CONTRAVENTION OF HEIGHT STANDARD

APPENDIX E

Appendix E

Contravention of the Height Standard

Integrated Development Application
Residential Flat Buildings
7, 7A, 9, 9A, 11, 11A, 11B & 13 Centennial Avenue
92, 94 & 96 Gordon Crescent
Lane Cove

1. Request

The submission provides justification for contravention of the 12m height standard which applies to the site pursuant to Clause 4.3 of Lane Cove LEP 2009. The submission demonstrates that compliance with the standard is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravention of the height standard. The submission refers to plans DA-00 to DA -17, shadow diagrams and compliance diagrams dated December 2011, prepared by Amglen and Hyecorp Design which are contained in Appendix A and B to the Statement of Environmental Effects (SEE11-18C) prepared by Metroplan.

2. Application of Clause 4.6 – Exceptions to Development Standards

The relevant provisions of Clause 4.6 are quoted below:

"(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) 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) 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) 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."

The provisions of Clause 4.6 of LEP 2009 are essentially similar to State Environmental Planning Policy No. 1 – *Development Standards* which however does not apply to LEP 2009 by virtue of Clause 1.9(2) of the Plan.

The aim of SEPP No.1 is to provide flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a) (i) and (ii) of the EPA Act 1979.

The broad principles of application of SEPP No. 1 are outlined in *Guidelines for the Use of the State Environmental Planning Policy No. 1* issued by the Department of Planning. The circular advises that:

> *"In deciding whether to consent to a development application, the Council should test whether the proposed development is consistent with the State, regional or local planning objectives for the locality, and in particular, the underlying objective of the standard. If the development is not only consistent with the underlying purpose of the standard, but also with the broader planning objectives for the locality, strict compliance with the standard would be unnecessary and unreasonable."*

While the application of Clause 4.6 of LEP 2009 has not been tested in the Land and Environment Court, interpretation of scope and application of SEPP No. 1 has been subject to numerous decisions by the Land and Environment Court. These are also relevant to this request for contravention of the height standard under Clause 4.6 of LEP 2009.

(a) The standard is a flexible instrument to be contrasted with a rule and is not either imperative or self-executing (Warringah Shire Council v. KVM Investments, 1981) (45 LGRA 425).

(b) The policy does not limit the extent of the departure from the standard which may be numerically major, provided it can be demonstrated that it meets the tests contemplated by the Guidelines. It is neither desirable nor prudent to define the limits of the dispersing power based upon an objection that compliance is unnecessary in the circumstances of a case.

(c) Compliance with a development standard may be unnecessary if it is demonstrated that the underlying objects or purpose of a development standard is satisfied by the particular development proposal (*Gooley v. Sutherland Council*, Land and Environment Court No. 10582 of 1982).

The various tests and criteria adopted by the Court to establish the validity of an objection under the policy may be summarised as follows:

(1) Identify the underlying purpose of the standard

It is necessary to discern the underlying purpose of the standard and to ascertain whether such purpose is met by the development.

(2) Demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Compliance may be unnecessary if it is demonstrated that the underlying purpose of the standard is satisfied by the particular development proposal. Compliance may be unreasonable where compliance with the development standard would defeat the underlying purpose of the development standard.

The development standards are not ends in themselves but means of achieving environmental or planning objectives. Generally, compliance with a development standard is accepted as means of achieving the relevant objectives. However, if a development demonstrates an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served). Preston CJ in Webbe v Pittwater Council, 2007.

(3) Is the granting of consent to the development application consistent with the aims of the policy set out in Clause 3?

Could it be established that compliance with development standards would tend to hinder the attainment of objectives specified in Section 5(a) (i) (ii) of the Environmental Planning and Assessment Act 1979.

(4) Consideration of Clause 8(a) and 8(b) of SEPP 1

The consent authority should take into consideration the concurrence provisions set out in these clauses, namely:

(a) Whether non-compliance with the development standard raises any matter of significance for state or regional environmental planning, and

(b) The public benefit of maintaining the planning controls adopted by the environmental planning instrument.

(5) The circumstances of the case

The principle adopted by the Court is that the circumstances of the case could be interpreted as broadly as possible. These may include merit considerations under S79C (1) of the Environmental Planning and Assessment Act, current consent by Council to adjacent development or previous use of SEPP No. 1 to uphold objections to the previous standards.

There may be some overlapping of considerations whether there should be a dispensation from the requirements of the development standard and whether on merit, based on consideration of matters under Section 79C (1) of the Environmental Planning and Assessment Act, consent could be granted on merit for the proposed development.

3. The Development Standard

Clause 4.3(2) *Height of Buildings* nominates a maximum height of 12m for any development on the subject site. Building height is defined as:

> '*the vertical distance between the* ***existing ground level*** *at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.'*

Buildings A and B comply with the 12m height limit. Building C, located on the former quarry site, exceed the height limit by up to 6 metres. However Building C would comply with the 12 m height limit if the height is measured from the **natural ground leve**l, which existed on the site prior to the quarrying activity, as determined by a geomorphological investigation. (Figure 1)

4. Purpose of the Standard

The objectives of the height standards are set out in Clause 4.3(1) of the Plan:

"(a) To minimise any overshadowing, loss of privacy and visual impacts of development on neighbouring properties, particular where zones meet, and

(b) To maximise sunlight for the public domain, and

(c) To relate development to topography."

5. Justification for Contravention of the Height Standard

5.1 Compliance with the height standard is unreasonable and unnecessary in the circumstances, and there are sufficient environmental planning grounds to justify contravening the height development standard**:**

5.1.1 The deemed non-compliance with the 12m height standard emanates from the definition of ground level in LEP 2009 as being the **existing ground level.** Such definition includes any modifications to the landform caused by the previous activity on the site which may have had significantly changed the **natural ground levels** of the site.

Use of **existing ground level**, which includes man made modifications of a site e.g. quarrying, basements excavation, cut and fill, swimming pools, as reference level, results in impractical and complex height plane which imposes unreasonable constraints on development. It has been an accepted practice, endorsed in the Land and Environment Court (Project Venture Development No.11 v Ku-ring-gai Council 2005NSW LEC 624) to adopt extrapolated ground levels, consistent with the prevailing landform, for those parts of the site which were clearly modified by previous activity.

In this instance, the previous quarrying activity resulted in a typical excavated shelf, with abrupt, practically vertical man-made cliffs along the northern and eastern boundaries of the site. The resultant irregular topography represents a major site constraint. Compliance with the height standard would make redevelopment of the site for high density residential flat building, envisaged by the R4 – *High Density Residential Zone*, economically unviable.

Other definition of ground level, commonly used in environmental planning instruments, adopt the concept of **'natural ground level'** being the ground level of the site **before** the erection of buildings or the carrying out of any work.

In the circumstances it was necessary and justifiable to adopt the **natural ground level** of the site which existed on the site prior to the quarrying activity as **deemed existing ground level.** Geomorphological experts and surveyors estimated with high degree of probability the **natural ground levels** which existed prior to the quarrying activity on the site (Appendix F of the SEE).

Building C is fully contained within the 12m height plane established with reference to the **natural ground level.**

5.1.2 Given the previous modification of the topography of the site, compliance with the 12m height limit measured from the **existing ground level** would result in an inefficient form of Building C with compromised solar access. Strict application of the height standard, combined with other controls which govern solar access, cross ventilation, building length, deep soil landscaping, asset protection zone and riparian zone setbacks would result in 1587m² reduction of GFA in Building C which would reduce the GFA of the entire development to13, 835m² which constitutes FSR of 1.69:1.

As even the proposed development only achieves a GFA of 15,422m² (FSR 1.89:1), strict compliance with the height standard, measured from the

existing ground level, would result in a GFA shortfall of 3301m² (19.2%) and render the redevelopment of the site economically unviable.

5.2 The Public Interest

The proposed development will serve the public interest because it is consistent with the objectives of the height standard and with the objectives of R4 – *High Density Residential Zone* as demonstrated below;

5.2.1 Objectives of the Height Standard

(i) Minimise any overshadowing

The building elements which exceed the height standard were designed to avoid any additional overshadowing of the site and property to the south, No. 15 Centennial Avenue or the bushland of Wilson's Creek. Shadow diagrams for the winter solstice indicate that the overshadowing impact of the proposed building complies with the sunlight access controls of the Lane Cove DCP 2009 (Figure 2).

(ii) Impact on privacy

The contravention of height standard does not impact on visual privacy of the adjacent properties and will have no impacts on future residential flat building developments permissible under the R4 – *High Density Residential Zone*.

The buildings' segments which exceed the 12m height standard are set back 10m to 22.5m from the side boundaries. The adjoining dwelling house to the south, No. 15 Centennial Avenue, is orientated towards east-west and has minimal opening in the north elevation which faces the development.

(iii) Visual impact on neighbouring properties

The uppermost storey, which contravenes the height standard, is set back from the main perimeter of the building, with setbacks ranging from 8m to 12m. The configuration significantly reduces the bulk of the uppermost storey which due to the setbacks will not be apparent from the adjoining properties. Notwithstanding the non compliance with the height limit above the existing ground level, Building C presents only a four storey elevation to Centennial Avenue consistent with the urban scale envisaged by the 12m height limit.

The site is surrounded by R4 – *High Density Residential Zone* to the north and south, and separated at least 30m from the lower density residential areas to the east of Centennial Avenue, zoned R2 – *Low Density Residential*. Thus, the contravention of the height standard will have no adverse impacts on areas designated for lower density residential development.

It is further relevant to note that the height control objectives do not encompass protection of views from adjoining properties. However the objectives and provisions of Part B.4 – *View Sharing,* of the Lane Cove DCP

2009 seek to minimise the impact of new development on existing public and private views and vistas, in particular, water views for foreshore residents.

The contravention of the height standard will have no impact on the existing views from the residences on the eastern side of Centennial Avenue or from the dwelling house to the south at No. 15 Centennial Avenue.

(iv) Maximise sunlight to public domain

The development will have acceptable overshadowing impact on the public domain being roads, footpaths, plazas or parkland, consistent with the objectives of the sunlight access provisions of the DCP 2009.

(v) To relate development to topography

The contravention of the height standards is dictated by the unnatural topography of part of the site which is a result of previous quarrying activity. It is relevant to note that the development complies with the 12m height limit on the unexcavated part of the site, measured from the existing ground level. The absolute height of Building C is identical to the absolute heights of Buildings A and B, which comply with the 12 m height standard by being excavated into the site, below the existing ground level.

5.2.2 Objectives of the R4 – High Density Residential zone

The development provides a balanced mix of 7 studios, 92 one-bedroom, 77 two-bedroom and 13 three-bedroom apartments, ranging in size from 40m^2 to 140m^2. All units are visitable in accordance with AS 1428.2 – *Design for Access and Mobility*, while 38 units (20% of total) are adaptable in accordance with AS 4299 – *Adaptable Housing*.

The site, identified as suitable for high density residential development, enjoys many locational advantages and is serviced by bus routes which provide access to the Chatswood Bus and Rail Interchange.

It is evident that the proposed development is fully consistent with the objectives of the R4 – *High Density Residential Zone*, namely:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high 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 a high concentration of housing with good access to transport, services and facilities.

5.3 Concurrence of the Director-General may be assumed since:

5.3.1 Contravention of the height standard does not raise any matters of significance for state or regional environmental planning. **On the contrary**, contravention is essential to achieve reasonable residential density envisaged for this site and the surrounding area by the R4 – *High Density Residential Zone* and the FSR standards of 2.1:1 under Clause 4.4 – *Floor Space Ratio*.

Even with contravention of the height standard, the development achieves FSR of 1.89:1, which represents a GFA shortfall of 1714m^2 (10%) from the nominal FSR of 2.1:1. A fully complying development on the subject site can only achieve FSR of 1.695:1 (GFA of 13,835m²) which constitutes a shortfall of 3301m² (19.2%).

The importance of realising the nominal development potential is clearly underscored in DCP 2009 (S1.4, p.4), which states, inter alia:

A priority will be achievement of the floor space in the LEP, notwithstanding the DCP provisions and controls.

It is an indisputable fact that the FSR standards are the primary determinant of the residential development potential inherent in the Lane Cove LEP 2009 needed to meet the residential dwelling targets for Lane Cove LGA, identified in the Inner North Sub-regional Strategy. It is therefore essential that the height standards realistically correlate to the FSR standards.

5.3.2 The Residential Flat Design Code provides extensive analysis of the relationship between Floor Space Ratio and height controls (see Primary Development Controls). Under Floor Space Ratio, it stipulates that: *In a new urban area, or where an existing area is undergoing change, FSR controls should be set after designing and testing building envelopes, not before.* This is essential in order *"to ensure that the development is in keeping with the optimum capacity of the site and the local area"*.

The FSR Control checklist stipulates:

Test the desired built form outcome against the proposed floor space ratio to ensure consistency with:

- *building height*
- *building footprint*
- *the three dimensional building envelope*
- *open space requirements.*

Analysis of possible FSRs indicates that for a building envelope footprint of 35% of the site, a four storey development can only achieve FSR of 1.1:1 (01.78, p. 35). Building Height Control Checklist (p. 25) stipulates that "*where there is an existing floor space ratio (FSR), test height controls against it to ensure a good fit".*

In Designing the Height Controls (p. 24), the Code recommends that site specific envelopes should be designed for difficult sites, for example, a very steep slope or a large complex site with changing topography. It also recommends that where the site is sloping or there are sharp changes in level, the height control plane should

be adjusted by extending the height limit horizontally by 10-18m from the building line(p. 25),(Figure3).

This approach was not adopted in the lane Cove LEP 2009 which assigns blanket and unrealistic height standards which in turn prevent achievement of the FSR standards and the residential dwellings target.

5.3.3 Floor Space Ratios of residential flat building developments approved in principle by the JRPP are on average 1.8:1 and confirm an inherent conflict between the height and density standards in this segment of the R4 – *High Density Zone*. Combined with the setbacks, building footprint and landscaped area controls of Lane Cove DCP 2009, the 12m height limit prevent achievement of the nominal FSR of 2.1:1, deemed suitable for the area pursuant to Clause 4.4 of LEP 2009

These findings are clearly supported by Council's analysis of residential potential of various sites identified in Appendix 3 – *Strategic Framework* to Council's submission pursuant to Section 64 of the Environmental Planning and Assessment Act 1979 to Director-General of DOP (18 May 2007). The estimates of dwelling yields adopt a realistic relationship between FSR and height, as follows: 4 storeys – approximately 1.2:1, 5 storeys – 1.5:1, 6 storeys – 1.7:1, and 7 storeys – 2:1 (Figure 4) *Extracts from Table 4 – Options for New Dwelling Numbers*).

5.3.4 Another development constraint, which was not apparently considered in preparation of the LEP, is the extent of the Bush Fire Prone Land which affects the R4 – *High Density Residential* land along Stringybark and Wilson's Creeks. The Assets Protection Zone associated with the Bush Fire Prone Land designation imposes significant additional setbacks and consequently reduces the available building footprint.

It is reasonable to conclude that strict adherence to the 12m height control in areas zoned for the high density residential development at FSR of 2.1:1 would reduce the assumed development potential by 25%-30% of this segment of the R4 – *High Density Zone*. The incompatible height standards, combined with the bush fire safety constraints, will prevent achievement of the 3,900 dwellings target assigned in the Inner North Sub-regional Strategy for Lane Cove LGA. This is clearly contrary to the underlying residential planning strategy for Lane Cove LGA which is implemented through the High Density Residential Zones and FSR controls of LEP 2009.

5.4 Better Outcome and Public Interest

5.4.1 There is no public benefit of maintaining blanket height standard which conflicts with the FSR standards, ignores specific topographical constraints and prevents achievement of the housing targets assigned for Lane Cove LGA in the Inner North Sub-regional Strategy.

5.4.2 The proposed development provides high level of residential amenity as demonstrated by full compliance with setback, landscaped area, solar access and natural ventilation controls. It will have no adverse impact on amenity of the surrounding residences, commensurate with the scale and density of development envisaged under the R4 – *High Density Residential Zone for* the land between Centennial Avenue and Gordon Crescent. The impacts will not be compounded by the contravention of the 12m height standard.

5.4.3 Contravention of the 12m height standard will allow residential development at scale and density appropriate for the site, consistent with the underlying subregional strategic planning rationale, without adverse impacts on the amenity of the surrounding residences. It will allow a better planning outcome and will serve the public interest.

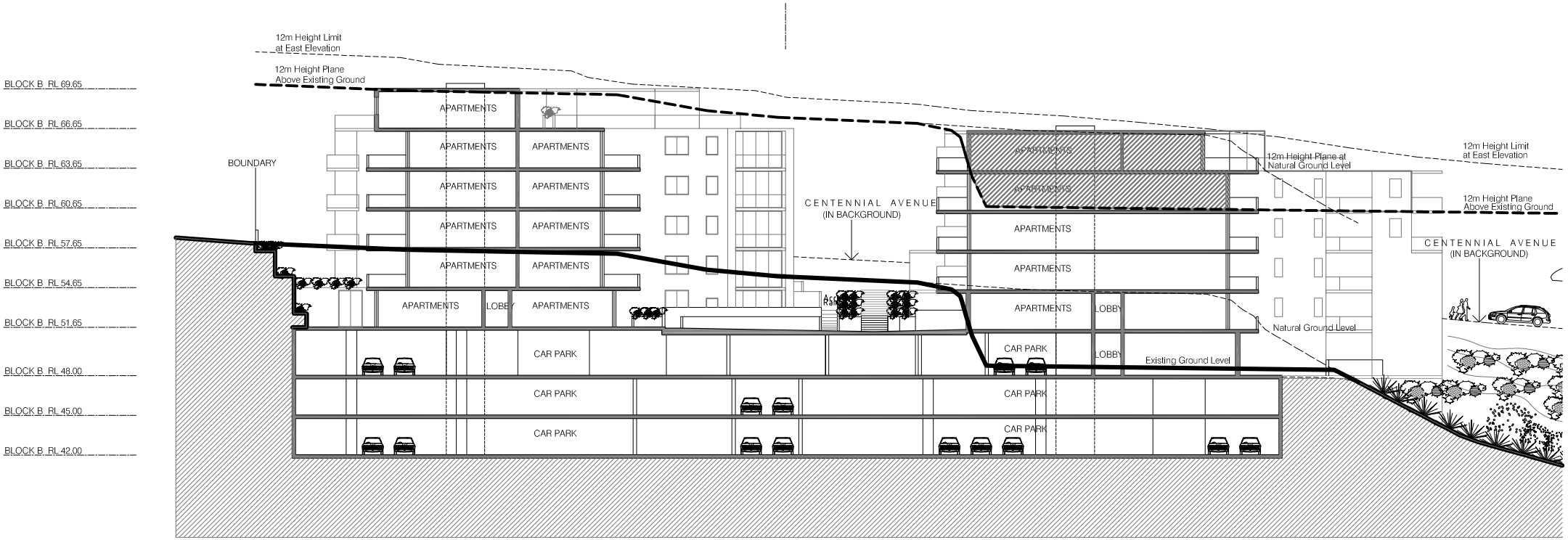
Flexible application of the height standard is in the circumstances, fully consistent with the objectives of the Environmental Planning and Assessment Act 1979 and in particular:

5(a)(i) The proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, town and villages for the purposes of promoting the social and economic welfare of the community and a better environment.

(a)(ii) The promotion and coordination of the orderly and economic use and development of land.

Gregor Zylber MPIA, CPP, TCP (Ord 4)

FIGURE 1



SECTION B-B

NOTE :-	NO.	REVISION	DATE	DRAWN	CHKD
	A	D.A SUBMISSION	15/12/11	MS	VA

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PROJECT/SITE

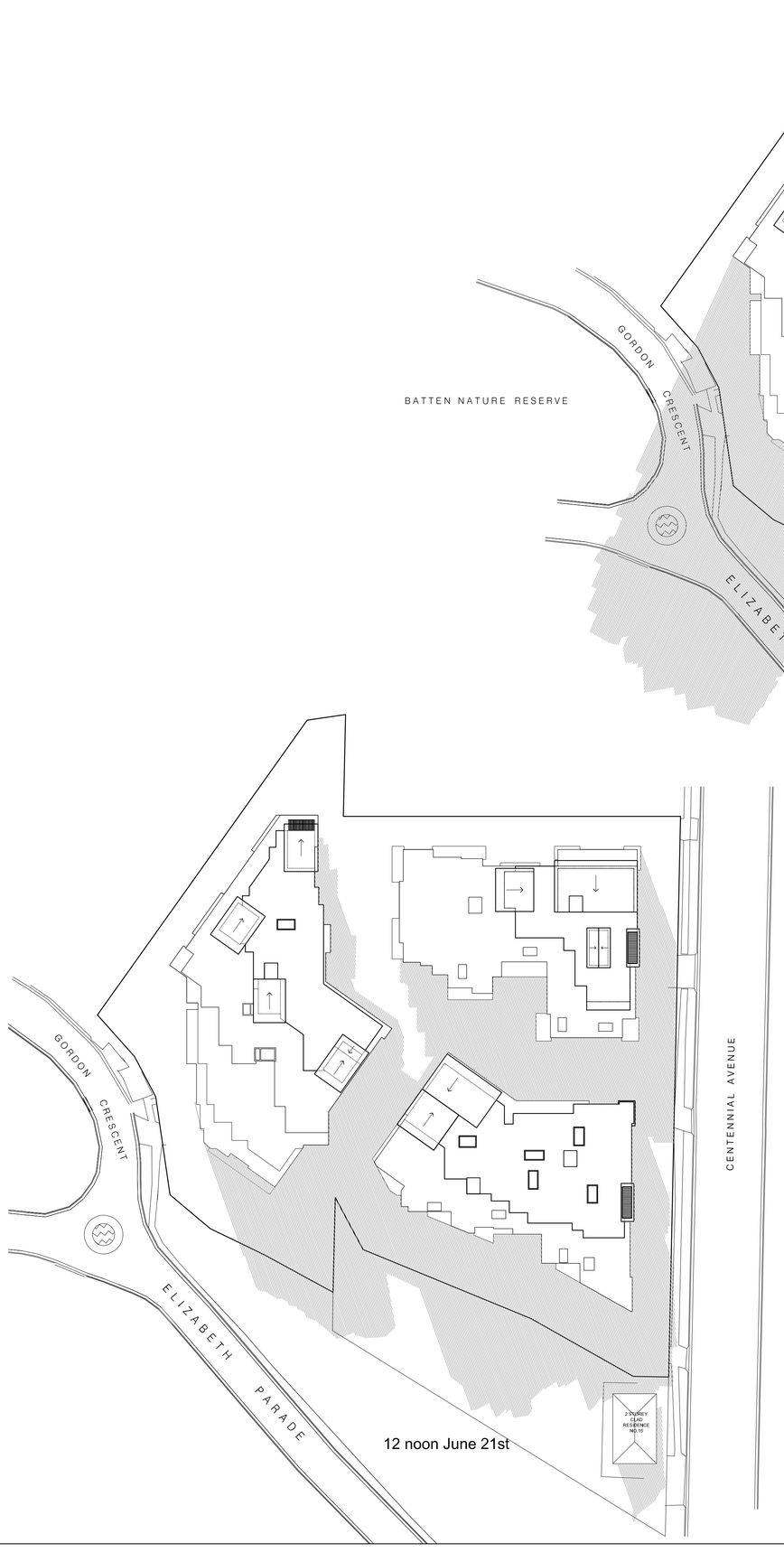
7 - 13 Centennial Avenue &
92 - 96 Gordon Crescent,
Lane Cove, NSW 2066

TITLE **Natural Ground Level Analysis**

SCALE	PAPER
NTS	A4

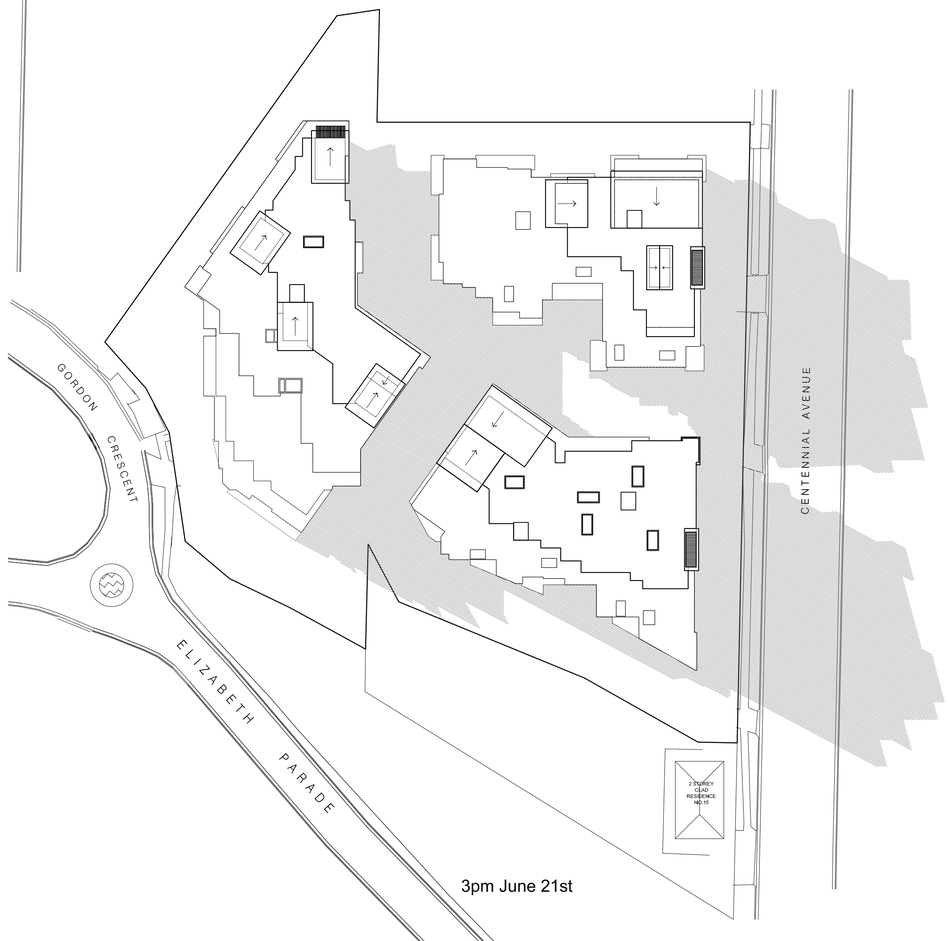
DATE	DRAWING	REV
15/12/11	DA-NG	A

FIGURE 2



12 noon June 21st

9am June 21st



3pm June 21st

NOTE :-

NO.	REVISION	DATE	DRAWN	CHKD
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PROJECT/SITE

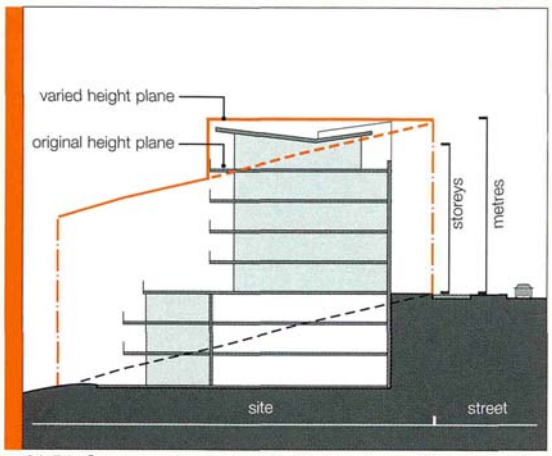
7 - 13 Centennial Avenue &
92 - 96 Gordon Crescent,
Lane Cove, NSW 2066

TITLE **Shadow Diagram**

SCALE	PAPER
1 : 500	A1
DATE	DRAWING / REV
07/12/11	DA-SH01 / A

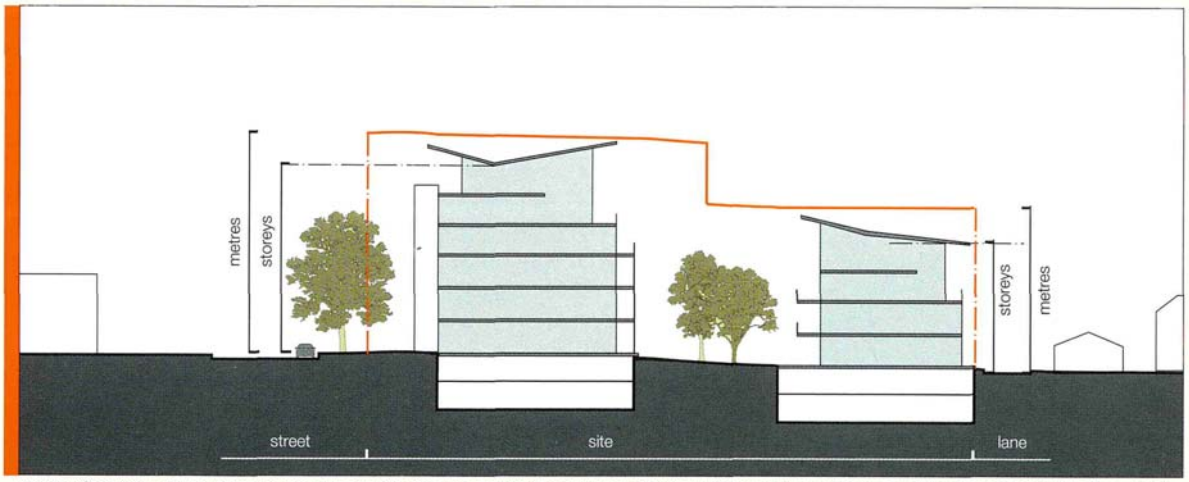
FIGURE 3

Page 25 of *Residential Flat Design Code*, Planning NSW



01.54. On steep slopes the height plane is modified along the street edge to facilitate appropriate building forms.

- AHD is measured from the top down. The whole building, including roof extrusions, must be within the nominated datum.
- Consider the application of height controls to relate new development to heritage buildings or existing datum lines, such as eaves and/or parapets. Test number of storeys using generous floor to ceiling heights.



01.55. On sites with dual frontages the height plane is established by the desired street scale and may need to change height in the middle of the site.

FIGURE 4

Table 4: Options for New Dwelling Numbers

(**Bold** indicates preferred options)

	Preferred locations	**Land area m2**	**Existing dwellgs**	**0.8 :1**	**1.2:1**	**1.5: 1**	**1. 7:1**	**2:1**	**Amdmt s Map ref.**
	Flats			**2-3 storeys eg walkups**	**4 storeys approx**	**5 storey s eg Helen St**	**6 storeys approx**	**7 storeys eg Duntroon Av**	
1	**Nield Ave –** *** excluding road** *** including road**	 6,520 7,330	 10		 **76** 87				**69**
2	**LC West shops** *** 1-15 Wood St** *** Beatrice St car park– Note (1)**	 5,857 2,020	 8 0		 **18**	**79**			**25** **24**
3	**Burns Bay Rd - 4(c)** *** 4(c) industrial zone (TUTA etc)** *** 6(a) former bowling club**	31,190 *28,255 * 2,935	0				**530** * 480 * 50	623	 **28** **29**
4	**150 Epping Rd - Shell site**	18,170 (31,066)	0			**272**			**2**
5	**Pacific Hwy/ Longueville Rd intersection** **(i) Longueville to Burley St** **(ii) Longueville to Gatacre Av**	8,804	0				 **60** **106**		 **75** **74**
6	**Pacific Hwy/ Gatacre Av to Allison Av**	5,168	3		**66**				**73**
7	**Finlayson St**	20,440	30			**276**			**10**
8	**27-43 Little Street (western side)**	6,890		45	**72**				**18A**
9	**Kara/ Burley Sts**	17,870	27	114	**184**	237			**76**
10	**Parkland Av to Landers Rd**	29,268	46		**305**				**9**