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1.0 Introduction

This Clause 4.6 variation request has been prepared by Ethos Urban on behalf of Ku-ring-gai Council. It is submitted to Ku-ring-gai Council (the **Council**) in support of a development application (**DA**) for the redevelopment of the Marian Street Theatre at 2 Marian Street, Killara.

Clause 4.6 of the *Ku-ring-gai Local Environmental Plan 2015 (Ku-ring-gai LEP)* enables the Council to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

This Clause 4.6 variation request relates to the development standard for building height under Clause 4.3 of the Ku-ring-gai LEP and should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Ethos Urban dated February 2020. The building height standard applying to the site is 9.5m. Parts of the existing building exceed the 9.5m height limit - by up to 2.37m at the rear (south) of the building and 5.1m in the centre of the building to the top of the existing Auditorium roof. The proposed alterations and additions will result in a total exceedance of up to 6.06m to the top of the building and 7.19m to the top of the PV cells (i.e. 4.82m above the existing building at the rear of the site, and 2.09m above the overall maximum height of the existing building).

Clauses 4.6(3) and (4)(a)(ii) require that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

- that the applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that 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.

The Land and Environment Court has established a set of factors to guide assessment of whether a variation to development standards should be approved. The original approach was set out in the judgment of Justice Lloyd in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89 in relation to variations lodged under *State Environmental Planning Policy 1 – Development Standards* (SEPP 1). This approach was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (Wehbe).

While these cases referred to the former SEPP 1, the analysis remains relevant to the application of Clause 4.6(3)(a). Further guidance on Clause 4.6 of the Standard Instrument has been provided by the Land and Environment Court in a number of decisions, including:

- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386; and
- *Moskovich v Waverley Council* [2016] NSWLEC 1015.

In accordance with the above requirements, this Clause 4.6 variation request:

- identifies the development standard to be varied (**Section 2.0**);
- identifies the variation sought (**Section 3.0**);
- establishes that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (**Section 4.0**);
- demonstrates there are sufficient environmental planning grounds to justify the contravention (**Section 5.0**);

- demonstrates that the proposed variation is in the public interest (**Section 6.0**); and
- provides an assessment of the matters the Secretary is required to consider before providing concurrence (**Section 7.0**).

Therefore, the DA may be approved with the proposed height variation in accordance with the flexibility allowed under Clause 4.6 of the Ku-ring-gai LEP.

2.0 Development Standard to be Varied

This Clause 4.6 Variation Request seeks to justify contravention of the development standards set out in Clause 4.3 of the Ku-ring-gai LEP. Clause 4.3 states as follows:

(1) *The objectives of this Clause are as follows:*

- to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*
- to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*
- to enable development with a built form that is compatible with the size of the land to be developed.*

(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.*

The site of the Marian Street Theatre building is mapped with a maximum building height of 9.5m, as shown at **Figure 1**. The adjoining Selkirk Park does not have a mapped height limit.



Figure 1 Extract of Height of Buildings Map (Marian Street Theatre site shown in red, Selkirk Park shown dashed)

Source: Ku-ring-gai LEP with additions

3.0 Nature of the Variation Sought

As detailed in **Section 2** above, the site is mapped with a maximum building height of 9.5m

Due to the topography of the site, the maximum RL for the development varies across the site. It is noted that parts of the existing building already exceed the 9.5m height limit - by up to 2.37m at the rear (south) of the building and 5.1m in the centre of the building to the top of the existing Auditorium roof. The proposal comprises alterations and additions to the existing Theatre building, which are required to address repairs and BCA compliance issues which resulted in the closure of the Theatre in 2013.

As a result, the development will continue to exceed the applicable height standard. The proposal includes additions that are required to improve the structural, acoustic and environmental performance of the building, as well as the functionality of the Theatre. The proposed additions will result in a further exceedance of the 9.5m height limit by up to 6.06m (to top of roof). The installation of PV cells to improve the environmental performance of the building, will increase the maximum height by an additional 1.13m, resulting in an overall maximum building height of 16.69m - an exceedance of 7.19m (i.e. 4.82m above the existing building at the rear of the site, and 2.09m above the overall maximum height of the existing building).

The existing and proposed non-compliances are described in **Table 1** and are illustrated on the height plane diagrams at **Figure 2** and **Figure 3**, and the Section at **Figure 4**.

Table 1: Existing and proposed building height summary**

Component	Maximum Height	Variation to LEP	Variation to Existing Building
Existing building (to top of roof)	RL 119.560 (11.87m)	2.37m/24.9%	-
Proposed building (to top of roof)	RL123.25 (15.56m)	6.06m/63.7%	3.69m/31.1%
PV cells (top)	RL124.38 (16.69m)	7.19m/75.7%	4.82m/40.6%

** For the purposes of this comparison, the figures for the existing building are taken from the rear (south) of the building, where the proposed height exceedance is greatest. As noted above, the maximum height of the existing building (the Auditorium roof) is RL122.29, which is 5.1m above the LEP height plane

As noted above, the non-compliance is driven by the height of the existing building and the topography of the site. In particular:

- The existing auditorium roof requires structural strengthening and acoustic treatment. To conserve the existing roof structure that is visible from within the auditorium, a second roof layer has been applied over to accommodate the necessary structural and acoustic upgrades. The second roof layer has been designed to fit the existing roof fall and form, minimising the height exceedance and any shadow impacts.
- A new roof structure has been installed over the stage to increase the performance capabilities of the Theatre below. The void below this roof structure is also required for smoke exhaust over the auditorium stage to meet required fire protection upgrades to the building. Walls and screens surrounding the roof overrun have been angled where possible to minimise shadow impacts.
- The installation of PV cells to improve the efficiency and environmental performance of the building.



Figure 2 Height plane diagram showing extent of the existing non-compliance with the height control

Source: TZG

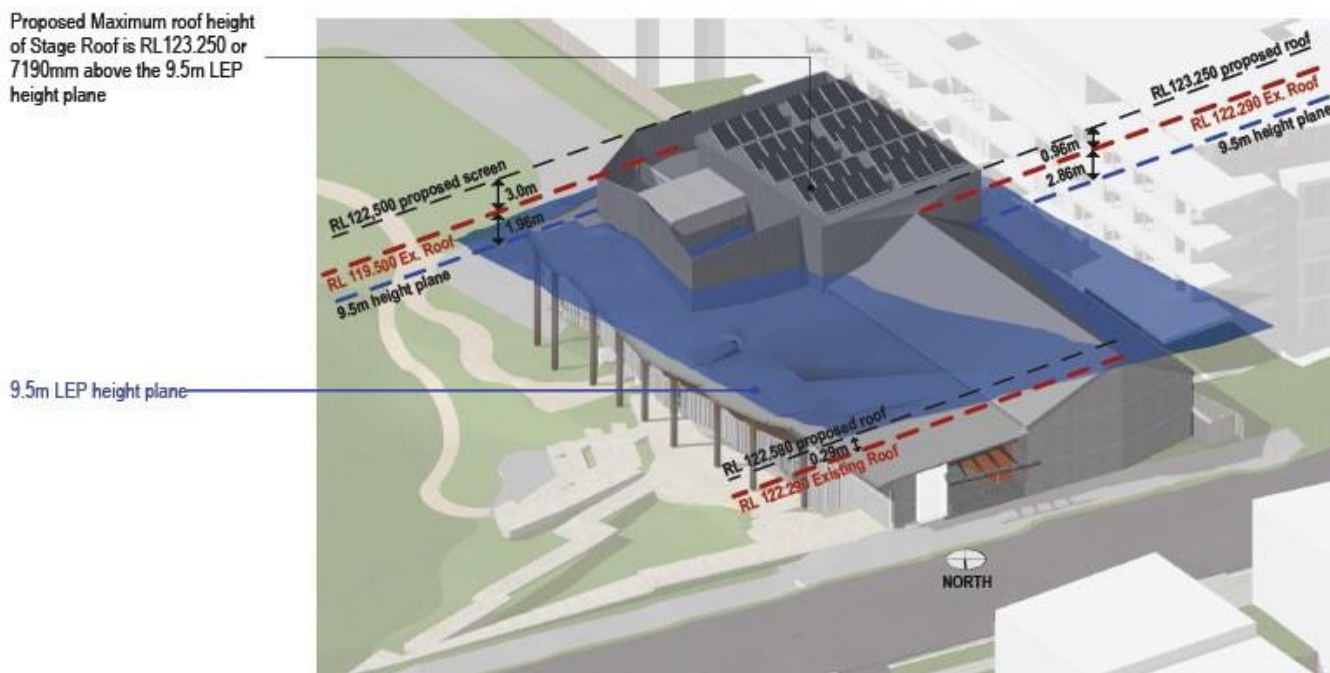


Figure 3 Height plane diagram showing extent of the proposed non-compliance with the height control

Source: TZG



Figure 4 Section showing height exceedance over the LEP and existing roof plane

Source: TZG

4.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five ways in which it could be shown that a variation to a development standard was unreasonable or unnecessary. However, His Honour in that case (and subsequently in *Initial Action*) confirmed that these five ways are not exhaustive, they are merely the most commonly invoked ways. Further, an applicant does not need to establish all of the ways.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis may be of assistance in applying Clause 4.6 given that subclause 4.6(3)(a) uses the same language as Clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]; *Initial Action* at [16]).

The five methods outlined in *Wehbe* were:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
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 compliance with the standard is unnecessary and unreasonable (**Fourth Method**).

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

In this instance, the **First Method** is of particular assistance in establishing that compliance with a development standard is unreasonable or unnecessary.

4.1 **The underlying objectives or purposes of the development standard are achieved notwithstanding non-compliance with the standard**

The objectives of the development standard contained in Clause 4.3 of the Ku-ring-gai LEP are:

- (a) *to ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,*
- (b) *to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,*
- (c) *to enable development with a built form that is compatible with the size of the land to be developed.*

The proposal is assessed against the objectives for the height of buildings development standard below.

To ensure that the height of buildings is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres

The site is not located in one of Ku-ring-gai's centres. Notwithstanding, the development, including the proposed height exceedance, responds to the existing building and the site's context and provides an appropriate transition between future development to the west (subject to an approved Development Application) and Selkirk Park to the east.

To establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity

The Marian Street Theatre is not located in a designated centre. Notwithstanding, the proposed development responds to the immediate context and the need to retain the existing Marian Street Theatre building for economic, social and community reasons.

The proposal provides a transition between land zoned R4 High Density Residential to the north, south and west of the site, and Selkirk Park to the east (see **Figure 5**). Land immediately to the west and south of the site has a height limit of 17.5m (see **Figure 1**). The proposed development, which has an overall maximum height of 16.69m (2.09m higher than the maximum point of the existing building), continues to provide a transition in scale to Selkirk Park to the east as shown in the north elevation at **Figure 6**.

Further, the development will not significantly impact local amenity, with minimal additional overshadowing impacts to Selkirk Park and residential development to the west (refer to **Section 5.2**). Due to the orientation of the site and the location of the building on the site's Marian Street frontage, there will be no overshadowing of residential development to the south of the site. Finally, as the majority of the new additions are limited to the rear part of the building, the streetscape impacts will be limited.

When balanced with the need to retain and upgrade the existing building, the proposed height exceedance is considered an appropriate outcome in the context of the existing and likely future context.



Figure 5 Extract of Zoning Map (Marian Street Theatre site shown in blue, Selkirk Park shown dashed)

Source: Ku-ring-gai LEP with additions

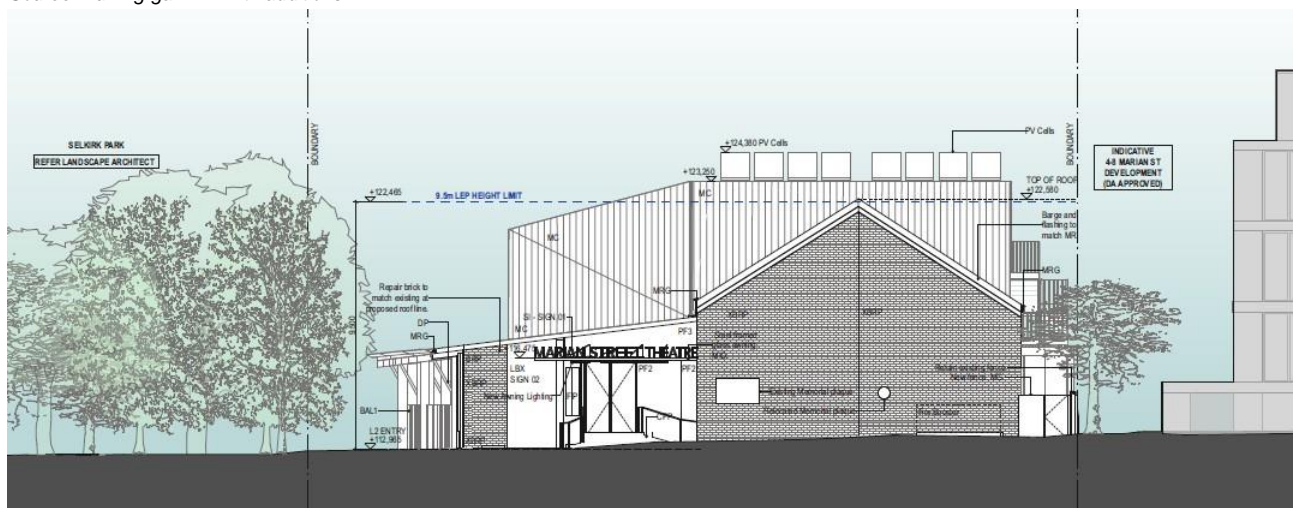


Figure 6 North elevation showing transition in scale between development to the west and Selkirk Park

Source: TZG

To enable development with a built form that is compatible with the size of the land to be developed

The proposed built form, including the height exceedance, is compatible with the size of the land to be developed. As detailed above, the non-compliance is driven by the retention of the existing building and the additions required to improve the structural and acoustic performance of the building, as well as the functionality of the Theatre.

The building, including the proposed alterations and additions, has a FSR of 0.463:1. This is well within the maximum FSR standard of 0.75:1 which applies to the site, demonstrating that the scale of the proposed development is compatible with the size of the land and does not represent an over development of the site.

The location of the existing building means that the built form will continue to be concentrated in the north of the site and the southern half of the site will continue to be used for landscaping and at-grade parking. If the existing building was demolished and the site was redeveloped, there would be an opportunity to design a building with a larger footprint and a reduced height to be within the maximum building height limit. However, the need to retain the existing building for economic, social and community reasons, together with the required structural, acoustic, functional and environmental improvements, forces a development which exceeds the building height standard by a maximum of 7.19m (an exceedance of 4.82m above the existing building at the rear of the site, and 2.09m above the overall maximum height of the existing building).

4.1.1 Conclusion on Clause 4.6(3)(a)

In summary, compliance with the development standard would be unreasonable or unnecessary because:

- The non-compliance is driven by the need to retain the existing building and undertake necessary structural, acoustic, functional and environmental upgrades to ensure the ongoing operation of the Theatre;
- The height and scale of the proposed development will continue to provide a transition in scale between development to the west and Selkirk Park to the east;
- The additions are generally limited to the rear of the building, thereby minimising impacts on the Marian Street streetscape;
- The scale of the proposed development does not represent an over development of the site; and
- The design protects the residential amenity of adjoining and surrounding properties, as well as the amenity of Selkirk Park to the east.

5.0 Clause 4.6(3)(b) There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the PLEP requires the consent authority to be satisfied that the applicant's written request has adequately addressed Clause 4.6(3)(b), by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning grounds relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland v Wingecarribee Shire Council* [42]).

There are sufficient environmental planning grounds to justify a flexible approach to the application of the height control as it applies to the site. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

5.1 Retention of the Existing Marian Street Theatre

Due to the topography of the site, the maximum RL for the development varies across the site. Parts of the existing building already exceed the 9.5m height limit by up to 2.37m at the rear (south) of the building and 5.1m in the centre of the building to the top of the existing Auditorium roof.

The proposal comprises alterations and additions to the existing building. As a result, the development will continue to exceed the applicable height standard. The proposed additions to improve the structural, acoustic and environmental performance of the building, as well as the functionality of the Theatre, will result in a further exceedance of the 9.5m height limit by up to 6.06m (63.7%) to the top of the building, and 7.19m (75.7%) to the top of the PV cells. The exceedance is only 2.09m over the maximum height of the existing building.

As noted above, the non-compliance is driven by the following proposed upgrades:

- The existing auditorium roof requires structural strengthening and acoustic treatment. To conserve the existing roof structure that is visible from within the auditorium, a second roof layer has been applied over to accommodate the necessary structural and acoustic upgrades. The second roof layer has been designed to fit the existing roof fall and form, minimising the height exceedance and any shadow impacts.
- A new roof structure has been installed over the stage to increase the performance capabilities of the Theatre below. The void below this roof structure is also required for smoke exhaust over the auditorium stage to meet required fire protection upgrades to the building. The height exceedance is primarily made up of the walls and roof that form the Theatre safety plant room and Theatre stage overrun. The Theatre built form has been designed to the minimum height and plan extents to ensure that a compliant, safe and functional Theatre can be constructed. Walls and screens surrounding the roof overrun have been angled where possible to minimise shadow impacts.

- The installation of PV cells to improve the efficiency and environmental performance of the building.

The retention of the existing building represents the most viable outcome from an economic, environmental and social perspective. The retention of the existing building, and the proposed structural, acoustic, functional and environmental upgrades, necessitates a further exceedance of the height of building development standard by up to 6.06m (63.7%) to the top of the building, and 7.19m (75.7%) to the top of the PV cells. The exceedance is only 2.09m over the maximum height of the existing building.

Notwithstanding, a number of measures have been used to minimise the extent of the height exceedance and reduce any impacts on neighbouring properties. These measures include:

- Using minimum compliant internal room clearance heights;
- Implementing a lighting only stage overrun instead of a fly tower overrun which would require a significant increase to the overrun height;
- Minimising internal circulation around plant areas;
- Sloping the MC 'Metal Cladding' screens where possible to maximise solar access to 4-8 Marian Street;
- Designing the stage overrun to a minimum footprint by locating it directly over the stage curtain and existing walls. Gantry access has been provided in lieu of separated corridors which would increase the stage overrun footprint substantially; and
- Locating PV Cells above the roof overrun in a due north orientation, which optimises their performance and provides a sustainable power source for the theatre. Utilising a low slope roof profile of 2 degrees, maximises PV Cell exposure to solar access whilst maximising solar access to 4 – 8 Marian Street.

Finally, the proposed development, including the exceedance of the LEP height standard, continues to be consistent with the objectives of the development standard, land use zone and the objects of the EP&A Act.

5.2 Minimal Overshadowing Impacts

The development, including the proposed exceedance of the mapped building height, will have an acceptable overshadowing impact on the property to the west of the site at 4 – 8 Marian Street. The site has been approved for the construction of a residential flat building with 31 apartments, including 14 affordable housing apartments. Construction has not yet commenced.

TZG has undertaken a solar access analysis to compare the overshadowing impacts of an LEP compliant building and the proposed building on the future development at 4 – 8 Marian Street. The analysis has determined that the proposed building will result in two of the approved apartments no longer achieving 2 hours of solar access on the Winter Solstice. However, the proposed development, including the exceedance of the LEP height limit, would result in the same level of solar access as an LEP compliant building, with 64.5% of apartments achieving a minimum of 2 hours solar access on the Winter Solstice under both development scenarios. The level of impact varies across apartments between the Marian Street Theatre form and the LEP compliant building form, however the net impact of total solar access compliant apartments is the same.

Shadow diagrams showing the overshadowing impacts of the existing, proposed and LEP compliant built form are provided at **Attachment A**. The findings of the analysis are summarised in **Table 2**. The analysis also identifies which apartments were approved as achieving solar access compliance under DA 0403/17.

Table 2: Solar Access Analysis

Note: The table below only assesses those apartments that are impacted by overshadowing from the MST DA or the LEP compliant form.

Apartment number (4-8 Marian St)	Compliant (Yes / no)? Approved DA 4-8 Marian St	Compliant (Yes/No) LEP Height Standard	Compliant (Yes / no)? MST DA	Comments
01	No	No	No	MST DA has no additional impact.
02	Yes	No	No	The MST DA reduces solar access to 1hr 45mins (9am-10:45am). It is noted that Apartment 02 has solar access from 7:30am so the apartment receives sunlight from 7:30am – 10:45am (3hr 15mins). An LEP compliant building would also result in additional overshadowing in the morning period between 9-10am, reducing sunlight access to 1hr 30 mins.

Apartment number (4-8 Marian St)	Compliant (Yes / no)? Approved DA 4-8 Marian St	Compliant (Yes/No) LEP Height Standard	Compliant (Yes / no)? MST DA	Comments
05	Yes	Yes	Yes	
06	Yes - <i>this apartment was labelled not compliant on plan, but counted as compliant in the schedule. TZG's analysis confirms that it does receive 2 hours solar access.</i>	No	No	<p>Both the proposed MST DA form and an LEP compliant form result in Apartment 06 being non-compliant for solar access.</p> <p>The MST DA results in a minor shadow increase to living room windows, however the private open space remains compliant. The MST DA reduces solar access to 2h 05mins solar access for private open space and 1h 45mins to the living room between 11:25am-1:05pm.</p> <p>It is noted that if an LEP-compliant roof was built over the theatre auditorium, the overshadowing impact would be greater (refer A-503 between 9-11am) than the MST proposal. This would reduce the solar access to this apartment's private open space by an additional 15 minutes compared to the proposed DA height.</p>
08	No	No	No	<p>This apartment already does not achieve compliant solar access, however would have reduced amenity with an LEP compliant built form.</p> <p>The MST DA has no additional overshadowing impact.</p> <p>An LEP compliant building would result in Apartment 08 receiving an additional 10 minutes of overshadowing on private open space and living rooms compared to the proposed DA height.</p>
09	Yes	Yes	Yes	<p>The MST DA has a very minor impact on Apartment 09, resulting in an additional 2 minutes of overshadowing.</p> <p>An LEP compliant form would result in Apartment 09 being overshadowed for an additional 15 minutes between 9am – 9:15am on June 21, to private open space. This apartment would remain compliant but would have reduced amenity compared to the proposed MST DA height and form.</p>
13	Yes	Yes	Yes	<p>The MST DA has no additional overshadowing impact.</p> <p>An LEP compliant form would result in Apartment 13 receiving additional overshadowing between 9am - 10am on June 21. This apartment would remain compliant, however would have significantly reduced amenity.</p>
14	Yes	Yes	Yes	<p>The MST DA maintains compliant solar access.</p> <p>An LEP compliant form would not have any additional impact.</p>
16	Yes - <i>however this appears to have been measured on the bedroom windows and not the living room windows, so therefore should be labelled as non-compliant.</i>	No	No	<p>Whilst the approved DA states that solar access is provided between 10am – 12pm, it is arguably already non-compliant reducing the total count of approved compliant apartments to below 70%.</p> <p>The MST DA reduces solar access to the living room to 1h 40mins. The private open space remains compliant, however as the living room solar access is reduced to less than 2 hours the apartment becomes non-compliant for minimum solar access. It is noted that this apartment receives solar access between 8am – 9am, and so does receive over 2 hours of solar access over this extended period.</p> <p>If an LEP compliant building was constructed, the private open space would receive approximately 15 minutes less solar access in the morning between 9-10am, taking solar access to less than 2 hours.</p> <p>Adjustments have been made to the metal cladding screen to the roof plant room to reduce the impact that the MST DA form has on this apartment.</p>
17	Yes	Yes	Yes	
21	Yes	Yes	Yes	

Apartment number (4-8 Marian St)	Compliant (Yes / no)? Approved DA 4-8 Marian St	Compliant (Yes/No) LEP Height Standard	Compliant (Yes / no)? MST DA	Comments
22	Yes	Yes	Yes	
23	Yes	Yes	Yes	
27	Yes	Yes	Yes	
28	No	Yes	Yes	The solar assessment is inconsistent within the approved 4-8 Marian St DA – it is mentioned as compliant on the solar plans, however it is non-compliant in the table. Under TZG's analysis for the MST DA, this apartment appears compliant for solar access, and continues to comply under the MST proposal.
30	Yes	Yes	Yes	
31	Yes	Yes	Yes	
TOTAL Compliant apartments	22/31	20/31	20/31	Note 1: Comments on Apartment 28 results in an additional apartment being compliant in the approved DA. Note 2: If Apartment 16 was correctly identified as non-compliant in the approved DA, these figures would be 21/31 (approved) and 20/31 (as proposed)
TOTAL %	70.9%	64.5%	64.5%	Note: If Apartment 16 was correctly identified as non-compliant in the approved DA, these figures would be 67.7% (approved) and 64.5% (as proposed)

5.3 Consistency with the Objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but would refer grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in Section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, in **Table 3** we consider how the proposed development is consistent with each object, notwithstanding the proposed variation of the building height development standard.

Table 3: Assessment of proposed development against the Objects of the EP&A Act

Object	Comment
(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources	The proposed height variation will promote the economic and social welfare of the community through the upgrade of an existing community facility which has been closed since 2013 due to the need for significant repairs and BCA compliance upgrades. The proposed development, including the exceedance of the mapped building height, will improve the social welfare of the community. Further, reuse of the existing building will facilitate a more sustainable development outcome.
(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment	The development application seeks approval for the adaptive reuse of the existing building, which already exceeds the mapped building height for the site. As a result, the height exceedance is largely driven by the height of the existing building and the need to make structural, functional and acoustic improvements to the Theatre. Retaining the existing building, and the provision of roof-top PV cells, supports the principles of ecologically sustainable development. Further, the building height variation will have no negative impact on environmental considerations and will support the social wellbeing of the Ku-ring-gai community.
c) to promote the orderly and economic use and development of land	The proposed alterations and additions to the currently disused Theatre represents an economically sustainable development outcome. The existing building already exceeds the maximum building height. The additional increase in height will allow for an improved acoustic, structural, functional and environmental outcome for the Theatre and the community.
(d) to promote the delivery and maintenance of affordable housing,	This object is not relevant to this proposed development.

Object	Comment
(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,	The proposed development application is supported by a Biodiversity Development Assessment Report. The proposal will have no significant impact on threatened species or ecological communities.
(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),	The site, including the Theatre building and adjoining Selkirk Park, is not a heritage item under Ku-ring-gai Council Local Environment Plan. However, the Theatre is identified as having some cultural and social significance. The proposed adaptive reuse of the existing building, which already exceeds the mapped building height, will facilitate the retention and conservation of the remaining original elements of the Memorial Hall.
(g) to promote good design and amenity of the built environment,	As noted above, the proposed built form is largely driven by the height of the existing building. As detailed at Section 4.1 , the proposal is compatible with the scale of the surrounding development, providing a transition land zoned high density residential to the west and public open space to the east. The proposed height exceedance will not adversely impact the amenity of the surrounding built environment, including with respect to overshadowing (refer to Section 5.2). Further, the additions are generally limited to the rear of the building, thereby minimising impacts on the Marian Street streetscape.
h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,	This proposed variation to the mapped maximum building height is in response to the required health and safety upgrades to the existing building.
(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,	This object is not relevant to this proposed development.
j) to provide increased opportunity for community participation in environmental planning and assessment.	The proposed development will be publicly notified in accordance with Council's requirements.

6.0 Clause 4.6(4)(A)(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

In *Initial Action* it is established that it is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. Accordingly, it is demonstrated throughout this Clause 4.6 that the proposal is in the public interest as it is entirely consistent with the objectives of the development standard and the objectives of the zone.

6.1 Consistency with the objectives of the development standard

The proposed development is consistent with the objectives of the height of buildings development standard, for the reasons discussed in **Section 4.1** of this report.

6.2 Consistency with the B1 Neighbourhood Centre Zone

The proposal is assessed against the objectives of the B1 Neighbourhood Centre zone below.

To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.

The proposed variation to the mapped maximum building height will contribute to the delivery of an upgraded community facility which will serve the needs of the local and wider community.

The proposed upgrades will allow for the Marian Street Theatre to operate for the first time since 2013, when it was closed due to the need for significant repairs and BCA compliance upgrades. The proposed exceedance in height is required to allow for the structural, acoustic, functional and environmental upgrades of the existing Marian Street Theatre.

It is therefore consistent with this objective notwithstanding the additional height proposed as part of this application.

7.0 Secretary's Concurrence

Under Clause 4.6(5) of the Ku-ring-gai LEP the Secretary's concurrence is required prior to any variation being granted. Under Clause 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 21 February 2018 to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. Whilst the proposed height exceedance exceeds 10%, the Sydney North Planning Panel assumes the Secretary's concurrence. Nevertheless, the following section provides a response to those matters set out in Clause 4.6(5) of the Ku-ring-gai LEP which must be considered by the Secretary.

7.1 Clause 4.6(5)(a): Whether a contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation does not raise any matters of significance for State or regional environmental planning. The variation to the building separation development standard will not contravene any overarching State or regional objectives or standards or have any effect outside the site's immediate area.

7.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

There is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the retention of the existing Marian Street Theatre represents the most viable economic, environmental and heritage outcome, and the additional height is required to allow for the structural, acoustic, functional and environmental upgrades of the building. The proposed works will benefit the broader community and will not give rise to any adverse environmental impacts.

Further, maintaining the building height standard would place the following constraints on the design of the Theatre, resulting in a facility that would not meet industry requirements:

- The stage overrun currently provides a WHS compliant stage gantry access to the stage, that has a minimised gantry to ceiling floor height. By lowering the ceiling, safe access would not be able to be provided to Theatre employees and staff on a daily basis.
- The stage overrun is required to have adequate lighting for stage productions. Not providing gantry access would constrain the possible performance types and prospective Theatre companies would not be able to optimise their productions. This would place economic constraints on the Theatre's operations and would not provide a feasible business model for this vital community facility to be reopened.
- With a lower stage overrun roof, there would not be adequate roof cavity space for acoustic insulation to dampen performance sound egress to neighbouring properties.
- With a lower stage overrun roof, there would not be adequate clearance for structural beams to support the acoustic insulation required.
- If the plant room roof heights were to be lowered, compliant access would not be provided to the fire safety plant room. This would make maintenance difficult to the essential plant areas, or would require the plant to be relocated externally.
- If the plant room heights were lowered, adequate fire safety smoke exhaust and mechanical plant would not be able to be accommodated within a sealed and acoustically dampened room. This would result in externally located mechanical plant, which would present additional acoustic noise impacts to the neighbouring building.
- Screening has been provided on the plant room edges to reduce the visual impact of unsightly plant from apartment balconies and living areas. If this was to be removed, or lowered, the essential plant areas would be visible to neighbouring buildings and residents.

If the additional height cannot be delivered, this will render the proposal unfeasible, which will be a lost opportunity to deliver the public benefits detailed within the SEE.

7.3 Clause 4.6(5)(c): Other matters required to be taken into consideration before granting concurrence

We are not aware of any other matters that the Secretary (or the Sydney North Planning Panel, under delegation) is required to consider before granting concurrence.

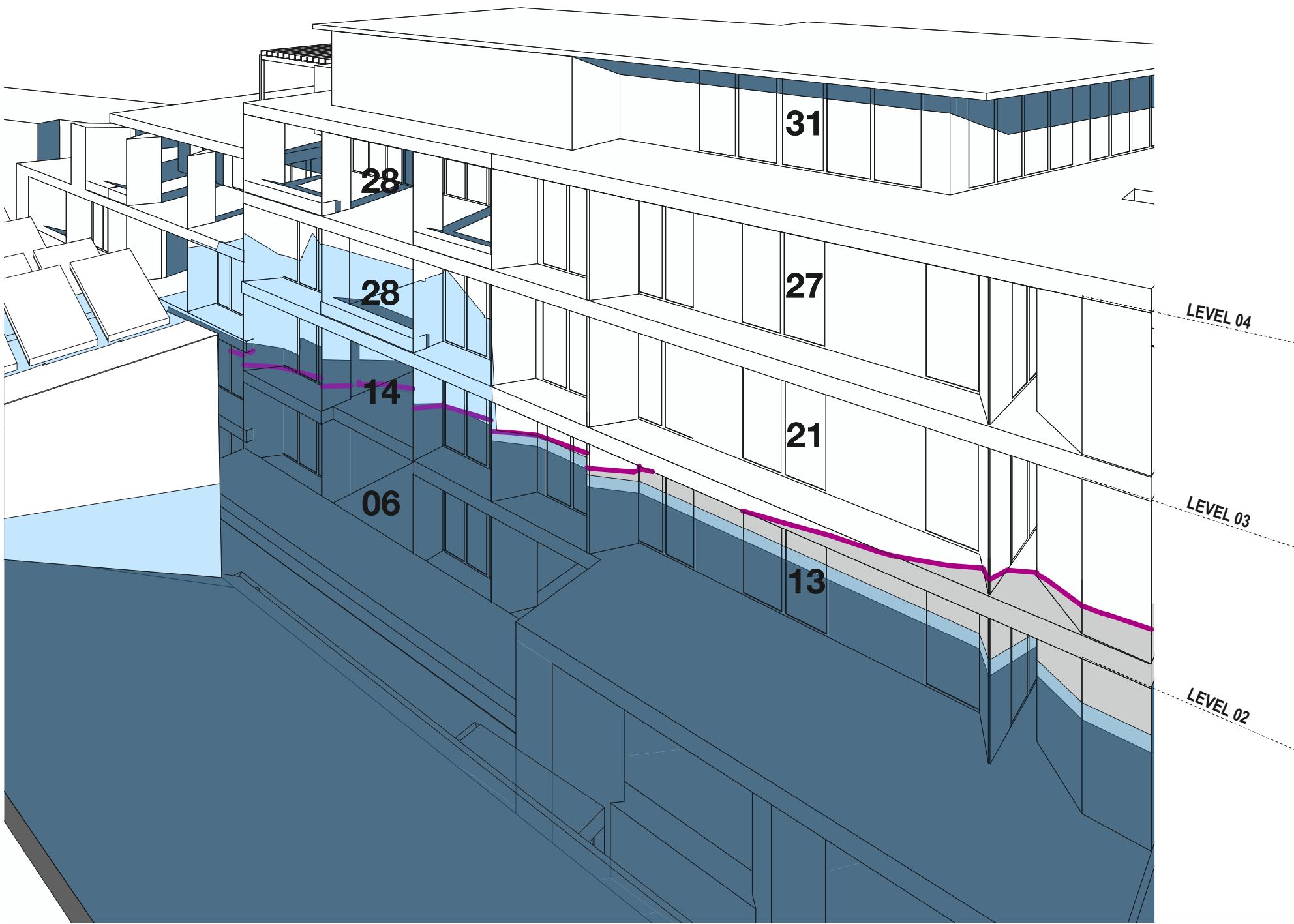
8.0 Conclusion

The assessment above demonstrates that compliance with the maximum building height development standard contained in Clause 4.3 of the Ku-ring-gai LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allowing for a better outcome in planning terms.

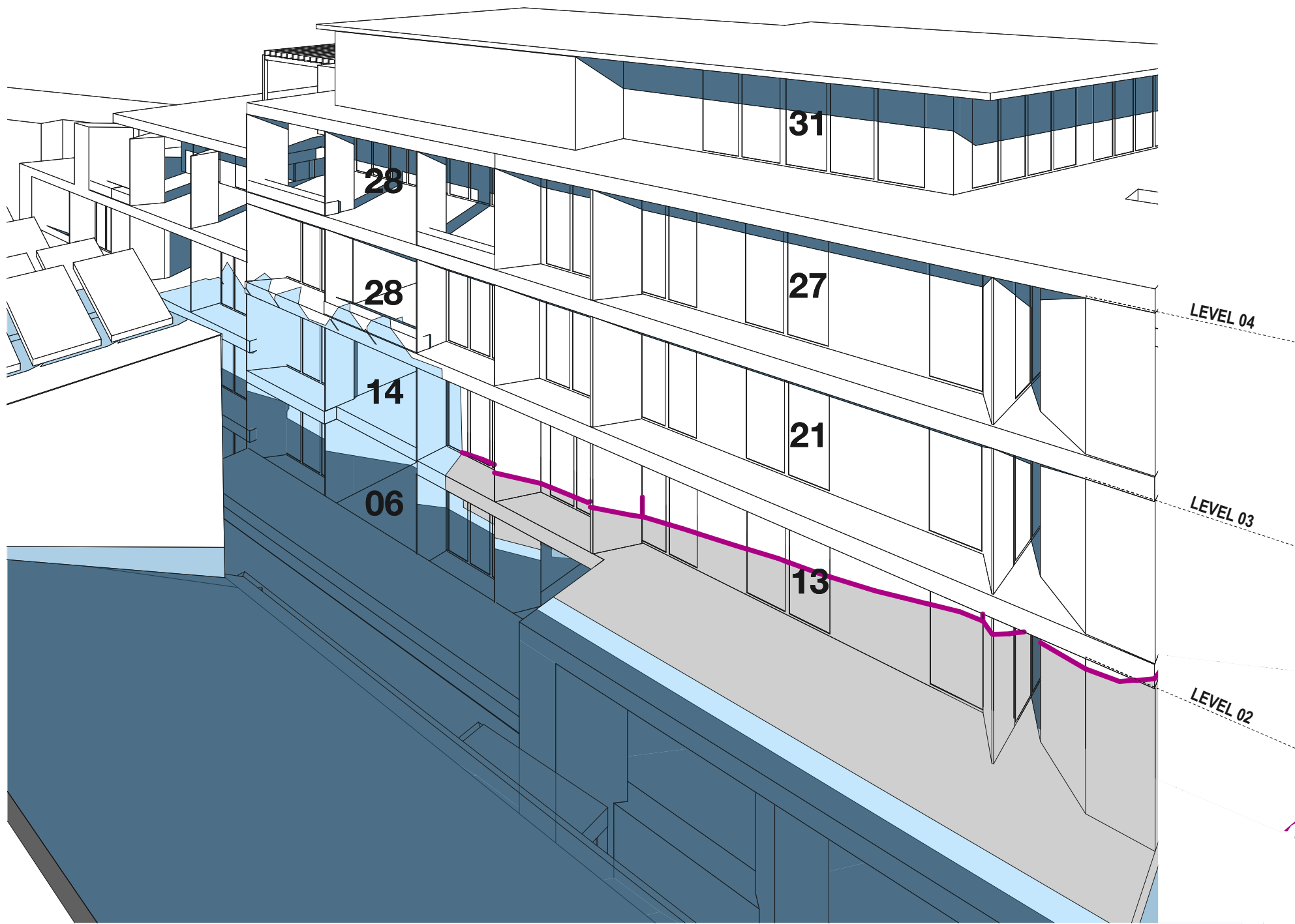
This Clause 4.6 variation demonstrates that, notwithstanding the non-compliance with the maximum height development standard, the proposed development:

- The variation is driven by the presence of the existing Theatre building. The additional height will enable the required structural, acoustic, functional and environmental upgrades to the existing Marian Street Theatre.
- Will have an appropriate impact, in terms of its scale, form and massing;
- Will not result in any additional overshadowing impacts on 4 – 8 Marian Street when compared to a LEP compliant built form;
- Will continue to provide an appropriate transition between high density residential development to the west, and the public open space to the east; and
- The design protects the residential amenity of adjoining and surrounding properties, as well as the amenity of Selkirk Park to the east and the Marian Street streetscape to the north.

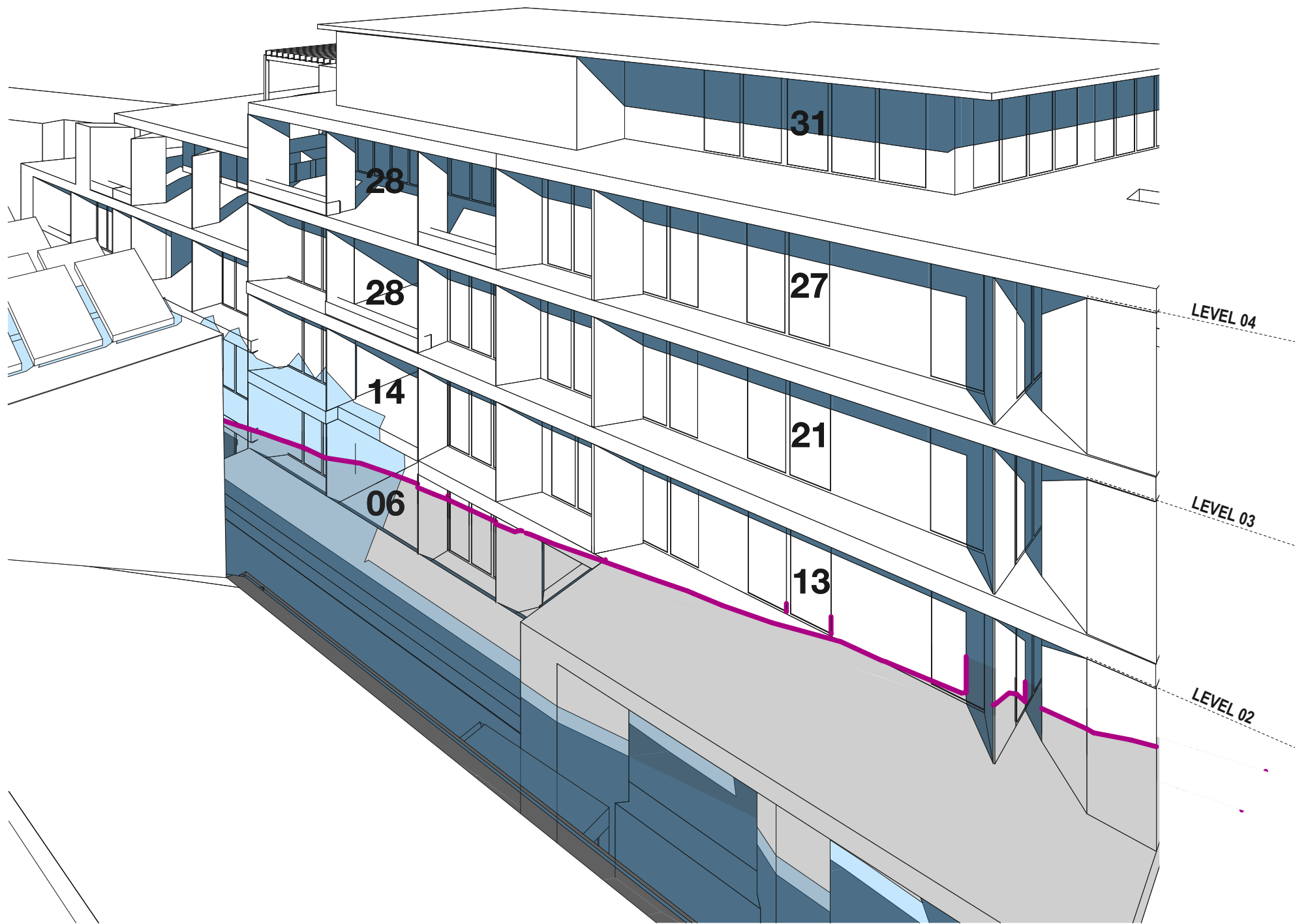
Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Ku-ring-gai LEP.



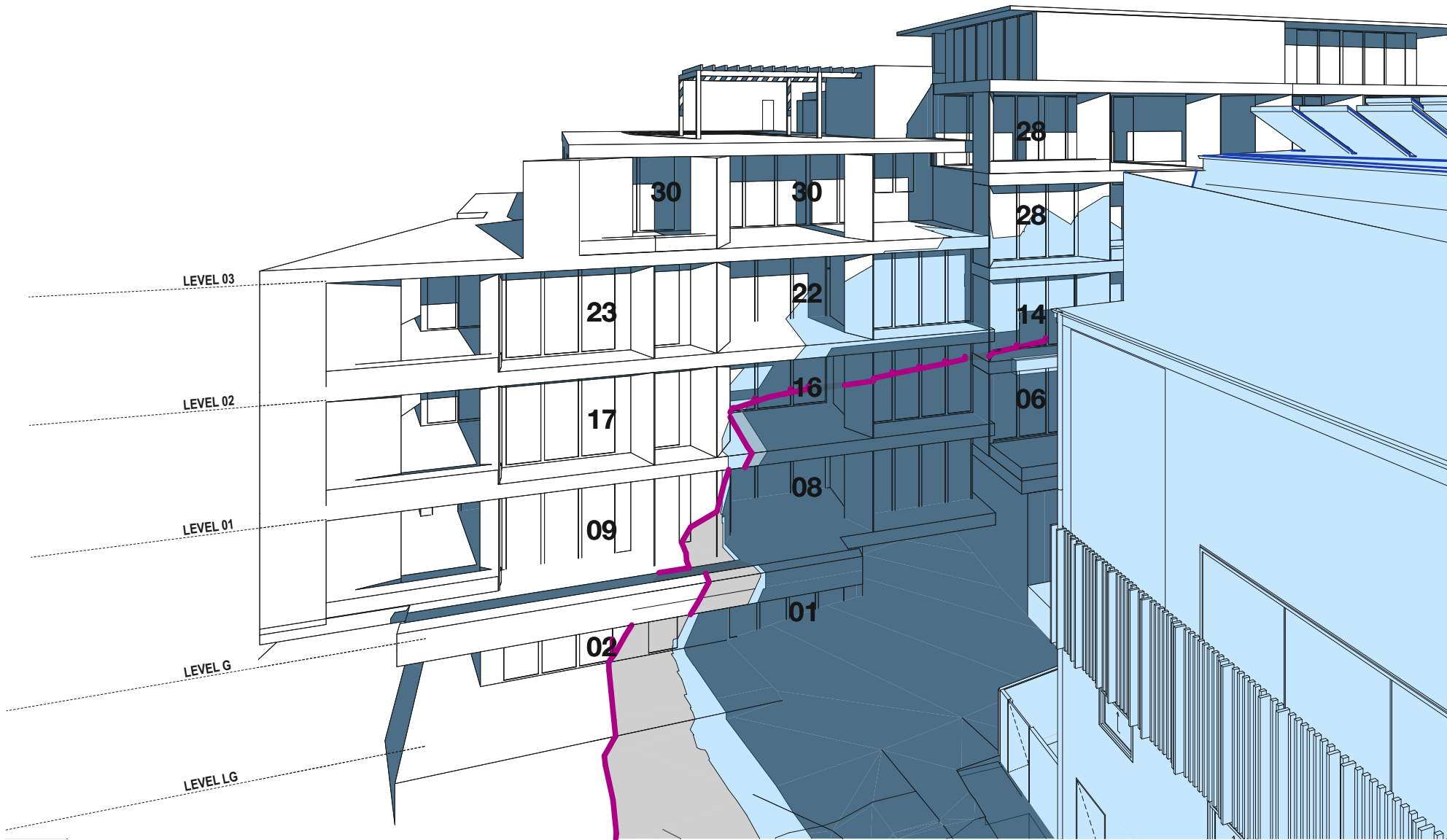
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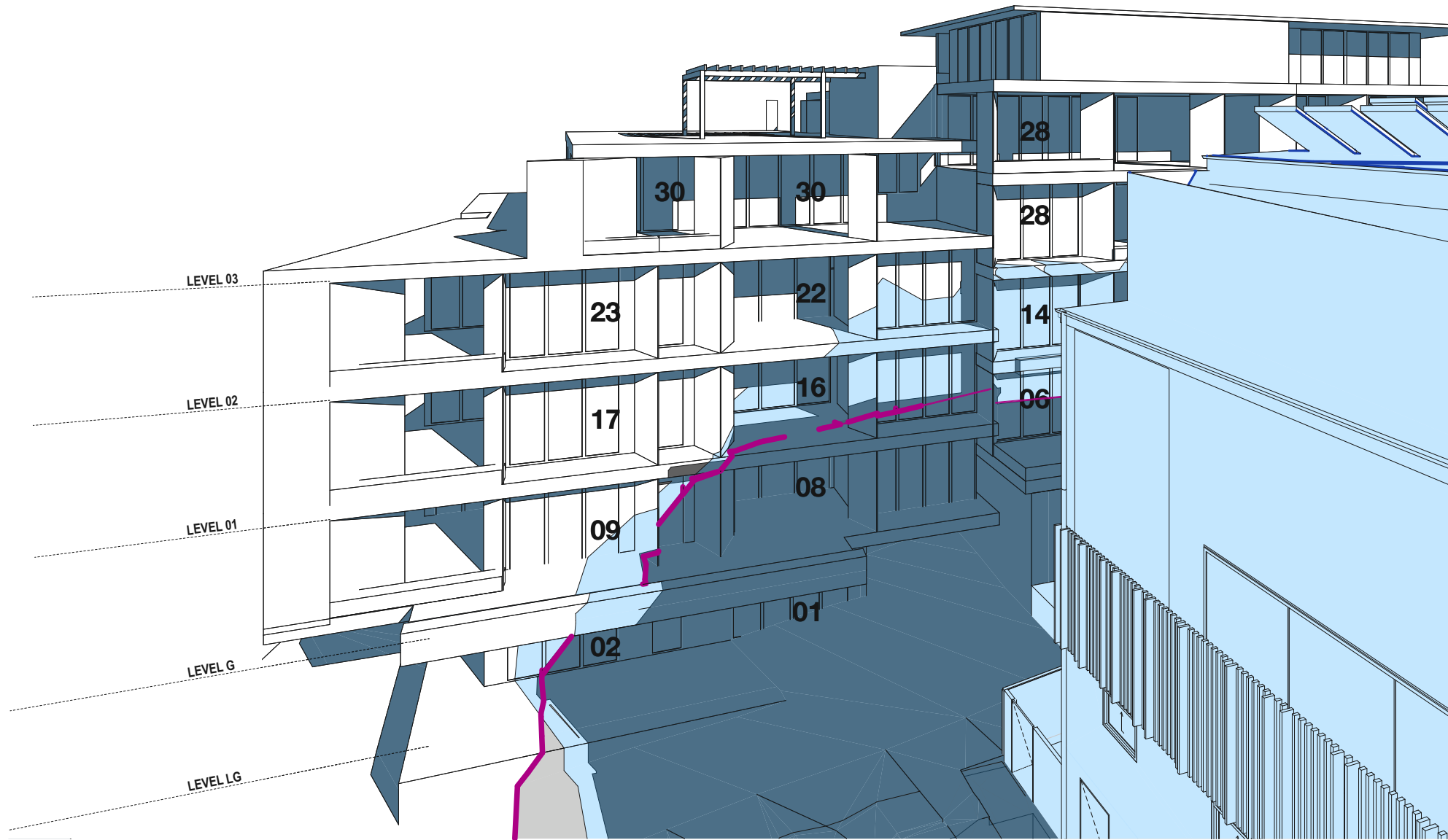
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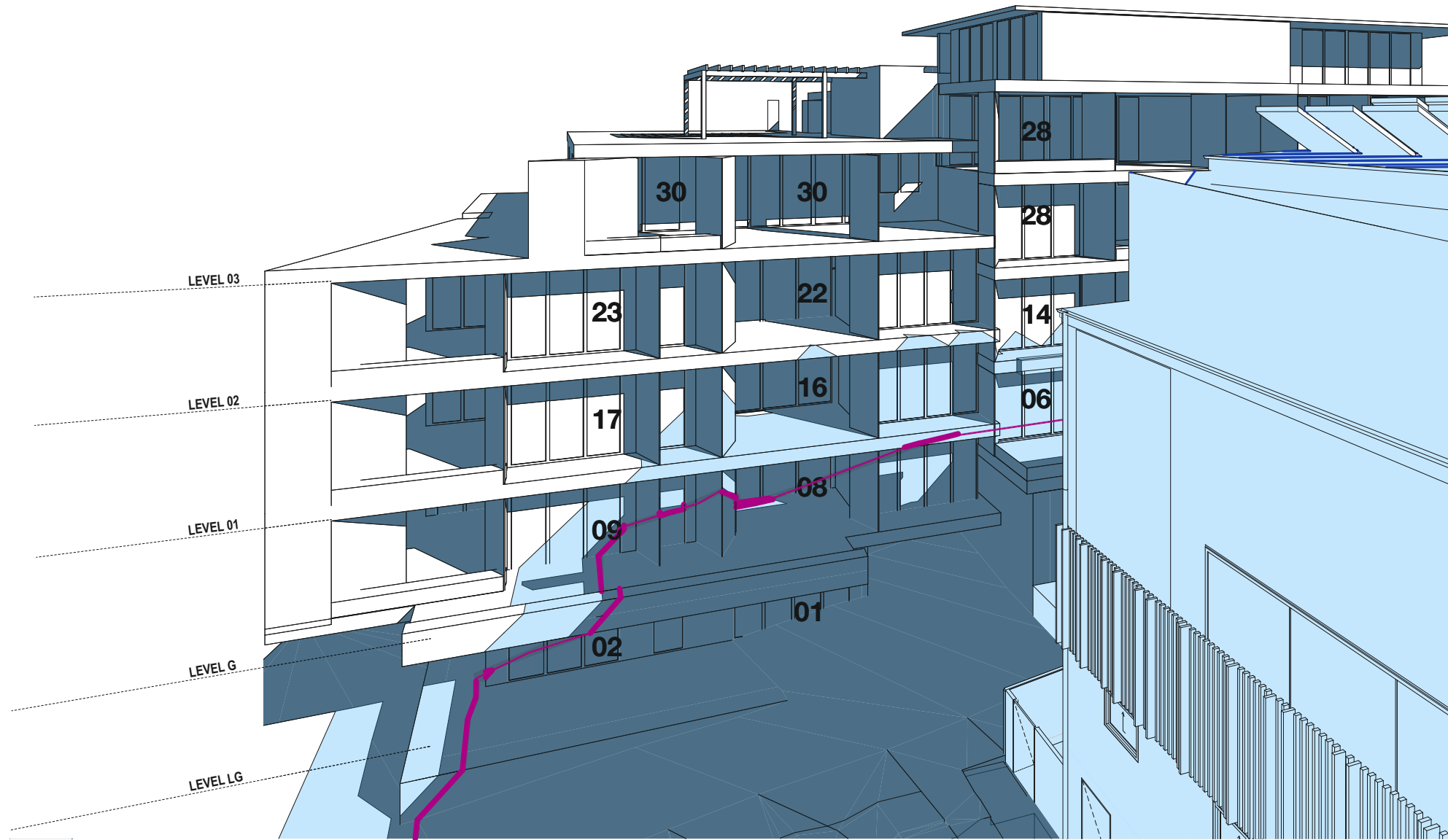
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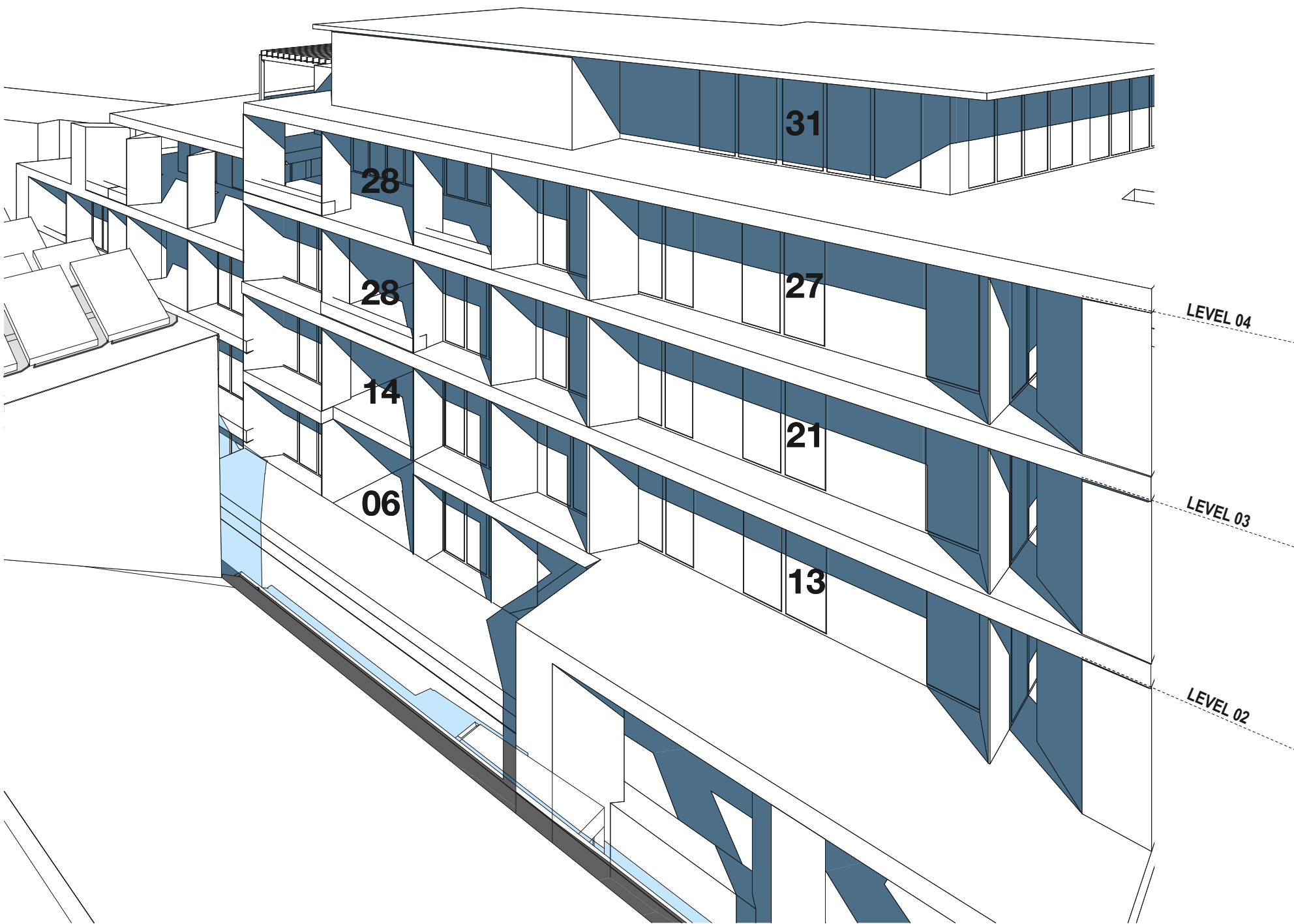
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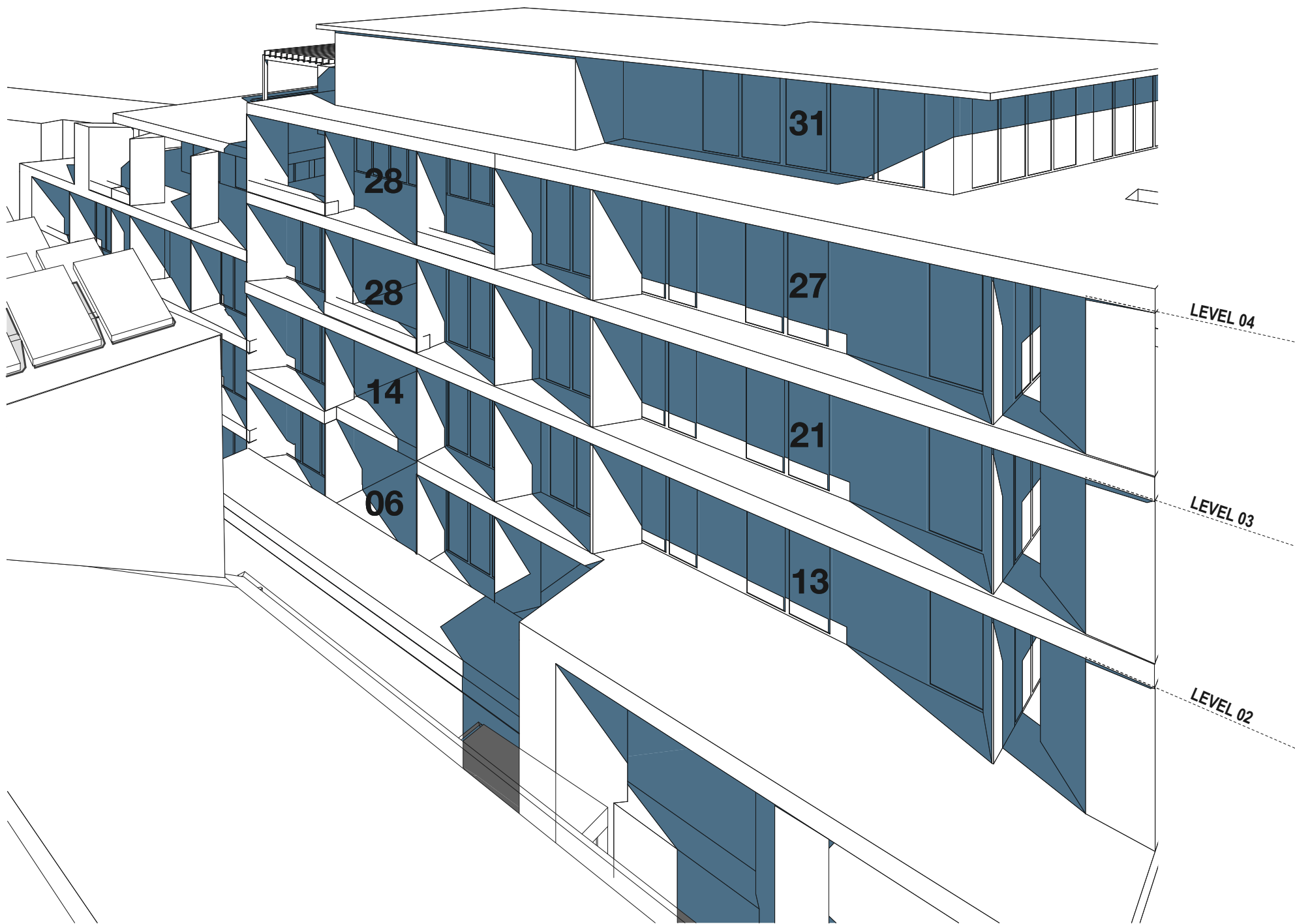
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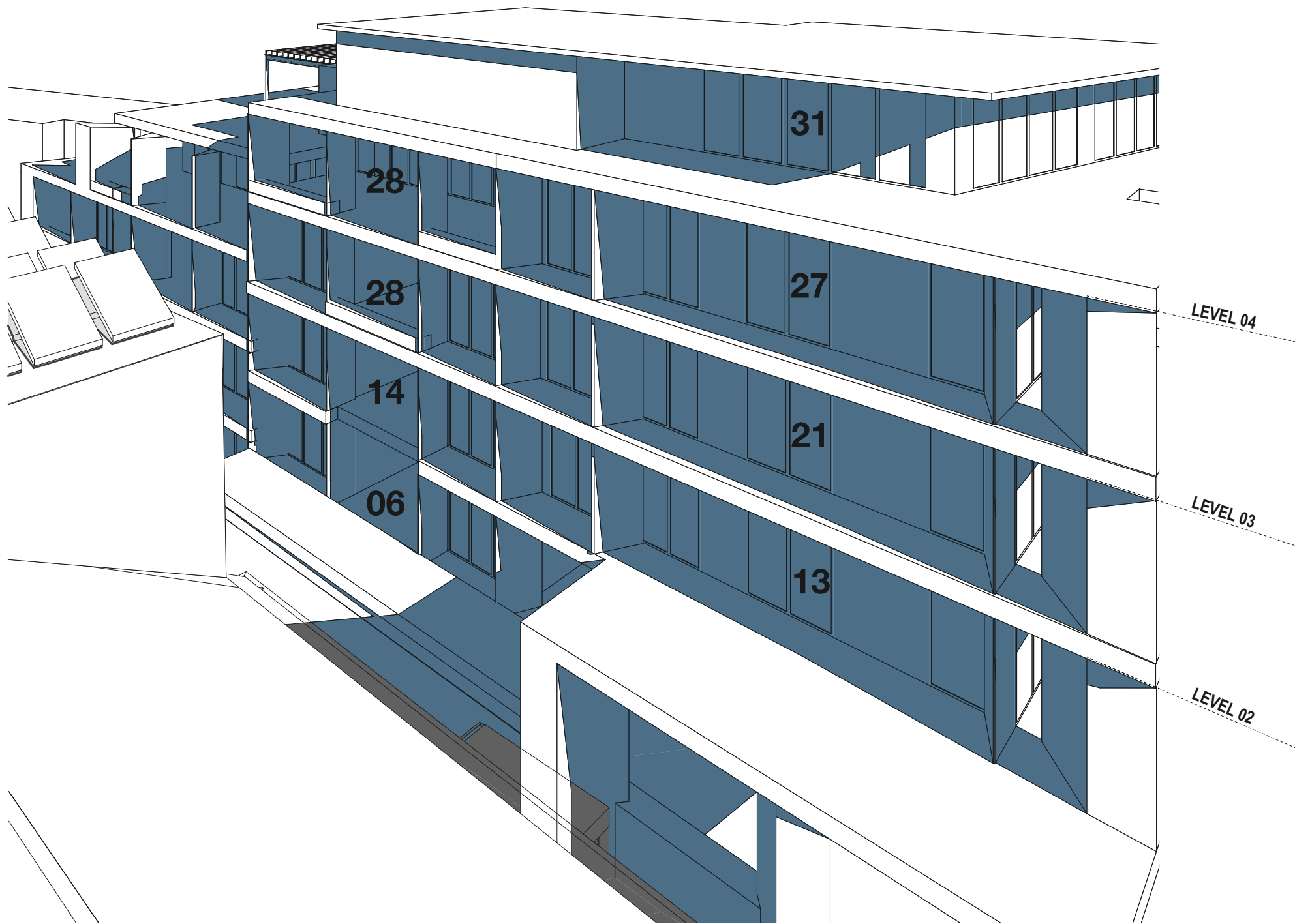
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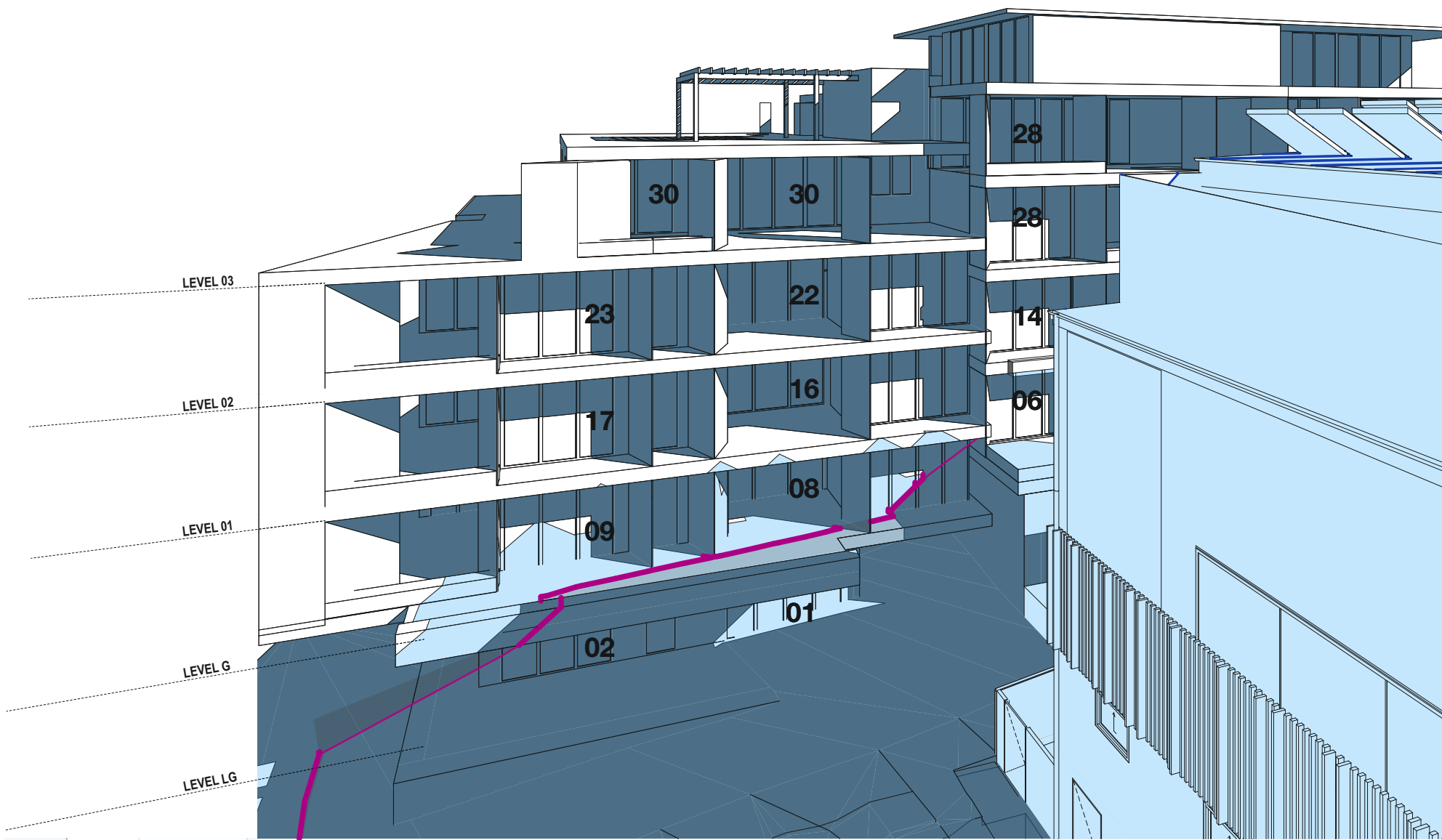
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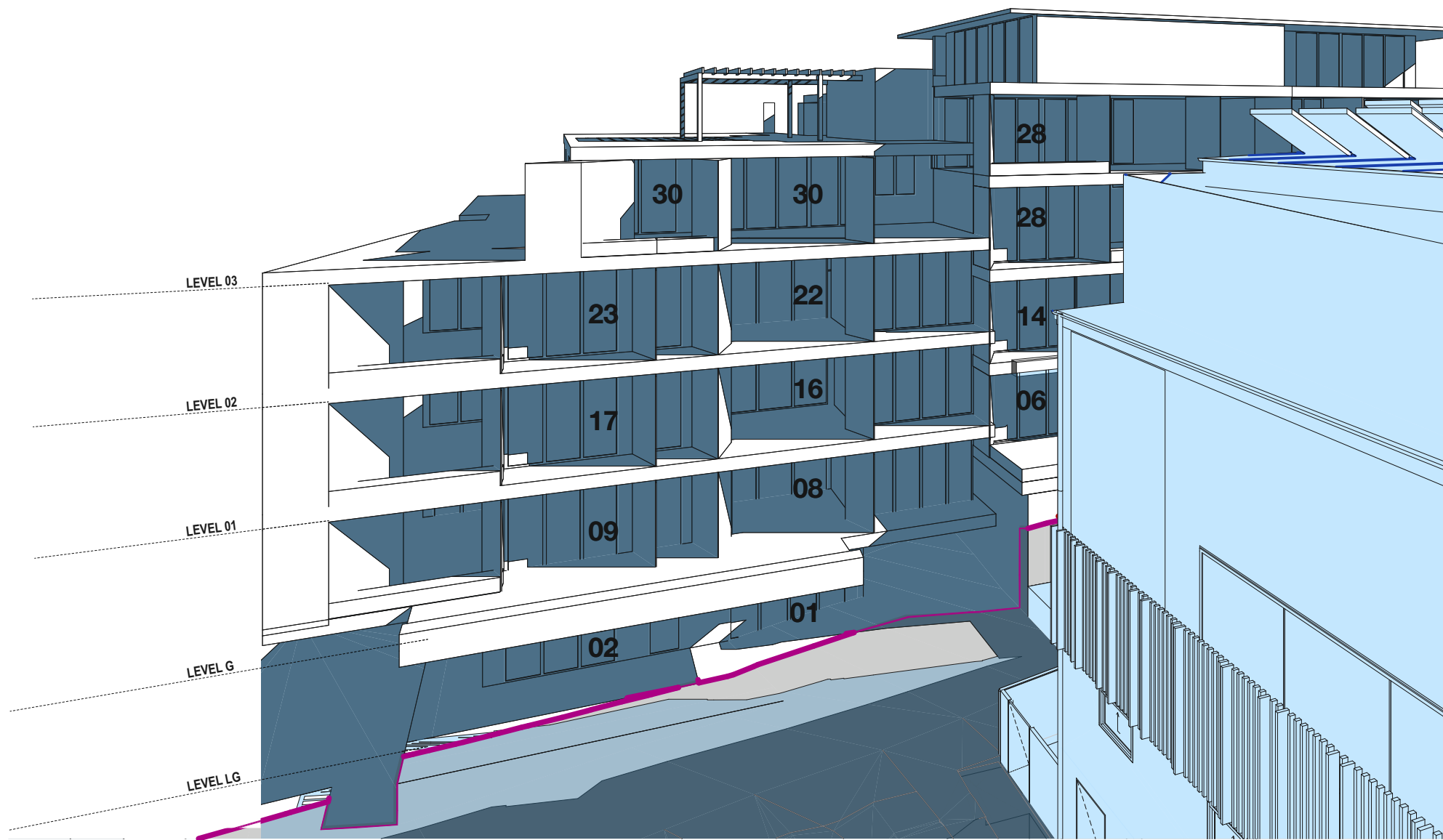
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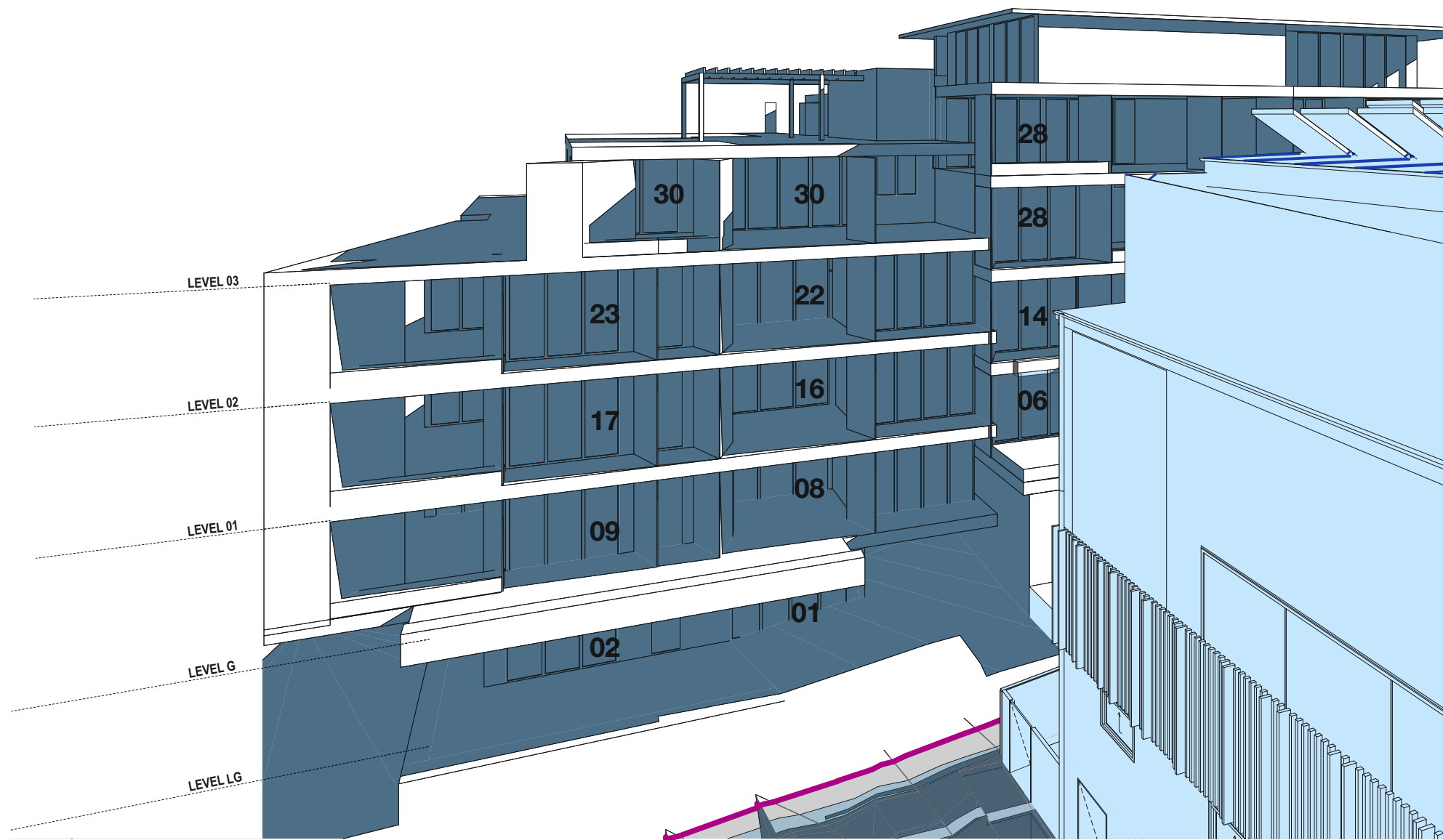
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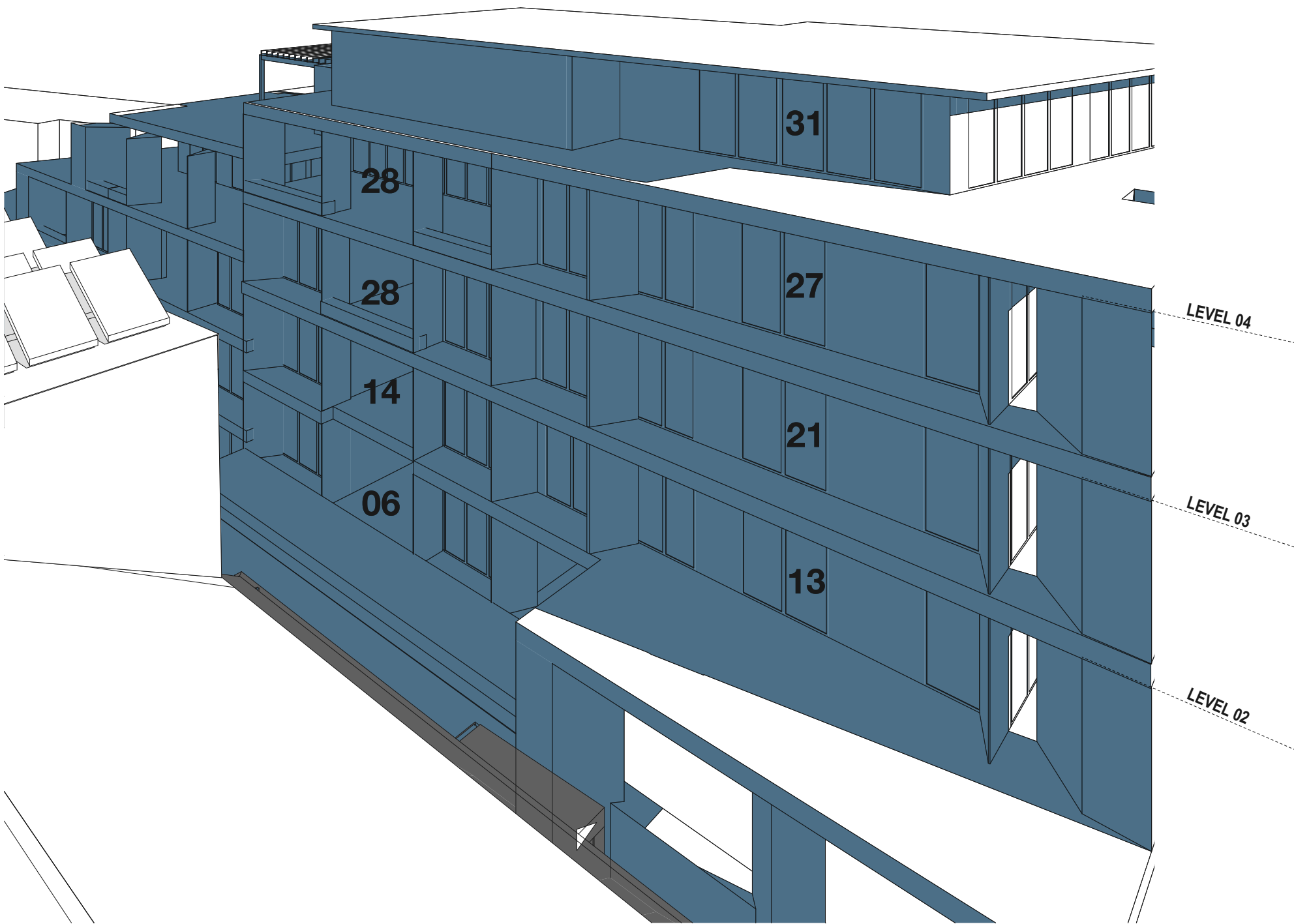
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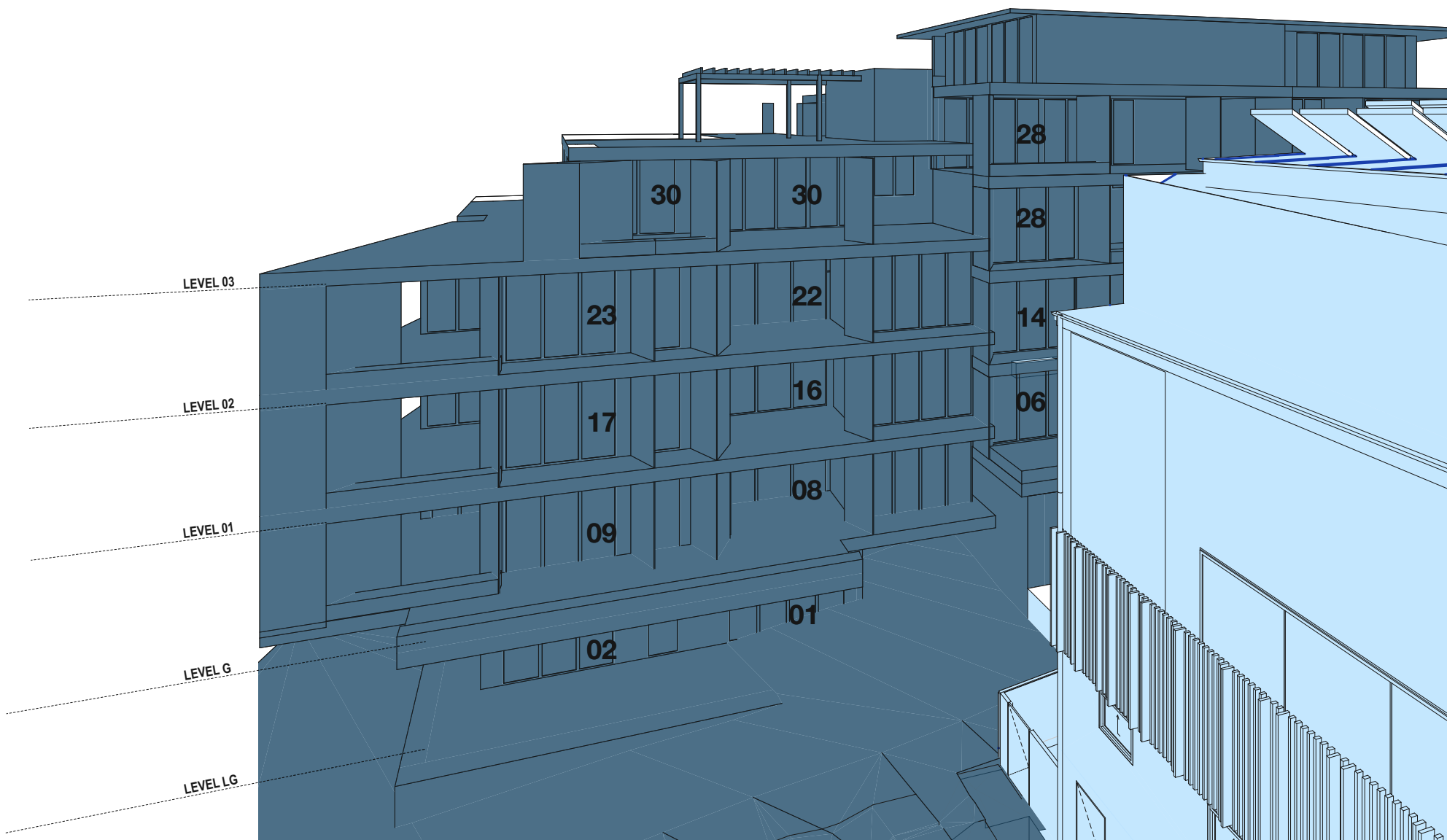
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