

Council's Legal Advice.

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Our Ref: MM:09310
Your Ref: LDA2015/654

29 March 2016

BY EMAIL

Dear Ms Connolly

City of Ryde and Kaloriziko Pty Ltd
Proposed development Victoria Rd, Church and St Anne's Streets Ryde
Advice on bonus provisions in Ryde LEP 2014

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1. I refer to Mr Stephen's email dated 15 March 2016.
2. I have been asked to advise in respect of the meaning of the expression "laneway access" and related matters in clauses 4.3A and 4.4A of *Ryde Local Environmental Plan 2014* ("LEP 2014") as it applies to a proposed development of various parcels of land at Victoria Rd, Little Church St and St Anne's St in the Ryde Town Centre ("LDA2015/654"). In providing this advice I have also been requested to comment on legal advice by Pikes and Verekers Lawyers dated 6 November 2015 prepared for the applicant for LDA2015/654.
3. In particular I am asked to advise whether:
 - a) the proposed vehicular access to the development meets the intent and specifications for laneway access required by clauses 4.3A and 4.4A of LEP 2014?
 - b) the proposed development constitutes mixed use for the purposes of clauses 2.3, 4.3A and 4.4A of LEP 2014?
 - c) the development qualifies for the bonus floor space ratio and height allowed in clauses 4.3A and 4.4A of LEP 2014?



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Summary of Advice

4. I consider that the word laneway in clauses 4.3A and 4.4A of LEP 2014 has its ordinary English meaning as set out in the Pikes and Verekers advice. I consider the ordinary meaning includes an alley behind buildings.
5. The proposed driveway shown on the architectural plans accompanying LDA2015/654 is a narrow way or passage between buildings that provides access behind the buildings fronting all three surrounding roads. There are no further specifications applying to the laneway required by clause 4.3A and 4.4A.
6. I do not consider that the proposed development constitutes mixed use development for the purposes of clauses 2.3, 4.3A and 4.4A of LEP 2014.
7. As the proposed development does not satisfy the mixed use component of the specification in clauses 4.3A and 4.4A of LEP 2014, it does not qualify for the bonus FSR and height.

Background

8. LDA2015/654 proposes the construction of a building containing 123 residential apartment units on a site comprising an area of 3,436 m². The development site has street frontages at 723-731 Victoria Rd, 10 Little Church St and 3-7 St Annes St Ryde. Five of the apartments are designed so as to include a room designated as a possible home office. Vehicular access to the development is by a combined entry and exit driveway to St Annes Street. The proposed driveway only provides access to the proposed development. The applicant for LDA2015/654 seeks to rely on the bonus FSR and height controls in clauses 4.3A and 4.4A of LEP 2014 on the basis that:
 - the proposed driveway is a laneway access; and
 - the proposed mix of home offices and residential units constitutes a mixed use development.
9. Clause 4.3A(1) of LEP 2014 is titled "Exceptions to Height of Buildings" and provides:

"The maximum height that is permitted by clause 4.3 is increased by the additional height specified opposite the area in Column 2, if the land and the development meet the specifications shown opposite the area in Column 3."
10. A similar allowance is permitted in relation to floor space ratio ("FSR") under clause 4.4A of LEP 2014.
11. The site the subject of LDA2015/654 is located within area E in the table to clause 4.3A (height of buildings) and area H in the table to clause 4.4A (FSR). The specification shown opposite area E in clause 4.3A and opposite area H in clause 4.4A are both described as:

The lot on which the building is sited has an area of at least 900 square metres and the proposed development is a mixed use development and provides laneway access.

12. Ryde Development Controls Plan 2014, Part 4.4 section 3.5 contains controls described as "access and the public domain". After listing the controls applying to access and the public domain the DCP contains a note in the following terms:

"Note: Reference to the provision of laneway access in LEP 2014 height and floor space incentive clauses means: (1) the provision of a new laneway in a location required by Council to achieve public benefit (2) the provision of laneway widening of an existing laneway in a location required by Council to achieve public benefit."

Advice

Does the proposed vehicular access to the development meet the intent and specifications for laneway access required by clauses 4.3A and 4.4A of LEP 2014?

13. Neither "laneway" or "lane" in clauses 4.3A and 4.4A are defined in LEP 2014. Accordingly they bear their ordinary English meanings, subject to the following general principles of statutory interpretation:
- a) words in a statute are construed according to their context and purpose;¹ context is determined by "textual and structural indicators" in the instrument and may also include an examination of the legislative history of the statute and any relevant extrinsic materials;²
 - b) an alternative construction to the literal meaning may be preferred if it is "reasonably open and more closely conforms to the legislative intent;"³
 - c) a dictionary may offer a reasonably authoritative source for describing the range of meanings of a word, and can illustrate usage in context. However a dictionary is not the primary means of construing a particular document for a particular purpose;⁴
14. As a general principle a development control plan cannot govern the meaning of a word in a local environmental plan, just as delegated or subordinate legislation cannot govern the meaning of an Act.⁵ Exceptions exist where a development control plan is expressly incorporated into a local environmental plan and, in the case of delegated or subordinate legislation, where a new Act came into force after the delegated or subordinate legislation.⁶
15. It can be readily inferred from the structure of LEP 2014, the text of clauses 4.3A and 4.4A and their relationship to the other provisions of LEP 2014 that the purpose of those clauses is to encourage developers to provide something more than would otherwise be required, or to achieve a particular design outcome, in return for additional FSR and height.

¹ section 33 *Interpretation Act 1987*; *Cranbrook School v Woollahra MC* [2006] NSWCA 155

² *Agricultural Equity Investments Pty Limited v The Hon Chris Hatcher MP, Minister for Resources and Energy, Special Minister* [2015] NSWLEC 23 and *Lloyd v Wollongong City Council* [2015] NSWLEC 146

³ *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 cited in *Matic v Mid Western Regional Council* [20008] NSWLEC 113

⁴ *House of Peace Pty Ltd v Bankstown City Council* [2000] NSWCA 44

⁵ *Chalmers v Sutherland Shire Council* (1997) 95 LGERA 415

⁶ *Joeni Investments Pty Ltd* [2015] NSWCA 147

16. I have been briefed with material explaining the history of clauses 4.3A and 4.4A, including similar clauses from *Ryde Local Environmental Plan 143* and *Ryde Local Environmental Plan 2010* and copies of Council reports to Council's meetings on 24 July 2012, 2 November 2010 (Committee of the Whole) and 11 December 2012. None of that material is particularly helpful in determining the nature of the outcome sought to be achieved by clauses 4.3A and 4.4A. In particular I note that deletion of the reference to a previous development control plan in the incentive clause under *Local Environmental Plan 143* suggests a broadening of the circumstances in which the incentives would apply.
17. The ordinary English meaning of the word "lane" as defined in the Macquarie Dictionary is set out in the Pikes and Verekers' advice as "a narrow way or passage between fences, walls or houses" and "any well-defined passage, track, channel or course". To that I would add the meaning from the Encarta Dictionary, namely "alley behind buildings". There is nothing to suggest that the ordinary English meaning conforms any more or less to the context and purpose of clauses 4.3A and 4.4A of LEP 2014 than any other potential meaning. Accordingly I consider that the word laneway in clauses 4.3A and 4.4A of LEP 2014 has its ordinary English meaning as set out above.
18. In my view the proposed driveway shown on the architectural plans accompanying LDA2015/654 is a narrow way or *passage* between buildings that provides access behind the buildings fronting all three surrounding roads. There are no further specifications applying to the laneway required by clause 4.3A and 4.4A.
19. The above conclusion does not relieve the applicant from complying with, or avoid Council requiring compliance with DCP 2014. DCP 2014 continues to apply to the assessment of the proposed development and must be considered as a "fundamental element" in or a "focal point" of the decision making process. Although not determinative, I consider that DCP 2010 is entitled to significant weight in the decision making process in this instance.

Does the proposed development constitute mixed use for the purposes of clauses 2.3, 4.3A and 4.4A of LEP 2014?

20. The expression "mixed use development" is defined in the Dictionary to LEP 2014 as "a building or place comprising 2 or more different land uses." Land use is not defined in LEP 2014, however it is used to describe land use zones in clause 2.1 and the land use table in clause 2.3. The expression land use is also closely aligned with the expression "use of land", which is a form of development as defined in section 4(1) of the *Environmental Planning and Assessment Act 1979*. In some circumstances land use has been held to include the construction of a building to enable a land use to be carried out.⁷ Against that background I consider that land use in the definition of mixed use development means a form of development listed in any of the land use tables in clause 2.3.
21. The definition of mixed use development refers to 2 or more different land uses. Not all types of development defined in the dictionary to LEP 2014 are mutually exclusive. For example attached dwelling, boarding house, dwelling house and group home are all species of the genus residential accommodation. Some types of development incorporate other types of development

⁷ *Lennard v Jessica Estates Pty Ltd* [2008] NSWCA 121


definitions. For example home industry, home business and home occupation all incorporate the word, and therefore the definition of, dwelling.

22. Five of the apartments are designed so as to include a room designated as a possible home office. I assume this means that the applicant is claiming that the building contains, or is capable of containing 2 different land uses; namely a residential flat building and home occupation or home business. Having regard to the purpose of clauses 4.3A and 4.4A described above, I do not consider that residential flat building and home occupation constitute 2 different land uses. Both incorporate the meaning of dwelling, which means that in a design sense there is no difference between an apartment contained in the residential flat building and the use of one of those apartments as a home occupation or home business.
23. I do not consider that the proposed development constitutes mixed use development for the purposes of clauses 2.3, 4.3A and 4.4A of LEP 2014.

Does the development qualify for the bonus floor space ratio and height allowed in clauses 4.3A and 4.4A of LEP 2014?

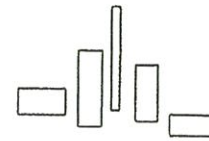
24. The proposed development satisfies the area component of the specification in clauses 4.3A and 4.4A of LEP 2014. However, for the reasons outlined above the proposed development satisfies the laneway component but not the mixed use component of LEP 2014. All three components must be satisfied in order for the development to qualify for the FSR and height bonus in those clauses. As the proposed development does not satisfy the mixed use component it does not qualify for the bonus the bonus FSR and height.
25. Please let me know if you require any further advice.

Yours faithfully



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PIKES & VEREKERS
LAWYERS

6 November 2015

Kaloriziko Pty Ltd
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BY EMAIL mc@c9d.sydney

Dear Sirs

**ADVICE RE FLOOR SPACE RATIO AND HEIGHT BONUS PROVISIONS 10 LITTLE CHURCH STREET
AND 3-7 ST ANNES STREET AND 723-731 VICTORIA ROAD, RYDE**
Our ref JRP:GT:150887

We are instructed to advise with respect to a proposed mixed use development at land comprising 10 Little Church Street, 3-7 St Annes Street and 723-231 Victoria Road, Ryde.

The subject land is within the Ryde Town Centre, pursuant to Ryde Local Environmental Plan 2014 ("the LEP") and that instrument at clauses 4.3A and 4.4A permits certain height and floor space bonuses for development of the land, provided certain criteria are met.

One of those criteria with respect to both the height and FSR bonuses is that the development "provides laneway access."

We are specifically instructed to advise as to the meaning of the words "provides laneway access", in light of a view expressed by Council that the meaning of those words is to be found in the Ryde Development Control Plan 2014 ("DCP"), specifically provisions relating to the Ryde Town Centre.

EXECUTIVE SUMMARY

There is no principle of interpretation which would permit a DCP to be used to determine the meaning of words used within an LEP. To attempt to do so fails to properly understand the role and function of DCP's within the NSW Planning Regime as well as the relationship between DCP's and LEP's and different manner in which those two instruments are made.

Further to attempt to construe the LEP by reference to the DCP in these particular circumstances would leave the relevant provisions of the LEP with no work to do. This speaks strongly against the approach proposed by Council.

The words "provide laneway access" in clause 4.3A and 4.4A of the LEP should be given their ordinary meaning, such that the requirement is that the development is accessible from and provides access to a laneway, being a narrow or well defined passage, track, channel, or course. In town planning terms arguably that

contemplates a narrow road, although not necessarily so. The term in question does not include reference to vehicles or vehicular access.

There is also no requirement for the lane to be dedicated to the public.

ORDINARY MEANING

The words "provide laneway access" are not defined in the LEP and as a matter of statutory construction and interpretation, they are to be given their ordinary meaning in a town planning context. As a matter of ordinary construction, regard should only be had to other instruments or documents if there is some ambiguity about the words of their intended effect.

There is no art or mystery to the words used in the LEP and they mean nothing more than they say. In order to take advantage of the additional floor space and height afforded by clauses 4.3A and 4.4A, the proposed development must provide access to a laneway, being, according to the Macquarie Dictionary (5th Ed):

1. A narrow way or passage between fences, walls or houses.
2. Any narrow or well defined passage, track, channel, or course.

It may be accepted that in town planning terms a laneway would ordinarily refer to a road, albeit a narrow one. Such a road may be a public or private road. It may be inferred given the link between the provision of the laneway and the additional development potential, and also that that additional development potential is increased for larger sites that the purpose of the provision is to ensure that high density development has appropriate access arrangements that do not deleteriously impact upon the surrounding road network.

Thus provided the laneway access for the proposed development achieves that purpose it matters not, in the terms of the LEP, exactly where that laneway is located.

STATUTORY REGIME

The Environmental Planning and Assessment Act 1979 contains distinct and separate provisions for the making of LEP's and DCP's. The most significant matter to note is the purpose for which DCP's are prepared according to the Act. Section 74BA of the Act provides that purpose:

- "1 The principle purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this part applies and to the consent authority for any such development:

- (a) *Giving effect to the aims of any environmental planning instrument that applies to the development;*
- (b) *Facilitating development that is permissible under any such instrument;*
- (c) *Achieving the objectives of land zones under any such instrument.*

The provisions of a development control plan made for that purpose are not statutory requirements.

2. *The other purpose of a development control plan is to make provisions of the kind referred to in section 74C(1)(b)-(e)."*
3. Subsection (1) does not affect any requirement under Division 3 of Part 4 in relation to complying development. (Section 74C is also significant. Firstly at 74C(1) (and by reference to section 74B(1)) it is the Council that may prepare a development control plan. This may be contrasted to section 53 of the Act under which it is the Minister who makes LEP's for a local government area.

In addition, at section 74C(3) and (4) provision is made for a development control plan to adopt the terms of other DCP's and to amend substitute or revoke other DCP's. There is nowhere in section 74BA or section 74C any provision that permits a development control plan to alter, impact upon or inform the construction of an LEP. Significantly at section 74C(5) a provision of a DCP has no effect to the extent that it is inconsistent or incompatible with a provision of an LEP. Thus where words within an LEP have a particular meaning, a development control plan cannot give those words a different meaning, even for the purposes of the development control plan itself.

It is also significant that the Environmental Planning and Assessment Act gives LEP's and DCP's entirely different statutory weight. Sections 76 to 76C of the Act provide the precise framework for the permissibility of development. Whether development is permissible without consent, with consent or is absolutely prohibited, is determined by reference to environmental planning instruments, being LEP's and state environmental planning policies.

Where development is permissible, it is only permissible if it is carried out in accordance with an environmental planning instrument. The bounds of permissibility are determined by LEP's and state environmental planning policies. DCP's, however, are limited to being a matter of mandatory consideration for determination of applications for development.

It is well accepted that the terms of a development control plan are a focal point of any such assessment, but a DCP does not have the mandatory and proscriptive

effect of an LEP. In light of this lesser status of DCP's, it must immediately be accepted that without something more, a DCP cannot be used to determine the meaning of an LEP.

Whilst it may be accepted that regulations or an instrument made under an Act may be used to more fully understand the statutory scheme provided for by the Act and that in terms of town planning controls, the planning scheme for a particular locality may be most fully understood by reading both the LEP and DCP, that does not permit the DCP to be used to change the meaning of words within the LEP.

The statutory scheme and indeed the planning scheme is defined and determined by reference to the Act. The Act provides that an LEP is made under the Act by the Minister and the DCP is made under the Act by a Council. The DCP is given any lesser status and the purpose of DCP's is expressly provided for the Act. Thus the DCP is not made under the LEP, but rather in parallel to it, by a different authority, for a defined purpose.

The meaning of words used by one authority in preparing an instrument of lesser status cannot possibly be used to determine the meaning of words in an instrument of higher status made by another authority.

In short, it is not for the Council and its DCP to try and alter or give different effect to the words used by the Minister in making the LEP.

This is notwithstanding the significant role that Council plays as the relevant planning authority in the LEP making process. However, the instrument that is ultimately made is an instrument of the Minister and it is the meaning of the words intended by the Minister in making the plan that is relevant, not the meaning that Council may wish to ascribe to them in a separate lesser instrument.

The situation may have been different had the Act expressly provided for DCP's to be used to construe LEP's, but that is not their purpose. Their purpose is to give effect to, or to give guidance on how to give effect to the provisions of the LEP. The situation may also be different where an LEP expressly calls up a DCP and its provisions, but that is not the case here.

The DCP patently cannot alter, effect or limit the meaning of words used in the LEP. This would be for the tail to wag the dog as French CJ observed in *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR1 at [56].

BONUS PROVISIONS WOULD HAVE NO WORK TO DO

The particular references in the DCP that we understand Council to rely on are found in the note to clause 3.5 and clause 8.3.1 of Part 4.4 Ryde Town Centre of the DCP.

Firstly it is noted that clause 3.5 has nothing to say about height, floor space ratio or density of development and clause 8.3 applies to a different precinct (the Main Street Precinct), within the Town Centre, with the subject site being located within the Heritage Precinct. There is no equivalent note anywhere in that Heritage Precinct Provisions.

The note in both instances provide:

"Note Reference to the provision of laneway access in LEP 2014 height and floor space incentive clauses means:

- 1. The provision of a new laneway in a location required by Council to achieve public benefit.*
- 2. The provision of laneway widening of an existing laneway in a location required by Council to achieve public benefit."*

We firstly note that what is "required" by Council is not defined. There is no specific laneways plan referred to, nor any other means by which it may be objectively determined, rather than on an ad hoc basis, what Council "requires". Harking back to the reasoning above, such an open ended provision could never used for the purposes of determining the meaning of words within an LEP.

Secondly if it is Council's contention that what is "required" is to be determined on an ad hoc application by application basis, Council can "require" the construction of a laneway as part of a development consent. Significantly its decision to do so must be informed by the purpose of the provision, that being to ensure the higher densities of development in the Ryde Town Centre with appropriate access arrangements.

That is a merit determination and one which would be made favourably to the applicant in the present circumstances.

In our view for Council to refuse an application for development of the density sought by the bonus provisions and intending to achieve the objectives for the Ryde Town Centre as contained in Part 4.4 of the DCP, would be to thwart and undermine the purpose and objective of the LEP.

If conversely Council suggests that the laneways required are those required by the DCP, having regard to the provision of the note in association with clause 3.5 relating to access and the public domain, the only possible "requirements" in the DCP are the through site links and public domain shown in figure 4.4.02. That figure, however, as it applies to the subject site, would leave the bonus provisions in the LEP with no work to do.

The subject site falls within an area of the Ryde Town Centre generally bound by Blaxland Road, Princess Street, Victoria Road and Belmore Street which is identified in the LEP for the purposes of floor space ratio controls as Area H and for the purposes of the height of buildings as Area E. Within that area figure 4.4.02 provides for some through site links or public domain (the only possible "laneways" identified or required by the DCP). On running along Devlin Street and Church Street, through the St Annes Anglican Church site and along Princess Street, between Blaxland Road and Victoria Road.

This leaves some six or seven large blocks comprising many allotments which are not adjacent to, nor could they provide access to, laneways. If development on those lots was required to be linked to the laneways identified in figure 4.4.02 of the DCP, the floor space and height bonuses could never be realised and the objectives for the Ryde Town Centre could never be met. This cannot be correct as it clearly undermines the objectives and purpose of the bonus provisions in the LEP and leaves those bonus provisions, with respect to much of the land identified for bonus uplift, with no work to do.

The conflict between figure 4.4.02 and the LEP provisions is further highlighted by the through site links between Eagle Street and Victoria Road, in the block otherwise bound by Gladstone Avenue and Church Street. Laneways are required, but there is no scope under the LEP for any additional floor space or height on that block. Contrary to the note for those particular laneways, no development incentives apply.

It is clear from the above analysis that the DCP, if it is intended to read down the meaning of the words in the LEP, cannot be read together with the LEP so as to achieve the outcomes intended for by the provisions in the LEP. The DCP if applied in the manner contended for by Council is inconsistent with the provisions of the LEP and to that extent must be considered invalid (in accordance with section 74C(5)(b)).

CONCLUSION

In our view the notes contained in the DCP with respect to the height and floor space incentives in the LEP cannot be used to alter or affect the ordinary meaning of the words in the LEP. Where the development in the appropriate areas is for mixed use purposes, is on a site of a sufficient area and provides access to a laneway irrespective of where that laneway is located or how the decision to locate that laneway was made, then the development is entitled to the bonuses provided for in the LEP.

With respect to the subject site that renders the height control 20 metres (14 metres plus a bonus of 6 metres) and the FSR control 2.5:1 (1.5:1 plus a 1:1 bonus).

Any attempt to read down the provisions of the LEP with respect to development bonuses is not only inconsistent with the statutory framework defining the

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relationships between LEP's and DCP's, but would also render those provisions of the DCP relied upon inconsistent with the express terms of the LEP. Those provisions of the DCP would in any event themselves be read down so as to avoid that outcome. As a result the permissible height and FSR on the land are 20 metres and 2.5:1.

If you have any queries regarding the above please do not hesitate to contact the undersigned.

Yours faithfully



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