



Residential Flat Building, Including In-Fill Affordable Housing 65 Muston Street, Mosman

*Clause 4.6 variation request – Clause 4.3A Height of Building
(Additional Provisions) in Mosman LEP 2012 which relates to
wall height*



CLAUSE 4.6 VARIATION REQUEST

MOSMAN LOCAL ENVIRONMENTAL PLAN 2012 CLAUSE 4.3A: HEIGHT OF BUILDINGS (ADDITIONAL PROVISIONS) – 7.2m MAXIMUM WALL HEIGHT

SSD 98068713 FOR A RESIDENTIAL FLAT BUILDING, INCLUDING IN-FILL AFFORDABLE HOUSING

No 65 MUSTON STREET, MOSMAN

Prepared for

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By

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Job No. 25-135
Clause 4.6-Wall Height
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Table of Contents

1.	INTRODUCTION	1
1.1	The Proposal	1
1.2	Site, Zoning, Zone Objectives and Permissibility	2
1.3	The wall height standard in the MLEP	2
1.4	Context.....	3
1.5	Principles and relevant authorities	4
2.	RELEVANT DEVELOPMENT STANDARD	5
3.	EXCEPTION TO DEVELOPMENT STANDARDS (CLAUSE 4.6).....	6
4.	IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE AND ARE THERE SUFFICIENT PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION OF THE STANDARD?.....	7
4.1	Extent of non-compliance.....	7
4.2	What is the Purpose/Object of the Standard?.....	7
4.3	Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case.....	8
4.4	Are there sufficient environmental planning grounds to justify contravention of the development standard?	8
5.	THE “FIVE PART TEST”	9
6.	CONCLUSION.....	11



ATTACHMENTS

Attachment 1: 7.2m wall height limit shown on the elevations

Attachment 2: 7.2m wall height limit shown on the height blanket diagram

1. INTRODUCTION

1.1 The Proposal

This Clause 4.6 variation request has been prepared on a precautionary basis in support of SSD-98068713 for a new residential flat building including infill affordable housing (“the proposal”) at No. 65 Muston Street, Mosman (“the site”). The proposed residential flat building contains 13 x 3 bedroom apartments (3 of which will be managed by a community housing provider for 15 years as affordable housing) along with basement car parking, communal facilities and landscaping. All relevant aspects of the proposal are described and assessed in the Environmental Impact Statement (“EIS”) and its appendices.

The proposal is State Significant Development (“SSD”) pursuant to Section 26A of Schedule 1 of State Environmental Planning Policy (Planning Systems) 2021 as it is development to which Chapter 2, Part 2, Division 1 of State Environmental Planning Policy (Housing) 2021 (“the Housing SEPP”) applies.

Pursuant to Clause 4.3A(4) of Mosman Local Environmental Plan 2012 (“MLEP 2012”), the site is subject to a maximum wall height of 7.2 metres with which the proposal does not comply. The 7.2m maximum wall height standard applies to all land in the Mosman LGA which has a maximum height limit of 8.5m as shown on the Height of Buildings Map in MLEP 2012. The 8.5m height limit corresponds to a two storey building height limit. However, the Housing SEPP relevantly permits a building height of 28.6m and 8 storeys and over-rides the development standards relating to maximum building height and storeys in MLEP 2012.

The alleged necessity for a Clause 4.6 variation request in relation to the 7.2m maximum wall height control in Clause 4.3(A)(4) of MLEP 2012 is that there is no corresponding maximum wall height standard in the Housing SEPP. The 7.2m maximum wall height limit, however, is incompatible and inconsistent with the building height controls in the Housing SEPP.

Reference to Section 3.28 of the Environmental Planning and Assessment Act 1979 (EP&A Act) confirms that in the event of an inconsistency between environmental planning instruments and unless otherwise provided there is a general presumption that a State Environmental Planning Policy prevails over a local environmental plan or another instrument made before or after that State Environmental Planning Policy.

A building which complied with the 7.2m wall height limit but which nevertheless had a building height of 28.6m would require the roof structure of the building (i.e. above the eaves) to have a height of 21.4m. In design terms this would be an absurd outcome. As the NSW planning system is not intended to result in an absurd design outcome, it can reasonably be concluded that, in the same way that the building height controls in the Housing SEPP prevail over the 8.5m and two storey height controls in MLEP 2012, they similarly prevail over the related 7.2m wall height control and therefore no Clause 4.6 variation request is needed to vary the maximum wall height development standard in Clause 4.3A(4).

Accordingly, this Clause 4.6 variation request has been prepared and is submitted on a precautionary basis.

1.2 Site, Zoning, Zone Objectives and Permissibility

The site, which comprises land in SP 32953 and which has an area of 1,342m² is located on the eastern side of Muston Street in Mosman, approximately 160m south of Almora Street and 275m to the north of Raglan Street. A two storey residential flat building containing 6 apartments is presently erected on the site.

The location and boundaries of the site are respectively identified on **Figures 1 and 2** in the EIS respectively.

The immediate, surrounding and wider contexts of the site are shown on **Figures 3A, 3B and 3C** in the EIS.

As shown on **Figure 4A** in the EIS, the site is in the R3 Medium Density Residential zone, the objectives of which are as follows:-

- “• *To provide for the housing needs of the community within a medium density residential environment.*
- *To provide a variety of housing types within a medium density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To provide for housing that is compatible with the desired future character of the area in terms of bulk, height and scale.*
- *To encourage residential development that has regard to local amenity and, in particular, public and private views.”*

Residential flat buildings are permissible with consent in the R3 Medium Density Residential zone.

1.3 The wall height standard in MLEP 2012

Clause 4.3A(4) of MLEP 2012 establishes a maximum wall height for land to which Clause 4.3A of the MLEP 2012 applies. A building on land to which Clause 4.3A applies must not have a wall height, at any point of the building (other than at a chimney, gable end or dormer window), that exceeds 7.2 metres. A wall height of 7.2m is typically associated with a two storey building.

Clause 4.6 of the MLEP allows approval to be granted to a DA (including a DA for SSD), even though the proposal contravenes a development standard in MLEP 2012, including the maximum wall height standard in Clause 4.3A(4).

This written request, which for the reasons set out above in Section 1.1 is submitted on a precautionary basis, addresses the requirements of Clause 4.6 in MLEP 2012.

1.4 Context

The site is part of an area to the east of Military Road at Mosman which is zoned R3 Medium Density (see **Figure 4A** in the EIS). Nevertheless, the 8.5m building height control in MLEP 2012 (and thus the 7.2m maximum wall height control) applies to all of the land zoned R3 Medium Density Residential (other than the limited area immediately adjacent to the eastern side of Military Road) in the same way it applies to land zoned R2 Low Density Residential (see **Figure 4B** in the EIS). In other words, pursuant to MLEP 2012 the height controls predominantly applying to land zoned R3 Medium Density Residential are the same as the height controls applying to land zoned R2 Low Density Residential.

The proposed residential flat building including infill affordable housing has a height, floor space ratio, bulk and scale significantly greater than surrounding and nearby buildings, most of which are dwellings. The height, floor space ratio, bulk and scale of those surrounding and nearby dwellings are generally consistent with the planning controls which have applied to the R3 Medium Density Residential zoned area around Spit Junction town centre for many years. The proposal is neither intended to nor does comply with these controls including the maximum wall height control in Clause 4.3A(4) of MLEP 2012. The proposed development is different in its height, bulk and scale to the type of development which the building height controls in MLEP 2012 permit.

The NSW State Government, in response to what is widely acknowledged and agreed to be a significant housing shortage in metropolitan areas, has introduced new floor space and height controls for the areas around 71 town centres which are designed to encourage the supply of more housing including infill affordable housing. One of the identified 71 town centres is Spit Junction and the site is located in the “inner” area within 400m safe walking distance of Spit Junction town centre in which the new controls apply (see **Figures 6A and 6B** in the EIS).

Whereas under the controls which apply to the site in MLEP 2012 the maximum height limit is 8.5m and the maximum FSR is 0.55:1, under the controls contained in Chapter 6 of SEPP (Housing) 2021 which apply to land within 400m safe walking distance of an identified town centre the maximum height limit is 22m (6 storeys) and the maximum FSR limit is 2.2:1. Additionally, the NSW State Government has identified a state-wide need for more affordable housing. Affordable housing is housing which provides secure rental options for low to moderate income households who cannot afford private market rents.

In order to encourage the supply of more affordable housing, the NSW State Government has introduced controls which provide for a potential increase in the height and FSR limits for residential flat buildings in an accessible area (the site is in an accessible area) which include an affordable housing component. Where the affordable housing component equates to 15% of GFA, the height and FSR limits increase by 30%. These affordable housing “incentives” apply to residential flat buildings in accessible areas, including around town centres, including the Spit Junction town centre. As a result, the height control on the site increases to 26.8m (i.e. 22m x 30%) and the FSR control increases to 2.86:1 (i.e. 2.2:1 FSR x 30%) for a residential flat building which includes an affordable housing component equivalent to 15% of the GFA of the building. The proposal has an affordable housing component equivalent to 18.9% of GFA.

The proposal is representative of the desired future character of the area around Spit Junction town centre of which the site forms part. The bulk and scale of the proposed building are by

necessity different to those of existing buildings which surround the site because the precinct is in transition, as intended and facilitated by the Housing SEPP.

1.5 Principles and relevant authorities

The principles and relevant authorities which have been considered in the preparation of this Clause 4.6 variation request are those found in:-

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;
- Wehbe v Pittwater Council [2007] NSWLEC 827 (“Wehbe”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (“Four2Five No 1”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (“Four2Five No 2”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 (“Four2Five No 3”);
- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118;
- Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245;
- Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61;
- Rebel MH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130; and
- SJD DBZ Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112.

2. RELEVANT DEVELOPMENT STANDARD

The relevant development standard is the 7.2m maximum wall height control in Clause 4.3A(4) of MLEP 2012.

Clause 4.3A(1) – (5) of MLEP 2012 states as follows: -

“(1) This clause applies to all land in a residential zone to which a maximum building height of 8.5 metres applies as shown on the Height of Buildings Map.

(2) The consent authority may refuse development consent for the erection of a building on land to which this clause applies if the building has more than two storeys above ground level (existing).

(3) However, the consent authority may grant development consent for an additional storey in the foundation space of an existing building on land to which this clause applies if the consent authority is satisfied that the building height and bulk is of an appropriate form and scale.

(4) A building on land to which this clause applies must not have a wall height, at any point of the building (other than at a chimney, gable end or dormer window), that exceeds 7.2 metres.

(5) In this clause—

dormer window means a window in the roof plane that measures no more than 25% of the width of the roof in that plane.

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

3. EXCEPTION TO DEVELOPMENT STANDARDS (CLAUSE 4.6)

Clause 4.6 of MLEP 2012 permits consent to be granted for a development application even though the development proposed in the development application would contravene a development standard imposed by MLEP 2012.

The objectives of Clause 4.6 of MLEP 2012 are as follows: -

“(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.”

Clause 4.6 relevantly states:-

“(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated—

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

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

Accordingly, Clause 4.6 can be used to vary (to the extent required) the 7.2m maximum wall height standard in Clause 4.3A(4) of MLEP 2012 in respect of a non-compliance with the wall height limit.

4. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE AND ARE THERE SUFFICIENT PLANNING GROUNDS TO JUSTIFY THE CONTRAVENTION OF THE STANDARD?

4.1 Extent of non-compliance

Provided in **Attachment 1** is a set of elevations on which is identified the 7.2m maximum wall height limit. The 7.2m maximum wall height limit is also identified on the height blanket diagram in **Attachment 2**.

The maximum extent of the non-compliance is 19.9m or 276%. The extent of the variation, whilst in all cases still significant, ranges as a result of the varying existing ground level of the site which falls unevenly from west to east.

The extent of non-compliance is to be generally expected for any residential flat building which includes infill affordable housing and which is of a height anticipated by and consistent with the intent of the Housing SEPP for an inner area around a town centre.

4.2 What is the Purpose/Object of the Standard?

The objectives of the “Height of buildings (additional provisions)” standard are set out as follows in Clause 4.3A(1A) of MLEP 2012:

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

- (a) to provide for view sharing,*
- (b) to minimise the adverse effects of the bulk and scale of buildings,*
- (c) to encourage 2-storey buildings consistent with the desired future character of the area.”*

The above objectives reflect the 8.5m building height limit which applies to all land in Mosman LGA to which the 7.2m maximum wall height applies. However, the proposal is a response to the intent and very different height standards in the Housing SEPP which take precedence over the height controls in MLEP 2012.

In the context of the maximum height of building control of 8.5m, the maximum 7.2m wall height control seeks to promote a two storey building form with a pitched roof. It is, in fact, a height control which seeks to retain the status quo whereas the height controls in Chapters 2 and 6 in the Housing SEPP encourage a future character for the area around Spit Junction town centre in which there is a significantly greater supply of housing: more people, in more dwellings, living within safe walking distance of goods, services, community facilities and public transport.

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

Yes, because the circumstances of the case are that the applicable building height controls in the Housing SEPP override the building height controls in MLEP 2012. The maximum building height control of 28.6m as permitted by the Housing SEPP is the relevant and prevailing building height control which applies to the proposed development. A 7.2m maximum wall height control is incompatible and inconsistent with the building height controls in the Housing SEPP which apply to the proposed development.

The facultative provisions in the Housing SEPP, including the maximum building height controls, would be thwarted if new residential flat buildings (including those with infill affordable housing) had to comply with the 7.2m wall height control in Clause 4.3A(4) of MLEP 2012.

4.4 Are there sufficient environmental planning grounds to justify contravention of the development standard?

The primary environmental planning ground to justify contravention of the 7.2m maximum wall height development standard in Clause 4.3A(4) in MLEP 2012 is fulfilment and satisfaction of the objectives of the Housing SEPP insofar as they relate to the provision of increased housing supply, including infill affordable housing, in the precinct around Spit Junction town centre. This cannot be meaningfully or practically achieved if compliance is required with the 7.2m wall height standard in Clause 4.3(A)(4).

Additionally, as the 7.2m maximum wall height standard is complementary to and, associated with, an 8.5m building height limit and a two storey limit, it is axiomatic that it is not intended to apply to building with a height of 28.6m and 8 storeys.

A further environmental ground to justify contravention of the development standard is that enforced compliance with the 7.2m wall height standard would result in an absurd design outcome wherein no external wall occupied the part of building between a height of 7.2m and 28.6m.

The proposal will result in a positive addition to the streetscape of Muston Street consistent with the desired future character for the precinct around Spit Junction town centre, have no unacceptable impacts on the future development potential of neighbouring sites, and which will provide excellent amenity for future residents without unreasonably affecting the amenity of existing residents in the immediate vicinity of the site.

The proposal provides for orderly and economic residential development of land on a sloping site and facilitates a high quality, logical and rational design outcome within a precinct undergoing transition.

The proposal represents a balanced planning outcome, having regard to the full range of relevant existing controls (particularly those in Housing SEPP), the constraints and opportunities of the site, and the desired future character of the precinct within safe walking distance of the Spit Junction town centre.

5. THE “FIVE PART TEST”

In addition to the above requirements, a consent authority may choose to not only use the principles of Clause 4.6 but also the “five part test” established by the Land and Environment Court.

Court cases dealing with requests to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded. The “five part test” is outlined below:-

- “1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. the development standard has been virtually abandoned or destroyed by the council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
- 5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.”*

In relation to test (1): no reliance is placed on this test for the reason that the standard in question is intended to be a control that results in two storey buildings. However, the following observations can be made on the following aspects of the objectives of the 7.2m maximum wall height development standard in Clause 4.3A(4) of MLEP 2012 (see Section 4.2 above):-

- **View Sharing**

The side setbacks ensure that the proposed building will be separated from any future similar developments on neighbouring sites which also rely on the relevant provisions in the Housing SEPP, thus providing for views between new buildings.

Additionally, the proposed building is aligned east-west and is relatively narrow, with a building width of approximately 15.4m for the lower 4 levels (i.e. Ground and Levels 1 – 3), 12.0m for Levels 4, 5 and 6 (excluding planters), and only 3.2m for Level 7 (although the roof above Level 7 has a width approximately 6.6m) when viewed directly from the west, thereby having a limited impact on easterly views.

- **Bulk and Scale**

Adverse effects of the bulk and scale of the proposed building are minimised by: -

- the provision of landscaped setbacks from all site boundaries;
- well-considered, high quality architectural design to suit the site and its context; and
- the external walls of the proposed development whilst significantly non-compliant in height within the 7.2m wall height control in Clause 4.3A of MLEP 2012 are nevertheless well-designed, appropriately and adequately setback from side boundaries and well-articulated as shown on the attached elevations.

In relation to test (2): the underlying objective or purpose of the standard is not relevant as it is inconsistent with the relevant building height provisions in the Housing SEPP.

In relation to test (3): no reliance is placed on this test.

In relation to test (4): no reliance is placed on this test.

In relation to test (5): no reliance is placed on this test.

6. CONCLUSION

The proposal will result in a high quality design outcome as envisaged for the site by its zoning and development controls as set out in the Housing SEPP and is consistent with the desired future character desired for the precinct around the Spit Junction Town Centre.

The proposed exceedance of the 7.2m wall height control is significant: the reason for this is that whereas the 7.2m maximum wall height standard is part and parcel of a planning regime which, for a large part of the Mosman LGA, seeks to limit development to 2 storeys in height, the Housing SEPP intends that there be a transformation of the precinct around the Spit Junction town centre resulting in buildings of significantly greater height.

The maximum building height control in the Housing SEPP for a building on the subject site which contains more than 15% of its GFA as affordable housing is relevantly 28.6m, and this prevails over the 8.5m maximum building height control in MLEP 2012. As the 7.2m maximum wall height control applies to all land to which the 8.5m maximum building height control applies, it can be seen that the 7.2m maximum wall height control conflicts within the maximum building height controls in the Housing SEPP.

Furthermore, if the proposed development had to comply with the 7.2m wall height control limit it would deny achievement of the maximum height controls in the Housing SEPP. In this regard, the 7.2m maximum wall height control in MLEP 2012 is inconsistent and incompatible with the maximum building height controls in the Housing SEPP and it is the latter which prevail.

It can be concluded that compliance with the 7.2 metre maximum building wall height standard in Clause 4.3A(4) of MLEP 2012 is unreasonable and unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the requested variation. This precautionary Clause 4.6 variation request (assuming that such a variation request is required) should therefore be supported.



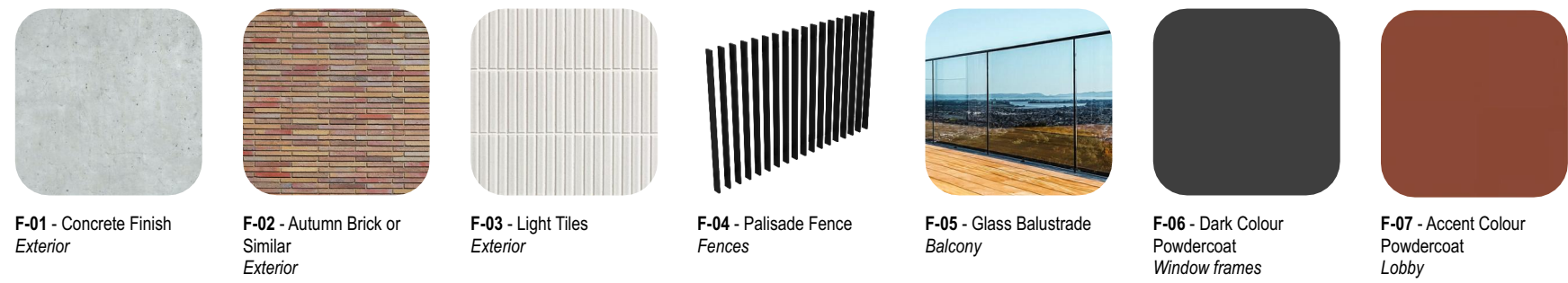
ATTACHMENTS



ATTACHMENT 1

Maximum Wall Height Diagram

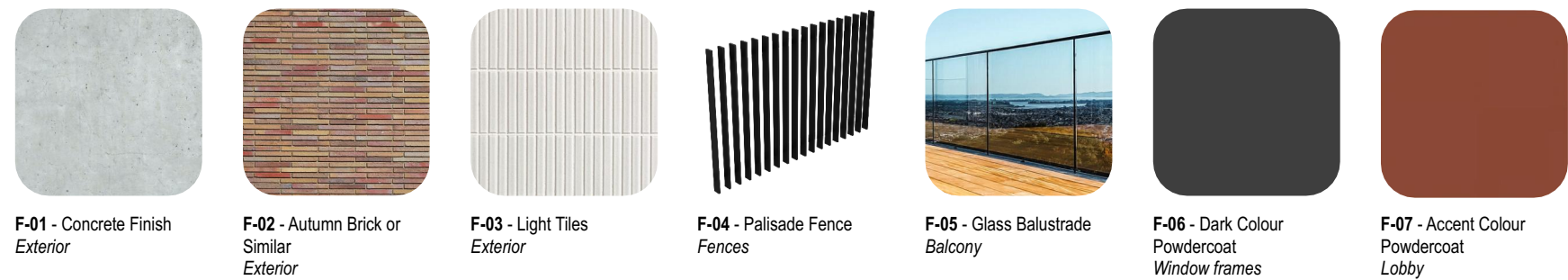
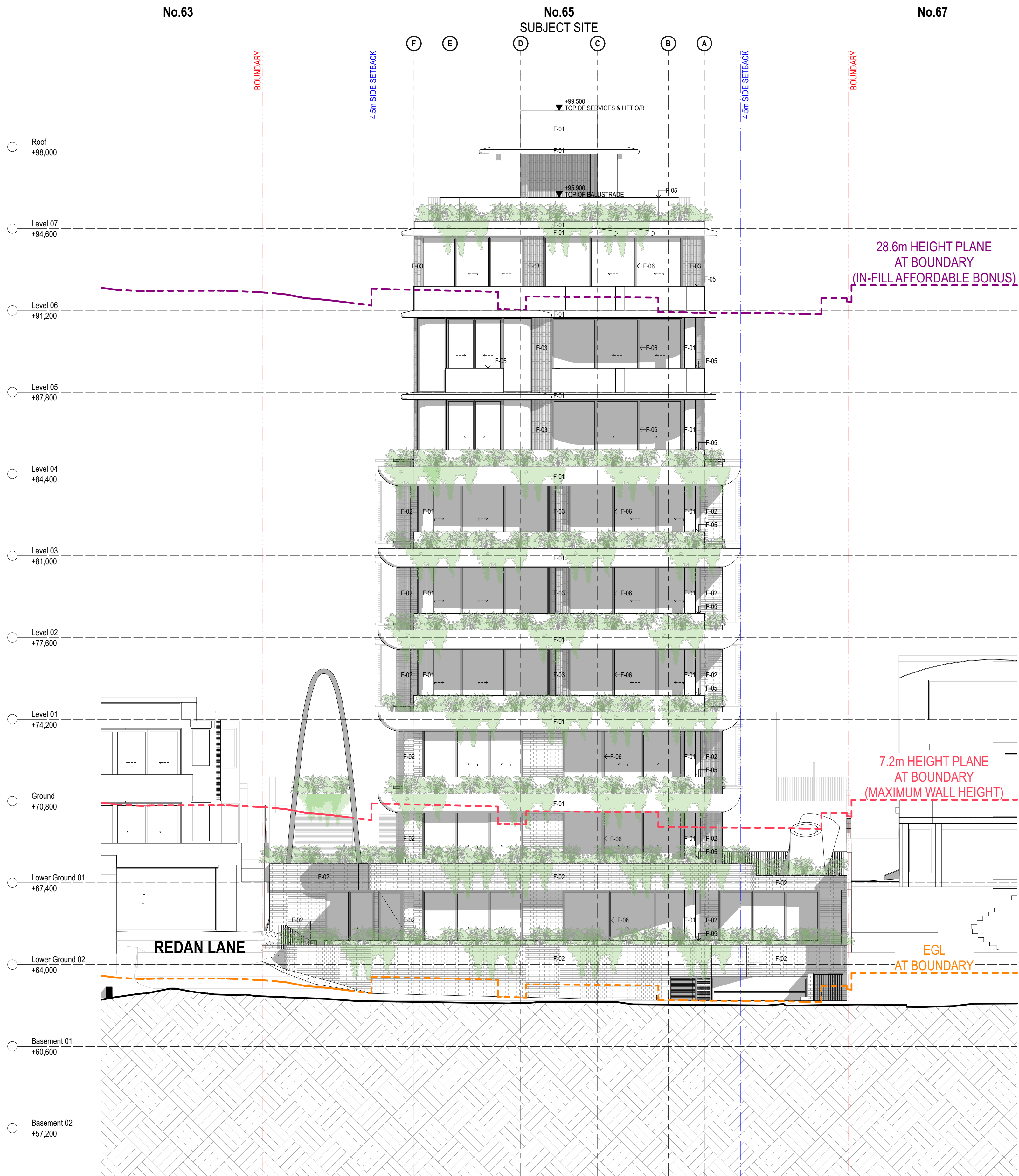
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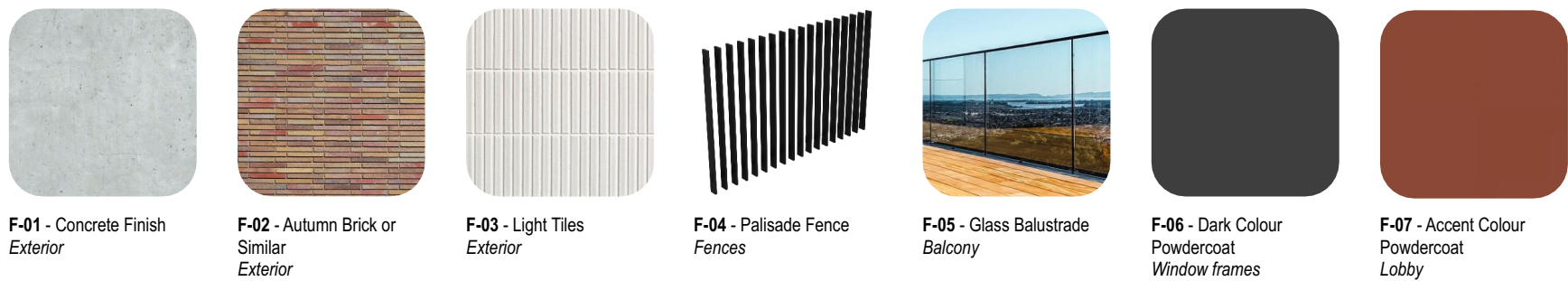
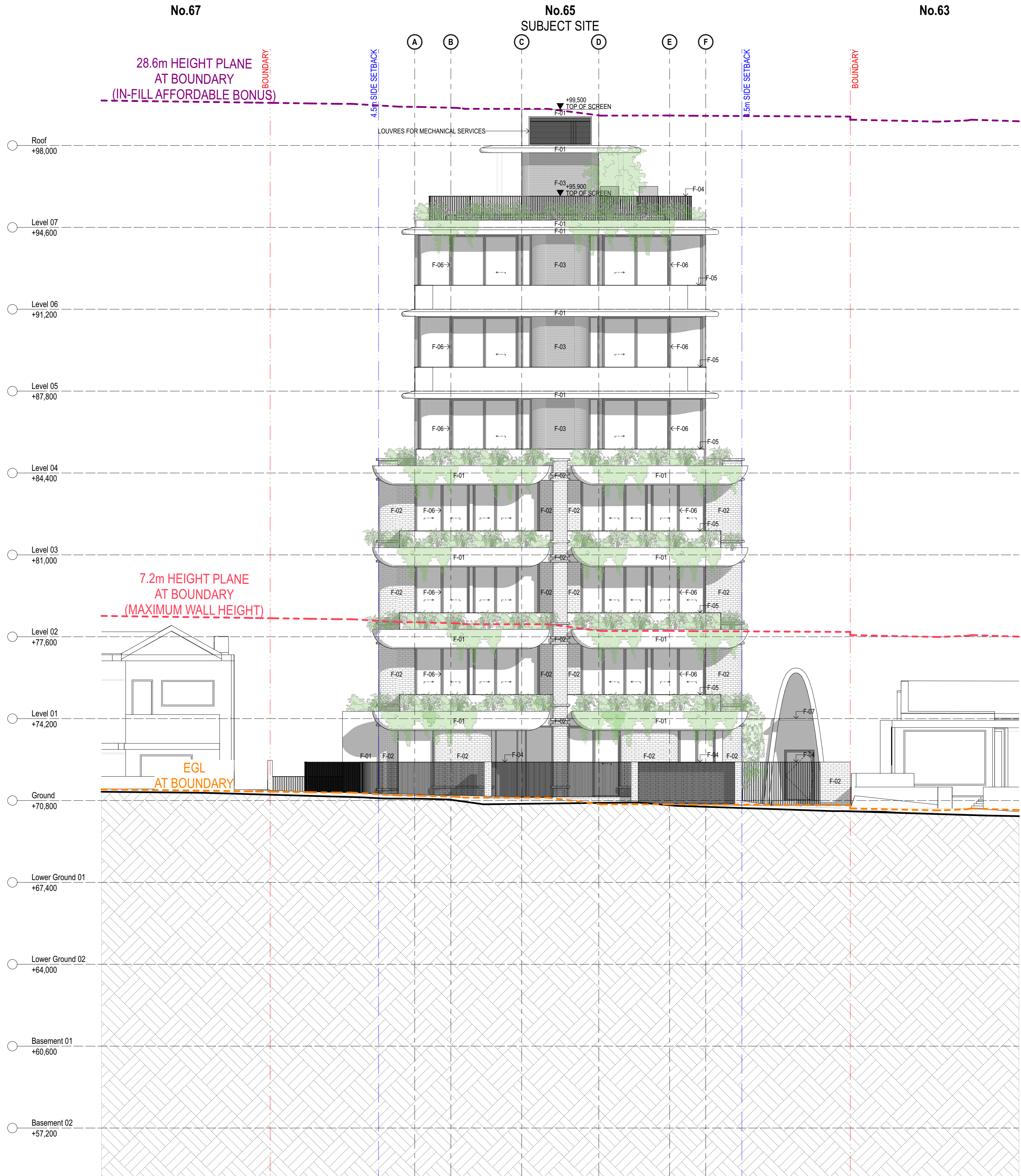




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ATTACHMENT 2

Wall Height Plane Diagram

