



## NOTICE OF BURWOOD LOCAL PLANNING PANEL MEETING

The meeting of the Burwood Local Planning Panel will be held at on Tuesday 14 May 2024 at 6:00 PM to consider the matters contained in the attached Agenda.

Tommaso Briscese  
**General Manager**

# Agenda

**For a Notice of Burwood Local Planning Panel Meeting of Burwood Council to be held in the Conference Room, Level 1, 2 Conder Street, Burwood on Tuesday 14 May 2024 immediately after the Public Forum commencing at 6.00pm.**

**Welcome to the meeting of the Burwood Local Planning Panel**

**I declare the Meeting opened at**

## **1. Acknowledgement of Country**

*I would like to acknowledge the Wangal people of the Eora Nation who are the traditional custodians of this land. I would also like to pay respect to their elders, both past and present, and extend that respect to other First Nations People who may be present.*

## **2. Introduction of Panel Members**

## **3. Recording of Meeting**

## **4. Explanation of how the panel will operate**

*The Panel has undertaken site investigations and we have before us reports provided by Burwood Council officers on the matters for consideration.*

*For each matter, the Council officer will briefly give an overview.*

*All members of the public who have registered to speak will have the opportunity to address the panel. I will invite you to speak and commence by stating your name and address or whom you represent.*

*After all speakers have been heard, the panel will adjourn to deliberate on the matter.*

*The Panel will make determinations on the matters before it. Each determination will include reasons for the determination, and all such details will be included in the official record of the meeting.*

*Members of the public are advised that Meetings of the Panel are audio recorded for the purpose of assisting with the preparation of Minutes and the recording of the public part of the meeting will be published on Council's website.*

## **5. Apologies/Leave of Absences**

## **6. Declarations of Interest by Panel Members**

## **7. Chair introduction of Agenda Item**

## **8. Council Officer Overview**

## **9. General Business**

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## **10. Development Applications**

(Item DA1/24)	DA.2023.65 - 40-44 Claremont Road, Burwood Heights - Site Amalgamation, Tree Removal, Partial Demolition of Existing Building, Site Excavation and Construction of a Part 2 and Part 4 Mixed Use Building comprising retail uses and a child care centre.....	27
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## General Business

### (Item GB1/24) Delegation of Functions from Burwood Local Planning Panel to Council Officers in Planning Appeals

File No: 24/12397

Report by Manager City Development

#### Report

Since the introduction of Local Planning Panels under the Environmental Planning and Assessment Act 1979 ('EPA Act'), the NSW Minister for Planning has issued a number of directions pursuant to section 9.1 of the Environmental Planning and Assessment Act 1979 (**the EPA Act**).

Relevant to this report is the *Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents* dated 6 May 2024 (**the Direction**).

The Direction identifies the type of development applications and modification applications that must be considered by Council's Local Planning Panel (**LPP**). A copy of the Direction is annexed at "**Attachment 1**".

Following the amendment to the EPA Act of 1 March 2018, the LPP has the control and direction section 8.15(4) of the EPA Act of the conduct of an appeal commenced pursuant to under Section 8.7, 8.8, 8.9 of the EPA Act and any subsequent appeal arising from a decision in those proceedings (**Planning Appeals**) that relates to an application that was determined by the LPP pursuant to the Direction.

Prior to the amendments to the EPA Act, senior Council staff were delegated with the authority to manage Planning Appeals and to give instructions with respect to resolving or defending matters. This report requests that the LPP delegate their functions of control and direction of Planning Appeals to senior Council staff of the Council to allow for the efficient and cost effective conduct of proceedings.

Section 8.15(4) of the EPA Act now provides that:

*(4) If the determination or decision appealed against under this Division was made by a Sydney district or regional planning panel or a local planning panel, the council for the area concerned is to be the respondent to the appeal but is subject to the control and direction of the panel in connection with the conduct of the appeal. The council is to give notice of the appeal to the panel.*

Council's position is that section 8.15(4) of the EPA Act does not apply to deemed refusals because a Local Planning Panel is not defined as a consent authority under section 4.5 of the EPA Act.

Although Council is the respondent in any appeal to the Court, in Planning Appeals that relate to a determination of the LPP, Council's conduct of the class 1 proceedings is subject to the control and direction of the LPP. This means that appeals to which section 8.15(4) applies will need to be reported to and instructions obtained from the LPP. By reason of section 2.20(8) of the EPA Act, the LPP cannot delegate its functions to a single Panel member and therefore a decision of the full Panel is required before solicitors are provided with any instructions.

Such a process is cumbersome in practice. Furthermore, the provision makes it difficult for Council to comply with the Court's requirements that:

*The parties are to participate, in good faith, in the conciliation conference (see s34(1A) of the Land and Environment Court Act 1979), including preparing to be able to fully and meaningfully participate, having authority or the ready means of obtaining authority to reach agreement and genuinely endeavouring to reach agreement at the conciliation conference (Paragraph 47 Practice Note – Class 1 Development Appeals).*

In order to ensure that Council can most efficiently and expediently conduct and manage the Planning Appeals process, it is appropriate that the LPP delegate all its Planning Appeal functions under section 8.15(4) to the General Manager, Director City Strategy and Manager City Development with the condition that in the case of a Planning Appeal relating to a decision of the Panel that is contrary to an assessment report, the General Manager, Director City Strategy or Manager City Development will consult with the Chair of

the Panel that made the relevant decision, as to the conduct of the Planning Appeal within fourteen (14) days of Council being served with the appeal.

Section 2.20(8) of the EPA Act allows Local Planning Panels to delegate any of their functions to the General Manager or other staff of the Council. Such a delegation does not require a resolution of the Council under section 381 of the Local Government Act 1993.

The requirement for the General Manager, Director City Strategy and Manager City Development to consult with the Chair of the Panel about the conduct of the appeal means that the Panel can be satisfied that Council will conduct the appeal with the LPP's decision in mind. If the LPP Chair was concerned that an appeal was not being conducted in a manner consistent with its determination, the LPP could resolve to revoke the delegation in that specific matter.

Any judicial review proceedings relating to a determination of the Panel are not the subject of section 8.15(4) of the EPA Act and Council will have the control and direction of such proceedings. Nevertheless, Council would intend to notify the LLP in the event that judicial review proceedings of an LLP decision are commenced.

### **Financial Implications**

Should the delegation not be provided to the General Manager, Director City Strategy and Manager City Development, then there are likely to be additional legal costs associated with the management of legal proceedings.

### **Conclusion**

Under the EPA Act the LPP currently has the control and direction of the conduct of the proceedings in any Planning Appeals relating to a determination of the LPP. In view of the practical realities of conciliation conferences and the need for instructions at short notice, together with the clear advantages of having an officer present at the conciliation with delegation to give instructions with respect to settlement or the defence of a Planning Appeal, it is appropriate for the LPP to delegate its functions under 8.15(4) of the EPA Act, to the General Manager, Director City Strategy and Manager City Development.

### **Recommendation(s)**


That pursuant to Section 2.20(8) of the *Environmental Planning and Assessment Act 1979*, the Burwood Local Planning Panel delegate its functions (i.e. all Planning Appeal functions) as referred to in Section 8.15(4) of the *Environmental Planning and Assessment Act 1979* to the General Manager, Director City Strategy and Manager City Development to independently manage all Planning Appeal functions subject to the requirement that, in the case of a Planning Appeal relating to a decision of the Burwood Local Planning Panel that is contrary to an assessment report, the General Manager, Direct City Strategy or Manager City Development will consult with the Chairperson of the Burwood Local Planning Panel that made the relevant decision, as to the conduct of the Planning Appeal within fourteen (14) days of Council being served with the appeal.

### **Attachments**

1. [Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents](#)

**LOCAL PLANNING PANELS DIRECTION – DEVELOPMENT APPLICATIONS AND APPLICATIONS TO MODIFY DEVELOPMENT CONSENTS**

I, the Minister for Planning and Public Spaces, give the following direction under section 9.1 of the *Environmental Planning and Assessment Act 1979*.

  
The Hon. Paul Scully MP  
Minister for Planning and Public Spaces

Dated: 6/3/24

**Objective**

The objective of this direction is to identify the development applications and applications to modify development consents that are to be determined by local planning panels on behalf of councils.

**Application**

This direction applies to councils in the Greater Sydney Region, Wollongong and Central Coast. It also applies to any other council that constitutes a local planning panel under the *Environmental Planning and Assessment Act 1979* (the Act).

**Interpretation**

A word or expression used in this direction has the same meaning as it has in the standard local environmental plan prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* made under the Act, unless it is otherwise defined in this direction.

**Direction**

1. Local planning panels of councils in the areas identified in the Table below are to determine development applications for development of a kind specified in the corresponding Schedule to this direction.

Table -

Council	Development
Bayside, Blue Mountains, Burwood, Camden, Campbelltown, Canada Bay, Georges River, Hawkesbury, Hornsby, Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Randwick, Ryde, Strathfield, Waverley, Willoughby, Wollondilly, Woollahra, and any other council that constitutes a local planning panel under the Act	Schedule 1
Blacktown, Canterbury-Bankstown, Central Coast, Cumberland, Fairfield, Inner West, Liverpool, Northern Beaches, Parramatta, Penrith, Sutherland, The Hills, Wollongong	Schedule 2
City of Sydney	Schedule 3

2. Local planning panels are to determine applications under section 4.55(2) of the Act for the modification of development consents granted by the panel that:
  - propose amendments to a condition of development consent recommended in the council assessment report but which was amended by the panel, or
  - propose amendments to a condition of development consent that was not included in the council assessment report but which was added by the panel, or
  - meet the criteria for development applications set out in the Schedules to this direction relating to conflict of interest, contentious development or departure from development standards.

Note: Councils in the areas identified in the Table to this direction are generally precluded from exercising consent authority functions by operation of section 4.8(2) of the Act. This means councils should make arrangements for the determination of all other modification applications under section 4.55(2), as well as sections 4.55(1) and (1A) of the Act, by council staff. Councils should also make arrangements for the determination of modification applications under section 4.56 of the Act by either the local planning panel or council staff.

This direction takes effect on the date of this direction and applies to development applications and applications to modify development consents lodged but not determined before the date of this direction.

## SCHEDULE 1

### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item, or
- (d) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

## 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case – is the subject of 10 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number and nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

## 3. Departure from development standards

Development that contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

## 4. Sensitive development

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment development) applies.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.

## SCHEDULE 2

### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes which requires:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item, or
- (d) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

### 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case - is the subject of 10 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number or nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

### 3. Departure from development standards

Development that contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

**4. Sensitive development**

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment) applies and is 4 or more storeys in height.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.



### SCHEDULE 3

#### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes which requires:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item,
- (d) development for the purpose of end of journey facilities, or
- (e) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

#### 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case – is the subject of 25 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number or nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

#### 3. Departure from development standards

For development for the purpose of dwelling houses, dual occupancies and attached dwellings, development that contravenes a development standard imposed by an environmental planning instrument by more than 25% or non-numerical development standard.

For all other development, development that contravenes a development standard

imposed by an environmental planning instrument by 10% or non-numerical development standards.

**4. Sensitive development**

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment) applies and is 4 or more storeys in height.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.

## (Item GB2/24) Delegation of Functions to Burwood Local Planning Panel from General Manager

File No: 24/12422

Report by Manager City Development

### Report

Since the introduction of Local Planning Panels under the Environmental Planning and Assessment Act 1979 ('EPA Act') in 2018, the NSW Minister for Planning has issued a number of directions pursuant to section 9.1 of the Environmental Planning and Assessment Act 1979 (**the EPA Act**).

Relevant to this report is the *Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents* dated 6 May 2024 (**the Direction**).

The Direction identifies **at a minimum** the type of development applications and modification applications that must be considered by the Burwood Local Planning Panel (BLPP). A copy of the Direction is annexed at "**Attachment 1**".

All other development applications, modifications to consent and review of determination applications under the Part 4 of the Environmental Planning and Assessment Act 1979 are determined by the NSW Sydney District Planning Panel, the NSW Independent Planning Commission or under Council staff delegations.

At Burwood Council, the determination applications under the Part 4 of the Environmental Planning and Assessment Act 1979 are delegated to the General Manager via section 377 of the Local Government Act 1993. A copy of the Direction is annexed at "**Attachment 2**".

A sub-delegation of functions such as the determination of applications under Part 4 of the Environmental Planning and Assessment Act 1979 are permitted to be provided from the General Managers under s378 of the *Local Government Act 1993* "...to any person or **body** (including another employee of the council)."

The Burwood Local Planning Panel, is considered a '**body**' under the s378 of the *Local Government Act 1993* provision.

Accordingly, following an initial review of Council's delegations, it is considered that in some circumstances, additional matters to those detailed under the 9.1 Ministerial Direction would be in the public interest to be considered in a public forum, by an independent body and determined by the Burwood Local Planning Panel instead of under staff delegation.

As such, pursuant to s378 of the *Local Government Act 1993*, the General Manager of Burwood Council has issued two new separate delegations:

Firstly, that either the Director City Strategy or Manager City Development of Burwood Council are delegated to:

- 1) *Exercise the power under section 4.16 of the Environmental Planning and Assessment Act 1979 to determine development applications for development consent subject to the following limitations:*
  - a) *the delegate is satisfied that the concerns of any objectors identified in written objections received by Council have been considered by the assessment officer in the assessment report; and*
  - b) *the development is not one which has been specified by the Minister by direction or circular as requiring determination by the Burwood Local Planning Panel.*
  - c) *the development is not one which has been specified by the Minister by direction or circular, legislation or any other Environmental Planning Instrument as requiring determination by a NSW Sydney District Planning Panel or the NSW Independent Planning Commission.*
- 2) **Authority to refer any other Application made under Part 4 of the Environmental Planning and Assessment Act 1979 (including Development Applications, Modification to Development Consent Applications, Review of Determination Applications) or Division 6.7 of the Environmental Planning and Assessment Act 1979 (Building Information Certificate Applications) for determination which would ordinarily be delegated for determination to a**

***Council Officer which in the opinion of either the Burwood Council's Director City Strategy or Manager City Development considers it to be in the public interest to have considered and determined by the Burwood Local Planning Panel.***

A copy of this delegation is annexed at "**Attachment 3**".

Secondly, in the event the delegation under Part 2 above is exercised by either the Director City Strategy or Manager City Development of Burwood Council, the Burwood Local Planning Panel are delegated to:

- 1) Determination of any other Application made under Part 4 of the Environmental Planning and Assessment Act 1979 (including Development Applications, Modification to Development Consent Applications, Review of Determination Applications) or Division 6.7 of the Environmental Planning and Assessment Act 1979 (Building Information Certificate Applications) which would ordinarily be delegated for determination to a Council Officer which in the opinion of either the Burwood Council's Director City Strategy or Manager City Development considers it to be in the public interest to have considered and determined by the Burwood Local Planning Panel.***

A copy of this delegation is annexed at "**Attachment 4**".

## **Financial Implications**

Additional applications considered by the BLPP are covered in existing budgets and financial agreements with Panel Members.

## **Conclusion**

Under the EPA Act, the *Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents* dated 6 May 2024 s9.1 Ministerial Direction identifies **the minimum** the types of development applications and modification applications that must be considered by Council's Local Planning Panel (LPP).

In this instance Burwood Council has identified that from time to time that in some circumstances, additional matters to those detailed under the 9.1 Ministerial Direction would be in the public interest to be considered in a public forum, by an independent body and determined by the Burwood Local Planning Panel instead of under staff delegation.

Accordingly, Council's General Manager has provided appropriate delegations under s378 of the Local Government Act 1993 firstly for the Director City Strategy or Manager City Development to refer additional matters to the BLPP for consideration and determination and secondly for the BLPP to have the delegated authority to determine those additional applications referred.

## **Recommendation(s)**

That the Burwood Local Planning Panel receive and note that pursuant to s378 of the Local Government Act 1993 the delegations provided by the General Manager of Burwood Council under Attachments 3 and 4 of this report, which provide that:

- 1) The Director City Strategy or Manager City Development have the authority to refer applications to the BLPP where in their opinion it is in the public interest to do so which is in addition to those specified under the s9.1 Ministerial Direction *Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents* dated 6 May 2024 (as amended); and
- 2) The Burwood Local Planning Panel to have the delegated authority to determine any additional applications referred to it from the Director City Strategy or Manager City Development.

## **Attachments**

- 1 [↓](#) Local Planning Panels Direction - Development Applications and Applications to Modify Development Consents
- 2 [↓](#) Delegations from Council to the General Manager adopted by Council 18.10.2022
- 3 [↓](#) General Manager Delegation - Determination of any application referred to BLPP for Determination by Director or Manager 7.12.2023

4. [General Manager Delegation - Determination of Development Applications and ability to refer application to BLPP for determination 7.12.2023](#)

**LOCAL PLANNING PANELS DIRECTION – DEVELOPMENT APPLICATIONS AND APPLICATIONS TO MODIFY DEVELOPMENT CONSENTS**

I, the Minister for Planning and Public Spaces, give the following direction under section 9.1 of the *Environmental Planning and Assessment Act 1979*.



The Hon. Paul Scully MP  
Minister for Planning and Public Spaces

Dated: 6/3/24

**Objective**

The objective of this direction is to identify the development applications and applications to modify development consents that are to be determined by local planning panels on behalf of councils.

**Application**

This direction applies to councils in the Greater Sydney Region, Wollongong and Central Coast. It also applies to any other council that constitutes a local planning panel under the *Environmental Planning and Assessment Act 1979* (the Act).

**Interpretation**

A word or expression used in this direction has the same meaning as it has in the standard local environmental plan prescribed by the *Standard Instrument (Local Environmental Plans) Order 2006* made under the Act, unless it is otherwise defined in this direction.

**Direction**

1. Local planning panels of councils in the areas identified in the Table below are to determine development applications for development of a kind specified in the corresponding Schedule to this direction.

Table -

Council	Development
Bayside, Blue Mountains, Burwood, Camden, Campbelltown, Canada Bay, Georges River, Hawkesbury, Hornsby, Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Randwick, Ryde, Strathfield, Waverley, Willoughby, Wollondilly, Woollahra, and any other council that constitutes a local planning panel under the Act	Schedule 1
Blacktown, Canterbury-Bankstown, Central Coast, Cumberland, Fairfield, Inner West, Liverpool, Northern Beaches, Parramatta, Penrith, Sutherland, The Hills, Wollongong	Schedule 2
City of Sydney	Schedule 3

2. Local planning panels are to determine applications under section 4.55(2) of the Act for the modification of development consents granted by the panel that:
  - propose amendments to a condition of development consent recommended in the council assessment report but which was amended by the panel, or
  - propose amendments to a condition of development consent that was not included in the council assessment report but which was added by the panel, or
  - meet the criteria for development applications set out in the Schedules to this direction relating to conflict of interest, contentious development or departure from development standards.

Note: Councils in the areas identified in the Table to this direction are generally precluded from exercising consent authority functions by operation of section 4.8(2) of the Act. This means councils should make arrangements for the determination of all other modification applications under section 4.55(2), as well as sections 4.55(1) and (1A) of the Act, by council staff. Councils should also make arrangements for the determination of modification applications under section 4.56 of the Act by either the local planning panel or council staff.

This direction takes effect on the date of this direction and applies to development applications and applications to modify development consents lodged but not determined before the date of this direction.

## SCHEDULE 1

### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item, or
- (d) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

## 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case – is the subject of 10 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number and nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

## 3. Departure from development standards

Development that contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

## 4. Sensitive development

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment development) applies.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.



## SCHEDULE 2

### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes which requires:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item, or
- (d) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

### 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case - is the subject of 10 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number or nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

### 3. Departure from development standards

Development that contravenes a development standard imposed by an environmental planning instrument by more than 10% or non-numerical development standards.

**4. Sensitive development**

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment) applies and is 4 or more storeys in height.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.

### SCHEDULE 3

#### 1. Conflict of interest

Development for which the applicant or land owner is:

- (a) the council,
- (b) a councillor,
- (c) a member of council staff who is principally involved in the exercise of council's functions under the *Environmental Planning and Assessment Act 1979*,
- (d) a member of Parliament (either the Parliament of New South Wales or Parliament of the Commonwealth), or
- (e) a relative (within the meaning of the *Local Government Act 1993*) of a person referred to in (b) to (d).

but not development for the following purposes which requires:

- (a) internal alterations and additions to any building that is not a heritage item,
- (b) advertising signage,
- (c) maintenance and restoration of a heritage item,
- (d) development for the purpose of end of journey facilities, or
- (e) minor building structures projecting from the building facade over public land (such as awnings, verandas, bay windows, flagpoles, pipes and services, and sun shading devices).

#### 2. Contentious development

Development that:

- (a) in the case of a council having an approved submissions policy - is the subject of the number of submissions set by that policy, or
- (b) in any other case – is the subject of 25 or more unique submissions by way of objection.

An **approved submissions policy** is a policy prepared by the council and approved by the Secretary of the Department of Planning, Housing and Infrastructure which details the circumstances in which a local planning panel or council staff should exercise the consent authority functions of the council, based on the number or nature of submissions received about development.

A **unique submission** means a submission which is in substance unique, distinctive or unlike any other submission. It does not mean a petition or any submission that contains the same or substantially the same text. Separate unique submissions may be made in relation to the same issue. One individual, or one household, could potentially submit multiple unique submissions.

#### 3. Departure from development standards

For development for the purpose of dwelling houses, dual occupancies and attached dwellings, development that contravenes a development standard imposed by an environmental planning instrument by more than 25% or non-numerical development standard.

For all other development, development that contravenes a development standard

imposed by an environmental planning instrument by 10% or non-numerical development standards.

**4. Sensitive development**

- (a) Designated development.
- (b) Development to which *State Environmental Planning Policy (Housing) 2021*, Chapter 4 (Design of residential apartment) applies and is 4 or more storeys in height.
- (c) Development involving the demolition of a heritage item.
- (d) Development for the purposes of new licensed premises, that will require one of the following liquor licences:
  - (i) a club licence under the *Registered Clubs Act 1976*,
  - (ii) a hotel (general bar) licence under the *Liquor Act 2007*, or
  - (iii) an on-premises licence for public entertainment venues under the *Liquor Act 2007*.
- (e) Development for the purpose of sex services premises and restricted premises.
- (f) Development applications for which the developer has offered to enter into a planning agreement.



## DELEGATIONS FROM COUNCIL TO THE GENERAL MANAGER

---

2 Conder Street, BURWOOD NSW 2134  
PO Box 240, BURWOOD NSW 1805  
Phone: 9911-9911 - Fax: 9911-9900  
Email: [Council@burwood.nsw.gov.au](mailto:Council@burwood.nsw.gov.au)  
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Public Document  
Adopted by Council: 18 October 2022 (Min. no. 140/22)  
Content Manager No.: 19/44296[v2]  
Version No.: 7  
Ownership: Governance & Risk

## Purpose

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To delegate functions to the General Manager in accordance with section 377 of the *Local Government Act 1993* to facilitate the exercise of Burwood Council functions.

This instrument of delegation specifies the limits of authority, responsibility and accountability for decisions made under delegation.

## Delegations

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Council delegates to the General Manager (or to the person who acts in that position):

- a) all of the functions, powers, duties and authorities of Council that it may lawfully delegate under the *Local Government Act 1993* or any other Act, regulation, instrument, rule or the like
- b) any functions, powers, duties and authorities delegated to the Council by any authority, body, person or the like

other than the exceptions outlined in this instrument of delegation.

## Exceptions

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### Expenditure

#### Prescribed Organisations

The General Manager cannot expend more than \$1,000,000 via a prescribed organisation i.e.: Local Government Procurement (LGP) and Procurement Australia (PA).

The General Manager has the discretion to refer any expenditure to Council for determination.

#### Council Resolved Projects

Where Council has approved the project, either through a Council resolution or the Operational and Capital Works Program, the General Manager cannot expend more than the resolved dollar value.

### Other Matters

#### Writing Off Accounts

The General Manager does not have the delegation to approve the writing off of accounts greater than \$10,000. Write offs are reported to Council on an annual basis.

#### Writing Off Stores and Materials

The General Manager does not have the delegation to approve the writing off of stores and materials greater than \$10,000.

### Item Number GB2/24 - Attachment 3

## General Manager Delegation - Determination of any application referred to RI PP for D



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Inc. 1874

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### GENERAL MANAGER'S INSTRUMENT OF DELEGATION

With immediate effect and pursuant to s378 of the *Local Government Act 1993*, I, Tommaso Briscese, General Manager of Burwood Council, delegate the following functions to the persons identified in the Schedule 1 of this instrument of delegation (**'Instrument'**):

- 1) Determination of any Application made under Part 4 of the *Environmental Planning and Assessment Act 1979* (including Development Applications, Modification to Development Consent Applications, Review of Determination Applications) or Division 6.7 of the *Environmental Planning and Assessment Act 1979* (Building Information Certificate Applications) which would ordinarily be delegated for determination to a Council Officer which in the opinion of either the Burwood Council's Director City Strategy or Manager City Development considers it to be in the public interest to have considered and determined by the Burwood Local Planning Panel.

The exercise of any function pursuant to this Instrument is subject to the conditions and limitations set out in Schedule 2 of this Instrument.

Tommaso Briscese  
General Manager

Dated: 7/12/2023

#### Schedule 1

For the purposes of this Instrument, a delegate includes each person or body holding the position within or on behalf Burwood Council set out below, together with any person appointed to act in that position:

1. 'Burwood Local Planning Panel' as appointed under Division 2.5 of the *Environmental Planning and Assessment Act 1979*.

#### Schedule 2

##### Conditions and Limitations Applying to Delegated Functions

The conditions and limitations set out in the General Manager's delegation apply, with the following further condition(s):

- 1 Nil.

## Item Number GB2/24 - Attachment 4

### General Manager Delegation - Determination of Development Applications and ability to refer



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#### GENERAL MANAGER'S INSTRUMENT OF DELEGATION

With immediate effect and pursuant to s378 of the *Local Government Act 1993*, I, Tommaso Briscese, General Manager of Burwood Council, delegate the following functions to the persons identified in the Schedule 1 of this instrument of delegation ('Instrument'):

- 1) Exercise the power under section 4.16 of the *Environmental Planning and Assessment Act 1979* to determine development applications for development consent subject to the following limitations:
  - a) the delegate is satisfied that the concerns of any objectors identified in written objections received by Council have been considered by the assessment officer in the assessment report; and
  - b) the development is not one which has been specified by the Minister by direction or circular as requiring determination by the Burwood Local Planning Panel.
  - c) the development is not one which has been specified by the Minister by direction or circular, legislation or any other *Environmental Planning Instrument* as requiring determination by a NSW Sydney District Planning Panel or the NSW Independent Planning Commission.
- 2) Authority to refer any other Application made under Part 4 of the *Environmental Planning and Assessment Act 1979* (including Development Applications, Modification to Development Consent Applications, Review of Determination Applications) or Division 6.7 of the *Environmental Planning and Assessment Act 1979* (Building Information Certificate Applications) for determination which would ordinarily be delegated for determination to a Council Officer which in the opinion of either the Burwood Council's Director City Strategy or Manager City Development considers it to be in the public interest to have considered and determined by the Burwood Local Planning Panel.

The exercise of any function pursuant to this Instrument is subject to the conditions and limitations set out in Schedule 2 of this Instrument.

Tommaso Briscese  
General Manager

Dated: 7/12/2023

#### Schedule 1

For the purposes of this Instrument, a delegate includes each person or body holding the position within or on behalf Burwood Council set out below, together with any person appointed to act in that position:

1. *Director City Strategy - City Strategy Directorate. Burwood Council*
2. *Manager City Development - City Strategy Directorate. Burwood Council*

#### Schedule 2

##### Conditions and Limitations Applying to Delegated Functions

The conditions and limitations set out in the General Manager's delegation apply, with the following further condition(s):

- 1 Nil.



## Development Applications

### **(Item DA1/24) DA.2023.65 - 40-44 Claremont Road, Burwood Heights - Site Amalgamation, Tree Removal, Partial Demolition of Existing Building, Site Excavation and Construction of a Part 2 and Part 4 Mixed Use Building comprising retail uses and a child care centre**

File No: 24/12863

Report by Executive Planner

**Owner:** Mabella Park Pty Ltd  
**Applicant:** Mr. Michael Semaan  
**Location:** Burwood Heights  
**Zoning:** E1 Local Centre pursuant to Burwood Local Environmental Plan 2012  
**Proposal**

The application proposes the amalgamation of 3 adjoining lots, partial demolition of existing building, excavation works and construction of a part 2, part 4 storey mixed use development comprising a florist and café on the ground floor, florist workshop on the first floor and a childcare centre for 88 children across 3 floors and associated parking and landscaping.

#### **BLPP Referral Criteria**

The application is referred to the Burwood Local Planning Panel as Council received over 10 unique submissions during the notification period. Council received a total of 12 submissions. 11 submissions objected to the proposed development whilst 1 submission contained a petition (63 signatures) expressing support for the proposed childcare centre.

#### **Background**

28/07/2023 – The subject application was lodged with Council

14/11/2023- A request for additional information (RFI) letter was issued to the Applicant and identified issues of non-compliant Floor Space Ratio and Outdoor Play Areas

28/11/2023 – Responses were received from the Applicant regarding Council's RFI letter

08/02/2024 – Amended plans were submitted by the Applicant

#### **Locality**

The subject site is legally described as Lots A, B and C in DP358791 and is located at No.40-44 Claremont Road, Burwood Heights. The site is located at the intersection of Claremont Road and Arthur Street. The amalgamated site will result in an irregular shaped corner land parcel with a frontage of approximately 19.7m to Claremont Road along its western boundary and a frontage of approximately 45.45m to Arthur Street along its southern boundary with a total site area of 872.7m<sup>2</sup>.

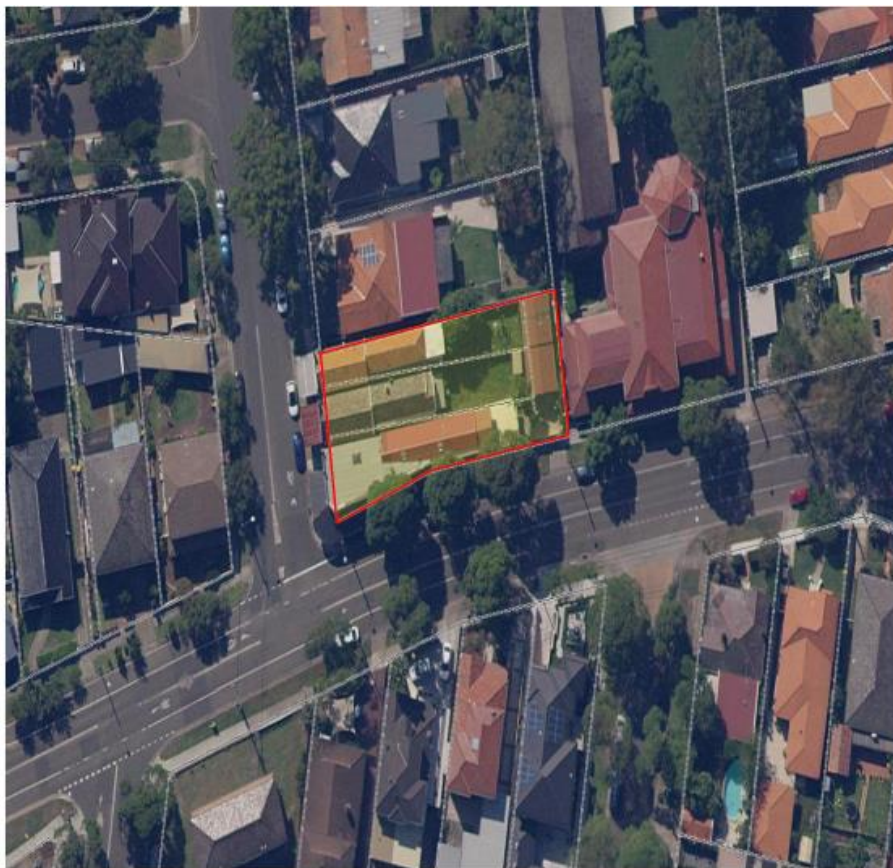
Currently, the site accommodates 3 buildings with ground level shops fronting Claremont Road with residential dwellings behind.

The development site has a cross-fall from the north-western portion of the site falling towards the south-eastern portion of the site, a fall of approximately 3.13m.

No off-street parking or vehicular connectivity is provided to 40 to 42 Claremont Road. No. 44 Claremont Road is serviced by a single informal off-street parking space, connecting to Arthur Street via combined ingress / egress driveway situated in the south-eastern corner of the site.

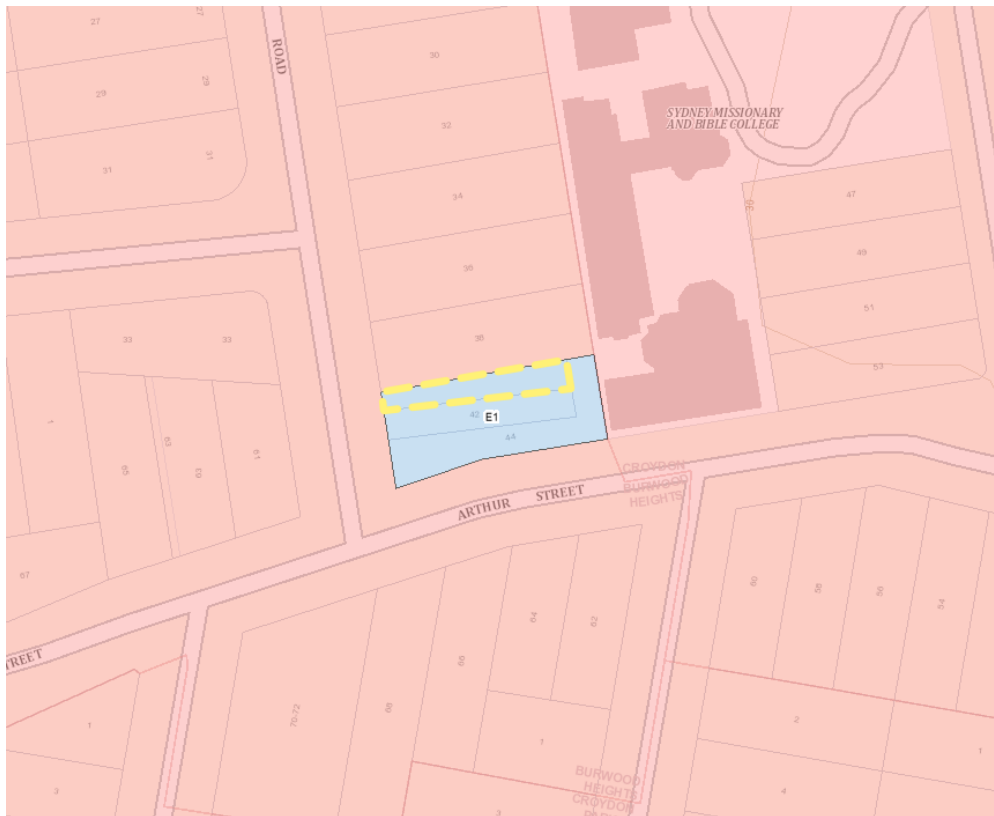
The development site bounded by low density housing to its northern, boundary and the Sydney Missionary and Bible College to its eastern boundary with Claremont Road separating the site from low density housing to the west and Arthur Street separating the site from low density housing to the south.

The Arborist Report identifies 2 trees at the rear of the site, an American Yucca (clump) *Agave americana* and a Bangalow Palm *Archontophoenix cunninghamiana*. Both of which are proposed to be removed to facilitate the basement.



 - Subject Site

**Figure 1:** Aerial image of subject site (Source: Six Maps).



**Figure 2:** Zoning Map of subject site (Source: e spatial planning viewer).



**Figure 3:** Existing Southern Façade facing Arthur Street (Source: Google Maps).



**Figure 4:** Existing Western Façade facing Claremont Road (Source: Google Maps).





**Figure 5:** Corner of subject site, at the intersection of Claremont Road and Arthur Street (Source: Google Maps).



**Figure 6:** Adjoining properties zoned R2 to the north on Claremont Road (Source: Google Maps).



**Figure 7:** Properties zoned R2 across the road on Claremont Road (Source: Google Maps).





**Figure 8:** Properties zoned R2 across the road on Arthur Street (Source: Google Maps).

## **PROPOSED DEVELOPMENT**

The proposal involves amalgamation of 3 adjoining lots located at No. 40-44 Claremont Road Burwood Heights, tree removal, partial demolition of the existing building and construction of a part 2 – part 4 storey ‘Mixed Use’ development comprising a commercial premises and a child care facility for 88 children over 2 levels of car parking. Submitted plans can be found at Attachment 1 and Attachment 2.

### **Demolition Works**

The development will retain the 3 existing façades of the retail and commercial buildings fronting Claremont Road and will demolish the remainder of the buildings.

### **Tree Removal**

The 2 trees located at the rear of the property are proposed to be removed.

### **Basement Parking**

The proposal has provided a total of 25 car parking spaces on-site within the basement level and within the lower ground floor the following breakdown:

- 3 x retail car parking spaces
- 14 x staff car parking spaces including 4 within a stacked parking
- 8 x parents car parking space including an accessible car parking space
- 4 bicycle parking spaces

### **Commercial Uses**

The submitted SoEE states that the development will retain the retail element via maintaining the use of No. 42 and 44 as a cafe and florist. Note that there is no approval for use of the site as a café as Development Application No. 2023.29 proposing a café at No. 44 Claremont Road was refused by Council.

### **Childcare Centre**

- The proposal will operate with a maximum capacity of 88 places with the following age groups:
  - 0-2 years: 12 places;
  - 2-3 years: 20 places;
  - 3-5 years: 56 places.

- The internal areas will consist of 6 separate indoor play rooms and 4 separate outdoor play areas over 4 levels
- The hours of operation will be 7:00am to 6:00pm Monday to Friday
- The facility will provide a total of 13 educators



**Figure 9:** Proposed front building elevation facing Claremont Road



**Figure 10:** Proposed rear building elevation



**Figure 11:** Proposed southern building elevation facing Arthur Street



**Figure 12:** Proposed northern building elevation facing residential properties



**Figure 13:** 3D photomontage showing rear outdoor play areas

## **SITE HISTORY**

On the 20th of March 2024, Council approved Development Application No. 2023.23 for Use of existing commercial premises for the purpose of a florist at No. 42 Claremont Road Burwood Heights. The approved hours of operation are between 9:00am and 5:00pm Monday to Sunday.

On the 25th of March 2024, Council refused Development Application No. 2023.29 for use of existing commercial premises for the purpose of a food and drink premises (café) at No. 44 Claremont Road Burwood Heights.



On the 2<sup>nd</sup> of April 2024, Council issued a Deferred Commencement for Development Application No. 2023.24 for use of existing commercial premises for the purpose of a beauty salon at No. 40 Claremont Road Burwood Heights.

The subject application seeks to continue the café and florist use on the ground floor shops. The submitted SoEE states that there will be no change to the operation of the café and florist shop in terms of its hours of operation and staff numbers. Given that the café was refused under Development Application No. 2023.29, there is no consent that allows the use of the ground floor shop as a café.

Furthermore, the application proposes a florist workshop on the first floor. There are no floor plans or written details relating to the activities undertaken within the workshop to enable a complete assessment of the proposal.

### **STATUTORY PLANNING FRAMEWORK**

The application is assessed under the provisions of Section 4.15 of the Environmental Planning and Assessment Act 1979, as amended, which include:

- SEPP (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- Education and Care Services National Regulations
- Burwood Local Environmental Plan (LEP) 2012
- Burwood Development Control Plan (DCP) 2013
- The likely social, environmental and economic impacts of the development
- The suitability of the site for the development
- The Public Interest
- Submissions made under the Act and Regulations

These matters are considered in this report.

#### **SEPP (Biodiversity and Conservation) 2021**

The proposal involves the removal of two trees as per the submitted Arborist Report. Landscape Plans have been submitted to Council as part of the DA. Council's Tree Management Officer has raised no objections to the proposal.

#### **State Environmental Planning Policy (Resilience and Hazards) 2021**

A Preliminary Site Investigation was submitted in support of the application. The investigation found that there is asbestos on site and recommended that a Detailed Site Investigation be undertaken to ascertain the extent of asbestos contamination. Following the Detailed Site Investigation, further works including remedial works will be required and is to be determined by the Detailed Site Investigation.

The applicant has not submitted a Detailed Site Investigation or Remedial Action Plan to demonstrate how the site can be appropriately remediated and made suitable for the proposed use.

#### **Burwood Local Environmental Plan (LEP) 2012**

The following is a summary of the relevant clauses under Burwood LEP 2012 applicable to the development.



Burwood LEP 2012	Proposal	Compliance
<b>Zoning</b>		
<b>Zone E1 Local Centre</b>	The development proposes to use the site for the purpose of a Centre-based child care facility and commercial premises.	Both uses are permitted in the E1 zone, subject to development consent.
<b>4.3(2) Height</b>		
<b>10m</b>	10.8m, (Clause 4.6 Written Request submitted)	Variation supported by Council as discussed below
<b>4.4(2) FSR</b>		
<b>1:1</b>	1.49:1, (Clause 4.6 Written Request submitted)	Variation not supported by Council as discussed below
<b>5.10 Heritage Conservation</b>		
<p>(1) Objectives The objectives of this clause are as follows—</p> <p>(a) to conserve the environmental heritage of Burwood,</p> <p>(b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,</p> <p>(c) to conserve archaeological sites,</p> <p>(d) to conserve Aboriginal objects and Aboriginal places of heritage significance.</p>	<p>The subject site is located within a Heritage Conservation Area and the proposal involves demolition of the building with the exception of the front facades which are to be retained. Concern was raised for the ability of the facades to withstand the impact of the demolition and excavation works.</p> <p>The amended application was referred to Council's Heritage Advisor for assessment. No issues were raised in relation to the design and appearance of the building.</p> <p>With regards to the protection and maintenance of the building, particularly during demolition, excavation and construction, the applicant's Heritage Consultant (Graham Hall and Partners) recommended methodologies to retain and protect the building facade. The method involves the footings of the street-facing walls to be underpinned and the provision of a temporary steel framework from inside the boundary.</p>	Yes

Burwood LEP 2012	Proposal	Compliance
<b>Zoning</b>		
<b>Zone E1 Local Centre</b>	The development proposes to use the site for the purpose of a Centre-based child care facility and commercial premises.	Both uses are permitted in the E1 zone, subject to development consent.

**Non-compliance with Clause 4.3 – Height of Buildings and Clause 4.6 Exception to Development Standards**

Clause 4.3(2) of BLEP 2012 prescribes the maximum building height for the site and refers to the Height of Buildings Map. The relevant map identifies the subject site as having a maximum permitted height of 10 metres. However, the proposed development has been calculated to have a maximum building height of 10.8 metres due to the lift overrun and fire stairs. This exceeds the 10 metres height of buildings development standard by 0.8 metres, which is equivalent to a variation of 8%. The extent of the non-compliance is shown in **Figure 15** below:



**Figure 15** – Extract of applicant's 3D photomontages showing the extent of the lift overrun and fire stairs above the 10m height limit

Clause 4.6 of the BLEP 2012 provides authority and procedures for consent authorities to consider, and where appropriate grant consent to, development even though the development would contravene a particular development standard. The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards, and to provide better outcomes for and from development by allowing flexibility. The provisions of Clause 4.6 may be applied to the maximum building height development standard of BLEP 2012 pursuant to Clause 4.6(6) and (8).

In accordance with Clause 4.6(3), for Council to consent to an exception to a development standard it must have considered a written request from the applicant that seeks to demonstrate that:

- 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."*

#### Request to vary Maximum Height of Buildings Development Standard

The applicant has submitted a written variation request under Clause 4.6 (refer to Attachment 3 of this report). The submitted request presents an adequate justification that has regard to the objectives of the height limit standard in BLEP 2012, and the objectives of the E1 zone. The 4.6 written request also addresses relevant case law concerning variations to development standards, whether the non-compliance is reasonable or necessary in the circumstances of the case, the planning grounds to justify the contravention, and the public interest. The applicant provided the following justification:

- *The building itself does not exceed the prescribed maximum building height provision, rather limited to the lift overrun – which is recessed and as such not highly visible from the street level. As such it can be concluded that the proposal is consistent with the objective to establish a maximum building height across the site mapped as being 10m and the point encroachment are not the result of an intentional attempt to break the maximum height of building to achieve a form or yield beyond that which is intended in the planning controls rather a bi-product of servicing the development with a lift and fire egress stairs.*
- *The variation as stated previous is partly a response to the cross-fall of the site. Particularly it is necessary to have a suitable balance between achieving appropriate amenity for ground floor commercial premises (avoiding excessive cut) and level floor plates for accessibility, whilst ensuring that the building levels are aligned to the levels of the public road infrastructure being provided across the site. The means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall and level changes, as in the case with the current proposal.*
- *The development is consistent with the intent of the maximum height control, noting that the minor encroachment associated with the lift overrun will not result in setting any negative height precedent within the immediate locality and the building itself is compliant other than those elements meaning the intended and desired height limit is maintained other than for the point encroachments.*
- *With the departure to the height provision limited to a small portion of the lift overrun, the encroachment will not be visible from the street level and as such will not impact on the streetscape presentation or to the heritage conservation area.*

The request has been reviewed and it is considered that the height breach is acceptable in this circumstance. The components of the building that breach the maximum BLEP 2012 height standard do not create any additional overshadowing impacts, are not noticeable from the neighbouring properties or the public domain and is therefore negligible.

#### Non-compliance with Clause 4.4 –Floor Space Ratio (FSR) and Clause 4.6 Exception to Development Standards

Clause 4.4(2) of BLEP 2012 prescribes the maximum FSR for the site and refers to the Floor Space Ratio Map. The relevant map identifies the subject site as having a maximum permitted FSR of 1:1. However, the proposed development has been calculated to have a maximum FSR of 1.49:1. This exceeds the 1:1 FSR development standard by 427.62m<sup>2</sup>, which is equivalent to a variation of 49%. The non-compliance arises from the inclusion of the outdoor play areas as gross floor area in the FSR calculation. The outdoor play areas on the ground, first and second floors are provided with acoustic barriers that are over 1.4m in height and are located around the perimeter of the play areas.



**Figure 14** – Extract of applicant's 3D photomontages showing the outdoor play areas at the rear of the site

The Burwood LEP 2012 defines gross floor areas as:

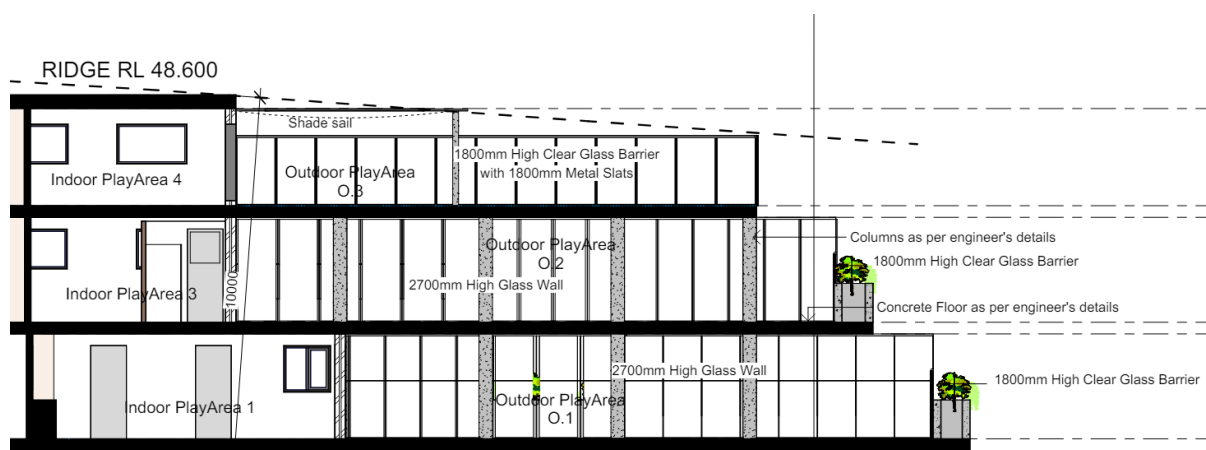
**gross floor area** means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

(i) terraces and balconies with outer walls less than 1.4 metres high

The outdoor play areas on the ground and first floor levels are provided with a 1m high solid balustrade which would not ordinarily result in the enclosed areas being constituted as floor area, as per the BLEP 2012 definition. Notwithstanding, the applicant proposes to install a 1.8m high glass acoustic barriers behind the balustrades to protect children from falling and mitigate noise emission.

The outdoor play areas on the second floor are enclosed by a 1.8m high clear glass barrier with metal slats.

This structural arrangement is shown in the figure below:



Council's assessment of the proposal concludes that the outdoor play areas enclosed by the acoustic barriers with a height of over 1.4m constitutes as floor area and is therefore required to be included in the FSR calculation. The original application did not include these areas as floor area. The applicant was advised of Council's concerns during the assessment of the application and has submitted a written request to vary the BLEP 2012 FSR development standard.

Clause 4.6 of the BLEP 2012 provides authority and procedures for consent authorities to consider, and where appropriate grant consent to, development even though the development would contravene a particular development standard. The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards, and to provide better outcomes for and from development by allowing flexibility. The provisions of Clause 4.6 may be applied to the maximum FSR development standard of BLEP 2012 pursuant to Clause 4.6(6) and (8).

In accordance with Clause 4.6(3), for Council to consent to an exception to a development standard it must have considered a written request from the applicant that seeks to demonstrate that:

- 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."*

#### Request to vary Floor Space Ratio Development Standard

The applicant has submitted a written variation request under Clause 4.6 (refer to Attachment 4 of this report). The submitted request has been reviewed and it is considered that the non-compliance is excessive and the variation is unreasonable and unnecessary in the circumstances of the case.

#### **Clause 4.6(3)(a) Strict Compliance is Unreasonable or Unnecessary**

The applicant provided the following justification in their written request:

- *The extent of 'enclosed' FSR arising from the internal areas of the building is less than the permissible FSR- being 0.78:1 as compared to the 1:1. The noncompliance arises from the inclusion of GFA to the play areas on balconies owing the height of the acoustic barrier- that are set back behind a balustrade and planter at the lower levels and then stepped in to the top most floor given the greater setback.*
- *The development density and intensity as proposed exhibits an appropriate urban form given:*
  - a. *Compliant setbacks*
  - b. *Compliant height (other than for point encroachments to the lift and stairs);*
  - c. *Suitable design response to the heritage items on the site noting retention of façade on the primary frontage/corner location;*
  - d. *The uses and density proposed, notwithstanding the breach, provide an appropriate urban form for the site particularly given the heritage context and the relationships to adjoining properties which has been achieved through considered setbacks and the spatial configuration of the built form noting the elements of the breach are relatively 'open' elements being the balconies which are situated in proximity to the transition point to lower density forms to the east.*
- *The perceived bulk of the development is primarily from the area of the built*
- *Whilst the FSR is non-compliant the extent of development proposed is consistent with the contemplated built form and massing when considering the GFA when excluding the barriers is below the 1:1. If the acoustic barriers were lowered to 1.39m (reduced by 401mm to the majority of the barriers) then no GFA or FSR issue arises and there is no*

*discernible difference in the way in which the proposal is perceived in terms of 'bulk' given the barriers are set in behind a planter at the more prominent lower levels.*

- *The barriers are necessary for visual and acoustic privacy and safety to the children.*
- *Therefore a 'compliant' FSR would be perceived in a similar way to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking.*
- *Therefore the bulk of the development is entirely in line with what is contemplated for the site and the area of non-compliance has no meaningful impact on the bulk of the development.*
- *The extent of development across the sites is appropriate, notwithstanding the numerical departure. This is because the development is compliant with the maximum permitted GFA in the areas that are internal in nature and the area of the breach is derived through the inclusion outdoor play areas with acoustic barriers around the perimeter that are greater than 1.4m and therefore must be excluded.*
- *Therefore a 'compliant' FSR enables a comparable level of development to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking.*
- *The intensity of the use arising from the proposed GFA must also be considered in relation to this objective and in that regard the traffic impacts are considered to be acceptable as set out in the report by Stanbury Traffic Planning. In addition, the amenity impacts of noise and other privacy impacts are avoided due to the use of the acoustic barriers as proposed- i.e. they provide a benefit to the scheme.*

The assessment of the application revealed that the development as a whole, with or without the acoustic structures presents as an overdevelopment of the site and comprises a bulk and scale that it is incompatible with the surrounding low density residential environment.

The proposed part 2 – part 4 storey is not considered to be in character with the surrounding area and creates an adverse visual impact upon the immediately adjoining properties and from the public domain due to the bulk of the building. There are no buildings within the immediate vicinity of the site that comprises 4 storeys.

The surrounding area is characterised by single and double storey buildings and therefore the scale of the proposed building is essentially double in size. Furthermore, the large expanse of glass along the side and rear facades is not considered to be an appropriate presentation to the street and the adjoining neighbours. In addition, the development being built to the south boundary on the ground floor and to a large extent on the first and second floor results in a dominant built form. In this regard, it is not considered that the variation is reasonable in this circumstance.

#### **Clause 4.6(3)(b) Sufficient Environmental Planning Grounds**

The applicant provided the following justification in their written request:

- *When including the outdoor play areas that are in a balcony configuration the FSR is non-compliant but the extent of development proposed is consistent with the contemplated built form and massing when considering the GFA when excluding the barriers is below the 1:1- being 0.78:1. If the acoustic barriers were lowered to 1.39m (reduced by 401mm to the majority) then no GFA/FSR issue arises and there is no discernible difference in the way in which the proposal is perceived given the barriers are set in behind a planter.*
- *Therefore a 'compliant' FSR would be perceived in a similar way to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking from educators using this area. There would also be potential safety risks to the children noting the need for a 1.8m barrier under the NCC.*
- *The breach to the FSR standard arises to protect acoustic amenity of adjoining properties in accordance with the acoustic report- as well as visual amenity through mitigating cross-*

*viewing given the design of the barrier also serves as a privacy screen given the design incorporates the planter and at the upper level the batten treatment.*

- *The visual presentation of the barrier to neighbours is also mitigated by the landscape planting proposed in front of it on the sensitive edge to the east. This is reflected on the figure below and therefore the barrier treatment improves visual and acoustic privacy outcomes but generates a technical noncompliance with FSR owing to its height.*
- *The acoustic attenuation and visual privacy mitigation afforded by the height of the acoustic barriers demonstrates suitable environmental planning grounds to vary the development standard- because absent the increased height the acoustic and visual privacy impacts are not adequately addressed.*
- *The safety to the children is also a factor for a development of this type with a 1.8m non climbable barrier mitigating fall risk.*
- *The proposal provides for the retention of the heritage façade and its restoration, which is predicated on a suitable development intensity being achieved noting the substantive expense of remedial works to the heritage façade. Therefore, the quantum of development, including the technical breach to the FSR, will facilitate the remedial works to retain/restore the heritage façade that can only be achieved at a development of the scale that is proposed. Whilst the proposal does not rely on Clause 5.10 the same principles are relevant in that the redevelopment facilitates the remedial façade works and restoration of heritage items.*
- *There is demand for child care in the Burwood LGA and the provision of a child care centre co-located with other commercial uses is desirable noting that the child care centre necessitates outdoor play areas and the heights of the barriers to the outdoor play areas generate the breach but mitigate acoustic privacy impacts, visual privacy impacts, and also enable safety for the children using those spaces.*
- *This design approach and breach of the FSR associated within the outdoor play areas enables a suitable design outcome on the site and is consistent with the following Objects of the Environmental Planning and Assessment Act 1979 as has been established under the prior discussion of environmental planning grounds:*
  - (c) to promote the orderly and economic use and development of land,*
  - (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
  - (g) to promote good design and amenity of the built environment,*
  - (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- *The departure to the FSR standard also does not generate any adverse amenity impacts to adjoining properties with regard to visual privacy or overshadowing given the lot orientation and careful design of the development.*

It is acknowledged that the acoustic barriers are required to be provided to effectively attenuate noise emission and mitigate fall risk. Notwithstanding, the barriers are physical structures that act as an outer wall and given that they are over 1.4m in height, the floor area that they enclose constitutes as floor area. The play areas that the barriers enclose are considered to be excessive in area and spans across three floors.

The bulk and scale of the proposed building is not ordinarily expected for a site that adjoins a low density residential environment. As mentioned previously, the development as a whole, with or without the acoustic structures presents what is considered to be an overdevelopment of the site and therefore the site is not suitable for the proposal.

Assessment of the application revealed that the scale of the development results in visual amenity issues, inappropriate presentation to the public domain due to bulk and large expanses of glass on the facades and lack of deep soil zones and landscaping to soften the development and provide a natural play setting for children. On this basis, it is considered that there are insufficient environmental planning grounds to support the variation.

With regard to the above, the requirements of Clause 4.6(3) have not been satisfied, and the variation is not supported.

### **State Environmental Planning Policy (Transport and Infrastructure) 2021: Part 3.3 – Early Education and Care Facilities – Specific Development Controls**

The subject Development Application has been assessed against the relevant clauses of the State Environmental Planning Policy (Transport and Infrastructure) 2021 and a number of issues were identified.

<b>Control</b>	<b>Prescribed</b>	<b>Comment</b>	<b>Compliance</b>
<b>Clause 3.22 – Centre-based child care facility – concurrence of Regulatory Authority required for certain development</b>	(1)(a) This section applies to development for the purpose of a centre-based child care facility if the floor area of the building or place does not comply with Regulation 107 (indoor unencumbered space requirements) of the Education and Care Services National Regulations.	Proposed number of children in care = 88  Minimum required unencumbered indoor space: 286m <sup>2</sup> in total across the site  Each indoor play room provides at least 3.25m <sup>2</sup> unencumbered play area for each child under care	Yes
	(1)(b) This section applies to development for the purpose of a centre-based child care facility if the outdoor space requirements for the building or place do not comply with Regulation 108 (outdoor unencumbered space requirements) of those Regulations.	Proposed number of children in care = 88  Minimum required unencumbered outdoor space: 616m <sup>2</sup>  Each outdoor play area provides at least 7m <sup>2</sup> unencumbered play area for each child under care	Yes
<b>Clause 3.23 – Centre-based child care facility – matters for consideration by consent authorities.</b>	Before determining a development application for development for the purpose of a centre-based child care facility, the consent authority must take into consideration any applicable provisions of the Child Care Planning Guideline, in relation to the proposed development.	The applicable provisions of the Child Care Planning Guideline have been considered and an assessment against the matters for consideration are provided later in this report.	The provisions of the Child Care Planning Guideline have been addressed separately throughout this report
<b>Clause 3.26 – Centre-based child care facility – non-discretionary development standards</b>	(1) The object of this section is to identify development standards for particular matters relating to a centre-based child care facility that, if complied with, prevent the	Noted	Noted



Control	Prescribed	Comment	Compliance
	consent authority from requiring more onerous standards for those matters.		
	<p>(2) The following are non-discretionary development standards for the purposes of section 4.15(2) and (3) of the Act in relation to the carrying out of development for the purposes of a centre-based child care facility:</p> <p>(a) location—the development may be located at any distance from an existing or proposed early education and care facility,</p> <p>(b) indoor or outdoor space</p> <p>(i) for development to which regulation 107 (indoor unencumbered space requirements) or 108 (outdoor unencumbered space requirements) of the <a href="#">Education and Care Services National Regulations</a> applies—the unencumbered area of indoor space and the unencumbered area of outdoor space for the development complies with the requirements of those regulations, or</p> <p>(ii) for development to which clause 28 (unencumbered indoor space and useable outdoor play space) of the <a href="#">Children (Education and Care Services) Supplementary Provisions Regulation 2012</a> applies—the development complies with the indoor space requirements or the useable outdoor play space requirements in</p>	<p>Assessment revealed that the bulk and scale of the proposed childcare centre is excessive and is unable to be accommodated at the subject site without causing adverse amenity impacts with respect to overlooking and privacy and visual impacts to the neighbours and public domain.</p> <p>Accordingly, it is not considered that the site is suitable for the scale of the proposed childcare centre.</p>	No

Control	Prescribed	Comment	Compliance
	that clause,  (c) site area and site dimensions—the development may be located on a site of any size and have any length of street frontage or any allotment depth,  (d) colour of building materials or shade structures—the development may be of any colour or colour scheme unless it is a State or local heritage item or in a heritage conservation area.		
	(3) To remove doubt, this section does not prevent a consent authority from— (a) refusing a development application in relation to a matter not specified in subsection (2), or  (b) granting development consent even though any standard specified in subsection (2) is not complied with.	Noted	Noted
<b>Clause 3.27 – Centre-based child care facility – development control plan</b>	(1) A provision of a development control plan that specifies a requirement, standard or control in relation to any of the following matters (including by reference to ages, age ratios, groupings, numbers or the like, of children) does not apply to development for the purpose of a centre-based child care facility—  (a) operational or management plans or arrangements (including hours of operation),  (b) demonstrated need or demand for child care services,	The Burwood Development Control Plan contains numerous provisions that are also provided for in the State Environmental Planning Policy (Transport and Infrastructure) 2021 and the Child Care Planning Guideline which prevail in accordance with this clause.	Noted

Control	Prescribed	Comment	Compliance
	<p>(c) proximity of facility to other early education and care facilities,</p> <p>(d) any matter relating to development for the purpose of a centre-based child care facility contained in—</p> <p>(i) the design principles set out in Part 2 of the <i>Child Care Planning Guideline</i>, or</p> <p>(ii) the matters for consideration set out in Part 3 or the regulatory requirements set out in Part 4 of that Guideline (other than those concerning building height, side and rear setbacks or car parking rates).</p>		
	(2) This section applies regardless of when the development control plan was made.	Noted.	Noted

### Child Care Planning Guideline: Part 2 – Design Quality Principles

The subject Development Application has also been assessed against Part 2 of the Child Care Planning Guideline (which is another State Government produced document). The subject proposal was found to be inconsistent with a number of principles.

Control	Prescribed	Comment	Compliance
<b>Principle 1 – Context</b>	<p>Good design responds and contributes to its context, including the key natural and built features of an area, their relationship and the character they create when combined. It also includes social, economic, health and environmental conditions.</p> <p>Well-designed child care facilities respond to and enhance the qualities and identity of the area including adjacent sites, streetscapes and</p>	<p>The subject proposal presents as a part 2 part 4 building with 3 levels of outdoor play areas facing north, east and south. The development comprises a basement and lower ground car park that is built to the northern and southern boundary to serve the 2 proposed land uses on site (café and florist (retail premises) with ancillary florist workshop and childcare centre).</p> <p>The site is surrounded by</p>	No

Control	Prescribed	Comment	Compliance
	<p>neighbourhood.</p> <p>Well-designed child care facilities take advantage of its context by optimising nearby transport, public facilities and centres, respecting local heritage, and being responsive to the demographic, cultural and socio-economic makeup of the facility users and surrounding communities.</p>	<p>low density residential development comprising single and double storey dwellings with generous deep soil zones and landscaped areas.</p> <p>The proposed building comprises excessive built areas with large expanses of glass on the facades and a thin deep soil strip along the rear of the site.</p> <p>It is considered that the bulk and scale of the development and the building mass is not in character and unsympathetic to the surrounding low density residential environment.</p>	
<b>Principle 2 – Built Form</b>	<p>Good design achieves a scale, bulk and height appropriate to the existing or desired future character of the surrounding area.</p> <p>Good design achieves an appropriate built form for a site and the building's purpose in terms of building alignments, proportions, building type, articulation and the manipulation of building elements. Good design also uses a variety of materials, colours and textures.</p> <p>Appropriate built form defines the public domain, contributes to the character of streetscapes and parks, including their views and vistas, and provides internal amenity and outlook.</p> <p>Contemporary facility design can be distinctive and unique to support innovative approaches to teaching and learning,</p>	<p>It is not considered that the design of the proposed development is of an appropriate built form that is in character with the surrounding low density residential environment.</p> <p>The building comprises 4 storeys to accommodate the 2 land uses. There are no 4 storey buildings within the vicinity of the site.</p> <p>It is not considered that the visual appearance of the building provides a positive contribution to the public domain due to the excessive bulk which dominates primary streetscape views.</p>	No

Control	Prescribed	Comment	Compliance
	while still achieving a visual appearance that is aesthetically pleasing, complements the surrounding areas, and contributes positively to the public realm.		
<b>Principle 3 – Adaptive Learning Spaces</b>	<p>Good facility design delivers high quality learning spaces and achieves a high level of amenity for children and staff, resulting in buildings and associated infrastructure that are fit-for-purpose, enjoyable and easy to use. This is achieved through site layout, building design, and learning spaces fit-out.</p> <p>Good design achieves a mix of inclusive learning spaces to cater for all students and different modes of learning. This includes appropriately designed physical spaces offering a variety of settings, technology and opportunities for interaction.</p>	<p>The development is compliant with Regulation 107 and 108 in regard to unencumbered indoor and outdoor space. Notwithstanding, there are no deep soil areas within the outdoor play areas to provide for a natural play space and a high level of amenity for the children.</p>	Yes
<b>Principle 4 – Sustainability</b>	<p>Sustainable design combines positive environmental, social and economic outcomes.</p> <p>This includes use of natural cross ventilation, sunlight and passive thermal design for ventilation, heating and cooling reducing reliance on technology and operation costs. Other elements include recycling and re-use of materials and waste, use of sustainable materials and deep soil zones for groundwater recharge and vegetation.</p> <p>Well-designed facilities are durable and embed</p>	<p><u>Ventilation and solar access</u></p> <p>Concern is raised for the ability of the Indoor Play Area No.1 on the ground floor to be naturally ventilated and be exposed to natural sunlight as this area is positioned between the cot rooms and Indoor Play Area 2.</p> <p><u>Deep Soil Zones (DSZ)</u></p> <p>There is limited DSZ provided on site. Only a 1.9m wide strip is located along the rear boundary and is not accessible or usable.</p>	No

Control	Prescribed	Comment	Compliance
	resource efficiency into building and site design, resulting in less energy and water consumption, less generation of waste and air emissions and reduced operational costs.		
<b>Principle 5 – Landscape</b>	<p>Landscape and buildings should operate as an integrated and sustainable system, resulting in attractive developments with good amenity. A contextual fit of well-designed developments is achieved by contributing to the landscape character of the streetscape and neighbourhood.</p> <p>Well-designed landscapes make outdoor spaces assets for learning. This includes designing for diversity in function and use, age-appropriateness and amenity.</p> <p>Good landscape design enhances the development's environmental performance by retaining positive natural features which contribute to the local context, co-ordinating water and soil management, solar access, micro-climate, tree canopy, habitat values and preserving green networks.</p>	<p>The development provides limited deep soil zones which is atypical of developments surrounding low density residential environments. The proposed basement car park that is built to the north and south boundaries results in the loss of opportunity to provide high quality and usable deep soil zones.</p> <p>The only deep soil zone is provided along the rear (eastern boundary) of the site with a width of 1.9m. It is considered that this arrangement is an insufficient landscape buffer treatment and does not appropriately separate the development from the adjoining residential neighbour.</p>	No
<b>Principle 6 – Amenity</b>	<p>Good design positively influences internal and external amenity for children, staff and neighbours. Achieving good amenity contributes to positive learning environments and the well-being of students and staff.</p> <p>Good amenity combines appropriate and efficient</p>	<p>The outdoor play areas are provided with 1.8m high glass acoustic barriers to attenuate noise and protect the amenity of surrounding residents. Notwithstanding, these structures result in large expanses of glass on the north, east and southern facades which is not in character with the</p>	No

Control	Prescribed	Comment	Compliance
	<p>indoor and outdoor learning spaces, access to sunlight, natural ventilation, outlook, visual and acoustic privacy, storage, service areas and ease of access for all age groups and degrees of mobility.</p> <p>Well-designed child care facilities provide comfortable, diverse and attractive spaces to learn, play and socialise.</p>	<p>surrounding developments.</p> <p>The bulk and scale of the development is considered to be excessive and therefore does not provide a positive contribution to the streetscape and results in adverse visual impacts to the neighbours and public domain.</p> <p>Furthermore, concern is raised for the ability of the Indoor Play Area No.1 on the ground floor to be naturally ventilated and be exposed to natural sunlight as this area is positioned between the cot rooms and Indoor Play Area 2.</p> <p>In addition, the glass barriers allow for overlooking into the play areas from the public domain and adjoining properties. The privacy of adjoining residents can also be impacted through overlooking from the upper floor balconies.</p>	
<b>Principle 7 – Safety</b>	<p>Well-designed child care facilities optimise the use of the built and natural environment for learning and play, while utilising equipment, vegetation and landscaping that has a low health and safety risk, and can be checked and maintained efficiently and appropriately.</p> <p>Good child care facility design balances safety and security with the need to create a welcoming and accessible environment. It provides for quality public and private spaces that</p>	<p><u>Privacy</u></p> <p>The outdoor play areas on the ground and first floors are provided with clear glass barriers and a 0.6m-1m high solid balustrade in front. It is considered that this arrangement is not sufficient to prevent overlooking to and from these play areas. Accordingly, it is not considered that the privacy of children and neighbours have been adequately protected.</p>	No



Control	Prescribed	Comment	Compliance
	<p>are inviting, clearly defined and allow controlled access for members of the community. Well-designed child care facilities incorporate passive surveillance and Crime Prevention Through Environmental Design (CPTED).</p> <p>Well-designed vehicular parking and access minimise traffic safety risks on children and staff.</p>	<p><u>Natural Play Areas</u></p> <p>Due to the extent of excavation to accommodate the basement and the multi storey design of the centre, children are not provided with any deep soil zones within their play areas to create a natural learning space.</p>	

### Child Care Planning Guideline: Part 3 – Matters for Consideration

The subject Development Application has been considered against Part 3 of the Child Care Planning Guideline. The subject proposal was found to be non-compliant with a number of matters for consideration.

Control	Prescribed	Comment	Compliance
<b>Objective: To ensure that appropriate zone considerations are assessed when selecting a site.</b>	<p>C1) For proposed developments in or adjacent to a residential zone, particularly if that zone is for low density residential uses consider:</p> <ul style="list-style-type: none"> <li>the acoustic and privacy impacts of the proposed development on the residential properties</li> <li>the setbacks and siting of buildings within the residential context</li> <li>• visual amenity impacts (e.g. additional building bulk and overshadowing, local character)</li> <li>• traffic and parking impacts of the proposal on residential amenity and road safety</li> </ul> <p>For proposed developments in commercial and industrial zones, consider:</p> <ul style="list-style-type: none"> <li>• potential impacts on the health, safety and wellbeing of children, staff and visitors with</li> </ul>	<p>The subject proposal provides a 1.8m high glass acoustic barrier along the perimeter of the outdoor play areas on all levels to provide for acoustic attenuation for the outdoor play area. The provision of the barriers results in large expanses of glass along the facades of the buildings which is an inappropriate presentation to the neighbouring properties and public domain and does not provide a positive contribution to the streetscape.</p> <p>Furthermore, the enclosure of the outdoor play areas results in the play areas being classified as floor area and therefore must be included in the FSR calculation. As a result, the floor area proposed on site is non-complaint with the BLEP 2012 development standard and is considered to be excessive and unable to be accommodated on site without causing adverse bulk and scale issues.</p>	No

Control	Prescribed	Comment	Compliance
	<p>regard to local environmental or amenity issues such as air or noise pollution and local traffic conditions</p> <ul style="list-style-type: none"> <li>the potential impact of the facility on the viability of existing commercial or industrial uses.</li> </ul>	<p>The siting of the building is not considered to be consistent with the setbacks and siting of surrounding buildings. The development provides a basement that is built to the side boundaries, resulting in the loss of opportunity for deep soil zones and landscaping along the side setback to soften the built form. The development is not considered to be compatible with the character of the area.</p>	
<p><b>Objective: To ensure that the site selected for a proposed child care facility is suitable for the use.</b></p>	<p>C2) When selecting a site, ensure that:</p> <ul style="list-style-type: none"> <li>the location and surrounding uses are compatible with the proposed development or use</li> <li>the site is environmentally safe including risks such as flooding, land slip, bushfires, coastal hazards</li> <li>there are no potential environmental contaminants on the land, in the building or the general proximity, and whether hazardous materials remediation is needed</li> <li>the characteristics of the site are suitable for the scale and type of development proposed having regard to: length of street frontage, lot configuration, dimensions and overall size number of shared boundaries with residential properties</li> <li>the development will not have adverse environmental impacts on the surrounding area, particularly in sensitive environmental or cultural areas</li> <li>where the proposal is to occupy or retrofit an existing premises, the interior and exterior spaces</li> </ul>	<p>The subject site is located within a low-density residential locality surrounded by single and double storey houses. A child care centre situated within a building containing 4 storeys and excessive floor areas is not considered to be a compatible development in this locality. It is considered that the proposed development dominates the streetscape and is not sympathetic to the surrounding low density residential locality.</p> <p>It is not considered that the development has embraced the character of the area and the premises has not been designed with consideration to the surrounding low density residential development. The development does not provide sufficient deep soil zones and landscaping around the side and rear boundaries to soften the development and effectively screen the development from the surrounding residential properties.</p> <p>The subject site is not located on a classified or arterial road or cul-de-sac.</p> <p>The subject site is not within the vicinity of any known incompatible social activities.</p>	Yes

Control	Prescribed	Comment	Compliance
	<p>are suitable for the proposed use. Where the proposal relates to any heritage item, the development should retain its historic character and conserve significant fabric, setting or layout of the item.</p> <ul style="list-style-type: none"> <li>• there are suitable and safe drop off and pick up areas, and off and on street parking.</li> <li>• the characteristics of the fronting road or roads (for example its operating speed, road classification, traffic volume, heavy vehicle volumes, presence of parking lanes) is appropriate and safe for the proposed use.</li> <li>• the site avoids direct access to roads with high traffic volumes, high operating speeds, or with high heavy vehicle volumes, especially where there are limited pedestrian crossing facilities.</li> <li>• it is not located closely to incompatible social activities and uses such as restricted premises, injecting rooms, drug clinics and the like, premises licensed for alcohol or gambling such as hotels, clubs, cellar door premises and sex services premises.</li> </ul>		
<b>Objective: To ensure that sites for child care facilities are appropriately located.</b>	<p>C3) A child care facility should be located:</p> <ul style="list-style-type: none"> <li>• near compatible social uses such as schools and other educational establishments, parks and other public open space, community facilities, places of public worship.</li> <li>• near or within employment areas, town centres, business centres, shops.</li> <li>• with access to public transport including rail, buses, ferries</li> <li>• in areas with pedestrian</li> </ul>	<p>Whilst the proposal is permitted in the E1 Local Centre zone, the site is immediately surrounded by low density residential developments within the R2 Low Density Residential zone. The proposal has not been designed to be sympathetic with the surrounding locality and therefore is likely to result in adverse amenity impacts with regards to bulk and scale, overlooking and visual impacts.</p>	Yes

Control	Prescribed	Comment	Compliance
	connectivity to the local community, businesses, shops, services and the like.		
<b>Objective: To ensure that sites for child care facilities do not incur risks from environmental, health or safety hazards.</b>	<p>C4) A child care facility should be located to avoid environmental conditions arising from:</p> <ul style="list-style-type: none"> <li>• proximity to: heavy or hazardous industry, waste transfer depots or landfill sites, Liquefied Petroleum Gas (LPG) tanks or service stations, water cooling and water warming systems odour (and other air pollutant) generating uses and sources or sites which, due to prevailing land use zoning, may in future accommodate noise or odour generating uses extractive industries, intensive agriculture, agricultural spraying activities</li> <li>• any other identified environmental hazard or risk relevant to the site and/ or existing buildings within the site.</li> </ul>	The immediate locality consists of detached single and two-storey residential development zoned R2 Low Density Residential and is not located in proximity to any hazardous industries, service stations, etc.	Yes
<b>Objective: To ensure that the child care facility is compatible with the local character and surrounding streetscape.</b>	<p>C5) The proposed development should:</p> <ul style="list-style-type: none"> <li>• contribute to the local area by being designed in such a way to respond to the character of the locality and existing streetscape</li> <li>• build on the valued characteristics of the neighbourhood and draw from the physical surrounds, history and culture of place</li> <li>• reflect the predominant form of surrounding land uses, particularly in low density residential areas</li> <li>• recognise and respond to predominant streetscape qualities, such as building form, scale, materials and colours.</li> </ul>	<p>The proposed development has not been designed to be consistent with the built form of the surrounding residential development. The development presents as a part 2 and part 4 storey building that is not compatible with the single and double storey residential developments within the surrounding locality.</p> <p>Furthermore, deep soil zones and landscaping is limited to the thin strip along the rear boundary which does not effectively soften and screen the development.</p> <p>The development being built to the north and south boundary is not sympathetic</p>	No

Control	Prescribed	Comment	Compliance
	<ul style="list-style-type: none"> <li>• include design and architectural treatments that respond to and integrate with the existing streetscape and local character</li> <li>• use landscaping to positively contribute to the streetscape and neighbouring and neighbourhood amenity</li> <li>• integrate car parking into the building and site landscaping design in residential areas</li> <li>• in R2 Low Density Residential zones, limit outdoor play space to the ground level to reduce impacts on amenity from acoustic fences/barriers onto adjoining residence, except when good design solutions can be achieved.</li> </ul>	to the adjoining residential properties and results in a dominant built form.	
<b>Objective: To ensure clear delineation between the child care facility and public spaces</b>	C6) Create a threshold with a clear transition between public and private realms, including: <ul style="list-style-type: none"> <li>• fencing to ensure safety for children entering and leaving the facility</li> <li>• windows facing from the facility towards the public domain to provide passive surveillance to the street as a safety measure and a connection between the facility and the community</li> <li>• integrating existing and proposed landscaping with fencing.</li> </ul>	The transition between public and private land is clear.	Yes
	C7) On sites with multiple buildings and/or entries, pedestrian entries and spaces associated with the child care facility should be differentiated to improve legibility for visitors and children by changes in materials, plant species and colours.	Pedestrian entry to the child care centre can be made via the lift from the car park or from the Claremont Road frontage that is clearly delineated through signage and separation from the retail uses.	Yes
	C8) Where development adjoins public parks, open space or bushland, the facility should provide an	Not relevant to the subject site.	N/A

Control	Prescribed	Comment	Compliance
	appealing streetscape frontage by adopting some of the following design solutions: <ul style="list-style-type: none"> <li>• clearly defined street access, pedestrian paths and building entries</li> <li>• low fences and planting which delineate communal/private open space from adjoining public open space</li> <li>• minimal use of blank walls and high fences.</li> </ul>		
<b>Objective: To ensure that front fences and retaining walls respond to and complement the context and character of the area and do not dominate the public domain.</b>	C9) Front fences and walls within the front setback should be constructed of visually permeable materials and treatments. Where the site is listed as a heritage item, adjacent to a heritage item or within a conservation area front fencing should be designed in accordance with local heritage provisions.	No fencing is proposed in this application.	N/A
	C10) High solid acoustic fencing may be used when shielding the facility from noise on classified roads. The walls should be setback from the property boundary with screen landscaping of a similar height between the wall and the boundary.	The site is not located on a classified road.	N/A
<b>Objective: To respond to the streetscape and site, mitigate impacts on neighbours, while optimising solar access and opportunities for shade.</b>	C11) Orient a development on a site and design the building layout to: <ul style="list-style-type: none"> <li>• ensure visual privacy and minimise potential noise and overlooking impacts on neighbours by facing doors and windows away from private open space, living rooms and bedrooms in adjoining residential properties placing play equipment away from common boundaries with residential properties locating outdoor play areas away from residential dwellings and other</li> </ul>	The building has been designed with large expanses of glass on the facades through the provision of clear glass barriers which results in overlooking and privacy issues. It is considered that the 1m high solid walls on the ground and first floors on the eastern and southern elevations are inadequate in protecting the privacy of children and neighbours. Furthermore, the 1.8m high barriers with metal slats on the third floor adds to the visual bulk of the development is not an appropriate presentation to the street or neighbouring property.	No

Control	Prescribed	Comment	Compliance
	<p>sensitive uses</p> <ul style="list-style-type: none"> <li>• optimise solar access to internal and external play areas</li> <li>• avoid overshadowing of adjoining residential properties</li> <li>• minimise cut and fill</li> <li>• ensure buildings along the street frontage define the street by facing it</li> <li>• ensure where a child care facility is located above ground level, outdoor play areas are protected from wind and other climatic conditions.</li> </ul>	<p>Due to the siting of the ground floor Indoor Play Area 1, this room will not be able to receive solar access or be naturally ventilated.</p> <p>The development when viewed from Arthur Street presents as an overdevelopment of the site due to the excessive number of storeys, large expanse of glass from the acoustic barriers around the outdoor play areas and monolithic appearance of windows.</p>	
<p><b>Objective: To ensure that the scale of the child care facility is compatible with adjoining development and the impact on adjoining buildings is minimised.</b></p>	<p>C12) The following matters may be considered to minimise the impacts of the proposal on local character:</p> <ul style="list-style-type: none"> <li>• building height should be consistent with other buildings in the locality</li> <li>• building height should respond to the scale and character of the street</li> <li>• setbacks should allow for adequate privacy for neighbours and children at the proposed child care facility</li> <li>• setbacks should provide adequate access for building maintenance</li> <li>• setbacks to the street should be consistent with the existing character.</li> </ul> <p>Where a Local Environmental Plan or Development Control Plan do not specify a floor space ratio for the R2 Low Density Residential zone, a floor space ratio of 0.5:1 is to apply to a child care facility in the R2 zone.</p>	<p>The building height and scale is inconsistent with the surrounding locality. The proposed building comprises 2-4 storeys whereas the surrounding buildings comprise 1-2 storeys. Accordingly, the development is not considered to retain the character of the area.</p> <p>The development does not provide area for sufficient landscaping and adequate privacy to neighbouring properties.</p>	No
<p><b>Objective: To ensure that setbacks from the boundary of a child care facility</b></p>	<p>C13) Where there are no prevailing setback controls minimum setback to a classified road should be 10 metres. On other road</p>	<p>The proposed side and rear setbacks comply with the DCP. Notwithstanding, the building mass and form are not sympathetic to the</p>	No



Control	Prescribed	Comment	Compliance
<b>are consistent with the predominant development within the immediate context.</b>	frontages where there are existing buildings within 50 metres, the setback should be the average of the two closest buildings. Where there are no buildings within 50 metres, the same setback is required for the predominant adjoining land use.	surrounding locality. The development comprises 4 storeys, excessive floor space and limited deep soil zones and landscaping. The development is not consistent with the predominant development within the immediate context.	
	C14) On land in a residential zone, side and rear boundary setbacks should observe the prevailing setbacks required for a dwelling house.	As above	No
<b>Objective: To ensure that buildings are designed to create safe environments for all users.</b>	C15) Entry to the facility should be limited to one secure point which is: <ul style="list-style-type: none"> <li>• located to allow ease of access, particularly for pedestrians</li> <li>• directly accessible from the street where possible</li> <li>• directly visible from the street frontage</li> <li>• easily monitored through natural or camera surveillance</li> <li>• not accessed through an outdoor play area.</li> <li>• in a mixed-use development, clearly defined and separate from entrances to other uses in the building.</li> </ul>	Entry to the facility is limited to one (1) vehicular entry point and one (1) pedestrian entry point from Claremont Road. Access points are visible from the street. The proposed access arrangement is satisfactory.	Yes
<b>Objective: To ensure that child care facilities are designed to be accessible by all potential users.</b>	C16) Accessible design can be achieved by: <ul style="list-style-type: none"> <li>• providing accessibility to and within the building in accordance with all relevant legislation</li> <li>• linking all key areas of the site by level or ramped pathways that are accessible to prams and wheelchairs, including between all car parking areas and the main building entry</li> <li>• providing a continuous path of travel to and within the building, including access between the street</li> </ul>	Access is provided to the site from the street, with public pedestrian footpaths on both frontages of the property.  Access from the basement is provided via a lift that connects to the foyer.	Yes

Control	Prescribed	Comment	Compliance
	<p>entry and car parking and main building entrance. Platform lifts should be avoided where possible</p> <ul style="list-style-type: none"> <li>• minimising ramping by ensuring building entries and ground floors are well located relative to the level of the footpath.</li> </ul> <p>Note: The National Construction Code and the Disability (Access to Premises – Buildings) Standards 2010 set out the requirements for access to buildings for people with disabilities.</p>		
<b>Objective: To provide landscape design that contributes to the streetscape and amenity</b>	<p>C17) Appropriate planting should be provided along the boundary integrated with fencing. Screen planting should not be included in calculations of unencumbered outdoor space.</p> <p>Use the existing landscape where feasible to provide a high-quality landscaped area by:</p> <ul style="list-style-type: none"> <li>• reflecting and reinforcing the local context</li> <li>• incorporating natural features of the site, such as trees, rocky outcrops and vegetation communities into landscaping.</li> </ul>	<p>A 1.9m wide landscape strip is provided along the rear (eastern) boundary. No side boundary landscaping is provided.</p> <p>No deep soil zones are provided within the outdoor play areas to provide a natural learning and play space for children.</p>	No
	<p>C18) Incorporate car parking into the landscape design of the site by:</p> <ul style="list-style-type: none"> <li>• planting shade trees in large car parking areas to create a cool outdoor environment and reduce summer heat radiating into buildings</li> <li>• taking into account streetscape, local character, pedestrian safety and context when siting car parking areas within the front setback</li> <li>• using low level</li> </ul>	<p>A 1.9m wide landscape strip (deep soil zone) is provided along the rear boundary, behind the driveway. It is considered that this arrangement is not sufficient to soften the development which, particularly due to the excessive bulk and scale.</p>	Yes

Control	Prescribed	Comment	Compliance
	landscaping to soften and screen parking areas.		
<b>Objective: To protect the privacy and security of children attending the facility.</b>	C19) Open balconies in mixed use developments should not overlook facilities nor overhang outdoor play spaces.	Concern is raised for overlooking of adjoining residential properties from the outdoor play areas on the ground and first floors.	No
	C20) Minimise direct overlooking of indoor rooms and outdoor play spaces from public areas through: <ul style="list-style-type: none"> <li>• appropriate site and building layout</li> <li>• suitably locating pathways, windows and doors</li> <li>• permanent screening and landscape design.</li> </ul>	The development is not provided with sufficient measures to prevent overlooking.	No
<b>Objective: To minimise impacts on privacy of adjoining properties.</b>	C21) Minimise direct overlooking of main internal living areas and private open spaces in adjoining developments through: <ul style="list-style-type: none"> <li>• appropriate site and building layout</li> <li>• suitable location of pathways, windows and doors</li> <li>• landscape design and screening.</li> </ul>	<p>The development proposed is a part 2 and part 4 storey development with outdoor play areas facing north, east and south.</p> <p>It is considered that the 0.6m-1m high solid balustrades located in front of the clear glass barriers are not sufficient to prevent overlooking and protect the privacy of children and neighbours.</p>	No
<b>Objective: To minimise the impact of child care facilities on the acoustic privacy of neighbouring residential developments.</b>	C22) A new development, or development that includes alterations to more than 50 per cent of the existing floor area, and is located adjacent to residential accommodation should: <ul style="list-style-type: none"> <li>• provide an acoustic fence along any boundary where the adjoining property contains a residential use. An acoustic fence is one that is a solid, gap free fence</li> <li>• ensure that mechanical plant or equipment is screened by solid, gap free material and constructed to reduce noise levels e.g. acoustic fence, building, or enclosure.</li> </ul>	Whilst the Acoustic Consultant has indicated that the development can comply with the applicable acoustic criteria, the proposed physical acoustic attenuation measures are considered to be inappropriate as they create large expanses of glass on the facades and provides an inappropriate presentation to the street and neighbouring properties.	No
	C23) A suitably qualified acoustic professional	An Acoustic Report was submitted in support of the	Yes

Control	Prescribed	Comment	Compliance
	<p>should prepare an acoustic report which will cover the following matters:</p> <ul style="list-style-type: none"> <li>• identify an appropriate noise level for a child care facility located in residential and other zones</li> <li>• determine an appropriate background noise level for outdoor play areas during times they are proposed to be in use</li> <li>• determine the appropriate height of any acoustic fence to enable the noise criteria to be met.</li> </ul>	<p>application which indicates that the development can comply with the required acoustic criteria.</p>	
<b>Objective: To ensure that outside noise levels on the facility are minimised to acceptable levels.</b>	<p>C24) Adopt design solutions to minimise the impacts of noise, such as:</p> <ul style="list-style-type: none"> <li>• creating physical separation between buildings and the noise source</li> <li>• orienting the facility perpendicular to the noise source and where possible buffered by other uses</li> <li>• using landscaping to reduce the perception of noise</li> <li>• limiting the number and size of openings facing noise sources</li> <li>• using double or acoustic glazing, acoustic louvres or enclosed balconies (wintergardens)</li> <li>• using materials with mass and/or sound insulation or absorption properties, such as solid balcony balustrades, external screens and soffits</li> <li>• locating cot rooms, sleeping areas and play areas away from external noise sources.</li> </ul>	<p>1.8m high acoustic barriers are proposed around the outdoor play areas to attenuate noise. Notwithstanding, the size and scale of these structures create large expanses of glass on the facades and provides an inappropriate presentation to the street and neighbouring properties.</p>	No
	<p>C25) An acoustic report should identify appropriate noise levels for sleeping areas and other non-play areas and examine impacts and noise attenuation measures where a child</p>	<p>An Acoustic Report was submitted in support of the application which indicates that the development can comply with the required acoustic criteria.</p>	Yes

Control	Prescribed	Comment	Compliance
	<p>care facility is proposed in any of the following locations:</p> <ul style="list-style-type: none"> <li>• on industrial zoned land</li> <li>• where the ANEF contour is between 20 and 25</li> <li>• along a railway or mass transit corridor, as defined by State Environmental Planning Policy (Infrastructure) 2007</li> <li>• on a major or busy road</li> <li>• other land that is impacted by substantial external noise.</li> </ul>		
<b>Objective: To ensure air quality is acceptable where child care facilities are proposed close to external sources of air pollution such as major roads and industrial development.</b>	<p>C26) Locate child care facilities on sites which avoid or minimise the potential impact of external sources of air pollution such as major roads and industrial development.</p>	<p>The site is not located near a major road or any industrial and uses. It is considered that the development would not be effected by air pollution.</p>	<p>Yes</p>
	<p>C27) A suitably qualified air quality professional should prepare an air quality assessment report to demonstrate that proposed child care facilities close to major roads or industrial developments can meet air quality standards in accordance with relevant legislation and guidelines.</p> <p>The air quality assessment report should evaluate design considerations to minimise air pollution such as:</p> <ul style="list-style-type: none"> <li>• creating an appropriate separation distance between the facility and the pollution source. The location of play areas, sleeping areas and outdoor areas should be as far as practicable from the major source of air pollution</li> <li>• using landscaping to act as a filter for air pollution generated by traffic and industry.</li> </ul> <p>Landscaping has the added benefit of improving aesthetics and minimising visual</p>	<p>Not applicable, the site is surrounded by low density residential development.</p>	<p>N/A</p>

Control	Prescribed	Comment	Compliance
	intrusion from an adjacent roadway • incorporating ventilation design into the design of the facility.		
<b>Objective: To minimise the impact of the child care facility on the amenity of neighbouring residential developments.</b>	C28) Hours of operation where the predominant land use is residential should be confined to the core hours of 7.00am to 7.00pm weekdays. The hours of operation of the proposed child care facility may be extended if it adjoins or is adjacent to non-residential land uses	The proposed hours of operation will be 7:00am to 6:00pm Monday to Friday.	Yes
	C29) Within mixed use areas or predominantly commercial areas, the hours of operation for each child care facility should be assessed with respect to its compatibility with adjoining and co-located land uses.	The proposed hours of operation will be 7:00am to 6:00pm Monday to Friday which is considered reasonable for the type of use proposed.	Yes
<b>Objective: To provide parking that satisfies the needs of users and the demand generated by the centre and to minimise conflicts between pedestrians and vehicles.</b>	C30) Off street car parking should be provided at the rates for child care facilities specified in a Development Control Plan that applies to the land.  Where a Development Control Plan does not specify car parking rates, off street car parking should be provided at the following rates:  Within 400 metres of a railway or Metro station within Greater Sydney: • 1 space per 10 children • 1 space per 2 staff. Staff parking may be stack or tandem parking with no more than 2 spaces in each tandem space.  In other areas: • 1 space per 4 children.	Under the Burwood Development Control Plan, the childcare component requires 22 car parking spaces. The subject development proposes 25 car parking spaces onsite, with 22 dedicated for the childcare centre and 3 for the shop which therefore complies.	Yes
	C31) In commercial or industrial zones and mixed-use developments, on street parking may only be	The site is located in the E1 Local Centre zone. The submitted Traffic Report states that the proposed off-	Yes

Control	Prescribed	Comment	Compliance
	considered where there are no conflicts with adjoining uses, that is, no high levels of vehicle movement or potential conflicts with trucks and large vehicles.	street parking provision accords with the minimum requirements of Burwood Development Control Plan, thereby indicating that there should not be any increased on-street parking demand as a result of the development.	
	C32) A Traffic and Parking Study should be prepared to support the proposal to quantify potential impacts on the surrounding land uses, to optimise the safety and convenience of the parking area(s) and demonstrate how impacts on amenity will be minimised. The study should also address any proposed variations to parking rates and demonstrate that: <ul style="list-style-type: none"> <li>• the amenity of the surrounding area will not be affected</li> <li>• there will be no impacts on the safe operation of the surrounding road network.</li> </ul>	<p>The development application is supported by a Traffic and Parking Impact Report that concludes the development is compliant with the Burwood DCP and provides the correct dedication of visitor and staff parking spaces. The development provides a single entry/exit driveway off Arthur Street.</p> <p>The Traffic and Parking report concludes that the surrounding road network is considered to be capable of accommodating the additional traffic projected to be generated by the subject development.</p> <p>Council's Traffic Engineers did not raise any concerns to the proposal</p>	Yes
<b>Objective: To provide vehicle access from the street in a safe environment that does not disrupt traffic flows.</b>	C33) Alternate vehicular access should be provided where child care facilities are on sites fronting: <ul style="list-style-type: none"> <li>• a classified road</li> <li>• roads which carry freight traffic or transport dangerous goods or hazardous materials.</li> </ul>	The site is not located on a classified road.	N/A
	C34) Child care facilities proposed within cul-de-sacs or via narrow lanes or roads should ensure that safe access can be provided to and from the site, and to and from the wider locality in times of emergency	The site is not located on a cul-de-sac or a narrow road.	Yes



Control	Prescribed	Comment	Compliance
<b>Objective: To provide a safe and connected environment for pedestrians both on and around the site.</b>	C35) The following design solutions may be incorporated into a development to help provide a safe pedestrian environment: <ul style="list-style-type: none"> <li>• separate pedestrian access from the car park to the facility</li> <li>• defined pedestrian crossings and defined/ separate paths included within large car parking areas</li> <li>• separate pedestrian and vehicle entries from the street for parents, children and visitors</li> <li>• pedestrian paths that enable two prams to pass each other</li> <li>• delivery, loading and vehicle turnaround areas located away from the main pedestrian access to the building and in clearly designated, separate facilities</li> <li>• minimise the number of locations where pedestrians and vehicles cross each other</li> <li>• in commercial or industrial zones and mixed-use developments, the path of travel from the car parking to the centre entrance physically separated from any truck circulation or parking areas</li> <li>• vehicles can enter and leave the site in a forward direction</li> <li>• clear sightlines are maintained for drivers to child pedestrians, particularly at crossing locations.</li> </ul>	The design of the car park separates pedestrian movement from vehicle movement.  Council's Traffic Engineers did not raise any concerns to the proposal.	Yes
	Mixed use developments should include: <ul style="list-style-type: none"> <li>• driveway access, manoeuvring areas and parking areas for the facility that are separate to parking and manoeuvring areas used by trucks</li> </ul>	The development provides a dedicated pedestrian path from the basement car park to the lift that connects to the childcare centre lobby.  All vehicles are able to enter and exit the site in a forward	Yes

Control	Prescribed	Comment	Compliance
	<ul style="list-style-type: none"> <li>• drop off and pick up zones that are exclusively available for use during the facility's operating hours with spaces clearly marked accordingly, close to the main entrance and preferably at the same floor level. Alternatively, direct access should avoid crossing driveways or manoeuvring areas used by vehicles accessing other parts of the site</li> <li>• parking that is separate from other uses, located and grouped together and conveniently located near the entrance or access point to the facility.</li> </ul>	<p>direction.</p> <p>Minor deliveries associated with the centre operation are expected to be undertaken by vans and utilities. Such servicing activities are proposed to be accommodated within single visitor passenger vehicle parking spaces located within the lower basement parking area. These activities are to be undertaken between 10:00am and 2:00pm, thereby being outside of the peak child set-down/ pick-up periods of the centre.</p>	
	<p>C37) Car parking design should:</p> <ul style="list-style-type: none"> <li>• include a child safe fence to separate car parking areas from the building entrance and play areas</li> <li>• provide clearly marked accessible parking as close as possible to the primary entrance to the building in accordance with appropriate Australian Standards</li> <li>• include wheelchair and pram accessible parking.</li> </ul>	<div> <div>Child care centres</div> <ul style="list-style-type: none"> <li>• If child care centre is located v of a metropolitan train station: <ul style="list-style-type: none"> <li>- 1 space per 10 c</li> <li>space per 2 staff</li> </ul> </li> <li>• In all other areas: <ul style="list-style-type: none"> <li>- 1 space per 4 ch</li> </ul> </li> </ul> </div> <p>Council's DCP requires the development to provide 1 parking space per 4 children under care.</p> <p><math>88/4 = 22</math></p> <p>22 car parking spaces are provided in the development for the childcare.</p>	Yes

## Child Care Planning Guideline: Part 4 – Applying the National Regulations to Development Proposals

The subject Development Application has been assessed against Part 4 of the Child Care Planning Guideline and found to be compliant.

Control	Prescribed	Comment	Compliance
<b>Section 4.1 – Indoor Space Requirements</b>	<b>Regulation 107 Education and Care Services National Regulations</b>  Every child being educated and cared for within a facility must have a minimum of 3.25m <sup>2</sup> of unencumbered indoor space.  If this requirement is not met, the concurrence of the regulatory authority is required under the Education SEPP.  Unencumbered indoor space excludes any of the following: <ul style="list-style-type: none"> <li>• passageway or thoroughfare (including door swings) used for circulation</li> <li>• toilet and hygiene facilities</li> <li>• nappy changing area or area for preparing bottles</li> <li>• area permanently set aside for the use or storage of cots</li> <li>• area permanently set aside for storage</li> <li>• area or room for staff or administration</li> <li>• kitchens, unless the kitchen is designed to be used predominately by the children as part of an educational program e.g. a learning kitchen</li> <li>• on-site laundry</li> <li>• other space that is not suitable for children.</li> </ul>	Compliant indoor and outdoor play areas for 88 children.	Yes
	<b>Verandahs as indoor space</b>  For a verandah to be included as unencumbered indoor space, any opening must be able to be fully closed during inclement weather. It can only be counted once and therefore cannot be counted as outdoor space as well as indoor space (refer to Figure 1).	No verandahs are included as indoor space	Yes
	<b>Storage</b>  Storage areas including joinery	Indoor and outdoor storage rooms/compartments	Yes

Control	Prescribed	Comment	Compliance
	<p>units are not to be included in the calculation of indoor space. To achieve a functional unencumbered area free of clutter, storage areas need to be considered when designing and calculating the spatial requirements of the facility. It is recommended that a child care facility provide:</p> <ul style="list-style-type: none"> <li>• a minimum of 0.3m<sup>3</sup> per child of external storage space</li> <li>• a minimum of 0.2m<sup>3</sup> per child of internal storage space.</li> </ul>	provided.	
<b>Section 4.2 – Laundry and Hygiene Facilities</b>	<p><b>Regulation 106 Education and Care Services National Regulations</b></p> <p>There must be laundry facilities or access to laundry facilities; or other arrangements for dealing with soiled clothing, nappies and linen, including hygienic facilities for storage prior to their disposal or laundering. The laundry and hygienic facilities must be located and maintained in a way that is not accessible by, and does not pose a risk to, children. Child care facilities must also comply with the requirements for laundry facilities that are contained in the National Construction Code.</p>	A laundry facility has been provided onsite, on the ground floor. The laundry facility is located in a way that is not accessible by, and does not pose a risk to children.	Yes
	<p><b>On Site Laundry</b></p> <p>On site laundry facilities should contain:</p> <ul style="list-style-type: none"> <li>• a washer or washers capable of dealing with the heavy requirements of the facility</li> <li>• a dryer</li> <li>• laundry sinks</li> <li>• adequate storage for soiled items prior to cleaning</li> <li>• an on-site laundry cannot be calculated as useable unencumbered play space for children (refer to Figure 2).</li> </ul>	The proposed onsite laundry contains 2 washing machines areas, a sink area and adequate storage for soiled items. The onsite laundry has not been calculated as useable unencumbered space.	Yes
	<p><b>External Laundry Service</b></p> <p>A facility that does not contain on site laundry facilities must make external laundering</p>	No external laundry service is proposed.	Not applicable

Control	Prescribed	Comment	Compliance
	arrangements. Any external laundry facility providing services to the facility needs to comply with any relevant Australian Standards.		
<b>Section 4.3 – Toilet and Hygiene Facilities</b>	<p><b>Regulation 109 Education and Care Services National Regulations</b></p> <p>A service must ensure that adequate, developmentally and age-appropriate toilet, washing and drying facilities are provided for use by children being educated and cared for by the service; and the location and design of the toilet, washing and drying facilities enable safe use and convenient access by the children.</p> <p>Child care facilities must comply with the requirements for sanitary facilities that are contained in the National Construction Code.</p>	The proposed toilet, washing and drying facilities are considered appropriate. The design and location of the toilet, washing and drying facilities enable safe use and convenient access by children.	Yes
	<p>Toilet and hygiene facilities should be designed to maintain the amenity and dignity of the occupants (refer to Figure 3). Design considerations could include:</p> <ul style="list-style-type: none"> <li>• junior toilet pans, low level sinks and hand drying facilities for children</li> <li>• a sink and handwashing facilities in all bathrooms for adults</li> <li>• direct access from both activity rooms and outdoor play areas</li> <li>• windows into bathrooms and cubicles without doors to allow adequate supervision by staff</li> <li>• external windows in locations that prevent observation from neighbouring properties or from side boundaries.</li> </ul>	The proposed toilet and hygiene facilities are designed to maintain the amenity and dignity of the occupants.	Yes
<b>Section 4.4 – Ventilation and Natural Light</b>	<p><b>Regulation 110 Education and Care Services National Regulations</b></p> <p>Services must be well ventilated, have adequate natural light, and be maintained at a temperature that ensures</p>	Concern is raised for the ability of the Indoor Play Area No.1 on the ground floor to be naturally ventilated and be exposed to natural sunlight as this area is positioned between the	No

Control	Prescribed	Comment	Compliance
	<p>the safety and wellbeing of children.</p> <p>Child care facilities must comply with the light and ventilation and minimum ceiling height requirements of the National Construction Code. Ceiling height requirements may be affected by the capacity of the facility.</p>	cot rooms and Indoor Play Area 2.	
<b>Section 4.5 – Administrative Space</b>	<p><b>Regulation 111 Education and Care Services National Regulations</b></p> <p>A service must provide adequate area or areas for the purposes of conducting the administrative functions of the service, consulting with parents of children and conducting private conversations.</p>	The proposed childcare centre includes adequate area for the purposes of conducting the administrative functions of the service, consulting with parents of children and conducting private conversations.	Yes
<b>Section 4.6 – Nappy Change Facilities</b>	<p><b>Regulation 112 Education and Care Services National Regulations</b></p> <p>Child care facilities must provide for children who wear nappies, including appropriate hygienic facilities for nappy changing and bathing. All nappy changing facilities should be designed and located in an area that prevents unsupervised access by children. Child care facilities must also comply with the requirements for nappy changing and bathing facilities that are contained in the National Construction Code.</p>	The proposed childcare centre provides facilities for children who wear nappies, including hygienic facilities for nappy changing and bathing. All nappy changing facilities are designed and located in an area that prevents unsupervised access by children.	Yes
<b>Section 4.7 – Premises Designed to Facilitate Supervision</b>	<p><b>Regulation 115 Education and Care Services National Regulations</b></p> <p>A centre-based service must ensure that the rooms and facilities within the premises (including toilets, nappy change facilities, indoor and outdoor activity rooms and play spaces) are designed to facilitate adequate supervision of children at all times, having regard to the need to maintain their rights and dignity. Child care facilities must also</p>	The design of the centre enables the children to be supervised appropriately.	Yes

Control	Prescribed	Comment	Compliance
	comply with any requirements regarding the ability to facilitate supervision that are contained in the National Construction Code.		
<b>Section 4.8 – Emergency and Evacuation Procedures</b>	<p><b>Regulations 97 and 168 Education and Care Services National Regulations</b></p> <p>Regulation 168 sets out the list of procedures that an education and care service must have, including procedures for emergency and evacuation.</p> <p>Regulation 97 sets out the detail for what those procedures must cover including:</p> <ul style="list-style-type: none"> <li>• instructions for what must be done in the event of an emergency</li> <li>• an emergency and evacuation floor plan, a copy of which is displayed in a prominent position near each exit</li> <li>• a risk assessment to identify potential emergencies that are relevant to the service.</li> </ul>	An Emergency and Evacuation Plan was not submitted with the application.	No
<b>Section 4.9 – Outdoor Space Requirements</b>	<p><b>Regulation 108 Education and Care Services National Regulations</b></p> <p>An education and care service premises must provide for every child being educated and cared for within the facility to have a minimum of 7.0m<sup>2</sup> of unencumbered outdoor space.</p> <p>If this requirement is not met, the concurrence of the regulatory authority is required under the Education SEPP.</p> <p>Unencumbered outdoor space excludes any of the following:</p> <ul style="list-style-type: none"> <li>• pathway or thoroughfare, except where used by children as part of the education and care program</li> <li>• car parking area</li> <li>• storage shed or other storage</li> </ul>	<p>Outdoor space compliant.</p> <p>Notwithstanding, the expanse of outdoor play areas across the ground, first and second floors is considered to be excessive and incompatible with the surrounding low density residential environment.</p>	No.

Control	Prescribed	Comment	Compliance
	<p>area</p> <ul style="list-style-type: none"> <li>• laundry</li> <li>• other space that is not suitable for children.</li> </ul> <p>When calculating outdoor space requirements, the area required for any additional child may be waived when the child is being cared for in an emergency circumstance as set out in Regulation 123(5) or the child is being educated or cared for in exceptional circumstances as set out in Regulation 124(5) and (6) of the National Regulations.</p> <p>Applicants should also note that Regulation 274 (Part 7.3 NSW Provisions) states that a centre-based service for children preschool age or under must ensure there is no swimming pool on the premises, unless the swimming pool existed before 6 November 1996. Where there is an existing swimming pool, a water safety policy will be required.</p> <p>A verandah that is included within indoor space cannot be included when calculating outdoor space and vice versa.</p>		
<b>Section 4.10 – Natural Environment</b>	<p><b>Regulation 113 Education and Care Services National Regulations</b></p> <p>The approved provider of a centre-based service must ensure that the outdoor spaces allow children to safely explore and experience the natural environment.</p>	The outdoor play areas do not comprise any deep soil zones to provide a natural play setting.	No
<b>Section 4.11 – Shade</b>	<p><b>Regulation 114 Education and Care Services National Regulations</b></p> <p>The approved provider of a centre-based service must ensure that outdoor spaces include adequate shaded areas to protect children from overexposure to ultraviolet radiation from the sun.</p>	Adequate shaded spaces are provided throughout the outdoor play areas. The proposed development provides adequate solar access for the outdoor play spaces.	Yes



Control	Prescribed	Comment	Compliance
<b>Section 4.12 – Fencing</b>	<p><b>Regulation 104 Education and Care Services National Regulations</b></p> <p>Any outdoor space used by children must be enclosed by a fence or barrier that is of a height and design that children preschool age or under cannot go through, over or under it.</p> <p>This Regulation does not apply to a centre-based service that primarily provides education and care to children over preschool age, including a family day care venue where all children are over preschool age.</p> <p>Child care facilities must also comply with the requirements for fencing and protection of outdoor play spaces that are contained in the National Construction Code.</p>	<p>Provided.</p> <p>Notwithstanding, the 1.8m high acoustic barriers enclosing the outdoor play areas results in the play areas being characterised as floor area. An assessment of the gross floor area and proposed floor space ratio is provided in the LEP assessment section of this report.</p>	No
<b>Section 4.13 – Soil Assessment</b>	<p><b>Regulation 25 Education and Care Services National Regulations</b></p> <p>Subclause (d) of Regulation 25 requires an assessment of soil at a proposed site, and in some cases, sites already in use for such purposes as part of an application for service approval.</p> <p>With every service application one of the following is required:</p> <ul style="list-style-type: none"> <li>• a soil assessment for the site of the proposed education and care service premises</li> <li>• if a soil assessment for the site of the proposed child care facility has previously undertaken, a statement to that effect specifying when the soil assessment was undertaken</li> <li>• a statement made by the applicant that states, to the best of the applicant's knowledge, the site history does not indicate that the site is likely to be contaminated in a way that poses an unacceptable risk to the health of children.</li> </ul>	<p>A Preliminary Site Investigation was submitted in support of the application. The investigation found that there is asbestos on site and recommended that a Detailed Site Investigation be undertaken to ascertain the extent of asbestos contamination. Following the DSI, further works including remedial works will be required, to be determined by the DSI.</p> <p>The applicant has not submitted a Detailed Site Investigation or Remedial Action Plan to demonstrate how the site can be appropriately remediated and made suitable for the proposed use.</p>	No

**NOTIFICATIONS / PUBLIC CONSULTATION**

The DA was placed on public notification from 9 August 2023 to 24 August 2023. In response to the notification of the DA, 12 unique submission letters were received, one off which was a petition (containing 63 signatures) which supported the proposed childcare centre).

The following table summarises the concerns raised by objectors and Council's comments on the issues raised:

<b>Concern raised</b>	<b>Council response</b>
Traffic congestion and collision during peak periods. Further, the T way intersection is an inappropriate location for a large scale childcare centre.	Council's Traffic Branch has assessed the application and raised no concerns.
The plans should be reconfigured to ensure that the entrance is only via the carpark and that the carpark is sufficient to allow all parents to park. This will minimise the parking issues and ensure the safety of the children attending the childcare centre.	A lift has been provided from the car park to the ground floor lobby to allow direct access to the childcare centre without needing to walk along the street or cross any roads.
There is no need for a childcare centre at this site as there are existing centres in the area.	There are no controls prohibiting the provision of a childcare centre at this site. Notwithstanding, Council's assessment revealed that the size and scale of the proposed childcare centre is not suitable for the site and the development is not in character with the surrounding area.
This site is a heritage site and needs to be protected.	The development involves the retention of the existing building facades facing Claremont Road. Council's Heritage Advisor did not raise any concerns in relation to the design and appearance of the building.
The site does not have access to public transport.	The development is provided with 2 levels of car parking to serve the needs of its users.
The development will cause overshadowing impacts.	The site has a west to east orientation and the shadows created by the building will fall onto the pedestrian footpath and road along Arthurs Street and Claremont Road. As such, no neighbouring residential development will be impacted.
This location is not suitable for a large childcare centre.	It is considered that the bulk and scale of the building is excessive and results in adverse visual amenity impacts upon the surrounding low density residential environment. The proposed 4 storey building is out of character and dominates the streetscape. There are no 4 storey buildings within the immediate vicinity of the site.  Furthermore, the location of the basement to the northern and southern boundaries result in loss of opportunity for deep soil zones and landscaping in order to soften the development.
The proposal is an overdevelopment of the site. The building is not sympathetic to the scale and built form of the surrounding areas. The building will be larger than any building nearby.	As above

Concern raised	Council response
The play areas located on the ground and first floor levels are enclosed by 1.8m high walls/barriers to all sides and are covered by a roof, and therefore should be included in the floor space ratio (FSR) calculation.	The applicant has acknowledged this and has submitted a Clause 4.6 written request to vary the FSR which has been reviewed and the variation is not supported as the development is considered to be excessive in scale and presents as an overdevelopment of the site. The same view applies to the development with or without the 1.8m acoustic barriers as the development is visually dominant when viewed from the streetscape and neighbouring properties due to the number of storeys proposed, none to minimal side setback from Arthur Street and large expanse of outdoor play areas.
The variation to the BLEP 2012 building height control is incompatible with the character of the neighbourhood.	The applicant has decreased the building height from a maximum of 12.02m to a maximum of 10.8m in the amended application. Please note only the lift overrun and fire stairs is above the BLEP 2012 height limit.
The number of children under care is excessive and should be reduced.	Council agrees with this statement and considers the scale of the centre to be excessive and incompatible with the surrounding low density residential environment. As such, the proposal in its current form is not supported.
The noise management procedures referred to in the Plan of Management do not reflect how the noise will be regulated and managed effectively during outdoor play times. The points stated are not specific to what practices will take place in minimising this noise concern.	<p>The submitted Plan of Management contains standard procedures in which staff will undertake where necessary, these include the following:</p> <p>Children who are making excessive noise outdoors-screaming and loud crying who cannot be settled are to be taken inside to calm them. Facility management will endeavour to respond to any noise complaint at the time of the event and record such events in a daily log. All educators are required to read the noise management plan.</p> <p>The submitted Acoustic Report indicates that all 88 children can play outside at the same time for 4 hours a day. The applicant has proposed to separate the play times for each child group which will therefore reduce the noise impacts.</p>
<p>The design of the building does not exhibit design excellence.</p> <p>The design of the building, particularly along the side and rear elevations, does not result in a highly attractive development that contributes to the heritage conservation area. The upper levels proposed to the front of the site, which will be visible from Claremont Road, do not integrate with the front façade and detracts from the existing shop front facades that will be retained. Given the extent of works proposed, the design should</p>	<p>The assessment of this application has established that the extent of building works is excessive in scale. The 4 storey component is not in character with the surrounding low density residential environment and protrudes above the existing historic façade thus detracting from its heritage significance.</p> <p>The large expanse of glass along the northern and southern elevation does not provide a visually appealing building design when viewed from the neighbouring properties and the public domain. It</p>

Concern raised	Council response
be more cohesive. The glass blocks along the northern side elevation and the ventilation grills along the lower portion of the southern elevation do little to add to the design quality of the building.	is considered that the design of the building is not well modulated and articulated to provide a positive contribution to the streetscape.

With regards to the above, the concerns raised by the objectors have been considered as part of the assessment of the application and given the nature of the concerns, the application warrants a refusal.

## REFERRALS

Branch / agency	Comments Received/ Resolution
Environment and Health	Council's Environment and Health Branch raised no concerns to the proposal.
Engineering Assessment Branch	Council's Engineering Assessment Branch raised no concerns to the proposal.
Waste Management Branch	Council's Waste Management Branch raised no concerns to the proposal.
Traffic Branch	Council's Traffic Branch raised no concerns to the proposal.
Tree Management Officer	Council's Tree Management Officer raised no concerns to the proposal.
Heritage Officer	Council's Heritage Officer raised no concerns to the proposal.

## SECTION 4.15 EVALUATION

Standard	Compliance
<b>1. Matters for consideration - general</b> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:	
a) The provisions of:	
(i) any environmental planning instrument, and	The proposed development is permitted in the E1 Local Centre zone, in accordance with the Burwood Local Environmental Plan (LEP) 2012.  Whilst the proposal is permitted in the zone, an assessment of the application revealed that the development is non-compliant with a number of development controls stipulated in the State Environmental Planning Policy (Transport and Infrastructure) 2021 and Education and Care Services National Regulations. Accordingly, Council is not in support of the application.

Standard	Compliance
(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and	Not applicable.
(iii) any development control plan, and	The Child Care Planning Guideline and Burwood Development Control Plan 2012 have been taken into consideration in regard to the proposed development. A number of non-compliances were identified as detailed in this report.
(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and	Not applicable.
(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and	Not applicable.
(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,	<p>The assessment of the application concludes that the development is likely to cause unacceptable environmental impacts upon the surrounding locality including visual amenity, overlooking and privacy and poor contribution to the streetscape.</p> <p>Furthermore, a Detailed Site Investigation has not been undertaken to ascertain the extent of asbestos contamination on site. A Remedial Action Plan has not been prepared to ensure that the site can be appropriately remediated and made suitable for the proposed use. Accordingly, it has not been demonstrated that the site is safe for the proposed use with respect to asbestos contamination.</p>
(c) the suitability of the site for the development,	The proposed development presents as an overdevelopment of the site and is not in character with the surrounding low density residential environment. The bulk and scale of the childcare centre is considered to be excessive and cannot be accommodated at the site without causing adverse amenity impacts to the surrounding locality, including visual impacts, overlooking and privacy and inappropriate

Standard	Compliance
	presentation to the public domain and neighbours.
(d) any submissions made in accordance with this Act or the regulations,	<p>The DA was placed on public notification from 9 August 2023 to 24 August 2023. In response to the notification of the DA, 11 unique submission letters were received and 1 petition.</p> <p>Due to the nature of the concerns raised by the objectors, the application is not supported by Council and warrants a refusal.</p>
(e) the public interest.	It is not considered that the proposed development is in the public interest due to the nature of the concerns raised in the submission letters and the amenity impacts caused by the bulk and scale of the development.

### **Conclusion**

After consideration of the development against Section 4.15 of the Environmental Planning and Assessment Act 1979 and the relevant statutory and policy provisions, the proposal is considered unsatisfactory and not in the public interest. Therefore, it is recommended that the application be refused.

### **Recommendation(s)**

That DA 24/12863 refused for the following reasons:

1. Pursuant to Section 4.15 (1) (c) of the *Environmental Planning and Assessment Act 1979*, the site is not considered to be suitable for the scale of the proposed development. The number of storeys and gross floor area proposed is excessive and results in a building with a bulk and scale that is unable to be accommodated on site without causing adverse visual impacts, overlooking and privacy issues and an undesirable addition to the streetscape.
2. Pursuant to Section 4.15 (1) (e) of the *Environmental Planning and Assessment Act 1979*, the proposal is not considered to be in the public interest as the development is considered to be an overdevelopment of the site and not sympathetic with the surrounding low density residential environment. Accordingly, approval of the development would result in a poor planning and amenity outcome and set an undesirable precedent for future development.
3. Pursuant to Section 4.15 (1) (e) of the *Environmental Planning and Assessment Act 1979*, approval of the proposed development would not be in the public interest due to noncompliance with the *Burwood Local Environmental Plan 2012* Floor Space Ratio development standard. The assessment of the application concluded that there are insufficient environmental planning grounds to support the variation due to the amenity impacts caused by the excessive gross floor area including inappropriate bulk and scale, poor presentation to the public domain, overlooking and privacy issues, limited deep soil zones and landscaping and inconsistency with the character of the area.
4. Pursuant to Section 4.15 (1) (e) of the *Environmental Planning and Assessment Act 1979*, the proposal is not considered to be in the public interest due to the submissions by way of objection received during the notification period.
5. Pursuant to Section 4.15 (1) (b) of the *Environmental Planning and Assessment Act 1979*, the application fails to demonstrate that the proposal will not have an adverse environmental impact with respect to asbestos removal.

6. Pursuant to Section 4.15 (1) (b) of the *Environmental Planning and Assessment Act 1979*, the design of the childcare centre does not enable the Indoor Play Area 1 Room on the ground floor to receive solar access and be naturally ventilated. Accordingly, this arrangement does not provide a high level of amenity for staff and students.
7. Pursuant to Section 4.15 (1) (b) of the *Environmental Planning and Assessment Act 1979*, the design of the childcare centre does not include any outdoor play areas comprising deep soil zones to provide a natural play setting and a high level of amenity for children.
8. Pursuant to Section 4.15 (1) (b) of the *Environmental Planning and Assessment Act 1979*, the development does not provide adequate landscaping to soften and screen the development from neighbouring residential properties.

### **Attachments**

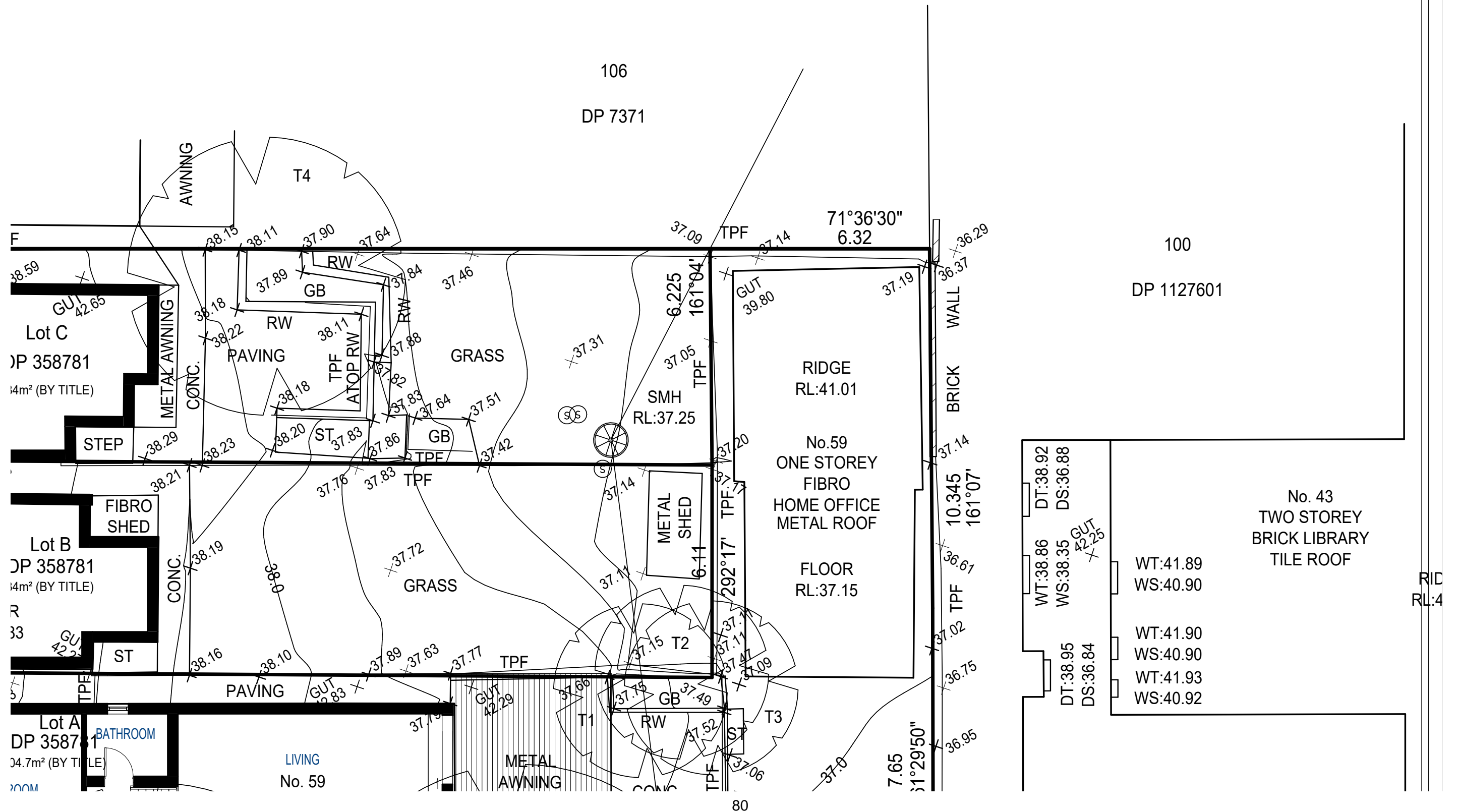
- 1 [↓](#) Architectural Drawings - 40-44 Claremont Road Burwood Heights
- 2 [↓](#) Landscape Plan - 40-44 Claremont Road Burwood Heights
- 3 [↓](#) Clause 4 .6 - Height - 40-44 Claremont Road, Burwood Heights
- 4 [↓](#) Clause 4.6 FSR- 40-44 Claremont Road Burwood Heights

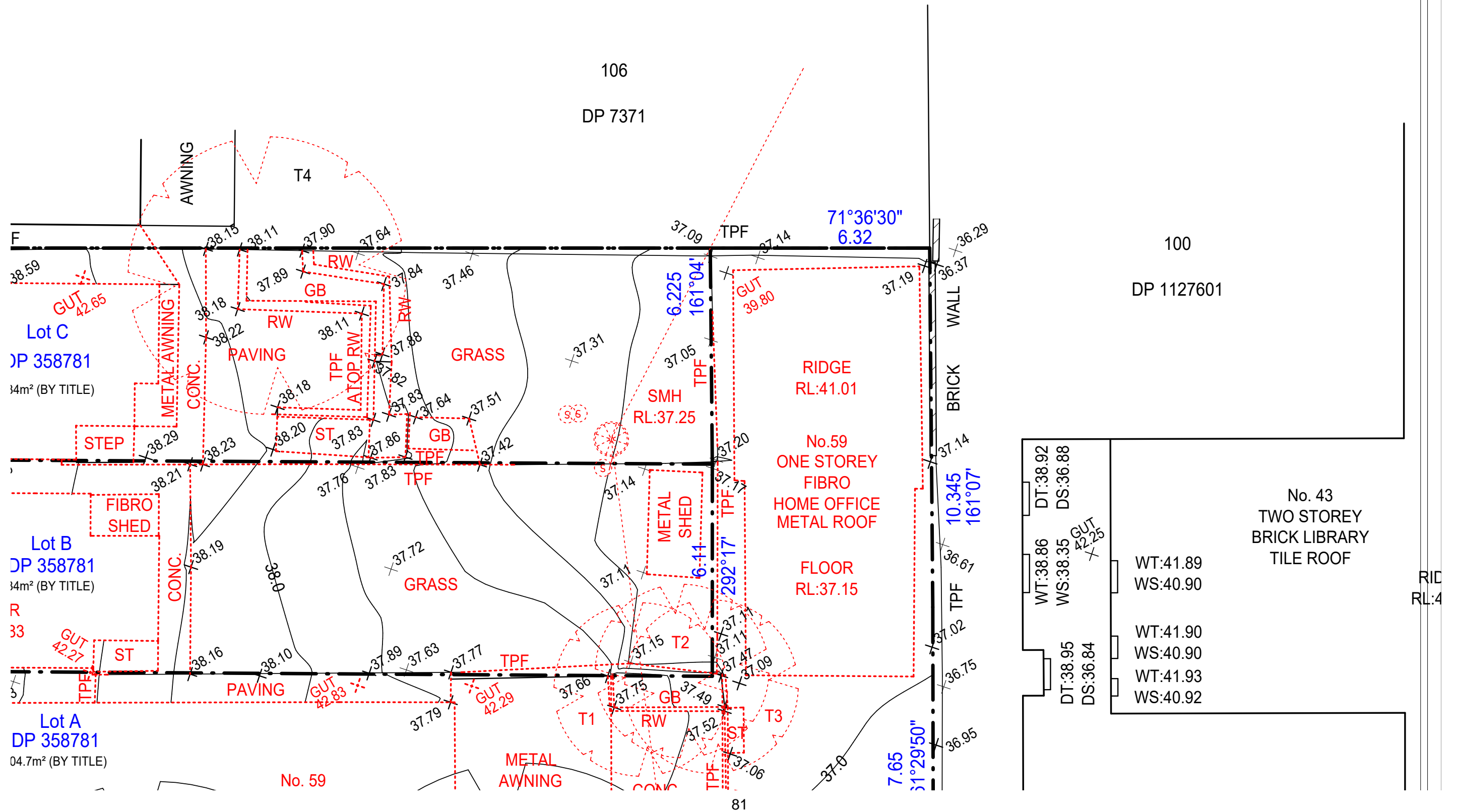


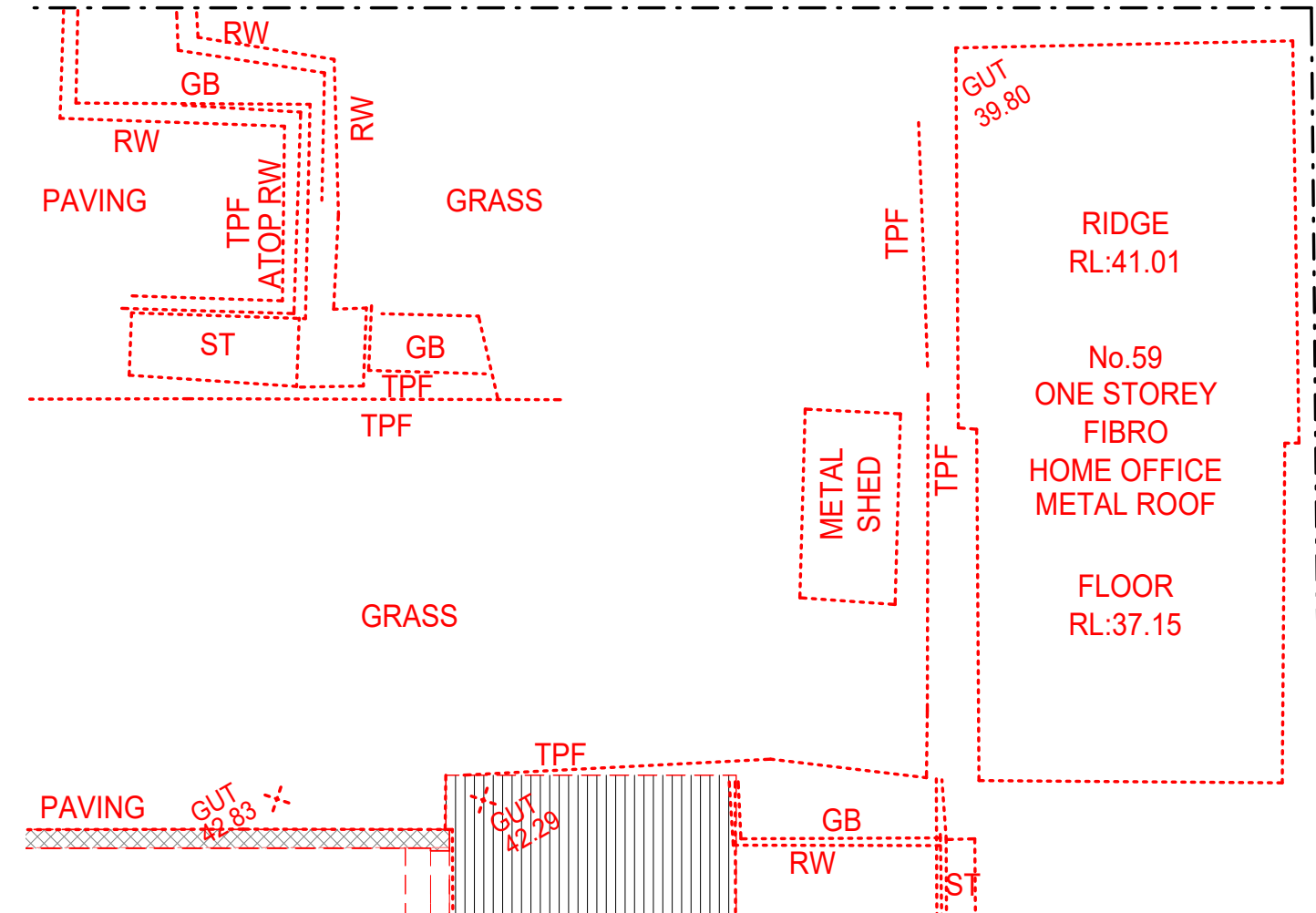
# BURWOOD HEIGHTS

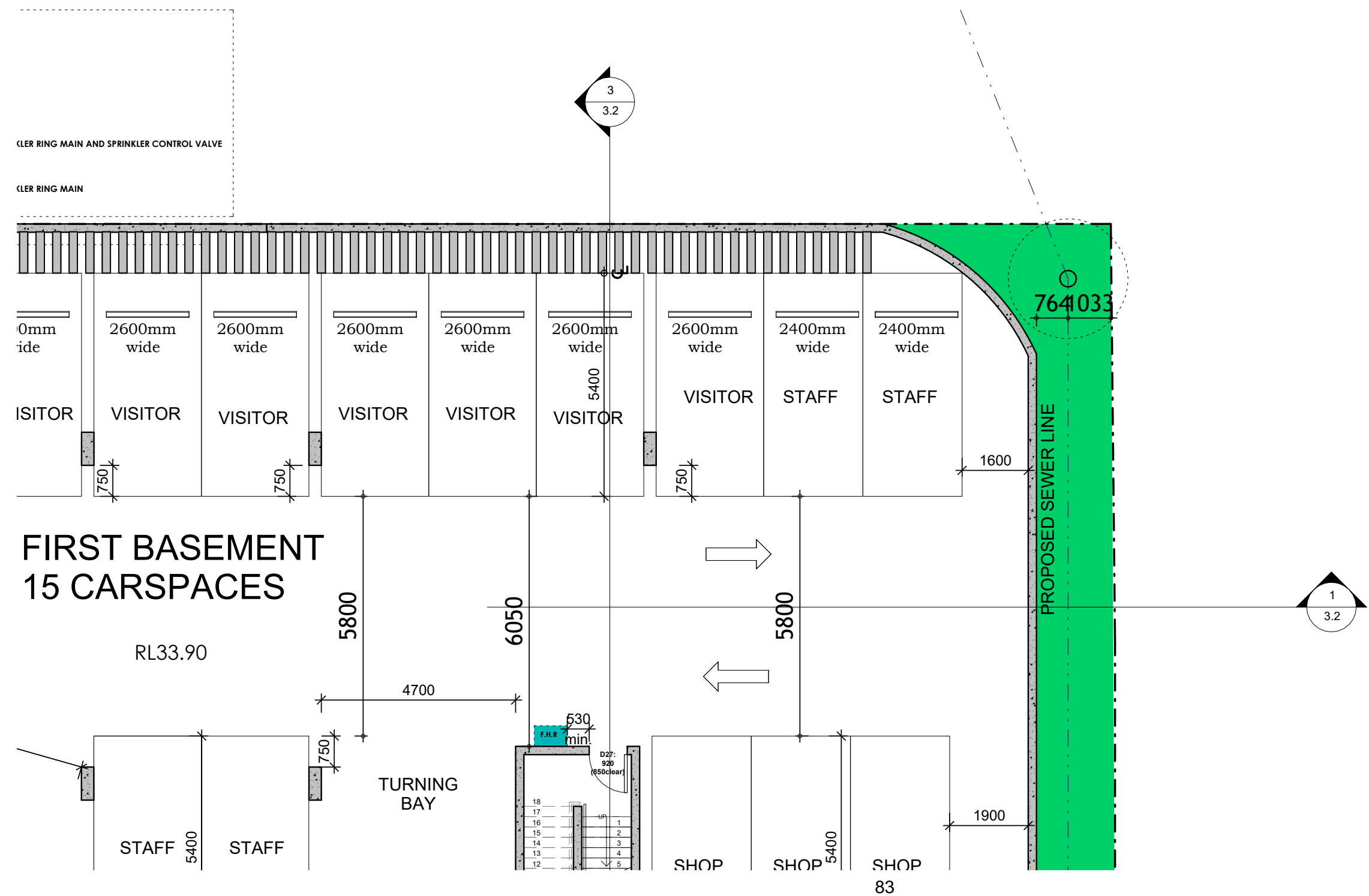




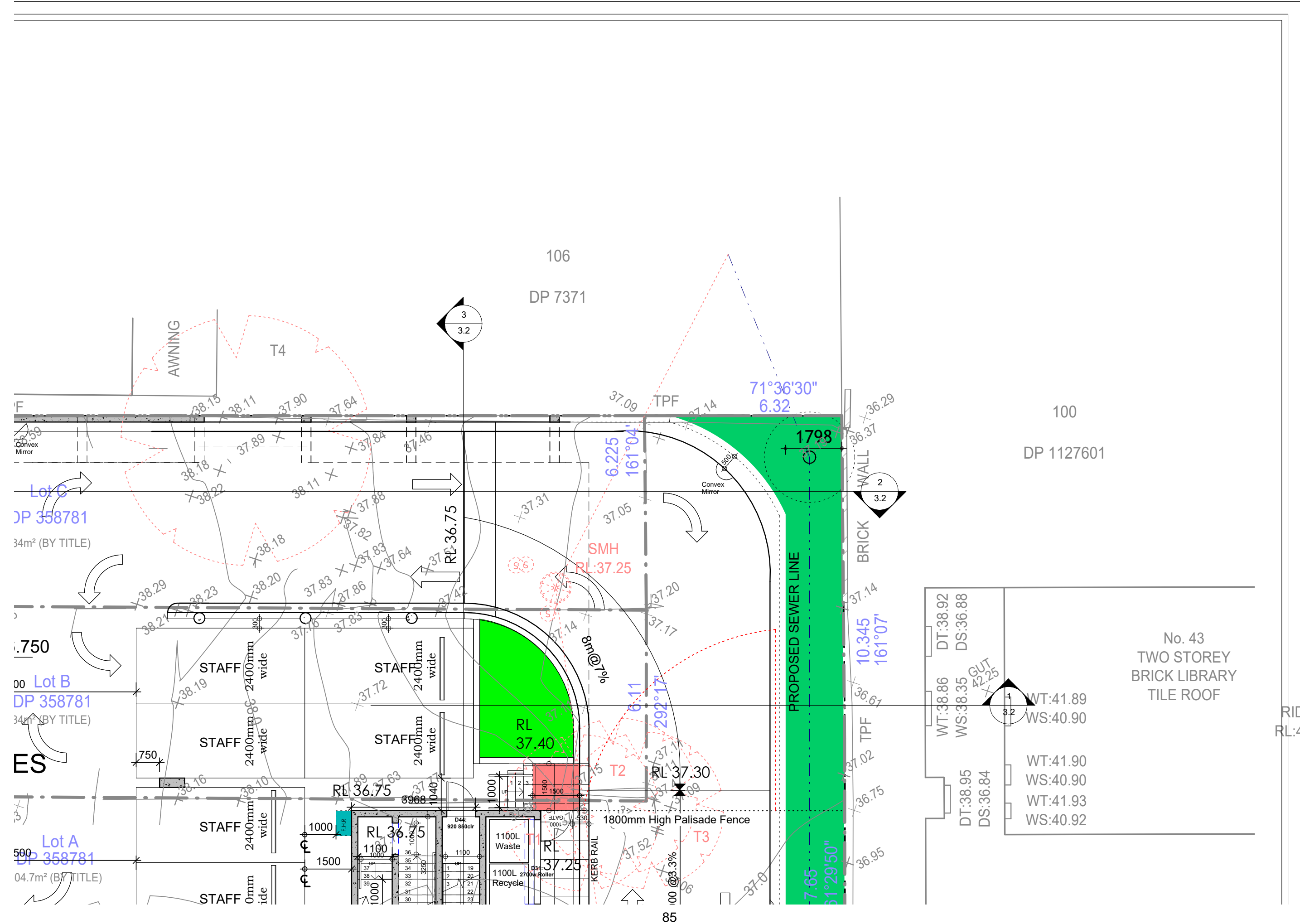




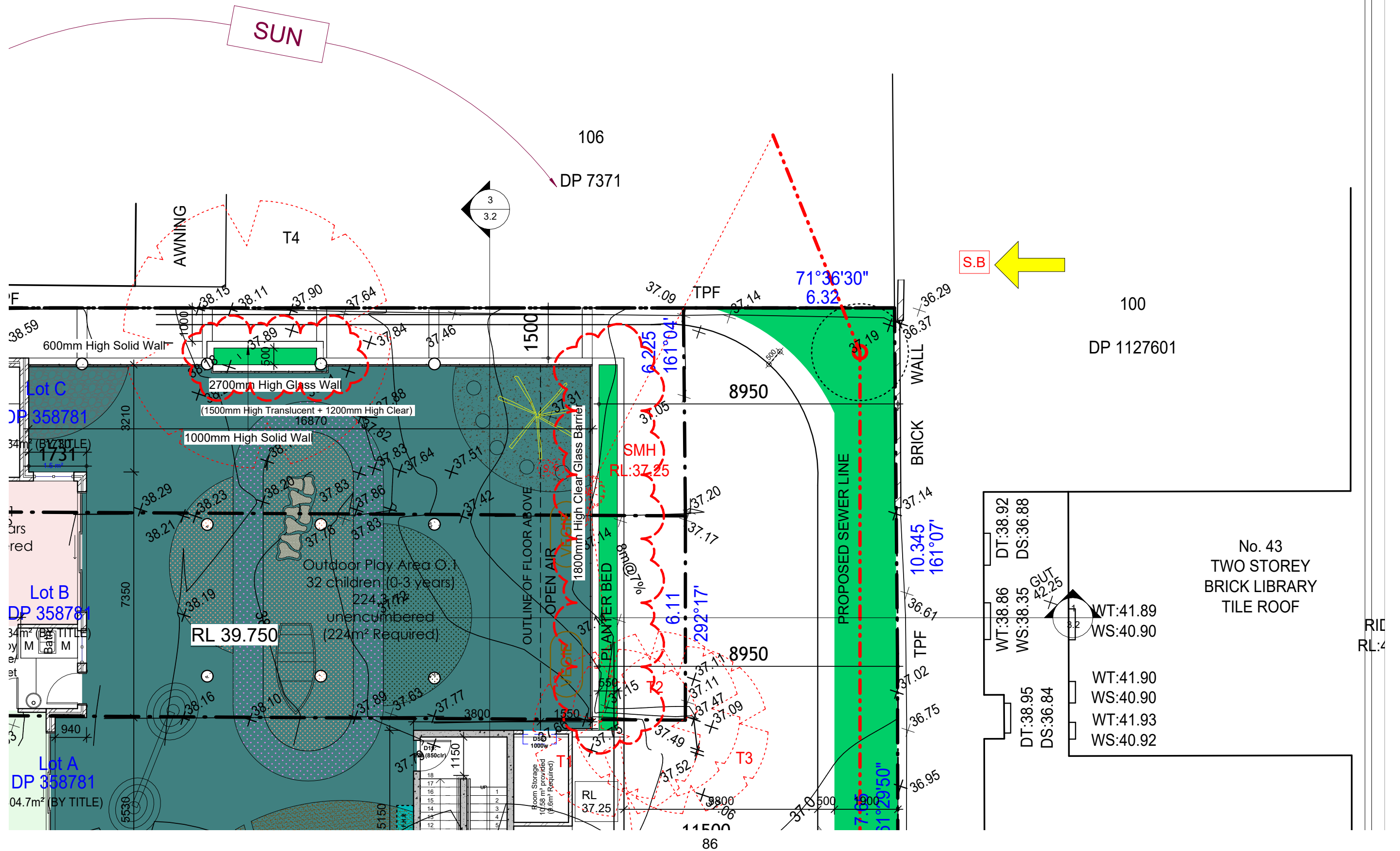






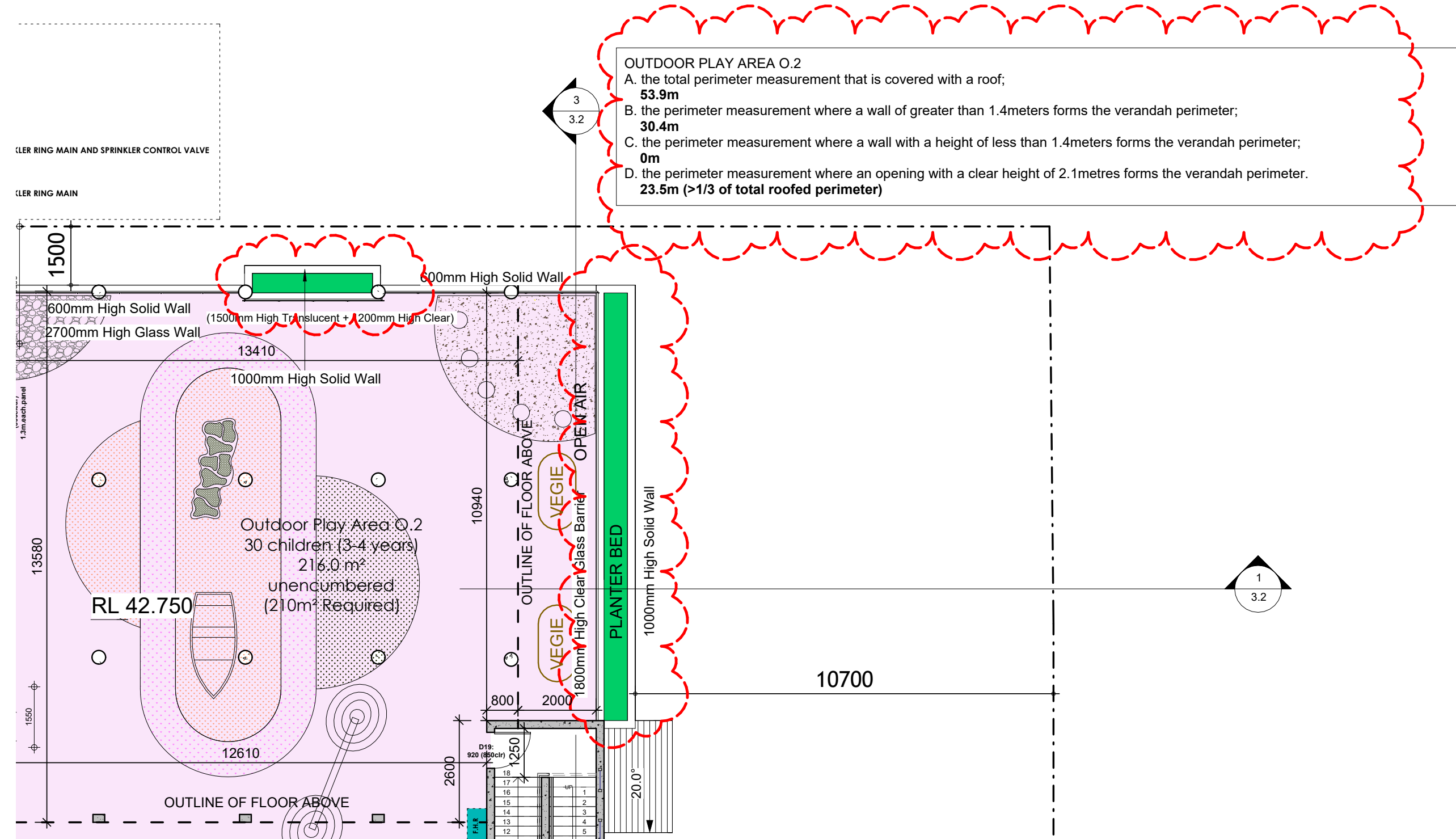


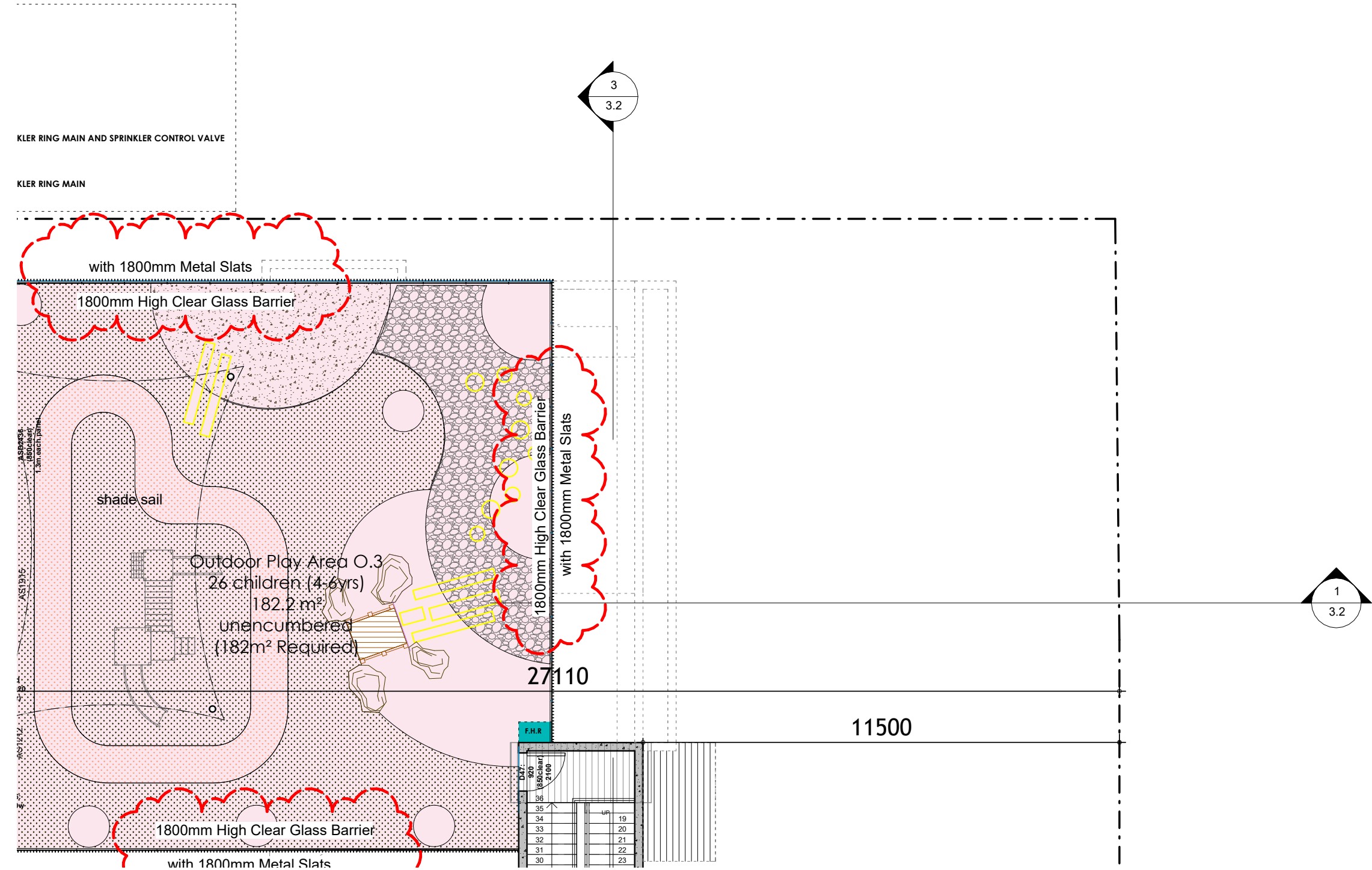


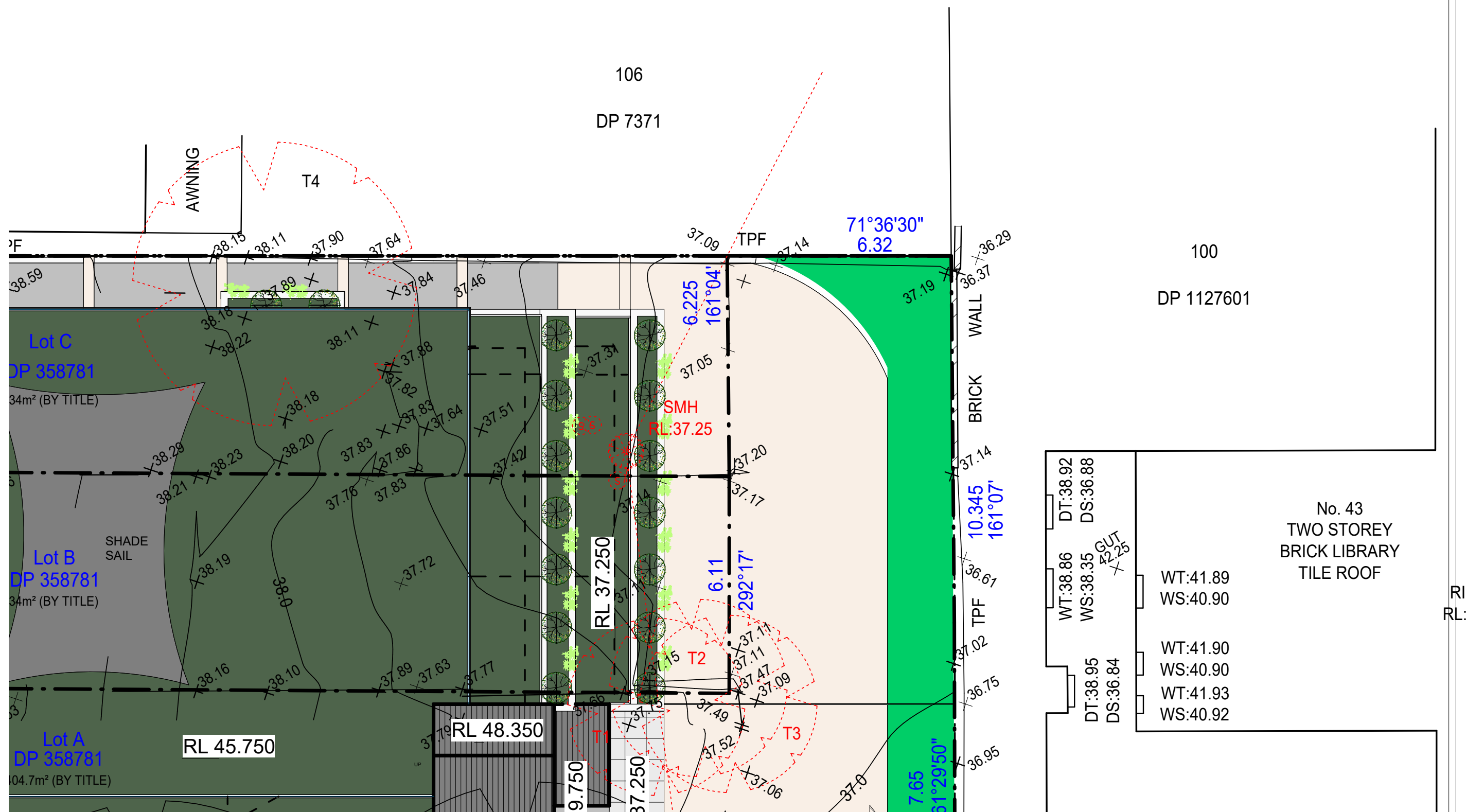








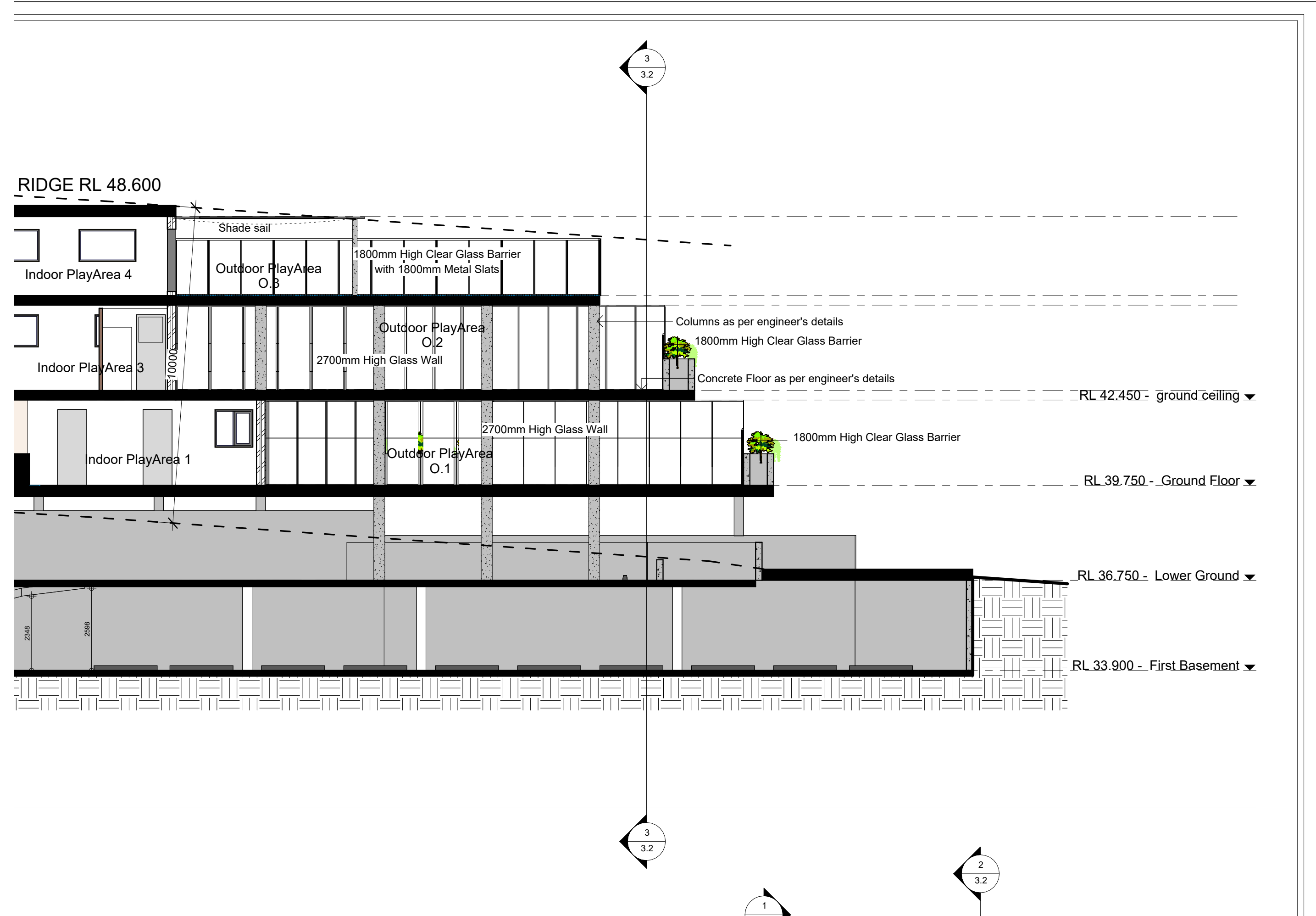




e	Department	Level	Area	Area Req'd
	32 children (0-3 years)	Ground Floor	224.3 m²	224
	30 children (3-4 years)	FIRST FLOOR	216.0 m²	210
	26 children (4-6yrs)	SECOND FLOOR	182.2 m²	182
total: 3			622.5 m²	

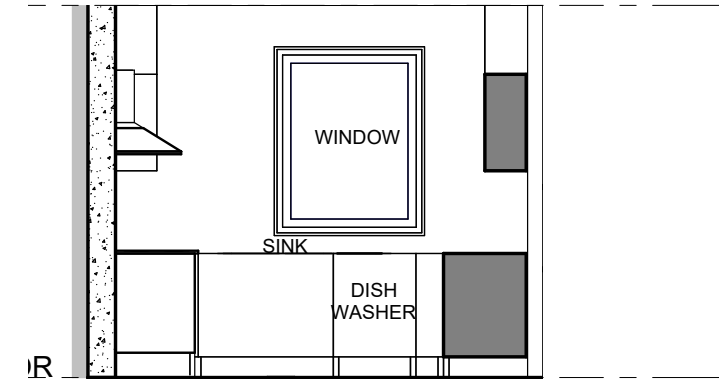






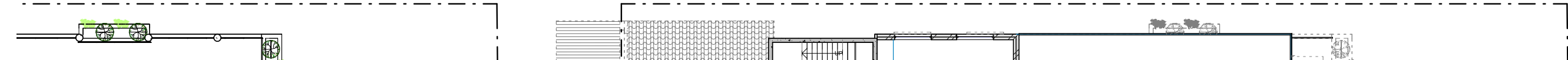
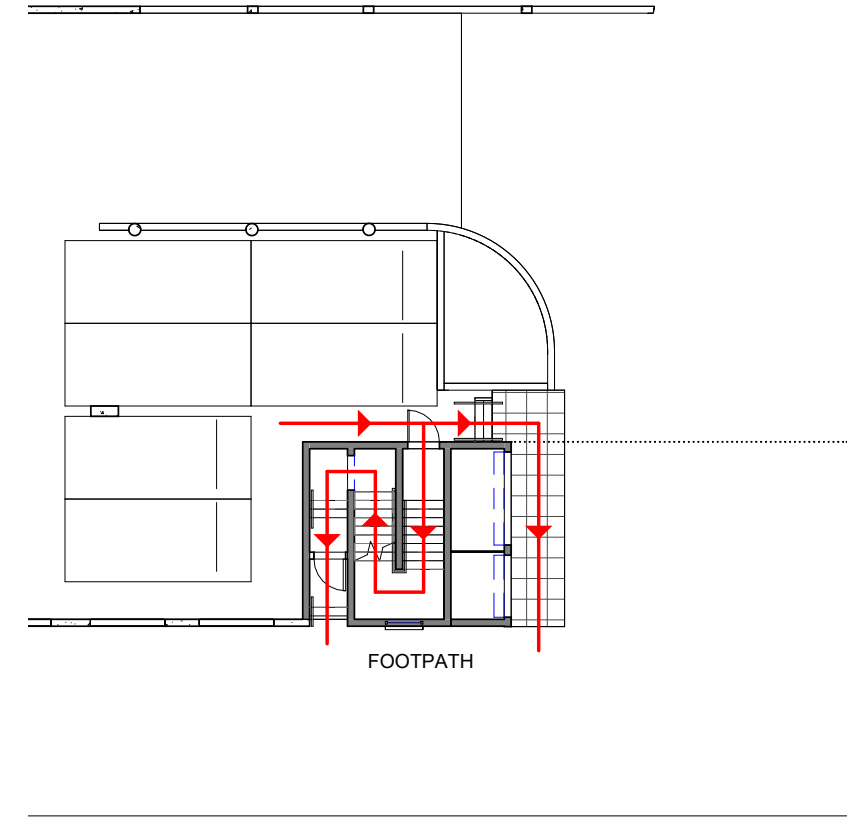


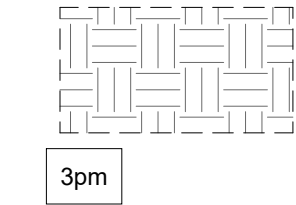




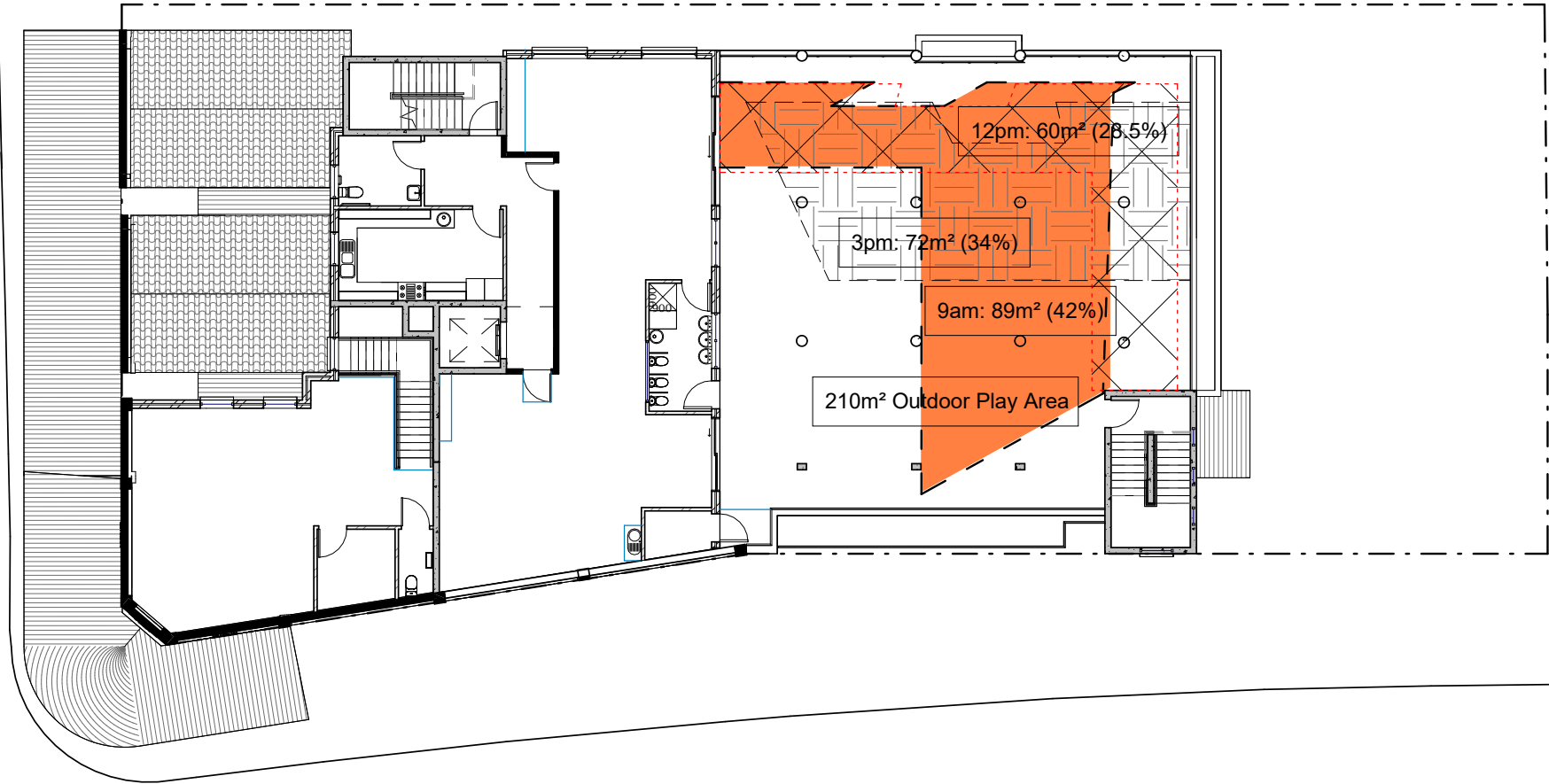
e design, construction, and fitout of  
e food premises must comply with







No. 38  
ONE STOREY  
RENDERED HOUSE



No. 43  
TWO STOREY  
BRICK LIBRARY

CLAREMONT ROAD

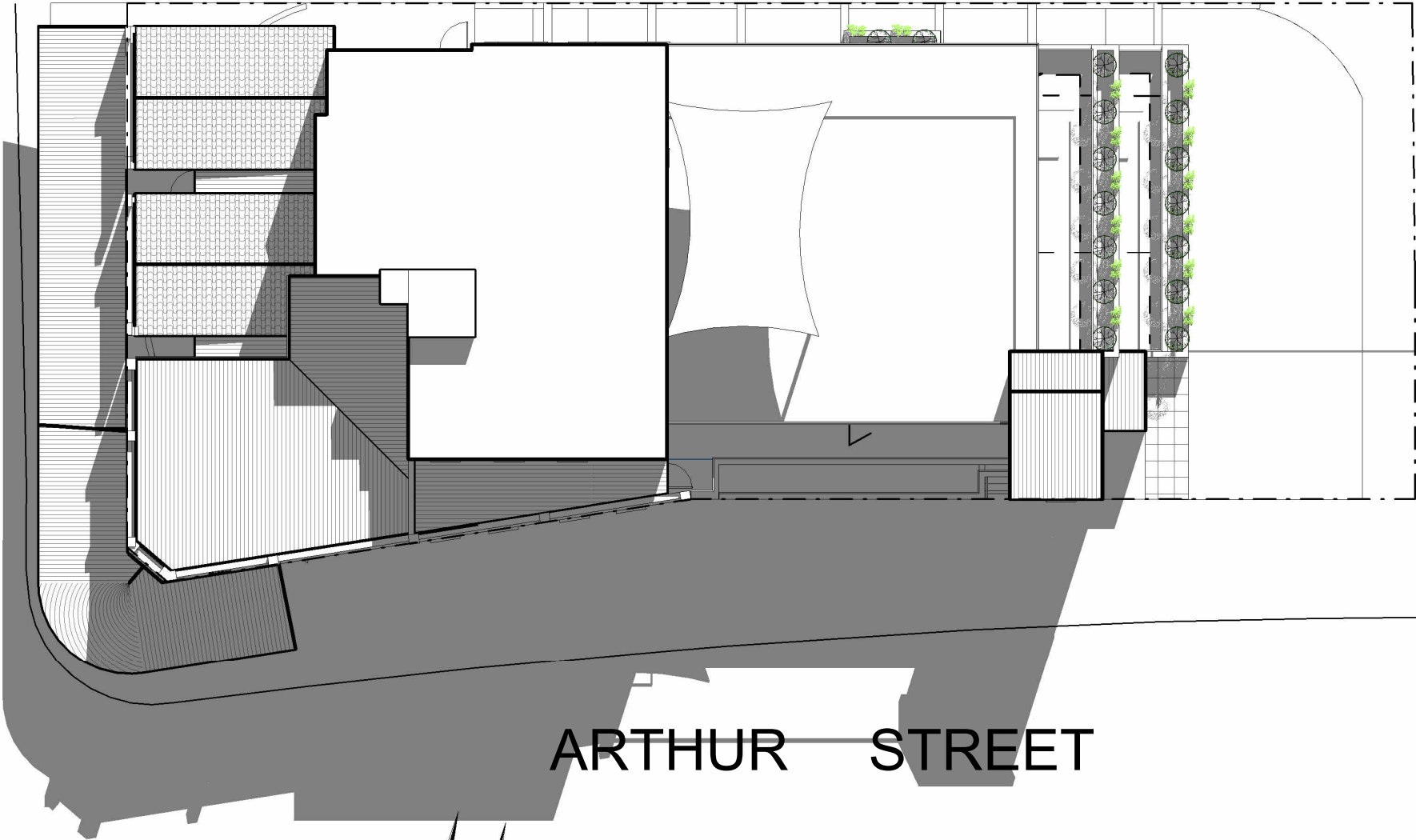
ARTHUR STREET

4 SOLAR ACCESS - First Floor  
- 1:200

CLAREMONT ROAD

No. 38  
ONE STOREY  
RENDERED HOUSE

No. 43  
TWO STOREY  
BRICK LIBRARY



ARTHUR STREET

9°30'









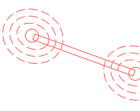








LEGEND / FINISHES SCHEDULE	PLAY AREA LEGEND
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	<p>EXISTING RL</p> <p>EXISTING TREE TO BE REMOVED</p> <p>NOTE: All noxious species on the site shall be removed and destroyed as per their classification under the noxious weeds Act.</p> <p>EXISTING TREE TO BE RETAINED AND SHALL BE PROTECTED DURING CONSTRUCTION IN ACCORDANCE WITH AS 4970-2009</p> <p>TREE PRUNING SHALL BE IN ACCORDANCE WITH AS 4373</p> <p>PROPOSED TREES, SHRUBS &amp; GROUND COVER (REFER NO. TO PLANT SCHEDULE)</p>
	<p>SELECTED 100 DEPTH PLAY MULCH WITH PROTECTION BOARD UNDER</p>
	<p>SELECTED WET POUR RUBBER (SOFT FALL) PLAY AREA &amp; PATTERN TO MANUF. DETAIL &amp; AS/NZS 4422:1996 STANDARDS</p>
	<p>SELECTED 100 DEPTH RIVER PEBBLES WITH PROTECTION BOARD UNDER</p>
	<p>SELECTED WET POUR RUBBER (SOFT FALL) PLAY AREA &amp; PATTERN TO MANUF. DETAIL &amp; AS/NZS 4422:1996 STANDARDS</p>

ITEM	MATERIAL
<b>SOIL</b> DETAIL 1 & 2	NOTE: ALL SOIL TYPE AS PER AUST. NATIVE LANDSCAPE SUPPLY OR EQUIVALENT AND SHALL BE IN ACCORDANCE WITH AS 4419 AND AS 4454 FOR SOIL CONDITIONERS AND COMPOSTS
<b>NATIVE GARDEN BED</b>	NATIVE GARDEN MIX
<b>PLANTER POTS</b>	PLANTER POT MIX IN ACCORDANCE WITH A54419:1998 & A53743
<b>MULCH</b>	SELECTED HARD WOOD CHIP SHALL BE IN ACCORDANCE WITH AS 4454
<b>PLANT MATERIAL</b>	AS PER PLANT SCHEDULE REFER TO DETAIL 2
<b>FENCE</b>	
<b>SIDES &amp; REAR BOUNDARY</b>	1800 HIGH LAPPED & CAPPED TIMBER FENCE OR 1800 HIGH COLOURBOND UNLESS THE TYPE OF MATERIAL IS STIPULATED IN ANY FLOOD STUDY PREPARE FOR THE SITE NOTE: SIDE FENCES ARE TO BE TAPER SIDE FROM THE FRONT BUILDING LINE TO BE NOT MORE THAN 900mm HIGH AT THE FRONT BOUNDARY

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### PLAY AREA LEGEND

	SELECTED PLANTER 1000D X 1000H GRC Cylinder Planter 1000D X 1000H
	SELECTED TIMBER BOAT
	WET POURED HOPSCOTCH (TO MANUF. DETAIL)
	SELECTED WATER PUMP FEATURE
	TIMBER BRIDGE
	SELECTED FEATURE ROCKS
	SELECTED RAISED VEGE GARDEN
	SELECTED ROCK EDGING
	SYNTHETIC TURF MOUND WITH BALANCE BEAM 300MM HIGH
	SELECTED LOG TEEPEE
	SYNTHETIC TURF MOUNDING WITH SLIDE TUNNEL UNDER
	SELECTED SAND STONE SEATS
	SELECTED TIMBER CUBBY (TO MANUF. DETAIL)
	SELECTED TREE TRUNKS / TIMBER SLEEPERS
	DIFFERENT HEIGHT SELECTED STEPPING STONES
	SELECTED PLAY EQUIPMENTS
	ALL OUTDOOR PLAY EQUIPMENT SHALL BE SELECTED BY OWNER AND TO COMPLY WITH AS/NZS 4486.1 1997 STD

# PROPOSED MIXED USE & CHILDCARE DEVELOPMENT (Development Application)

## DRAWING SCHEDULE

DRAWING NO:	DRAWING TITLE	
22215 DA 1/3	LEGEND/ DETAILS / PLANT SCHEDULE	
22215 DA 2/3	LOWER & GROUND LEVEL	LANDSCAPE CONCEPT PLAN
22215 DA 3/3	LEVELS 1 & 2	LANDSCAPE CONCEPT PLAN

## PROPOSED PLANT SCHEDULE

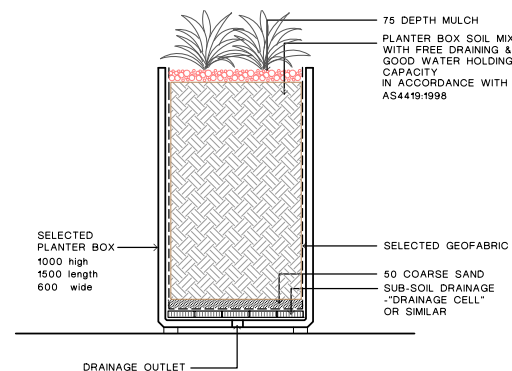
IN ACCORDANCE WITH AS 2303: 2015

CODE	BOTANICAL NAME	COMMON NAME	APPROX MATURED HEIGHT	POT SIZE	QUANTITY
<b>GROUND COVER / BOARDER</b>					
2	Lomandra 'TANIKA'	Dwarf Lomandra	0.75	150mm	19
3	Viola hederacea	Native Violet	hanging	150mm	12
4	Liriope muscari 'Just Right'	Just Right Liriope	0.5	150mm	98
7	Phorumn Chocomin Mist	Chocomin Mist	0.5	150mm	18
8	Dichondra Silver Falls	Silver Falls	0.1	150mm	35
10	Aspidistra elatior	Cast-Iron Plant	0.5	150mm	28
<b>LOW SHRUBS</b>					
13	Acacia cognata Limelight	Bower Wattle	0.7	200mm	3
16	Callistemon Great Balls of Fire	Great Balls of Fire	2	200mm	7
20	Westringia Wynyabbie Gem	Wynyabbie Gem	1.2	200mm	9
<b>TALL SHRUBS</b>					
28	Pittosporum tenuifolium 'Silver Sheen'	Pittosporum Silver Sheen	3	200mm	12
<b>FEATURE SHRUBS</b>					
35	Cordylina 'Red Sensation'	Red Sensation	1.2	25 L	2
37	Rhapis excelsa	Lady palm	2.5	200mm	6
39	Thysanotus maxima	Tiger grass	1.5	200mm	4
<b>TREES</b>					
43	Elaeocarpus reticulatus	Blueberry Ash	8	45 L	3
48	Magnolia Teddy Bear	Magnolia	5	45 L	3

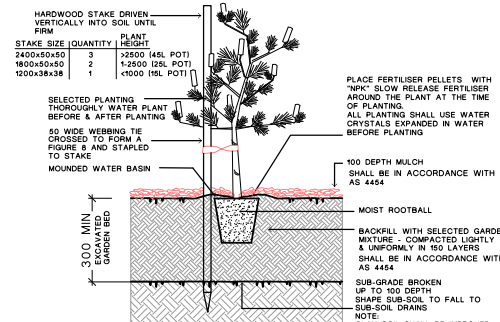
NOTE:

THE TREES SHALL COMPLY WITH NATSPEC SPECIFYING TREES:  
A GUIDE TO ASSESSMENT OF TREE QUALITY (2003) OR AUSTRALIAN STANDARD AS 2303  
- 2015 TREE STOCK FOR LANDSCAPE USE.

HEIGHT AND SPAN ARE INDICATIVE ONLY.SUBJECT TO ON SITE ENVIRONMENTAL FACTORS.  
USE ONLY AS A GUIDE.



1. TYPICAL PLANTER TROUGH DETAIL  
(TO COMPLY WITH BCA REQUIREMENTS)  
NOTE :  
INSTALLATION OF SUB-SOIL  
DRAINAGE SHALL BE AS PER  
MANUFACTURER'S DETAILS &  
SPECIFICATION

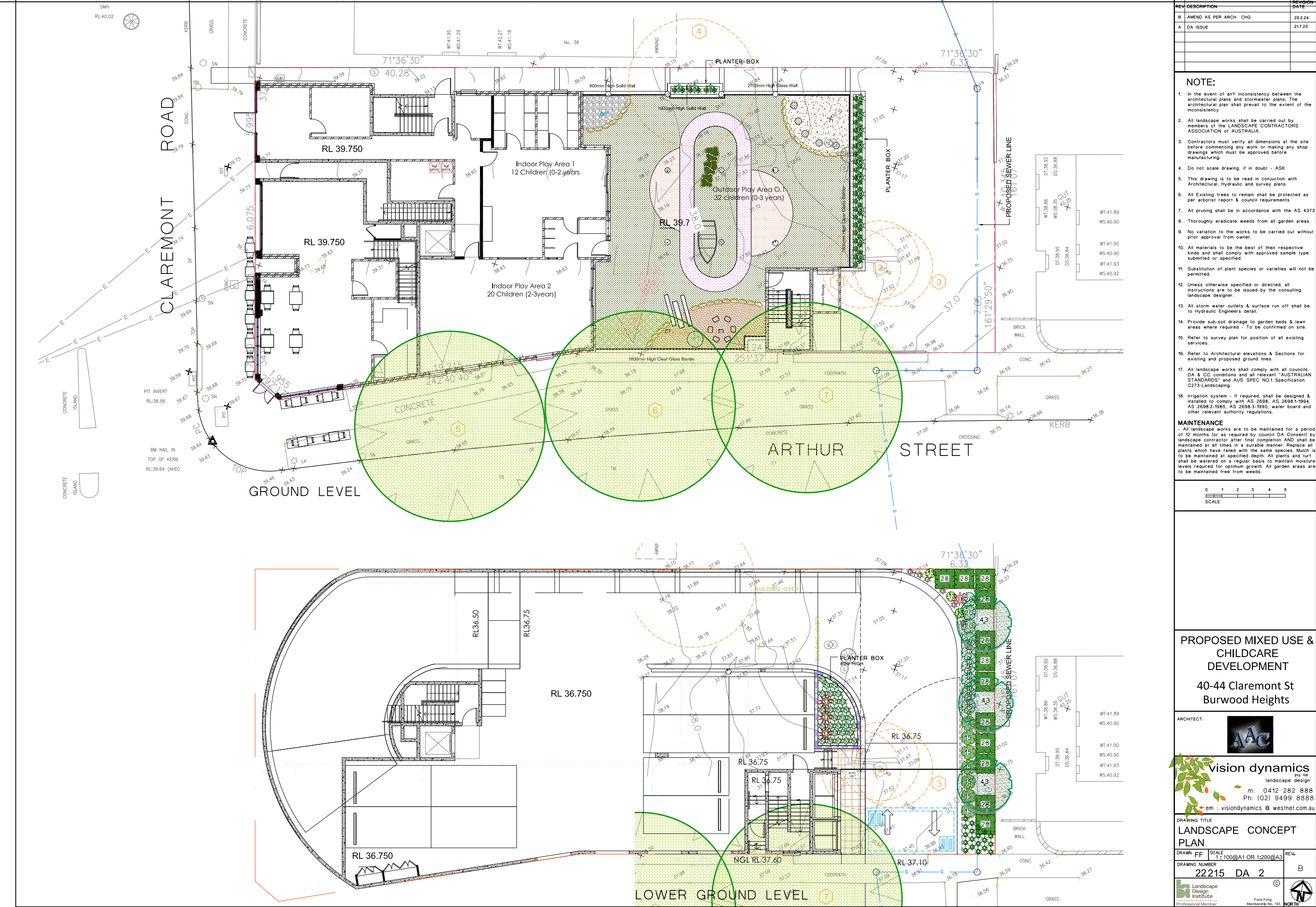


## 2. TREE & SHRUB PLANTING IN GARDEN BED ©

**NOTE :**  
DO NOT PLANT IN UNSUITABLE WEATHER CONDITIONS SUCH AS  
EXTREME HEAT, COLD, WIND OR RAIN. CLAY SOIL IS TO BE TREATED  
WITH CLAY BREAKER AND ORGANIC COMPOST  
  
ALL SOIL TYPE AS PER AUST. NATIVE LANDSCAPE SUPPLY OR  
EQUIVALENT AND SHALL BE IN ACCORDANCE WITH AS 4419



Landscape Plan - 40-44 Claremont Road Burwood Heights





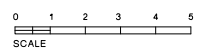


NOTE:

1. In the event of any inconsistency between the architectural plans and stormwater plans, The architectural plan shall prevail to the extent of the inconsistency
2. All landscape works shall be carried out by members of the LANDSCAPE CONTRACTORS ASSOCIATION of AUSTRALIA.
3. Contractors must verify all dimensions at the site before commencing any work or making any shop drawings which must be approved before manufacturing.
4. Do not scale drawing, if in doubt - ASK
5. This drawing is to be read in conjunction with Architectural, Hydraulic and survey plans
6. All Existing trees to remain shall be protected as per arborist report & council requirements
7. All pruning shall be in accordance with the AS 4373
8. Thoroughly eradicate weeds from all garden areas.
9. No variation to the works to be carried out without prior approval from owner.
10. All materials to be the best of their respective kinds and shall comply with approved sample type submitted or specified.
11. Substitution of plant species or varieties will not be permitted.
12. Unless otherwise specified or directed, all instructions are to be issued by the consulting landscape designer.
13. All storm water outlets & surface run off shall be to Hydraulic Engineers detail.
14. Provide sub-soil drainage to garden beds & lawn areas where required - To be confirmed on site.
15. Refer to survey plan for position of all existing services.
16. Refer to Architectural elevations & Sections for existing and proposed ground lines.
17. All landscape works shall comply with all councils DA & CC conditions and all relevant "AUSTRALIAN STANDARDS" and AUS SPEC NO.1 Specification C273-Landscaping.
18. Irrigation system - If required, shall be designed & installed to comply with AS 2698, AS 2698.1-1994, AS 2698.2-1995, AS 2698.3-1990, water board and other relevant authority regulations.

## MAINTENANCE

- All landscape works are to be maintained for a period of 12 months (or as required by council DA Consent) by landscape contractor after final completion AND shall be maintained at all times in a suitable manner. Replace all plants which have failed with the same species. Mulch is to be maintained at specified depth. All plants and turf shall be watered on a regular basis to maintain moisture levels required for optimum growth. All garden areas are to be maintained free from weeds.



PROPOSED MIXED USE &  
CHILD CARE  
DEVELOPMENT

40-44 Claremont St  
Burwood Heights

ARCHITECT:



 vision dynamics pty ltd  
landscape design  
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DRAWING TITLE

LANDSCAPE CONCEPT  
PLAN

DRAWN	FF	SCALE	1:100@A1 OR 1:200@A3	REV.
DRAWING NUMBER				
22215 DA 3				

Fiona Fong  
Membership No. 193



## CLAUSE 4.6 VARIATION

### BUILDING HEIGHT

40-44 CLAREMONT ROAD,  
BURWOOD HEIGHTS

28 NOVEMBER 2023





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## INTRODUCTION & BACKGROUND

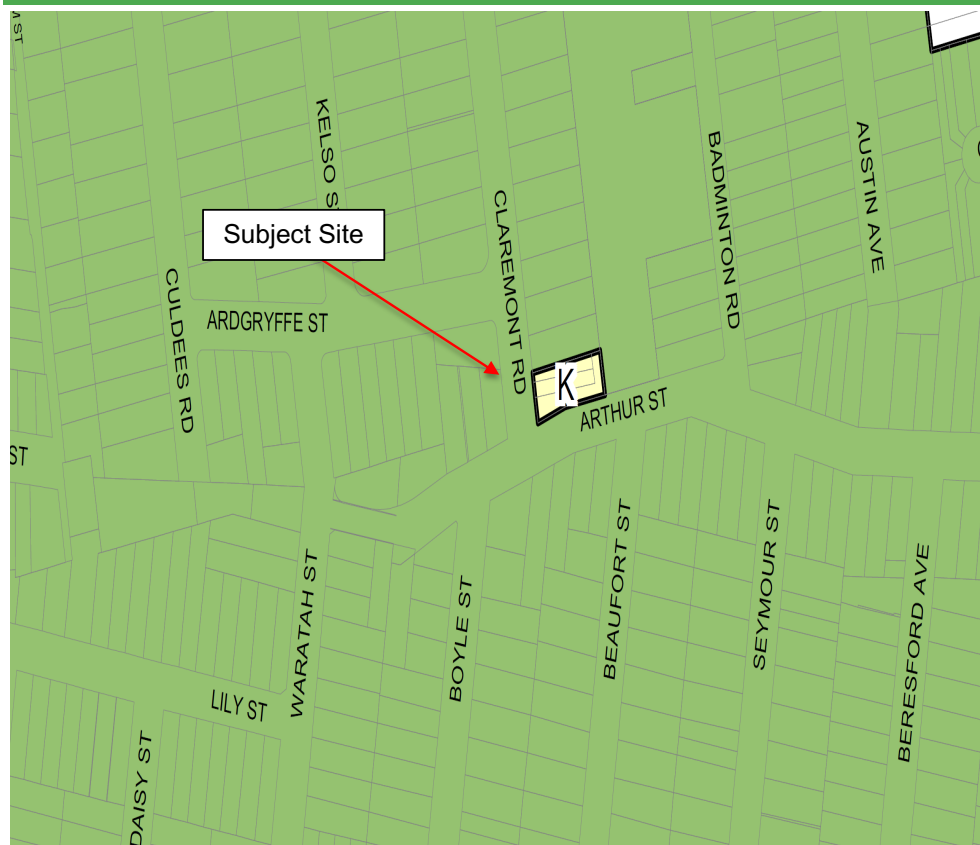
### *The Development Proposal & The Site Area*

The development seeks consent to amalgamate 3 separate land parcels, remove identified trees and undertake demolition works in-order to construct a part 2 – part 4 storey 'Mixed Use' development comprising a commercial premises and a child care facility over 2 levels of basement at 40-44 Claremont Street, Burwood Heights.

The development site once consolidated can be best described as an irregular shaped corner land parcel with a frontage of approximately 19.7m to Claremont Road along its western boundary and a frontage of approximately 45.45m to Arthur Street along its southern boundary with a total site area of 872.7m<sup>2</sup>.

Clause 4.3 under the Burwood Local Environmental Plan 2012 (BLEP 2012) stipulates that the development site is subject to a maximum building height of 10m – as indicated on the height of building map extract below. It is noted that the 'K' notation a height limit of 10m.

**Figure 1: Height of Building Map Extract (Source: Burwood LEP 2012)**



#### 4.3 Height of buildings

(1) The objectives of this clause are as follows:

- (a) to establish the maximum height of buildings to encourage a medium density development in specified areas and maintain Burwood's low density character in other areas
- (b) to control the potentially adverse impacts of building height on adjoining areas.

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

The development exhibits the following building height elements:

Portion	Maximum Height	Departure
Actual Building	<10m	None
Lift Over-Run	10.37m-10.8m	Yes- variation maximum 8% to fire stair.

The 3d height plane shows the extent of the height breach limited to the lift and fire stairs that are essential to the development- and the image shows how minor the breach is and this is not perceptible from the public domain given the location and height of existing trees as shown at Figure 3.

Figure 2: 3D height plane.

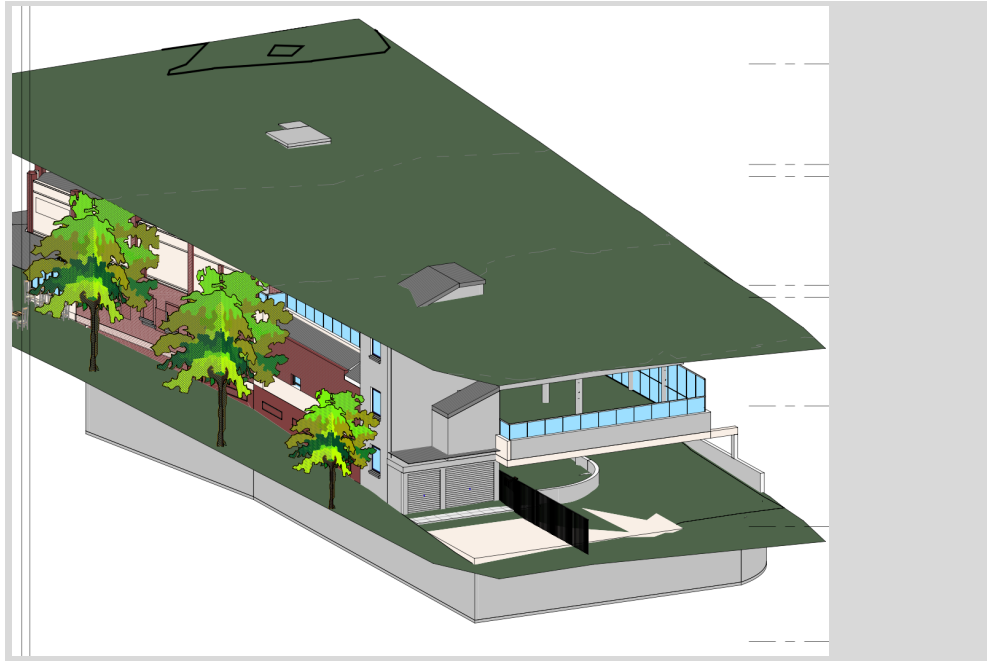


Figure 3: 3D height plane.



Accordingly, development consent to the proposal is sought, even though the overall height of the building does not comply with Clause 4.3 of the LEP, pursuant to this request that addressed the requirements of Clause 4.6 of the Burwood LEP 2012.

The application asks that the Consent Authority consider this request, and grant development consent to the proposal, despite the departure from the control, for the reason stated within this paper.



## THE LAW

Clause 4.6 of the Burwood Local Environmental Plan 2012 provides that development consent may be granted for development even though the development would contravene a development standard.<sup>1</sup> That clause is in the following terms:

### ***“4.6 Exceptions to development standards***

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

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

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

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

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

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

- (a) the consent authority is satisfied that:*
  - (i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Secretary has been obtained.*

*(5) In deciding whether to grant concurrence, the Secretary must consider:*

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*

---

<sup>1</sup> Clause 4.6(2)



- (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Consequently, by this request, the applicant seeks to justify the contravention of the Standard by demonstrating (as clause 4.6(3) requires):

- (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."*

Further, the Consent authority must be satisfied (as clause 4.6(4) requires) that:

- (i) *(this 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) *that concurrence of the Secretary has been obtained*

#### RELEVANT CASE LAW

There are a number of Land and Environmental Court cases including:

- *Four 2 Five v Ashfield (2015) NSWCA 248*
- *Micaul Holdings Pty Ltd v Randwick City Council (2016) NSWLE C7*
- *Moskovich v Waverley Council (2016) NSWLEC 1015*
- *Zhang v Council of the City of Ryde (2016) NSWLEC 1179*

In addition, a recent judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliance scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the building height departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and



- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgement is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is "consistent with" the objectives of the development standard and zone is not a requirement to "achieve" those objectives. It is a requirement that the development be compatible with the objectives, rather than having to 'achieve' the objectives.
- Establishing that 'compliance with the standard is unreasonable or unnecessary in the circumstances of the case' does not always require the application to show that the relevant objectives of the standard are achieved by the proposal (Wehbe "test" 1). Other methods are available as per the previous 5 test applying to SEPP 1, set out in Wehbe v Pittwater.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in 'the public interest'.

In relation to the current proposal the key are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating consistency with the E1 Local Centre zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provision of Clause 4.6.

### THE VARIATION & DESIGN RESPONSE

Clause 4.3 under Burwood LEP 2012 stipulates a maximum building height of 10m for the subject site. The development exhibits the following building height elements:

Portion	Maximum Height	Departure
<b>Actual Building</b>	<10m	None
<b>Lift Over-Run</b>	10.37m-10.8m	Yes- variation maximum 8% to fire stair.

The 3d height plane shows the extent of the height breach limited to the lift and fire stairs that are essential to the development- and the image shows how minor the breach is and this is not perceptible from the public domain given the location and height of existing trees as shown at Figure 3.

Figure 2: 3D height plane.



As per the architectural plans submitted, the variation to height control is limited to the lift over-run – a function of providing access requirements to service the building and also cross-fall of the site, with all portions of the building being below the 10m prescribed height limit, noting that the lift overrun is recessed and not visible from the street level.





### COMPLIANCE UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the following reasons:

1. Compliance with the objectives of the development standard and the zone are achieved despite non-compliance with that standard.
2. The development would not only retain the retail use of No. 42 and 44 as a florist and café
3. The relevant objectives of the zone in particular the delivery of retail use would be thwarted should the development be refused solely on the height non-compliance, noting that extensive period of rain in 2022 has resulted in the existing building required to under-go extensive repairs to the parapets, lintels and awnings to save the building.
4. Further, as explained below, the underlying objectives of the control, as well as the objectives of the zone, are achieved despite the minor non-compliance with the numerical development standard.
5. The development will not only retain the existing inter-war shop façade combined with the construction of a suspended awning similar to the existing three separate awnings will ensure that not only the historical street patterns within the existing shop continues to be read as separate entities but will retain the retail element via maintaining the use of No. 42 and 44 as a cafe and florist's shop and introduce valuable child care places within Burwood Heights.

### ADDRESS OF CLAUSE 4.6 PROVISIONS

A detailed discussion against the relevant provisions of Clause 4.6 are provided below.

The design scheme ensures that the building itself is contained below the maximum building height line which indicates that the variation is not simply a means of achieving additional yield on the site – but a site specific design response.

In this case, the variation stems from a portion of the lift overrun which is recessed and not visible from the street level. As such the proposal will continue to be consistent with the underlying intent of the control and the variation is considered appropriate.

Clause 4.6 provides that development consent may be granted for development even through the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

3. *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to*





*justify the contravention of the development standard by demonstrating:*

- a. That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - b. That there are sufficient environmental planning grounds to justify contravening the development standard.*
4. *Development consent must not be granted for development that contravenes a development standard unless:*
- a. the consent authority is satisfied that:*
    - i. the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)*
    - 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 concurrency of the Director-General has been obtained.*
  - c. or unnecessary in the circumstances of the case, and*
5. *In deciding whether to grant concurrence, the Director-General must consider:*
- a. Whether contravention of the development standard raises any matter of significant for State or regional environmental planning, and*
  - b. The public benefit of maintain the development standard, and*
  - c. Any other matters required to be taken into consideration by the Director-General before granting concurrence.*

Each of these provisions are addressed in turn.

#### **Clause 4.6(3) – Compliance Unreasonable and Unnecessary**

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as:

- The underlying objectives of the control are satisfied.

This sets the desired future character for development in the E1 – Local Centre Zone in the immediate locality, with the current proposal is consistent with the approved building height for other development in the locality which clearly establishes the directed future character of the locality.



### Underlying Objectives are Satisfied

In *Whebe v Pittwater* it was set out that compliance can be considered unreasonable or unnecessary where:

- (i) The objectives of the standard are achieved notwithstanding non-compliance with the standard*

It is considered that this approach can be followed in this instance.

The objectives of the building height development standard are stated as:

- (a) to establish the maximum height of buildings to encourage a medium density development in specified areas and maintain Burwood's low density character in other areas*  
*(b) to control the potentially adverse impacts of building height on adjoining areas.*

The proposal, despite the numerical non-compliance identified, remains consistent with the objective as set out in the following analysis against each objective –

#### Clause 4.3 Height Objective (a) to establish the maximum height of buildings

- The building itself does not exceed the prescribed maximum building height provision, rather limited to the lift overrun – which is recessed and as such not highly visible from the street level. As such it can be concluded that the proposal is consistent with the objective to establish a maximum building height across the site mapped as being 10m and the point encroachment are not the result of an intentional attempt to break the maximum height of building to achieve a form or yield beyond that which is intended in the planning controls rather a bi-product of servicing the development with a lift and fire egress stairs.
- The variation as stated previous is partly a response to the cross-fall of the site. Particularly it is necessary to have a suitable balance between achieving appropriate amenity for ground floor commercial premises (avoiding excessive cut) and level floor plates for accessibility, whilst ensuring that the building levels are aligned to the levels of the public road infrastructure being provided across the site. The means that variation in height, relative to NGL, is unavoidable on sites that have a cross-fall and level changes, as in the case with the current proposal.
- The development is consistent with the intent of the maximum height control, noting that the minor encroachment associated with the lift overrun will not result in setting any negative height precedent within the immediate locality and the building itself is compliant other than those elements meaning the intended and desired height limit is maintained other than for the point encroachments.



- With the departure to the height provision limited to a small portion of the lift overrun, the encroachment will not be visible from the street level and as such will not impact on the streetscape presentation or to the heritage conservation area.

Clause 4.3 Height Objective (b) to control the potential adverse impacts of building height on adjoining areas

- Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard it is noted:
  - The variation will be visually unnoticeable and will have no adverse impact on the physical bulk, height or scale of the development.
  - The variation will not lead to a reduction in solar penetration on site or to adjoining properties nor will it lead to sunlight loss or overshadowing.
  - The proposed variation will not lead to view loss or interrupt on views to and from the site.
  - The proposed variation will not lead to a reduction in privacy afforded to neighbouring properties.
- With the departure to the height provision limited to a portion of the lift overrun – which is recessed, the encroachment will not be visible from the street level and as such will not impact on the streetscape presentation.
- The non-compliance to the height control has no impact on the setting of any items of environmental heritage or view corridors.

As outlined above, the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable. The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.



## ENVIRONMENTAL PLANNING GROUNDS

The following factors demonstrate that sufficient environmental planning grounds exist to justify contravening the maximum building height development standard<sup>2</sup> and further demonstrates that the height departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site. For that purpose, the critical matter that is required to be addressed is the departure from the development standard itself, not the whole development.

- The variation to the height control does not generate unacceptable adverse impacts to surrounding properties or as viewed from the public domain. The variation to the height control does not result in unacceptable overshadowing and privacy impacts to the adjoining residential properties;
- There are also circumstances that relate to the topographical fall of the site. This undulation and historic landform modification means that to achieve strict compliance would result in the building levels to be further stepped and cut into the site which results in a poor outcome for the ground floor tenancies, accessibility, entry to lobbies and alignment of buildings with the public domain; and it would result in a suboptimal outcome as compared to the current situation which results in the non-compliance to the building height control.

There are relevant concepts in Clause 1.3 “Objects of Act” of the Environmental Planning and Assessment Act 1979 to “proper management, development and conservation of the state’s natural and other resources”, “to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment”, “to protect the environment”, and “to promote the proper construction and maintenance of buildings”. These concepts, identified in the Acts objects, give weight to the need to ensure that development is planned in a way that does not give rise to unnecessary or excessive environmental impacts that would arise if the proposal was required to undertake more extensive excavation of the land, or give rise to greater use of excavation equipment and truck movements to undertake works and remove spoil. In addition the provision of a lift over-run and fire stair enables the proper construction and maintenance of the building and also to achieve suitable access to the development and therefore the breach to the lift and fire stairs furthers the object that sets out: “(g) to promote good design and amenity of the built environment”.

Therefore, the current proposal is a sufficient outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design response on the site.

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<sup>2</sup> As clause 4(3)(b) requires



Furthermore, there is no adverse environmental planning ground that could be said to arise from the departure from the control. The above analysis demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.

#### CLAUSE 4.6(4) ZONE OBJECTIVES & THE PUBLIC INTEREST

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) for the reasons set out previously.

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control. In addition, the proposal is consistent with the objectives of the E1 Local Centre Zone, being:

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

The proposal:

- Contributes to a range of retail/business and community uses that serve the needs of people who live in, work in or visit the area;
- The proposal will generate employment opportunities and economic growth;
- The proposal maintains business, retail and community uses at the ground floor;
- The proposal is consistent with the intent of the maximum height control and the overall objectives of the E1 Zoning in that the development will permit the retention of existing inter-war commercial building subject to structural faults and repair work with the proposed retainment of existing façade with construction of a suspended awning similar will ensure that not only the historical street patterns within the existing shop continues to be read as separate entities and have minimal impact on the significance of the conservation area. As such, the minor encroachment to the height control will have no adverse impact within the heritage conservation area.



On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the building height standard, and the objective of the E1 zone and the numerical departure from the building height control will have no impact on the streetscape or on the overall heritage conservation area.

Clause 4.6(5)

As addressed, it is understood the concurrency of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significant for State or regional environmental planning given the nature of the development proposal; and
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height controls is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building form in the locality and the nature and height of approved developments in the locality.

Conclusion

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.

The proposal will not have any adverse effect on the surrounding locality. The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the proposed variation.







# Clause 4.6 Variation

FLOOR SPACE RATIO

40-44 Claremont Road,  
Burwood Heights

29 FEBRUARY 2024



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## CLAUSE 4.6 DEPARTURE

### BACKGROUND TO THE BREACH

This Clause 4.6 variation has been prepared in support of a development application for the removal of identified trees and undertake partial demolition works in-order to construct a part 2 – part 4 storey 'Mixed Use' development comprising a commercial premises and a child care facility over 2 levels of basement at 40-44 Claremont Street, Burwood Heights. It is noted that the proposal will retain the shop front façade through remedial works and underpinning- this is in order to retain those facades for the identified heritage buildings.

Council has identified that the development exceeds the FSR development standard- being a technical departure- arising from the height of acoustic barriers to the balcony outdoor play area being 1.8m.

The acoustic barrier, which achieves a 1.8m glass barrier, is inset behind a 1m high solid wall that forms the 'outer wall' at the ground and first floor level. Therefore the applicants view was that it was not GFA because the 'outer wall' was actually less than 1.4m (being the solid balustrade) and the acoustic barrier is not a 'wall' and therefore the area should not be included in GFA. An example of this arrangement is provided below that is extracted from the plans for an understanding as to how and why the issue arises.

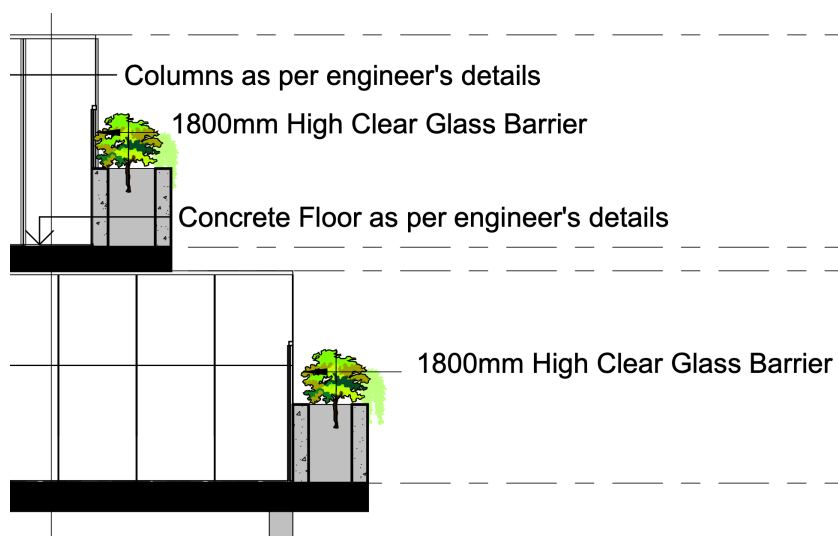


Figure 1: Acoustic Barrier and Balustrade Design

Given the issue identified by the Council a Clause 4.6 variation has been prepared to deal with this issue for abundant caution.

It is noted that as shown on the drawings:

- When excluding the balcony outdoor play areas, at each level, from GFA the FSR is 0.78:1 and complies with the 1:1 and is 28% below the FSR standard.
- When including the balcony outdoor play areas at the ground floor and first floor (which are roofed) from GFA the FSR is 1.28:1 and exceeds the 1:1. This equates to a 28% departure.
- When including the second floor outdoor play area which is open to the sky but has 1.8m walls then the GFA increases further and the GFA is 1.49:1 which exceeds the control by 49%.



## THE FSR DEVELOPMENT STANDARD

The proposed development exceeds the maximum permitted FSR control of 1:1 that applies under the Burwood LEP

An extract of the relevant FSR map is provided below that identifies the site and the relevant FSR provision- being 1:1.



Figure 2: FSR Map Extract

## VARIATION TO THE STANDARD ASSOCIATED WITH THE DEVELOPMENT

It is noted that as shown on the drawings:

- When excluding the balcony outdoor play areas, at each level, from GFA the FSR is 0.78:1 and complies with the 1:1 and is 28% below the FSR standard.
- When including the balcony outdoor play areas at the ground floor and first floor (which are roofed) from GFA the FSR is 1.28:1 and exceeds the 1:1. This equates to a 28% departure.
- When including the second floor outdoor play area which is open to the sky but has 1.8m walls then the GFA increases further and the GFA is 1.49:1 which exceeds the control by 49%.

It is noted that the method of calculation includes the outdoor play areas that are 'balconies' where the acoustic barriers are greater than 1.4m. It is noted that the applicant was of view that the balconies were excluded from GFA because the 'outer wall' was less than 1.4m and the acoustic barriers are not 'walls' in the same way as a solid balustrade

Therefore when including the outdoor play areas that are in a balcony configuration the FSR is non-compliant but the extent of development proposed is consistent with the contemplated built form and massing when considering the GFA when excluding the barriers is below the 1:1- being 28% less than the maximum. If the acoustic barriers were lowered to 1.39m (reduced by 401mm) then no issue arises and there is no discernible difference in the way in which the proposal is perceived given the barriers are set in behind a planter or at the upper level.

Therefore a 'compliant' FSR would be perceived in a similar way to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking. In addition safety issues arise noting the requirement for upper level balconies to now adopt a 1.8m safety barrier under the updated provisions of the BCA/NCC.

The breach arises to protect acoustic amenity of adjoining properties in accordance with the acoustic report- as well as visual amenity through mitigating cross-viewing given the design of the barrier also serves as a privacy screen. The visual presentation of the barrier to neighbours is also mitigated by the landscape planting proposed in front of it on the key edges.

Therefore the barrier treatment improves visual and acoustic privacy outcomes, as well as safety for children, but generates a technical non-compliance owing to its height.



## RELEVANT CASE LAW

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*. In addition a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the FSR departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum FSR control and on that basis that compliance is unreasonable or unnecessary;

- Demonstrating consistency with the E1 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.



## ADDRESS OF CLAUSE 4.6 PROVISIONS

Clause 4.6 of the Burwood LEP provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

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

*(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

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

*(4) Development consent must not be granted for development that contravenes a development standard unless:*

*(a) the consent authority is satisfied that:*

*(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

*(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

*(b) the concurrence of the Director-General has been obtained.*

*(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.*

Clause 4.6 does not restrain the consent authority's discretion as to the numerical extent of the departure from the development standard. Each of the relevant provisions of Clause 4.6 are addressed in turn below.



**CLAUSE 4.6(3)(A) - COMPLIANCE UNREASONABLE AND UNNECESSARY**

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as:

The underlying objectives of the control are satisfied, known as the first way in the decision of *Wehbe v Pittwater Council* (2007) 156 LGERA 446;

***Underlying Objectives are Satisfied***

The proposal, despite the numerical non-compliance identified, is consistent with the objectives of Cl. 4.4 – Floor Space Ratio of the Burwood LEP 2012

The objectives of the 'FSR' development standard are stated as:

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

*(a) to enable development density and intensity of land use to achieve an appropriate urban form,*

*(b) to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.*

Each objective is considered below.

*Objective (a): to enable development density and intensity of land use to achieve an appropriate urban form,*

- The extent of 'enclosed' FSR arising from the internal areas of the building is less than the permissible FSR- being 0.78:1 as compared to the 1:1. The non-compliance arises from the inclusion of GFA to the play areas on balconies owing the height of the acoustic barrier- that are set back behind a balustrade and planter at the lower levels and then stepped in to the top most floor given the greater setback.
- The development density and intensity as proposed exhibits an appropriate urban form given:
  - a. Compliant setbacks
  - b. Compliant height (other than for point encroachments to the lift and stairs);





- c. Suitable design response to the heritage items on the site noting retention of façade on the primary frontage/corner location;
  - d. The uses and density proposed, notwithstanding the breach, provide an appropriate urban form for the site particularly given the heritage context and the relationships to adjoining properties which has been achieved through considered setbacks and the spatial configuration of the built form noting the elements of the breach are relatively 'open' elements being the balconies which are situated in proximity to the transition point to lower density forms to the east.
- The perceived bulk of the development is primarily from the area of the built
  - Whilst the FSR is non-compliant the extent of development proposed is consistent with the contemplated built form and massing when considering the GFA when excluding the barriers is below the 1:1. If the acoustic barriers were lowered to 1.39m (reduced by 401mm to the majority of the barriers) then no GFA or FSR issue arises and there is no discernible difference in the way in which the proposal is perceived in terms of 'bulk' given the barriers are set in behind a planter at the more prominent lower levels.
  - The barriers are necessary for visual and acoustic privacy and safety to the children.
  - Therefore a 'compliant' FSR would be perceived in a similar way to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking.
  - Therefore the bulk of the development is entirely in line with what is contemplated for the site and the area of non-compliance has no meaningful impact on the bulk of the development.
  - The extent of development across the sites is appropriate, notwithstanding the numerical departure. This is because the development is compliant with the maximum permitted GFA in the areas that are internal in nature and the area of the breach is derived through the inclusion outdoor play areas with acoustic barriers around the perimeter that are greater than 1.4m and therefore must be excluded.
  - Therefore a 'compliant' FSR enables a comparable level of development to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking.



- The intensity of the use arising from the proposed GFA must also be considered in relation to this objective and in that regard the traffic impacts are considered to be acceptable as set out in the report by Stanbury Traffic Planning. In addition the amenity impacts of noise and other privacy impacts are avoided due to the use of the acoustic barriers as proposed- i.e. they provide a benefit to the scheme.
- Objective (b): The development site is not within Burwood Town Centre and this is not relevant/applicable as it relates to this proposal.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

#### CLAUSE 4.6(3)(B) - SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Pain J held in *Four2Five vs Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, being grounds that are specific to the site.

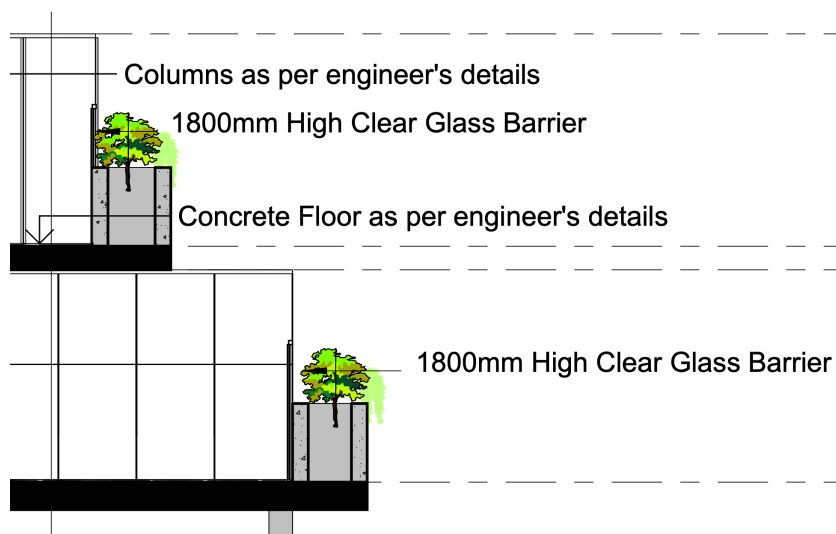
Pursuant to clause 4.6(3)(b) of the LEP, there are sufficient environmental planning grounds to justify the variation to the FSR development standard.

The below points demonstrate suitable environmental planning grounds exist to justify contravening the FSR development standard and further demonstrates that the FSR departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- When including the outdoor play areas that are in a balcony configuration the FSR is non-compliant but the extent of development proposed is consistent with the contemplated built form and massing when considering the GFA when excluding the barriers is below the 1:1- being 0.78:1. If the acoustic barriers were lowered to 1.39m (reduced by 401mm to the majority) then no GFA/FSR issue arises and there is no discernible difference in the way in which the proposal is perceived given the barriers are set in behind a planter.
- Therefore a 'compliant' FSR would be perceived in a similar way to this scheme- but the acoustic impacts would be greater because of a lack of acoustic attenuation and also generate greater privacy impacts from overlooking from educators using this area. There would also be potential safety risks to the children noting the need for a 1.8m barrier under the NCC.



- The breach to the FSR standard arises to protect acoustic amenity of adjoining properties in accordance with the acoustic report- as well as visual amenity through mitigating cross-viewing given the design of the barrier also serves as a privacy screen given the design incorporates the planter and at the upper level the batten treatment.
- The visual presentation of the barrier to neighbours is also mitigated by the landscape planting proposed in front of it on the sensitive edge to the east. This is reflected on the figure below and therefore the barrier treatment improves visual and acoustic privacy outcomes but generates a technical non-compliance with FSR owing to its height.



- The acoustic attenuation and visual privacy mitigation afforded by the height of the acoustic barriers demonstrates suitable environmental planning grounds to vary the development standard- because absent the increased height the acoustic and visual privacy impacts are not adequately addressed.
- The safety to the children is also a factor for a development of this type with a 1.8m non climbable barrier mitigating fall risk.
- The proposal provides for the retention of the heritage façade and its restoration, which is predicated on a suitable development intensity being achieved noting the substantive expense of remedial works to the heritage façade. Therefore the quantum of development, including the technical breach to the FSR, will facilitate the remedial works to retain/restore the heritage façade that can only be achieved at a development of the scale that is proposed. Whilst the proposal does not rely on Clause 5.10 the same principles are relevant in that the redevelopment facilitates the remedial façade works and restoration of heritage items.

- There is demand for child care in the Burwood LGA and the provision of a child care centre co-located with other commercial uses is desirable noting that the child care centre necessitates outdoor play areas and the heights of the barriers to the outdoor play areas generate the breach but mitigate acoustic privacy impacts, visual privacy impacts, and also enable safety for the children using those spaces.
- This design approach and breach of the FSR associated within the outdoor play areas enables a suitable design outcome on the site and is consistent with the following Objects of the Environmental Planning and Assessment Act 1979 as has been established under the prior discussion of environmental planning grounds:
  - (c) to promote the orderly and economic use and development of land,*
  - (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
  - (g) to promote good design and amenity of the built environment,*
  - (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- The departure to the FSR standard also does not generate any adverse amenity impacts to adjoining properties with regard to visual privacy or overshadowing given the lot orientation and careful design of the development.

Therefore, the current proposal is a suitable outcome from an environmental planning perspective and demonstrates that there is merit in varying the FSR control to achieve a suitable design response on the site which demonstrates sufficient environmental planning grounds to support the departure to the FSR standard arising from the outdoor play areas.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control.



**CLAUSE 4.6(4) ZONE OBJECTIVES & THE PUBLIC INTEREST**

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3).

As addressed the proposed development is in the public interest as it remains consistent with the objectives of the FSR control. In addition, the proposal is consistent with the objectives of the E1 Local Centre Zone, being:

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

The proposal:

- Contributes to a range of retail/business and community uses that serve the needs of people who live in, work in or visit the area;
- The proposal will generate employment opportunities and economic growth;
- The proposal maintains business, retail and community uses at the ground floor;
- The proposal is consistent with the intent of the FSR control and the overall objectives of the E1 Zoning in that the development will permit the retention of existing inter-war commercial building subject to structural faults and repair work with the proposed retainment of existing façade with construction of a suspended awning similar will ensure that not only the historical street patterns within the existing shop continues to be read as separate entities and have minimal impact on the significance of the conservation area. As such, the minor FSR breach will have no adverse impact within the heritage conservation area.

On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the FSR standard, and the objective of the E1 zone and the numerical departure from the FSR control will have no impact on the streetscape or on the overall heritage conservation area.



CLAUSE 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance pursuant to Planning Circular PS20-002, however the following points are made in relation to this clause:

- a) The contravention of the FSR control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and the breach arising from inclusion of outdoor play areas.
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal as the proposal is consistent with the underlying objectives of the control.

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.



## CONCLUSION

Strict compliance with the prescriptive FSR requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development is in the public interest because it is consistent with the objectives of the FSR development standard (CI 4.4) and the objectives of the zone and the proposal demonstrates sufficient environmental planning grounds to warrant support of the departure.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by residential development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.

