MILLS OAKLEY

17 March 2023

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Dear Craig,

2 Marshall Ave - DA 79/2022, St Leonards

We act for SLS Canberra Residences Pty Ltd and SLS Holdsworth Residences Pty Ltd (**our Client**), the owners of 1-5 Canberra Ave, 4-8 Marshall Avenue and 2-8 Holdsworth Ave, St Leonards (**the Site**). As you know, an updated clause 4.6 request for DA79/2022 (**the DA**), originally lodged on 18 July 2022, was placed on exhibition on 3 January 2023. We now provide a response to the lengthy submission prepared by Minter Ellison on behalf of Mr Hart, the owner of 2 Marshall Ave, St Leonards.

1. Background

1.1 Before we provide more detailed comments, it is in our view important to remember the conduct of Mr Hart prior to the time that the DA was submitted. **Not only is 2 Marshall Ave the only property which could not be purchased (ten other properties were purchased and amalgamated by our Client), Mr Hart appears to believe that he can fail to act reasonably in negotiations and hold our Client to ransom to meet his asking price, whatever that may be at any point in time**. As early as August 2021 Mr Hart was threatening to de-rail our Client's DA if our Client did not act exactly as Mr Hart wished, writing the below in an email to Colliers, the appointed buyer's agent:

If New Hope attempts to lodge a DA without my property included it would likely result in council rejecting the DA for the reasons stated above in the LEP, and should Council accept the DA, that would result in a protracted Court action that would likely take several years to resolve. I have lived in this property for 56 years, a few more years won't be bothersome.

1.2 It is quite notable that this important communication has been omitted entirely from any legal letters or analysis received from Mr Hart's solicitors or barrister. Their reticence to address the true chronology of events, in which **Mr Hart openly stated that he was willing to out wait our clients whilst actively frustrating their DA process**, seriously undermines the credibility of their legal conclusions.

1.3 Since the time of that communication in August 2021, Mr Hart has unfortunately continued to act in an unreasonable manner and demanded that our Client pay various and ever-changing sums of money, which were not supported by any valuation evidence, for his property. The history of Mr Hart's dramatically fluctuating "asking price" is as follows:

- During the course of **2021**, Mr Hart maintained that his property was worth over **$30 million (he had not obtained a valuation at this time)**;

- In **January 2022**, Mr Hart dropped his asking price to **$21 million** without reason or justification (**he had not obtained a valuation at this time**);

- On **18 July 2022 the DA was lodged (at this time our Client's highest offer was $11.15 million and Mr Hart's demand was $21 million. That is, at the time of lodging the DA, the parties were approximately $10M apart in value. At that time, it is uncontroversial that our Client's offer was above any of the independent valuation amounts, and that Mr Hart had not obtained any valuation)**;

- On **21 October 2022** (3 months after DA lodgement), Mr Hart further dropped his asking price to **$13.775 million**. This drop in asking price appears to follow the receipt of independent valuation reports commissioned by Mr Hart or his representatives.
- Nevertheless, and on any version of events, even at this time (3 months after the DA lodgement) Mr Hart was still seeking an amount that was **$2.625M above Our Client's offer**.

1.4 As Council would be aware, our Client has an obligation to reasonably attempt to purchase 2 Marshall Ave so that the property can be amalgamated. However, the law is very clear that **our Client does not have an obligation to purchase a property in circumstances where the owner does not accept reasonable offers, and/or who seeks to frustrate the amalgamation process. This is not an uncommon occurrence and the Courts have commented on it extensively,** as detailed further below.

1.5 Our Client is also not obliged to continue to engage in negotiations indefinitely, particularly after a DA has already been lodged, and indeed, after it has been extensively assessed and progressed. **Mr Hart is now willing to accept less than half of his original asking price. This in itself is indicative of a completely unreasonable position which Mr Hart adopted prior to our Client lodging the DA. That said, it does not render Mr Harts current position reasonable**.

1.6 Our Client took Mr Hart's demands and communications at face value and accepted that Mr Hart would not sell his property for any less than $21 million, and proceeded to lodge their DA (noting that Mr Hart's demand was $10 million above the three valuations our Client obtained). **Our Client accepted that when Mr Hart stated that $11 million was "manifestly unreasonable", that this was his position.**

1.7 Our Client is entitled to proceed to seek development consent with its proposed development without 2 Marshall Ave being incorporated. **The principals for site isolation outlined in *Karavellas* are to address exactly this type of situation** where one landholder acts unreasonably and tries to hold a developer to ransom on the basis that they are the last property the developer "should" acquire. **To require our Client to redesign their entire development, and start the DA design and assessment process over again, simply because Mr Hart now decides he is willing to sell his property for $16.225 million less than his original asking price (a matter which he may or may not maintain in any case) is completely unjust and undermines any certainty offered by the planning system.**

1.8 As expressly stated by the Land and Environment Court in its Planning Principle in *Karavellas*:

"*Amalgamation of the sites to achieve a desirable outcome must be balanced against one property owner frustrating the overall development and the property interests of other owners*" (at para [23]).

1.9 Similarly, in *Vanovac Tuon Architects Pty Ltd v Ku-ring-gai Council* [2016] NSWLEC 1558, a case quoted in the barrister submission dated 6 March 2023 proffered by Mr Hart, the Land and Environment Court again expressly said at [70]:

"*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*".

1.10 **Further, the Minter Ellison submission and attachments ignore the fact that Council and the Panel have no role to play in negotiations between the parties and in fact must not**

involve themselves in negotiations. Repeated references to Mr Hart's property "still being on the market" seem to invite the Panel to become involved in negotiations at this late stage.

1.11 **Even now, the parties are still $2.1m apart (since Mr Hart dropped his asking price by a further $6million after the DA was lodged).**

1.12 **In *Karavellas* the parties were literally only $50,000 apart and the Court found that it was a fact that the adjacent site could not reasonably be purchased**, stating at [20]:

> ***"****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*".

1.13 Further, the Court expressly acknowledged in *Karavellas* that **there are obvious consequences for a party who chooses to 'hold out' rather than accept a reasonable purchase offer**. In approving that DA, the Court in Karavellas expressly said it had "*given weight to the efforts made by the applicant to initially amalgamate the sites…and the rejection of the latest offer by Mr Khoury in full knowledge of the implications for his site.*" (at [23]). Further, and equally aptly, the Court noted that the owner of the isolated site in that case "*is fully aware that access through his site is not required* ***and the implications for re-development of his site*** *in the event that it is not amalgamated with the adjoining sites*" (at [20]).

1.14 We provide specific comments on the submissions below but all these comments should be read in the context of the above background.

2. Comments on the Minter Ellison Submission and attachments

2.1 As you know, we have already responded to a large number of letters submitted by Minter Ellison on behalf of Mr Hart. We do not repeat these detailed responses here but rely upon them. We request that Council consider these previous detailed responses in relation to this most recent submission, as **the issues raised in the 6 March 2023 submission are the same as those raised by Minter Ellison previously.**

2.2 We make the following comments regarding the attachments to the 6 March 2023 submission.

a) Appendix A: Minter Ellison comments on clause 4.6 request

2.3 The Minter Ellison letter takes phrases (typically not even whole sentences) and attacks these phrases without considering the broader context of the phrase, the sentence or the paragraph in which the phrase sits. We do not intend to respond in any detail to this document.

2.4 We note that **the letter refers in a number of places to Mr Hart still being willing to negotiate and to sell his property now. This is not relevant as the planning principal clearly states that a reasonable offer only needs to take place prior to the DA being submitted. Further, and as noted above, the applicant's offers have never been accepted, and still are not accepted. That is the end of the matter, as the Court held in Karavellas, with a warning that the consent authority should not involve itself in negotiations where an agreement on price has not been reached.**

2.5 **Requiring a proponent to continue to negotiate with a landowner even after a DA is submitted is clearly not reasonable or contemplated by the planning principal regarding site isolation.** That is precisely why the Planning Principle requires the negotiations to take place "***at an early stage and prior to the lodgement of the development application***" (para [18]).

2.6 We have reviewed the updated Clause 4.6 request dated December 2022 and are of the view that it is a comprehensive and robust document which meets all legal requirements.

b) Appendix B: "Advice on Karavellas"

2.7 We make the following comments on the memorandum by Mr Tim Poisel dated 6 March 2022:

- Firstly, and with the greatest respect to Mr Poisel, we cannot understand how he arrived at certain conclusions within his advice, or how some extremely relevant

background facts are simply outright omitted, as we have detailed above. That said, we must note that Mr Poisel was admitted to the Bar in 2020, and prior to that spent 5 years working at Minter Elllison, the solicitors who happen to be acting for Mr Hart in objecting to the subject DA.

- We say this is relevant because Mr Poisel has expressly adopted assumptions provided to him presumably by his instructing solicitors Minter Ellison, a number of which we do not agree with, and his advice is premised on these assumptions;
- Mr Poisel has accepted that Mr Hart was "willing to negotiate" prior to the lodgement of the DA. However, Mr Hart's conduct as outlined above clearly shows that he was not negotiating at all, let alone in good faith. Rather, he was insisting that exorbitant demands be met, under threat of delaying the DA through litigation, and in circumstances where the figures he was insisting upon were (a) not informed by any valuation reports and (b) were subsequently wholly abandoned by him and his legal team. It is therefore trite for Mr Poisel to conclude that Mr Hart was "willing to negotiate", given those features of his 'negotiating'.
- Despite some references to New Hope, Evergreen or SLS, there is no doubt that offers were made to purchase 2 Marshall by Colliers, the authorised buyers agent, on behalf of the owner of the Site, and that these were genuine offers which could have been accepted by Mr Hart so that the owner of the Site ultimately owned his property. At no stage did Mr Hart show any confusion regarding the purchaser. Mr Hart has also been represented by Minter Ellison for over 1 year **and at no point has Minter Ellison raised this issue.** In any case, the Court has considered this issue in the recent case of *Adam Hughes v Penrith City Council [2018] NSWLEC 1369* and found that offers by a real estate agent are sufficient for the purposes of negotiating to purchase a property. In the Adam Hughes case, the applicant claimed that the test in *Karavellas* was not met as there was not a clear approach by the owner of the development site to purchase their property. The Court rejected this argument and granted consent to the development application on the basis that the test in *Karavellas* had been met as an offer had been made by a real estate agent (and that an offer did not need to come direct form an owner).
- Further, there is no legal requirement whatsoever in any LEP, DCP, Planning Principle, nor in any Court judgments, as to who exactly may convey the offer to purchase a site for the purposes of amalgamation. **This novel argument has entirely been invented, but not supported by even one Court authority to support it (and the *Adam Hughes* case above shows that the Court has considered the issue and held the complete opposite of what Mr Poisel argues – that is, the Court has found that it is acceptable for offers to be made by an agent)**. It is a nonsense, particularly given that the Planning Principle requires offers to be made **before a DA is even lodged**, meaning that at that time of the offer there is no formal 'applicant' for the DA, because the DA does not yet exist. **In any case, we confirm that the offers were made on behalf of our Client. That is the end of that matter**. With respect, the argument should not have even been raised.
- Mr Poisel notes that the offers were open for 7 days and subject to due diligence and suggests that this is not "reasonable", though he does not provide any legal basis for this assertion. In our view the offers were clearly reasonable. All offers to purchase land are subject to contractual terms and conditions, and a due diligence period is in our opinion quite standard and prudent practice. Such terms are simply a commercial reality when purchasing property for development in NSW. If any of the particular terms were objected to, **objections could have been raised at the time by Mr Hart**, for example by requesting more time to consider the offers. Tellingly, it is only now that any complaint is made about them, and only by Mr Poisel;
- Mr Poisel prefers the valuation reports obtained for Mr Hart over those obtained by our Client, without interrogating the reports or giving proper reasons as to why Mr Hart's valuation reports should be preferred. Neither he, nor we, are qualified valuers. With respect, it is not the place of solicitors or barristers to express concluded views about which valuer's expert approach is to\ be preferred. In any case, as outlined above, the Court's planning principle in *Karavellas* expressly cautions against this

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c) ABC Planning Report

2.8 We disagree with the assertion in the ABC Planning Report that clauses 4.3 and 4.4 of the LEP need to be varied by way of a clause 4.6 request. We note that Minter Ellison's criticism of the clause 4.6 request does not include this and that Minter Ellison indicated that the ABC Planning Report was commissioned by their client directly. We presume that Minter Ellison, like us, do not agree with the assertion of Mr Betros that clauses 4.3 and 4.4 need to be subject to a clause 4.6 request.

2.9 The ABC Report focusses on DCP and Master Plan Controls but seems to ignore the fact that these controls cannot be met as 2 Marshall was not able to be purchased for an amount even close to market value.

2.10 The ABC Report also ignores the fact that the development of 2 Marshall is impacted by the fact that Mr Hart was not willing to sell his property for a reasonable amount. In *Hamdan Co Group Pty Ltd v Canterbury-Bankstown Council* [2018] NSWLEC 1255, the Court accepted 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."

d) ***Appendix J: "Misleading Statements by Applicant"***

2.11 Our Client strongly objects to any suggesting that they have misled Council, or anyone for that matter.

2.12 At paragraph 5 of Appendix J, Minters Ellison write:

We contacted both Colliers and Mills Oakley on behalf of the client, with a letter of offer to sell the property on 21 September 2022.

2.13 We confirm that we have no record of receiving any such letter of offer to sell (the letter appears to only have been sent to Colliers). This inaccuracy in a document which asserts that our Client has made misleading statements is concerning.

e) Appendix L: Valuation Summary

2.14 The Valuation Summary notes that Mr Hart obtained independent valuations in the range of $12.5M to $18.590 (this $18 million valuation being a valuation which is backdated by 18 months and based on incorrect assumptions regarding GFA $ rate).

2.15 What the Valuation Summary does not state is that Mr Hart insisted on a sale price of $30 million and then $21 million for a period of 6 months. **Mr Hart's conduct did not even align with the valuation reports which he obtained.**

Next Steps

The Minter Ellison submission does not raise any issues which would require Council to reconsider the decision to support the DA and recommend to the Sydney North Planning Panel that the DA be approved. The fact that Mr Hart regrets that he did not sell his property when the opportunity was available to him, and now is trying to rectify this, is not a lawful reason to recommend that the DA be refused. In any case, **even now Mr Hart is seeking a price more than $2M greater than our client has reasonably offered. This demonstrates plainly that amalgamation is not feasible**.

Prior to lodging their DA, two formal offers (based on independent valuations and above the valuation amounts) were made in writing to Mr Hart but both of these were rejected on the basis that Mr Hart was only willing to accept $30 or $21 million. Mr Hart put in writing that $11million was "manifestly unreasonable" and expressly stated that he was content to deliberately delay the DA, by litigation if necessary, noting that "I have lived in this property for 56 years, a few more years won't be bothersome". Our Client reasonably accepted at face value that Mr Hart would not accept $11m and lodged their DA. The Colliers agent, who has experience and knowledge of the St Leonards South precinct, confirmed to Mr Hart that after lengthy negotiations, agreement could not be reached.

The criticisms in the Minter Ellison submission are almost all premised on the fact that our Client did not make a reasonable offer. Once it is accepted that our Client did in fact make such offers, the criticisms in the submission have no basis.

Our Client has suffered significant delays in the assessment of their DA due to the conduct of Mr Hart who, by his own admission, is disrupting the assessment process and seeking to delay any decision. This most recent submission from Minter Ellison does not raise any new issues and we ask that Council continue to prepare their updated assessment report so that the DA can go before the Panel for decision on 5 April 2023.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or awhealy@millsoakley.com.au or Clare Collett at ccollett@millsoakley.com.au

Yours sincerely

Anthony Whealy
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