

3 October 2024

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Dear Saul

**Legal Advice re calculation of Gross Floor Area**

We refer to your request for our legal opinion on whether corridor and breezeway areas should be included or excluded from the calculation of Gross Floor Area ('GFA') under the applicable definition in the [Standard Instrument – Principal Local Environmental Plan 2006](#) ('Standard Instrument').

**Summary Advice**

In our legal opinion, based on the facts set out below and the reviewed material, we advise as follows:

- a. The question of whether unenclosed 'corridors' and 'breezeways' are to be included or excluded from the calculation of GFA has been the subject of recent judicial consideration by the Land and Environment Court ('Court').
- b. The Court's findings have steered away from the relevant test being the "*prospect of rain entering the breezeway*" and instead, now focus' on whether the walls bounding the corridors can in fact be characterised as 'external walls' via the provision of detailed evidence.

**Substantive Advice****2. Definition of GFA pursuant to the Standard Instrument**

2.1. Pursuant to the dictionary contained within the Standard Instrument, GFA is defined 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—*

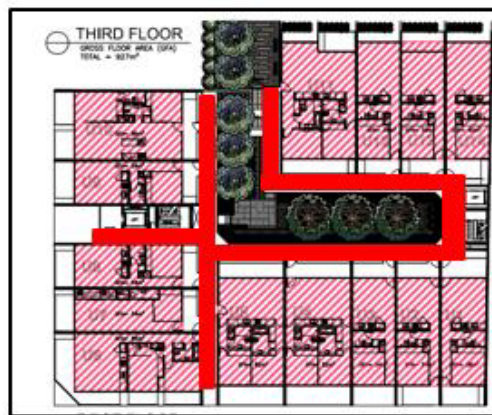
- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic, but excludes—*
- (d) any area for common vertical circulation, such as lifts and stairs, and*
- (e) any basement—*
  - (i) storage, and*
  - (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."*

**3. Judicial Consideration of the Definition of GFA – Unenclosed Corridors and Breezeways**

- 3.1. The question of whether unenclosed 'corridors' and 'breezeways' are to be included or excluded from the calculation of GFA has been the subject of significant judicial consideration by the Court. As you will see, the Court's findings in each case focus on the characterisation of the walls surrounding the corridor or breezeway areas, in particular whether those walls are 'external walls' or 'internal walls'.
- 3.2. This characterisation is critical because GFA by definition is "*measured from the internal face of external walls*".
- 3.3. We provide the following summary of the key Court decisions on this topic below.

[GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney \[2015\] NSWLEC 1521 \('GGD Danks'\)](#):

- 3.4. In *GGD Danks*, the Applicant excluded certain areas (corridors / breezeways open to internal landscaped areas) from the calculation of GFA (see **Figure 1** below), and the Council argued that these areas should be included.



**Figure 1: GFA Plan from *GGD Danks* identifying relevant corridors / breezeways in red  
Source: GFA Plan Rev 1, prepared by Derek Raithby Architecture dated November 2014**

- 3.5. The Court ultimately held at [31] that the central corridors in dispute were to be **excluded** from the calculation of GFA for the following reasons:
  - a. the corridors were open at both ends (fixed open louvres were proposed at one end and the other was open to the balcony / landscaped area [28]);
  - b. the definition of GFA "*...requires floor area of each level to be measured from the **internal face of external walls**, measured at a height of 1.4m above ground*", and as the corridors in this case were "*contained on either side by the external face of walls that formed the external walls of the units on either side of the corridor*" the Court held that "*...the external face of the wall cannot be characterised as an internal face*";
  - c. an external wall "*must provide the weatherproofing that maintains the internal wall of face as a dry wall, in other words, an external wall has a specific function that distinguishes it from an internal wall...*"; and
  - d. "*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.*"

(our **emphasis** added).
- 3.6. Relevantly, Commissioner O'Neill rejected Council's submission at [29] that "*it is normal practice for Council staff to exclude 2m of such corridor adjacent to the fixed, open louvres or a balustrade and the rest of the area of the corridor is included in the GFA calculation*" on the basis that Council provided no explanation for this approach, and that in any case, it did not align with the definition of

GFA. The Court held, not surprisingly, that the definition of GFA must be adhered to, rather than general notions of what should or should not be included as a matter of practice or custom.

[Landmark Group Australia Pty Ltd v Sutherland Shire Council](#) [2016] NSWLEC 1577 (**'Landmark'**):

- 3.7. In *Landmark*, the Applicant sought to adopt the approach approved by the Court in *GGD Danks* and excluded internal breezeways / corridors from the calculation of GFA on the basis that these areas were open (without louvres) on both ends (see **Figure 2** below).



**Figure 2: GFA Plan from *Landmark* identifying relevant corridors / breezeways in red**  
Source: GFA Plan Rev A, prepared by Marchese Partners dated 2016

- 3.8. In this case, the Court distinguished (albeit temporarily – see *HPG* below) the approach taken in *GGD Danks* and held that the breezeways / corridors were to be **included** in the calculation of GFA as the walls in these areas were ‘internal’ to the ‘external’ walls of the building. We extract Commissioner Morris’ reasoning at [60] as follows:

*“Similarly, I find the same applies to the breezeway/corridors on the upper levels of the building. These are also within the internal face of the external walls of the building. Those external walls are no different from the windows, doors and other architectural features that form the perimeter of the building. The fact that two 2m wide areas around the perimeter of the building are not wholly enclosed [did] not alter the location of the buildings external walls in this case”.*

[HPG Mosman Projects Pty Ltd v Mosman Municipal Council](#) [2021] NSWLEC 1243 (**'HPG'**):

- 3.9. In *HPG*, the Applicant excluded certain areas of corridors from the calculation of GFA on the basis that these common corridors were open areas of horizontal circulation from which all units accessed fire stairs and lifts [30] (see **Figure 3** below).



**Figure 3: GFA Plan from *HPG* identifying relevant corridors / breezeways in red**  
Source: GFA Plan Rev G, prepared by PDB Architects dated 14 April 2021

3.10. The Court held that the corridors should be excluded from the calculation of GFA, and in doing so, **expressly disagreed with the earlier decision in *Landmark*** for the following reasons at [34]-[39]:

- a. 'external wall/s' is not defined in the *Standard Instrument* or applicable LEP, and as such, O'Neill C adopted the ordinary meaning of the term from the National Construction Code ('NCC'), being, "*an outer wall of a building which is not a common wall*";
- b. O'Neill went onto clarify that "*an outer wall of a building is either the façade that forms the building envelope or an external wall that is the threshold between an internal room and an external space*";
- c. "...breezeways, or corridors, are external spaces because they **function in the same way as an inset balcony** and the opening has an outer wall less than 1.4m high";
- d. "*The communal corridors on Levels 1 and 2 are external spaces and the walls lining the corridors will have to be external walls in order to make the units adjoining the corridor habitable space*";
- e. "*I respectfully disagree with the finding in *Landmark Group* because the corridor was unenclosed and was an external space. **The test is not the "prospect of rain entering the breezeway" or whether the external space is identified as a breezeway or a corridor (at [36]). For the units adjoining the corridor to each be a dwelling, they must be enclosed on all sides by external walls or common walls. As the corridor was open at each end, the side walls of the corridor had to be external walls to the units on either side of the corridor.***"; and
- f. "*I understand the Council's cynicism in relation to the practice of creating horizontal circulation spaces in multi-residential developments which are external spaces by dint of the deletion of a window in an opening or an open ended corridor, in order that the spaces do not contribute to the calculation of the GFA, however, **the calculation of GFA has to be consistent with the LEP definition. The definition of GFA should be clarified or amended so that common horizontal circulation in multi-residential developments, such as corridors or breezeways, is explicitly included in the definition of GFA. On the basis of the definition of GFA in LEP 2012, the area of the breezeways on Levels 1 and 2 of the proposal do not contribute to the calculation of GFA and the proposal complies with the FSR development standard.***"

(our **emphasis** added).

3.11. The decision of *HPG* supports the proposition that breezeways / corridors which are open at each narrow end (described in *Landmark* at [35] as '*proportionally insignificant in the context of the total area of the external walls of the building*'), as distinct from being open along the full length of the corridor, are able to be excluded from the calculation of GFA.

3.12. It is particularly noteworthy that the Commissioner in *HPG* expressly held at [39] that in order to include open breezeways as GFA, it would be necessary to formally amend the Standard Instrument definition of Gross Floor Area, which otherwise simply cannot be interpreted to include such spaces as GFA. Put simply, the definition of GFA that is contained in the Standard Instrument, does not define such spaces as being GFA, and they therefore **cannot legally be counted as part of the FSR** of a development.

[\*Emag Apartments Pty Limited v Inner West Council\* \[2022\] NSWLEC 1042 \('\*Emag\*\)](#)

3.13. Similarly, in *Emag* the Applicant excluded certain internal corridors / breezeways (being those which ran through the entire length of the proposed boarding house footprint, and which were open on each narrow end) from the calculation of GFA (see **Figure 4** below).



**Figure 4: GFA Plan from *Emag* identifying relevant corridors / breezeways in red**  
Source: GFA Plan Rev I, prepared by Tier Architects dated 16 December 2021

3.14. In *Emag* the Court affirmed the approach taken by Commissioner O’Neill in *HPG*, and held that the corridors / breezeways should be **excluded** from the calculation of GFA for the following reasons at [53]-[54]:

- a. **“...the walls between boarding rooms and the corridor breezeways act as a threshold between an internal room and an external space (*HPG* at [35]), and so the walls of the corridors are external walls and the area of the corridors therefore does not contribute to the GFA (*HPG* at [36])”;**
- b. **“The walls bounding the corridors have the characteristics described by the Commissioner in *HPG*, including an outer skin that is able to withstand inclement weather, and a cavity that separates the ‘wet skin’ from the internal skin of studwork and plasterboard”;** and
- c. **“...Furthermore, a *setdown* in the slab between boarding rooms and the breezeway supports this separation of ‘internal’ and ‘external’ spaces, as does provision of waterproof membrane to drainage below elevated external pavers in the breezeway.”**

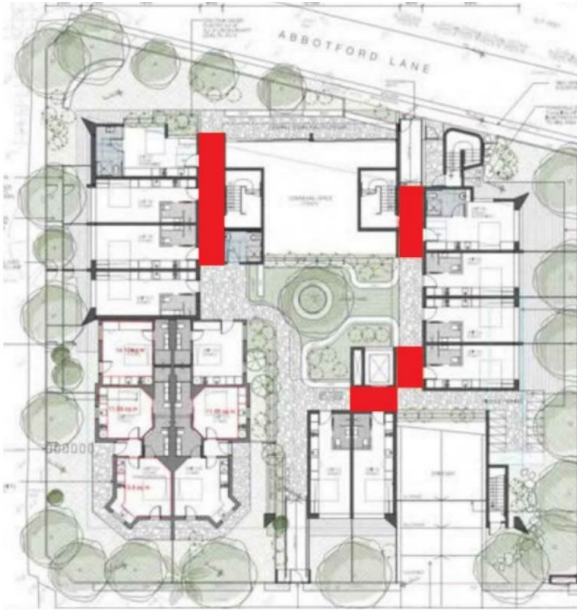
(our **emphasis** added)

3.15. As can be seen from **Figure 4** above, the Applicant in *Emag* did not seek to exclude the residual corridor areas on the building floor plate which lead from the relevant ‘breezeway’ areas at junctions to ‘dead ends’ and not to other open ends.

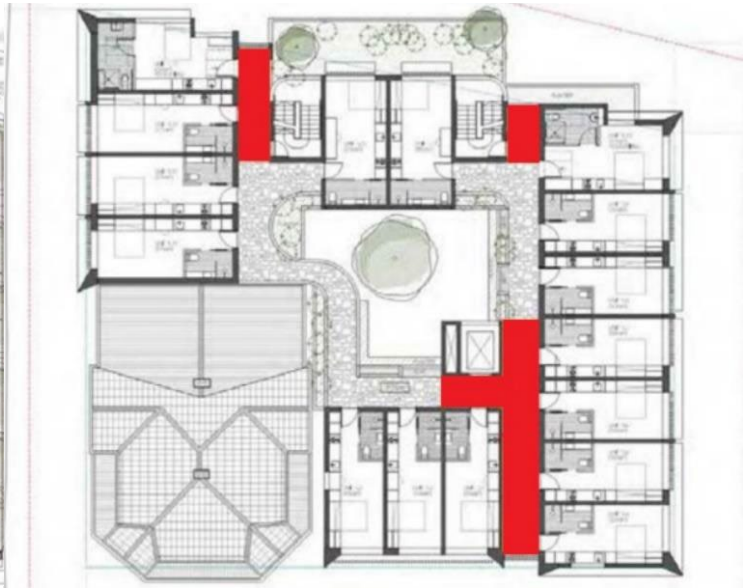
[David Mitchell Architects Pty Ltd v Randwick City Council](#) [2022] NSWLEC 1144 (**‘David Mitchell Architects’**):

3.16. In *David Mitchel Architects* the Applicant excluded certain open / horizontal circulation areas (which connected to internal landscaped areas) from the calculation of GFA (see **Figures 5 and 6** below).

3.17. In this case, Council contended that the corridors / breezeways should be included in the calculation of GFA because the areas *“are enclosed spaces with full height timber screens forming the end or face of the corridors which act as ‘walls’...”*



**Figure 5: Ground Floor Plan from David Mitchell Architects identifying relevant corridors / breezeways in red, Source: Ground Floor Plan, prepared by David Mitchell Architects**



**Figure 6: Level 1 Plan from David Mitchell Architects identifying relevant corridors / breezeways in red, Source: Level 1 Floor Plan, prepared by David Mitchell Architects**

3.18. The Court ultimately agreed with the Applicant (who relied on the reasoning in *HPG*) and held that the corridor / breezeway areas should be **excluded** from the calculation of GFA for the following reasons at [55]-[56]:

- a. the Court’s decision in *GGD Danks* was correct – in other words, “*the floor area inside corridors or breezeways that is firstly, open at both ends, notwithstanding a wall of fixed open louvres, and secondly that is exposed to the elements such as rain in inclement weather, is appropriately excluded from GFA*”;
- b. Council’s argument failed to satisfy the definition of GFA as “*the areas identified by [Council] do not fall within the definition [of GFA] as they are not floor area that can be measured from the inside face of external walls...*”;
- c. “*Further, in GGD Danks the Court determined that the external face of the wall cannot be characterised as an internal face, because an external wall has a specific function which distinguishes it, that being weatherproofing. The definition of GFA refers to the interior surface of the wall that forms the façade or exterior of the building, that cannot be a reference to external walls...*”; and
- d. in light of the above, the corridors were “*designed and constructed to be outdoor areas and are not GFA*”.

3.19. It is also important to note that in this case, the Council sought to rely on the *Landmark* decision as reason for including certain corridor areas, however, this reasoning was ultimately not accepted by the Court.

[\*Australex Group Pty Ltd v Fairfield City Council\* \[2022\] NSWLEC 1685 \(\*‘Australex’\*\):](#)

3.20. The Applicant in *Australex* also excluded corridors / breezeways when calculating the overall GFA for the boarding house development on the basis that these areas were either open at both ends or ‘external walls’ (see **Figure 7** below).



**Figure 7: Floor Plans from Australex identifying relevant corridors / breezeways in red and green**  
Source: Floor Area Plan, prepared by Hill Thalys dated September 2022

- 3.21. When interpreting the definition of GFA in *Australex*, the Court took a different approach to that adopted in *HPG* and *GGD Danks*, and ultimately held that certain corridors / breezeways should be **included** in the GFA figure.
- 3.22. As identified in **Figure 7** above, the Court held that the areas in green should be excluded from the calculation of GFA, whereas the red areas were to be included. Although the Court acknowledges that the green and red areas are corridors and are open at one or more ends, it was ultimately held at [38]-[40] that the intricate design of the structure (which had three principal elements) presented as a single building. As such, the red areas in Figure 7 were characterised as ‘internal’ walls and were therefore to be included in the calculation of GFA.
- 3.23. However, (and in our view, rather peculiarly), Walsh C relied on a Macquarie Dictionary definition of ‘building’ as opposed to that provided in the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**). As a consequence of this, Walsh C **did not** adopt the standard interpretation of GFA which had been widely accepted by the Court in *HPG*, *GGD Danks*, *Emag* and *David Mitchell Architects*.
- 3.24. The Court provided the following reasoning at [27]-[39] for this interpretation:
- a. “...in its clear expression, [the definition of GFA in the LEP] establishes that GFA means the sum of the floor area of each floor of a building...”;
  - b. “It seems to me that FLEP’s Dictionary definition of GFA is intended to help with the application the FSR development standard at cl 4.4 of FLEP” and as such, the definition is “concerned, [amongst] other things, with the control of building density... and bulk”;
  - c. “Clearly, there is no accounting for proportionately small openings in otherwise enclosed communal corridors... nor is there any consideration of (internal v external) wall construction particulars specified in the definition. In my view, the issue of how the walls function, also, does not relate to the underlying contextual question of the interpretation of building confines or building density or bulk”; and
  - d. “In turn, I conclude that it would be at odds with the GFA definition, read in whole and in context, to exclude lengths of internal communal corridors which happened to have openings, at one or both ends, to the otherwise generally perceived building (and thus floor area) confines...”.
- 3.25. Although this decision has not yet been analysed in any recent case law, **we caution against relying on this authority**, as there are a number of cases which conflict with Commissioner Walsh’s determination, and in any case, **we consider it to be plainly wrong, particularly as it**

ignores the definitions in the Standard Instrument and in the Act itself, and instead applies different definitions to justify an end result legally, that approach would plainly be incorrect, and appealable.

- 3.26. In that regard, we note that the interpretation of GFA in *Australlex* was not challenged—presumably because the Applicant’s development was ultimately **approved** in any event, notwithstanding the additional GFA and non-compliance with the standard.
- 3.27. **We therefore comfortably conclude that the decision in *Australlex* is legally incorrect**, and this perhaps explains why it is so at odds with the many decisions referenced above which have adhered to the definition of GFA to come to very different conclusions in relation to the exclusion of breezeways from GFA calculations.

[Connoisseur Investments Pty Ltd v Sutherland Shire Council \[2020\] NSWLEC 1181 \('Connoisseur'\)](#):

- 3.28. In *Connoisseur*, the Applicant was seeking consent for a multi dwelling housing development. In this case, the Respondent Council argued that certain stairs, walls lifts, lift wells, service risers and basement laundry facilities should be **included** in the calculation of GFA because these areas were either oversized (i.e. in excess of that permitted under the planning controls) or ‘habitable spaces’ (see [81] and [87]).
- 3.29. Commissioner Horton disagreed with the Council’s position, and ultimately preferred the Applicant’s ‘hybrid’ method of calculating GFA – being, “*certain parts of the stairs, lifts and lift wells are to be included in the calculation of GFA.*” In other words, this meant that:
- a. laundry basement facilities were **excluded** from the overall GFA as these areas were not habitable rooms [81];
  - b. the standard approach to common / shared spaces was adopted - meaning that every alternate flight of stairs was **excluded** from the overall GFA [82];
  - c. the standard approach to void / lift spaces was adopted - meaning that voids were **excluded** [86]; and
  - d. all service areas (irrespective of whether they are considered 'oversized') were **excluded** from the calculation of GFA because of these areas being expressly excluded in the GFA definition [87].
- 3.30. This ‘hybrid’ methodology accepted by the Court in *Connoisseur* been consistently applied in more recent cases such as [Barel v Randwick City Council \[2022\] NSWLEC 1176](#) and [Sit Family Pty Ltd v Mosman Municipal Council \[2022\] NSWLEC 1032](#).

#### 4. Conclusion

Although the court has applied varying methodologies of calculating GFA, the above case law authorities confirm that “*calculation of GFA has to be consistent with the LEP definition*”. As such, it is our view that when applying the case law correctly, **breezeways / corridors do not contribute to the calculation of GFA.**

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or [awhealy@millssoakley.com.au](mailto:awhealy@millssoakley.com.au)

Yours sincerely




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