

Sydney North Planning Panel Meeting 05 April 2023
SUPPLEMENTARY REPORT: AREAS 1, 2 AND 4: 1 - 5 CANBERRA AVENUE, 4 - 8 MARSHALL AVENUE AND 2 - 8 HOLDSWORTH AVENUE ST LEONARDS SOUTH

Subject: Supplementary Report: Areas 1, 2 and 4: 1 - 5 Canberra Avenue, 4 - 8 Marshall Avenue and 2 - 8 Holdsworth Avenue St Leonards South

Record No: DA22/79-01 - 6643/23

Division: Environmental Services Division

Author(s): Christopher Shortt

Panel Reference	PPSSNH-338
DA Number	79/2022
LGA	Lane Cove Council
Proposed Development	Demolition of existing structures and construction of three (3) residential flat buildings (ranging from 12 to 19 - storeys) comprising a total of 232 apartments and basement parking for 348 vehicles.
Street Address	1 - 5 Canberra Avenue, 4 - 8 Marshall Avenue, 2 - 8 Holdsworth Avenue St Leonards South.
Applicant/Owner	Applicant: SLS Holdsworth Residences Pty Ltd. (New Hope Evergreen) Owner: SLS Holdsworth Residences Pty Ltd. (New Hope Evergreen)
Date of DA lodgement	18 July 2022
Total number of Submissions Number of Unique Objections	<ul style="list-style-type: none"> 23 unique submissions
Recommendation	Approval subject to draft conditions
Regional Development Criteria (Schedule 7 of the SEPP (State and Regional Development) 2011	Development has a capital investment value of more than \$30 million.
List of all relevant s4.15(1)(a) matters	<ul style="list-style-type: none"> relevant environmental planning instruments <ul style="list-style-type: none"> SEPP 65 – Design quality of Residential Apartment Development and Apartment Design Guide (ADG); SEPP Resilience and Hazards 2021; SEPP (Building Sustainability Index) 2004; SEPP (Infrastructure) 2007; SEPP (Transport and Infrastructure) 2021 SEPP (State and Regional Development) 2011; and Lane Cove Local Environmental Plan 2009. relevant development control plan <ul style="list-style-type: none"> Lane Cove Development Control Plan 2009 relevant planning agreement that has been entered into

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	<p>under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4</p> <ul style="list-style-type: none"> - Yes – draft planning agreement that a developer has offered to enter into under Section 7.4 (see Annexure 27) • relevant regulations e.g. Regs 92, 93, 94, 94A, 288 - Clause 92(1)(b) – Demolition of Structures • coastal zone management plan - Nil <p>other relevant plans</p> <ul style="list-style-type: none"> - St Leonards South Landscape Masterplan - St Leonards South Section 7.11 Contributions Plan - Special Infrastructure Contribution Levy Direction
Clause 4.6 requests	Submitted clause 4.6 variation report relating to minimum site area of Area 1. (Refer to Annexure 41)
Summary of key submissions	<ul style="list-style-type: none"> • Site isolation of 2 Marshall • Clause 4.6 minimum site area • Floor Space Ratio • Solar Access • Building Depth • Building Separation • Urban Design and Architecture • Traffic and Parking • Design excellence and DRP comments • Landscaping and open Space • Heritage • Wind Impacts • Acoustic impacts • Shadows • Site suitability and public interest
Report prepared by	Chris Shortt
Report date	23 March 2023

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report?

Yes

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?

Yes

e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6

Yes

of the LEP) has been received, has it been attached to the assessment report?

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)? **Yes**

Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment? **Yes**

Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

EXECUTIVE SUMMARY

This supplementary report is submitted due to additional and amended information being submitted to Council for assessment from both objectors and the applicant. This report should be read in conjunction with Council's Planning Assessment Report prepared for the Panel meeting of 7 December 2022 (**previous report**), Annexure 2 ADG Assessment, and Annexure 3 DCP Assessment.

The development applicable was publicly notified for 28 days from 20 July 2022 – 17 August 2022.

A total of nine (9) unique submissions were received in response to the public notifications. Those submissions were considered in the Previous Report and copies of all submissions were provided to the Panel on 23 November 2022.

A table of submissions received and provided to the Panel is Annexure 4 to the Previous Report. An updated table has been provided which also responds to documentation received in 2023.

The DA was scheduled to be determined by the Sydney North Planning Panel (SNPP) at its meeting 07/12/2022. The application was withdrawn from being determined and rescheduled to a 05/04/23 after the submission of amended and additional information for Council's assessment.

Subsequently the additional documents were submitted by the Applicant including:

- Updated Clause 4.6 Variation Request dated 22 December 2022 (ANNEXURE 41);
- Pocket park comparative solar analysis between master plan envelopes and proposed development; (ANNEXURE 43);
- Valuation report of 2 Marshall Avenue; (ANNEXURE 44);
- Updated re-development options for 2 Marshall Avenue in isolation (ANNEXURE 42)

The Amended application documents were placed on Council's website on 3 January 2023 and uploaded to the planning portal on 24 February 2023. The proposal was not required to be formally re-advertised as per Council's Notification of Development Application Policy. Despite this, Council has taken into consideration all additional public submissions received prior to the finalisation of this supplementary report.

Fourteen (14) additional unique public submissions were also submitted to Council in 2023 and have been forwarded to the SNPP for review and consideration.

The total number of unique submissions at the time of this report is twenty-three (23).

An updated Annexure 4 Response to Submissions has been prepared to address the additional submissions and correspondence received in 2023 and is provided at Updated Annexure 4 to this Supplementary Report.

6.1.1.2.5 Variation to minimum Site Area. (Area 1).

The following assessment is intended to supplement the section 4.15 assessment in the Previous Report.

(i) any environmental planning instrument

In addition to the assessment undertaken in the Previous Report, an assessment against the objectives of the R4 Zone, clause 4.6 and clause 7.1 have been undertaken as set out later in this report.

(ii) any development control plan

The DCP does not contain provisions relating to site isolation.. Therefore the Land and Environment Court Planning Principles in (*Karavellas v Sutherland Shire Council*) (**Karavellas**) apply and are relevant. The Applicant has provided sufficient information with the DA and also in the Revised Request to establish that the principles in Karavellas have been met.

(iii) any submissions made in accordance with this Act or the regulations

There have been a considerable number of submissions made by or on behalf of 2 Marshall Avenue in relation to the offer and negotiation process. The Applicant and 2 Marshall have put competing positions as to whether the process meets the first Karavellas limb for various reasons and therefore whether the consent authority can be satisfied the offers and process are reasonable.

Many submissions were received outside formal notification periods. Notwithstanding this, a more detailed consideration and response to objections on particular aspects is contained in the updated Annexure 4 to this Supplementary Report - summary of submissions received.

(iv) the public interest.

The proposed development is considered to be in the public interest for the reasons advised in the Previous Report and despite the fact that amalgamation with 2 Marshall Avenue has not occurred because:

- (i) development of 2 Marshall Avenue is achievable outside of the development; and
- (ii) early delivery of this project including dedication of the park to Council under the proposed planning agreement will provide a significant material public benefit.

This report does not set out in detail the circumstances of the negotiations to purchase 2 Marshall Avenue. That information is addressed in the Previous Report, and in particular Annexure 7,

containing the evidence of the negotiations including the sums of the offers and counter offers made to purchase and sell 2 Marshall Avenue.

6.1.1.2.6 Variation to minimum Site Area. (Area 1).

Background:

The updated clause 4.6 variation request (**Revised Request**) expands and provides a more detailed assessment from the applicant's clause 4.6 variation request dated 1 July 2022. It addresses the tests in cl. 4.6 including:

- (a) The relevant *Wehbe* tests when considering whether compliance with the minimum lot size is unreasonable or unnecessary;
- (b) Analysis of the environmental planning grounds; and
- (c) Consideration of whether the proposal development is in the public interest because it is consistent with the objectives of the R4 zone and the development standard for minimum site area.

Under Clause 7.1 (4)(e) development consent is not be granted unless the consent authority is satisfied that the development will comply with the requirements of clause 7.2 relating to minimum site area.

It should be noted that the development standard for site area is not excluded from the operation of Clause 4.6 as it is expressly excluded in clause 4.6(8) (cb). It is noted that the minimum site area is the only development standard in the St Leonards South Precinct able to use Clause 4.6.

Extent of the Variation Sought:

Under Clause 7.2 of the Lane Cove LEP 2009 the site amalgamation pattern is established for the St Leonards South Precinct. Area 1 requires a minimum site area of 3000sqm.

The residential property known as 2 Marshall Avenue which is located at the north-eastern corner of Area 1 has not been included in the development site.

As a result, Area 1 is **264sqm** below the minimum site area requirements of 3000sqm. The proposal for Area 1 is 2736sqm or an **8.8% variation** to the development standard.

The applicant has acquired 4 out of the 5 sites within Area 1. It is noted that the site area of 2 Marshall Avenue is 682.9m² and therefore amalgamation of all of the sites within Area 1 would have resulted in a greater area than what is required under the minimum site area development standard.

The overall development application combines Areas 1, 2 and 4 in the SLS precinct. The minimum site area requirement for Areas 1,2 and 4 combined (3000sqm + 2000sqm + 1500sqm) is 6500sqm). It is noted that the development site area exceeds the minimum requirement overall (6727sqm).

Although, the contravention specifically occurs in Area 1, the development standard relates to all sites in the proposed DA (Areas 1, 2 and 4). It is necessary for the CI 4.6 to consider the total development to demonstrate the site area, landscaping, and urban design have been resolved despite the breach in Area 1, to comply with the relevant objectives of the development standard

for the aspect which breaches in Area 1 and the objectives of the R4 zone. All of which have been addressed in this Supplementary report.

Justification for Contravention of the Development Standard:

Consistent with the judgment of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC (Initial Action)*, for there to be power to grant development consent for a proposal that contravenes a development standard, clause 4.6 (4)(a) requires that the consent authority, be satisfied by three matters before granting consent to a development which varies a development standard being

- (a) the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i));
- (b) the written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i); and
- (c) the proposed development is in the public interest because it is consistent with the objectives of the zone and the standard in question (cl 4.6(4)(a)(ii)).

The consent authority must form an opinion and be satisfied in respect of (a) (b) and (c) above.

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

In the assessment of the reasonableness of the contravention of a development standard the decision of the NSW Land and Environment Court in: *Wehbe v Pittwater Council (2007) LEC 827 (Wehbe)* is relevant to the subject development proposal.

Wehbe identified common (but not exhaustive) tests as a means to seek to establish compliance with the development standard can be shown as unreasonable or unnecessary in the circumstances of the case.

Wehbe identified tests by which compliance with the development standard can be shown as unreasonable or unnecessary in the circumstances of the case.

Of the five methods outlined in *Wehbe* the Revised request uses the following test:

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

The Revised Request addresses the breach of the site area standard and addresses the *Wehbe* tests. The Revised Request states that the site area development standard clause does not contain objectives itself. However, the request does analyse the departure from the minimum site area by reference to the objectives in clause 7.1(1) for the St Leonards South area, which apply to the controls in clause 7.2.

The request and the three matters of which the consent authority must be satisfied when determining a variation request are considered below.

The objectives or purposes of the development standard.

Clause 7.2 of Lane Cove LEP 2009 sets the minimum site area requirements. Clause 7.2 does not contain any objectives to the minimum site area requirements. However, clause 7.2 provides that *"For the purpose 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..."* Therefore it is considered the objectives in clause 7.1(1) are appropriately the objectives for the site area prescribed in clause 7.2.

Clause 7.1 contains the overarching objectives for the St Leonards South Precinct which is to promote (by providing building height and floor spaces incentives), residential development within the St Leonards South Precinct 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.*

The proposed development and the Revised Request is assessed in this report, against the overall objectives in clause 7.1 being the objectives for development on land in St Leonards South Precinct as the underlying objectives.

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

Compliance with the minimum site area is unreasonable or unnecessary in this instance. The Applicant has satisfactorily demonstrated compliance with the Karavellas planning principle (see more detailed discussion below) and the objectives of the standard are achieved notwithstanding the short fall of 264m².

(a) community facilities, open space, including communal open space, and high-quality landscaped areas are achieved despite the variation to the minimum site area requirements.

The written request has adequately addressed this objective in relation to the breach of the site area control.

On assessment, despite the inability to meet the minimum site area requirement for Area 1, the proposed development would still meet the minimum required public recreation area of 900sqm in Area 1 (provides 913sqm), and providing a total of 1348sqm of land for the purpose of public recreation over Areas 1 and 2. This land is positioned at the northern portion of the site and is to be dedicated as a pocket park to Council under the terms of the Voluntary Planning Agreement between Council and the applicant.

The pocket park would include a variety of passive and active facilities including children's cycle track with scooter obstacle loop, picnic space, BBQs, seating lounges, bridge elements over swales, deck and bleachers, open lawn area, public art, and generous landscaping of native trees and shrubs. The pocket park complies with the area requirements specified in Clause 7.4 of the Lane Cove LEP and would provide of high quality public open space in Area 1. The landscaped

area in Area 1 is 39% unencumbered deep soil capable of accommodating a compliant number of large replacement trees.

The proposal also provides significant high quality communal open space. In Area 1 approximately 1124sqm (44%) of Area 1 is dedicated as communal facilities. This includes green spine at ground level which directly links to a level 1 indoor/outdoor recreation facilities in Area 1 including lap pool and spas. The green spine is 24m wide and provides a diverse range of passive and active uses including table tennis, BBQ zone with dining tables, hammocks, shade structures, raised boardwalks, and child play areas. The applicant states that the outcome is a notable achievement and positive environmental outcome on a reduced site area. The combination of high quality communal and public open spaces set in a landscaped setting is considered to comply with Clause 7.1(a) objectives of SLS of the Lane Cove LEP 2009.



Figure 1: Area 1-Pocket Park noted by red outline (913 sqm in Area).

(b) efficient pedestrian and traffic circulation is achieved despite the variation to the minimum site area requirements.

The written request has adequately addressed this objective in relation to the breach of the site area control.

On assessment, despite the inability to meet the minimum site area requirement for Area 1, the proposed development would still provide an efficient outcome for pedestrian and vehicular traffic circulation.

The combined development provides a consolidated 4 levels of basement carparking across Areas 1, 2 and 4 with a single vehicle entry from Canberra Avenue. As a result, the total number of vehicle crossovers is reduced from 10 to 1. The removal crossovers previously allocated to single

dwelling houses would increase overall on-street parking. The basement carpark has been consolidated footprint to maximise the deep soil area of the green spine.

Area 1 exhibits a high degree of pedestrian interconnectivity throughout the green spine, the pocket park. Area 1 accommodates a clearly legible entrance to the residential flat building with appropriate security access. A pedestrian access link is provided from Canberra Avenue into the public pocket park and communal recreation areas of the green spine. The proposal complies with Clause 7.1(b) objectives of SLS of the Lane Cove LEP 2009.

(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 is achieved despite the variation to the minimum site area requirements.

The written request has adequately addressed this objective in relation to the breach of the site area control, on assessment.

On assessment, the entire proposal over Areas 1, 2 and 4 would provide an appropriate dwelling mix of 1, 2, 3 and 4-bedroom residential units as well as 21 townhouse dwellings and includes 28 affordable dwellings. The proposal complies with the dwelling mix requirements of the ADG with a minimum of 20% 1-bedroom dwellings, 20% 2-bedroom dwellings, and 20% 3 – 4 bedroom dwellings.

Area 1 would comply with Clause 7.3 of the Lane Cove LEP and provides 14 affordable housing units.

Despite the variation to the minimum site area for Area 1 the proposal would provide a variety of housing types, would cater to a diverse demographic of household budgets and living circumstances, and complies with the Clause 7.1(b) objectives in Lane Cove LEP 2009 which apply to the St Leonards South Area.

(d) the amalgamation of lots to prevent the fragmentation or isolation of land.

2 Marshall Avenue is depicted in Area 1 of the key sites map in the LEP.

The LEP scheme expressly contemplates variation of the minimum site area and the applicant has demonstrated to the degree required to satisfy the consent authority, that 2 Marshall Avenue is capable of development consistent with the applicable planning controls. Whilst 2 Marshall has been excluded from the development site the material satisfactorily demonstrates it is not isolated in the sense it can be developed.

In respect of Area 1, it is noted that amalgamation has been secured in large part as the applicant has acquired 4 out of the 5 sites within Area 1. The Applicant was unable to acquire 2 Marshall Avenue.

For the development as a whole, when considering the separate public interest test in clause 4.6, the proposal would deliver an amalgamation of lots consistent with the objective by securing 10 out of the 11 sites in Areas 1, 2 and 4.

Having amalgamated all sites except 1, with the only site not being amalgamated located in the northeastern area clearly separated from the proposed development, the proposal has prevented the fragmentation of land.

The Applicant has provided development options which are permissible and therefore considered feasible having regard to the principles in various case law authority.

It is noted that the amalgamation pattern in the DCP is neither a statutory requirement nor a necessity to deliver the DCP redevelopment objectives which on assessment are otherwise met.

As the DCP does not contain specific provisions in relation to site isolation, other than an amalgamation map, the site isolation matters fall to be assessed against the Land and Environment Courts' Planning Principle in Karavellas.

It is considered that the information contained with the Revised Request confirms that the proposed development has prevented fragmentation of land and that 2 Marshall Avenue is not 'isolated' in the planning sense because reasonable offers have been made to purchase 2 Marshall Avenue and redevelopment of 2 Marshall Avenue is achievable outside of the subject development.

The adjacent land is not 'isolated' but is capable of redevelopment in accordance with the planning framework. The proposal is consistent with objective (d) notwithstanding the 284m² breach of site area.

Karavellas

The written request has addressed this objective in relation to the breach of the site area control on the basis that the planning principles in Karavellas have been met.

The Karavellas site isolation principles require consideration of two limbs:

- (a) Firstly, is amalgamation of the sites feasible (first limb); and
- (b) Secondly, can orderly and economic development of the separate sites be achieved if amalgamation is not feasible (second limb).

The first limb is concerned with whether the adjacent site can reasonably be purchased for amalgamation purposes. Karavellas and the cases which have followed later and applied it particularise factors and steps relevant to the satisfaction of the first limb including that:

- (a) negotiations commence prior to lodgment of a development application;
- (b) a reasonable offer be based on at least one recent valuation and may include other incidental costs;
- (c) where negotiations fail, the DA should include details of the negotiations.

These factors are met in respect of the development application.

(1) *Is amalgamation of the sites feasible? (the first limb)*

On assessment it is considered the Revised Request and the chronology of events which underly it satisfactorily demonstrate amalgamation is not feasible,

The Revised Request contains information of negotiations with the owner of 2 Marshall Avenue. The applicant has also provided 3 separate valuations from accredited valuers which at Appendix C of the Revised Request. The Revised Request confirms that the offers were higher than those valuations. The timeline on page 19 confirms that the offers were made **prior** to the lodgement of the DA.

There have been a considerable number of submissions made by or on behalf of 2 Marshall Avenue in relation to the offer and negotiation process. The Applicant and 2 Marshall have put competing positions as to whether the process meets the first Karavellas limb for various reasons and therefore whether the consent authority can be satisfied the offers and process are reasonable.

The Revised Request establishes that amalgamation with 2 Marshall Avenue is not feasible within the meaning of the planning principle that is, reasonable offers to purchase were made and amalgamation was not achieved. The development options in Appendix D of the Revised Request establish that development of Marshall Avenue can occur within the planning framework outside of this development without significant impact from the development. Therefore it is considered that 2 Marshall Avenue is not isolated and that the development is consistent with this objective.

Caselaw makes plain that it is not the function of the consent authority to insert itself into commercial negotiations or valuations and determine what is a reasonable price. Where a site has not been able to be amalgamated, the consent authority's task is to evaluate whether there has been a reasonable offer to purchase by reference to the planning principles. As set out above, the requirements of Karavellas have been met.

(2) *Can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible? (the second limb)*

- (i) The second limb of the planning principle in Karavellas requires the consent authority to consider whether the adjacent land can achieve a development that is consistent with the planning controls despite not being amalgamated. The courts have found that development consistent with the planning controls does not necessarily mean development to the highest or best use or full potential.
- (ii) In addressing the development capability of 2 Marshall Avenue, the applicant provided 10 redevelopment options for the site based on permitted uses in the R4 zone, and development permitted under the Housing SEPP 2021 which are also appended to the Revised Request (Refer to Annexure 42). A range of permissible uses under the R4 High Density Residential Zone of the Lane Cove LEP 2009 and the SEPP (Housing) 2021 have been provided. Unless a use is prohibited within the R4 zone, a consent authority can consider development proposals in a formal DA which may also include proposals with variations to Council's DCP controls, as DCP controls are guidelines.

Some of the proposals may require variations to Council's DCP controls. DCP controls are guidelines and variations can be considered by the consent authority.

It is considered these concept drawings demonstrate to the level required, that 2 Marshall Avenue can be redeveloped on its own, such that the fact the site is not amalgamated by the current proposal would not adversely preclude some form of redevelopment potential consistent with the controls nor result in its impermissible isolation.

- (iii) The proposed development has been scaled appropriately to respond to both the existing and potential future condition of 2 Marshall Avenue, therefore orderly and economic development can still be achieved despite not being included in the proposed scheme.

- (iv) There is caselaw to support lower density uses such as dwelling houses and boarding houses. In particular the decision in *Statewide Planning Pty Ltd v Canterbury Bankstown Council*. (2021) NSWLEC 1210 (*Statewide*)

*“The R4 zone Land Use Table **permits** residential flat buildings as well as a number of other uses including dwelling houses... the planning controls anticipate a variety of housing types within the high-density residential environment of the R4 Zone... to require only high-rise development would preclude the variety of housing types and other uses anticipated by the land use table and its objectives” (at [90]-[96]).*

It is considered these concept drawings demonstrate that 2 Marshall Avenue can be redeveloped on its own consistent with the planning controls, such that fact the site is not amalgamated by the current proposal would not adversely preclude some form of redevelopment potential.

- (v) The majority of Area 1 (including 2 Marshall) is subject to shadows in mid-winter due to existing large developments north of the site (including 88 Christie Street, 1 – 13 Marshall Avenue and 15 – 19 Marshall Avenue) and the existing topography which falls to the south. It is noted that the proposed tower development in Area 1 would be located south of 2 Marshall Avenue and would not cast any additional shadows onto that site. The proposed development would not result in any accumulative solar impacts to the existing conditions experienced by 2 Marshall Avenue. Despite the existing solar conditions of the overall area, an orderly and economic use of 2 Marshall Avenue as a standalone site can be achieved. Council has discretion to approve any future redevelopments of 2 Marshall as a stand-alone site with variations to the LC DCP solar access controls which are guidelines.
- (vi) The incorporation of 2 Marshall Avenue would not result in any material change to ADG solar compliance for the Tower in Area 1. A building envelope extending northward by approximately 12m (as per the masterplan) would generally be subject to the same shadows or potentially greater adverse shadow impacts at 10am than the proposal which would be a further distance away from the large developments to the north. The sun diagrams submitted on behalf of 2 Marshall do not provide any comparative analysis to justify that the proposal would benefit from increased ADG compliance from the inclusion of 2 Marshall as part of the development.

Having regard to the above and when assessed against the Karavellas principles, despite the inability to meet the minimum site area requirement for Area 1, the proposed development is consistent with cl 7.1(4)(d) and objectives of SLS of the Lane Cove LEP 2009. An appropriate amalgamation of lots has occurred and on analysis that 2 Marshall Avenue is not impermissibly isolated.

Clause 4.6(3)(b) Environmental Planning Grounds to justify contravening the development standard

The Revised Request relies on three environmental planning grounds to satisfy clause 4.6(3)(b). These are addressed below.

Ground 1: is that the development meets and addresses *Karavellas*. The Revised Request addresses the relevant principles.

The Revised Request provides information of negotiations which commenced in 2021 prior to lodgment of the development application and confirms that two offers were made to purchase 2 Marshall Avenue. The Revised Request contains **3 independent valuations** (Refer to Annexure 6 and 44 which includes the 3 valuation reports from M3, JLL and Charter Keck Kramer) and confirms that the offers were higher than the valued amounts and were made prior to lodgment of the DA.

The information provided in the Revised Request demonstrates that negotiations between the applicant and 2 Marshall Avenue failed and that 2 Marshall Avenue rejected the two offers to purchase.

Council and the SNPP as the consent authority do not have any role in the valuation and negotiation process between the applicant and 2 Marshall Avenue.

Ground 2: is that the development achieves compliance with the **St Leonards South Landscape Masterplan** despite the breach of the minimum site area. This is correct and is considered a justifiable planning ground. The area has been designed accordingly as envisaged for the site and wider St Leonards South precinct.

The proposal demonstrates compliance with the relevant design principles of the Landscape Masterplan including, working within existing topography, accessibility connectivity and trees and landscaping, public, private and communal open space, and sustainability.

Despite 2 Marshall not being included, the proposal would provide a compliant 913 sqm of public open space in Area 1. The 913 sqm pocket park would include accessible pedestrian access from both the Marshall and Canberra Avenue frontages. The park would also have access via a secure entry point to the adjoining communal open space (green spine for residents only).

The pocket park would include a variety of passive and active facilities including children's cycle track with scooter obstacle loop, picnic space, BBQs, seating lounges, bridge elements over swales, deck and bleachers, open lawn area, public art, and generous landscaping of native trees and shrubs. The overall facilities, quality, usability of the pocket park would not be compromised as a result of the exclusion of 2 Marshall. Solar analysis diagrams demonstrated that the revised layout of the pocket park would result an increased level of solar access to the park at winter solstice. Therefore, the revised orientation of the pocket park would achieve better solar amenity during mid-winter in comparison to the St Leonards Master plan. (Refer to Annexure 43).

The proposal also provides compliant a 24m wide green spine in accordance with the St Leonards South Landscaping Master Plan. Over 50% of the green spine is unencumbered deep soil and can accommodate compliant soil volumes for vigorous canopy trees at a replacement ratio of 1:1. The green spine includes a wide variety of amenities and facilities including table tennis, BBQ zone with dining tables, hammocks, shade structures, raised boardwalks, and child play areas.

Ground 3: is that the development is consistent with the objects of the EP&A Act. This was found to be a sufficient environmental planning ground in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [\[2018\] NSWLEC 118](#). The justifications for consistency with the objects of the EP&A Act are agreed with.

Clause 4.6(4)(a)(ii) public interest

The public interest tests requires the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives of the zone.

The objectives of the development standard are provided in clause 7.1(1) of the Lane Cove LEP as follows:

- (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.*

The objectives of the R4 zone are as follows:

- To provide for the housing needs of the community within a high density residential environment.*
- To provide a variety of housing types within a high density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- To provide for a high concentration of housing with good access to transport, services and facilities.*
- To ensure that the existing amenity of residences in the neighbourhood is respected.*
- To avoid the isolation of sites resulting from site amalgamation.*
- To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

The Revised Request states that there are no express objectives of the relevant standard but does assess the proposed development against the objectives in clause 7.1 in any event.

The applicant's justifications against the relevant objectives of the minimum site area development standard and the R4 zone are considered to have merit. For the reasons set out below, in the Previous Report and this supplementary report generally, the proposal is in the public interest as it is consistent with the objectives of the R4 zone and the minimum site area standard.

Clause 4.6 of Lane Cove LEP 2009 - Minimum Site Area development standard

The objectives of this clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

In terms of the variation from the minimum site area requirements (Clause 7.2), Clause 4.6 of the Lane Cove LEP 2009 allows the consent authority to vary development standards.

The Sydney North Planning Panel can grant an exception to the minimum site area development standard for Area 1, in this case as the Director -General's concurrence can be assumed where clause 4.6 is adopted as per Department of Planning circular PS 08 -003 date 9th May 2008.

1. As per the requirements of Clause 4.6(4)(a)(i) of the Lane Cove LEP 2009, the applicant has submitted a written request (Refer to Annexure 41) to vary the development standard demonstrating that compliance is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the standard. The written request is summarised as follows:
 - The variation would achieve the objectives of the development standard and the broader planning objectives of the St Leonards South Precinct in relation to the overall built form and public open space outcome envisaged for Area 1;
 - If the required site areas are combined for Areas 1, 2 and 4 (3000sqm + 2000sqm + 1500sqm = 6500sqm), the development site area exceeds the minimum requirement overall (6727sqm);
 - Despite the inability to meet the minimum site area requirement for Area 1, the proposed development would still meet the minimum required public recreation area of 900sqm in Area 1 (providing 913sqm), and providing a compliant total of 1348sqm of land for the purpose of public recreation over areas 1 and 2. This land is positioned at the northern portion of the site and is to be dedicated as a pocket park to Council under the terms of the Voluntary Planning Agreement between Council and the applicant; The applicant states that the outcome is a notable achievement and positive environmental outcome on a reduced site area.
 - The proposed development exhibits high quality design and design excellence and would 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*;
 - The proposed development has been designed and scaled appropriately to respond to 2 Marshall Avenue remaining as is, and in response to its likely future condition (if the existing dwelling is demolished and developed)
 - Various negotiations have been undertaken to reasonably acquire the lot at 2 Marshall Avenue in accordance with Karavellas. It has been demonstrated the development of 2 Marshall Avenue is achievable. It is not isolated in that sense and the objectives of both clause 7.1(1) and the R4 zone (see below) are achieved notwithstanding the 8.8% minimum site area breach.
 - The variation would not be contrary to the public interest because it is consistent with the objectives of the zone, the St Leonard's South Precinct and would assist with housing diversity and affordability in the Lane Cove LGA, including the delivery of 28 required LEP affordable dwellings and pocket park dedicated to Council. It would not be in the public interest to delay or prohibit the delivery of these areas in the St Leonards Precinct if strict compliance with the minimum site area development standard were enforced.

The reasons as assessed and are considered to justify the variation sought.

2. As per Clause 4.6(4)(a)(ii) of the of the Lane Cove LEP 2009, the consent authority must be satisfied that the proposed development would be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone. The objectives of the R4 High Density Residential Zone are:
- *To provide for the housing needs of the community within a high-density residential environment.*
 - *To provide a variety of housing types within a high-density residential environment.*
 - *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
 - *To provide for a high concentration of housing with good access to transport, services and facilities.*
 - *To ensure that the existing amenity of residences in the neighbourhood is respected.*
 - *To avoid the isolation of sites resulting from site amalgamation.*
 - *To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

The proposal is considered to be consistent with the overall objectives of the zone as:

- The proposal would provide 232 new dwellings for a growing population within a high-density residential environment.
- The proposal would provide a dwelling mix of 1, 2, 3 and 4-bedroom residential units as well as 21 townhouse dwellings, and includes 28 affordable dwellings. The variety of housing types would cater to a diverse demographic within a high-density residential environment.
- The site is serviced by a range of well-established and frequent public transport services. The nearest bus stops along Pacific Highway are an approximate 200 to 300 metre walk from the site. St Leonards Railway Station is approximately 200 metres to the north and within a five-minute walk.
- The site is in close proximity to the St Leonards CBD which is an established health and education precinct, with Royal North Shore Hospital, North Shore Private Hospital and TAFE NSW Northern Sydney Institute located north of the site and within an accessible walk.
- Areas west and south of the site are also within the St Leonards South Precinct and are at various stages of being redeveloped to accommodate high density residential apartment buildings as envisaged by the SLS Masterplan. The proposal has been designed and scaled appropriately to ensure no adverse impacts to the amenity of the existing neighbourhood north and west of the site in terms of shadows, privacy, view loss, traffic, among others.
- Approximately 39% of Area 1 site would be soft landscape, due to a combination of large public, and communal park areas. The accumulated development includes approximately 1680sqm dedicated to a central green spine communal area, and over 1300sqm of public recreation area to be dedicated to Council as a pocket park. Over 50% of the green spine is unencumbered deep soil and can accommodate compliant soil volumes for vigorous canopy trees at a replacement ratio of 1:1. The landscaping setbacks adjacent to 2 Marshall Avenue at both the Canberra and Marshall Avenue frontages would allow a better integration between the standalone site and the development site. Please refer to Figure 2 below.
- The applicant submitted solar access diagrams of the pocket park which confirmed that the amended park configuration would receive higher solar access than the original Masterplan location.
- The proposal would not result in site isolation as the applicant has demonstrated that the site at 2 Marshall Avenue can be redeveloped in its own right.



Figure 2: Photomontage of Area 1 and 2 viewed from cnr of Marshall and Holdsworth facing west.

The proposal is considered to be consistent with the overall objectives of the zone and the development standard and will be in the public interest.

It is noted that Clause 4.6 of the Lane Cove LEP 2009 excludes all other development standards related to St Leonards South Precinct (i.e., height FSR, recreation area, affordable housing etc). Minimum site area is the only development standard in the precinct able to use a clause 4.6. In view of the circumstances, the proposed development is acceptable as it is generally consistent with the remaining amalgamation pattern envisaged in the planning controls contained with Part 7 of LCLEP.

Additional submissions on the application of clause 4.6

As summarised in Updated Annexure 4, submissions have been made which state the failure to comply with the minimum site area for area 1 means the proposal does not get the benefit of the incentive height and incentive FSR prescribed in clause 7.1(3) of the LEP and instead a variation to the general height control in clause 4.3 and FSR control in clause 4.4 is required to be sought.

That is considered to be a misconstruction of the instrument's provisions and incorrect. The height and floor space in part 7 of the LEP applies to development which meets the description in clause 7.1(2) as this application does.

The minimum site area is prescribed in clause 7.2 and is expressly capable of variation under clause 4.6, although the height and FSR in 7.1(3) are not.

CONCLUSION

This Supplementary Report is to be read in conjunction with the Previous Report and Annexures 1 – 46 which assessed the merits of the proposed development in depth.

The DA warrants approval having regard to the matters required to be considered under section 4.15(1) of the EPA Act.

The Application seeks a variation to the minimum site area requirement development standard and has submitted a written request pursuant to clause 4.6 of the LEP (the Revised Request considered in this report).

The SNPP as the consent authority is required to form the opinion that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; that there are sufficient environmental grounds to warrant departure; and that the proposed development is in the public interest as it is consistent with the objectives of the zone and the standard in question in order to be satisfied that the clause 4.6 variation to the minimum site areas standard should be granted.

It is considered that the applicant through its written request has sufficiently justified that strict compliance with the development standard is unreasonable or unnecessary in this instance. For the reasons outlined above, there are also sufficient environmental planning grounds to justify the departure. The proposed development is in the public interest as it is consistent with the objectives of the R4 zone and the objectives of the minimum site area standard when evaluated against the objectives in clause 7.1(1).

It is recommended that a clause 4.6 variation to the minimum site area control, be granted. Further it is not considered that the fact that adjacent land has not been amalgamated should be an impediment to the progress of this DA, as the Applicant has demonstrated an appropriate response to the Land and Environment Court Planning Principle for site isolation.

RECOMMENDATION

That:-

- (a) The Sydney North Planning Panel determines that it is satisfied:
- (i) The applicant's written request to vary the minimum site area development standard prescribed by clause 7.2 (for the purposes of clause 7.1(4)(e)) of the Lane Cove LEP 2009, adequately demonstrates and the Panel is of the opinion, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
 - (ii) The applicant's written request to vary the minimum site area development standard prescribed by clause 7.2 (for the purposes of clause 7.1(4)(e)) of the Lane Cove LEP 2009, adequately demonstrates and the Panel is of the opinion, that sufficient environmental planning grounds have been established to justify contravening the standard; and
 - (iii) The proposed development is in the public interest because it is consistent with the

objectives of the R4 zone and the objectives of the standard for minimum site area set out in clause 7.1(1).

- (b) The Applicant's written request dated 22 December 2022, pursuant to clause 4.6 of the Lane Cove Local Environmental Plan 2009 seeking to vary the development standard for minimum site area as prescribed in clause 7.2 of the Lane Cove Local Environmental Plan 2009, is upheld.
- (c) That pursuant to section 4.16(1)(b) of the Environmental Planning and Assessment Act 1979, Development Application No 79/2022 for demolition of existing structures and construction of three residential flat buildings ranging from 12-19 storeys comprising a total of 232 apartments and basement parking for 348 vehicles at 1-5 Canberra Avenue, 4-8 Marshall Avenue and 2-8 Holdsworth Avenue St Leonards South is approved subject to the conditions of consent in Annexure 1.

Mark Brisby
Executive Manager
Environmental Services Division

ATTACHMENTS:

There are no supporting documents for this report.