Annexure A - Clause 4.6 Variation Request Residential Flat Building at Nos.62-64 Cross Street, Guilford Clause 4.3 – Height of Buildings

1. <u>Building height control</u>

Clause 4.3 (2) of Parramatta Local Environmental Plan 2011 (PLEP 2011) relates to the maximum building height requirements and refers to the *Height of Buildings Map*. The relevant map identifies the building height controls that apply to the site as shown in the extract of the map in Figure 1 (with the subject site outlined in red). A maximum building height of 11m applies to the site.



Figure 1: Extract from Height of Buildings Map to PLEP 2011 (L = 11m)

Building height is defined in PLEP 2011 as:

" building height (or height of building) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.."

The maximum building height control is a "development standard" to which exceptions can be granted pursuant to clause 4.6 of the LEP.

2. <u>Proposed Variations to Maximum Building Height</u>

The development application proposes the construction of a residential flat building. The height of the building is compliant with the 11m height control with the exception of the lift overrun located in the centre of the western section of the building and the south eastern roof parapet of the eastern section of the building.

The lift overrun is a maximum height of 13.431m, and therefore exceeds the maximum height limit by 2.431m which is a variation to the control equivalent to 22.1%. The south eastern roof parapet is a maximum height of 11.4m and therefore exceeds the maximum building height limit by 400mm, which is a variation to the control equivalent to 3.6%.

3. Clause 4.6 to PLEP 2011

The objectives and provisions of clause 4.6 to PLEP 2011 are as follows:

4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:
- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case,
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
- (a) the consent authority is satisfied that:
- (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
- (b) the concurrence of the Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary must consider:
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.
- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which <u>State Environmental Planning Policy (Building Sustainability Index: BASIX)</u> 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4,
- (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 development standards in clause 4.3 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This request addresses the requirements of subclauses 4.6(3) and 4.6(4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives of clause 4.3 to PLEP 2011 for building height control are as follows, inter alia:

- "(a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,
- (c) to require the height of future buildings to have regard to heritage sites and their settings,
- (d) to ensure the preservation of historic views,
- (e) to reinforce and respect the existing character and scale of low density residential areas.
- (f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes."

It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 so as to permit the maximum building heights as described in Section 2 above.

In order to address the requirements of subclause 4.6(4)(a)(ii), the objectives (a) to (c) of clause 4.3 are addressed in turn below. Objective (d) is not relevant to the proposal as the site is not within a historic view corridor and is not part of an area identified as having historic views or scenic value. Objective (e) is not relevant to the proposal because the site is not within a low density residential area and the adjoining residential zone to the east is Zone R3 Medium Density Residential. Objective (f) is not relevant to this proposal as the site is not within a commercial centre.

Objective (a): "to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan"

The minor non-compliance with the maximum building height control of 11m does not prevent the achievement of a transition between building heights on surrounding land. As shown in Figure 1 the building height controls for all surrounding land is 11m and there is no transition in height sought in the planning controls that apply to redevelopment of the subject site and surrounds.

Objective (b): "to minimize visual impact, disruption of views, loss of privacy and loss of solar access to existing development"

There are no existing views to or from the site or across the site from adjoining land and accordingly the proposed minor variation to maximum building height will not disrupt views.

The revised scheme has lowered the building height overall and therefore issues of amenity are further improved notwithstanding minor numerical non-compliance.

Overall the shadow impacts of the proposal are to be reasonably expected as the area undergoes a transition from low density to high density residential development.

Therefore the proposal meets Objective (b).

Objective (c): "to require the height of future buildings to have regard to heritage sites and their settings"

The Statement of Heritage Impact originally submitted with the development application concluded that the proposal had an acceptable impact to both nearby heritage items at No. 55 and No.66 Cross Street. Therefore, the revised scheme which has lowered the building height will continue to be compatible with the likely future context and setting of the listed heritage items and will not detract from the heritage significance of the buildings.

The non-compliant section of the roof parapet and lift overrun do not create opportunities for overlooking, and the lift is essential for accessible vertical circulation throughout the building.

In summary, the height of the proposal will have no detrimental environmental impact and will not be detrimental to the amenity of the site and surrounding properties. The proposed building height is mostly compliant with the height control and the sections of the building which require minor variations to the height control will be consistent with the relevant objectives for controlling building height. The majority of the parapet and rooftop terrace surface of the building are below the 11m height limit. The proportion of the building which is non-compliant is a minor section of the lift overrun which does not add to the overall bulk and scale of the building as viewed from the adjoining public streets and from most neighbouring properties and therefore the building dimensions will be compatible with the desired existing and future character of a high density residential neighbourhood.

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The objectives for development in Zone R4 High Density Residential are as follows:

- "• To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide opportunity for high density residential development close to major transport nodes, services and employment opportunities.
- To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood."

The proposal is consistent with the zone objectives in that it will provide additional higher density housing close to major public transport routes and accessible to employment opportunities. The proposal includes dwellings of various sizes, layout and orientation. The site is within walking distance to high frequency service public buses and trains, the commercial services available at Guildford centre and it is less than 30 minutes travel time to Parramatta CBD using public transport. Home employment can be conducted from the proposed apartments without development consent. For these reasons the proposal meets the relevant objectives for development in Zone R4 and the partial non-compliance with the height control does not prevent the development from meeting the objectives of the zone.

4. Sufficient Environmental Planning Grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, the assessment of the numerical non-compliance is guided by the recent decision of the NSW *LEC Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 whereby Justice Pain ratified the decision of Commissioner Pearson.

There are positive impacts of providing a covered all-weather lift access to the communal rooftop area. The lift access enables an accessible path of travel. The rooftop location is the most appropriate position for communal open space suited for year-round passive recreation. Rooftop common open space is spatially separated from neighbouring properties and is a large consolidated area with unobstructed solar access for year-round use. Roof top terraces are highly appropriate in a high density residential locality. Ground level communal open space in the central courtyard is primarily for movement space, landscaping, solar access and natural ventilation within the site and for achieving a solar access corridor for the neighbouring child care centre. The roof top terrace is wholly available for outdoor passive recreation and social interaction of residents and provides a very different quality of space to the ground level communal open space area. Both areas of communal open space contribute positively to the amenity of future residents and their visitors as well as create outdoor spaces compatible with the amenity of neighbouring properties.

The minor non-compliant section of the roof parapet is located at the south east corner of the building and the variation is no more than 400mm which will be imperceptible in the overall scale of the completed building. The minor non-compliance makes a contribution to the shadow cast by the building which is also of minimal significance in the overall shadow to be cast by the building.

On "planning grounds" and in order to satisfy that the proposal meets objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve "a better outcome for and from development", the non-compliance relates to the lift and stair access at the roof top and a minor section of the parapet. The remainder of the building is compliant with the maximum height control. The building overall is compatible with the streetscape and the evolving character of the neighbourhood.

Strict compliance would be counterproductive in terms of the amenity and accessibility for future residents to high quality outdoor communal space and have no benefit in terms of streetscape and impacts to neighbouring properties.

The merits of the proposal on "environmental planning grounds" need to be balanced with the burden that strict compliance places on the proposal and whether strict compliance will result in a better or neutral outcome. The development has been designed to provide a high quality urban outcome with a highly useable roof top communal open space area compatible with the privacy and amenity of neighbouring properties. Insisting on strict compliance in this instance would result in a deletion of the lift access to the rooftop terrace. This would prevent an accessible path of travel and all-weather access to the communal open space which is an inequitable and inconvenient outcome for future residents and their visitors.

Insisting on strict compliance for the south east corner of the parapet will have an imperceptible impact on the potential shadow cast by the building and will not change visual and aural privacy or the aesthetics of the building as viewed from surrounding properties and the street.

To require strict compliance would therefore result in an unreasonable burden on the development with no demonstrable built form or amenity benefits. As such the proposal results in a high quality residential development which is suited to the site and its context.

5. <u>Insistence on Compliance is Unreasonable and Unnecessary</u>

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

" An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

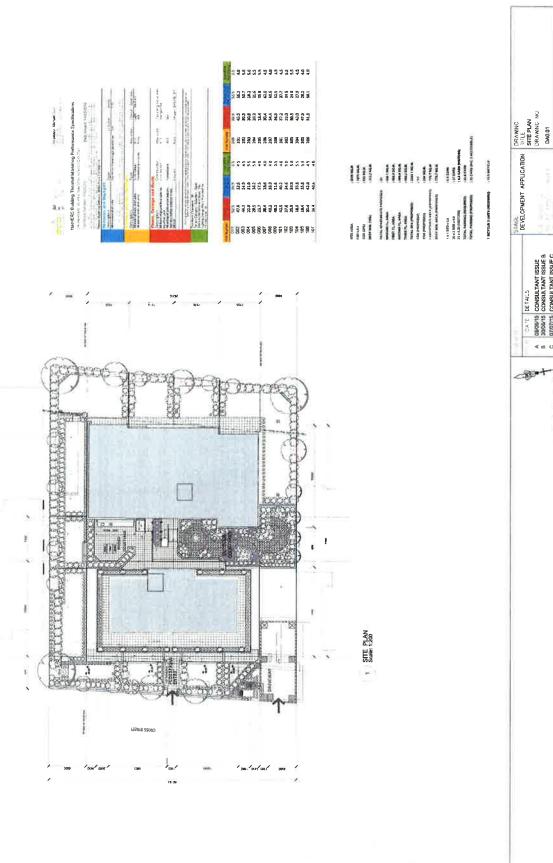
"The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

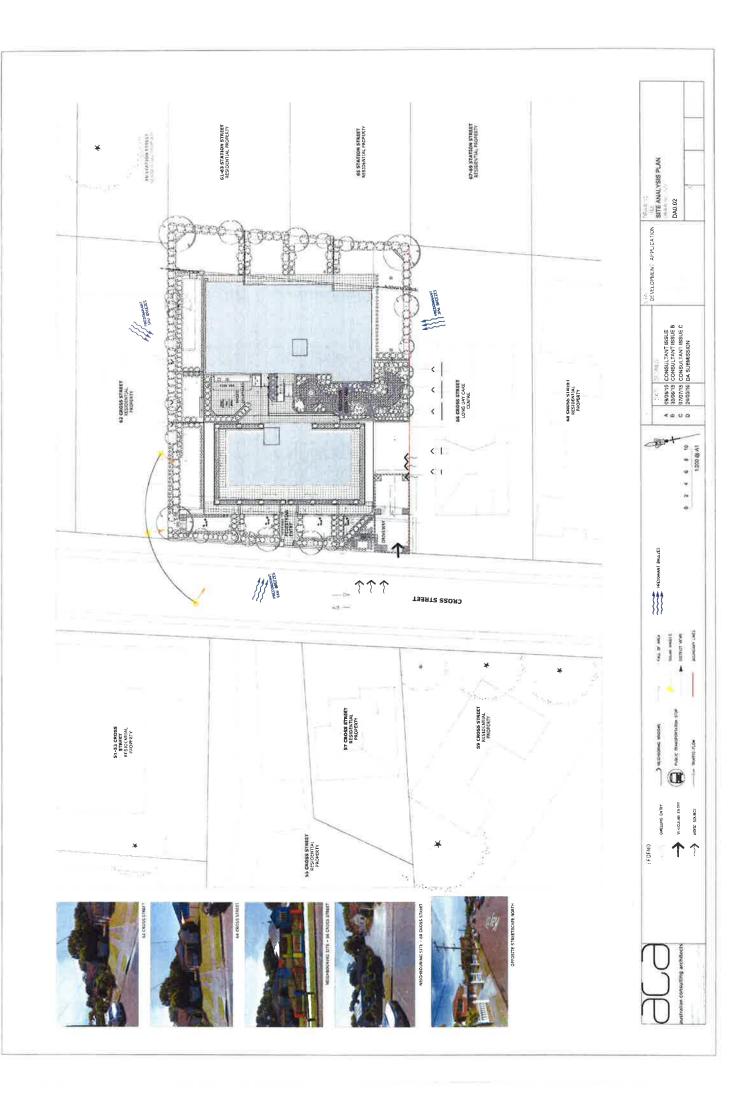
Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

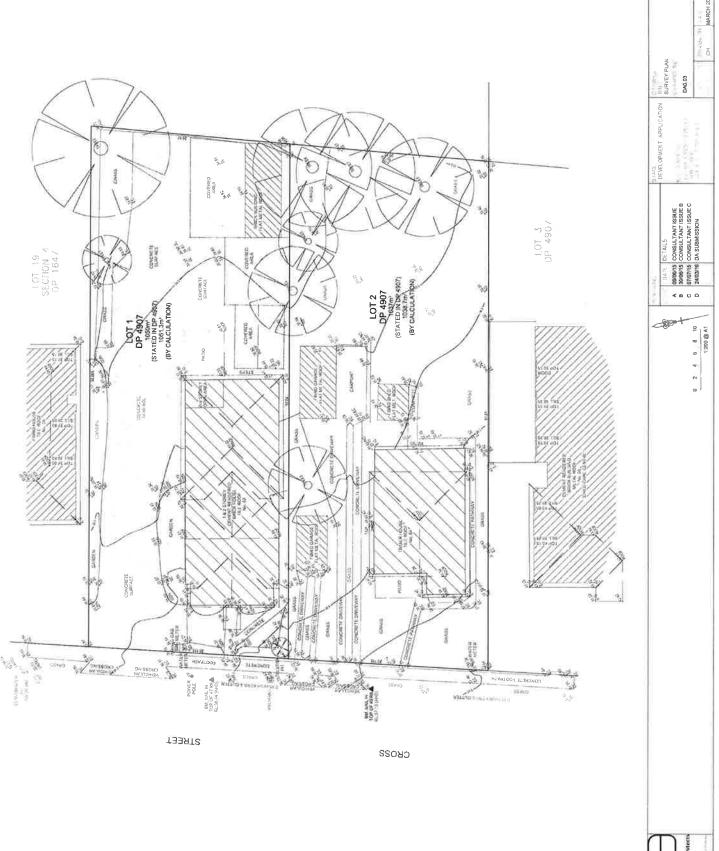
- 1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
- The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
- 5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is our opinion that strict compliance with the maximum height development standard for the entire building is unnecessary in the circumstances of this case as the development meets the relevant objectives of that standard and the zone objectives. Furthermore the non-compliance relates to the lift overrun and south east corner of the parapet only. The majority of the building is compliant with the height of building control.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of clause 4.6(3) are satisfied.







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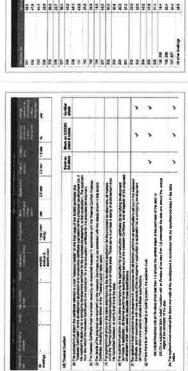
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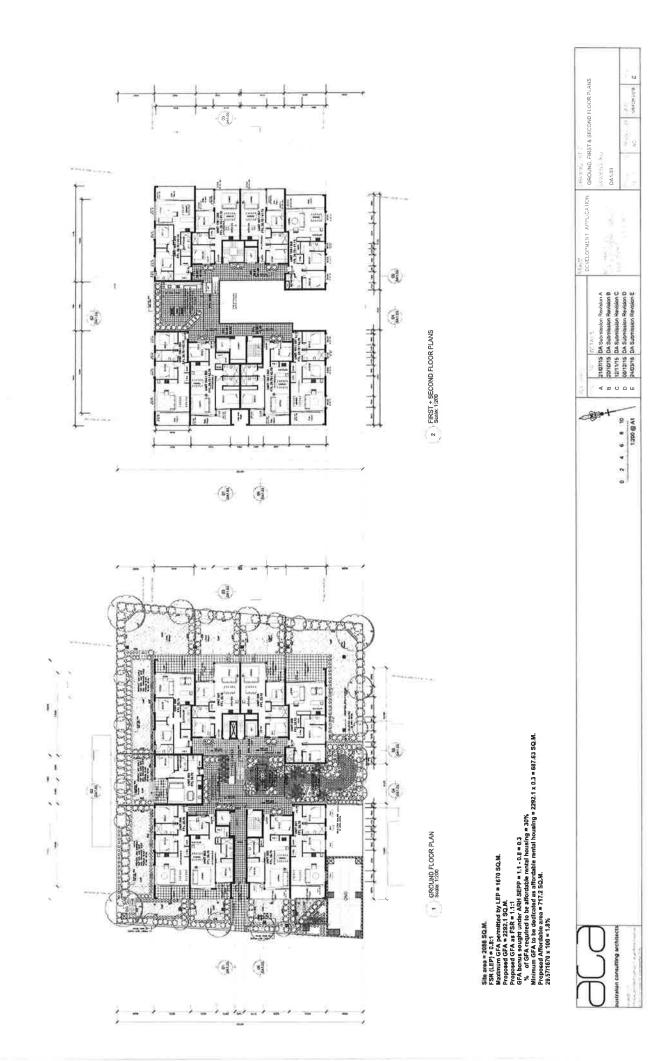
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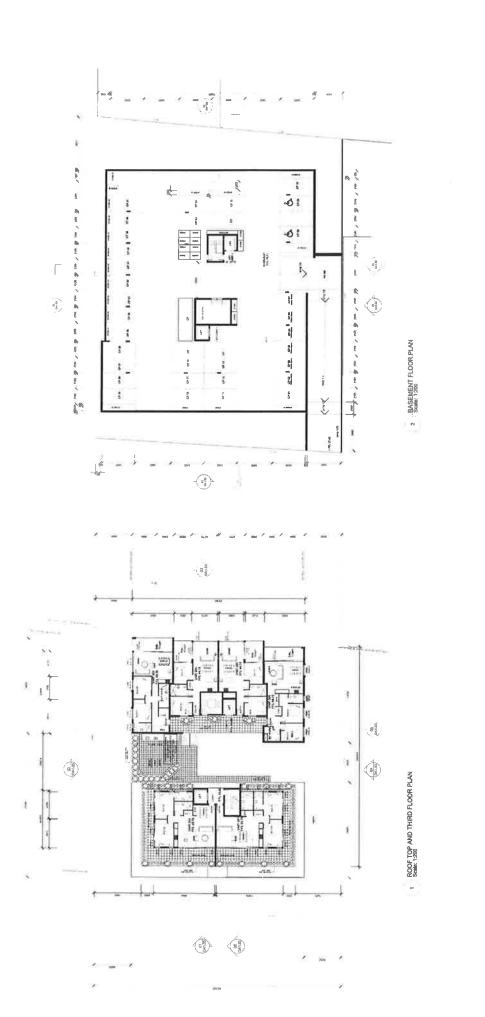
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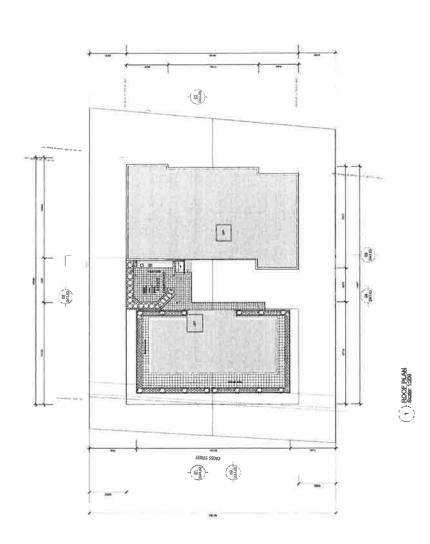
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