

Clause 4.6 Variation Request

St Leonards South – Area 1
Minimum Lot Size

2210638

SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd



'Gura Bulga'

Liz Belanjee Cameron

'Gura Bulga' – translates to Warm Green Country. Representing New South Wales.

By using the green and blue colours to represent NSW, this painting unites the contrasting landscapes. The use of green symbolises tranquillity and health. The colour cyan, a greenish-blue, sparks feelings of calmness and reminds us of the importance of nature, while various shades of blue hues denote emotions of new beginnings and growth. The use of emerald green in this image speaks of place as a fluid moving topography of rhythmical connection, echoed by densely layered patterning and symbolic shapes which project the hypnotic vibrations of the earth, waterways and skies.

Ethos Urban acknowledges the Traditional Custodians of Country throughout Australia and recognises their continuing connection to land, waters and culture.

We acknowledge the Gadigal people, of the Eora Nation, the Traditional Custodians of the land where this document was prepared, and all peoples and nations from lands affected.

We pay our respects to their Elders past, present and emerging.

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This document has been prepared by:

Clare Swan	22/12/2022
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1.0 Introduction

This Clause 4.6 variation request has been prepared by Ethos Urban on behalf of SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd (the Applicant). It is submitted to Lane Cove Council (the Council) in support of a development application (DA) for a residential development at 4-8 Marshall Avenue, 1-5 Canberra Avenue, and 2-8 Holdsworth Avenue, St Leonards (the site), also known as Area 1, 2 and 4 of the St Leonards South Precinct. This Clause 4.6 variation request relates to a variation to the *Lane Cove Local Environmental Plan 2009* (Lane Cove LEP) minimum site area requirements development standard for Area 1 of the St Leonards South Precinct. The DA itself relates to a broader area, being Area 1, 2 and 4 of the St Leonards South Precinct.

Clause 4.6 of the *Lane Cove Local Environmental Plan 2009* (Lane Cove LEP) enables Council to grant consent for development even though the development contravenes a development standard in certain circumstances. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three key matters before granting consent to a development that contravenes a development standard. These three matters are detailed below:

- That the Applicant's written request has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the Applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

It is important to note at the outset that clause 4.6 of the LEP *"is as much a part of [the LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome."* (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

This clause 4.6 variation request relates to the development standard for minimum site area requirements for Area 1 of the St Leonards South Precinct, under Clause 7.1(4)(e) and Clause 7.2 of the Lane Cove LEP. Whilst the Statement of Environmental Effects (SEE) for the project dated 1 July 2022 provides a comprehensive assessment of the environmental ground supporting approval of the DA, the environmental grounds justifying contravention of the development standard are contained (or replicated in parts) in this Clause 4.6 variation request. This Clause 4.6 variation request therefore forms the relevant written request required in satisfaction of Clause 4.6.

This Clause 4.6 variation request demonstrates that compliance with the minimum site area requirement for the St Leonards South Precinct is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to vary the development standard, and that it is in the public interest to justify contravention to the development standard.

This Clause 4.6 variation request demonstrates that, notwithstanding variation from the minimum site area development standard for Area 1.

- The variation still achieves the objectives of the development standard and the broader planning objectives for the St Leonards South Precinct in terms of the built form and open space outcome envisaged for Area 1;
- The proposed development is compliant with the minimum recreation area for Area 1, notwithstanding the variation from the minimum site area for Area 1. This is a notable achievement and positive environmental outcome on a reduced site area, given that under the St Leonards Masterplan a reasonable amount of the intended recreation area was to be provided on the 2 Marshall site. The development has been able to accommodate the required recreation areas in full, despite the variation from the minimum site area development standard, therefore meeting the objectives of the development standard;
- If the minimum site areas for Area 1, 2 and 4 are combined ($3,000\text{m}^2 + 2,000\text{m}^2 + 1,500\text{m}^2 = 6,000\text{m}^2$), the development site area exceeds that minimum requirement on an overall basis ($6,727\text{m}^2$);

- The proposed development exhibits high quality design and design excellence, has been the subject of numerous meetings/feedback from Council's design excellence panel even before the DA was formally lodged, and will not result in any adverse impacts to the surrounding area;
- The proposed development has demonstrated an appropriate response to the Land and Environment Court (L&E) Planning Principle for site isolation under *Karavellas v Sutherland Shire Council* and it is submitted that a sufficiently detailed and specific response to a Land and Environment Planning Principle is a relevant environmental planning ground to be considered under Clause 4.6. Various offers and negotiations have been undertaken to reasonably acquire the lot at 2 Marshall Avenue in accordance with the relevant L&E Court Planning Principle;
- The proposed development has been designed and scaled appropriately and has been designed to appropriately respond to 2 Marshall Avenue remaining as is, and in response to its likely future condition (if the existing dwelling is demolished and redeveloped);
- There are sufficient environmental planning grounds to justify contravening the development standard including substantive compliance with the St Leonards South Precinct Planning controls including height, FSR, affordable dwellings and recreation areas as well as substantive compliance with the ADG, notwithstanding the variation from the minimum site area development standard; and
- The variation is in the public interest because it is consistent with the objectives of the zone, the objectives for the St Leonards South Precinct and will assist with housing diversity and affordability within the Lane Cove LGA, including the delivery of required LEP affordable housing dwellings for Area 1. It would not be in the public interest to delay the delivery of these areas (*ad infinitum*) of the St Leonards South Precinct if strict compliance with the minimum site area development standard were enforced.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Lane Cove LEP.

It should be noted that the focus of this Clause 4.6 variation request is the proposed variation to the development standard itself, being clause 7.1(4)(e) and 7.2 of the Lane Cove LEP. This focus accords with the Land and Environment Court's decision in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118* at [24] where the Court noted that the focus of a Clause 4.6 request should be the aspect of the development that contravenes the development standard, not the development as a whole. However, given that the development standard relates to the site area of Area 1 but also the DA which relates to Area 1,2 and 4 (being the site of the total development), it is both relevant and necessary for this Clause 4.6 request to consider the total development in order to demonstrate that the site area, design and layout have been successfully and skilfully resolved so as to meet the objectives of the development standard, and the objectives of the R4 zone. In other words, while the focus of this Clause 4.6 request is on the site area of Area 1, it is obviously necessary and relevant to consider how the proposed development, and all of its component parts, work successfully within the site areas for which the DA applies.

2.0 Development Standard to be Varied

2.1 Relevant Development Standard

This clause 4.6 variation request justifies the variation of the development standard set out in Clause 7.1(4)(e) and 7.2 of the Lane Cove LEP, relating to minimum site area requirements, which states as follows:

7.1 Development on land in St Leonards South Area

(4) Development consent must not be granted under this clause unless the consent authority is satisfied that—

(a) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be studio or 1 bedroom dwellings, or both, and

(b) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be 2 bedroom dwellings, and

(c) at least 20% of the total number of dwellings (to the nearest whole number of dwellings) contained in the development will be 3 or more bedroom dwellings, and

(d) the development will provide appropriate building setbacks to facilitate communal open space between buildings, and

(e) the development will comply with the requirements of clause 7.2 in relation to the minimum site area of the development, and

(f) the development will, if applicable, comply with the requirements of clause 7.3 in relation to the minimum number of dwellings that will be used for the purposes of affordable housing, and

(g) the development will, if applicable, comply with the requirements of clause 7.4 in relation to the minimum area that will be used for the purposes of recreation areas and community facilities, and

(h) the development will, if applicable, comply with the requirements of clause 7.5 in relation to the provision of pedestrian links and roads.

7.2 Minimum site area requirements

For the purposes of clause 7.1(4)(e), the minimum site area for development on land to which clause 7.1 applies is the area specified in the table to this clause.

Column 1	Column 2
Area 1	3,000 square metres
Area 2	2,000 square metres
Area 3	1,600 square metres
Area 4	1,500 square metres

Clause 7.2 establishes an amalgamation pattern for the St Leonards South Precinct and outlines a minimum site area of 3,000m² for Area 1, which is illustrated in **Figure 1** below (with the Site boundary of the proposed DA shown in red). Under Clause 7.1(4)(e) development consent is not to be granted unless the consent authority is satisfied that the development will comply with the requirements of Clause 7.2 in relation to minimum site area. This development standard is not excluded from the operation of Clause 4.6 (Variation to Development Standards) via clause 4.6(8).

In that regard, it is noted that Clause 4.6 of the Lane Cove LEP excludes all other development standards related to the St Leonards South Precinct (i.e., height, FSR, recreation area, affordable dwelling etc). Minimum site area is the only development standard in the precinct able to use Clause 4.6. Although not specifically stated, it is assumed that this was a deliberate decision on behalf of the legislature when gazetting the St Leonards South LEP, that in some circumstances the required site amalgamations may not be possible or reasonably achievable and that a mechanism to vary the standard is required to ensure that the overall orderly and economic development of the precinct is not stymied or delayed. This is the case for the subject DA.



Figure 1 Required Amalgamation Pattern for the St Leonards South Precinct (Subject DA boundary in red)

Source: Lane Cove DCP

2.2 Is the Planning Control in Question a Development Standard

'Development Standards' are defined under Section 4(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) as follows:

"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

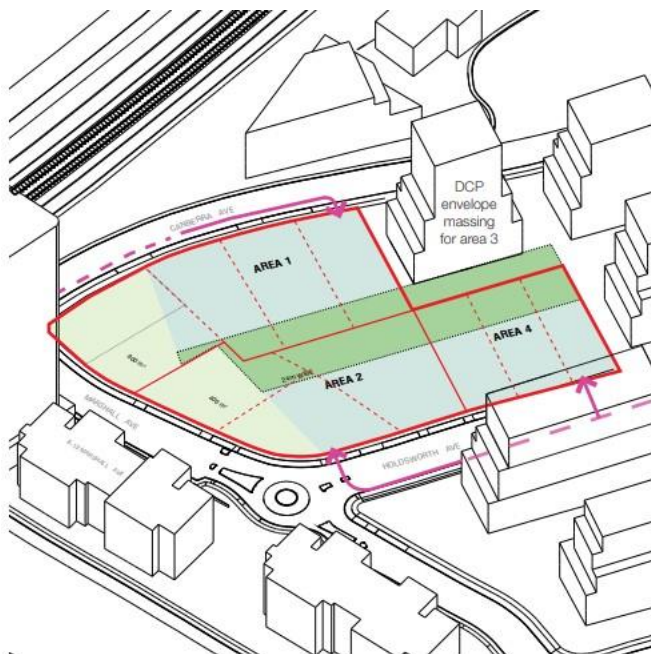
(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a "building or work,...

The additional provisions specified under Part 7 of the Lane Cove LEP, including the minimum site area requirements provide guidance to development within the St Leonards South Precinct and are clearly intended to be applied as a development standard. As such, a Clause 4.6 variation request is provided.

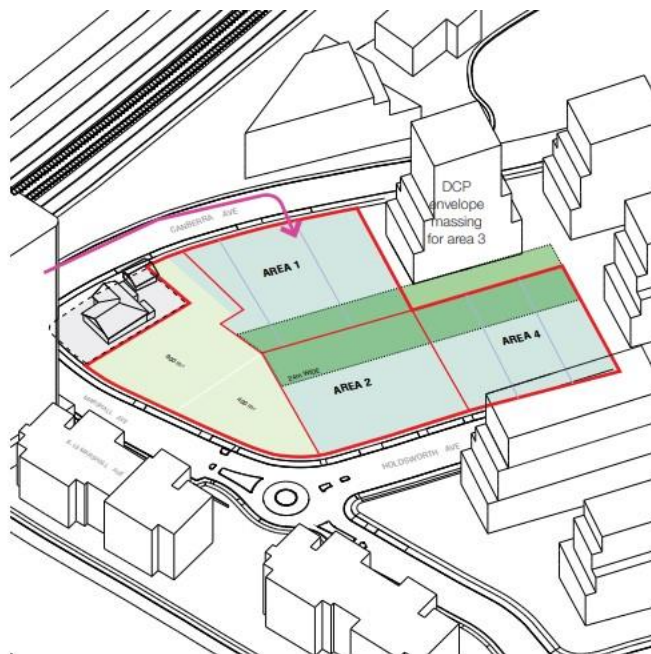
2.3 Extent of the Variation Sought

As detailed in **Section 2.1** above, an amalgamation pattern was identified for the St Leonards South Precinct and Area 1 was afforded a minimum site area of 3,000m² in accordance with Clause 7.2 of the Lane Cove LEP.

Due to the exclusion of 2 Marshall Avenue from the DA, the development proposes a site area of 2,736m² for Area 1, which is 264m² below the minimum lot size of 3,000m². This equates to an 8.8% variation to the development standard.



DCP & LMP
Original masterplan



Site Proposal
Reconfiguration whilst maintaining core elements

Figure 2 St Leonards South Masterplan Amalgamation Plan vs Proposed DA Amalgamation Plan

Source: Rothe Lowman

3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Lane Cove LEP provides that:

4.6 Exceptions to development standards

- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
- (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*

Further, clause 4.6(4)(a) of the Lane Cove LEP provides that:

- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
- (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827;
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009;
3. *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191;
4. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130;
5. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action);
6. *Baron Corporation Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 1552 (Baron Corporation);
7. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha);
8. *Turland v Wingecarribee Shire Council* [2018] NSWLEC 1511;
9. *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
10. *Moskovich v Waverley Council* [2016] NSWLEC 1015; and
11. *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [clause 4.6(3)(b)]; and
3. That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out [clause 4.6(4)].

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ("Initial Action") provides guidance in respect of the operation of Clause 4.6 subject to the clarification by the NSW Court of Appeal in *Rebel MH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] and [51] where the Court confirmed that properly construed, a consent authority has to be directly satisfied that an applicant's written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3). In other words, it is not enough for a clause 4.6 request to simply state that the necessary matters have been addressed, rather the consent authority of course needs to turn its mind to those matters and be satisfied that they have been addressed.

In *Initial Action* Chief Justice Preston considered the proper interpretation of clause 4.6 and found that:

- **Clause 4.6 does not require a proponent to show that the non-compliant development would have a neutral or beneficial test relative to a compliant development (at [87]);**
- **There is no requirement for a clause 4.6 request to show that the proposed development would have a 'better environmental planning outcome for the site' relative to a development that complies with the standard (at [88]); and**
- **One way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts (at [95(c)]).** That is, the absence of environmental harm is sufficient to show that compliance with the development standard is unreasonable or unnecessary.

(Our emphasis)

These comments of Chief Justice Preston are particularly pertinent in this case as this Clause 4.6 request shows that there are no adverse amenity or design impacts due to variation from the site amalgamation development standard.

The relevant matters contained in Clause 4.6 of the Lane Cove LEP, with respect to the specific minimum site area requirement (and objectives) for St Leonards South, are each addressed below, including with regard to these L&E Court decisions.

3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under Clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Lane Cove LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this Clause 4.6 variation request. The five methods outlined in *Wehbe* include:

- The objectives of the standard are achieved notwithstanding non-compliance with the standard (**First Method**).
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary (**Second Method**).
- The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable (**Third Method**).
- The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable (**Fourth Method**).
- The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone (**Fifth Method**).

Whilst the Court has held that there are at least five (5) different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (*Wehbe*), it is important to note that:

- The requirement is to demonstrate that compliance is unreasonable or unnecessary. It does not need to be shown that compliance is both unreasonable and unnecessary;
- *Wehbe* identifies five ways of demonstrating that compliance is unreasonable or unnecessary, but the Courts have held that this list is not exhaustive (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [22]);
- Equally, it is not necessary to identify more than one of the five *Wehbe* tests. “An applicant does not need to establish all of the ways. It may be sufficient to establish only one way” (*Initial Action* at [22]).

Based on this, of particular relevance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary, is the **First Method** in this instance.

3.1.1 The underlying objectives or purposes of the development standard

Importantly, Clause 7.2 does not contain any specific objectives to the development standard for site area. It might be assumed or inferred that the objective is to ensure that there is sufficiently large site area to be able to achieve appropriate development outcomes and associated communal spaces and landscaped areas, public places, residential amenity and the like. This might be inferred because the Standard is expressed in numerical terms, requiring a minimum size of site area “of the development” (cl7.1(4)(e)), plainly seeking to ensure that there is adequate site area for a development. In addition, Clause 7.1 contains the overarching objectives for the precinct, which is to promote, by providing building height and floor space incentives, residential development within St Leonards South that provides for:

- (a) Community facilities, open space, including communal open space, and high quality landscaped areas, and
- (b) Efficient pedestrian and traffic circulation, and
- (c) A mix of dwelling types in residential flat buildings, providing housing choice for different demographics, living needs and household budgets, including by providing affordable housing, and
- (d) The amalgamation of lots to prevent the fragmentation or isolation of land.

In the absence of express objectives of the minimum site area development standard, the proposed development is assessed against the overall objectives of development on land in the St Leonards South precinct below and having regard to the inferred objective that adequate site area be provided for “the development” (cl7.1(4)(e)).

3.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

Objective (a): to promote residential development that provides community facilities, open space, including communal open space, and high-quality landscaped areas,

High quality communal open space and high-quality landscaped areas achieved notwithstanding the minimum site area variation

Clause 7.4 of the Lane Cove LEP specifies minimum recreation area and community facility requirements for development on land within the St Leonards South Area. Area 1 and 2 are required to provide at least 900m² and 400m², respectively for the purposes of recreation areas. Because this is a large development which spans an area greater than Area 1 alone (namely Areas 1, 2 and 4), it has the ability to better achieve the same objective without needing to rely upon the site area of Area 1 alone.

Despite the variation to the minimum site area requirement for Area 1, the proposed development will still meet the minimum recreation area of 900m² in Area 1 and 400m² in Area 2, providing a total of 1,300m² of land for the purposes of recreational area. This land is positioned at the northern portion of the site and is intended to be dedicated as a pocket park to Council via a voluntary planning agreement (VPA). The recreation area will comprise of a children’s cycle track and obstacle loop, nature play, picnic area, deck and bleachers, artwork and wayfinding, and community planters, lawn area and seating.

In addition to this, the development comprises over 3,400m² of communal open space. This is proposed to be provided throughout the development in the green spine, the pool deck and amenity level, and rooftop terraces on each building.

With respect to the DA and when considering the proposed building on Area 1 in isolation, a high amenity response to the ADG recommended performance criteria is achieved notwithstanding the variation to the minimum site area requirements, as follows:

- In Area 1, 1,124.2m² (44% of the Applicant's Area 1 site) is provided for communal facilities, comprising 629.3m² (23% of the Applicant's Area 1 site) as outdoor communal open space areas and 584.9m² (21% of the Applicant's Area 1 site) as internal communal facilities. Whilst the ADG recommends 25% of the site area be provided for communal open space, the combination of indoor and outdoor space within Building 1 well exceeds the ADG recommended site area dedicated to communal facilities. The combination of indoor and outdoor communal facilities provides a choice and diversity of indoor and outdoor space for residents to use.
- The green spine, which is a key feature of the overall DA, is also a key feature of the St Leonards South Precinct. The green spine is a 24m wide shared communal open space between residential flat buildings. Ordinarily a residential flat building development would provide communal open space for its own use only. The green spines combine the communal open space of multiple residential flat buildings with each contributing to, and sharing in, a larger communal open space area (in this instance Area 1, 2 and 4). The shared communal open space for the overall DA is characterised by shared communal open space and significant landscaping (50% minimum deep soil).
- In addition, approx. 272.8m² communal roof terrace area is provided on Area 4 and approx. 412.1 m² communal roof terrace area on Area 2, adding to the diversity of amenity and ample communal open space available for the DA.
- The Applicant's Area 1 deep soil is 1,068.3m² (39%) of site area (well in excess of the ADG recommendation for 7% of site area), comprising a combination of the dedicated recreation area space and landscape setbacks of sufficient width.
- Further approximately 55% of the overall DA site is soft landscape, due to a combination of large public, private and elevated landscaping. This includes approximately 1,680m² dedicated to a central green spine communal area, and over 1300m² of public recreation area to be dedicated to Council as a pocket park. Over 50% of the green spine is unencumbered deep soil, as intended as the primary area of deep soil for each Area by the St Leonards Landscape Master Plan.

Thus, the proposed development has been designed accordingly with high-quality landscaped areas and a variety of recreational facilities, communal open space and deep soil zones, which are able to be achieved (both quantitatively and qualitatively) notwithstanding the variation from the Area 1 minimum lot size development standard.

Improved solar access to LEP Area 1 and Area 4 minimum recreation areas achieved through proposed development and variation to minimum site area development standard

Rothe Lowman have undertaken an assessment of the solar access received to the Area 1 (900m²) and Area 2 (400m²) planned recreation areas (total: 1,300m²) (**Appendix A**). As a comparison, Rothe Lowman have also undertaken the same analysis on the outline of the recreation area, if 2 Marshall Avenue had been integrated into Area 1.

This analysis demonstrates that the design for the new recreation areas results in an area of higher solar access than the St Leonards South planned recreation area location. Further, despite the variation to the minimum site area development standard (and hence adjusted location for the recreation area), the proposal results in no net loss of solar compared to what the St Leonards South masterplan (incorporating 2 Marshall Avenue) would have achieved.

The Rothe Lowman analysis shows that for at least three hours, more than 50% of the recreation area (1,300m²) receives solar access (as a comparison the planned recreation area locations under the St Leonards South masterplan are only able to achieve solar access to 50% of the recreation area for two hours (9am/10am)). The overall percentage of solar access achieved to the recreation areas across the day is improved under the Applicant's proposal, when compared to the St Leonards South masterplan.

Table 1 below is a summary showing the amount of recreation area at each of the key hourly intervals (June 21) receiving solar access in both square metres and a percentage of the overall recreation areas.

Table 1 Comparison of Area 1 + Area 2 recreation area solar access (Applicant's DA compared to St Leonards South Masterplan) (June 21)

APPLICANT'S PROPOSAL				ST LEONARDS SOUTH MASTERPLAN			
Time	Area of Park receiving solar access			Area of Park receiving solar access			
9am	795	sqm	61%	737	sqm	57%	
10am	639	sqm	49%	695	sqm	53%	
11am	684	sqm	53%	562	sqm	43%	
12pm	754	sqm	58%	427	sqm	33%	
1pm	689	sqm	53%	406	sqm	31%	
2pm	195	sqm	15%	243	sqm	19%	
3pm	23	sqm	2%	85	sqm	7%	
	540	sqm	42%	451	sqm	35%	

Area of Park Receiving 2 hrs of solar access

Park Size	1300	sqm
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Source: Rothe Lowman

Improved solar access to LEP Area 1 minimum recreation areas achieved through proposed development and variation to minimum site area development standard

Rothe Lowman have also undertaken an assessment of the solar access received to the Area 1 (900m²) planned recreation area, when considered in isolation (**Appendix B**). As a comparison, Rothe Lowman have also undertaken the same analysis on the outline of the recreation area for Area 1, if 2 Marshall Avenue had been integrated into Area 1 in the DA.

This analysis demonstrates that the design for the new recreation areas results in an area of higher solar access than the St Leonards South planned recreation area location. Further, despite the variation to the minimum site area development standard (and hence adjusted location for the recreation area), the proposal results in no net loss of solar compared to what the St Leonards South masterplan (incorporating 2 Marshall Avenue) would have achieved.

The Rothe Lowman analysis shows that for at least four hours, more than 50% of the recreation area (900m²) receives solar access (as a comparison the planned recreation area locations under the St Leonards South masterplan are only able to achieve solar access to 50% of the recreation area for two hours (9am/10am)). The overall percentage of solar access achieved to the Area recreation area across the day is improved under the Applicant's proposal, when compared to the St Leonards South masterplan.

Table 2 below is a summary showing the amount of Area 1 recreation area at each of the key hourly intervals (June 21) receiving solar access in both square metres and a percentage of the overall recreation areas.

Table 2 Comparison of Area 1 recreation area solar access (Applicant's DA compared to St Leonards South Masterplan) (June 21)

APPLICANT'S PROPOSAL		
Time	Area Of Park Receiving Solar Access on Area 1 Park (m2)	%
9am	588	65%
10am	553	61%
11am	449	50%
12pm	617	69%
1pm	677	75%
2pm	195	22%
3pm	0	0%
Average	440	49%

Area 1 Park Size	900
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ST LEONARD SOUTH MASTER PLAN		
Time	Area Of Park Receiving Solar Access on Area 1 Park (m2)	%
9am	562	62%
10am	602	67%
11am	295	33%
12pm	270	30%
1pm	392	43%
2pm	243	27%
3pm	85	9%
Average	350	39%

Source: Rothe Lowman

Objective (b): to promote residential development that provides efficient pedestrian and traffic circulation,

Despite the variation to the minimum site area requirement for Area 1, the proposed development comprises a consolidated basement for the DA, which has been largely facilitated by the opportunity of the Applicant developing a consolidation of Areas 1, 2 and 4. The consolidated basement carpark strategy results in a more positive outcome for the precinct and the DA site as it minimises the number of vehicular access points on the street from ten (DCP for Area 1, 2 and 4)) to one (proposed DA), thus providing opportunity for increased kerbside parking as well as improvements to the surrounding streetscape/landscape planting.

High quality landscaping and public domain works are proposed to the streetscape and open space to ensure an enjoyable pedestrian experience for all residents and visitors of the development. Additionally, the proposed development is well connected and integrated at the ground plane. A resident through site link is proposed in between Area 2 and 4, which will enhance permeability from the Holdsworth Avenue to the green spine. A public through site link is proposed on the northern end of the Area 1 land (on a portion of the Applicant's land) providing access from Canberra Avenue to the recreation area/ pocket park area, which will enhance permeability from Canberra Avenue to the planned recreation areas. Further the pocket park provides cross site connections between Canberra, Marshall and Holdsworth Avenue for ease of access for the broader public in the precinct.

Notwithstanding the proposed Area 1 minimum site area variation, the proposal represents a consolidated site of Area 1, 2 and 4. Vehicular access to the site is provided from Canberra Avenue as the proposed development comprises a shared four level basement across all three areas. The proposed consolidated basement strategy is a direct response to the provisions and objectives of the Lane Cove DCP, which encourages that ‘*where areas are consolidated, minimise vehicle access points.*’ Not only does this strategy assist in the rationalising of driveways and vehicular access points, it also enhances the streetscape through additional street tree planting. Therefore, the structure of the DA traffic planning, including variation to minimum site area for Area 1, leads to an improved traffic and pedestrian outcome.

Objective (c): to promote residential development that provides a mix of dwelling types in residential flat buildings, providing housing choice for different demographics, living needs and household budgets, including by providing affordable housing,

Despite the variation to the minimum site area requirement for Area 1, the proposed development seeks to provide diversity in household typology to meet the demographics of the area and assist with housing affordability.

Specifically, the unit mix for the development consists of at least 20% of each size dwelling and includes studio and 1-bedroom, 2-bedroom, and 3-bedroom apartments, which is in line with Clause 7.1(4) of the Lane Cove LEP. This mix is also demonstratable when considering the Area 1 apartment building alone, which includes 100 apartments across variety of typologies.

Additionally, Clause 7.3 of the Lane Cove LEP outlines affordable housing requirements, which specifies 14 dwellings for Area 1 and 7 dwellings for both Area 2 and 4. The proposed DA is compliant with this provision and comprises of a total of 28 affordable housing units. This requirement is also demonstratable when considering the Area 1 apartment building alone, with the required 14 affordable housing units able to be accommodated in Area 1, notwithstanding the variation to the minimum site area development standard (and hence reduced overall GFA in Building 1). As such, this objective is plainly met, and is arguably not directly related to site area in any event, but rather to dwelling design and typology.

Objective (d): to promote residential development that provides for the amalgamation of lots to prevent the fragmentation or isolation of land.

The first point to note is that the proponent has provided for the amalgamation of lots by managing to secure and amalgamate 10 out of the 11 sites within Areas 1, 2 and 4. The proponent has only been unable to secure, on a reasonable basis, one remaining property, being 2 Marshall Avenue, located on the north-eastern corner of Area 1. Notwithstanding, the proponent has managed to secure and incorporate 10 sites having a combined total area of 6,727m², across Areas 1, 2 and 4 (where the combined minimum site area required under clause 7.2 of the Lane Cove LEP is less, at 6500m²). Lot amalgamation has therefore been very successfully achieved. Focussing on Area 1 alone, four out of the five Area 1 lots have been amalgamated.

The amalgamation plan for St Leonards South includes 2 Marshall Avenue as part of Area 1, however, the proponent is unable to reasonably acquire the allotment due to rejection of purchase offers made to the landowner. The applicant's demonstration of an adequate response to the Land and Environment Court contained within *Karavellas v Sutherland Shire Council* is a relevant matter for consideration when addressing this objective. The planning principle contained within *Karavellas* explicitly provides for the “fragmentation” of land in certain circumstances such as these. The fact that one objective of clause 7.1 refers to “promoting” amalgamation of lots (which has plainly occurred, as detailed above) does not prevent the application of the planning principle on site isolation. In fact, the planning principle contained in *Karavellas* explicitly outlines circumstances in which such an objective does not need to be met and, most importantly, all of the requirements in *Karavellas* have been met in this case.

Despite this, the proposed development has been designed and scaled appropriately and will not result in unreasonable isolation of the adjoining site to the north at 2 Marshall Avenue, in that its orderly and economic development can still be achieved despite not being included in the proposed scheme. Further discussion on site isolation is outlined in **Section 3.2.1** of this Clause 4.6 request

Further, the proposal provides different opportunities relating to vehicular access, green spine planning, communal open space, pedestrian linkages, basement design and the like as a result of the Applicant acquiring and developing across three separate areas – Areas 1, 2 and 4. Therefore, the amalgamation of lots objective of St Leonards South is achieved, notwithstanding that 2 Marshall Avenue is not part of the development scheme.

Ultimately, it is submitted that the development is “consistent with” the objective to prevent site isolation in circumstances where the proponent has documented that it has used reasonable endeavours to purchase all of the

land within Area 1, so as to avoid fragmentation, but has not been reasonably able to secure only one of those properties, despite having adhered to the processes called for by the Land and Environment Court's Planning Principle (in terms of making reasonable offers at an early stage and indeed before the development application had been lodged). The Courts have frequently noted that a requirement for consistency with a planning or zoning objective requires *compatibility* (*Friends of Malua Bay Inc v Perkins* (2014) 203 LGERA 14 at [42]). A proposal that has been prepared pursuant to the Karavellas planning principle on isolation of land is plainly compatible with this objective.

We also note that, as found by Justice Preston in *Initial Action*, compliance with the development standard will prima facie be unnecessary if it can be shown that there is an absence of environmental harm/adverse amenity impacts for the proposed development. The proposed variation does not cause environmental harm/adverse amenity impacts to 2 Marshall Avenue (refer **Section 3.2.1** below) and does not result in adverse impacts or amenity concerns for properties to the south, future residents within the overall DA, nor for future residents of Building 1 (Area 1). The proposal provides an improved environmental outcome for solar access to the dedicated recreation areas for Area 1 and Area 2, when compared to the solar access achieved for the adopted Lane Cove St Leonards South Masterplan locations.

3.1.3 Summary

In summary, notwithstanding the variation from the minimum site area development standard, the proposed development meets the overall objectives of the St Leonards South Precinct as it:

- Provides for an abundance of community facilities and open space, including recreation areas, landscaping and communal open space that are of a high-quality standard when considering Area 1 alone and when considering the overall development contribution across Areas 1, 2 and 4. To remove Area 1 from the development (due to not meeting the minimum site area requirements) would substantively undermine the proposal's contribution to Council's planned public open space network.
- Provides improved solar access to the planned recreation spaces when compared to the St Leonards South Masterplan recreation area layout (which included recreation area on 2 Marshall Avenue). An improved solar access outcome to the planned open space occurs when considering Area 1 and 2 combined and when considering Area 1 in isolation, notwithstanding the adjustment to the location of the open space and the variation to the minimum site area requirements.
- Enhances pedestrian access and traffic circulation throughout the development in a safe manner and reduces the number of vehicle cross overs in the St Leonards South precinct through an amalgamated development proposition (Area 1, 2 and 4);
- Assists with housing diversity and affordability providing much needed additional dwellings on Area 1, which also contributes to the overall contribution to housing supply in the precinct. The proposed Area 1 building provides this housing supply while achieving substantive compliance with the St Leonards South Precinct Planning controls including height, FSR, affordable dwellings and recreation areas. The Area 1 building also achieves this housing supply while achieving substantive compliance with the ADG (building separation, suitable solar access given site orientation and existing overshadowing of the site from buildings to the north, cross ventilation, deep soil zones, communal open space). This substantive compliance is achieved notwithstanding the variation from the minimum site area development standard.
- Appropriately responds to the neighbouring site to the north at 2 Marshall Avenue and does not result in isolation that impedes the future orderly development of that land.
- Appropriately amalgamates multiple areas of St Leonards South – Area 1, 2 and 4 – for better planning and design benefits.
- Has in fact managed to successfully amalgamate and incorporate four out of the five lots in Area 1, and 10 out of the 11 lots across Areas 1, 2 and 4.

Whilst the proposed development does meet the overall objectives of the St Leonards South Precinct, it is important to remember that in this case amalgamation was not feasible and the requirement of the planning principle relating to site isolation have been met. It is important that compliance with the objectives are considered in the context that all requirements in *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 have been met and that it is on this basis that 2 Marshall Ave is not included within the development footprint.

Lastly, it is important to remember that in *Karavellas*, the Court expressly held as follows (at [20]:

*"I find that in answering the first question the amalgamation of the sites is not reasonably feasible. I do not accept council's submission that as the parties are only \$50,000 apart, amalgamation is feasible. **Inherent in the concept of whether amalgamation is feasible is whether it is also reasonable.** While it appears feasible to amalgamate the*

sites, it is on the basis that Mr Khoury's counter offer is accepted. **I do not see it as the role of the Court to enter into negotiations on a final purchase price but rather to be satisfied that a reasonable offer has been made."**

In that context, the development plainly is consistent with (i.e., compatible with) the objectives for the site area development standard for Area 1.

3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the Lane Cove LEP requires the departure from the development standard to be justified by demonstrating:

That there are sufficient environmental planning grounds to justify contravening the development standard.

The environmental planning ground relied on in the written request under Clause 4.6 must be sufficient to justify contravening the development standard. The focus is on the aspect of the development that contravenes the development standard, not the development as a whole. Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action v Woollahra Municipal Council* [24] and *Turland V Wingecarribee Shire Council* [42]). In *Initial Action* the Court also confirmed that it is not necessary to show that there would be a better environmental planning outcome – this is not the test. In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site, and whether they are 'sufficient'.

There are sufficient environmental planning grounds to justify a flexible approach to the application of the minimum site area requirements as it applies to Area 1. In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. The applicable circumstances that relate to the site are discussed below.

3.2.1 Ground 1: The development meets and addresses the relevant Land and Environment Court Planning Principle for Site Isolation

2 Marshall Avenue, St Leonards does not form part of the site, however, it is identified as being located within Area 1 of the precinct under the St Leonards South Landscape Masterplan. The proponent has made multiple attempts to acquire the adjoining property, although, the adjoining landowner of 2 Marshall Avenue is unwilling to sell at the terms offered.

A summary of the relevant Land Environment Court Planning Principles in relation to site isolation and the assessment of the proposed development against these has been provided below, as it applies to the DA and Area 1.

Karavellas v Sutherland Shire Council [2004] NSWLEC 251

The Planning Principle which is contained within *Karavellas v Sutherland Shire Council* relates to the role of the L&E Court in assessing site isolation. Specifically, two questions are required to be considered when assessing whether it is reasonable to isolate a site through redevelopment, which is discussed below.

Question 1 – Is amalgamation of the site feasible?

The Principle to be applied in answering Question 1 is set out in *Melissa Grech v Auburn Council* [2004] NSWLEC 40, in which Brown C stated the following:

"Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application.

Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of the properties. These details should include offers to the owner of the isolated property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, is to be based on at least one recent independent

valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.

Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s 79C of the Environmental Planning and Assessment Act 1979."

While several documented attempts have been made to acquire the land, the current landowner sought 2-3 times the valuation amount of any of the three independent valuations obtained by SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd. **Appendix C** provides the following valuation reports which were obtained from leading consultants:

- 1) M3 report dated June 2021 and July 2021;
- 2) JLL reported dated July 2021;
- 3) Charter Keck Kramer report dated August 2021;

Several attempts to acquire the property with genuine offers over the course of the past year, are briefly documented as follows:

- 29 April 2021: Engagement of buyer's agent for 2 Marshall Avenue and numerous verbal negotiations and offers made.
- 3 May 2021: Email correspondence from owner of 2 Marshall Avenue requesting sale price triple the market value.
- May 2021: SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd engaged three independent valuations by JLL, Charter Keck Cramer, and M3.
- 20 August 2021: SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd made another offer 4.6% above the market value.
- 28 August 2021: Landowner of 2 Marshall Avenue rejected the offer and requested a sale price two times the market value
- 18 December 2021: SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd made final offer 6% above the market value.
- 4 January 2021: Landowner of 2 Marshall Avenue rejects final offer.

Although initial offers were made prior to obtaining the independent valuations, these initial offers were in line with the subsequent valuations and are sufficient for the purposes of showing that 2 Marshall Avenue cannot be amalgamated (*Karavellas*). In *Ben Boyd Constructions Pty Ltd v Willoughby City Council* [2006] NSWLEC 794, negotiations took place between the parties and commenced prior to the DA being lodged but some of the initial offers were made before a valuation was obtained. Despite this, the Court found that although the developer's initial offer was not based on an independent valuation, it was consistent with later valuations obtained and as such had been sufficient (with the benefit of hindsight).

In this case (adopting the approach in *Grech*, which was affirmed in *Karavellas*):

- **Negotiations between the owners of the properties commenced at an early stage**, and well before SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd lodged the DA;
- **Offers were made on at least one recent independent valuation (in this case offers were made based on three independent valuations);**
- When considering the level of negotiation, **the consent authority should remember that SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd appointed a buyers agent, obtained three independent valuations and offered more than any of these valuations.** The owner of 2 Marshall Ave consistently stated (including in writing) that they would never accept these offers and consistently demanded a purchase price of 2-3 times the amount of any of the independent valuations (circa \$3 million), even though they did not have any valuation to substantiate this claim;
- **Inherent in the concept of whether amalgamation is feasible is whether it is also reasonable.** Furthermore, amalgamation is not feasible simply because the parties are not too far apart in their negotiations. In *Karavellas*, the Court explicitly stated that simply because the parties were only \$50,000 apart in negotiations, this did not mean that amalgamation was feasible;

- **It is not the role of the consent authority (whether Court or Planning Panel or Council) to enter into negotiations regarding a final sale price.** Rather, the consent authority simply needs to be satisfied that a reasonable offer has been made (based on the history of negotiations). An offer supported by a valuation will prima facie be reasonable, and it would be beyond, and directly contrary to, the Planning Principle, if a consent authority were to insist that a proponent offer or pay more than the amounts advice(s) by their professional valuer(s). To do so would not be 'reasonable' and is expressly what the Court cautioned against in Karavellas at [20].

Taking the above into consideration, amalgamation of 2 Marshall Ave is clearly not feasible in this case.

Question 2 – Can the isolated site be appropriately developed?

In assessing whether it is appropriate to isolate the adjoining site, we have considered whether the site can be appropriately redeveloped in accordance with the relevant planning controls.

The Planning Principle to be applied in answering Question 2 is set out in *Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189*, in which Tour C stated:

"The key principle is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls would be required, such as non-compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity.

To assist in this assessment, an envelope for the isolated site may be prepared which indicates height, setbacks, resultant site coverage (both building and basement). This should be schematic but of sufficient detail to understand the relationship between the subject application and the isolated site and the likely impacts the developments will have on each other, particularly solar access and privacy impacts for residential development and the traffic impacts of separate driveways if the development is on a main road.

The subject application may need to be amended, such as by a further setback than the minimum in the planning controls, or the development potential of both sites reduced to enable reasonable development of the isolated site to occur while maintaining the amenity of both developments."

The principle here, as set out by this case, centres around the ability to develop the adjoining site.

The project architect, Rothe Lowman have undertaken an analysis to examine how the property could be developed in the future having regard to the Apartment Design Guide (ADG), design principles on the Applicant's proposal and potential development at 2 Marshall Avenue (**Appendix D**).

There are a number of permissible options for future development on the adjoining site, which include:

- Retaining the existing 180msq dwelling house;
- Redevelopment of the site to deliver a dwelling house of approximately 240msq over 2 floors;
- Multi dwelling housing. Whilst this would require a variation to the DCP minimum lot size of 1,100m², Rothe Lowman have prepared a multi dwelling housing option responsive to site constraints and setbacks;
- A childcare centre;
- Bed and breakfast accommodation;
- A group home using SEPP (Housing) 2021 and complying with the SEPP minimum site area of 450m²;
- A boarding house using SEPP (Housing) 2021. This would require a Clause 4.6 variation to the SEPP minimum lot size of 800m² for boarding house. However, Rothe Lowman have prepared a boarding house responsive to site constraints and setbacks. It is noted that SEPP development standards are capable of being varied under Clause 4.6 of Lane Cove LEP which refers to (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this **or any other environmental planning instrument (our emphasis).***
- Development involving four (4) neighbourhood shops;
- Shop top housing. Whilst this would require a variation to the DCP minimum lot size of 1,500m², Rothe Lowman have prepared a shop top housing option responsive to site constraints and setbacks;
- A hotel. Whilst this would require a variation to the DCP minimum lot size of 2,000², Rothe Lowman have prepared a hotel option, responsive to site constraints and setbacks;

- Residential flat building. Whilst this would require a variation to the DCP minimum lot size of 1,500m², Rothe Lowman have prepared a residential flat building option responsive to site constraints and setbacks; and
- Forming part of the St Leonards South open space network as recommended under the St Leonards South Landscape Masterplan.

In *Cornerstone*, the Court explicitly stated that part of the test in the second limb is as follows: *“If variations to the planning controls would be required, such as non-compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity.”* This clearly shows that the development of 2 Marshall Ave can be development which does not fully comply with the planning controls.

“whilst the schematic design does not meet a number of numerical requirements in the DCP... It is reasonably apparent that as an isolated site its development potential may not be as great as a larger site, but a satisfactory outcome is possible.”

In *Vanovac Tuon Architects Pty Ltd v Ku-ring-gai Council* [2016] NSWLEC 1558, the Court considered a circumstance where negotiations to purchase a site had failed and held the following:

*“It does not follow that simply because negotiations with the owner of an isolated site have not been successful that any development that may leave a site isolated must be refused. In my view, **it would be unreasonable to withhold an approval, even if it results in a site that cannot be developed to its full potential if all reasonable attempts have been made to address the potential isolation issue.**”*

This approach was affirmed in *In Hamdan Co Group Pty Ltd v Canterbury-Bankstown Council* [2018] NSWLEC 1255, where the Court accepted the applicant’s argument that *“it should not be required for the applicant to ensure that adjoining owners can redevelop their site to the highest and best use of an RFB when those owners do not agree to sell their site to the applicant at a market rate to create a sufficiently wide site to enable an RFB redevelopment over both properties.”*

These cases clearly demonstrate that potential redevelopment options for 2 Marshall Ave can consider developments which do not fully comply with all controls. The Rothe Lowman development analysis shows that there are a wide range of options which may be considered.

Perhaps most notably, in the very recent decision of *Statewide Planning Pty Ltd v Canterbury-Bankstown Council* [2021] NSWLEC 1210, an isolated site was an R4 zoned parcel. The Court accepted the evidence of the applicant’s expert town planner (at [92]-[93]) who opined that *“not all development needs to be high rise or built to the maximum allowable FSR or height in order to achieve the R4 zone objective of providing “a variety of housing types within a high-density residential environment” and on that basis held that “this does not necessarily make it an unreasonable development option accepting that it is a constrained site”.*

In *Statewide*, the applicant’s indicative schematic designs demonstrated that the neighbouring site could achieve an independent redevelopment, notwithstanding the key proposed redevelopment scenario was well below the maximum permissible planning controls achieving only 38% of the permissible FSR (at [90], [93]). The Senior Commissioner of the Land and Environment Court agreed that this was a reasonable outcome in the circumstances.

In the present circumstances, it is clear from the range of permissible uses in the R4 High Density zone and the indicative development forms prepared by Rothe Lowman, that for 2 Marshall Avenue there are a range of orderly and economic development options which could be pursued. It is apparent that the site is capable of redevelopment in a number of options and is not being left behind as undevelopable or underdeveloped.

Whilst some of the development options require variation to DCP minimum lot size controls, such variations could be more readily achieved, in that DCP controls are required under the EP&A Act to be applied flexibly and that DCPs variations also don’t require the more extensive documentation/legally nuanced justification required by Clause 4.6 variations.

The boarding house option requires a variation to the SEPP (Housing) minimum lot size of 800m². Variations to SEPP development standards are lawful under Clause 4.6 and a variation of 113m² is not a significant variation (10x13m). This variation is one justified by the Rothe Lowman development options, which demonstrate a boarding house design capable of being accommodated on 2 Marshall Avenue with suitable setbacks.

The proposal has therefore demonstrated that the isolated site can be appropriately redeveloped, to the level of architectural detail required of the Planning Principle and demonstrating that a number of development options are possible and available to the owner of the land.

Response to 2 Marshall Avenue

The masterplan documents for St Leonards South show the Area 1 masterplan building extending into 2 Marshall Avenue, and hence no setback to the 2 Marshall property boundary was required as 2 Marshall Avenue was part of the overall Area 1 development site. However, given that 2 Marshall Avenue has not been acquired for incorporation into the development site, an appropriate setback has needed to be derived in the current DA.

Permissible land uses on 2 Marshall Avenue include a range of uses including dwelling house, childcare centre, multi dwelling housing, bed and breakfast accommodation, childcare centre, group home, neighbourhood shops, shop top housing, residential flat building, hotel, and boarding house. It is noted that the St Leonards South masterplan ultimately foresaw most of 2 Marshall Avenue forming part of the planned recreation areas/pocket park. With this in mind, the appropriate setback to 2 Marshall Avenue needs to be considered in terms of the range of potential uses.

The proposed DA has been designed and scaled appropriately with a six-metre setback to the site at 2 Marshall Avenue. Any future residential redevelopment of 2 Marshall Avenue will be of modest scale (the site is too small to access the incentive height and FSR controls for St Leonards South) and hence is subject to a LEP 9.5m height limit. Therefore, when considering setbacks between the Applicant's site and 2 Marshall Avenue, it is appropriate to utilise the ADG design guidance developments for development up to 12m (as 2 Marshall Avenue if retained or redeveloped will remain at this lower scale). This ADG guidance requires a 12-metre building separation in such instances.

It is noted that because the existing dwelling at 2 Marshall Avenue is setback over 12 metres from its boundary, the required ADG separation distance is met, and the Applicant's proposal could on paper adopt a zero setback to the 2 Marshall Avenue boundary. However, a larger setback has been adopted for the Applicant's proposal, in recognition of 2 Marshall Avenue's existing amenity and its future redevelopment potential. The ADG also specifies that where a development adjoins a lower density zone an additional three metre setback could be applied to address interface issues. In this instance, 2 Marshall Avenue is not an adjoining lower density zone (it is zoned R4 High density), though albeit a lower density dwelling is located on the R4 zoned site. However, using this ADG provision as a 'guide' to determine an appropriate setback from the boundary, a setback of three metres could be applied to the Applicant's development site, so a total of 15 metre separation would be achieved to the existing dwelling.

Alternatively, should 2 Marshall Avenue become open space in the future, there are comparable setbacks written into the St Leonards South section of the DCP, with a six-metre setback to proposed local park and pedestrian links adjacent to Area 21.

Therefore, the proposal has adopted a six-metre setback to the 2 Marshall Avenue boundary as appropriate in either situation, whether the site remains a dwelling, is redeveloped to 9.5m, or if the site become a pocket park in the future (noting that 0-3m would be the ADG interpreted minimum). It is also reiterated that under the St Leonards South Masterplan, the Council reference scheme sited residential flat buildings that extended into 2 Marshall Avenue and fronted the planned pocket park. Therefore, the six-metre proposed setback provides a more ample setback response to Marshall Avenue in the eventuality of it becoming future open space. The architectural plans have also responded to the site interface with appropriate outlook and privacy in the event of 2 Marshall Avenue being redeveloped.

3.2.2 Ground 2: Compliance with the St Leonards South Landscape Masterplan

The proposed development (and specifically the Area 1 building) (notwithstanding the minimum site area variation), is compliant with the St Leonards South Landscape Masterplan and Part C8 of the Lane Cove Development Control Plan.

Specifically, the proposed DA has been designed in accordance with the built form and density intent for the St Leonards South precinct and proposes three residential flat buildings of an appropriate height and scale, along with an abundance of recreational areas, green spine, deep soil and communal open space.

Further, the Area 1 building specifically has been designed in accordance with the built form and density intent for Area 1 and proposes a residential flat building of an appropriate height and scale (LEP compliant), along with a compliant recreational area, and an abundance of landscape opportunities and communal open spaces.

Despite the minor variation with the minimum site area for Area 1, the proposed development will still comply with the minimum recreation area of 900m² for Area 1. This is a notable achievement and positive environmental outcome on a reduced site area, given that under the St Leonards Masterplan a notable amount of the recreation area was intended to be provided on the 2 Marshall Avenue site itself. The DA has been able to accommodate the required recreation areas, despite the variation from the minimum site area development standard. The proposed development will dedicate a pocket park to Council and will contribute to the open space network within St Leonards (including a public

connection through the Applicant's land within Area 1 to Canberra Avenue), while also providing a high-quality space at the gateway to the precinct from the St Leonards town centre.

3.2.3 Consistency with the objects of the Environmental Planning and Assessment Act 1979

In *Initial Action*, the Court stated that the phrase “environmental planning grounds” is not defined but would refer to grounds that relate to the subject matter, scope and purpose of the EP&A Act, including the objects in Section 1.3 of the Act. While this does not necessarily require that the proposed development should be consistent with the objects of the Act, nevertheless, **Table 3** considers how the proposed variation is consistent with each object, notwithstanding the proposed variation of the minimum site area development standard.

Table 3 Assessment of proposed development against the objects of the EP&A Act

Objective	Comment
<i>(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.</i>	The proposed development on 2,736m ² of Area 1 land will still promote the economic and social welfare of the community through the introduction of a tangible improvement in the building form in the area that will respond appropriately to the character of St Leonards while delivering high quality residential land use and open space in the Lane Cove LGA. The proposed building located on Area 1 is able to accommodate planned dwellings, including affordable dwellings, at the height and density envisaged within the precinct/LEP height and FSR standards, notwithstanding the variation from the minimum site area development standard. The proposed development is able to accommodate planned recreation areas/open space, pocket parks, green spines and communal open spaces, notwithstanding the variation from the development standard.
<i>(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment.</i>	The proposed development and the proposed building proposed on a reduced Area 1 site, will facilitate ecologically sustainable development by allowing an appropriate development on a master planned site and in a location that will not have any negative impact on environmental and social consideration and will support the rejuvenation of St Leonards South. The future inclusion of 2 Marshall Avenue into the St Leonards Precinct pocket park system is not impeded by the proposal.
<i>(c) to promote the orderly and economic use and development of land.</i>	<p>The site, including Area 1, is significantly underutilised and is occupied by low density residential. The site is strategically located within St Leonards South and is in close proximity to existing heavy rail and the future Metro Station.</p> <p>The proposed development delivers 232 apartments and will therefore contribute to the housing market within St Leonards in accordance with the future vision set out for the precinct. Area 1 is an integral component of that contribution and accommodates 100 planned dwellings.</p> <p>The orderly and economic development of the Area 1 land is able to be achieved, notwithstanding the minimum site area variation. In particular, to delay delivery of additional homes, in a precinct that has been master planned over a number of years would not</p>

	<p>represent the orderly and economic development of land, and hence the variation to the minimum site area is warranted in this instance. The orderly and economic development and built form response to 2 Marshall Avenue remaining in situ or being redeveloped, is also addressed at the built form discussion at Section 3.2.1 and Appendix D.</p>
<p><i>(d) to promote the delivery and maintenance of affordable housing.</i></p>	<p>The development of a reduced Area 1 site will contribute towards the provision of more housing supply within St Leonards, thus contributing towards meeting the demand for housing within the area. If compliance with the minimum site area development standard was required, it would be an unknown timeframe under which the development could proceed, including the affordable dwellings required to be provided. The proposal is able to provide the required LEP affordable dwellings, notwithstanding, the development being on a reduced site area (and hence reduced overall GFA in the DA).</p>
<p><i>(e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.</i></p>	<p>The development of Area 1 (with variation to minimum site area) will have no impact on threatened species or ecological communities.</p>
<p><i>(f) to promote the sustainable management of built and cultural heritage (including Aboriginal Cultural Heritage),</i></p>	<p>Area 1 does not contain buildings or elements of historic or cultural significance. The proposed development, inclusive of the variation to the site area, has been designed with reference to Connecting to Country principles.</p>
<p><i>(g) to promote good design and amenity of the built environment,</i></p>	<p>The proposed development, inclusive of the Area 1 variation to minimum site area, has been subject to extensive consultation with Lane Council and the Design Excellence Panel and therefore, the proposed development of Area 1 has been designed to directly respond to feedback and provide good design.</p> <p>The proposed development will particularly receive a high level of amenity through the abundance of landscaping, communal open space and outlook provided. The variation to the minimum site area does not undermine the built form quality of the Area 1 development, and also does not affect the future development or existing amenity of 2 Marshall Avenue, as per the site isolation response discussion at Section 3.2.1 and Appendix D.</p>
<p><i>(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,</i></p>	<p>This development of Area 1, inclusive of the variation to minimum site area will comply with all relevant BCA codes and will promote the health and safety of occupants.</p>
<p><i>(i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State.</i></p>	<p>This object is not relevant to this proposed variation. Council is required to publish a public register of approved Clause 4.6 variations in their LGA.</p>
<p><i>(j) to provide increased opportunity for community participation in environmental planning and assessment.</i></p>	<p>The proposed development, inclusive of this Clause 4.6 Variation Request for Area 1 has been publicly notified in accordance with the Council requirements.</p>

3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

3.3.1 Consistency with objectives of the development standard

The minimum site area requirement under Clause 7.2 does not contain any specific objectives, however, it is noted that the proposed development is consistent with the objectives of the St Leonards South precinct under Clause 7.1, for the reasons discussed in **Section 3.1.2** of this report.

3.3.2 Consistency with objectives of the zone

The proposed development and variation from the development standard proposed for Area 1 is consistent with the objectives of the R4 High Density Residential Zone, as demonstrated in **Table 4** below.

Table 4 Assessment of consistency with R4 High Density Residential zone objectives

Objective	Comment
<i>To provide for the housing needs of the community within a high density residential environment.</i>	The proposed development, and particularly the Area 1 proposed building, has had regard to the housing needs for the community through providing a range of dwellings of different sizes, including affordable housing dwellings with a high level of residential amenity. The proposed DA has additional dwellings through incorporating Area 1 (on a reduced site area), thereby providing a community benefit in the form of housing supply, recognising the growing population and changing demographics, whilst providing no adverse environmental impacts and. The proposed Area 1 building provides the required LEP affordable dwellings and much needed market housing, notwithstanding, the development being on a reduced site area (and hence reduced overall GFA for the DA).
<i>To provide a variety of housing types within a high density residential environment.</i>	The proposed development provides three new residential flat buildings that will assist with housing diversity and supply. Additional dwelling supply is able to be accommodated, as Area 1 has been proposed for development, notwithstanding its variation from the minimum site area requirements. The Area 1 building will provide a variety of different size apartments and townhouses that also include affordable housing units, notwithstanding the variation to minimum site area. The proposal, notwithstanding the variation to minimum site area, provides a high-quality residential environment.
<i>To enable other land uses that provide facilities or services to meet the day to day needs of residents</i>	The site is within walking distance of St Leonards Transport Interchange (heavy rail and buses) and the future metro station. Therefore, the proposed development, and the Area 1 building is within proximity of several services and facilities, which provide and service the day to day needs of the residents. The development of Area 1 is still capable of providing the LEP required recreation area/facility (900m ²) for residents to enjoy, notwithstanding the variation from the minimum site area. This is a notable achievement and positive environmental outcome on a reduced site area, given that under the St Leonards Masterplan a reasonable amount of the recreation area was provided

	on the 2 Marshall Avenue land. The development has been able to accommodate the required recreation areas, despite the variation from the minimum site area development standard.
<i>To provide for a high concentration of housing with good access to transport, services and facilities.</i>	The proposed development, and in particular the Area 1 proposed building, comprises apartments and town homes within an area that is highly connected and accessible with an abundance of transport services available. Area 1 is the St Leonards South site closest to the St Leonards centre and station and is therefore optimally located within walking distance of these services. To delay delivery of additional homes, in a precinct that has been master planned over a number of years would not assist in the delivery of high-quality housing supply, and hence the variation to the minimum site area is warranted in this instance
<i>To ensure that the existing amenity of residences in the neighbourhood is respected.</i>	The proposed Area 1 building has been appropriately designed and scaled and will not have any adverse amenity impacts to the surrounding area. In particular an appropriate built form interface has been developed with 2 Marshall Avenue, as outlined at Section 3.2.1 and Appendix D .
<i>To avoid the isolation of sites resulting from site amalgamation.</i>	As mentioned above in Section 3.2.1 , the proposed development, despite not incorporating 2 Marshall Avenue, has appropriately responded to the existing and future condition of 2 Marshall Avenue not being part of the development scheme. The building on Area 1 has been designed accordingly to accommodate the future development options as discussed and outlined at Section 3.2.1 .
<i>To ensure that landscaping is maintained and enhanced as a major element in the residential environment.</i>	The proposed development comprises high quality landscape elements throughout the green spine, pocket park, rooftop terraces, amenities level and setbacks. The variation from the minimum development standard does not affect the Area 1 building nor the DA's ability to meet high quality landscape objectives.

3.3.3 Overall public interest/conclusion on Clause 4.6(4)(a)(ii)

The DA and Area 1 building provides for new residential housing for new and existing residents of the Lane Cove LGA within an area that is highly connected and accessible with an abundance of transport services. Housing stock, diversity and product availability is a key issue in the current property market, which this proposal seeks to address. Area 1 is the St Leonards South site closest to the St Leonards centre and station. Its development, notwithstanding the variation to the minimum site area (and hence a reduced overall permissible GFA on the Applicant's land), will deliver high quality dwellings, landscape open space, a compliant recreational pocket park (900m²) and a compliant number of affordable dwellings. This proposal, inclusive of the minimum site area variation, is consistent with the objectives as set out in the Greater Sydney Region Plan. The proposed development will facilitate various dwelling types and sizes and provides variety to suit different family structures and demographics.

Additionally, the DA will provide a pocket park at the north of the site which will be dedicated for public open space. This will contribute to the open space network within the Lane Cove LGA and will comprise of open lawn area, community garden, fitness activity, play equipment, etc. Importantly, the compliant pocket park for Area 1 (900m²) connects into an augments/add to the compliant pocket park for Area 2 (400m²). The development of Area 1, notwithstanding the variation to minimum site area, is therefore integral to a coherent, high amenity landscape public open space network. The exclusion of Area 1 from the development (due to non-compliance with minimum site area) would undermine the strategic intent for Council's planned open space network and hence would not be in the public interest.

Further, to delay delivery of additional homes, affordable dwellings and recreation areas (open space), in a precinct that has been master planned over a number of years would not be in the public interest, and hence the variation to the minimum site area is warranted in this instance. If compliance with the minimum site area development standard was required, it would be an unknown timeframe under which the development could proceed, including the identified affordable dwellings required by the LEP.

Despite the minimum site area variation for Area 1, the proposed development will be in the public interest as it provides high quality housing and LEP compliant areas of open space within a strategic location to support the growing population. Further, the development will provide local construction and development jobs for the duration of the development, and more broadly into the future, the ongoing support, growth and economic viability of St Leonards.

3.4 Other Matters for Consideration

Under clause 4.6(5), in deciding whether to grant concurrence, the Director-General must consider the following matters:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The variation of the minimum site area requirement does not raise any matter of significance for State or regional planning. We do note, however, that the variation to minimum site area in Area 1, is consistent with the most recent metropolitan plan for Sydney, A Metropolis of Three Cities, in that it:

- Provides residential development to meet the needs of the local population, both at the present time and in the future as Sydney's population grows and ages;
- Contributes to the development of a new community within the St Leonards South precinct;
- Is well located in relation to existing and future transport services, including the railway station and the future metro station;
- Does not affect any heritage assets.

3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As mentioned above, there is no public benefit in maintaining the development standard. The proposed site area does not result in an overdevelopment of the Area 1 site and the proposed development has been designed in accordance with the built form provisions and vision for the St Leonards South Precinct. There is no public benefit in maintaining the development standard as the proposal will still meet the minimum LEP recreation area requirement for the development and the required LEP affordable housing dwellings for Area 1. Additionally, the proposal will allow for an economically viable development that will provide 100 residential dwellings for Area 1, responding to housing diversity, tenure and affordability.

Accordingly, it is not considered that there would be any public benefit for the minimum site area development standard under the Clause 7.2 of the Lane Cove LEP to be complied with, particularly as the proposed development has been designed and scaled appropriately to respond the neighbouring site at 2 Marshall Avenue and has demonstrated that 2 Marshall Avenue has the potential for redevelopment in isolation

3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

The concurrence of the Secretary of the Department of Planning, Industry and Environment (DPIE) is required before the consent authority can grant development consent: cl 4.6(4)(b). Concurrence is currently assumed for the Sydney North Planning Panel.

4.0 Conclusion

The assessment above demonstrates that compliance with the minimum site area requirement contained in Clause 7.1(4)(e) and 7.2 of the Lane Cove LEP for Area 1 is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the Area 1 land in an appropriate manner, whilst providing sufficient environmental grounds to justify the variation to the development standard.

This Clause 4.6 variation demonstrates that, notwithstanding the variation from the minimum site area requirement and amalgamation pattern for the St Leonards South Precinct for Area 1:

- The variation still achieves the objectives of the St Leonards South Precinct in terms of the built form and open space outcome envisaged for Area 1;
- The proposed development is compliant with the minimum recreation area for Area 1, notwithstanding the variation from the minimum site area for Area 1. This is a notable achievement and positive environmental outcome on a reduced site area, given that under the St Leonards Masterplan a reasonable amount of the recreation area was intended to be provided on the 2 Marshall site itself. The development has been able to accommodate the required recreation areas in full, despite the variation from the minimum site area development standard;
- If the minimum site areas for Area 1, 2 and 4 are combined ($3,000\text{m}^2 + 2,000\text{m}^2 + 1,500\text{m}^2 = 6,000\text{m}^2$), the development site area exceeds that minimum requirement on an overall basis ($6,727\text{m}^2$);
- The proposed development exhibits design excellence, has been the subject of numerous meetings/feedback from Council's design excellence panel, and will not result in any adverse impacts to the surrounding area;
- The proposed development has demonstrated an appropriate response to the Land and Environment Court Planning Principle for site isolation under *Karavellas v Sutherland Shire Council*. Various offers and negotiations have been undertaken to reasonably acquire the lot at 2 Marshall Avenue in accordance with the relevant L&E Court Planning Principle;
- The proposed development has been designed and scaled appropriately and has been designed appropriately to respond to 2 Marshall Avenue remaining as is and in response to its potential future condition in a number of redevelopment scenarios (if the existing dwelling is demolished and developed);
- The Area 1 building includes substantive compliance with the St Leonards South Precinct Planning controls including height, FSR, affordable dwellings and recreation areas as well as substantive compliance with the ADG performance criteria, notwithstanding the variation from the minimum site area development standard; and
- The variation is in the public interest because the development proposed on Area 1 is consistent with the objectives of the zone, the St Leonards South Precinct and will assist with housing diversity and affordability within the Lane Cove LGA, including the delivery of required LEP affordable dwellings. It would not be in the public interest to delay the delivery of these areas (*ad infinitum*) of the St Leonards South Precinct if strict compliance with the minimum site area development standard were enforced.

Therefore, the DA may be approved with the variation as proposed in accordance with the flexibility allowed under Clause 4.6 of the Lane Cove LEP.

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D