

The General Manager
Rockdale City Council
PO Box 21
ROCKDALE NSW 2216

Attention: Pascal Van de Walle

Dear Pascal,

**CLAUSE 4.6 VARIATION (AMENDED) – FLOOR SPACE RATIO (DA2015/0279)
15-21 WILLIS STREET, WOLLI CREEK**

We act on behalf of the owners of the subject property in relation to the development application proposed at the abovementioned property. Provided below is detailed justification for the proposed Floor Space Ratio (FSR) non-compliance (a separate clause 4.6 variation is provided for the proposed building height).

1. Floor Space Ratio (amended)

Clause 4.4 of Rockdale LEP 2011 relates to maximum FSR of development and prescribes a maximum of 2.85:1 in relation to the subject site (5,016m²). Pursuant to Clause 4.5 of the LEP, FSR means *the ratio of the gross floor area of all buildings within the site to the site area*. Gross Floor Area is defined in RLEP as follows:

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:

- (a) the area of a mezzanine, and
- (b) habitable rooms in a basement or an attic, and
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,

but excludes:

- (d) any area for common vertical circulation, such as lifts and stairs, and
- (e) any basement:
 - (i) storage, and
 - (ii) vehicular access, loading areas, garbage and services, and
- (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
- (h) any space used for the loading or unloading of goods (including access to it), and
- (i) terraces and balconies with outer walls less than 1.4 metres high, and
- (j) voids above a floor at the level of a storey or storey above.

When the GFA of the proposed development is measured strictly in accordance with the above definition, total calculable floor area of 5,121.30m² is produced (an additional 105.30m²), creating an FSR of 2.91:1 or variation to the standard of 0.06:1 or 2.11% (1,760m² site area). It must be noted that this FSR variation is entirely attributed to design changes requested by Council or the DRP during DA assessment including a garbage holding area with 2m width fronting Willis Street which will be visible from the public domain, however, this was a design change requested by Council post-DA lodgement and it does not contribute to the dominant façade presentation on Willis Street. As detailed below, it is our view that open common

Provided with this Clause 4.6 variation are calculation sheets that are based on our interpretation of the GFA definition and Council's stated position.

Structural drawing of a balcony slab showing reinforcement details. The drawing includes dimensions for slab width (2596), reinforcement spacing (119), and bar diameters (50, 268, 141). Red dashed circles and arrows highlight the 'OPEN ABOVE BALUSTRADE HEIGHT' areas at the ends of the slab.

In this regard, in the matter of *Haralambis Management Pty Ltd v Council of the City of Sydney* [2013] NSWLEC 1009, town planning experts assisting the Court (both for the applicant and the respondent) concluded that a breezeway/corridor should not be included in the calculation of floor space if louvers remain permanently open. The proposed development is entirely consistent with this court judgement as the proposed louvers to the common corridors will remain permanently open and fixed in this position. This position is supported by the legal advice attached to this submission, which concludes that open louvers are not calculable as GFA, and states as follows:

- Page 2

- (a) **closable** bi-fold windows over a solid balustrades; and
(b) **closable** aluminium framed glass louvres,

were external walls (at [23], [39] and [44]).

20. In our opinion, the open corridors depicted in drawing SK100 must be excluded from the calculation of 'gross floor area' under the LEP.

We note Council's verbal comments that proposed common corridors add to building bulk and should therefore be included in GFA calculations, however, it is our view that the GFA definition does not reference assessment of building bulk as a relevant matter to consider. It is only necessary to consider the clear meaning of the words within the GFA definition, which is consistent with relevant case law on statutory interpretation. Assessment of building bulk and scale is a matter for separate assessment under various LEP and DCP provisions. For these reasons, it is our view that the proposed corridors should be excluded from GFA calculations.

In addition, in response to comments made by Council's Design Review Panel, the building entry from Guess Avenue was widened and the buildings have been aligned along the southern property boundary, and these alterations add to calculable GFA. The original development proposal positioned the garbage holding area at the end of Willis Street within an open enclosure. However, at the request of Council, the garbage holding area was shifted to the ground level of the building (adjacent to the Willis Street entry foyer) and this adds to calculable GFA. The external wall of the garbage holding area fronting Willis Street has a width of only 2m.

Provided below is a summary of the proposed GFA:

Site area	= 1,760m ²
Permitted FSR	= 2.85:1
Total permitted GFA (<i>original DA proposal</i>)	= 5,016m ²
Proposed FSR	=2.91:1 (5,121m ²)
Plan amendments post-DA lodgement	
Garbage holding room	= 12m ²
Larger lobbies (DRP request)	= 10m ²
Alterations to Unit B2-001 (DRP request)	= 12m ²
Building realignment, southern boundary (DRP request)	= 58.3m ²
Replanning to increase building separation (Council request)	= 13m ²
(Subtotal	= + 105.3m ²)
APPLICANT's CALCULATION TOTAL GFA	= 5,121.30m²
APPLICANT's FSR CALCULATION	= 2.91:1
Inclusion of open common corridor (Council interpretation)	= 159.3m ²
COUNCIL's CALCULATION TOTAL GFA	= 5,280.30m²
COUNCIL's FSR CALCULATION	= 3:1

It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 of the LEP so as to permit the proposed FSR of 2.91:1 or 3:1, depending on interpretation as outlined above.

The objectives and provisions of clause 4.6 are as follows:

- " 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
 - (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.
 - (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.
 - (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
 - (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4."
 - (ca) clause 4.3 (2A), 4.4 (2A), (2B), (2C) or (2D).

The development standards in clause 4.3 are not "expressly excluded" from the operation of clause 4.6.

Objective 1(a) of clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate that the exception sought is consistent with the exercise of "an appropriate degree of flexibility" in applying the development standard, and is therefore consistent with objective 1(a). In this regard, it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, for example, subclause 4.6(6).

Objective 1(b) of clause 4.6 is addressed later in this request.

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

- " (a) to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale,
(b) to minimise adverse environmental effects on the use or enjoyment of adjoining properties,
(c) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation."

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the objectives of clause 4.4 are addressed in turn below:

Objective (a) is in relation to the creation of maximum building densities as a development standard. Although the proposal exceeds the maximum building density, it is not dramatically beyond anticipated yield given required height and boundary setbacks, which create a permitted building envelope. The proposal will make good use of the infrastructure available within the locality (including proximity to public transport, employment and shopping), and will not introduce additional car parking that will affect the level of service or functionality of nearby intersections. In addition, the proposal will enhance the high-density character of the area and provide additional housing choice in close proximity to public transport.

The small section of external garbage room wall that is visible within the Willis Street site frontage has width of only 2m and will not be a visually dominant portion of the building.

Objective (b) As outlined in the submitted Statement of Environmental Effects, the proposal does not introduce any visual or acoustic privacy issues to surrounding properties. Further, the amended design follows the general alignment of future buildings to Guess Avenue and Willis Street. The proposal will not create any significant or noticeable environmental or amenity based impacts on the streetscape, surrounding properties or in the immediate locality. As demonstrated within the amended shadow diagrams, the proposed development will maintain acceptable levels of sunlight to the future development anticipated on the adjoining site. In addition, it has been demonstrated in the DA submission that the development will achieve compliant solar access to the units proposed within the development.

Objective (c) is not strictly applicable to the proposed modification. The entire surrounding locality is at present undergoing a significant transition to a high density, mixed-use locality and the proposal is entirely consistent with this characteristic. On a broader strategic planning basis, the proposal is consistent with the metropolitan strategy which seeks increased housing density within highly accessible localities. More specifically, the metropolitan strategy states that:

Accelerate housing supply, choice and affordability and build great places to live:

- Work with Council's to identify suitable locations for housing intensification and urban renewal, including employment agglomerations, particularly around Priority Precincts, established and

new centres, and along key public transport corridors including the Illawarra Rail Line, the South Line and Sydney Rapid Transit (along the Bankstown Line)

In relation to broader public benefits arising from the proposal, as previously outlined, the development will replace existing non-residential buildings with a contemporary residential apartment development that has been designed with regard to the desired future built form context of the site and will provide appropriate levels of amenity to future residents. The proposed development will result in an increase in the available housing stock in the locality by the provision of a high quality residential development that has been designed in response to the opportunities and constraints presented by the site. The subject site enjoys excellent access to commercial services, community facilities and public transport that provides access to a wide range of commercial centres. In addition, the development has been designed to minimise impacts on neighbouring properties and likely future adjoining properties and strict compliance with the FSR standard would result in no material built form benefits. For these reasons, the proposed development is within the public interest.

The proposed GFA variation (regardless of the methodology adopted for interpretation of GFA) is relatively minor in the context of recent approvals that have been granted for development within the vicinity of the site and the Wolli Creek Precinct in general. For example, DA-2014/122/A at 13-21 Arncliffe Street, Wolli Creek, was approved by Council on 1 April 2015 with an FSR of 3.41:1, a 19.6% variation.

The proposal satisfies objective 1(b) of clause 4.6 in that allowing flexibility in the particular circumstances of this development will achieve "a better outcome for and from development".

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of development in the zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

In response to the above zone objectives, as indicated in the submitted Statement of Environmental Effects, the proposal provides a land use that is suitable and encouraged within the locality and will integrate residential land uses with existing and future business uses. The development has been designed for ease of pedestrian access and given the proximity to Wolli Creek, walking is expected to be common. Suitable bike facilities are located within the development and residents will have direct access to public transport.

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

" An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

" The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers 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 the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance 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 zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Having regard to all of the above, it is considered that compliance with the floor space ratio development standard is unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. Given that compliance with the zone and development standard objectives is achieved, insistence on strict compliance with the FSR standard is considered to be unreasonable and unnecessary in the circumstances. The proposal is compliant with the relevant objectives, will create negligible environmental impacts and will provide for additional housing within a highly suitable location, as is encouraged by the metropolitan strategy.

Variation to the maximum FSR for the site will enable recommendations made by the Design Review Panel and Council to be implemented, whilst creating a better planning outcome for the site. The proposal is therefore justified on environmental planning grounds. For the reasons above, the proposed FSR variation is consistent with the requirements of Cause 4.6(3) of the LEP.

Conclusion

The development proposal will provide diverse and additional housing choice within superior amenity. This is achieved by well-planned and functional apartments with high solar and cross ventilation performance, and access to common open space.

Accordingly, for the reasons stated above, we respectfully request that Council permit variation to the building height and FSR development standards. We trust the information provided is adequate however, should you have any questions or wish to discuss the application, please do not hesitate to contact our office.

Yours faithfully,
Planning Ingenuity Pty Ltd



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5 August 2015

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Dear Benjy

Advice re DA-2015/279, 15-21 Willis Street Wolli Creek – gross floor area issues

Overview

Issue	1	You have sought legal advice in relation to the above development application (your development application).
	2	You have asked us to address three issues:
	(a)	Issue 1: Whether the open corridors depicted in drawing SK100 'open corridor details' (prepared by you and enclosed with this advice) must be excluded from the calculation of 'gross floor area' under the <i>Rockdale Local Environmental Plan 2011 (the LEP)</i> .
	(b)	Issue 2: Whether the position would change if the open corridors remained the same, but the fixed open louvres were removed and only a solid balustrade was used for each open corridor.
	(c)	Issue 3: Whether rooms that are exclusively occupied by a garbage compactor (connected to a garbage chute) must be excluded from the calculation of 'gross floor area'.
Summary	3	In our opinion:
	(a)	The open corridors depicted in drawing SK100 must be excluded from the calculation of 'gross floor area' under the LEP.
	(b)	The position would not change if the open corridors remained the same, but the fixed open louvres were removed and a solid balustrade was instead used for each open corridor.

- (c) Rooms that are exclusively occupied by a garbage compactor (connected to a garbage chute) must be excluded from the calculation of 'gross floor area'

4 Our opinion reflects the position we would expect the courts to take - if the matter were to come before them as a question of law.

Detailed advice

- Background 5 In providing this advice, we have assumed and understand the facts to be as follows:
- (a) Your development application is for:
 - (i) demolition of existing structures;
 - (ii) the construction of two new residential flat buildings; and
 - (iii) basement car parking.
 - (b) Your development application was made to Rockdale City Council (**the Council**) on 3 February 2015.
 - (c) Your development application is for the development of Lot 1 DP802439 and SP37252 (**your site**).
 - (d) Your development application includes, or will (once amended) include, 'open corridors' as depicted in drawing SK100.
 - (e) The open corridors will include, on one side, fixed open louvres as depicted in drawing SK100.
 - (f) The fixed open louvres would not have anything more than a negligible effect on airflow.
 - (g) The fixed open louvres would not be an adequate safety barrier sufficient to prevent people and objects from falling. They would not satisfy Building Code of Australia requirements in this regard.
 - (h) Any solid balustrades associated with an open corridor would be less than 1.4 metres high (measured from the floor).
 - (i) A garbage compactor is a machine used to reduce the size of waste material through compaction.
- 6 Please inform us if any of the above facts or assumptions are not correct as it may change our advice.

Issue 1 Open corridors with fixed open louvres

7 The phrase 'gross floor area' is given a special meaning by the LEP. It means:

the sum of the floor area of each floor of a building measured from the internal face of **external walls** ... measured at a height of 1.4 metres

above the floor (bold added) ...

8 To determine whether the floor of the open corridors should be included in the calculation of gross floor area, it is first necessary to ascertain whether the fixed open louvres are 'external walls'. We note that any solid balustrades associated with the fixed open louvres will be under 1.4 metres in height measured from the floor.

9 If the fixed open louvres are not an 'external wall':

- (a) there is no floor space capable of being measured at a height of 1.4 metres; and
- (b) the walls separating the interior of the building from the open corridor are the 'external walls' of the building.

10 This means that the floor area of the external corridors would not form part of the gross floor area: *Haralambis Management v City of Sydney* [2013] NSWLEC 1009 [37].

11 The *Macquarie Dictionary* (online) defines a 'wall' as follows:

an upright work or structure of **stone, brick, or similar material**, serving for enclosure, division, support, protection, etc., as one of the upright enclosing sides of a building or a room, or a glass fence of masonry (bold added).

12 It is plain that the fixed open louvres are not 'walls' under the dictionary definition. This is because the louvres are not made from material that is similar to stone or brick (ie they are not solid). We also think that they do not 'enclose' the open corridor because:

- (a) the louvres are fixed open with a 411 millimetre gap between them at their narrowest point; and
- (b) on either end of the fixed open louvres there are no louvres or other physical structures above the balustrade height.

13 However, this does not, in itself, resolve the issue. The Court of Appeal has accepted that:

- (a) 'walls have many purposes and effects'; and
- (b) the purpose of the relevant legislative provision 'must be borne steadfastly in mind in determining the meaning of the language in the statute ... in relation to the word "wall",

(*Blacktown Workers' Club v O'Shannessy* [2011] NSWCA 265 [38]).

14 The courts have considered the important characteristics of an 'outer wall' when used in the definition of 'building floor area' (a definition that was very similar to – in wording and function – the definition of 'gross floor area' in the LEP). It was said that:

[F]or the purposes of the definition ... the characteristic of the outer wall which is important is its **delineation of the interior from the exterior of a building**. ...

The most important feature of an 'outer wall', in the ordinary meaning of that term, is the protection it gives its occupants against the weather, noise, odours, trespassers, human or animal, and other nuisances. On floors above ground level, outer walls also prevent occupants and their belongings from falling to the ground (bold added).

(*Adelaide City Council v Sarris* [2015] SASCF 48 [15]-[16]).

- 15 In our view, the fixed open louvres (as depicted in drawing SK100) would not provide meaningful protection against heat, rain or harsh weather. They would provide no substantive protection against noise or odours. The louvres themselves would not be an adequate safety barrier sufficient to prevent people and objects from falling.
- 16 Far from performing as 'external walls' the fixed open louvres would require the residents and visitors to the apartment to experience the outdoor environment. In our view, the fixed open louvres simply do not perform the functions of external walls.
- 17 In saying this, we have taken into consideration the way that this definition is used by clause 4.4 of the LEP. Clause 4.4 sets maximum floor space ratios for buildings. The explicit objective of this clause is to:
- (a) establish the maximum development density and intensity of land use;
 - (b) minimise adverse environmental effects on the use or enjoyment of adjoining properties; and
 - (c) maintain an appropriate visual relationship between new development and other development.

In our view, these objectives are not advanced by requiring all open corridors to be included in 'gross floor area' when bordered by fixed open louvres, but excluding such corridors when they are bordered by balustrades.

- 18 Our conclusion is strengthened by the way these issues were dealt with in the Land and Environment Court decision of *Haralambis Management v City of Sydney* [2013] NSWLEC 1009. In that case, it was agreed **and accepted** that the lobbies in a mixed use building should be excluded from the 'gross floor area' as the louvres above a solid balustrade were permanently **open** (at [19] and [23]).
- 19 The *Haralambis* decision also adopted a similar approach (to the one that we have taken in paragraphs 15-16 above) in deciding that:
- (a) **closable** bi-fold windows over a solid balustrades; and
 - (b) **closable** aluminium framed glass louvres,
- were** external walls (at [23], [39] and [44]).
- 20 In our opinion, the open corridors depicted in drawing SK100 must be excluded from the calculation of 'gross floor area' under the LEP.

Issue 2

Open corridors without fixed open louvres

- 21 You have also asked us to consider whether the position would change if the open corridors remained the same, but the fixed open louvres were removed and a solid concrete balustrade was instead used for each open corridor.
- 22 The Land and Environment Court has previously concluded (in the context of a particular development) that a glass balustrade was a wall: *Haralambis Management*. In the light of this judgment, in our

opinion it is likely that a **concrete** balustrade will be regarded as a wall.

- 23 The 'gross floor area' definition requires that the floor area be measured from the internal face of external walls at a height of 1.4 metres above the floor.
- 24 However, in the present case, there would be no solid balustrade to measure from at a height of 1.4 metres (as each balustrade would be less than 1.4 metres high). In our opinion, the purpose behind providing a precise point of measurement is to ensure that low walls are not taken to be 'external walls' for the purpose of the definition of 'gross floor area'.
- 25 Accordingly, in our opinion, the position would not change if the open corridors remained the same, but the fixed open louvres were removed and a solid balustrade was instead used for each open corridor. That is, we consider that (as we said for issue 1) the open corridors depicted in drawing SK100 must still be excluded from the calculation of 'gross floor area' under the LEP.

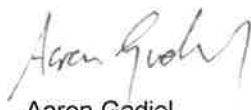
Issue 3

Garbage compactor

- 26 The LEP's definition of 'gross floor area' excludes
plant rooms, lift towers and other areas used exclusively for mechanical services or ducting (bold added) ...
- 27 The *Macquarie Dictionary* (online) relevantly defines 'plant' to be
the equipment, as for electricity, air conditioning, plumbing, etc., **used in the functioning of a large building** (bold added) ...
- 28 In our view, it is plain that a room for a garbage compactor is a 'plant room'.
- 29 We note that garbage chute is connected to the room. The *Macquarie Dictionary* (online) defines a duct as:
any **tube**, canal, or **conduit** by which fluid or other substances are conducted or conveyed (bold added).
- 30 A garbage chute is clearly a form of 'ducting'. Given that ducting is itself excluded from the calculation of 'gross floor area', we cannot see any basis for thinking that the presence of a garbage chute could affect the status of the room as a 'plant room'. Of course, the 'plant' (the garbage compactor) needs both the chute, and garbage, to do its work.
- 31 In short, in our opinion, rooms that are exclusively occupied by a garbage compactor (connected to a garbage chute) must be excluded from the calculation of 'gross floor area'.

Please do not hesitate to contact me on (02) 9931 4929 if you would like to discuss this advice.

Yours sincerely



Aaron Gadiel

Partner

Accredited Specialist - Local Government and Planning Law

Encl.

The General Manager
Rockdale City Council
PO Box 21
ROCKDALE NSW 2216

Attention: Pascal Van de Walle

Dear Pascal,

CLAUSE 4.6 VARIATION (AMENDED) – BUILDING HEIGHT (DA2015/0279) 15-21 WILLIS STREET, WOLLI CREEK

We act on behalf of the owners of the subject property in relation to the development application proposed at the abovementioned property. In response to Council's additional information letter dated 30 April 2015, we provide below detailed justification for the proposed height non-compliance. Other matters raised in Council's letter are dealt with separately by others.

1. BUILDING HEIGHT

Clause 4.3 of Rockdale LEP 2011 relates to the height of buildings and prescribes a maximum building height of 28m in relation to the subject site. The proposed building has been designed to generally comply with the maximum permitted building height limit, however, results in isolated non-compliances relating to Building 1 (fronting Guess Avenue) for the lift overruns, fire stairs and canopy proposed over the rooftop communal open space. Proposed Building 2 (fronting Willis Street) is fully compliant with the height limit. As outlined in Figures 1 and 2, the extent of encroachment ranges from 500mm or 1.8% (for the fire stairs and canopy) to 2.6m or 9.3% to the lift overruns.



Figure 1: Guess Avenue elevation

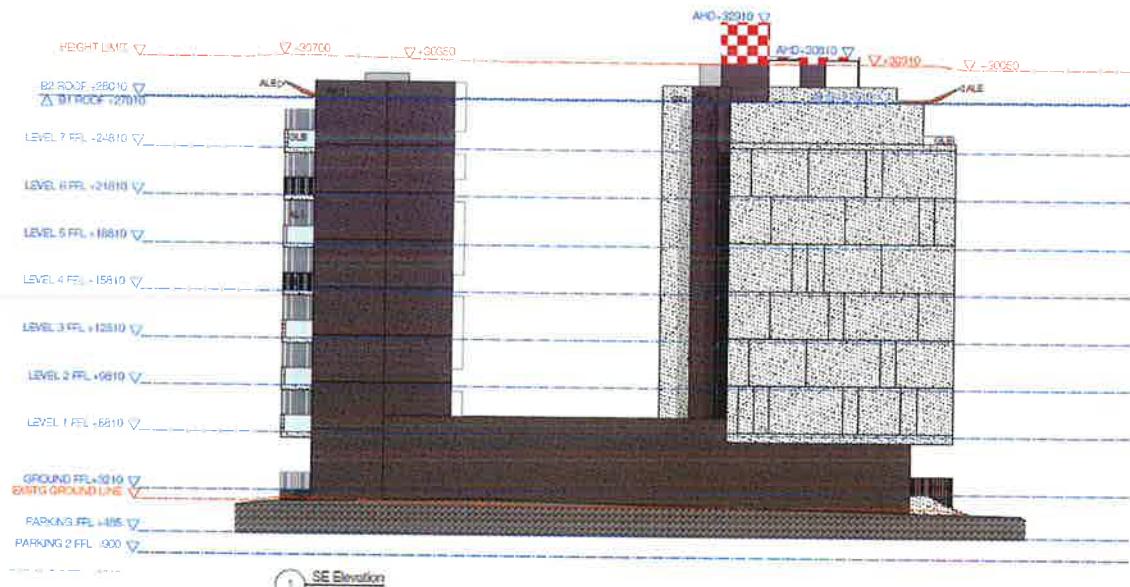


Figure 2: Southern elevation

The lift overruns and fire stairs provide equitable access to the north facing communal rooftop terrace and barbecue area, and the canopy provides weather protection for this space. The addition of the rooftop terrace was highly recommended by Council's Design Review Panel, notwithstanding the variation required to the height limit.

Importantly, as indicated in Figures 3 and 4, the proposed height variation will not be visible from any point on Guess Avenue fronting the site.



Figure 3: Guess Ave, looking north-west



Figure 4: Guess Ave, looking south-west

It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 of the LEP so as to permit the proposed minor projects above the 28m height limit.

The objectives and provisions of clause 4.6 are as follows:

- " 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
 - (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.
 - (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.
 - (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
 - (8) This clause does not allow development consent to be granted for development that would contravene any of the following:
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4."
 - (ca) clause 4.3 (2A), 4.4 (2A), (2B), (2C) or (2D).

The development standard imposed under clause 4.3(2) is not "expressly excluded" from the operation of clause 4.6.

This submission will address the requirements of subclauses 4.6(3) & (4). In this regard, it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, for example, subclause 4.6(6).

Consistency with objectives of the particular standard

The objectives and relevant provisions of clause 4.3 are as follows, inter alia:

- " (a) to establish the maximum limit within which buildings can be designed and floor space can be achieved,
- (b) to permit building heights that encourage high quality urban form,
- (c) to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity."

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the objectives of clause 4.3 are addressed in turn below:

Objective (a) is in relation to maximum limits within which buildings can be designed and floor space can be achieved. The proposal requires a relatively minor variation to the maximum height limit set under clause 4.6(2) and as such a variation is not substantially different to the maximum building height anticipated on the site, as outlined below. In addition, the proposed height non-compliance does not relate to parts of the building that contribute to calculable floor space.

While the variation will change the maximum limit (in a minor way), the variation will **not** result in an absence of maximum limits. **A maximum limit will still be applied.** This maximum limit will be 28 metres for most points of the development, although it will be 23.5 metres (for the fire stairs and canopy) and 25.6 metres (for the lift overruns) on the building fronting Guess Avenue.

Objective (b) the proposal has high quality form and is designed by well renowned architects. In addition, Council's Design Review Panel was generally supportive of the design subject to some relatively minor amendments, including use of the rooftop as a communal open space to supplement the communal space provided at ground level. As described in Figures 3 and 4, the proposed height non-compliances will not be visible from the Guess Avenue frontage and will also not be visible the Willis Street frontage. Conversely, the proposed height non-compliance will allow for a communal roof top terrace that will have high amenity for enjoyment and interaction of residents.

Objective (c) is in relation to sky exposure and daylight access. As demonstrated within the amended submission, the proposed development will maintain appropriate levels of solar access to neighbouring properties and will achieve compliant solar access within the development. Due to the angle of the sun at mid-winter, the portions of Building 1 that project above the 28m height limit will not create any additional overshadowing impacts. The height non-compliance will not impact on any 'key areas' and or the public domain.

Objective (d) is in relation to transitioning building forms and land use intensity. The surrounding locality has the same zoning, height and density controls as the subject site, and as such no transition in terms of building form or use is necessary.

Consistency with zones objectives

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of development in the zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

In response to the above zone objectives, as indicated in the submitted Statement of Environmental Effects, the proposal provides a land use that is suitable and encouraged within the locality and will integrate residential land uses with existing and future business uses. The development has been designed for ease of pedestrian access and given the proximity to Wolli Creek, walking is expected to be common. Suitable bike facilities are located within the development and residents will have direct access to public transport, including Wolli Creek Railway Station which is less than 400m from the subject site.

The development will replace existing non-residential buildings with a contemporary residential apartment development that has been designed with regard to the desired future built form context of the site and will provide appropriate levels of amenity to future residents. The proposed development will result in an increase in the available housing stock in the locality by the provision of a high quality residential development that has been designed in response to the opportunities and constraints presented by the site. The subject site enjoys excellent access to commercial services, community facilities and public transport that provides access to a wide range of commercial centres.

Sufficient environmental planning grounds

The north facing communal rooftop terrace and barbecue area was highly recommended by Council's Design Review Panel. That is, the inclusion of the terrace in the development (with facilities and equitable access) represents an improved urban design outcome for the subject site. This means that there are sufficient environmental planning grounds to justify the variation of the height control, **particularly** given that:

- the development has been designed to minimise impacts on neighbouring properties and likely future adjoining properties;
- strict compliance with the building height standard would result in no material built form benefits;
- the proposed height non-compliance does not relate to parts of the building that contribute to calculable floor space;
- the proposed height variation will not be visible from any point on Guess Avenue fronting the site; and
- the variation avoids the need for reducing in the provision of dwellings in an 'accessible location' where the zone objective is to 'maximise public transport patronage and encourage walking and cycling'.

Unreasonable or unnecessary in the circumstances of the case

Returning to Clause 4.6(3)(a), in *Wehbe V Pittwater Council (2007)* NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

- " An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

The judgement goes on to state that:

- " The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers 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)."

However, in *Four2Five v Ashfield Council* [2015] NSWLEC 90 the Land and Environment Court said that whether something was 'unreasonable or unnecessary' is now addressed specifically in clause 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary. Accordingly, while the objectives of the standard are achieved despite non-compliance with the standard, this request goes further. It seeks to demonstrate that requiring strict adherence to the standard would be 'unreasonable or unnecessary' for reasons **that are additional** to mere consistency with the development standard.

Preston CJ in the judgement then expressed the view that there are four **additional** ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. ...
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 zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Additionally, in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 Court of Appeal said that a requirement may be unreasonable when 'the severity of the burden placed on the applicant is disproportionate to the consequences attributable to the proposed development' (at paragraph 15).

Having regard to all of the above, it is considered that compliance with the building height development standard is unreasonable or unnecessary in the circumstances of this case as:

- The proposed height variation will not be visible from any point on Guess Avenue fronting the site.
- The lift overruns and fire stairs provide equitable access to the north facing communal rooftop terrace and barbecue area, and the canopy provides weather protection for this space. The addition of the rooftop terrace was highly recommended by Council's Design Review Panel, notwithstanding the variation required to the height limit.
- Requiring strict compliance with the height limit would undermine or thwart the objective of the height control 'to permit building heights that encourage high quality urban form'.
- To the extent that the height control is strictly applied and the rooftop terrace is retained as depicted, the number of dwellings to be provided within the development would need to be reduced. This would undermine or thwart the zone objective 'to maximise public transport patronage and encourage walking and cycling' by providing for less dwellings in an 'accessible location' (ie a location in close proximity to high quality public transport infrastructure and within a walkable neighbourhood).
- The proposed development meets the objectives of the height control **and** strict compliance with the height control would undermine or thwart its objectives, or the zone's objectives (or both).
- The burden placed on future residents (by eliminating the rooftop terrace and/or equitable access to it) and/or the broader community (by reducing the numbers of homes within an accessible location in easy reach of public transport) would be disproportionate to any consequences that may arise from the proposed non-compliance with the height control.

Given that compliance with the zone and development standard objectives is achieved, insistence on strict compliance with the building height standard is considered to be unreasonable and unnecessary in the circumstances. The proposal is compliant with the relevant objectives, will create negligible environmental impacts and will provide communal open space in a highly desirable, high amenity location. The proposal is therefore justified on environmental planning grounds. For the reasons above, the proposed building height variation is consistent with the requirements of Cause 4.6(3) of the LEP.

Conclusion

The development proposal will provide diverse and additional housing choice within superior amenity. This is achieved by well-planned and functional apartments with high solar and cross ventilation performance, and access to common open space.

Accordingly, for the reasons stated above, we respectfully request that Council permit variation to the building height development standard. We trust the information provided is adequate however, should you have any questions or wish to discuss the application, please do not hesitate to contact our office.

Yours faithfully,

Planning Ingenuity Pty Ltd



Benjamin Black
ASSOCIATE DIRECTOR

