



**NSLPP MEETING HELD ON 03/02/21**

**Attachments:**

1. Site Plan
2. Architectural Plans
3. Clause 4.6 Statement
4. Previous NSLPP Report

**ADDRESS/WARD:** 58 Cowdroy Avenue, Cammeray

**APPLICATION No:** Section 8.2 Review of Determination No. 3/20 (DA56/20)

**PROPOSAL:** Demolition of existing dwelling and construction of a new dwelling with associated tree removal and earthworks.

**PLANS REF:**

<b>Drawing No.</b>	<b>Description</b>	<b>Prepared by</b>	<b>Dated</b>
DA 00	Demolition Plan	COSO Architecture	11/2020
S8.2.01	Proposed Site Plan	COSO Architecture	11/2020
S8.2.02	Proposed Entry Level	COSO Architecture	11/2020
S8.2.03	Proposed Upper Floor Plan	COSO Architecture	11/2020
S8.2.04	Proposed Mid Floor Plan	COSO Architecture	11/2020
S8.2.05	Proposed Lower Floor Plan	COSO Architecture	11/2020
S8.2.06	Proposed Section AA	COSO Architecture	11/2020
S8.2.07	Proposed Sections BB & CC	COSO Architecture	11/2020
S8.2.08	Proposed Section DD	COSO Architecture	11/2020
S8.2.09	Proposed Western Elevation	COSO Architecture	11/2020
S8.2.10	Proposed North & South Elevation	COSO Architecture	11/2020
S8.2.11	Proposed Eastern Elevation	COSO Architecture	11/2020
Rev A	Arboricultural Impact Appraisal	Naturally Trees	4/12/20

**OWNER:** [REDACTED]

**APPLICANT:** Paul Etherington & Renata Etherington

**AUTHOR:** John McFadden, Consultant Town Planner

**DATE OF REPORT:** 25/01/2021

**DATE LODGED:** 19/11/2020

**AMENDED:** 24/12/20 – Vehicle Turn Area/Arborist report/BASIX Certificate

**SUBMISSIONS:** Four (4) objections

**RECOMMENDATION:** Refusal

## EXECUTIVE SUMMARY

On 5 August 2020, the North Sydney Local Planning Panel (NSLPP) refused DA56/20 for the demolition of an existing dwelling and construction of a new dwelling with associated tree removal and earthworks on land at 58 Cowdroy Avenue, Cammeray. The applicant seeks a review of determination under s.8.2 of the *Environmental Planning & Assessment Act, 1979* (EPA Act).

**The application is reported to the NSLPP for determination, as directed by the Minister for Planning, Industry and Environment as the proposal involves a non-compliance with the maximum ‘height of building’ development standard under *North Sydney Local Environmental Plan 2013* (NSLEP) exceeding 10% and given that the application seeks a review of determination under sections 8.2-8.5 (inclusive) of the EPA Act.**

In accordance with the Minister’s direction of 1 August 2020, a public meeting determination of this matter is not required as there are less than 10 submissions.

A revised clause 4.6 request for an exception to the maximum ‘height of building’ development standard under NSLEP has been submitted by the applicant with this ‘review of determination’ application. The amended proposal is substantially the same development for the purposes of s.8.3(3) of the EPA Act. The amended design has included a courtyard which appears to enable space for one (1) replacement tree to compensate for the removal of all nine (9) trees on the site. However, no revised landscaping plans have been submitted. The amended proposal, whilst reducing the height of the building and decreasing the site coverage, does not make a satisfactory attempt to comply with the relevant environmental planning instruments and controls.

The amended plans indicate some reduction in the impact of the development on adjoining development in terms of view impacts and overshadowing. However, a further reduction in the roof height, increased setbacks and less site coverage is desirable in order to make these impacts acceptable. The proposal is a ‘new build’ (not alterations and additions) and in the absence of any floor space ratio (FSR) control, should be able to comply with de facto building envelope controls such as height, setbacks and site coverage under NSLEP and North Sydney Development Control Plan 2013 (NSDCP). It is acknowledged that the topography of the site is a major constraint and with an appropriate design, some height variations could be justified.

However, the proposed upper floor, with ceiling heights up to 5.26m, is considered excessive and contributes to the non-compliance with that development standard and associated amenity and environmental impacts on both surrounding development and the public domain. The written clause 4.6 request seeking an exception to the maximum ‘height of building’ development standard under NSLEP is not supported as it has not adequately demonstrated that compliance with the standard is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to support the proposed variation. The breaches to the maximum building height control are not considered to be in the public interest given that the proposal is not consistent with the objectives of the maximum ‘height of building’ control, or the objectives of the E4 Environmental Living zone under NSLEP.

Council’s notification of the review and amended plans attracted four (4) submissions against the application which again raised a number of issues including those outlined above. Following this assessment and having regard to the provisions of Section 4.15 and Sections 8.2–8.5 (inclusive) of the *Environmental Planning & Assessment Act 1979*, the application is recommended for **refusal**.



## DESCRIPTION OF PROPOSAL

The applicant seeks a review of the Panels refusal for development consent for demolition of an existing dwelling and construction of a new dwelling with associated tree removal and earthworks on land at No. 58 Cowdroy Avenue, Cammeray.

The Statement of Environmental Effects (SEE) originally submitted with the application lists the proposed works as follows, (modifications currently proposed with the s.8.2 review are highlighted in red):-

The works include:

### **Carport Level (FFL 22.86)**

- Suspended double garage (reduced in length)
- New entryway with stairs accessing the lower level (stairs reconfigured to permit a courtyard for tree planting)

### **Mezzanine Level (FFL 20.02 now raised slightly to FFL 20.36)**

- Storage area to include water tanks

### **Upper Floor Plan (FFL 18.25 now reduced by 950mm to FFL 17.30)**

- Open plan kitchen/dining/living which provides access to the terrace
- Pantry
- Bathroom (W/C)

### **Mid Floor Plan (FFL 14.85 now reduced 650mm to FFL 14.20)**

- 3 bedrooms including ensuites with the main bedroom (Bedroom 01) including a robe and access to the terrace
- Home office
- Linen press

### **Lower Floor Plan (FFL 11.10)**

- Laundry
- Bathroom
- Guest Bedroom with ensuite
- Gym
- Cellar
- Pool Room with access to the balcony, swimming pool and waterfront

A lift is proposed from the carport to the lower floor level servicing all floors.

Some landscaping treatment is also proposed on the architectural plans. However, no comprehensive planting details have been provided.

Significant excavation was proposed on the original proposal which is also a feature of the s.8.2 amended plans as is the removal of all trees across the site. The amended design has provided a small courtyard which may permit a replacement tree to be planted.



The relocation of a retaining wall on adjacent Council land in Cowdroy Avenue has also been proposed to provide access to the proposed double garage.

The amended proposal is illustrated in the following figures 1-6:-

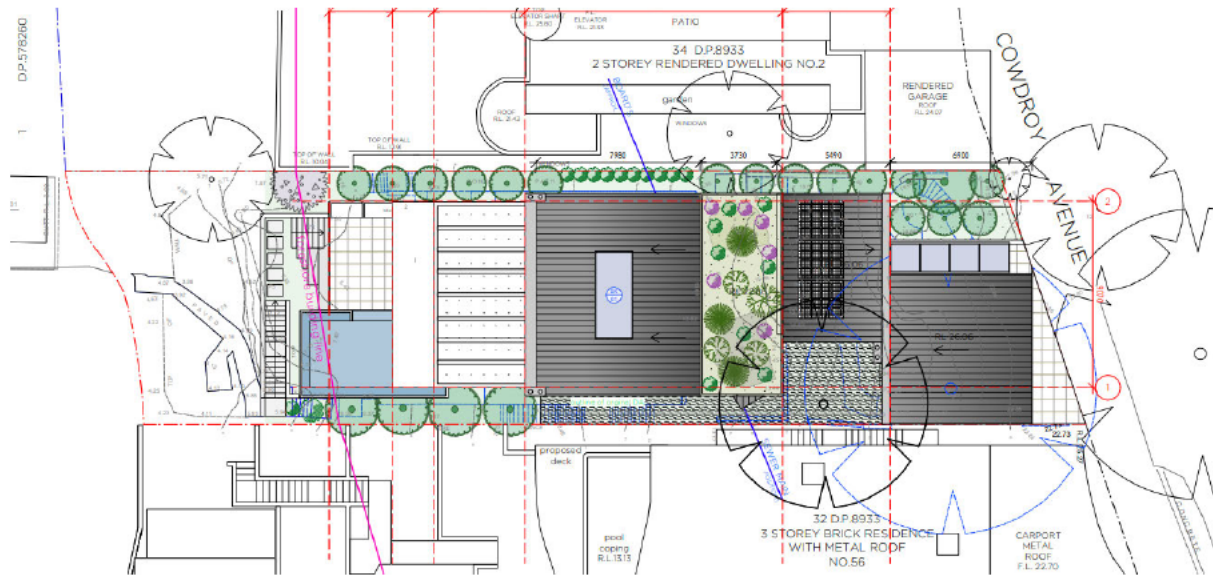


Figure 1: Amended Site Plan

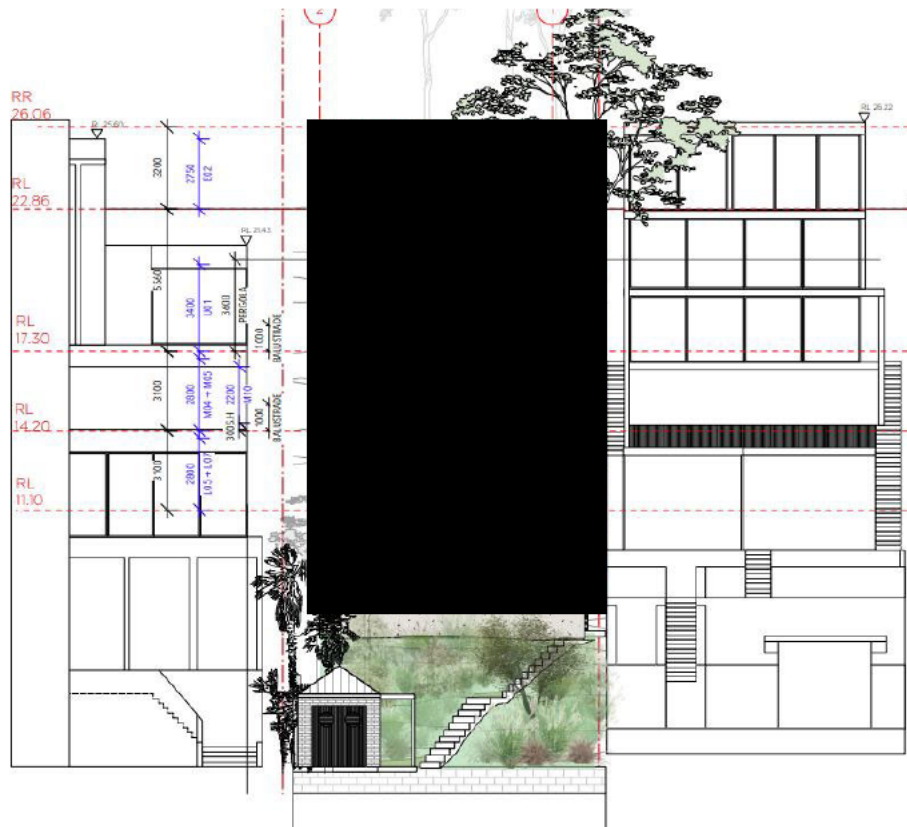


Figure 2: Proposed Amended North Elevation







## STATUTORY CONTROLS

North Sydney LEP 2013

- Zoning - E4 Environmental Living
- Item of Heritage - No
- In Vicinity of Item of Heritage - No
- Conservation Area - No
- FSBL - Yes

Environmental Planning & Assessment Act 1979

SREP (Sydney Harbour Catchment) 2005

SEPP No. 19 - Bushland in Urban Areas

SEPP (Vegetation in Non-Rural Areas) 2017

SEPP (Building Sustainability Index - BASIX) 2004

SEPP No. 55 - Remediation of Lands and Draft Remediation SEPP

Draft SEPP (Environment)

## POLICY CONTROLS

DCP 2013

Sydney Harbour Foreshores & Waterways Area DCP 2005

## DESCRIPTION OF LOCALITY

A full description of the subject site and locality was made with the previous report to the North Sydney Local Planning Panel at its meeting of 5<sup>th</sup> August 2020 and this report should be referred to if required.



Figure 7: Aerial photograph of the subject site (outlined red) and surrounding development

It is relevant to note (as per the development application form) that ‘the site’ includes Lot 33 DP 8933 only and not the adjoining Lot 1 DP 583587 on the foreshore.

## **RELEVANT HISTORY**

A history of previous applications on the subject site, previous recent applications on neighbouring land, and, a history of the application the subject of this review has been covered with the previous report to the NSLPP at its meeting of 5th August 2020 and this report should be referred to as required.

### **Determination of DA 56/20**

The NSLPP considered the proposal at its meeting of 5 August 2020 and determined the application by way of refusal for the following reasons:-

1. ***Inadequate written request pursuant to Clause 4.6 in North Sydney Local Environmental Plan 2013;***
2. ***The proposed development is not appropriate in its waterfront context and is incompatible with the built form and landscape character of the area;***
3. ***The proposed development will adversely impact on existing views and result in an unreasonable level of view sharing for surrounding properties;***
4. ***The excessive excavation and fill and building footprint for the proposed development would result in the unjustified removal of significant trees and natural features of the site and may affect the structural integrity of neighbouring land and buildings;***
5. ***Unreasonable privacy impacts to the neighbouring properties;***
6. ***Unreasonable loss of sky outlook and ambient for the neighbouring properties;***
7. ***Contrary to the public interest and not suitable for the subject site.***

### **Current Application for S.8.2 Review**

<b><i>Date</i></b>	<b><i>Action</i></b>
<b>19 November 2020</b>	A request for review of determination under section 8.2 of the EPA Act was lodged with accompanying amended plans and a revised clause 4.6 submission to the ‘Height of Buildings’ development standard under clause 4.3 of NSLEP.
<b>4 – 18 December 2020</b>	Adjoining property owners and the Bay Precinct were notified about the subject application seeking a review of determination.
<b>24 December 2020</b>	Additional information submitted: 1. Draft Arborist Report 2. Civil Engineering works and Vehicle turn area 3. BASIX certificate

## **EXTERNAL REFERRALS**

### **Natural Resources Access Regulator (NRAR)**

The original proposal lodged on the 17<sup>th</sup> March 2020 was referred to Water NSW and NRAR as integrated development as the plans appeared to indicate the possible construction of a new replacement sea wall along the mean high-water mark of the site.

The Natural Resources Access Regulator (NRAR) responded to state that the proposal is exempt from the need to obtain a controlled activity approval under Clause 29 (Activities with respect to dwellings), Schedule 4 of the Water Management Act (General) Regulation 2018.

**In view of the above, the current application for Review and amended plans were not referred again for comment.**

### **Water NSW**

Water NSW responded to the original proposal and plans lodged on 17 March 2020, as follows:-

*“Water NSW advises that any excavations should not interfere with the groundwater table. A sufficient buffer should be maintained between the excavation and the predicted highest groundwater table.*

*If groundwater is extracted during construction works during unforeseen circumstances, a water supply work approval and an access licence approval would be required to account for the water take pursuant to the Water Management Act 2000.*

*Hence, no approvals would be required from Water NSW if the excavation is located above the water table and no water is to be extracted during construction of any basement structures.”*

**In view of the above comments, which would be applicable to the current amended plans lodged with the review, the proposal was not referred again to Water NSW.**

### **Comment**

If the Panel were minded to now approve the application subject to this review, a condition could be proposed to achieve the intent of the above comments.

## **INTERNAL REFERRALS**

### **Building**

The proposed works the subject of this application have not been assessed in accordance with compliance with the National Construction Code of Australia. This would need to be undertaken prior to the issue of a Construction Certificate. Should significant changes be required to achieve compliance with NCC standards, a section 4.55 application would be necessary.

## **Landscape Development Officer**

### **Council's Landscape Development Officer comments s.8.2 – 4 Jan 2021**

*'This proposal (S8.2 Review) cannot be supported in its current form.'*

*The amended proposal does not appear to have made any attempt to retain the mature site trees as advised in response to the original DA lodgement. The suggestion that a single replacement canopy tree, which would take decades to reach the height and maturity of the number of removed canopy trees, might represent a considered response to previous Landscape Comments provided by Council, is, at best, flawed.*

*No updated Landscape Plan or Arborist report appear to have been provided.*

Council's Landscape Officer comments dated 14/4/20' – see below:

*"It does not appear that this design has considered the amenity value of existing mature site trees, particularly in light of the E4 zoning. It is also noted that there appear to be inaccuracies with regard to purported site coverage.*

*The arborist report prepared by Andrew Scales of Naturally Trees dated 18 November 2019 assesses Trees 2,3 & 4 as Category Z Unimportant Trees requiring removal.*

- *T2 Liquidambar styraciflua (16 x 10) is noted as "pushing on retaining wall. Acute dieback"*
- *T3 Grevillea robusta (20 x 14) is noted as "failed central leader. Large epicormic growth"*
- *T4 Eucalyptus pilularis (22 x 22) is noted as "Cavity on main trunk. High-risk tree."*

#### *"3.2.3*

*Low category trees to be removed: The proposed development will necessitate the removal of nine trees of low and very low retention value. These include Trees 1,2,3,4,8,9,10,11 and 13. None of these trees are considered significant or worthy of special measures to ensure their preservation."*

*However, in the arborist report prepared by Andrew Scales of Naturally Trees less than three months earlier, dated 27/6/19, in support of DA 153/19 at 56 Cowdroy Avenue, the abovementioned trees are assessed as Category A important Trees which were to be protected and retained. In this earlier report, the following is noted:*

- *T2 Liquidambar styraciflua (16 x 10) is noted as "pushing on retaining wall."*
- *T3 Grevillea robusta (20 x 14) is noted as "failed central leader."*
- *T4 Eucalyptus pilularis (22 x 22) is noted as "Cavity on main trunk, possible high risk tree"*

3.2.2.....

- *“Trees 2, 3, and 4: These are important trees with a high potential to contribute to amenity so any adverse impacts on them should be minimised.”*

*Before any further consideration can be given to this proposal, a detailed report from the arborist shall be required detailing how the “acute dieback” to T2, “Large epicormic growth” to T3 developed, and T4 went from a “possible high risk tree” to a “high risk tree”, and these trees went from Category A important Trees with high potential to contribute to amenity so any adverse impacts on them should be minimised, to Category Z Unimportant Trees not considered significant or worthy of special measures to ensure their preservation in less than three months.*

*It is also noted that the arborist report dated 18/11/19 advises that Tree 5 (AA) (22m x 22m) and T6 (A) (10m x 10m) which are street trees planted in the council reserve opposite 58 Cowdroy Avenue are “important trees with a high potential to contribute to amenity so any impact on them should be minimised” “could potentially be adversely affected through disturbance to their TPZs”. The report does however conclude that these trees could be retained without adverse effects are properly specified and controlled through a detailed arboricultural method statement.*

*A further arborist report addressing the concerns raised above, and/or amended plans that allows for the retention of important site trees particularly T1, T2, T3, & T4 is required before this proposal could be considered.*

*The Landscape plan prepared by habit8 dated 10/12/19 does not contain plant numbers, pot sizes or actual species to be used, but rather a selection of plants outlined in a planting palette. An amended landscape plan shall be required to accompany any new proposal, and shall include species, number, and pot size. Plant species chosen should be selected with the natural harbourside location and proximity to bushland considered.”*

### **Council’s Landscape Development Officer further comments - Jan 2021**

An amended ‘**Arboricultural Impact Appraisal and Method Statement**’ – (**Revision A**) was prepared on 4 December 2020 (the same day as the previous comments from Council Landscape Development Officer).

The amended report was referred back to the Landscape Officer who advised that his comments still stand after a review of the revised arborist report, as this report still states a requirement for removal of all site trees.

### **Engineering Infrastructure**

Council’s Engineering Project Manager, Engineering Infrastructure commented on the initial March 2020 proposal and responded to state that no ‘in principle’ objection was raised to the relocation of the retaining wall on Council’s Land subject to three conditions.



### Comment

As the current amended plans lodged with this review are not significantly different (from an engineering perspective) from the original plans lodged in March 2020, if the Panel is inclined to approve the application, the 3 conditions recommended could be imposed on any consent granted.

### **Section 8.2 and Amended Plans**

Council's Engineer was referred the amended plans and confirmed that previous engineering comments still stand.

### **Traffic and Parking Section**

#### **Previous Report:-**

Council's Traffic and Parking Section reported on the original proposal and raised no 'in principle' objection to the application subject to some further information, amendments and conditions as summarised below:-

1. No objection is raised to the removal and relocation of the existing retaining wall provided that it is located at the end of the access road to 58 Cowdroy Avenue and moving it further back will not result in any parking loss and disruption to the traffic flow.
2. The turning paths provided on the driveway crossing plan do not indicate if these are for ingress or egress. Both ingress and egress must be assessed and shown using a B85 turning template in accordance with AS2890.1:2004 Off-Street Car Parking.
3. It appears on the driveway plan that vehicles are driving forward into the garage and reversing out, resulting in vehicles having to reverse all the way down the access road past all the neighbouring driveways then turn around at the split road to enter the road network. This would be hazardous to both vehicles entering the access road and exiting the neighbouring driveways as well as any pedestrians walking on the roadway. It is therefore recommended that a turntable be provided within the proposed garage to accommodate the parking and rotating of the two (2) cars installed in the garage to allow vehicles to enter and exit in a forward direction subject to compliance with B85 turning templates in accordance with AS2890.1:2004 Off-Street Car Parking.
4. A CTMP shall be provided and approved by the North Sydney Local Traffic Committee prior to issuing of a construction certificate. All surrounding property, road and pedestrian accesses must be maintained at all times during demolition, excavation and construction.

### **Comment**

In relation to the points raised, and specifically points 2 and 3, a turntable has now been provided to permit vehicles to enter and leave in a forward direction. In relation to point 4, a suitable condition requiring a CTMP could be imposed should the Panel be of a mind to approve the proposal.

### **Property Services**

Council's Property Section responded to a referral of the original Plans submitted in March 2020 and stated that no objection was raised to the relocation of the retaining wall on Council's land subject to the requirements of Council's Infrastructure and Traffic Sections being met by the applicant.

#### **Comment:-**

As this part of the proposal is unchanged, it was not considered necessary to refer the amended plans back to the Property Services Section, and any approval granted would be subject to the previous requirements.

### **Development Engineering**

The original application and plans lodged in March 2020 were referred to Council's Senior Development Engineer who raised no objection at that time subject to a number of conditions encompassing the above requirements of Council's Infrastructure and Transport Sections, and other conditions including the requirement for a geotechnical report and geotechnical stability measures, dilapidation reports, sediment control, and a drainage management plan.

#### **Comment:-**

The above requirements are still applicable to the current amended proposal lodged with this application for review. If the Panel is inclined to approve the proposal, conditions could be imposed on any consent granted.

## **SUBMISSIONS**

### **Original Application**

The proposal was notified to surrounding properties and the Bay Precinct between 27 March and 14 April 2020. Five (5) submissions objecting to the application were received.

The submissions raised 26 points which are detailed in the original report to the NSLPP.

### **Section 8.2 review -Amended Plans**

Surrounding property owners and the Bay Precinct were notified of the current request for a review of the determination, amended plans and clause 4.6 submission.

The notification period ended on 18 December 2020 and four (4) submissions were received from adjoining/nearby properties.

### **Basis of Submissions**

#### **Immediate adjoining property to the west**

- Visual aesthetics – bulk, scale, height & materials;
- View loss;
- Overshadowing;
- Privacy;

- Environmental change – including impact on the prevailing north east breeze and extensive shadowing of existing gardens and pool.

#### **Immediate adjoining property to the east**

- Drawing inaccuracies in the plotting of No.2 Folly Point Cammeray;
- Sydney Water Board Sewer;
- Building Height;
- Impact to view sharing and view loss;
- Landscaping;
- Statutory Requirements.

#### **Neighbouring property to the west**

- Development remains excessive for the site, is both out of character for the foreshore and overly imposing;
- Proposal still exceeds the minimum height requirements;
- The proposed building extends beyond the current building line to the foreshore;
- The building is not stepped down the hill;
- The roofline is excessively imposing.

#### **Nearby property to the west**

- Height ‘significantly exceeds the maximum building height’ and bulk;
- Plans not clearly labelled, that do not correctly represent the situation;
- ‘Coverage’, excessive close to waterfront , 48% compared with allowable 40%;
- ‘Positioning’, side setbacks do not conform with Council’s rules;
- Approval of variations to building requirements would have ‘flow on effects’;
- Owners of No.50 Cowdroy Ave had to modify their previous DA to preserve cross views, current proposal should also preserve views.

### **CONSIDERATION**

#### **Environmental Planning and Assessment Amendment Act 1979**

##### **Division 8.2 – Reviews**

Division 8.2 of the EPA Act pertains to ‘Reviews’ and enables an applicant to request a review of a determination by Council. The first step is to consider whether the subject application satisfies the significant relevant provisions of sections 8.2 – 8.5 of the EPA Act which is detailed as follows:

##### ***Section 8.2 Determinations and decisions subject to review***

(1) *The following determinations or decisions of a consent authority under Part 4 are subject to review under this Division—*

- (a) *the determination of an application for development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*

- (b) *the determination of an application for the modification of a development consent by a council, by a local planning panel, by a Sydney district or regional planning panel or by any person acting as delegate of the Minister (other than the Independent Planning Commission or the Planning Secretary),*
- (c) *the decision of a council to reject and not determine an application for development consent.*

### ***Section 8.3 Application for and conduct of review***

(2) *A determination or decision cannot be reviewed under this Division*

- (a) *after the period within which any appeal may be made to the Court has expired if no appeal was made, or*
- (b) *after the Court has disposed of an appeal against the determination or decision.*

#### **Comment:**

The subject application satisfies section 8.2(1)(b) of the EPA Act because it seeks a review of the determination of a development application by NSLPP. The original development application (**D56/20**) for demolition of an existing dwelling and construction of a new dwelling was determined by NSLPP on 5 August 2020.

The review of determination is required to be completed within the timeframe specified in subclause (2)(a), being 12 months from the date the notice of determination was received by the applicant (i.e. 5 August 2021). This time frame has been extended from 6 months to 12 months as part of the legislation changes in response to COVID-19.

It is considered that the assessment and the determination of this s.8.2 Review application would be completed within 12 months from the date of original DA determination. Therefore, the application also satisfies section 8.3(2)(a) of the EPA Act.

#### *Section 8.3(3)*

*In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.*

#### **Comment:**

The applicant has made further amendments to the architectural plans since the original DA determination (**D56/20**). However, the proposed development would still involve the demolition of the existing dwelling and the construction of a detached dwelling similar in terms of the overall form and the level of accommodation within the proposed dwelling as compared to the dwelling proposed in the original DA.

Therefore, the proposal would result in a development that is considered to be substantially the same development as described in the original application.

*Section 8.3(4)*

*The review of a determination or decision made by a delegate of a Council is to be conducted—*

- (a) by the council (unless the determination or decision may be made only by a local planning panel or delegate of the council), or*
- (b) by another delegate of the council who is not subordinate to the delegate who made the determination or decision.*

**Comment:**

The original development application (**D56/20**) was determined by NSLPP and the subject review will be determined by NSLPP in accordance with section 8.3(4) of the EPA Act.

**It is considered that this application satisfies the relevant provisions as contained under Division 8.2 and Sections 8.2 to 8.5 of the EPA Act.**

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

**Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005**

*Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* (SREP SHC) applies to the site.

The site is located on the foreshore of Long Bay, Middle Harbour, and is within the Sydney Harbour Catchment Area and the Foreshores and Waterways Area, where it is zoned ‘Zone No W1 Maritime Waters’.

The SEE submitted with the original plans did not acknowledge or address the Sydney Harbour Catchment Planning Principles which must be considered in the carrying out of development within the catchment. However, Council Officers addressed the planning principles in the initial report and the principles will be revisited in view of the current amended plans.

Part 2 - Planning Principles

Consideration must be given to the planning principles for the Sydney Harbour Catchment and Foreshores and Waterways Area as detailed in clause 13 and 14 of SREP SHC.

As detailed below, the proposed development is not considered to adequately satisfy a number of the planning principles in clauses 13 and 14 in SREP SHC particularly those requiring development “to maintain, protect and enhance the unique visual qualities of Sydney Harbour” (clauses 13(f) and 14(d)) and “to protect.....remnant native vegetation’ and to protect, maintain and enhance natural assets” (clauses 13(j) and 14(a)).

Division 2 - Matters for consideration

The matters referred to in clause 21 to 27 of the SREP SHC must be taken into consideration before granting consent to development

Clause 21 Biodiversity, ecology and environment protection - Conditions could be imposed to ensure that the proposal does not adversely impact the waterway. However, the removal of up to nine (9) trees is a concern as this would remove habitat corridors and habitat for native fauna.

The amended plans have included a courtyard behind the garage which may enable one replacement tree to be planted. However, Council's Landscape Officer states that it will take decades for the tree to replace that which has been lost and infers that this single measure is insufficient. No supporting landscape plan was submitted.

The amended proposal, which still results in excessive site coverage and tree removal is not considered to adequately consider clause 21 of SREP SHC.

Clause 22 Public Access to, and use of, foreshores and waterways - There is no public access to the waterway through the subject site as this is a private property.

Clause 23 Maintenance of a working harbour - The amended proposal would have no impact upon the 'use' of the Harbour.

Clause 24 Interrelationship of waterway and foreshore uses - The amended proposal does not cause any conflict between any foreshore uses and the waterways.

Clause 25 Foreshore and waterways scenic quality - The proposed amended development is not considered to maintain, protect and enhance the visual qualities of Sydney Harbour and its islands and foreshores by virtue of the excessive scale and mass of the new building, as evidenced by the extensive tree removal and non-compliances with the building height, building side setbacks and site coverage controls.

Clause 26 Maintenance, protection and enhancement of views - The proposed amended development would fail to maintain, protect and enhance views to Long Bay and Middle Harbour from surrounding properties, particularly the neighbour to the immediate west, as discussed in detail later in this report.

### Division 3 - Foreshores and Waterways Planning and Development Advisory Committee

Clause 29 of Division 3 requires referral of this application to the Foreshores and Waterways Planning and Development Advisory Committee, as the application involves demolition, which under Schedule 2 of the SREP SHC requires their comments. A referral for the original proposal in March 2020 was sent to the Foreshores and Waterways Planning and Development Advisory Committee. However, no response was received.

The amended proposal has not been reissued to the Foreshores and Waterways Planning and Development Advisory Committee as this is not considered necessary in this instance.

### **Sydney Harbour Foreshore and Waterways Development Control Plan 2005**

Consideration is also to be given to the design guidelines for 'land-based development', specifically 5.4 'Built Form' in the Sydney Harbour Foreshores and Waterways DCP.

The scale of the amended development, when viewed from Sydney Harbour is still considered excessive and non-compliant with the permissible building height control and contributes to a cumulative impact of buildings dominating the foreshores. The proposed development does not appropriately step down the site and there is inadequate articulation and visual breaks in the facades of the building to minimise its visual impact on the waterway. The proposed development is therefore considered to be contrary to Part 5.4 'Built Form' in the Sydney Harbour Foreshores and Waterways DCP.

'Vegetation Character Type 3' applies to the site and is characterised by residential development within areas of steep topography and the retention of natural land water interface elements. The intent in this area is to allow suitable development that is of an appropriate scale and siting to maintain natural shorelines and vegetation.

The following performance criteria are relevant Vegetation Character Type 3 and as discussed, the development in its current form fails to achieve these criteria.

**\*development at the water's edge has been sited so that the view of the natural shoreline remains predominant**

**Comment:**

The amended development still includes the removal of all substantial trees, altering of the existing landform and significant retaining walls, which will still result in a hard, man-made appearance within this area such that little of the natural shoreline is retained.

**\*significant natural features such as rock outcrops, dominance of the tree canopy, native vegetation, ridgelines, rock ledges and platforms are protected and enhanced;**

**Comment:**

The amended proposal still involves the removal of all existing trees from the site including several significant trees that are of a high amenity value. It is acknowledged that the new courtyard behind the garage may permit the replanting of one trees on site, however this appears to be the only concession and falls short of meeting this performance criteria.

**\*development is sited and designed so that the visual dominance of the tree canopy on the slopes and along the skyline is maintained;**

**Comment:**

As mentioned above the, level of tree removal still does not meet this performance criteria. Most significant trees are located towards the boundaries of the site and could therefore be accommodated within a more sensitively designed proposal.

**\*development retains the character of the enclosed waterbody or bay by maintaining the visual dominance of the natural features and preserving key points and entry into these areas in their natural state;**

**Comment:**

The amended proposal, whilst proposing a reduction in roof height still presents as a bulky building as evidenced by the non-complaint site coverage and building height, resulting in a building which visually dominates the site at the cost of all natural features across the site, resulting in material harm to the intrinsic character of Long Bay.

**\*overall colours should match native vegetation and geological features as closely as possible with trim colours drawn from natural elements such as tree trunks and stone.**

**Comment:**

The external materials originally proposed large expanses of zinc and metal which were incompatible with the surrounding natural environment of the harbour. The amended plans include some improvements, however external finishes could be conditioned to be more sympathetic if the Panel was of a view to approve the amended proposal.

In summary, the proposal is considered to be unsatisfactory having regard to the matters of consideration under SREP (Sydney Harbour Catchment) 2005.

**SEPP No. 19 - Bushland in Urban Areas**

The site is identified on Council's Bushland Buffer Map as being within 100m of bushland (Buffer Area 'A'). The provisions of SEPP 19 require Council to assess the protection and preservation of bushland within urban areas.

The application proposes the removal of at least nine (9) trees from the site including significant trees which may form part of the remnant bushland in the area, resulting in a loss of intrinsic and aesthetic value that the trees provide, along with a likely loss of corridors and habitat for native flora and fauna, contrary to the aims of this SEPP.

**SEPP (Vegetation in Non-Rural Areas) 2017**

The subject site is a non-rural area (zoned E4 Environmental Living) and contains a number of substantial trees, and as such Part 9 of the SEPP applies. It is proposed to remove all trees from within the site to make way for the development, including several significant trees which make a significant contribution to the visual amenity and biodiversity value of the site.

Council does not concur with the arborists report which recommends removal of all trees from the site because they were all unimportant, refer also to Landscape Development Officer's comments earlier in this report. The development provides inadequate landscaping and deep soil zones, such that only limited replenishment tree planting would be possible and provide minimal canopy cover. The proposal therefore conflicts with the aims of this SEPP.

**SEPP (Building Sustainability Index: BASIX) 2004**

A draft BASIX report has been submitted with the amended application to satisfy the requirements of SEPP (BASIX). However, the draft document is not acceptable and any consent to this review would require a valid BASIX Certificate be submitted for the amended proposal.



## SEPP 55 - Remediation of Land and Draft Remediation of Land SEPP

The site is not a known source of contamination given its long history of residential use. Conditions relating to the management of asbestos could be imposed should the application be approved to address the requirements of the SEPP.

### Draft Environment SEPP

This draft SEPP proposes to integrate the provisions of seven (7) SEPPs/SREPs including SREP (Sydney Harbour Catchment) 2005. It is noted that the SREP (Sydney Harbour Catchment) 2005 will be repealed with the finalisation of the Draft Environment SEPP where the matters for consideration under the draft SEPP would be similar to the current policy.

The amended proposal is still considered to be contrary to several objectives of the SEPP for the reasons discussed under the operative planning instruments above.

## NORTH SYDNEY LOCAL ENVIRONMENTAL PLAN 2013

### 1. Permissibility within the zone

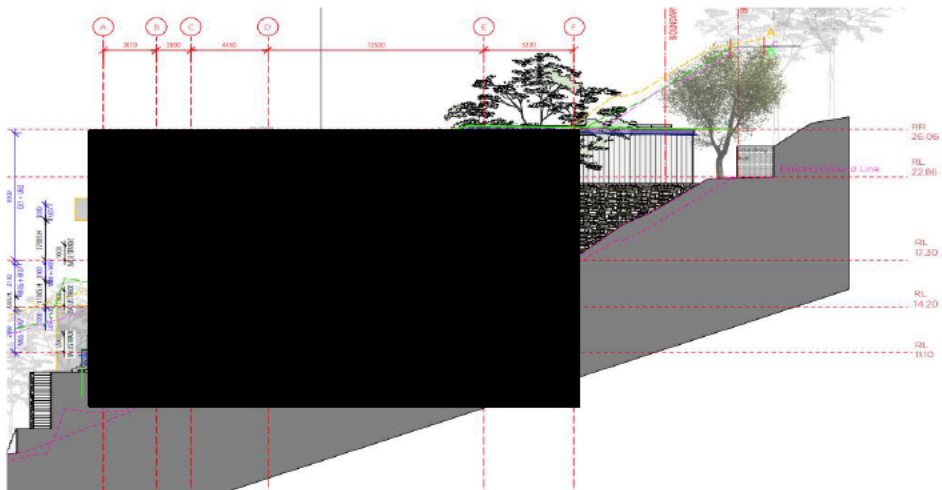
The subject site is zoned E4 - Environmental Living under the provisions of NSLEP. The application proposes the demolition of a dwelling and construction of a new dwelling, which is a permissible form of development in the E4 - Environmental Living zone with consent under NSLEP.

### 2. Clause 4.3 – Height of Buildings - Development Standard

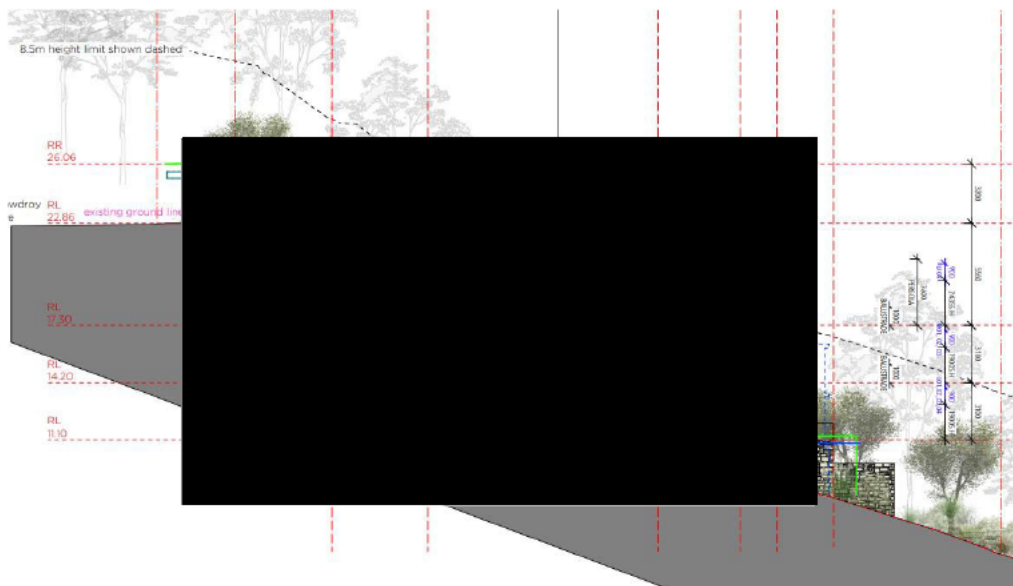
Principal Development Standard - North Sydney LEP 2013			
Site Area - 556m <sup>2</sup>	Amended Proposal	Control	Complies
Clause 4.3 Height of Building	Variable maximum height approximately 11.76m - 11.86m	8.5m maximum height	No

Under the provisions of Clause 4.3(2) in NSLEP, the maximum height of a building permitted on the subject site is 8.5 metres. The applicant has submitted an amended written request to justify the proposed variation to the building height control (refer to **Appendix 3**).

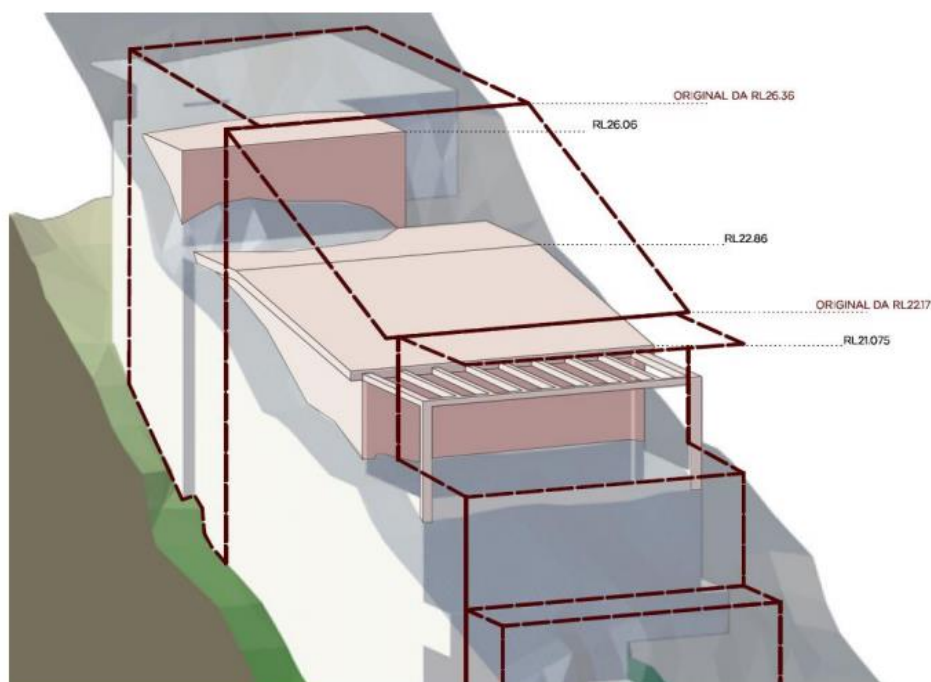
The submitted cl.4.6 submission and amended plans illustrate the proposed non-compliances as follows (refer to Figures 8, 9 & 10 below).



**Figure 8: West elevation (8.5m height line not clearly depicted above NGL)**



**Figure 9: Proposed East elevation with 8.5m height line above NGL shown dotted in black**



**Figure 10: ‘Building Height Blanket’ from applicant’s clause 4.6 submission showing original proposal and amended proposed height breach**

Council’s previous report to the Panel stated that:-

*‘For clarity it is noted that ground level (existing) as defined in NSLEP is the lowest floor level of a building not including any basement levels, provided the relevant basement level meets the NSLEP 2013 definition. In the circumstances of this case, the existing basement level protrudes more than 1 metre above ground level (existing) and includes north facing openings, and consequently the building height should be measured from both the basement and the lower floor levels, and not the assumed natural ground level in these areas of the site.’*

The lowest floor of the current amended development, designated ‘Lower Floor’ level has a RL of 11.10. The high ceiling above the upper floor creates a roof RL of 22.86 creating an overall height of 11.76m in this location. The adjacent section of the building that contains the lift has a roof RL of 26.06 with the lowest floor level below it the ‘Mid Floor’ RL of 14.20 increasing the overall height to 11.86m. The amended development is therefore between 3.26m – 3.36m in excess of the 8.5m maximum height development standard.

The proposed breach has been assessed in accordance with the requirements of clause 4.6(3) and (4), the objectives of the control and the zone. These matters have been considered below:

### **3. Clause 4.6 Exceptions to Development Standards and Applicant’s Submission**

#### **Clause 4.6(3) North Sydney LEP 2013**

*‘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.”*

Firstly, 4.6(3)(a) requires that:-

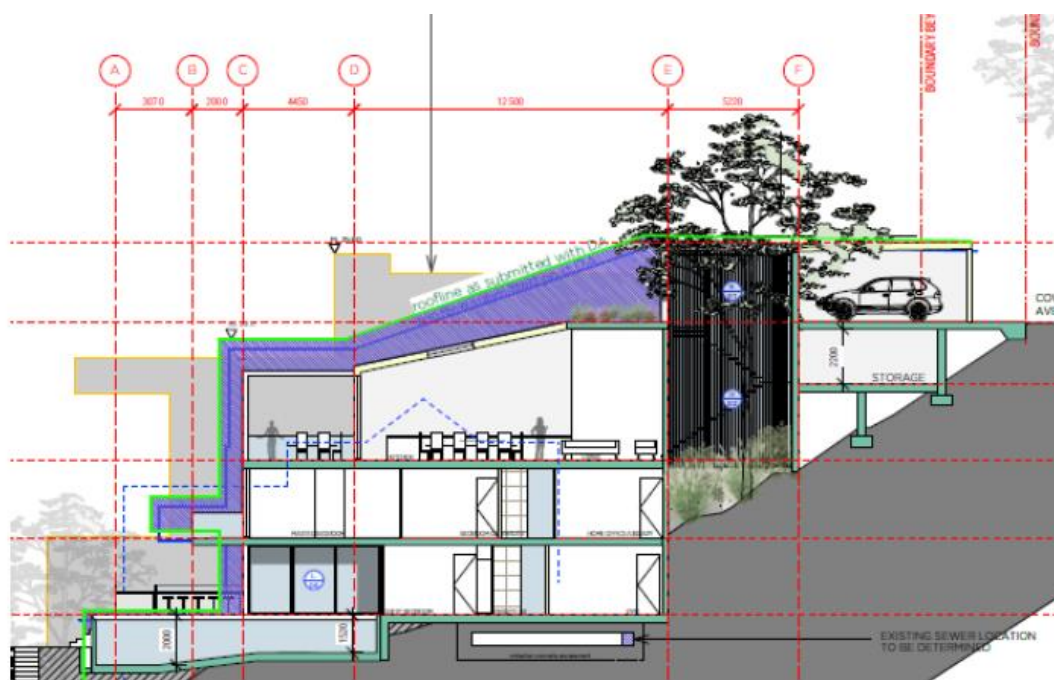
- a) *Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.*

The Clause 4.6 submission lodged with the current review cites the *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 decision to explore the question of the whether the development standard is unreasonable and/or unnecessary, but fails to adequately address the ‘circumstances of the case’. The ‘unreasonable/unnecessary’ question will be dealt with after examining the objectives of the zone and development standard later in this report.

The covering letter dated 9 November 2020 by the applicant’s planning consultant includes a comment on the proposed development and notes that:-

*‘This site analysis clearly demonstrates that the height of any new contemporary dwelling house on the site will be significantly influenced by the steep topography of the land and the sewer main which traverses through the developable area of the property and prevents the lower ground floor level from being reduced in height.’*

The steep topography is typical of most of the foreshore areas in the Sydney Harbour and affects many properties. Sydney Harbour is a ‘drowned river valley’ with relatively few level areas adjoining the foreshores. It is not considered that steep topography is unusual or a special circumstance of the case in this regard.



**Figure 11: Section from applicant’s covering letter showing topography and sewer mains constraints.**

In relation to the location of the sewer, it is acknowledged that not all foreshore properties are affected by a sewer main. However, from viewing the section of the development the sewer does not appear to be a significant constraint as a two-storey development can easily be constructed over it, even a 3 storey with conservative ceiling heights and/or a minor variation to the height standard.

The current application proposes an unusually high vaulted ceiling for the upper level of approximately 5.26m, this creates a height excess of up to 3.36m, the equivalent of a building almost 4 storeys in height.

As the 8.5m development standard would appear to suggest a general 2 storey building height, it is not considered the sewer main location, or topography are particularly onerous or unique site constraints in this case.

The applicant has failed to demonstrate any 'special circumstances of the case' that requires such a significant height variation (3.36m) particularly having regard to an unnecessarily high third floor ceiling height.

Secondly, Clause 4.6(3)(b):-

***'(b) That there are sufficient environmental planning grounds to justify contravening the development standard.'***

The clause 4.6 submission merely states that the 'sufficient environmental planning grounds' to justify the variation to the height of buildings development standard are:-

*'.....namely the constraints imposed by the site's steep topography and the presence of a sewer main which traverses the developable area of the site and prevents a further lowering of the lower ground floor plate.'*

As mentioned previously, it is not considered either of the constraints mentioned are significant as a contemporary dwelling house can be constructed on the site complying with the 8.5m height limit even with the 'constraints' mentioned.

The submission quotes *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, and, Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248*, where in the Initial Action the Court found that:-

*'The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole'*

The applicant, in the following passage, proceeds to do exactly the above, and promotes the development stating that the development could comply, but as it is in a prestigious waterfront location, the clause 4.6 variation for a height variation should be permitted.

*'Whilst strict compliance could be achieved by removing or significantly reducing the upper most floor of the dwelling, such outcome is neither orderly or economic given the prestigious waterfront location of the property where there is an expectation that a reasonable level of floor space can be achieved and the disparate building height that would result compared to that of surrounding development and development generally along this section of the foreshore.'*

In view of the above, it is not considered that there are sufficient environmental planning grounds to justify the contravention of the development standard as proposed.

**Clause 4.6(4) North Sydney LEP 2013**

***‘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 Planning Secretary has been obtained.\****

\*(with regard to clause 4.6(4)(b) Consent Authorities have assumed concurrence except in certain circumstances)

**Clause 4.6(4)(a)(i)**

Firstly, has the applicant’s written request adequately addressed the matters required to be demonstrated by subclause (3)?

From the discussion above, it is not considered the current proposal has any unique ‘circumstances of the case’ to warrant the height variation as proposed. Likewise, no convincing ‘environmental planning grounds’ have been put forward to justify the extent of the variation as proposed.

Secondly, the consent authority (in this case the Planning Panel) must be satisfied 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 ‘***

**Clause 4.6(4)(a)(ii)**

**Objectives of the E4 – Environmental Living Zone**

Taking the zone objectives first, the Zone E4 - Environmental Living objectives are:\_

- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*
- *To ensure that residential development does not have an adverse effect on those values.*
- *To ensure that a high level of residential amenity is achieved and maintained.*

Firstly, is the proposal low impact residential development?



The proposal seeks to remove all significant trees on the site, or at best possibly replant one tree. The covering letter submitted with the review states that *'the proposal is now compliant with the maximum 40% site coverage and minimum 30% landscaped area provision'*. However, the 'Site Calculation Diagram' (Dwg S8.2 20) submitted, notes the site coverage is 267m<sup>2</sup> or 48%, and the landscaped area at 227m<sup>2</sup> or 40.8%.

The landscaping may technically comply with minimum area, but the site coverage still appears to exceed the requirement, and this is a **'minimum requirement'** – particularly given that the amended proposal is for a new development, not alterations and additions.

The amended proposal also still exceeds the height limit by a substantial amount (3.6m), overshadows adjoining properties and results in some view loss, although it is acknowledged the current proposal has reduced both of the latter impacts from the original proposal.

It is therefore unrealistic to classify the proposal as a 'low impact residential development'.

Secondly, does the development have an adverse effect on the *'special ecological, scientific or aesthetic values'*?

The removal of all the trees onsite would do little to promote ecological values, and the excess height and four storey appearance would do little to enhance the aesthetic values of the site. (It is unlikely significant scientific values are impacted.)

Thirdly, does the development ensure a high level of residential amenity is achieved and maintained?

Obviously, the subject property will enjoy increased amenity from the new building, pool, terraces and up to 5m ceiling height of the upper floor with its improved views. The proposal will however, impact adjoining properties to a degree in relation to view impacts and increased overshadowing. However, as noted, the amended proposal is an improvement on the original proposal.

Visually the amended proposal is still bulky in appearance due to the non-compliant height and site coverage, both of which appear to detract from the residential amenity of adjoining properties.

In view of the above, it is not considered the development satisfactorily meets the objectives of the E4 - Environmental Living zone under NSLEP.

### **Objectives of the 'Height of Buildings' Development Standard**

A comment on each of the objectives of the building height development standard is provided below:

- (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*

### **The Applicant's response – (clause 4.6 submission)**

*'The land upon which the development is proposed is steeply sloping falling approximately 12 metres across its surface through the proposed building footprint.'*

*The proposal has been designed to utilise the excavation created to accommodate the existing dwelling with additional excavation otherwise limited to that required to accommodate 3 floors of accommodation consistent with that established by a majority of waterfront properties along Cowdroy Avenue.....*

*The floor plates have been arranged such that the uppermost level is setback behind the levels below as they present to the foreshore with an open pergola structure constructed over the upper most terrace for sun and weather protection. I am of the opinion that the proposal does achieve this objective by minimising excavation and providing for a building that integrates with and appropriately steps down the landform on this steeply sloping site notwithstanding the building height breaching elements.'*

### **Assessment**

As in the previous comments for the original proposal, it is not considered the development steps down the slope in a fashion consistent with the objective.

It is acknowledged that the topography of the site is challenging, however the design will not only exceed the 8.5m height limit, but also the site coverage requirement and present as a bulky, 3 storey+ façade when viewed from the waterways.

It is noted the adjoining dwelling to the west, No. 56 Cowdroy Avenue may not be the best example of stepped development, but, this dwelling was built prior to the current LEP.



**Figure 12: Applicant's single photo montage of the proposed development**



The 8.5m maximum building height development standard would appear to only encourage residential development to 2 storeys (although not implicit). The current design is not only three storeys, but 3 storeys with a 5m ceiling height for its upper floor. A more stepped design would result in a lower, more compliant building, following more closely the natural fall of the land rather than the proposed building with a bulky vertical appearance.

Additional photomontages would be required in order to provide a more thorough assessment of the amended proposal from the waterway.

It is not considered the amended proposal meets objective (a).

**(b) to promote the retention and, if appropriate, sharing of existing views,**

**The Applicant's response – (clause 4.6 submission)**

The applicant seeks to justify the height variation by comparing it with the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140. The four assessment steps are:-

**Step 1 - Assessment of views to be affected.**

*'Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.'*

**Applicant's clause 4.6 submission:-** Acknowledges that the adjoining properties (in particular Nos. 54D & 56 Cowdroy Ave and No. 2 Folly Point all have panoramic land/water interface views of Long Bay, and further up the harbour to the north east.

**Assessment:-** It is agreed the views are valued 'whole views' with land/water interface and distant views towards Beauty Point, Mosman.

**Step 2 – Consideration as to what part of the property the views are obtained.**

*'For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.'*

**Applicant's clause 4.6 submission:-**

These views are available from the living areas and adjacent balconies from both a standing and seated position. The views available over the subject site are obtained directly across the side boundary and over the roof of the existing dwelling located on the subject site.

**Assessment:-** Agreed, the views affected by the proposal will be across side boundaries, which are more difficult to protect. It should be noted that land/water interface views to the north would not be affected by the development.

The 'Tenacity' principle does not disregard side boundary views, merely states that it is 'often unrealistic' to retain them. In the current proposal, it is realistic, as a development that complied with site cover, and, more importantly, height requirements, could result in the retention of most views.

**Step 3 - Assess the extent of the impact.**

*'This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.'*

**Applicant's clause 4.6 submission:-**

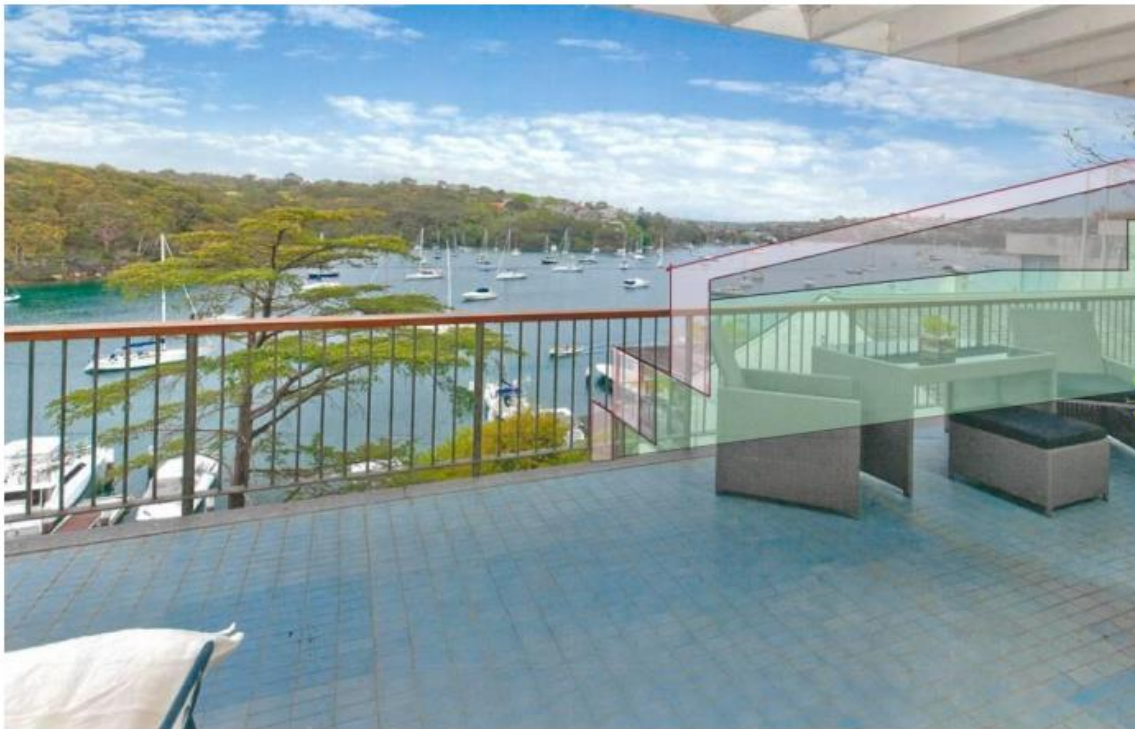
The applicant claims that:-

*' the amended plans provide for a reduction in building height and increased setback to the waterfront I am of the opinion that the proposal will not give rise to any loss of significant or unobstructed water views available from No. 54D Cowdroy or No. 2 Folly Point. The view loss is appropriately described as minor to negligible from these properties '*

With regard to No. 56 Cowdroy Ave, the applicant states that the siting of the existing house closer to the street frontage makes the house more vulnerable to view impacts particularly across side boundaries and so, the extent of the impact is minor.

**Assessment:-** The previous report on the original development went into some detail to describe the view impacts and should be referred to, keeping in mind the current amended development plans have reduced the overall height somewhat, and, increased the foreshore setback slightly.

Whilst each of the 3 affected neighbouring properties will retain their northerly views to the rear, it is the side views that are to be impacted. As mentioned previously, the Tenacity principle does not dismiss side boundary views, merely notes that their retention is 'often' unrealistic.



**Figure 13: Applicant’s ‘view loss montage’ of northeast view from 56 Cowdroy Ave, showing outline of original proposed building (rose shading), a minor modification lodged during assessment (blue shading), and, current amended proposal (light blue shading).**

The view assessment shown above (**Figure 13**) is the only photograph with superimposed building outlines that has been provided with the current review application and clause 4.6 submission, the view impact from the lower levels of No. 56, and, the two other properties has not been demonstrated.

As to the extent of the impacts, classification is a subjective process, and taking into consideration the 3 affected properties will retain northerly views, it is the northeast views of Nos. 54D & 56 impacted by the development and western views of No. 2 Folly Point.

On the basis of the limited information provided, it is considered that the view impacts would be greater than ‘negligible’, and rather ‘minor’ with possibly ‘moderate’ for some specific views from certain locations. In summary, it is difficult to ascertain to full extent of view impacts from the level of information provided.

**Step 4: Assess the reasonableness of the proposal that is causing the impact.**

*‘A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.’*

**Applicant's clause 4.6 submission (divided into sections for convenience):-**

*'Whilst the proposal does not company(sic) with the 8.5 metre height standard it is clearly evident that 3 storey dwelling houses with car parking at street level are characteristic of development along the foreshore with the established built form circumstance reflecting both the existing and desired future character noting the recent approval of alterations and additions to a number of surrounding properties including No. 56 Cowdroy Avenue where a building height variation was approved for a building height variation greater than that currently proposed.'*

*'As previously indicated, the height, bulk and scale of the development has been substantially reduced with compliant landscaped area now achieved through a reduction in building footprint and the introduction of an internalised courtyard area between the garage and main living areas of the dwelling house.'*

*'.....the proposed building as amended will sit comfortably within the established foreshore visual catchment and will display a height, bulk, scale and setbacks which are entirely consistent with those established by immediately adjoining development...'*

*'The amended plans also provide the planting of a replacement canopy tree adjacent to the proposed internalised courtyard area with a green roof and diaphanous landscape screen to the western façade ensuring that the edges of the building are appropriately softened with the building sitting within a landscape setting consistent with that established by adjoining development and development generally within the sites visual catchment.'*

*'.....that most observers would not find the proposed garages by virtue of their form, massing or street alignment, offensive, jarring or unsympathetic in a streetscape .....*

**Assessment: -**

Firstly, the 8.5m height standard would appear to encourage 2 storey development rather than 3 storeys, or at best 2 storeys with a lower or basement level partly in excavation. If 3 storey development was to be accepted as the 'desired future character' of the area, surely the LEP height control would have reflected this. It is considered the 8.5m height limit (which is not a generous height, being identical to the height limit for 'Complying Development') has been chosen to reduce the conflict caused in these foreshore areas where view issues are common. Secondly, whilst the height of the building has been reduced, the variation is still substantial, up to 3.36m, which could equate to a whole floor in excess of the 8.5m height standard. The bulk of the development would only appear marginally reduced with only a 1-1.5m increased rear setback proposed.

Thirdly, the photo montage (**Figure 12**) would not appear to support the contention that the building 'sits comfortably' within the foreshore, it is noted that only the north elevation, a 'straight on' view was provided, a perspective from an angle would probably accentuate the proposed bulk further.

No. 2 Folly Point (albeit a large house), is significantly modulated and stepped down the slope whilst No.54D Cowdroy Ave is setback and appears lower in height. No.56 Cowdroy Ave is the exception, and does appear bulky from the foreshores, although considerably setback. As mentioned previously, this dwelling was constructed well before the current NSLEP.

Fourthly, whilst the new courtyard behind the garage is a welcome addition to the proposal, the replacement planting of only 1 tree will not compensate for the loss of all the trees from the site. No amended landscaping plans or details of replanting have been submitted, however, and so the positive effect of this aspect of the proposal is uncertain.

Fifthly, no objection is raised to the streetscape impact of the proposed garage as it is reduced in width from the original proposal and is located at a dead end of this part of the street.

In summary, 'Tenacity' suggests that where *'an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable'* and this is considered applicable to the current application. The unnecessary height variation proposed aggravates a perhaps minor view loss to a more unacceptable level.

The second part of the principle, which is dismissed by the clause 4.6 submission as N/A is worth mentioning as it suggests that even developments complying with development standards and/or guidelines could have unacceptable view impacts if alternative designs could mitigate these impacts. In the current proposal the height does not comply by a significant margin, and, for unnecessary reasons (an upper floor ceiling height of approx. 5m).

If the minor/moderate view impacts were caused by a height complying development, there may be reason to support it. However, in the current situation, it is considered the proposal fails the 'reasonableness' test.

In summary, it is considered the proposal fails the Tenacity 4-step view sharing principles.

**(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,**

**The Applicant's response – (clause 4.6 submission):-**

*'The shadow diagrams at Annexure 1 demonstrate that the proposal will allow for compliant levels of solar access to be maintained to north facing living and adjacent open space areas of both adjoining properties between 9am and 3pm on 21st June. No overshadowing impacts will occur to public spaces or the street.'*

**Assessment: -**

The orientation of the lots is in a general NNE/SSW alignment and shadow diagrams submitted indicate the adjoining properties would receive the minimum 3 hours of sunlight between 9am – 3pm on the winter solstice. However, the shadow diagrams also indicate unnecessary overshadowing caused by the proposed development.

Whilst some overshadowing is unavoidable, the height of the proposed building, 3m over the maximum permitted will increase the extent of morning shadowing to 56 Cowdroy Ave, and afternoon shadowing to 2 Folly Point unnecessarily. Overshadowing to public reserves & streets is not considered to be an issue.

Notwithstanding compliance with the minimum solar access requirements, the proposal could be considered to not 'maintain solar access' as the adjoining properties will be overshadowed unnecessarily by the non-compliant, excessive height.

- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,**

**The Applicant's response – (clause 4.6 submission):-**

*'Minimising privacy impacts have been incorporated into the dwelling design by minimising the fenestration to the side elevations. The east elevation has a minimal number of windows which consist of primarily highlight windows to provide natural light to internal areas. The western elevation includes a diaphanous landscape screen to provide visual relief and additional screening for both the occupants and adjoining development.'*

*This objective is achieved notwithstanding the building height breach proposed.'*

**Assessment: -**

Some level of overlooking is inevitable for these foreshore properties due to the high expectation of large areas of terraces and outdoor entertaining areas. Localised impacts can often be dealt with by privacy screens, high level side windows and landscaping. It is not considered privacy is an impact that could not be dealt with by appropriate conditions.

- (e) to ensure compatibility between development, particularly at zone boundaries,**

**The Applicants response – (Clause 4.6 submission):-**

*'The property is not at a land-based zone boundary. The proposed dwelling is compatible in scale and height with that of adjoining development and development generally along this section of the foreshore as previously detailed in this document. This objective is achieved notwithstanding the building height breaching elements.'*

**Assessment: -**

This objective is not strictly applicable to the current development.

- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.**

**The Applicant's response – (clause 4.6 submission):-**

*'In relation to the existing and desired future character of the area it is clearly evident that 3 and 4 storey dwelling houses with car parking at street level are characteristic of development along the foreshore with the established built form circumstance reflecting both the existing and desired future character noting the recent approval of alterations and additions to a number of surrounding properties including No. 56 Cowdroy Avenue to the west of the site where a building height variation was approved for a building height variation greater than that currently proposed.'*

**Assessment: -**

As previously mentioned above, it is not considered 3 and 4 storey dwelling houses are the desired future character of the area as an 8.5m height limit has been applied to most foreshore residential areas. The claim that 3 and 4 storey dwelling houses are common could be a result of the observation of dwelling houses stepping down the foreshore sites with two storeys in each section giving the appearance of four storeys, when in fact many are only two storeys when measured vertically at any one point.

The applicant has not claimed that the development standard has been abandoned by numerous unjustified clause 4.6 variations being approved.

With regard to 'appropriate scale and density', there is no density control such as an FSR control applicable to the site, therefore building setbacks, height and site coverage create a defacto density/scale control and in this regard, height and site coverage (in particular) are not complied with in the current application.

As it is still considered the scale and density of the development is excessive, the proposal does not meet this objective of the height development standard.

Considering the above, it is considered the amended proposal is not still consistent with the objectives a), b) and f) of the 'Height of Buildings' development standard and is only partly consistent with objectives c) and d).

**Clause 4.6 Submission Summary:-**

**Is the development Standard 'Unreasonable & Unnecessary'?**

The applicant relies on the 'Wehbe v Pittwater Council' case law examples and in particular, if the objectives of the development standard have been achieved in addition to the objectives of the zone.

As the preceding examination of the applicants clause 4.6 request and the amended proposal has found, the objectives of the zone and 'height of buildings' development standard have not been achieved by the proposal. Consequently, adherence to the height development standard is not 'unreasonable and unnecessary'.

Further, the applicant's written request has not adequately addressed the matters referred to in subclause (3) of clause 4.6 as there are no unique circumstances of the case to justify the height variation as proposed, further, no convincing environmental planning grounds have been put forward to justify the variation.

The proposed variation would also not be in the public interest as a most of the objectives of both the E4 zoning, and height of buildings development standard have not been met.

Notwithstanding the above, it is considered that some minor variations to the 8.5m height development standard could possibly be supported, such as a roof projection of the lift behind the garage, and/or, minor roof corner projections of the house due to the topography of the site.

The upper floor plan ceiling height as proposed, is considered excessive and could easily be reduced so that the height breach is substantially reduced, this would have the benefits of reducing overshadowing, view impacts and a lessening of the buildings bulk.

#### **4. Clause 6.9 - Development within the Foreshore Area**

The site is affected by the Foreshore building line on Council's Local Provisions Map (refer to previous report). The objective of this clause is to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area.

The foreshore building line is now marked on the submitted architectural plans and based on the FBL, it is clear that part of the proposed swimming pool associated with the new dwelling encroaches the foreshore in its northwest corner. There is also a minor encroachment of steps.

The swimming pool and steps that do encroach are works that are permissible pursuant to subclause (2)(a) and (b) of clause 6.9, subject to the matters within subclause (3) being satisfied. These matters relate to the physical and visual impacts of the works on the foreshores. With the deletion of several proposed retaining walls and new steps in the amended proposal, the minor encroachment of the pool and some steps/paving is considered to be acceptable.

It was noted in the previous report for the original development that *Water NSW* had responded to the original referral with the following:-

*“Water NSW advises that any excavations should not interfere with the groundwater table. A sufficient buffer should be maintained between the excavation and the predicted highest groundwater table. If groundwater is extracted during construction works during unforeseen circumstances, a water supply work approval and an access licence approval would be required to account for the water take pursuant to the Water Management Act 2000. Hence, no approvals would be required from WaterNSW if the excavation is located above the water table and no water is to be extracted during construction of any basement structures.”*

If the Panel is inclined to approve the current review application, conditions could be imposed to achieve the above requirements and to ensure other mitigation measures such as sediment control are implemented.

#### **5. Clause 6.10 Earthworks**

The amended application still involves significant excavation extending to the boundaries of the site as was illustrated on the bulk excavation plan provided with the original application (Drawing DA01), although it will be slightly reduced with the provision of a courtyard behind the garage.

Clause 6.10(3) in NSLEP requires the consent authority to consider the following matters:

- (a) the likely disruption of, or any detrimental effect on:
  - (i) drainage patterns and soil stability in the locality of the development, and
  - (ii) natural features of, and vegetation on, the site and adjoining land,

#### **Geotechnical considerations**

A preliminary geotechnical assessment by Crozier Geotechnical Consultants was submitted with the original application, and these matters were addressed in the original report.



Council's Development Engineer raised no objection to the original application and Geotech report subject to planning conditions including conditions requiring dilapidation reports for excavation, the submission of a geotechnical report, and regarding geotechnical stability during works.

It is noted that at the time of the original assessment, Sydney Water had not been consulted by the applicants regarding the sewer main which runs through the property. No additional information has been submitted with the current application, so suitable conditions would need to be imposed should the Panel approve the current review.

### Natural Features (Trees)

Council's Landscape Development Officer found the Landscaping Plan submitted with the original proposal inadequate in that it contains no details of species and number of plants, and pot size. This level of detail is particularly necessary given the waterfront location and close proximity to bushland. Further, the level of tree removal was unacceptable and this is still the case with the current amended proposal.

There are also potential impacts for trees on Council land outside the subject site associated with the proposed relocation of a retaining wall within the tree protection zone (TPZ) of these trees.

### NORTH SYDNEY DEVELOPMENT CONTROL PLAN 2013

The proposal has been previously assessed against the NSDCP. However, the modifications require re- assessment due to the changes proposed (Table below):

<b>DEVELOPMENT CONTROL PLAN 2013 – Part B Section 1- Residential Development</b>		
	<i>complies</i>	<i>Comments</i>
<b>1.2 Social Amenity</b>		
<b>1.2.1 Population Mix</b>	N/a	The proposal would not alter the existing population mix in the locality.
<b>1.2.2 Maintaining Residential Accommodation</b>	Yes	The proposal would maintain residential accommodation through a replacement dwelling which provides additional floorspace to satisfy the desire of the future occupants
<b>1.2.3 Affordable Housing</b>	N/a	The proposal would have no impact on affordable housing in the locality.
<b>1.2.4 Housing for Seniors/Persons with disability</b>	N/a	The proposal would have no impact on housing for seniors and/or disabled persons
<b>1.3 Environmental Criteria</b>		
<b>1.3.1 Topography</b>	No	<p>To achieve the objective of ensuring that the natural topography and landform are maintained, a number of provisions apply in Part B Section 1.3.1 in NSDCP as discussed below:-</p> <p><i>P1 Development should not result in the ground level (finished) being greater than 500mm above or below ground level (existing).</i></p> <p>Comment: The amended proposal still involves significant excavation as well as areas of fill, particularly on the lower floor level, resulting in ground levels being in some areas greater than 500mm above or below ground level (existing). An area behind the garage now will be retained as a courtyard for possible tree planting and the extensive retaining walls and steps on the lower part of the site have been reduced in extent.</p> <p><i>P2 Habitable rooms (not including bathrooms, laundries and storerooms) should be located above ground level (existing).</i></p> <p>Comment: Habitable rooms are generally above or close to ground level (existing).</p>

		<p><i>P3 New development should not result in the removal or covering of rock outcrops, overhangs, boulders, sandstone platforms or sandstone retaining walls.</i></p> <p>Comment: The site has been previously developed however the foreshore setback area still contains some remnant areas of natural rock. The amended plans will now retain much of the existing area between the foreshore building line and the waterline which was previously the site of proposed extensive retaining walls.</p> <p><i>P4 Excavation should not occur within 1m of any property boundary. Where excavation is required within 500mm of a property boundary, Council must not grant development consent unless it is satisfied that the proposed excavation will not result in adversely impacting upon the structural integrity of adjoining properties. Note: In order to satisfy Council that the level of excavation is acceptable, it is recommended that applicants submit appropriate details from a structural engineer.</i></p> <p>Comment: The preliminary geotechnical assessment submitted with the original proposal stated that the bulk excavation will extend to within 1.5m and 2.0m of the east and west site boundaries respectively, however the bulk excavation plan provided (Drawing DA01) indicated that bulk excavation and filled areas would extend to the side boundaries in large areas of the site. The extent of level changes along the side boundaries of the site is therefore unclear and requires clarification.</p> <p><i>P5 The depth of soil around buildings must be sufficient to sustain trees as well as shrubs and smaller scale gardens.</i></p> <p>Comment: The amended proposal still occupies a significant proportion of the site (50% site cover) and there is limited physical space along the side boundaries and within the area alongside the waterway to support reasonable canopy cover. It is noted that an area behind the proposed garage approximately 4.5 x 4.5m will be retained to provide for the planting of at least one tree.</p> <p>Overall, the amended development does little to conform to, reflect the natural landform, or sufficiently step down the site in a modulated fashion like other development in the vicinity of the site. The continuous floor plates of the building still do not step down with the topography and rely on areas created by excessive excavation and fill. The large sloping roof form provides for significant internal volume to the dwelling but results in an unsatisfactory bulk and scale and adverse amenity impacts as discussed in this (and the previous) report.</p>
<p><b>1.3.2 Bushland</b></p>	<p>No</p>	<p>The subject site does not immediately adjoin land zoned E2 Environmental Conservation, but is located in 'Buffer Area A' on the bushland buffer map, which indicates the site is located within 100m of bushland.</p> <p>The amended application seeks to remove all the existing trees from within the site including significant trees of between 16 and 24 metres in height which may form part of the remnant bushland in the locality. The loss of these trees would result in a reduction in visual amenity of the site and loss of habitat and corridors for native fauna. These trees are located close to the western side boundary and could be retained in a more sensitive design. As mentioned, space for one tree has been included in the amended proposal, but no supporting information has been provided in this regard.</p>
<p><b>1.3.3 Bush Fire Prone Land</b></p>	<p>N/A</p>	<p>The subject site is not located on bushfire prone land.</p>
<p><b>1.3.4 Foreshore Frontage</b></p>	<p>No</p>	<p>Part B Section 1.3.4 in NSDCP aims to promote a scale and form of development that enhances the scenic, environmental and cultural qualities of the foreshore. The proposed removal of all trees from within the site, including within the foreshore area and provision of a significant retaining wall within the foreshore area are not considered complimentary to the location of the site within the foreshore area, contrary to Objective O1 and Provisions P2, P4, P5, P7, P8, P9 and P10 of Part B Section 1.3.4 in NSDCP.</p>

		Refer also to detailed discussion under SREP (Sydney Harbour Catchment) 2005 earlier within this report.
<b>1.3.6 Views</b>	No	Whilst the amended proposal has included a reduction in the roof height and slight reduction in the northerly projection of the building, the excess height still results in view losses to adjoining properties as discussed in detail earlier in this report. It is considered a more skilful design including a reduction in the roof line (thus upper floor ceiling height) would provide for a more satisfactory outcome. Causing any view loss by way of non-compliant building elements does not represent good design.
<b>1.3.7 Solar Access</b> <ul style="list-style-type: none"> <li>• Minimum 3 hours between 9am – 3pm winter solstice</li> </ul>	No	The applicant has submitted amended shadow diagrams which indicate that neighbouring properties will continue to receive a minimum of 3 hours between the hours of 9.00am and 3.00pm during winter solstice to satisfy Provision P1 of Part B Section 1.3.7 in NSDCP.  Notwithstanding the above, it is still considered that whilst Provision P1 may be satisfied, due to the scale, bulk and height of the building, including significant roofline above the upper floor, which extends well above the building height development standard, the proposal would result in unnecessary shadowing for the adjoining properties during the winter solstice compared with a height compliant or more closely compliant building form. The proposal is therefore contrary to the objective of the 1.3.7 (Solar Access) in NSDCP, which is to: “To ensure that all dwellings have reasonable access to sunlight and daylight.”
<b>1.3.8/9 Visual &amp; Acoustic Privacy</b>	Yes/No	As discussed earlier in this report, the proposed large elevated terrace which is partly above the NSLEP building height development standard is likely to lead to some loss of visual and acoustic privacy. Privacy screens may offer some mitigation of adverse effects which could be conditioned on any approved design.  The remainder of the new dwelling is generally acceptable with respect to visual and acoustic privacy, also subject to the provision of privacy screens along the edges of outdoor terrace areas via conditions. There is however still some concern regarding the swimming pool, which is to be situated above extensive fill and may therefore result in elevated noise affecting neighbours residential amenity (see section regarding swimming pools later in this table).
<b>1.4 Quality built form</b>		
<b>1.4.1 Context</b>	No	The amended development still does not respond adequately to the existing characteristics and constraints of the site and within the wider context. The site analysis plan submitted with the original application (drawing DA23) was not considered adequate as it lacked detail or proper assessment of the site context and constraints. One photomontage of the development has been submitted but this is a North elevation only view and proper assessment of the views from the waterway is difficult to determine from the one view.  From the plans provided, the proposed dwelling, by way of its continuous sloping roof, scale and bulk particularly to the northern end, would still form a prominent element within the waterway catchment, which does little to enhance the character of the area.
<b>1.4.2 Subdivision Pattern</b>	Yes*	*The proposal does not seek to alter the existing subdivision pattern. It is noted that the foreshore reclaimed lot, (Lot 1 DP 583587) which is zoned E4 -Environmental Living and 33.98m <sup>2</sup> in area, is not included as part of the current application.  It is noted that the NSLEP definition of ‘site area’ states that: - ‘.....the land may include the whole or part of one lot, or more than one lot if they are contiguous to each other....’ However, this is of no benefit to the current application and unable to be relied upon to improve the compliance with site coverage.
<b>1.4.3 Streetscape</b>	Yes	Conditions could be imposed to ensure the relocated retaining wall is built to Council requirements and to secure an appropriate bond for the protection of infrastructure and trees on Council land.
<b>1.4.5 Siting</b>	Yes	The proposal generally maintains the characteristic building orientation and siting of the original dwelling on the site.

<b>Setback - Front</b> <ul style="list-style-type: none"> <li>Match adjoining properties, or,</li> <li>an average of adjoining properties</li> </ul>	Yes	The front setback is commensurate with other properties in the street.
<b>Setback - Side</b> 1st storey (up to 4m) - 900mm 2nd storey (up to 7m) 1.5m 3rd storey or higher (> 7m) - 2.5m	No	The side setbacks appear generally unaltered from the original plans i.e. 1.5m on the eastern side and 1.8m on the western side.  As the building is 3 storeys and well over 7m in height, the 2.5m side setback requirement for the 3 <sup>rd</sup> floor should apply.  It is noted that some adjoining and nearby properties also do not appear to comply with these setback requirements. However, due to the height of the proposal, the upper level (3 <sup>rd</sup> storey) should have been designed to step in from the side boundaries to reduce the impacts of the proposal on adjoining properties.
<b>Setback – Rear</b> <ul style="list-style-type: none"> <li>match adjoining properties, or,</li> <li>any setbacks identified in the relevant area character statement (in this case none specified)</li> </ul>	Yes/No	There is a considerable difference between the rear setbacks of the adjoining properties, 56 Cowdroy Avenue having an unusually large rear setback and 2 Folly Point a relatively short one. The original rear setback proposed was approximately 10m and this was considered unsatisfactory in the previous assessment. Although the current proposal has marginally increased this setback, as the overall development does not comply with the site coverage requirement, the rear building setback could be increased to provide more of a buffer between the harbour and comply with the site coverage requirement.
<b>1.4.7 Form Massing Scale</b>	No	The form, massing and scale of the building is still considered unsatisfactory as evidenced through the significantly non-complaint building height, site coverage, side setbacks and and lack of stepping with the natural topography, resulting in a building which is bulky and out of character with other buildings in the locality. The application fails to achieve Objective O1 and Provisions P1 and P3 of Part B Section 1.4.7 in NSDCP.
<b>1.4.8 Built Form Character</b>	No	The amended development does not respond to the existing characteristics and constraints of the site and wider context as discussed throughout this report.
<b>1.4.9 Dwelling Entry</b>	Yes	Given the topography of the site, the dwelling is to be sited primarily below street level. A sense of address is created through the new street access alongside the new garage. It is not feasible to provide passive surveillance to the street given the slope of the site.
<b>1.4.10 Roofs</b>	No	The proposed large sloping roof form is inconsistent with existing development around the site, is inconsistent with the relevant character statement, and fails to provide a modulated built form following the natural topography of the site as discussed throughout this report.
<b>1.4.11 Dormers</b>	N/A	None proposed
<b>1.4.12 Materials</b>	Yes/No	The originally proposed large expanses of zinc and metal were found to be incompatible with the surrounding built context waterfront natural environment. The current amended proposal lists the roof colour as ‘medium’ on the ‘Assessor Construction Summary’. A condition could be imposed should the application be approved to ensure the metal roof has a colour sympathetic to the foreshore location.
<b>1.4.14 Front Fences</b>	Yes	The amended proposed garage has been reduced in width and side entry alongside the garage would occupy much of the street frontage of the site, which is not unreasonable in the context where garages adjoining the street are common. A low front fence to the remainder of the frontage could be conditioned.
<b>1.5 Quality Urban Environment</b>		
<b>1.5.3 Safety and Security</b>	Yes	It is not feasible to provide passive surveillance to the street given the slope of the site. The proposal would not unduly compromise the safety and security of the occupants and visitors to the dwelling.
<b>1.5.4 Vehicle Access and Parking</b> <ul style="list-style-type: none"> <li>Detached dwellings with 3 or more bedrooms. 2 carspaces (maximum requirement)</li> </ul>	Yes	The site contains an existing carport at the street level. Given the topography of the site there is no potential to move the parking out of the front setback area.  The initial application proposed parking for two vehicles within a new garage. This level of parking was acceptable. As discussed earlier in this report, Council’s Transport Section previously raised concern that there is no provision for vehicles turning within the site so they can leave the property in forward gear and recommended a turntable



		<p>accordingly to avoid the requirement for long reverse maneuvers.</p> <p>A turntable has now been included in the plans submitted with the current review.</p> <p>It would be necessary to relocate a retaining wall on Council's land to provide access to the new garage. As discussed earlier in this report, Council's Property, Infrastructure Engineering and Transport Section had no objection to the relocation of the retaining wall subject to conditions to ensure it is constructed to Council's requirements.</p>																				
<p><b>Site Coverage, Landscape Area and Un-Built Upon Area</b></p>	No	<p>Existing and proposed site coverage, landscaped area and unbuilt upon area are set out in the tables below.</p> <table border="1"> <thead> <tr> <th>Site Area:</th> <th>Existing</th> <th>Proposed</th> <th>Control</th> <th>Complies</th> </tr> </thead> <tbody> <tr> <td>Site coverage (556m<sup>2</sup>)</td> <td>33 % (approx.)</td> <td>54% (300m<sup>2</sup> approx)</td> <td>40% maximum</td> <td>No* (78m<sup>2</sup> excess)</td> </tr> <tr> <td>Landscape Area</td> <td>62% (approx.)</td> <td>42% 236m<sup>2</sup> Approx.</td> <td>40% minimum</td> <td>Yes</td> </tr> <tr> <td>Un-Built Upon Area</td> <td>5% (approx.)</td> <td>4% approx</td> <td>20% maximum</td> <td>Yes</td> </tr> </tbody> </table> <p>Even if the area of Lot 1 DP 583587 were to be included (additional 34m<sup>2</sup>), the proposal would not comply with site coverage (i.e. still likely to exceed by 64m<sup>2</sup>).</p> <p>The proposal is for a new dwelling (not alterations and additions) and it is important to note that any existing non-compliance does not reflect the desired future character of the area – particularly as the existing development is to be demolished. Therefore, there is no reason for the application not to comply with this control.</p> <p><b>*Non-compliant site coverage</b></p> <p>The objectives of the site coverage control are:-</p> <p>O1 To ensure that development is balanced and in keeping with the optimum capacity of the site with no over development.</p> <p>O2 To ensure that development promotes the existing or desired future character of the neighbourhood.</p> <p>O3 To control site density.</p> <p>O4 To limit the building footprint so as to ensure adequate provision is made for landscaped area and private open space.</p> <p>The compliance diagram submitted with the review application states that the site coverage is 48%, however calculations indicate the site coverage as 54%, noting that the swimming pool as well as external stairs are also considered site coverage in addition to buildings under Part B Section 1.5.5 in NSDCP. The proposed site coverage of at least 54% exceeds the maximum control by 78m<sup>2</sup></p> <p>Consequently, the proposed development is considered an overdevelopment of the site that is not in accordance with the character of the neighbourhood contrary to all the above listed objectives in NSDCP.</p>	Site Area:	Existing	Proposed	Control	Complies	Site coverage (556m <sup>2</sup> )	33 % (approx.)	54% (300m <sup>2</sup> approx)	40% maximum	No* (78m <sup>2</sup> excess)	Landscape Area	62% (approx.)	42% 236m <sup>2</sup> Approx.	40% minimum	Yes	Un-Built Upon Area	5% (approx.)	4% approx	20% maximum	Yes
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<p><b>1.5.7 Excavation</b></p>		<p>The proposed excavation necessitates the removal of all existing trees on the site and fails to retain natural landforms. The location and extent of excavation has not been clearly specified within the application, however based on the information available it appears the proposal may impact the structural integrity of adjoining properties contrary to objectives O1, O2, O3 and O4 in Part B, Section 1.5.7 in NSDCP.</p> <p>Refer also to discussion under NSLEP regarding earthworks earlier in this report.</p>																				
<p><b>1.5.8 Landscaping</b></p> <ul style="list-style-type: none"> <li>Trees should provide 50% canopy cover over landscaped areas at maturity</li> </ul>	No	<p>Whilst the minimum area requirement of soft landscaping appears to be met, there is inadequate space for structural landscaping (i.e. large shrubs and trees) to reach maturity and play an environmental role and provide a softening of the built form. The application also proposes significant altering of ground levels and removal of all trees from within the site including large trees that contribute to the visual amenity of the site. The application fails to satisfy Objectives O1, O3 and O4 or Provisions P1, P2, P3, P5, P6, P7, P9 of Part B Section 1.5.8 in NSDCP.</p>																				

		Refer also to Council's Landscape Development Officer's comments earlier within this report, where concern is raised regarding the removal of significant trees, and inadequate detail on the landscape plans. Officers also note that the proposal includes works within the dripline of trees on Council land.												
<b>1.5.9 Front Gardens</b>	Yes	The proposed landscaping alongside Cowdroy Avenue is minimal however garages in the front setback are characteristic and this part of Cowdroy Avenue is not highly used or visible except to residents.												
<b>1.5.10 Private Open Space</b> <ul style="list-style-type: none"> <li>• Detached dwellings between 500- 749m<sup>2</sup> require a minimum of 50M<sup>2</sup></li> </ul>	Yes	The proposal generally meets the requirements.												
<b>1.5.11 Swimming Pools</b>	No	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Control</th> <th style="text-align: left;">Proposed</th> <th style="text-align: left;">Compliance</th> </tr> </thead> <tbody> <tr> <td>Setback 1.2m min</td> <td>1.2m</td> <td>Yes</td> </tr> <tr> <td>Height of pool -500m max</td> <td>3m</td> <td>No</td> </tr> <tr> <td>Nearest habitable room – 6m min.</td> <td>&gt;6m</td> <td>Yes</td> </tr> </tbody> </table> <p>*The swimming pool is situated above extensive fill and would be visually imposing and also likely to result in elevated overlooking and noise affecting neighbours residential amenity.</p>	Control	Proposed	Compliance	Setback 1.2m min	1.2m	Yes	Height of pool -500m max	3m	No	Nearest habitable room – 6m min.	>6m	Yes
Control	Proposed	Compliance												
Setback 1.2m min	1.2m	Yes												
Height of pool -500m max	3m	No												
Nearest habitable room – 6m min.	>6m	Yes												
<b>1.5.13 Garbage Storage</b>	Yes	The plans do not indicate where garbage storage would be located, however there is space alongside Cowdroy Avenue in the front setback for a screened bin enclosure.												
<b>1.6 Efficient Use of Resources</b>														
<b>1.6.1 Energy Efficiency</b>	No	An amended BASIX Certificate has been submitted to demonstrate compliant energy efficiency, but this is a draft document only and therefore is not a valid certificate.												
<b>1.6.8 Stormwater Management</b>	Yes	Council's Senior Development Engineer has recommended conditions for stormwater management.												

## DCP CHARACTER STATEMENTS - Section 4: Cammeray Planning Area

### Section 4.2 Cammeray Neighbourhood

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

#### 4.2.2 Desired Future Character

##### Diversity

*P3 The density of development along foreshore areas and in areas of steep terrain must be kept to a minimum.*

##### Comment:

The amended application still exceeds the height, site coverage controls and does not meet the side setback controls of the North Sydney LEP 2013 and DCP respectively. As there is no applicable 'floorspace ratio', these controls create an envelope for a 'de facto' density control.

#### 4.2.3 Desired Built Form

*Section 4.2.3 Provision P1 - Buildings should provide adequate separation to bushland and foreshore areas.*

**Comment:**

The amended application has reduced some of the proposed stairs and retaining structures within the foreshore area, however, some still remain. The new building is to be situated on an area of fill resulting in a hard and developed appearance to the foreshore area. As the proposal has excessive height and site coverage, the building could be setback further from the foreshores to comply with these requirements and lessen the impact of the development.

*P2 Buildings should not obstruct views from neighbouring properties. This is especially important in foreshore areas or sites that enjoy water views.*

**Comment:**

As discussed throughout this report, the amended development still results in view loss for neighbours, particularly the immediate neighbour to the west of the site. Whilst view impacts are across side boundaries, this is directly attributable to the non-compliant elements of the building, such as height, bulk and setbacks, thus acceptable view sharing is not achieved. A more considered design which better complies with the planning controls is likely to reduce this impact further.

*P4 Buildings near foreshore areas should address the waterway*

**Comment:**

Whilst the building will 'address' the foreshore, the proposed building's bulk and height, projecting towards the north, are likely have an overbearing effect. The single photo montage provided only shows the view from the north and no perspective views are provided.

*P5 Buildings on sloping land should be designed to follow the slope of the land, with minimum cut and fill to be undertaken*

**Comment:**

The development does not follow the natural landform or step down the site in a modulated fashion like other development in the vicinity of the site. The continuous floor plates of the building do not adequately step down with the topography, and the large sloping roof form provides for significant internal volume to the dwelling with a floor to ceiling height of up to 5.26 metres at the upper floor level.

This results in an unsatisfactory bulk and scale and adverse amenity impacts as discussed in this report. The new building also does not utilize the existing floor levels, but instead is situated above a filled area at its northern end, further increasing its substantial bulk and scale.

*P8 Development adjoining foreshore or bushland areas use muted colours and non-reflective materials to ensure the scenic and environmental qualities are enhanced.*

**Comment:**

The external materials dominated by large expanses of metal roofing which would be more visible from the foreshores due to its design. The 'Assessor Construction Summary' lists the roof colour as 'medium' however more specific details or a condition could be required if the proposal was to be approved.

In conclusion, the amended proposed development, by way of its failure to follow the topography through a stepped built form, still results in excessive scale and bulk. The building also has an incongruous materiality and overly assertive built form, failing to provide the desired future character and built form for the Cammeray Neighbourhood within the Cammeray Planning Area.

## **NORTH SYDNEY LOCAL INFRASTRUCTURE CONTRIBUTIONS PLAN 2020**

At its meeting held on 30 November 2020, Council resolved to adopt the *North Sydney Local Infrastructure Contributions Plan 2020*, subject to a commencement date of 1 March 2021 under clause 31(4) of the *Environmental Planning and Assessment Regulation 2000 (EPA Regulation)*.

The *North Sydney Local Infrastructure Contribution Plan 2020* proposes a new 1% s.7.12 levy for all residential accommodation development and non-residential development (including alterations and additions that have not previously attracted a levy) with a cost greater than \$100,000.

Notwithstanding this, the application is not subject to the new levy in accordance with the transitional arrangements as contained in section 4.2 of the *North Sydney Local Infrastructure Contributions Plan 2020* stating that the contribution plan only applies to a DA/CDC that was submitted but not determined after the date the plan took effect (i.e. 1 March 2021).

## **SITE SUITABILITY**

As discussed throughout this report the site is not considered to be suitable for the development.

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

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

## **PUBLIC INTEREST**

The amended proposal, in its current form, is not in the public interest for the reasons provided throughout 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                                | N/A |



7.	Physical relationship to and impact upon adjoining development (Views, privacy, overshadowing, etc.	Yes
8.	Site Management Issues	Yes
9.	All relevant S 4.15 considerations of the EPA Act	Yes

### **SUBMITTERS CONCERNS**

The issues raised in the submissions have generally been addressed within this report, however a summary of concerns and planning responses to the issues raised by objectors are provided below.

#### **Objection 1 - Immediately adjoining property to the west**

This submission summarized the concerns of the owners of this adjoining property to the west as follows:-

- ***Visual aesthetics – bulk, scale, height & materials***

#### **Comment:**

Agreed, the bulk, scale and height of the amended development excessive as outlined in this report. Some of the materials as originally proposed were also inappropriate however these could be modified via conditions if need be.

- ***View loss***

#### **Comment:**

Agreed, there is a view loss to the north east from No.56 Cowdroy Avenue, although it is noted that this is part of wider panoramic water views. The north east view impact, although across a side boundary which is often harder to protect (as the Tenacity Principle suggests), is, in this case, an unnecessary impact exacerbated by the height non-compliance and excessive bulk of the proposed development.

- ***Overshadowing***

#### **Comment:**

It is noted that the minimum 3 hours solar access requirement has been met, however, unnecessary morning overshadowing would be created by a design that is still over the height limit and site coverage controls creating excessive bulk to the development.

- ***Privacy***

#### **Comment:**

Privacy in the foreshore areas can be difficult to maintain with the competing desire for extensive decks and terraces to take advantage of views and the swimming pools, all usually on steeply sloping sites.

In the current case, the excessive height means floor and window levels are higher than they would ordinarily be, which exacerbates any adverse impacts. Some mitigation of privacy impacts could be achieved by judicious screening and high sill levels on some windows and these measures could be conditioned if the proposal was to be approved.

- ***Environmental change – including impact on the prevailing north east breeze and extensive shadowing of existing gardens and pool***

**Comment:**

The ‘Environmental Change’ impact is not expanded on in the objector’s submission. However, there may be some obstruction of summer northeast sea-breeze due to the size and bulk of the building. Pool and garden overshadowing would be restricted to mornings and as mentioned, the height and bulk of the proposed building does unnecessarily increase overshadowing although minimum solar access requirements are met.

The submission also makes a number of valid points, such as:-

- *‘As the proposed development is a new construction, rather than an alteration to a pre-existing building, there is no reason for the applicant not to have a fully compliant development that meets all the criteria set down in the North Sydney Local Environmental Plan 2013 (the LEP) and the North Sydney Development Control Plan (the DCP).’*
- *‘The perfunctory argument that non-compliance is acceptable as it is a prestigious waterfront property is irrelevant as the same argument could apply to all the adjacent properties in Cowdroy Avenue and Folly Point leaving future development as a free for all,’*

**Summary:**

There is a reasonable expectation that adjoining developments should comply with development standards and policies, and whilst some impacts can be unavoidable, impacts caused by unjustified variations are unacceptable.

**Objection 2 - Immediate adjoining property to the east**

- ***Drawing inaccuracies in the plotting of 2 Folly Point, Cammeray;***

**Comment:**

The drawings prepared by RAlA registered Architects (Coso Architecture) and the 2018 Survey Plan prepared by P. S. Graham & Associates (a registered surveyor), are received by Council in good faith presuming a level of professionalism and accuracy.

It is noted more than one objector has questioned the accuracy of the plans. It is agreed the plans are not fully dimensioned and the elevations such as West Elevation Dwg No. S8.2 09 have unidentified lines possibly indicating height limits above NGL, but not adequately labelled.

- ***Sydney Water Sewer;***

**Comment:**

The RL of the sewer has not been provided and simply noted as ‘*to be determined*’. This would affect the overall height of the building and should have been provided on the plans submitted.

- ***Building Height;***

**Comment:**

Agreed, the overall height of the proposed building is excessive and unnecessary due in large part to the high ceiling of the 3<sup>rd</sup> storey.

- ***Impact to view sharing and view loss;***

**Comment:**

No. 2 Folly Point has panoramic views to the north east, north and north west and it is only the north west view which would be affected. Although these views are across a side boundary, they are land/water interface views and as the impact is caused by non-compliances (excessive height and bulk/site coverage) the impact is considered unjustifiable.

- ***Landscaping;***

**Comment:**

The Council Landscape Officer has also found the proposal unacceptable due to the removal of all trees onsite. Inadequate replanting and landscape areas remain to compensate for the tree removal proposed.

- ***Statutory Requirements.***

**Comment:**

The objectors submission claims that SEPP (Coastal Management) 2018, SREP SHC and the Sydney Harbour Foreshores and Waterways Area DCP 2005 have not been considered in the review submission. The SEPP does not apply to this property as clause 14(2) of the SEPP (Coastal Management) 2018 exempts land that is already covered by the SREP SHC.

The objector is correct in stating that the original and review submissions have not addressed the SREP SHC or the DCP. Nevertheless, an assessment of the proposal has been undertaken in this report and has found that the proposal is at odds with both the ‘Planning Principles’ and ‘Matters for Consideration’ of SREP SHC. Further, issues with the Principles and Performance criteria of the Sydney Harbour DCP have also been identified in this report.

### **Neighbouring property to the west**

- *Development remains excessive for the site, is both out of character for the foreshore and overly imposing;*

#### **Comment:**

The non-compliance with height, setbacks and site coverage identified in this report concur with the objectors claims of the development remaining excessive.

- *Proposal still exceeds the minimum height requirements;*

#### **Comment:**

Agreed, the amended proposal still exceeds the maximum height development standard and this report considers the clause 4.6 submission not justified.

- *The proposed building extends beyond the current building line to the foreshore;*

#### **Comment:**

Whilst parts of the development, namely the pool and some steps encroach on the Foreshore Building Line (FBL), these are allowable encroachments. The bulk of the building does however project northward towards the water and although it does not encroach on the FBL, it does create other issues such as visual bulk, view impacts etc on the foreshores.

- *The building is not stepped down the hill;*

#### **Comment:**

Agreed, the building does not step down the site in a sympathetic fashion in relation to the topography. This is reflected in the 3 storey, bulky appearance of the development.

- *The roofline is excessively imposing.*

#### **Comment:**

The amended plans have reduced the impact of the roof in comparison to the original plans, however, a significant, and unjustified height variation remains.

- *The extension of the building line to the north, impacting our foreshore line of sight, seems unwarranted and excessive and further reduction in the scale is needed.*

#### **Comment:**

Agreed, the proposal not only has excessive site coverage, height and non-compliant setbacks, the bulk is located closer to the foreshores than other properties, with consequent impacts.

### **Nearby Property to the west**

- ***Height ‘significantly exceeds the maximum building height’ and bulk;***

#### **Comment:**

Agreed, the proposed height is excessive and unjustified. The height variation in addition to excess site coverage and inadequate 3<sup>rd</sup> floor setbacks also creates excessive bulk.

- ***Plans not clearly labelled, concern they do not correctly represent the situation;***

#### **Comment:**

It is agreed the plans are not clearly labelled.

- ***‘Coverage’, excessive close to waterfront , 48% compared with allowable 40%;***

#### **Comment:**

Agreed, as previously discussed in this report.

- ***‘Positioning’, side setbacks do not conform with Council’s rules;***

#### **Comment:**

Whilst the first two floors generally comply with the side setback requirements, the third floor does not and should be setback 2.5m, which is not the case in this current proposal.

- ***Approval of variations to building requirements would have ‘flow on effects’;***

#### **Comment:**

The approval of a variation to the height development standard, especially if it is unjustified, erodes the validity of the development standard and makes it difficult to enforce in the future.

- ***Owners of No.50 Cowdroy Ave had to modify their previous DA to preserve cross views, current proposal should also preserve views.***

#### **Comment:**

Agreed, Council needs to apply its development requirements in a consistent and fair manner with each development application assessed.

## **CONCLUSION AND REASONS FOR RECOMMENDATION**

### **North Sydney Local Planning Panel’s recommendations for the amended proposal**

When the NSLPP refused the original proposal, it made the following comments in the minutes of the meeting and recommended that in addition to addressing the reasons for refusal, any amended plans should address its suggested amendments:-

*'The Panel is aware of the constraints and context of the site and recognises that maintaining complete views across boundaries is an unrealistic expectation, at the same time consideration is to be given to the concept of view sharing.*

*The Panel considers that in the event of amended plans being submitted, the reasons for refusal below should be addressed, together with any other appropriate amendments to mitigate the impacts of the development:*

- *The height and overall massing of the building should be reduced to mitigate impacts from the public domain and have regard to view sharing.*
- *The site coverage should be reduced to allow space for landscaping and canopy trees and where possible to retain trees. As such the parking platform and any associated structure prevents this objective being achieved.*
- *The design should be amended to provide a more modulated form which steps down with the topography having regard to existing ground levels.'*

Considering the three points above:-

#### Reduction in Height and Massing

Whilst the roofline has been lowered slightly, the proposal still exceeds the maximum development standard by 3.6m due in large part to the desire for a third storey and a 5m ceiling height for that storey. As no floorspace ratio is applicable to the site, the density of development is controlled by height, site coverage and setbacks, which create a building envelope.

The amended proposal exceeds all three of these controls resulting in a building of bulky appearance. It is noted that the foreshore setback has been slightly increased, but this and the minor reduction in height have not gone far enough to address these concerns.

#### Site Coverage reduced to permit canopy trees or tree retention where possible.

The site coverage has also been slightly reduced, however still results in a site coverage of 54% and this results in at least 78m<sup>2</sup> less available site area for landscaping.

No trees are to be retained in the current proposal and Council's Landscape Officer is unconvinced the single canopy replacement tree proposed will address the issue. In relation to the parking platform, it is appreciated that there is no other option to provide parking, the small courtyard proposed behind the garage will do little to compensate for the loss of all the canopy trees onsite.

#### Design amendments for a more modulated form which steps down with the topography

The only amendment which might be construed as modulating the design is the reduction in roof height/angle directly behind the garage/lift, which creates a step in this location when viewed from the side elevations. In this regard the amended design has made some effort to adopt the Planning Panel's recommendations.

The Planning Panel also recommended that: -

*Any amended plans shall be accompanied with a new Clause 4.6 that correctly identifies the extent of the height breach (refer to NSLEP definitions for building height and existing ground level); and is supported by a View Impact Assessment from neighbouring properties (by way of comment neighbours should allow access to facilitate such an analysis).*

Firstly, whilst the plans appears to have identified the height breach, the elevations, in particular, include lines above NGL/AGL which are unannotated and confusing. Secondly, the 'View Impact Assessment' consists of a single Plan (Dwg No. 8.2 22 (DA 25)) containing a photomontage from one property, of one view direction, and, from one location on that property. This represents an unsatisfactory response to the Panel's request.

### **Current Modified Plans and Clause 4.6 Submission.**

The modified proposal was considered under the relevant environmental planning instruments and policies including NSLEP and NSDCP and found to be still unsatisfactory.

The amended clause 4.6 submission seeking a variation to the building height control is not considered to be well founded as it has failed to demonstrate that compliance is unreasonable or unnecessary. Moreover, there are no unique circumstances of the case to warrant non-compliance with the development standard. Further, it is considered that there are insufficient environmental planning grounds to support the variation to the building height control.

As no FSR (a common development standard in land use zones) applies to the land, the 'Height of Buildings' development standard, assumes greater importance in controlling development.

The applicable relevant maximum height of 8.5m would generally suggest the height of a 2-storey dwelling house with a pitched roof, although 3 storeys could be achieved with either some excavation and/or a flat or low-pitched roof design. Obviously if a 3-storey dwelling is desired, ceiling heights within the dwelling must be conservative.

This height control, in addition to North Sydney DCP requirements such as site coverage and setbacks, creates a building envelope to guide residential development.

The current amended proposal exceeds the height development standard in addition to excessive site coverage, and, non-compliant side setbacks, especially for the proposed 3<sup>rd</sup> storey, resulting in a development of excessive bulk, scale and mass that is not compatible with the predominant character of the area.

Furthermore, the breaches to the building height control are not considered to be in the public interest as the proposal is not consistent with the objectives of the building height control or the E4 - Environmental Living zone.

The amended development, although with the lowered roof form, would result in unnecessary view loss and loss of outlook for neighbours around the site which is directly attributable to the non-compliant height, scale and bulk.



The extensive excavation and filled areas across the site and significant building footprint results in the need to remove all trees from the site including three large trees which contribute positively to the visual amenity of the site and surrounds. The amended development provides inadequate landscaped area to support adequate canopy trees to replace the existing, and, other soft landscaping.

The proposal, which is essentially a 'new build', should be able to comply with all development standards and DCP requirements, except, where departures are justifiable. In this regard, it is appreciated that the site has challenging topography and minor projections into the 8.5m height limit could be entertained. However, the current proposal does not appear to have taken the LEP and DCP requirements into serious consideration.

Following this assessment, and having regard to the provisions of Section 4.15 of the EPA Act, the application for a review of the determination under section 8.2 is recommended for refusal due to the following reasons:

1. The written request pursuant to clause 4.6 in NSLEP is not supported;
2. The proposed development is not appropriate to its context and is incompatible with the built form and landscape character of the Cammeray foreshore area;
3. The proposed development will unnecessarily adversely impact existing views and result in an unreasonable level of view sharing for surrounding properties;
4. The excessive excavation and filled areas across the site would adversely impact neighbour amenity and existing vegetation and natural features of the site;
5. Unnecessary overshadowing of neighboring properties caused by a non-compliant building form;
6. Insufficient and inadequate plans and supporting details;
7. The development is not in the public interest given the above likely impacts.

#### **HOW WERE THE COMMUNITY VIEWS TAKEN INTO CONSIDERATION?**

The application for the s.8.2 Review was notified to adjoining properties and the Bay Precinct for 14 days and four (4) submissions were received from adjoining/nearby properties.

A number of issues were raised including inadequate clause 4.6 justification, view loss, excessive scale, bulk and building height, incongruous design, overshadowing and loss of light, loss of visual privacy and deficiencies in the SEE and plans.

The issues raised in the submissions have been considered in the assessment of the application and where appropriate are reflected in the recommended reasons for refusal.

#### **RECOMMENDATION**

PURSUANT TO SECTION 4.16 OF ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

**THAT** the North Sydney Local Planning Panel, exercising the functions of Council as the consent authority, resolve to reaffirm the **refusal** of Development Application No. 56/20 for the demolition of an existing detached dwelling, excavation, tree removal and construction of a new detached dwelling, on land at No. 58 Cowdroy Avenue, Cammeray for the following reasons:-

**1. The written request pursuant to clause 4.6 of NSLEP is not supported;**

The written request pursuant to clause 4.6 of NSLEP seeking a variation to the height of building development standard in clause 4.3 of NSLEP is not considered to be well founded.

**Particulars:**

- a) The proposed development significantly breaches the 8.5m maximum height of building development standard specified in clause 4.3(2) in NSLEP for a substantial part of the proposed building.
- b) The written request submitted with the application seeking a variation to the maximum height of building development standard has inadequately addressed the matters required to be addressed in subclause (3) in clause 4.6 in NSLEP.

The written request has failed to adequately demonstrate that compliance is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the height of building development standard.

- c) The proposed development is not considered to be in the public interest as the development is not consistent with the objectives of the height of building standard in clause 4.3(1) in NSLEP and the objectives of the E4 -Environmental Living zone (dot points 1, 2 and 3) under NSLEP.

**2. The proposed development is not appropriate to its context and is incompatible with the built form and landscape character of the Cammeray foreshore area;**

The amended development is not appropriate to its context or compatible with the existing and future character of the Cammeray foreshore by virtue of its excessive height, bulk and scale, its excessive building footprint and inadequate area for deep soil tree planting, its incongruous built form and its failure to respond to the natural topography of the site.

**Particulars:**

- a) The proposed development has a large sloping roof form, high side walls and internal 3<sup>rd</sup> floor ceiling height of up to 5.26 metres with a substantial portion of the building still exceeding the 'height of buildings' development standard. Surrounding dwellings provide a significantly reduced volume and overall proportions.

The proposed development is therefore not compatible with the predominant scale of the area, contrary to Aims of NSLEP, specifically clause 1.2(2)(a) and 1.2(2)(b)(i) and (iii), clauses 4.3(1)(e) and (f) in NSLEP (Height of Buildings - Objectives), the Objectives of the E4 Environmental Living zone, Objective O5 in Part B section 1.1.1 in NSDCP (General Objectives), and Objective O1 and Provisions P1 and P3 in Part B Section 1.4.7 in NSDCP.

- b) The proposed development as amended still does not adequately follow the natural topography of the site through a stepping of the built form contrary to Aims of NSLEP 2013, specifically clause 1.2 (2)(e)(i), clause 4.3(1)(a) in NSLEP (Height of Buildings - Objectives), Objective O8 in Part B section 1.1.1 (General Objectives), ) the Objectives of the E4 Environmental Living zone, Objective O1 and Provisions P1, P3, P4 and P5 in Part B Section 1.3.1 (Topography), and Provision P5 in Part C Section 4.2.3 (Cammeray Neighbourhood) in NSDCP.
  - c) The proposed development as amended has a site coverage of at least 50% (including the foreshore lot) which is substantially non-compliant with the maximum site coverage of 40% specified in P1 in Part B, section 1.5.5 in NSDCP. The proposed development fails to satisfy Objectives O1, O2, O3 and O4 in Part B section 1.5.5 in NSDCP.
  - d) The proposed development whilst having a landscaped area of 40% which barely complies with the minimum landscaped area specified, does not have adequate areas for deep soil planting and fails to satisfy Objectives O1(a), (c) and (f) and provisions P1, P3 and P8 in Part B, Section 1.5.6 in NSDCP, and Objectives O1, O2 and O3 and Provisions P2, P3, P6, P7, P9 of Part B Section 1.5.7 in NSDCP.
  - e) The proposed rear setback is still well forward of the western neighbours, combined with the height, building bulk and inadequate stepping to the built form at the rear of the building, fails to satisfy Objectives O2 and O4 of Part B Section 1.4.6 in NSDCP.
  - f) The proposed height, bulk and scale of the building and the extensive works and removal of vegetation within the foreshore area, incompatible with the waterfront natural environment. The development is therefore contrary to Aims of NSLEP 2013, specifically clause 1.2(2)(a) and 1.2(2)(b)(i) and (iii), clauses 4.3(1)(e) and (f) in NSLEP (Height of Buildings - Objectives), clause 6.9 (1), (3)(a), (b), and (g), the Objectives of the E4 Environmental Living zone specifically dot point 1), Objectives O4 and O5 in Part B Section 1.1.1 in NSDCP, Objective O1 and Provisions P2, P4, P5, P7, P8, P9 and P10 in Part B Section 1.3.4 in NSDCP, Objective O1 and Provision P2 in Part B section 1.4.12 in NSDCP, Provision P8 in Part B section 1.3.4 in NSDCP, and Objective O1 and Provision P3 in Part B section 1.4.7 in NSDCP.
  - g) The proposed side setbacks, which provide no stepping at the 3<sup>rd</sup> floor level, fails to satisfy objectives O2, O3 and O4 of Part B Section 1.4.6 in NSDCP.
  - h) The proposed development is not considered to maintain, protect and enhance the visual qualities of Sydney Harbour by virtue of the excessive height, bulk and scale of the building along with the extensive works and removal of vegetation within the foreshore area contrary to the planning principles in clauses 13(f) and 14(d) and clause 25 of SREP (Sydney Harbour Catchment) 2005.
- 3. The proposed development will unnecessarily adversely impact existing views and result in an unreasonable level of view sharing for surrounding properties;**

The proposed development, by way of its height, scale and siting, will result in unreasonable view loss for several properties around the site and particularly the neighbour to the immediate west.

**Particulars:**

- a) The proposed development unnecessarily impacts existing views for properties around the site. The impact on existing views is generally caused by elements of the proposed development that fail to comply with Council's maximum building envelope controls.
  - b) Having regard to the view sharing principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 the majority of the views that are to be impacted are significant including water views with land and water interface. These views, whilst across side boundaries, are from primary living spaces and for the western neighbour the view impacts would be considered moderate from all primary living areas.
  - c) Occupants of the new dwelling will obtain unobstructed views at the expense of the neighbouring properties. If the building complied with height and site coverage requirements the view impacts would be significantly reduced.
  - d) The proposed development is contrary to clause 1.2(2)(c)(i) Aims of Plan in NSLEP 2013, the Objectives of the E4 Environmental Living zone and Objective O2 and P4 in Part B, section 1.3.6 in NSDCP.
- 4. The amended design still proposes excessive excavation and filled areas across the site would adversely impact neighbour amenity and existing vegetation and natural features of the site;**

The proposed development involves extensive excavation or fill across the majority of the site and construction of a new dwelling with significantly non-complaint site coverage, which results in the removal of all trees from the site including significant trees and natural features of the site.

**Particulars:**

- a) The amended application proposes the removal of all trees from within the site including several significant trees which would be likely to reduce the visual amenity and ecological performance of the site within its waterfront location within close proximity to bushland.

The tree removal has not been adequately justified in the submitted arborists reports. The development is therefore contrary to clause 1.2(2)(e)(i) Aims of Plan in NSLEP, Objectives O1, O2, O3 and O4 in Part B, section 1.5.7 in NSDCP, Objectives O1, O3 and O4 and provisions P1, P2, P3, P5, P6, P7, and P9 in Part B, section 1.5.8 in NSDCP, Objective O1 of Part B section 16.2.1 in NSDCP and Provisions P2, P3, P4 in Objective O1 of Part B section 16.2.2 in NSDCP.

- b) The application has failed to provide clarity as to the extent of excavation and any required retaining walls near site boundaries, and limited details are provided in respect of measures that may be necessary to support the excavation, including whether support extending into neighbouring land will be required.

The proposed excavation is contrary to the Objectives of clause 6.10 in NSLEP and Provisions P4 and P5 in Part B, section 1.3.1 in NSDCP.

**5. Unnecessary overshadowing of neighbouring properties caused by a non-compliant building form;**

The proposed development would result in unnecessary shadowing for neighbours.

**Particulars:**

- a) The amended development, although complying with the minimum 3 hours of solar access to neighbours requirement, still results in unnecessary shadowing to adjoining neighbours by way of the proposals excessive scale, bulk and height and is contrary to the Aims of NSLEP 2013, specifically (2)(c)(i); (Residential amenity); the Objectives of the E4 Environmental Living zone, specifically dot point 3, Objective O4 in Part B, section 1.1.1 in NSDCP, and Objectives O2 and O4 and Provision P4 in Part B, section 1.4.6 in NSDCP.

**6. Insufficient and inadequate plans and supporting information;**

The plans submitted with the review application are lacking in detail and supporting information inadequate.

**Particulars:**

- a) The architectural plans are insufficiently dimensioned, with features on the plans such as setbacks and the 8.5m height lines on elevational plans are either not dimensioned, unlabelled and/or confusing. Further, the RL of the Sewer Main has not been provided on the sectional plans;
- b) Detailed landscaping plans have not been submitted;
- c) The photomontage is inadequate as only one view has been submitted and no perspectives have been provided from the waterway.
- d) The view analysis is inadequate as it shows one view, from one location on one property, with no other supporting information.
- e) The BASIX certificate is a draft only and therefore is invalid.

**7. The amended development is not in the public interest given the above likely impacts.**

**Particulars:**

- a) The above matters were raised in the four (4) submissions from nearby residents. The proposal is, therefore, not considered to be in the public interest or suitable for the site and is contrary to section 4.15 of the EPA Act.

**John McFadden**  
**CONSULTANT TOWN PLANNER**

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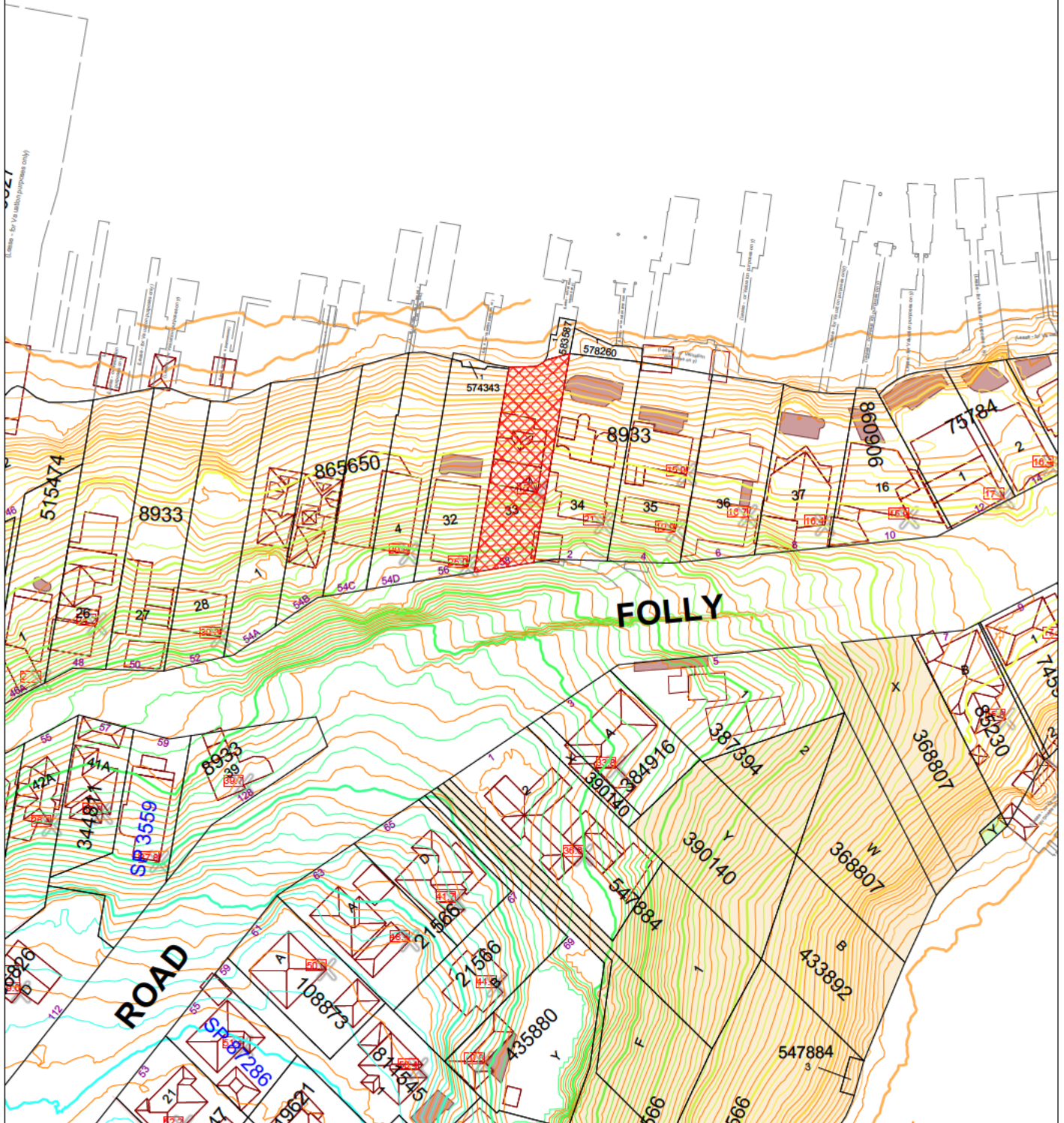
Note by Manager Development Services

This report has been reviewed for content and quality assurance purposes only. It remains an independent report and the recommendation made is the professional view of the consultant planner and are not influenced by Council staff.

**STEPHEN BEATTIE**  
**MANAGER DEVELOPMENT SERVICES**

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# Long



## North Sydney Council

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## DEVELOPMENT APPLICATION SECTION 8.2 SUBMISSION

58 COWDROY AVE, CAMMERAY 2062

NOVEMBER 2020

REV. C

### ARCHITECTURAL DRAWINGS FOR SECTION 8.2 SUBMISSION

### DATE

S8.2 01	Proposed Site Plan	1:200	NOV 2020
S8.2 02	Proposed Entry Level	1:200	NOV 2020
S8.2 03	Proposed Upper Floor Plan	1:200	NOV 2020
S8.2 04	Proposed Mid Floor Plan	1:200	NOV 2020
S8.2 05	Proposed Lower Floor Plan	1:200	NOV 2020
S8.2 06	Proposed Section AA	1:200	NOV 2020
S8.2 07	Proposed Section BB & CC	1:200	NOV 2020
S8.2 08	Proposed Section DD	1:200	NOV 2020
S8.2 09	Proposed Western Elevation	1:200	NOV 2020
S8.2 10	Proposed North & South Elevation	1:200	NOV 2020
S8.2 11	Proposed Eastern Elevation	1:200	NOV 2020
S8.2 12	9AM Winter Solstice Shadow Diagram	1:200	NOV 2020
S8.2 13	12PM Winter Solstice Shadow Diagram	1:200	NOV 2020
S8.2 14	3PM Winter Solstice Shadow Diagram	1:200	NOV 2020
S8.2 15	Winter Solstice Elevation Shadow	1:200	NOV 2020
S8.2 16	9AM Equinox Shadow Diagram	1:200	NOV 2020
S8.2 17	12PM Equinox Shadow Diagram	1:200	NOV 2020
S8.2 18	3PM Equinox Shadow Diagram	1:200	NOV 2020
S8.2 19	Equinox Elevation Shadow	1:200	NOV 2020
S8.2 20	Site Coverage Calculation	1:200	NOV 2020
S8.2 21	Height Blanket Diagram		NOV 2020
S8.2 22	View Loss Diagram		NOV 2020
S8.2 23	Photo Montage		NOV 2020

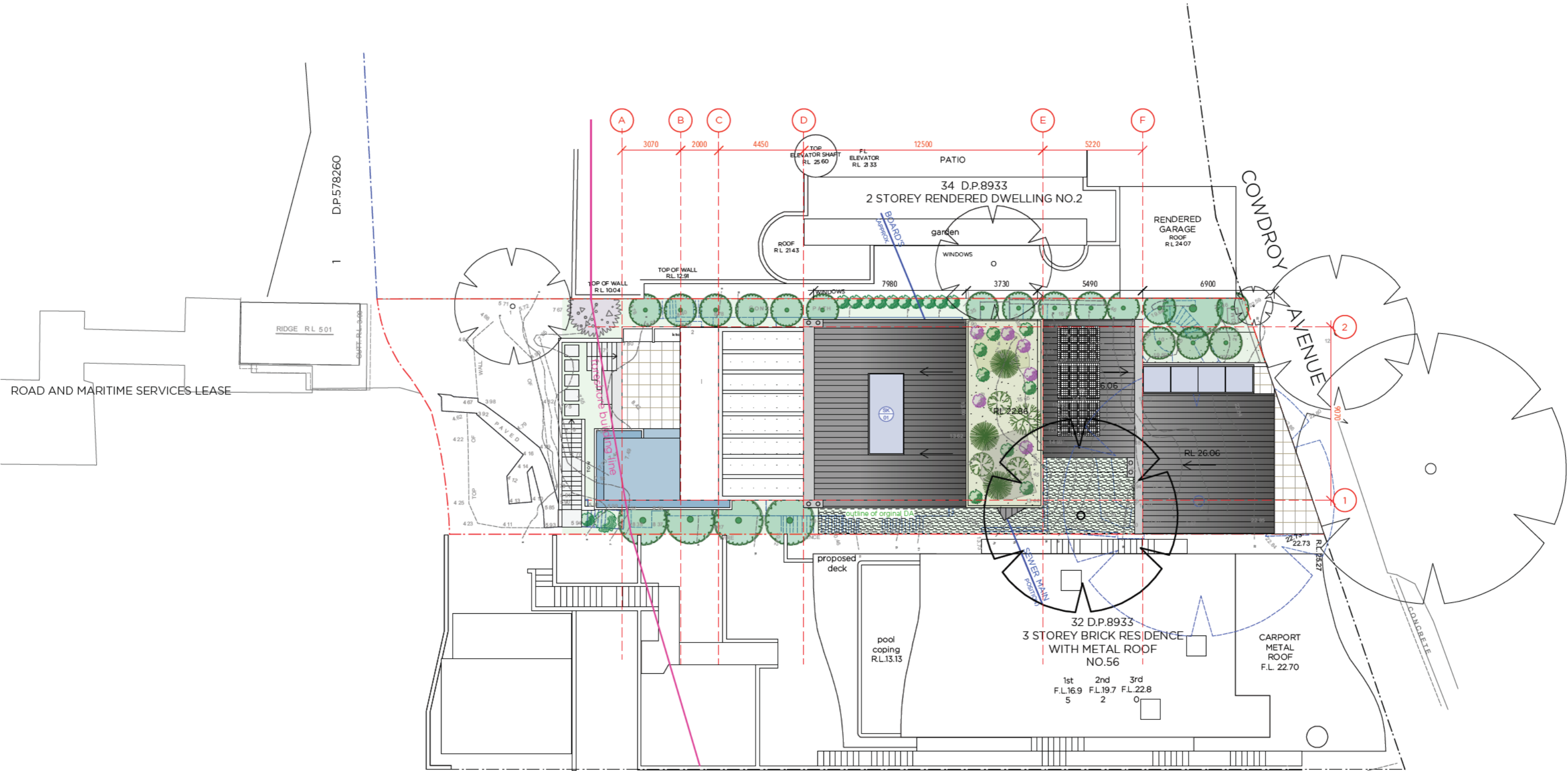
### TO BE READ IN CONJUNCTION WITH

### ORIGINAL DEVELOPMENT APPLICATION SUBMITTED JAN 2020

MD01	Existing Site Plan	1:200
MD02	Existing North Elevation	1:200
MD03	Existing South Elevation	1:200
MD04	Existing East Elevation	1:200
MD05	Existing West Elevation	1:200
MD06	Existing section AA	1:200
DA 00	Proposed Demolition Plan	1:200
DA 00a	Bulk Excavation Diagram	1:200
DA 01	Proposed Site Plan	1:200
DA 02	Proposed Entry Level	1:200
DA 03	Proposed Upper Floor Plan	1:200
DA 04	Proposed Mid Floor Plan	1:200
DA 05	Proposed Lower Floor Plan	1:200
DA 06	Proposed Section AA	1:200
DA 07	Proposed Section BB & CC	1:200
DA 08	Proposed Section DD	1:200
DA 09	Proposed Western Elevation	1:200
DA 10	Proposed North & South Elevation	1:200
DA 11	Proposed Eastern Elevation	1:200
DA 12	9AM Winter Solstice Shadow Diagram	1:200
DA 13	12PM Winter Solstice Shadow Diagram	1:200
DA 14	3PM Winter Solstice Shadow Diagram	1:200
DA 15	Winter Solstice Elevation Shadow	
DA 16	9AM Equinox Shadow Diagram	1:200
DA 17	12PM Equinox Shadow Diagram	1:200
DA 18	3PM Equinox Shadow Diagram	1:200
DA 19	Equinox Elevation Shadow	
DA 20	Schedule of Materials and Finishes	N/A
DA 21	Site Analysis Plan	1:200
DA 22	Waste Management Plan	1:200
DA 23	Site Coverage Calculation	1:200
DA 24	Concept Hydraulic Plan	1:200
DA 25	Neighbouring View Analysis	1:200

### AMENDMENTS FROM ORIGINAL DA

- RL'S MODIFIED
- GRID LINES MODIFIED
- BUILDING BULK ALTERED
- POOL MODIFIED
- ROOF RECONFIGURED
- GARAGE AND ENTRY MODIFIED
- STAIR MOVED TO ALLOW FOR COURTYARD FOR TREE
- INTERIOR MODIFICATIONS TO ALLOW FOR STAIR



LEGEND.

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.

**SITE PLAN**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

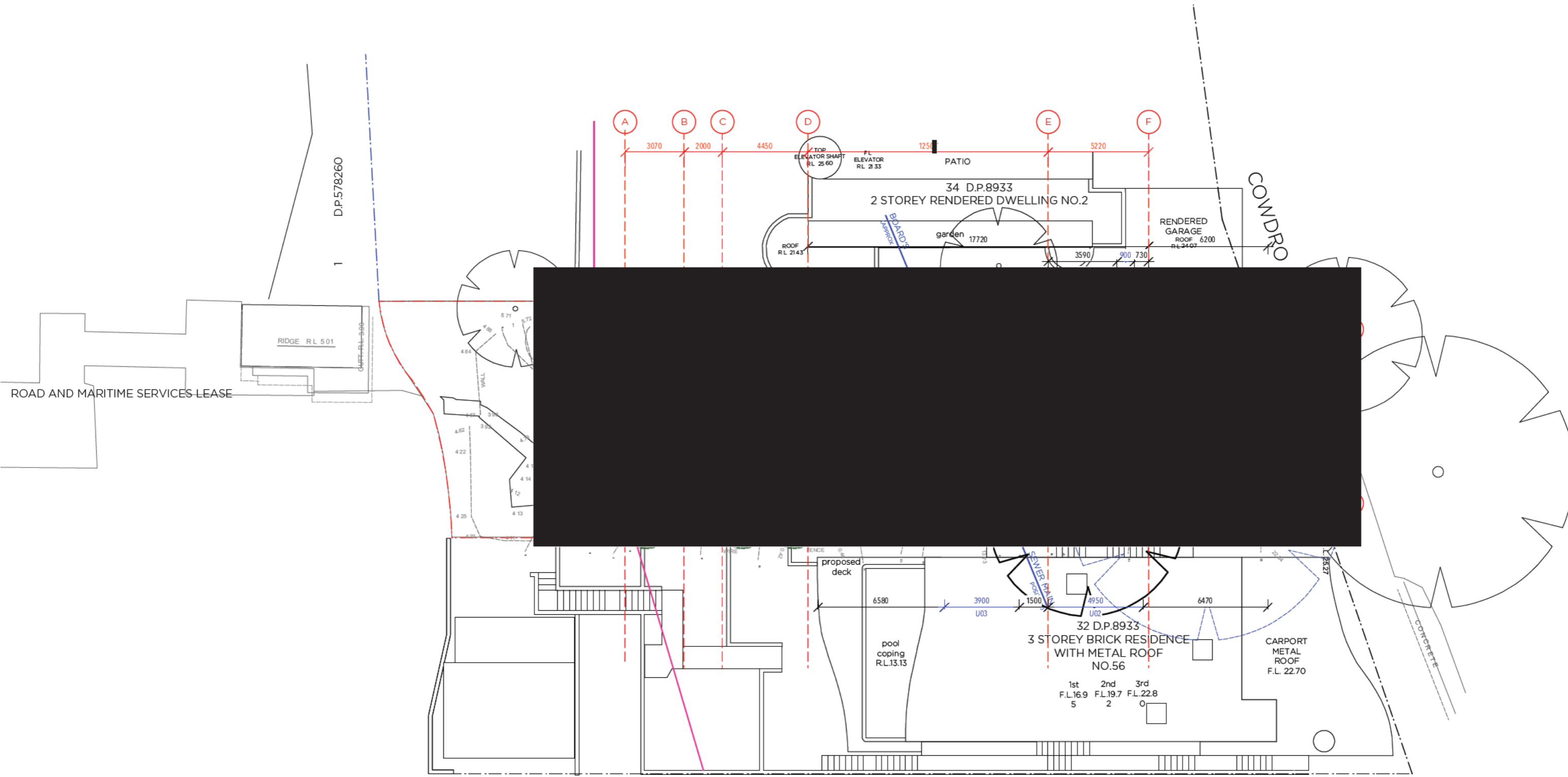


DRAWING NO.

**S8.2 01**

REVISION.





LEGEND

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**UPPER FLOOR PLAN**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

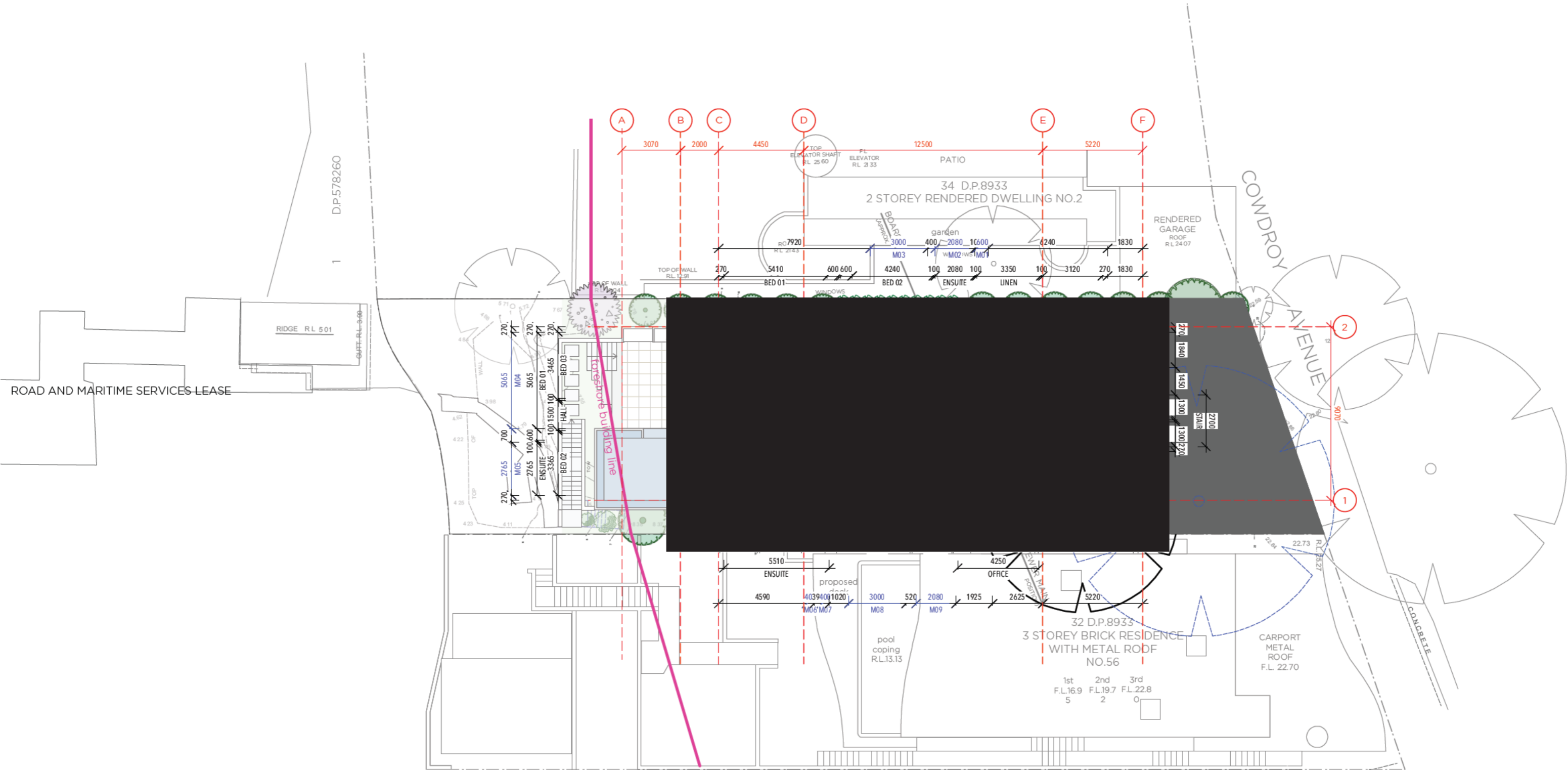


DRAWING NO.

**S8.2 03**

REVISION.





LEGEND.

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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.  
**MID FLOOR PLAN**

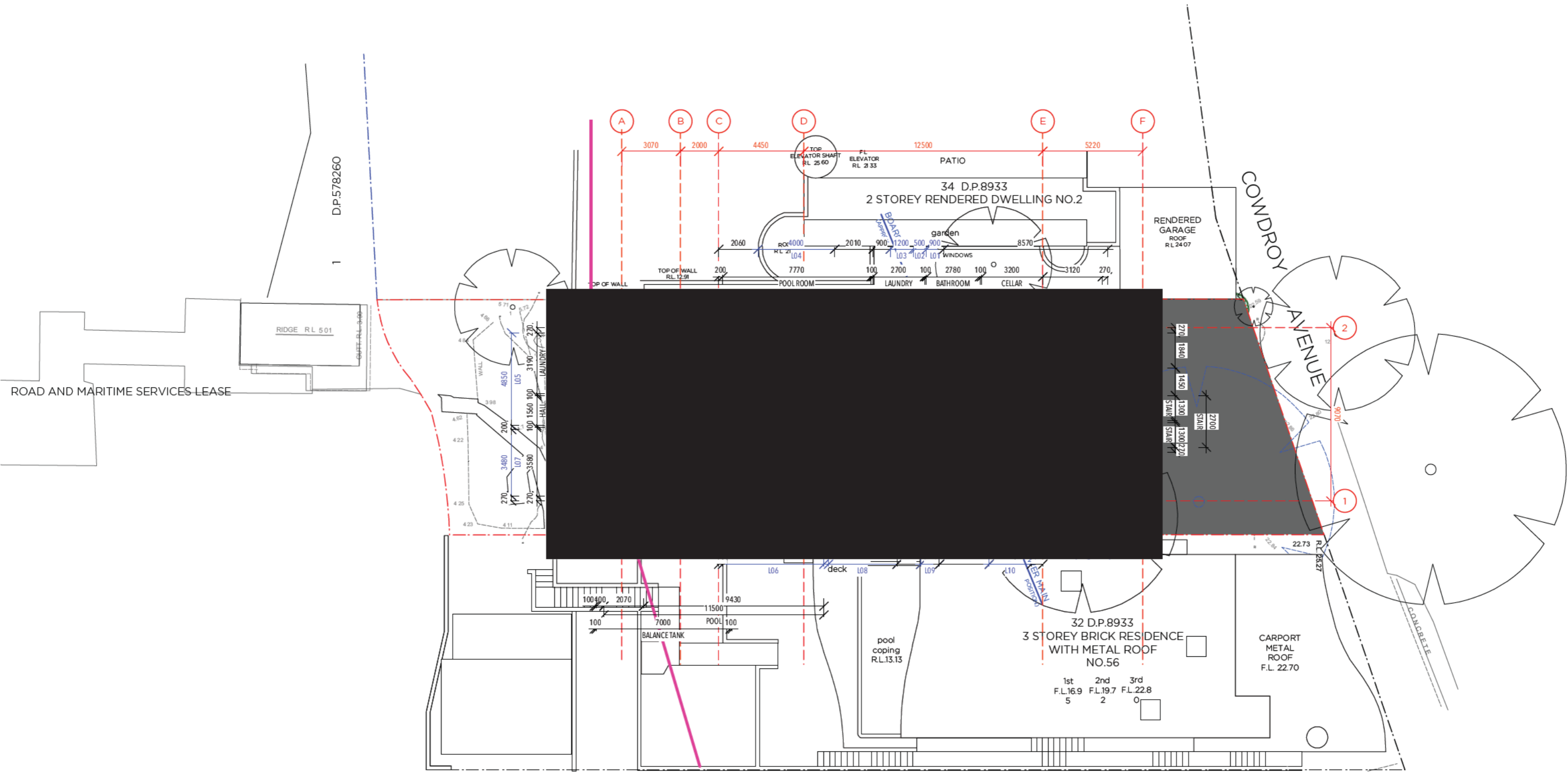
DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.

**S8.2 04**

REVISION.



LEGEND.

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
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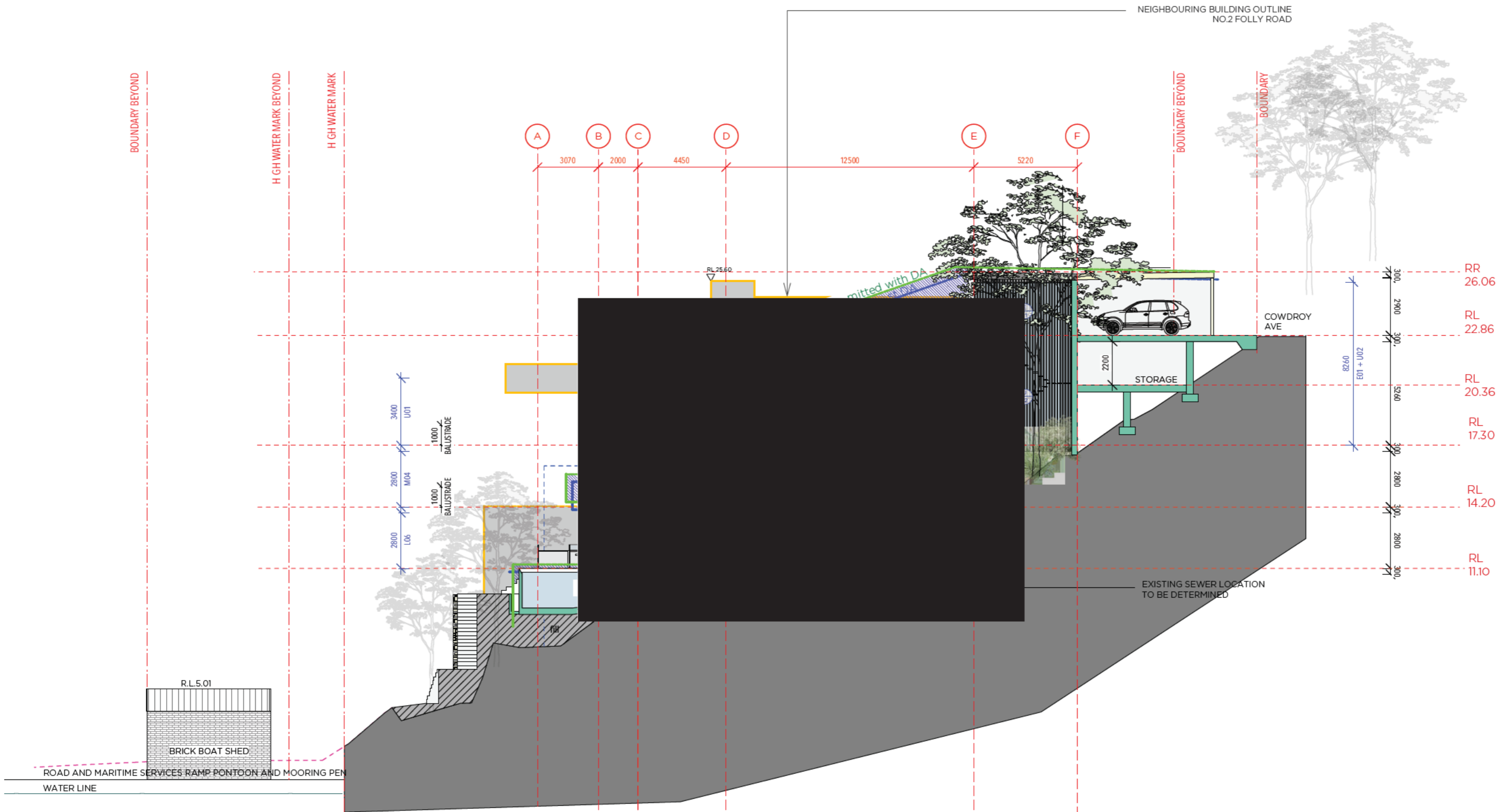
DRAWING NAME.  
**LOWER FLOOR PLAN**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 05**

REVISION.



LEGEND.

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.  
**SECTION AA**

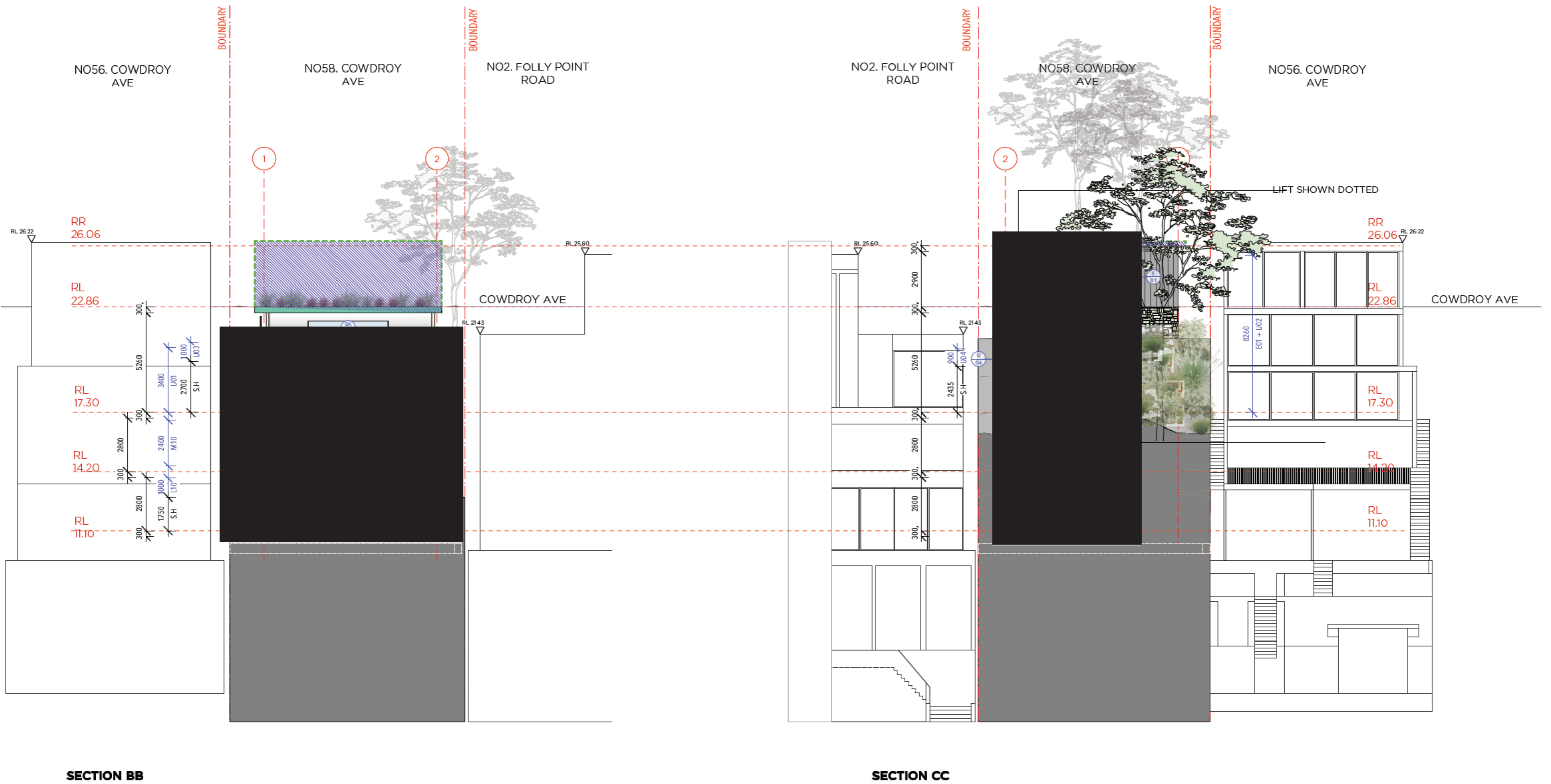
DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

DRAWING NO.

**S8.2 06**

REVISION.





LEGEND.

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**DEVELOPMENT APPLICATION**  
**SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



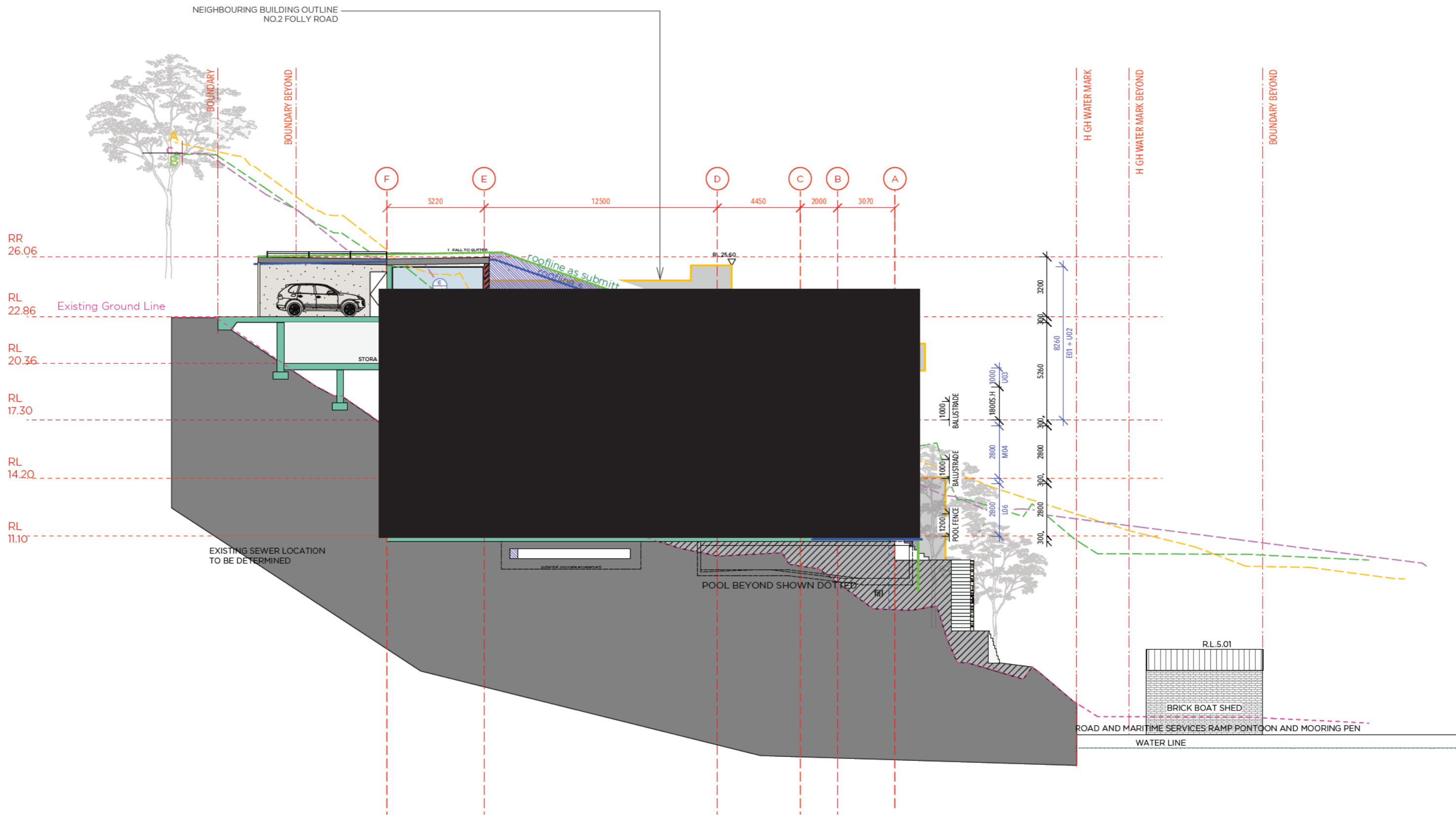
DRAWING NAME.  
**SECTION BB + CC**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

DRAWING NO.

**S8.2 07**

REVISION.



LEGEND.

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.

**SECTION DD**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

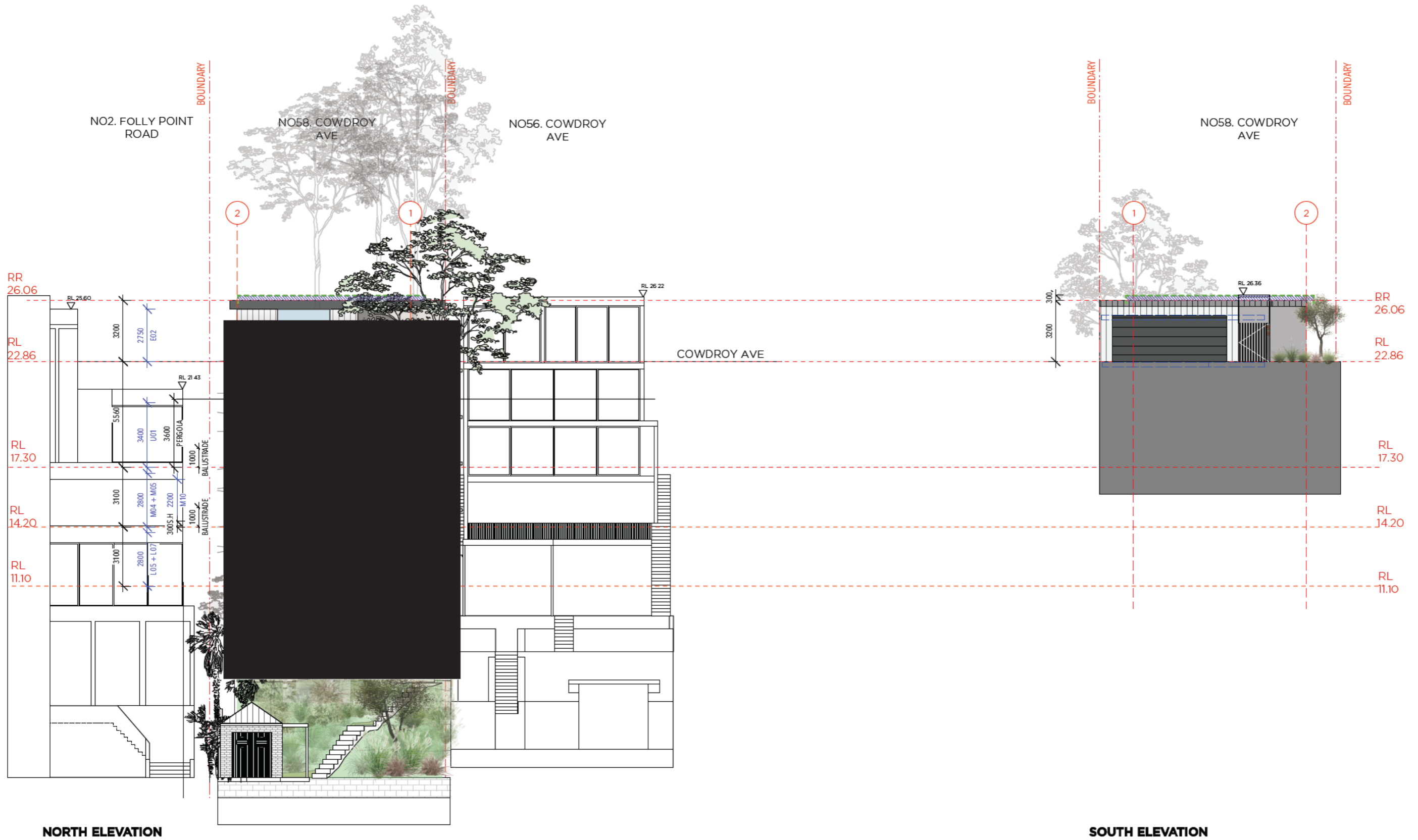
DRAWING NO.

**S8.2 08**

REVISION.







LEGEND.

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**COSO**  
ARCHITECTURE

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**DEVELOPMENT APPLICATION**  
**SECTION 8.2 SUBMISSION**  
58 COWDROY AVENUE CAMMERAY 2062  
PREPARED FOR RENATA + PAUL



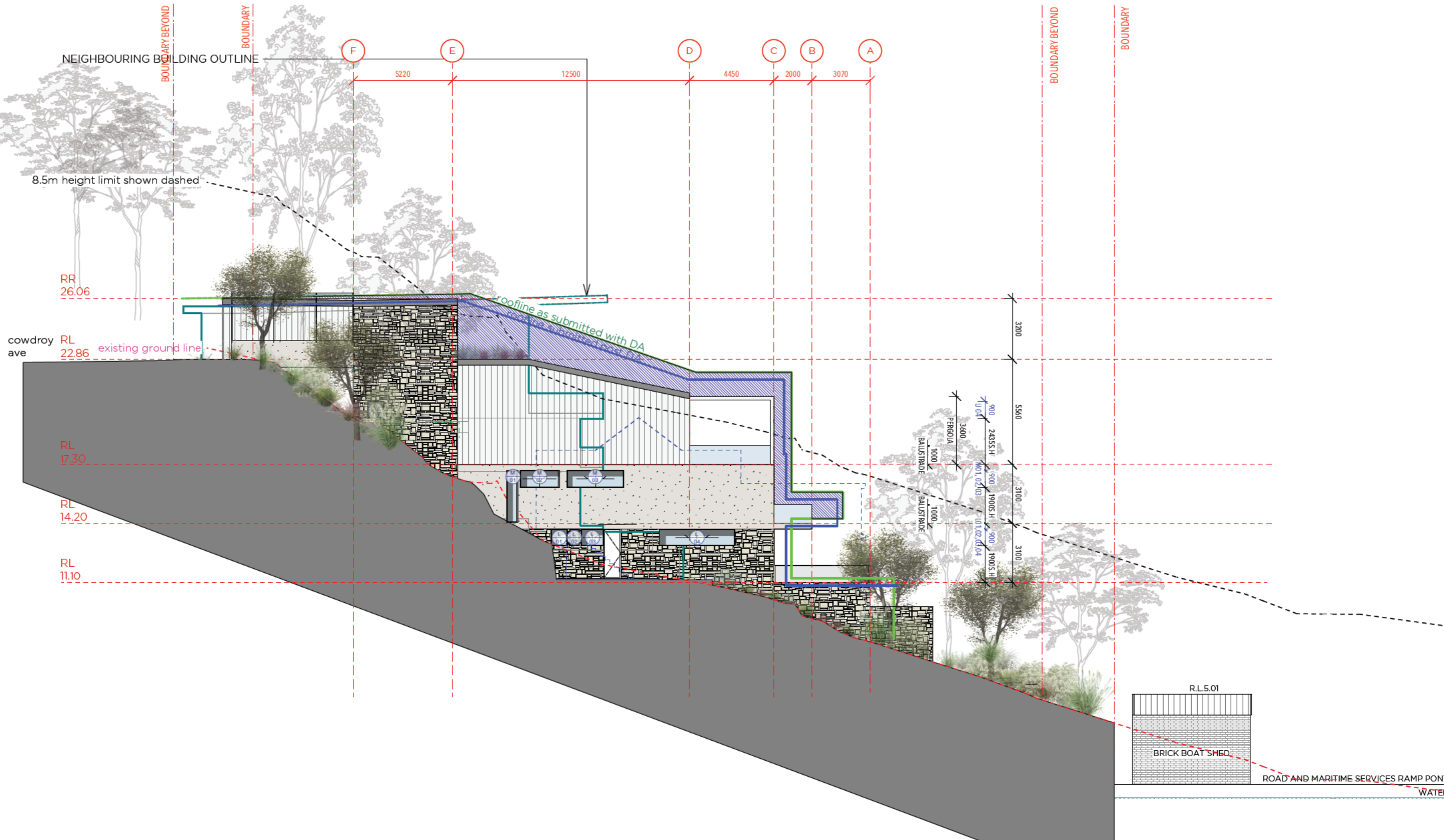
DRAWING NAME.  
**NORTH ELEVATION AND SOUTH ELEVATION**

DATE: NOVEMBER 2020  
SCALE: 1:200 AT A3/ 1:100 AT A2

DRAWING NO.

**S8.2 10**

REVISION.



LEGEND.

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.  
**EAST ELEVATION**

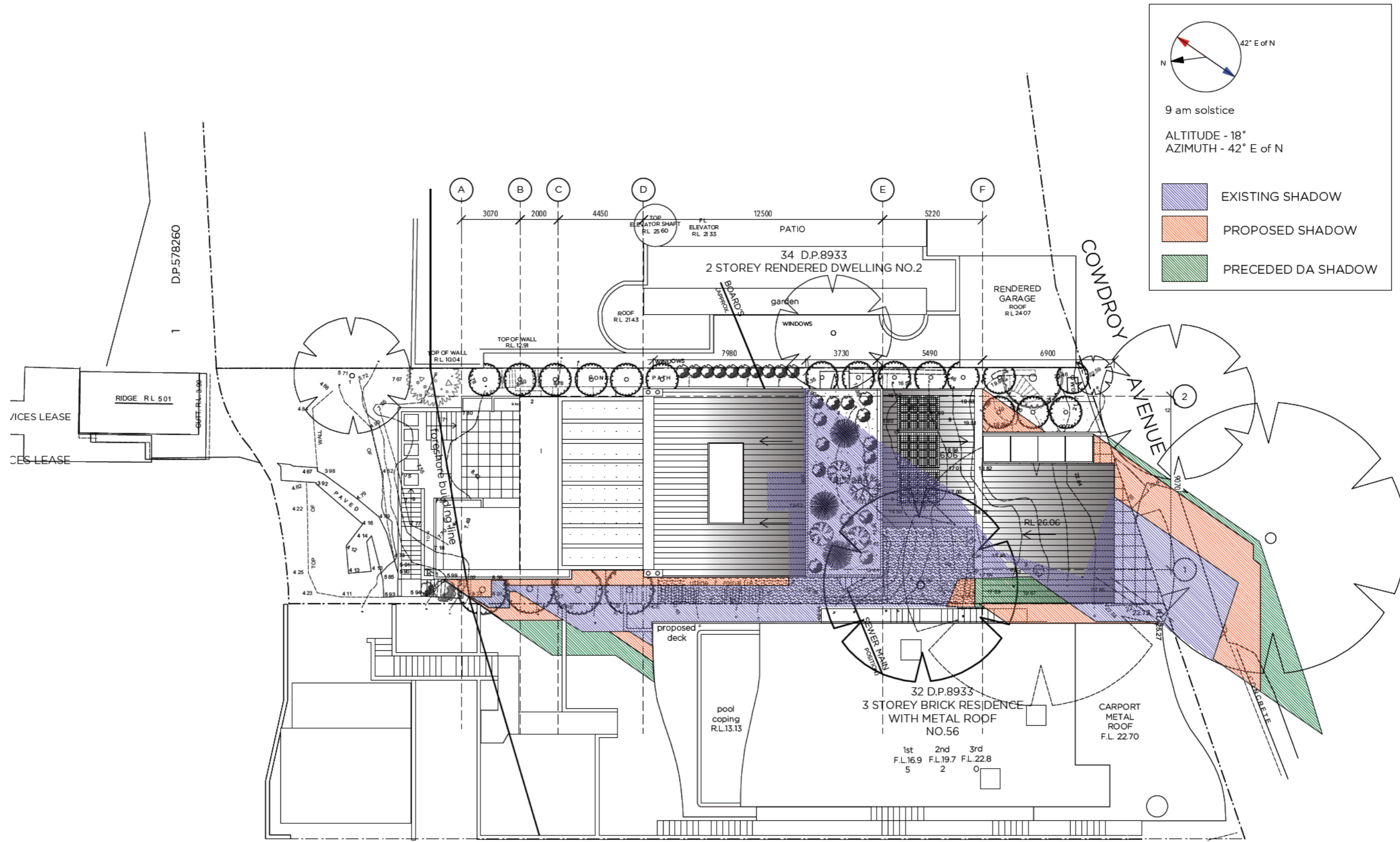
DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

DRAWING NO.

**S8.2 11**

REVISION.





LEGEND.

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.

**9am SOLSTICE SHADOWS**

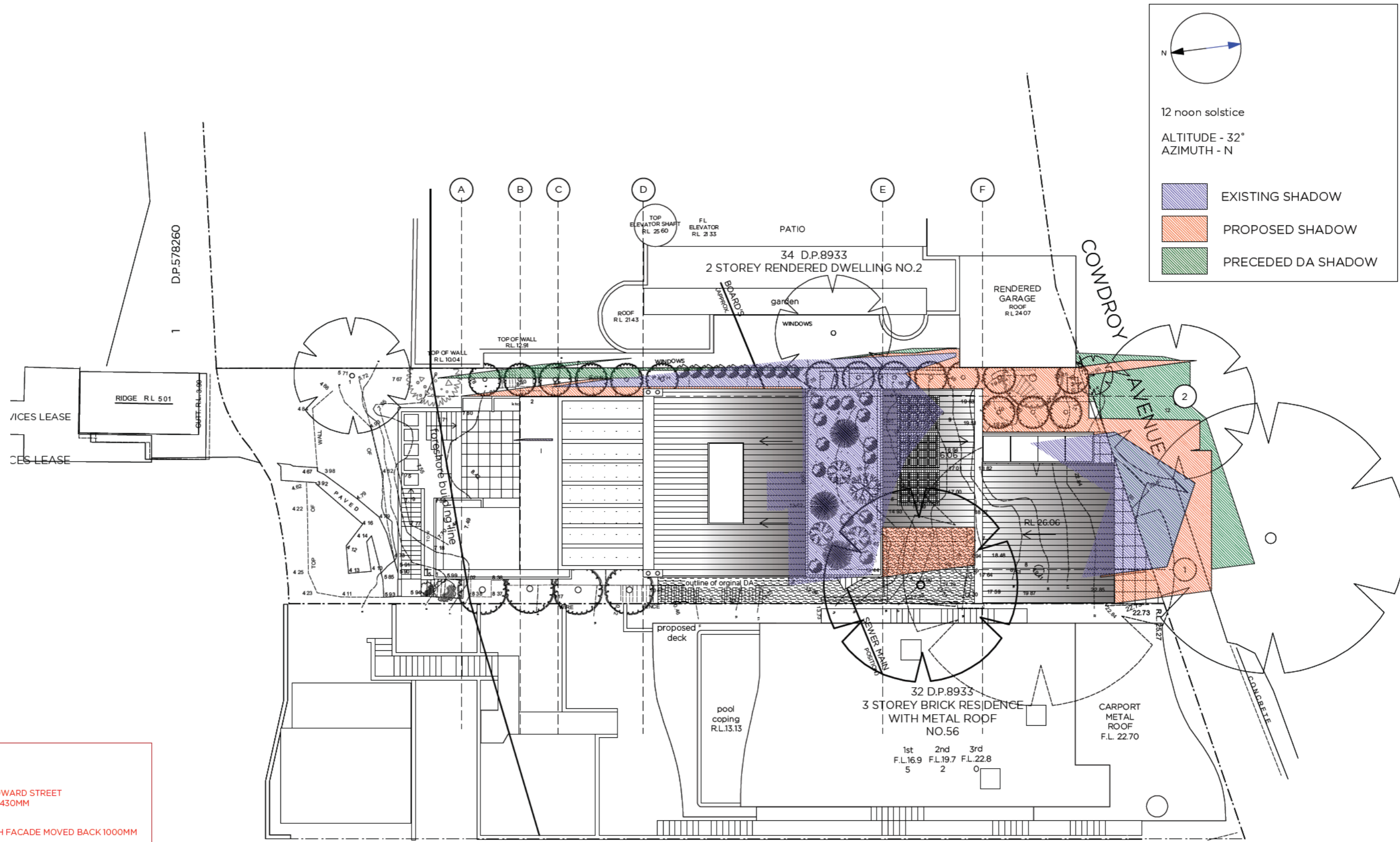
DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.

**S8.2 12**

REVISION.



**AMENDMENTS:**  
**AUGUST**  
 - RL'S MODIFIED  
 - GRID LINES MODIFIED  
 - BUILDING MOVES 570MM TOWARD STREET  
 - GRIDLINE D-E REDUCED BY 430MM  
 - POOL MODIFIED  
 - ROOF RECONFIGURED  
 - OVERALL BUILDINGS NORTH FACADE MOVED BACK 1000MM  
**SEPTEMBER**  
 - GARAGE AND ENTRY MODIFIED  
 - STAIR MOVED TO ALLOW FOR COURTYARD FOR TREE  
 - INTERIOR MODIFICATIONS TO ALLOW FOR STAIR

**LEGEND.**

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**COSO ARCHITECTURE**  
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**DEVELOPMENT APPLICATION SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL






DRAWING NAME:  
**12pm SOLSTICE SHADOWS**  
 DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

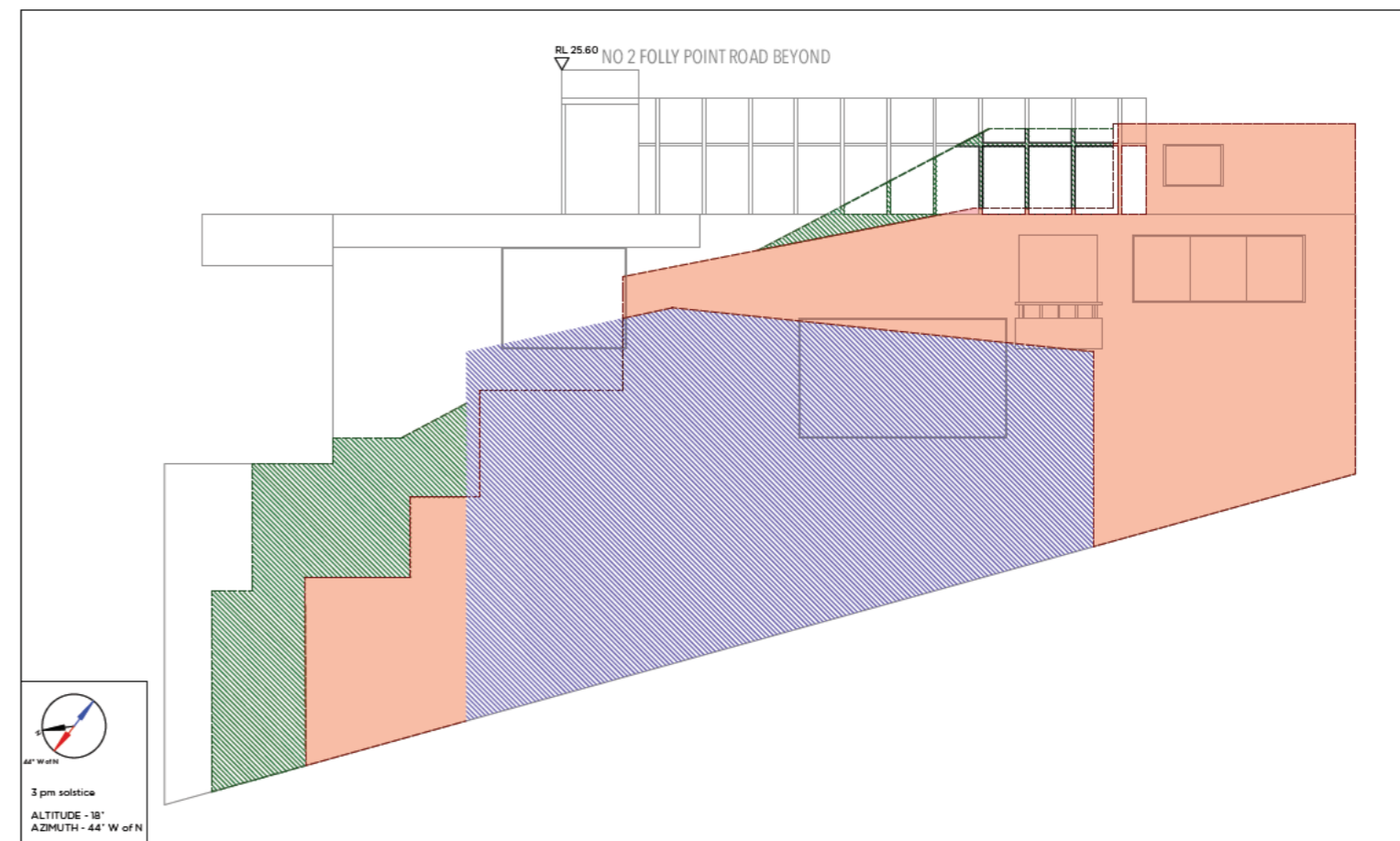
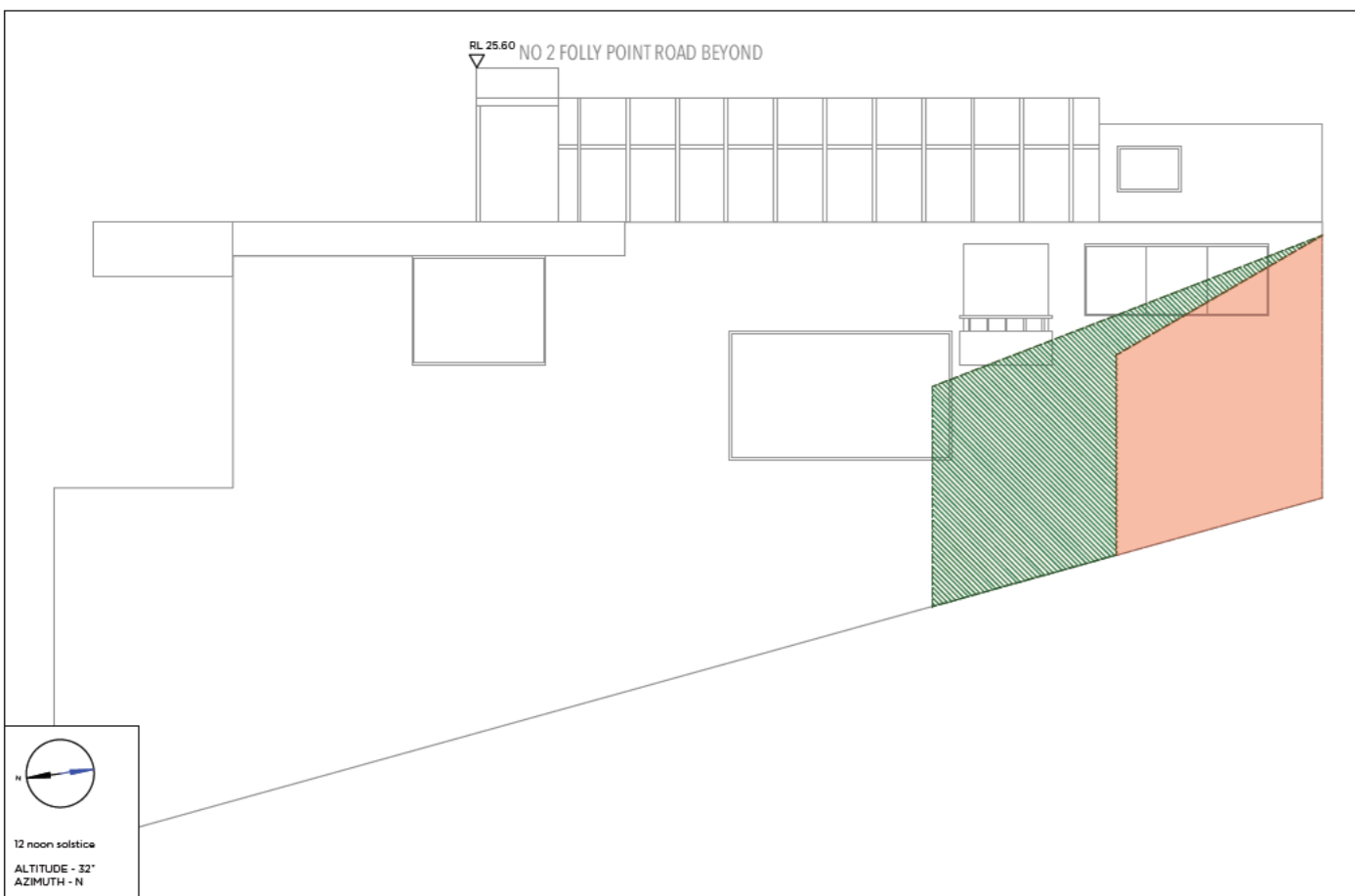
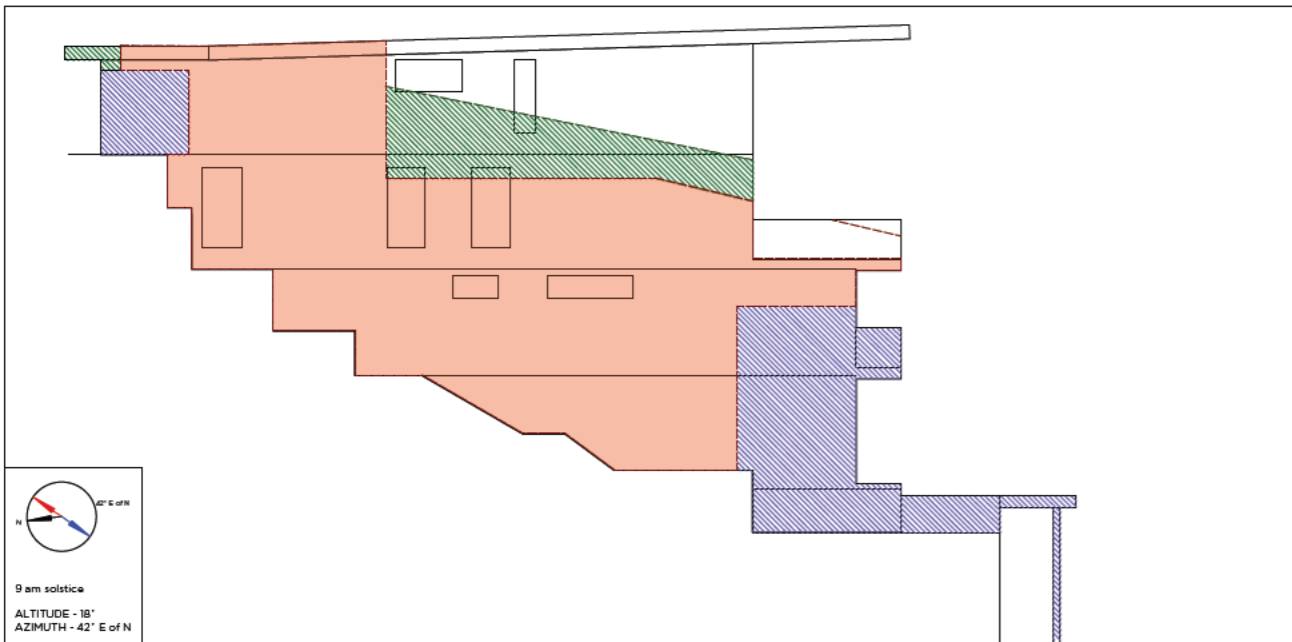


DRAWING NO.  
**S8.2 13**  
 REVISION.



**SOLSTICE**

-  EXISTING SHADOW
-  PROPOSED SHADOW
-  PRECEDED DA SHADOW



**LEGEND.**

 EXISTING	 TIMBER	 BLOCKWORK	 CONCRETE	 BRICK	 CLADDING	 ROOFING	 RENDER	 TIMBER FLOOR	 TILES	 PAVING	 HATCH SHOWING ORIGINAL DA BULK	 ORIGINAL DA
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**DEVELOPMENT APPLICATION  
SECTION 8.2 SUBMISSION**  
58 COWDROY AVENUE CAMMERAY 2062  
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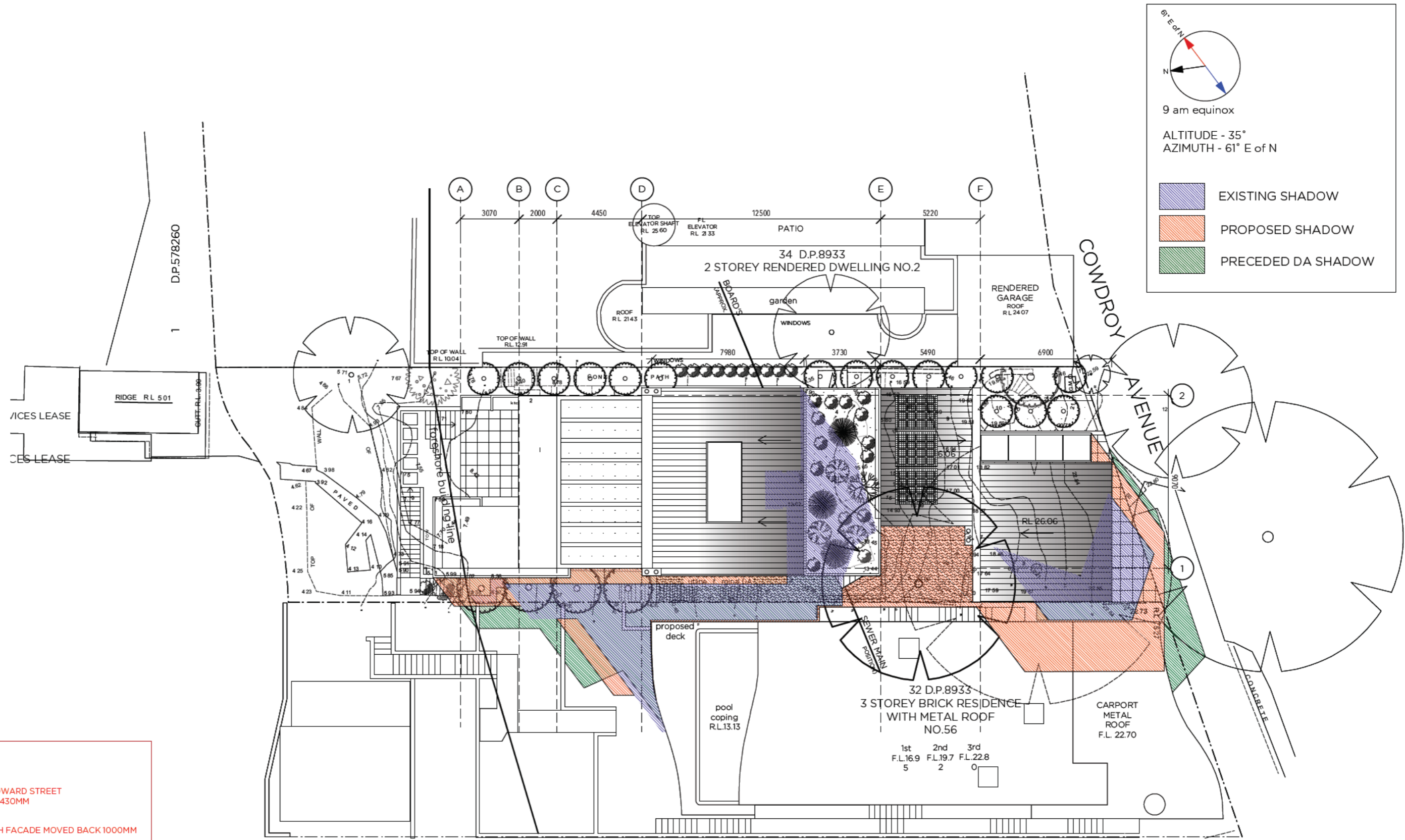


DRAWING NAME:  
**SOLSTICE ELEVATION SHADOW**

DATE: NOVEMBER 2020  
SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 15**  
REVISION.



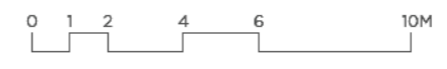
**AMENDMENTS:**  
**AUGUST**  
 - RL'S MODIFIED  
 - GRID LINES MODIFIED  
 - BUILDING MOVES 570MM TOWARD STREET  
 - GRIDLINE D-E REDUCED BY 430MM  
 - POOL MODIFIED  
 - ROOF RECONFIGURED  
 - OVERALL BUILDINGS NORTH FACADE MOVED BACK 1000MM  
**SEPTEMBER**  
 - GARAGE AND ENTRY MODIFIED  
 - STAIR MOVED TO ALLOW FOR COURTYARD FOR TREE  
 - INTERIOR MODIFICATIONS TO ALLOW FOR STAIR

**LEGEND.**

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**COSO ARCHITECTURE**  
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**DEVELOPMENT APPLICATION SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



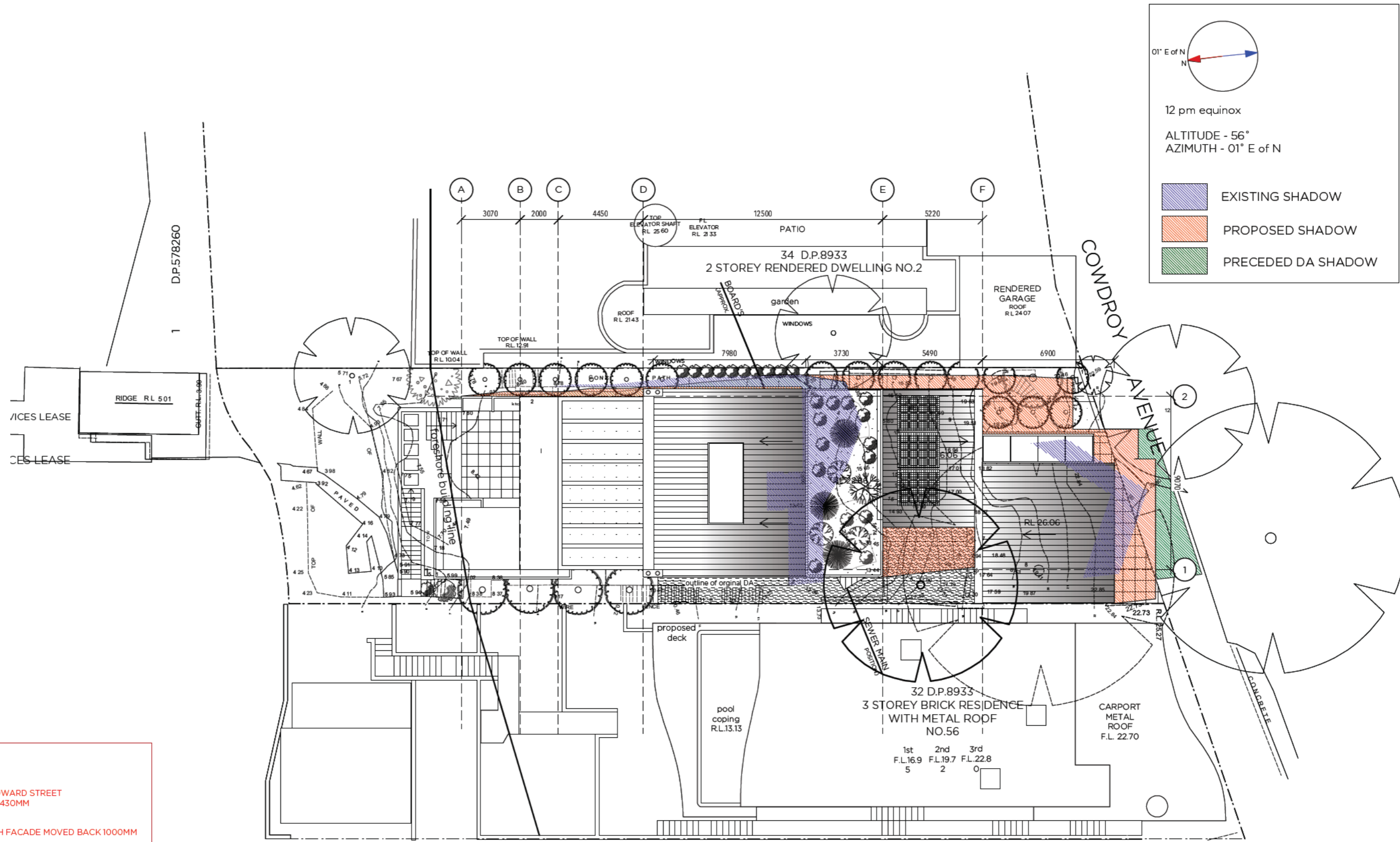
DRAWING NAME:  
**9am EQUINOX SHADOWS**

DRAWING NO.  
**S8.2 16**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

REVISION:





**AMENDMENTS:**  
**AUGUST**  
 - RL'S MODIFIED  
 - GRID LINES MODIFIED  
 - BUILDING MOVES 570MM TOWARD STREET  
 - GRIDLINE D-E REDUCED BY 430MM  
 - POOL MODIFIED  
 - ROOF RECONFIGURED  
 - OVERALL BUILDINGS NORTH FACADE MOVED BACK 1000MM  
**SEPTEMBER**  
 - GARAGE AND ENTRY MODIFIED  
 - STAIR MOVED TO ALLOW FOR COURTYARD FOR TREE  
 - INTERIOR MODIFICATIONS TO ALLOW FOR STAIR

**LEGEND.**

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**COSO**  
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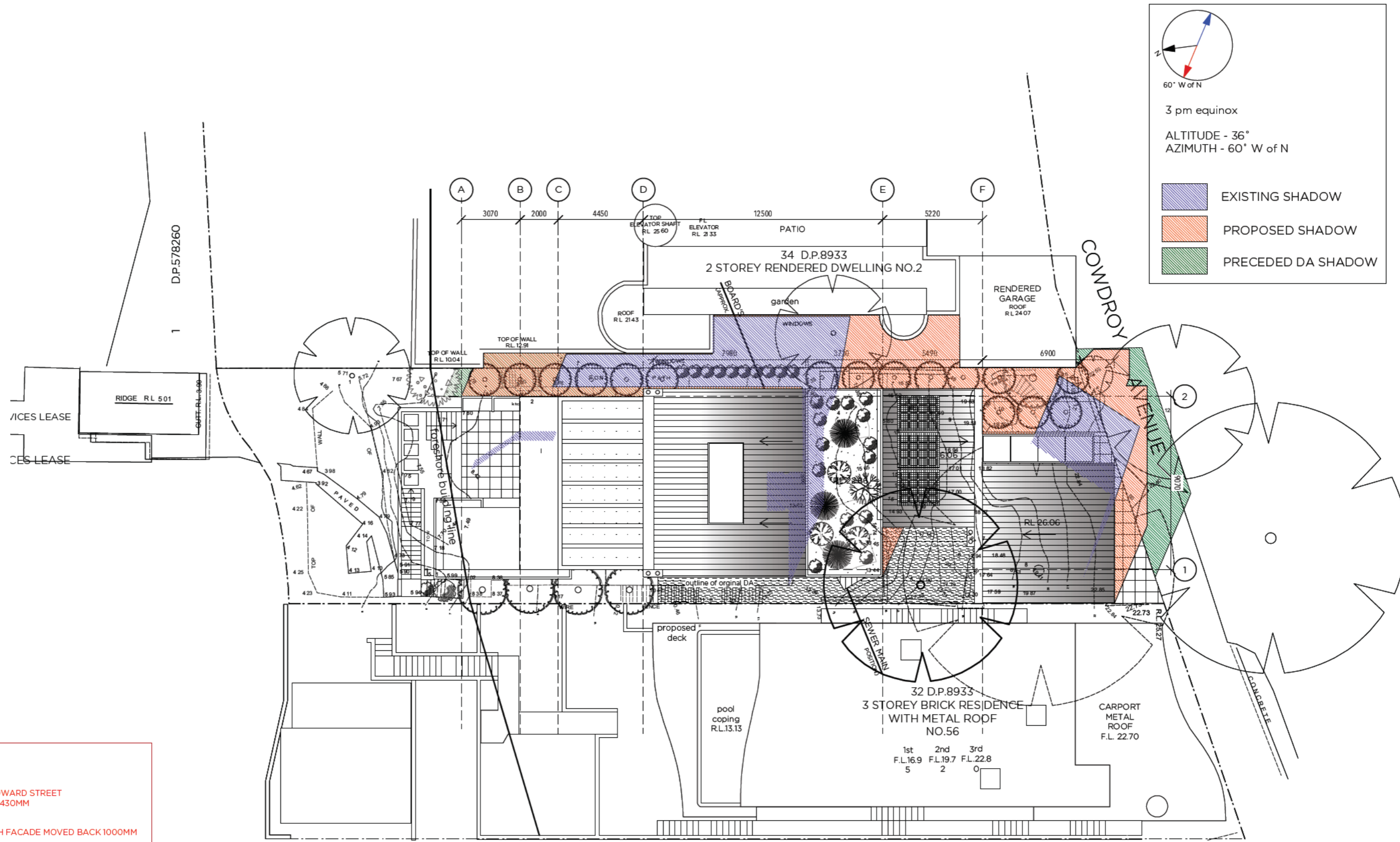
**DEVELOPMENT APPLICATION**  
**SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**12pm EQUINOX SHADOWS**  
 DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 17**  
 REVISION.



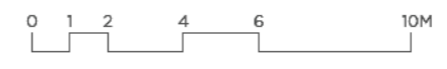
**AMENDMENTS:**  
**AUGUST**  
 - RL'S MODIFIED  
 - GRID LINES MODIFIED  
 - BUILDING MOVES 570MM TOWARD STREET  
 - GRIDLINE D-E REDUCED BY 430MM  
 - POOL MODIFIED  
 - ROOF RECONFIGURED  
 - OVERALL BUILDINGS NORTH FACADE MOVED BACK 1000MM  
**SEPTEMBER**  
 - GARAGE AND ENTRY MODIFIED  
 - STAIR MOVED TO ALLOW FOR COURTYARD FOR TREE  
 - INTERIOR MODIFICATIONS TO ALLOW FOR STAIR

**LEGEND.**

EXISTING	TIMBER	BLOCKWORK	CONCRETE	BRICK	CLADDING	ROOFING	RENDER	TIMBER FLOOR	TILES	PAVING	HATCH SHOWING ORIGINAL DA BULK	ORIGINAL DA
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**3pm EQUINOX SHADOWS**




DRAWING NO.  
**S8.2 18**

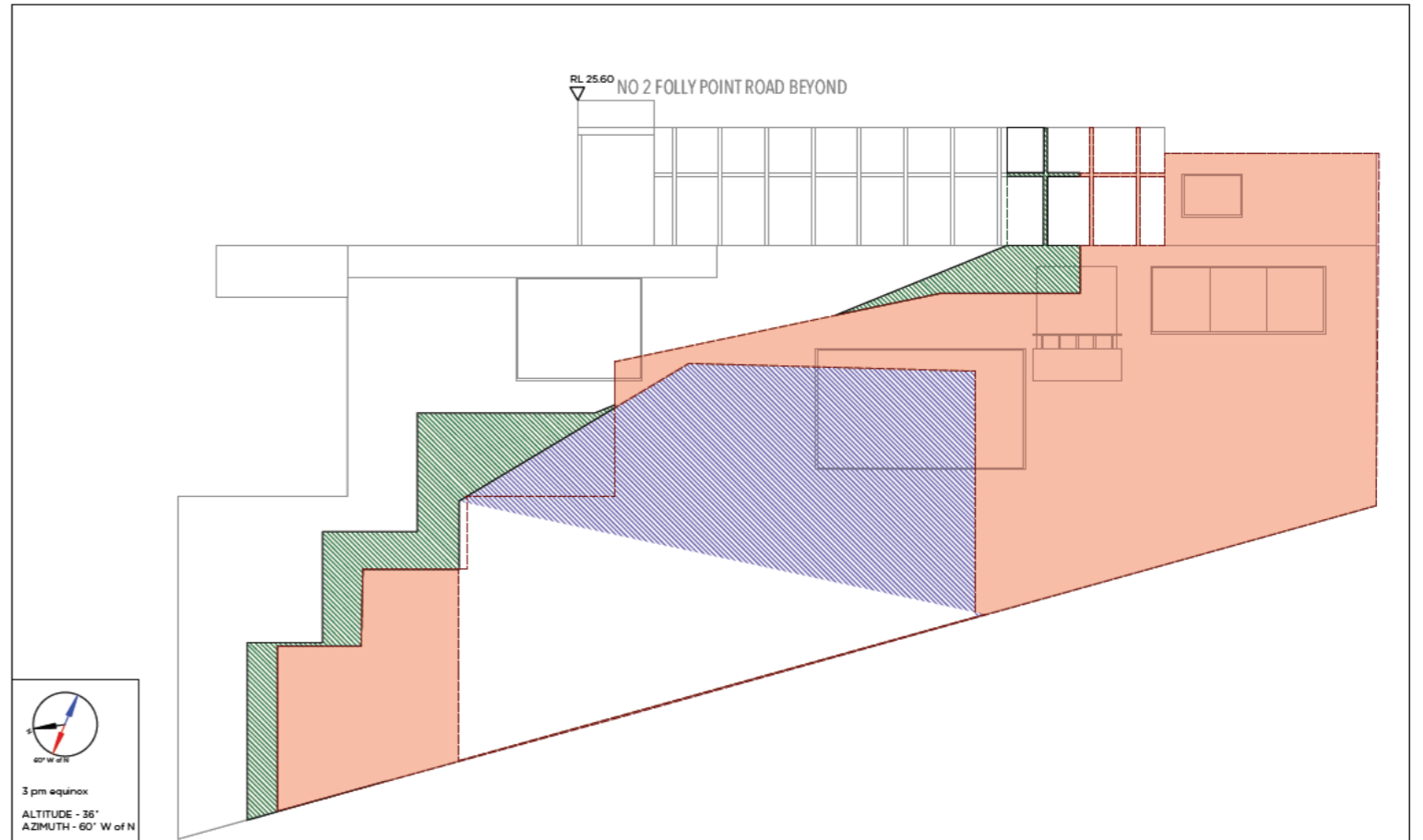
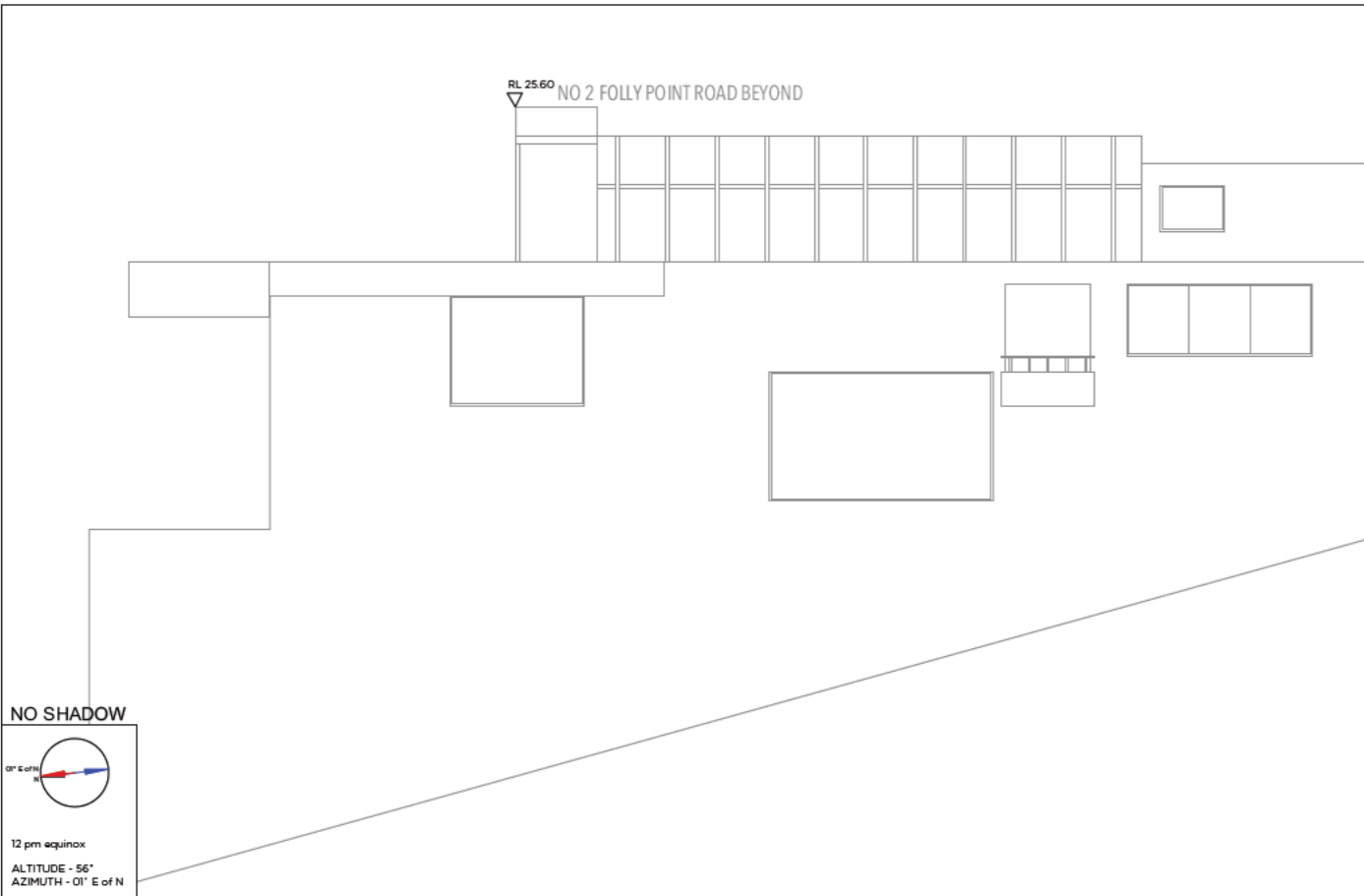
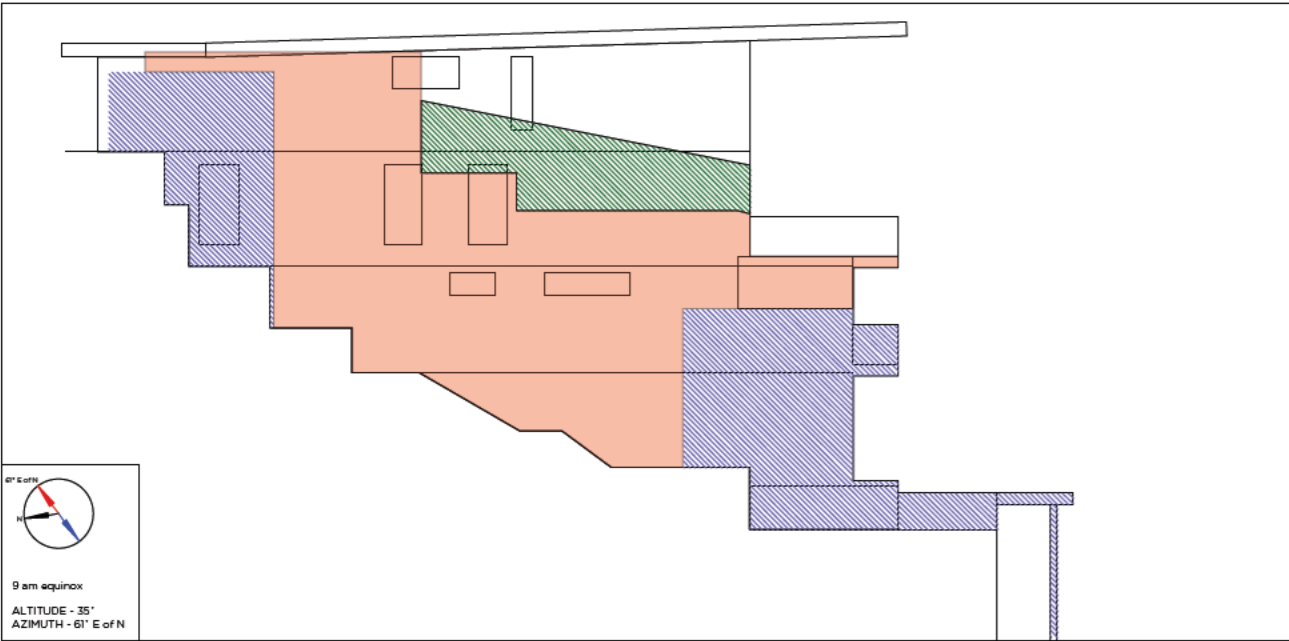
DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2

REVISION:



**EQUINOX**

-  EXISTING SHADOW
-  PROPOSED SHADOW
-  PRECEDED DA SHADOW



**LEGEND.**

 EXISTING	 TIMBER	 BLOCKWORK	 CONCRETE	 BRICK	 CLADDING	 ROOFING	 RENDER	 TIMBER FLOOR	 TILES	 PAVING	 HATCH SHOWING ORIGINAL DA BULK	 ORIGINAL DA
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**DEVELOPMENT APPLICATION  
SECTION 8.2 SUBMISSION**

58 COWDROY AVENUE CAMMERAY 2062  
PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**EQUINOX ELEVATION SHADOWS**

DATE: NOVEMBER 2020  
SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 19**

REVISION.



KEY

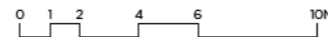
- original DA
- amended DA
- 8.2 submission



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**DEVELOPMENT APPLICATION  
SECTION 8.2 SUBMISSION**  
58 COWDROY AVENUE CAMMERAY 2062  
PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**56 COWDROY AVE VIEW LOSS  
DIAGRAM 02**

DATE: 07 OCTOBER 2020  
SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**DA 25**

REVISION.

LEGEND.

- EXISTING
- TIMBER
- BLOCKWORK
- CONCRETE
- BRICK
- CLADDING
- ROOFING
- RENDER
- TIMBER FLOOR
- TILES
- PAVING
- HATCH SHOWING ORIGINAL DA BULK
- ORIGINAL DA

**COSO**  
ARCHITECTURE

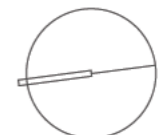
Paul Connor RAIA#7058 Anthony Solomon RAIA#5684  
The Cooperage, Studio 4.04, 56 Bowman Street,  
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**DEVELOPMENT APPLICATION  
SECTION 8.2 SUBMISSION**  
58 COWDROY AVENUE CAMMERAY 2062  
PREPARED FOR RENATA + PAUL



DRAWING NAME:  
**VIEW LOSS DIAGRAM**

DATE: NOVEMBER 2020  
SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 22**

REVISION.





LEGEND.

	EXISTING		TIMBER		BLOCKWORK		CONCRETE		BRICK		CLADDING		ROOFING		RENDER		TIMBER FLOOR		TILES		PAVING		HATCH SHOWING ORIGINAL DA BULK		ORIGINAL DA
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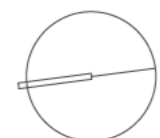
Paul Connor RAIA#7058 Anthony Solomon RAIA#5684  
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**DEVELOPMENT APPLICATION  
 SECTION 8.2 SUBMISSION**  
 58 COWDROY AVENUE CAMMERAY 2062  
 PREPARED FOR RENATA + PAUL



DRAWING NAME.  
**PHOTOMONTAGE**

DATE: NOVEMBER 2020  
 SCALE: 1:200 AT A3/ 1:100 AT A2



DRAWING NO.  
**S8.2 23**  
 REVISION.



## ATTACHMENT 3

**Clause 4.6 variation request – Height of buildings****Height of Buildings****1.0 Introduction**

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

**2.0 North Sydney Local Environmental Plan 2013 (“NSLEP”)****2.1 Clause 4.3 - Height of buildings**

Pursuant to Clause 4.3 of NSLEP 2012 the height of a building on the subject land is not to exceed 8.5 metres in height. The objectives of these controls are as follows:

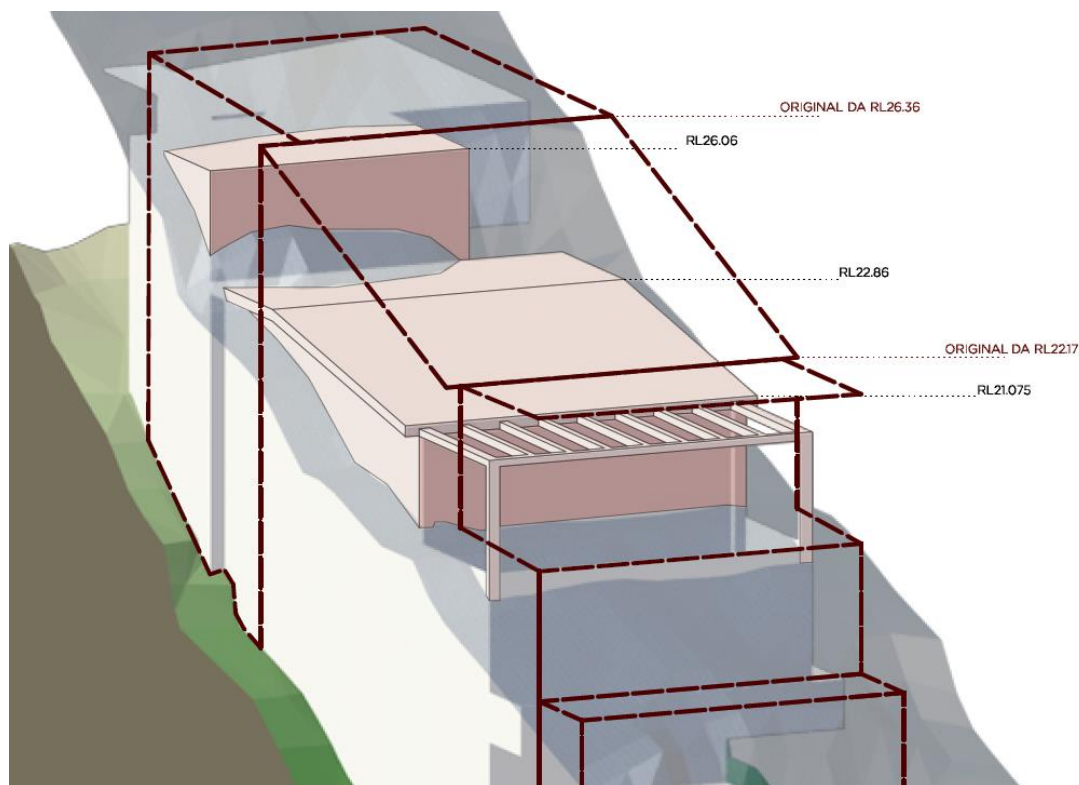
- a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- b) *to promote the retention and, if appropriate, sharing of existing views,*
- c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- e) *to ensure compatibility between development, particularly at zone boundaries,*
- f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

Building height and wall height are defined as follows:

***Building height (or height of building)*** means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

**Wall height** means the vertical distance between the ground level (existing) and the underside of the eaves at the wall line, parapet or flat roof, whichever is the highest.

The proposed new dwelling has a maximum building height of 12.1 metres along the northern edge of the upper level pergola with the extent of non-compliance reducing in a southerly direction to a point where the garage sits some 5.3 metres below the height standard where it adjoins the front boundary of the property as depicted in the height blanket diagram at Figure 1 below. The maximum extent of non-compliance is 3.6 metres or 42%.



**Figure 1** – Building height blanket breach diagram with breaching elements of the mandated scheme shown in pink.

## 2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of NSLEP provides:

- (1) *The objectives of this clause are:*
  - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
  - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

*Initial Action* involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

*“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”*

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of NSLEP provides:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*

This clause applies to the clause 4.4 Height of Buildings Development Standards.

Clause 4.6(3) of NSLEP provides:

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*

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

The proposed development does not comply with the height of buildings provisions at clause 4.4 of NSLEP which specifies a maximum building height however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of NSLEP provides:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - (a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - (b) *the concurrence of the Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 4.6(4)(a)(ii)) is that the proposed development will be in the public interest ***because*** it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation* 2000, the Secretary has given written notice dated 5<sup>th</sup> May 2020, attached to the Planning Circular PS 18-003 issued on 5<sup>th</sup> May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

Clause 4.6(5) of NSLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.4 of NSLEP from the operation of clause 4.6

### 3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clauses 4.4 of NSLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
  - (a) compliance is unreasonable or unnecessary; and
  - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.4 standards and the objectives for development for in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.4 of NSLEP?



## 4.0 Request for variation

### 4.1 Is clause 4.4 of MLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes a provision of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.4 MLEP prescribes a fixed building height provision that seeks to control the height of certain development. Accordingly, clause 4.4 MLEP is a development standard.

### 4.2a Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

#### Consistency with objectives of the height of buildings standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- (a) *to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*

Response: The land upon which the development is proposed is steeply sloping falling approximately 12 metres across its surface through the proposed building footprint.

The proposal has been designed to utilise the excavation created to accommodate the existing dwelling with additional excavation otherwise limited to that required to accommodate 3 floors of accommodation consistent with that established by a majority of waterfront properties along Cowdroy Avenue as depicted in Figure 2 below.



**Figure 2** – View looking back towards the subject site and surround 3 and 4 storey properties.

The floor plates have been arranged such that the uppermost level is setback behind the levels below as they present to the foreshore with an open pergola structure constructed over the upper most terrace for sun and weather protection. I am of the opinion that the proposal does achieve this objective by minimising excavation and providing for a building that integrates with and appropriately steps down the landform on this steeply sloping site notwithstanding the building height breaching elements.

This objective is achieved.

- (b) *to promote the retention and, if appropriate, sharing of existing views,*

Response: The on-line Oxford dictionary defines the word “promote” as follows:

*Support or actively encourage (a cause, venture, etc.); further the progress of*

<https://www.lexico.com/definition/promote>

Accordingly, this objective must be applied in the context of an encouragement to retain views, were appropriate, rather than a requirement to retain existing views.

In this regard, the site is located within an established foreshore residential precinct whereby it would be extremely difficult to further develop this underdeveloped site without impacting existing views to some extent. That is, adopting a position that view retention is required to demonstrate consistency with objective in 4.3(1)(b) NSLEP, there would be little if no ability to further develop the subject site without impacting views and therefore falling foul of the objective. In this instance, the retention of views is neither reasonable nor appropriate.

Having regard to the view sharing principles established by the Land and Environment Court of NSW in the matter of *Tenacity Consulting v Warringah* [2004] NSWLEC 140 as they relate to an assessment of view impacts from No’s 56 and 54D Cowdroy Avenue and No. 2 Folly Point Road, being the properties identified during Council’s assessment of the development application as being effected in relation to views, I have formed the following opinion:

### **First Step - Assessment of views to be affected**

*An assessment of the view to be affected. The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

All properties have access to panoramic views across the harbour including the land water interface along its northern foreshore from each level of property as depicted in the following photographs noting that the profiles erected for the original proposal can be clearly seen for reference.



**Figure 3** – Part of the panoramic view available from the upper level balcony of No. 56 Cowdroy Avenue in a north easterly direction directly across the side boundary of the subject site towards the harbour.



**Figure 4** – Part of the panoramic view available from the mid and upper levels of No. 54D Cowdroy Avenue in a north easterly direction directly across the side boundary of the site towards the harbour.





**Figure 5** - Part of the panoramic view available from upper level balcony of No. 2 Folly Point in a westerly direction directly across the side boundary of the site towards the bay.

### **Second Step - From what part of the property are the views obtained**

*The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

Comment: These views are available from the living areas and adjacent balconies from both a standing and seated position. The views available over the subject site are obtained directly across the side boundary and over the roof of the existing dwelling located on the subject site.

### **Third Step – Assessment of extent of the impact**

*The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless.*

*For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment: Noting that the amended plans provide for a reduction in building height and increased setback to the waterfront I am of the opinion that the proposal will not give rise to any loss of significant or unobstructed water views available from No. 54D Cowdroy or No. 2 Folly Point. The view loss is appropriately described as minor to negligible from these properties.

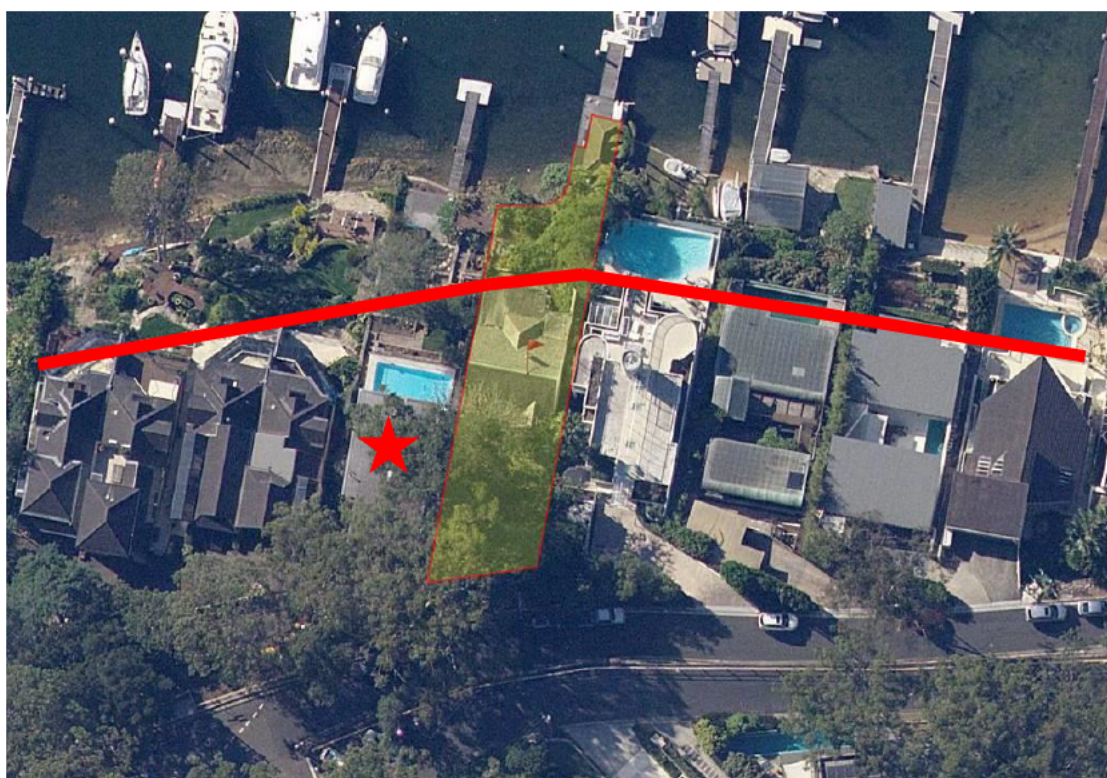
The view impact from the upper level balcony of No. 56 Cowdroy Avenue is depicted in Figure 6 below with view loss limited to close water views and a number of moored boats. The balance of the existing panoramic views including the land water interface on the northern side of bay are maintained.



**Figure 6** – View loss montage from the upper level balcony of No. 56 Cowdroy Avenue

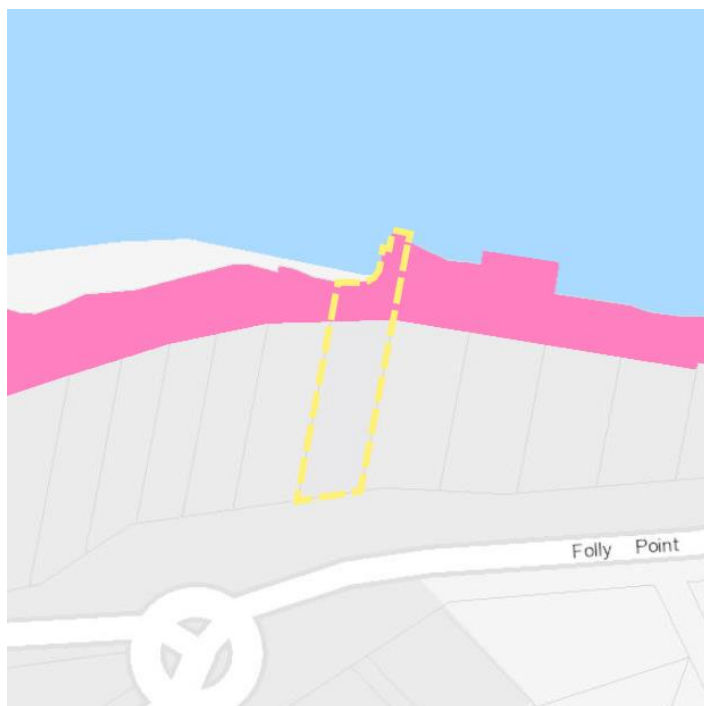
I note that No. 56 Cowdroy Avenue is set back much further into the hillsides, and behind the foreshore building line, than the majority of properties located along this section of the foreshore the majority of which have historically been constructed to the Foreshore Building Line. This setback arrangement can be seen in the aerial photograph at Figure 7 below and the foreshore building line extract at Figure 8 over page.

This spatial arrangement makes No. 56 Cowdroy Avenue particularly vulnerable to view impact particularly the view elements obtained directly access side boundaries.



**Figure 7** – Photograph showing the established alignment of development with No.56 Cowdroy Avenue (with red star) setback well behind such alignment





**Figure 8** – NSLEP foreshore building line map extract enabling an analysis as to the consistency of the established foreshore setbacks along this section of the waterfront (Figure 7) with the prescribed foreshore building line

In this regard, I am of the opinion that there can be no realistic expectation that all views from No. 56 Cowdroy will be maintained particularly in circumstances where such views are only available across the side boundary and over the central portion/ logical building footprint of an under-developed property.

Based on an assessment of the totality of the views available from this property, and the vulnerability of views available across side boundaries, I consider the view impact to be appropriately described as minor.

#### **Fourth Step – Reasonableness of the proposal**

*The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them.*

*Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.*

*With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Whilst the proposal does not company with the 8.5 metre height standard it is clearly evident that 3 storey dwelling houses with car parking at street level are characteristic of development along the foreshore with the established built form circumstance reflecting both the existing and desired future character noting the recent approval of alterations and additions to a number of surrounding properties including No. 56 Cowdroy Avenue where a building height variation was approved for a building height variation greater than that currently proposed. As previously indicated, the height, bulk and scale of the development has been substantially reduced with compliant landscaped area now achieved through a reduction in building footprint and the introduction of an internalised courtyard area between the garage and main living areas of the dwelling house.

In this context, the proposed building as amended will sit comfortably within the established foreshore visual catchment and will display a height, bulk, scale and setbacks which are entirely consistent with those established by immediately adjoining development and development generally within the sites visual catchment. In fact, the overall height of the development is now substantially lower than that established by the 2 immediately adjoining properties as depicted on the architectural plans and in the montage at Figure 9 below.



**Figure 9** – Montage of proposed development as viewed from the water

The amended plans also provide the planting of a replacement canopy tree adjacent to the proposed internalised courtyard area with a green roof and diaphanous landscape screen to the western façade ensuring that the edges of the building are appropriately softened with the building sitting within a landscape setting consistent with that established by adjoining development and development generally within the sites visual catchment.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the proposed garages by virtue of their form, massing or street alignment, offensive, jarring or unsympathetic in a streetscape or waterfront context having regard to the built form and landscape characteristics of development within the sites visual catchment. The proposed landscape treatments will soften and screen the development as viewed from the water.

Strict compliance is unreasonable and unnecessary under the circumstances including the apparent relaxation of the building height standard along this section of Cowdroy Avenue.

***With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.***

Comment: N/A

Having reviewed the detail of the application we have formed the considered opinion that a view sharing scenario is maintained between adjoining properties in accordance with the principles established in *Tenacity Consulting Pty Ltd v Warringah Council* [2004] NSWLEC140 and *Davies v Penrith City Council* [2013] NSWLEC 1141.

Accordingly, the development, notwithstanding the building height breach, promotes the sharing of views and accordingly achieves this objective.

- (c) *to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*

Response: The shadow diagrams at Annexure 1 demonstrate that the proposal will allow for compliant levels of solar access to be maintained to north facing living and adjacent open space areas of both adjoining properties between 9am and 3pm on 21<sup>st</sup> June. No overshadowing impacts will occur to public spaces or the street.

- (d) *to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*

Response: Minimising privacy impacts have been incorporated into the dwelling design by minimising the fenestration to the side elevations. The east elevation has a minimal number of windows which consist of primarily highlight windows to provide natural light to internal areas. The western elevation includes a diaphanous landscape screen to provide visual relief and additional screening for both the occupants and adjoining development.

This objective is achieved notwithstanding the building height breach proposed.

- (e) *to ensure compatibility between development, particularly at zone boundaries*

Response: The property is not at a land-based zone boundary. The proposed dwelling is compatible in scale and height with that of adjoining development and development generally along this section of the foreshore as previously detailed in this document. This objective is achieved notwithstanding the building height breaching elements.

- (f) *to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

Response: In relation to the existing and desired future character of the area it is clearly evident that 3 and 4 storey dwelling houses with car parking at street level are characteristic of development along the foreshore with the established built form circumstance reflecting both the existing and desired future character noting the recent approval of alterations and additions to a number of surrounding properties including No. 56 Cowdroy Avenue to the west of the site where a building height variation was approved for a building height variation greater than that currently proposed.

As previously indicated, the height, bulk and scale of the development has been substantially reduced with compliant landscaped area now achieved through a reduction in building footprint and the introduction of an internalised courtyard area between the garage and main living areas of the dwelling house.

In this context, the proposed building as amended will sit comfortably within the established foreshore visual catchment and will display a height, bulk, scale and setbacks which are entirely consistent with those established by immediately adjoining development and development generally within the sites visual catchment. In fact, the overall height of the development is now substantially lower than that established by the 2 immediately adjoining properties as depicted on the architectural plans and in the montage at Figure 9.

The amended plans also provide the planting of a replacement canopy tree adjacent to the proposed internalised courtyard area with a green roof and diaphanous landscape screen to the western façade ensuring that the edges of the building are appropriately softened with the building sitting within a landscape setting consistent with that established by adjoining development and development generally within the sites visual catchment.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of Project Venture Developments v Pittwater Council (2005) NSW LEC 191, we have formed the considered opinion that most observers would not find the proposed garages by virtue of their form, massing or street alignment, offensive, jarring or unsympathetic in a streetscape or waterfront context having regard to the built form and landscape characteristics of development within the sites visual catchment. The proposed landscape treatments will soften and screen the development as viewed from the water.

In this regard, the development, notwithstanding the building height breaching elements, displays and appropriate scale and density that is in accordance with, and promotes the character of, an area. This objective is achieved.

As the development achieves each objective of the height of building standard it is both unreasonable and unnecessary to comply with the height of building standard in the circumstances of this case.

#### Consistency with zone objectives

The subject site is zoned E4 Environmental Living pursuant to the provisions of NSLEP. Dwelling houses are permissible in the zone with the consent of council. The stated objectives of the E4 zone are as follows:



- *To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.*

Response: The building height breaching component of the development is appropriately described as being of low environmental impact having regard to the ecological, scientific and aesthetic values of the site as detailed throughout this document. This objective is achieved notwithstanding the building height breach.

- *To ensure that residential development does not have an adverse effect on those values.*

Response: The building height breaching component of the development is appropriately described as being of low environmental impact having regard to the ecological, scientific and aesthetic values of the site as detailed throughout this document. This objective is achieved notwithstanding the building height breach.

- *To ensure that a high level of residential amenity is achieved and maintained.*

Response: As previously mentioned, the building height breaching components of the development will not give rise to any unacceptable residential amenity impacts in relation to privacy, view loss or overshadowing.

The non-compliant component of the development, as it relates to building height, demonstrates consistency with objectives of the E4 zone and the height of building standard objectives. Adopting the first option in *Wehbe* strict compliance with the height of buildings standard has been demonstrated to be is unreasonable and unnecessary.

#### **4.2b Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?**

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds.*

*The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

Sufficient environmental planning grounds exist to justify the height of buildings variation namely the constraints imposed by the site’s steep topography and the presence of a sewer main which traverses the developable area of the site and prevents a further lowering of the lower ground floor plate. The height, bulk and scale of the development is consistent with the existing and likely future character of the area and complimentary and compatible with that established by adjoining development and development generally along this section of the foreshore.

Whilst strict compliance could be achieved by removing or significantly reducing the upper most floor of the dwelling, such outcome is neither orderly or economic given the prestigious waterfront location of the property where there is an expectation that a reasonable level of floor space can be achieved and the disparate building height that would result compared to that of surrounding development and development generally along this section of the foreshore.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).

- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 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 have a better environmental planning outcome than a development that complies with the development standard.*

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

#### **4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A and the objectives of the R2 Low Density Residential zone**

The consent authority needs to be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in *Initial Action* (Para 27) described the relevant test for this as follows:

*“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. 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. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”*

As demonstrated in this request, the proposed development it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

Accordingly, the consent authority can be satisfied that the propose development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

#### **4.4 Secretary's concurrence**

By Planning Circular dated 5<sup>th</sup> May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determination s are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

#### **5.0 Conclusion**

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the height of buildings standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of the case, and

- (e) that given the developments ability to comply with the zone and height of buildings standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- (g) Concurrence of the Secretary can be assumed in this case.

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the highly considered opinion that there is no statutory or environmental planning impediment to the granting of a height of buildings variation in this instance.

**Boston Blyth Fleming Pty Limited**

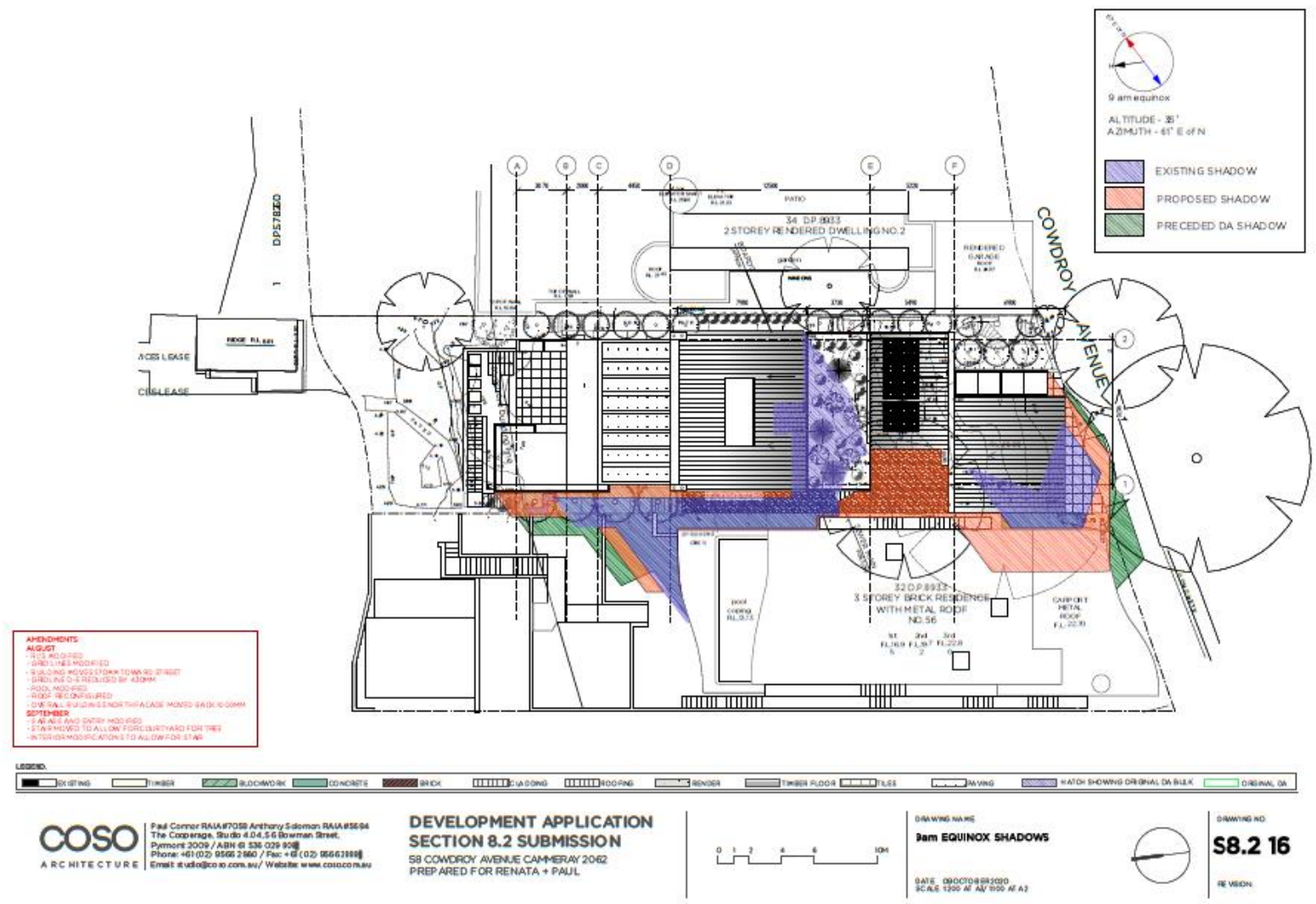


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**Annexure 1**      Shadow diagrams



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