



## **Clause 4.6 Variation Request**


Height of Buildings  
(Clause 4.3) Marrickville LEP  
2011

**3-7 & 13-17, Regent Street, 287-309 Trafalgar Street  
and 16-20 Fisher Street, Petersham**

Submitted to Innerwest Council  
On Behalf of Petersham RSL Club  
c/- Deicorp Projects Petersham Pty Ltd

MAY 2019

## REPORT REVISION HISTORY

Revision	Date Issued	Revision Description	
01	13/05/19	Draft for review	
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02	15/05/19	Final	
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## APPENDICES

Appendix No	Document Title	Prepared by

## 1. INTRODUCTION

This is a formal written request that has been prepared in accordance with Clause 4.6 of the *Marrickville Local Environmental Plan 2011*. It has been prepared to support a Development Application (DA) submitted to Innerwest Council (Council) for the construction of an eight storey residential flat building, a seven storey residential flat building and an eleven storey mixed use complex on three sites as follows:

- **Site 1:** 3-7 Regent Street, Petersham;
- **Site 2:** 13-17 Regent Street, Petersham; and
- **Site 3:** 287-309 Trafalgar Street and 16-20 Fisher Street, Petersham.



Figure 1: Cadastral Map of site, subject site outlined in blue (Source: SIX Maps)

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development and it is noted that the development standard is not specifically excluded from the operation of Clause 4.6 of MLEP.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal<sup>1</sup>.

In the most recent decision (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118), Chief Justice Preston provided further clarification on the application of cl 4.6 and the preconditions which must

<sup>1</sup> Relevant decisions include: *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Wehbe v Pittwater Council* [2007] NSWLEC 827; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248; *Moskovich v Waverley Council* [2016] NSWLEC 1015; *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 and *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118.

be satisfied for consent to be granted pursuant to cl 4.6(4). That is, the consent authority must form two positive opinions of satisfaction under cl. 4.6(4)(a), as summarised below:

- the **written request** has adequately demonstrated that the matters under cl 4.6(3) are satisfied, being that compliance with the standard is unreasonable or unnecessary, and there are sufficient environmental planning grounds to justify contravening the development standard. It is not the consent authority's role to directly form an opinion as to whether these matters are satisfied, rather indirectly by the satisfaction that the written request has addressed these matters.
- be **directly satisfied** that the proposed development satisfies cl 4.6(4)(a)(ii), being the proposed development will be in the public interest because it is consistent with the objectives of the zone and the objectives of the development standard. The consent authority must form this opinion directly, rather than indirectly satisfied that the written request has adequately addressed these matters.

The consent authority does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3) (Initial Action [25]).

In Sections 3 and 4 of this request we have explained how flexibility is justified in this case in terms of the matters explicitly required by cl. 4.6 to be addressed in a written request from the applicant. In Sections 4, 5, 6 and 7 we address additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by cl. 4.6 or the assumed concurrence of the Secretary.

The following request demonstrates that by exercising the flexibility afforded by cl 4.6, in the particular circumstances of this application, not only would the variation be in the public interest because it satisfies the relevant objectives of both the R4 High Density Residential zone and the Height of Buildings development standard, but it would also result in a better planning outcome for, and from, the development.

### 1.1. What is the Environmental Planning Instrument (EPI) that applies to the land and what is the development standard being varied?

The relevant EPI that applies to the land is the *Marrickville Local Environmental Plan 2011* (MLEP).

The development standard that this request seeks approval to vary is the Height of Buildings standard in Clause 4.3 of the MLEP.

The numeric value of the Height of Buildings development standard for each of the sites is shown in the Height of Buildings Map extract at **Figure 2** below. The relevant maximum building heights for each of the sites are as follows:

- Site 1: 26 metres;
- Site 2: 20 metres; and
- Site 3: 35 metres, 29 metres and 20 metres.

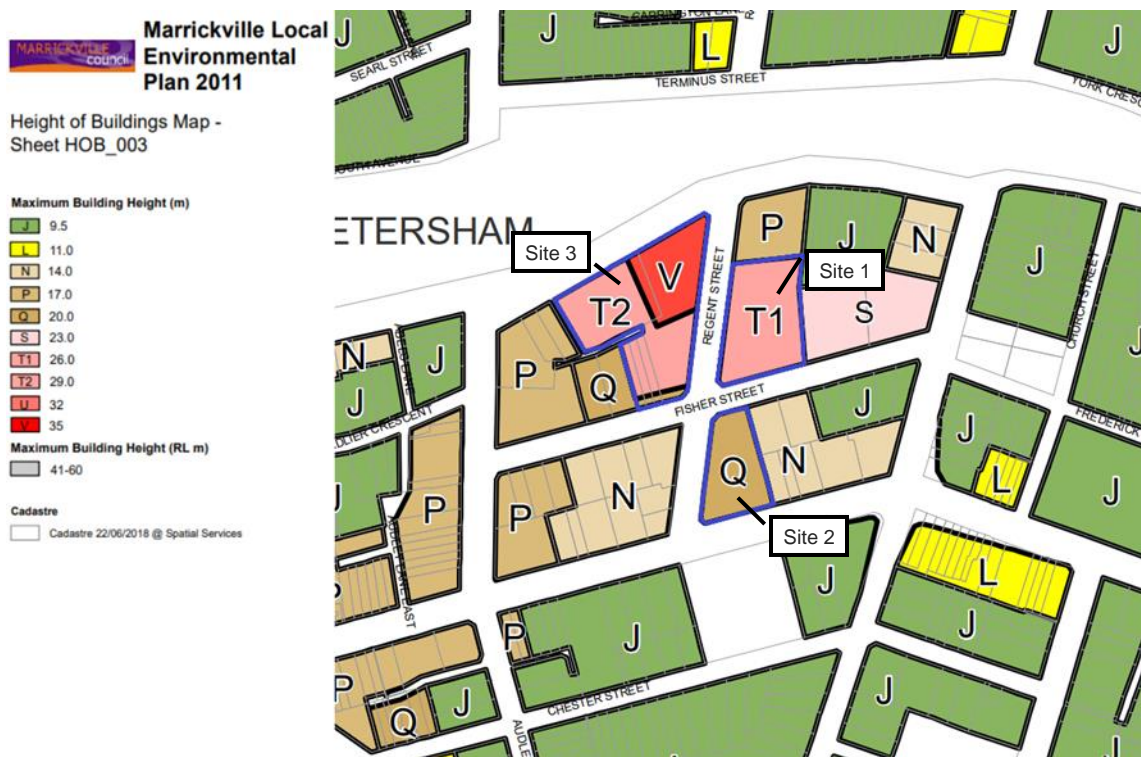


Figure 2: Height of Buildings Map extract, subject site outlined in blue (Source: MLEP 2011)



## 2. EXTENT OF VARIATION

The proposal contravenes the maximum building height standard on Site 1 and Site 3.

### Site 1

The building on site 1 contravenes the maximum building height standard in the location of the lift overruns.

The maximum building height on Site 1 is 27.6m - which is 1.6m (6%) in excess of the maximum building height standard. This occurs at the northern lift core. The variation at the southern lift core is 1.25m.

**Figure 3** below illustrates the location of the maximum building height. The roof plans and sections in **Appendix 1** show the extent of the variations.

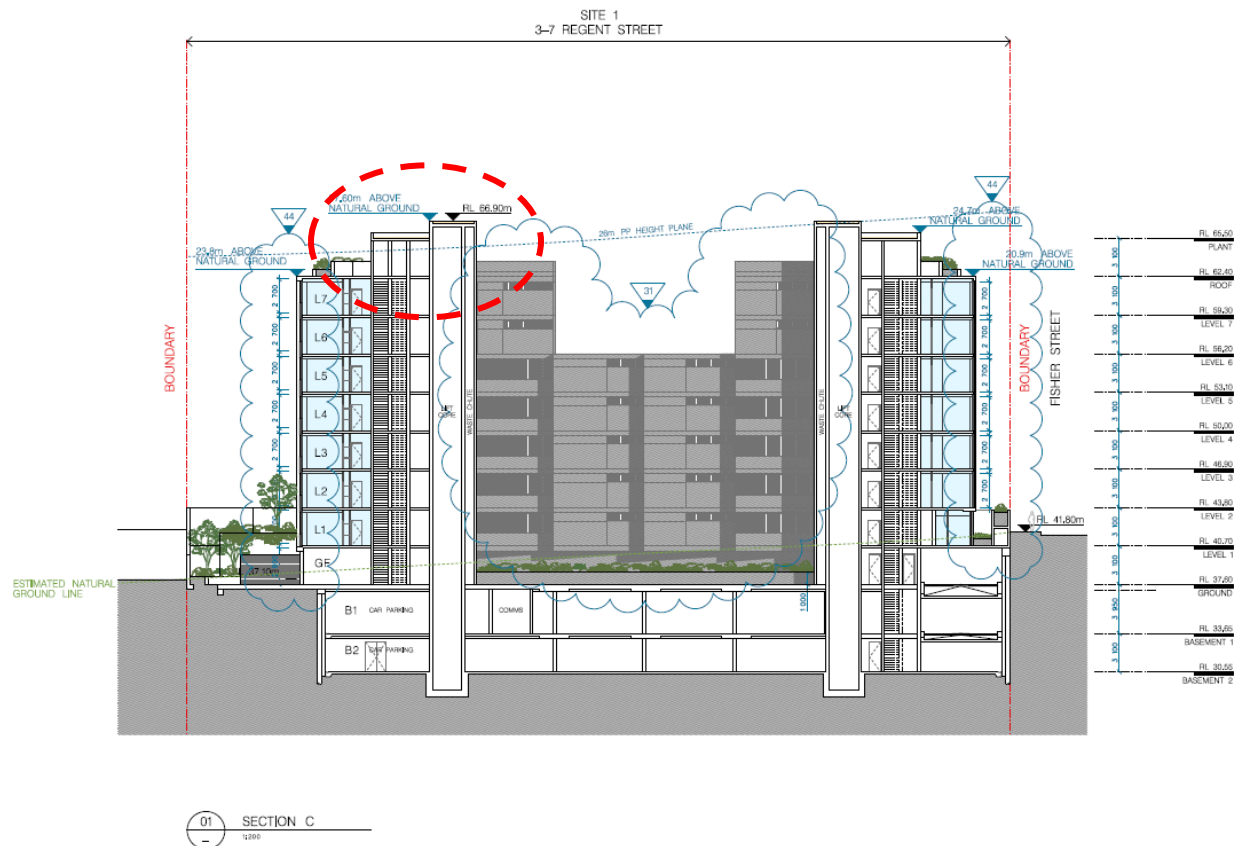


Figure 3: Extract of Section C for Site 1, variance (1.6 metres) circled in red (Source: Candalepas Associates)

### Site 3

The proposed development on Site 3 comprises three residential buildings (referred to as buildings A, B and C) above a registered club and cafe.

Building A exceeds the maximum building height by 5.6m in the location where a maximum building height of 20m applies along the Fisher Street frontage. The location of the 20m maximum building height control can be seen in **Figure 4** below and the extent of the variation is depicted in **Figure 5** (below).

Building C has a maximum building height of 32.4m and exceeds the applicable maximum building height of 29m by 3.4m (12%). The elements of Building C which exceed the maximum building height standard are the lift and two sets of stairs providing access to the roof top communal open space as well as pergolas, amenities and balustrades associated with the roof top communal open space and a plant room.

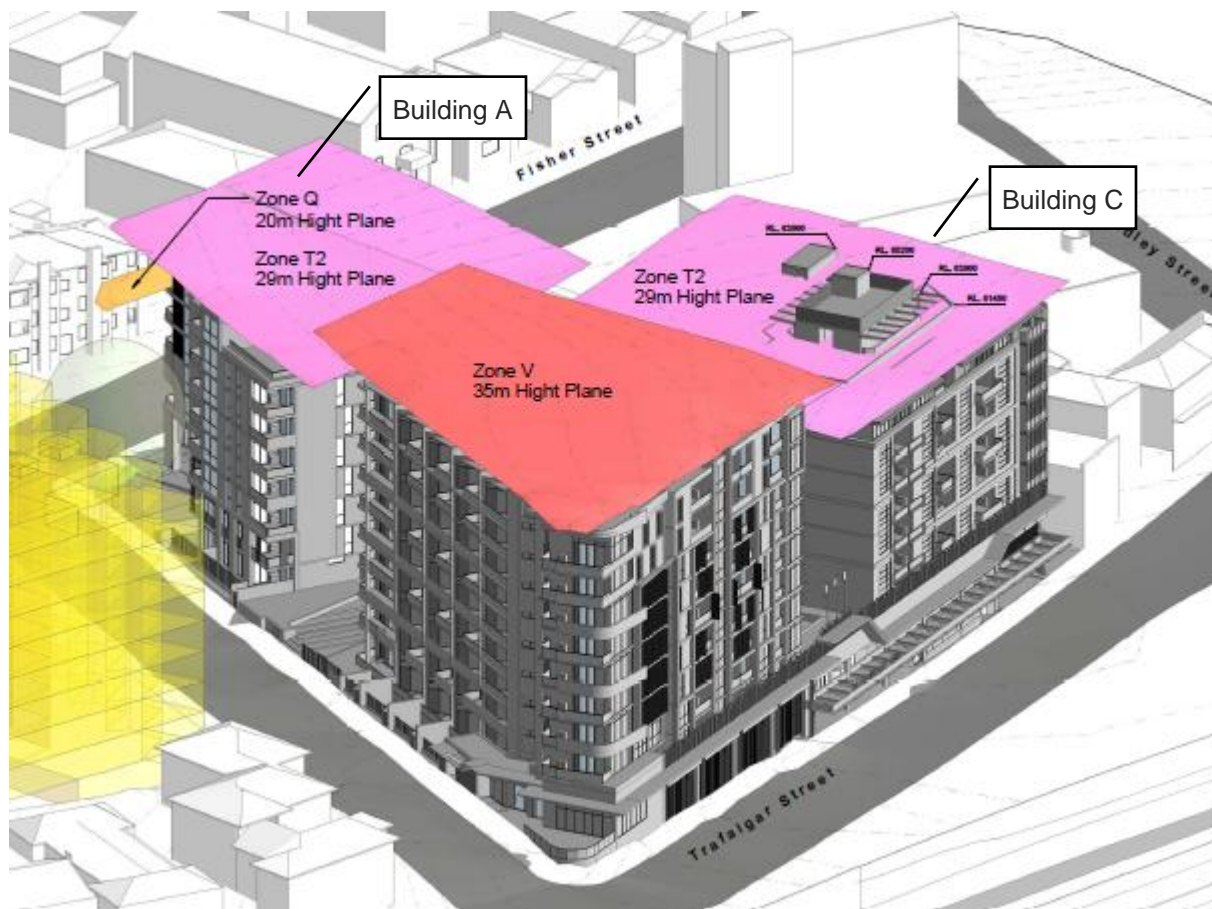


Figure 4 - Height planes and variations on Site 3 (Source: Nordon Jago)





Figure 5: Extract of Section L for Building A in Site 3, variance (5.54 metres) circled in red (Source: Nordon Jago Architects)

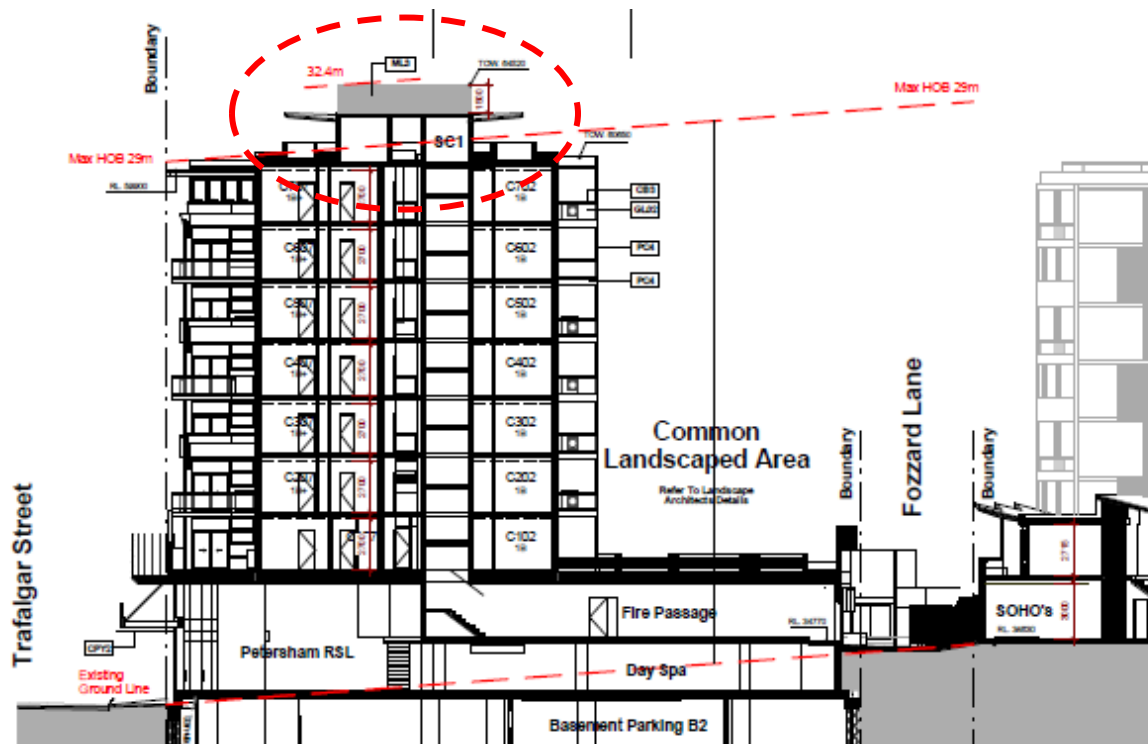


Figure 6: Extract of Section F for Building C in Site 3, variance (3.4 metres) circled in red (Source: Nordon Jago Architects)

### 3. COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THIS CASE. [CL.4.6 (3)(A)]

#### 3.1. Achieves the objectives of the standard

Compliance with the Height of Buildings development standard is unreasonable or unnecessary in the circumstances of this case because, as explained in **Table 2** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.<sup>2</sup>

*Table 1: Achievement of Development Standard Objectives.*

Objective	Discussion
(a) to establish the maximum height of buildings,	<p>The proposal is consistent with the maximum building height that was envisaged when the maximum building height control was established.</p> <p>The maximum building height control was established in an amendment to the MLEP with the benefit of detailed development concept plans that are consistent with the development application.</p> <p>At the time it was known that there would be some minor variations of the maximum building height control as a result of lift overruns and other minor rooftop features. The response to this by the consent authority was to include a provision in Section 9.6.5.1 of the MDCP which expresses the maximum building height in storeys and foreshadows that “<i>Small breaches of the MLEP 2011 height (in metres) can be considered to accommodate lift overruns and architectural roof features.</i>” It is important to note that the proposal is consistent with the storey height expressed in the DCP except for the six-storey street wall height applying to a small area of Building A on Site 3. In this location the Council’s Architectural Excellence Panel recommended that the street wall expression be deleted in favour of the building form as presented which was considered to have a better relationship with the streetscape.</p>
(b) to ensure building height is consistent with the desired future character of an area,	<p>The proposed development is consistent with the detailed development concept plans that were revised in consultation with Council following the exhibition of the Planning Proposal. This review led</p>

<sup>2</sup> In *Wehbe v Pittwater Council* [2007] NSWLEC 827 Preston CJ identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established. Although the decision concerned SEPP 1, it remains relevant to requests under clause 4.6 as confirmed by Pain J in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, notwithstanding that if the first and most commonly applied way is used, it must also be considered in 4.6(4)(a)(ii). The 5 ways in *Wehbe* are: 1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard; 2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary; 3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable; 4. The development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or 5. The zoning of the land is unreasonable or inappropriate.

Objective	Discussion
	to the incorporation of the site-specific master plan for the site in the Petersham South Precinct into Part 9.6 of MDCP 2011. The master plan defines the desired future character of the locality. The proposal is consistent with the building height and massing that is expressed in the masterplan.
(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,	<p>The parts of the residential flat building within Site 1 and Building C in Site 3 in excess of the height provision are minor and are generally located centrally within the building floorplate and therefore do not increase the wall height of the building.</p> <p>The deletion of the street wall expression on Building A as requested by the Architectural Excellence Panel does not prejudice satisfactory exposure to the sky and sunlight.</p> <p>The variations will not be readily discernible when viewed from public domain areas and surrounding properties and the proposed development ensures buildings and public areas receive satisfactory exposure to the sky and sunlight</p>
(d) to nominate heights that will provide an appropriate transition in built form and land use intensity.	<p>The parts of the buildings in excess of the prescribed height limits under MLEP at Site 1 and Site 3 are relatively minor and are located in a position where they will not have a significant perceptible effect on the transition in built form or land use intensity in this locality. For the most part, the building elements which seek to vary the prescribed height limits for the site are located centrally within the building footprint and will not result in any adverse impacts to adjoining properties or the public domain.</p> <p>It is worth noting that the proposed building is consistent with the development concept plans on which the Planning Proposal and the amendment of MDCP 2011 were based on, in relation to the site-specific master plan for the development sites.</p> <p>In particular, it is noted that the overall height and form of Building C is consistent with Section 9.6.5.1 (Masterplan Area (MA 6.1)) of the MDCP which states the following:</p> <p><i>“C5 The height of proposed buildings on the land shaded in Figure (6.1a) must conform to the control diagram(s) in Figures (6.1b) to (6.1m). The height is expressed in number of storeys.</i></p> <p><i>C6 Small breaches in the MLEP 2011 height (in metres) can be considered to accommodate lift overruns and architectural roof features.”</i></p> <p>The relevant control diagram (6.1m) shows a section through Building C illustrating 8 storeys with the lift over run and plant room located above.</p>

Objective	Discussion
	<p>Whilst the proposed lift over run and plant room contributes to the overall height when measured in accordance with the LEP, it is indicated by the MDCP control above (C6), that small breaches in the LEP height control may be considered to be acceptable for accommodating lift overruns and the like. The lift overrun in this instance includes lift access to the rooftop communal open space area and is considered to be consistent with the intentions of the DCP.</p>

#### **4. THERE ARE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE STANDARD. [CL. 4.6(3)(B)]**

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard and the environmental planning grounds advanced in the written request must justify contravening the development standard, not simply promote the benefits of carrying out the development as a whole.

The elements that contravene the maximum building height standard are for the most part lift overruns and rooftop plant that due to their location within the central areas of the roof do not cause unreasonable overshadowing and do not contribute unreasonably to the perceived bulk and scale of the buildings. When expressed in storeys, the proposal is consistent with the building heights shown in the MDCP.

On the Fisher Street frontage of Building A of Site 3, the element which exceeds the maximum building height standard is the front part of the top two floors. Instead of a six-storey street wall in this location the façade continues for the full eight storeys. The Inner West Architectural Excellence Panel considered that this was a more appropriate response to the streetscape of Fisher Street and facilitated the retention of significant trees on the corner of Fisher and Regent Street.

## 5. THE PROPOSAL WILL BE IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE STANDARD AND THE OBJECTIVES OF THE ZONE. [CL.4.6(4)(A)(II)]

In section 3 (above), it was demonstrated that the proposal is consistent<sup>3</sup> with the objectives of the development standard. The proposal is also consistent with the objectives of the zone as explained in **Table 2** (below).

*Table 2: Consistency with Zone Objectives.*

Objective	Discussion
To provide for the housing needs of the community within a high-density residential environment.	The proposal provides 357 new dwellings in a high-density residential environment that is consistent with the Masterplan adopted by Council and incorporated in the MDCP.
To provide a variety of housing types within a high-density residential environment.	The proposal comprises a mix of modern one- and two-bedroom dwellings with lift access which will fill a gap in the local housing market.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	The proposal facilitates the relocation and upgrading of the Petersham RSL Club. The Club provides recreation and leisure facilities for the local community. The proposal also includes a new café.
To provide for office premises but only as part of the conversion of existing industrial and warehouse buildings or in existing buildings designed and constructed for commercial purposes.	Not applicable to the proposal.
To provide for retail premises in existing buildings designed and constructed for commercial purposes.	Not applicable to the proposal.
To provide for well connected neighbourhoods that support the use of public transport, walking and cycling.	<p>The proposal improves connectivity within and surrounding the three sites. It incorporates the widening of Fozzard Lane located and the creation of a publicly accessible open space creating public pedestrian access between Trafalgar Street, Fozzard Lane and Regent Street.</p> <p>The proposal includes the provision of a total of 281 bicycle spaces within the three sites, thereby encouraging and accommodating the use of active forms of transportation for those utilising the developments.</p>

<sup>3</sup> In *Dem Gillespies v Warringah Council* [2002] LGERA 147 and *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC the term 'consistent' was interpreted to mean 'compatible' or 'capable of existing together in harmony'



	The provision of 357 new dwellings in close proximity to Petersham railway station will support the use of public transport.
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As can be seen from **Table 1** and **Table 2**, the proposal is consistent with the objectives of the standard and the objectives of the zone and is therefore considered to be in the public interest.

**6. CONTRAVENTION OF THE DEVELOPMENT STANDARD DOES NOT  
RAISE ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL  
ENVIRONMENTAL PLANNING. [CL. 4.6(5)(A)]**

There is no identified outcome which would be prejudicial to planning matters of state or regional significance that would result as a consequence of varying the development standard as proposed by this application. This is because the minor variations of the development standard generally relates non-habitable space including rooftop plant and lift overruns and does not intensify development of the sites.

## **7. THERE IS NO PUBLIC BENEFIT OF MAINTAINING THE STANDARD. [CL. 4.6(5)(B)]**

It is worth noting that the variance of the Height of Buildings development standard relates to the plant lift overruns within the residential flat building at Site 1 and Building C at Site 3 as well as the provision of private open space for four of the units within Building A at Site 3. The variation of the development standard is minor and will not affect surrounding residential amenity in terms of privacy, solar access, visual impact or view loss.

Accordingly, there is no public benefit<sup>4</sup> in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the variation to the Height of Buildings standard.

We therefore conclude that the benefits of the proposal outweigh any disadvantage and as such the proposal will have an overall public benefit.

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<sup>4</sup> *Ex Gratia P/L v Dungog Council* (NSWLEC 148) established that the question that needs to be answered to establish whether there is a public benefit is "whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development"

## 8. CONCLUSION

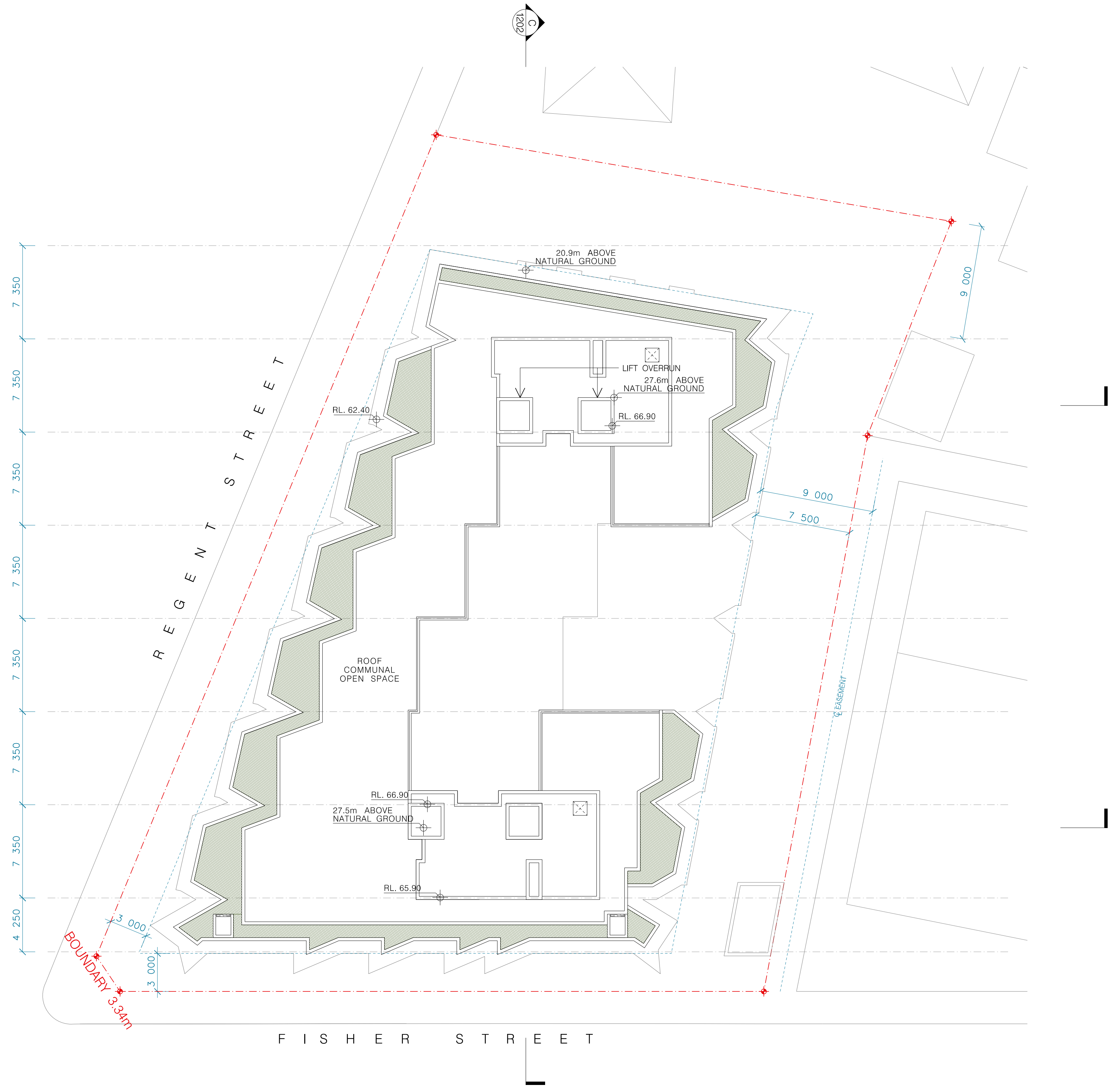
This Clause 4.6 variation request demonstrates, as required by Clause 4.6 of the Marrickville Local Environmental Plan 2011, that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;
- There are sufficient environmental planning grounds to justify the contravention;
- The development achieves the objectives of the development standard and is consistent with the objectives of the R4 High Density Residential Zone and Clause 4.3 of the MLEP 2011;
- The proposal is consistent with the surrounding and desired character;
- The proposed development, notwithstanding the variation, is in the public interest and there is no public benefit in maintaining the standard; and
- The variation does not raise any matter of State or Regional Significance.

On this basis, therefore, it is considered appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.

## **APPENDIX 1**

Site 1 rooftop plan and sections.



01 ROOF PLAN  
1:200

TYPICAL BASIC GLAZING SCHEDULE

NOTE: RESTRICTED OPENING TO BCA REQUIREMENTS REFER TO PLAN FOR WIDTH OF GLAZING. REFER TO PLAN FOR SCREENED GLAZING

AWNING A-A - TYPE A	SLIDING S-A - TYPE A	SLIDING S-B - TYPE B	SLIDING S-C - TYPE C	CASEMENT C-A - TYPE A	DOUBLE HUNG DH - TYPE A	LOUVER L-A - TYPE A
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UNIT STORAGE SCHEDULE

STORAGE TYPE	m <sup>3</sup>
ST - A	2
ST - B	3
ST - C	4
ST - D	5
ST - E	6

\* TOTAL STORAGE VOLUME PER UNIT

UNIT STORAGE SCHEDULE

STORAGE TYPE	m <sup>3</sup>
ST - A	2
ST - B	3
ST - C	4
ST - D	5
ST - E	6

\* TOTAL STORAGE VOLUME PER UNIT

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SCALE: 1:200@A1 / 1:400@A3  
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DATE:  
25 OCT 2018

CHECKED 1:  
S/A, LM

CHECKED 2:  
JL

DRAWN BY:  
S/A, LM, PN

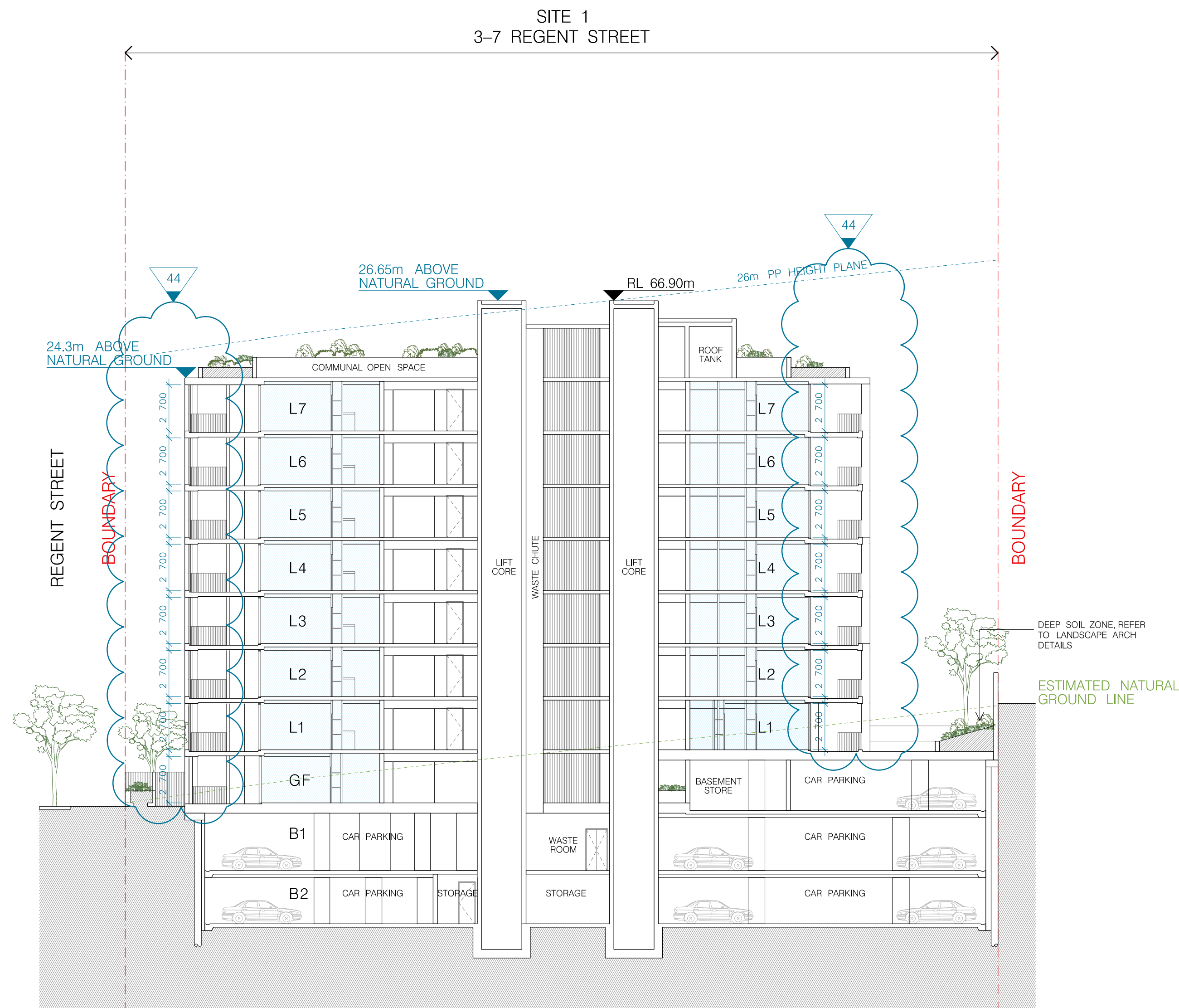
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ROOF PLAN

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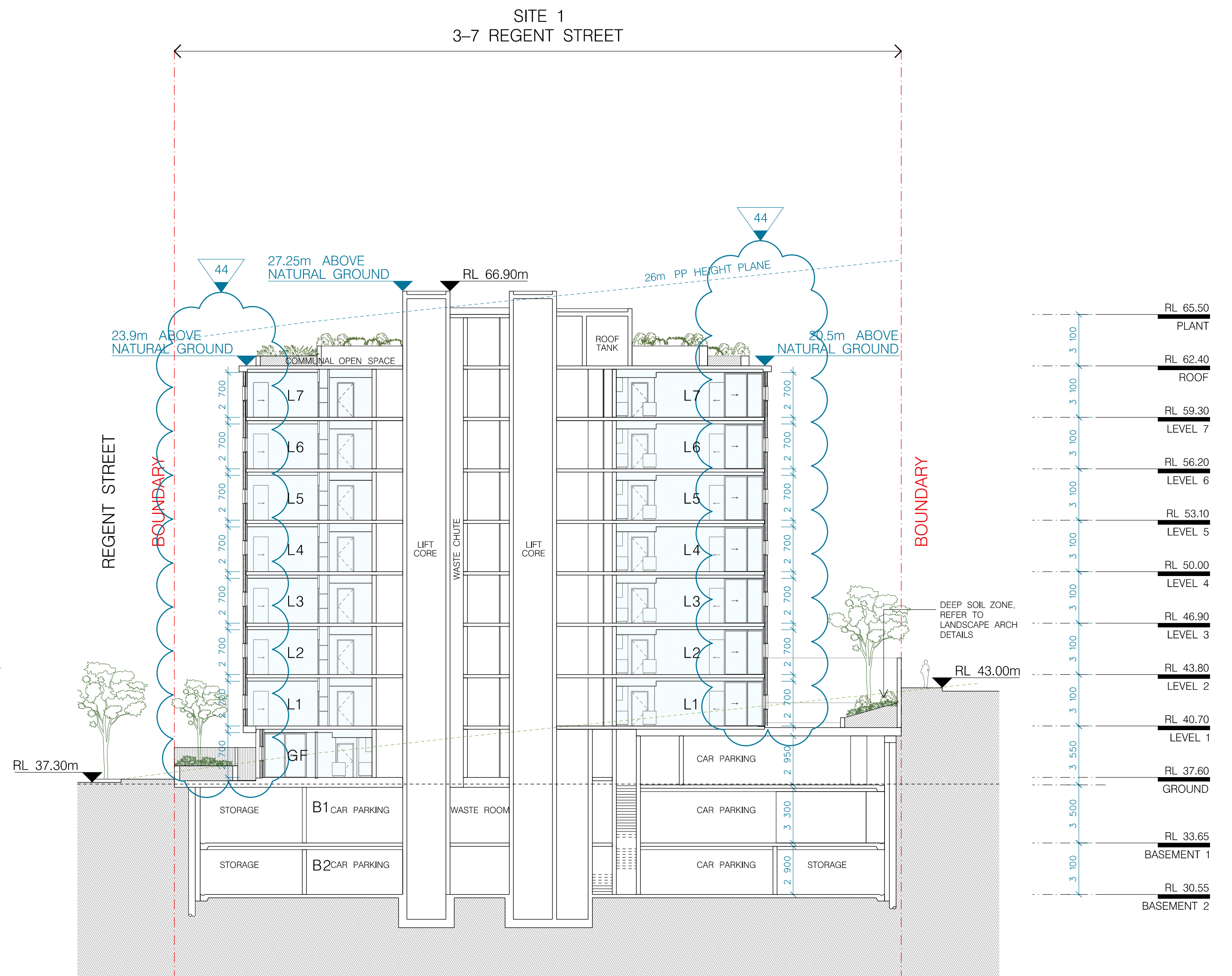
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ISSUE  
B





01 SECTION A  
1:200



02 SECTION B  
1:200



Architectural section drawing of a building complex. The drawing shows a central core with a waste chute and two side wings. The building is bounded by a red dashed line labeled "BOUNDARY" and "FISHER STREET".

Key features and dimensions:

- Central Core:** Contains a "WASTE CHUTE" and a "31" level marker. The height is marked as "26m PP HEIGHT PLANE".
- Left Wing:** Contains levels L1, L2, L3, L4, L5, L6, and L7. The height is marked as "27.60m ABOVE NATURAL GROUND". The ground level is marked as "RL 66.90m".
- Right Wing:** Contains levels L1, L2, L3, L4, L5, L6, and L7. The height is marked as "24.7m ABOVE NATURAL GROUND". The ground level is marked as "HL 41.80m".
- Ground Level:** Includes "B1 CAR PARKING", "B2 CAR PARKING", and "COMMS". The ground level is marked as "RL 37.10m".
- Height Markers:**
  - 23.8m ABOVE NATURAL GROUND (Left Wing)
  - 27.60m ABOVE NATURAL GROUND (Left Wing)
  - 24.7m ABOVE NATURAL GROUND (Right Wing)
  - 20.9m ABOVE NATURAL GROUND (Right Wing)
- Other Dimensions:**
  - 2 700 (multiple instances, likely floor-to-floor height)
  - 1 000 (likely total height or depth)

## BOUNDARY

FISHER STREET

01

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SCALE: 1:200@A1 / 1:400@A3



DRAWING:  
SECTION C

DRAWING No.  
DA - 1202

ISSUE  
B

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