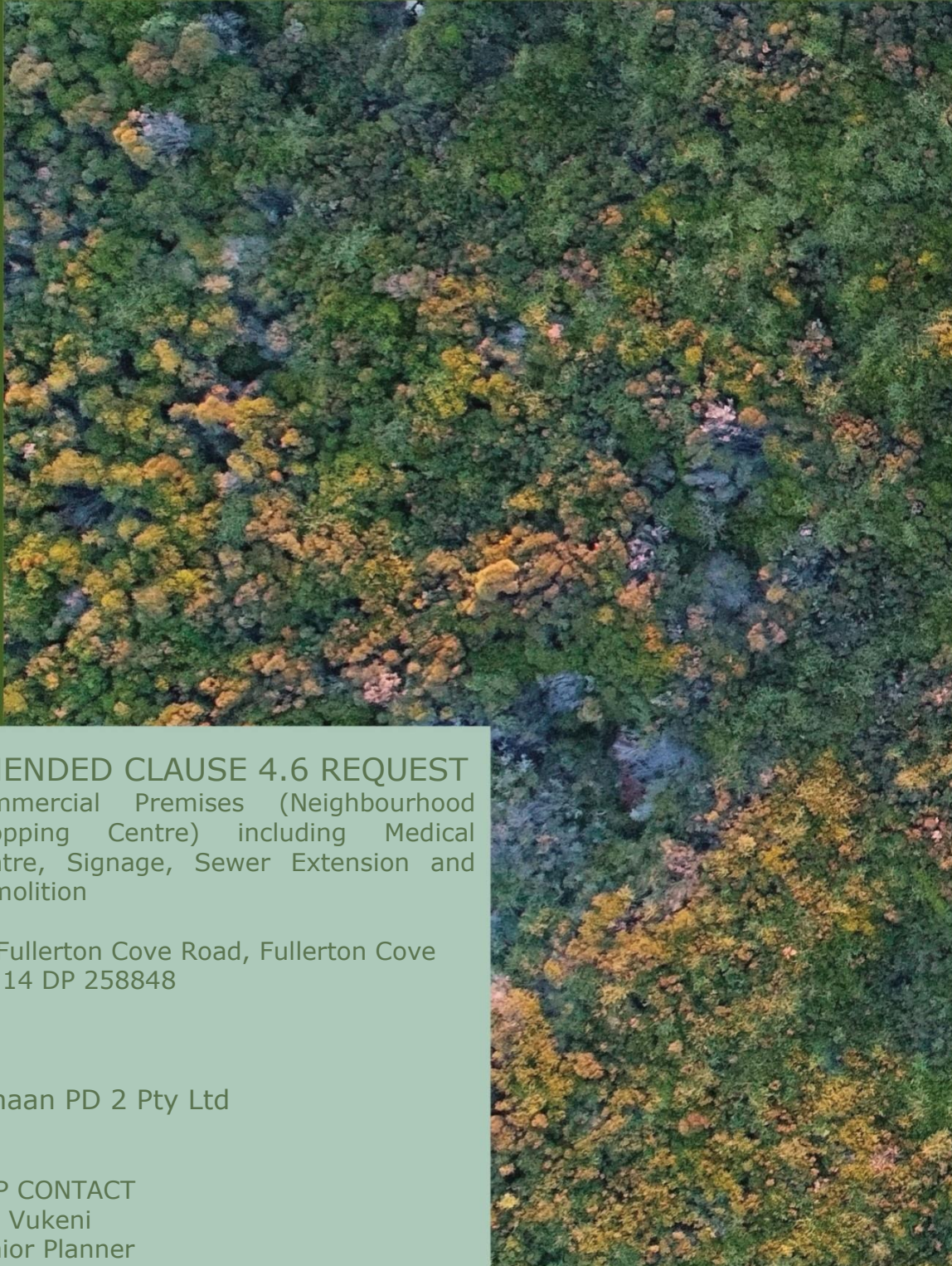


Appendix 4: Clause 4.6 Variation Request

Monteath
& Powys

M &
P



AMENDED CLAUSE 4.6 REQUEST

Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition

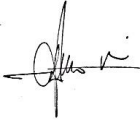

42 Fullerton Cove Road, Fullerton Cove
Lot 14 DP 258848

For
Canaan PD 2 Pty Ltd

M&P CONTACT
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Senior Planner

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Our Ref:	22/0032
Date:	22/03/2024
Project	Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition
Client	Canaan PD 2 Pty Ltd
Author	Itto Vukeni Senior Planner B. U & E P, MPIA
Certification	<i>I hereby certify that this assessment has been prepared in accordance with the requirement of the Environmental Planning & Assessment Act 1979 and its associated Regulations and Guidelines. I certify that to the best of my knowledge the information contained within this report is neither false nor misleading.</i>
Signature	
Reviewer	Lachlan Sims Principal Planner B U & R P, MPIA
Signature	

Document Control					
Revision	Date	Revision Details	Author	Verifier	Approver
0	13/03/2024	Draft	IV	LS	LS
1	22/03/2024	Final	IV	LS	LS

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APPENDIX A: BUILDING HEIGHT PLANE

APPENDIX B: PROPOSED DEVELOPMENT PLANS

1. INTRODUCTION

Monteath & Powys Pty Ltd act on behalf of the Applicant, Canaan PD 2 Pty Ltd, in lodging this submission for a Clause 4.6 request pursuant to the *Port Stephens Local Environmental Plan 2013* (LEP). The request seeks to vary the maximum building height provisions for the proposed Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition development on Lot 14 DP 258848, addressed as 42 Fullerton Cove Road, Fullerton Cove.

The proposed development is to be reviewed against the relevant provisions under Part 4 of the LEP which overviews principal development standards. Specifically, the development is to be reviewed against clause 4.3 and 4.6 for exceptions to development standards.

2. SITE DETAILS

Lot 14 DP258848 is the site in this matter, located at 42 Fullerton Cove Road, Fullerton Cove NSW 2318. The land constitutes an area of 6.86 hectares with primary road frontage to Fullerton Cove Road and secondary road frontage to Nelson Bay Road. Access to the site is currently provided via the principal frontage and towards the northwestern property corner.

3. PROPOSED DEVELOPMENT

Change of Use is proposed for Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre, Signage, Sewer Extension and Demolition over the site. Plans detailing the proposal are attached as **Appendix A** and **B**. The development proposes a maximum building height of 9.75m from the natural ground level which exceeds the maximum building height provisions for the site of 9m by an additional 0.75m.

4. DEVELOPMENT STANDARD TO BE VARIED

It is proposed to vary clause 4.3 (2) of the *Port Stephens Local Environmental Plan 2013* relating to height of buildings. The development standard to be varied is not expressly excluded from the operation of Clause 4.6 of the LEP.

Clause 4.3 of the LEP for height of buildings dictate that:

(1) *The objectives of this clause are as follows—*

- (a) *to ensure the height of buildings is appropriate for the context and character of the area,*
- (b) *to ensure building heights reflect the hierarchy of centres and land use structure.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

Figure 1 provides an extract from the Port Stephens Council's height of building map to depict the height provisions for the site.



Figure 1: Building Height Map (Port Stephens Council, 2024)

Under the LEP, building height (or height of building) is defined as follows:

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.*

Clause 4.3 applies to the proposal as it relates to the erection of a Commercial Premises (Neighbourhood Shopping Centre) including Medical Centre and Signage building on land shown on height of buildings map – sheet HOB_004A. The site is identified as having a maximum height of 9m as per **Figure 1**.

5. PLANNING CONTEXT

The site is associated with an earlier Planning Proposal approval to rezone the premises from RU2 Rural Landscape to B1 Neighbourhood Centre (E1 Local Centre) and E3 Environmental Management (C2 Environmental Conservation in March 2017) determined on 12 October 2020 by the Department of Planning and Environment and gazetted on 14 October 2022. Approximately 2.0 - 2.5ha of the land was proposed for rezoning to E1 Local Centre, with up to 2.0 hectares designated for development. The selection of this area was informed by a site analysis that considered flooding and ecology to balance them with operational needs. The remaining portion of the site was proposed to be preserved in its natural vegetated state for rezoning to E3 Environmental Conservation (C2 Environmental Conservation).

5.1 PORT STEPHENS LOCAL ENVIRONMENTAL PLAN 2013

The *Port Stephens Local Environmental Plan 2013* is the relevant local planning instrument applicable to the site and the proposed development. The aims of this plan are as follows:

(2) The particular aims of this Plan are as follows—

(aa) (Repealed)

(a) to cultivate a sense of place that promotes community well-being and quality of life,

(b) to provide for a diverse and compatible mix of land uses,

(c) to protect and conserve environmental values,

(d) to facilitate economic growth that contributes to long-term employment,

(e) to provide opportunities for housing choice and support services tailored to the needs of the community,

(f) to conserve and respect the heritage and cultural values of the natural and built environments,

(g) to promote an integrated approach to the provision of infrastructure and transport services,

(h) to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts.

Compliance with aims a, b, c, d, f, g, and h is achieved by the proposed development as demonstrated in the Statement of Environmental Effects (SEE) which accompanied the lodged Development Application.

Pursuant to the LEP, the development area is zone E1 Local Centre whilst the remaining site area is zoned C2 Environmental Conservation. An extract of the zone objectives is provided below:

Zone E1 Local Centre

1 Objectives of zone

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.

Zone C2 Environmental Conservation

1 Objectives of zone

- To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.
- To prevent development that could destroy, damage or otherwise have an adverse effect on those values.

The proposed development complies with zone E1 Local Centre and C2 Environmental Conservation objectives. By promoting a range of retail, business and community uses that serve the needs of people who live in, work in, or visit the area. As well as by encouraging investment in local commercial development. Further, adverse impacts on ecological, cultural, and aesthetic values are not proposed by the development as demonstrated in the Statement of Environmental Effects accompanying the lodged Development Application.

6. EXTENT OF NON-COMPLIANCE

The proposed development exceeds the maximum building height provisions at the northern and south building aspects. **Figure 2** provides an extract from the proposed development plans to overview the height exceedance.

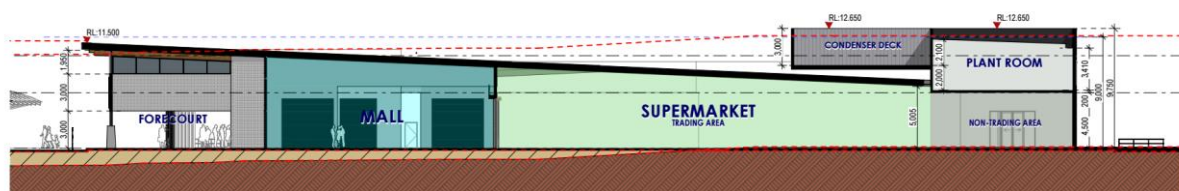


Figure 2: Building Section (EJE, 2024)

Specifically, the blue dashed horizontal line indicates a 9m height above the proposed floor level. In contrast, the red dashed line indicates a 9m height above natural ground level.

The blue 9m height line above floor level, results in only the perimeter walls of the Plant Room and Condenser Deck on the First Floor exceeding the 9m height limit (as shaded in red in **Figure 2**). Note, the perimeter walls are only parapets or screens walls, where the actual roof is lower than the 9m height line, and the Condenser Deck is an open area (except for the expected mechanical plant)

Whereas the red 9m height line above natural ground, results in the Forecourt roof exceeding the 9m height limit (southern building aspect). However, this can be considered as an architectural feature.

In effect, a variation of 0.75m or 8.33% to the development standard is proposed. As shown in **Figure 3**, the parts exceeding the maximum building height provisions are considered minor and are triggered by the proposed condenser deck and plant room and southern roof pitch which is considered as an architectural roof feature.

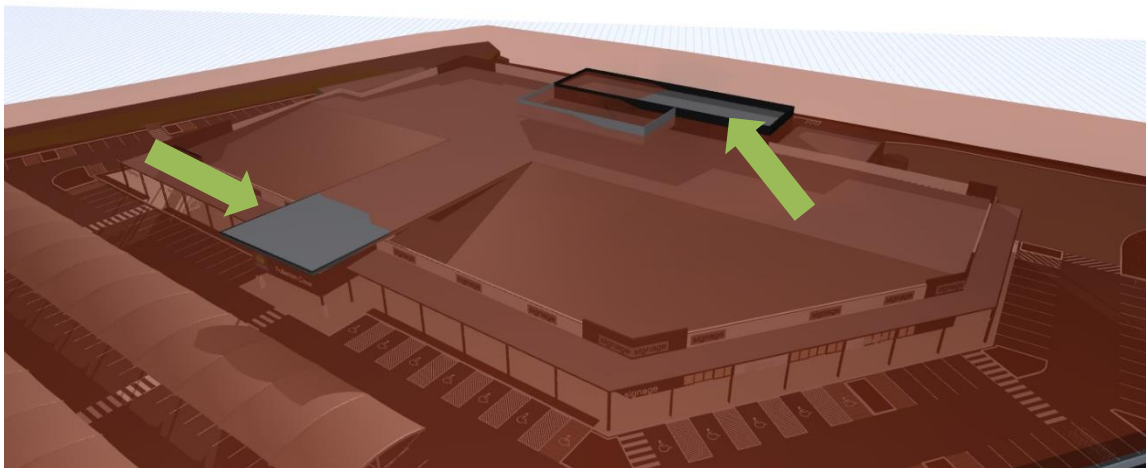


Figure 3: Building Section (EJE, 2024)

Visual amenity impacts on the adjoining properties, due to exceedance of the maximum building height, are not envisaged for the proposed development. Further, the additional built form proposed will not compromise the architectural elements within the locality, the bulk or scale of the development along Fullerton Cove as it is located within the northern and southern building aspects which are surrounded by vegetation. As such, a degree of flexibility is to be considered in this instance.

7. PRINCIPLES OF THE LAND & ENVIRONMENT COURT RELATIVE TO CLAUSE 4.6

7.1 INITIAL ACTION PTY LTD VS WOOLLAHRA MUNICIPAL COUNCIL 2018

The case of Initial Action Pty Ltd v Woollahra Municipal Council in 2018 clarified how a certain clause, Clause 4.6, in the Woollahra LEP (Local Environmental Plan) is applied. This clause allows a council to approve a development even if it doesn't meet certain rules if certain conditions are met.

The court pointed out that before granting such approval, the council must be convinced of two things. First, that the developer has provided a good enough reason why they can't meet the rules and that there are good environmental reasons to allow it. Second, the council must directly be satisfied that these reasons are good enough, not just indirectly by accepting the developer's explanation.

This report evaluates how well a particular development meets these requirements based on established court principles.

Section 8 of this report assesses the variation to the development standard in accordance with accepted principles established by the Land and Environment Court.

8. CLAUSE 4.6 OF LEP ASSESSMENT

The following sections assess the variation to the development standard in accordance with accepted principles established by the Land and Environment Court.

8.1 CLAUSE 4.6 (2).

Pursuant to Clause 4.6 (2), development consent may be granted for development even though the development would contravene a development standard imposed by the clause or any other environmental planning instrument subject to this clause. In this regard, the proposal complies with Clause 4.6 (2) and the development type is not expressly excluded from the operation of this clause in LEP or all other environmental planning instruments subject to this clause.

8.2 CLAUSE 4.6 (3).

Clause 4.6 (3) dictates that development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that:

- a) *compliance with the development standard is unreasonable or unnecessary in the circumstances, and*
- b) *there are sufficient environmental planning grounds to justify the contravention of the development standard.*

The grounds on which the proposed development seeks to demonstrate the matters in paragraphs (a) and (b) are discussed.

i. The objectives of the standard are achieved notwithstanding non-compliance with the standard.

The objectives supporting the maximum building height control under Clause 4.3 have been achieved by the proposed development. Specifically, consistency with the objectives, and the absence of any environmental impacts, demonstrates that strict compliance with the development standard would be both unreasonable and unnecessary in this instance. The matters are to be discussed in greater detail.

Clause 4.3 Maximum Building Height

The proposed development is located within the E1 Local Centre zone and is surrounded by zone C2 Environmental Conservation.

(a) to ensure the height of buildings is appropriate for the context and character of the area

Following objective (1)(a) of Clause 4.3, the proposed development is deemed to comply. Specifically, the Planning Proposal approval over the site was subject to a condition that dictates development for commercial premises or neighbourhood supermarkets on the land must not exceed 5,500 sqm. As per the lodged application material, the proposed development for commercial premises or neighbourhood supermarkets does not exceed 5,500 sqm. Exclusions were not applied as part of the Planning Proposal to limit the use of a Clause 4.6 variation for the development of the site or to constrain exceedance in the maximum building height provisions.

Additionally, Clause 5.6 of the LEP includes provisions for architectural roof features for developments that exceed or cause a building to exceed, the height limits set by Clause 4.3 may be carried out, without the need for Clause 4.6 but only with development consent. The development triggered a Clause 4.6 variation as the parts exceeding the maximum height provisions were not considered architectural roof features by the Regional Planning Panel. In light of the above, the proposed development, including the parts exceeding the maximum height provisions, would be accepted without the need for Clause 4.6 variation if were not due to the roof not being considered as an architectural roof feature.

As per the proposed development plans, the proposed development footprint is contained within the middle portions of the site and is surrounded by zone C2 Environmental Conservation, refer to **Figure 1**. The site is a corner lot with principal road frontage to Fullerton Cove Road and secondary road frontage to Nelson's Bay Road. As such, the development does not directly adjoin a sensitive land use within the north,

south and east site aspects. Immediate land uses are comprised of low-density residential and conservation zones. Also, the exceedance in the maximum building height provisions is minor and triggered by the roof pitch and plant room. Considering the above, it is determined that the proposal ensure the height of buildings is appropriate for the context and character of the area as per objective (1) (a).

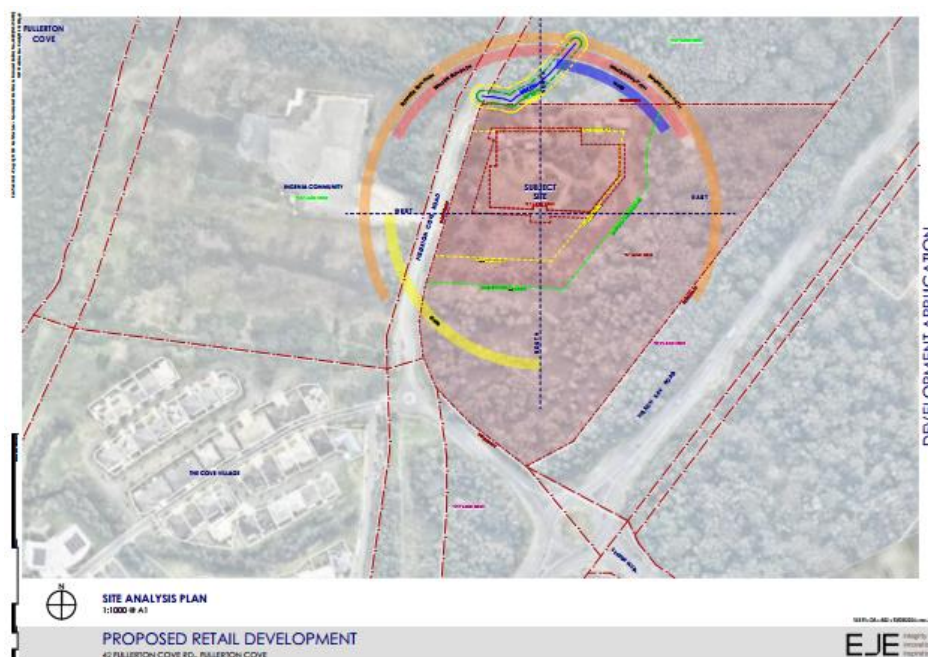


Figure 5: Site Analysis (EJE, 2024)

(b) to ensure building heights reflect the hierarchy of centres and land use structure.

The proposed development is for Commercial Premises (Neighbourhood Shopping Centre) including a Medical Centre, Signage, Sewer Extension and Demolition which aligns with the existing Planning Proposal Approval over the site. As discussed, the subject site has a maximum building height provision of 9m and the proposal seeks a variation of 0.75m as the parts exceeding is not considered to be an architectural roof type. In this regard, the development is deemed to ensure building heights that reflect the hierarchy of the centre and land use structure, and the minor exceedance is triggered by a roof type that is not considered to provide architectural features.

In light of the above facts, compliance with the development standard is unreasonable or unnecessary in the circumstances on the following grounds:

- The building height proposed is not inconsistent with the objectives of Clause 4.3 of LEP as shown in the discussion above. Specifically, a Clause 4.6 variation is triggered by the proposal due to exceedance by that part of the building which is not deemed to provide architectural building features.

- the subject site, its locational context within the surrounding area, the availability of local infrastructure and its position to public transport services all support the development outcomes sought. The proposed building height does not unduly impact the amenity of the locality given the minor variation proposed and as the site is surrounded by Environmental Conservation.
- The proposal is consistent with the maximum gross floor area provisions for the commercial premises or neighbourhood supermarkets on the land which must not exceed 5,500 sqm. Further, exclusions were not applied as part of the Planning Proposal to limit the use of a Clause 4.6 variation for the development of the site or to constrain exceedance in the maximum building height provisions for developments over the site.
- The resultant environmental impacts of the proposed building height are acceptable in the circumstances. The proposal has been designed to address the site constraints, streetscape, and relevant objectives of both the development standard and the zone. additional significant impacts in relation to design impacts such as solar access, overshadowing, and ventilation, then would be the case if the building met the current LEP height limit not envisaged for the proposed development.
- Further, the proposal will contribute towards the ongoing strategic directions of the relevant planning strategies of the locality in the Hunter. In this case, strict compliance with the development standard for building height in the LEP is unnecessary and unreasonable. The additional height does not create any additional environmental, social or economic impacts than a building at the current LEP height limit.

9. CONCLUSION

Having evaluated the likely effects arising from the non-compliance of this proposal, we are satisfied that the objectives of the development standard are satisfied as the breach of the control does not create any adverse environmental impacts and allows for the orderly development of land.

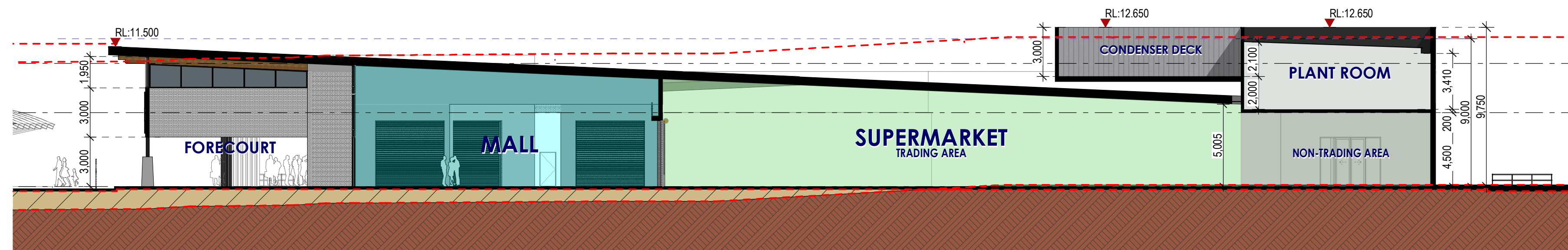
In summary, this Clause 4.6 variation is well founded as required by the LEP in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of the development, particularly considering that the development is complimentary to the surrounding development.
- The development meets the objectives of the standard to be varied in Clause 4.3 and the objectives of the E1 Local Centre zoning of the land.
- The development submitted aligns with the development expectations for the area as envisaged by the Council and regional and local strategies.

- There are sufficient environmental planning grounds to justify the departure from the standards. The proposal will have negligible environmental impacts.

Subsequently, strict compliance with the development standard is unreasonable and unnecessary in this particular instance, and the use of Clause 4.6 of the LEP to vary Clause 4.3 is considered to be appropriate. Based on the above, it is sensible to conclude that strict compliance with the controls is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.

Appendix A: Building Height Plane



Appendix B: Proposed Development Plans

DEVELOPMENT APPLICATION
OF
PROPOSED RETAIL DEVELOPMENT
AT
42 FULLERTON COVE RD., FULLERTON COVE
FOR
CANAAN PD 2 Pty Ltd

BY



PROJECT # 14311 - 19/03/2024 - REV. B

DRAWING SCHEDULE

A00	COVER SHEET	A11	PERSPECTIVE VIEW 02
A01	LOCATION PLAN	A12	PERSPECTIVE VIEW 03
A02	SITE ANALYSIS PLAN	A13	PERSPECTIVE VIEW 04
A03	OVERALL SITE PLAN	A14	PERSPECTIVE VIEW 05
A04	DEVELOPMENT SITE PLAN	A15	NOTIFICATION PLAN
A05	GROUND FLOOR PLAN	A15	PERSPECTIVE VIEW 06
A06	FIRST FLOOR PLAN	A16	PERSPECTIVE VIEW 07
A07	PROPOSED PYLON SIGNAGE PLAN	A17	PERSPECTIVE VIEW 08
A08	SITE ELEVATIONS	A18	PERSPECTIVE VIEW 09
A09	SITE SECTIONS	A19	PERSPECTIVE VIEW 10
A10	PERSPECTIVE VIEW 01	A20	BUILDING MATERIALS & FINISHES
		A21	GROSS FLOOR AREA PLAN

FULLERTON COVE

FULLERTON COVE ROAD

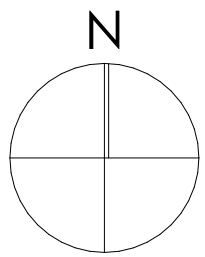
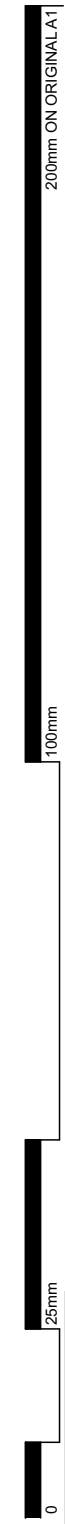
SUBJECT SITE

NELSON BAY ROAD

THE COVE VILLAGE

SEASIDE BLVD.

DEVELOPMENT APPLICATION



LOCATION PLAN
1:2000 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE



FULLERTON
COVE

INGENIA COMMUNITY

'RU2' LAND ZONE

SUBJECT
SITE

'B1' LAND ZONE

EAST

'RU2' LAND ZONE

WEST

FULLERTON COVE ROAD

WIND

SOUTH

NELSON BAY ROAD

'E2' LAND ZONE

'SP2' LAND ZONE

'SP2' LAND ZONE

THE COVE VILLAGE

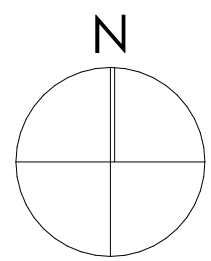
SITE ANALYSIS PLAN

1:1000 @ A1

PROPOSED RETAIL DEVELOPMENT

42 FULLERTON COVE RD., FULLERTON COVE

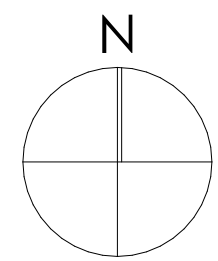
DEVELOPMENT APPLICATION



OVERALL SITE PLAN
1:1000 @ A1

PROPOSED RETAIL DEVELOPMENT

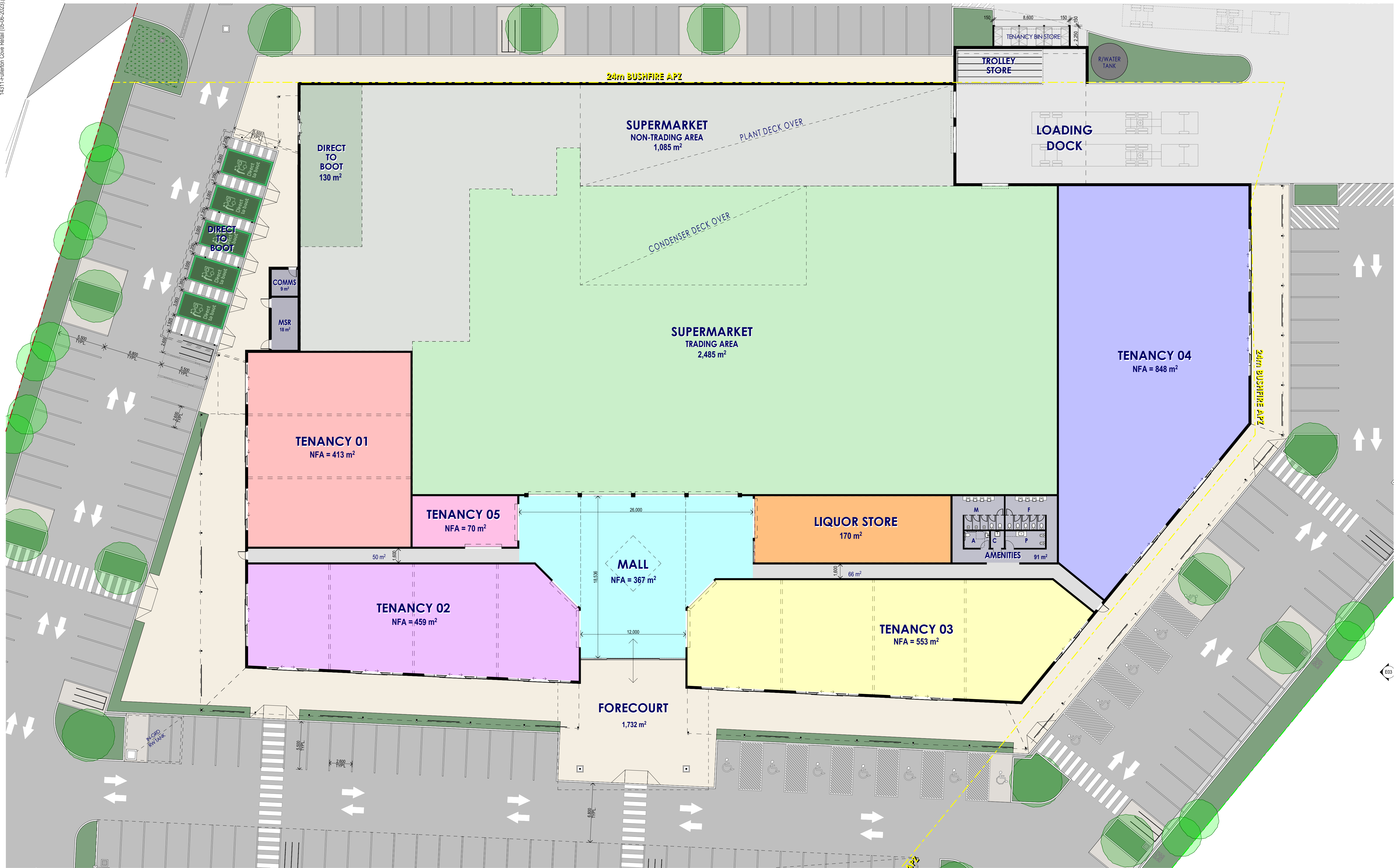
42 FULLERTON COVE RD., FULLERTON COVE

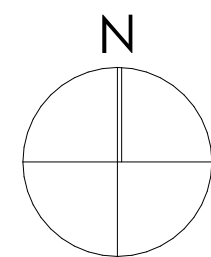


DEVELOPMENT SITE PLAN
1:500 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE

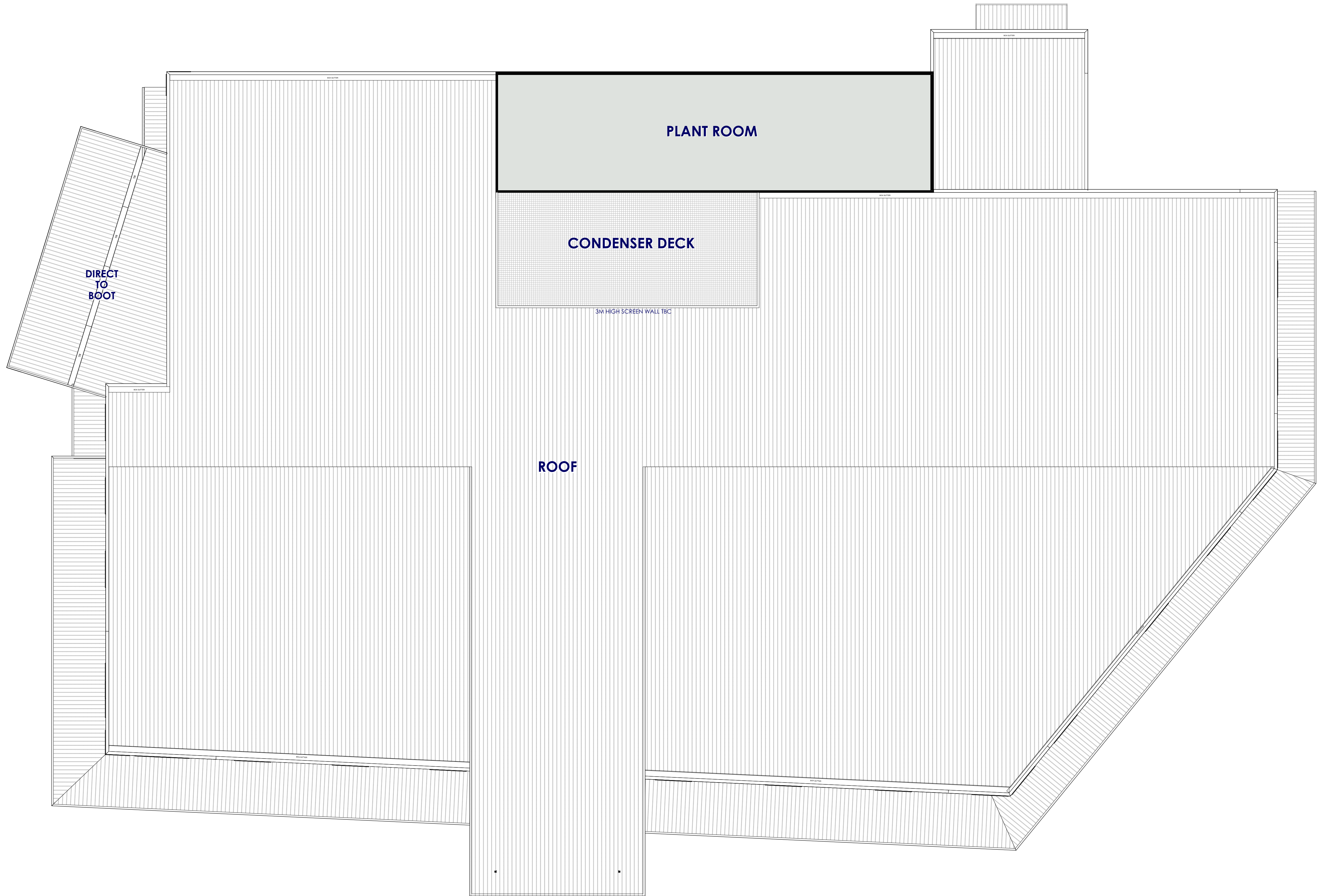






FIRST FLOOR PLAN
1:200 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE

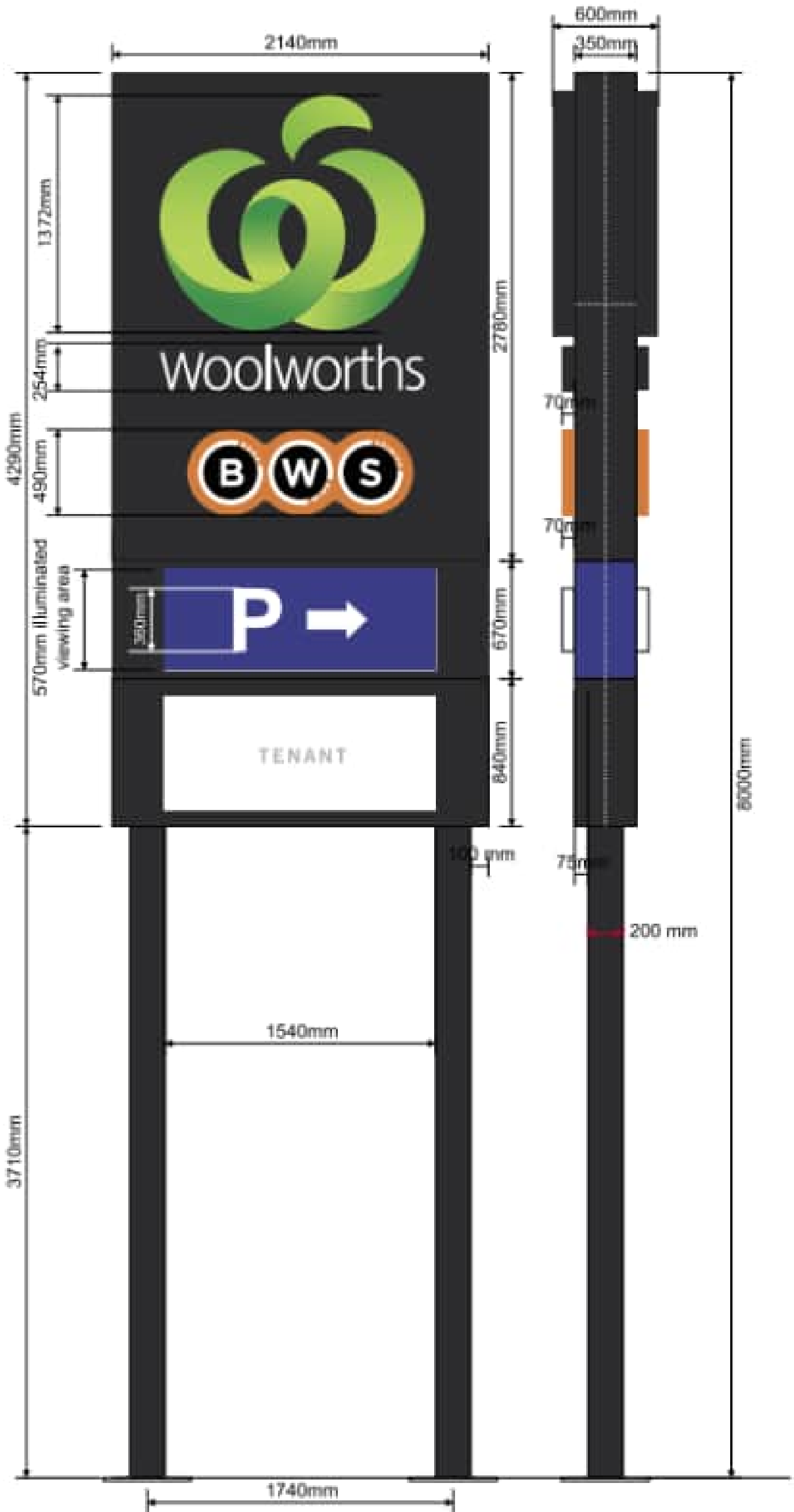




PROPOSED PYLON SIGN PHOTO-MONTAGE



PROPOSED PYLON SIGNAGE PLAN
1:200 @ A1

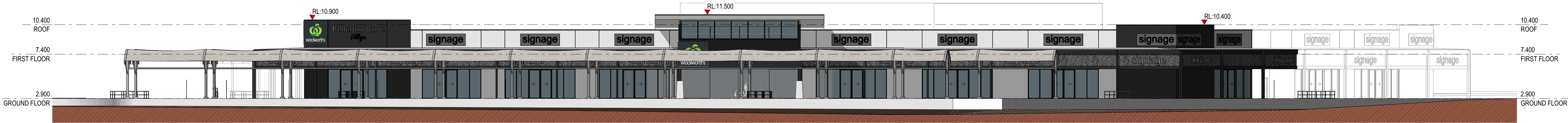


PYLON SIGN ELEVATION
1:25 @ A1

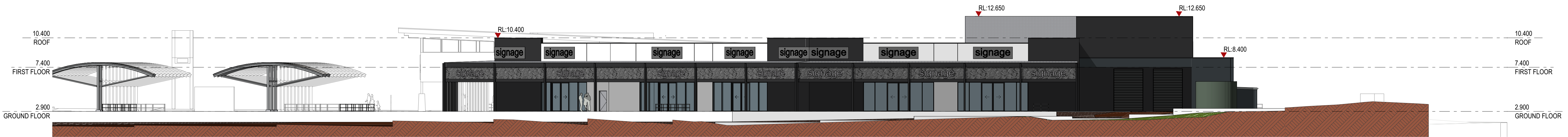
DEVELOPMENT APPLICATION



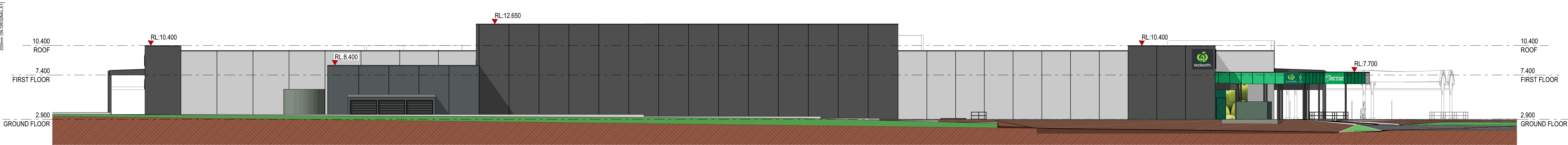
WEST / FULLERTON COVE ROAD ELEVATION



SOUTH ELEVATION



EAST ELEVATION



NORTH ELEVATION

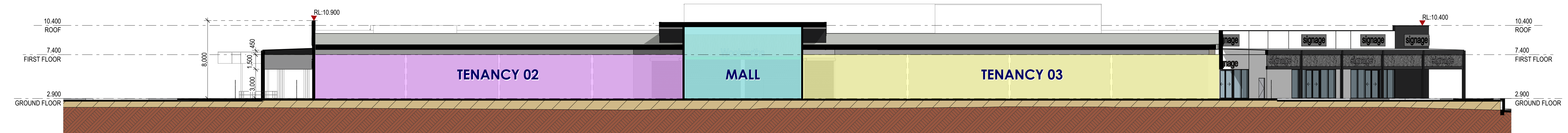
SITE ELEVATIONS

1:200 @ A1

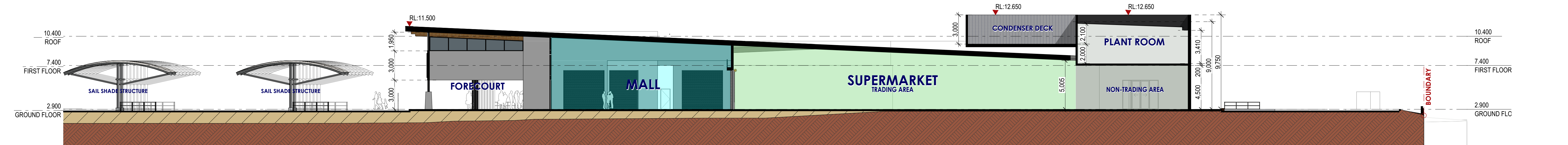
PROPOSED RETAIL DEVELOPMENT

42 FULLERTON COVE RD., FULLERTON COVE

DEVELOPMENT APPLICATION



SECTION 02



SECTION 01

SITE SECTIONS
1:200 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE



SOUTH-WESTERN / FULLERTON COVE ROAD APPROACH VIEW

PERSPECTIVE VIEW 01
1:1 @ A1



WESTERN / FULLERTON COVE ROAD VIEW

PERSPECTIVE VIEW 02

1:1 @ A1

PROPOSED RETAIL DEVELOPMENT

42 FULLERTON COVE RD., FULLERTON COVE

PRE-DA CONCEPT DESIGN



NORTHERN / FULLERTON COVE ROAD VIEW

PERSPECTIVE VIEW 03
1:1 @ A1



WESTERN / VERANDAH APPROACH VIEW

PERSPECTIVE VIEW 04

1:1 @ A1

PROPOSED RETAIL DEVELOPMENT

42 FULLERTON COVE RD., FULLERTON COVE



PRE-DA CONCEPT DESIGN

SOUTH-WESTERN / VERANDAH APPROACH VIEW 1

PERSPECTIVE VIEW 05
1:1 @ A1

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SOUTH-WESTERN / VERANDAH APPROACH VIEW 2

PERSPECTIVE VIEW 06
1:1 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE



SOUTH-EASTERN / FORECOURT VIEW

PERSPECTIVE VIEW 07
1:1 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE



SOUTH-EASTERN / VERANDAH VIEW

PERSPECTIVE VIEW 08
1:1 @ A1



SOUTH-WESTERN / AERIAL VIEW 1

PERSPECTIVE VIEW 09
1:1 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE

DEVELOPMENT APPLICATION



SOUTH-WESTERN / AERIAL VIEW 2

PERSPECTIVE VIEW 10
1:1 @ A1



SOUTH-EASTERN / FORECOURT VIEW

BUILDING MATERIALS & FINISHES
1:1 @ A1

PROPOSED RETAIL DEVELOPMENT
42 FULLERTON COVE RD., FULLERTON COVE

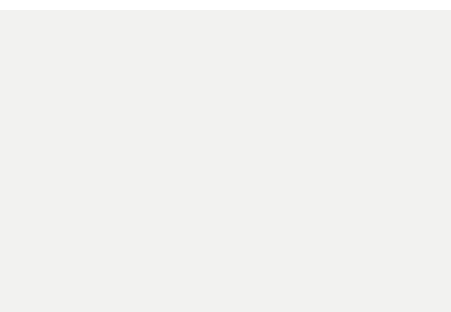
LEGEND - MATERIALS & FINISHES



01
RS1
COLOURBONDED STEEL ROOF SHEETING (RS).
COLBOND, 'SHALE GREY' OR SIMILAR.



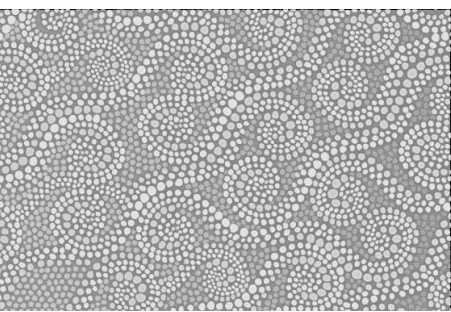
02
PT1
PAINT (PT) - EXTERNAL WALLS.
DULUX 'WOOLWORTHS DARKNESS' OR SIMILAR.



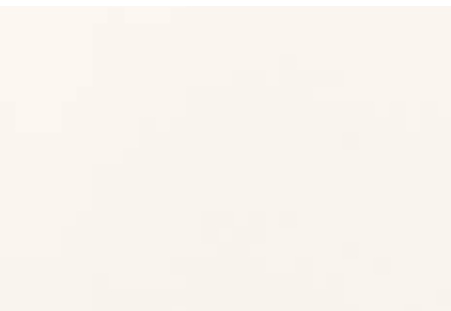
03
PT2
PAINT (PT) - EXTERNAL WALLS & CEILINGS/SOFFITS.
DULUX 'WOOLWORTHS WHITE' OR SIMILAR.



04
PT3
PAINT (PT) - EXTERNAL COLUMNS, BEAMS, GLAZING SUITE
FRAMES, GUTTERS, & DOWNPIPES.
DULUX 'MONUMENT' OR SIMILAR.

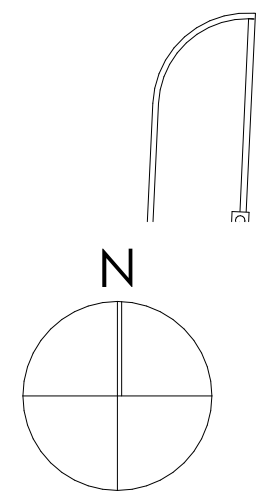


05
PMS
PERFORATED METAL SHEETING (PMS) - EXTERNAL
VERANDAH INFILL SPANDRLS.
PATTERNED PERFORATIONS - DETAILS TO BE DETERMINED.



06
SSS
SAIL SHADE STRUCTURE (SSS) - EXTERNAL CARPARKS.
TENSIONED PVC MEMBRANE OVER GLAV. STEEL
STRUCTURE.

DEVELOPMENT APPLICATION

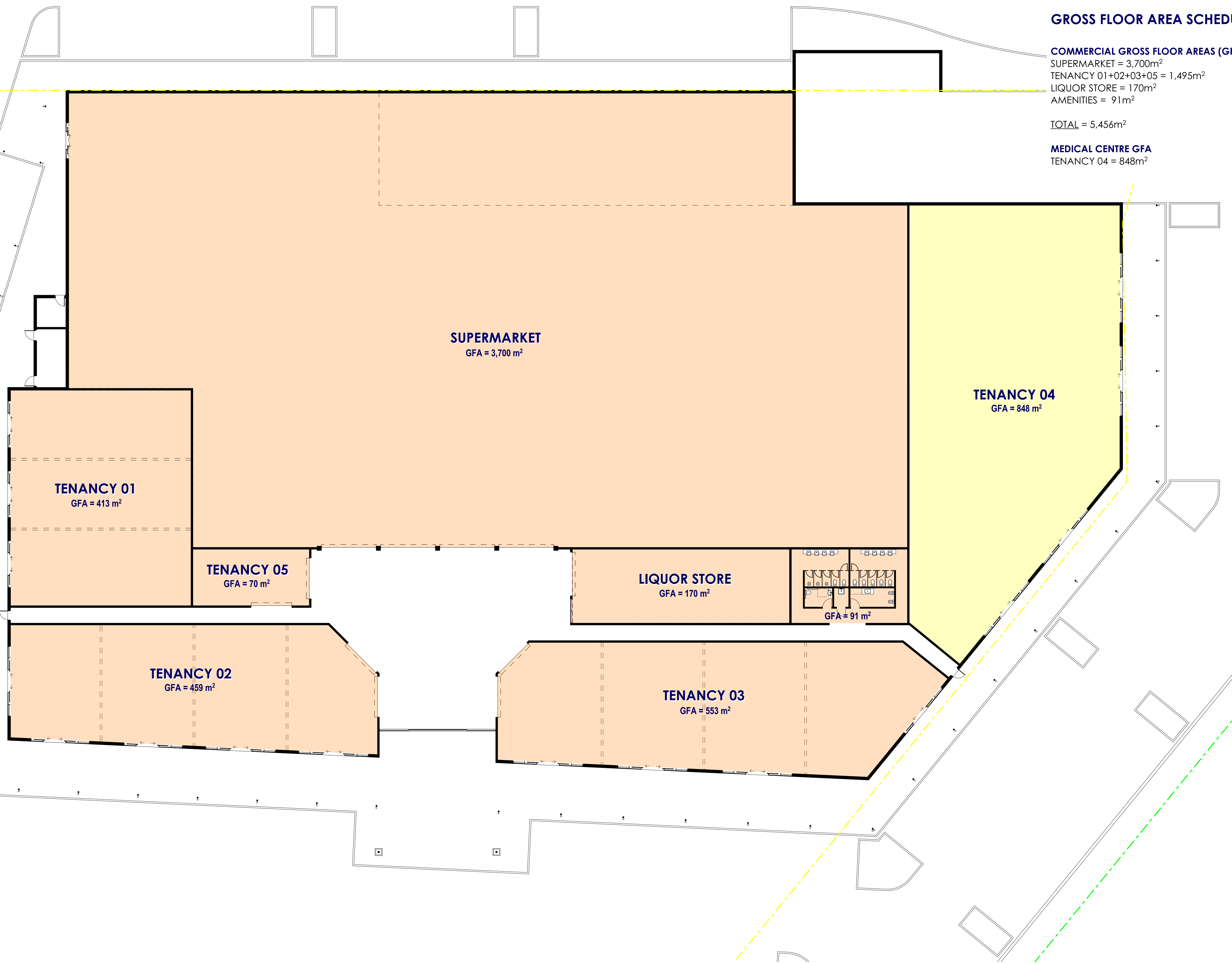


GROSS FLOOR AREA PLAN

1:200 @ A1

PROPOSED RETAIL DEVELOPMENT

42 FULLERTON COVE RD., FULLERTON COVE



GROSS FLOOR AREA SCHEDULE

COMMERCIAL GROSS FLOOR AREAS (GFA)

SUPERMARKET = 3,700m²
TENANCY 01+02+03+05 = 1,495m²
LIQUOR STORE = 170m²
AMENITIES = 91m²

TOTAL = 5,456m²

MEDICAL CENTRE GFA

TENANCY 04 = 848m²

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