



**NSLPP MEETING HELD ON 5/05/21**

**Attachments:**

1. Site Plan
2. Architectural Plans
3. Clause 4.6 Variation

**ADDRESS/WARD:** 13 Eden Street, North Sydney(W)

**APPLICATION No:** DA 339/20

**PROPOSAL:** To change of use of six (6) “business/retail” tenancies to studio apartments

**PLANS REF:** Project 2304 Plan Ref DA01, DA02, DA03 and DA4 Issue G prepared by Max Wessels. Plans DA101A, 102A, 103A, 104A, 105A and 201A prepared by Cracknell & Lonergan Architects

**OWNER:** [REDACTED]

**APPLICANT:** Myrtle 29 Pty Ltd

**AUTHOR:** Leonie Derwent, Consultant Planner Ingham Planning Pty Ltd

**DATE OF REPORT:** 20 April 2021

**DATE LODGED:** 21 December 2020

**RECOMMENDATION:** Refusal

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## EXECUTIVE SUMMARY

This development application seeks approval to change of use of six (6) “business/retail” tenancies to studio apartments which are located on the ground floor of an existing mixed use building.

The premises are located on the ground floor of a mixed use development within a B4 mixed use zone. The site is occupied by a mixed-use development accommodating eight (8) non-residential tenancies at the ground floor level, and seventeen (17) residential apartments above. Off- street car parking is provided for 22 vehicles within a basement level accessed via a combined entry/exit driveway located along the Eden Street frontage of the site.

**The proposal is reported to North Sydney Local Planning Panel for determination due to the level of public interest expressed and the total number of unique submissions that have been received objecting to the proposal. Notification of the proposal has attracted 12 public submissions. One submission was on behalf of 4 properties.**

The proposal has been assessed against the relevant requirements of the North Sydney LEP 2013 and North Sydney DCP 2013 and is considered to be contrary to the aims of the plan and objectives of the B4 (Mixed Use) zone and the provisions of Part B Section 2 of the DCP relating to mixed use development.

The zone objectives and DCP provisions require that a diversity of activities be maintained, including non-residential uses, while protecting residential accommodation and local amenity.

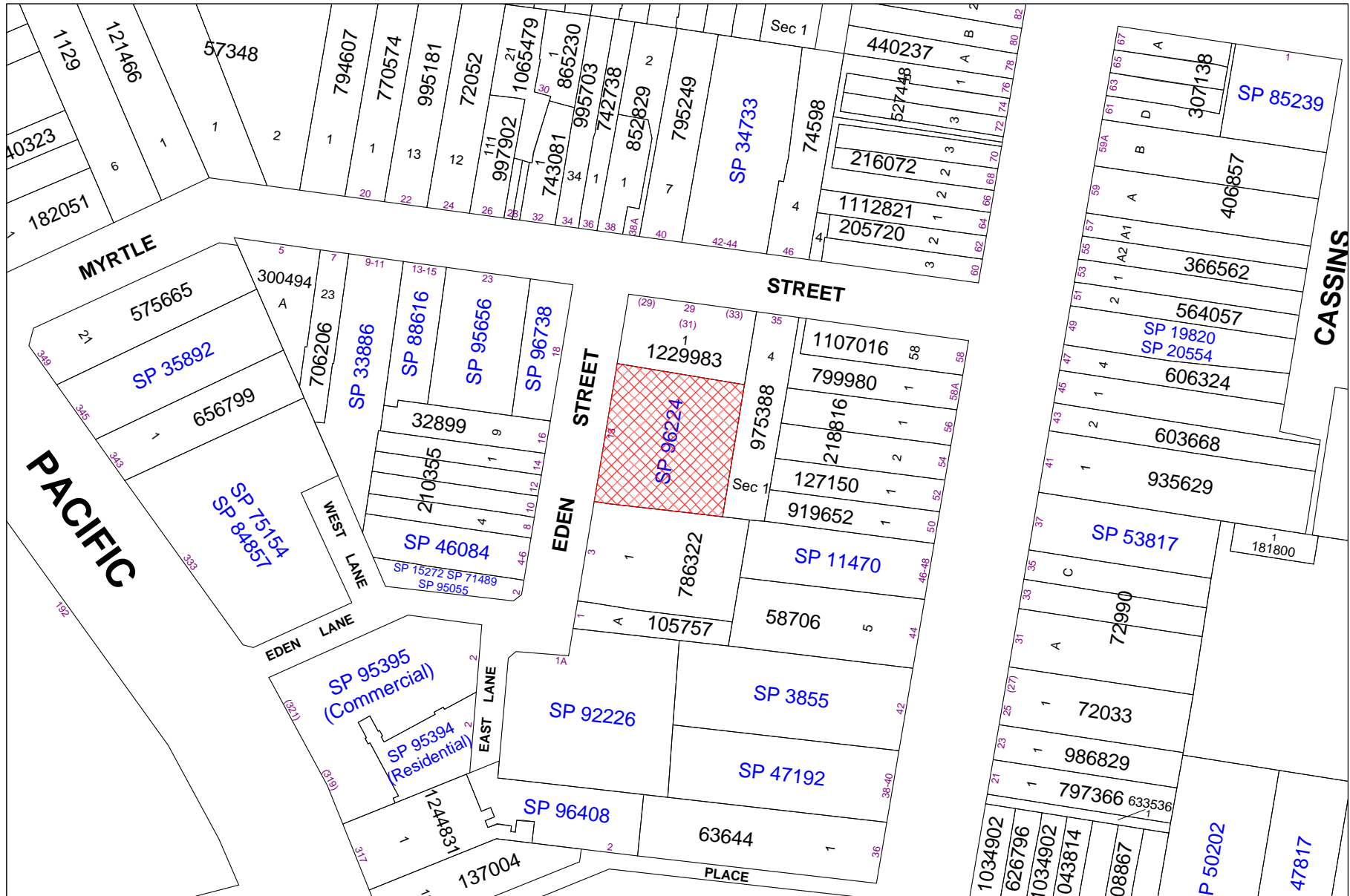
Due to the design of the existing mixed use building, with its large central courtyard and void above, the proposal would adversely affect the amenity of existing residential properties within the building in terms of acoustic privacy. Impacts of the proposal on residential amenity are considered to be unreasonable and unsatisfactory, and contrary to the aims under Clause 1.2 2(d) (ii) of the North Sydney Local Environmental Plan 2013.

The application also involves a loss of non-residential floor space within the building, contrary to the requirements of Clause 4.4A (Minimum non-residential FSR) of NSLEP 2013. The written request seeking a variation to the non-residential FSR standard is not considered to be well founded as it has not adequately addressed subclause (3) in Clause 4.6 in NSLEP 2013, nor it is considered to be in the public interest as it is inconsistent with the objectives of the standard and zone.

This application is reported to the Planning Panel in conjunction with DA 287/20 which seeks separate development consent for the extension of hours of the same premises for continued commercial use.

Following this assessment, the development application is not considered to be reasonable in the circumstances and is recommended for **refusal**.

LOCATION MAP



□ Property/Applicant    ● Submitters - Properties Notified

## **DESCRIPTION OF PROPOSAL**

The subject site is located on the north eastern corner of the intersection of Eden Street and Myrtle Street.

The subject premises were approved as part of Development Consent (DA 351/2013) which was approved by the Land and Environment Court. DA 351/2013 permitted substantial alterations and additions to, and partial demolition of 2 existing buildings on No. 29-33 Myrtle Street, demolition of an existing building on No. 13 Eden Street and the construction of a new 4 storey building with basement parking at Nos. 29-33 Myrtle Street and No. 13 Eden Street, North Sydney to create a mixed use building comprising 17 residential apartments, ground floor retail/business uses and basement parking for 22 vehicles.

On 3 November 2016, Council granted Development Consent (DA 176/2016) to subdivide the site to create two (2) allotments in a stratum subdivision. The former dwellings occupy Lot 1 in DP 1229983 and the mixed-use development to the rear occupies Lot 2. A right of footway extends over Lot 1 in favour of Lot 2, and a right of carriageway extends over Lot 2 in favour of Lot 1 to provide access to the basement.

The approved development has been modified under two previous modification applications to make minor changes to the approved development (tree removal and minor reconfiguration of internal and external parts of the development).

Applications to modify the existing development consent to have 24 hours operating hours apply to both the 3 Cottages in Myrtle Street and Suites G.01- G.07 and have previously been submitted to Council in 2018 and 2019 and refused on the grounds that the amended development did not satisfy the requirements of Section 4.55 of the Act, and that the modification “would not ensure that the amenity of the surrounding locality is maintained”. The subject application is a development application and not a modification to the existing development consent.

### **Proposed change of use of six of the approved “business/retail” tenancies to studio apartments.**

This development application seeks development consent to change of use of six of the approved “business/retail” tenancies to studio apartments which are located on the ground floor of an existing mixed use development at No. 13 Eden Street, North Sydney.

### **Proposed Development**

The existing “business/retail” tenancies include kitchen, bathroom and laundry facilities, therefore there are no major physical works which are required to facilitate the change of use to studio apartments. As discussed within this report, some works are required to satisfy fire separation, and these are indicated in the BCA Report which was submitted with the application.

The existing “business/retail” tenancies have access to individual courtyards to the north, accessed directly to/from the open plan living areas. The apartment and courtyard sizes, as provided in the SEE, are summarised below:

Apartment	Floor Area m2	Courtyard Size m2
Apartment 1	62	7
Apartment 2	33	8
Apartment 3	33	8
Apartment 4	41	5
Apartment 5	34	5
Apartment 6	34	5

Two (2) of the “business/retail” tenancies (No’s 1 and 4) include off-street car parking spaces within the existing basement.

The two tenancies known as G.07 and the retail space fronting Eden Street will remain as business/retail uses.

As shown in the extract of the proposed ground plan below, the layout of the mixed use building is centred around a courtyard area. Apartments on the upper floors open up onto the void space which is created by the ground floor courtyard space. Some apartments on the upper levels have balconies overlooking the courtyard.

The configuration of the building with the central courtyard was a consideration in the NSLPP’s refusal of the recent DA 180/2019 which sought to convert ground floor tenancies to a motel use. The NSLPP considered that there were inherent conflicts between the use of a motel and the residential uses above due to no barrier between the two uses.

While this use seeks to convert most of the ground floor to residential use, the issue of noise is paramount due to the design of the existing building. The plan shown below indicates the existing balcony areas in orange. These areas are directly adjacent to the central courtyard and the location of balconies on the upper levels are directly above. In addition, the SEPP 65 Design Statement prepared by Cracknell and Lonergan Architects states that the central courtyard will serve as a communal area of open space.

An extract of the ground floor plan submitted with the application is provided below:



Figure 1:

## STATUTORY CONTROLS

North Sydney LEP 2013

- Zoning – B4 Mixed Use
- Item of Heritage - No
- In Vicinity of Item of Heritage – No, nearest items are the rear of Nos 58/58A West Street
- Conservation Area – No, adjacent to CA09 Holterman Estate C.
- FSBL - No

S7.11 Contribution – Yes (Contribution required if consent is granted)

Environmental Planning & Assessment Act 1979

SEPP No. 55 - Contaminated Lands - No

SEPP No. 64 - Advertising Signs – No

SEPP65 - Design Quality of Residential Apartment Development – Yes

SEPP (BASIX) - Yes

SREP (2005) - No

Local Development - Yes

## POLICY CONTROLS

NSLEP 2013

The site is zoned B4 – Mixed Use under North Sydney Local Environmental Plan 2013 (NSLEP 2013).

Under the B4 zone, the following may be carried out with development consent:

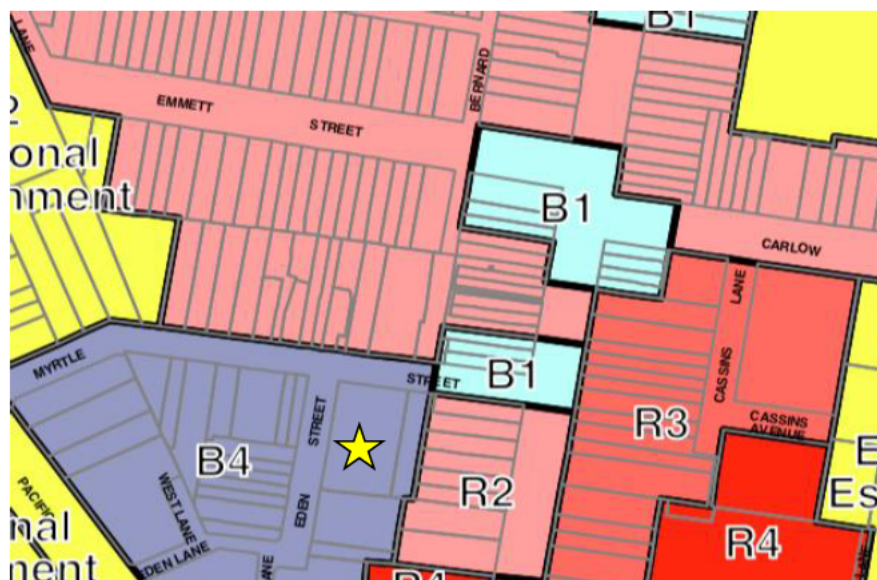
*Amusement centres; Backpackers' accommodation; Boarding houses; Car parks; Centre-based child care facilities; Commercial premises; Community facilities; Educational establishments; Entertainment facilities; Function centres; Hostels; Hotel or motel accommodation; Information and education facilities; Medical centres; Oyster aquaculture; Passenger transport facilities; Places of public worship; Recreation areas; Recreation facilities (indoor); Registered clubs; Residential flat buildings; Respite day care centres; Restricted premises; Roads; Seniors housing; Serviced apartments; Sex services premises; Shop top housing; Signage; Tank-based aquaculture; Vehicle repair stations; Veterinary hospitals*

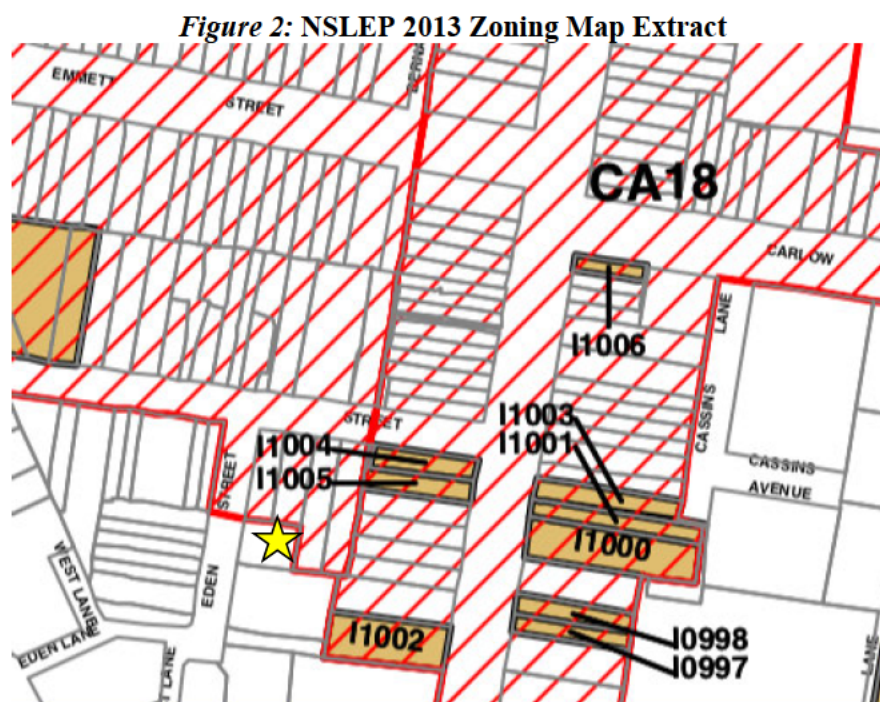
The proposal will continue to support both residential and commercial uses however it will not comply with other provisions of the NSLEP for mixed use development.

Clause 2.3 of the LEP requires the consent authority to have regard to the objectives for development in a zone when determining a DA in respect of land within the zone. The objectives of the B4 Mixed Use 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 create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
- *To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.*

In regard to the above objectives, the amenity of the existing residents within the building would be reduced by the conversion of the lower level of the building being converted to studio apartments, and the vision for the separation between of uses between the lower levels and upper levels to maintain amenity for residential users. In addition, objective 4 seeks to maintain existing commercial space which is not met by this proposal.





**Figure 3: NSLEP 2013 Heritage Map Extract**

### North Sydney DCP 2013

Part B, Section 2 – Commercial and Mixed Use Developments applies to the application.

Part B, Sections 10 and 11 (Carparking and Traffic generation) do not apply as there is no proposal change to the basement carpark level with 2 spaces being available for the six apartments.

### **DESCRIPTION OF LOCALITY**

The site is not within the Holtermann Estate Conservation Area C but is immediately adjacent to the area.

The site is located within an established mixed-use precinct characterised by a relative predominance of commercial and residential land uses, accommodated within a wide variety of building forms. Within the vicinity of the site are 1-2 storey dwellings and multi-level commercial buildings of different architectural styles.

### **RELEVANT HISTORY**

#### **DA 351/2013**

Development Consent (DA 351/2013) was approved by the Land and Environment Court. DA 351/2013 permitted substantial alterations and additions to, and partial demolition of 2 existing buildings on No. 29-33 Myrtle Street, demolition of an existing building on No. 13 Eden Street and the construction of a new 4 storey building with basement parking at Nos. 29-33 Myrtle Street and No. 13 Eden Street, North Sydney to create a mixed use building comprising 17 residential apartments, ground floor retail/business uses and basement parking for 22 vehicles.



The approved development has been successfully modified under two previous modification applications (**DA351/2 and DA351/3**) to make minor changes to the approved development (tree removal and minor reconfiguration of internal and external parts of the development). A subsequent modification which related to the former cottages was refused by Council.

### DA 176/2016

On 3 November 2016, Council granted Development Consent (DA 176/2016) to subdivide the site to create two (2) allotments in a stratum subdivision. The former dwellings occupy Lot 1 in DP and the mixed-use development to the rear occupies Lot 2. A right of footway extends over Lot 1 in favour of Lot 2, and a right of carriageway extends over Lot 2 in favour of Lot 1 to provide access to the basement. This consent was subsequently modified by Council on the 07/08/2017.

### DA 301/16

On 24 November 2016 Development Application No. 301/16 was approved by delegated authority for the first use of the eleven (11) non-residential tenancies. Use for each ground floor tenancy on the subject were shown on the approved floor plans as follows:



*Figure 4: Approved uses ground floor tenancies G01 to G07 (DA301/16).*

Under the approval granted by DA 301/16 the following relevant conditions apply to the ongoing commercial operation of the premises:

**I. On-Going / Operational Conditions**

**Hours of Operation**

11. *The hours of operation are restricted to:*

*Monday to Saturday: 7.00 am to 7.00 pm  
Sunday or a Public Holiday: No operation.*

*(Reason: To ensure that the amenity of the surrounding locality is maintained)*

**No Entertainment**

12. *In relation to Tenancy No. 8, this approval is for a sandwich shop only and does not authorise musical or other forms of entertainment. A separate development consent is required for any proposed entertainment.*

*(Reason: Clarification of terms of this consent and ensure compliance with relevant legislation)*

**Commercial Waste and Recycling Storage**

13. *Commercial waste and recycling material/storage bins must be stored in a separate area to the residential waste and recycling material/storage bins.*

*(Reason: To ensure that commercial waste and residential waste is not mixed and is properly managed)*

**Waste Collection**

14. *Waste and recyclable material, generated by this premises, must not be collected between the hours of 10pm and 6am on any day.*

*(Reason: To ensure the amenity of surrounding properties)*

**Delivery Hours**

15. *No deliveries, loading or unloading associated with the premises are to take place between the hours of 10pm and 6am on any day.*

*(Reason: To ensure the acoustic amenity of surrounding properties)*

**Shop Premises Registration**

16. *The shop premises must be registered with Council and NSW Food Authority prior to commencement of operation of the approved activity. Shop Premises Registration must be maintained at all times.*

*Note:*

- a) Council registration forms can be found at <http://www.northsydney.nsw.gov.au>*
- b) Notification is required to the NSW Food Authority under Standard 3.2.2 Division 2 Section 4 Notification. (see [www.foodnotify.nsw.gov.au](http://www.foodnotify.nsw.gov.au))*

*(Reason: To ensure compliance with environmental health legislation)*

***Details of commencement of approved uses***

17. *Documentary and photographic evidence of the commencement of each and every approved use (11 in total) is to be provided to North Sydney Council within one month of the commencement of each use, for Council's records. Details are to include at least the business name and full contact details, together with photographic evidence of commencement.*

*No change of use under SEPP (Exempt and Complying Development Codes) 2008 of any of the approved uses is to be carried out unless the subject approved use has been lawfully commenced and is existing, supported by documentary and photographic evidence as detailed above.*

*(Reason: For Council's records and to ensure compliance with the provisions of SEPP (Exempt and Complying Development Codes) 2008)*

On 19 February 2018 correspondence was received by Council from Moore Development Group to provide documentary evidence to address the requirements of Condition I7 above which states that the existing occupancy was for office uses.

**DA 180/2019**

On 20 June 2019 the NSLPP refused development consent for the change of use from business / retail use to motel use of six (6) ground floor tenancies.

**DA 288/2020**

On 9 November 2020 a development application was lodged with Council for the change of use to residential - 6 lots and was rejected by the DRP on the 12 November 2020.

**DA287/2020**

On the 9 November 2020 a development application was lodged with Council for the use of the ground floor premises G01-G07 (inclusive) 24 hours, 7 days a week. This application is currently being assessed by Council.

**DA 288/220**

On 12 November 2020 Council rejected an application which sought development consent for the use of the ground floor premises for residential purposes. The application was rejected on the grounds that insufficient information was submitted with the following information not provided:

**1. *Design Verification Statement/SEPP 65***

*Please provide a design verification statement to Council that demonstrates compliance with SEPP 65 verifying that:*

- *the nominated architect designed or directed the design of the apartment building.*
- *the design principles as set out in part 2 of SEPP 65 have been achieved for apartment building development*
- *that the 10 design quality principles are individually addressed.*

## 2. **Plans**

*The plans submitted do not demonstrate compliance with ADG/SEPP 65 standards for residential apartments, please provide a suite of architectural plans of the proposed apartments that demonstrate compliance with the ADG/SEPP 65.*

## 3. **Statement of Environmental Effects**

*A revised Statement of Environmental Effects is required to address the relevant provisions in North Sydney Local Environment Plan 2013 and North Sydney Development Control Plan 2013 along with specific details as to how the application meets these provisions.*

## **REFERRALS**

### **Building**

The proposal was referred to Council's Building Surveyor who provided the following comments.

*The development application seeks approval for the change of use of 6 class 5 existing Ground Floor retail/business tenancies to 6 class 2 studio apartments with no physical building works proposed.*

*The proposed development will result in a change of the buildings NCC BCA classification to be a class 2, 5 and 7a building of Type A construction.*

*The Statement of Environmental Effects accompanying the development application informs that no physical building works are intended. However, upon review of the Fire Safety Statement accompanying the application dated 30 October 2020 prepared by BCA Logic it has been revealed that fire safety upgrade works are required and proposed triggering the requirement for a Construction Certificate.*

*Upgrade of the building pursuant to Clause 94 of the Environmental Planning & Assessment Regulations 2000 is not required.*

*A review of the Plans submitted with the application revealed that adequate cooking and sanitary facilities are provided to each studio.*

*Access to the new part of the building for persons with a disability is only required to be considered if the studio apartments are intended to be used for short term rental accommodation.*

*A detailed assessment of compliance with the Building Code of Australia 2019 will be undertaken by an appropriately accredited certifier at the Construction Certificate Stage of the proposed development. Additionally, a Fire Safety Schedule is to be prepared by the certifier and accompany the Construction Certificate.*

*Generally, the proposed works are able to comply with the NCC BCA 2019, Volume 1.*

## Heritage

The proposal was not referred to Council’s Heritage Advisor for comment.

## SUBMISSIONS

Adjoining properties and the Hayberry Street were notified of the proposed development between 1 to 29 January 2021 and a notice was placed on Council’s website on 14 January 2021. A total of 15 submissions were received with the main issues raised summarised below:

### Basis of Submissions

- The applicant has not presented a compelling argument to the variation of floorspace
- The lack of demand for commercial premises does not warrant conversion to residential use in a mixed use zone
- Retention of the commercial use of the ground floor premises requested
- Resulting noise and parking issues from the conversion of ground floor premises to residential uses
- The proposed change of use will result in a change to the character of the development
- Privacy issues will result from a mix of residential and commercial uses on the same floor
- The design of the building was to enable commercial uses on the ground floor, operating in reasonable time frames, and residential above. The design of the building around a courtyard results in noise travelling up to dwellings. Use of the ground floor as predominantly residential use will exacerbate noise within the entire building which could not be managed.
- Loss of amenity by way of increased noise and increased pressure for carparking on streets.

## CONSIDERATION

The relevant matters for consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*, are assessed under the following headings:

The application has been assessed against the relevant numeric controls in NSLEP 2013 and DCP 2013 as indicated in the following compliance tables. More detailed comments with regard to the major issues are provided later in this report.

### NSLEP 2013 Compliance Table

<b>Principal Development Standards – North Sydney Local Environmental Plan 2013</b>			
<b>Site Area - 805.1m<sup>2</sup></b>	<b>Proposed</b>	<b>Control</b>	<b>Complies</b>
Clause 4.1 – Subdivision lot size	No Change to existing		YES
Clause 4.3 – Heights of Building	No Change to existing		YES
Clause 4.4 – Floor Space Ratio	No Change to existing overall FSR		YES
Clause 4.4a – Non residential FSR	Change to existing FSR due to increase residential	minimum non-residential floor space ratio (FSR) of 0.5:1.	NO 0.1:1 proposed

**DCP 2013 Compliance Table**

<b>DEVELOPMENT CONTROL PLAN 2013 – Part B Section 2- Commercial and Mixed Use Development</b>		
	<i>Complies</i>	<i>Comments</i>
<b>2.2 Function</b>		
<p><b>Diversity of Activities</b>  <i>O1 To ensure a diversity of activities, facilities, opportunities and services is provided, including high grade business accommodation, community services, employment, entertainment, government agencies, health and welfare, recreation and retail.</i></p> <p><i>P3 A variety of uses should be provided at street level, which contributes positively to economic and social vitality.</i></p>	No	Although some non-residential uses would be retained on the ground floor, the retention of only two tenancies would not comply with this objective as a diversity of activities within the building and immediate neighbourhood in line with the desired outcomes in the B4 zone could not be provided. The proposed conversion of the majority of the ground floor to residential use would inevitably limit the use of the remaining two tenancies due to concerns that future ground floor residents might have.
<b>Maximise Use of Public Transport</b>	Yes	The site is accessible to public transport and will still encourage walking and cycling by virtue of its location within North Sydney.
<b>Mixed Residential Population</b>	N/A	Uses retained.
<b>2.3 Environmental Criteria</b>		
<b>Clean Air</b>	Yes	
<b>Noise</b>	Yes	
<b>Solar Access</b>	No	The matter of solar access is dealt with in the ADG. Apartments 1-4 receive no solar access into Private Open Spaces. Apartments 1-3 receive no solar access into living areas. Therefore Apartments 1-3 would not receive any solar access to either Private Open Spaces or Living Areas which is unsatisfactory, particularly in the small studios proposed.
<b>Acoustic Privacy</b>	No	<p>The stated objective is:</p> <p><i>O1 To ensure all residents within mixed use developments are provided with a reasonable level of acoustic privacy.</i></p> <p>The design of the building with a central courtyard would result in noise travelling into other apartments on the same level and on the upper levels.</p> <p>Fundamentally the design was to provide a mixed use of commercial premises on the ground level, operating in accepted business hours, having no conflict with residential users at more sensitive hours of the day and night.</p>
<b>Visual Privacy</b>	No	The mix of residential and non-residential uses on the ground floor may result in privacy concerns into the residential apartments. The proposed studio apartments are small and it is likely that doors would be kept open to improve ventilation and use of the courtyard. This would also raise acoustic issues within the development.
<b>2.5 Quality Urban Environment</b>		
<b>Accessibility</b>	Yes	
<b>Safety and Security</b>	Yes	
<b>Private Open Space</b>	No	Although the studios are comparable in size to other studio spaces, the small sizes would be likely to result in the residents of the studios utilising the courtyard area for open space which is undesirable given the design of the building around a central courtyard.
<b>Vehicular Access</b>	Yes	

Car Parking	Yes	
Garbage Storage	Yes	
Site Facilities	Yes	

## NORTH SYDNEY LEP 2013

### 1. Permissibility within the zone:

The subject site is zoned B4 Mixed Use pursuant to LEP 2013. The proposed use of the ground floor would result in six of the tenancies being residential use while only two (2) would be retained as commercial use.

### 2. Objectives of the zone

The particular objectives of the Mixed Use zone are to:

- *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 create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
- *To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses on the lower levels and residential uses above those levels.*

The proposal to convert six of the eight commercial tenancies to residential use is inconsistent with the objectives of the zone which seek to ensure that there is a mixture of compatible land uses, that mixed use areas are interesting and vibrant, to maintain existing commercial space and to concentrate non residential uses on lower levels with residential uses above. In this regard:

- The proposal in its current form, with business uses on the ground floor being restricted in use from 7am until 7pm, is acceptable and was anticipated by residential occupants. The proposal to extend the use of the ground floor tenancies to include six residential tenancies which would rely on access through the central courtyard and having doors and windows open to provide amenity and natural ventilation would produce increased noise to the upper level residential uses within the building. Fundamentally the design of the building does not support uses on the ground floor which would create any additional noise. The potential use of the central courtyard as a common area is problematic to the upper levels, especially to balconies on the upper levels.
- The deletion of a large area of commercial floor area would not provide the ongoing opportunity for a vibrant centre.
- The conversion of the commercial spaces to residential studios is contrary to the objective to maintain existing commercial space.
- The mixed use on the ground floor is also problematic in regard to privacy and noise generation between these uses.

### 3. Non residential Floor space control in mixed use developments.

Clause 4.4A of the LEP specifies a minimum non-residential floor space ratio (FSR) of 0.5:1. In that regard, the proposed development results in the site accommodating approximately 80m<sup>2</sup> of non-residential floor space, representing a non-residential FSR of approximately 0.1:1. As such, a clause 4.6 variation needs to be considered and supported by Council.

The applicant has prepared a clause 4.6 variation and it is summarised below. A copy of the document is provided at Attachment 2:

*“Is the requirement a development standard?”*

*The non-residential FSR control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.*

*What is the underlying object or purpose of the standard?”*

*The objectives of the non-residential FSR control are expressed as follows:*

- (a) to provide for development with continuous and active street frontages on certain land in Zone B1 Neighbourhood Centre, Zone B4 Mixed Use and Zone SP2 Infrastructure,*
- (b) to encourage an appropriate mix of residential and non- residential uses,*
- (c) to provide a level of flexibility in the mix of land uses to cater for market demands,*
- (d) to ensure that a suitable level of non residential floor space is provided to promote employment and reflect the hierarchy of commercial centre*

*In relation to objective (a), the proposed development maintains the existing active street frontage, with the existing “business/retail” tenancy retained at the street frontage.*

*In relation to objective (b), the proposed development will maintain a mix of residential and non-residential land uses.*

*In relation to objective (c), the proposed development maintains an active street frontage, and maintains a mix of residential and non- residential uses.*

*Further, the North Sydney Local Planning Panel identified “inherent conflicts” between motel accommodation at the ground floor level and the residential apartments above (DA 180/19). The specific concerns included noise disturbance from guests impacting upon the residential apartments above, particularly through the central courtyard area.*

*In the circumstances, the proposed development will provide six (6) studio apartments in place of six (6) “business/retail” tenancies, and thereby reduce any potential conflicts between residential and non- residential uses, including through the central courtyard area.*

*In regard to objective (d), the existing “business/retail” tenancies have only ever been occupied by businesses associated with the owner since construction.*



*The owner-occupation of the tenancies has been necessary in circumstances where the owner has been unable to lease or sell any of the tenancies (despite continuous marketing) to any business/retail” related operator/s.*

*In that regard, it has become abundantly clear (over many years) that the site is not suited to non-residential use/s at the ground floor level with restricted operating hours, no direct street frontage, and with residential apartments occupying the levels above.*

*The nature of recent development in the vicinity of the site reflects a diminished demand for non-residential floor space within the immediate vicinity of the site.*

*Further, the numerical “shortfall” of non-residential floor space will not materially affect employment or the hierarchy of commercial centres.*

*In summary, the proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.”*

## **Comment**

The “appropriate mix” is guided by the FSR for non residential development which seeks a minimum of 0.5:1 of non residential uses, located on the lower floors of the development to create vibrancy and to cater for market demands in the short, medium and long terms. The proposal to maintain only two of the eight commercial tenancies proposes a non residential FSR of only 0.1:1 which is a significant departure from the minimum requirement and is not supported.

The previous application which was refused by the NSLPP dealt with a motel use and residential uses above. The existing situation is business and retail uses on the ground floor which are restricted in use from 7am to 7pm which are compatible with the residential uses on the upper levels. The use of six ground floor tenancies as studios would possibly create conflict between the uses on the ground floor in terms of use, privacy and noise and would increase noise to the upper levels as use would be unrestricted and the central courtyard is more likely to be used as common area.

*“Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?”*

*The Department of Planning published “Varying development standards: A Guide” (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in Wehbe v Pittwater Council [2007] NSWLEC 827 to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.*

1. *The objectives of the standard are achieved notwithstanding non- compliance with the standard;*

*The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.*

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

*The objectives and purpose of the non-residential FSR control remain relevant, and the proposed development is generally consistent with the objectives of the control, notwithstanding the numerical variation.*

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

*The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.*

*Further, strict compliance with the non-residential FSR control would restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and reduce any potential conflicts between residential and non-residential uses.*

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;*

*The non-residential FSR control has not specifically been abandoned or destroyed by the Council's actions. Irrespective, the Council has consistently adopted an orderly but flexible approach to the implementation of development standards (including the non-residential FSR control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations.*

*Further, the objectives of Clause 4.6 of the LEP includes to provide "an appropriate degree of flexibility in applying certain development standards to particular development".*

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

*The zoning of the land remains relevant and appropriate. Irrespective, strict compliance with the non-residential FSR control would unnecessarily restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and reduce any potential conflicts between residential and non-residential uses."*

## **Comment**

The clause 4.6 variation is not robust enough in regards to providing an adequate argument as to how the underlying objectives (b), (c) and (d) of the standard would be met by the proposal. It is not considered that there would be an appropriate mix of residential and non residential uses within the building. The remaining two tenancies would not provide a level of flexibility in the medium to long term if changes occurred in the market place and would not promote employment opportunities.

Are there sufficient environmental planning grounds to justify contravening the development standard?

*The proposed numerical variation to the non-residential FSR control is reasonable and appropriate in the particular circumstances on the basis that:*

- *the proposed development maintains the existing active street frontage, with the two (2) tenancies closest to the street maintained for “business/retail” uses;*
- *the proposed development will maintain an appropriate mix of residential and non-residential land uses;*
- *the existing “business/retail” tenancies have only ever been occupied by businesses associated with the owner since construction. The owner-occupation of the tenancies has been necessary in circumstances where the owner has been unable to lease or sell any of the tenancies (despite continuous marketing) to any “business/retail” related operator/s;*
- *it has become abundantly clear (over many years) that the site is not suited to non-residential use/s at the ground floor level with restricted operating hours, no direct street frontage, and with residential apartments occupying the levels above;*
- *the recent development in the locality reflects a diminished demand for non-residential floor space within the immediate vicinity of the site;*
- *strict compliance with the non-residential FSR control would unnecessarily restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and where there are potential conflicts between residential and non-residential uses;*
- *the Council has consistently adopted an orderly but flexible approach to the implementation of development standards (including the non-residential FSR control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations;*
- *the proposed development is consistent with, or not antipathetic to, the objectives of the B4 – Mixed Use zone; and*
- *the proposed development is generally consistent with, or not antipathetic to, the objectives of the non-residential FSR control, notwithstanding the numerical variation.*

Are there any matters of State or regional significance?

*The proposed numerical variation to the non-residential FSR control does not raise any matters of State or regional significance.*

What is the public benefit of maintaining the standard?

*The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.*

*In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the non-residential FSR control in other instances.*

*In that regard, the objectives of Clause 4.6 of the LEP includes to provide*

*“an appropriate degree of flexibility in applying certain development standards to particular development”.*

*Any other matters?*

*There are no further matters of relevance to the proposed variation to the building height control.*

*Zone Objectives and Public Interest*

*The site is zoned B4 – Mixed Use pursuant to the North Sydney Local Environmental Plan (LEP) 2013, and the objectives of the zone are expressed as follows:*

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations to as to maximise public transport patronage and encourage walking and cycling.*
- *To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
- *To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominately on the higher levels.*
- *The proposed development is generally consistent with (or not antipathetic to) the objectives of the B4 – Mixed Use zone on the basis that:*
  - *the proposed development maintains a mix of compatible non- residential and residential land uses;*
  - *the site is well serviced by public transport which provides convenient access to the North Sydney Central Business District (CBD) and beyond;*
  - *the proposed development will contribute to a safe and vibrant urban environment offering a good level of residential amenity; and*
  - *the proposed development maintains non-residential floor space at the ground floor level at the street frontage, with the existing residential apartments occupying the levels above.*

*Finally, the variation to the non-residential FSR control does not raise any significant matters of public interest. “*

## **Comment**

The submitted clause 4.6 variation has not provided a compelling argument as to why Council should vary the non residential FSR to the extent proposed. Comparisons with other developments is not relevant to this case and it is the peculiarities of the design of this building which give rise to issues of noise to existing residents.

As discussed, while the addition of studio apartments contributes to the mix of apartment sizes within the development, the location and size of the apartments and including the lack of cross ventilation would be likely to promote the use of the courtyard as a communal space. This was not envisaged as communal open space when the building was originally designed.

#### **4 Heritage Provisions**

The site is not within a Heritage Conservation Area but immediately adjacent to one. There is no change to the form or appearance of the building. The proposed development will facilitate the use of the existing buildings for purposes that are permissible in the zone, and no physical works are required to accommodate the change of use. Accordingly, the proposed development will have no impact on the heritage significance of the conservation area.

#### **SREP (Sydney Harbour Catchments) 2005**

The site is located within the catchment of Sydney Harbour and is subject to the provisions of the above SREP. The proposed use would not be visible from Sydney Harbour and will not have any other impact thereupon. The proposed development raises no other issues and otherwise satisfies the aims and objectives of the SREP.

#### **SEPP 55 and Contaminated Land Management Issues**

The proposed use is considered to be satisfactory with regard to the requirements of the SEPP. In particular the requirements of Clause 7 of the consent have been considered and the subject site considered suitable for the proposed intended use.

#### **SEPP 65 Design Quality of Residential Apartment Development**

The proposed studio apartments have been assessed in regard to the main requirements of SEPP65 (apartment size, floor to ceiling heights, outdoor space, storage and cross ventilation).

The SEE states that some apartments are below the minimum floor area for a studio (35sqm) however the architectural plans indicate slightly larger sizes and compliance. The main non compliance is ventilation – none of the six apartments are provided with cross ventilation.

This may suggest that future residents would be likely to have doors and windows open to courtyard side of the apartments to improve ventilation and as a result conflict may occur in terms of noise and privacy.

The applicant has provided design verification statement which includes a statement that the central courtyard would provide a communal outdoor space. It would be very likely that this space would be utilised by ground floor residents as outdoor area. The concern is that the use of the central courtyard will lead to increased noise within the building due to the design of the building. Once approved, the management of noise would be difficult.

The matter of solar access is dealt with in the SEPP to ensure that good amenity is achieved through adequate access to sunlight. The analysis provided with the applicant indicates that Apartments 1-4 receive no solar access into Private Open Spaces. Apartments 1-3 receive no solar access into living areas. Therefore Apartments 1-3 would not receive any solar access to either Private Open Spaces or Living Areas which is unsatisfactory, particularly in the small studios proposed.

## **DEVELOPMENT CONTROL PLAN 2013**

### ***Relevant Planning Area: Crows Nest/ St Leonards***

The application has been assessed against the relevant controls in DCP 2013.

#### **2. Environmental Criteria**

The issue of concern that has been raised by many residents within the apartments at 13 Eden Street is potential noise between the increased use of the ground floor (for either extended commercial use or residential use) and the apartments above.

#### **3. Quality Built Form**

There are no material changes to the building, some works are required for fire separation and fit out works are required.

#### **4. Urban Environment**

Although the site is within a B4 Mixed Use zone, where there is an expectation that there will be a range of different uses to that allowed in residential zones and a B4 mixed use development explicitly requires non residential uses on the ground floor of a mixed use building with residential above.

#### **5. Providing for the Community**

There is no change to the public domain.

#### **6. Efficient Use of Resources**

There is no change to the use of resources within the site.

#### **7. Car parking**

Off-street parking will continue to be accommodated in the existing car spaces located in the basement car parking area of the building. The use of the ground floor as residential use would be likely to increase the demand for street parking by future residents and visitors, particularly at night and on the weekend when the existing commercial uses are currently not in use, which frees up demand to some degree.

#### **11. Waste Management**

The site is currently serviced for the removal of waste. The proposed application is unlikely to result in an increase for waste services.

## **SECTION 7.11 CONTRIBUTIONS**

Not applicable unless approval was granted.

## **ALL LIKELY IMPACTS OF THE DEVELOPMENT**

All likely impacts of the proposed development have been considered within the context of this report.

## **ENVIRONMENTAL APPRAISAL**

## **CONSIDERED**

1.	Statutory Controls	Yes
2.	Policy Controls	Yes
3.	Design in relation to existing building and natural environment	Yes
4.	Landscaping/Open Space Provision	Yes
5.	Traffic generation and Carparking provision	Yes
6.	Loading and Servicing facilities	Yes
7.	Physical relationship to and impact upon adjoining development (Views, privacy, overshadowing, etc.)	Yes
8.	Site Management Issues	Yes
9.	All relevant S4.15 considerations of Environmental Planning and Assessment (Amendment) Act 1979	Yes

## **SUBMITTERS CONCERNS**

Issues raised by the submitters have been dealt with within this report and by the reasons for refusal.

## **CONCLUSION**

This development application seeks approval to change of use of six (6) “business/retail” tenancies to residential studio apartments which are located on the ground floor of an existing mixed use building.

The proposal has been assessed against the relevant requirements of the North Sydney LEP 2013 and North Sydney DCP 2013 and is considered to be contrary to the aims of the plan and objectives of the B4 (Mixed Use) zone and the provisions of Part B Section 2 of the DCP relating to mixed use development.

The zone objectives and DCP provisions require that a diversity of activities be maintained, including non-residential uses, while protecting residential accommodation and local amenity.

A number of surrounding residents have raised a number of concerns relating to noise, carparking, the applicant has not presented a compelling argument to the variation of floorspace, the lack of demand for commercial premises does not warrant conversion to residential use in a mixed use zone, the proposed change of use will result in a change to the character of the development, privacy, design of the building is not suitable and loss of amenity. Due to the design of the existing mixed use building, with its large central courtyard and void above, the proposal would adversely affect the amenity of existing residential properties within the building in terms of acoustic privacy. Impacts of the proposal on residential amenity are considered to be unreasonable and unsatisfactory, and contrary to the aims under Clause 1.2 2(d) (ii) of the North Sydney Local Environmental Plan 2013.

The application also involves a loss of non-residential floor space within the building, contrary to the requirements of Clause 4.4A (Minimum non-residential FSR) of NSLEP 2013. The written request seeking a variation to the non-residential FSR standard is not considered to be well founded as it has not adequately addressed subclause (3) in Clause 4.6 in NSLEP 2013, nor it is considered to be in the public interest as it is inconsistent with the objectives of the standard and zone.

Following this assessment, the development application is not considered to be reasonable in the circumstances and is recommended for **refusal**.

## **RECOMMENDATION**

**PURSUANT TO SECTION 4.16 OF ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (AS AMENDED)**

**THAT** the North Sydney Local Planning Panel, as the Consent Authority on behalf of Council under the Ministers Direction, refuse consent to Development Application No. 339/20 to convert six of the eight ground floor business/retail tenancies to residential studio apartments for the following reasons:

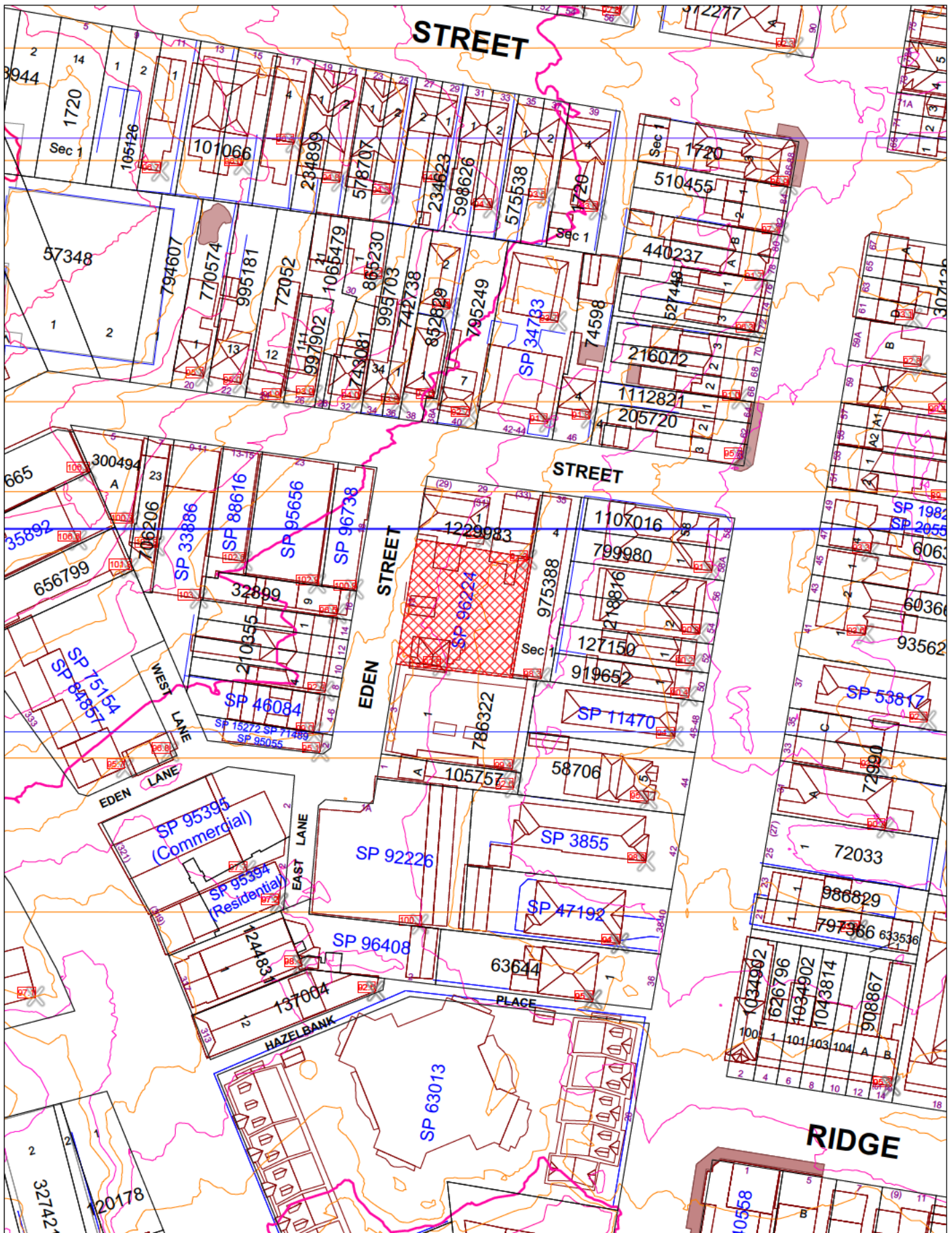
1. The proposal would be contrary to clause 1.2 2(a) of the North Sydney Local Environmental Plan because it has not been demonstrated that the proposal is appropriate to its context and enhances the amenity of the North Sydney community and environment.
2. The proposal is contrary to clause 1.2 2(b) (ii) of the North Sydney Local Environmental Plan because it has not been demonstrated that the proposal will maintain a diversity of activities while protecting residential accommodation and local amenity.
3. Due to the design of the building with a central courtyard and void above, the proposal is contrary to clause 1.2 2(d) (ii) of the North Sydney Local Environmental Plan because the development will adversely affect the amenity of residential properties in terms of acoustic privacy.
4. The proposal is contrary to the stated aim of the B4 Mixed Use zone which is to create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.
5. The proposal is contrary to Objective 5 of Part 1.1.1 (General) of the North Sydney DCP which requires that any development does not have adverse impacts on residential amenity or environmental quality.
6. The written request seeking a variation to the non-residential FSR standard is not considered to be well founded as it has not adequately addressed subclause (3) in Clause 4.6 in NSLEP 2013, nor it is considered to be in the public interest as it is inconsistent with the objectives of the standard and zone.



7. The proposal to convert the six commercial tenancies to residential studios fails to achieve the objectives and guidelines for reasonable solar access into areas of Private Open Spaces and Living Rooms of apartments. In this regard, the proposed apartment 1-4 would receive no solar access to areas of private open space while apartments 1-3 would fail to achieve minimum levels of solar access to living areas within the apartments. In addition, none of the apartments provide adequate cross ventilation. Therefore, the proposed conversion to residential studios would therefore not result in a good planning outcome due to poor residential amenity to any future resident.

**Leonie Derwent**  
**Ingham Planning Pty Ltd**  
**CONSULTANT TOWN PLANNER**

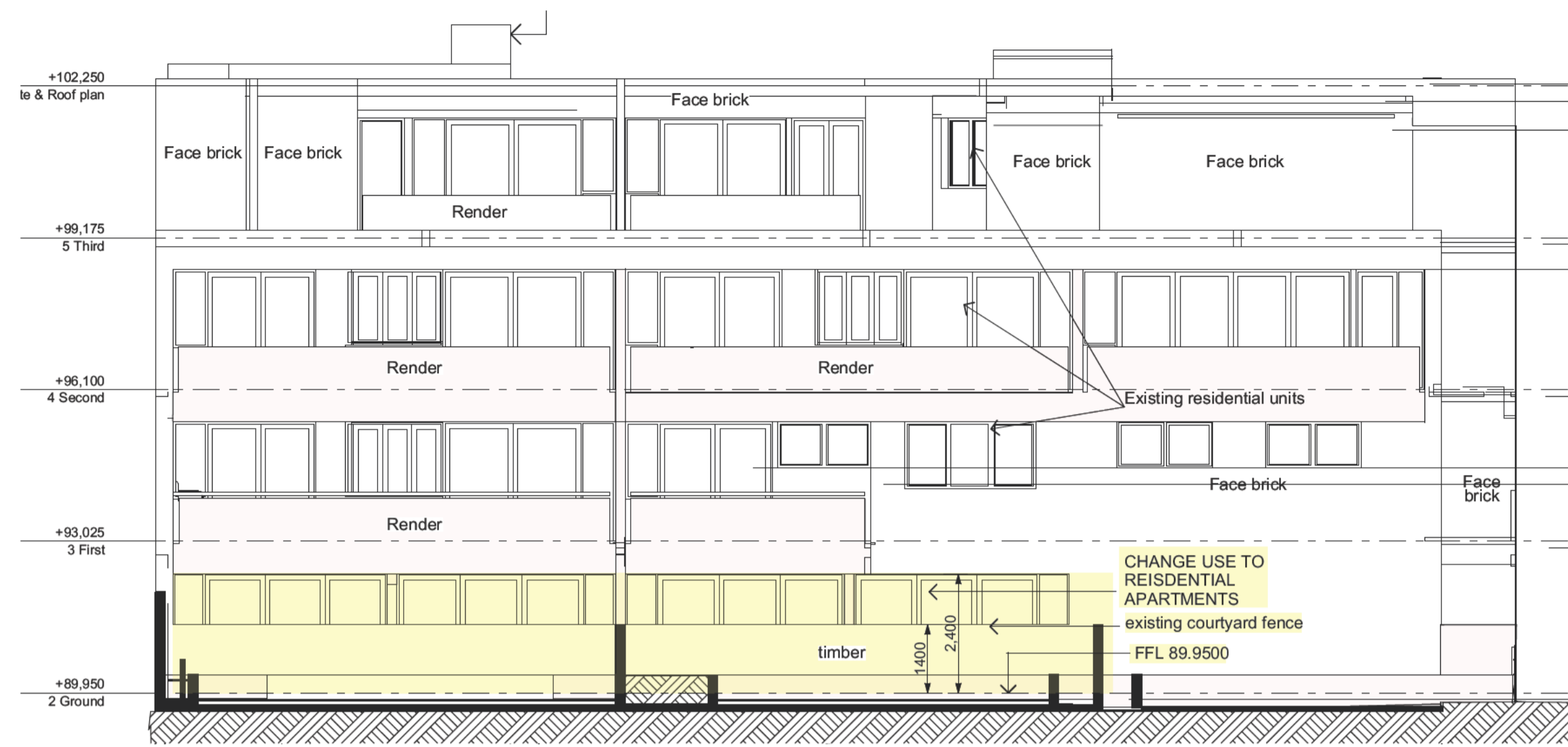
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**North Sydney Council**

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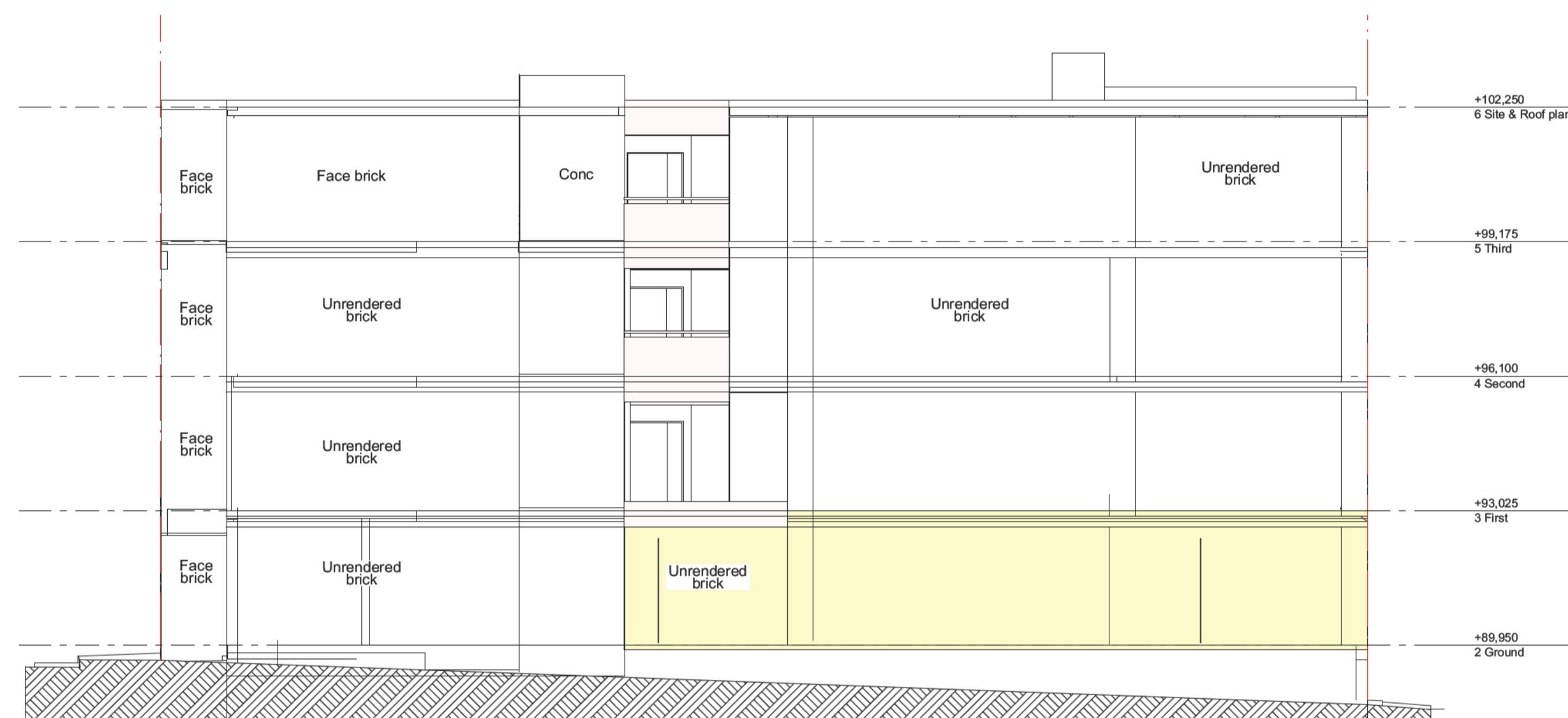
Further details can be obtained by calling (02) 9936 8100 or e mail [mapping@northsydney.nsw.gov.au](mailto:mapping@northsydney.nsw.gov.au)



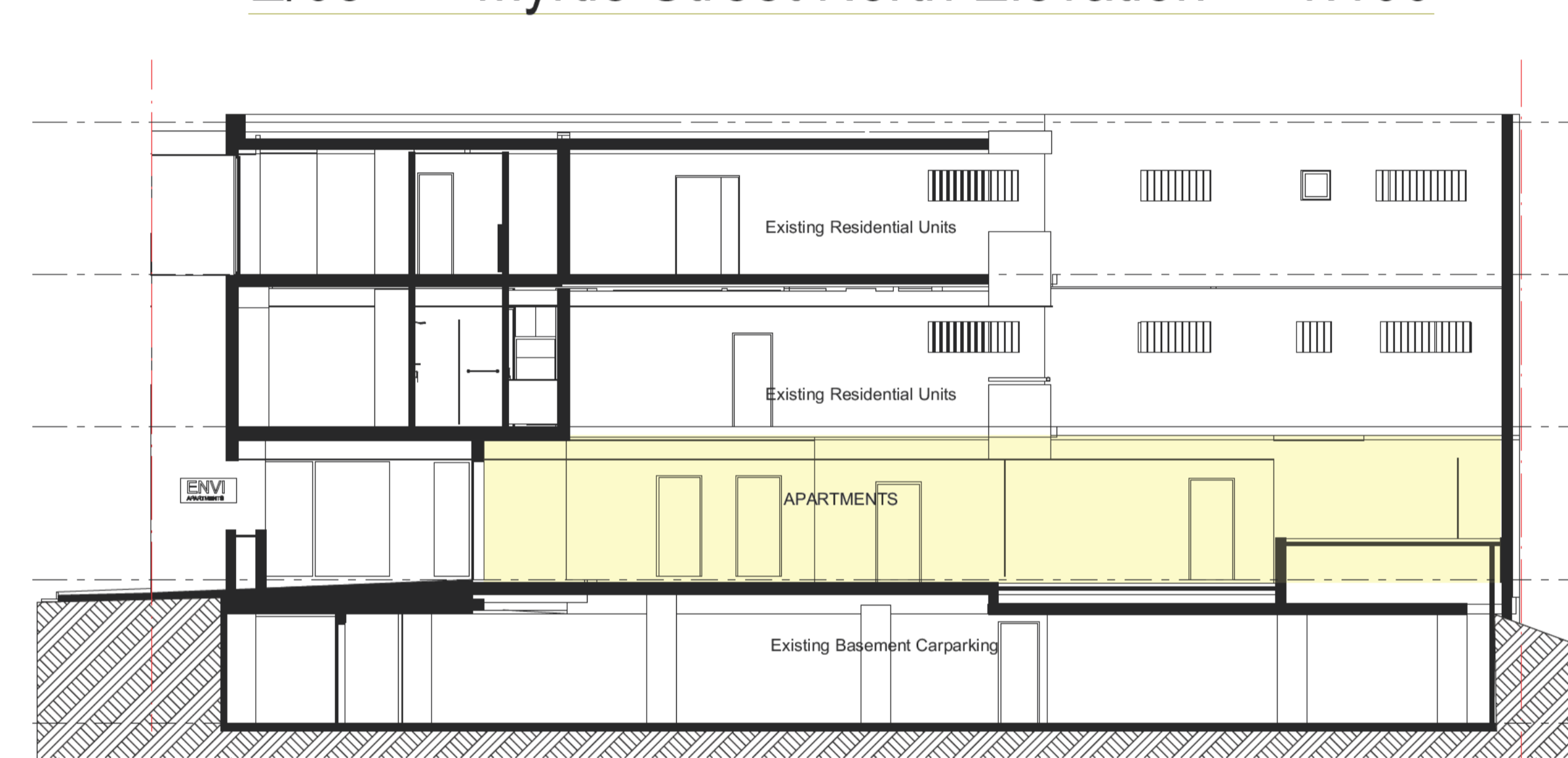
E/04 North Elevation 1:100



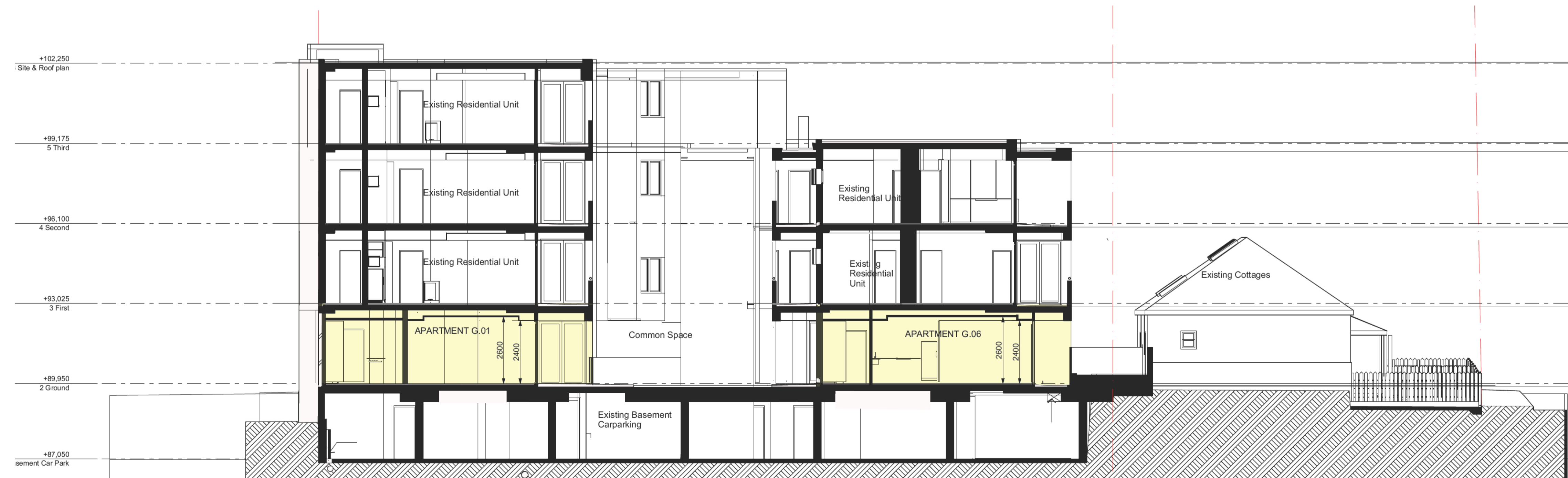
E/05 Myrtle Street North Elevation 1:100



E/06 South Elevation 1:100



E/07 South Elevation / Section 1:100



S/01 Section 1 1:100



G	CHANGE OF USE TO RESIDENTIAL APARTMENTS	24.9.20
F	BUSINESS CHANGED TO MOTEL SUITES	9.5.19
E	DA Amended	27.11.18
D	DA Amended	26.10.18
C	DA Re-submission	5.07.18
B	DA Issue	10.05.18
A	DA Issue	21.03.18
No	Amendment	date

The builder shall check and verify all dimensions and verify all errors and omissions to the Architect. Do not scale the drawings. Drawings shall not be used for construction purposes until issued by the Architect for construction.

**Client** Myrtle 29 P/L  
**Project Name** 13 Eden St North Sydney  
**Architect** Max Wessels  
 3 Oleander Rd Wahroonga  
 Ph 0405 137430

**Description:** Change of use to Residential Apartments

**Drawing Title:** Elevations/ Section

**Scale:** 1:100 @ A1  
 1:200 @ A3  
**Date:** May 2019

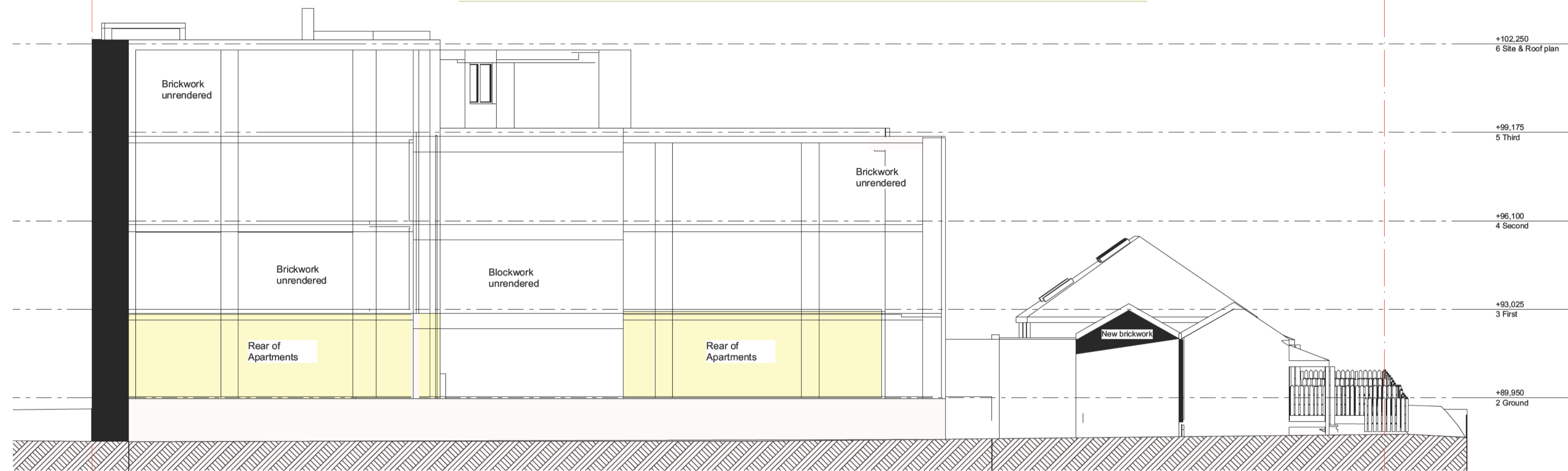
**Status:** DA  
**Checked By:** JMW

**Project No.:** 2314  
**Drawing No.:** DA3  
**Amend No.:** G

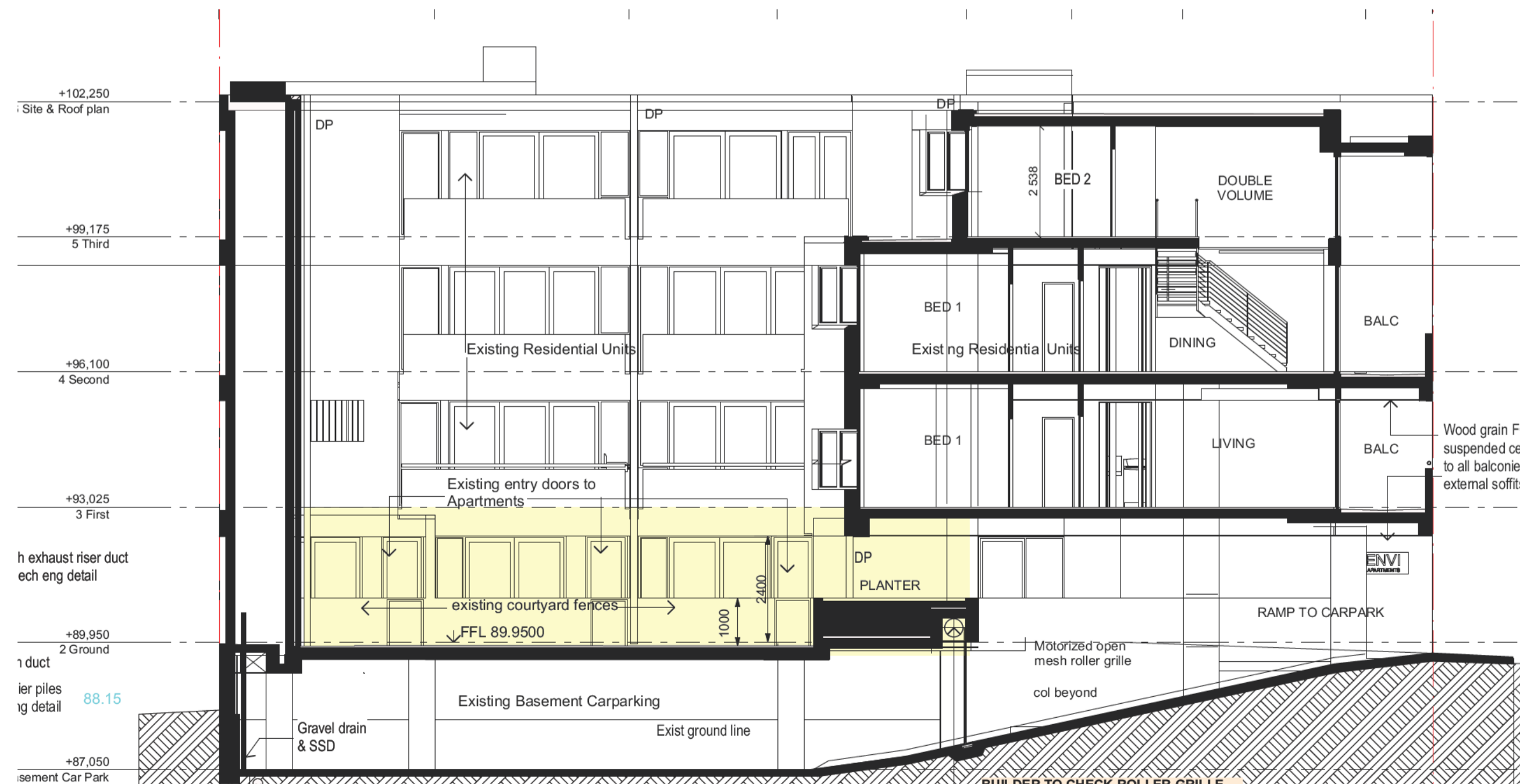
**Plot Date:** 19/10/2020



E/01 West Elevation Edén Street 1:100



E/02 East Elevation 1:100



S/03 East Elevation /Section 1:100



G	CHANGE OF USE TO RESIDENTIAL APARTMENTS	24.9.20
F	BUSINESS CHANGED TO MOTEL SUITES	9.5.19
E	DA Amended	27.11.18
D	DA Amended	26.10.18
C	DA Re-submission	5.07.18
B	DA Issue	10.05.18
A	DA Issue	21.03.18
No.	Amendment	date

The builder shall check and verify all dimensions and verify all errors and omissions to the Architect. Do not scale the drawings. Drawings shall not be used for construction purposes until issued by the Architect for construction.

Client	Myrtle 29 P/L
Project Name	13 Eden St North Sydney
Architect	Max Wessels 3 Oleander Rd Wahroonga Ph 0405 137430

Description: **Change of use to Residential Apartments**

Drawing Title: **Elevations**

Scale: 1:100 @ A1  
1:200 @ A3  
Date: May 2019  
Status: DA  
Checked By: JMW

Project No:	Drawing No.:	Amend No.:
<b>2314</b>	<b>DA2</b>	<b>G</b>

Plot Date: 19/10/2020



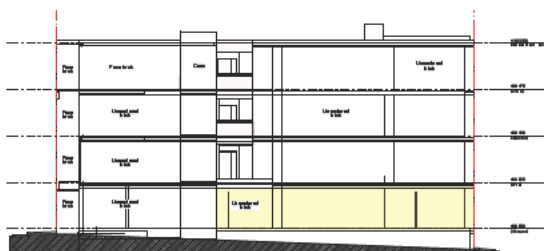
North Elevation



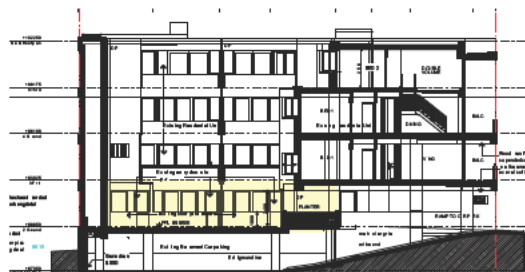
West Elevation Eden Street



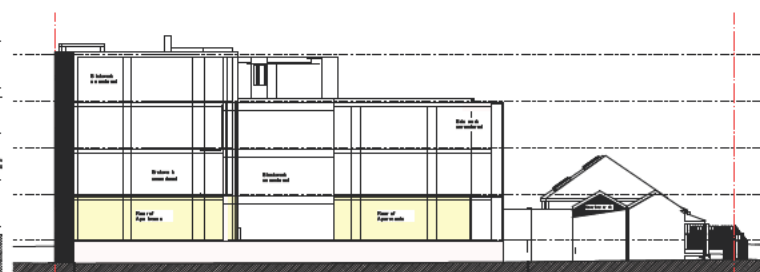
Myrtle Street North Elevation



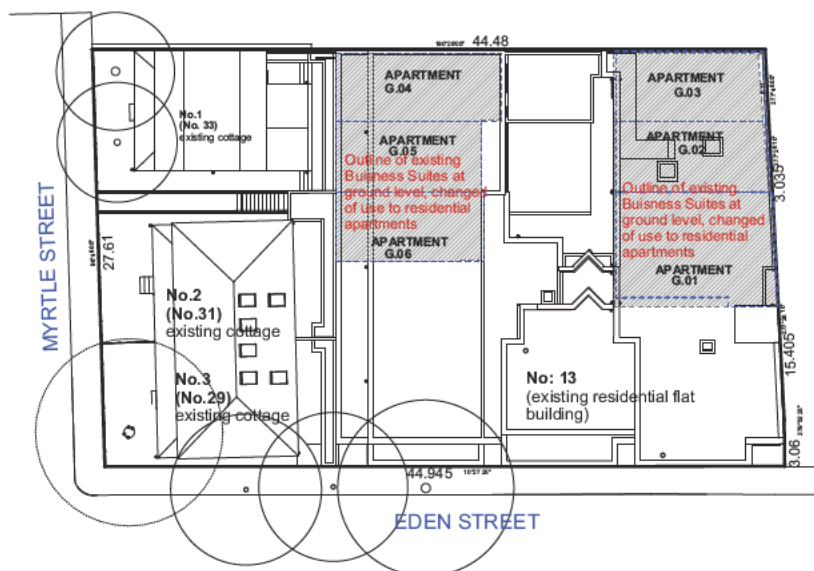
South Elevation



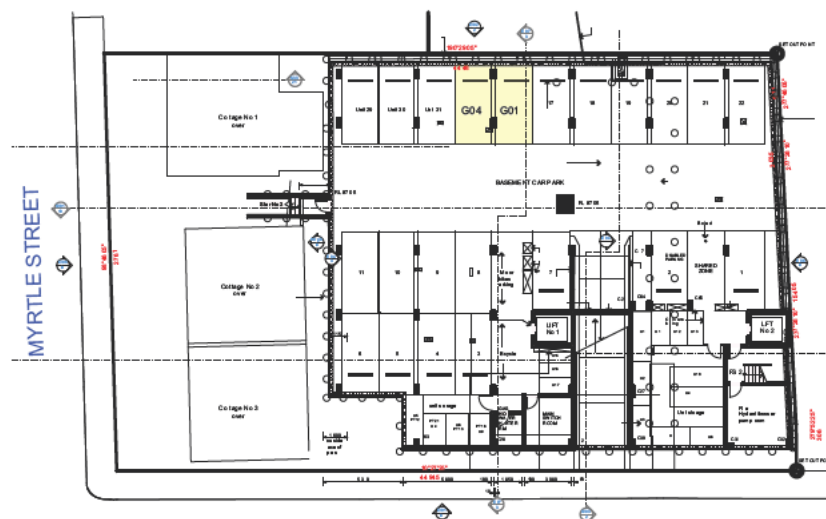
East Elevation /Section



East Elevation



Site & Roof Plan



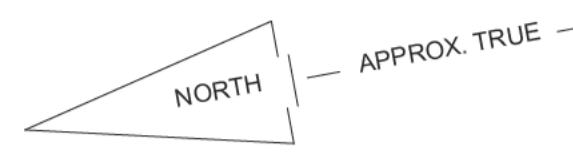
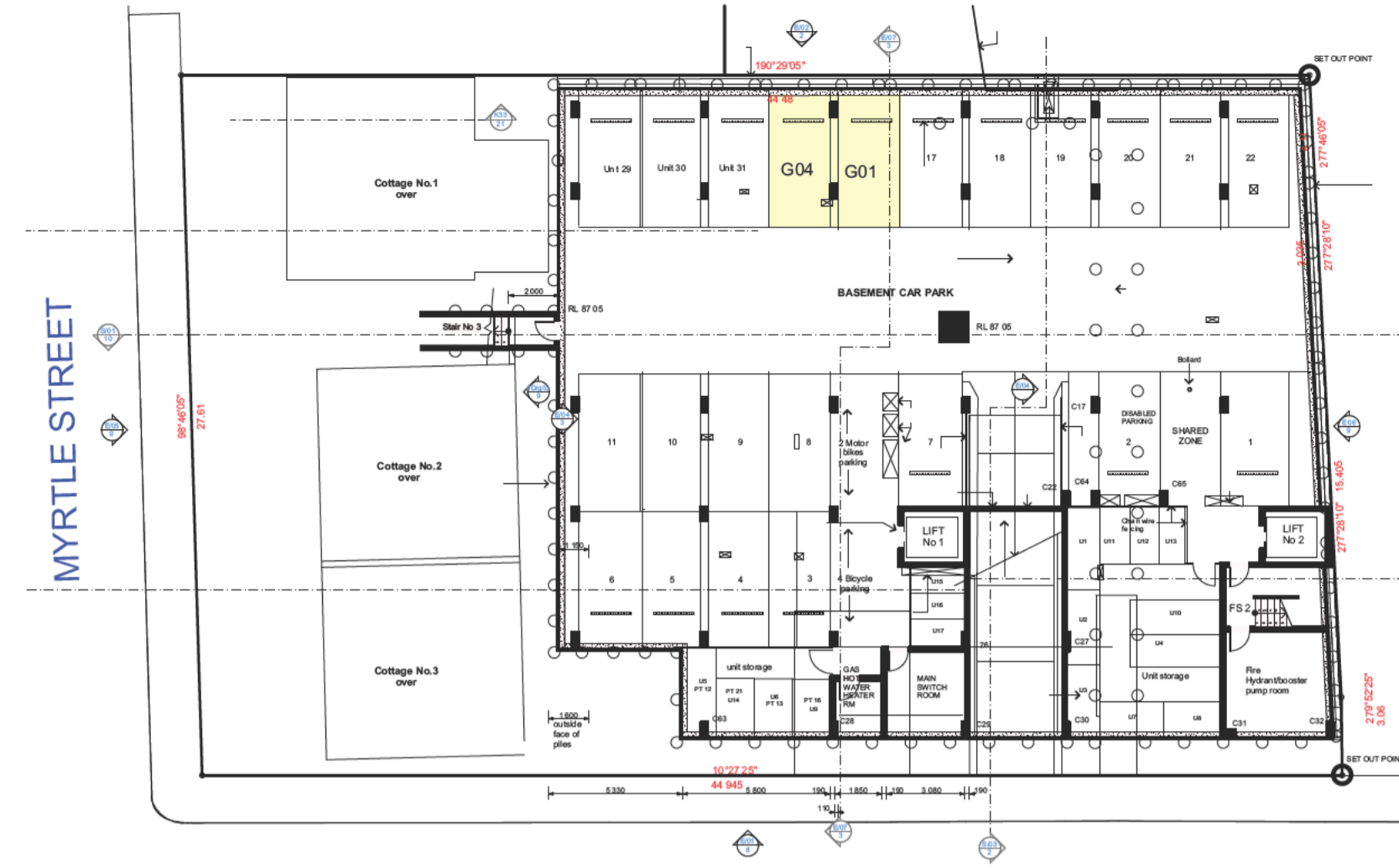
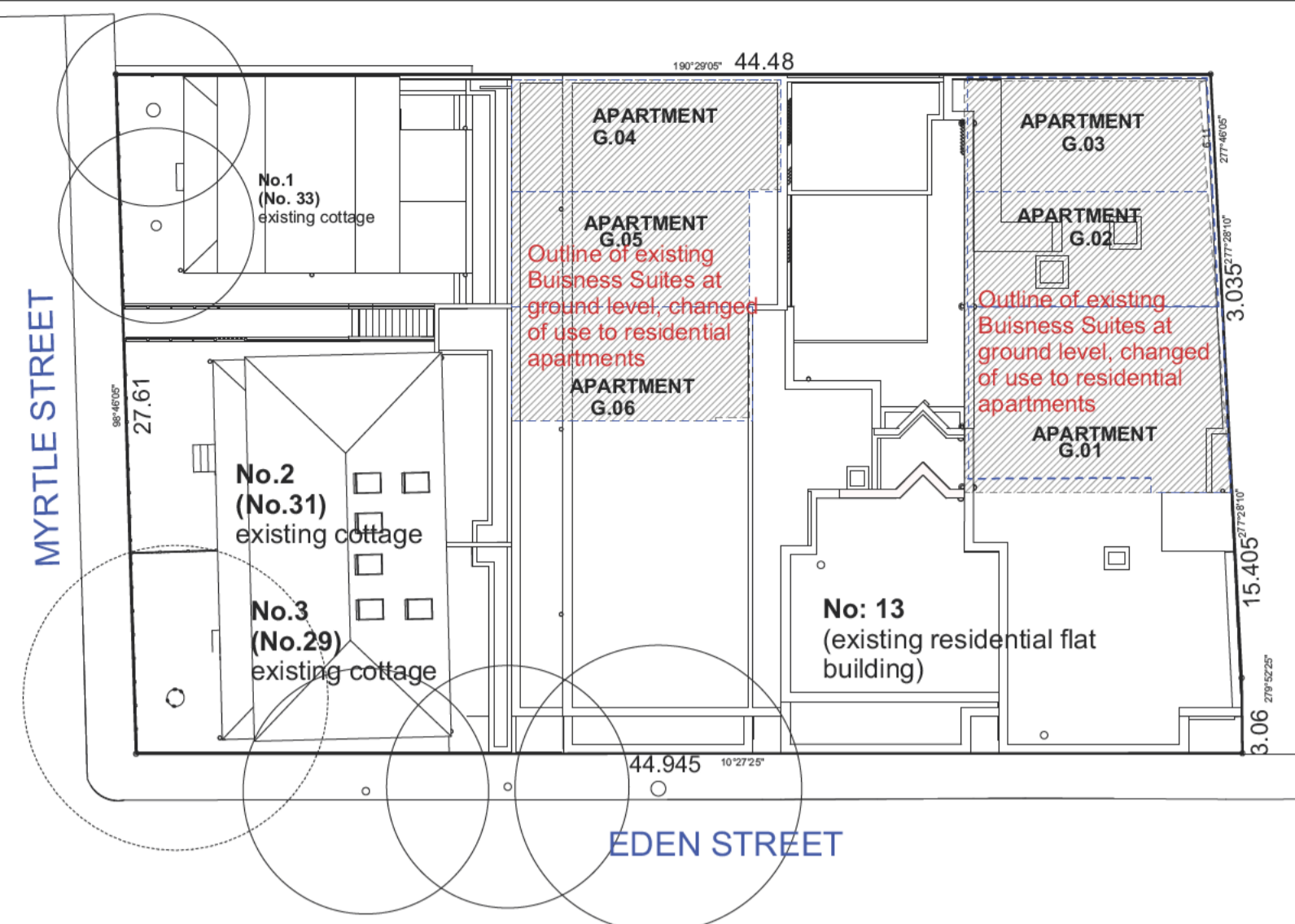
Basement Car Park

1:500

C	CHANGE OF USE TO RESIDENTIAL APARTMENTS 249 21	9 0 19
F	BUSINESS CHANGED TO HOTEL SUITES	9 0 19
D	DA Approved	27 11 18
C	DA Approved	20 10 18
C	DA R. 2	5 07 18
A	DA	10 05 18
A	DA	21 03 18
A	A	0 1

The holder shall check and verify all information over the plan and certify to the Architect. Do not seal in the drawings. Drawings shall not be used for construction purposes and issued by the Architect for construction.

Client	Myrtle 29 P/L		
Project Name	13 Eden St North Sydney		
Architect	Max Watson 3 Church Rd Wahroonga PH: (02) 9743		
Description	Change of use to Residential Apartments		
Drawing Title	Notification Plan		
Scale	1:500	Date	May 2019
Status	DA	Checked By	
Project No.	2314	Drawing No.	DA
		Amend No.	G
Plot Date	18/10/2020		



G	CHANGE OF USE TO RESIDENTIAL APARTMENTS	24.9.20
F	BUSINESS CHANGED TO MOTEL SUITES	9.5.19
E	DA Amended	27.11.18
D	DA Amended	26.10.18
C	DA Re-submission	5.07.18
B	DA Issue	10.05.18
A	DA Issue	21.03.18
No	Amendment	date

The builder shall check and verify all dimensions and verify all errors and omissions to the Architect. Do not scale the drawings. Drawings shall not be used for construction purposes until issued by the Architect for construction.

Client	Myrtle 29 P/L
Project Name	13 Eden St North Sydney
Architect	Max Wessels 3 Oleander Rd Wahroonga Ph 0405 137430

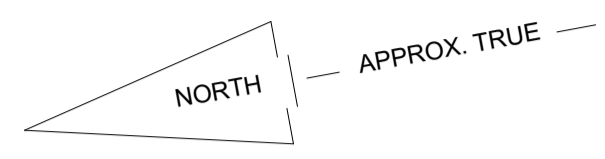
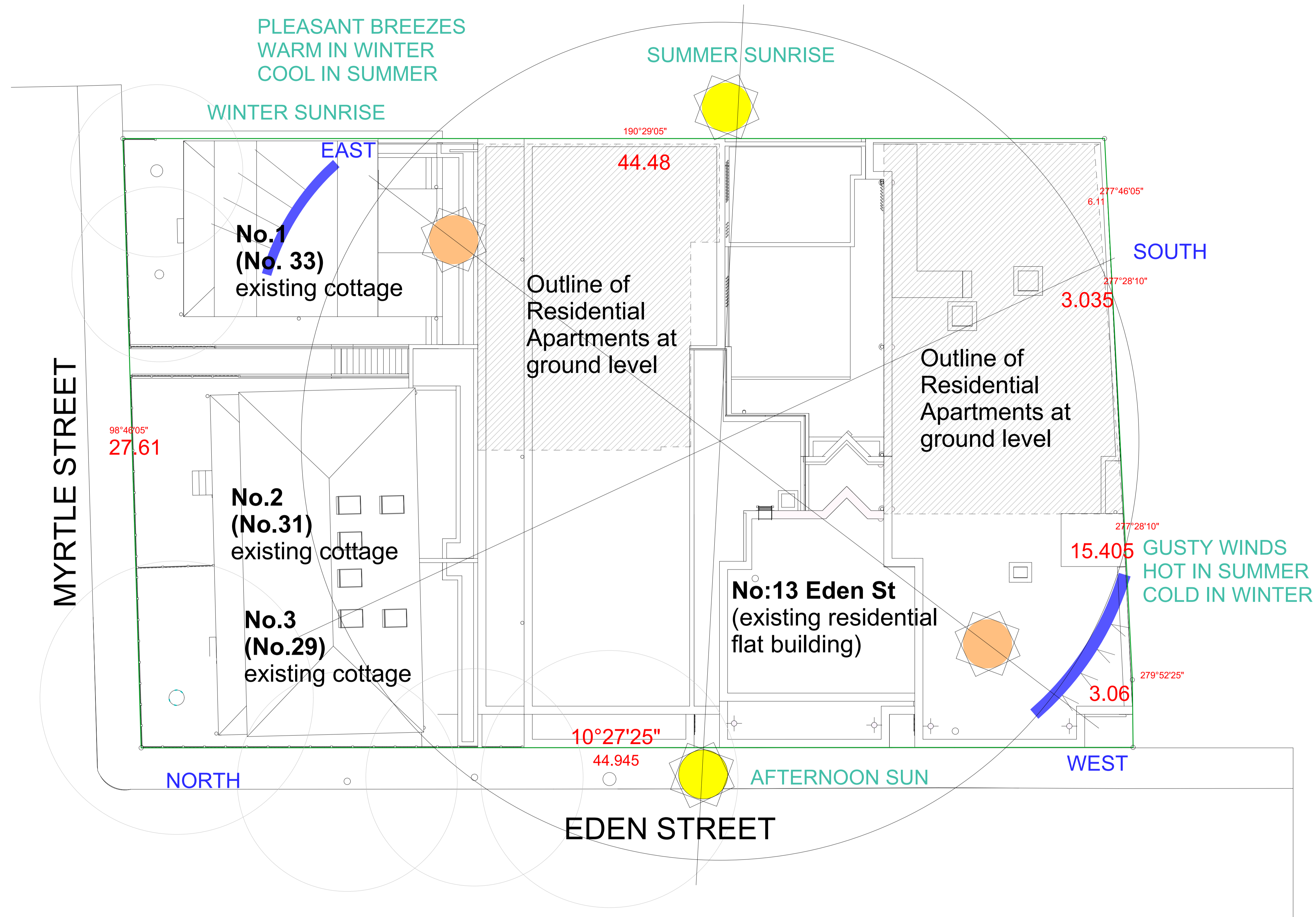
Description: **Change of use to Residential Apartments**

Drawing Title: **Site & Ground Floor Plan**

Scale: 1:100 @ A1  
1:200 @ A3  
Date: May 2019  
Status: DA  
Checked By: JMW

Project No: **2314**  
Drawing No.: **DA01**  
Amend No.: **G**

Plot Date: 19/10/2020



G	CHANGE OF USE TO RESIDENTIAL APARTMENTS	24.9.20
F	BUSINESS CHANGED TO MOTEL SUITES	9.5.19
E	DA Amended	27.11.18
D	DA Amended	26.10.18
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B	DA Issue	10.05.18
A	DA Issue	21.03.18
No.	Amendment	date

The builder shall check and verify all dimensions and verify all errors and omissions to the Architect. Do not scale the drawings. Drawings shall not be used for construction purposes until issued by the Architect for construction.

Site Analysis Plan

1:100

Client		Myrtle 29 P/L	
Project Name		13 Eden St North Sydney	
Architect		Max Wessels 3 Oleander Rd Wahroonga Ph 0405 137430	
Description: <b>Change of use to Residential Apartments</b>			
Drawing Title: <b>Site Analysis Plan</b>			
Scale:	1:100 @ A1 1:200 @ A3	Date:	May 2019
Status:	DA	Checked By:	JMW
Project No:	<b>2314</b>	Drawing No.:	<b>DA4</b>
		Amend No.:	<b>G</b>
Plot Date:		19/10/2020	

# ***Attachment A***

## ***Clause 4.6 "Written Request" to Vary the Non-Residential Floor Space Ratio Control***



## INTRODUCTION

The subject site is located on the eastern side of Eden Street, approximately 15 metres to the south of Myrtle Street. The site encompasses an area of approximately 805.1m<sup>2</sup> and is generally rectangular in shape with a frontage of 29.785 metres to Eden Street.

The site is occupied by a mixed-use development accommodating eight (8) "business/retail" tenancies at the ground floor level, and seventeen (17) residential apartments above.

The proposed development relates to six (6) of the "business/retail" tenancies at the ground floor level. The remaining tenancies, including the tenancy fronting Eden Street, will continue to be used for "business/retail" related purposes.

Clause 4.4A of the North Sydney Local Environmental Plan (LEP) 2013 specifies a minimum non-residential floor space ratio (FSR) of 0.5:1.

The proposed development results in the site accommodating approximately 80m<sup>2</sup> of non-residential floor space, representing a non-residential FSR of approximately 0.1:1.

In the circumstances, this "written request" has been prepared to vary the non-residential FSR control.

The non-residential FSR control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

### CLAUSE 4.6 OF THE NORTH SYDNEY LEP 2013

Clause 4.6(1) is facultative and is intended to allow flexibility in applying development standards in appropriate circumstances.

Clause 4.6 does not directly or indirectly establish a test that non-compliance with a development standard should have a neutral or beneficial effect relative to a complying development (*Initial* at 87).

Clause 4.6(2) of the LEP specifies that "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”.*

Clause 4.6(3) specifies that 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.*

The requirement in Clause 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard has a better environmental planning outcome than a development that complies with the development standard (*Initial* at 88).

Clause 4.6(4) specifies that 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.*

Clause 4.6(5) specifies that 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.*

## CONTEXT AND FORMAT

This “*written request*” has been prepared having regard to “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118; and*
- *Hansimikali v Bayside Council [2019] NSWLEC 1353.*

“*Varying development standards: A Guide*” (August 2011) outlines the matters that need to be considered in DA’s involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ, in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are effectively five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary as follows:

1. The objectives and purposes of the standard are achieved notwithstanding non-compliance with the development standard.
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

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

As Preston CJ, stated in *Wehbe*, the starting point with a SEPP No. 1 objection (now a Clause 4.6 variation) is to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances. The most commonly invoked 'way' to do this is to show that the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The Applicant relies upon ground 1 in *Wehbe* to support its submission that compliance with the development standard is both unreasonable and unnecessary in the circumstances of this case.

In that regard, Preston CJ, in *Wehbe* states that "... *development standards are not ends in themselves but means of achieving ends*". Preston CJ, goes on to say that as the objectives of a development standard are likely to have no numerical or qualitative indicia, it logically follows that the test is a qualitative one, rather than a quantitative one. As such, there is no numerical limit which a variation may seek to achieve.

The above notion relating to 'numerical limits' is also reflected in Paragraph 3 of Circular B1 from the former Department of Planning which states that:

*As numerical standards are often a crude reflection of intent, a development which departs from the standard may in some circumstances achieve the underlying purpose of the standard as much as one which complies. In many cases the variation will be numerically small in others it may be numerically large, but nevertheless be consistent with the purpose of the standard.*

It is important to emphasise that in properly reading *Wehbe*, an objection submitted does not necessarily need to satisfy all of the tests numbered 1 to 5, and referred to above. This is a common misconception. If the objection satisfies one of the tests, then it may be upheld by a Council, or the Court standing in its shoes. Irrespective, an objection can also satisfy a number of the referable tests.

In *Wehbe*, Preston CJ, states that there are three (3) matters that must be addressed before a consent authority (Council or the Court) can uphold an objection to a development standard as follows:

1. The consent authority needs to be satisfied the objection is well founded;
2. The consent authority needs to be satisfied that granting consent to the DA is consistent with the aims of the Policy; and
3. The consent authority needs to be satisfied as to further matters, including non-compliance in respect of significance for State and regional planning and the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Further, it is noted that the consent authority has the power to grant consent to a variation to a development standard, irrespective of the numerical extent of variation (subject to some limitations not relevant to the present matter).

The decision of Pain J, in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* suggests that demonstrating that a development satisfies the objectives of the development standard is not necessarily sufficient, of itself, to justify a variation, and that it may be necessary to identify reasons particular to the circumstances of the proposed development on the subject site.

Further, Commissioner Tuor, in *Moskovich v Waverley Council [2016] NSWLEC 1015*, considered a DA which involved a relatively substantial variation to the FSR (65%) control. Some of the factors which convinced the Commissioner to uphold the Clause 4.6 variation request were the lack of environmental impact of the proposal, the characteristics of the site such as its steeply sloping topography and size, and its context

which included existing adjacent buildings of greater height and bulk than the proposal.

The decision suggests that the requirement that the consent authority be satisfied the proposed development will be in the public interest because it is "*consistent with*" the objectives of the development standard and the zone, is not a requirement to "*achieve*" those objectives. It is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony'. It means "*something less onerous than 'achievement'*".

In *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ found that it is not necessary to demonstrate that the proposed development will achieve a "*better environmental planning outcome for the site*" relative to a development that complies with the development standard.

Finally, in *Hansimikali v Bayside Council [2019] NSWLEC 1353*, Commissioner O'Neill found that it is not necessary for the environmental planning grounds relied upon by the Applicant to be unique to the site.

## **ASSESSMENT**

### Is the requirement a development standard?

The non-residential FSR control is a development standard and is not excluded from the operation of Clause 4.6 of the LEP.

### What is the underlying object or purpose of the standard?

The objectives of the non-residential FSR control are expressed as follows:

- (a) *to provide for development with continuous and active street frontages on certain land in Zone B1 Neighbourhood Centre, Zone B4 Mixed Use and Zone SP2 Infrastructure,*
- (b) *to encourage an appropriate mix of residential and non-residential uses,*
- (c) *to provide a level of flexibility in the mix of land uses to cater for market demands,*

- (d) *to ensure that a suitable level of non-residential floor space is provided to promote employment and reflect the hierarchy of commercial centres.*

In relation to objective (a), the proposed development maintains the existing active street frontage, with the existing *"business/retail"* tenancy retained at the street frontage.

In relation to objective (b), the proposed development will maintain a mix of residential and non-residential land uses.

In relation to objective (c), the proposed development maintains an active street frontage, and maintains a mix of residential and non-residential uses.

Further, the North Sydney Local Planning Panel identified *"inherent conflicts"* between motel accommodation at the ground floor level and the residential apartments above (DA 180/19). The specific concerns included noise disturbance from guests impacting upon the residential apartments above, particularly through the central courtyard area.

In the circumstances, the proposed development will provide six (6) studio apartments in place of six (6) *"business/retail"* tenancies, and thereby reduce any potential conflicts between residential and non-residential uses, including through the central courtyard area.

In relation to objective (d), the existing *"business/retail"* tenancies have only ever been occupied by businesses associated with the owner since construction.

The owner-occupation of the tenancies has been necessary in circumstances where the owner has been unable to lease or sell any of the tenancies (despite continuous marketing) to any *"business/retail"* related operator/s.

In that regard, it has become abundantly clear (over many years) that the site is not suited to non-residential use/s at the ground floor level with restricted operating hours, no direct street frontage, and with residential apartments occupying the levels above.

The nature of recent development in the vicinity of the site reflects a diminished demand for non-residential floor space within the immediate vicinity of the site.

Further, the numerical "shortfall" of non-residential floor space will not materially affect employment or the hierarchy of commercial centres.

In summary, the proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published "*Varying development standards: A Guide*" (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council [2007] NSWLEC 827* to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard;*

The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.

2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

The objectives and purpose of the non-residential FSR control remain relevant, and the proposed development is generally consistent with the objectives of the control, notwithstanding the numerical variation.

3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.



Further, strict compliance with the non-residential FSR control would restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and reduce any potential conflicts between residential and non-residential uses.

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;*

The non-residential FSR control has not specifically been abandoned or destroyed by the Council's actions. Irrespective, the Council has consistently adopted an orderly but flexible approach to the implementation of development standards (including the non-residential FSR control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations.

Further, the objectives of Clause 4.6 of the LEP includes to provide "an appropriate degree of flexibility in applying certain development standards to particular development".

5. *Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.*

The zoning of the land remains relevant and appropriate. Irrespective, strict compliance with the non-residential FSR control would unnecessarily restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and reduce any potential conflicts between residential and non-residential uses.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposed numerical variation to the non-residential FSR control is reasonable and appropriate in the particular circumstances on the basis that:

- the proposed development maintains the existing active street frontage, with the two (2) tenancies closest to the street maintained for *"business/retail"* uses;
- the proposed development will maintain an appropriate mix of residential and non-residential land uses;
- the existing *"business/retail"* tenancies have only ever been occupied by businesses associated with the owner since construction. The owner-occupation of the tenancies has been necessary in circumstances where the owner has been unable to lease or sell any of the tenancies (despite continuous marketing) to any *"business/retail"* related operator/s;
- it has become abundantly clear (over many years) that the site is not suited to non-residential use/s at the ground floor level with restricted operating hours, no direct street frontage, and with residential apartments occupying the levels above;
- the recent development in the locality reflects a diminished demand for non-residential floor space within the immediate vicinity of the site;
- strict compliance with the non-residential FSR control would unnecessarily restrict the use of the ground floor level tenancies to non-residential uses in circumstances where there is no realistic market demand, and where there are potential conflicts between residential and non-residential uses;
- the Council has consistently adopted an orderly but flexible approach to the implementation of development standards (including the non-residential FSR control) in appropriate circumstances, including when the objectives of the standard are achieved, notwithstanding numerical variations;
- the proposed development is consistent with, or not antipathetic to, the objectives of the B4 – Mixed Use zone; and
- the proposed development is generally consistent with, or not antipathetic to, the objectives of the non-residential FSR control, notwithstanding the numerical variation.

Are there any matters of State or regional significance?

The proposed numerical variation to the non-residential FSR control does not raise any matters of State or regional significance.

### What is the public benefit of maintaining the standard?

The proposed development is generally consistent with the objectives of the non-residential FSR control, notwithstanding the numerical variation.

In the circumstances, the proposed development does not affect the public benefit of maintaining compliance with the non-residential FSR control in other instances.

In that regard, the objectives of Clause 4.6 of the LEP includes to provide *"an appropriate degree of flexibility in applying certain development standards to particular development"*.

### Any other matters?

There are no further matters of relevance to the proposed variation to the building height control.

### Zone Objectives and Public Interest

The site is zoned B4 – Mixed Use pursuant to the North Sydney Local Environmental Plan (LEP) 2013, and the objectives of the zone are expressed as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations to as to maximise public transport patronage and encourage walking and cycling.*
- *To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
- *To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominately on the higher levels.*

The proposed development is generally consistent with (or not antipathetic to) the objectives of the B4 – Mixed Use zone on the basis that:

- the proposed development maintains a mix of compatible non-residential and residential land uses;

- the site is well serviced by public transport which provides convenient access to the North Sydney Central Business District (CBD) and beyond;
- the proposed development will contribute to a safe and vibrant urban environment offering a good level of residential amenity; and
- the proposed development maintains non-residential floor space at the ground floor level at the street frontage, with the existing residential apartments occupying the levels above.

Finally, the variation to the non-residential FSR control does not raise any significant matters of public interest.

### **CONCLUSION**

The purpose of this submission is to formally request a variation in relation to the non-residential FSR control in Clause 4.4A of the North Sydney LEP 2013.

In general terms, strict compliance with the non-residential FSR control is unreasonable and unnecessary in the particular circumstances, and there are sufficient environmental planning grounds to justify the numerical variation.