

10 September 2015

Mr Pascal van de Walle
Senior Development Assessment Planner
Major Assessment Team
Rockdale City Council

By Email - pvandewalle@rockdale.nsw.gov.au

Dear Mr van de Walle

15-21 WILLIS STREET WOLLI CREEK - DEVELOPMENT APPLICATION DA-2015/279

We refer to the abovementioned development application to be determined by the Sydney East Joint Regional Planning Panel on 16 September 2015.

As advised in my emails to you email of 1 and 2 September 2015, given that Council's position regarding floor space was not finalised until 1 September 2015, there was insufficient time for us to issue Council with a final clause 4.6 floor space variation, in time for your JRPP lodgement deadline of 2 September 2015. The emails identified that we would be submitting a revised clause 4.6 variation for floor space, prior to the JRPP determination meeting.

Accordingly, we now **attach** the following in support of our development application:

- A final clause 4.6 floor space variation prepared by Planning Ingenuity, dated 9 September 2015, justifying the floor space variation
- Legal advice prepared by Gadens Lawyers, dated 9 September 2015, which addresses the final clause 4.6 variation

In light of the revised floor space variation and supporting legal advice we would hope that Council officers are of a mind to prepare and forward to the JRPP a supplementary report which supports our development application as currently proposed including a set of modified development consent conditions deleting condition 44 parts (a) and (b).

Should Council still not be satisfied with the floor space variation as proposed, we think that it would be remiss of Council not to furnish the JRPP members with a copy of the legal advice (which you will not forward to us) and which you have advised advances Council's position, that the open corridors to building 2 should be included in the calculation of the gross floor area for the development. Our legal advice that we have forwarded to you is very clear that the open corridors should be excluded from the calculation of the gross floor area of the building.

We have now had an opportunity to review Council's report to JRPP and offer the following additional comments:

Building separation

Council's report inaccurately describes the building separation, on levels 5-7, between the building 2 open corridors and the building 1 apartments opposite as inadequate and not compliant with RFDC building separation requirements.

The open corridors are clearly non-habitable spaces as defined in Council's development control plan and the RFDC.

The nominated building separation on levels 5-7 of 13.080m and is therefore compliant with both Council's DCP controls and the RFDC controls of 13.0m between non-habitable spaces, applicable to those levels.

It therefore goes without saying that the building separation is entirely appropriate.

The only non-compliance with building separation relates to the separation between the living room to apartment 1 in building 2 (all levels) and this has been carefully addressed by the inclusion of privacy louvres. At meetings with Council we have offered to seal up the living room windows, if necessary. Both Council and the applicant consider the provision of louvres as a more favoured solution as it will allow additional sunlight into the living room whilst maintaining the privacy objectives of building separation.

The compliant building separation has been discussed in more detail within the clause 4.6 variation to floor space.

Car Parking

Council's report contains an error in that the proposed number of visitor car parking spaces is in fact 10 and not 11.

Therefore, it could be argued that there is a numerical shortfall of 3 visitor car parking spaces when compared against Council's DCP control of 1 visitor space per 5 apartments. My understanding is that there is no dispute as to the acceptability in the provision of 74 proposed resident car parking spaces.

As you are no doubt aware on 1 March 2013 a new planning reform came into effect. The Environmental Planning and Assessment Amendment Act 2012 has clarified the purpose and status of development control plans, being to "provide guidance" to proponents and Councils in achieving the land use zone objectives and facilitating permissible development under an environmental planning instrument (refer section 74BA EP&A Act). Development control plans are therefore non-statutory.

Moreover, Section 79C (3A) (b) of the EP&A Act states as follows, bold added:

*"If a development control plan contains provisions that relate to the development that is the subject of a development application, **the consent authority:***

(a)

*(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards – **is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the object of those standards** for dealing with that aspect of the development*

(c)"

In *Catalina Island Pty Limited v Pittwater Council* [2014] NSWLEC 1125, Senior Commissioner Moore considered the application of section 79(C) (3A) of the Act. In that case, the development did not comply with a specific DCP control and the Senior Commissioner considered whether the controls needed to be applied. The Senior Commissioner expressly stated that the act **required him** (in a mandatory sense) to take a flexible attitude in considering the applicable standards in the relevant DCP and in considering whether **the objects** of the standards are addressed by the alternative solution.

It is therefore imperative that Council, in assessing our proposed visitor car parking provision, considers more broadly the objectives of the controls rather than adhering to strict numerical compliance. It is also worth noting that the car parking provisions are contained within Council's LGA wide DCP and that the proposed development is located within 400m of Wolli creek station.

In other words, in relation to the visitor car parking, there appears to be no consideration given to the proximity of a proposed development to a train station in comparison to a proposed development which is remote from public transport.

Interestingly, Council's DCP includes a concession for non-residential uses in Wolli Creek Town centre, as follows:

Travel Demand Management Concession

A 20% reduction of the 'non-residential' component of the parking requirement shall be applied to any development within the Rockdale Town Centre and Wolli Creek Town Centre.

The car parking objectives within Rockdale DCP are as follows (bold added):

Objectives

*A. To provide sufficient, convenient and safe on-site car parking while **encouraging alternative modes of transport, such as walking and cycling***

B. To ensure that on-site car parking, loading facilities and driveways do not dominate or detract from the appearance of the development and the local streetscape

C. To limit the amount of excavation required for the purpose of car parking so that impacts on ground water flows are minimised and the amount of landscaped area is maximised

D. To ensure adequate egress and ingress to the site and parking Facilities

E. To discourage excessive parking in development close to public transport

We submit that the provision of 10 car parking spaces (or 1 per 6.7 apartments) is adequate given the proximity to Wolli Creek train station and is fully compliant with DCP objectives (A) and (E).

The car parking objectives contained within the RFDC are as follows:

- *To **minimise car dependency for commuting** and recreational transport use and **to promote alternative means of transport-public transport, bicycling and walking***
- *To **provide adequate car parking for the buildings user's and visitors, depending on building type and proximity to public transport***
- *To integrate the location and design of car parking with the design on the site and the building*

The zone objectives within Rockdale LEP 2011 include (bold added):

- 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**

We submit that the visitor car parking provision proposed would be more consistent with the abovementioned objectives than a development which achieved strict numerical compliance with the DCP control as it would encourage visitors to utilise nearby public transport (Wolli Creek station which is within 400m of the development) and use alternate means of transport such as cycling and walking.

We also **attach** a letter prepared Traffic and Transport Planning Associates which concludes that our visitor parking provision is entirely consistent with RMS Guidelines given the proximity to railway station and supermarket/specialty shops and is a significantly higher provision per apartment than the nearby Discovery Point development (where the visitor parking provision is 1 space per 20 apartments).

It is requested that draft condition 11 be modified to permit visitor parking to be provided at the proposed rate of 1 space per 6.7 apartments.

Draft conditions of development consent and staging

Our statement of environmental effects nominates that the development is to be constructed in four stages. This seems to have been overlooked and the draft conditions do not appear to relate to the staged construction certificates, albeit inadvertently. There may be a need for Lateral Estate to lodge a minor modification application at some future point should it become clear that specific conditions will delay the relevant stage of construction.

CONCLUSION

As you are aware, Lateral Estate has worked very cooperatively with Rockdale Council since DA lodgement. It is our view that the original design prepared by award winning architect, Tony Caro, and reviewed by Rohan Dickson, a renowned urban design specialist, was of extremely high quality in terms of aesthetics, environmental performance and compliance with statutory planning controls. The design responded very well to site specific constraints and would result in a development which in our view is superior to other developments approved and being constructed within Wolli Creek.

We have incorporated the majority of design changes recommended by both Council and the St George Design Review Panel. All the modifications that have been introduced further enhance the design. The modified design will ensure that the development makes an extremely positive contribution to both streetscapes and to Wolli Creek in general.

We would hope that Council after reviewing the additional information provided agrees that the built form proposal and parking provision are now acceptable and submits a supplementary report to the JRPP removing these two remaining contentions.

LATERAL ESTATE PTY LIMITED



Benjy Levy
Development Manager

c.c Sydney East JRPP panel members

C/o Ms Lisa Foley- lisa.foley@planning.nsw.gov.au

c.c Mr Stephen Kerr, Director of City Planning & Development, Rockdale Council - skerr@rockdale.nsw.gov.au

c.c Mr Luis Melim, Manager Development Services, Rockdale Council - LMelim@rockdale.nsw.gov.au

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).

We note that the scheme as originally submitted to Council had a compliant Floor Space Ratio (on the assumption that our interpretation of excluding the 'open' common corridors from Gross Floor Area (GFA) calculations is correct – see over page). However, as a result of input from Council's Design Review Panel, various relatively minor changes to the design created incremental increase in GFA over the building levels. This has created non-compliant FSR as discussed below.

1. General

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 (this is 5,016m², given the site area of 1,760 m²). 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.

In our view, although there could be design alternatives to achieve a fully compliant scheme (small reductions in unit areas and building width, for example), the development outcome would be suboptimal (reduced occupant amenity) and there would not be any tangible benefit to surrounding sites, streetscape presentation or the public domain. To the contrary, reduced unit size would be at odds with zone and LEP objectives which seek to improve residential amenity and maximise public transport patronage. The benefits of the proposed variation to the development and occupant amenity far outweigh any benefit that could be derived from insistence on a fully compliant scheme.

As indicated, it is our view that the GFA calculations prepared by the project architect should exclude open common corridors as they are open to the weather and direct sunlight on one side, with fixed open louvres positioned adjacent to each corridor for privacy to the apartments opposite. A gap of 411mm is proposed between the louvres and the corridors are also complete open at either end, as indicated in Figure 1. The fixed open louvres do not separate the interior from the exterior of the building. The open corridors are part of the exterior of the building.



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 Land and Environment Court (both for the applicant and the respondent) concluded that a breezeway/corridor should not be included in the calculation of floor space if louvres remain permanently open. The proposed development is entirely consistent with this court judgement as the proposed louvres 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 louvres are not calculable as GFA, and states as follows:

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.

We agree with Gadens' assessment that the objectives of the floor space ratio control (in clause 4.4 of the LEP) are not advanced by requiring all open corridors to be included in 'gross floor area' when bordered by fixed open louvres, when such corridors would be excluded when they are bordered by balustrades of less than 1.4 metres in height.

As outlined below, in response to comments made by Council's Design Review Panel the buildings have been aligned along the southern property boundary (Figures 2 and 3) and the building entry from Guess Avenue was widened. These alterations add to the 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. This change is visible in Figures 4 and 5.

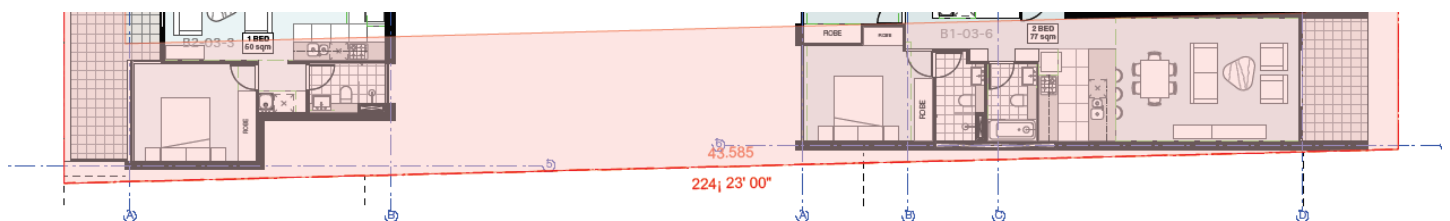


Figure 2: Original plan proposing partial setback to southern boundary

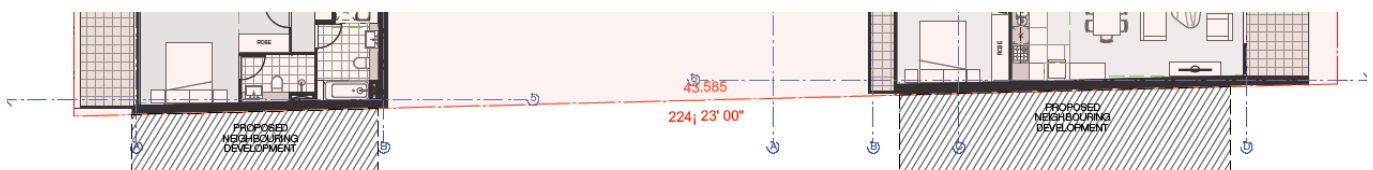


Figure 3: Amended plan aligning building with nil setback to southern boundary

These design changes created a number of benefits, including:

- Removal of the “unworkable residual spaces”(also contributing to the internal amenity of the affected apartments);
- Better relationship to future development on the neighbouring property to the south; and
- Retention of the DCP desired unit mix.

These design changes resulted in an incremental increase in GFA on all levels.

In relation to the ground floor 2 bedroom apartment on Willis Street, the Design Review Panel was of the view that it had an uncomfortable relationship to the street and poor entry, with two door swings in conflict. To access the lift and basement, the resident would need to leave the building and re-enter the main entry which is inconvenient and potentially insecure. In addition, the panel said that the main entries to each block need to be increased in size by moving the doors outwards towards the face of the building.

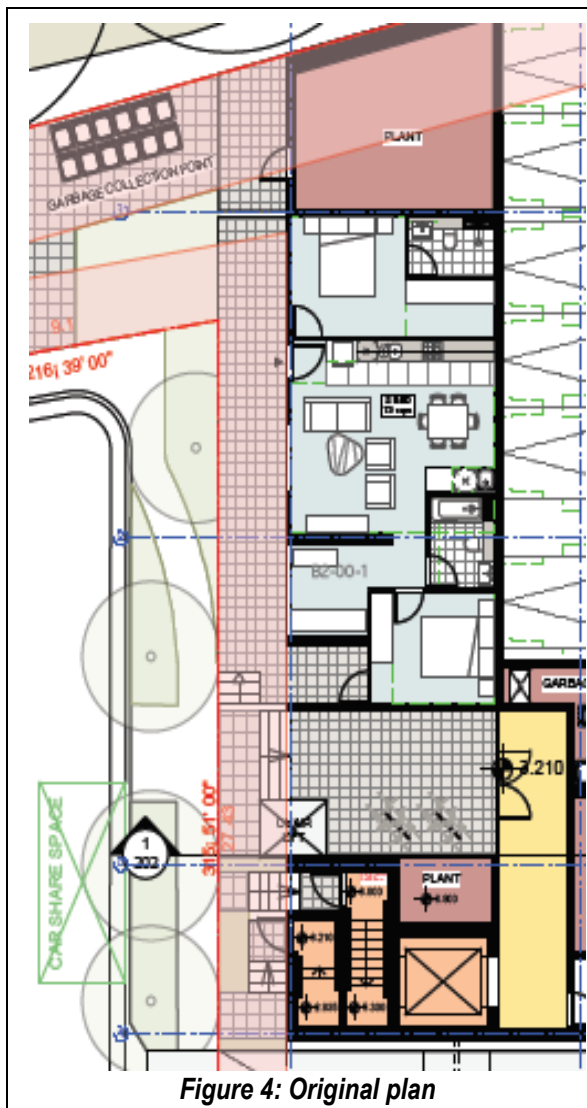


Figure 4: Original plan

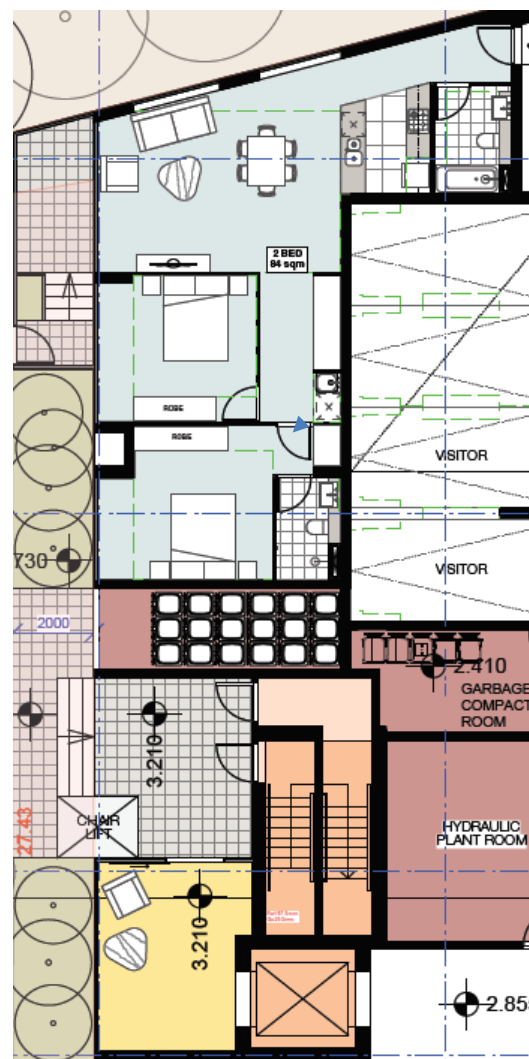


Figure 5: Amended plan

The amended design provides a better relationship to the street with the ground floor apartment now sleeved by landscaping. The lobby also presents better to the street and has a more functional sitting area. The garbage holding room is also now internalised as requested without being visually dominant in the street facade. Again, all of these changes resulted in an incremental increase in GFA.

Provided below is a detailed 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)
<i>Plan amendments post-DA lodgement</i>	
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
<i>Inclusion of open common corridor (Council interpretation)</i>	= 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. 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).

The balance of this request will be divided into the following sections, each dealing with the nominated aspect of clause 4.6:

- consistency with the development standard objectives and the zone objectives (clause 4.6(a)(ii));
- sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)); and
- compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)).

2. Consistency with the development standard objectives and the zone objectives (clause 4.6(a)(ii))

Development standard objectives

The objectives and relevant provisions of clause 4.4 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 fulfil the requirements of subclause 4.6(4)(a)(ii), each of the objectives of clause 4.4 are addressed in turn below:

Objective (a) relates to the creation of **maximum building densities/intensities**. The proposed FSR variation still ensures that the development is subject to limits on density and intensity. The maximum will be 2.91:1 (as per the applicant's calculations) or 3:1 (as per the Council's calculations). The difference between each of these figures and the standard of 2.85:1 is minor and, in our view, immaterial in the context of the lack any meaningful adverse impact from the exceedence.

The minor nature of the proposed GFA variation is particularly apparent when considered in the context of recent approvals 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 proposed FSR variation is necessary to accommodate various changes to the development that have been sought by the Council. These changes do not place any additional strains on infrastructure or generate additional vehicular and pedestrian traffic. The changes assist (rather than detract from) achieving the desired future character of Rockdale.

In relation to the garbage rooms (including the garbage chutes), these structures are predominantly accessed and visible from within the ground floor parking level and do not add to externally visible building bulk. 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.

If the Council's method of calculating gross floor area is accepted – and the open corridors are included – then it is necessary to consider whether the development has been made any more dense or intense by the inclusion of the fixed open louvres. (The Council accepts that the open corridors would not be gross floor area if the fixed open louvres were omitted and there was simply a solid balustrade of less than 1.4 metres high.) We consider that the inclusion of the fixed open louvres does not increase the 'density and intensity' of land use in any substantive way. There is no additional strain on infrastructure and no additional generation of vehicular traffic. The open louvres improve the amenity of the development, both for its residents, visitors and the future occupants of the adjoining property to the south. This positively assists in achieving (and does not detract from) the desired future character of Rockdale.

Objective (b) relates to the minimisation of **adverse environmental effects** on the use or enjoyment of **adjoining properties**. 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 development overall (and the proposed FSR variation in particular) 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 – even with the proposed FSR variation - 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. The changes to the development that are facilitated by the proposed FSR variation are about minimising the potential for adverse environmental effects. They do not increase such effects.

If the Council's method of calculating gross floor area is accepted – and the open corridors are included – then it is necessary to consider whether the inclusion of the fixed open louvres increases adverse environmental effects on adjoining properties. In this regard, it should be noted that the louvres are not visible to the street and therefore their potential to have any impacts (good or bad) on adjoining properties is almost non-existent. To the extent that the open louvres can be seen from the property to the south, the impact of the louvres is beneficial as they improve the appearance of the building 2 facade in comparison to the building's appearance if only solid balustrades at height of below 1.4 metres were proposed).

Objective (c) relates to the visual relationship between new development and areas that are not undergoing or likely to undergo a substantial transformation. Nothing about the development (including the proposed FSR variation) raises any issue of consistency with this objective. This is because 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.

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 (as Wolli Creek train station is located within 400 metres of the development).

The variation to the FSR sought by the applicant does not detract from the development's consistency with the zone objectives and, in fact, **further**s the zone objectives by ensuring that the changes sought by the Council (including its Design Review Panel) are accommodated without reducing the number of dwellings/bedrooms in the development.

By avoiding the reduction in dwellings/bedrooms that might otherwise have occurred (as a consequence of implementing the Council's favoured design changes) the development's ability to contribute to the goal of maximising public transport patronage and encouraging walking and cycling is undiminished.

3. Sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b))

As outlined above, the proposed variation to the FSR is necessary to accommodate various improvements to the development sought by the Council (including its Design Review Panel). These changes, and their associated environmental planning benefits, can be briefly re-stated as follows:

- **The buildings have been aligned along the southern property boundary.** "Unworkable residual spaces" have been removed with a better relationship to future development on the neighbouring property to the south. The internal amenity of affected apartments has been improved.
- **The ground floor 2 bedroom apartment has been re-configured.** This has given the unit a better relationship to the street and the future residents will have better access to the lift and basement.
- **The main entries to each block have been increased in size by moving the doors outwards towards the face of the building.** This has improved the relationship of those blocks with the street.
- **The garbage holding room has been internalised.** This has improved the development's presentation to Willis Street.
- **There has been some replanning to increase building separation.** This has allowed greater building separation without reducing the amenity of the apartments affected. It provided superior abutment treatment to the proposed development on the adjoining property to the south. This improved the solar access that would be enjoyed by that neighbouring property.

If the Council's method of calculating gross floor area is accepted – and the open corridors are included – then it is necessary to consider whether the inclusion of the fixed open louvres would deliver an environmental planning benefit. The addition of the louvres to building 2 contributes to a sense of privacy by the occupants of some units in building 1 and improves the aesthetic appearance of the façade of building 2. If the fixed open louvres were omitted (which Council concedes would mean that the corridors would not contribute to gross floor area), building 2 would be less visually appealing and the amenity of the future residents of building 1 would be suboptimal.

In its assessment report of 3 February 2015, the Council officers agreed that there are sufficient environmental planning grounds to justify **some** variation of the FSR (on page 23). If it is accepted that the open corridors are not 'gross floor area' the Council officers says that a contravention to the extent of 10sqm is justified (on page 26). If the open corridors are taken to be 'gross floor area' then the Council officers say that a contravention to the extent of 169sqm is justified.

Council officers say that the full extent of the FSR that the applicant has sought is not justified because "the proposed separation between the two buildings is narrow and does not meet the objectives (or requirements) of the RFDC or RDCP 2011". Accordingly, the Council officers propose a reduction in

gross floor area on the 6th, 7th and 8th floor of building 1 (levels 5, 6 and 7 on the plans). This reduction is approximately 32 sqm metres on each of these three levels, and is said to be 95.3 sqm in total.

We consider that the Council officers' proposal will lead to an environmental planning outcome that is suboptimal, when compared with the environmental planning outcome that would be secured by the adoption of the applicant's proposal.

We say this for two reasons.

Firstly, the Council officers' proposal will come at a social cost. That social cost is the loss of three bedrooms from the development (with the two 2 bedroom apartments on each of the three affected floors being converted into either a 1 bedroom apartment **and** a 2 bedroom apartment **or** a single 3 bedroom apartment). This reduction in bedroom numbers (and the resultant change to the apartment mix) would reduce the overall ability of the development to accommodate families (as families can comfortably occupy 2 bedroom and 3 bedroom apartments, but not 1 bedroom apartments).

The reduction in bedroom numbers would also reduce the development's contribution to the zone B4 objective to "maximise public transport patronage and encourage walking and cycling". Less bedrooms means that less people will have the opportunity to live in close proximity to high quality public transport within a precinct highly suited to walking and cycling.

Secondly, the building separation issue which has caused the Council officers concern does not actually arise. This is because at that point, the relevant building separation benchmark under:

- the Residential Flat Design Code (page 28); and
- Rockdale Development Control Plan (section 4.4.5(A)(9), page 47).

is the benchmark set between habitable rooms/balconies and non-habitable rooms, that is, 13 metres.

Under the RFDC a 'habitable room' (in "Glossary" page 118) means

any room or area used for normal domestic activities, including living, dining, family, lounge, bedrooms, study, kitchen, sun room and play room

Under the RFDC a 'non-habitable room' (in "Glossary" page 118) means

spaces of a specialised nature not occupied frequently or for extended periods, including bathrooms, toilets, pantries, walk-in wardrobes, corridors, lobbies, photographic darkrooms and clothes drying rooms (bold added).

Under the DCP a 'habitable room' (in 'Definitions' page III) is:

*a room used for normal domestic activities **other than** a bathroom, toilet, pantry, walk-in wardrobe, **corridor** lobby, photographic darkroom, clothes drying room, and **other spaces of a specialised nature occupied neither frequently nor for extended periods of time** (bold added)*

Under the DCP a 'non-habitable room' (in 'Definitions' page III) are:

spaces of a specialised nature not occupied frequently or for extended periods, including bathrooms, toilets, pantries, walk-in wardrobes, **corridors**, lobbies, photographic darkrooms and clothes drying rooms (bold added).

The building separation benchmark is intended to be measured between unenclosed spaces (hence the reference to “spaces” and “balconies”). However, it is clear that the open corridor is **not** a balcony, it is a **corridor**. Furthermore the open corridor is clearly a space that is of a ‘specialised nature occupied neither frequently nor for extended periods of time’. This means that the open corridor is not a ‘habitable room’.

Accordingly, this building separation issue does not arise. There is **no** environmental planning **benefit** from the removal of the 95.3 sqm of floor space. As there **is** an environmental planning (social) **cost** to the removal of that floor space (as outlined above), the Council officers’ proposal is less desirable than the applicant’s proposal.

In short, we consider that there are sufficient environmental planning grounds to justify the applicant’s proposed variation to the FSR standard.

4. Compliance is unreasonable or unnecessary in the circumstances of the case (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.”

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 *Wehbe* 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.

This list was not exhaustive.

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 floor space ratio development standard is unreasonable or unnecessary in the circumstances of this case for the reasons set out below:

- Strict compliance with the FSR control will inevitably have one or more of the following consequences:
 - reduced internal amenity for the apartments (ie reduced apartment sizes, reduced building separation, removal of the fixed open louvres from building 2 and/or reinstatement of the original configuration for the ground floor 2 bedroom apartment);
 - reduced visual attractiveness of the development and a less satisfactory relationship with the street/adjoining properties (ie removal of the fixed open louvres from building 2, reduced size of the main entries, externalising the garbage storage area and/or reinstatement of the 'unworkable residual spaces' that would affect the property to the south);
 - the omission of bedrooms or apartments from the development;
 - skewing the mix of apartments away from 2 bedroom dwellings.

Each of these consequences carries a social, economic and environmental cost and would lead to a suboptimal environmental planning outcome (in comparison with the proposed development).

- To the extent that strict compliance must be achieved by reducing internal apartment amenity:
 - the LEP aim set out in clause 1.2(2)(c) ('to maintain and improve residential amenity and encourage a diversity of housing to meet the needs of Rockdale residents') would be undermined; and
 - a burden would be imposed on the applicant and future occupiers of the development and this burden will be disproportionate to the consequences attributable to the proposed development.
- To the extent that strict compliance must be achieved by reducing visual attractiveness of the development and adopting a less satisfactory relationship with the street/adjoining properties:

- the FSR control aim set out in clause 4.4(1)(b) of the LEP ('to minimise adverse environmental effects on the use or enjoyment of adjoining properties') would be **thwarted** as adverse environmental effects (visual impacts) would not be **minimised**;
 - the LEP aim set out in clause 1.2(2)(c) ('to maintain and improve residential amenity and encourage a diversity of housing to meet the needs of Rockdale residents') would be undermined; and
 - a burden will be imposed on the applicant, future occupiers of the development, occupiers of neighbouring sites and the wider community and this burden will be disproportionate to the consequences attributable to the proposed development.
- To the extent that strict compliance must be achieved by omitting bedrooms or dwellings:
 - the B4 zone objective 'to maximise public transport patronage and encourage walking and cycling' would be:
 - thwarted as an opportunity to **maximise** public transport patronage would be lost; and
 - undermined, as walking/cycling would not be encouraged to the same extent;
 - the LEP aim set out in clause 1.2(2)(g) ('to encourage residential and employment densities around transport nodes in order to provide sustainable transport options') would be undermined;
 - the LEP aim set out in clause 1.2(2)(c) ('to maintain and improve residential amenity and encourage a diversity of housing to meet the needs of Rockdale residents') would be undermined;
 - the LEP aim set out in clause 1.2(2)(a) ('to provide a vibrant area in which Rockdale residents can live, work and play') would be undermined;
 - a burden would be imposed on:
 - the applicant (in the form of lower development revenue);
 - the future occupiers of the development (as the fixed costs of running the building lifts, car parking and other facilities will have to be defrayed over a smaller number of dwellings); and
 - the community (because of the reduced access of potential homebuyers/renters to a precinct intended to support public transport patronage, walking and cycling),
- and these burdens would be disproportionate to the consequences attributable to the proposed development

- To the extent that strict compliance must be achieved by changing the unit mix so that it is skewed away from the more versatile 2 bedroom units:
 - the LEP aim set out in clause 1.2(2)(c) ('to maintain and improve residential amenity and encourage a diversity of housing to meet the needs of Rockdale residents') would be undermined;
 - the LEP aim set out in clause 1.2(2)(a) ('to provide a vibrant area in which Rockdale residents can live, work and play') would be undermined;
- The variation in FSR is minor, irrespective of how gross floor area is calculated (a 2.11% variation based on the applicant's legal advice and a 5.28% variation based on the Council's legal advice).

The proposal is compliant with the relevant objectives, will no (or negligible) adverse environmental impacts and will provide for additional housing within a highly suitable location.

The proposed 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.

Conclusion

The development proposal will provide diverse and additional housing choice with 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 the JRPP permit the variation to the FSR 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

Our reference Aaron Gadiel 35606890
Direct line +61 2 9931 4929
Email aaron.gadiel@gadens.com
Partner responsible Aaron Gadiel

5 August 2015

Privileged and confidential

Benjy Levy
Lateral Estate Pty Ltd
Suite 1.06, Level 1
55 Miller Street
Pyrmont NSW 2009

By email: benjy@lateralestate.com

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</i> (the LEP). |
| | (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

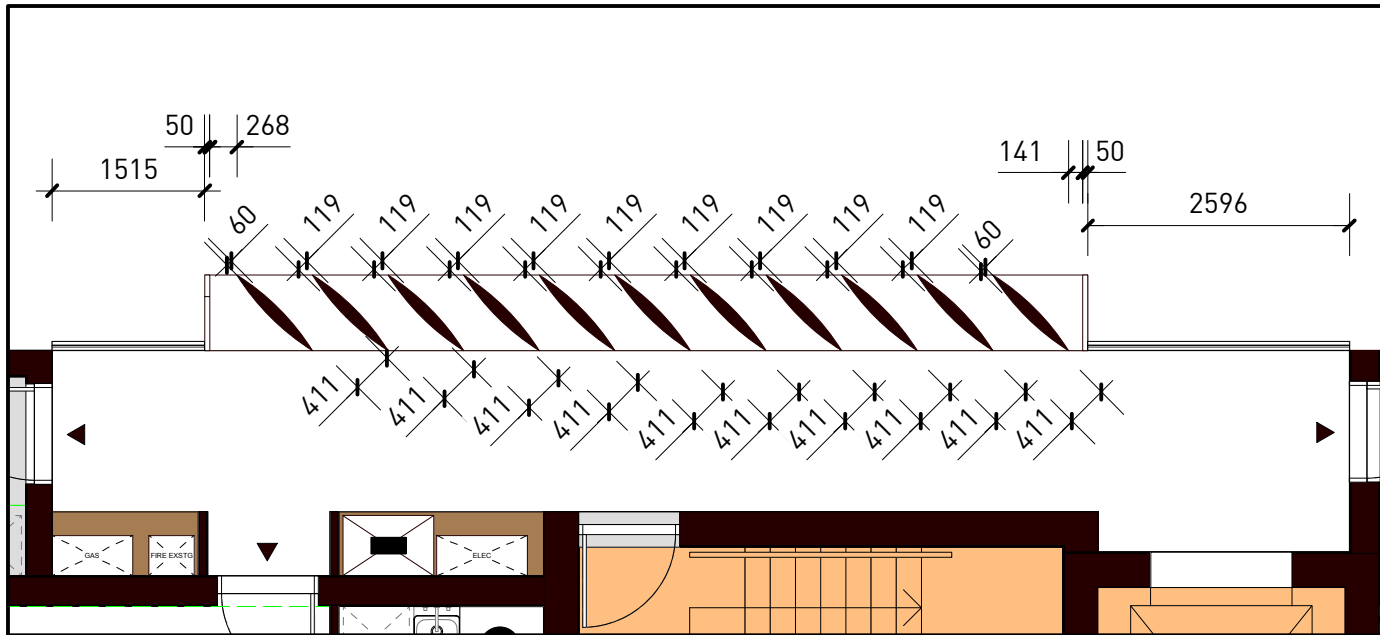


Aaron Gadiel

Partner

Accredited Specialist - Local Government and Planning Law

Encl.






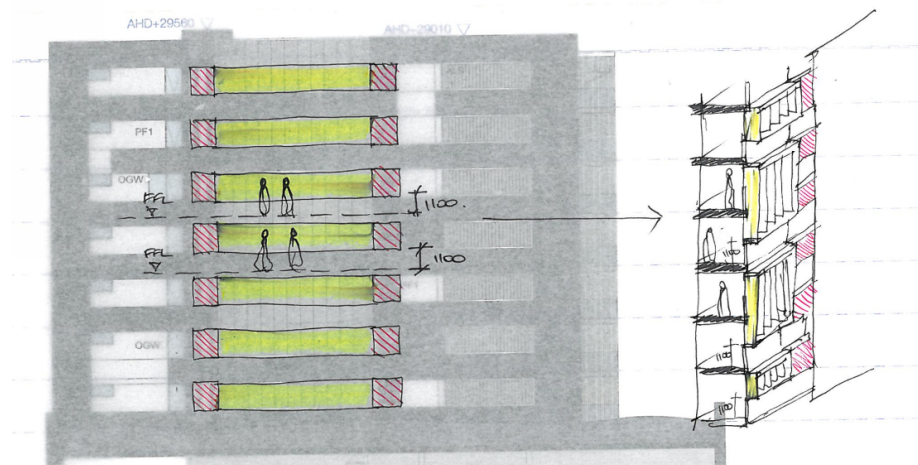
OPEN AREA = $1515 + 268 + (411 \times 10) + 141 + 2596 = 8630\text{mm}$

TOTAL AREA = (OPEN AREA) + $50 + 60 + (119 \times 9) + 60 + 50 = 9921\text{mm}$

$8630\text{mm} / 9921\text{mm} = 87\% \text{ OPEN AREA}$

MEASURED AT 1.4m ABOVE FINISHED FLOOR LEVEL IN ACCORDANCE WITH GFA
DEFINITION ROCKDALE LEP

 = 100% OPEN (ABOVE THE 1100H. BALUSTRADE)
 = FIXED OPEN LOUVER (AS ON PLAN)




OPEN CORRIDOR DETAILS
15-21 WILLIS STREET WOLLI CREEK

SK100 ○

Our reference Aaron Gadiel 35606890
Direct line +61 2 9931 4929
Email aaron.gadiel@gadens.com
Partner responsible Aaron Gadiel

9 September 2015

Privileged and confidential

Benjy Levy
Development Manager
Lateral Estates Pty Ltd
55 Miller Street
Pyrmont NSW 2009

Dear Benjy

Advice regarding the clause 4.6 request for DA-578/2014

Overview

Questions	1	You have asked us to provide you with legal opinion in answer to the following questions: (a) Question 1: Is clause 4.6 (for floor space ratio) legally sound? (b) Question 2: If the development application is the subject of a merit appeal, what is the likely view of the Land and Environment Court?
Summary	2	In our opinion: (a) A floor space ratio variation made on the basis of the clause 4.6 request would be legally sound. (b) It is likely that the Land and Environment Court would, on appeal, uphold the clause 4.6 request.

Detailed advice

Facts	3	We understand and have assumed the facts in this matter to be as follows: (a) You are the applicant for DA-2015/279, lodged with Rockdale City Council. (b) The application relates to land known as Lot 1 DP 802439 and SP 37252 (the site). (c) The land is subject to <i>Rockdale Local Environmental Plan 2011</i> (the LEP).
-------	---	--

- (d) The site is zoned B4 Mixed Use (**B4**).
- (e) The development application is for the construction of two eight storey residential flat buildings comprising 67 residential units, basement parking and demolition of existing structures.
- (f) On your figures (which are based on our legal advice) the 'gross floor area' of the proposed development is 5,121.30m². This equates to a floor space ratio of 2.91:1.
- (g) The Council's officers have obtained their own legal advice, to the effect that the open corridors should be included as 'gross floor area'. The area of these open corridors is 159m². This means that, according to the Council's figures, the 'gross floor area' of the proposed development is 5,280.3m². This would equate to a floor space ratio of 3:1.
- (h) The LEP imposes a maximum floor space ratio of 2.85:1.
- (i) A new clause 4.6 request has been prepared to seek a variation of the maximum floor space ratio and is marked with today's date (**the clause 4.6 request**).

4 If any of the above facts are not correct, please let us know as it may change our advice.

Question 1 ***Is clause 4.6 (for floor space ratio) legally sound?***

5 In order for a clause 4.6 request to be legally sound it must (under clause 4.6(3)) seek 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.

In our opinion, the clause 4.6 request plainly does this. We do not consider that there is any doubt about the validity of the request.

6 In saying this, we have taken into account the recent series of decisions in the Land and Environment Court and the Court of Appeal: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009; *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248. The clause 4.6 request is consistent with the legal principles established by those cases.

7 In order for the consent authority to actually approve the clause 4.6 request, the consent authority must be **satisfied** that:

- (a) the request has adequately addressed the matters outlined in paragraph 5 above (clause 4.6(4)(a)(i); and
- (b) the proposed development will be in the public interest because it is consistent with:

- (i) the objectives of the particular standard; and
 - (ii) the objectives for development within the zone in which the development is proposed to be carried out
- (clause 4.6(4)(a)(ii)).

8 This means that **if** the consent authority (that is the Sydney East Joint Regional Planning Panel) is **not** satisfied as to the matters in paragraph 7, a development consent could not be lawfully granted on the strength of the clause 4.6 request.

9 We have carefully reviewed the clause 4.6 request. In our opinion:

- (a) the clause 4.6 request is sufficient to allow the Sydney East Joint Regional Planning Panel to be satisfied in the way that is required by clause 4.6(4)(a); and
- (b) nothing in the clause 4.6 request will cause the panel to take into account an irrelevant consideration.

10 In short, we consider that a floor space ratio variation made on the basis of the clause 4.6 request would be legally sound.

Question 2 ***If the development application is the subject of a merit appeal, what is the likely view of the Land and Environment Court?***

11 We consider that the clause 4.6 request has considerable merit.

12 In our opinion, based on the information presently available to us, we consider it likely that the Court would, on appeal, uphold the clause 4.6 request.

Please do not hesitate to contact me on (02) 9931 4929 if you require further information.

Yours sincerely



Aaron Gadiel
Partner

Accredited Specialist - Local Government and Planning Law

9 September 2015

Ref: 14277

Mr Benjy Levy
Development Manager
Lateral Estate
Suite 1.06 Level 1
55 Miller Street
Pyrmont NSW 2009

E: benjy@lateralestate.com

Dear Benjy

Proposed Development 15-21 Willis Street, WOLLI CREEK

I understand that Council have raised an issue in regard to the proposed parking provision for visitors in the subject development scheme.

The SEPP now makes reference to the RMS Development Guidelines. In fact I was engaged by the former RTA to undertake the survey and assessment study for the "High Density Residential" landuse the results of which is included in the RMS Guidelines.

There was a range of High Density Residential sites selected across the Metropolitan Area for the surveys and whilst they are divided into categories of Regional and Sub-Regional, the major difference for the latter category was the proximity to a railway station. The specified rate of 1 space per 5 units was a statistical average of the survey results however the visitor demands at sites near railway stations were lower.

The RMS document takes this into account in the last sentence on P5-5 as follows:

“The recommended minimum number of off-street visitor parking spaces is one space for every 5 to 7 dwellings. Councils may wish to reduce this requirement for buildings located in close proximity to public transport, or where short term unit leasing is expected.”

The proposed development of 67 apartments is to provide 10 visitor parking spaces which equates to 1 space per 6.7 units and is therefore entirely compliant with the above provision given the proximity of the railway station and supermarket / specialty shops etc. By way of comparison, the Discovery Point development is currently being constructed in close proximity and the consent for this development only requires 1 visitor space per 20 apartments.

It is my assessment that the proposed provision of visitor parking spaces for the Willis Street development will be appropriate and adequate to the circumstances.

Yours faithfully



Ross Nettle
Director
Transport and Traffic Planning Associates