



Land and Environment Court New South Wales

Case Name: Linfield Developments Pty Ltd v Cumberland Council

Medium Neutral Citation: [2019] NSWLEC 131

Hearing Date(s): 17 – 19 September 2019

Date of Orders: 20 September 2019

Date of Decision: 20 September 2019

Jurisdiction: Class 1

Before: Robson J

Decision: See orders at [29]

Catchwords: DEVELOPMENT APPLICATION – appeal against Council’s deemed refusal of development application for demolition of existing structures and construction of shop top housing and residential flat buildings above commercial premises over basement car parking – cl 4.6 written request seeking to exceed the height development standard – consideration of further material and amended plans – appeal upheld – development consent granted subject to conditions of consent

Legislation Cited: Auburn Development Control Plan 2010
Auburn Local Environmental Plan 2010 cl 4.3, 4.6
Environmental Planning and Assessment Act 1979 (NSW) ss 1.4, 8.15
Standard Instrument (Local Environmental Plans) Order 2006 cl 4.6
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118
RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130
Wehbe v Pittwater Council [2007] NSWLEC 827

Texts Cited: Land and Environment Court Practice Note – Class 1

Development Appeals
NSW Department of Planning and Environment,
"Apartment Design Guide", July 2015

Category: Principal judgment

Parties: Linfield Developments Pty Ltd (Applicant)
Cumberland Council (Respondent)

Representation: Counsel:
N Eastman with L Nurpuri (Applicant)
A Gough, solicitor (Respondent)

Solicitors:
Mills Oakley (Applicant)
Storey & Gough Lawyers (Respondent)

File Number(s): 2018/00348614

Publication Restriction: Nil

JUDGMENT

- 1 Before the Court is a Class 1 appeal brought by Linfield Developments Pty Ltd ('applicant') concerning the deemed refusal by Cumberland Council ('Council') of development application DA-62/2018 lodged with Council on 27 February 2018. The application, which was amended on 25 June 2019, and further amended on 19 September 2019, seeks consent for the demolition of existing structures, consolidation of six lots, construction of shop top housing and residential flat buildings comprising 427 apartments above commercial tenancies over basement parking and public domain works at 35 and 26 – 36 Northumberland Road, Auburn ('site').
- 2 On 17 September 2019, during the first day of the hearing, the parties' legal representatives informed the Court that the applicant had prepared further detailed plans and evidence which could satisfy a number of Council's outstanding concerns. The hearing was adjourned to allow Council to consider the further material.
- 3 An inspection of the site and surrounding areas (including the residence of two objectors) was undertaken with the parties' legal representatives and experts on day two of the hearing. At the site view, the Court heard oral submissions from two local residents who had made written submissions.
- 4 Upon resuming the hearing in court, Mr N Eastman of counsel (who appears with Ms L Nurpuri for the applicant) and Mr A Gough, solicitor (who appears for Council) tendered extensive documentary material and detailed expert evidence. The parties' legal representatives informed the Court that the material and the applicant's recently amended plans addressed Council's outstanding concerns. The Court was informed that the parties wished to proceed by way of the Court considering the further material and making orders by consent.

- 5 For the reasons that follow, I consider that the appeal should be upheld and that development consent should be granted subject to conditions generally in accordance with the draft consent orders provided by the parties.

Background

- 6 The site is bifurcated by Northumberland Road on the intersection with Hall Street. It presently comprises six Torrens Title allotments with a combined area of approximately 12,000m². The site is presently occupied by an existing two storey commercial building (being the former Auburn RSL building) on the eastern side of Northumberland Road and an at grade sealed car park on the western side. The site is in an area characterised by a diverse mix of residential development, ranging from single storey dwelling houses to large scale residential flat buildings.
- 7 The site is zoned B4 – Mixed Use pursuant to the Auburn Local Environmental Plan 2010 ('ALEP'). The objectives of the B4 zone are:
- To provide a mixture of compatible land uses.
 - To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
 - To encourage high density residential development.
 - To encourage appropriate businesses that contribute to economic growth.
 - To achieve an accessible, attractive and safe public domain.
- 8 For convenience, and to provide context for what follows, an aerial photograph of the site (extracted from the evidence) is reproduced below:



9 The salient elements of the proposal are:

- (1) Demolition of the former Auburn RSL building currently existing at 35 Northumberland Road and demolition of the at grade car park at 26 – 36 Northumberland Road;
- (2) Excavation associated with the construction of two basements (of three and four levels respectively);
- (3) Construction of a residential flat building and commercial premises on each side of Northumberland Road;

- (4) The western building (at 26 – 36 Northumberland Road) will comprise of two separate “blocks” and will have a height of 10 storeys containing basement level parking and storage areas, a ground level podium consisting of commercial tenancies and residential apartments, and further residential apartments within two towers between levels 1 to 9; and
- (5) The eastern building (at 35 Northumberland Road) will comprise of four separate “blocks” and will have a height of 10 storeys containing basement level parking and storage areas, a ground level podium consisting of commercial tenancies and residential apartments, and further residential apartments within three towers between levels 1 to 9.
- 10 In total, there will be 427 residential apartments comprising 126 x 1 bedroom apartments, 276 x 2 bedroom apartments, 25 x 3 bedroom apartments above 3,999m² of commercial space.
- 11 Council’s amended statement of facts and contentions dated 1 August 2019 (‘SOFAC’) raised concerns in relation to overdevelopment, overshadowing, design quality of the residential apartment development, built form, scale, streetscape and public domain, landscaping and open space, parking and loading, acoustic impacts, and public interest.
- 12 Each of the contentions has been addressed to Council’s satisfaction by the amended plans and proposed conditions.
- 13 The plans the subject of the development application have been through a number of iterations. On 25 June 2019, the applicant was granted leave to rely on an amended development application, and further leave was granted on 19 September 2019. The most recent amendments (which the parties agree are not minor for the purposes of s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW) (‘EPA Act’)) respond to expert evidence primarily in relation to town planning and urban design, as well as acoustic, traffic, landscaping, hydrological and civil engineering concerns.

Given the size and nature of the proposed development, the evidence now before the Court is extensive and comprises the material accompanying the Class 1 application in addition to the further material lodged in support of the most recent amended plans.

Consideration

Merit matters

- 14 In making my findings in light of the agreement now reached between the parties, I have read the detailed joint expert report (town planning and urban design) filed 13 September 2019 and prepared by Messrs R Dickson, I Armstrong, D Haskew and S McDonald ('Town Planning and Urban Design Report'), which considers Council's contentions in relation to overdevelopment, overshadowing, design quality, built form, scale, streetscape and public domain. The Town Planning and Urban Design Report refers to and considers the relevant environmental planning instruments and policies, including State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (and its "Apartment Design Guide" companion), the ALEP and the Auburn Development Control Plan 2010.
- 15 It is clear that the matters considered by the experts in the Town Planning and Urban Design Report led to the most recent amendments of the plans. At the site inspection, Messrs Haskew, Armstrong and McDonald confirmed that the more recent amended plans, subject to a number of minor clarifications, satisfied all the outstanding concerns particularised in Council's SOFAC.
- 16 I have also considered two acoustic reports of Dr R Tonin, the expert joint report in relation to traffic and parking prepared by Mr R Varga and Mr B Sudarson, the arboricultural impact statement and tree management plan prepared by Mr S Freeman, as well as the joint expert report of the hydrological engineers prepared by Mr D Bewsher and Mr B Sudarson.

17 Given my consideration of the evidence, my understanding of the not insignificant amendments made to the plans in response to the expert evidence, and considering the agreed conditions, I accept that the evidence now before the Court appropriately addresses the issues raised in Council's contentions.

Variation of the height standard

18 The Court's approval of a variation to a development standard is required to engage jurisdiction to entertain this appeal. Clause 4.3 of the ALEP specifies the maximum height of buildings by reference to the Height of Buildings Map therein. This provision of the ALEP is a development standard for the purposes of the EPA Act as it fixes a standard in respect of an aspect of the development, being the building height (see par (c) of the definition of "development standards" in s 1.4 of the EPA Act). The maximum height shown on the Height of Buildings Map for the site is 32m.

19 Because there is a non-compliance with cl 4.3(2) of the ALEP in relation to building height, the applicant prepared an updated written request dated 18 September 2019 for variation to cl 4.3(2) pursuant to cl 4.6 of the ALEP. The non-compliance primarily concerns lift overruns and some ancillary structures which relate to the rooftop communal open space. The exceedance, over a relatively small area, ranges between 150mm to 3.7m.

20 For convenience, and to understand what follows, a plan showing the extent of the non-compliance with the height standard (that is, the height blanket) is attached and marked Annexure "A".

21 Clause 4.6 of the ALEP provides an exception to the development standards, including the height development standard in cl 4.3 if certain requirements are met. Clause 4.6 is a standard provision of local government plans throughout NSW and it derives from cl 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006. Clause 4.6 of the ALEP relevantly provides:

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, and
 - (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.

22 Pursuant to cl 4.3(1) of the ALEP, the objectives of the height development standard are:

- (a) to establish a maximum height of buildings to enable appropriate development density to be achieved, and
- (b) to ensure that the height of buildings is compatible with the character of the locality.

23 As stated by Preston CJ of LEC in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [24], only if the consent authority meets the requirements in cl 4.6(3) and (4) will the power in cl 4.6(2) to grant consent to development that contravenes the development standard be enlivened.

24 Having considered the applicant's cl 4.6 written request and the expert evidence before the Court, I record my findings as follows:

(1) Pursuant to cl 4.3(3), I have considered the applicant's written request that seeks to justify the contravention of the height standard. The request demonstrates the matters in cl 4.6(3)(a) and (b), that is, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (as the objectives of the standard are achieved notwithstanding non-compliance with the standard and requiring compliance would thwart or undermine at least one of the objectives of the height control development standard: *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42]-[43], [46]), and that there are sufficient environmental planning grounds to justify contravening the development standard.

(2) I am satisfied under cl 4.6(4)(a)(i) that the applicant's written request has in fact adequately addressed the matters required to be demonstrated by cl 4.6(3) (that compliance with the development standard is unreasonable or unnecessary in the circumstances, and

that there are sufficient environmental planning grounds to justify contravening the development standard). I rely upon and adopt the reasoning on pages 11-12 in the written request (Exhibit G in these proceedings).

- (3) I consider that compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case as: limiting the height of the building (for example, to 9 storeys) while still facilitating the 3.6:1 FSR development standard will erode site planning flexibility and reduce the articulation in the skyline of the proposed development which I consider to be both necessary and appropriate; it is antithetical to the B4 zone objective (see [7] above) “to encourage high density residential development”; and, the breach would have negligible adverse impacts and would allow a better outcome for the development.
- (4) Further, taking into account the limited effect of the relatively minor exceedance, I accept that the objectives of the standard (including enabling appropriate development density to be achieved) are met notwithstanding the minor non-compliance with the standard and that the underlying objective or purpose of the standard would be defeated or flouted if compliance was required. To this end, requiring compliance with the standard would be unreasonable.
- (5) I consider there to be sufficient environmental planning grounds to justify contravening the development standard as I find, as noted above, that the specific elements of the non-compliant parts of the building are minor and provide a negligible contribution to building bulk. As such, the non-compliant parts are not demonstrative of overshadowing impacts. In light of the fact that the site is a very large development (approximately 12,000m²) and in accordance with the expert evidence, the minor variation to the height standard delivers significant amenity improvements for adjoining properties compared to an alternative scenario (where a complying development may be under

the maximum height limit but may occupy a larger building footprint with reduced site flexibility within which to protect the amenity of adjoining buildings).

(6) Pursuant to cl 4.6(4)(a)(ii), I am satisfied that the proposed development is in the public interest because it is consistent with both of objectives of the development standard (see [22] above) and the objectives of the B4 zone (see [7] above). I accept and adopt the reasoning on pages 9-11 of Exhibit G.

(7) In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [29], Preston J stated:

On appeal, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41].

(8) Pursuant to cl 4.6(5)(a), I note that contravention of the development standard does not raise any matters of significance for State or regional environmental planning. Having regard to the specific characteristics of the site and the details of the proposed development, I consider that the non-compliance supports Council's vision for the locality. Accordingly, pursuant to cl 4.6(5)(b), I find that there is no public benefit in maintaining the development standard in this instance.

25 I have considered the written submissions received in response to the advertising of the proposal from Mr R Minehan and Ms R Chan who oppose the development, and from Mr J Ralph, who wrote in support of the development. I have also considered the oral submissions made onsite by both Mr Minehan and Mr Ralph. The Court also inspected the residence of Mr Minehan and Ms Chan at 5/24 Northumberland Road to understand their concerns which in summary related to loss of value of their property,

disruption during construction, loss of privacy and sunlight, loss of a local public car park, and loss of native trees.

26 While the objections of Mr Minehan and Ms Chan were bona fide and well presented, the evidence before the Court has to a large extent considered and addressed the specific concerns raised. In particular, the Town Planning and Urban Design Report considered the impact of the proposal on the residential apartment building in which Mr Minehan and Ms Chan reside. Further, at the hearing, the Court was informed that the amended plans provided for further aspects including building separation and further landscaping at the interface between the proposal and 24 Northumberland Road. I am informed that these aspects have been explained to Mr Minehan and Ms Chan.

27 Although discernible effects will result from the proposal, particularly as it introduces a form of development that is both obvious and to some extent at variance with the present surrounding development, the evidence of the various experts leads me to the view that the amenity and other impacts the subject of the residents' concerns are not sufficient on their own or in a cumulative sense to warrant refusal of the development application. I also accept the expert evidence that there is "high vulnerability" of older three storey flat buildings within the emerging town centre.

28 Based on the evidence before me and for the reasons given above, I am satisfied that the proposal and the conditions now agreed between the parties adequately address the matters raised in Council's contentions and the concerns raised by the objectors. To adopt the wording in par (99) of the Court's Practice Note for Class 1 Development Appeals (dated 29 March 2018), it is "lawful and appropriate" to grant consent to the proposal.

Orders

29 The orders of the Court are:

- (1) The applicant is granted leave to amend development application DA-62/2018 to rely upon the plans and documents set out in the Schedule attached to these orders.
- (2) The appeal is upheld.
- (3) Development consent is granted to development application DA-62/2018 for the demolition of existing structures, construction of shop top housing and residential flat buildings comprising 126 x 1 bedroom apartments, 276 x 2 bedroom apartments, 25 x 3 bedroom apartments above 3,999m² of commercial premises over basement car parking for 742 vehicles on the land comprising Lot 33 in DP 829625 and Lots 1, 2, 3, 4, 5 Section 11 in DP 995 and known as No 35 and 26 – 36 Northumberland Road, Auburn, subject to the Conditions of Consent set out in Annexure "B".

30 The Court notes:

- (1) In relation to Order (1) above, the parties agree that the amendments made to the development application are not minor for the purposes of section 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW) and that the applicant is to pay the respondent's costs thrown away as a consequence of the amendments as agreed or assessed.

I CERTIFY THAT THIS AND
THE 11 PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE J. E. ROBSON.

P. Pritchard
.....
Associate

Date 20 September 2019
.....

ANNEXURE "A"

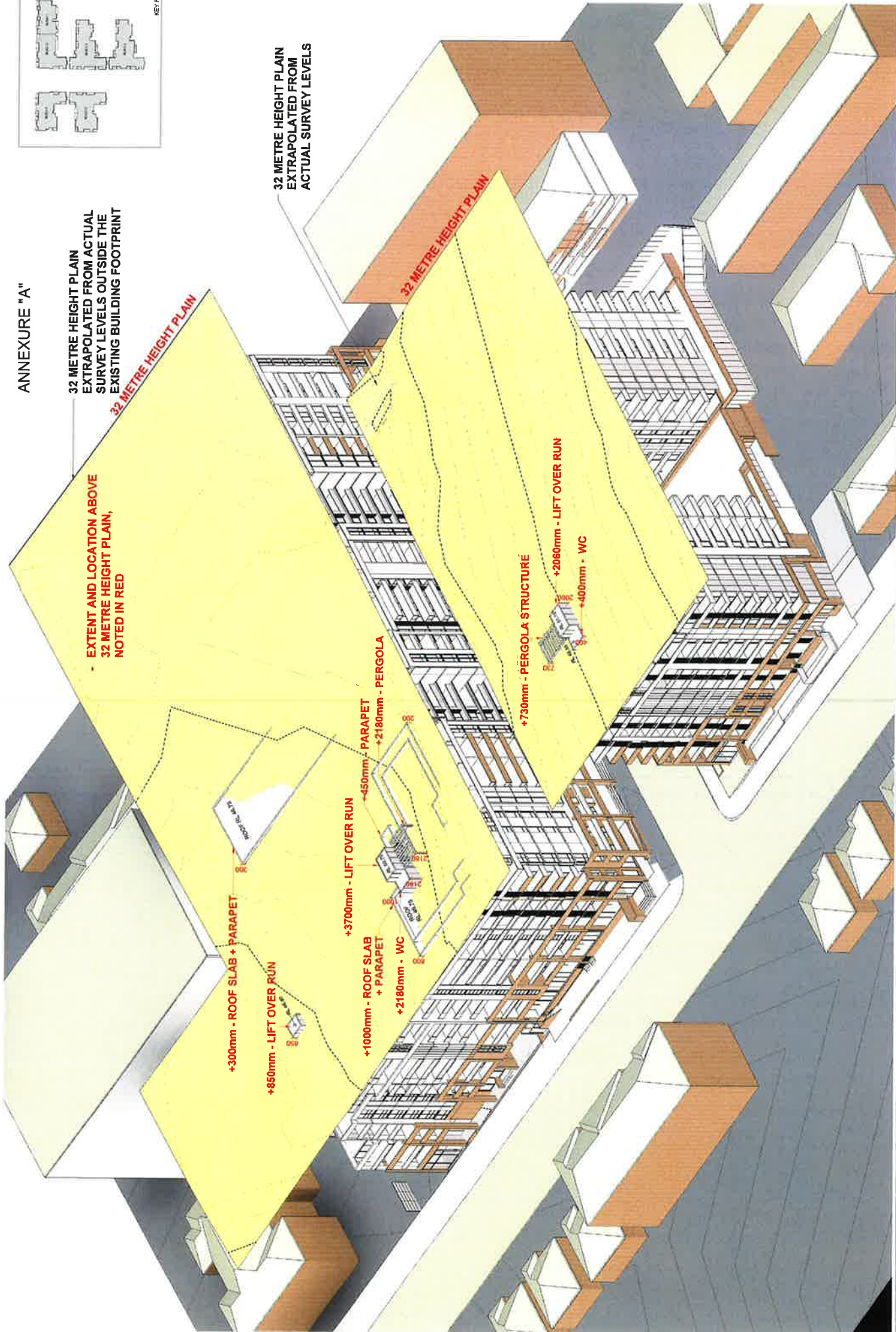
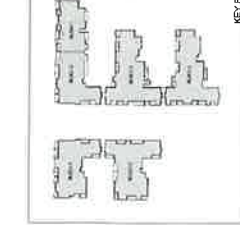
32 METRE HEIGHT PLAIN
EXTRAPOLATED FROM ACTUAL
SURVEY LEVELS OUTSIDE THE
EXISTING BUILDING FOOTPRINT

- EXTENT AND LOCATION ABOVE
32 METRE HEIGHT PLAIN,
NOTED IN RED

32 METRE HEIGHT PLAIN

32 METRE HEIGHT PLAIN
EXTRAPOLATED FROM
ACTUAL SURVEY LEVELS

32 METRE HEIGHT PLAIN



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AERIAL DIAGRAM

DA-551 - 1
1:500 (A3)
DATE: AUGUST 2013 (REV)
DRAWN: LO

THE GARDENS OF AUBURN

NORTHUMBERLAND ROAD
AUBURN



KWC CAPITAL PARTNERS +
LINFELD DEVELOPMENTS

CLIENT

NO.	DATE	REVISION



