

Before a Panel appointed by Dunedin City Council

In the Matter of the Resource Management Act 1991

And

In the Matter of of an application by Barry and Victoria Smaill to undertake a multi-unit development including demolition of existing buildings and earthworks at 43 Cargill Street, Dunedin

LUC-2018-679

Statement of Evidence of Emma Rayner Peters

Dated 4th September 2020

Contents

Topic	Paragraphs
Introduction	1 – 4
National Policy Statement on Urban Development 2020	5
2GP Appeal ENV-2018-CHC-280	6 – 10
Amendments to Proposal	11 – 17
Effects (s104C(1)(b) & s104(1)(a))	18 – 22
Positive Benefits (s104(1)(ab))	23
Objectives and Policies (s104(1)(b))	24 – 25
Other Matters (s104(1)(c))	26
Draft Conditions	27
Conclusion	28 – 29
Appendix 1: ENV-2018-CHC-280 – Agreed Amendments to Rules 15.5.2.4, 15.10.3 and 9.5.3.	
Appendix 2a: Pictorial Summary of 2006 Plan Building Envelope Breaches	
Appendix 2b: Pictorial Summary of 2GP Building Envelope Breaches	
Appendix 3: Effects of 2GP HIRB Breaches in Relation to Shading of 45 Cargill Street.	

Introduction

1. My name is Emma Rayner Peters. I hold a BA and LLB both from the University of Otago and a First Class Honours degree and MA with Distinction, both from the University of Canterbury. I have worked as a solicitor in the areas of commercial and environmental law. I have been the principal of Sweep Consultancy Limited since 2003 providing resource management advice predominantly in the Dunedin City, Clutha, Waitaki, Queenstown Lakes and Central Otago districts.
2. I have prepared this evidence based upon my investigations and knowledge of the site and the Dunedin City District Plan 2006 (**2006 plan**) and the Dunedin City Second Generation District Plan (**2GP**).
3. I acknowledge we are not before the Environment Court. However, I have read the Code of Conduct for Expert Witnesses within the Environment Court Consolidated Practice Note 2014 and I agree to comply with that Code. This evidence is within my area of expertise, except where I state that I am relying on the evidence of another person. To the best of my knowledge, I have not omitted to consider any material facts known to me that might alter or detract from the opinions expressed in this evidence.
4. To avoid repetition, my evidence has been structured to address the key areas of concern raised in the s42A report and the submissions received. Where relevant, I have made reference to specific submissions where these identify matters that I consider require specific mention.

National Policy Statement on Urban Development 2020

5. The National Policy Statement on Urban Development 2020 (NPS-UD 2020) came into force on 20 August 2020. The car parking policies (policies 10 and 11 and subpart 8) of NPS-UD 2020 have the effect of removing minimum parking rates from district plans in tiers 1 – 3 local authorities. Dunedin City Council (**Council**) is classified as a tier 2 local authority. Developers can still choose to provide car parking and, if so provided, the design and dimensions of the car parking can be assessed against relevant performance standards in a plan.

2GP Appeal ENV-2018-CHC-280

6. At paragraph [16] the reporting planner invites clarification from the applicants in relation

to the status of Mr Smaill's 2GP appeal.

7. In relation to density in the inner city residential zone, Mr Smaill and Council reached agreement that residential activity could occur at a maximum density of 1 habitable room per 30m² as a restricted discretionary activity with Council's discretion restricted to the effects on the efficiency and affordability of infrastructure. This agreement was achieved by:
- amending rule 15.5.2.4 to provide at d. an exception to the permitted density requirement of 45m² per habitable room in the inner city residential zone for a maximum development potential of 30m² per habitable room as a restricted discretionary activity; and
 - amending rules 15.10.3 and 9.5.3 so that Council's discretion exercised pursuant to rule 15.5.2.4.d is restricted to effects on the efficiency and affordability of infrastructure.

These agreed amendments are set out in Appendix 1.

8. The consent memorandum is on file at the Environment Court pending resolution of higher order appeals, namely, an appeal by BP Oil NZ Limited and others (ENV-2018-CHC-29; Council reference appeal point 374) relating to Objective 2.7.1 and an appeal by Robert Wyber (ENV-2018-CHC-281; Council reference appeal point 212) relating to Policy 2.7.1.1.
9. Recent mediation in relation to the Wyber appeal has resolved appeal point 212 between Mr Wyber, Council and all s274 parties excepting one. It is also my understanding that appeal point 374 has been resolved in recent mediation; and that resolution of these two appeal points, Wyber (212) and BP Oil (374), have no impact on the agreed amendments for inner city residential zone density provisions. Indeed this was anticipated in the affidavit of Ms Emma Christmas dated 28 February 2020¹ and filed with the consent memorandum.
10. Mr Smaill's appeal point Council reference 209 relating to outdoor living space and appeal point 210 relating to site coverage – building and impermeable surfaces, have been withdrawn. Mr Smaill's appeal point 211 regarding height in relation to boundary remains live awaiting an options paper to be prepared by Council prior to undertaking mediation.

Amendments to Proposal

11. In response to submissions and the s42a report, the applicant has made several changes to

¹ See paragraphs [30] – [35] of Ms Christmas' affidavit.

their proposal. All changes are considered to be within the scope of the original application given limited notification by Council.

12. The changes are:

- Deletion of one bedroom from the multi-unit building – this is bedroom 1 in unit 4 so that the density becomes 1 habitable room per 30m²² thereby complying with the 2GP restricted discretionary density provided for by the mediated resolution as set out in paragraph 7 above.
- Changing the internal layout of bedrooms 2, 4 and 7 so that the layout of the wardrobe and ensuite in these bedrooms mirrors the layout of the wardrobe and ensuite in bedroom 1 such that the wardrobes and ensuites 'back onto' each other. As noted by Mr McKinlay, Urban Design, this affords the opportunity for larger windows in bedrooms 2, 4 and 7 on the street facing wall and also for additional detailing of those windows on the external facade.
- Inclusion of some heritage design elements in the street facade. The applicants wish to make this a collaborative design exercise with Council and so are open to direction from Council as to which heritage elements are to be included.
- Provision of a 1.5m landscaping strip between the property boundary and fence in front of the basement car parking. This landscaping would not be provided in front of the lobby which will remain as is excepting provision of pedestrian access via Cargill Street through the lobby as suggested by the reporting planner³. The provision of the landscaping and additional space for bicycles and/or recycling and rubbish bins means that the basement car park is 'pushed' further under the building by 2.7m. The 'lid' on the basement car parking area will extend to the property side of the landscaping and affords security for the basement car park and access to the street facade of the building. The provision of the landscaping will also slightly reduce the site coverage.

13. The reporting planner has picked up on an inconsistency with respect to the width of balconies at paragraph [44] of the s42a report. The floor plan should show all balconies with a width of at least 1.2m with the door to some balconies being recessed into the bedroom space. This creates an 'optical illusion' in the elevations wherein some balconies

² Site area is 934m² divided by 31 habitable rooms equals 30.13m².

³ S42a report paragraph [95].

appear shorter than 1.2m but in fact only part of the balcony is showing due to being recessed.

14. Given the changes to the proposal detailed in paragraph 12 above, an updated pictorial summary of the breaches of the building envelope pursuant to both plans is provided in Appendix 2a (2006 plan) and Appendix 2b (2GP).
15. The building, excluding the basement carpark, is 'set into' the ground on average approximately 1m. The applicants have investigated further lowering the building by deepening the excavations, however, doing so raises other technical challenges which are costly to overcome and will detract from the amenity those in ground floor units would experience. The applicants investigated lowering the ceiling heights in the units from their current 2.7m to 2.4m but, again for aesthetic reasons for those who will live within the units, have decided to retain this feature.
16. There is the potential, due to the NPS-UD 2020 superceding minimum car parking rates, to remove the car parking altogether from the proposal. However, the applicants wish to retain some degree of parking on site. Indeed the impact of the proposal on the already considered insufficient availability of street parking is a concern raised by a submitter⁴.
17. The applicants continue to seek a consent period of ten (10) years for this project which fits with the timeframe for other projects they have planned.

Effects (s104C(1)(b) and s104(1)(a))

18. Section 104C(1)(b) of the Resource Management Act 1991 (**act**) states:

“When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which—

...

(b) it has restricted the exercise of its discretion in its plan or proposed plan.”

19. Section 104(1) and part 2 of the act are to be taken into account but only so far as they relate to matters over which the discretion of Council is restricted.
20. The reporting planner concludes his effects assessment at paragraph [111] stating that: *“I consider that, overall, the proposed multi-unit residential development will have more than*

⁴ Point 2 of submission by Pete and Gina Franklin.

minor adverse effects on neighbouring properties and streetscape.”

21. Taking into account the reporting planner's conclusion regarding his effects assessment, changes to the proposed activity described in paragraph 12 above, the pending amendments to the inner city residential density requirement and the NPS-UD 2020, effects on neighbouring properties, streetscape and the efficiency and affordability of infrastructure are now the only effects which can be taken into account pursuant to s104(1)(a) for this site and proposed activity.
22. An analysis of the proposal's breaches of conditions or performance standards in terms of effects on neighbouring properties and streetscape pursuant to both plans is undertaken below.

Neighbouring Properties:

- 2006 plan: discretion restricted to condition with which the activity fails to comply so what effect will the breaches of height plane angle (Rule 8.10.2.(ii)) and height (Rule 8.10.2.(iii)) have in terms of potential loss of access to sunlight and privacy for neighbouring properties⁵? The breaches with respect to 2006 plan HPA and height are shown pictorially in Appendix 2a.

Residential 4 zoning anticipates medium density housing, including multi-unit buildings, as is reflected by the density requirement of a minimum of 200m² per residential unit⁶ which the proposal meets.

The multi-unit building essentially complies with the residential 4 zone building envelope apart from some minor breaches as shown in Appendix 2a. As such, there are no shading effects on neighbouring properties caused by breaches to the height plane angle or height pursuant to the 2006 plan.

The areas of the building used by residents for living and sleeping comply with the residential 4 zone building envelope and density rules and as such the effects on adjoining properties with respect to privacy are anticipated by the zoning.

- 2GP: what effect will the multi-unit building have on surrounding sites' residential amenity⁷? Again this entails understanding the effect the breaches of the height in

⁵ The loss of sunlight and privacy for 45 Cargill Street was of particular concern to its non-resident owner, Michael Thomas, who made a submission.

⁶ 2006 Plan Rule 8.10.1(i).

⁷ 2GP Rules 15.3.4.3 & 15.11.2.1.c.

relation to boundary (Rule 15.6.6.1) will have in terms of potential loss of access to sunlight and privacy for neighbouring properties. The breaches with respect to 2GP HIRB are shown pictorially in Appendix 2b.

The reporting planner states that good reasons need to be provided for breaching the building envelope⁸. The breaches of the 2GP building envelope by the gable ends and roof ridge lines could be removed from the building design; however, the gable ends and pitched roofs provide architectural form which ties in with desirable heritage features of other properties within the neighbourhood. Removing these features to achieve compliance with the 2GP building envelope would be to make the building emulate some of the less architecturally desirable examples of existing multi-unit buildings that can be seen in the neighbourhood. This would be particularly nonsensical given that what precisely the 2GP height in relation to boundary performance standards will be, is, at this point in time, uncertain, given that appeal ENV-2018-CHC-280 is still live on this point.

Diagrams showing the shading effects of the 2GP HIRB breaches were provided in response to a further information request. In response to the s42a report further shading diagrams have been prepared by the applicants. There are no shading effects on 33 and 35 Cargill Street. There are limited shading effects on 45 Cargill Street. All of the shading diagrams are appended at Appendix 3.

The areas of the building used by residents for living and sleeping comply with the inner city residential zone building envelope and density performance standards as such the effects on adjoining properties with respect to privacy are anticipated by the zoning. The dwelling at 45 Cargill Street is approximately 20m from the road frontage, and the multi-unit residential building on 33 Cargill Street is separated by an approximately 3.1m wide driveway to 35 Cargill Street with the reporting planner noting that there are no obvious outdoor living areas for 33 and 35 Cargill Street⁹.

- General Comments: Various submitters¹⁰ raised concerns with the effects on neighbouring properties from construction, noise once occupied, rubbish bins and the like. I concur with the reporting planner's analysis that these concerns can either be dealt with via conditions of consent or, if outside the scope of present proceedings, be

⁸ See paragraph [97] of the s42a report.

⁹ S42a report, paragraph [100].

¹⁰ Julie-Ann Brosnahan; Raphael Richter-Gravier; Pete and Gina Franklin.

dealt with via other processes if an issue arises in the future.

Streetscape:

Both the 2006 plan and the 2GP require a 3m front yard/road boundary setback and 1m side yard/side boundary setback¹¹. The lobby will replace the existing garage which adjoins the road and side boundaries. The basement car park will now be set back 1.5m from the road boundary with landscaping to be provided in the setback on either side of the vehicle access. This setback will shorten the length of the side yard/side boundary setback breach of the basement carpark from approximately 5m to 3m.

In the case of the 2006 plan, Council's discretion is restricted to the condition with which the activity fails to comply; whereas pursuant to the 2GP Council's discretion is restricted to what effect the multi-unit building will have on streetscape amenity and character¹². Both entail understanding what the breaches of the front and side yards/boundary setbacks have on the character and amenity of the streetscape.

The breaches of the front and side yards/setbacks occurred so as to provide on site car parking without requiring the excavations to be too deep which becomes economically unfeasible. The 1.5m setback provides a compromise between providing for streetscape amenity (via the landscaping and lowering of the height of the car park fence) and provision of on site parking. The occupation of the side yard for a short distance when immediately adjoining a driveway is considered to be of less than minor effect on streetscape amenity and character.

Efficiency & Affordability of Infrastructure

This 2GP assessment matter arises from the amendments to the inner city residential density provisions achieved via mediation of ENV-201-CHC-280.

According to the information from Council staff included in the s42A report, there are no issues with the transportation network or the water network. However, 3 waters has identified issues with both the stormwater and wastewater network relating to surcharges downstream of the site¹³. No information is provided on potential solutions to fix these network issues nor are any costings provided for such potential solutions. There has been no exploration of potential on-site retention or attenuation respectively.

¹¹ 2006 Plan Rules 8.10.2(i)(a)(i) and (ii) respectively; 2GP Rules 15.6.13.1.a.iv.1 and 2 respectively.

¹² 2GP Rules 15.3.4.3 & 15.11.3.1.a.

¹³ See paragraph 3 of the memorandum from 3 Waters dated 21 August 2020.

3 waters oppose the application based on the 2GP density but may not have realised that mediation for ENV-2018-CHC-280 results in a maximum development potential of 30m² per habitable room which the proposed activity now meets. This means that development to this density is 'anticipated' by the 2GP for the inner city residential zone.

Furthermore, the memorandum does not appear to take into account the implications of the NPS-UD 2020 which came into effect on 20 August 2020 and requires local authorities to enable greater intensification in areas of high demand and where there is the greatest evidence of benefit – city centres, metropolitan centres, town centres and near rapid transit stops¹⁴. The inner city residential zone is one such area in Dunedin.

Positive Effects (s104(1)(ab))

23. The applicants' willingness to retain on-site parking despite the effect of the NPS-UD 2020 of requiring the removal of minimum car parking provisions from plans, means the provision of car parking as part of this proposal can be considered as a positive benefit.

Objectives and Policies (s104(1)(b))

24. Relevant objectives and policies to effects on neighbouring properties and streetscape are detailed below in the table below.

2006 Plan	2GP
Objective 8.2.1: Ensure that the adverse effects of activities on amenity values and the character of residential areas are avoided, remedied or mitigated. Policy 8.3.1: Maintain or enhance the amenity values and character of residential areas.	Objective 15.2.3: Activities in residential zones maintain a good level of amenity on surrounding residential properties and public spaces. Policy 15.2.3.3: Require buildings and structures in the Inner City Residential Zone to be of a height and setback from boundaries that: a. enables a high quality, medium density form of development; b. is consistent with the existing streetscape character of the zone; and c. avoids or, if avoidance is not practicable, adequately mitigates, adverse effects on sunlight access on outdoor spaces at the rear of adjacent sites. Objective 15.2.4: Activities maintain or enhance the amenity of the streetscape, and reflect the current or intended future character of the neighbourhood. Policy 15.2.4.8: Only allow...multi-unit developments where they are designed to ensure that streetscape and neighbourhood amenity and character is maintained or enhanced.

25. The proposed activity as modified and described in paragraph 12 above, is consistent with

¹⁴ See: Ministry for the Environment *Introductory guide to the National Policy Statement on Urban Development 2020* page 8.

these objectives and policies. The breaches of the building envelope provide for desirable architectural features fitting with better examples of architecture in the neighbourhood. These desirable architectural features have a positive impact on streetscape amenity and character; as will the 1.5m landscaping to be provided on the road boundary excepting the lobby and vehicle access to the basement car parking. The breaches of the building envelope have no effect in terms of shading on 33 and 35 Cargill Street and only a minor shading effect on 45 Cargill Street. Both the residential 4 and inner city residential zonings anticipate multi-unit development at the proposed density.

Other Matters (s104(1)(c))

26. The applicants have requested a lapse date of 10 years. This provides for the provision of this project within a period that involves other projects being undertaken by the applicants.

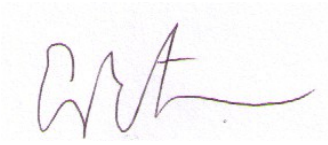
Draft Conditions

27. The applicants agree to the bulk of the conditions but ask that they have a chance to review the conditions once the issues and potential solutions (including likely costs) for the stormwater and waste water network constraints have been provided by 3 waters.

Conclusion

28. The decision making pathway is clear. The activity status for the proposed activity is restricted discretionary. It is open to the Panel to find that each of the breaches of the building envelope are less than minor and cumulatively no more than minor. When exercising its discretion the Panel needs to ensure that it concerns itself only with those matters to which its discretion is restricted and keeps in mind the implications of the NPS-UD 2020. The proposal will result in much needed housing capacity within the inner city within the short to medium term, which in the face of Dunedin's current housing capacity crisis can only be considered positive.
29. There will always be some tension between providing for medium density and the change this will have on the existing neighbourhood including the potential loss of some existing amenity enjoyed by residents of adjoining properties. However, the application complies with the density for both plans and the breaches of the building envelope and site coverage were for the reasons of providing a better architectural outcome for streetscape amenity and character and to provide on site car parking. There is a clear thrust in the policy

framework of both plans for an increase to medium density within residential 4 and inner city residential zones.

A handwritten signature in purple ink, appearing to read 'Emma Peters', with a long horizontal flourish extending to the right.

Emma Peters (BA (First Class Honours), MA (Distinction), LLB)

Appendix 1: ENV-2018-CHC-280 – Agreed Amendments to Rules 15.5.2.4, 15.10.3 and 9.5.3¹⁵

Rule 15.5.2.4:

Standard residential activity that contravenes the performance standard for density is a non-complying activity, except the following are restricted discretionary activities:

- a. papakāika that contravenes the performance standards for density;*
- b. standard residential in the General Residential 2 Zone (infrastructure constraint mapped area) that contravenes the performance standards for maximum development potential per site, provided the maximum development potential per site of the activity proposed does not exceed 1 habitable room per 45m²; and*
- c. contravention of Rule 15.5.2.3 (bulk and location performance standards for multiple residential buildings on the same site); and*
- d. standard residential in the ICR Zone that contravenes the performance standard for maximum development potential per site (15.5.2.1.e.ii), provided the maximum development potential per site of the activity proposed does not exceed 1 habitable room per 30m².*

Rule 15.10.3

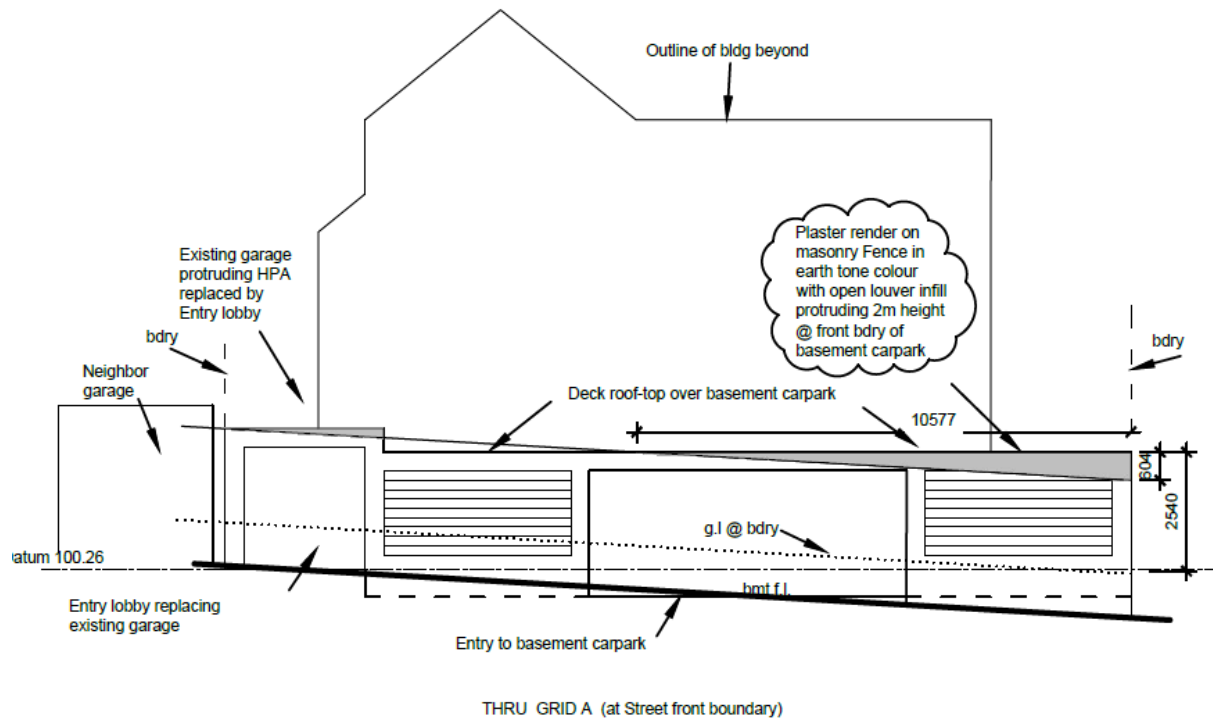
3.	<i>Density - (Rule 15.5.2.4.b)</i> <i>standard residential in General Residential 2 Zone infrastructure constraint mapped area (<u>Rule 15.5.2.4.b</u>).</i> <i><u>standard residential in ICR Zone (Rule 15.5.2.4.d)</u></i>	<i>a. Effects on efficiency and affordability of infrastructure</i>	<i>See Rule 9.5</i>
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¹⁵ Amendments as detailed in Appendix A of ENV-2018-CHC-280 Consent Memorandum dated 28 February 2020.

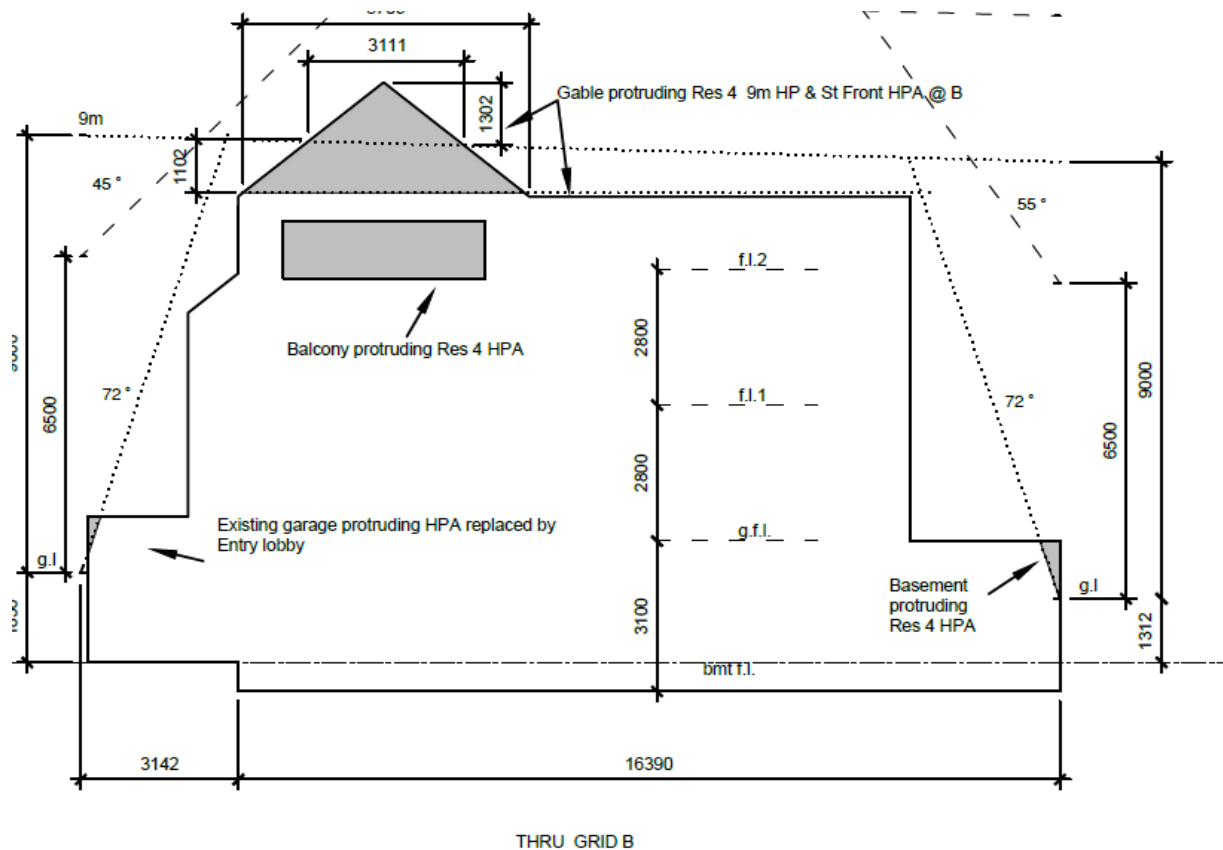
Rule 9.5.3

<u>X.</u>	<u>Density - standard residential in in ICR Zone (Rule 15.5.2.4.d)</u>	<u>a. Effects on efficiency and affordability of infrastructure</u>	<u>Relevant objectives and policies:</u> 1. <u>Objective 9.2.1</u> 2. <u>Development in an area with public water supply and/or wastewater infrastructure will not exceed the current or planned capacity of that infrastructure or compromise its ability to service any activities permitted within the zone (Policy 9.2.1.1).</u> <u>General assessment guidance:</u> 3. <u>In determining whether Policy 9.2.1.1 is achieved, Council will consider the cumulative effects of the proposed development together with existing development and permitted development that is likely to arise in the future.</u>
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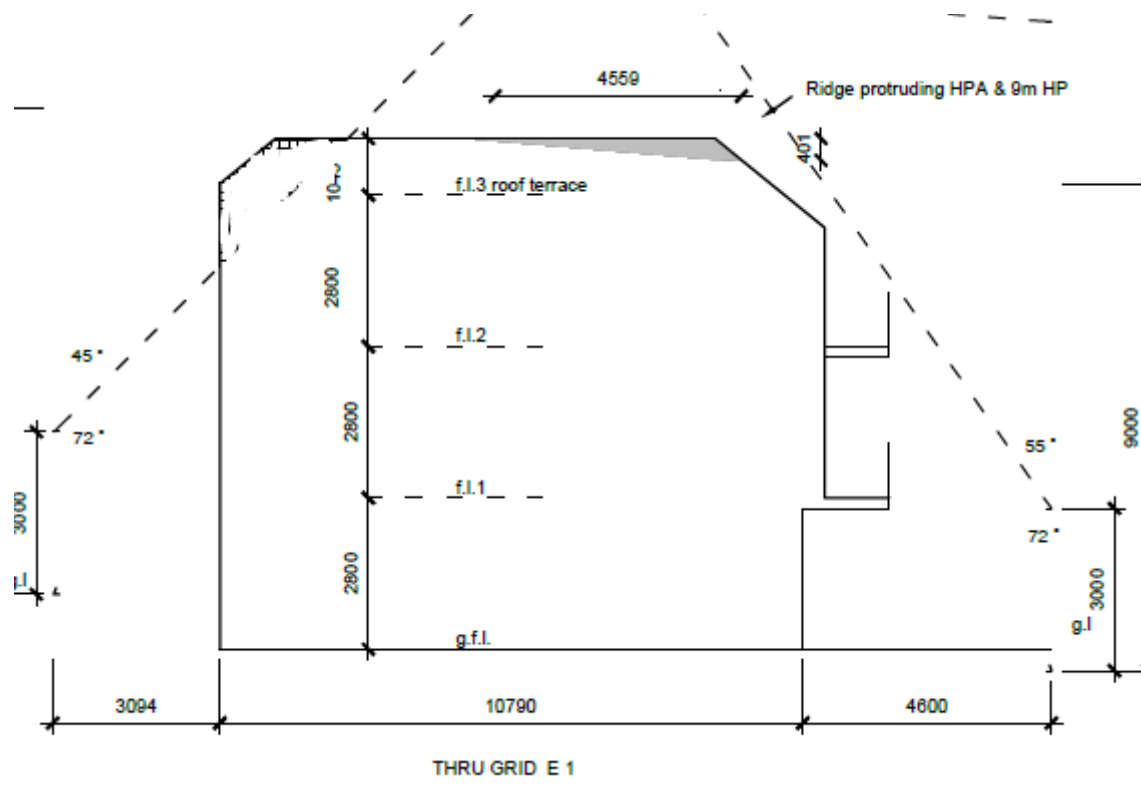
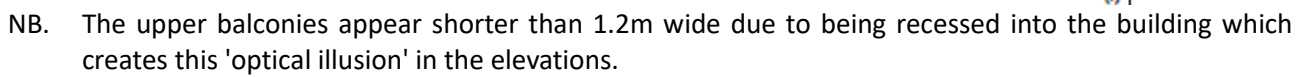
Appendix 2a: Pictorial Summary of 2006 Plan Building Envelope Breaches – Solid Grey Areas



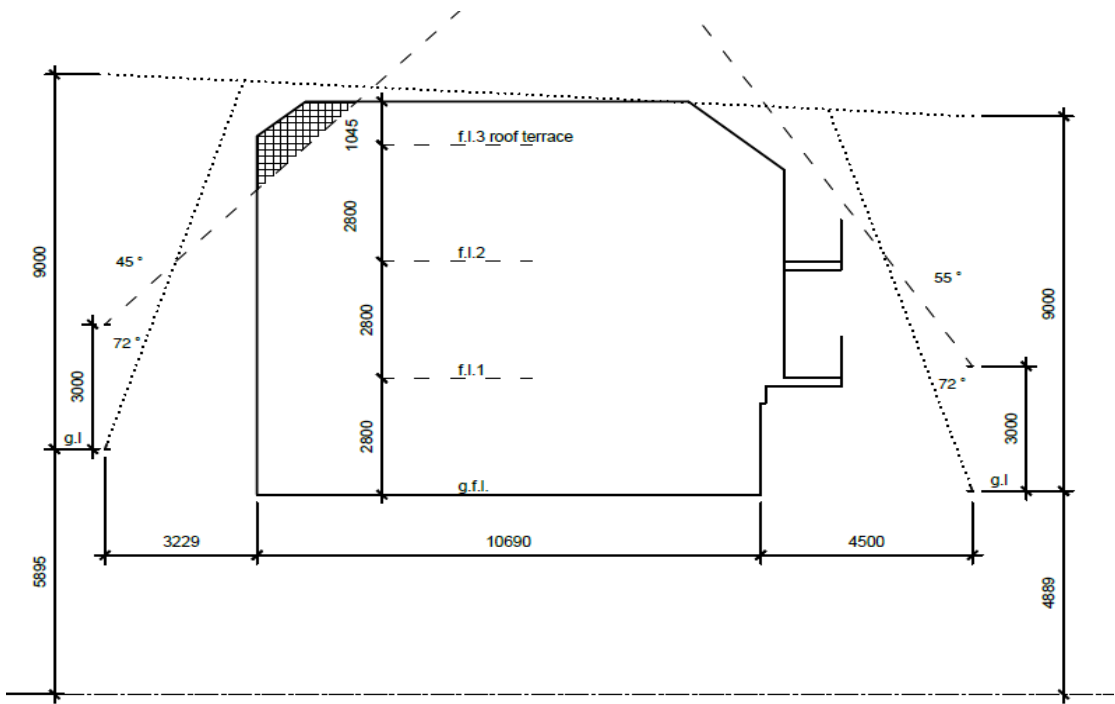
NB. The change to the proposal whereby a 1.5m strip of landscaping removes the protrusion of the basement carpark through the 2m height restriction at front boundary (right hand solid gray area shown above).



NB. The change to the proposal whereby a 1.5m strip of landscaping is provided will reduce the length of the basement protruding through the building envelope from approximately 5m to 3m.

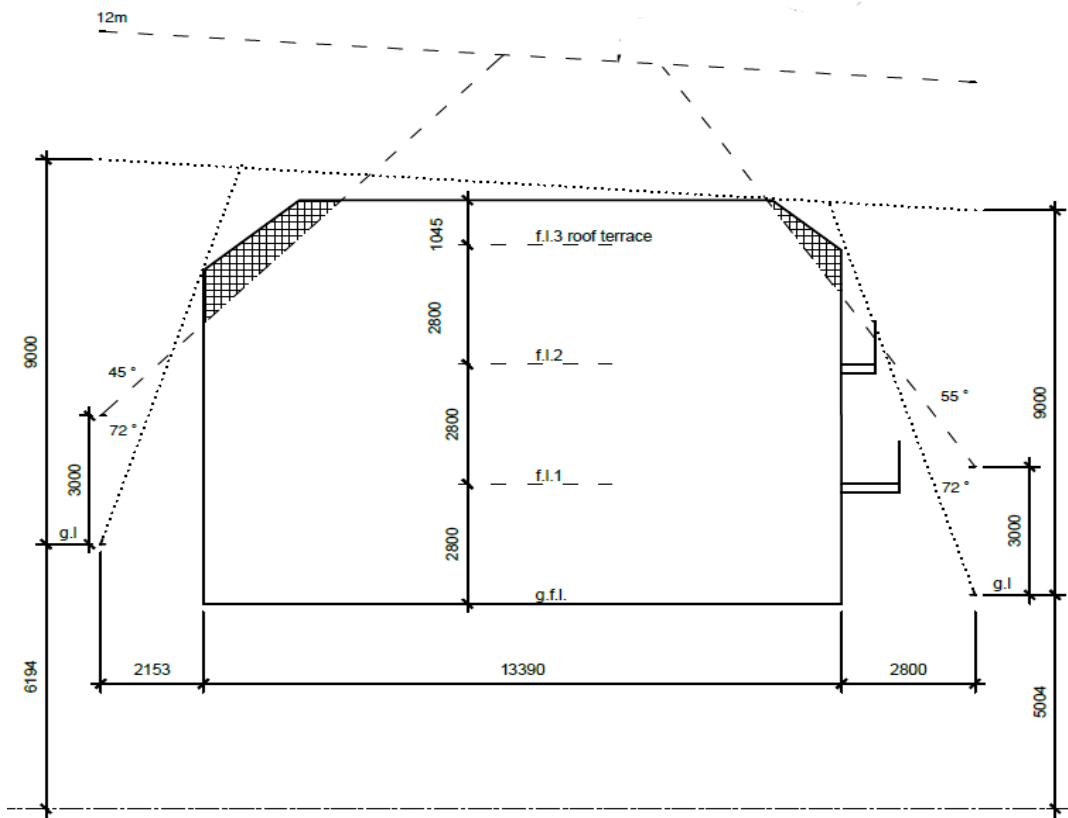


Appendix 2b: Pictorial Summary of 2GP Building Envelope Breaches – Hatched Areas

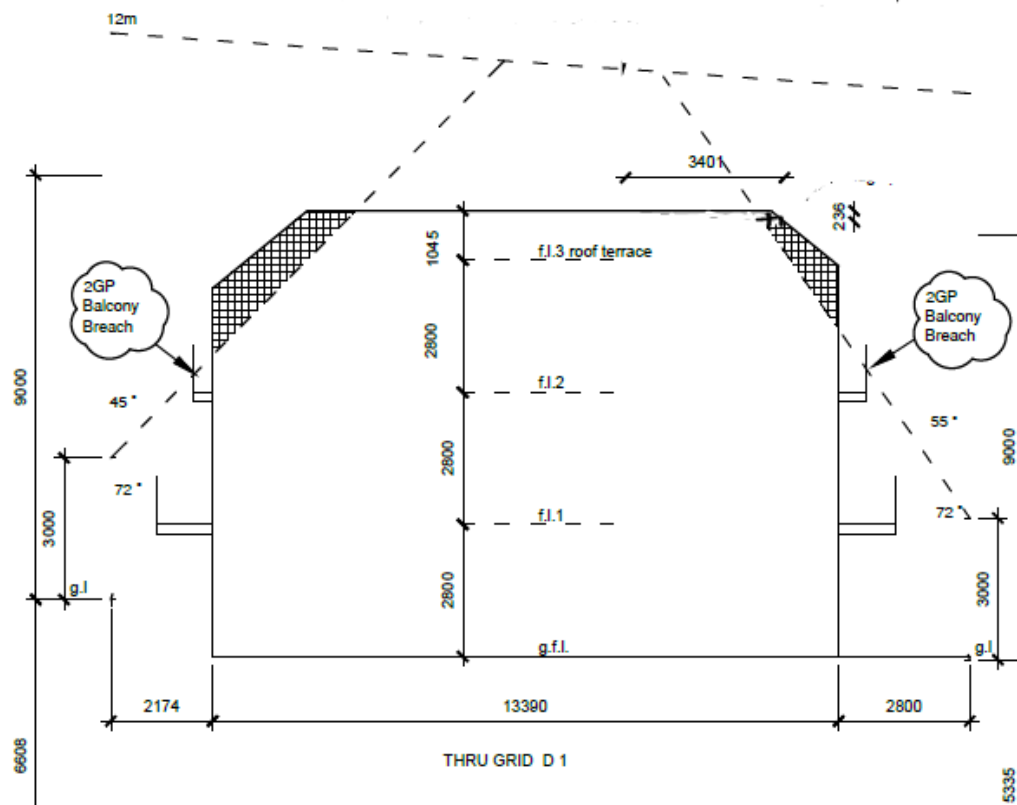
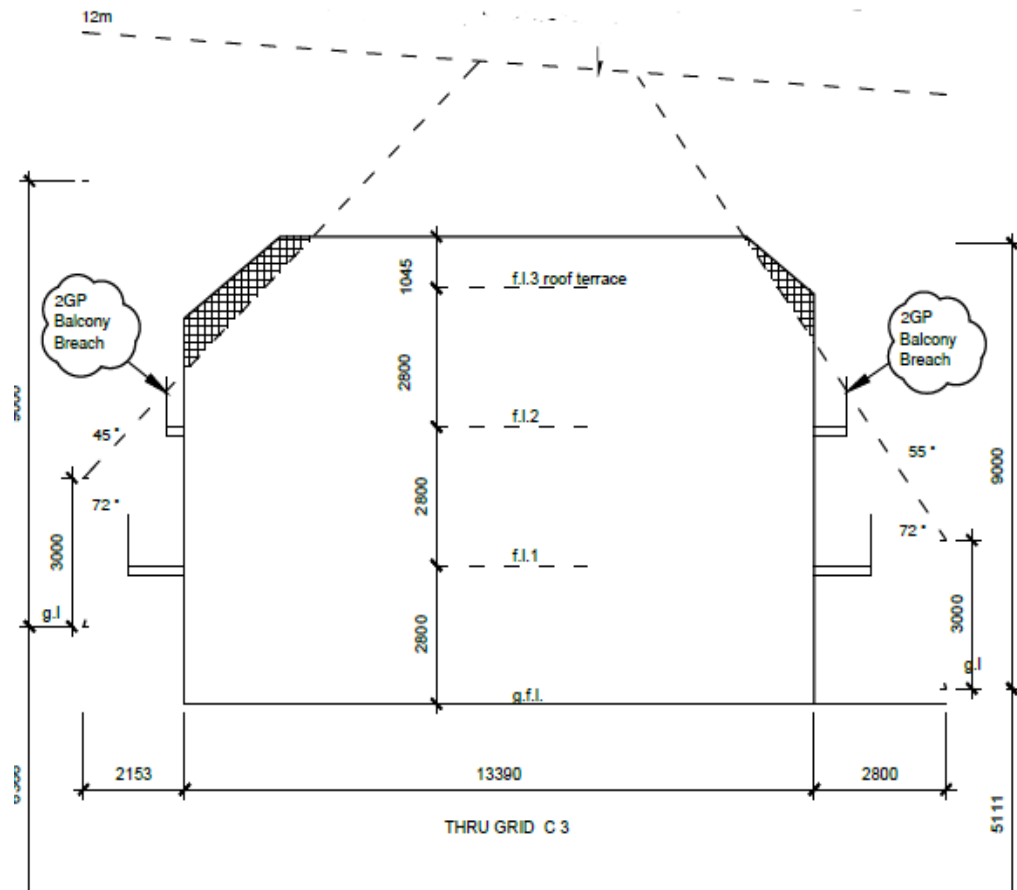


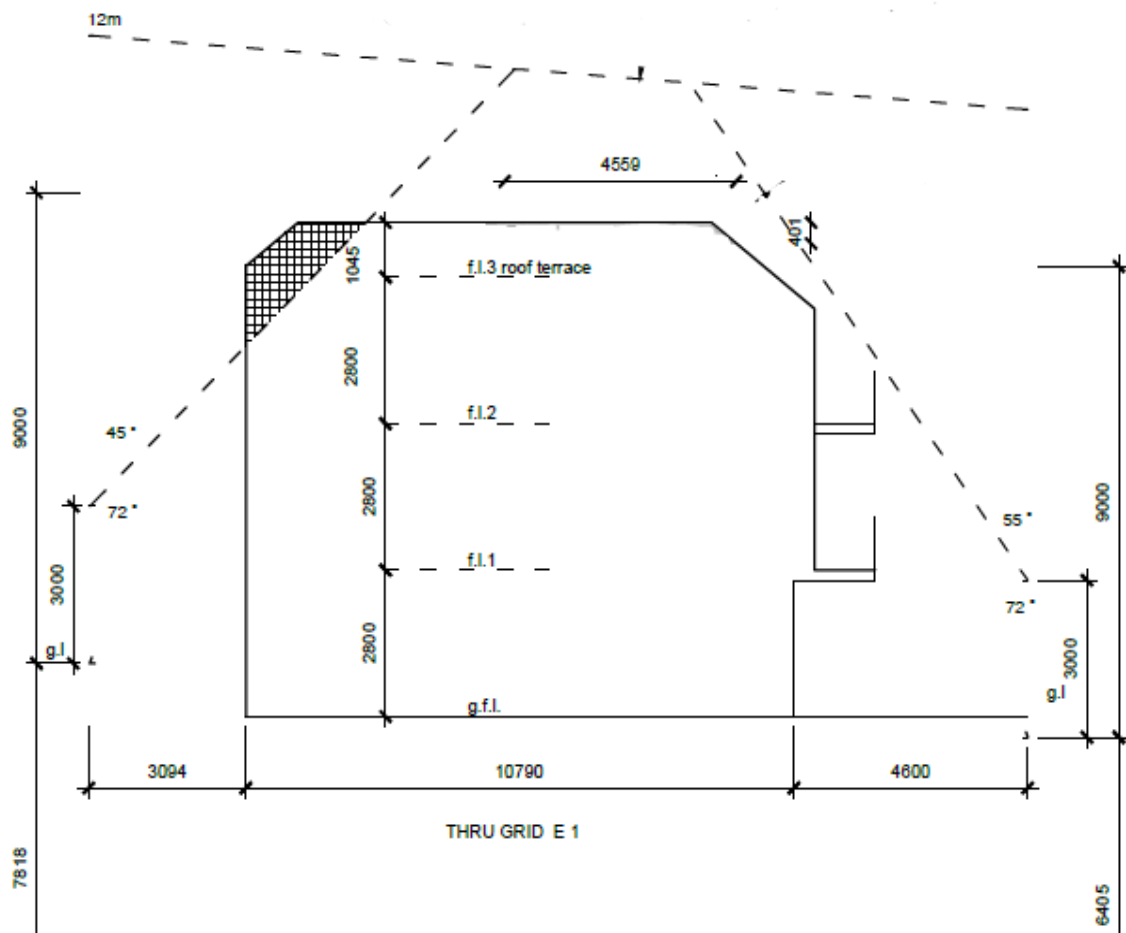
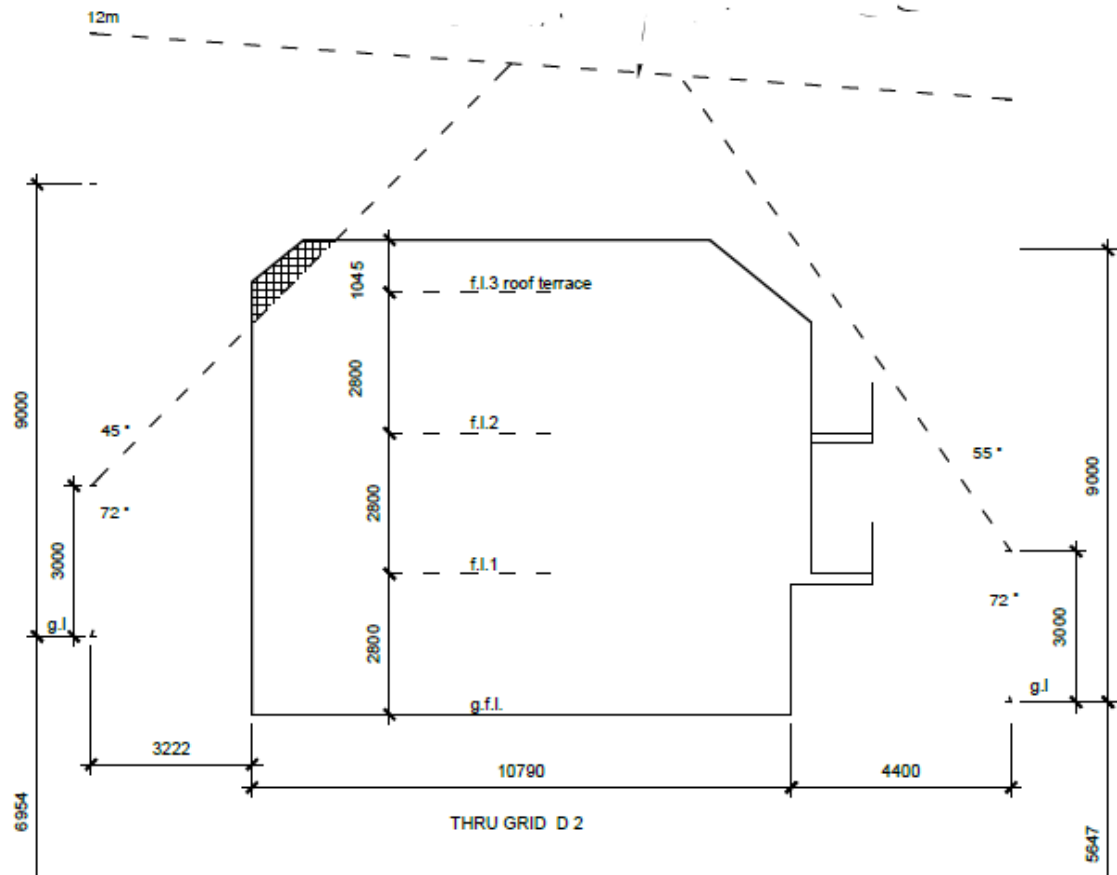
THRU GRID C 1

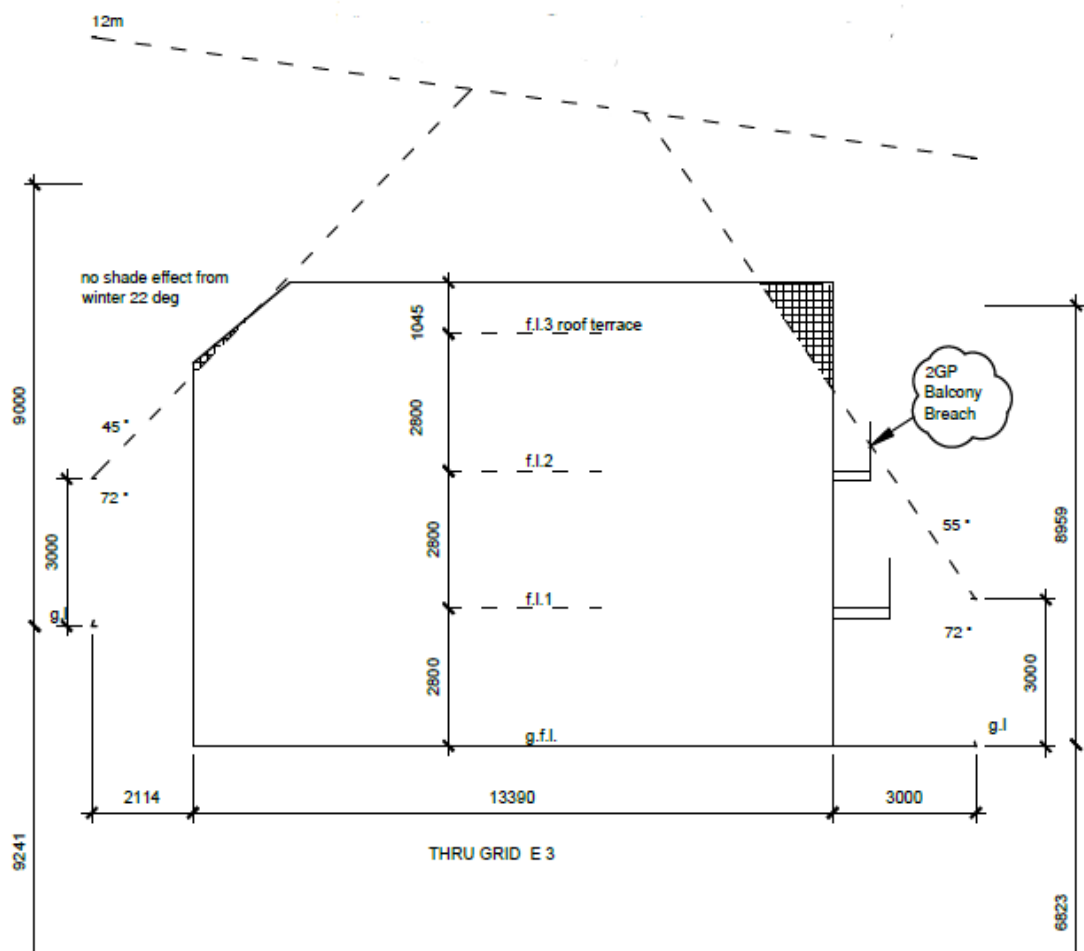
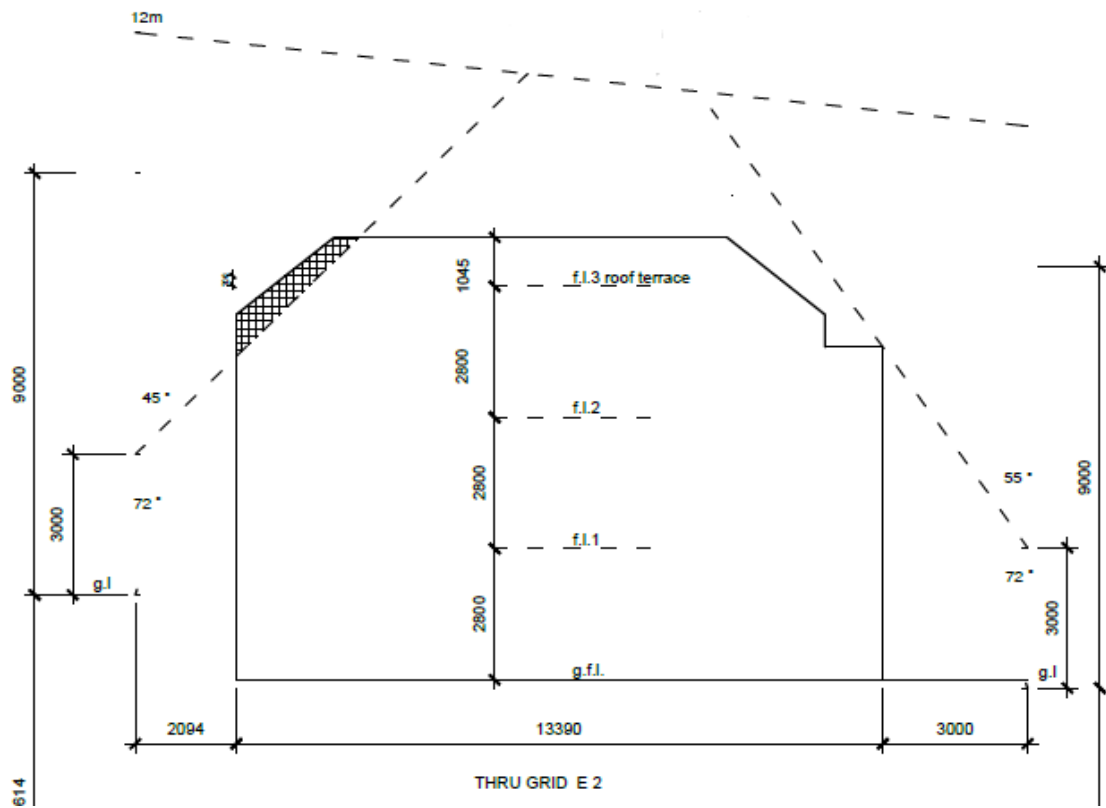
NB. Some balconies appear shorter than 1.2m wide due to the balconies being recessed into the building which creates this 'optical illusion' in the elevations. This applies to C2, C3, D1 and E3.

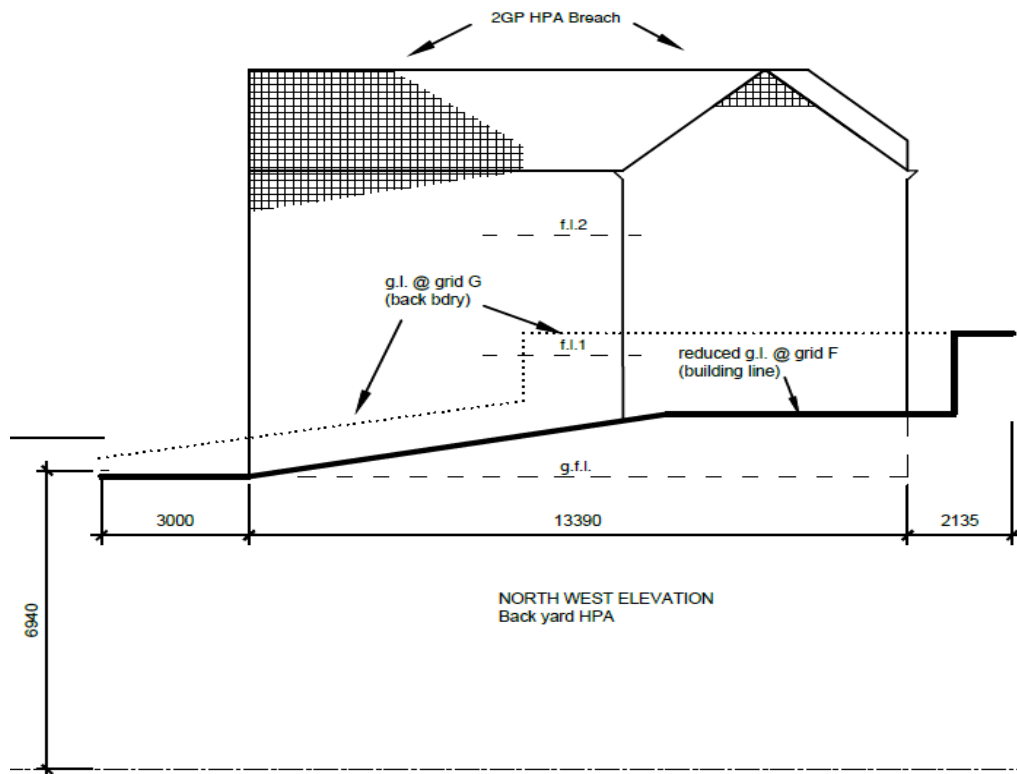
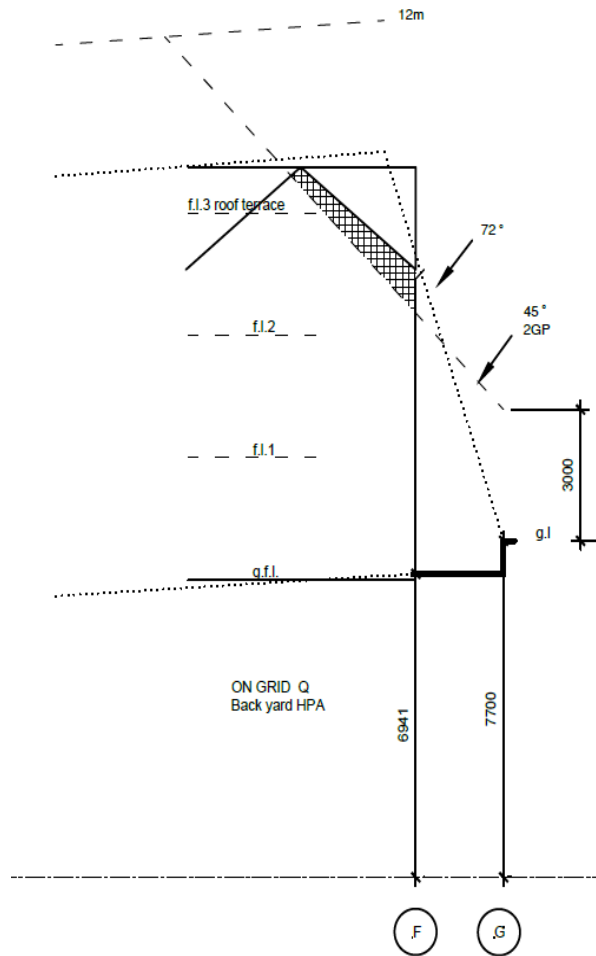


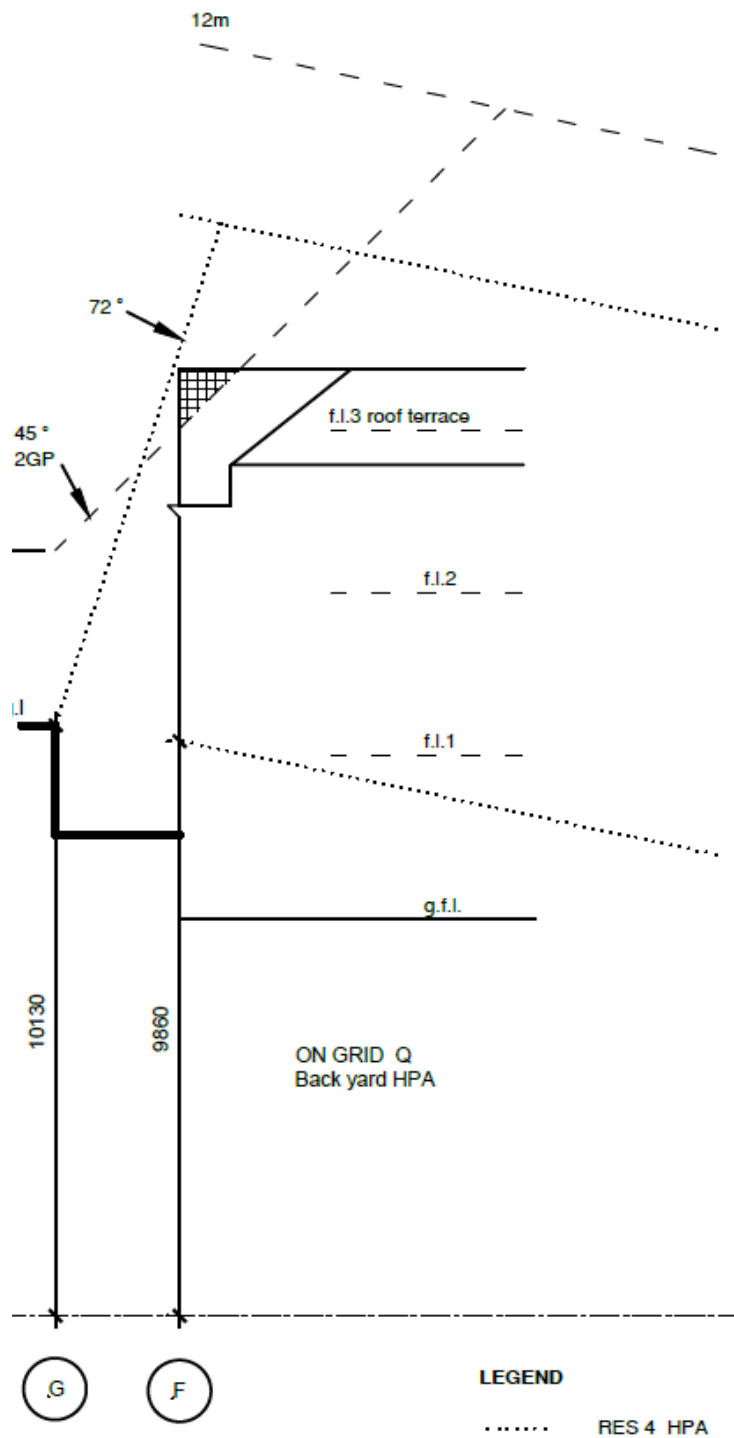
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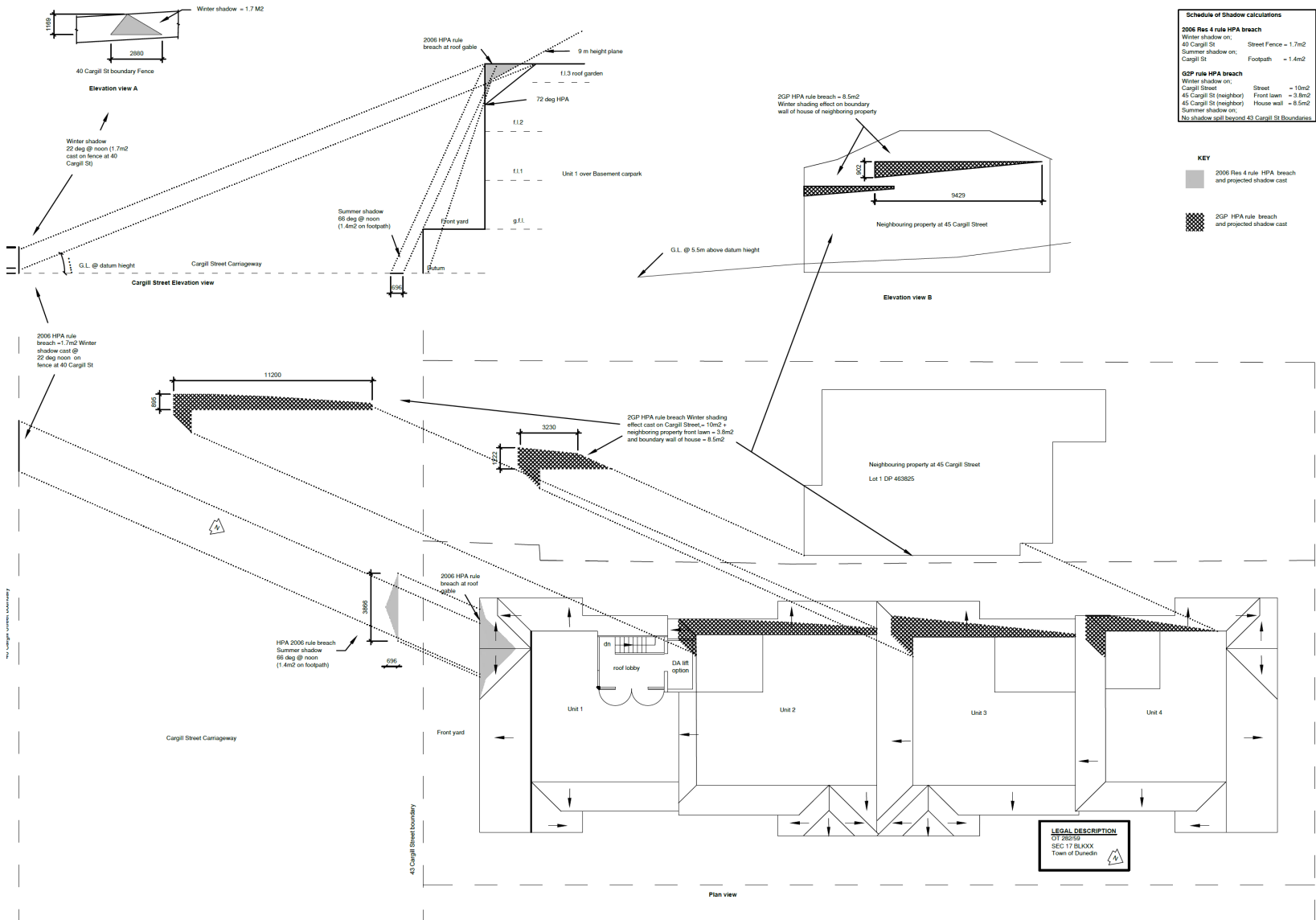








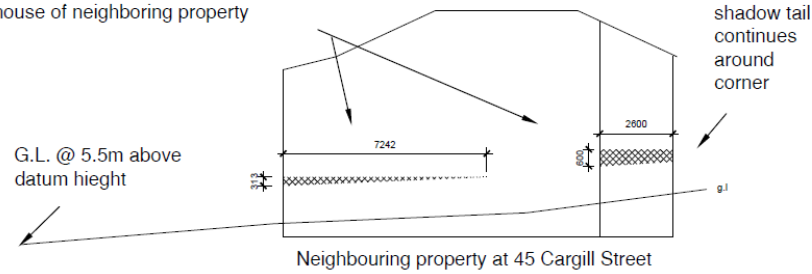
Appendix 3: Effects of 2GP HIRB Breaches in Relation to Shading of 45 Cargill Street.



PROPOSED RESIDENTIAL ACCOMMODATION UNITS AT 43 CARGILL STREET, DUNEDIN.

RESOURCE CONSENT SHADING EFFECT
OF HPA 2006 and 2GP rule BREACH
SCALE A1:100 A3:1:200
DRAWN B SMALL
REG LBP 119890
NOV 2019 LUC 13

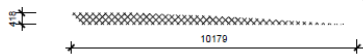
Shadow Cast from 2GP HPA rule breach
12 noon Equinox shading effect on boundary
wall of house of neighboring property



Neighbouring property at 45 Cargill Street

Elevation of Residence wall on boundary - view B

2GP HPA rule breach Equinox shading effect
cast on neighboring property front lawn = 2.5m²
and boundary wall of house = 2.7m²



sun path

Neighbouring property at 45 Cargill Street
Lot 1 DP 463825

sun path

sun path

Equinox shadow effect at 12 noon
sun path direction of Nth -14Deg 1
NE at altitude angle of 40 degree
Cast on 45 Cargill St front lawn an
Residence boundary wall total = 5.

Note
Shadow duration 1 hour each side
12 noon until vanished

43 Cargill Street boundary

Front
yard

Unit 1

Unit 2

Unit 3

Unit 4

roof lobby

dn

DA lift
option

LEGAL DESCRIPTION
OT 282/59
SEC 17 BLKXX
Town of Dunedin

Plan view

Equinox shadow effect at 12 noon

KEY

 2GP HPA rule breach
and projected shadow ca