



Council Ref: SC2593

19 December 2016

Codes and Approval Pathways
Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Redleaf Council Chambers
536 New South Head Road
Double Bay NSW 2028

Correspondence to
General Manager
PO Box 61
Double Bay NSW 1360
DX 3607 Double Bay
records@woollahra.nsw.gov.au
www.woollahra.nsw.gov.au

Telephone: 61 2 9391 7000
Facsimile: 61 2 9391 7044

Dear Sir / Madam

**Submission to exhibition: Draft Medium Density Design Guide and
Explanation of Intended Effects for the new Medium Density Housing
Code**

Thank you for the opportunity to comment on the exhibition of the Draft Medium Density Design Guide (the draft guide) and Explanation of Intended Effects (the explanation paper) for the new Medium Density Housing Code (the draft code). Our submission to this exhibition follows on from our submission on 1 March 2016 to the discussion paper on expanding complying development to include two storey medium density housing types (the discussion paper).

The exhibited documents propose two main initiatives:

1. Introduce a new "Medium Density Housing Code" into State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP).
2. Publish a "Medium Density Design Guide", similar to the Department's "Apartment Design Guide", to guide development, and the creation of development principles, standards and controls for medium density development.

We acknowledge that the Department has amended the current documentation to address a number of concerns we raised in our submission to the discussion paper. This submission involves contributions from Council staff in strategic planning, compliance, development assessment, engineering, health and tree management. A summary of our concerns about the draft code, draft guide and explanation paper are included below, and greater detail is provided in the following tables:

- Table 1: Detailed discussion of the main issues identified by Council staff
- Table 2: Minor documentation issues identified by Council staff

1. We are concerned that the draft code was not provided as part of the exhibition documentation. While the explanation paper may describe the intention of the draft code, it does not allow the public an opportunity to review the actual wording of the draft code which, in some cases, will include proposed development standards. For example the standards relating to flood control lots, bush fire prone land, and tree removal are not detailed in the explanation paper or the guide, and are either separately contained in sections of the Codes SEPP, or will need to be included within the draft code.

2. We do not support expanding complying development to include two storey medium density housing types. The main reasons the proposal is not supported are listed below.

- *Community consultation*

The draft code will override and disregard the desires of the local community to determine the urban setting in which they choose to live, by imposing a “one size fits all” approach to development control.

- *Built form and local character*

The draft code and design guide will not address the existing or desired future character of any area to which they apply, creating a generic built form that does not respond to local character or conditions.

- *Design verification statements*

The draft guide proposes that design verification statements be prepared by the designer of a proposed development, to assess the merits of a development against design criteria. As the designer will assess the merits of their own design, the statements will not provide an independent assessment. Additionally, there is no proposed mechanism to ensure that designers are held accountable for the accuracy of their statements. We recommend the establishment of an independent third party certification or registration system for practitioners who would be permitted to either prepare independently assessed design verification statements, or confirm the accuracy of design verification statements prepared by designers.

- *Articulation zone*

We do not support the proposed articulation zone standard as it is overly generous and is a significant increase on the standard proposed in the discussion paper, from 25% to the equivalent of more than 40% in some cases. The standard has the potential to significantly impact on the bulk, scale and appearance of development by eroding the front setback. It is recommended that a standard limiting the maximum percentage of development in the articulation zone be included in the design guide.

- *Building height and excavation depth*

The draft code has the potential to permit development substantially higher than 9m. This is because height is measured from the existing ground level. Since 3m of excavation is

permitted, on sloping sites, it is conceivable that development could be constructed to 12m above finished ground level.

- *Other planning and amenity considerations*

The draft code may be inconsistent with other planning controls and amenity considerations such as the impact of development on flood control lots, adjoining heritage items, view sharing, amenity of residents, and the loss of a significant number of trees.

- *Testing of standards and controls, and the “Recommended Principal Controls for Different Types”*

We are concerned that the testing process for the standards and controls of the draft code, and that the “Recommended Principal Controls for Different Types” included in Appendix 5 of the draft guide, are not sufficiently robust to determine an appropriate control set to ensure good quality built form outcomes, particularly on irregular sites. All of the examples provided in test sites in the discussion paper, and in Appendix 5, illustrate development on flat, rectangular (or almost rectangular) lots. A more appropriate testing methodology and illustration of the proposed control set would demonstrate development on more realistic lots with differing topography and shapes. The testing and appendix examples should also have extended to the potential amenity impacts of the proposed control set on adjoining land, rather than just whether the standards permit various dwelling types onto particular sized lots. We consider that significantly more testing is still required for the draft code and that additional examples be included for irregular sites and adjoining land.

- *Complying development framework compliance*

The explanation paper fails to recognise that the existing complying development framework has a significant number of shortfalls in terms of diligence in assessing approvals, adherence to approvals and conditions, and ongoing monitoring of completed development, which would be significantly amplified by expanding the type and number of additional complying development approvals.

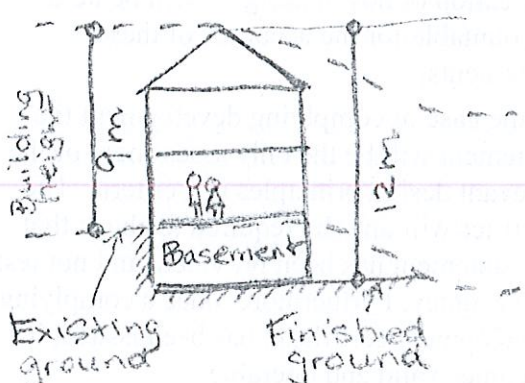
Yours sincerely



Allan Coker
Director - Planning & Development

Table 1: Main issues identified by Council staff

Main Council staff concerns	Council staff comments
<p>1. Community consultation</p> <p>The draft code will in many cases override and disregard Woollahra Council's recently implemented LEP and DCP that were subject to extensive local community consultation.</p>	<p>We do not agree with the proposed expansion of complying development codes as it will undermine the community consultation element of LEP / DCP creation.</p>
<p>2. Built form and local character</p> <p>The draft code will override our precinct relevant desired future character statements and precinct controls with a generic "one size fits all" approach. This approach will effectively remove from consideration our clear statements of desired future character as well as our detailed precinct controls which are contained in our DCP for categories of development to which the code applies.</p>	<p>We do not support the proposed expansion of complying development codes as it will undermine the existing and desired future local character of built areas.</p>
<p>3. Design verification statements</p> <p>The proposed design verification statements are intended to articulate how a proposed development responds to numerous design principles and meets numerous design criteria.</p> <p>The statement will be prepared by the person who designed the development. Therefore, the assessment of the merits of the design against the design criteria will not be independent. Additionally, there is no indication of how a designer will be held accountable for the accuracy of these statements.</p> <p>In the case of complying development the statement will be the only assessment of the relevant design principles and criteria. The certifier will only be required to check that the statement has been provided, and not test its accuracy. Furthermore, once a complying development certificate has been issued, it becomes valid and operable.</p> <p>Therefore, the proposed code will establish a mechanism for the consideration of design principles and criteria which is not independent and does not require accuracy or accountability, effectively nullifying any assessment process it aims to achieve.</p>	<p>We request that the Department ensure that designers of medium density development are held accountable for the accuracy of their design verification statements. This requires independent assessment of design against the design criteria of the code and design guide.</p> <p>We recommend the establishment of an independent third party certification or registration system for practitioners who would be permitted to either prepare independently assessed design verification statements, or confirm the accuracy of design verification statements prepared by designers.</p> <p>In line with our recommendation for CDC compliance below, the design verification statements require a stringent mechanism to control, suspend or override an issued CDC, where it can be demonstrated that the development does not comply with all the design principles and criteria of the guide. This mechanism should not rely on the CDC being surrendered or set aside by the Land & Environment Court.</p>

Main Council staff concerns	Council staff comments
<p>4. Articulation zone</p> <p>The draft guide defines the articulation zone as “an area in front of the building line that may contain porticos, balconies, bay windows, decks, patios, pergolas, terraces, verandahs, window box treatments, window bays, awnings and sun shading features”.</p> <p>The draft design guide standard for the articulation zone is it can protrude 1.5m in front of the building line, compared to the discussion paper standard allowing building articulation of up to 25% of the entire front setback. The front setback standards proposed in the draft guide range between 3.5m – 10m depending on lot area. Therefore, applying a 1.5m articulation zone into a 3.5m front setback permits up to 40% of the front setback to be occupied by the building elements referred to above.</p>	<p>We do not support the proposed articulation zone standard as it is overly generous and is a significant increase on the standard proposed in the discussion paper. The standard has the potential to significantly impact on the bulk, scale and appearance of development within the front setback.</p> <p>It is recommended that a standard limiting the maximum percentage of development in the articulation zone be included in the design guide.</p>
<p>5. Building height and excavation depth</p> <p>Building height</p> <p>Building height has been amended from the discussion paper in the following way:</p> <ul style="list-style-type: none"> • The definition of “Building height” is now the same as that in the Standard Instrument. • The height of buildings is generally 8.5m, except terraces house which are 9.0m above existing ground level. This is higher than the building heights proposed in the discussion paper. <p>Excavation depth</p> <p>Excavation has been amended from the discussion paper in the following way:</p> <ul style="list-style-type: none"> • The maximum excavation depth is 3m below existing ground level, as described in the Orientation and Siting “Design Criteria” controls for 4 types of development. • On sloping sites buildings are to respond to the topography with changes in floor level to minimise cut and fill. Unless a 	<p>We are extremely concerned that the true potential building height permissible by the proposed controls has not been considered.</p> <p>On sloping sites, the draft code could result in a building with a height above finished ground level of 12.0m. As illustrated in the image below.</p>  <p>The development of a group of dwellings to a maximum building height of 12.0m in low and medium density residential areas has the</p>

Main Council staff concerns	Council staff comments
<p>dwelling is over a basement, the ground floor is not to be more than 1.3m above ground level, and no more than 1m below ground level.</p> <p>Combined effect of building height and excavation depth</p> <p>Any excavation proposed for a car park basement must comply with all boundary setback requirements, which encourages basement car parking to be built directly below dwellings.</p> <p>Therefore, on a sloping site, the actual maximum permissible height of a building above finished ground level is 12.0m (9.0m above the existing ground level for terrace houses plus 3.0m below the existing ground level).</p>	<p>potential to create significant amenity impacts to adjoining land, such as overshadowing, privacy / overlooking, view disruption and creating excessive bulk and scale of development.</p> <p>This potential excessive height must be contained by way of an additional control restricting wall height when combined with basement car parking.</p>
<p>6. Flood control lots</p> <p>We are unsure what standards will apply to flood control lots in the draft code. This is due to the exclusion of the draft code wording from the exhibition material, as discussed previously in this submission.</p>	<p>We consider that flood control lots should be excluded from all forms of medium density complying development to ensure adequate assessment of the design, development and monitoring of flood control measures on flood control lots.</p>
<p>7. Development adjoining heritage items</p> <p>The maximum height of development (9.0m) and side setbacks (min. 0m) proposed for complying development may not be appropriate for development adjoining a heritage item. Although the guide makes a minor reference that a “DCP can provide finer control of building heights on unique sites such as the interface with heritage or other land use zones” (2A Building Envelopes - Heights and Setbacks, page 17), this does not apply to complying development.</p>	<p>We consider that development adjoining heritage items should not be permitted as complying development.</p>

Main Council staff concerns	Council staff comments
<p>8. View sharing</p> <p>The code will exclude from consideration the impact medium density development has on views. This is because there is no mechanism available for a merit assessment based on view sharing principles which have been established by the Land and Environment Court in <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140. As previously discussed a design verification statement prepared by the person who designs the proposal gives us no confidence that view sharing will be properly considered and assessed.</p> <p>The issue of views and view sharing is particularly relevant in the Woollahra LGA which is located on Sydney Harbour and characterised by sloping land which provides significant public and private views to residents.</p>	<p>We recommend that development which may result in the significant obstruction of views from private and public not be permitted as complying development. This type of development requires merit assessment and cannot be codified.</p> <p>Additionally, diagrams could be added to the draft guide to illustrate how to assess the view impact on development sites and adjoining land. This would guide appropriate design for developments subject to a DA.</p>
<p>9. Removal or pruning of trees</p> <p>We are unsure what standards will apply for the removal or pruning of trees in the draft code. This is due to the exclusion of the draft code wording from the exhibition material, as discussed previously in this submission. However, the general housing code permits removal or pruning of trees as complying development if:</p> <ol style="list-style-type: none"> the tree is not listed on a significant tree register or register of significant trees kept by the council, and the tree or vegetation will be within 3m of any development that is a building that has an area of more than 25m², and the tree or vegetation has a height that is less than: <ol style="list-style-type: none"> for development that is the erection of a new dwelling house—8m and is not required to be retained as a condition of consent to the subdivision of the lot, or for any other development—6m. 	<p>The Woollahra LEP and DCP:</p> <ul style="list-style-type: none"> requires Council approval for the removal or pruning of any tree: <ul style="list-style-type: none"> listed as a heritage item, listed on Council's significant tree register, or with a height greater than 5 metres or with a spread greater than 3 metres. does not provide approval exceptions for the proximity of a tree to a building, and encourages the replacement of any trees removed as part of a development to maintain the existing number of trees. <p>We recommend that the draft code align with these provisions.</p>

Main Council staff concerns	Council staff comments
<p>10. Testing of standards and “Recommended Principal Controls for Different Types”</p> <p>As stated in our previous submission to the discussion paper, the modelling used to test the draft standards were generally applied to relatively flat, regularly shaped sites.</p> <p>This testing methodology appears to have been repeated in Appendix 5 “Recommended Principal Controls for Different Types” of the guide. All the examples provided in the appendix illustrate development on flat, rectangular (or almost rectangular) lots.</p> <p>A more appropriate test of the proposed standards would be to apply them to realistic and irregular sites with differing topography. It is critical to know what would be the worst case scenario, because some applicants will take each development standard to its limit.</p>	<p>We are concerned that the testing of the proposed code standards and controls, and that the “Recommended Principal Controls for Different Types” included in Appendix 5 of the guide were not sufficiently robust to determine appropriate controls to ensure good quality built form outcomes.</p> <p>We recommend that additional testing and examples be provided of the proposed control set on realistic lots with differing topography and shapes. The testing and examples should also extend to illustrating the potential amenity impacts of the proposed control set on adjoining land.</p>
<p>11. Permissible uses</p> <p>Clarification is required for Clause 1.18 (1) (b) of the Codes SEPP. Currently Clause 1.18 (1) (b) provides an ambiguous definition of consent permissibility as a general requirement for complying development in the Codes SEPP.</p> <p>The clause states that:</p> <p>“(1) <i>To be complying development for the purposes of this Policy, the development must: ...</i></p> <p>(b) <i>be permissible, with consent, under an environmental planning instrument applying to the land on which the development is carried out</i>”</p> <p>This wording is ambiguous as it may be interpreted to mean that any use permissible in any clause (or zone) within any SEPP or LEP applying to any land within a particular LGA, is permissible as complying development on any land within the LGA. For example, a food and drink premises not permitted with development consent in a residential zone, may be permissible as complying development because it is</p>	<p>We request that Clause 1.18 (1) (b) of the Codes SEPP be amended to provide greater clarification of permissibility of complying uses.</p> <p>This amendment could be a rewording of sub-clause (1)(b) along the lines of:</p> <p>“(b) <i>be permissible, with consent, on the land on which the development is carried out on that land, under an environmental planning instrument applying to that land</i>”</p>

Main Council staff concerns	Council staff comments
<p>permissible with consent within a business zone within the same LEP, and the LEP applies to that land because it is an LGA wide LEP and applies to all land in the LGA. Additionally, permissibility of uses within a particular zone may be reliant on various clauses of an environmental planning instrument. For example, the Clause 6.6 of the Woollahra LEP only permits the use of non-residential uses in residential zones if there is a lawful pre-existing history of that use. This understanding of permissibility requires a level of investigation of the LEP that a certifier may not be willing or able to undertake.</p> <p>The current review process for the draft code is a good opportunity for the amendment of Clause 1.18 to provide greater clarification of permissibility of complying uses.</p>	
<p>12. CDC Compliance</p> <p>The current complying development legislative framework does not provide more stringent mechanisms to control, suspend or override an issued CDC, where it does not comply with all the development standards nominated in the Codes SEPP.</p> <p>Once a complying development certificate (CDC) has been issued, even where it does not comply with all the development standards nominated in the Codes SEPP, it is legal and operational until it is either surrendered or set aside by the Land & Environment Court. Achieving either outcome can be an expensive and time consuming exercise for the community.</p> <p>To reiterate our submission to the discussion paper, our observations are based on first-hand experience. Over the past 12 months we have received complaints from the community on the following flawed complying developments:</p> <ol style="list-style-type: none"> 1. The internal alterations of a hotel/pub that was operating in a residential R2 Low Density Residential zone under existing use rights. A CDC was issued pursuant to 	<p>We reiterate our previous submission statement that there is a need for a more stringent mechanisms to control, suspend or override an issued CDC, where it does not comply with all the development standards nominated in the Codes SEPP, other than relying on the CDC being surrendered or set aside by the Land & Environment Court.</p> <p>The examples cited represent only a tiny portion of similar breaches in the issuing and use of CDCs. Expanding complying development to the more intense residential uses proposed in the discussion paper will only worsen the number and intensity of the potential amenity impacts created by breaches to the CDC framework.</p> <p>CDC conditions</p> <p>We consider the current review process for the draft code as a good opportunity for the Department to amend the conditions for complying development to include a trigger point for adherence, such as requiring the certification of surveys, plans, designs, “prior to the issue of an occupation certificate”, in</p>

Main Council staff concerns	Council staff comments
<p>'Part 5 Commercial and Industrial Alterations Code' of the Codes SEPP, even though the development standards required "the current use of the premises must not be an existing use within the meaning of section 106 of the Act". When our concerns were drawn to the attention of the owner, works proceeded and we were required to commence Class 4 proceedings in the Land & Environment Court. A building certificate application was subsequently lodged and approved for the works covered by the flawed CDC, resulting in the owner surrendering the CDC and permitting us to discontinue the Class 4 proceedings.</p> <p>2. The construction of a new dwelling approved pursuant to 'Part 3 General Housing Code' of the Codes SEPP. Following the site being excavated in excess of 3.0 metres it became evident to us that the approved CDC plans did not comply with Clauses 3.2 ('New single and two storey dwelling houses'), 3.13 ('Maximum height of dwelling houses and outbuildings') and 3.16 ('Setbacks of dwelling houses and outbuildings from side boundaries and built to boundary walls'). While we raised our concerns with the owners before the initial floor slab was poured, works continued and we initiated Class 4 proceedings in the Land & Environment Court. This matter is ongoing at the time of lodging our submission.</p>	<p>an attempt to ensure compliance with the conditions.</p> <p>The conditions also need to include a condition ensuring payment of section 94 contributions and section 94A levies to Council.</p>
<p>13. CDC definitions loopholes</p> <p>The definitions in the Codes SEPP and the Standard Instrument currently permit loopholes which are being inappropriately used by private certifiers. One example is provided below.</p> <p>Definition of storey and "meter room"</p> <p>The Codes SEPP (and the Standard Instrument) use the following definition of</p>	<p>We request that the Department seek to close loopholes in definitions controls which are being inappropriately used by private certifiers, rather than allowing a significantly wider range and number of complying residential developments. For example, the clarification of the definition of a meter room.</p> <p>The Department should continuously and systematically liaise with Councils regarding</p>

Main Council staff concerns	Council staff comments
<p>storey:</p> <p><i>“storey means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include:</i></p> <p><i>(a) a space that contains only a lift shaft, stairway or meter room, or</i></p> <p><i>(b) a mezzanine, or</i></p> <p><i>(c) an attic.”</i></p> <p>This definition excludes a ‘meter room’ from a storey, however there is no definition of a “meter room” and there is no case law on this specific issue. The lack of a definition of meter room has created a loophole in the definition of storey, which has generated a significant problem for us in the case of a recent privately issued CDC under the ‘General Housing’ Code (GHC) of the Codes SEPP. The CDC relates to a new single dwelling with a large (greater than 30sqm) “<i>MECHANICAL/PLANT ROOM</i>”. The mechanical/plant room was identified with a note that stated “<i>NOT COUNTED AS A STOREY</i>”. An extract of the plans approved by a private certifying authority are provided below.</p> <p>While the above approval appears to clearly be in breach of the maximum 2 storeys permissible by the current (and proposed) Codes SEPP controls, it is currently a valid and operable CDC that we have commenced Class 4 proceedings against. This example demonstrates how development controls and definitions can, and are, being manipulated, especially where they lack certainty.</p>	<p>any loopholes within the CDC framework, with a view to eradicating them at the earliest opportunity to avoid inappropriate complying development.</p>

Main Council staff concerns

Council staff comments

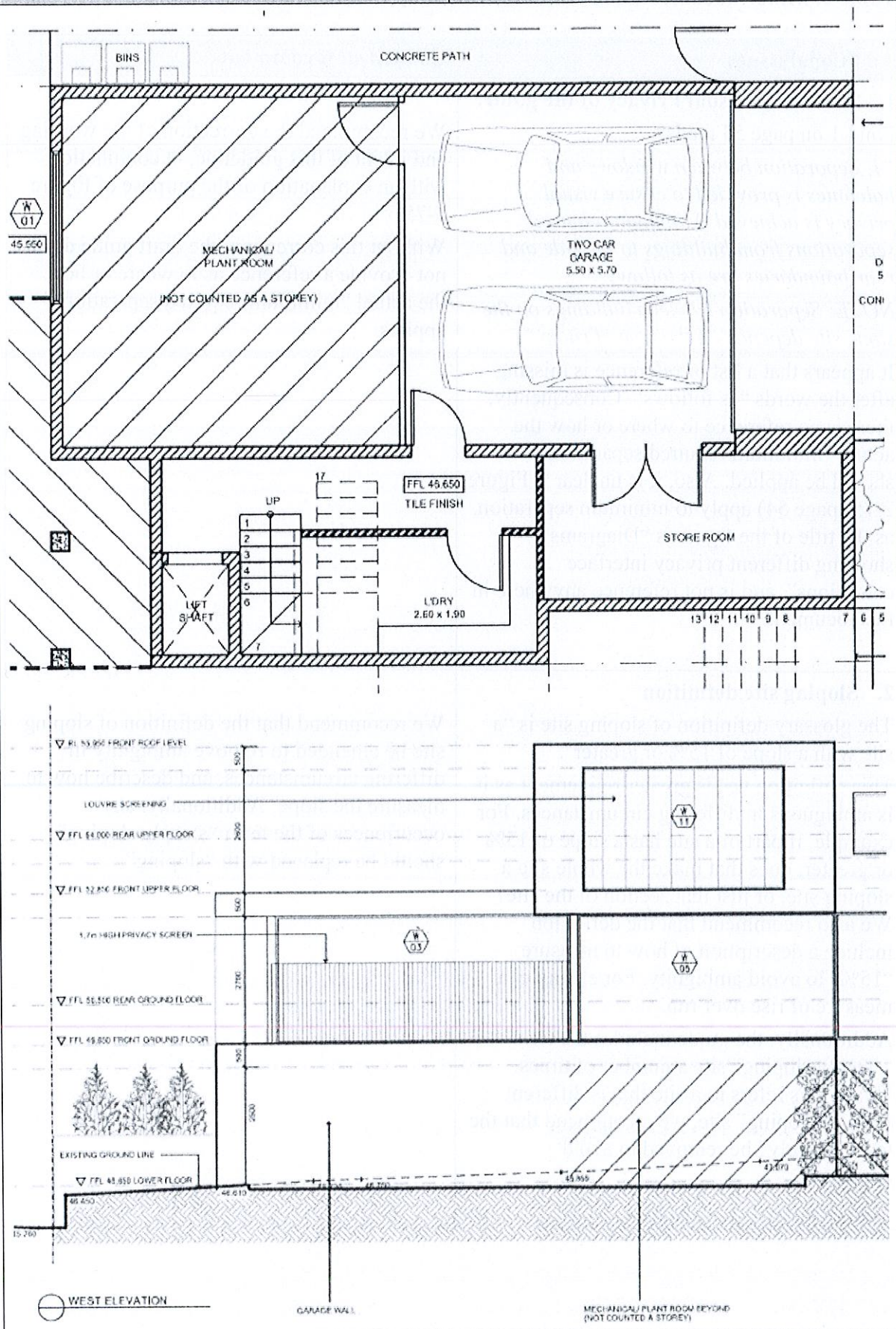


Table 2: Minor documentation issues identified by Council staff

Additional issues	Council staff comments
<p>1. Section 2P Visual Privacy of the guide.</p> <p>Point 1 on page 53 reads:</p> <p><i>“1. Separation between windows and balconies is provided to ensure visual privacy is achieved. Minimum required separations from buildings to the side and rear boundaries are as follows:</i></p> <p><i>NOTE: Separation between buildings on the same site depends on the type of room.”</i></p> <p>It appears that a list or reference is missing after the words “as follows”. Consequently, there is no reference to where or how the actual “minimum required separations” should be applied. Also, it is unclear if Figure 2-75 (page 54) apply to minimum separation, as the title of the figure is “Diagrams showing different privacy interface conditions”, and is not reference anywhere in the document.</p>	<p>We recommend the correction of the wording and intent of this guideline, in conjunction with an explanation of the purpose of Figure 2-75.</p> <p>Without this correction, the draft guide does not provide a reference as to where or how the actual “minimum required separations” applies.</p>
<p>2. Sloping site definition</p> <p>The glossary definition of sloping site is “a site with a slope of 15% or greater”.</p> <p>This definition needs greater refinement as it is ambiguous in differing circumstances. For example, if part of a site has a slope of 15% or greater, does that make the whole site a sloping site, or just that section of the site? We also recommend that the definition include a description of how to measure “15%” to avoid ambiguity. For example, a measure of rise over run.</p> <p>Additionally, the guide includes the term “steeply sloping” site a number of times. Unless this refers to a site that is different from a “sloping” site, we recommend that the term “steeply” be removed to avoid confusion.</p>	<p>We recommend that the definition of sloping site be amended to remove ambiguity in differing circumstances, and describe how to measure the slope. Additionally, any occurrences of the term “steeply sloping” should be replaced with “sloping”.</p>

Additional issues	Council staff comments
<p>3. Consistency of terms</p> <p>The following terms are used inconsistently throughout the documents and should be corrected for consistency:</p> <ul style="list-style-type: none"> • “Principal Controls” and “Principle [sic] Development Controls” • “Design Principles” and “Design Quality Principles” • “Design Guidance” and “Design Guidelines” • “Bicycle and Car Parking” and “Car and Bicycle Parking” • “Communal and Open Spaces” and “Communal Spaces” • “Aesthetics and Articulation” and “Visual Appearance and Articulation” • “Townhouses and Master Planned Communities” and “Multi-dwelling Housing and Master Planned Communities” • “Sloping site” and “steeply sloping site”. 	<p>Correct inconsistent terms.</p>
<p>4. Minor wording error in the design guide: page 51, item 17 reads “<i>Excavation should be minimised while through efficient car park layouts and ramp design</i>”. Strikeout added.</p>	<p>Correct minor wording error. Delete the word “while”.</p>