

18 May 2022

David Ryan – Chair
Sydney Central City Planning Panel

By email enquiry@planningpanels.nsw.gov.au

Dear Mr Ryan

Re: Concept Development Application - DA/812/2021 (PPSSCC-285)
33-43 Marion Street, Parramatta
Determination Meeting – 19 May 2022

I write to you in relation to a Concept application. The development proposal is to be considered by the Sydney Central City Planning Panel on Thursday 19 May 2022.

Request

Our request as applicants is the following:

1. That the panel defer the determination to allow the progression of a design excellence review process in accordance with 7.10 of the Parramatta LEP and the Director General's Design Excellence Guidelines.
2. That the Secretary's advice be obtained on the commencement of a design excellence process with an exceptions clause as per 7.10 of the Parramatta LEP.
3. That the item be reported back to the panel post the outcome of the design excellence process and further review of the legal advice provided with the application on the application of density for the ARHSEPP.

Background to Social Housing Methodology Delivery

The project is seeking a concept development application approval to support the delivery of a 26/27 level high-quality mixed-use tower in the Parramatta CBD in a mixed-use business zone. The project aims, in applying the Affordable Rental Housing SEPP (ARH SEPP), is to deliver approximately 190 new dwellings, retail space, commercial floorspace for tertiary training and medical uses. The scheme also seeks to provide, approximately 70 new affordable housing dwellings (as part of the 190) and approximately 100 new student housing dwellings in connection with the tertiary use. The private sector investment directly responds to the State's proactive policy approach to the delivery of new affordable housing and employment floorspace in western Sydney. The application is supported by a detailed application and is designed by award winning architects - Stanisic and associates.

Pacific Community Housing (PCH) as a registered provider is progressing this project in partnership with private sector investment. The mission of PCH is to promote and provide access to safe and secure affordable housing. PCH mode of business operation in seeking to achieve the organisation's social objectives and includes partnering with private sector firms demonstrating how sustainable business outcomes can be gained whilst providing significant outcomes in social housing. To date we have had

success and the portfolio of new affordable housing in projects progressing through the planning system is significant.

We have sought to work collaboratively with council, especially given the amount of affordable housing involved, yet this has been impacted by council's approach during the last month.

Brief Synopsis of the Process

Immediately post the Minister's determination of the planning proposal for the land at the start of 2021, we progressed a request to the council for a design excellence process for the project. Post discussion with the City Architect we were requested to lodge a draft design excellence brief with council, that sought to utilise the provisions of the then ARH SEPP (now Housing SEPP 2021). It was considered that as an alternate EPI was to be applied that a design excellence process was appropriate to interrogate design outcomes to support the sustainable delivery of the scheme. However, after weeks of reviewing the draft scheme, the council planning staff intervened and requested a concept DA rather than a design excellence process; advice which we followed in our effort to be collaborative with council.

Prior to the lodgement of the concept development council officers remarked on the proposed calculation of density via the application of the ARH SEPP, which needed to be reviewed and considered. As a result, and in knowledge of council, we briefed Justin Doyle of counsel who provided advice to guide the consideration of density in the applied EPI. The draft application was subsequently amended to align with that advice. It was agreed with council planning staff that a comparison of the Doyle advice and any advice council obtained (if any differences) would be undertaken as a sensible process to ensure uniformity of density application methodology between the applicant and council.

The application was lodged in August 2021. The Regional Panel was briefed on 1 December 2021 on the project. Unfortunately, we were not provided an opportunity to brief the panel at that time. We attended to the issues raised by council and the panel meticulously. We provided a very detailed response to all of council's issues and the Panel's comments. We have also provided an update response following council clarification of their position on the density, which was supplied at the penultimate stage just prior to the council decision to seek refusal of the application.

Unfortunately, the ensuing council assessment process has not reciprocated an open and transparent process to share advice by council. Despite providing detailed responses to all of council's issues and seeking to workshop outstanding matters and having requested to discuss/present/brief the Panel, we are now faced with a recommendation for refusal of a project.

Our request to brief the panel to assist to resolve assessment issues, was not actioned by council. Council also did not consult to obtain the panel's position to our request on commencing a design excellence process. This left us with no choice but to seek the Secretary's decision on a design excellence process after we were categorically advised by council officers that unless we produced a reference design that accorded with the DCP we would not be granted consideration of a design excellence process. We were therefore surprised that, despite the Department of Planning and Environment's Planning Delivery Unit (PDU) offering to assist and set up a workshop arrangement to resolve issues, the council staff sought to quickly progress the assessment report with a recommendation for refusal, seeking an electronic determination without our involvement.

The report before the panel omits this important detail and also omits the advice on the calculation of the density. The absence of such details leaves the panel improperly briefed to consider the proposal before it.

In that context, therefore, we attach to this letter a number of documents that we have provided to council that we feel demonstrate that all issues raised have either been adequately addressed or can be addressed. Importantly, a project chronology is also included which provides a detailed background and history of the project and highlights the approach of staff on our requests to commence a design excellence process, and the lack of communication on council's position on the calculation of the density.

Please therefore, find attached the following:

Attachment 1 – Project Chronology

Attachment 2 – Detailed Response to Council/Panel comments (including J. Doyle legal advice)

Attachment 3 – Updated legal advice, J. Doyle, April 2022

The design team, including the project architects Stanasic Architects, will be on hand at the meeting of the 19 May 2022 to respond directly to these issues and explain how these have or can be resolved. We will also have Mr Tim Hale SC to assist the panel on our behalf.

We are open to reasonable changes to the innovative form of development proposed and for that reason consider a design excellence process would contribute to good design and a balanced outcome.

We look forward to presenting to you at the meeting later this week and trust that the detailed responses provided to council's issues, and the legal advice of Justin Doyle of counsel, will assist the Panel in its deliberations and discussion for the meeting later this week.

We would seek that at that meeting, the panel defer the determination and that it instead resolve to commence a design excellence meeting, as we have been repeatedly requesting over the last year, and to which our requests to seek the Panel's position on, have been rejected.

We look forward to answering any questions the panel may have in the meeting on Thursday.

Yours sincerely

Matthew Daniel



Development Director

Pacific Planning

Encl:

Attachment 1 – Project Chronology

Attachment 2 – Detailed Response to Council/Panel comments (including J. Doyle legal advice)

Attachment 3 – Updated legal advice, J. Doyle, April 2022

Project Chronology – 33-43 Marion Street, Parramatta

Date	Milestone
February 2021	The site-specific Planning Proposal was made and notified in February 2021.
March 2021	Discussion on process for progressing a DA commenced in March 2021.
7 April 2021	On 7 April 2021 a meeting was held with the City Architect of Council and after the meeting we were requested to provide a draft design excellence brief and reference design. The City Architect advised support for a design excellence process and supported the introduction of affordable housing uses into the scheme.
22 April 2021	On 22 April 2021 a design excellence brief template was provided to the City Architect for review and comment. We were advised on 29 April that the formal review of the design brief has commenced.
11 May 2021	On 11 May 2021 we were advised of delays in the review but asked to submit additional items including a reference design, Typical layouts, landscape concepts and the Marion Street precinct Plan (The later a document owned by council). The response information was provided to council on 12 May.
28 May 2021	On 28 May 2021 we were advised that the Executive Planner from council would be assisting the City Architect with a response to the submitted information. We also expressed concern to the significant delay in the process of commencing a design excellence process.
1 June 2021	On 1 June 2021 we received an email from Mark Leotta from council who raised concerns with the design excellence brief and advised they would not accept its progression and endorsement due to the concerns with the staged approach to the scheme and the application of the ARH SEPP densities. The council advised they would seek that 43 be included in the overall scheme in a design brief.
4 June 2021	On 4 June 2021 council's planner Alex McDougall advised us that we should progress a concept development application to assist with the various issues in the project and to settle on the scheme. We decided to work with council on the concept process. It was also considered that it was sensible to share legal advice between the applicant and council respectively to assist to settle a position on affordable housing incentive bonuses.
August 2021	The concept DA was lodged for the site 33-43 Marion Street in August with a request for further information received 2 September 2021 which included a request for lodgement fees and other items. The fees were paid on 7 September.
20 September 2021	Additional information was provided on 20 September 2021 and further formal information on 11 October 2021. We were advised on 29 October no further information was required.

September – October	<p>The Concept Application was supported by legal advice prepared by Mr Justin Doyle of counsel as per the agreement and request by staff to obtain assisting advice. The application was specifically designed and the floorspace incentives for affordable housing incorporated within the development has accorded with this advice and direction from counsel.</p> <p>During discussion with council officer's, we were again advised that the council would consider sharing their own legal advice on density in a collaborative approach to assist an outcome. The officer agreed this was a sensible outcome and was seeking advice from superiors on how this could be done.</p>
12 November 2021	<p>On 12 November 2021 we requested that further consideration be given to enabling a design excellence process, noting a design excellence brief template was issued to council in April 2021.</p> <p>We were advised in response that it was the officers view that a design excellence process would follow the determination of the concept DA. We were also advised that the briefing to the regional panel would occur on 1 December 2021. We were advised we would be informed of any issue raised, if any.</p>
1 December 2021	The Sydney Central City Planning Panel was briefed on the proposal.
6 December 2021	<p>On 6 December we were provided the comments from the briefing of the panel. It is very frustrating that many of the items raised by the panel were due to a bias briefing by council staff. Of note was the issue raised regarding design excellence and how such would be assured. The answer to this is obvious – run a design excellence process. Other aspects of note are:</p> <ol style="list-style-type: none"> Note on the appropriate way to consider bonuses. It is noted that on agreement with council we provided a legal advice from J. Doyle as a result of advice that council will collaboratively seek to share their advice with us to assist settling the appropriate application of densities applied from the ARH SEPP. There is no mention in the minutes that the panel was aware of this advice and its content. Incorrect reference to the Parramatta CBD Planning Proposal imminence noting that this site was the subject of a finalised EPI from February 2021. Incorrect reference to a tower set back control being related to the LEP and set back to a heritage item. Incorrect consideration of the application of the ARH SEPP and carparking. Statement of non-compliance with a DCP for development that applies an alternate EPI to that the DCP relates to. Noted that the set back to the west did however match the DCP design scheme for setback considerations. Finally, and repeated the panel questioning how design excellence could be achieved.
22 December 2021	<p>After repeated requests the council provided advice on the issues it felt were of concern in an email on 22 December 2021. Council advised their preliminary review meant that considerable changes were required which meant that council would not accept any revised documentation.</p> <p>We provided immediate response to this email and advised we were not seeking to withdraw and that we held a difference of opinion that these items were considerable.</p>
23 December 2021	<p>In a further email to the Manager of Assessment at council we noted our concern that council would seek to refuse an application with affordable housing and delay issuing such with weeks delay and just prior to the end of the year.</p> <p>We had a detailed discussion on 23 December 2021 with the manager of assessment which was followed by an email on 24 December 2021. A follow up email was sent on 10 January 2022 seeking a time to meet with staff to workshop and address the issue of the application. An electronic email was received advising the Manager was on leave until 31 January 2022. On receipt</p>

	we followed up other senior staff seeking advice on the project in the absence of the Manager.
13 January 2022	<p>On 13 January 2022 we received an email from council's Acting Manager of Assessments. The email advised that council has preliminary advice on the densities to be applied, that the proposed project densities applied were wrong, and that whereas the concept DA would benefit from savings provisions, the future works DA would not be assessed against the ARH SEPP (incorrect). Further, council advised the DA did not address the issues of the VPA as the scheme does not deliver the benefits of the public domain; however, a meeting could occur on the Manager's return on 31 January 2022.</p> <p>We immediately responded and advised we would seek a process to sit and work through the issues with council as this was the best way to support the housing outcome. We also requested a formal applicant meeting with the Regional Panel prior to council completing its assessment report. We provided a detailed response to issues raised and advice as to how we would respond. We advised of our understanding of the savings provisions and the application of a concept DA. Council responded the following day that they would meet on 2 February.</p>
2 February 2022	<p>A meeting was held on 2 February 2022. The discussion again considered the issue of density and our reminder that these issues can be resolved by meeting and discussing the issues of our legal advice and that of council to land on an agreed position.</p> <p>We advised that the issues of design excellence were relevant and our response from the heritage, landscape and design architects were that all the issues council were raising would be best dealt with via a design excellence process; we again formally requested such be progressed for the entire site; we discussed issues of dedication of affordable housing if required and asked that the responsible officer with delegation be advised.</p>
18 February 2022	On 18 February 2022 a detailed response to issues raised by staff and raised in the Panel briefing minutes of the 1 December 2021, was lodged to council. On 23 February the council acknowledged receipt.
8 March 2022	On 8 March 2022 we followed up council and again requested a meeting to discuss any issues of density concern and other items. We advised of the serious impact to the project if we could not resolve these issues.
10 March 2022	On 10 March 2022 the council responded saying they were working through the very detailed information we had provided and would respond to us shortly. We responded to council advising we were also preparing a draft easement to assist council to have the confidence that the easements, as required by the VPA, would be provided. Subsequently the draft easement was provided to show the VPA benefits easements would be delivered by the landowner.
4 April 2022	After more requests to meet and workshop items the council responded on 4 April 2022 with a summary of their opinion to the density applied. We immediately provided this to J. Doyle to review and ask that he consider it with a view to updating his advice as maybe required so that we could revert that back to council.
24 April 2022	<p>On 24 April 2022 we provided the revised J. Doyle advice to council staff and again requested a process to discuss the advice and to workshop a response.</p> <p>In a phone call to council, we made an additional request to make representation to the regional panel to endorse a design excellence process. We were advised by staff that unless we provided a reference design that</p>

	completely complied with the DCP we would not receive endorsement to commence a design excellence process. We then made representation to the Department of Planning and Environment (department) due to the lack of traction received by council to commence and progress a design excellence process.
	The Deputy Secretary of the department, post a briefing from us, provided the support of the PDU to assist this issue.
	In considering the issue of design excellence it was agreed that it would be preferred, if possible, for council staff, the PDU and us to work collaboratively to achieve an outcome prior to us progressing a formal request to the Secretary.
May 2022	We note we were advised that the PDU discussed a process with council to set up a workshop arrangement and the council had agreed to such a meeting. We were however advised that the council significantly delayed setting a date to meet with the PDU and a date was not set until 9 May 2022 approximately 2 weeks post the initial contact.
	We were advised that post the meeting of 9 May it was the intention and agreement of the parties that a meeting of the PDU, the council and us would be held to discuss outcomes collaboratively regarding the process of the application for affordable housing under assessment.
6 May 2022	On 6 May 2022 the council moved to provide a determination report to the regional panel. On that advice we immediately advised the Director of the PDU of this event.
	We are advised the director of the PDU was advised at the meeting with council on 9 May that the council had advised there was no point meeting as the council officers had already issued their determination advice for refusal to the regional panel and that as applicants, we would be provided an opportunity to present to the regional panel on 19 May when the determination report would be considered.
10 May 2022	On Tuesday 10 May 2022 we were contacted by the panels' secretariat who advised us that the council were seeking to have the item progressed to be determined by electronic process by the regional panel on 12 May without an applicant presentation to the panel noting there was less than 10 submissions to the application. We advised the secretariat that it was our understanding we were to be afforded the opportunity to present to the panel on 19 May 2022.
19 May 2022	We are now advised the determination meeting will be held on 19 May 2022 and a presentation will be held.
	The report to the regional panel is void of many of the aspects of the process of the proposal: <ul style="list-style-type: none"> a. It makes no reference to the request for a design excellence process that has continued for 12 months. b. There is no reference to the council original agreement to workshop legal advice and sharing of such to assist settle the density treatment for affordable housing and the council's refusal to then progress such. c. There is incorrect reference to the substantial RFI documentation provided to the council during the assessment process including the updated legal advice.

18 February 2022

Mr Brett Newman
Chief Executive Officer
City of Parramatta Council
126 Church Street
PARRAMATTA NSW 2150

Response to Issues – Concept Development Application – DA/812/2021
33-43 Marion Street, Parramatta

Attention: Myfanwy McNally, City Significant Development Manager

Dear Mr Newman

I write to you regarding a Concept Development Application (DA) in relation to a proposed concept design for land located at 33-43 Marion Street, Parramatta, incorporating a 27 storey mixed use development.

On 22 December 2022, communication was received from council that raised a number of issues with the application. A meeting was subsequently held on Wednesday 2 February, where the matters previously raised were comprehensively addressed and discussed.

The discussion was informed by a detailed architectural response prepared and presented by Stanisis Architects. The response documents are enclosed for completeness. In summary, the following documents are enclosed as part of the response to the matters raised:

Attachment 1 – Architectural Design Statement
Attachment 2 – Landscape Design Statement
Attachment 3 – Landscape Architectural Design Set
Attachment 4 – Heritage Architectural Design Statement
Attachment 5 – Legal Advice
Attachment 6 – Economic Analysis of the Viability of Proposed Floorplates at 43 Marion Street

The response package addresses the matters raised as follows:

[Parramatta Local Environmental Plan 2011](#)

Aims of Plan and Zone Objectives [cl. 1.2(2)(a,j,m) and cl. 2.3(2)]

It is not clear that the small footprint of the Stage 2 tower envelope would provide a suitable commercial floorplate that would accommodate the needs of future businesses.

It is noted that the council's main concern regarding this point was the ability for the landowner to complete the requirements of the Planning Agreement, specifically relating to the registration of the easements. We expand on this issue below in a later point.

It is noted at the meeting on 2 February we advised that if required we could produce an economic analysis report to comment on the supply rates of the need for the use proposed. This report has now been prepared by PPM Economics & Strategy and is included at Attachment 6.

The proposed floorplates of the 43 Marion Street component are purposely designed by the landowner of no. 43 and are to be utilised specifically for medical and educational purposes. It is noted there is an existing business operating on the site for educational uses. As such there is empirical evidence of a long history of operation for the use in the existing built form which has a lower grade commercial floor plate design and related facilities than that proposed in the new facility. That is to advise the design advice provided to us from the landowner is as a result of the understanding of the experienced operation of that education business. The investor has made a deliberate commercial decision to maintain ownership and operation of the business in the new design.

It was also noted at the meeting, that the design provides for a 2 metres setback for the western portion of the development to allow for a larger footprint for the no. 43 site.

Floor Space Ratio (cl. 4.4)

Council has obtained legal advice which contradicts the applicant's interpretation and application of the Affordable Rental Housing SEPP, Design Excellence and Clause 4.6 floor space 'bonuses'. Further, the applicant has not demonstrated that the proposal would achieve objective 1(a) of the control, namely that the proposal would have an acceptable impact on traffic.

It is noted that the council advises it has a specific policy that seeks to support the sustainable delivery and supply of new affordable housing to support the critical shortage in the Parramatta LGA. It is also noted council seeks to work positively with the Community Housing Sector that seeks to supply and manage it.

The Concept Application was supported by legal advice prepared by Mr Justin Doyle of counsel. The application has been designed and the floorspace incentives for affordable housing has accorded with this advice and direction from counsel.

We have been advised in earlier meetings with council staff that council may have obtained its own legal advice which may result in alternate advice on the operation of the ARH SEPP 2009 as applied in this application. At that time, it was considered sensible for council's advice to be shared with us for review and consideration to support outcomes in a subsequent meeting with council to discuss the appropriate pathway to promote an agreed sustainable approach to the delivery of affordable housing for this project.

We are concerned that at this time we still have no progression on advancing an apparent alternate viewpoint and as such is creating an impasse between council and a Community Housing Provider (CHP) on this issue. We feel this context is preventing a considered and professional approach to support the delivery of new affordable housing.

Heritage (cl. 5.10)

Insufficient heritage justification has been provided for non-compliance with the site specific western tower setback control to adjoining heritage items.

As mentioned in the response to request for information letter dated 11 October 2021, considerable heritage analysis has been undertaken since 2017 in relation to the site and adjoining heritage properties. This work has been prepared by eminent heritage architects John Oultram of John Oultram Heritage and Design, and Peter Lonergan of Cracknell & Lonergan Architects who has an extensive library on history relevant to Parramatta.

That response letter stepped out the several reports that have been prepared over a number of years, which have also built on the heritage work undertaken by Hector Abrahams Heritage on behalf of council that considered the interface areas. Out of that work came a Precinct Plan for Marion Street, prepared by SJB, that presents a smaller tower setback than that studied and adopted and resulted in the final determination by the Minister for the land use controls on this land.

Notwithstanding the setback, the extensive heritage analysis prepared both on behalf of council and the applicant concludes that the success of the design and its proximity to the heritage item is best handled at the street level through the detailed articulation and design of the podium and first three floors, rather than the tower form at large. A numerical setback of 9 metres is just as effective as 12 metres in achieving the objectives of council's heritage studies, because the primary interface between the heritage item, being single storey dwellings, and the proposed development is enjoyed at the ground plane and broadly, for the first three storeys which enjoys a through-site link and the six metre podium building setback. The proposed 9 metre setback occurs above the podium form and does not disrupt or affect the ability to appreciate the curtilage and setback along the streetscape of the adjoining heritage item. The building form as presented is in consideration of the historical and detailed heritage analysis for this site with the application of the relevant EPIs that apply to the land, which support the objectives of the zone and the aims of the EPI applied.

The Heritage Architectural Design Statement prepared by Cracknell & Lonergan Architects is again included for completeness. Council has the several other heritage reports that have been prepared but these can be supplied once again if required for the benefit of council and the panel as maybe required. These include:

- Statement of Heritage Impact, prepared by Cracknell & Lonergan Architects, dated 3 May 2017
- Heritage Response to Gateway determination, prepared by Cracknell & Lonergan Architects, dated September 2018
- Heritage Fabric Analysis and Photographic Reports of 29, 31, 33, 35, and 37 Marion Street, prepared by Cracknell & Lonergan Architects, dated 3 May 2017.
- Heritage Statement for 29 Marion Street, prepared by John Oultram Heritage and Design, dated September 2017.
- Heritage Statement for 31 Marion Street, prepared by John Oultram Heritage and Design, dated September 2017.
- Heritage Statement for 37 Marion Street, prepared by John Oultram Heritage and Design, dated September 2017.

Design Excellence - Landscaping (cl.7.10(4)(d)(xiii))

No deep soil or large tree planting proposed on site. No details of on-structure planting. As such, the proposal does not demonstrate that the future detailed DA could satisfy the criteria of excellence in landscape design.

A Landscape Design Statement and Landscape Architectural Design Set has been prepared by Sturt Noble Associates and is attached.

In summary, the landscape design has accommodated a minimum soil volume of 15m³ for small tress, with understorey planting to 2 metres tall and small tree to 8 metres tall along the through site link, which is of a

sufficient height to present to the heritage items and meets the objectives of the guideline of the design EPI applied to the land.

[Apartment Design Guide](#)

Orientation (cl. 3B)

Proposal would result in significant solar impacts to adjoining properties. The applicant has not demonstrated, with elevation shadow diagrams or modelling, that the non-complying elements of the concept envelope would have an acceptable impact on adjoining residential units, particularly those at 27 Station Street.

Refer to architectural design statement prepared by Stanisic Architects attached.

Communal Open Space (cl. 3D)

The proposal does not provide the required communal open space for residential units. Approximately 15% of site area provided.

Refer to architectural design statement prepared by Stanisic Architects attached.

Deep Soil (cl.3E)

No true deep soil proposed. Western boundary through site link would be ideal location, allowing tree planting to potentially improve heritage interface and ameliorate wind conditions in lane.

Refer to architectural design statement prepared by Stanisic Architects attached.

Solar Access (cl.4A)

Proposal does not demonstrate that the future detailed DA could comply with the relevant solar access requirements. This primarily appears to be a result of the lack of openings available on the eastern elevation of Stage 1. Approximately 67% of units would receive required solar access and 33% would receive no solar access.

Refer to architectural design statement prepared by Stanisic Architects attached.

[Parramatta Development Control Plan 2011](#)

Building Envelopes (cl.4.3.3.7p)

Various non-compliances with setback and floorplate controls, primarily to accommodate FSR bonuses associated with ARH SEPP. The applicant has not demonstrated that the non-compliances would have acceptable impacts on the amenity and heritage curtilage of adjoining properties.

Refer to architectural design statement prepared by Stanisic Architects attached.

Building Form (cl. 4.3.3.1 'Building Exteriors')

The applicant has not demonstrated that the eastern façade of the future Stage 1 building can be treated in such a way so as to have an acceptable appearance prior to construction of the Stage 2 building.

Council asked us to progress with a concept DA and many of the issues that are arising are as a result of the lack of clarity of staging and the consideration of an ability to achieve design excellence. Our advice from Stanisic, Sturt Nobel (Landscape) and Lonergan (Heritage) view is that design excellence can be achieved in a future works process. It is noted this advice carries a significant level of professional weight and secure reliance for the consent authority noting the considerable experience and peer respect of these professional firms.

It is noted that the SEE was not specifically clear on the issue of how the building would be delivered and able to achieve the requirements of the planning agreement. It is noted the landowner has a contractual obligation. It is further noted that we have landowners approval to progress to a works DA for the entire site. The landowner is focused and are very keen to progress the works DA to deliver the development outcome for the entire site and meet its obligations under the planning agreement for the entire site. We have provided a design brief to the council to enable the design excellence process to commence and would like to start that immediately. Can that be arranged forthwith?

It is not the preference that the site be developed in two stages. The identification of stages was to illustrate the split in land ownership associated with the development, and the desire to include the entirety of the site in the development outcome rather than separately. This is in part, why council originally requested that we lodge a concept DA in order to clarify these matters.

Notwithstanding, the attached Architectural Design Statement discusses the treatment of the eastern wall to illustrate the achievement of design excellence to ensure that if there is a time delay in some items of the built form, a satisfactory design response can be achieved. Note it is not the preference or intent for this to occur.

Voluntary Planning Agreement

Public Right of Way

The VPA requires that the public domain benefits (i.e. setbacks and through site links) be provided prior to an OC for any part of the development. As such, a condition would need to be included requiring the existing building on Stage 2 be demolished and easements provided prior to OC of Stage 1. It is understood that such a condition would not be consistent with the owners' expectations that the 43 Marion Street building would remain and continue to operate.

It is agreed that the only way the development could be staged separately in two parts is to have the VPA amended. We understand at this time that is not a preference of council.

The landowner as defined in the VPA has a contract with the council and is required to provide an easement when the development process commences and for that easement to be relied upon on occupation. Our advice from our lawyers is that the works DA is the catalyst to provide this easement for review and it is our program to provide that to council with that application.

We note we also have a demolition approval that is current and active for the all the land and the easement can be provided as contemplated.

Concluding remarks

We note that the impact of the increased density to support the delivery of affordable housing is minor in respect of the DCP setbacks which was written and endorsed without the consideration of the provisions of the ARH SEPP 2009 being applied in this application. We again note that we seek council's legal advice to make any comparisons required to ensure an acceptable and sustainable outcome. We note we specifically went and gained advice from

counsel (who also is a panel Chair appointed by the Minister). We obtained and provided this advice in consideration of council's policy on new affordable housing and not as a means to create conflict of opinion but to assist reduce the risk of divergence of opinion and to gain advice from a source we felt would be considered reliable by us and council.

Further, we note councils' comments on the ability of the application to achieve design excellence. As discussed above, we have engaged respected consultants in their relevant fields to assist with the concept application and ensure that the concept provides a pathway to achieve design excellence in a future process. We note that we have lodged a design excellence brief to commence the design excellence process at the start of 2021, however council requested that a Concept DA be lodged prior to the design excellence process. We have followed councils advice and direction and trust that we can now resolve any outstanding issues and move forward with determination and the design excellence process.

I trust that the information provided and attached documentation adequately responds to the matters council has raised. We look forward to receiving councils' legal advice in order to resolve the issue of density calculation.

If you have any questions in relation to this matter, please do not hesitate to contact me on 0437 521 110.
Yours sincerely



James Mathews
Planning Director
Pacific Planning

Attachments:

Attachment 1 – Architectural Design Statement

Attachment 2 – Landscape Design Statement

Attachment 3 – Landscape Architectural Design Set

Attachment 4 – Heritage Architectural Design Statement

Attachment 5 – Legal Advice

Attachment 6 – Economic Analysis of the Viability of Proposed Floorplates at 43 Marion Street

DESIGN STATEMENT - SUPPLEMENT

Application:
CONCEPT DA

Address:
**3343 MARION STREET, HARRIS PARK
MIXED USE RESIDENTIAL APARTMENT DEVELOPMENT**

**ISSUE A
01.02.2022**

INTRODUCTION

We refer to an email from Parramatta City Council (Alex McDougall, Executive Planner, City Significant Development) in respect of the Concept DA at 33-43 Marion Street, Harris Park (DA/812/2021) which raises a number of issues following a preliminary assessment of the application.

This Design Statement – Supplement is accompanied by additional documentation and provides a detailed response to a number of the issues raised in relation to the Apartment Design Guide and Parramatta Development Control Plan 2011, to assist Council in their assessment. Refer to Architectural Drawing DA 410-412 (Rev A), DA 503 (Rev B).

APARTMENT DESIGN GUIDE

1. **Orientation (cl. 3B)** – *Proposal would result in significant solar impacts to adjoining properties. The applicant has not demonstrated, with elevation shadow diagrams or modelling, that the non-complying elements of the concept envelope would have an acceptable impact on adjoining residential units, particularly those at 27 Station Street.*

Response:

The Marion Street Precinct Plan (MSPP), prepared by SJB Urban, dated 16 September for Parramatta City Council was undertaken to "investigate the heritage value of the Marion Street Precinct, in order to formulate appropriate urban design-led planning controls" and to satisfy the Apartment Design Guide, Part 2 – Developing the Controls during the strategic planning process when preparing the controls. These controls were the basis for the site-specific development controls for the site that are now contained within the Parramatta DCP 2011, Part 4, Section 4.3 (p) 33-44 Marion Street, Parramatta.

The built form projected for this site within the MSPP, modelled in three dimensions and tested to assess its potential overshadowing impact, was with a 9m setback to the western boundary and is also contained within the Preferred Precinct Plan for the site. The additional 3m setback (12m tower setback) was not tested and the potential overshadowing impact of this increased setback unknown. If the 9m western setback was only modelled and informed the Preferred Precinct Plan for the site, the Concept Development Application then has the same impact, considered by Council and the expert urban designers who prepared the report to be acceptable.

A solar access study has been prepared to assess in detail the potential impact to surrounding residential flat buildings, including 27 Station Street West and 69-71 High Street, Harris Park should the western boundary setback be reduced from 12m to 9m as proposed by the Concept Development Application.

The site at 27 Station Street West has been modelled in three dimensions using a detailed survey for the site which includes the profile and levels of the building at 27 Station Street West (refer to survey attached). It locates private open spaces and windows along Peace Lane. Google street viewed was also reviewed to confirm which windows are to living areas.

The Apartment Design Guide (3B-2) recommends that living areas, private open space and communal open space of neighbouring properties should receive solar access in accordance with sections 3D Communal and public open space and 4A Solar and daylight access.

The solar access diagrams (refer to CD 410-412) measured at the winter solstice, illustrate the following:

1. The subdivision layout and building patterns of surrounding residential properties is favourable, allowing 2 hours of solar access to be achieved in the morning or afternoon.
2. 25 Station Street West is already overshadowed by 27 Station Street West.
3. The only residential properties that are potentially impacted by the proposed development are 27 Station Street West and 69-71 High Street.

4. At 69-71 High Street:
 - i. Apartments that face east receive 2 hours of solar access (11.10am to 1.10pm) which meets the guideline of the Apartment Design Guide.
 - ii. Apartments that face north are overshadowed in the morning (9.00am to 10.10am) but continue to receive more than 2 hours of solar access.
 - iii. The difference between a 9m tower setback and 12m tower setback is negligible and allows all apartment that currently receive solar access to continue to receive 2 hours solar access at mid-winter.
5. At 27 Station Street West:
 - i. Apartments are overshadowed by a built form that applies the development standards and controls.
 - ii. To the east, facing Station Street West, there are 6 x apartments in a stack:
 - 3 x apartments have dual orientation receiving solar access from the east and the west with private open spaces and living areas located on the corner. The proposed additional form, Stage 2, does not prevent these apartments to continue to receive solar access.
 - The remaining 3 x apartments are overshadowed by existing commercial development for 1 hours between 9.00-10.00am. After 11.00am, these apartments are overshadowed by a built form that applies the development standards and controls.

One of these apartments is already overshadowed by the existing commercial building between 10.00-11.00am.

The remaining two apartments would only receive 30 minutes of solar access to the living area and private open space if a DCP envelope was adopted – the additional form proposed to the east will only reduce solar access for 30 minutes between 10.00-10.30 at mid-winter.

However, they receive solar access before 9am and will receive solar access one month either side of the solstice.

Summary:

At 57 Station Street, to retain 30 minutes of solar access to 2 x apartments to the east, Levels 5-6 (Stage 2) could be articulated at the south-eastern corner of the proposed built form.

- iii. To the west, along the western boundary, there are 12 x apartments in two stacks:
 - a reduced tower setback of 9m from the western boundary does not have any impact until after 11.30am.
 - The podium overshadows 4 x lower-level apartments along Peace Lane, but this was already anticipated by the development controls that apply to the site.
 - 3 x apartments have a north and west orientation and are able to receive 2 hours solar access with living areas and private open spaces located on the corner.
 - 3 x apartments receive continue to receive 2 hours solar access and are not affected by the proposed additional form.
 - The remaining 2 x apartments would only receive 1 hour of solar access to the living area and private open space if a DCP envelope was adopted – the additional form to the west

will only receive solar access for 1 hour between 2.00-3.00pm at mid-winter. However, they will receive solar access after 3pm and will receive solar access one month either side of the solstice.

Summary:

At 57 Station Street, to retain 1 hour of solar access to 2 x apartments, Levels 5-7 (Stage 1) could be articulated at the south-west corner of the proposed built form.

2. **Communal Open Space (cl. 3D)** – *The proposal does not provide the required communal open space for residential units. Approximately 15% of site area provided.*

Response:

We refer to drawing CD 204 – Level 4 Plan, CD 504 – Communal Open Space Diagrams, Deep Soil Area submitted with the application and Design Statement. As indicated in these documents, communal open space is provided at Level 4 and Level 26 for residential units, and can meet the Apartment Design Guideline of 25% of the site area for communal open space.

A landscape concept has been prepared by Sturt Noble Associates.

The total area of communal open space is 536sqm, (28%) of the stage 1 site area of 1,945sqm sqm comprising 200sqm communal open space on level 4 and 400sqm on the roof terrace on level 26; the ADG design guidance for minimum communal open space is 486.22sqm, ie 25 % of the site area of 1,945sqm.

In addition to the communal open spaces at Levels 4 and 26, the through site link is communal open space that is accessible by the general public. Communal open space is defined in the ADG as “*outdoor space located within the site at ground level or on a structure that is within common ownership and for the recreational use of residents of the development. Communal open space may be accessible to residents only, or to the public*”. Being at ground level with no residential accommodation, this space does not have any visual or acoustic privacy constraints that would prevent its use as publicly accessible communal open space.

Summary:

The proposal provides communal open spaces in excess of the minimum guideline of the Apartment Design Guide. No further change is required.

3. **Solar Access (cl.4A)** – *Proposal does not demonstrate that the future detailed DA could comply with the relevant solar access requirements. This primarily appears to be a result of the lack of openings available on the eastern elevation of Stage 1. Approximately 67% of units would receive required solar access and 33% would receive no solar access.*

Response:

We note that the EP+A Regulation 2000 defers the need to verify that a Concept DA complies with SEPP 65 as it is, by its nature, a Concept only – a building envelope. Further design processes, including the need to satisfy the Consent Authority that a future DA has achieved Design Excellence and meets the minimum guidelines of the Apartment Design Guide, in order to activate incentive provisions within the Parramatta LEP.

We refer to the Design Statement accompanying the Concept DA. The development is capable of achieving 125 (70%) apartments with solar access between 9am and 3pm at mid-winter. In addition, the development is capable of achieving no more than 15% of apartments will receive no direct sunlight between 9am and 3pm at mid-winter. We also refer to the note on CD 002 “the total number of apartments subject to the mix of studios, 1 bed, 2 bed and 3 bed apartment types”.

Meeting the amenity guidelines of the apartment design guide is based upon a number of factors, but importantly the mix and the total number of apartments. The indicative layout provided with the Concept DA does not attempt to resolve all layouts at this stage, nor is it required to, but it does provide us with a

framework that can be developed in future stages. By changing the mix of apartments, the number of apartments that receive solar access or those that don't receive solar access change.

We have prepared a sketch that illustrates the impact of varying the) refer to CD 503 (Rev B). By rotating apartments A7+A8 and B8+B9 onto the western elevation, an additional apartment receives solar access and only one apartment at this level receives no sun. Applying this at each level, 79% of apartments will receive a minimum of 2 hours solar access at mid-winter.

The Apartment Design Guide recommends that no more than 15% of apartments (27/178) receive no solar access at mid-winter. This guideline can be satisfied by consolidating apartment A5+A6 at Levels 6-15 into a 3 bedroom apartment in addition to rotating apartments A7+A8 and B8+B9 to the western elevation.

The development is capable of achieving 2 hours of solar access at mid-winter with less than 15% apartments receiving no solar access without relying on primary openings along the eastern elevation. The total number of apartments is subject to the mix of studios, 1 bed, 2 bed and 3 bed apartment types.

Summary:

The proposal is capable of achieving solar access to living areas and private open spaces to 70% of apartments at mid-winter and less than 15% of apartments with no solar access at mid-winter. No further change is required.

PARRAMATTA DEVELOPMENT CONTROL PLAN 2011

4. **Building Envelopes (cl.4.3.3.7p)** – *Various non-compliances with setback and floorplate controls, primarily to accommodate FSR bonuses associated with ARH SEPP. The applicant has not demonstrated that the non-compliances would have acceptable impacts on the amenity and heritage curtilage of adjoining properties.*

Response:

Refer to Item 1 above.

5. **Building Form (cl. 4.3.3.1 'Building Exteriors')** – *The applicant has not demonstrated that the eastern façade of the future Stage 1 building can be treated in such a way so as to have an acceptable appearance prior to construction of the Stage 2 building.*

Response:

This application is for a Concept DA and would be subjected to further design processes, including the need to satisfy the Consent Authority that a future DA has achieved Design Excellence, in order to activate incentive provisions within the Parramatta LEP.

The eastern facade of the future Stage 1 building, if it does not proceed at the same time as Stage 2, can be adequately treated so that it has an appropriate appearance in the short-term. This is a common condition within an evolving urban context.

According to the NCC BCA Volume 1, the common boundary is considered a fire-source feature and any openings within 3m of this boundary are required to be protected by wall-wetting sprinklers in accordance with Clause C3.4. It is likely that in the short-term, that this elevation will contain windows so that it does not present as a blank wall. These windows would be secondary windows so that when Stage 2 is completed, the apartments can satisfy the light and ventilation requirements of the BCA (Part F4) and meet the amenity guidelines (4A-B) of the Apartment Design Guide, verified by an Architect in a future

Development Application. We note that the EP+A Regulation 2000 defers the need to verify that a Concept DA complies with SEPP 65 as it is, by its nature, a Concept only.

The Concept DA also proposes that the stage boundary is setback 2m from the existing boundary. This provides further flexibility for articulation and detail to this elevation to be studied during the Design Excellence Process.

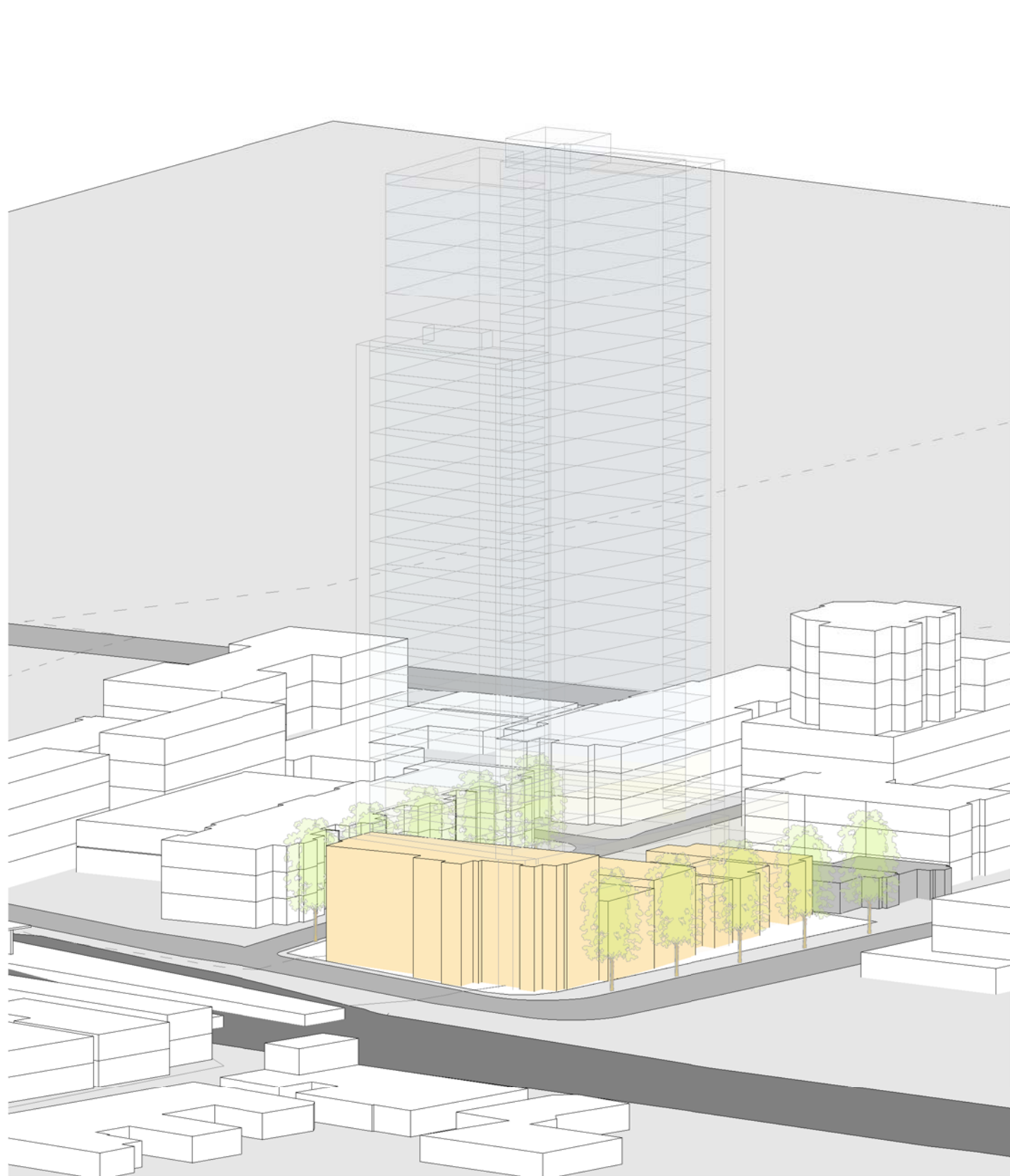
Summary:

Eastern elevation of Stage 1 is capable of being treated so that it has an acceptable appearance prior to the construction of the Stage 2 building. No further change is required.

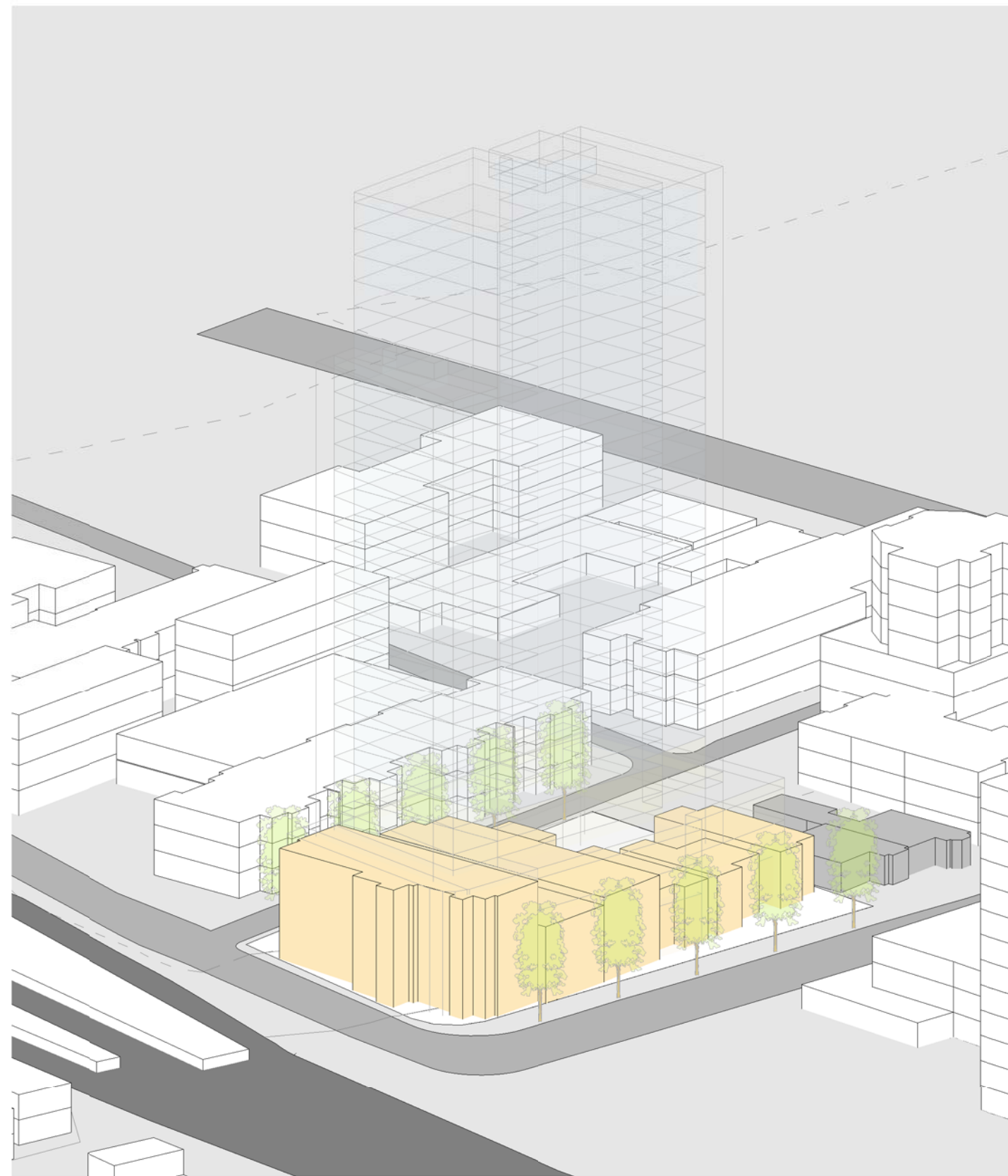
CONCLUSION

The detailed responses above, read together the additional documentation has addressed Council's issues raised following their preliminary assessment of the Concept DA, in relation to the Apartment Design Guide and Parramatta Development Control Plan 2011. The responses are summarised below:

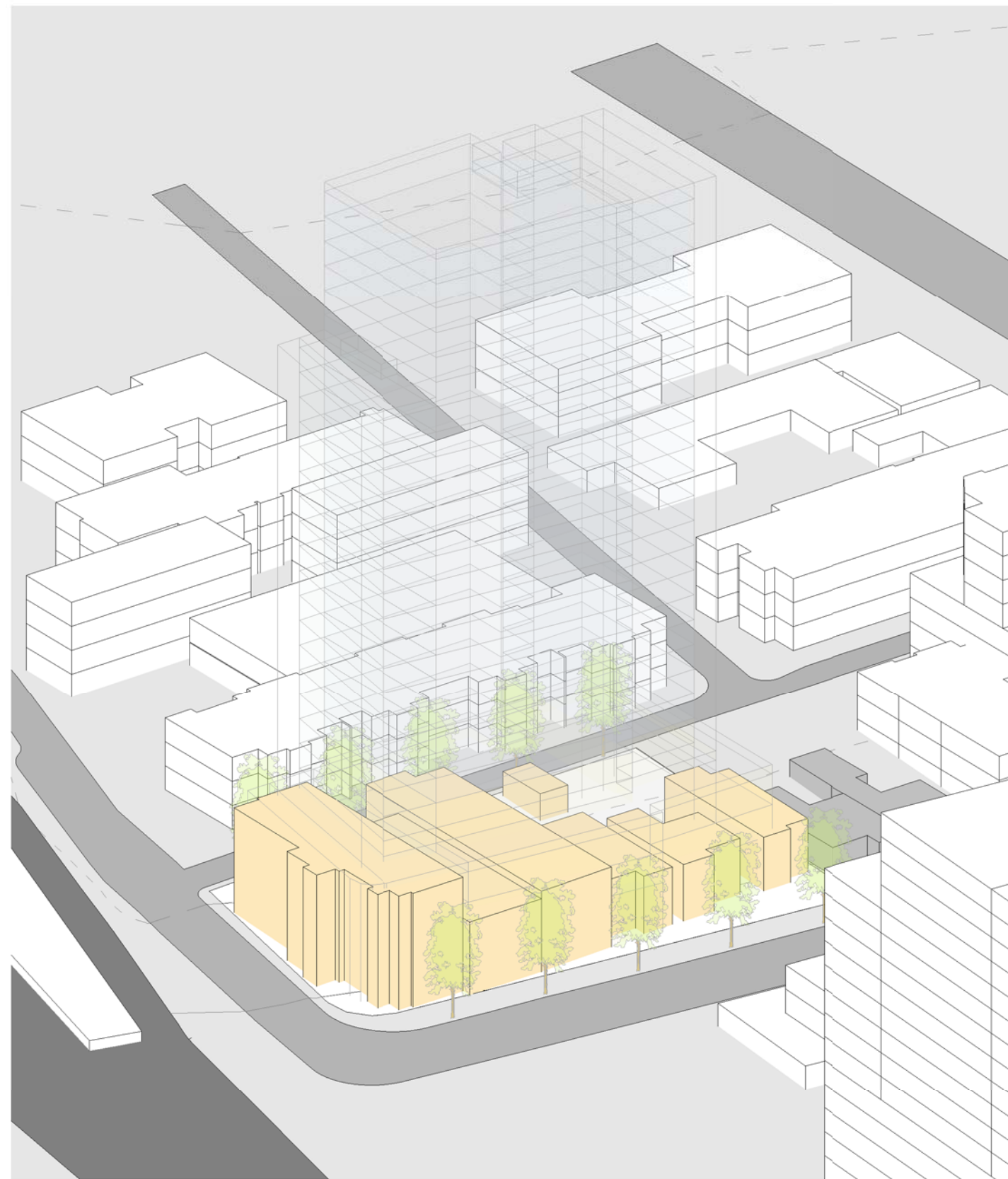
1. At 57 Station Street, to retain 30 minutes of solar access to 2 x apartments to the east, Levels 5-6 (Stage 2) could be articulated at the south-eastern corner of the proposed built form.
2. At 57 Station Street, to retain 1 hour of solar access to 2 x apartments, Levels 5-7 (Stage 1) could be articulated at the south-west corner of the proposed built form.
3. The proposal already provides communal open spaces in excess of the minimum guideline of the Apartment Design Guide. No further change is required.
4. The proposal is capable of achieving solar access to living areas and private open spaces to 70% of apartments at mid-winter and less than 15% of apartments with no solar access at mid-winter. No further change is required.
5. The eastern elevation of Stage 1 is capable of being treated so that it has an acceptable appearance prior to the construction of the Stage 2 building. No further change is required.



1 EXISTING 0900



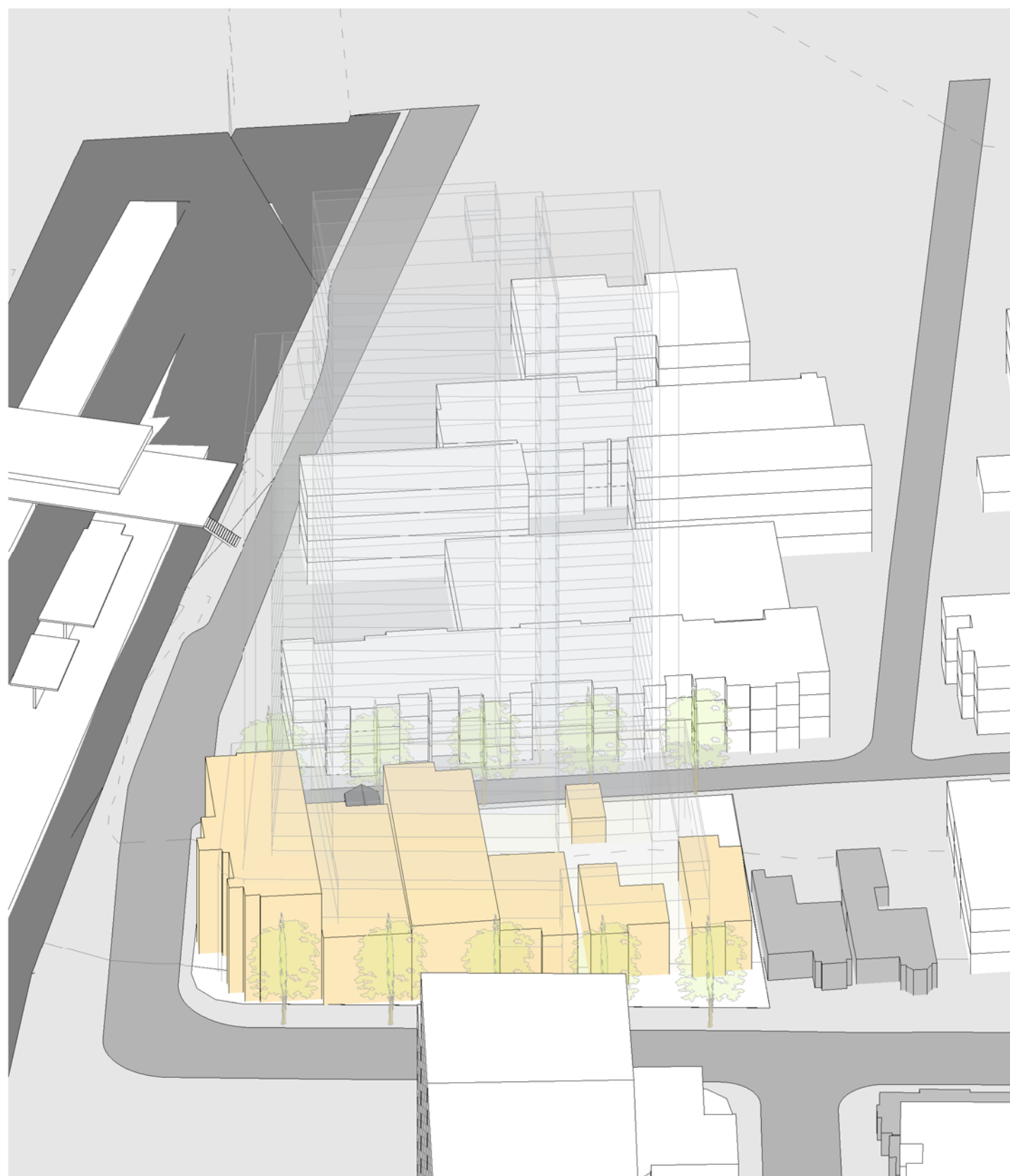
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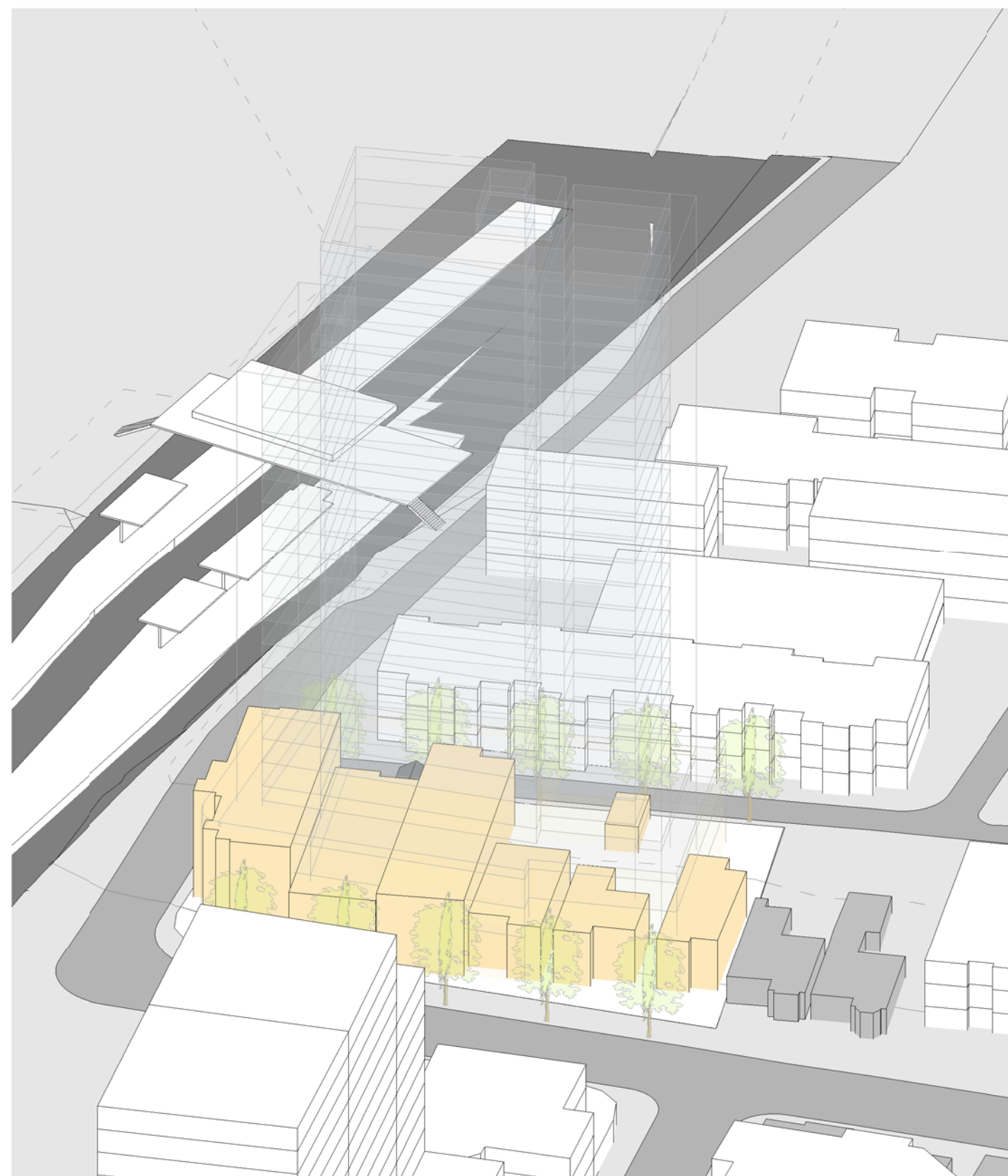
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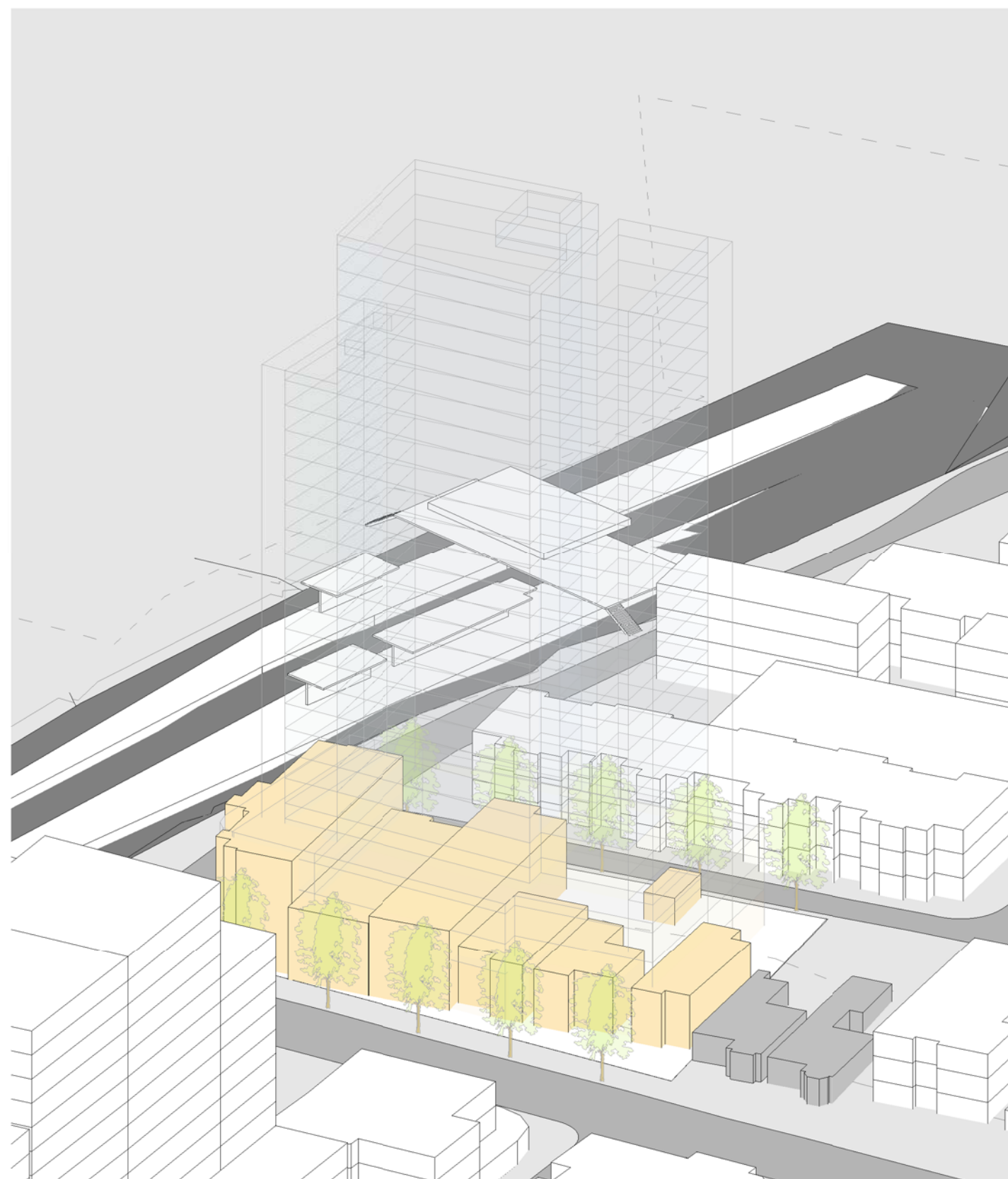
4 EXISTING 1200



5 EXISTING 1300



6 EXISTING 1400



7 EXISTING 1500

issue	amendment	date
A	RESPONSE TO COUNCIL'S PRELIMINARY ASSESSMENT	01.02.22

legend
Retail
Existing building
Local heritage item
Concept DA envelope

architect
stanisic architects

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client
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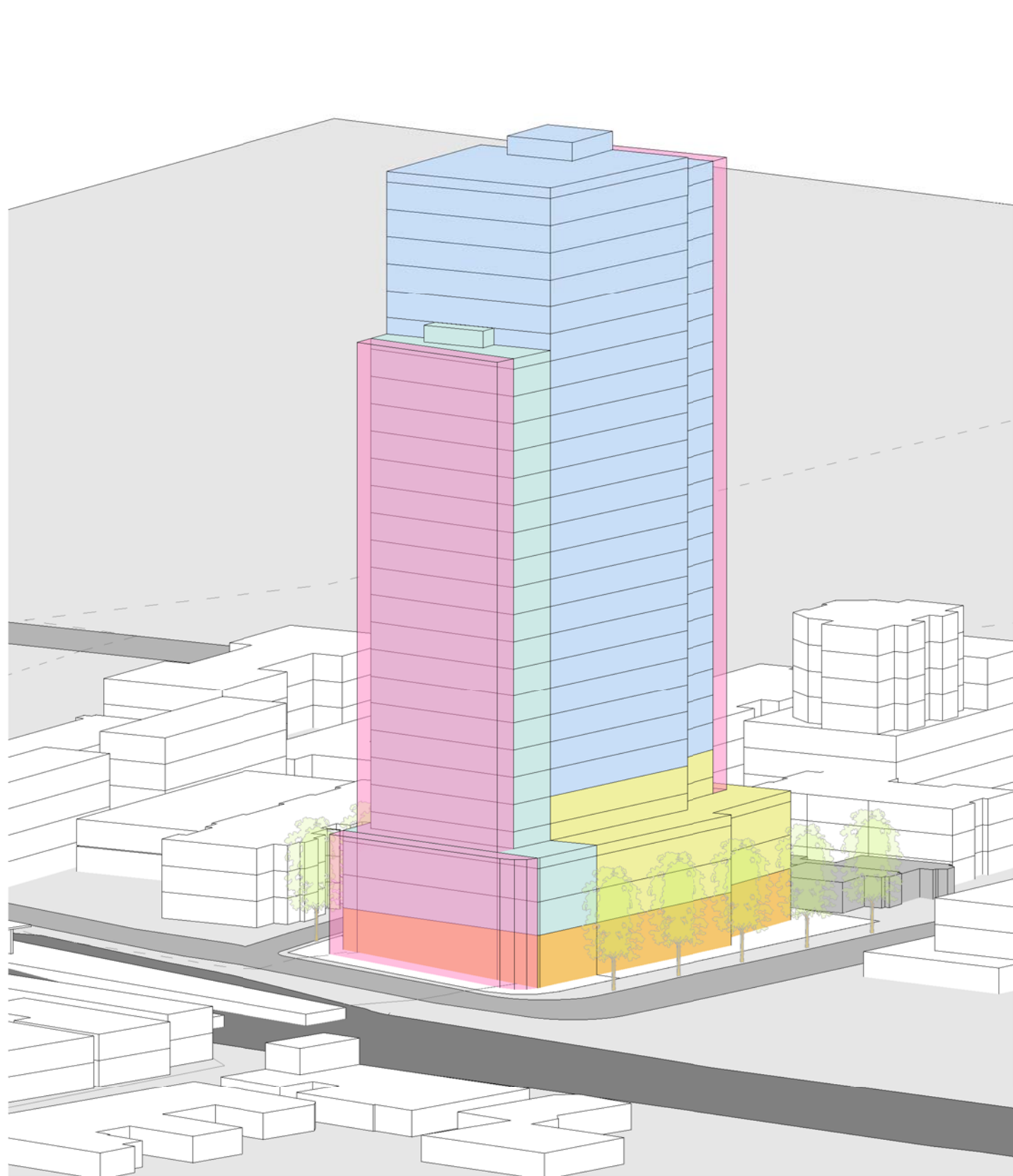
scale
NTS
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project		PROPOSED MIXED USE DEVELOPMENT 33-43 MARION STREET, HARRIS PARK	
checked	FS	drawing	SOLAR ACCESS STUDY - WINTER SOLSTICE (EXISTING)
drawn	JN	issue	A
project no	19 004	drawing no	CD 410

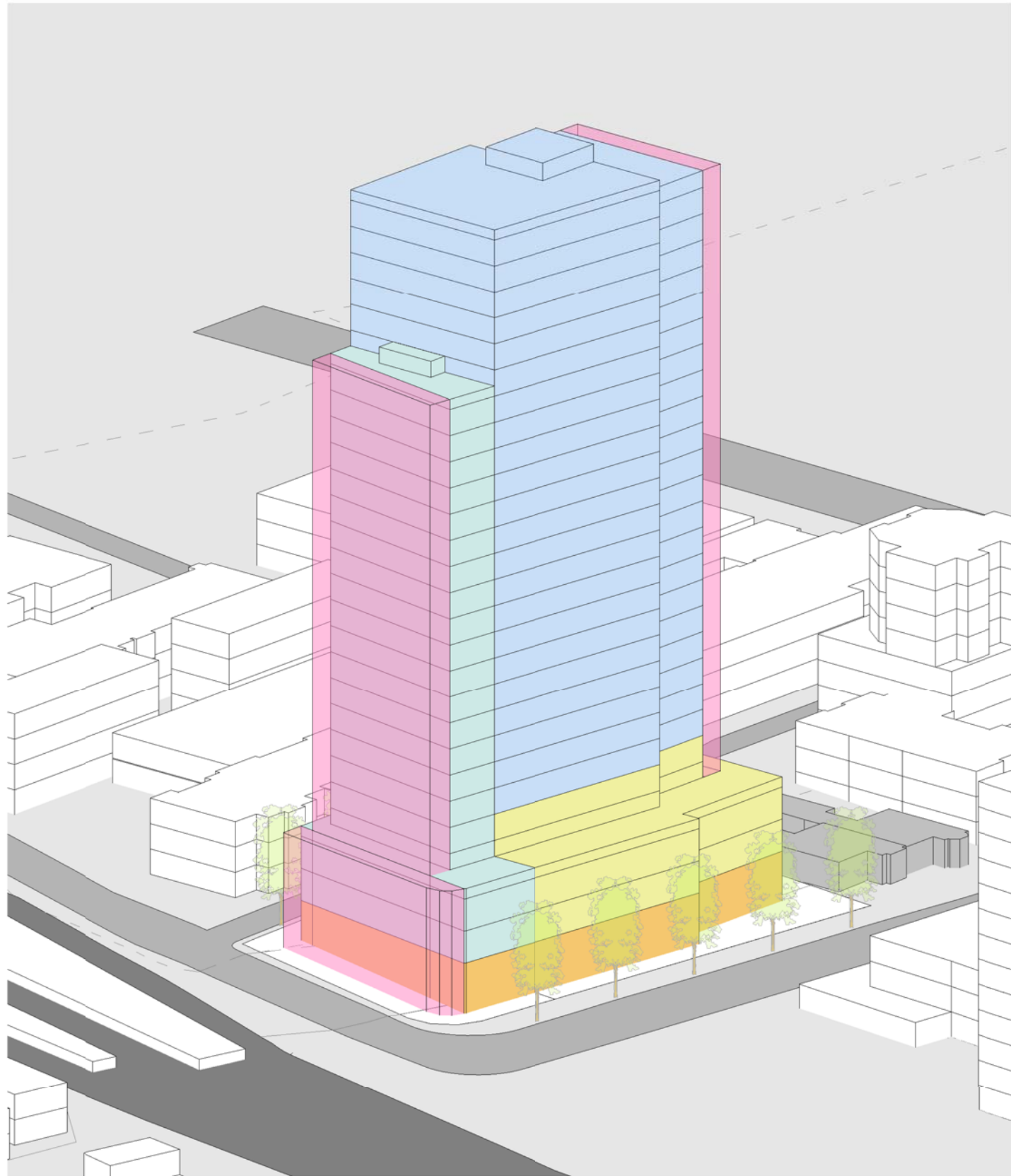
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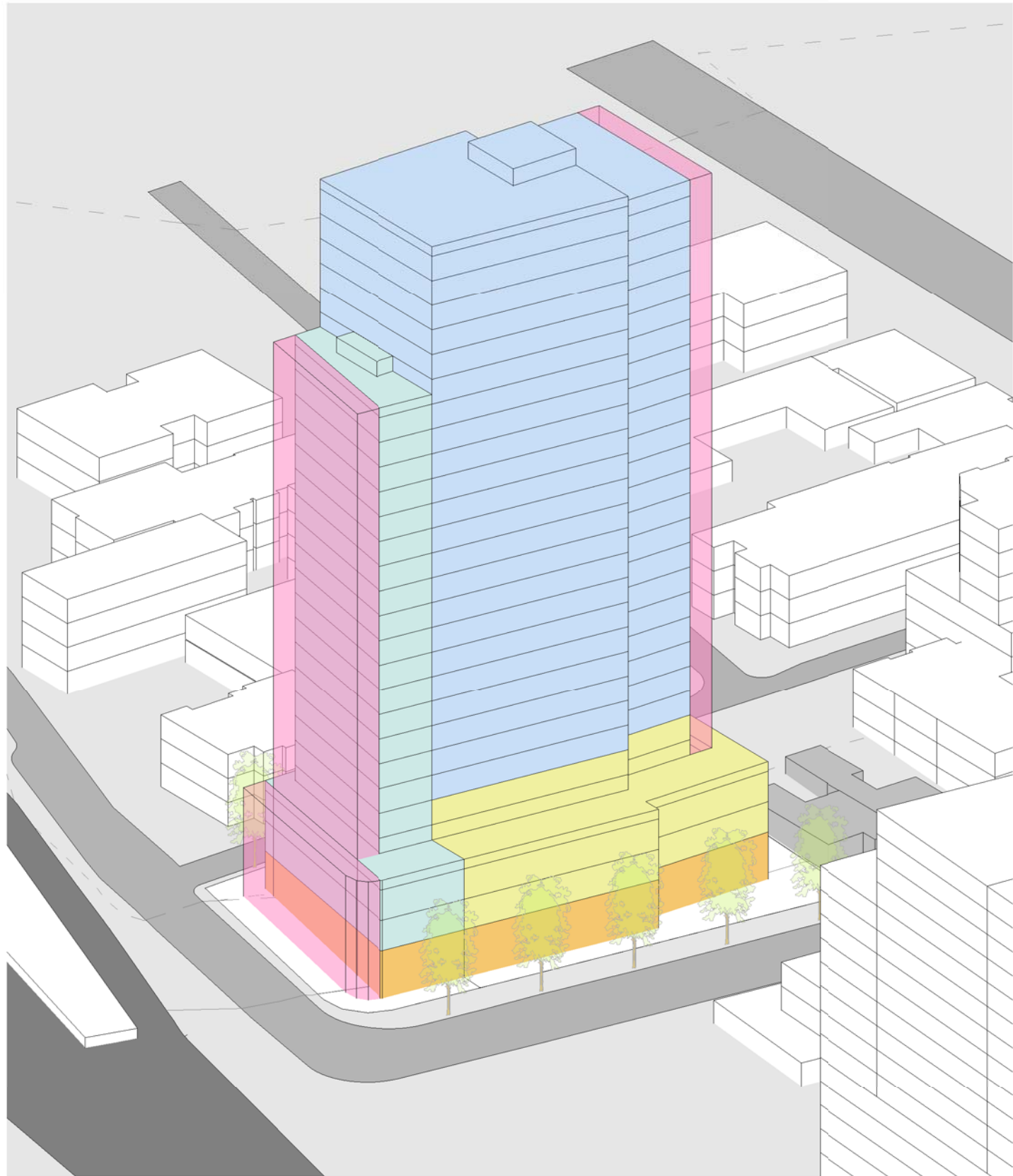
the layout shown and the areas noted on this drawing are indicative only. layouts are to be read in conjunction with floor plans, elevations + sections.



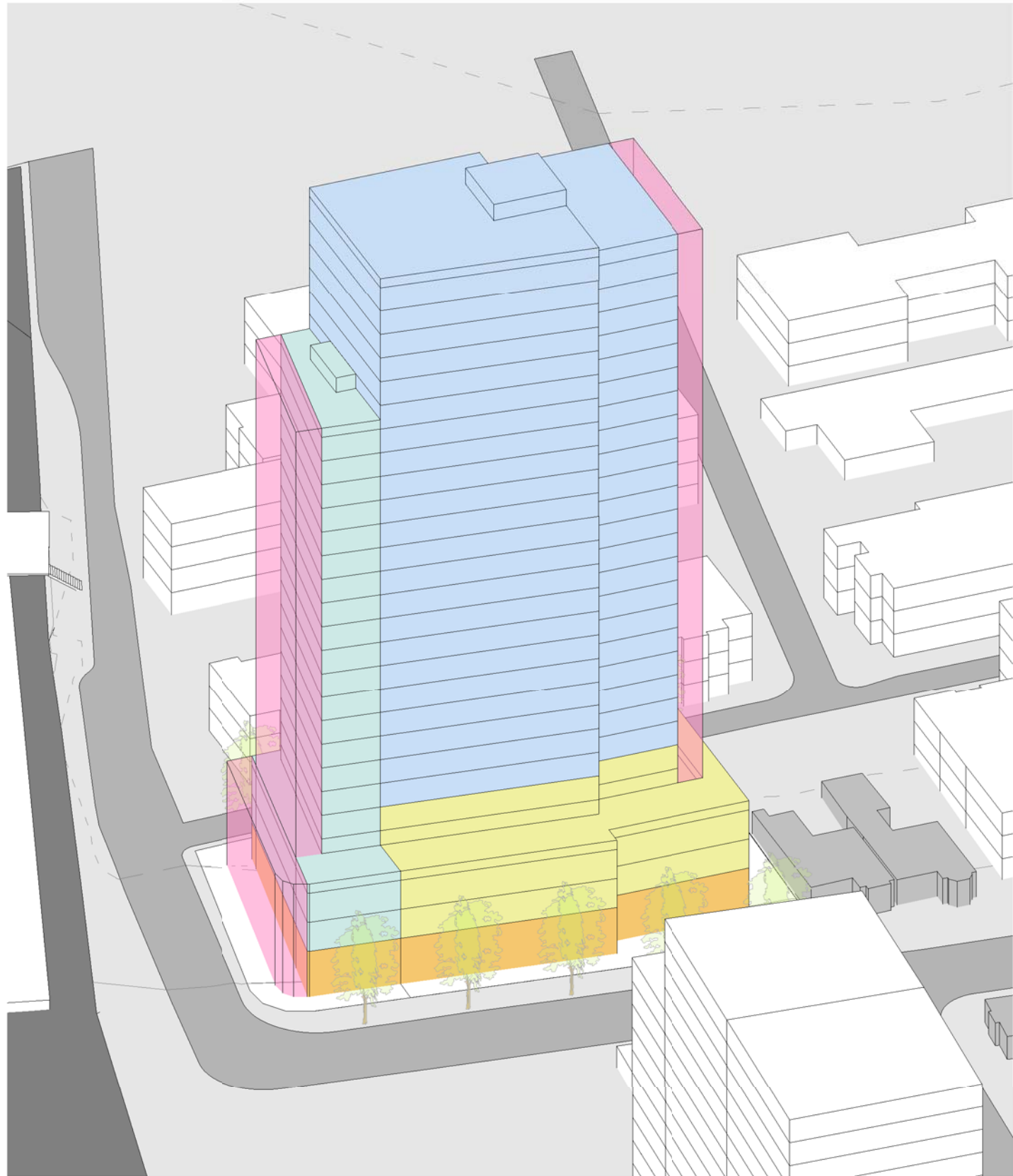
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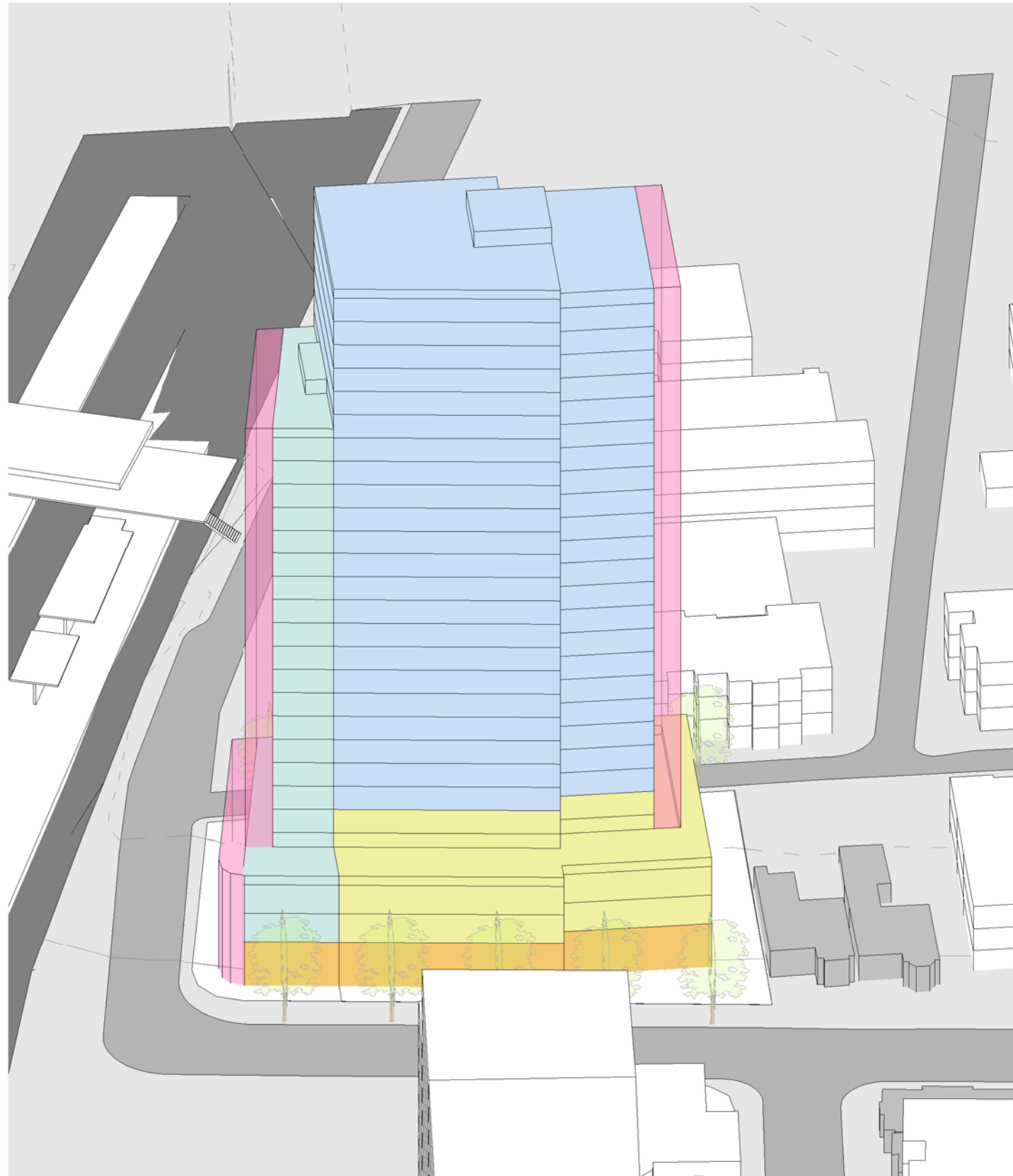
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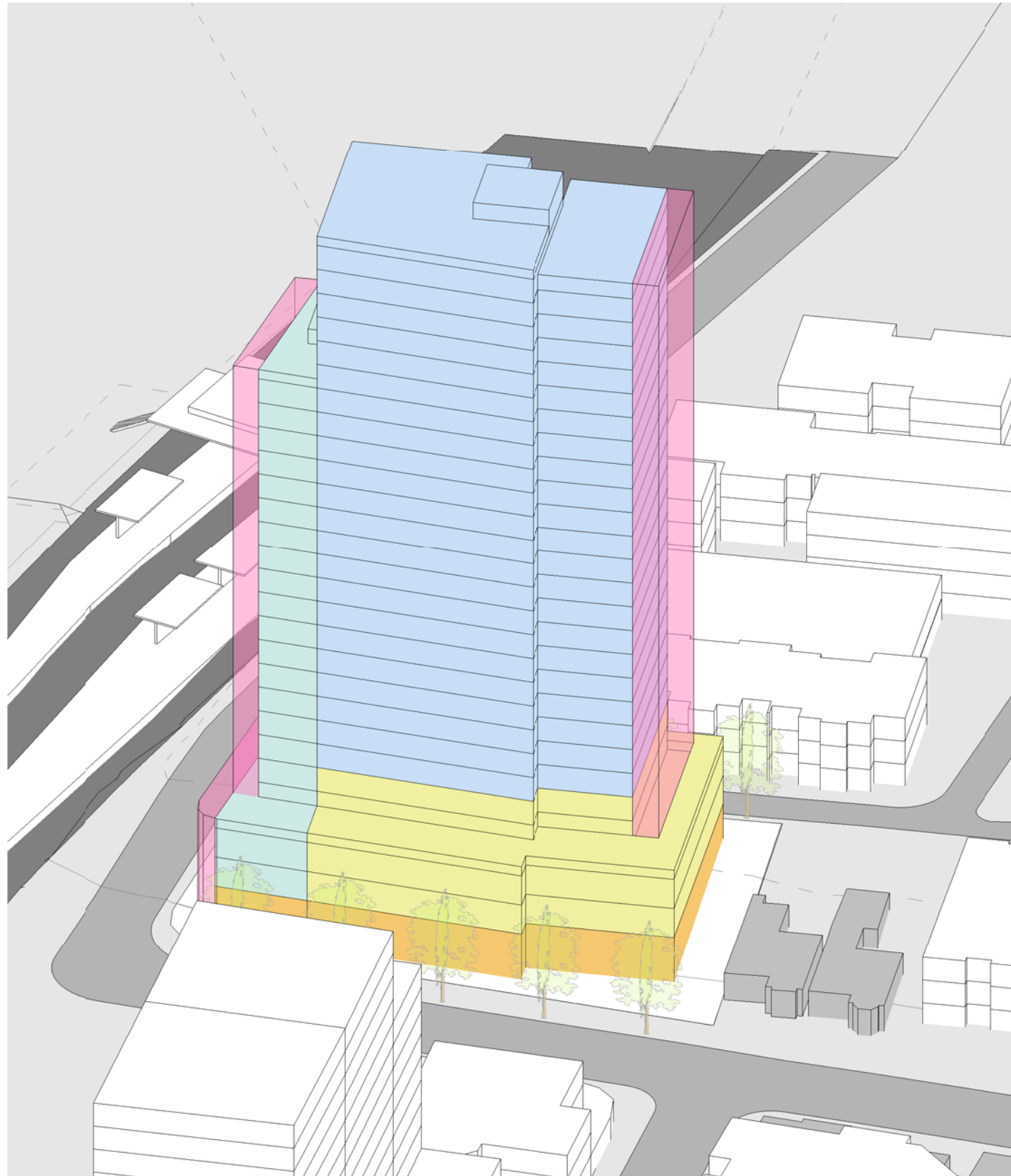
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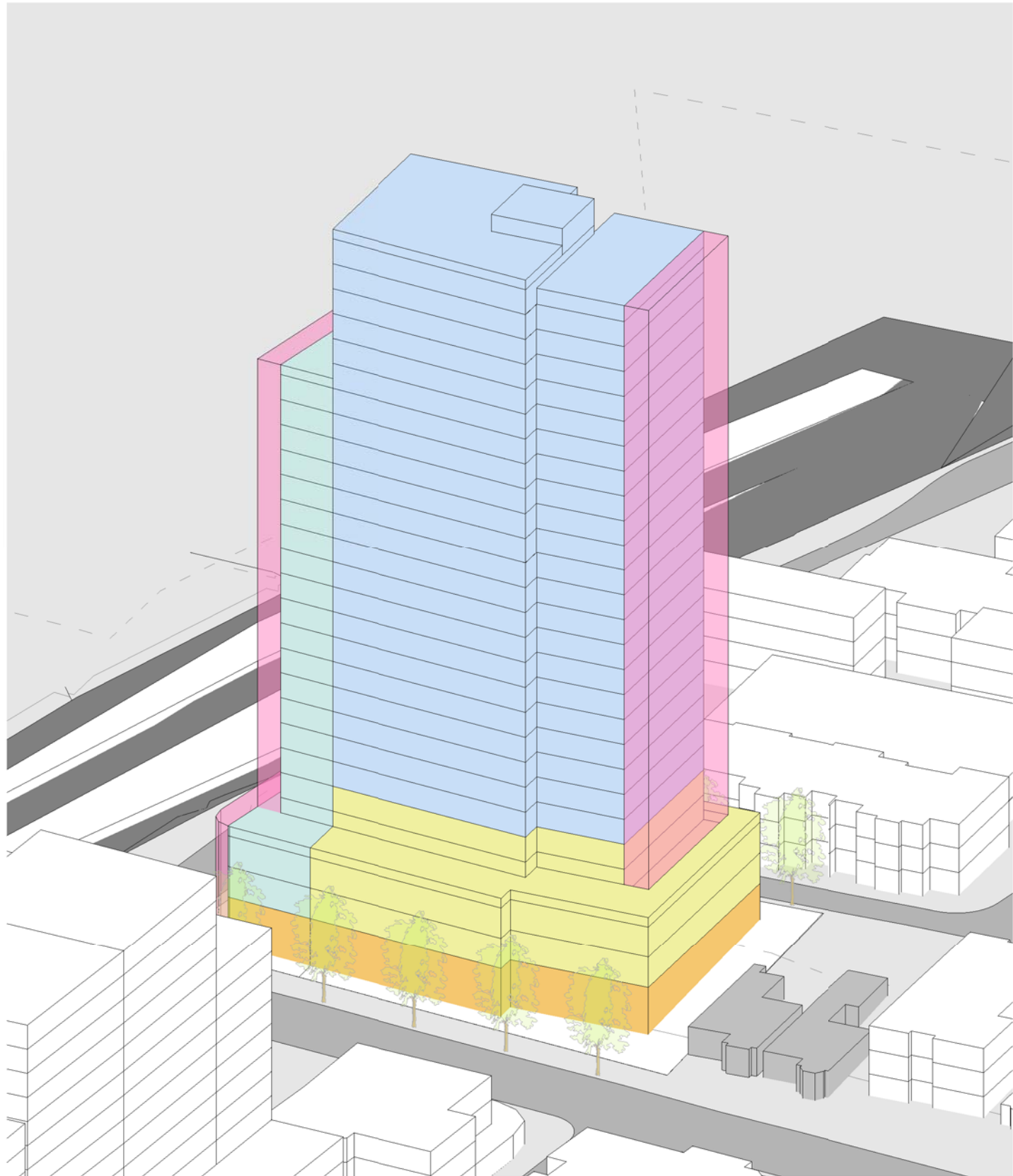
4 DCP ENVELOPE 1200



5 DCP ENVELOPE 1300



6 DCP ENVELOPE 1400



7 DCP ENVELOPE 1500

issue amendment
A RESPONSE TO COUNCIL'S PRELIMINARY ASSESSMENT

date
01.02.22

legend
Retail
Student accommodation
Residential
Commercial
Existing building
Local heritage item
Proposed additional form (Concept DA)

architect
stanisic architects

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client

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project

PROPOSED MIXED USE DEVELOPMENT
33-43 MARION STREET, HARRIS PARK

checked FS drawing
SOLAR ACCESS STUDY - WINTER SOLSTICE (DCP)

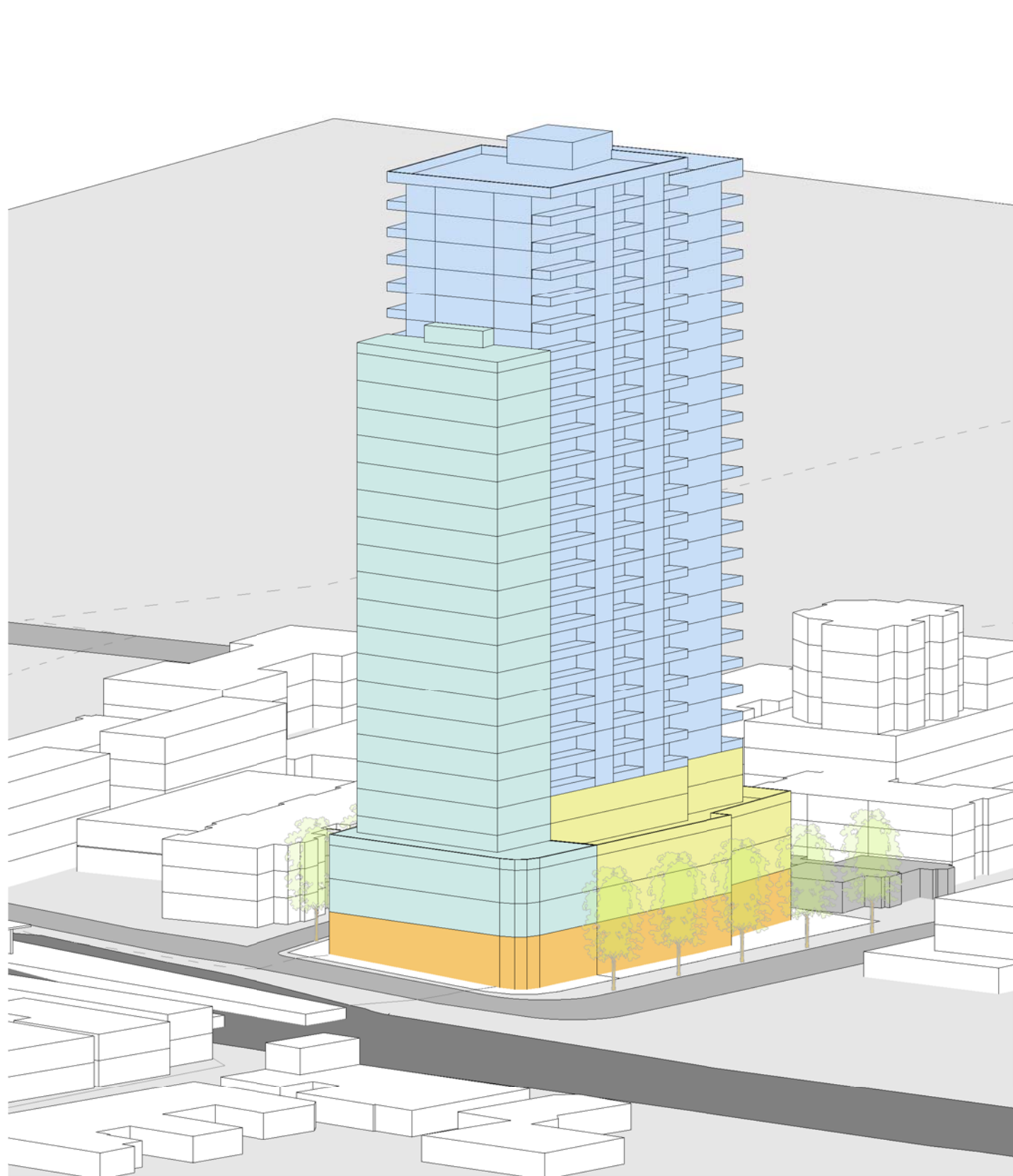
drawn JN issue
A

project no 19 004 drawing no
CD 411

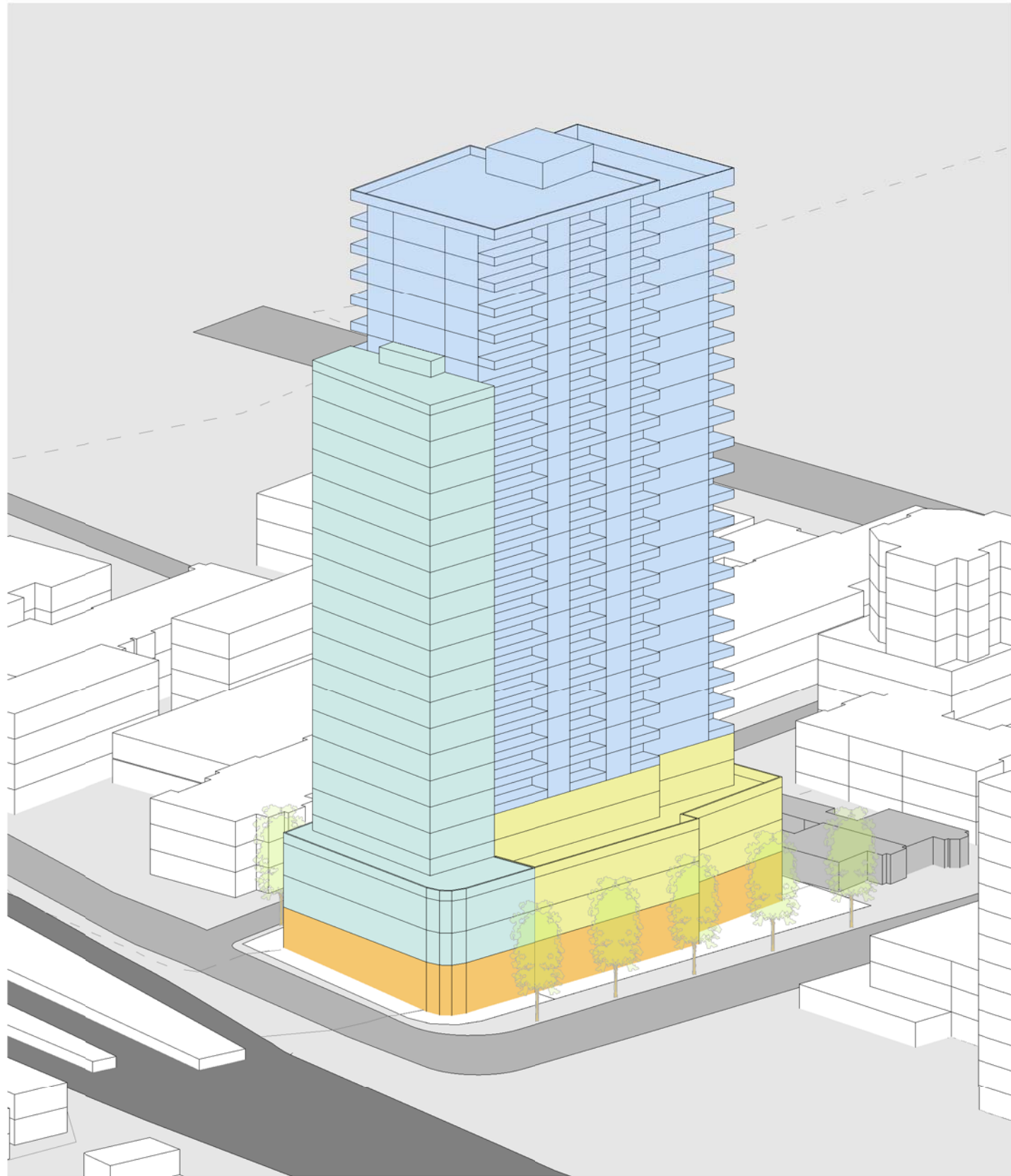
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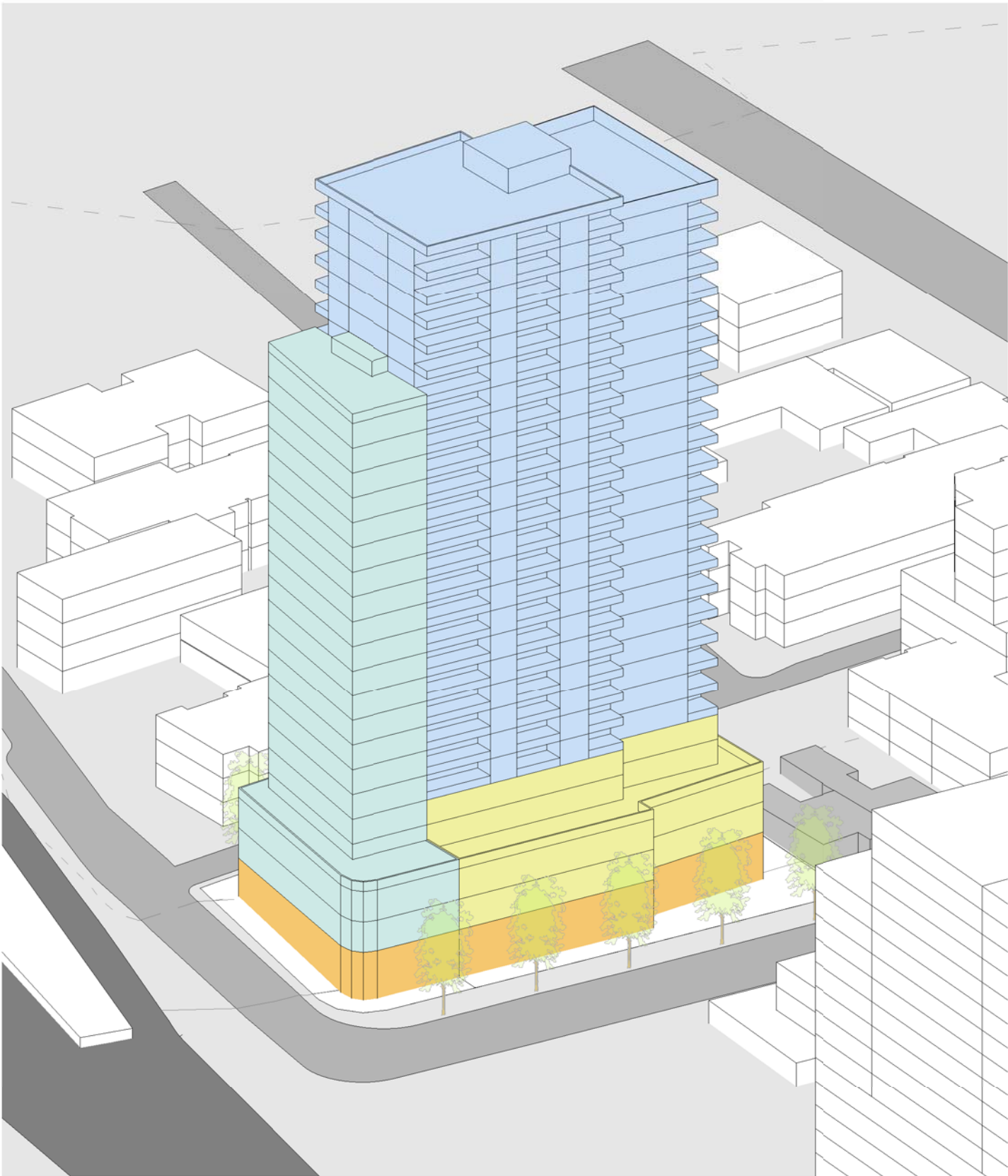
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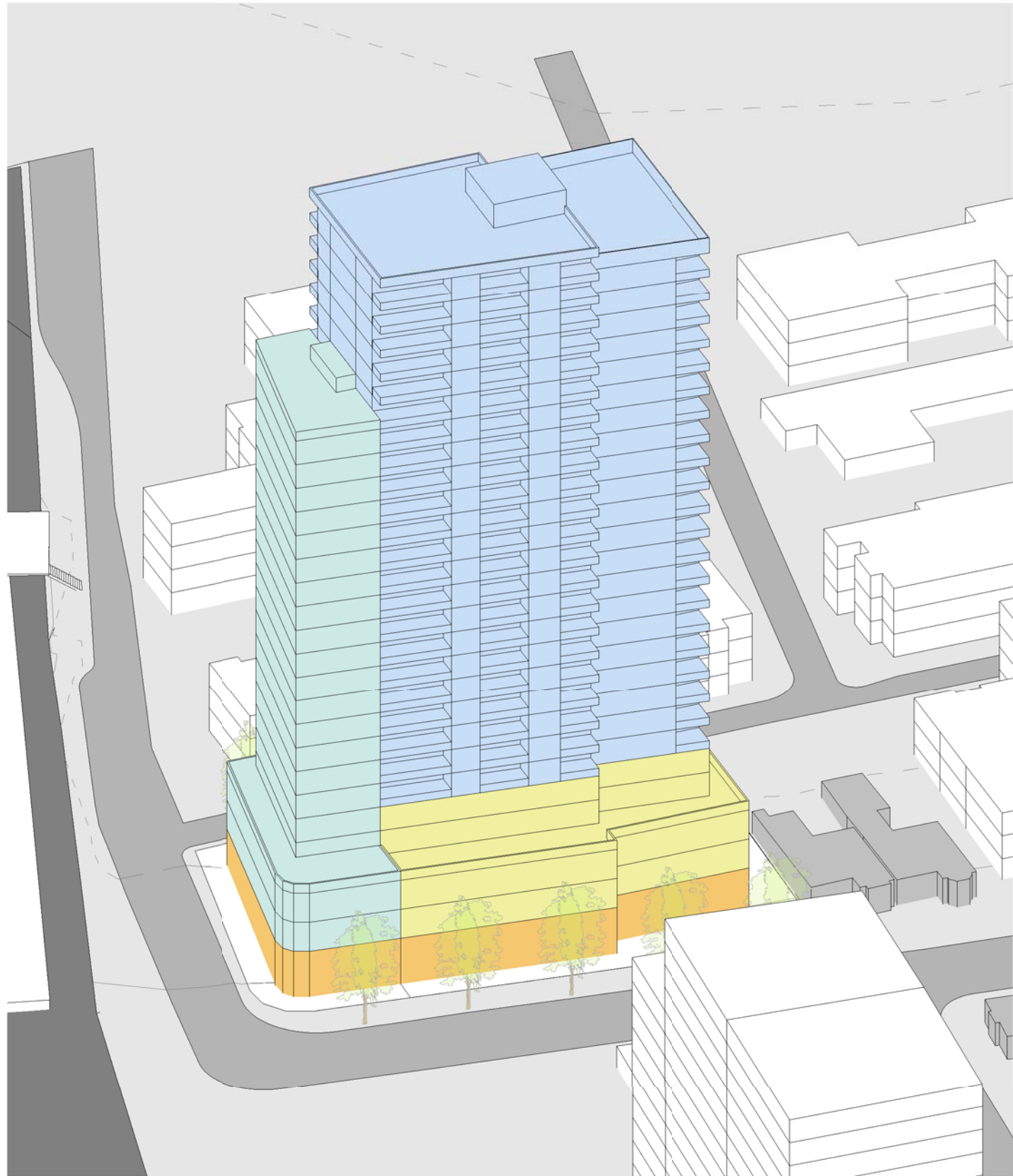
1 CONCEPT DA 0900



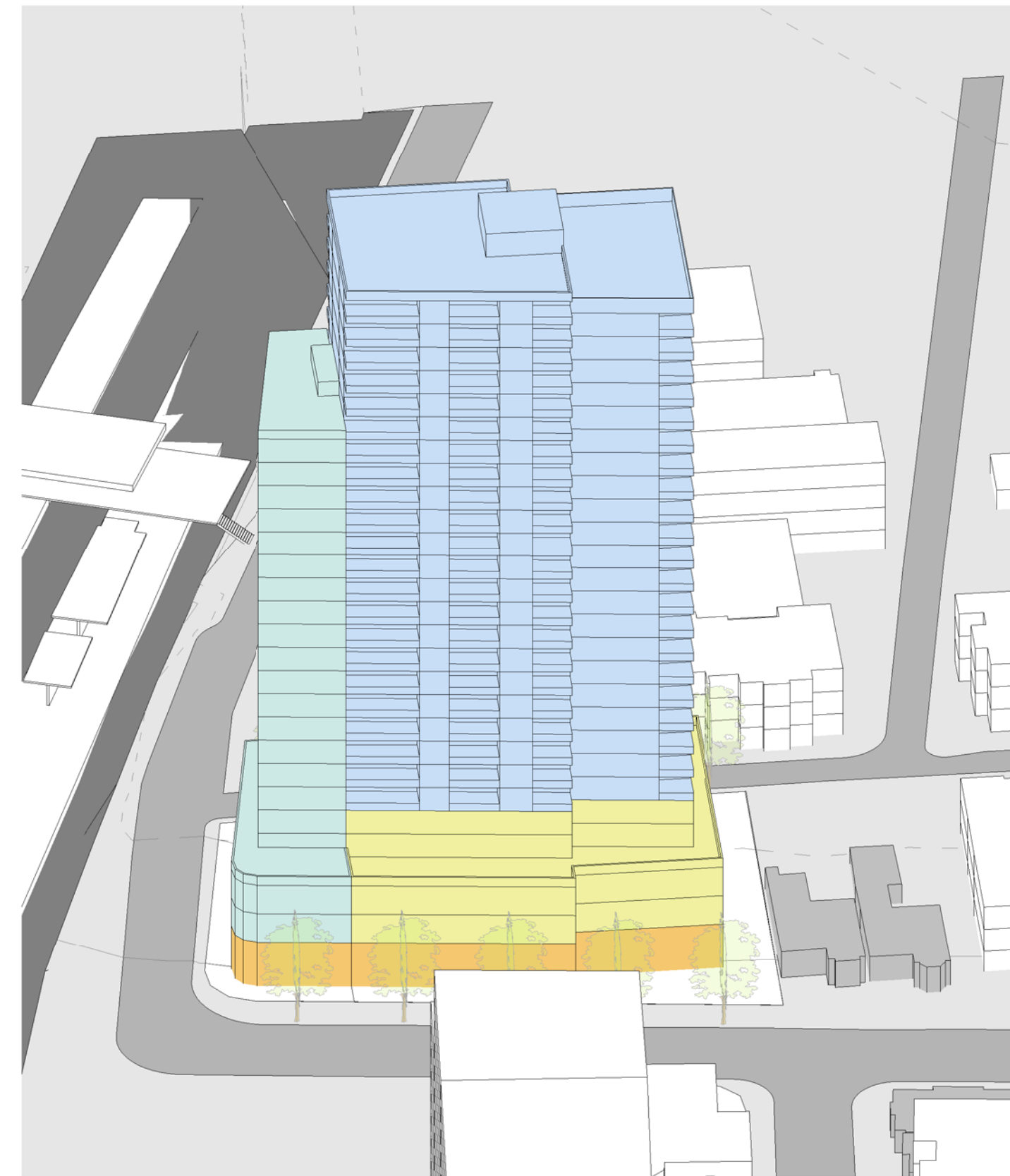
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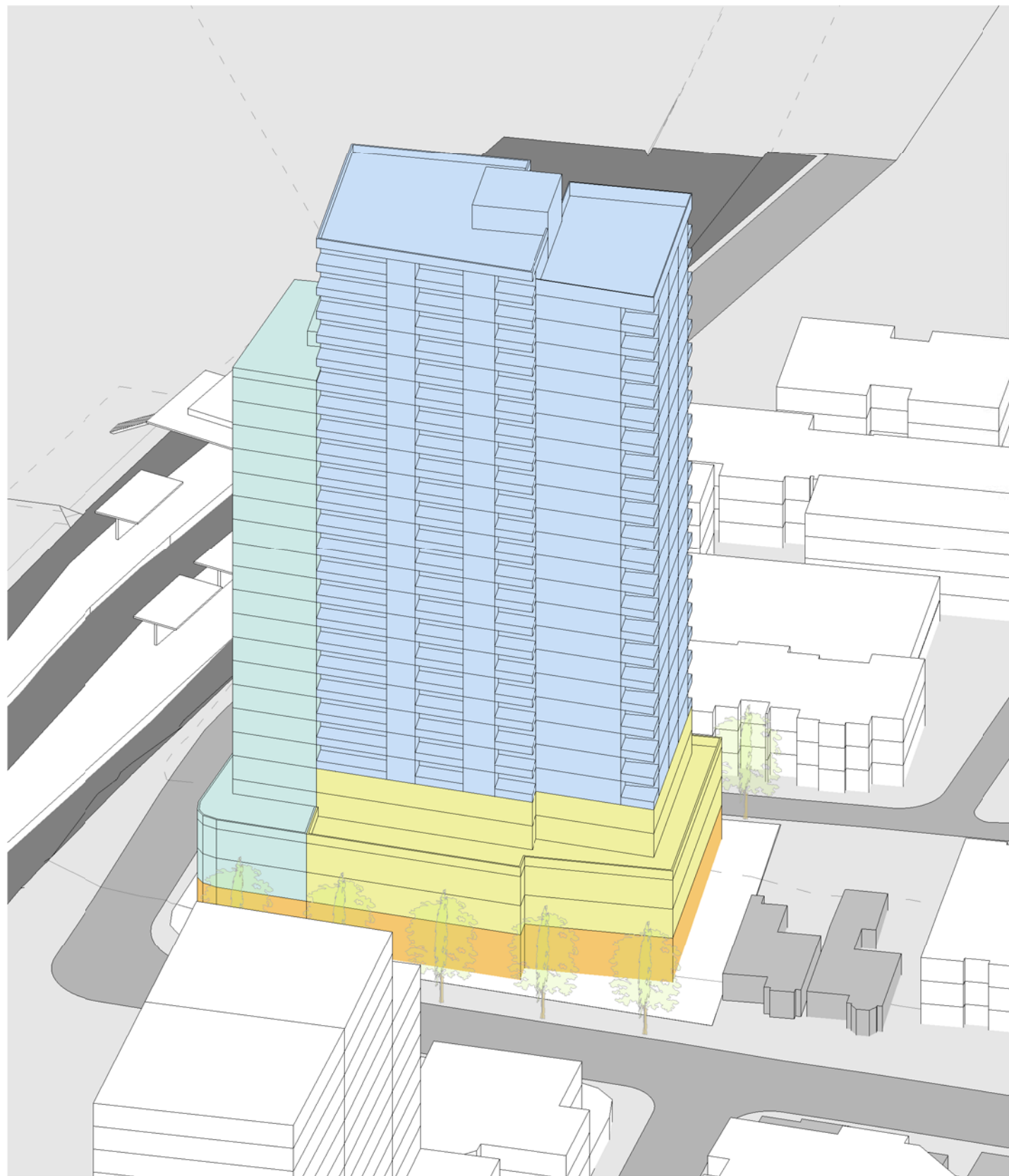
3 CONCEPT DA 1100



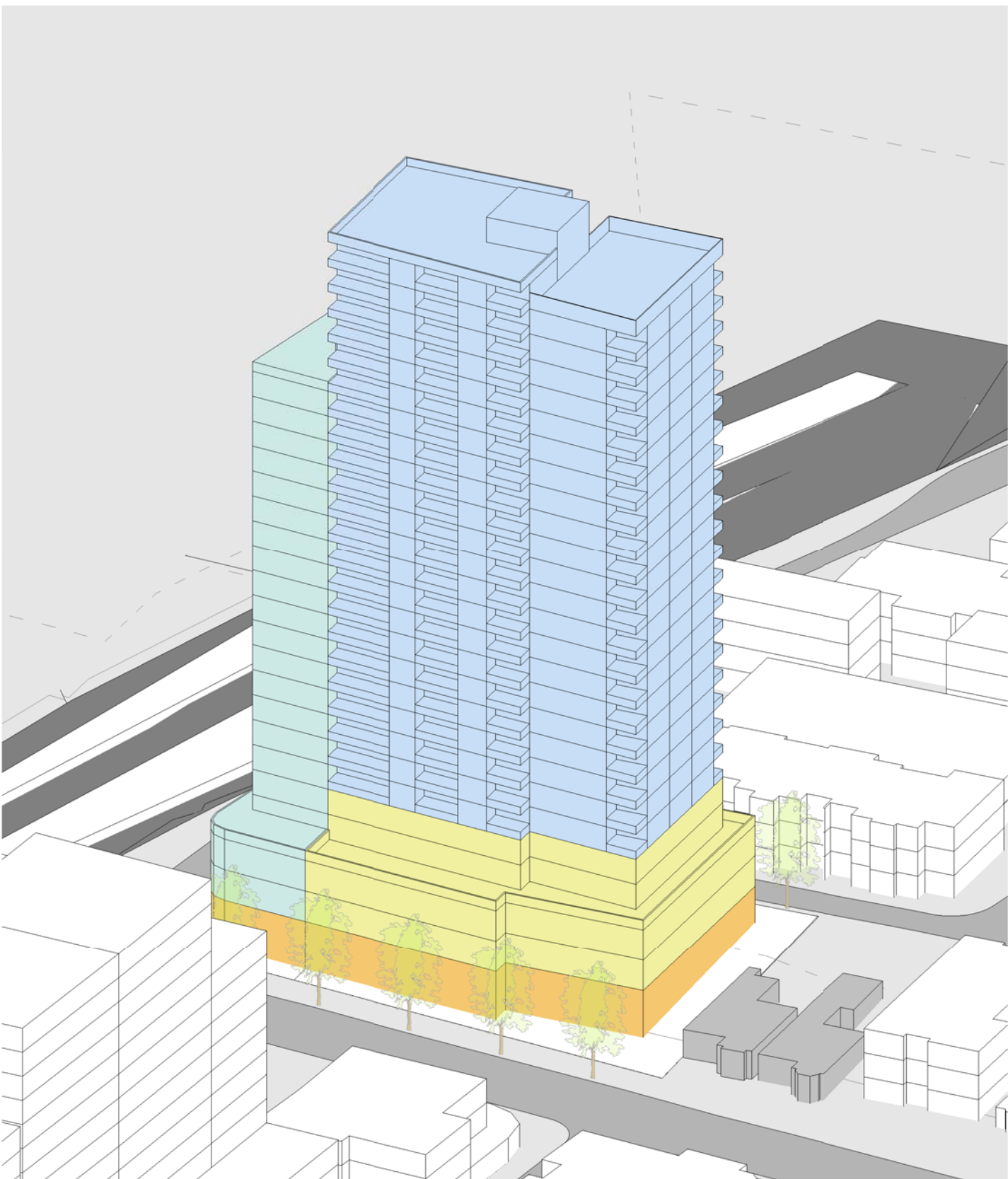
4 CONCEPT DA 1200



5 CONCEPT DA 1300



6 CONCEPT DA 1400



7 CONCEPT DA 1500

issue amendment
A RESPONSE TO COUNCIL'S PRELIMINARY ASSESSMENT

date
01.02.22

legend
Retail
Student accommodation
Residential
Commercial
Existing building
Local heritage item

architect
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client

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scale

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project

PROPOSED MIXED USE DEVELOPMENT
33-43 MARION STREET, HARRIS PARK

checked

FS

drawing SOLAR ACCESS STUDY - WINTER SOLSTICE
(PROPOSAL)

drawn

JN

issue

project no

19 004

drawing no

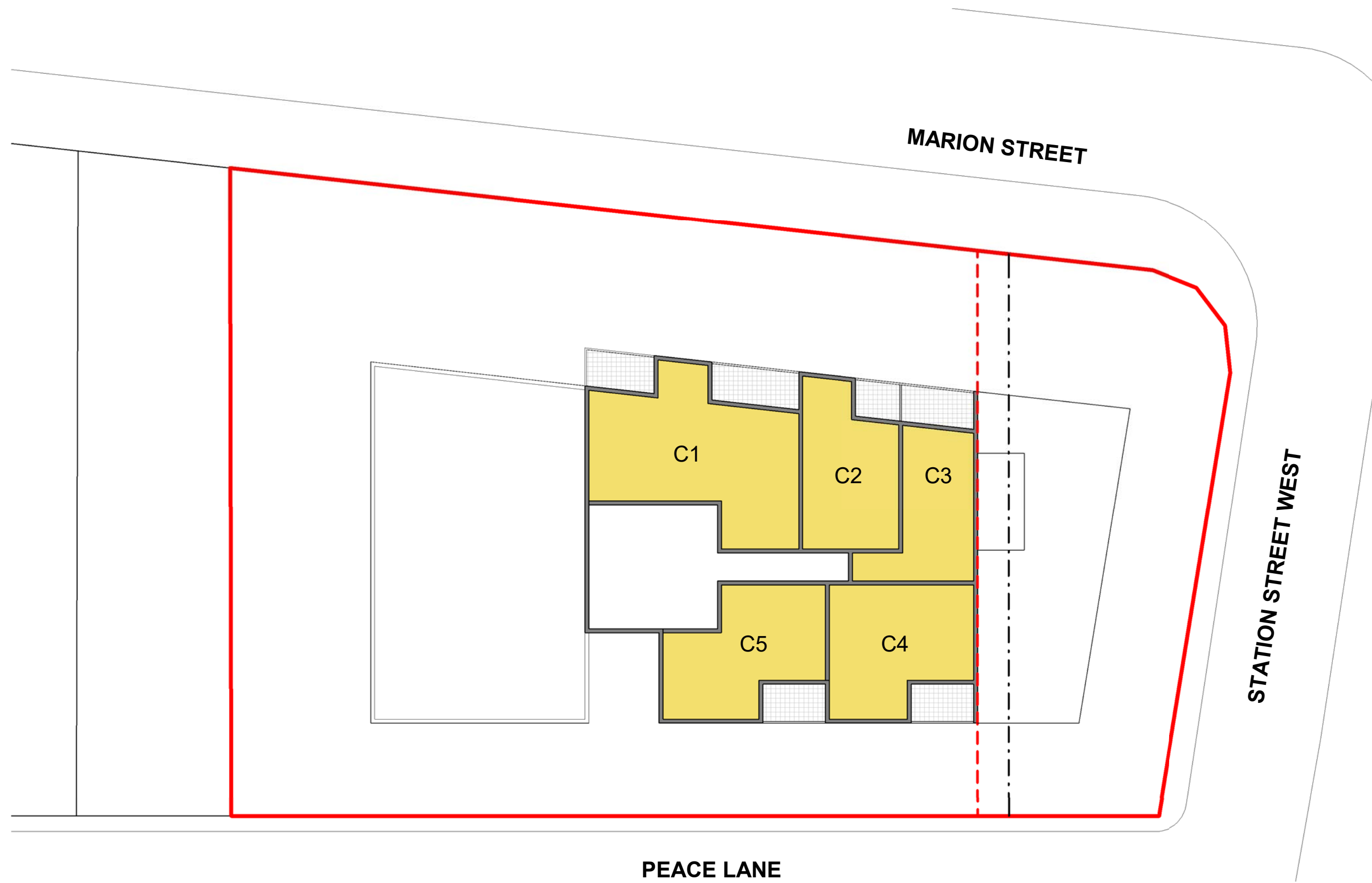
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CD 412

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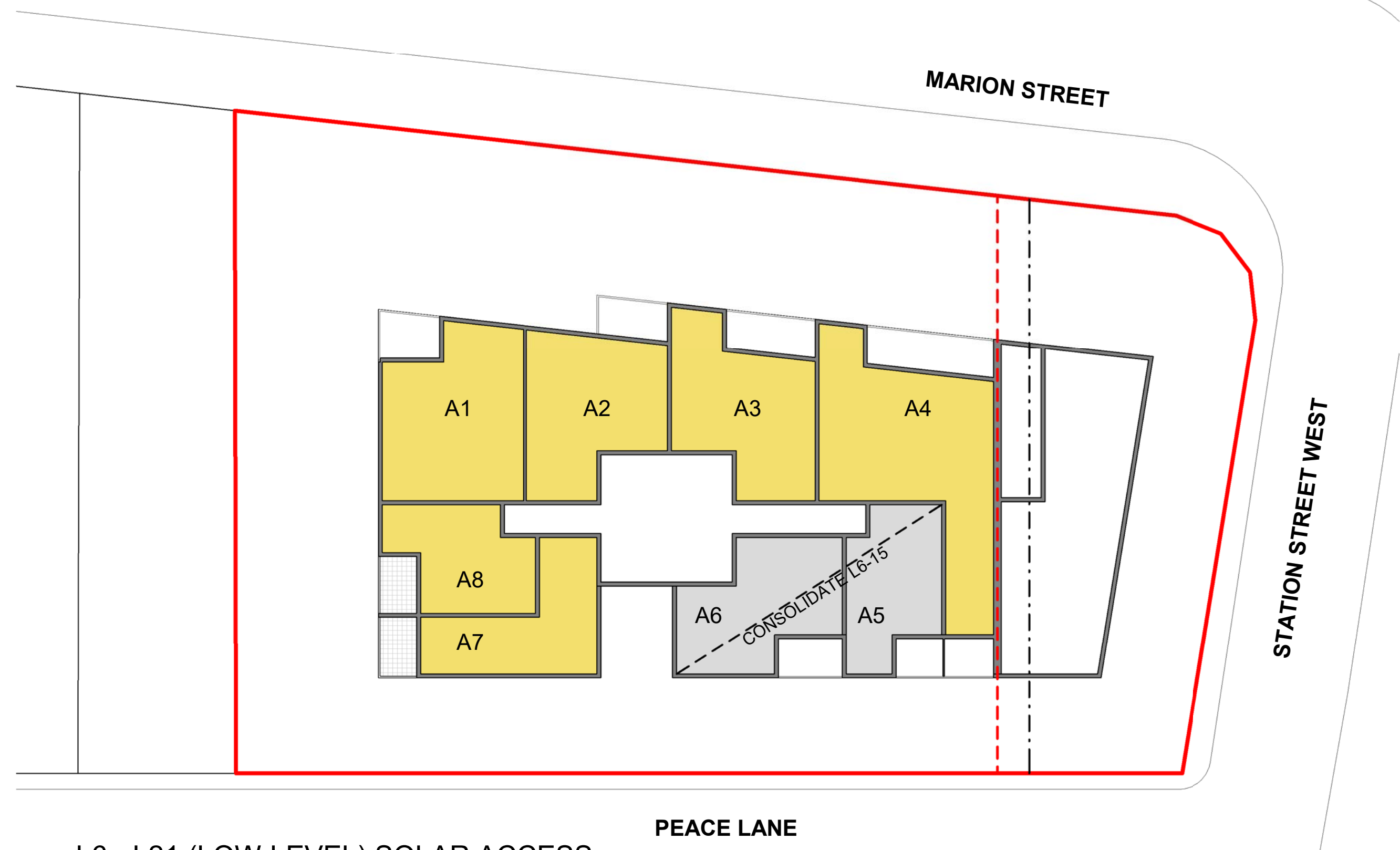
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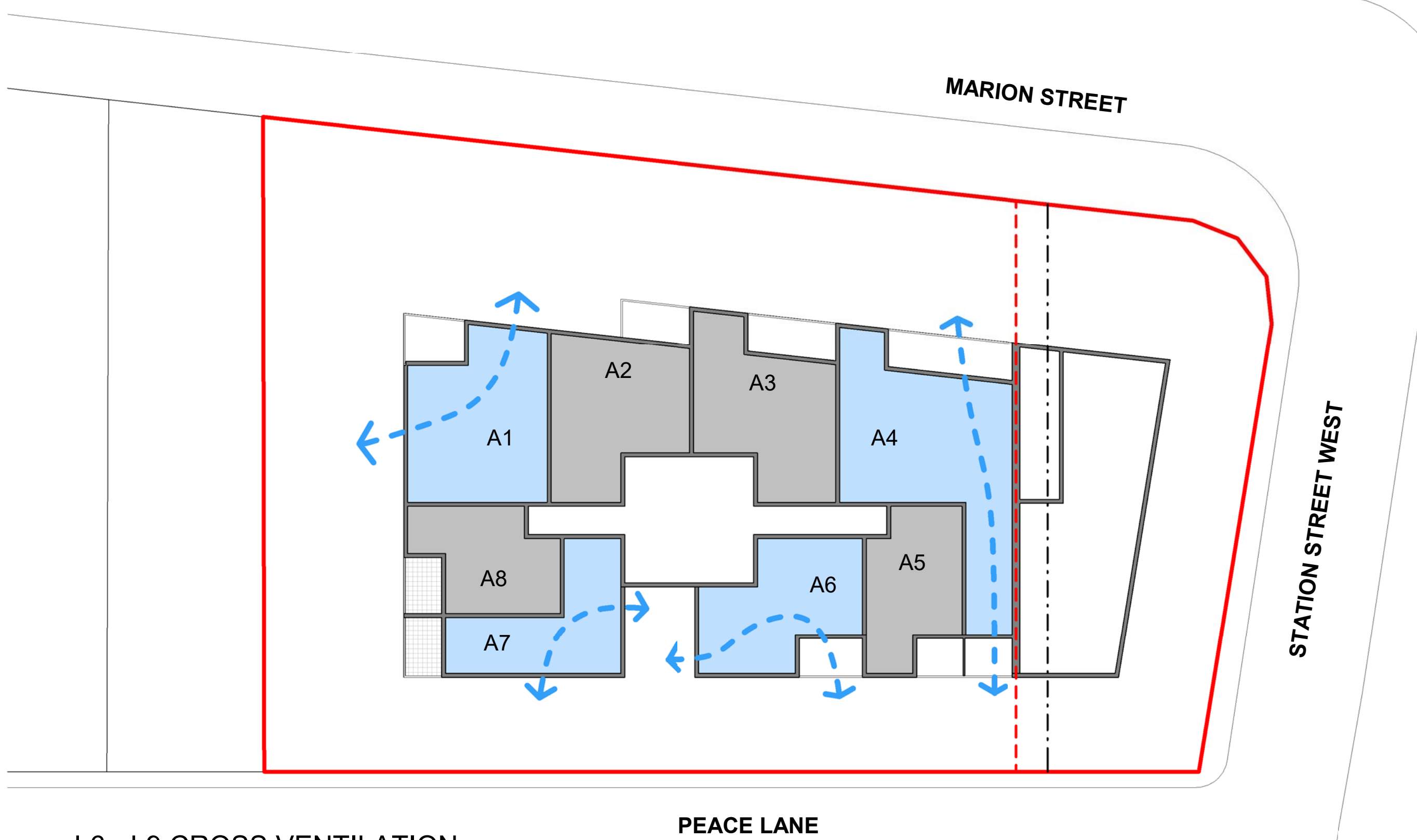
1 L27 (HIGH LEVEL) SOLAR ACCESS
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2 L22 - L26 (MID LEVEL) SOLAR ACCESS
1 : 250



3 L6 - L21 (LOW LEVEL) SOLAR ACCESS
1 : 250

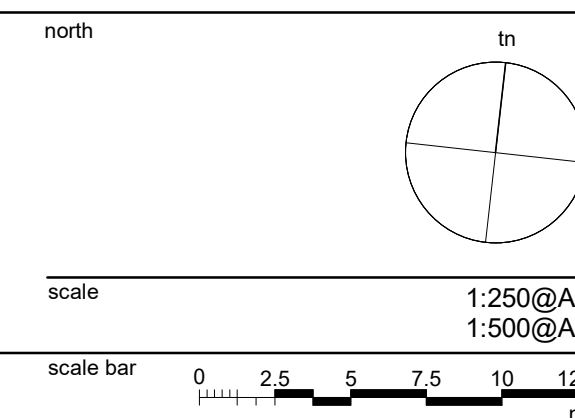


4 L6 - L9 CROSS VENTILATION
1 : 250

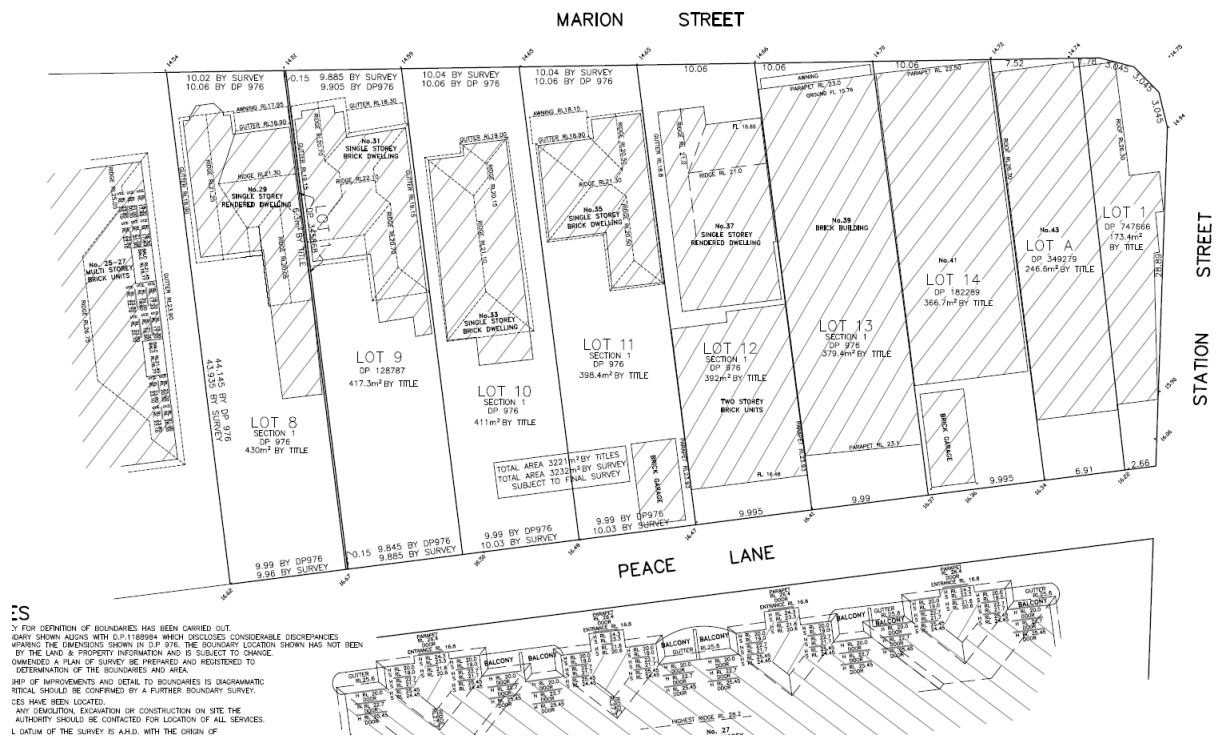
issue	amendment	date	legend
A	ISSUE FOR CONCEPT DEVELOPMENT APPLICATION	03.08.21	
B	RESPONSE TO COUNCIL'S PRELIMINARY ASSESSMENT	01.02.22	

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project	PROPOSED MIXED USE DEVELOPMENT 33-43 MARION STREET, HARRIS PARK
checked	FS
drawn	AN
project no	19 004
drawing no	



28.01.2022

RE: 33 – 43 Marion Street, Harris Park

To whom it may concern,

Please find below the considerations for selecting planting at 33 – 43 Marion Street, Harris Park.

Through Site Link

Proposed trees. Minimum soil volume provided for small tree 15m³ as per the Apartment Design Guide 3E Deep Soil Zones Table 2. Tree species, selection and allocated soil volumes as found in *Apartment Design Guide 3E Deep Soil Zones Table 2*. Small native tree 'Tuckeroo' *Cupaniopsis anacardioides* to 5 - 8m high x 5 - 7 spread

Street Tree Planting

Proposed street trees as per '*Public Domain Guidelines*' 2017, figure 3.8 Typical Street Type Layout - Urban Living (see page 2) and species selection as per '*Public Domain Guidelines*' 2017, figure 4.4 CBD Street Tree Strategy.

Yours faithfully,



Liam Noble
Director
BL Arch (Hons. 1 UNSW) Assoc. Dip Hort Eng.

Typical Street Type Layout - Urban Living
City of Parramatta Public Domain Guidelines

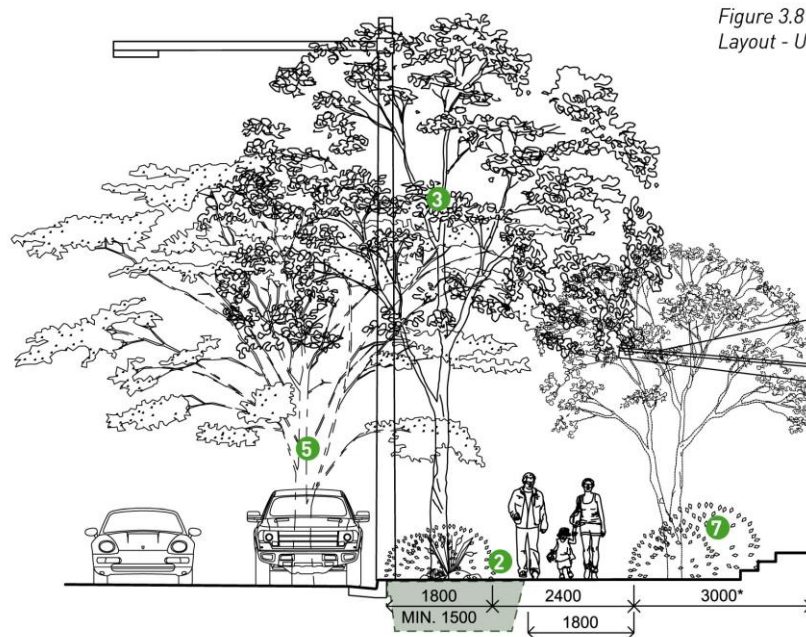


Figure 3.8 Typical Street Type
Layout - Urban Living



33 - 43 MARION STREET, HARRIS PARK

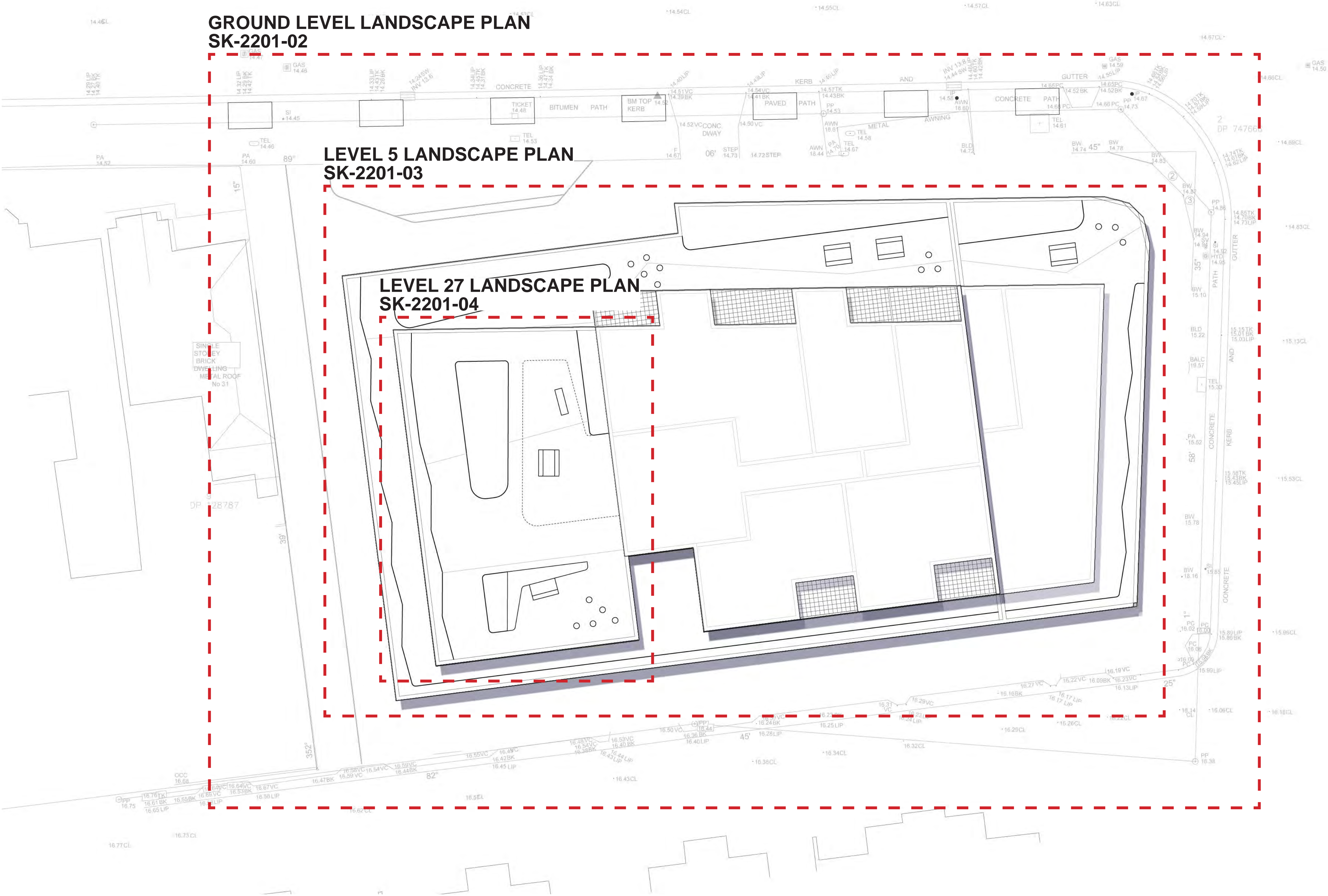
LANDSCAPE ARCHITECTURAL DRAWING SET

Issue: A

Date: 28.01.2022

FOR:
PACIFIC PLANNING

SITE PLAN



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landscape architecture
environmental & urban design

PROJECT
33 MARION STREET, HARRIS PARK

CLIENT
PACIFIC PLANNING

DRAWING
SITE PLAN

DRAWING No. **SK-2201-01** ISSUE **A** DRAWN **jc** DATE **28.01.2022**

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1:300@A3

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GROUND FLOOR LANDSCAPE PLAN

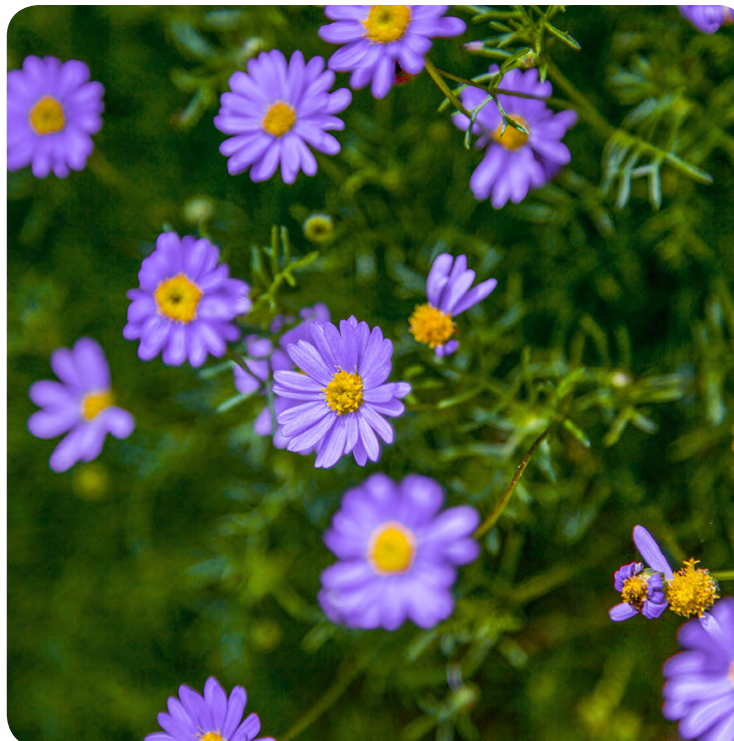


NOTES

1. Street trees. Species selection as per 'Public Domain Guidelines' Figure 4.4 CBD - Street Tree Strategy. Street tree planned as per 'Public Domain Guidelines' Figure 3.8 Typical Street Type Layout Urban Living
2. Existing widened footpath to be retained to accommodate tree canopy as shown 'Public Domain Guidelines' Figure 3.8 Typical Street Type Layout Urban Living
3. Make good existing pavers as per Public Domain Guidelines' Figure 4.2 CBD - Paving Strategy
4. Inclusion of planted garden areas to enhancesoftening of streetscape to City of Parramatta guidelines
5. Communal seating to front of building
6. Final unit paver to City of Parramatta approval.
7. Large canopy shade tree
8. Final design to be determined in conjunction with project architect. All ramps and hand rails to design standards
9. Through Site Link tree planting with layered understorey planting. Provide screening to neighbouring property. Understorey planting to 2m tall and small tree to 8m tall.

Tree species, selection and allocated soil volumes as found in *Apartment Design Guide 3E Deep Soil Zones Table 2*. Small native tree Blueberry Ash *Elaeocarpus reticulatus* 'Prima Donna'

PLANTING IMAGES



Brachyscome multifida



Correa alba



Cyathea cooperi



Dianella 'Silver Streak'



Melaleuca thymifolia

LEGEND

- Site boundary
- Awning over
- +98.000 RL = Proposed levels
EX = Existing level
TB = Top of Bench
- Proposed street trees as per 'Public Domain Guidelines' 2017, figure 3.8 Typical Street Type Layout and figure 4.4 CBD Street Tree Strategy
- Proposed trees. Minimum soil volume provided for small tree 15m3 as per the Apartment Design Guide. Refer to planting schedule on SK-2201-05 for species

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PROJECT
33 MARION STREET, HARRIS PARK

CLIENT
PACIFIC PLANNING

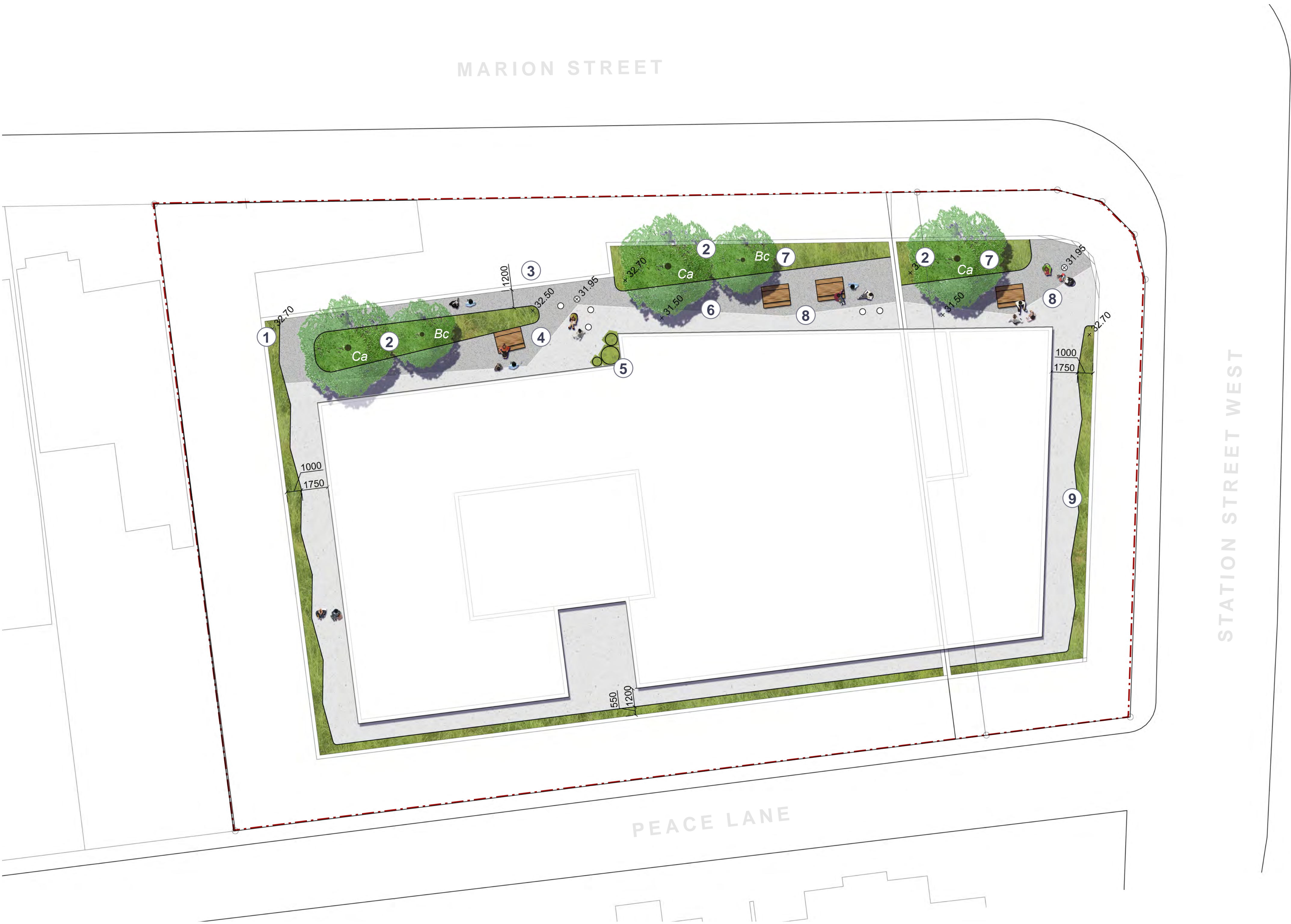
DRAWING
GROUND FLOOR LANDSCAPE PLAN

DRAWING NO.	ISSUE	DRAWN	DATE
SK-2201-02	A	jc	28.01.2022

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LEVEL 5 LANDSCAPE PLAN



NOTES

- 1. Non climable planter with planting to total 2m high (including planter) to provide screening to neighbouring property
- 2. Feature trees with understorey planting to raised island planter. Minimum soil volume provided for small tree 15m3 as per the Apartment Design Guide.
- 3. Views directed to the North
- 4. Picnic table to island planter
- 5. Planting to feature pots
- 6. Two tone paving
- 7. Non climable planter
- 8. Picnic tables
- 9. Non climable planter with planting to 2m high (including planter) to provide screening from railway

LEGEND

- Site boundary
- +98.000 RL = Proposed levels
EX = Existing level
TB = Top of Bench
- Proposed trees. Minimum soil volume provided for small tree 15m3 as per the Apartment Design Guide. Refer to planting schedule on SK-2201-05 for species

PLANTING IMAGES



Dichondra argentea 'Silver Falls'



Kalanchoe tomentosa



Lomandra longifolia 'Tanika'



Myoporum parvifolium 'Yareena'



Sedum morganianum



Wahlenbergia communis

Sturt Noble Associates

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PROJECT
33 MARION STREET, HARRIS PARK

CLIENT
PACIFIC PLANNING

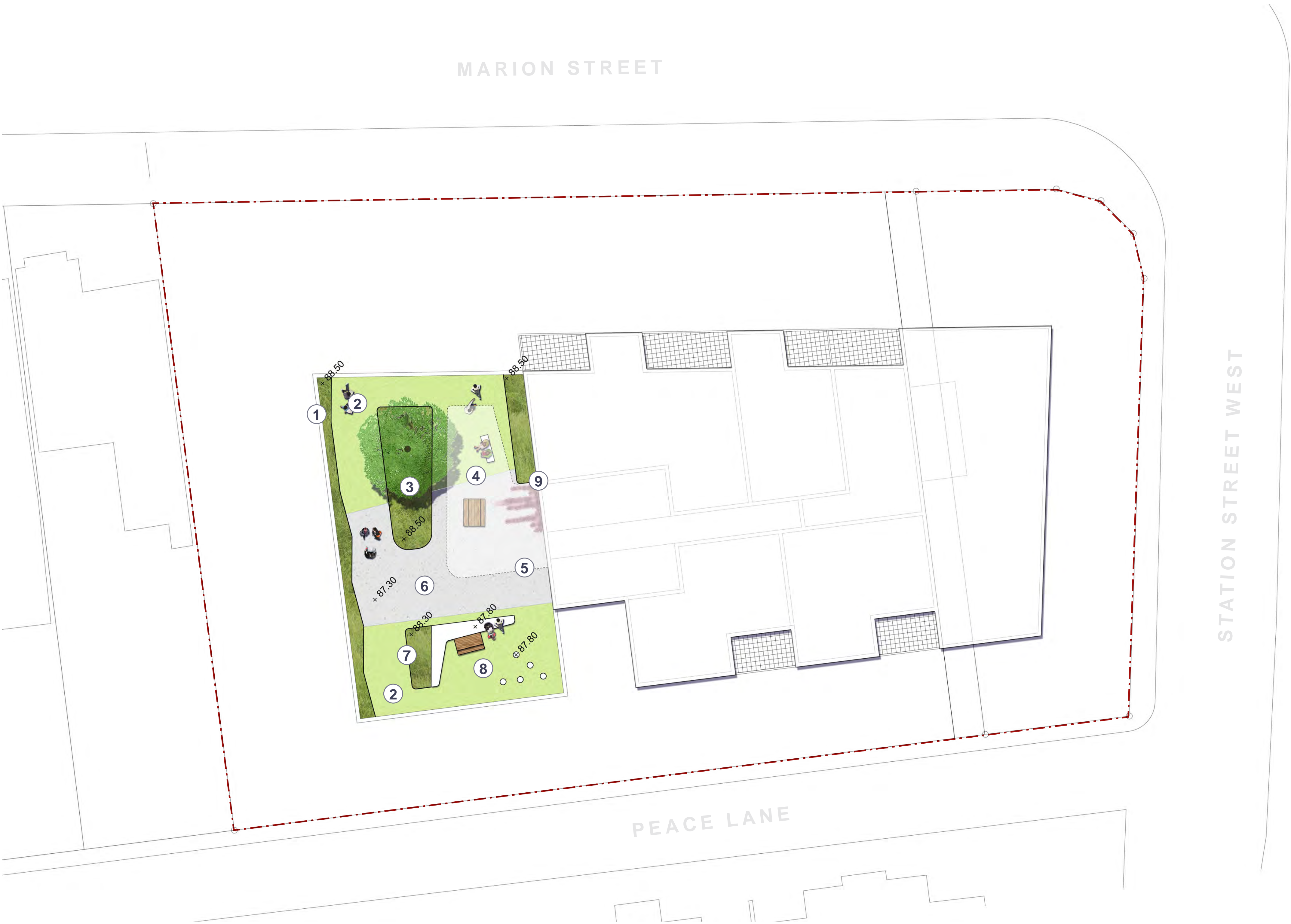
DRAWING
LEVEL 5 LANDSCAPE PLAN

DRAWING NO. **SK-2201-03** ISSUE **A** DRAWN **jc** DATE **28.01.2022**

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LEVEL 27 LANDSCAPE PLAN



NOTES

- 1. Non climable planter with planting to 2m high to provide screening to neighbouring property
- 2. Artificial turf
- 3. Feature tree with understorey planting to raised island planter
- 4. Communal picnic table and bench
- 5. Pergola
- 6. Unit paver
- 7. Raised island planter
- 8. Informal communal seating
- 9. Flowering vine to pergola from adjoining planter

LEGEND

- - - Site boundary
- - - - - Awning over
- +98.000 RL = Proposed levels
EX = Existing level
TB = Top of Bench
- Proposed trees. Minimum soil volume provided for small tree 15m3 as per the Apartment Design Guide. Refer to planting schedule on SK-2201-05 for species

PLANTING IMAGES



Banksia spinulosa 'Stumpy Gold'



Grevillea 'Poorinda Royal Mantle'



Mesembryanthemum Pink



Pelargonium australe



Xerochrysum bracteatum



Zamia furfuracea

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PROJECT
33 MARION STREET, HARRIS PARK

CLIENT
PACIFIC PLANNING

DRAWING
LEVEL 27 LANDSCAPE PLAN

DRAWING NO.	ISSUE	DRAWN	DATE
SK-2201-04	A	jc	28.01.2022

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PLANT SCHEDULE

CODE	BOTANICAL NAME	COMMON NAME	POT SIZE	SPACING
TREES				
Bc	<i>Backhousia citriodora</i>	Lemon myrtle	100L	A.S.
Ca	<i>Cupaniopsis anacardiodes</i>	Tuckeroo	100L	A.S.
Er	<i>Elaeocarpus reticulatus</i> ‘Prima Donna’	Blueberry Ash	100L	A.S.
Lc	<i>Lophostemon confertus</i>	Brush Box	100L	A.S.
Wf	<i>Waterhousea floribunda</i>	Weeping Lilly Pilly	100L	A.S.
SHRUBS & GROUNDCOVERS				
	<i>Alpinia caerulea</i> ‘Redback’	Redback Ginger	5L	0.5m
	<i>Anigozanthos</i> ‘Bush Pioneer’	Kangaroo Paw	150mm	0.5m
	<i>Asplenium nidus</i> ‘Osaka’	Birdsnest Fern	25L	0.8m
	<i>Banksia robur</i>	Swamp Banksia	25l	0.8m
	<i>Banksia spinulosa</i>	Birthday Candles Banksia	5L	0.8m
	<i>Banksia spinulosa</i> ‘Slumpy Gold’	Banksia spinulosa	5L	0.5m
	<i>Blechnum nudum</i>	Fishbone Water Fern	150mm	0.5m
	<i>Brachyscome multifida</i>	Native Daisy	150mm	0.3m
	<i>Carex appressa</i>	Tall Sedge	150mm	0.5m
	<i>Carpobrotus glaucescens</i>	Pig Face	150mm	0.2m
	<i>Convolvulus sabatius mauritanicus</i>	Purple Morning Glory	150mm	1m
	<i>Cordyline stricta</i>	Slender Palm Lily	25L	0.4m
	<i>Correa glabra</i>	Rock Correa	150mm	0.6m
	<i>Cyathea cooperi</i>	Australian Tree Fern	45L	A.S.
	<i>Cycas revoluta</i>	Sago Palm	25L	1.2m
	<i>Dianella caerulea</i>	Blue Flax-Lily	5L	0.4m
	<i>Dianella</i> ‘Border Silver’	Border Silver Flax Lily	150mm	0.4
	<i>Dianella</i> ‘Silver Streak’	Silver Streak Flax Lily	150mm	0.4m
	<i>Dichondra argentea</i> ‘Silver Falls’	Dichondra ‘Silver Falls’	150mm	0.4m
	<i>Elettaria cardamomum</i>	True Cardamo	5L	0.5m
	<i>Grevillea</i> ‘Poorinda Royal Mantle’	Royal Mantle Grevillea	5L	1m
	<i>Hardenbergia violacea</i>	Purple Coal Pea	5L	0.8m
	<i>Hedychium gardnerianum</i>	Ginger Lily	5L	0.6m
	<i>Helmholtzia glaberrima</i>	Stream Lily	25L	0.8m
	<i>Hibbertia scandens</i>	Guinea Flower	150mm	0.2m
	<i>Kalanchoe beharensis</i>	Felt Bush	150mm	0.2m
	<i>Kalanchoe tomentosa</i>	Chocolate soldier	150mm	0.2m
	<i>Liriope muscari</i> ‘Evergreen Giant’	Evergreen Giant Lily Turf	150mm	0.3m
	<i>Lomandra hystrix</i>	Slender Mat Rush	5L	1m
	<i>Lomandra longifolia</i> ‘Tanika’	Lomandra Tanika	150mm	0.3m
	<i>Macrozamia communis</i>	Burrawany	A.S.	25L
	<i>Melaleuca thymifolia</i>	Thyme Honey Myrtle	5L	0.8m
	<i>Mesembryanthemum</i> Pink	Pink Pigface	150mm	0.2m
	<i>Myoporum parvifolium</i>	Creeping Boobialla	150mm	0.5m
	<i>Myoporum parvifolium</i> ‘Yareena’	Yareena Myoporum	150mm	0.8m
	<i>Ozothamnus diosmifolius</i>	Rice Flower	150mm	0.8m
	<i>Pandorea pandorana</i>	Bower Plant	5L	A.S.
	<i>Pelargonium australe</i>	Native Storksbill	150mm	0.5m
	<i>Philodendron scandens</i>	Climbing Philodendron	5L	1m
	<i>Prostanthera rotundifolia</i>	Native Mint Bush	150mm	0.3m
	<i>Salvia officinalis</i>	Common Sage	150mm	0.2m
	<i>Scaevola aemula</i> ‘Aussie Crawl’	Fan Flower	150mm	0.6m
	<i>Sedum morganianum</i>	Burros Tail	150mm	0.2m
	<i>Senecio cineraria</i> ‘Dusty Miller’	Silver ragwort	150mm	0.3m
	<i>Senecio mandraliscae</i>	Blue Chalk Sticks	150mm	0.4m
	<i>Telopea speciosissima</i>	NSW Waratah	25L	2m
	<i>Tulbaghia violacea</i>	Society Garlic	150mm	0.2m
	<i>Viola hederacea</i>	Australian Native Violet	150mm	0.2m
	<i>Wahlenbergia communis</i>	Tufted Bluebell	5L	0.3m
	<i>Xerochrysum bracteatum</i>	Everlasting Daisy	5L	0.6m
	<i>Zamia furfuracea</i>	Cardboard Palm	25L	1.5m
	<i>Zamioculcas zamiifolia</i>	Zanzibar Gem	5L	0.5m

PLANT IMAGES



Alpinia caerulea ‘Redback’



Carpobrotus glaucescens



Dichondra argentea ‘Silver Falls’



Liriope muscari ‘Evergreen Giant’



Telopea speciosissima



Banksia robur



Cordyline glauca



Hardenbergia violacea



Melaleuca thymifolia



Wahlenbergia communis



Banksia spinulosa



Cyathea cooperi



Hibbertia scandens



Pandorea pandorana



Xerochrysum bracteatum



Brachyscome multifida



Dianella ‘Silver Streak’



Kalanchoe tomentosa



Sedum morganianum



Zamia furfuracea



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PROJECT
33 MARION STREET, HARRIS PARK

CLIENT
PACIFIC PLANNING

DRAWING
GROUND FLOOR LANDSCAPE PLAN

DRAWING NO.
SK-2201-05

ISSUE
A

DRAWN
jc

DATE
28.01.2022

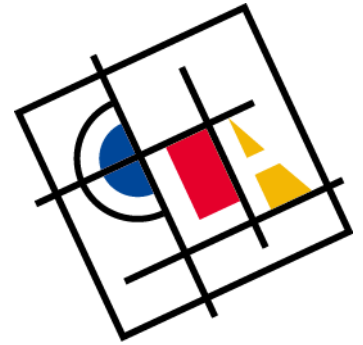


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7 October 21

Attn: James Matthews
Pacific Planning

Via Email.

**CRACKNELL
&
LONERGAN**
ARCHITECTS PTY LTD

ABN 55 100 940 501
Nominated Architect: Peter J Lonerган
NSW Architects Registration No. 5983

Dear Mr. Matthews,

RE: Urban Design & Heritage Comment (Statement of Advice) | Marion Street Parramatta
Concept Development & Planning Proposal

- 1.0 I have been requested to provide advice around the proposed development at 33-43 Marion Street, Parramatta. I understand that a planning proposal for the site was finalised on 26 February 2021. I also understand that the planning proposal was supported by a Precinct Plan that considered the broader Marion Street precinct, prepared by SJB planning, and a site specific DCP.
- 2.0 A Concept Development Application was lodged on 28 August 2021. I have been requested to advise specifically and provide comment on the adequacy of setback requirements and the protection of heritage curtilage for the items adjacent, at No. 29 and 31 Marion Street.
- 3.0 I have reviewed as part of this statement, the SJB Marion Street Precinct Planning report, the adopted controls and planning diagrams which apply to the subject property and I make the following comments and observations:
 - 3.1 A through-site link of six metres has been provided separating the subject site from the adjoining heritage items. I believe this is acceptable and appropriate for the site.
 - 3.2 A three-storey podium incorporating a three metre street setback and six metre through-site link is a control and this is considered appropriate.
 - 3.3 The tower component above the podium controlled behind the principal built form of the heritage items is considered appropriate for the building line. It is my further opinion that elements for apartment buildings, such as but not limited to screening devices, balconies and other façade treatment or features can be used and may encroach on the setback without impacting the overall scale and built form setback. It is my consideration that this would form part of a future design excellence process in the assessment of a detailed development application for the site.

3.4 It is considered that the proposed six metre setback incorporating the podium for the first fifteen metres and through-site link, along with the nine metre setback from the boundary for the tower form provides for adequate and appropriate separation to retain the heritage curtilage of the adjoining items.

3.5 The proposed setback from the heritage item is considered appropriate because:

3.5.1 The primary interface between the heritage item, being single storey dwellings, and the proposed development is enjoyed at the ground plane and broadly, for the first three storeys which enjoys a through-site link and the six metre podium building setback.

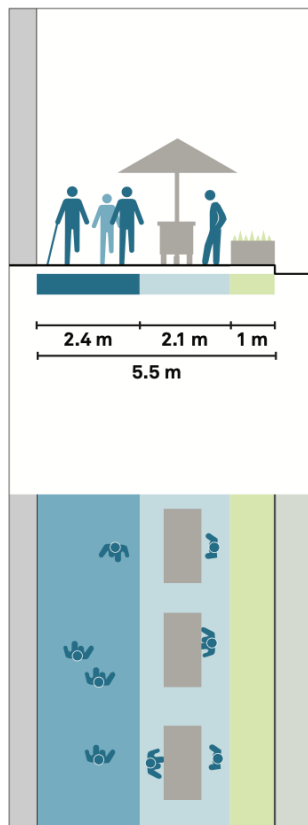
3.5.2 The curtilage of the proposed items is generally viewed from a westerly direction away from the development site and along Marion Street. Consequently, the development, although adjacent to the heritage item, does not immediately impact the ability to appreciate the item and its adjoining houses.

3.5.3 The proposed 9 metre setback occurs above the podium form and does not disrupt or affect the ability to appreciate the curtilage and setback along the streetscape of the adjoining heritage item.

4.0 Whilst Development Control Plans are advisory within the larger legislative framework, it is important in the design excellence process for the controls to be less numerically prescriptive to allow for a genuinely competitive design process which allows for innovative and high quality design to be encouraged, rather than designs which simply seek to meet numerical controls.

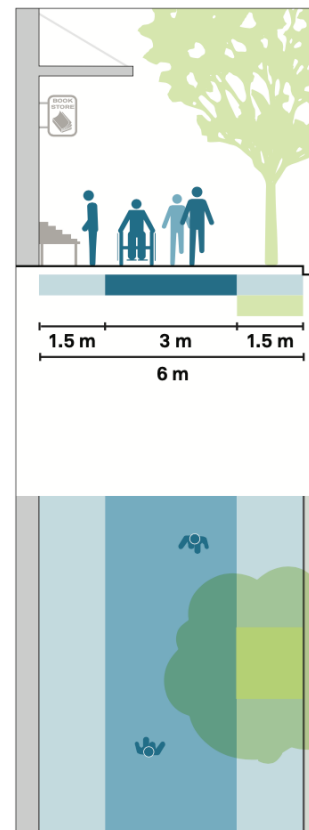
5.0 I would assert the previous advice previously provided by this office on the success of the design and its proximity to the heritage item is best handed at the street level through the detailed articulation and design of the podium and first three floors, rather than the tower form at large. In particular, it is my view that consideration of the street level activation through the transparency, usage and articulation of the podium, such as through the creation of colonnaded foyers and other inviting forms of street and pedestrian activation should be encouraged.

6.0 As a supplementary example, the Global Street Design Guide, published by the global designing cities initiative provides for example diagrams demonstrates potential for successful street activation achieved through a mixture of porous and accessible street frontages at the ground/podium level, alongside wide thoroughfares which enable a mixture of uses (encompassing soft landscaping, shared paths of pedestrian and cycle traffic and shared outdoor dining or retail spaces).



Neighborhood Main Street 1

On small retail streets with low but persistent pedestrian traffic, sidewalks should provide a minimum clear path of **2.4 m** in addition to space for commercial activities. When there is not enough width to plant trees, provide landscaping strips or planters.



Neighborhood Main Street 2

Neighborhood main streets should provide a clear path of **2.4 m** to allow moderate volumes of people to comfortably pass one another. Space for commercial activity to extend from storefronts should be allocated on the building side. Tree pits, planters, and seating should provide a buffer between pedestrians and moving vehicles or cycles.

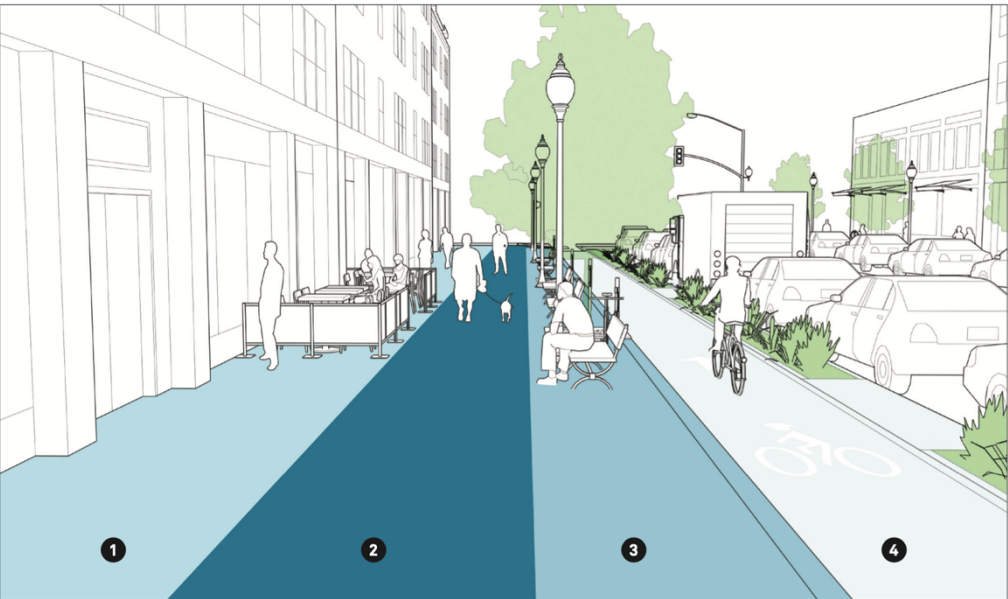


6.3.4 | Sidewalks

Sidewalks play a vital role in city life. As a conduit for pedestrian movement and access, they enhance connectivity and promote walking. As public spaces, sidewalks serve as the front steps to the city, activating streets socially and economically. Safe, accessible, and well-maintained sidewalks are a fundamental and necessary investment for cities, and have been shown to enhance general public health and maximize social capital.

Just as roadway expansions and improvements have historically enhanced travel for motorists, superior sidewalk design can encourage walking by making it more attractive.

Curb cuts for vehicle access should be limited in areas with high pedestrian volumes, and when unavoidable, they must maintain accessible levels, slopes, and clear path minimums.



Frontage Zone

1 The frontage zone defines the section of the sidewalk that functions as an extension of the building, whether through entryways and doors or sidewalk cafés and sandwich boards. The frontage zone consists of both the facade of the building fronting the street and the space immediately adjacent to the building.

Clear Path

2 The pedestrian clear path defines the primary, dedicated, and accessible pathway that runs parallel to the street. The clear path ensures that pedestrians have a safe and adequate place to walk and should be 1.8–2.4 m wide in residential settings and 2.4–4.5 m wide in downtown or commercial areas with heavy pedestrian volumes.

Street Furniture Zone

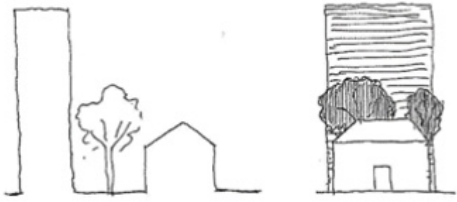
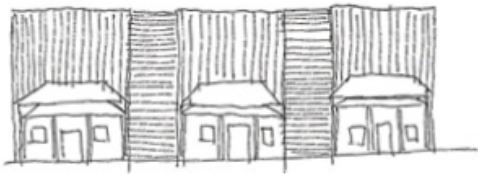
3 The street furniture zone is defined as the section of the sidewalk between the curb and the clear path, in which street furniture and amenities such as lighting, benches, newspaper kiosks, transit facilities, utility poles, tree pits, and cycle parking are provided. The street furniture zone may also contain green infrastructure elements such as rain gardens, trees, or flow-through planters.

Buffer Zone

4 The enhancement or buffer zone is defined as the space immediately next to the sidewalk, and may consist of a variety of different elements. These include curb extensions, parklets, stormwater management features, parking, cycle racks, cycle share stations, and curbside cycle tracks.

Previous diagrams extracted from the Global Street Design Guide.

7.0 These aspects of design for the podium would be consistent with the objectives of the Hector Abrahams Heritage Interface guidelines and are sound and generative guidelines which facilitate design excellence within Parramatta, without being over-prescriptive numerical envelope controls. A selection of the diagrams which forms this report have been reproduced here and are of assistance in considering how new buildings may be appropriately positioned in relation to retained heritage items.

	
<p>Figure F-15a Hector Abrahams</p> <p>Guidelines on building separation and linkage to adjoining heritage items.</p>	<p>Figure F-16b Hector Abrahams</p> <p>Guidelines on conservation of existing street pattern and rhythm for podium levels.</p>

8.0 Overall therefore, it is my view that greater flexibility or the encouragement of innovative designs which do not necessarily comply with numerical controls should be entertained as part of any future detailed development application, including any future design excellence process for the site so as not to exclude innovative approaches to the heritage interface and restrict design to being limited exclusively by numerical compliances.

Regards,



Peter Lonergan

Director | Cracknell & Lonergan Architects Pty Limited
Nominated Architect: Peter J Lonergan | Registration No. 5983

MEMORANDUM OF ADVICE

**Density controls to be applied in the assessment of a development application for a
proposed mixed use development at 33 – 43 Marion Street Parramatta**

To

Pacific Planning Pty Ltd

**Justin Doyle
Barrister**

Frederick Jordan Chambers
Level 2, 53 Martin Place
Sydney NSW 2000
Ph: 9229 7326
Email: jdoyle@fjc.net.au

August 2021

1. This advice

Pacific Planning Pty Ltd is the planning consultant engaged to prepare a concept DA for the mixed use development of land comprising 33 – 43 Marion Street Parramatta (“Concept DA Site”), being land zoned B4 mixed uses under Parramatta LEP 2011 (“PLEP”).

The concept DA also relies upon *State Environmental Planning Policy (Affordable Rental Housing) 2009* (“ARH SEPP”) which operates to facilitate the increased supply and diversity of affordable rental and social housing in NSW.

It is in that context that I have been briefed to advise as to the maximum achievable FSR permissible on the site, taking into account how the interrelating provisions of PLEP and the ARH SEPP are correctly to be applied.

To provide that advice, I firstly provide an overview of the development as I understand it. I then review the applicable provisions of PLEP and the ARH SEPP as relevant to determining the maximum FSR possible. Lastly, after noting the maximum densities potentially achievable under those instruments, I make some observations as to how those maximums operate within the scheme established by the two instruments.

2. The proposed concept development

The land to be the subject of the concept development application is currently comprised of a number of allotments which are under separate ownership. Presently it is anticipated that development of the land will proceed by consolidation of land contributed from 7 allotments into a single site upon which two buildings will be constructed. I am instructed that the form and massing of two buildings have been conceived and planned by the architect together to ensure that they integrate and respectively present compatible uses, with easements allowing for shared and connected access across the consolidated site.

The form of the development depicted in the plans presented to me is divided into a western Stage 1 building and an eastern Stage 2 building. Each of the buildings present a podium over three levels. The ground level in both stages is retail.

Density controls applying to mixed use development at 33 – 43 Marion Street Parramatta

In the western Stage 1, levels 2 and 3 of the podium and the first two levels of the main tower (levels 4 and 5) are together proposed as affordable student accommodation. From level 5 and above residential apartments of mixed size are proposed.

In the eastern Stage 2, all levels other than the ground floor retail is proposed as commercial

I am instructed that the detailed design of each of the buildings proposed in the concept development application is intended to be the subject of separate subsequent staged development applications.

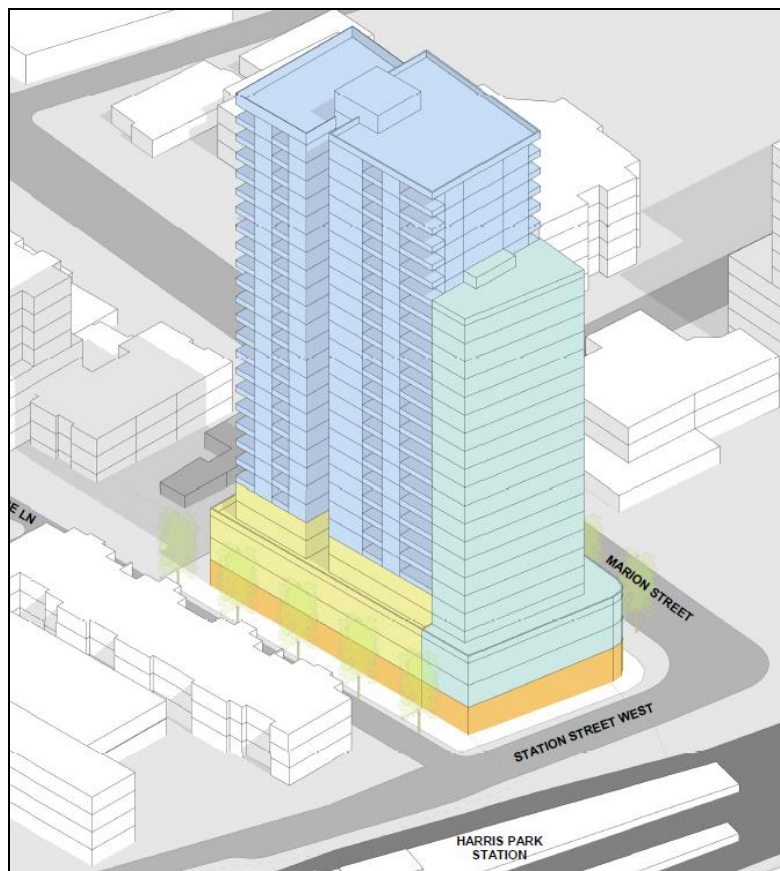
As I presently understand it, the concept for which concept development consent is to be sought (under Division 4.4 of the Environmental Planning & Assessment Act 1979 (“EP&A Act”)) includes:

- a proposed maximum envelope as defined by a maximum height for the podium level and the respective tower elements of Stages 1 and 2, as well as minimum setbacks for the different components of the new buildings as depicted in the concept DA plans;
- the proposed arrangement of uses within the proposed tower and podium elements of the new buildings as depicted in the concept DA plans including ground floor retail, commercial, student accommodation (which will adopt the required features of a boarding house listed at cl 30(1)(a)-(h) of the ARH SEPP and with students charged at rates such as to qualify the accommodation as “*affordable housing*” within the meaning of the SEPP),
- a maximum FSR respectively for:
 - (a) the Stage 1 retail component proposed in the western portion of the development;
 - (b) the Stage 1 affordable student housing proposed within the western portion of the development to make up at least 20% of the gross floor area;
 - (c) the Stage 1 residential apartments proposed within the western portion of the development; and
 - (d) the Stage 2 retail and commercial development.

Density controls applying to mixed use development at 33 – 43 Marion Street Parramatta

Notably, while when complete they will be structurally connected through shared access and carparking, Stages 1 and 2 have been conceived so as to permit each to be constructed separately. The total FSR for the entire development of 33-43 Marion Street is 8.82:1. However, when considered separately, Stage 1, being 33-41 Marion Street, is 9.168:1 and 43 Marion Street is 7.245:1.]

For reference, I have extracted this image of the configuration of the differing uses of the proposed building elements within the proposed staged development from the plans supplied, which describes the proposed arrangement of uses.



- RETAIL
- STUDENT ACCOMMODATION
- RESIDENTIAL
- EXISTING BUILDING
- LOCAL HERITAGE ITEM

Overlapping provisions of PLEP and the ARH SEPP will apply together to regulate the density of development permitted on the site by:

- (a) mapping a maximum ‘floor space ratio’ for the land;
- (b) allowing bonus increases to that maximum in certain overlapping circumstances;
- (c) setting ‘*deemed to satisfy*’ provisions which prevent a DA being refused on the ground of excessive density if specified preconditions are met.

3. Relevant Controls

There are a number of interrelating clauses of PLEP and the ARH SEPP which must be considered in order to arrive at the maximum density permitted on the land. As set out below the resulting calculation required is complicated and requires each step in the interpretation of the two instruments to be considered carefully and in sequence, beginning with the LEP.

3.1. Parramatta LEP

Clause 4.4 of PLEP stipulates a development standard fixing a maximum ‘floor space ratio’. The maximum floor space mapped for this site under that clause is 6:1 (with a maximum height set by clause 4.3 of 80 metres).

Clause 4.5 of PLEP defines what ‘floor space ratio means and prescribes the method of calculating the FSR.

Clause 7.2(1) of PLEP in some circumstances can further limit that maximum FSR in some circumstances. But for this concept DA, where the maximum site area the subject of the Concept DA Site is proposed to be more than 1,800 m², there is no resulting reduction of LEP under that clause.

Clause 7.10 of PLEP contains a more general bonus provision directed to encouraging “design excellence”. It allows the consent authority to approve a building with an additional bonus FSR of (alternatively) 15% or 25% depending on whether or not all of the building is commercial where requirements to ensure “design excellence” will be met.

It reads:

7.10 Design Excellence—Parramatta City Centre

- (1) The objective of this clause is to deliver the highest standard of architectural, urban and landscape design.
- (2) This clause applies to development involving the erection of a new building or external alterations to an existing building on land to which this Part applies.
- (3) Development consent must not be granted to development to which this clause applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.
- (4) In considering whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters—
 - (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
 - (b) whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,
 - (c) whether the proposed development detrimentally impacts on view corridors,
 - (d) how the proposed development addresses the following matters—
 - (i) the suitability of the land for development,
 - (ii) the existing and proposed uses and use mix,
 - (iii) any heritage and archaeological issues and streetscape constraints or opportunities,
 - (iv) the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,
 - (v) the bulk, massing and modulation of buildings,

- (vi) street frontage heights,
 - (vii) environmental impacts, such as sustainable design, overshadowing and solar access, visual and acoustic privacy, noise, wind and reflectivity,
 - (viii) the achievement of the principles of ecologically sustainable development,
 - (ix) pedestrian, cycle, vehicular and service access and circulation requirements, including the permeability of any pedestrian network,
 - (x) the impact on, and any proposed improvements to, the public domain,
 - (xi) the impact on any special character area,
 - (xii) achieving appropriate interfaces at ground level between the building and the public domain,
 - (xiii) excellence and integration of landscape design.
- (5) Development consent must not be granted to the following development to which this clause applies unless a competitive design process has been held in relation to the proposed development—
- (a) development in respect of a building that has, or will have, a height above ground level (existing) greater than 55 metres,
 - (b) development on a site greater than 1,000 square metres and up to 1,800 square metres seeking to achieve the maximum floor space ratio identified on the Floor Space Ratio Map, where amalgamation with adjoining sites is not physically possible,
 - (c) development having a capital value of more than \$10,000,000 on a “Key site” identified on the Key Sites Map,
 - (d) development having a capital value of more than \$100,000,000 on any other site,
 - (e) development for which the applicant has chosen such a process.

- (6) A competitive design process is not required under subclause (5) if the consent authority is satisfied that such a process would be unreasonable or unnecessary in the circumstances and that the development—
 - (a) involves only alterations or additions to an existing building, and
 - (b) does not significantly increase the height or gross floor area of the building, and
 - (c) does not have significant adverse impacts on adjoining buildings and the public domain, and
 - (d) does not significantly alter any aspect of the building when viewed from public places.
- (7) If, before the commencement of this clause, the Secretary issued a certificate under clause 22B(5) of Parramatta City Centre Local Environmental Plan 2007 for any development to which subclause (5) of this clause applies, then subclause (5) of this clause does not apply to that development.
- (8) If the design of a new building, or an external alteration to an existing building, is the winner of a competitive design process and the consent authority is satisfied that the building or alteration exhibits design excellence, it may grant development consent to the erection of the new building, or the alteration to the existing building, with—
 - (a) in any case—a building height that exceeds the maximum height shown for the land on the Height of Buildings Map or an amount of floor space that exceeds the maximum floor space ratio shown for the land on the Floor Space Ratio Map (or both) by up to 15%, or
 - (b) if the proposal is for a building containing entirely non-residential floor space in Zone B4 Mixed Use—a building height that exceeds the maximum height shown for the land on the Height of Buildings Map or an amount of floor space that exceeds the maximum floor space ratio shown for the land on the Floor Space Ratio Map (or both) by up to 25%.

(9) In this clause—

building or alteration exhibits design excellence means a building where the design of the building (or the design of an external alteration to the building) is the winner of a competitive design process and the consent authority is satisfied that the building or alteration exhibits design excellence.

competitive design process means an architectural design competition carried out in accordance with procedures approved by the Secretary of the Department of Planning and Environment.

Specifically, if the requirements of the clause are met, the consent authority may approve a residential building with a floor space ratio up to 15% more than the maximum floor space ratio shown for the land on the FSR map. **15% above the mapped FSR of 6:1 is 6.9:1.**

Similarly, a proposed building which would contain “*entirely non-residential floor space*” can be approved with an FSR that exceeds the 6:1 standard fixed by clause 4.4 by 25% if the relevant requirements of clause 7.10 are otherwise satisfied. The mapped FSR **if increased by 25% bonus obtainable for a commercial building is (6:1 x 1.25) 7.5:1.**

If Stage 2 of the development is proposed to be retail and commercial, and the other requirements of clause 7.10 are satisfied, that higher FSR would seem to be available to that part of the proposal if the other requirements of clause 7.10 are satisfied.

It is also important that clause 7.10 is expressed to allow for a percentage increase over “*the maximum floor space ratio shown for the land on the Floor Space Ratio Map*”. Because the mapped FSR is the base for the increase, the bonus does not allow for an increase that can build upon an increase allowable under some other provision of the LEP.

Clause 7.22 of PLEP addresses the Concept DA Site specifically in the following terms:

7.22 Development on land at 33–43 Marion Street, Parramatta

- (1) The objectives of this clause are as follows—
 - (a) to encourage high performing building design, namely built form, services and layout of residential flat buildings and mixed use development in the Parramatta City Centre that minimises the consumption of energy and water,
 - (b) to provide increased amenity to occupants over the long term,
 - (c) to ensure the increase in gross floor area is compatible with surrounding buildings in terms of bulk, height and amenity,
 - (d) to ensure high performing building measures reflect new technologies and commercial viability.
- (2) This clause applies to the erection of a new building to be used for the purposes of a residential flat building or mixed use development on land identified as “Area 15” on the Key Sites Map if—
 - (a) the lot on which the building will be sited is at least 24 metres wide at the front building line, and
 - (b) the site area of the development is at least 1,800 square metres.
- (3) Despite clause 4.4, development consent may be granted for development to which this clause applies if the building exceeds the maximum permissible floor space ratio by up to 5% of the maximum permissible floor space ratio, but only if the consent authority is satisfied that—
 - (a) the additional floor space will be used for the purposes of residential accommodation, and
 - (b) the development will not adversely impact on neighbouring land in terms of visual bulk or overshadowing.
- (4) Development consent must not be granted under this clause unless the consent authority is satisfied that—
 - (a) the part of a building that is a dwelling, whether or not as part of a residential flat building or mixed use development, exceeds the BASIX water target score for the building by a minimum 15-point increase, and
 - (b) the part of a building that is a dwelling, whether or not as part of a residential flat building or mixed use development, exceeds the BASIX

energy target score for the building by at least the amount specified in the Table to this subclause for a building of that kind.

Table Minimum increase in BASIX energy target score

Height of building, expressed as number of storeys	Building with FSR of at least 6:1, but less than 14:1	Building with FSR of at least 14:1
5–15 storeys	25	15
16–30 storeys	20	10
31–40 storeys	10	10
41 or more storeys	10	10

(5) In this clause—

BASIX energy target score means the energy target score set out in a BASIX certificate, within the meaning of the Environmental Planning and Assessment Regulation 2000.

BASIX water target score means the water target score set out in a BASIX certificate, within the meaning of the Environmental Planning and Assessment Regulation 2000.

maximum permissible floor space ratio means the maximum floor space ratio permitted for the building as a result of the floor space ratio shown for the land on the Floor Space Ratio Map.

mixed use development means a building or place comprising commercial premises and dwellings.

The proposed staged development will comprise ‘2 or more different land uses’ and therefore meets the definition of “*mixed use development*”. I am instructed that the site meets the numerical dimension requirements of subclause (2) and will sit entirely within the “*land identified as ‘Area 15’*”. Given the consolidated approach to the development and the fact that the parking will be structurally connected, the larger 33-43 Marion Street allotment is appropriately to be treated as one ‘*site*’. Accordingly, the minimum area is met and the clause applies.

The area of the development within the main tower element proposed to be used for residential development exceeds the area of the ‘*additional floor space*’ over 6:1 which would be allowed under

clause 7.22. Accordingly, it could be said that the additional bonus floor space allowed under the clause “*will be used for the purposes of residential accommodation*”.

Assuming that it can be established that (when viewed objectively) the development will not “*adversely impact on neighbouring land in terms of visual bulk or overshadowing*” (which would be a matter for expert planning and architectural advice), and assuming the BASIX energy and water targets can be met, the additional bonus of “*up to 5% of the maximum permissible floor space ratio*” allowed by clause 7.22(3) would be available.

A question will arise as to whether it is possible a particular BASIX score can be met by a concept development where the detail of the environmental features of the building are not yet proposed, and the environmental performance of the building cannot yet be modelled.

To apply the clause, it is necessary to determine the “*maximum permissible floor space ratio*”. That expression is relevantly defined for the purposes of the clause (as quoted above) to be that “*permitted for the building as a result of the floor space ratio shown for the land on the Floor Space Ratio Map*”. That is, in my opinion, the clause allows a bonus calculated as a percentage of the mapped FSR, not a percentage of the allowable FSR increased by any other provision.

In that way, the effect of clause 7.22 is to increase the maximum FSR permitted under PLEP by 5% if its preconditions are met. The maximum FSR would then be:

$$6:1 \times 1.05 = 6.3:1.$$

It separately allows a bonus 5%. That bonus is expressed to allow a development which “*exceeds the maximum floor space ratio*” by that percentage. Clause 7.22 does not operate cumulatively, and only allows the mapped FSR of 6:1 to increase by 5% (to 6.3:1).

Notably, environmental performance is also one of the factors to be satisfied for the bonus under clause 7.10 being available, which may explain why the bonus provisions are not cumulative.

Clause 4.6 of PLEP allows for a “*development standard*” to be varied.

However, clause 4.6(8) limits the maximum variation allowable for this site (given it is in the Parramatta City Centre) to 5%. It reads:

4.6(8) This clause does not allow development consent to be granted for development that would contravene any of the following —

(ca) a development standard that relates to the height of a building, or a floor space ratio, in Parramatta City Centre (as referred to in clause 7.1(1)) by more than 5%

The term “*development standard*” is defined in s 4 of the EP&A Act to relevantly as follows:

*development standards means **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—***

*... (c) the character, location, siting, bulk, scale, shape, size, height, **density**, design or external appearance of a building or work,*

It seems plain enough that the maximum FSR mapped under clause 4.4, read together with the allowances provided by either clause 7.10 or clause 7.22, relevantly fix standards for density for the site. The controls under those clauses are therefore “*development standards*” applying the definition for that phrase. The maximum allowable under the bonus provisions calculated under those clauses are therefore amenable to variation under clause 4.6.

While clause 4.6 allows for a request to be made, its requirements would have to be met before the FSR standards can be varied. That is, in order for the consent authority to apply the clause to permit non-compliant development, it must find relevantly that:

a) compliance with the development standard would be unreasonable or unnecessary in the circumstances of the case,

- b) there are sufficient environmental planning grounds to justify contravening the development standard.*
- c) 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*
- d) the concurrence of the Secretary has been obtained.*

The Secretary gave notice under clause 64 of the *Environmental Planning & Assessment Regulation 2000* by planning circular PS 20-002 of 5 May 2020 that his concurrence may relevantly be assumed.

Notably, clause 4.6 does not state that the precondition to permit departure from a standard is that the consent authority has determined that permitting non-compliance would be reasonable, but rather that requiring compliance would be “*unreasonable or unnecessary*” which is a different focus.

There is no requirement that the consent authority find that there will be ‘no effect’ of the non-compliance, or that a benefit will flow from a non-compliance, but only that the such impacts of the noncompliance that are anticipated will be acceptable, such that it would be unreasonable or unnecessary not to permit the variation.

As Preston CJ put it in his judgment delivered in *Initial Action Pty Ltd v Woollabra Municipal Council* [2018] NSWLEC 118 at [87] (applied by the Court of Appeal in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 at [189]):

‘Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this

objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.'

Preston CJ held further that the Commissioner misdirected herself by requiring that the development which contravened the height development standard result in a 'better environmental planning outcome for the site' relative to a development that would comply with the height development standard. Preston CJ said at [88]:

'Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.'

Initial Action therefore requires the following matters to be established (*SJD DB2 Pty Ltd v Woollabra Municipal Council* [2020] NSWLEC 1112 at [31]):

- a) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),*
- b) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),*
- c) The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and*
- d) The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).*

In the decision of Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), (upheld subsequently by the Court of Appeal (albeit for procedural reasons) in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248) her Honour made the following observations as to the breadth of the discretion allowed by clause 4.6 at [26]:

"26. The EPA Act and the LEP contain no definition of "unreasonable" or "unnecessary". There are limiting words to some extent in subclause (3)(a) in that what is "unreasonable or unnecessary" must relate to "the circumstances of the case". The circumstances of the case are not

defined in any way suggesting a wide scope in the meaning of that phrase. Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

Ultimately, whether the variation under clause 4.6 will be allowed will require a merit assessment of the impacts of the increased density. If for example the height of the building will not increase, and the envelope and anticipated traffic impacts are consistent with the anticipated character of the area and objectives of the zone, the variation might well be allowed.

Applying clause 4.6 to the development standards stated for development to which clause 7.10 applies, the following maximum achievable density limits can be calculated:

Residential building: **6.9:1 plus 5% = 7.245:1**

Commercial building **7.5:1 plus 5% = 7.875:1**

3.2. ARH SEPP

The ARH SEPP applies to all land in NSW (cl 7) and is arranged into different divisions applying to different forms of lower cost accommodation.

Terms used in the SEPP are defined by with reference to the defined terms set out in clause 4, or by the Standard Instrument (see cl 4(2)).

Residential development will qualify as “*affordable housing*” for the purposes of the SEPP if it is “*for*” at least “*moderate income household*” (in addition to including housing for a “*very low income household*” or “*low income household*”) (cl. 6).

Relevantly a household will fall within that category if the household “*has a gross income that is less than 120 per cent of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent*”.

Information as to the calculation of the different income bands referred to in the clause is published at <https://www.facs.nsw.gov.au/providers/housing/affordable/manage/chapters/household-median-incomes-2020-21>. The Guidelines there discussed allow for the income of the total household (which may be the entire boarding house, or possibly sub-units within the boarding house) to be averaged across the number of adults residing in the household.

Student housing would be anticipated to meet those requirements. If the Council queries that fact, evidence of a social planner on the subject of the likelihood of the accommodation being likely to be occupied by moderate income households could be obtained

Part 1 Clause 3 of the ARH SEPP sets out the objectives of the instrument as being the facilitation of affordable housing in NSW. It notably includes:

3 Aims of Policy

The aims of this Policy are as follows—

- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards

Part 2 Division 1 clause 10 of the ARH SEPP sets out provisions specifically to encourage “in-fill affordable housing”.

Clause 10(1) sets out the development those provisions are to apply to. Relevantly, it states:

- (1) This Division applies to residential development if—
 - (a) the development is permitted with consent under another environmental planning instrument, and ...

- (c) the percentage of the gross floor area of the development that is to be used for the purposes of affordable housing is at least 20%, and

“Affordable housing” is defined by s 1.4 of the EP&A Act and clause 6 of the ARH SEPP together as follows:

affordable housing means housing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument.

- (1) In this Policy, a household is taken to be a very low income household, low income household or moderate income household if the household—
 - (a) has a gross income that is less than 120 per cent of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent, or
 - (b) is eligible to occupy rental accommodation under the National Rental Affordability Scheme and pays no more rent than that which would be charged if the household were to occupy rental accommodation under that scheme.

As already noted, while I have seen no evidence on the subject, student housing would seem inevitably to meet that definition. If further investigation is required in that regard, further guidance as to the applicable income bands can be found in *State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)* Clause 8.

Each of the components of the subject development are permissible uses permitted in the zoning table. Assuming that the student accommodation proposed makes up at least 20% of the gross floor area (as I am instructed it is to be one of the components of the concept proposed in the concept DA), then the Division applies.

As the wording used in the clause is particular to state that the Division applies to development of which 20% is affordable housing, the Division must apply to the whole of a mixed use development which satisfies that threshold, not just the affordable housing component.

Part 2 Division 1 clause 13 of the ARH SEPP regulates density of in-fill affordable housing relevantly as follows:

13 Floor space ratios

- (1) (Repealed)
- (2) The maximum floor space ratio for **development to which this Division applies is the existing maximum floor space ratio for any form of residential accommodation permitted on the land** on which the development is to occur, plus—
 - ... (b) if the existing maximum floor space ratio is greater than 2.5:1—
 - (i) 20 per cent of the existing maximum floor space ratio—if the percentage of the gross floor area of the development that is used for affordable housing is 50 per cent or higher, or
 - (ii) Z per cent of the existing maximum floor space ratio—if the percentage of the gross floor area of the development that is used for affordable housing is less than 50 per cent,where—

AH is the percentage of the gross floor area of the development that is used for affordable housing.

Z = AH ÷ 2.5
- (3) In this clause, gross floor area does not include any car parking (including any area used for car parking).

Note—

Other areas are also excluded from the gross floor area, see the definition of gross floor area contained in the standard instrument under the Standard Instrument (Local Environmental Plans) Order 2006.

From the plans I have seen, it seems unlikely that the proposed student housing will exceed 50% of the FSR of the development. Accordingly, clause 13(2)(b)(ii) will apply.

For the reasons set out above, those bonus provisions apply to the whole of the proposed development, not just the affordable housing part. In applying the clause, the phrase “*existing maximum floor space ratio*” is defined to mean:

“... the maximum floor space ratio **permitted** on the land under an environmental planning instrument or development control plan applying to the relevant land, other than this Policy or *State Environmental Planning Policy No 1--Development Standards* .”

The word “*permitted*” on my reading is a reference to the distinction made in the EP&A Act between controls that variously “*consent to, permit, regulate, restrict or prohibit*” development (see definition of control in s 4). Permitted development is development that may lawfully be carried out either without consent (see s 4.1) or with consent (see s 4.2), but not development which is prohibited (see s 4.3).

That meaning is important because the “*maximum*” density of development that can lawfully be carried out on the land is not limited to the mapped development standard under clause 4.4. That is because a higher density can be approved firstly through the bonus provisions under clauses 7.10 and 7.22, and secondly (as set out above) as then varied by an additional 5% under clause 4.6 if a request made under that clause is upheld.

For “*any form of residential accommodation permitted on the land*” the maximum density permitted if the requirements of clause 7.10 and 4.6 can be met is (as calculated above) 7.245:1. It must be remembered that it is the “maximum permissible” that is the relevant starting point, not the density appropriate for the site on a merit assessment. Arguably the 4.6 request must be made to

unlock the 5% bonus as a matter of permissibility, but the clause does not require the request to have been granted on merit.

To that figure is to be added “Z per cent of the existing maximum floor space ratio”. Notably, where used in clause 13(2)(b) of the ARH SEPP (in contrast to how it is used in the chapeau of that clause) there is no direction that it is to be the maximum density only for residential development. Applying the definition of the phrase “existing maximum floor space ratio” without that limitation, it is shown above to be 7.875:1 (the figure applying to commercial development).

The variable “Z” will change depending on the percentage of affordable housing provided (AH). The range between 20% and 50% (where $Z = AH/2.5$) would result in a range in possible “Z” results of (20/2.5) 8% to (50/2.5) 20%.

In turn (applying the clause) that results in a range of potential density values to be added under clause 13(2)(b)(ii) of (7.875:1 x 8%) 0.63:1 through to (7.875:1 x 20%) 1.575:1.

To add those densities to the ‘existing maximum floor space ratio’ for residential development of as the clause provides the range of maximum densities will be:

$$7.245:1 + 0.63:1 = \mathbf{7.875:1}$$

through to

$$7.245:1 + 1.575:1 = \mathbf{8.82:1}$$

I stress that that is the range of ‘maximum’ permissible densities obtainable for the land under the bonus provision allowed by clause 13. Clause 13 is not a ‘deemed to satisfy’ provision which obliges the consent authority to approve a development with that density. The development will have to be justified in the usual way through good design taking into account the considerations under s 4.15 of the EP&A Act, including the objectives of the Affordable Housing SEPP.

3.3. Part 2 Division 3 of the ARH SEPP

Division 3 of Part 2 of the ARH SEPP applies to “boarding houses”. The definition of “*boarding house*” supplied in the *Principal Local Environmental Plan (Standard Instrument)* is:

boarding house means a building that—

- (a) is wholly or partly let in lodgings, and
- (b) provides lodgers with a principal place of residence for 3 months or more, and
- (c) may have shared facilities, such as a communal living room, bathroom, kitchen or laundry, and
- (d) has rooms, some or all of which may have private kitchen and bathroom facilities, that accommodate one or more lodgers,

but does not include backpackers’ accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

Note—

Boarding houses are a type of residential accommodation—see the definition of that term in this Dictionary.

The intended student housing component of the development would (I understand) have the following characteristics required by that definition:

- (a) The accommodation would be wholly or partly let in separate lodgings for each student, and
- (b) The accommodation would provide the students with a principal place of residence for the duration of their period of study which would be expected to be 3 months or more, and
- (c) The portion of the building devoted to the accommodation would have shared facilities, such as communal living rooms, bathrooms, kitchens or laundries, and
- (d) the proposed rooms would accommodate one or more “lodgers”.

The proposal is not for “*backpackers’ accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment*” which are all excluded by the applicable definition of “*boarding house*”.

As to whether a student living in “*student accommodation*” is a lodger, the definition provides no specific guidance. The decision of Hasluck J of the Western Australian Supreme Court in Commissioner for *Fair Trading v Voulon* [2005] WASC 229 includes a survey of a number of earlier authorities on the question. There the Court found (at [81]) that:

“[81] *The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. In other words, a lodger is entitled to live in the premises but cannot call the place his own. He resides essentially as an inmate in another person's house.*”

The Court notes that whether the occupier has a right of “*exclusive possession*” is the crucial test of a tenancy at common law (applying High Court in *Radaich v Smith* (1959) 101 CLR 209). That is, test is whether the property owner has the right to enter the boarder’s rooms.

Hostels provided by the Commonwealth Government for the accommodation of immigrant families were found by the High Court in *Commonwealth v Bogle, Boreham & Clark* (1953) 89 CLR 229 to constitute lodgings. Emphasis was placed upon the character of the services and facilities provided, the inclusive nature of the charge made, and the fact that master keys of all the rooms were retained by officers of the Department.

Having regard to those principles, if the application does need to rely upon Part 2 Division 3 which contains provisions assisting the grant of consent to a boarding house, the DA might usefully specify something to the effect that:

‘The accommodation provided to students will be by licence entitling the student to the use of common facilities. The accommodation licence will give a right to accommodation within an allocated student room which may include bathroom and kitchenette facilities, but will not give the occupying student a right to exclusive possession.’

If such words are included, in my opinion the part of the building providing student accommodation in the proposed concept would be correctly categorised as a ‘boarding house’ as defined by the Standard Instrument, and Division 3 of Part 2 of the ARH SEPP would apply. The Division applies to the applicable R4 Residential zone (see cl 26). “*Boarding house*” development may therefore be carried out, even if prohibited in that zone (see cl 28).

There is nothing in the instrument that says that a boarding house (to which Part 2 Division 3 applies) is not also to be considered to be used “*for the purposes of affordable housing*” such that Division 1 discussed above would not also apply.

The density controls of the two Divisions would seem to me to be consistent in terms of density, and can be read together because cl 13 is directed to fixing a maximum permissible FSR, whereas clause 29 describes “*deemed to satisfy*” standards “*that cannot be used to refuse consent*” which is a different focus.

While (for the reasons set out above) it is my opinion that the the FSR bonus provisions under Division 1 of the ARH SEPP does apply to increase the permissible density permitted under clause 7.10 of the LEP, it is also my view that the two Divisions within ARH can not be cumulative. That is because both Divisions 1 and 3 set their respective FSR controls as referable to the “*existing maximum floor space ratio*” which as we have seen is a defined term in the ARH SEPP referable to what is permissible under the applicable LEP.

Furthermore, Clause 4 defines “*existing maximum floor space ratio*” as “*the maximum floor space ratio permitted on the land under an environmental planning instrument or development control plan applying to the relevant land, **other than this Policy***”.

Notably, Clause 27 is worded quite differently to clause 10. It provides:

27 Development to which Division applies

- (1) This Division applies to development, on land to which this Division applies, for the purposes of boarding houses.

It can be seen that while Division 1 applies to the whole of a building which has 20% of affordable housing, Division 3 applies only to the boarding house component of the building.

Clause 29 of Division 3 then says relevantly:

29 Standards that cannot be used to refuse consent

- (1) A consent authority must not refuse consent to development to which this Division applies on the grounds of density or scale if the density and scale of the buildings when expressed as a floor space ratio are not more than—
...
 - (c) if the development is on land within a zone in which residential flat buildings are permitted and the land does not contain a heritage item that is identified in an environmental planning instrument or an interim heritage order or on the State Heritage Register—the existing maximum floor space ratio for any form of residential accommodation permitted on the land, plus— ...
 - (ii) 20% of the existing maximum floor space ratio, if the existing maximum floor space ratio is greater than 2.5:1.

Given that this deemed to satisfy provision will apply only to the boarding house component, it seems highly unlikely that it will assist in increasing the maximum FSR possible for this development where the FSR bonus permitted by Division 1 will apply to the whole building, and is therefore already substantially higher.

Density controls applying to mixed use development at 33 – 43 Marion Street Parramatta

It remains however a mandatory consideration when determining the DA under Division 3 “*whether the design of the development is compatible with the character of the local area.*” (See cl 30A of the ARH SEPP).

I would be happy to discuss these provisions with you further if it will assist in preparing the planned concept DA.

Justin Doyle

A handwritten signature in black ink, appearing to read 'F. J. Chambers', with a large loop at the end.

Frederick Jordan Chambers
August 2021

Economic Analysis of the Viability of Proposed Floorplates at 43 Marion Street, Harris Park

FINAL – Prepared for Pacific Planning

by PPM Economics and Strategy

Date: 16 February 2022

COMMERCIAL – IN – CONFIDENCE

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Introduction

We understand that Council has raised the following concern regarding Stage 2 of the proposed 33-43 Marion Street development. Council has noted the following:

It is not clear that the small footprint of the Stage 2 tower envelope would provide a suitable commercial floorplate that would accommodate the needs of future businesses.

The site at 43 Marion Street is currently home to the Australian Health and Management Institute (AHMI). The owners of AHMI are the investment owners of proposed Stage 2 at 43 Marion Street, Harris Park. The owners wish to build a purpose-built 20-storey tower (21 floors), separate from the building at 31-41 Marion Street.

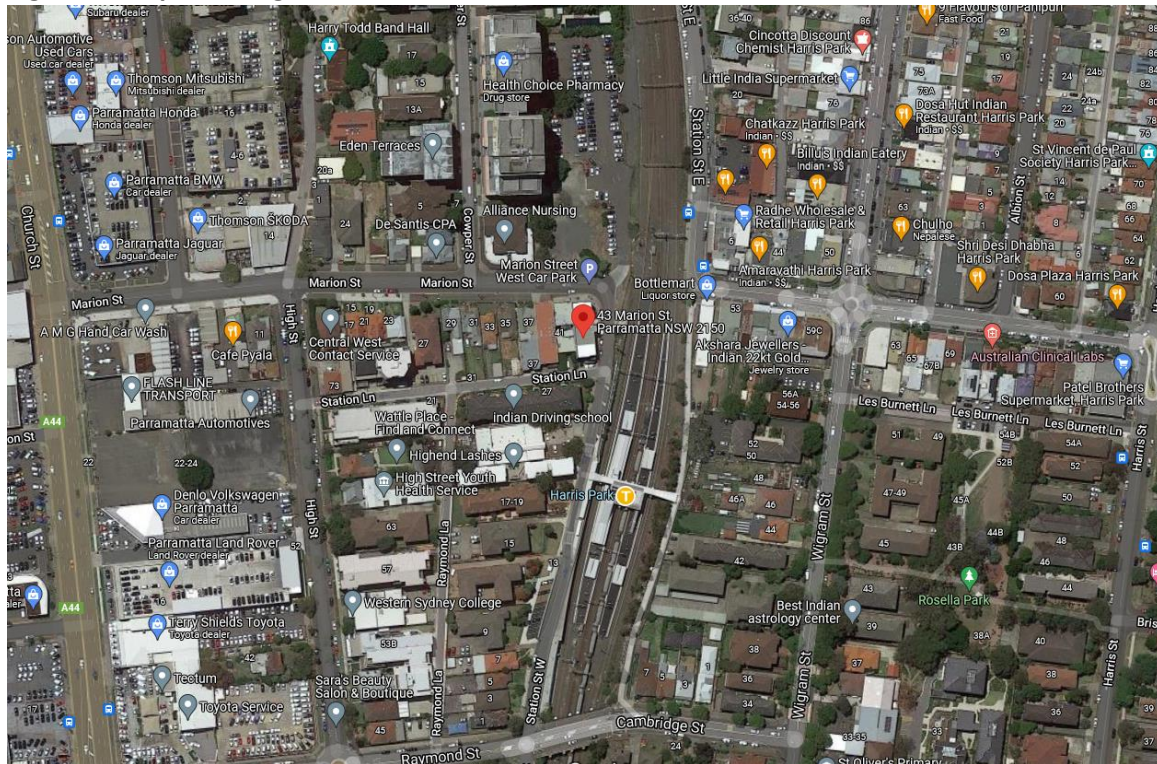
This report, commissioned by Pacific Planning on behalf of the owners of 43 Marion Street, Harris Park, seeks to answer the following questions:

- What is the basic business model of the current operations on the land at 43 Marion Street, Harris Park?
- What are the attributes of the current floor space at its uses?
- What are the current projections of the business in the years to come?
- What is the projected operation of the new facility contemplated by the DA and why is it viable in its proposed form, quantum of floorspace and general layout?
- How are the future operations considered in the context of the new development?
- What is the process to manage the business during the construction period and the move back support ongoing operations?
- Why is the provision of this new “C grade” floorspace appropriate in the context of a CBD that also seeks to encourage additional “A grade” floorspace?

Background

Figure 1 shows the location of 43 Marion Street, Harris Park.

Figure 1: Map Showing Site of 43 Marion Street, Harris Park



Source: Googlemaps

Figure 2 shows the current AHMI building at 43 Marion Street.

Figure 2: 43 Marion Street, Harris Park



Source: Googlemaps

The current building on the site has a GFA of 795 m² over three floors (two storeys) with floorplates typically around 265m². The site area is 429m² and the existing footprint of the building is 295m². The existing building footprint is shown in Table 1.

Table 1: Existing Building Footprint

Site Area (m²)	429.4
Existing footprint (m²)	295
Typical level (90% efficiency) (m²)	265
Approximate GFA (3 x levels) (m²)	795
Approximate FSR	1.85:1

Source: AHMI

The proponent is seeking to replace this building with a tower as Stage 2 of the proposed 33-43 Marion Street development. This would be a separate but connected building from the 33-41 Marion Street building, purpose with teaching and medical uses. The GFA would be 3,115m² over 21 floors. This is shown in Table 2.

Table 2: Stage 2, 43 Marion Street, Harris Park

Level	Residential GFA (m²)	Student GFA (m²)	Commercial GFA (m²)	Retail GFA (m²)	Total GFA (m²)
1 (Ground)			23	258	281
2			283		283
3			283		283
4			126		126
5			126		126
6			126		126
7			126		126
8			126		126
9			126		126
10			126		126
11			126		126
12			126		126
13			126		126
14			126		126
15			126		126
16			126		126
17			126		126
18			126		126
19			126		126
20			126		126
21			126		126
Total			2,857		3,115
Total Site Area					430
FSR					7.24

Source: Stanisc, 12/7/21

Current Operations

The site currently caters for 270 students in a rotation education program in the current building. Fees average at about \$10,000 to \$12,000 per enrolment. Table 3 shows the revenue based on current enrolment, showing based on a \$10,000 fee per enrolment, revenue would sit at \$2.7 million and at \$12,000 per student would go to \$3.2 million.

Table 3: Revenue from Current Enrolments

	Lower Fee	Higher Fee
Enrolled	270	270
Average Fee Per Enrolment (\$)	10,000	12,000
Total Revenue (\$)	2,700,000	3,240,000

Source: AHMI, PPM Economics and Strategy

There are 1,300 student on the books at this stage that are enrolled or to be enrolled in upcoming education programs. This large growth requires more space and more room for students to be taught simultaneously at a purpose-built facility. Table 4 shows revenue projections based on 1,300 students.

Table 4: Revenue from Enrolled and Upcoming Enrolled Students

	Lower Fee	Higher Fee
Enrolled	1,300	1,300
Average Fee Per Enrolment (\$)	10,000	12,000
Total Revenue (\$)	13,000,000	15,600,000

Source: AHMI, PPM Economics and Strategy

As shown in Table 4, revenue is expected to grow to between \$13 million and \$15.6 million.

As noted earlier, the current building at 43 Marion St has a site area of 429m² and a total gross floor area of 795m² over three floors (including the ground floor).

Based on the site area and 1,300 students, there are 0.6 students per square metre on the current site.

On a per square metre basis, the current building earns between \$3,396 per m² and \$4,075 per m².

Future Operations

When covid restrictions on overseas travel cease the current market projections are that the business will need to cater for a growth to 2000 students. This would increase revenue to between \$20 million and \$24 million. This is shown in Table 5.

Table 5: Projected Revenue from Enrolment Forecasts

	Lower Fee	Higher Fee
Enrolled	2,000	2,000
Average Fee Per Enrolment (\$)	10,000	12,000
Total Revenue (\$)	20,000,000	24,000,000

Source: AHMI, PPM Economics and Strategy

When Covid restrictions on overseas travel cease the current market projections are that the business will need to cater for a growth to 2,000 students. This would increase revenue to between \$20 million and \$24 million.

The new purpose built facility for student and medical uses will increase the floorspace currently available at 43 Marion Street, and is designed to cater for this growth.

The typology of the floorplates and areas as designed is such that meets the operational requirement of the business model.

Based on data from Table 2, showing a GFA of 3,115m², there are projected to be 1.6 students per m² (which is more dense and therefore more viable than current operations at 0.6 students per m²).

Earnings per square metre for the proposed development are projected to be between \$6,421 per m² and \$7,705 per m², nearly double the earnings that are currently being made per square metre.

Table 6 shows a comparison between current operations and future operations.

Table 6: Current Operations and Future Operations Comparison

	Current	Future
Enrolled	1,300	2,000
GFA	795	3,115
Student Density (/m²)	0.6	1.6
Earnings /m² (\$)	Between 3,396 and 4,075	Between 6,421 and 7,705

Source: AHMI, PPM Economics and Strategy

Timeline for Decanting and Moving Into New Building

AHMI has advised that if it is assumed that the DA consent and CC is prepared to enable to construction in 1 July 2023 with contingency then the following program is to be implemented:

- The business will re locate for an 18 -24 month period with a rolling lease in either the Granville or Parramatta commercial market.
- The building will be demolished at the same time as the adjoining structures and construction commenced on 43 Marion Street in accordance with the issued consent.
- On completion and occupation the operation will be moved back into the new facility at 43 Marion Street and the business will continue.

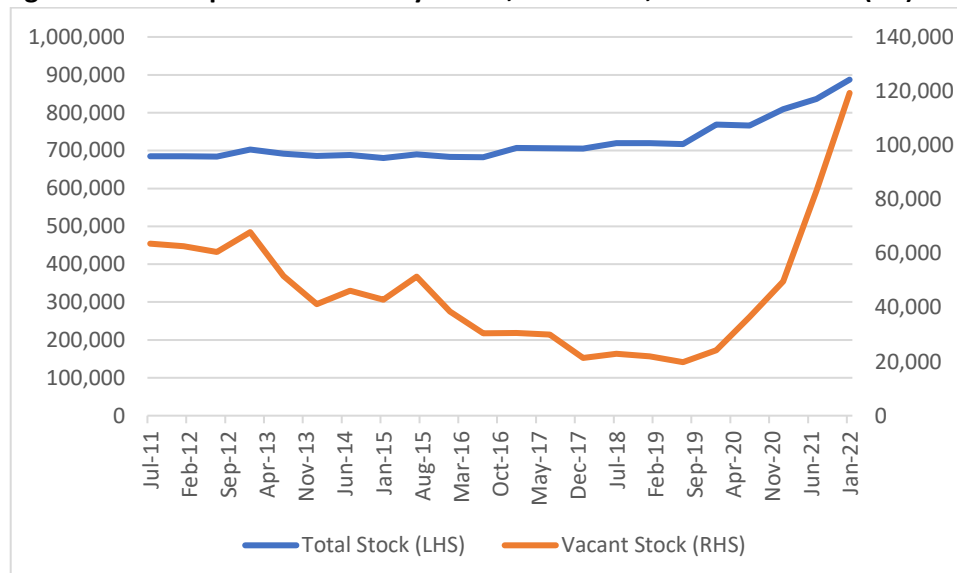
Provision of C Grade Floorspace in Parramatta CBD

The intention of the proponent is to owner-occupy all floors above ground level. We understand, however, that Council is concerned that the small floorplates will mean, in the event that the building is placed for rent on the open market, that there will not be enough demand for offices of that size.

The proposed new office space is likely to be classified as “C” grade space. This is not because of the amenity it will provide the occupants, but because the floorplate sizes mean the type of tenant is restricted to smaller and start-up businesses requiring office space.

Demand for office space in the Parramatta CBD has been affected by the COVID-19 pandemic. The vacancy rate has risen largely due to the increase in stock that has not been absorbed. In the six months to January 2022, the stock of office space rose by 51,242m², the largest rise since January 2020. At the same time, vacancies rose by 36,180m² (suggesting that around 15,000m² of the new stock was uncommitted). This is shown in Figure 3, where both the stock and the vacant space have both been rising.

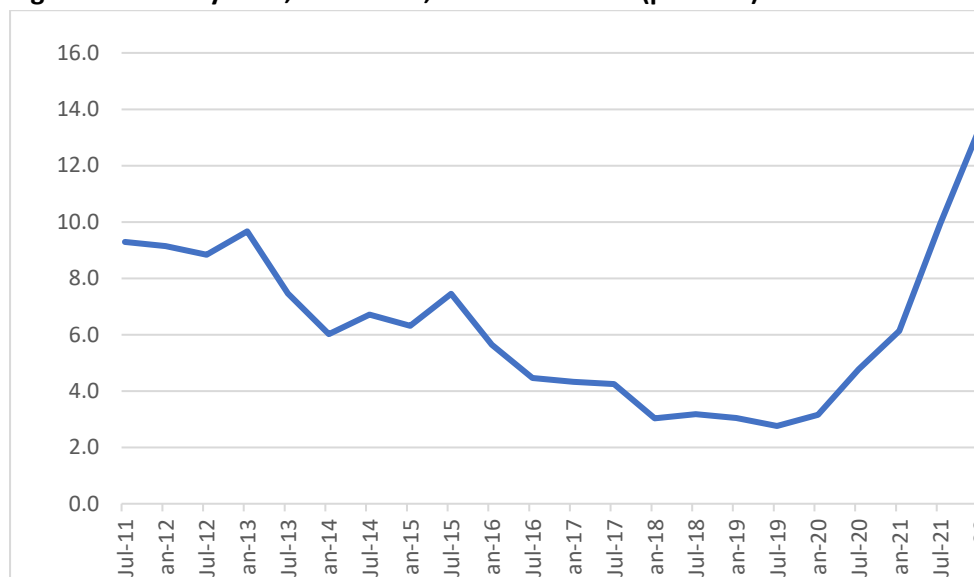
Figure 3: Office Space and Vacancy Levels, All Grades, Parramatta CBD (m²)



Source: Property Council of Australia

As a result of rising stock without absorption, the vacancy rate rose from 9.9 per cent in July 2021 (which was the highest reading of the pandemic period) to 13.4 per cent in January 2022. This is shown in Figure 4.

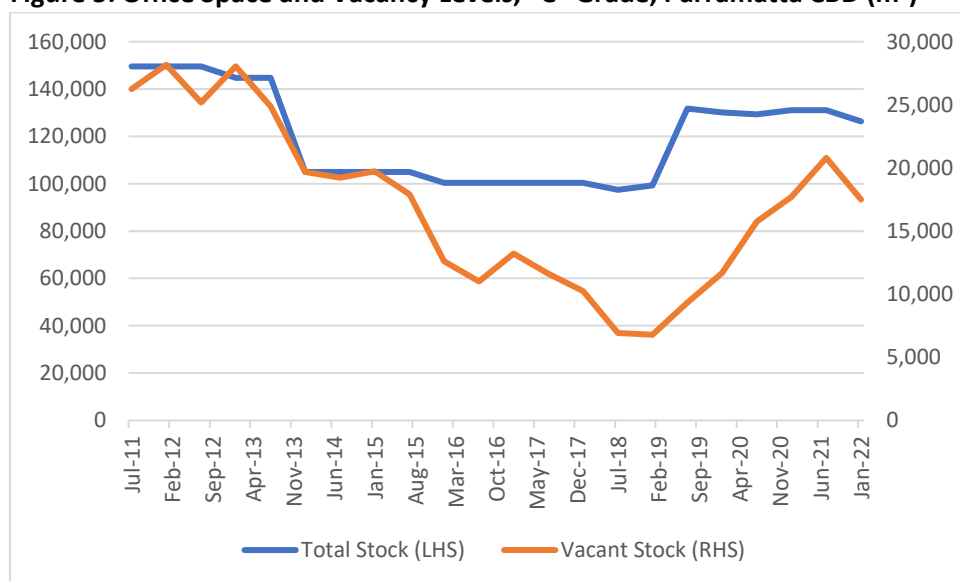
Figure 4: Vacancy Rate, All Grades, Parramatta CBD (per cent)



Source: Property Council of Australia

The vacancy rate for “C” grade office space fell to 13.9 per cent in January 2022. This was due to a reduction in stock (from 131,008m² in July 2021 to 126,384m² in January 2022) and a reduction in the amount of space vacant (dropping from 20,805m² in July 2021 to 17,509m² in January 2022).

Figure 5: Office Space and Vacancy Levels, “C” Grade, Parramatta CBD (m²)



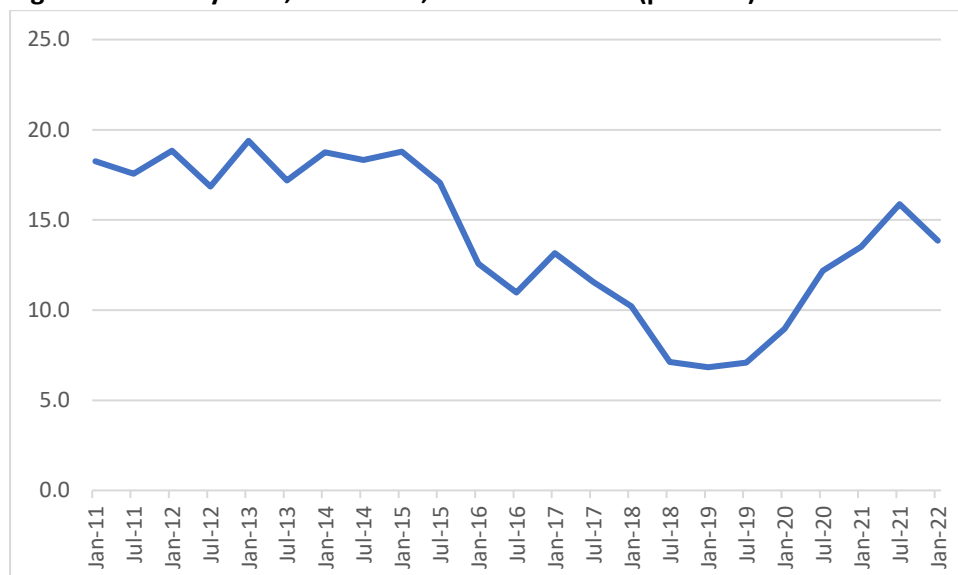
Source: Property Council of Australia

This translates to a vacancy rate of 13.9 per cent, which is down from 15.9 per cent recorded in July 2021. This is shown in Figure 6. While it may be too early to suggest a trend, the latest figure does suggest a tightening in the “C” grade office market in Parramatta.

As shown the vacancy rate for “C” grade space is now lower than it was up until July 2015 and is lower than the 10-year average vacancy rate for “C” grade office space of 14.1 per cent.

The trend in office space suggests that there is always demand for “C” grade office space in Parramatta. Office space of all grades is required in a vibrant CBD to ensure there is space for businesses starting up that only need a small amount of space (but require a CBD location), up to large established firms and government departments.

Figure 6: Vacancy Rate, “C” Grade, Parramatta CBD (per cent)



Source: Property Council of Australia

With some businesses deciding to decrease their office commitment, large floorplates may not be needed for even the largest of businesses located in the Parramatta CBD. Some businesses may opt for a small office so they can have a presence in the CBD, but may opt for flexible working arrangements meaning employees can work from anywhere. Smaller floorplates could be exactly what the market is looking for if this trend continues. It should also be noted that the demand for “A” grade office space has increased to 17.6 per cent in January 2022, up from 11.4 per cent in July 2021, suggesting that not every business requires “A” grade space.

The new building will add 3,115m² of office space. This is only 2.5 per cent of the total stock and, if the whole of the space was vacant on January 2022 levels (which is highly unlikely), it would only represent 15.1 per cent of the total vacant space.

It is also worth noting that the current building is a two-storey stand-alone building at 43 Marion Street. Were it not to join the scheme for the block (31-43 Marion Street), the proposed adjoining building would be a 26-storey building directly overlooking it. With a site area of just under 430m², this is likely to represent the only opportunity to redevelop this site. Excluding 43 Marion Street from the overall redevelopment would likely reduce the value of 43 Marion Street, leaving it as an essentially stranded asset while the rest of the land around Harris Park station redevelops. This is likely to be a worse situation for Council than the small floorplates within the proposed 20-storey building at 43 Marion Street.

Parramatta is looking to be an education hub in western Sydney. Western Sydney University is building a new campus as part of the Parramatta City Square redevelopment. The university will have a 15 year lease on the building (while the owner of 43 Marion Street will own the building and has committed to run its business out of the site in perpetuity). While the university will be “A” grade space, AHMI provides a complimentary education service, including for students from non-English speaking backgrounds to transition to university. It should also be noted that it will adjoin student accommodation, creating an opportunity for a pathway for international students to train and stay in Parramatta.

On the current vacancy and trend, it appears that there is little cause for concern regarding the vacancy of “C” grade office space in Parramatta.

Market for C Grade Floorspace if Building Becomes Unoccupied

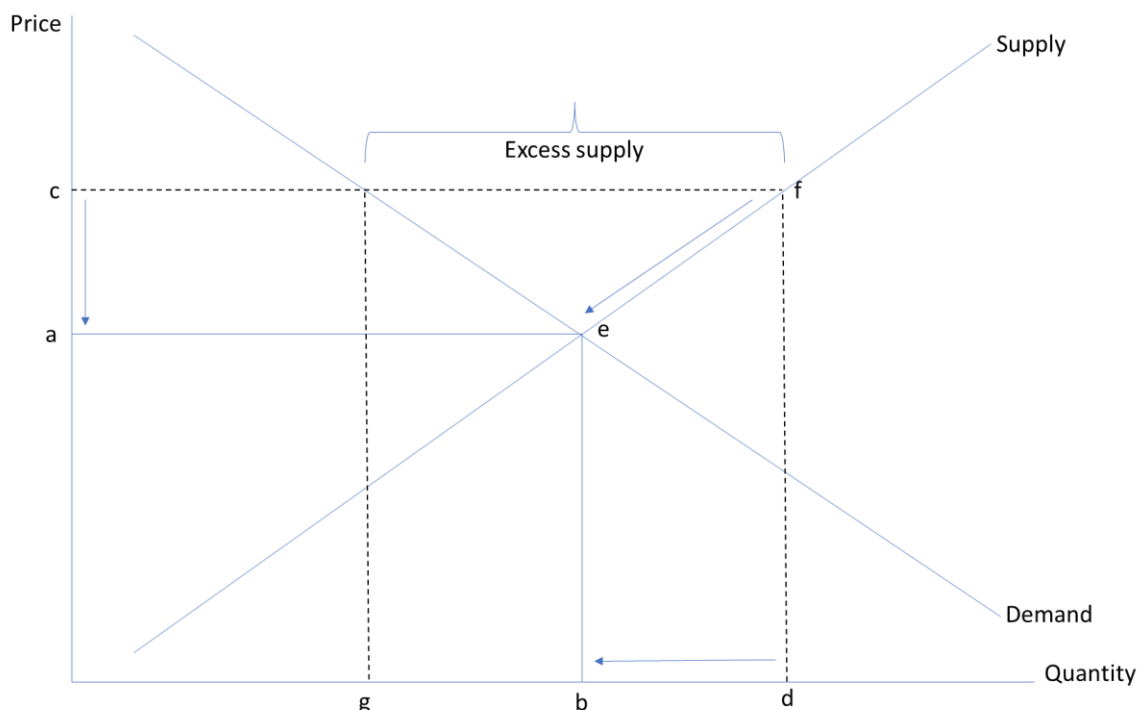
We have been advised that Council is concerned about the viability of the office space were it to go on the open market for rent. Council is concerned about the space being unoccupied for an extended period were the proponent not to owner-occupy the site.

Economic theory dictates that, for a normally traded good such as office space, that when there is excess supply, the price (rent) falls to clear the market. Effectively:

- The law of demand says that at higher prices, buyers will demand less of an economic good
- The law of supply says that at higher prices, sellers will supply more of an economic good
- These two laws interact to determine the actual market prices and volume of goods that are traded on a market.

Figure 7 shows supply and demand for a good or service – in this case, the market for “C” grade office space in the Parramatta CBD.

Figure 7: Supply and Demand Diagram for “C” Grade Office Space in the Parramatta CBD



Source: PPM Economics and Strategy

In Figure 7, the equilibrium price (the price where both buyers and sellers are happy) is at “a” and the equilibrium quantity (the quantity where both buyers and sellers are happy) is at “b”. The “equilibrium point” is at “e”.

Suppose a situation, such as during the COVID-19 pandemic, where rent was too expensive for renters. The quantity supplied was at “d” while the price was at “c”. At this price, renters only demand a quantity of “g”, resulting in an excess of demand.

In this situation, landlords and building owners will lower the price back to “a” and the quantity supplied will reduce to “b”, clearing the market.

The same is likely to happen if there is excess supply at 43 Marion Street. If the office space is not occupied, the owner will likely reduce the rent to the point where renters are attracted to the space.

While this may affect the breakeven point for the office development, supply and demand (and therefore the rent) are likely to move around during the payback period to the long term average. As the rent can adjust to reduce the amount of excess office space available, it is unlikely that an additional 2,000m² of office space (or a part of that) would make the proposal unviable.

Conclusion

The proponent is committed to owner-occupying the whole of the building. Any analysis of demand and supply is therefore moot. We understand that, in the future, should the proponent decide to move out, it would, however leave the site (wholly or partially) vacant. It is the evidence of the business model as presented from an ongoing operation, that there is a strong incentive for the investment landowner to continue the operation on the land in a new building. Locating the business in a new facility will specifically support the growth of the business that has a service delivery advantage due to its location. The business owner has been instructive of the design outcome for the land to meet that business purpose. The proposal meets the objective of the EP&A Act in response to economic sustainability.

Council need not fear that the proposed 20-storey building at 43 Marion Street will be a stranded asset. Indeed, it is more likely that the undeveloped site will become a stranded asset if it is not redeveloped along with the rest of 31-41 Marion Street.

Demand for “C” grade office space in Parramatta continues to improve as the worst of the COVID-19 pandemic passes. The demand for “A” grade space has deteriorated markedly as larger firms reassess the amount of space they need and make the decision to move to flexible working arrangements with a smaller CBD presence.

Smaller floorplates are very likely to be needed in the future. Some businesses have decided, post-pandemic, to have a presence in the CBD, but to reduce the amount of space they occupy.

All CBDs need a mix of large and small floorplates to accommodate a wide variety of businesses, from start-ups to established multi-national firms and government departments. Without smaller floorplates in modern buildings, it is unlikely that startup and smaller firms could afford a presence in the CBD, and would therefore have to look elsewhere to accommodate their business. Even though Parramatta City Council has a preference for redeveloping offices to an “A” grade standard, this will not suit all businesses and would likely price many out of the market.

The viability of a building (or any good or service), at any rate, is determined by the interaction of supply and demand. When there is an excess of supply, landlords and building owners lower the rent to the point where there is as much demand for office space as there is supply. This is called the equilibrium point. If the rent for the proposed building needs to adjust to meet renters, then it can (and should). This would mean that less rent would be collected and increase the time it would take for the development to break even. However, as the office market improves, rents can go up again, reducing the time taken to break even. Rents adjust up and down to meet the demand, and this will be the case for 43 Marion Street, just as it is for all buildings in the Parramatta CBD.

As shown in this report, Council need not be concerned that the proposed building at 43 Marion Street will be unviable or unoccupied for an extended period of time.

MEMORANDUM OF ADVICE

Density controls to be applied in the assessment of a development application for a proposed mixed use development at 33 – 43 Marion Street Parramatta

To

Pacific Planning Pty Ltd

**Justin Doyle
Barrister**

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Sydney NSW 2000
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Email: jdoyle@fjc.net.au

April 2022

1. This advice

Pacific Planning Pty Ltd is the planning consultant engaged to prepare and progress a staged concept DA for the mixed-use development of land comprising 33 – 43 Marion Street Parramatta (“Concept DA Site”), being land zoned B4 mixed uses under Parramatta LEP 2011 (“PLEP”).

The concept DA also relies upon *State Environmental Planning Policy (Affordable Rental Housing) 2009* (“ARH SEPP”) which operates to facilitate the increased supply and diversity of affordable rental and social housing in NSW.

It is in that context that I have been briefed to advise as to the maximum achievable FSR permissible on the site, taking into account how the interrelating provisions of PLEP and the ARH SEPP are correctly to be applied.

This advice has been updated from an earlier advice I prepared in August 2021 to reflect:

- a) lodgement of the concept DA with receipt of the lodgement fee confirmed as at 6 September 2021;
- b) statutory changes since that original advice, including particularly the introduction of the *Housing SEPP 2021* (and associated revisions of other instruments albeit subject to savings and transitional provisions discussed below);
- c) progressed discussions between the respective owners of land comprising the total development parcel allowing better integration of development across the whole of the subject site, with the two properties now likely to be constructed together;
- d) preliminary consideration of the density controls applying to the development documented in an email from Parramatta Council by email of 19 April 2022; and
- e) consequential observations made in relation to the statutory scheme and correction of errata.

To provide that updated advice, I firstly provide an overview of the development as I understand it. I then review the applicable provisions of PLEP and the ARH SEPP as relevant to

determining the maximum FSR possible. Lastly, after noting the maximum densities potentially achievable under those instruments, I make some observations as to how those maximums operate within the scheme established by the two instruments. Where it might assist I have referenced the preliminary consideration of density controls for the development by the Council as reflected in its 19 April 2022 email.

I have also added at the end of my advice a summary of the FSR calculation that I see as applying to the development as lodged.

2. The proposed concept development

The land to be the subject of the concept development application is currently comprised of a number of allotments which are under separate ownership. Presently it is anticipated that development of the land will proceed by consolidation of land contributed from 7 allotments into a single site upon which two buildings will be constructed. I am instructed that the form and massing of two buildings have been conceived and planned by the architect together to ensure that they integrate and respectively present compatible uses, with easements allowing for shared and connected access across the consolidated site.

The form of the development depicted in the plans presented to me is divided into a western Stage 1 building and an eastern Stage 2 building. Each of the buildings present a podium over three levels. The ground level in both stages is retail.

In the western Stage 1, levels 2 and 3 of the podium, the first two levels of the main tower (levels 4 and 5) are together proposed as affordable student accommodation. From level 5 and above residential apartments of mixed size are proposed.

In the eastern Stage 2, all levels other than the ground floor retail is proposed as commercial.

I am instructed that the detailed design of each of the buildings proposed in the concept development application is now intended to be the subject of a single consolidated development application. Indeed, while referred to as Stage 1 and 2, both ‘Stages’ are proposed to be completed together as a single construction project.

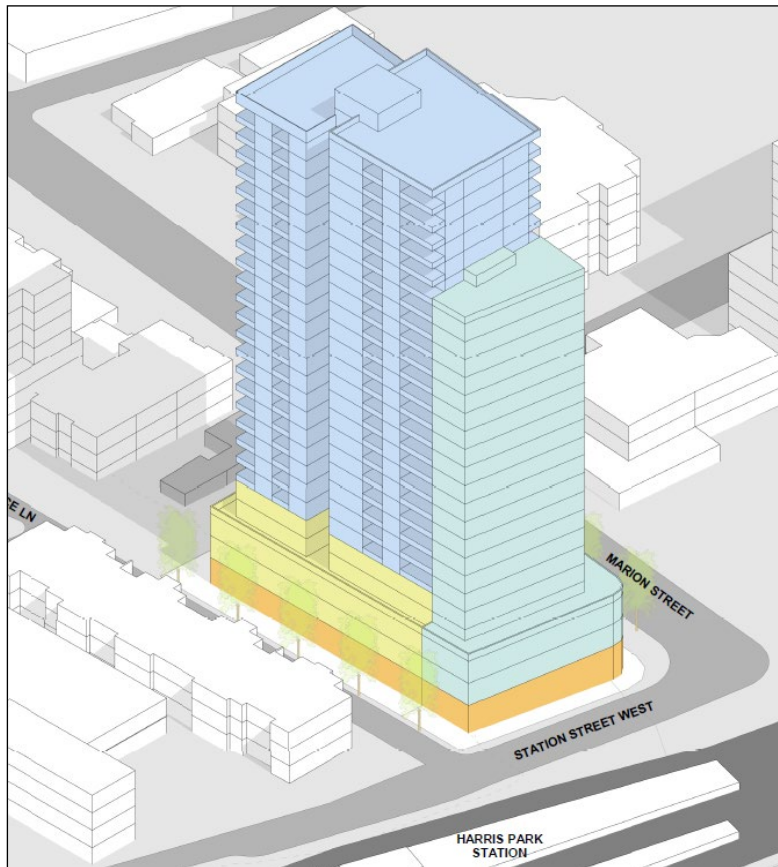
As I presently understand it, the concept for which concept development consent is to be sought (under Division 4.4 of the *Environmental Planning & Assessment Act 1979* (“EP&A Act”)) includes:



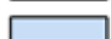



- a proposed maximum envelope as defined by a maximum height for the podium level and the respective tower elements of Stages 1 and 2, as well as minimum setbacks for the different components of the new buildings as depicted in the concept DA plans;
- the proposed arrangement of uses within the proposed tower and podium elements of the new buildings as depicted in the concept DA plans including ground floor retail, commercial, student accommodation (which will adopt the required features of a boarding house listed under Part 2 New Affordable Rental Housing cl 30(1)(a)-(h) of the ARH SEPP),
- a maximum FSR respectively for:
 - (a) the Stage 1 retail component proposed in the western portion of the development;
 - (b) the Stage 1 new affordable rental student housing proposed within the western portion of the development to make up at least 20% of the gross floor area;
 - (c) the Stage 1 new residential apartments and new affordable rental apartments proposed within the western portion of the development; and
 - (d) the Stage 2 retail and commercial development.

When complete Stages 1 and 2 will be structurally connected through shared access and carparking, Stages 1 and 2 have been conceived so as to permit each to be constructed separately. However, at present it is now envisaged that the whole development will proceed as one construction project. The total FSR for the entire development of 33-43 Marion Street as lodged is 8.82:1, although for reasons explained below I understand that FSR is proposed to be reduced to take into account ongoing discussions with the Department and Council.

Density controls applying to mixed use development at 33 – 43 Marion Street Parramatta

For reference, I have extracted this image of the configuration of the differing uses of the proposed building elements within the proposed staged development from the plans supplied, which describes the proposed arrangement of uses.



	RETAIL
	STUDENT ACCOMMODATION
	RESIDENTIAL
	COMMERCIAL
	EXISTING BUILDING
	LOCAL HERITAGE ITEM

Overlapping provisions of PLEP and the ARH SEPP will apply together to regulate the density of development permitted on the site by:

- (a) mapping a maximum 'floor space ratio' for the land;
- (b) allowing bonus increases to that maximum in certain overlapping circumstances;

- (c) setting ‘*deemed to satisfy*’ provisions which prevent a DA being refused on the ground of excessive density if specified preconditions are met.

3. Relevant Controls

There are a number of interrelating clauses of PLEP and the ARH SEPP which must be considered in order to arrive at the maximum density permitted on the land. As set out below the resulting calculation required is complicated and requires each step in the interpretation of the two instruments to be considered carefully and in sequence, beginning with the LEP.

3.1. Parramatta LEP

Clause 4.4 of PLEP stipulates a development standard fixing a maximum ‘floor space ratio’. The maximum floor space mapped for this site under that clause is 6:1 (with a maximum height set by clause 4.3 of 80 metres).

Clause 4.5 of PLEP defines what ‘floor space ratio’ means and prescribes the method of calculating the FSR.

Clause 7.2(1) of PLEP in some circumstances can further limit that maximum FSR in some circumstances. But for this concept DA, where the maximum site area the subject of the Concept DA Site is proposed to be more than 1,800 m², there is no resulting reduction of LEP under that clause.

Clause 7.10 of PLEP contains a more general bonus provision directed to encouraging “design excellence”. It allows the consent authority to approve a building with an additional bonus FSR of (alternatively) 15% or 25% depending on whether or not all of the building is commercial where requirements to ensure “design excellence” will be met.

It reads:

7.10 Design Excellence—Parramatta City Centre

- (1) The objective of this clause is to deliver the highest standard of architectural, urban and landscape design.

- (2) This clause applies to development involving the erection of a new building or external alterations to an existing building on land to which this Part applies.
- (3) Development consent must not be granted to development to which this clause applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.
- (4) In considering whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters—
 - (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
 - (b) whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain,
 - (c) whether the proposed development detrimentally impacts on view corridors,
 - (d) how the proposed development addresses the following matters—
 - (i) the suitability of the land for development,
 - (ii) the existing and proposed uses and use mix,
 - (iii) any heritage and archaeological issues and streetscape constraints or opportunities,
 - (iv) the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,
 - (v) the bulk, massing and modulation of buildings,
 - (vi) street frontage heights,
 - (vii) environmental impacts, such as sustainable design, overshadowing and solar access, visual and acoustic privacy, noise, wind and reflectivity,

- (viii) the achievement of the principles of ecologically sustainable development,
 - (ix) pedestrian, cycle, vehicular and service access and circulation requirements, including the permeability of any pedestrian network,
 - (x) the impact on, and any proposed improvements to, the public domain,
 - (xi) the impact on any special character area,
 - (xii) achieving appropriate interfaces at ground level between the building and the public domain,
 - (xiii) excellence and integration of landscape design.
- (5) Development consent must not be granted to the following development to which this clause applies unless a competitive design process has been held in relation to the proposed development—
 - (a) development in respect of a building that has, or will have, a height above ground level (existing) greater than 55 metres,
 - (b) development on a site greater than 1,000 square metres and up to 1,800 square metres seeking to achieve the maximum floor space ratio identified on the Floor Space Ratio Map, where amalgamation with adjoining sites is not physically possible,
 - (c) development having a capital value of more than \$10,000,000 on a “Key site” identified on the Key Sites Map,
 - (d) development having a capital value of more than \$100,000,000 on any other site,
 - (e) development for which the applicant has chosen such a process.
- (6) A competitive design process is not required under subclause (5) if the consent authority is satisfied that such a process would be unreasonable or unnecessary in the circumstances and that the development—
 - (a) involves only alterations or additions to an existing building, and

- (b) does not significantly increase the height or gross floor area of the building, and
 - (c) does not have significant adverse impacts on adjoining buildings and the public domain, and
 - (d) does not significantly alter any aspect of the building when viewed from public places.
- (7) If, before the commencement of this clause, the Secretary issued a certificate under clause 22B(5) of Parramatta City Centre Local Environmental Plan 2007 for any development to which subclause (5) of this clause applies, then subclause (5) of this clause does not apply to that development.
- (8) If the design of a new building, or an external alteration to an existing building, is the winner of a competitive design process and the consent authority is satisfied that the building or alteration exhibits design excellence, it may grant development consent to the erection of the new building, or the alteration to the existing building, with—
 - (a) in any case—a building height that exceeds the maximum height shown for the land on the Height of Buildings Map or an amount of floor space that exceeds the maximum floor space ratio shown for the land on the Floor Space Ratio Map (or both) by up to 15%, or
 - (b) if the proposal is for a building containing entirely non-residential floor space in Zone B4 Mixed Use—a building height that exceeds the maximum height shown for the land on the Height of Buildings Map or an amount of floor space that exceeds the maximum floor space ratio shown for the land on the Floor Space Ratio Map (or both) by up to 25%.
- (9) In this clause—

building or alteration exhibits design excellence means a building where the design of the building (or the design of an external alteration to the building) is the winner of a

competitive design process and the consent authority is satisfied that the building or alteration exhibits design excellence.

competitive design process means an architectural design competition carried out in accordance with procedures approved by the Secretary of the Department of Planning and Environment.

Specifically, if the requirements of the clause are met, the consent authority may approve a residential building with a floor space ratio up to 15% more than the maximum floor space ratio shown for the land on the FSR map. **15% above the mapped FSR of 6:1 is 6.9:1.**

Similarly, a proposed building which would contain “*entirely non-residential floor space*” can be approved with an FSR that exceeds the 6:1 standard fixed by clause 4.4 by 25% if the relevant requirements of clause 7.10 are otherwise satisfied. The mapped FSR **if increased by 25% bonus obtainable for a commercial building is (6:1 x 1.25) 7.5:1.**

If Stage 2 of the development is constructed as an entirely separate commercial building, and the other requirements of clause 7.10 are satisfied, that higher FSR would seem to be available to that part of the proposal if the other requirements of clause 7.10 are satisfied. However, at present, I understand that the project is now intended to be constructed as a single building over a unified basement parking and podium level.

It is also important that clause 7.10 is expressed to allow for a percentage increase over “*the maximum floor space ratio shown for the land on the Floor Space Ratio Map*”. Because the mapped FSR is the base for the increase, the bonus does not allow for an increase that can build upon an increase allowable under some other provision of the LEP.

Clause 7.22 of PLEP addresses the Concept DA Site specifically in the following terms:

7.22 Development on land at 33–43 Marion Street, Parramatta

- (1) The objectives of this clause are as follows—
 - (a) to encourage high performing building design, namely built form, services and layout of residential flat buildings and mixed use development in the

- Parramatta City Centre that minimises the consumption of energy and water,
- (b) to provide increased amenity to occupants over the long term,
 - (c) to ensure the increase in gross floor area is compatible with surrounding buildings in terms of bulk, height and amenity,
 - (d) to ensure high performing building measures reflect new technologies and commercial viability.
- (2) This clause applies to the erection of a new building to be used for the purposes of a residential flat building or mixed use development on land identified as “Area 15” on the Key Sites Map if—
- (a) the lot on which the building will be sited is at least 24 metres wide at the front building line, and
 - (b) the site area of the development is at least 1,800 square metres.
- (3) Despite clause 4.4, development consent may be granted for development to which this clause applies if the building exceeds the maximum permissible floor space ratio by up to 5% of the maximum permissible floor space ratio, but only if the consent authority is satisfied that—
- (a) the additional floor space will be used for the purposes of residential accommodation, and
 - (b) the development will not adversely impact on neighbouring land in terms of visual bulk or overshadowing.
- (4) Development consent must not be granted under this clause unless the consent authority is satisfied that—
- (a) the part of a building that is a dwelling, whether or not as part of a residential flat building or mixed use development, exceeds the BASIX water target score for the building by a minimum 15-point increase, and
 - (b) the part of a building that is a dwelling, whether or not as part of a residential flat building or mixed use development, exceeds the BASIX energy target score for the building by at least the amount specified in the Table to this subclause for a building of that kind.

Table Minimum increase in BASIX energy target score

Height of building, expressed as number of storeys	Building with FSR of at least 6:1, but less than 14:1	Building with FSR of at least 14:1
5–15 storeys	25	15
16–30 storeys	20	10
31–40 storeys	10	10
41 or more storeys	10	10

(5) In this clause—

BASIX energy target score means the energy target score set out in a BASIX certificate, within the meaning of the Environmental Planning and Assessment Regulation 2000.

BASIX water target score means the water target score set out in a BASIX certificate, within the meaning of the Environmental Planning and Assessment Regulation 2000.

maximum permissible floor space ratio means the maximum floor space ratio permitted for the building as a result of the floor space ratio shown for the land on the Floor Space Ratio Map.

mixed use development means a building or place comprising commercial premises and dwellings.

The proposed staged development will comprise ‘2 or more different land uses’ and therefore meets the definition of “*mixed use development*”. I am instructed that the site meets the numerical dimension requirements of subclause (2) and will sit entirely within the “*land identified as ‘Area 15’*”. Given the consolidated approach to the development and the fact that the parking will be structurally connected, the larger 33-43 Marion Street allotment is appropriately to be treated as one ‘*site*’. Accordingly, the minimum area is met and the clause applies.

The area of the development within the main tower element proposed to be used for residential development exceeds the area of the ‘*additional floor space*’ over 6:1 which would be allowed under clause 7.22. Accordingly, it could be said that the additional bonus floor space allowed under the clause “*will be used for the purposes of residential accommodation*”.

Assuming that it can be established that (when viewed objectively) the development will not “adversely impact on neighbouring land in terms of visual bulk or overshadowing” (which would be a matter for expert planning and architectural advice), and assuming the BASIX energy and water targets can be met, the additional bonus of “up to 5% of the maximum permissible floor space ratio” allowed by clause 7.22(3) would be available.

A question will arise as to whether it is possible that a particular BASIX score can be met by a concept development where the detail of the environmental features of the building are not yet proposed, and the environmental performance of the building cannot yet be modelled.

To apply the clause, it is necessary to determine the “*maximum permissible floor space ratio*”. That expression is relevantly defined for the purposes of the clause (as quoted above) to be that “*permitted for the building as a result of the floor space ratio shown for the land on the Floor Space Ratio Map*”. That is, in my opinion, the clause allows a bonus calculated as a percentage of the mapped FSR, not a percentage of the allowable FSR increased by any other provision.

In that way, the effect of clause 7.22 is to increase the maximum FSR permitted under PLEP by 5% if its preconditions are met. The maximum FSR would then be:

$$6:1 \times 1.05 = 6.3:1.$$

It separately allows a bonus 5%. That bonus is expressed to allow a development which “*exceeds the maximum floor space ratio*” by that percentage. Clause 7.22 does not operate cumulatively, and only allows the mapped FSR of 6:1 to increase by 5% (to 6.3:1).

Notably, environmental performance is also one of the factors to be satisfied for the bonus under clause 7.10 being available, which may explain why the bonus provisions are not cumulative.

Clause 4.6 of PLEP allows for a “*development standard*” to be varied.

However, clause 4.6(8) limits the maximum variation allowable for this site (given it is in the Parramatta City Centre) to 5%. It reads:

4.6(8) This clause does not allow development consent to be granted for development that would contravene any of the following —

(ca) a development standard that relates to the height of a building, or a floor space ratio, in Parramatta City Centre (as referred to in clause 7.1(1)) by more than 5%

The term “*development standard*” is defined in s 4 of the EP&A Act to relevantly as follows:

development standards means 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—

*... (c) the character, location, siting, bulk, scale, shape, size, height, **density**, design or external appearance of a building or work,*

It seems plain enough that the maximum FSR mapped under clause 4.4, read together with the allowances provided by either clause 7.10 or clause 7.22, relevantly fix standards for density for the site. The controls under those clauses are therefore “*development standards*” applying the definition for that phrase. The maximum allowable under the bonus provisions calculated under those clauses are therefore in my opinion amenable to variation under clause 4.6.

While clause 4.6 allows for a request to be made, its requirements would have to be met before the FSR standards can be varied. That is, in order for the consent authority to apply the clause to permit non-compliant development, it must find relevantly that:

a) compliance with the development standard would be unreasonable or unnecessary in the circumstances of the case,

- b) *there are sufficient environmental planning grounds to justify contravening the development standard.*
- c) *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*
- d) *the concurrence of the Secretary has been obtained.*

The Secretary gave notice under clause 64 of the *Environmental Planning & Assessment Regulation 2000* by planning circular PS 20-002 of 5 May 2020 that his concurrence may relevantly be assumed.

Notably, clause 4.6 does not state that the precondition to permit departure from a standard is that the consent authority has determined that permitting non-compliance would be reasonable, but rather that requiring compliance would be “*unreasonable or unnecessary*” which is a different focus.

There is no requirement that the consent authority find that there will be ‘no effect’ of the non-compliance, or that a benefit will flow from a non-compliance, but only that impacts of the noncompliance that are anticipated will be acceptable, such that it would be unreasonable or unnecessary not to permit the variation.

As Preston CJ put it in his judgment delivered in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [87] (applied by the Court of Appeal in *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 at [189]):

‘Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this

objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.'

Preston CJ held further that the Commissioner misdirected herself by requiring that the development which contravened the height development standard result in a 'better environmental planning outcome for the site' relative to a development that would comply with the height development standard. Preston CJ said at [88]:

'Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.'

Initial Action therefore requires the following matters to be established (*SJD DB2 Pty Ltd v Woollabra Municipal Council* [2020] NSWLEC 1112 at [31]):

- a) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),*
- b) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),*
- c) The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and*
- d) The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).*

In the decision of Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90), (upheld subsequently by the Court of Appeal (albeit for procedural reasons) in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248) her Honour made the following observations as to the breadth of the discretion allowed by clause 4.6 at [26]:

"26. The EPA Act and the LEP contain no definition of "unreasonable" or "unnecessary". There are limiting words to some extent in subclause (3)(a) in that what is "unreasonable or unnecessary" must relate to "the circumstances of the case". The circumstances of the case are not

defined in any way suggesting a wide scope in the meaning of that phrase. Subclause (3)(b) requires a written report to demonstrate that sufficient environmental planning grounds support the contravention of a development standard. The EPA Act or the LEP do not define "sufficient" or "environmental planning grounds". As the Appellant submitted these phrases are of wide generality enabling a variety of circumstances or grounds to justify contravention of the particular development standard. The "sufficient ... grounds" must be "environmental planning grounds" by their nature. The word "environment" is defined in the EPA Act to mean "includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings".

Ultimately, whether the variation under clause 4.6 will be allowed will require a merit assessment of the impacts of the increased density. If for example the height of the building will not increase, and the envelope and anticipated traffic impacts are consistent with the anticipated character of the area and objectives of the zone, the variation might well be allowed.

Applying clause 4.6 to the development standards stated for development to which clause 7.10 applies, the following maximum achievable density limits (assuming the clause 4.6 request is granted) can be calculated:

Residential building: **6.9:1 plus 5% = 7.245:1**

Commercial building **7.5:1 plus 5% = 7.875:1**

3.2. ARH SEPP

The ARH SEPP applies to all land in NSW (cl 7) and is arranged into different divisions applying to different forms of lower cost accommodation.

Terms used in the SEPP are defined by with reference to the defined terms set out in clause 4, or by the Standard Instrument (see cl 4(2)).

Residential development will qualify as “*affordable housing*” for the purposes of the SEPP if it is “*for*” at least “*moderate income household*” (in addition to including housing for a “*very low income household*” or “*low income household*”) (cl. 6).

Relevantly a household will fall within that category if the household “*has a gross income that is less than 120 per cent of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent*”.

Information as to the calculation of the different income bands referred to in the clause is published at <https://www.facs.nsw.gov.au/providers/housing/affordable/manage/chapters/household-median-incomes-2020-21>. The Guidelines there discussed allow for the income of the total household (which may be the entire boarding house, or possibly sub-units within the boarding house) to be averaged across the number of adults residing in the household.

Student housing would be anticipated to meet those requirements. If the Council queries that fact, evidence of a social planner on the subject of the likelihood of the accommodation being likely to be occupied by moderate income households could be obtained

Part 1 Clause 3 of the ARH SEPP sets out the objectives of the instrument as being the facilitation of affordable housing in NSW. It notably includes:

3 Aims of Policy

The aims of this Policy are as follows—

- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards

Part 2 Division 1 clause 10 of the ARH SEPP sets out provisions specifically to encourage “in-fill affordable housing”.

Clause 10(1) sets out the development those provisions are to apply to. Relevantly, it states:

- (1) This Division applies to residential development if—
 - (a) the development is permitted with consent under another environmental planning instrument, and ...
 - (c) the percentage of the gross floor area of the development that is to be used for the purposes of affordable housing is at least 20%, and

“*Residential development*” is defined in clause 10 to include “*residential flat buildings*”.

The term “*residential flat buildings*” is defined by the Standard instrument as follows:

residential flat building means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.

Note—

Residential flat buildings are a type of residential accommodation—see the definition of that term in this Dictionary.

The building the subject of this DA contains 3 or more dwellings, in addition to the other retail and commercial uses proposed. It therefore meets the definition of ‘*residential flat building*’.

In addition to being a building containing “3 or more dwellings”, the proposed development is also a “*building ... comprising 2 or more different land uses*”, and is therefore a “*mixed use development*”.

“*Affordable housing*” is defined by s 1.4 of the EP&A Act and clause 6 of the ARH SEPP together as follows:

affordable housing means housing for very low income households, low income households or moderate income households, being such households as are prescribed by the regulations or as are provided for in an environmental planning instrument.

- (1) In this Policy, a household is taken to be a very low income household, low income household or moderate income household if the household—
 - (a) has a gross income that is less than 120 per cent of the median household income for the time being for the Greater Sydney (Greater Capital City Statistical Area) (according to the Australian Bureau of Statistics) and pays no more than 30 per cent of that gross income in rent, or
 - (b) is eligible to occupy rental accommodation under the National Rental Affordability Scheme and pays no more rent than that which would be charged if the household were to occupy rental accommodation under that scheme.

As already noted, while I have seen no evidence on the subject, student housing would seem inevitably to meet that definition. If further investigation is required in that regard, further guidance as to the applicable income bands can be found in *State Environmental Planning Policy No 70 – Affordable Housing (Revised Schemes)* Clause 8.

Each of the components of the subject development are permissible uses permitted in the zoning table. Assuming that the student accommodation proposed makes up at least 20% of the gross floor area (as I am instructed it is to be one of the components of the concept proposed in the concept DA), then the Division applies.

As the wording used in the clause is particular to state that the Division applies to residential flat building development of which 20% is affordable housing, the Division must apply to the whole of a residential flat building development which satisfies that threshold, not just the affordable housing component. **Part 2 Division 1 clause 13 of the ARH SEPP** regulates density of in-fill affordable housing relevantly as follows:

13 Floor space ratios

- (1) (Repealed)
- (2) The maximum floor space ratio for **development to which this Division applies** is **the existing maximum floor space ratio for any form of residential**

accommodation permitted on the land on which the development is to occur,
plus—

... (b) if the existing maximum floor space ratio is greater than 2.5:1—

- (i) 20 per cent of the existing maximum floor space ratio—if the percentage of the gross floor area of the development that is used for affordable housing is 50 per cent or higher, or
 - (ii) Z per cent of the existing maximum floor space ratio—if the percentage of the gross floor area of the development that is used for affordable housing is less than 50 per cent,
- where—

AH is the percentage of the gross floor area of the development that is used for affordable housing.

$$\mathbf{Z} = \mathbf{AH} \div 2.5$$

- (3) In this clause, gross floor area does not include any car parking (including any area used for car parking).

Note—

Other areas are also excluded from the gross floor area, see the definition of gross floor area contained in the standard instrument under the Standard Instrument (Local Environmental Plans) Order 2006.

From the plans I have seen, it seems unlikely that the proposed student housing will exceed 50% of the FSR of the development. Accordingly, clause 13(2)(b)(ii) will apply.

For the reasons set out above, those bonus provisions apply to the whole of the residential component of the proposed development, not just the affordable housing part (because

Division 1 of the ARH SEPP applies to residential development “including” 20% affordable housing). In applying the clause, the phrase “*existing maximum floor space ratio*” is defined to mean:

“... the maximum floor space ratio **permitted** on the land under an environmental planning instrument or development control plan applying to the relevant land, other than this Policy or *State Environmental Planning Policy No 1--Development Standards* .”

The word “*permitted*” on my reading is a reference to the distinction made in the EP&A Act between controls that variously “*consent to, permit, regulate, restrict or prohibit*” development (see definition of control in s 4). Permitted development is development that may lawfully be carried out either without consent (see s 4.1) or with consent (see s 4.2), but not development which is prohibited (see s 4.3).

That meaning is important because the “*maximum*” density of development that can lawfully be carried out on the land is not limited to the mapped development standard under clause 4.4. That is because a higher density can be approved firstly through the bonus provisions under clauses 7.10 and 7.22, and secondly (as set out above) as then varied by an additional 5% under clause 4.6 if a request made under that clause is upheld.

For “*any form of residential accommodation permitted on the land*” the maximum density permitted if the requirements of clause 7.10 and 4.6 can be met is (as calculated above) 7.245:1. It must be remembered that it is the “*maximum permissible*” that is the relevant starting point, not the density appropriate for the site on a merit assessment nor the residential development that is in fact proposed. Arguably the 4.6 request must be made to unlock the 5% bonus as a matter of permissibility, but the clause does not require the request to have been granted on merit but only that it is able to be permitted.

To that figure is to be added “*Z per cent of the existing maximum floor space ratio*”, being the floor space ratio for affordable infill residential development to which Part 2 Division 1 applies.

The variable “Z” will change depending on the percentage of affordable housing provided (AH). The range between 20% and 50% (where $Z = AH/2.5$) would result in a range in possible “Z” results of $(20/2.5) 8\%$ to $(50/2.5) 20\%$.

In turn (applying the clause) that results in a range of potential density values to be added under clause 13(2)(b)(ii) of $(7.875:1 \times 8\%) 0.63:1$ through to $(7.875:1 \times 20\%) 1.575:1$.

To add those densities to the ‘existing maximum floor space ratio’ for residential development of as the clause provides the range of maximum densities. For a residential development with at least 50 affordable housing, the permitted FSR will be:

$$7.245:1 + 20\% = \mathbf{8.694} \text{ (for a residential development with 50\% affordable housing)}$$

I stress that that is the ‘*maximum*’ permissible density in my opinion obtainable under the bonus provision allowed by clause 13. Clause 13 is not a ‘deemed to satisfy’ provision which obliges the consent authority to approve a development with that density.

The development will have to be justified in the usual way through good design taking into account the considerations under s 4.15 of the EP&A Act, including the objectives of the Affordable Housing SEPP and relevant parts of the LEP controls.

3.3. Part 2 Division 3 of the ARH SEPP

Division 3 of Part 2 of the ARH SEPP applies to “boarding houses”. I observe that as a building including a ‘*boarding house*’ may also be a building “*a building containing 3 or more dwellings*” (if the boarding house includes three or more rooms or suites of rooms that may be occupied separately as I understand is here the case), the same building may also be a ‘*residential flat building*’. I see nothing in the instrument to make the two definitions mutually exclusive.

The definition of “*boarding house*” supplied in the *Principal Local Environmental Plan (Standard Instrument)* is:

boarding house means a building that—

- (a) is wholly or partly let in lodgings, and
- (b) provides lodgers with a principal place of residence for 3 months or more, and
- (c) may have shared facilities, such as a communal living room, bathroom, kitchen or laundry, and
- (d) has rooms, some or all of which may have private kitchen and bathroom facilities, that accommodate one or more lodgers,

but does not include backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.

Note—

Boarding houses are a type of residential accommodation—see the definition of that term in this Dictionary.

The intended student housing component of the development would (I understand) have the following characteristics required by that definition:

- (a) The accommodation would be wholly or partly let in separate self-contained lodgings for each student with a kitchen and bathroom expected to be provided, and
- (b) The accommodation would provide the students with a principal place of residence for the duration of their period of study which would be expected to be 3 months or more, and
- (c) While the portion of the building devoted to the accommodation would have shared facilities, such as communal living rooms for different parts of the boarding house component, the building would nonetheless be arranged such that there were at least 3 separate '*domiciles*' across the three levels of the boarding house component with separate amenities for each, and
- (d) the proposed rooms would accommodate one or more "lodgers".

The proposal is not for "*backpackers' accommodation, a group home, hotel or motel accommodation, seniors housing or a serviced apartment*" which are all excluded by the applicable definition of "*boarding house*".

As to whether a student living in “*student accommodation*” is a lodger, the definition provides no specific guidance. The decision of Hasluck J of the Western Australian Supreme Court in Commissioner for *Fair Trading v Voulon* [2005] WASC 229 includes a survey of a number of earlier authorities on the question. There the Court found (at [81]) that:

“[81] *The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. In other words, a lodger is entitled to live in the premises but cannot call the place his own. He resides essentially as an inmate in another person's house.*”

The Court notes that whether the occupier has a right of “*exclusive possession*” is the crucial test of a tenancy at common law (applying High Court in *Radaich v Smith* (1959) 101 CLR 209). That is, test is whether the property owner has the right to enter the boarder’s rooms.

Hostels provided by the Commonwealth Government for the accommodation of immigrant families were found by the High Court in *Commonwealth v Bogle, Boreham & Clark* (1953) 89 CLR 229 to constitute lodgings. Emphasis was placed upon the character of the services and facilities provided, the inclusive nature of the charge made, and the fact that master keys of all the rooms were retained by officers of the Department.

Having regard to those principles, if the application does need to rely upon Part 2 Division 3 which contains provisions assisting the grant of consent to a boarding house, the DA might usefully specify something to the effect that:

‘The accommodation provided to students will be by licence entitling the student to the use of common facilities. The accommodation licence will give a right to accommodation within an allocated student room which may include bathroom and kitchenette facilities, but will not give the occupying student a right to exclusive possession.’

If such words are included, in my opinion the part of the building providing student accommodation in the proposed concept would be correctly categorised as a ‘*boarding house*’ as defined by the Standard Instrument, and Division 3 of Part 2 of the ARH SEPP would apply.

The Division applies to the applicable B4 mixed use zone (see cl 26). “Boarding house” development may therefore be carried out, even if prohibited in that zone (see cl 28).

There is nothing in the instrument that says that a boarding house (to which Part 2 Division 3 applies) is not also to be considered to be used “*for the purposes of affordable housing*” such that Division 1 discussed above would not also apply.

The density controls of the two Divisions would seem to me to be consistent in terms of density, and can be read together because cl 13 is directed to fixing a maximum permissible FSR, whereas clause 29 describes “*deemed to satisfy*” standards “*that cannot be used to refuse consent*” which is a different focus.

While (for the reasons set out above) it is my opinion that the FSR bonus provisions under Division 1 of the ARH SEPP does apply to increase the permissible density permitted under clause 7.10 of the LEP, it is also my view that the two Divisions within ARH can not be cumulative. That is because both Divisions 1 and 3 set their respective FSR controls as referable to the “*existing maximum floor space ratio*” which as we have seen is a defined term in the ARH SEPP referable to what is permissible under the applicable LEP.

Furthermore, Clause 4 defines “*existing maximum floor space ratio*” as “*the maximum floor space ratio permitted on the land under an environmental planning instrument or development control plan applying to the relevant land, **other than this Policy***”.

Notably, Clause 27 is worded quite differently to clause 10. It provides:

27 Development to which Division applies

- (1) This Division applies to development, on land to which this Division applies, for the purposes of boarding houses.

It can be seen that while Division 1 applies to the whole of the residential component of a building which has 20% of affordable housing, Division 3 applies only to the boarding house component of the building.

Clause 29 of Division 3 then says relevantly:

29 Standards that cannot be used to refuse consent

- (1) A consent authority must not refuse consent to development to which this Division applies on the grounds of density or scale if the density and scale of the buildings when expressed as a floor space ratio are not more than—
...
 - (c) if the development is on land within a zone in which residential flat buildings are permitted and the land does not contain a heritage item that is identified in an environmental planning instrument or an interim heritage order or on the State Heritage Register—the existing maximum floor space ratio for any form of residential accommodation permitted on the land, plus— ...
 - (ii) 20% of the existing maximum floor space ratio, if the existing maximum floor space ratio is greater than 2.5:1.

Given that this deemed to satisfy provision will apply only to the boarding house component, it seems highly unlikely that it will assist in increasing the maximum FSR possible for this development where the FSR bonus permitted by Division 1 will apply to the whole building, and is therefore already substantially higher.

It remains however a mandatory consideration when determining the DA under Division 3 “*whether the design of the development is compatible with the character of the local area.*” (See cl 30A of the ARH SEPP).

4. Summary of my opinion as to maximum FSR calculation

Having regard to the discussion above, my calculation of the maximum FSR applying in my opinion to a residential flat building including 20% in-fill affordable housing (which in my opinion may include boarding house accommodation within the meaning of the ARH SEPP) is:

Maximum FSR permitted in the B4 Mixed Use Zone Parramatta LEP

Clause 4.4

Mapped FSR 6:1

Clause 7.10 bonus

15% above the mapped FSR of 6:1 6.9:1 (not 100% commercial)

Clause 4.6

6.9:1 plus 5% = 7.245:1 (maximum permitted assuming clause 4.6 test is met)

Bonus applying under the ARH SEPP

Plus 20% bonus applying to

Development to which

Division 1 of the ARH SEPP applies

with at least 50% affordable housing

7.245:1 + 20% 8.694:1

(Notably, I have applied the bonus under the ARH SEPP only to the FSR permissible for residential development under the PLEP, and not the higher bonus applicable to commercial development).

I must stress again that the maximum FSR as in my opinion it is to be calculated is just that – a maximum - determined according to the instruments as drafted, and it will be for the determining authority to consider whether the development application submitted should be approved on merit.

5. Council's response

I have been briefed with an email from Parramatta Council by email of 19 April 2022 which sets out its preliminary response to the FSR calculation in the DA documents.

My responses to the principal issues raised in that email are:

a) **Council:** PLEP cl.4.6(8) – Max CBD variation (5%)

- *Does not form part of the “floorspace permitted on the land” when calculating other bonuses.*
- *As this only gives power for cl.4.6 to be used to exceed FSR by max of 5%, and the other bonuses are equal to or more than 5%, Clause 4.6 cannot be used to increase floorspace beyond other bonuses.*

Response: As set out above, the 5% variation to the mapped FSR control allowable if the requirements of clause 4.6 are met increases the maximum floorspace which is “*permitted on the land*” because clause 4.6 is as much part of the LEP as any other clause.

By its very nature, a “*bonus*” provision increases what is permitted on land under a planning instrument.

b) Council: PLEP cl.7.10(8) – Design Excellence Bonus (15% resi, 25% comm)

- *Does not form part of the “floorspace permitted on the land” when calculating other bonuses as it is discretionary (“May grant consent”, not “must grant consent” to bonus).*
- *Can only formally be granted after design competition is run, until then would need to be represented as a dashed line on concept drawings.*
- *Can only be granted to commercial floor space which doesn’t benefit from the ARH bonuses.*
- *The Stage 2 development would be part of larger building containing residential uses and as such benefit from only the 15% bonus (not the 25% bonus for fully non-residential buildings).*

Response: The fact that FSR available under a bonus provision is “*discretionary*” does not mean that it is not relevantly “*permitted*” on the land. I have already stressed that it will be for the determining authority to be satisfied that consideration of relevant matters argues in favour of that maximum being

achievable. That is, Council is right to stress that the emphasis is what “may” and not what “must” be allowable. But that does not change what is “permitted” on the land, which is different to what is ultimately to be approved.

c) **Council:** PLEP cl.7.22(3) – *Site Specific Residential Bonus (5%)*

- *Does not form part of the “floorspace permitted on the land” when calculating other bonuses as it only applies in certain circumstances.*
- *As this only gives power to exceed FSR by max of 5%, and the other bonuses are equal to or more than 5%, cannot be used to increase floorspace beyond other bonuses.*

Response: For the same reasons, the “*Site Specific Residential Bonus*” increases what is “permitted” on land. However, because the bonus permitted under cl.7.10(8) leads to a greater permissible FSR, and the bonus provisions are available alternatives (rather than being cumulative), I have not applied this bonus in my calculation.

d) **Council:** ARH SEPP cl.13(2) – *In-fill Bonus (20% if 50% residential is affordable)*

- *Can only apply to residential floor space, not entire development, as cl.11 sets out that the division applies only to residential flat buildings.*
- *Boarding house floorspace cannot make up percentage of affordable for purpose of bonus as it is not development to which the clause applies and is not ‘affordable housing’ as defined by the SEPP (even though it may be cheaper accommodation).*
- *Floor space benefitting from this bonus cannot also benefit from DE, 4.6 or site specific ‘bonuses’, as they only bestow a discretionary power to increase the FSR from the mapped rate by an amount less than allowable per the SEPP.*

Response: Clause 11 is expressed to apply to residential flat buildings. The definition of “*residential flat building*” in the standard instrument is “*a building containing 3 or more dwellings*” which the building proposed in this DA plainly does, even though the building also contains other additional uses. It is also a “*mixed use*

development’ as defined, but that does not stop clause 11 and Part 2 Division 1 of the instrument applying.

Notably, 50% of the total floorspace of the entire proposed new building including the commercial portion is proposed to be affordable housing. To suggest that the bonus is to be calculated against the floorspace of the residential apartments only would reduce the amount of affordable housing encouraged. While this advice is not directed to a merit assessment of the proposal, the stated aims of the ARH SEPP are to encourage the delivery of new affordable housing and an interpretation which favours those aims might be preferred given the extensive authorities encouraging a purposive interpretation of planning instruments (see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78]; *Port Stephens Council v Chan Industrial Pty Ltd* (2005) 141 LGERA 226 at [14] (NSWCA) citing *Kingston v Ke prose Pty Ltd* (1987) 11 NSWLR 404 at 423 (NSWCA) per McHugh JA; cf s 25(3) EPA Act. See also the approach of Pain J in *Costelloe -v- Wollondilly Shire Council* [2007] NSWLEC 706) and Biscoe J in *Save Our Street Inc v Settree* (2006) 149 LGERA 30 as examples).

e) **Council:** ARH SEPP cl.29(1)(c) – Boarding House Bonus (20%)

- *Can only apply to boarding house, not entire development, as clauses 26 and 27 set out that the division applies only to boarding houses.*
- *Floor space benefitting from this bonus cannot also benefit from DE, 4.6 or site specific ‘bonuses’ for same reason outlined above.*

Response: It is true that the bonus applies to the boarding house component, but the Application relies upon the maximum FSR permitted for residential flat buildings with 50% affordable housing. For the reasons set out above, a building containing a “boarding house” can also be a “residential flat building” if it contains 3 or more dwellings that are able to be occupied as separate domiciles. However, if for

any reason the boarding house is to be considered separately, the bonus rate of 20% is the same – meaning it does not change the outcome.

6. Savings Provision

Lastly, I note the wording of the Savings and Transitional Provision included in the Housing SEPP 2021 at Schedule 7A.

It reads relevantly:

2 General savings provision

- (1) This Policy does not apply to the following matters—
 - (a) a development application made, but not yet determined, on or before the commencement date,
 - (b) a concept development application made, but not yet determined, on or before the commencement date,**
 - (c) a staged development application made subsequent to a concept development application approval granted on or before the commencement date,

Clause 2(1)(b) of that savings provision should apply to the pending concept DA, as well as any DA subsequently lodged relying on any concept approval granted.

I remain happy to discuss these provisions further if it will assist in progressing the concept DA.

Justin Doyle
Frederick Jordan Chambers
April 2022