

10 November 2016 10 November 2016

**Mills Oakley**  
ABN: 51 493 069 734

Your ref:  
Our ref: AJWS/MDSS/3231046

Mr Jarrod White  
Sunny Thirdi Regent St Pty Ltd  
Suite 107, 20A Danks Street  
Waterloo NSW 2017

All correspondence to:  
PO Box H316  
AUSTRALIA SQUARE NSW 1215

**Email:** jarrod@milligangroup.com.au

**Contact**  
Matt Sonter +61 2 8035 7850  
Email: msonter@millsOakley.com.au

**Partner**  
Anthony Whealy +61 2 8035 7848  
Email: awhealy@millsOakley.com.au

Dear Jarrod

**Legal advice re calculation of the 'gross floor area'**  
**Property: 80-88 Regent Street, Redfern**

We refer to your request for legal advice in relation to whether your proposed development application (DA) has correctly excluded the breezeways (**central corridors**) on the Ground Level through to Level 17, as well as the Ground Level Service & Loading Bay, for the purposes of calculating the 'gross floor area' (GFA) within the meaning / definition contained in the *Sydney Local Environmental Plan 2012* (LEP).

In providing this advice we have reviewed your most recent architectural plans prepared by SJB Architects dated 15 July 2016 and 19 October 2016, which includes a comprehensive GFA analysis plan. We have also had particular regard to the amended Ground Floor plan dated 4 November 2011, and the attached 'Detailed Section – Breezeway' also dated 4 November 2016.

**Summary advice**

In our opinion, it is correct to exclude the central corridors and the Ground Level Service & Loading Bay from the calculation of GFA. We therefore support the approach that has been taken.

**Detailed advice**

1. The critical factor in reaching our conclusion is that the definition of GFA in the Dictionary to the LEP (which is a Standard Instrument definition and therefore applies essentially across the entire State) expressly states that:

**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 (our emphasis):

- (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.

2. In this case, an examination of the architectural plans and the Detailed Section – Breezeway, indicates that the central corridor walls are quite plainly the **external face of external walls**, not the **internal face of external walls**, and are therefore **not** captured by the definition of GFA. In other words, the breezeway walls are open to the elements and designed for exposure to weather, having only 1.1m high balustrades at each end and will be weatherproofed to comply with AS.4654.1 "Waterproofing membranes for external above ground use-Design and installation", and AS.4654.2 "Waterproofing membranes for external above-ground use-Materials" (we refer in particular to the Detailed Section – Breezeway which is attached to this advice). They are therefore **external** walls, as described in the leading judgement on this issue, namely the Land and Environment Court decision in *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521, which we discuss in detail further below.
3. In relation to excluding the Ground Level Service & Loading Bay, we note that subsection (h) of the definition of GFA outlined above excludes '**any** space used for the loading or unloading of goods (including access to it)' (our emphasis). We are instructed that this Ground Level space will be used as the primary dedicated space used by the occupants of the development for the loading and unloading of goods for both the retail and residential components of the development. As such, it falls squarely within the exclusion of GFA under subsection (h) of the definition of GFA.
4. In relation to both the central corridors and the Ground Level Service & Loading Bays, it is important to recognise that the LEP, being an instrument made under Part 3 of the *Environmental Planning and Assessment Act 1979* (NSW), is a form of delegated legislation. This means that the principles relating to the interpretation of Acts of Parliament are applicable. It is well recognised at law that a key principle of statutory interpretation is that all words are to have meaning and effect (*Project Bluesky Inc vs Australian Broadcasting Authority* [1998] HCA). Or as the Court has recently emphasised in judgments relating to clause 4.6 of the Standard Instrument LEP, the consent authority must be "faithful to the language of the clause": *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [62].
5. Obviously, this is of equal relevance and importance in the present circumstances where the dictionary definition of GFA applies in all Standard Instrument LEPs throughout NSW and therefore is not intended to be subject to varied application / interpretation on a case by case basis in different local government areas depending on the subjective opinion of the relevant consent authority in each case. Put simply, the calculation of GFA must be conducted in the manner required by the LEP which includes, most relevantly, **the words used in the definition of GFA** as set out in the Dictionary to the LEP.

***GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521**

6. Should there be any doubt on the issue of the central corridors, we note that the Land and Environment Court of NSW has ruled on precisely this issue in the matter of *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521. That decision was handed down nearly 12 months ago and has never in that time been challenged, let alone overturned.
7. In our experience most councils in Land and Environment Court appeals **request** that applicants calculate GFA in accordance with the *GGD Danks* decision, in recognition of the fact that it has determined the basis on which breezeways are to be treated for FSR purposes. The critical issue is usually whether the breezeways are **open at each end**, in the sense of being open to the elements and requiring weatherproofing of the breezeway walls and lift doors, etc. Of course, balustrades are required for BCA / safety purposes but the breezeways must otherwise be open at each end in order to be excluded from calculation of GFA.

8. The LEP definition of GFA is entirely consistent with the findings of this case, which importantly, also dealt with central corridors, in the sense that the Commissioner expressly noted that the corridors in that matter ran between rows of apartments along either side, stating at paragraph 28 of the judgment that “...*The eastern and western walls of the corridor are the external face of the walls of units or their courtyard...*”
9. Factually therefore there is no relevant different in circumstances other than that the corridors in that matter were somewhat **more enclosed**, with the Commissioner noting that the corridors had “a ‘wall’ of fixed, open louvres” at one end (paragraph 28 of the judgment). We note that your proposed DA, on the other hand, has only a 1.1m high concrete balustrade at each end of the central corridors.
10. In *GGD Danks Street P/L*, the City of Sydney Council sought to argue that a central corridor should be included in the definition of GFA notwithstanding that it was open at each end of the corridor, noting that this was City of Sydney Council’s standard practice to always include such areas in the calculation of GFA. The Land and Environment Court ruled that the central corridors were excluded from the definition of GFA, and stated at paragraph 31 of the judgment that:

*“...the area of the corridor, open at both ends, does not form part of the GFA. The definition of GFA in LEP 2012 requires the floor area of each level to be measured from the internal face of external walls, measured at a height of 1.4m above ground. The corridor is contained on either side by the external face of walls that form the external walls of the units on either side of the corridor (except for the courtyard of units 7, 20 and 32 on each floor, as the corridor is contained next to these units by the outer fence or wall that forms the edge of the private courtyard). **The external face of the wall cannot be characterised as an internal face, because an external wall must provide the weatherproofing that maintains the internal wall or face as a dry wall, in other words, an external wall has a specific function that distinguishes it from an internal wall.** In full brick construction, where the wall forms the façade of a building, the outer skin of brickwork is wet during inclement weather and the purpose of the cavity between the brickwork skins is to maintain the inner or internal wall as dry. The internal face of an external wall in the definition of GFA must refer to the interior surface of the wall that forms the façade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall. **Therefore, the sum of the floor area of each floor of a building measured from the internal face of external walls requires the floor area that is included in the GFA calculation to be internal floor space**” (our emphasis).*

11. As can be seen, and as stated above at paragraphs 4 and 5 of this advice, the Court’s approach to calculating GFA correctly emphasises that the words used in the definition of GFA must be applied “faithfully”. As such, what is critical is to identify the **internal face of external walls**. Calculable floor area falls within those walls only, not within the **external** walls that are constructed to form the breezeways.
12. As stated above, we have reviewed your most recent architectural plans, and the attached Detailed Section drawing, all of which can be readily conditioned to form part of a development consent, in order to ensure compliance with the LEP definition of GFA. We note in particular that the breezeway walls will be constructed as external walls to ensure that they are suitable for exposure to the elements and will not allow penetration of rain into the apartments (and the same can be said of the lift doors, which must of course be weatherproofed, and the lifts themselves are excluded from the definition of GFA in any case). In that regard, the Section specifies that the breezeway walls will be constructed as external walls which comply with AS.4654.1 “*Waterproofing membranes for external above ground use-Design and installation*”, and AS.4654.2 “*Waterproofing membranes for external above-ground use-Materials*”.
13. Ultimately, *GGD Danks Street P/L* is best summed up by the simple statement expressed at paragraph 31 of the judgment as follows:

*‘...The corridor will be wet during inclement weather by rain blown along the gap, the walls containing the corridor function as external walls and so the corridor cannot be characterised as internal floor space.’*

14. Again, we cannot see any reason to differentiate your proposed DA.

## Conclusion

15. The Land and Environment Court's decision in *GGD Danks Street P/L* is clear and is squarely applicable to your proposed DA, and accords with the approach that you have taken to the calculation of GFA in your proposed DA.
16. Accordingly, we are of the opinion that your proposed DA has correctly excluded the central corridors from the calculation of GFA as defined in the LEP, and is directly in line with the Land and Environment Court's decision on the matter.
17. Further, we are also of the opinion that your DA has correctly excluded the Ground Level Service & Loading Bay from the calculation of GFA as defined in the LEP.

Please contact Anthony Whealy on (02) 8035 7848 or Matt Sonter on (02) 8035 7850 should you wish to discuss.

Kind regards



Anthony Whealy  
**Partner**  
Accredited Specialist Local Government & Planning

Nominated Architects: Adam Haddow-7188 | John Pradel-7004

FOR APPROVAL

Rev	Date	Revision	By	Chk.
8	04.11.2016	Revised DA Issue	NK	AH



Client



Project

88 Regent

80-88 Regent St, Redfern for  
Sunny Thirdi Regent St Pty Ltd

Drawing Name

Detail Section - Breezeway

Date 04.11.2016 Scale 1 : 50 Sheet Size @ A1

Drawn NK Chk. AH

Job No. 5359 Drawing No. DA-0610 Revision / 8