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Dear Kevin

**Advice on site isolation for proposed Development Application**  
**Site: 116, 118 and 120 Frenchs Forest Road West and 11 Gladys Avenue, Frenchs Forest**

We refer to your request for advice in relation to the proposed development application at 116, 118 and 120 Frenchs Forest Road West and 11 Gladys Avenue, Frenchs Forest ('**Site**'), for the demolition of existing structures and construction of 3 residential flat buildings ('**Proposed Development**').

Specifically, you have asked us to provide advice on whether the adjoining properties to the east and west of the Site are considered 'isolated' under the *Warringah Local Environmental Plan 2011* ('**WLEP**'), the Warringah Development Control Plan ('**WDCP**') and/or the Land and Environment Court's site isolation planning principle, known as *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 at [17]-[19] ('**Karavellas**').

**Summary Advice**

In our view, based upon the facts set out below and the material that we have reviewed, we advise as follows:

- The adjoining properties to the west of the Site, being 9, 9A and 9B Gladys Avenue, are **not isolated by the Proposed Development** as the concept plans that you have prepared demonstrate that the sites are able to be developed in accordance with the current planning controls if amalgamated with one another. In our view this is a reasonable development proposition as neither property is presently considered to be an 'island' in the sense that there is potential for those sites to be amalgamated with one another because they have not yet benefited from the recent 'Frenchs Forest Road West Neighbourhood Precinct' up-zoning (see *Adouni and Raad Pty Ltd v Georges River Council* [2020] NSWLEC 1166 ('**Adouni**') at [81]-[83]).
- The adjoining properties to the east of the Site, being 114 Frenchs Forest Road West, 13 and 15 Gladys Avenue are equally **not isolated by the Proposed Development** for the same reasons as the above. That is, the concept plans that you have prepared demonstrate that the sites are able to be developed in accordance with the current planning controls if amalgamated with one another, because none of those properties are presently considered to be an 'island' because they have not yet benefited from the recent up-zoning (see *Adouni* at [81]-[83]). In addition, we note that 114 Frenchs Forest Road West and 13 Gladys Avenue exceed the applicable minimum lot size development standard on their own for the purposes of a residential flat building development

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pursuant to clause 8.6 of the *WLEP* and could potentially (subject to further planning consideration) be developed for such a purpose in the future without requiring amalgamation.

- None of the adjoining properties will be left 'isolated' by the Proposed Development simply because they cannot each be redeveloped independently for the purposes of a residential flat building, as suggested by Council's Design & Sustainability Advisory Panel ('**DSAP**'). This is not the test for whether a property is isolated by a proposed development.
- Accordingly, the *Karavellas* planning principle and Clause 5.2.6 of the *WDCP* **do not** apply as the neighbouring land will not be isolated by your development. Despite this, as Council has raised *Karavellas* in correspondence to you, we provide some further commentary on *Karavellas* and clause 5.2.6 of *WDCP* below.

## Background

In preparing this legal opinion, we have considered and understand the relevant facts to be as follows:

- The Site consists of 4 separate allotments, described as follows:
  - 11 Gladys Avenue, Lot 14 in DP 25713;
  - 116 Frenchs Forest Road West, Lot 24 in DP 25713;
  - 118 Frenchs Forest Road West, Lot 2 in DP 213608; and
  - 120 Frenchs Forest Road West, Lot 1 in DP 213608.
- The Site has combined a total area of 5,740m<sup>2</sup>, with two street frontages comprising a southern frontage to Frenchs Forest Road West of approximately 70m, and a northern frontage to Gladys Avenue of approximately 10m.
- The Site is directly adjoined by the following allotments:

### To the west

- 9 Gladys Avenue, Lot 151 in DP 847732 – which contains a two storey residential dwelling, site area approximately 758.8m<sup>2</sup>;
- 9A Gladys Avenue, Lot 61 in DP 1294380 – which contains a single storey residential dwelling sharing an access handle with 9B Gladys Avenue, site area approximately 283m<sup>2</sup> excluding the access handle;
- 9B Gladys Avenue, Lot 62 in DP 1294380 – which contains a single storey residential dwelling sharing an access handle with 9A Gladys Avenue, site area approximately 518m<sup>2</sup>;

### To the east

- 13 Gladys Avenue, Lot 5 in DP 580693 – which contains a large single storey residential dwelling and pool, site area approximately 2,690m<sup>2</sup>;
- 15 Gladys Avenue, Lot 4 in DP 580693 – which contains a large single storey residential dwelling and pool, site area approximately 708m<sup>2</sup>; and
- 114 Frenchs Forest Road West, Lot 25 in DP 25713 – which contains a single storey residential dwelling, site area approximately 1,795m<sup>2</sup>.

### ('Adjoining Properties')

- In 2021, the 'Frenchs Forest 2041 Place Strategy' was finalised, and in 2022 new planning controls were introduced for the Frenchs Forest Precinct. As part of these amendments, the Site and Adjoining Properties were rezoned.
- The Site and Adjoining Properties are currently zoned R3 Medium Density Residential pursuant to the *WLEP*. Boarding houses, dual occupancies, dwelling houses, multi dwelling housing, residential flat buildings and seniors housing are permissible with consent in the R3 Zone, among other uses.
- Pursuant to Schedule 1, clause 24 of the *WLEP*, the Site and 114 Frenchs Forest Road West are identified as being located within 'Area 24' on the Additional Permitted Uses Map, meaning shop top housing and other business uses are permitted.
- The Site and Adjoining Properties are located within the Frenchs Forest Town Centre (Frenchs Forest Road West Neighbourhood Precinct) and are therefore subject to the site-specific development controls provided in Part 8 of the *WLEP* and Part G9, Section 5.2 of the *WDCP*.
- A summary of the relevant development controls is as follows:

#### WLEP

- Clause 4.1 – 600m<sup>2</sup> minimum lot size for subdivision generally
- Clause 8.6 - 1,400m<sup>2</sup> minimum lot size for multi dwelling housing, residential flat buildings, shop top housing
- Clause 8.7 - 30m minimum street frontage for residential flat buildings and shop top housing

#### WDCP

- Clause 5.2.6 – Site Consolidation

*3. Should a development result in an isolated lot, the applicant must demonstrate that the isolated lot is capable of being reasonably developed without detracting from the character of the surrounding area.*

- Clause 5.2.10 – Parking, basement design and basement access

*4. Vehicular access is prohibited from Frenchs Forest Road West and Wakehurst Parkway. This includes all vehicular access points for loading and unloading, garbage and recycling services and building services generally.*

- On 25 May 2023, the Proposed Development was considered by the DSAP, which did not support the original design but recommended amendments.
- On 8 June 2023, the Proposed Development, as amended, was again considered by the DSAP, which made the following comments:

*The proposal has the **potential to result in the isolation** of Nos. 9 and 9A Gladys Avenue and preclude its **development for the purpose of residential flat building development**. The proposal may also lead to the isolation of 114 Frenchs Forest Road west due to the **restrictions on access from Frenchs Forest Road West**. Any development resulting in the isolation of adjoining sites must also be accompanied by documentation addressing the relevant Planning Principle - Karavellas v Sutherland Shire Council [2004] NSWLEC 251. Refer to comments from Council Strategic Planner" (at page 8)*

*"Amalgamation – additional lot amalgamation would be seen as a positive outcome e.g. No. 114 Frenchs Forest Road West; Nos. 9 & 9A Gladys Avenue; Nos. 114 Frenchs Forest Road West, 13 & 15 Gladys Avenue. Can the Applicant demonstrate that the surrounding lots are able to be **redeveloped in the following patterns below**:*

*9 & 9A Gladys Avenue  
114 Frenchs Forest Road West, 13 & 15 Gladys Avenue*

*It is likely that the above lots will only be able to achieve multi dwelling housing as they would not meet the minimum street frontage requirements (30m) for residential flat buildings” (at page 14).*

[our **emphasis** added]

- We note that 9B Gladys Avenue is not referred to in the DSAP comments. We expect that this was simply an oversight.
- You have prepared schematic architectural plans prepared by Brewster Murray dated 13 September 2023 (**'Schematic Plans'**) that illustrate development of the adjoining sites:
  - to the west of the Site, being 9, 9A and 9B Gladys Avenue for the purpose of a residential flat building;
  - to the east of the Site, being 114 Frenchs Forest Road West, 13 and 15 Gladys Avenue for the purpose of a residential flat building.

Please confirm if any of the above facts or assumptions are incorrect as this may change our opinion.

### Detailed Advice

1. **Proper Application of the Site Isolation Planning Principle**
  - 1.1 First and foremost, the *Karavellas* planning principle only applies “**when a site is to be isolated through redevelopment**” (at [17]).
  - 1.2 What this means is that if an applicant can demonstrate that relevant neighbouring properties “*can achieve a development that is consistent with the planning controls*” (*Cornerstone Property Group Pty Ltd v Warringah Council* [2004] NSWLEC 189) then the *Karavellas* planning principle does **not** apply at all. **Site isolation principles simply do not apply at all when a site will not be isolated.**
  - 1.3 In our experience, Council’s often ask applicant’s to show how *Karavellas* is met when there is any query regarding site isolation. However, *Karavellas* is only relevant to sites which are actually isolated by a development application.
  - 1.4 The first issue is therefore to determine if the Adjoining Properties would be isolated by the Proposed Development.
  - 1.5 In *Statewide Planning Pty Ltd v Canterbury-Bankstown Council* [2021] NSWLEC 1210 (**'Statewide Planning'**), the Court considered provisions of the relevant development control plan that set out what an isolated site is, and objectives and controls for development adjoining isolated sites, finding that land adjoining a development site was not isolated by the development because it could still be redeveloped as a standalone development envisaged by the controls (*Statewide Planning* at [101]).
  - 1.6 The Senior Commissioner’s decision in *Statewide Planning* confirmed that the *Karavellas* planning principle is **only a relevant consideration** in the assessment of a development application to “*fill in the gaps where the planning control or policy is silent*” (at [99]). In other words, if an applicable LEP or DCP:
    - (a) contains express controls dealing with the issue of site isolation, then it would be these controls that are to be squarely considered in the assessment of a development application rather than “*slavishly*” following the *Karavellas* planning principle; or
    - (b) do not contain express controls dealing with the issue of site isolation (or if there are obvious gaps in those controls), then the *Karavellas* planning principle would be a relevant consideration in the assessment of a development application.
  - 1.7 To this end, we observe that:
    - (a) there are no express controls dealing with the issue of site isolation in the *WLEP*; and
    - (b) there are limited controls dealing with the issue of site isolation contained in Part G9, Clause 5.2.6 ‘Site Consolidation’ of the *WDCP*.

- 1.8 The only control in the WDCP relating to site isolation reads as follows:

*3. Should a development result in an isolated lot, the applicant must demonstrate that the isolated lot is capable of being reasonably developed without detracting from the character of the surrounding area.*

- 1.9 Neither the WDCP or the WLEP contain a control regarding lot amalgamation. The only control is that an applicant show that an isolated lot can be reasonably developed without detracting from the character of the surrounding area.
- 1.10 On our review, there are “gaps” in the controls dealing with the issue of site isolation contained in Part G9, Clause 5.2.6 ‘Site Consolidation’ of the *WDCP*. That is, the control only relates to a development which will result in an isolated site, with no guidance provided on how to determine whether a site is isolated or the matters to avoid when consolidating lots.
- 1.11 Therefore, if the Adjoining Properties will be isolated, when the consent authority is undertaking its assessment of the Proposed Development, the *Karavellas* planning principle together with Clause 5.2.6 of the *WDCP* will be relevant considerations (consistent with *Statewide Planning*). We turn now to the important issue of whether the Adjoining Properties will be isolated.

## **2. Are the Adjoining Properties Isolated by the Proposed Development?**

- 2.1 As noted above, the first step is to determine whether a site is isolated by a proposed development or whether it can achieve development consistent with the planning controls.
- 2.2 In this case, there are no planning controls which **require** the amalgamation of the Adjoining Properties, in part or full. There is therefore no onus on the applicant to amalgamate the Adjoining Properties.
- 2.3 The Adjoining Properties will therefore only be isolated if they cannot be reasonably developed.
- 2.4 As noted above, all of the adjoining land is zoned R3, with additional uses permitted at 114 Frenches Rd West. The following uses are permissible in the R3 zone:

*Attached dwellings; Bed and breakfast accommodation; Boarding houses; Boat sheds; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; Dual occupancies; Dwelling houses; Educational establishments; Emergency services facilities; Environmental protection works; Exhibition homes; Group homes; Home businesses; Multi dwelling housing; Neighbourhood shops; Oyster aquaculture; Places of public worship; Recreation areas; Residential flat buildings; Respite day care centres; Roads; Secondary dwellings; Seniors housing; Tank-based aquaculture; Veterinary hospitals*

### Adjoining Properties - West

- 2.5 With respect to the Adjoining Properties to the west of the Site, being 9, 9A and 9B Gladys Avenue, it appears to us (subject to detailed planning assessment) that the sites individually would be constrained for the purposes of redevelopment for a single residential dwelling or other low/medium density residential use due to their limited site areas.
- 2.6 Notwithstanding this, each of the allotments have not been developed in accordance with the current planning controls for the Frenchs Forest Road West Neighbourhood Precinct and are therefore capable of being amalgamated together, or with other properties to the west for the purposes of redevelopment.
- 2.7 For example, if 9, 9A and 9B Gladys Ave were amalgamated, the site area of the amalgamated lot would be more than the 1400 sqm required for a residential flat building. This is precisely the scenario upon which the Schematic Plans have been prepared, which illustrate a development that achieves:
- (a) a permissible use (residential flat building);
  - (b) a compliant height of 13m; and
  - (c) a compliant FSR of 1:1.
- 2.8 Equally, and although you would need to obtain further advice from your planner on this issue, it seems to us that an amalgamated site could also be redeveloped for other permissible uses such as boarding houses, seniors housing or child care facilities. If necessary, we expect that you could show how an amalgamated site could be redeveloped for a number of different purposes. **It is not necessary to only show that the amalgamated site can be used for a**

**residential flat building. In fact, any permissible use is sufficient to show that the site will not be isolated.**

- 2.9 This situation was considered in *Adouni* (in which we acted for the applicant), where the Court was required to consider specific ‘site isolation’ controls and held that the adjacent sites to the north of the subject site, which contained an existing single storey attached dual occupancy, were **not** isolated as contended by council because:
- (a) there was a common controlling interest in those neighbouring sites and the further adjacent sites to the north, and on that basis the Court found that future amalgamation of all of those sites was feasible as they were all yet to benefit from a recent uplift following re-zoning (at [82]-[83] and [85]);
  - (b) schematic plans had been prepared by the applicant which identified that the neighbouring site could be redeveloped independently should the owner choose not to amalgamate with the sites further to the north, and in passing the Court noted that planning controls should operate independently of present ownership (at [86]).
- 2.10 Importantly, the Court made a very practical observation in *Adouni* at [81] stating that, in those circumstances the particular neighbouring **site was not considered to be “an island” and therefore, could not be considered isolated.**
- 2.11 On our reading, Council appears to accept this conclusion in the present circumstances, noting in the DSAP extract above that the Applicant is required to “*demonstrate that the surrounding lots are able to be redeveloped in the following patterns*”.
- 2.12 It would appear to us that if the Adjoining Properties to the west were amalgamated together, the resulting site would be capable of being developed in accordance with the current planning controls, including for the purposes of a residential flat building pursuant to the Schematic Plans and possibly also a range of other uses subject to further envelope/schematic plans.
- 2.13 Whilst the resulting site would not be capable of complying with the 30m frontage required by cl 8.7 of the *WLEP* for residential flat buildings, it is possible for land to be redeveloped in circumstances where there is not full compliance with a LEP control. In fact, developments are regularly approved in reliance on a clause 4.6 variation request. Full compliance with all LEP and DCP controls is not required to show that a site can reasonably be redeveloped so that it is not isolated. In this respect, we note that cl 8.7 is not excluded from the operation of cl 4.6 of the *WLEP*.
- 2.14 Furthermore, **the ability for the 9-9B Gladys Ave to be development for an alternative reduced form of development does not mean that orderly and economic use and development of land is not achieved. That is, a site does not have to be able to be developed for the “highest and best” use, in order that it not be isolated. Council is incorrect in asserting that you must show that 9-9B Gladys Ave can be redeveloped for the purposes of a residential flat building.** In fact, we refer to the ‘Frenchs Forest Place Strategy 2041’ which envisages the Frenchs Forest Road West Neighbourhood Precinct “*offering a diversity of housing for residents*”. In order to show that the properties won’t be isolated, you only need to show that they can be redeveloped for a reasonable permissible use. However, you do not need to show that they can be redeveloped for the “highest” use, which may or may not be a residential flat building (even though that is what you have been able to show in the Schematic Plans).
- 2.15 In this regard, we refer to *Statewide Planning*, where the Court was required to consider specific ‘Site Isolation’ controls and held that the adjacent site to the South, which contained an existing 2-storey dwelling house, was **not** isolated as contended by council because the indicative schematic designs had been prepared by the applicant, which demonstrated that the neighbouring site could achieve an **independent redevelopment**, notwithstanding the key proposed redevelopment scenario was well within the maximum permissible planning controls achieving only 38% of the permissible FSR (at [90], [93]). **In *Statewide Planning* the Court found that an adjacent site was not isolated, even though it couldn’t be developed in a way that achieved the highest permissible FSR and in fact only achieved 38% of permissible FSR.**
- 2.16 In reaching this conclusion, 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”**.

- 2.17 Having regard to the above, in our view the Adjoining Properties to the west are not isolated by the Proposed Development as the sites are not considered an ‘island’ and are reasonably capable of redevelopment in accordance with the new applicable planning controls as demonstrated by the Schematic Plans. Accordingly, the *Karavellas* planning principle and Clause 5.2.6 of the *WDCP* **do not** apply.
- Adjoining Properties - East
- 2.18 With respect to the Adjoining Properties to the east of the Site, being 114 Frenchs Forest Road West, 13 and 15 Gladys Avenue, these allotments are substantially larger than the Adjoining Properties to the east, with 13 Gladys Avenue and 114 Frenchs Forest Road West each far exceeding the minimum lot size prescribed by cl 8.6 of the *WLEP* for the purposes of residential flat buildings.
- 2.19 Notwithstanding this, again it is clear that these allotments have not yet been developed in accordance with the current planning controls for the Frenchs Forest Road West Neighbourhood Precinct and are therefore capable of being amalgamated together for the purposes of redevelopment. Accordingly, consistent with the above reasoning in *Adouni*, these allotments are **not considered ‘islands’**, they therefore cannot be isolated.
- 2.20 It would appear to us that if the Adjoining Properties to the east were amalgamated together, the resulting site would be capable of being developed in accordance with the current planning controls, including for the purposes of a residential flat building. This is precisely the scenario upon which the Schematic Plans have been prepared, which illustrate a development that achieves:
- (a) a permissible use (residential flat building);
  - (b) a compliant height of 13m on 13 and 15 Gladys Avenue and 17.5m on 114 Frenchs Forest Road West; and
  - (c) a compliant FSR of 1:1 on 13 and 15 Gladys Avenue and 2.1 on 114 Frenchs Forest Road West.
- 2.21 Again, the Adjoining Properties to the east, if amalgamated together would not be capable of complying with the 30m frontage required by cl 8.7 of the *WLEP* for residential flat buildings. However, the ability for a site to be developed for an alternative reduced form does not mean that orderly and economic use and development of land is not achieved (see *Statewide Planning* at [90]-[93]). Furthermore, and as stated above, it may be possible to obtain consent for a residential flat building with a street frontage of less than 30m in reliance on clause 4.6 of the *WLEP*.
- 2.22 With respect to the DSAP comments in respect of cl 5.2.10 of the *WDCP* limiting vehicular access from Frenchs Forest Road West, we note that this would be easily overcome by consolidation/amalgamation of the Adjoining Properties to the east as demonstrated in the Schematic Plans. If this did not occur, we note that a DCP is not a strictly binding and inflexible planning instrument. This is clear from s 3.42 of the *Environmental Planning and Assessment Act 1979* (**‘EP&A Act’**), which provides that DCP controls are ‘not statutory requirements’ and their purpose is to provide guidance only. The fact that development is inconsistent with a particular control in a DCP is not a ground in of itself for refusing a development application. In fact, s 4.15(3A)(b) of the *EP&A Act* statutorily requires that a consent authority be flexible in applying numerical controls within a DCP and to allow reasonable alternative solutions that achieve the objects of those controls. Whilst this is certainly a consideration in determining whether a site is isolated, non-compliance with a DCP control does not automatically mean that a parcel of land cannot be redeveloped in accordance with the relevant planning controls.
- 2.23 In support of the above comments, we note that in *Ayache v Bayside Council* [2020] NSWLEC 1295, the Court found at [81] that an adjoining site could be developed sufficiently to meet the test in *Karavellas*, even though that development would achieve less than that allowed under the *LEP* and that access would be difficult and involve a right of way being negotiated:

*“Having regard to the established principles in Karavellas v Sutherland Shire Council [2004] NSWLEC 251 and Cornerstone Property Group Pty Ltd v Warringah Council (2004) 139*

*LGERA 245; [2004] NSWLEC 189 , I am satisfied that the site could be developed in some form however it would be less than that allowed under the LEP and relies wholly on access to the site for vehicles being provided through the subject site. The applicant has failed to demonstrate how that is provided, however it is likely that a right-of-way would be required through the building. The streetscape issues raised by the Council's experts, whilst relevant in the design and assessment of a development application for that site, are not reasons to reject this application on the basis of failure to consolidate the lot into this site. I am satisfied that No 11 Kingsland Road would be capable of achieving a development of appropriate urban form with an acceptable level of amenity."*

- 2.24 Having regard to the above, in our view the Adjoining Properties to the east are not isolated by the Proposed Development as the sites are not considered an 'island' and are reasonably capable of redevelopment in accordance with the new applicable planning controls as demonstrated by the Schematic Plans. Accordingly, the *Karavellas* planning principle and Clause 5.2.6 of the *WDCP* **do not** apply. Notwithstanding the above conclusion, we have notionally considered for abundant caution what would be required to satisfy the *Karavellas* planning principle and Clause 5.2.6 of the *WDCP*.

### 3. Application of *Karavellas* planning principle and Clause 5.2.6 of the *WDCP*

- 3.1 The planning principle in *Karavellas* requires the consent authority to consider two questions:

- (a) Is amalgamation of the development site and the isolated site feasible? (**'the first limb'**)
- (b) Can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible? (**'the second limb'**)

The first limb of the planning principle – Is amalgamation of the site feasible?

- 3.2 The following actions need be taken to ensure the first limb of the *Karavellas* planning principle is satisfied:

- (a) a formal offer to purchase the isolated site should be made prior to lodging the development application and must be in writing; and
- (b) the offer must be based upon at least one recent independent valuation of the isolated site and the valuation must be made available/shown to the other party so that they are privy to all of the facts which have informed the offer.

- 3.3 To satisfy this limb, a consent authority, including the Court is **not required to "delve into the negotiations to decide who's being more reasonable or unreasonable"** (see *Statewide Planning* at [114]). But rather, the consent authority need only consider whether a 'reasonable' offer has been made.

- 3.4 This principle has been well established for over a decade now with the Court initially observing that it is **not "...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"** (*Karavellas* at [20]).

- 3.5 An offer is generally considered reasonable in circumstances where it is based on at least one recent independent valuation. For example, in *Limahart Pty Ltd v Kogarah Council* [2006] NSWLEC 415 at [21]-[27].

- 3.6 To that end, we understand that the market rate of the Adjoining Properties has been estimated to exceed the economic feasibility for consolidating them for inclusion with the Proposed Development. That is, the cost of acquiring the Adjoining Properties at their present market rate would exceed any potential yield derived from an amalgamated development due to a number of external factors (e.g. construction costs). Arguably, in these circumstances the Adjoining Properties are already at their 'highest and best use', which also favours against them being considered isolated in response to the Proposed Development.

- 3.7 In any event, we note the following:

- (a) in considering the reasonableness of offers made, all that is required is that offers have been informed by independent valuations, and that those offers have been provided in a timely manner to allow the relevant neighbours a reasonable time period in which to respond;



- (b) it is not necessary for an offer to be based on a maximum FSR or height rather than market value. Equally, it is not necessary for an offer to be based on the market value of a property that is already at its 'highest and best use'; and
- (c) Any such valuation should therefore consider market impacts (including global, Sydney and local markets), median prices, potential development, affordable housing contribution and feasibility components/assumptions of development, among other things (which we note that you have undertaken).
- 3.8 Ultimately, we understand that you have not yet made any offers to purchase any Adjoining Properties. **In circumstances where the Schematic Plans provide evidence that the Adjoining Properties are able to be redeveloped and will not be isolated, it is in fact not necessary for you to make any offers to purchase the Adjoining Properties.**
- The second limb of the planning principle – Can orderly and economic use and development of the separate sites be achieved without amalgamation?
- 3.9 In *Karavellas* [at 19], the Court noted the expansion of the principle for the second limb in *Cornerstone* where it stated that:
- "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."*
- (our **emphasis** added)
- 3.10 In respect of the latter, in *Hamdan Co Group Pty Ltd v Canterbury-Bankstown Council* [2018] NSWLEC 1255 at [88], the Court accepted that *"it should not be required for the applicant to ensure that adjoining owners redevelop their site to the highest and best use...when those owners do not agree to sell their site to the applicant at a market rate."*
- 3.11 This is reflective of the position that **there is no legal power for an applicant to force an owner to sell**. The consent authority, including the Court therefore does not generally get involved in the valuation exercise. What it seeks to ensure is that an owner has a fair opportunity to sell a property before their site is isolated. If they do not take that opportunity, when presented with a reasonable offer, they may well suffer the consequences, as no one can force an owner to sell, and some sites may simply become isolated – that is just a reality of the matrix of laws applicable to property ownership in NSW. Your obligation under the planning principle is to give the owner a fair and reasonable opportunity to sell and move on before such isolation occurs (if the site is in fact to be isolated).
- 3.12 In addition, in *Limahart Pty Ltd v Kogarah Council* [2006] NSWLEC 415 at [31] the Court held that *"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."*
- 3.13 As stated above, the Schematic Plans provide evidence that the Adjoining Properties are able to be redeveloped and will not be isolated. However, we would suggest that additional information be provided in respect of the Schematic Plans to demonstrate/assess 'solar access' and 'privacy impacts', which are impacts expressly called on by the second limb *Karavellas* planning principle.
- Clause 5.2.6 of the WDCP
- 3.14 As set out above, clause 5.2.6 of the WDCP applies where a development will result in an isolated lot, and requires an applicant to *"demonstrate that the isolated lot is capable of being reasonably developed without detracting from the character of the surrounding area"*.
- 3.15 In our view, this requirement is consistent with the second limb of the *Karavellas* planning principle, however requires consideration of the specific character statements provided in the WDCP.

- 3.16 Accordingly, in preparing the 'envelope' or 'schematic' plans we would recommend that consideration be given, whether in writing or in plan, to the character statements provided in Part G9, Section 5.2 of the *WDCP*.

### Conclusion

The Schematic Plans provide evidence that the Adjoining Properties, to the east and west, are able to be redeveloped and will not be isolated. Accordingly, it is our view that the Adjoining Properties would not be isolated by the Proposed Development. On this basis, the *Karavellas* planning principle does not apply.

If you have any questions or require further information in relation to this advice, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or James Oldknow of +614 8035 7875 or [joldknow@millsoakley.com.au](mailto:joldknow@millsoakley.com.au).

Yours sincerely



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