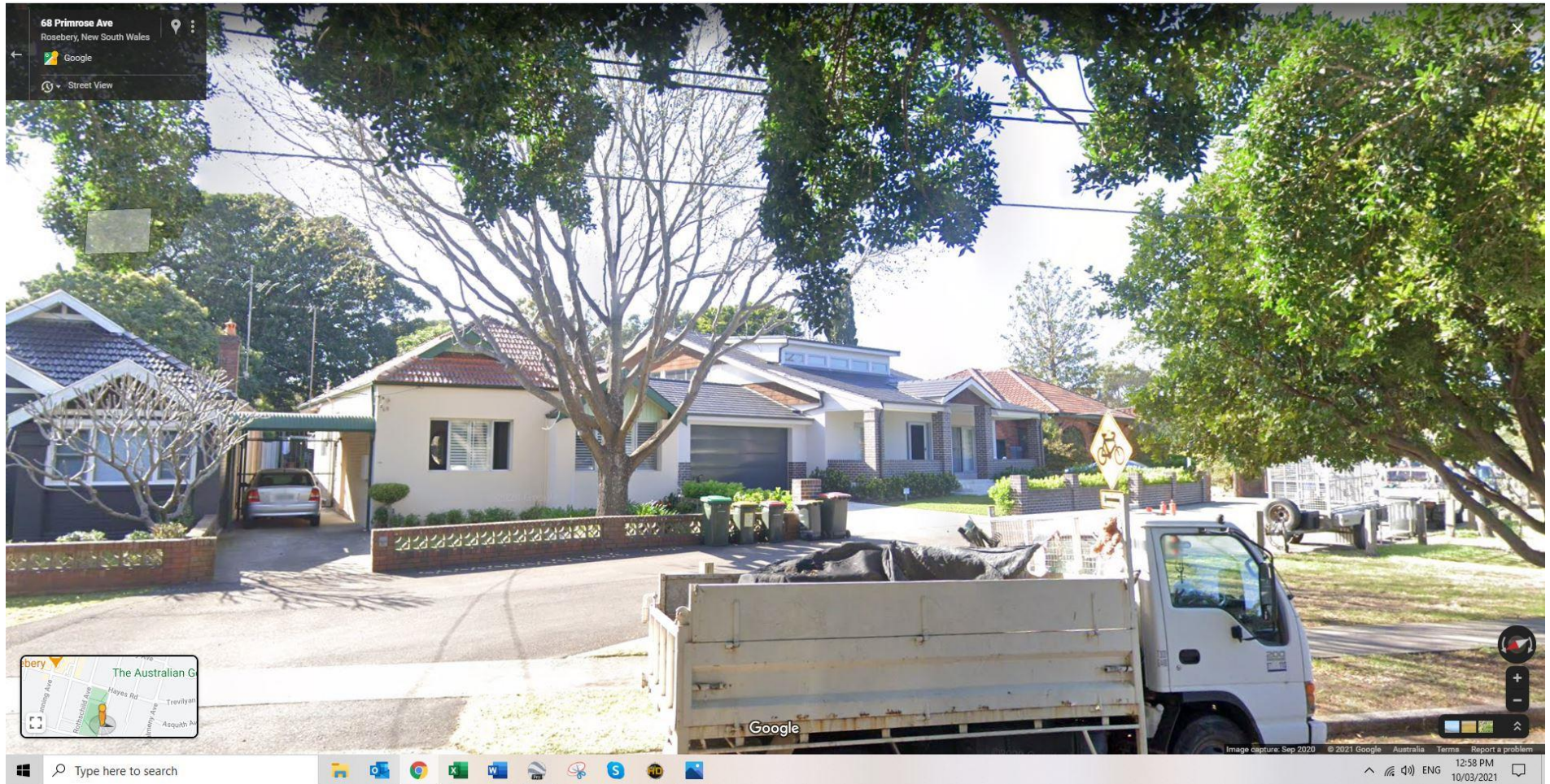
2 storey

Height Anomalies



2 storey to rear

Height Anomalies



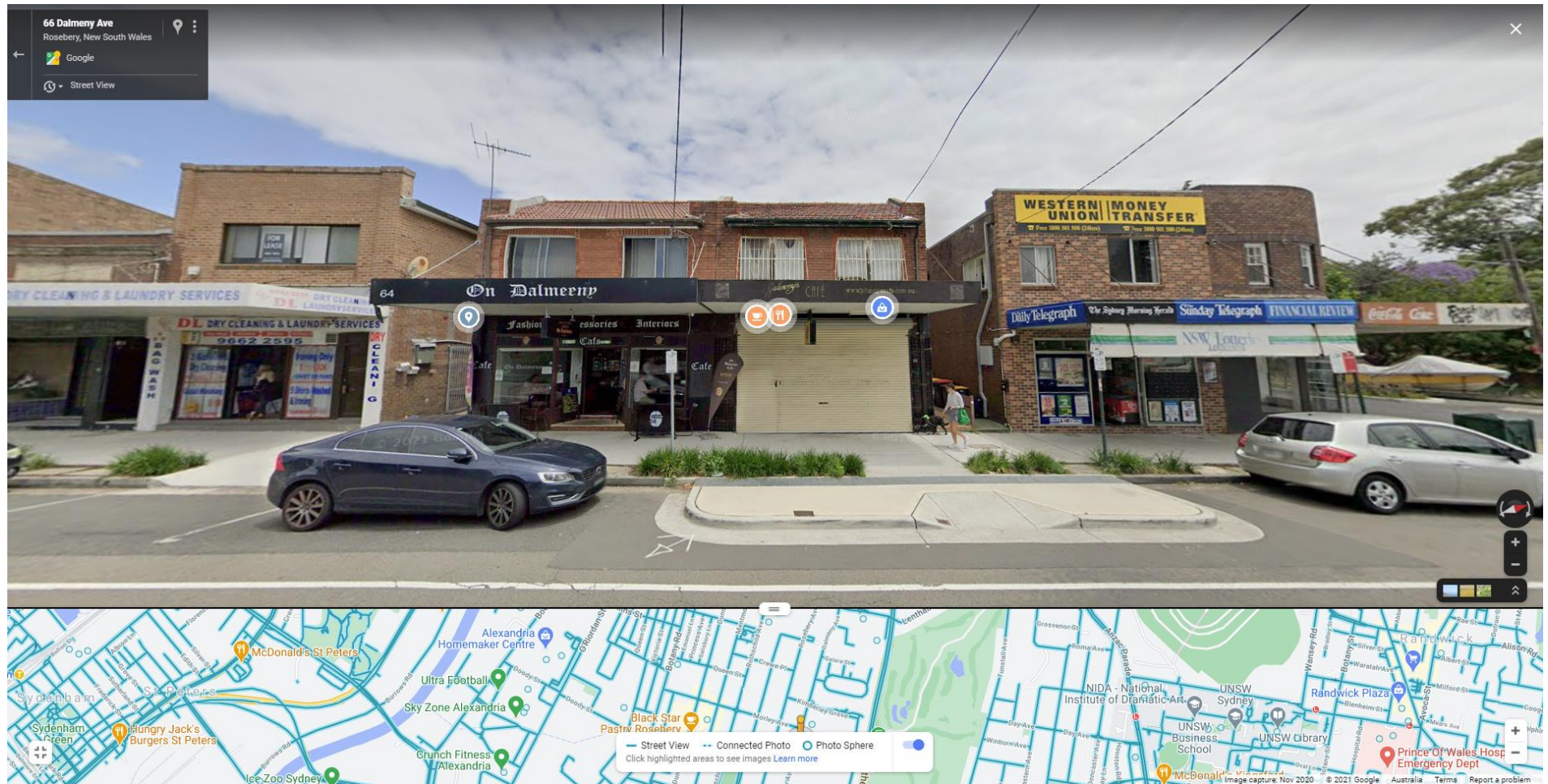
2 storey to rear

Height Anomalies



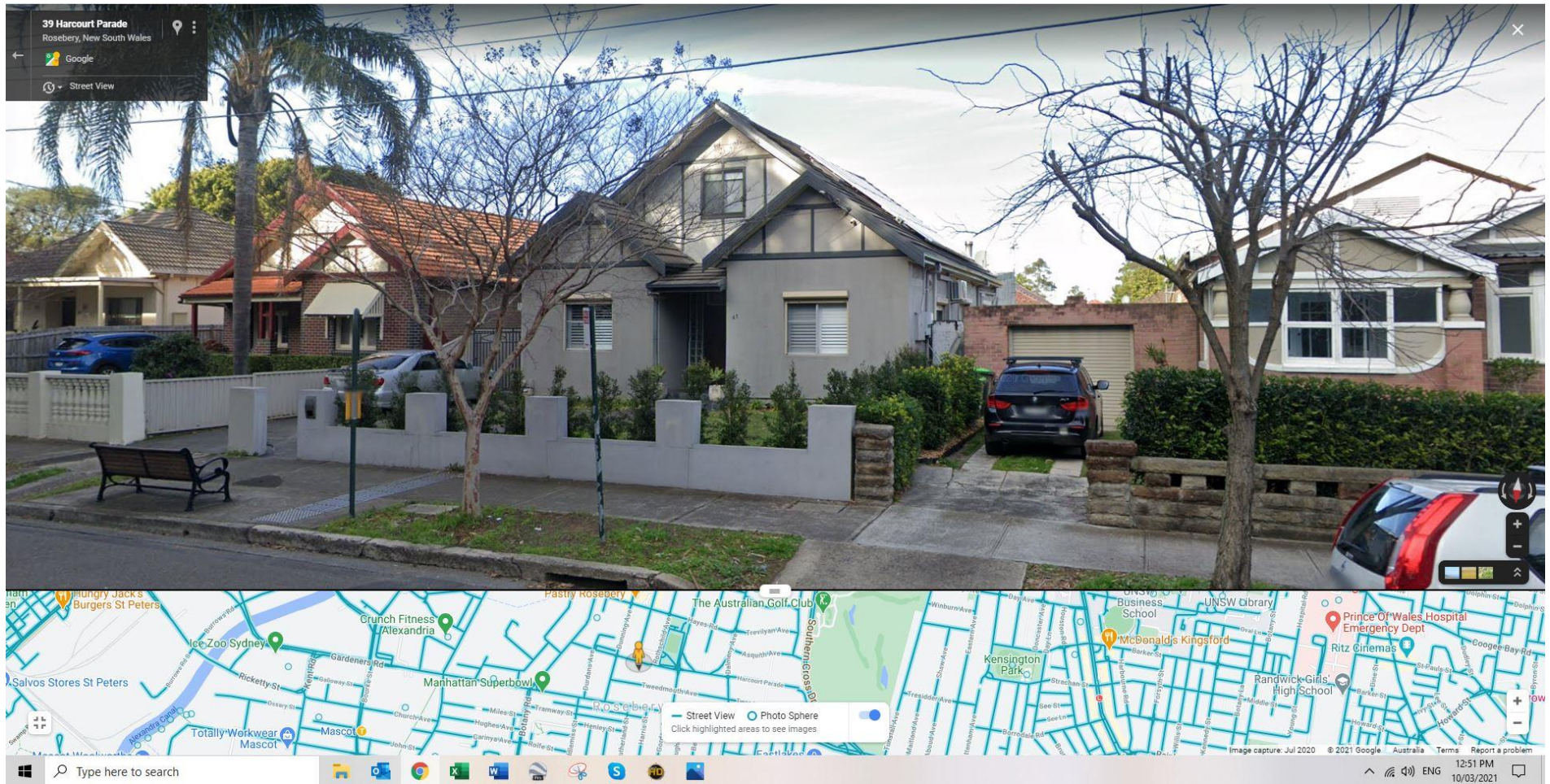
2 storey

Height Anomalies



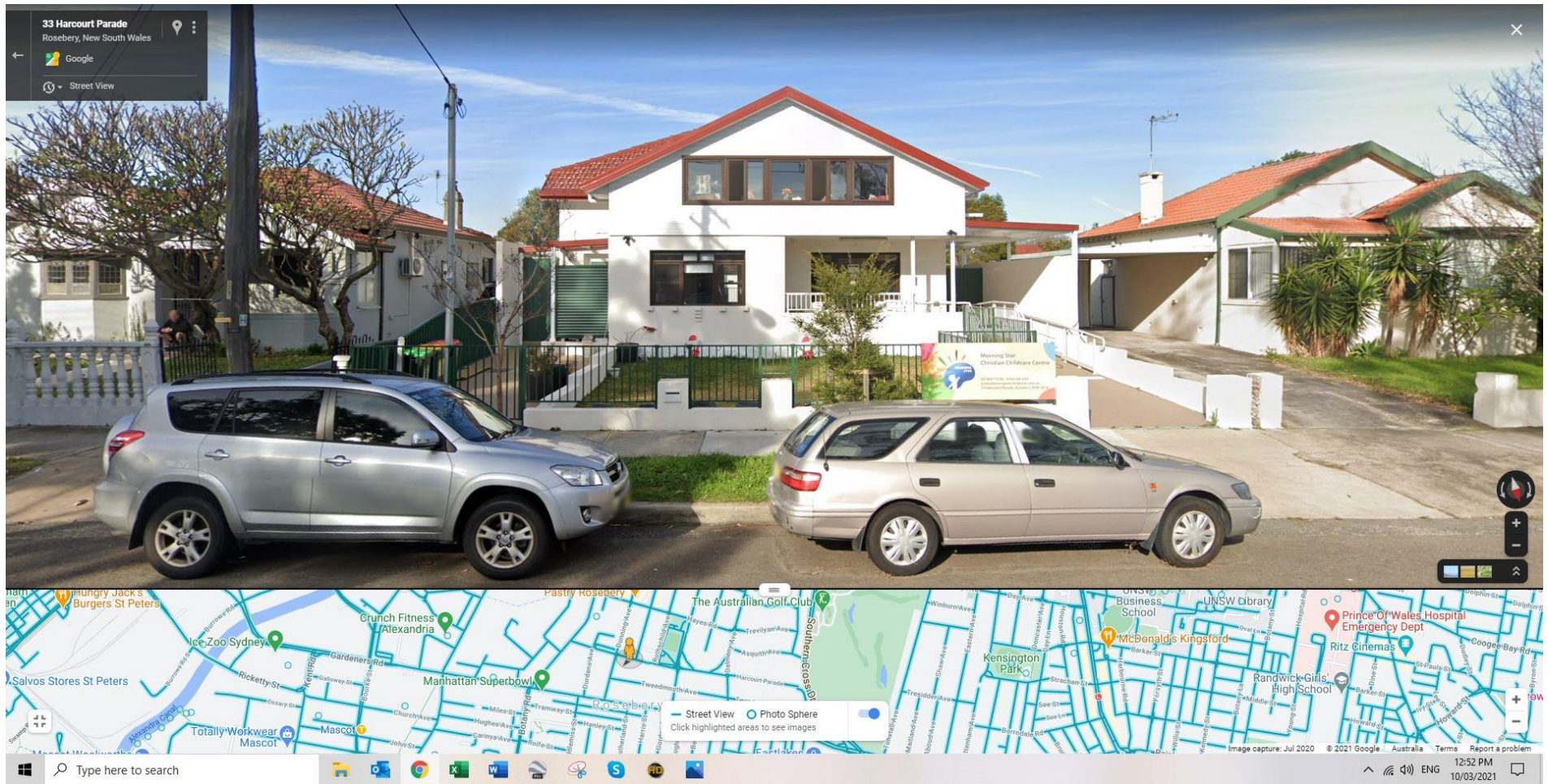
2 storey

Height Anomalies



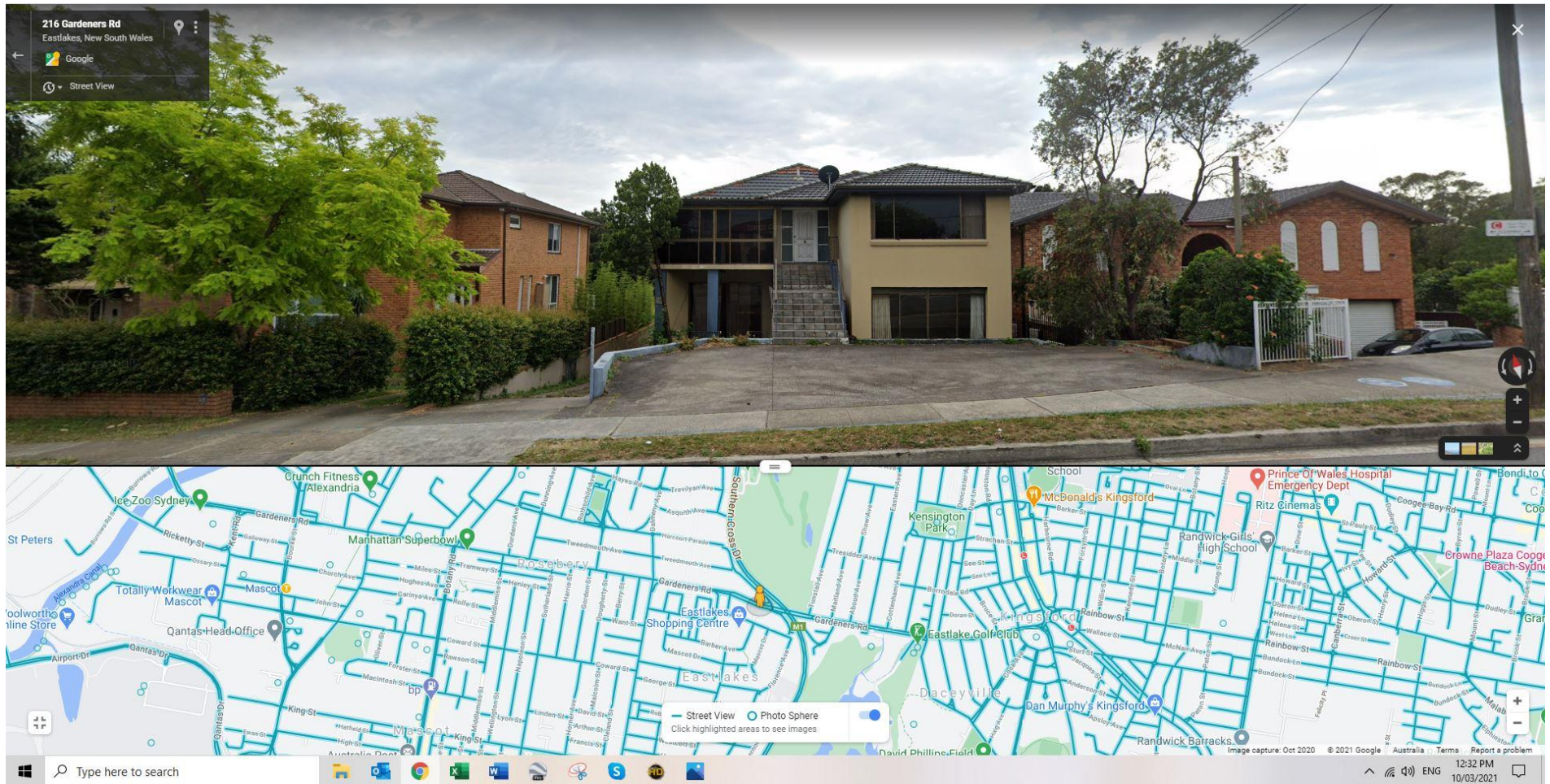
2 storey

Height Anomalies



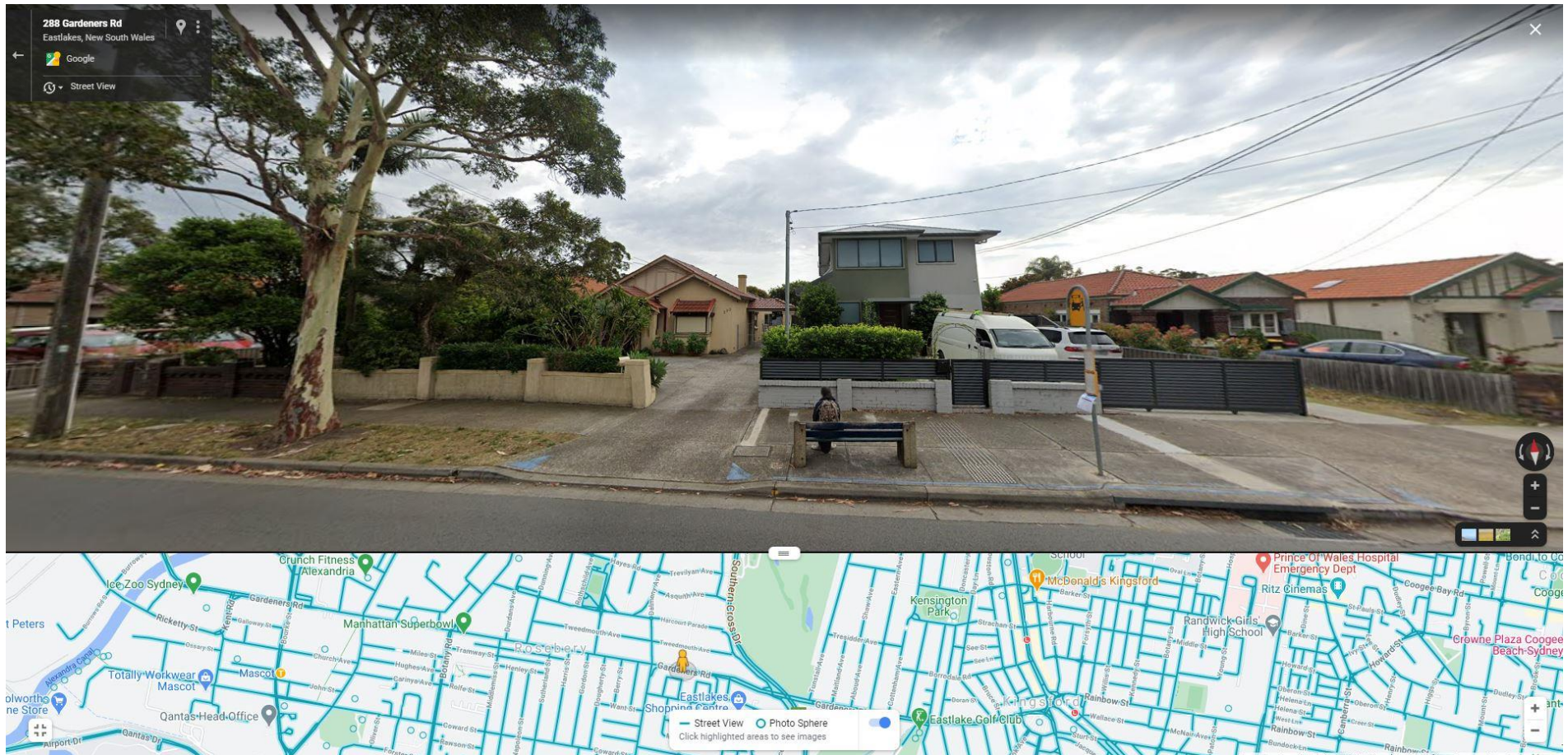
2 storey

Height Anomalies



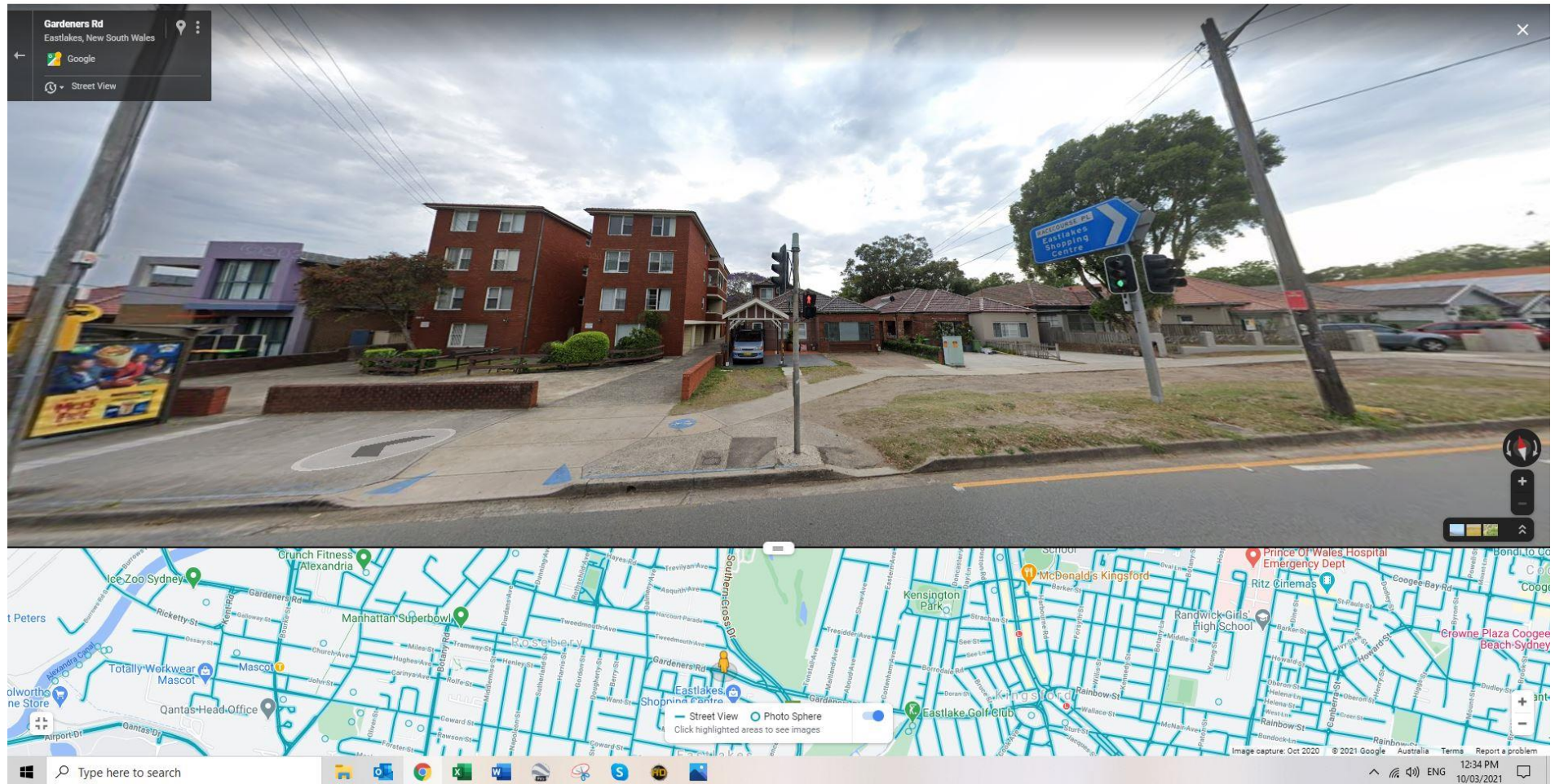
2 storey

Height Anomalies



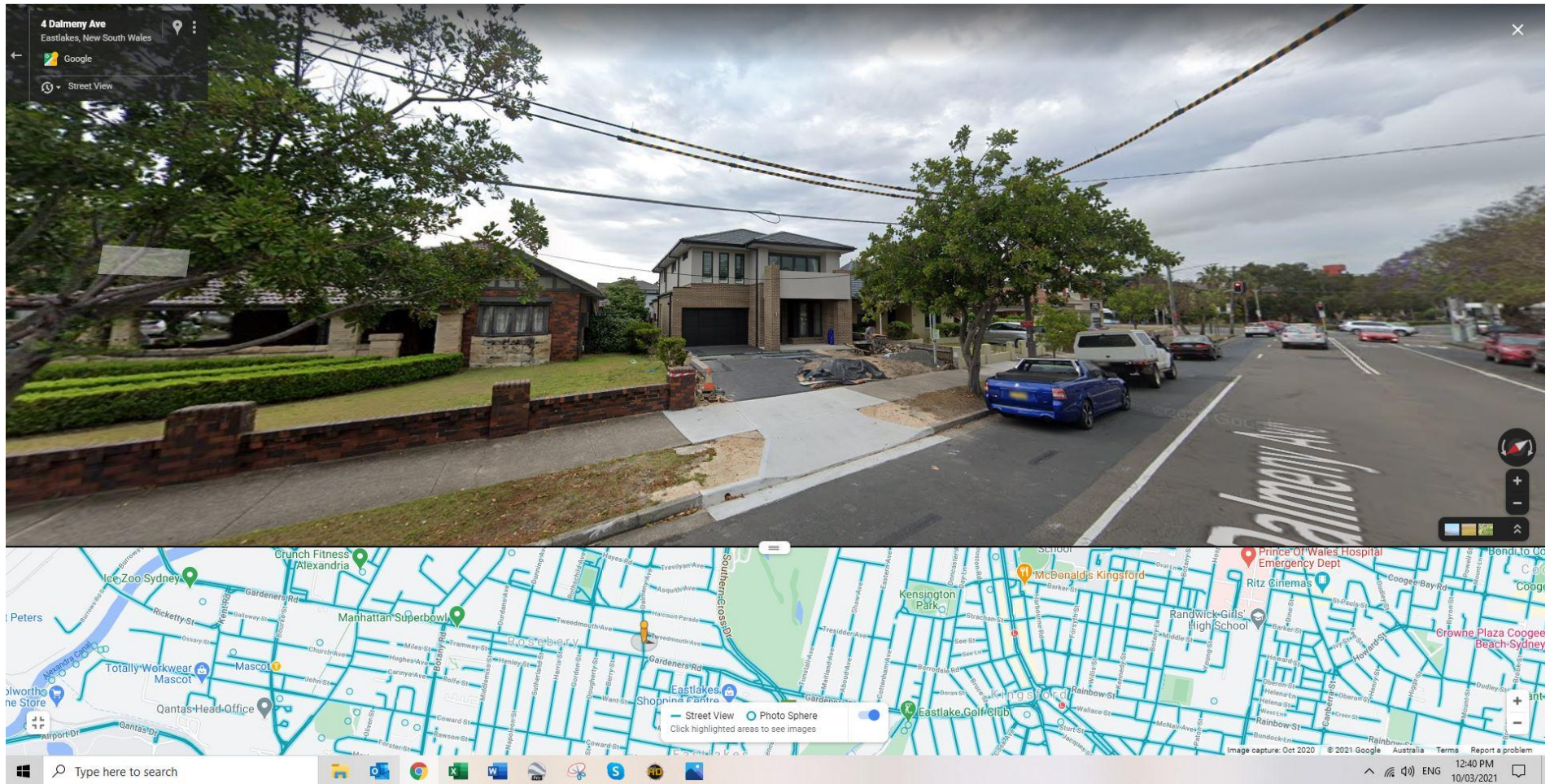
2 storey to rear

Height Anomalies



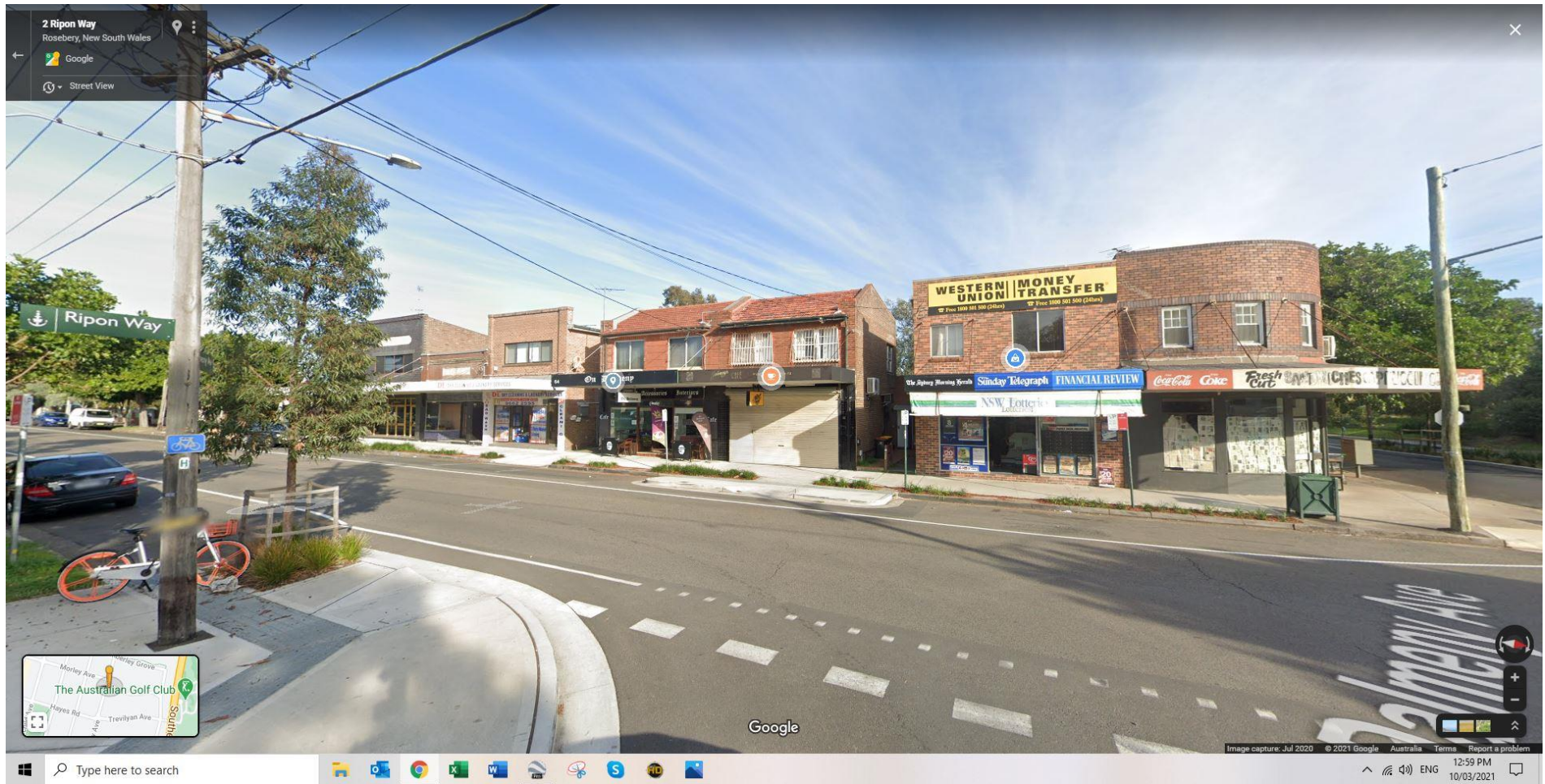
4 storey multi residences

Height Anomalies



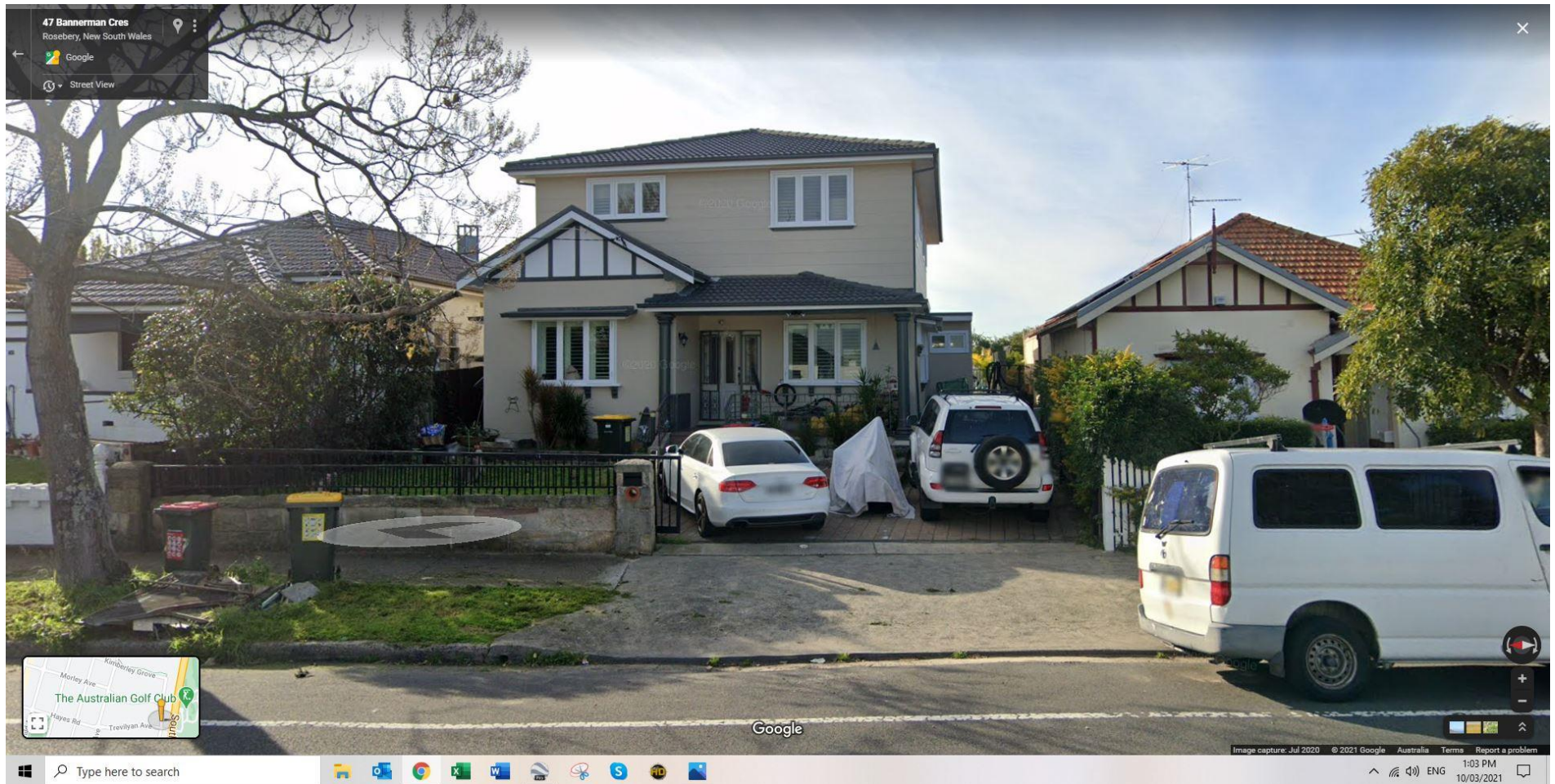
2 storey (in construction)

Height Anomalies



2 storey

Height Anomalies



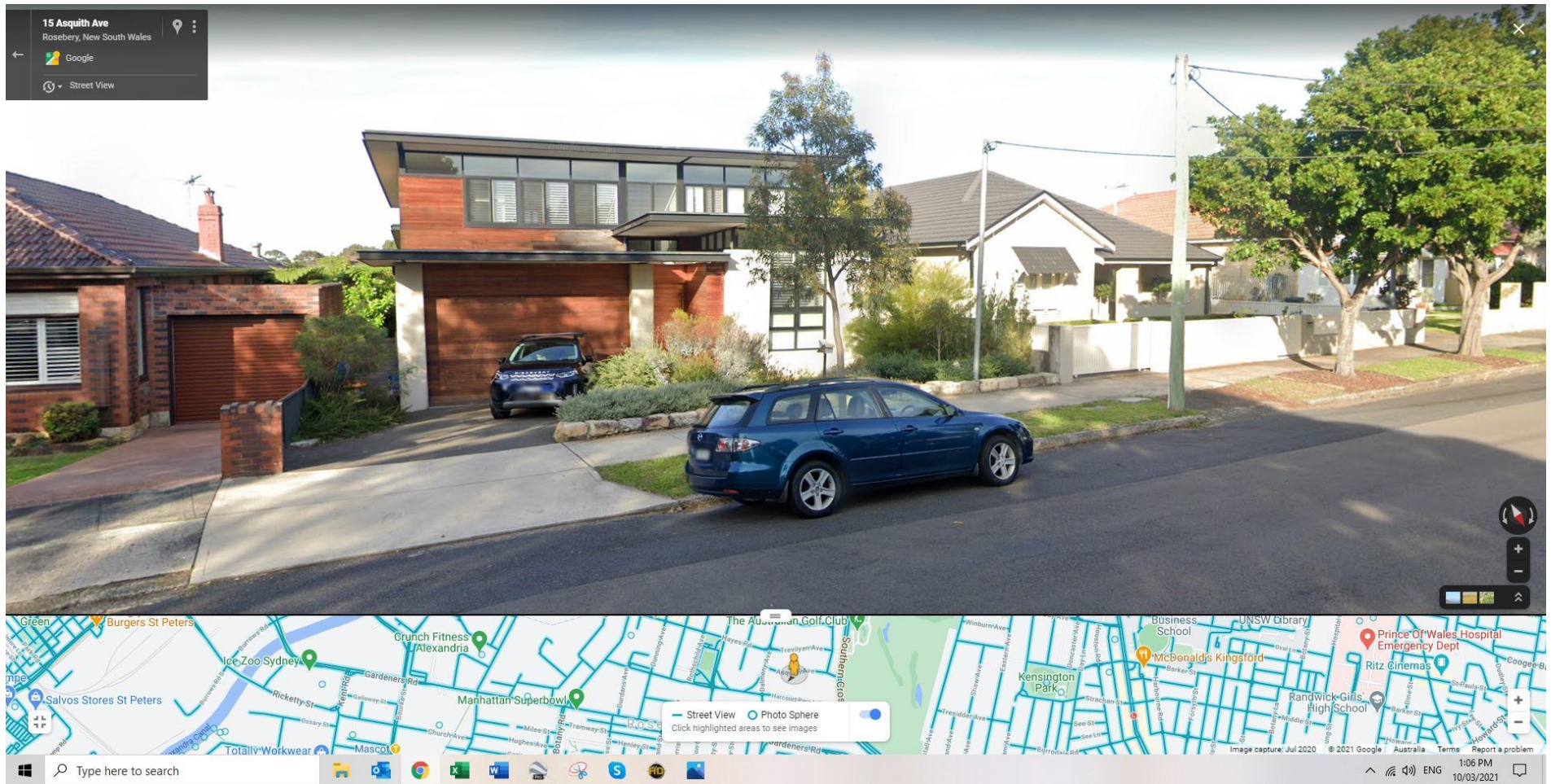
2 storey

Height Anomalies



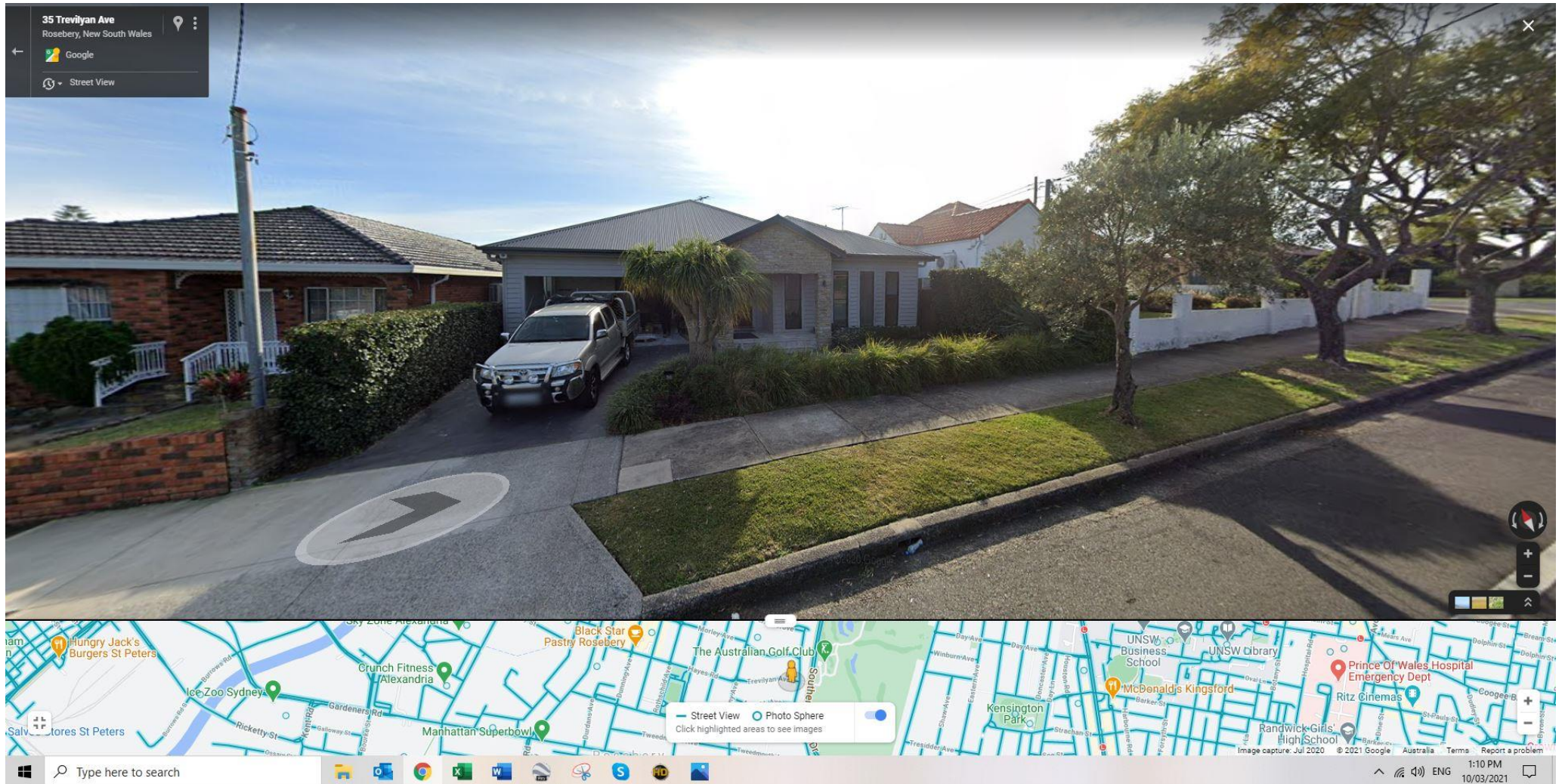
2 storey to rear

Height Anomalies



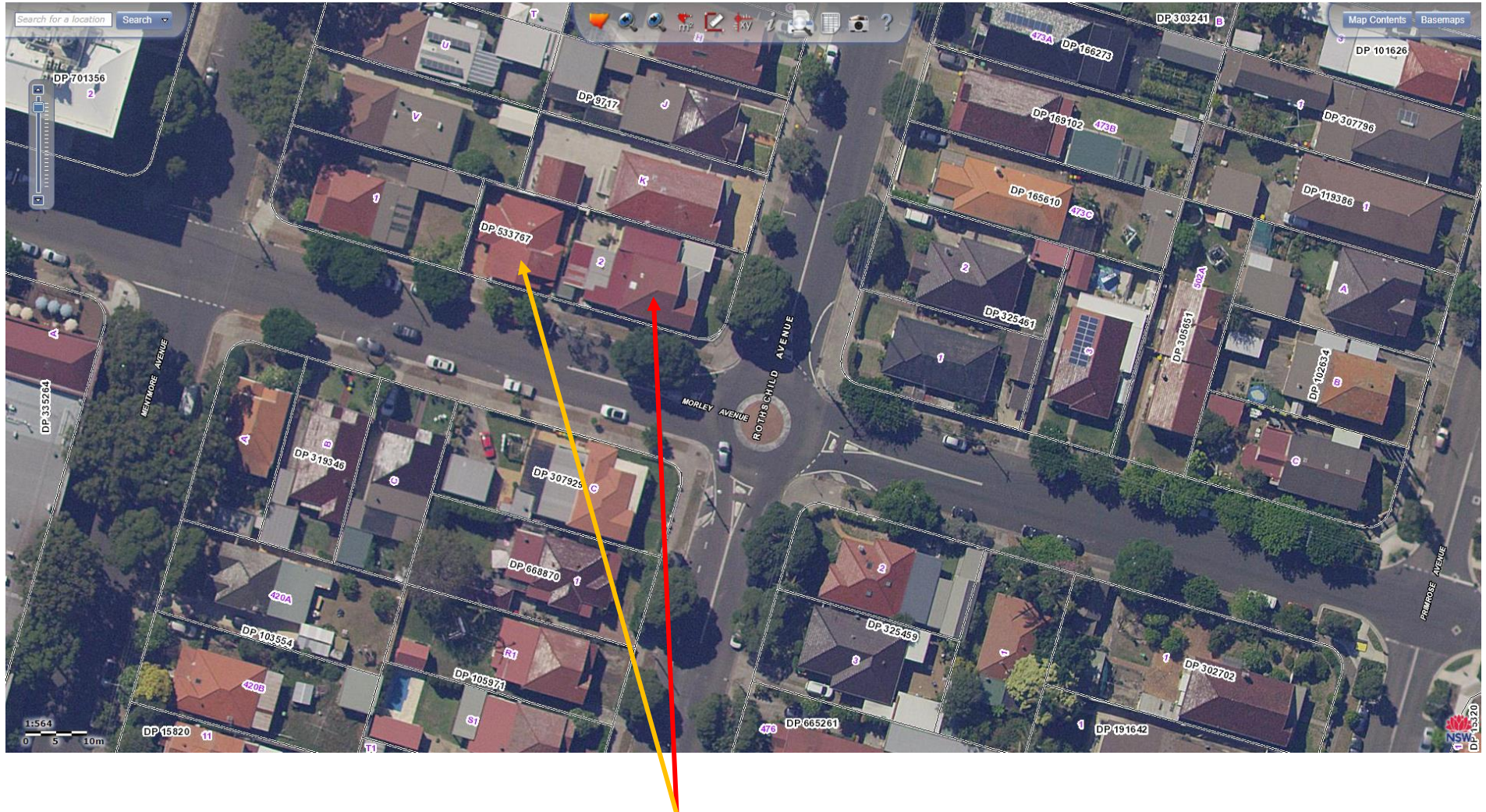
2 storey

Materials Anomalies



Weatherboard Clad Residence with Steel Roofing

Single Residence Anomalies (per Lot in original DP)



Multiple Residences on a Single Lot

Single Residence Anomalies (per Lot in original DP)



2 original lots divided to add a 3rd residence to the rear

Single Residence Anomalies (per Lot in original DP)



Granny Flat Residence added

Single Residence Anomalies (per Lot in original DP)



2 original lots divided to add a 3rd residence

Single Residence Anomalies (per Lot in original DP)



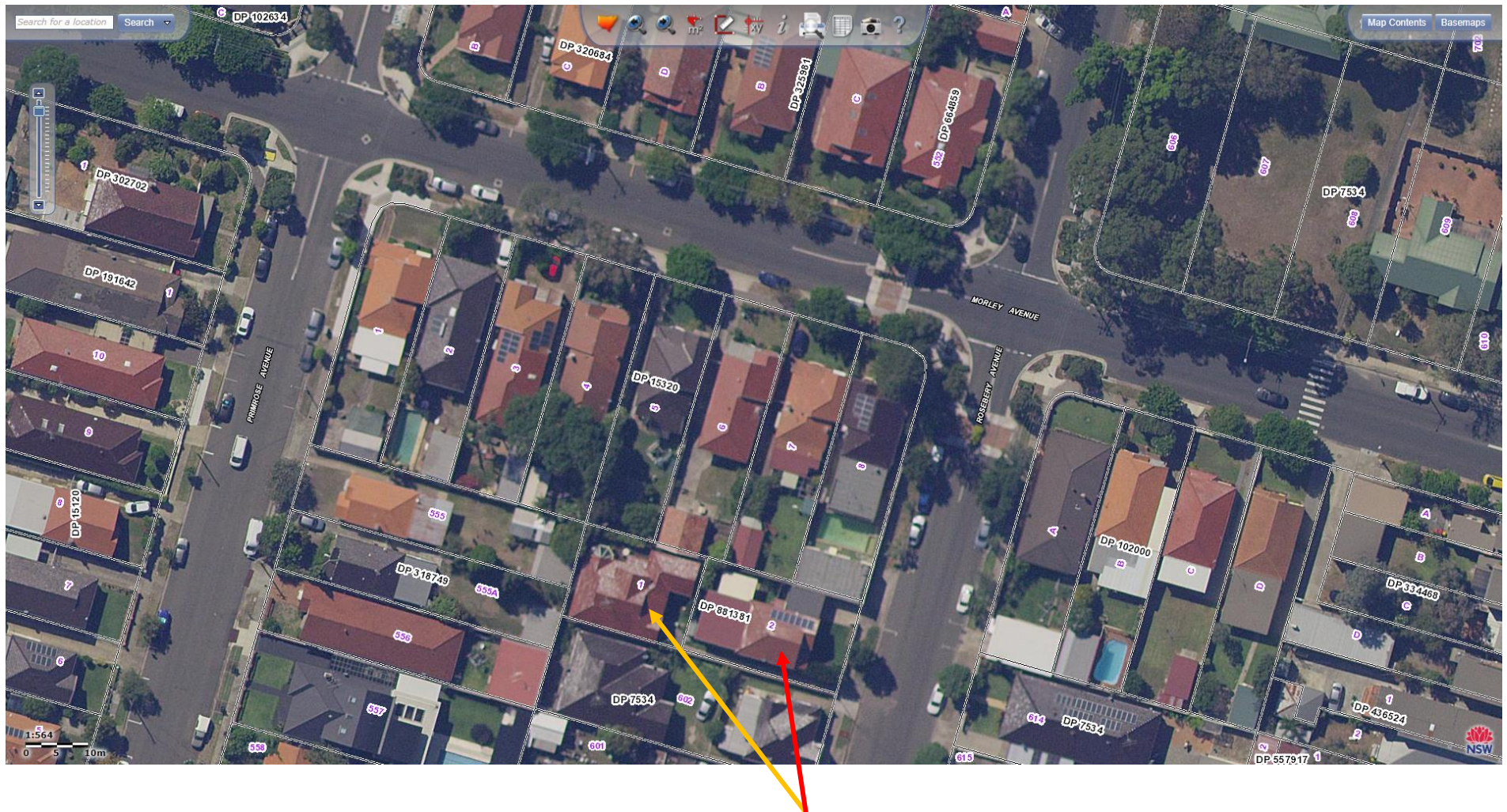
3 original lots divided to add a 4th residence to the rear

Single Residence Anomalies (per Lot in original DP)



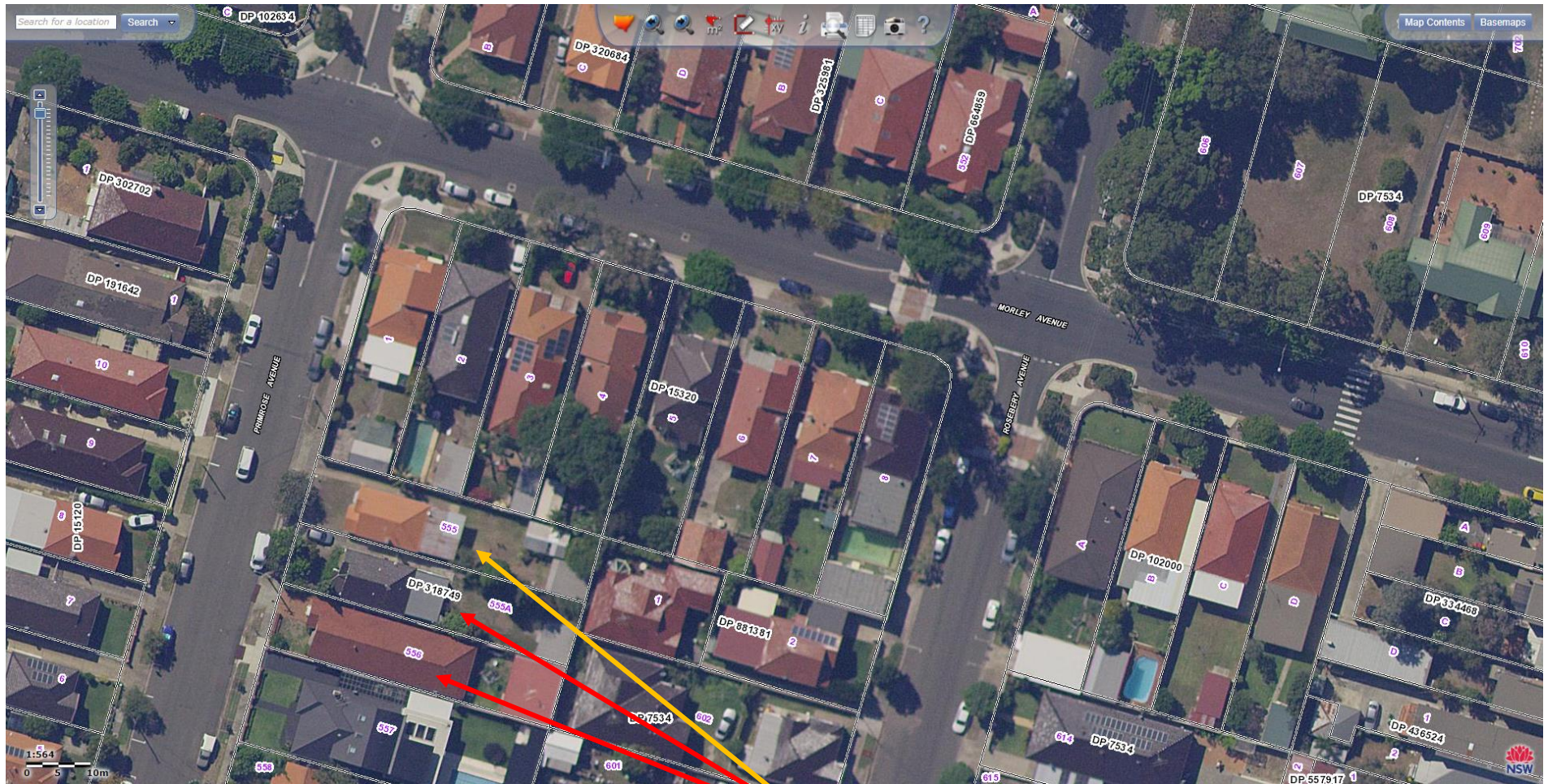
2 original lots divided to add a 3rd residence to the rear

Single Residence Anomalies (per Lot in original DP)



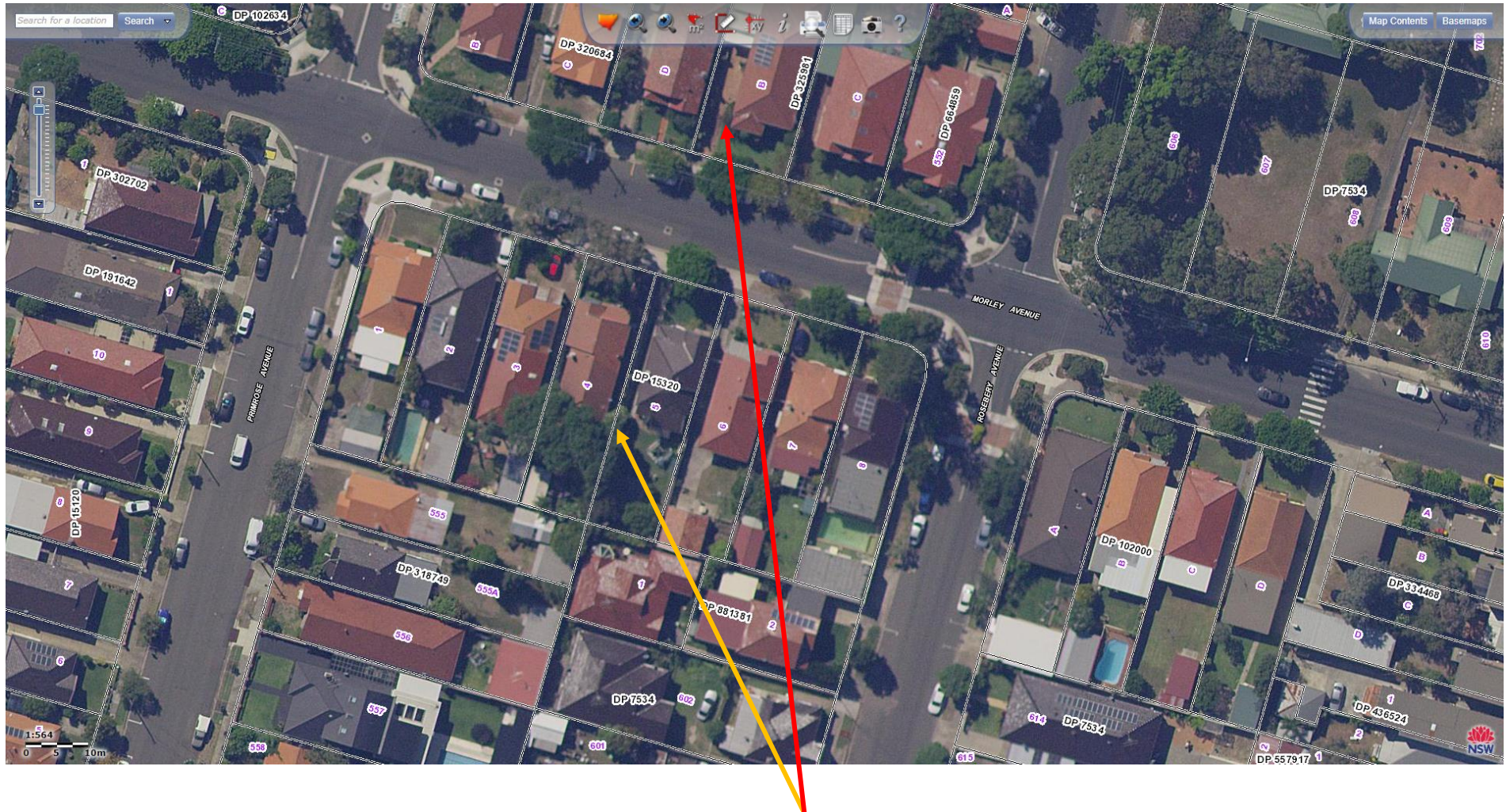
Lot subdivided to add an additional residence

Single Residence Anomalies (per Lot in original DP)



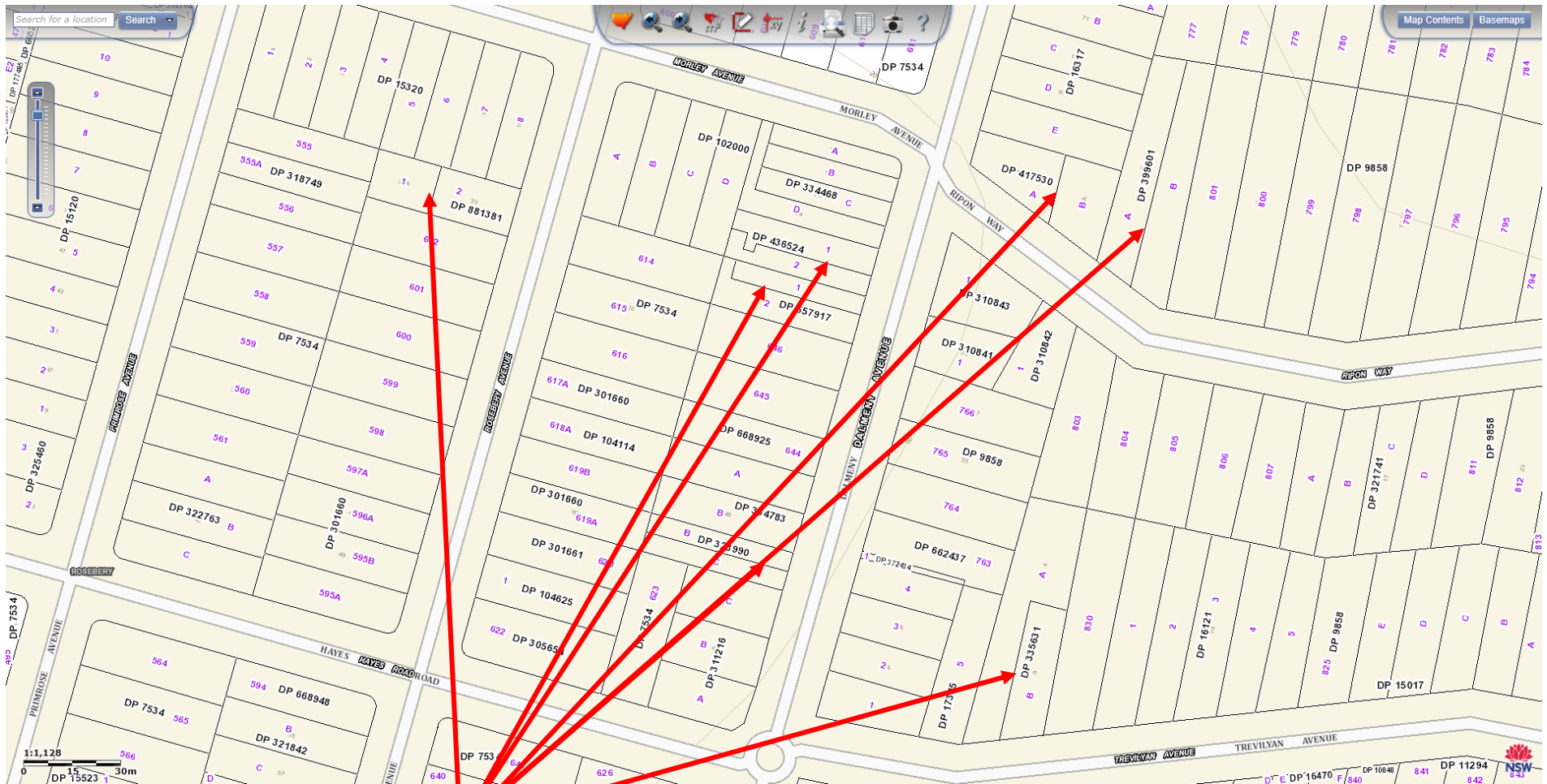
2 original lots divided to add a 3rd residence

Single Residence Anomalies (per Lot in original DP)



Narrower allotments used to create 8 residences where 6 are established to the North

Single Residence Anomalies (per Lot in original DP)



1 into 2

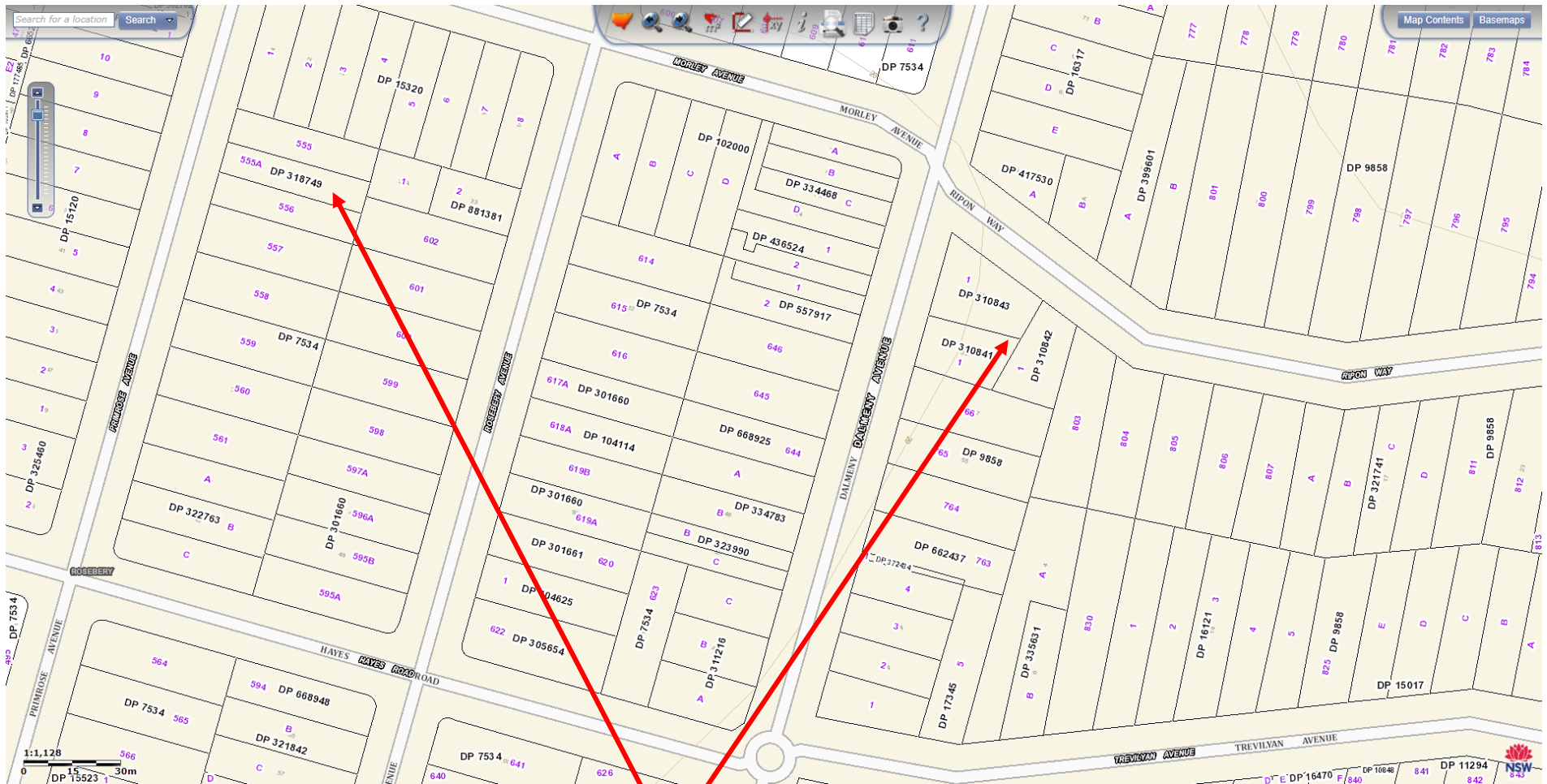
2 into 3

3 into 4

4 into 5

Residence additions by Original Lot Subdivision ?

Single Residence Anomalies (per Lot in original DP)



1 into 2

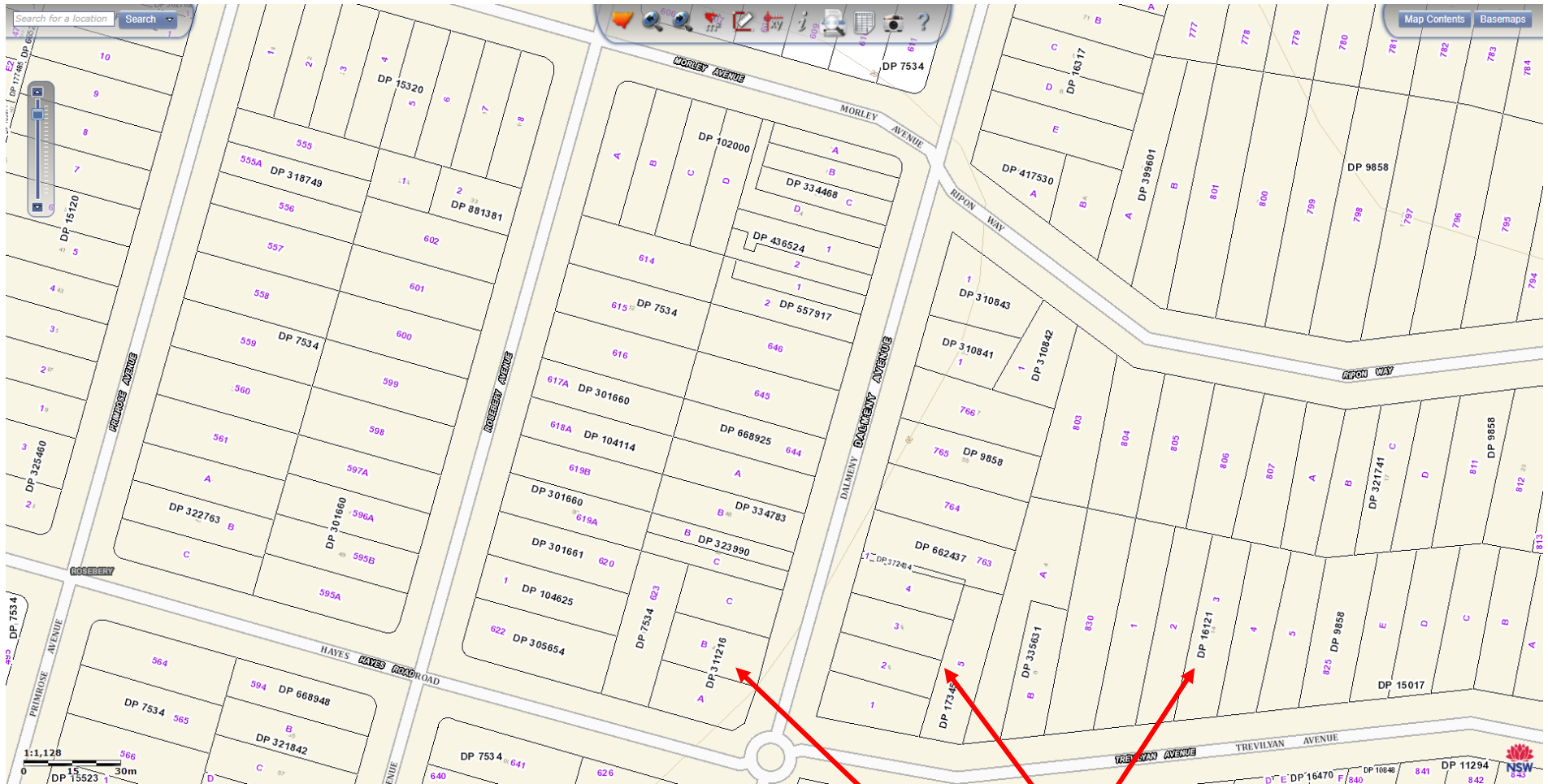
2 into 3

3 into 4

4 into 5

Residence additions by Original Lot Subdivision ?

Single Residence Anomalies (per Lot in original DP)



1 into 2

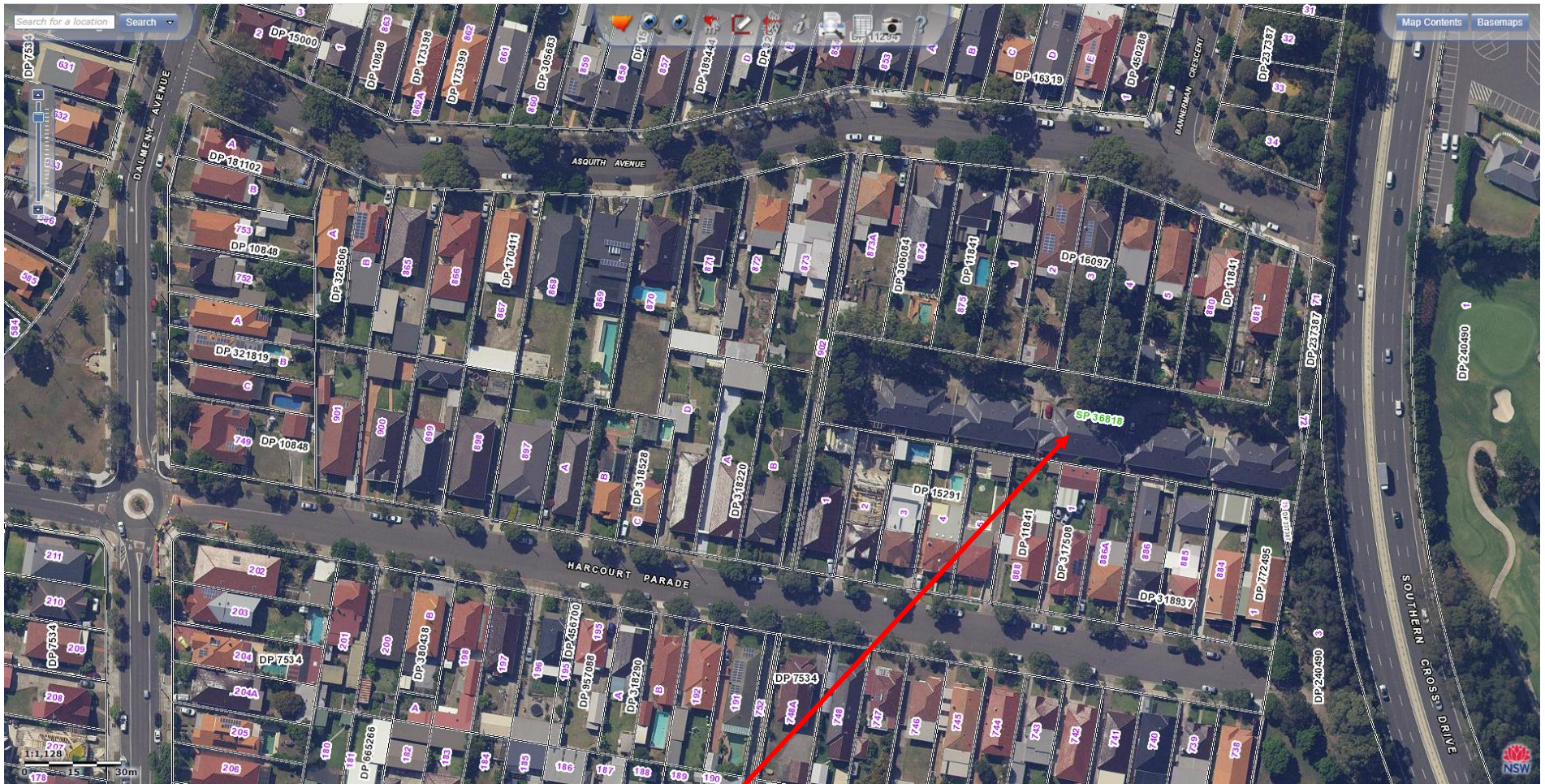
2 into 3

3 into 4

4 into 5

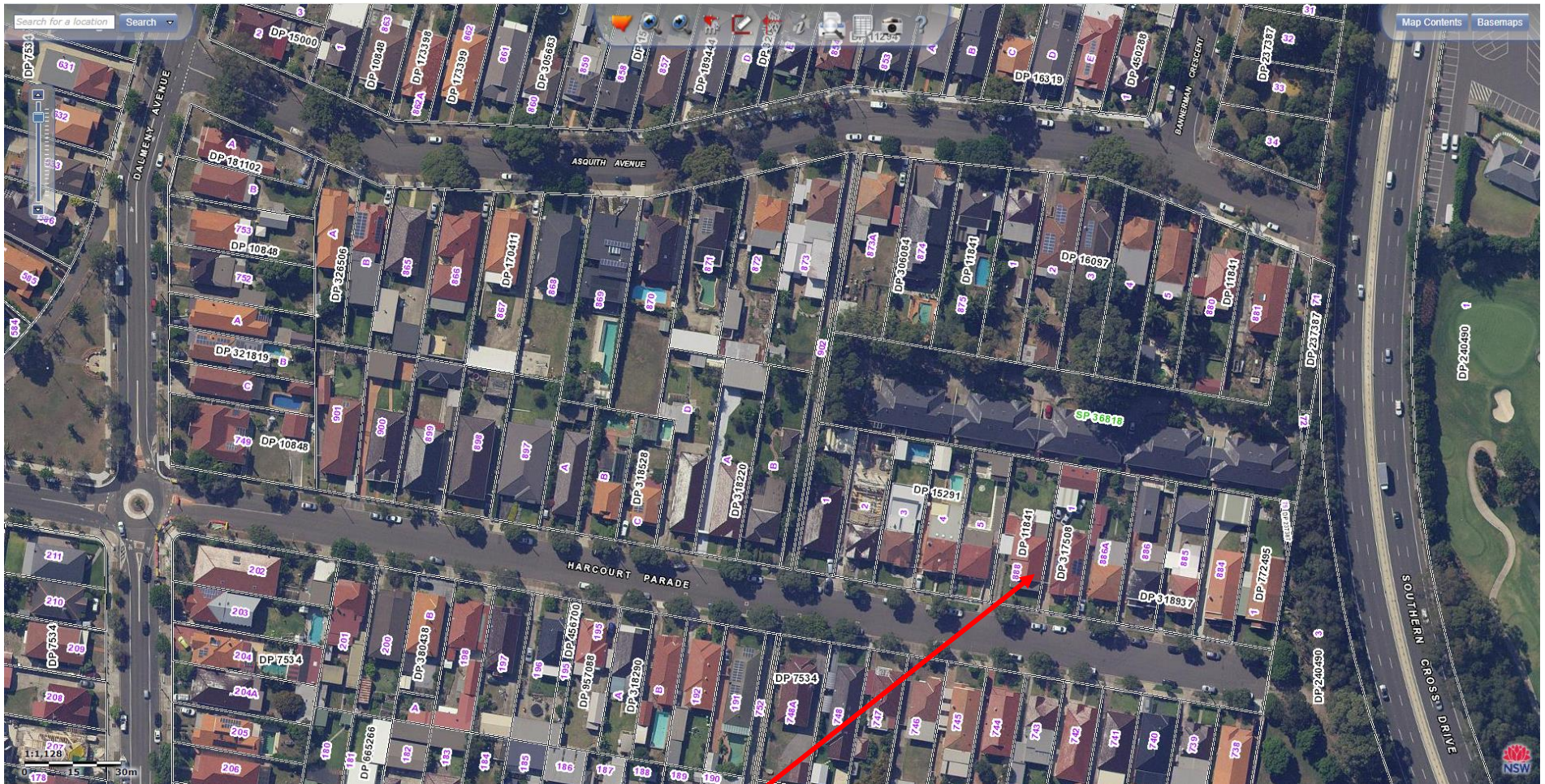
Residence additions by Original Lot Subdivision ?

Single Residence Anomalies (per Lot in original DP)



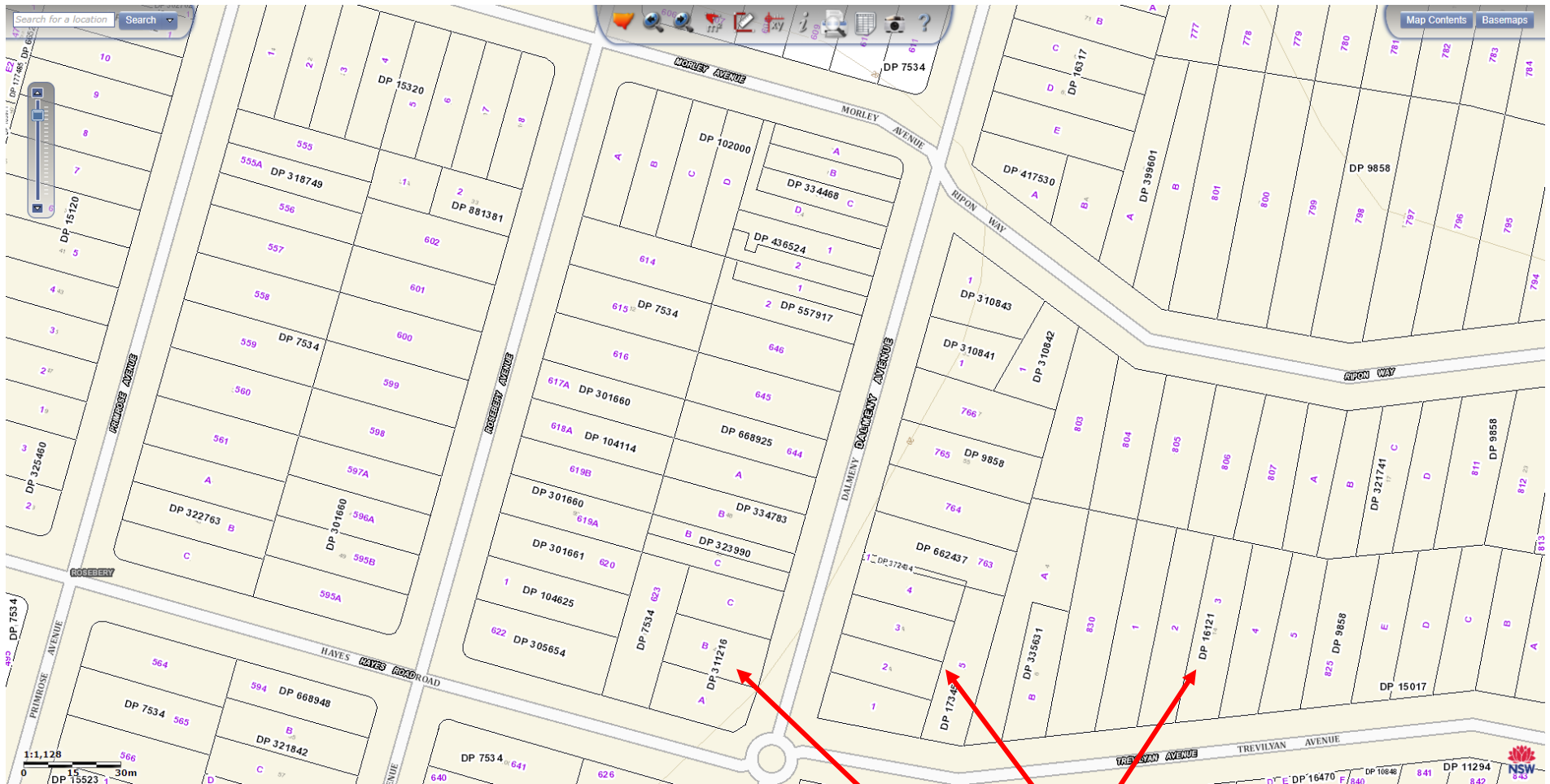
10 x strata residences on one lot

Single Residence Anomalies (per Lot in original DP)



1 into 2 & likely rear Granny Flat to form 3 residences on original lot 887

Single Residence Anomalies (per Lot in original DP)



1 into 2

2 into 3

3 into 4

4 into 5

Residence additions by Original Lot Subdivision ?

Metal Roofing Examples



PROPOSED STATUTORY AMENDMENTS

Rosebery Estate 2 year temporary exclusion from the Housing Code and the Low Rise Housing Diversity Code

Explanation of Intended Effect

December 2020



NSW Department of Planning, Industry and Environment | dpie.nsw.gov.au

Rosebery Estate 2 year temporary exclusion from the Housing Code and the Low Rise Housing Diversity Code

Introduction

This Explanation of Intended Effect (EIE) has been prepared under section 3.30 of the *Environmental Planning and Assessment Act 1979* (EP&A Act). It recommends a temporary exclusion of the Rosebery Estate within the City of Sydney local government area from the Housing Code and Low Rise Housing Diversity Code.

The temporary exclusion will be achieved by including the Rosebery Estate area as identified on the Rosebery Estate Complying Development Land Map in Schedule 5 to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP) for a period of two years.

A copy of the Rosebery Estate Complying Development Land Map is attached to this paper.

This EIE is presented in two parts.

Part 1 – Background and context

This part provides an overview of the suburb of Rosebery and an explanation of the covenant which applies to this small suburb located in the City of Sydney local government area. -

Part 2 – Temporary inclusion of the Rosebery Estate in Schedule 5 of the Codes SEPP

This part explains the justification on the proposed temporary exclusion of the Rosebery Estate from the Housing Code and the Low Rise Housing Diversity Code.

Part 1 – Background and context

1.1 The suburb of Rosebery

Rosebery is a garden suburb located in the City of Sydney local government area (see Figure 1). It was established in 1912 and retains its distinct subdivision and predominately single storey scale. Despite some unsympathetic alterations, Rosebery features a generally consistent built form and scale comprising mostly Federation, Californian Bungalow and other Inter-War housing styles.



Figure 1: Map of the Rosebery Estate

In May 2008, the City of Sydney Council resolved that the Rosebery Estate was not suitable for a heritage conservation area listing based on the findings of a heritage study prepared by Council. The report found that Rosebery was too highly modified to constitute a conservation area.

The Rosebery Estate has been identified as a special character area in the City of Sydney's planning controls since the South Sydney Development Control Plan 1997 and continues to be recognised in the Sydney Local Environmental Plan 2012. The locality statement for the Rosebery Estate in the Sydney Development Control Plan 2012 identifies the special nature of Rosebery's subdivision pattern, setbacks and built form character and scale. Development applications received by Council within the Rosebery Estate are assessed against this locality statement to ensure new additions are sensitive and to protect the character of the area.

1.2 The Rosebery Covenant

The Rosebery Covenant was imposed at the time of subdivision by the Town Planning Company of Australia, the former owner of the land, in 1914 and describes the type of housing that can be built within the Estate. This includes limiting the materials of the front façade to brick or stone, limiting the number of dwellings on a lot and requiring a dwelling to be limited to a single storey height.

Instances in the Rosebery Estate where the covenant has not been upheld have caused a degree of uncertainty about its continued application; this is because a covenant is valid until it ceases to be enforced.

Covenants can affect the planning system, but sit outside of the planning system, and can involve complex legal property law issues. To provide time to resolve issues with the application of the Rosebery Covenant and local character, a two year temporary exclusion from both the Housing Code and the Low Rise Housing Diversity Code is proposed for the Estate.

Part 2 – Temporary exclusion of the Rosebery Estate from the Housing Code and Low Rise Housing Diversity Code

An amendment to Schedule 5 to the Code SEPP (Land excluded from the Housing Code, Inland Code or Low Rise Housing Diversity Code) is proposed for the temporary exclusion of the Rosebery Estate from both the Housing Code and the Low Rise Housing Diversity Code for a period of two years.

Both the Housing Code and the Low Rise Housing Diversity Code sit within the Codes SEPP and allow two storey dwellings to be approved by a complying development certificate provided they meet all the planning controls in the Codes SEPP.

2.1 Justification on the proposed temporary exclusion

A two year temporary exclusion from the Housing Code and the Low Rise Housing Diversity Code will provide time for the inconsistent application of the covenant to be resolved. During this period, the Department will investigate the wording and impacts of clauses in environmental planning instruments that work to suspend covenants. The Department will also develop an education program for all stakeholders on the application of covenants in regard to complying development certificates.

Determining the validity of the Rosebery Covenant falls to the beneficiaries of the covenant, in this case it is the landowners in the Rosebery Estate.

Codes SEPP

Clause 1.20 of the Codes SEPP (Suspension of covenants, agreements and instruments) generally allows for covenants to be suspended, meaning that the covenant would no longer apply to a particular lot and development under the Codes SEPP may be carried out.

However, this does not apply in the case of a covenant imposed by an owner or former owner of the land (clause 1.20(2)(c)).

Sydney Local Environmental Plan 2012

In the Rosebery Estate, clause 1.9A of the Sydney Local Environmental Plan 2012 turns off the covenant. This means that a homeowner can develop a two storey house in the Rosebery Estate via a development application with regard to development controls that reference the built form characteristics of the area and the built form principles of the covenant. There has been differing opinions on whether this clause also turns off the covenant for a complying development certificate.

The Council has previously requested an exemption for the Rosebery Estate from the Codes SEPP citing that development permitted under the Codes SEPP is unsympathetic and detrimental to the character of the Rosebery Estate. Council has indicated that residents in Rosebery have expressed their concern about housing being delivered through private certification and the impacts on the area.

Since the Low Rise Housing Diversity Code commenced in Council's local government area on 1 July 2020, six complying development certificates have been issued in the Rosebery Estate. Council have reported that there are at least 11 two storey developments that have been previously completed as complying development. This demonstrates the covenant is not being applied consistently, which has resulted in a high level of uncertainty amongst residents in the Rosebery Estate.

It is also considered that the Low Rise Housing Diversity Code will increase demand for two storey development in the form of dual occupancies and make future breaches of the covenant more likely. As the covenant is imposed by a former owner of the land, legal action around enforcement of the covenant must be undertaken by residents, not Council, which is both time consuming and costly.

A two year temporary exclusion of the Rosebery Estate from the Housing Code and the Low Rise Housing Diversity Code would provide certainty for land owners while the validity of the covenant is determined. It also provides time for the Department to review how covenants interact with environmental planning instruments, and develop education materials for certifiers, landowners and the community.

Saving and transitional provisions

It is proposed that an application for a complying development certificate that has been made but not finally determined before the commencement of this Policy must be determined as if this Policy had not commenced.

ONE SHILLING
RECEIVED
13 OCT 1927
REC'D 13 OCT 1927
3573206
B 573206 C

THE T. TOWN PLANNING COMPANY OF AUSTRALIA LIMITED (In Liquidation)

(herein called transferor)

being registered as the proprietor of an estate in fee simple in the land hereinafter described, subject, however, to such encumbrances, liens and interests as are notified hereunder in consideration of £2000 (the receipt whereof is hereby acknowledged) paid to it by

CHARLES ALLEN LEWIS of [redacted] Merchant

(herein called transferee)

do hereby transfer to the said transferee

ALL such its Estate and Interest in ALL THE land mentioned in the schedule following:-

No.	County.	Parish.	State if Whole or Part.	Vol.	Fol.
(SEE ANNEXURE)					

AND IN CONSIDERATION of the foregoing transfer the Transferee for himself and the transferee covenants with the transferor and assigns his executors administrators and assigns but also the lands hereby transferred and the respective successive owners and tenants of each lot thereof covenants with the transferor and its assigns that he or they will not erect or cause or allow to be erected on the lands comprised in the within transfer any weatherboard or other wooden residence but will erect on each such lot only a double fronted cottage residence of one storey and shall not erect more than one such residence upon each such lot which residence shall have a front elevation of brick or stone or brick and stone with slate or tile roofing and shall stand back at least twenty feet from the alignment of the street to which the respective lots front and shall cost not less than four hundred pounds.

AND for the purposes of Section 89 of the Conveyancing Act 1919 it is hereby further agreed and declared that:-

(a) The lands to which the benefit of the above covenant is intended to be applied are as regards deposited Plan 9717 the whole of the lands comprised therein other than the land hereby transferred; and as regards deposited Plan 7534 the whole of the lands comprised therein other than the land hereby transferred; and as regards deposited Plan 9858 the whole of the lands comprised therein other than the land hereby transferred.

(b) The lands which are to be subject to the burden of the above covenant are the lands comprised herein.

(c) The above covenant may be released varied or modified with the consent of the transferor.

AND the transferor hereby requests the Registrar General to issue on the certificate of title to issue for the land hereby transferred the foregoing covenant and condition.

ENCUMBRANCES &C. REFERRED TO.

Reservations and conditions (if any) contained in Crown Grants.

Signed at Sydney the 2nd day of October 1927

THE T. TOWN PLANNING COMPANY OF AUSTRALIA LIMITED (In Liquidation) was hereunto affixed by KEITH HABERFIELD STANTON one of the Liquidators thereof in the presence of

Signed in my presence by the said KEITH HABERFIELD STANTON who is personally known to me

Signed in my presence by the transferee CHARLES ALLEN LEWIS WHO IS PERSONALLY KNOWN TO ME

Accepted, and I hereby certify this Transfer to be correct for the purposes of the Real Property Act.

Vol. 4086 Fol. 185

Req:R484338 /Doc:DL B573206 /Rev:03-Oct-1997 /NSW LRS /Pgs:ALL /Prt:10-Mar-2021 11:06 /Seq:2 of 4
Office of the Registrar-General /Src:CITEC /Ref:covanent

273 George

CONSENT OF MORTGAGEE.

I, mortgagee under Mortgage No. [redacted], release and discharge the land comprised in the within transfer from such mortgage and all claims thereunder but without prejudice to my rights and remedies as regards the balance of the land comprised in such mortgage.

Dated at this day of 192 [redacted] Mortgages.

Signed in my presence by who is personally known to me.

MEMORANDUM AS TO NON-REVOCATION OF POWER OF ATTORNEY.¹

(To be signed at the time of executing the within instrument.)

Memorandum whereby the undersigned states that he has no notice of the revocation of the Power of Attorney registered No. [redacted] Miscellaneous Register under the authority of which he has just executed the within transfer.²

Signed at the place and on the date above mentioned, in the presence of-

FORM OF DECLARATION BY ATTESTING WITNESS.³

Appeared before me at [redacted] the day of [redacted] one thousand nine hundred and twenty [redacted] the attesting witness to this instrument, and declared that he personally knew the person signing the same, and whose signature thereto he has attested; and that the name purporting to be such signature of the said [redacted] is own handwriting, and that [redacted] was of sound mind and freely and voluntarily signed the same.

5 DEC 1927

MEMORANDUM OF TRANSFER of

Acres 2 roads 274 perches.

Several lots of land in DP 7534, 9717 & 9858 at Rosebery subject to Covenant

Waterloo Municipality

Parish Alexandria County

Charles Allen Lewis Transferee.

Particulars entered in Register Book, Vol. 4086 Fol. 185

the 2nd day of December 1927 at minutes 10 o'clock in the forenoon.

W. H. HAYTON Acting Registrar General

PROGRESS RECORD

	Initials	Date
ent to Survey Branch		
Received from Records		
Draft written		18/10/27
Draft examined		19/10/27
Diagram prepared		30/11/27
Diagram examined		30/11/27
Draft forwarded		7 DEC 1927
Supt. of Engrs.		
Cancellation Clerk		

Vol. 4086 Fol. 185

Diagram Fees

Additional Folios

If the parties be resident without the State, but in any other part of the British Isles the instrument must be signed or acknowledged before the Registrar-General or Recorder of such Possession, or before any Judge, Notary Public, Justice of the Peace for New South Wales, or before any Minister, Ambassador, Envoy, Minister Chargé d'Affaires, Secretary of the Embassy or Legation, Consul-General, Consul, Vice-Consul, Acting Consul, or Consular Agent, who affix his seal of office, or the attesting witness may make a declaration of the due execution thereof before one of such persons (who should sign and affix his seal to such declaration), other person as the said Chief Justice may appoint.

If resident in the United Kingdom then before the Mayor or Chief Officer of any city or a Notary Public.

If resident at any foreign place, then the parties should sign or acknowledge before a Minister, Ambassador, Envoy, Minister Chargé d'Affaires, Secretary of the Embassy or Legation, Consul-General, Consul, Vice-Consul, Acting Consul, or Consular Agent, who affix his seal of office, or the attesting witness may make a declaration of the due execution thereof before one of such persons (who should sign and affix his seal to such declaration), other person as the said Chief Justice may appoint.

The fees are:- Lodgment fee 12/6 (includes endorsement on first certificate), and each additional certificate included in the Transfer, and 2/6 for every new Certificate of Title unless the consideration is over £1,000, in which case the Certificate fee will be 2/6 1/2. Ad fees, however, may be necessary in cases involving more than a simple diagram or more than six folios of engrossing.

Tenants in common must receive separate Certificates.

If part only of the land is transferred a new Certificate must issue, but the old Certificate may remain in the Office, or the Transferor may take out a new Certificate for the residue.

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