

13 February 2020

Mr Jason Maslen  
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Dear Mr Maslen

**Response to request for additional information  
Stevenson Library Building, The Scots College, Mod 1 (SSD-8922-Mod-1)**

1. We act for The Scots College and are instructed to respond to your letter dated 4 February 2020 to Mr Paul Oates in relation to the above application. In particular, this letter responds to:
  - (a) Woollahra Municipal Council's (**Council**) letter dated 29 January 2020; and
  - (b) Lindsay Taylor Lawyers letter dated 16 January 2020.
2. We appreciate that Lindsay Taylor Lawyers letter address both The Scots College's modification application and Cranbrook's. However, both Schools have distinct reasons opposing the imposition of the levy on their developments. Despite this, both consider the condition unfair and unreasonable given all other State significant school developments in other local government areas have not had the levy imposed (where student numbers have not increased).
3. In summary, neither Council's letter nor the advice of Lindsay Taylor Lawyers address the primary basis for our client's modification application that seeks the deletion of condition C32 imposing the \$288,630.68 levy on the School's development - the construction of a new Library. The main reason our client seeks the deletion of condition C32 is because it is simply unfair and plainly unreasonable. It is unfair and unreasonable to impose a levy on schools within the Woollahra Municipal Council local government area and not in other areas through the State of New South Wales. If the payment of a levy in this way were to remain, it can only be seen as a penalty (or a "tax" as Lindsay Taylor Lawyers say) to schools within the Woollahra local government area and may discourage or delay future investment in educational facilities within this area - an outcome we do not expect the Minister intended.
4. More detailed submissions are set out below.

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## Unfairness and unreasonableness

5. The primary reason that our client seeks the deletion of condition C32 and the \$288,630.68 levy is because it is unfair and unreasonable. This is because:
  - (a) It is not imposed on other private schools throughout the State outside of Woollahra's local government Council area. This results in the unequal treatment of The Scots College (and Cranbrook also within the Woollahra local government area who are also seeking to modify a similar condition) when compared with other independent schools who have, or may in the future undertake State significant developments simply because of its location within the Woollahra local government area. A list of 10 independent schools that have been granted development consent for State significant projects and which have not been required to pay a section 7.12 levy is listed in **Attachment A**.
  - (b) The development that is the subject of the approved State significant development application is for "*major alterations and additions to the Stevenson Library Building*" located on The Scots College premises in Bellevue Hill. The purpose of the development is to deliver an improved existing facility to provide better education, operational and design outcomes for the College. Consequently, the development generates no long term impact on public facilities. There is also no increase in student numbers proposed.
6. Such unfair treatment will negatively impact future fundraising activities for new State significant development the School may in the future propose as parents and alumni become aware that they are paying an additional impost that other schools in other areas do not have to pay.
7. Given the unfairness generated by the imposition of the condition, it ought to be deleted to create parity across independent schools throughout the State.

## The Minister's discretion

8. Section 7.12 of the *Environmental Planning and Assessment Act 1979* (NSW) under which the levy has been imposed is **discretionary**. That section states:

**"7.12 Fixed development consent levies**  
(cf previous s 94A)  
(1) A consent authority **may** impose, as a condition of development consent, a requirement that the applicant pay a levy of the percentage, authorised by a contributions plan, of the proposed cost of carrying out the development."

(emphasis added)
9. It is not the case that the Minister **must** impose the levy. Indeed, the Minister does not impose the levy on other school developments for which he is the consent authority. It appears that Woollahra Council is alone in insisting on the imposition of the levy given other Councils have been prepared not to actively lobby for the imposition of the levy.
10. In circumstances where the services and facilities delivered by The Scots College provide an education benefit to the community and where the development does not create an increase in demand for public services or facilities, there was no reason for the levy to be imposed and there is no persuasive reason as to why it should not be removed. It is no doubt that precisely for this reason the discretion not to impose the contributions exists.
11. In addition to the above, the need for consistency throughout the State's planning regime is evident within the aims of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*. Relevantly, Clause 3 of that Policy states:



### " 3 Aims of Policy

*The aim of this Policy is to facilitate the effective delivery of educational establishments and early education and care facilities across the State by—*

- (a) improving regulatory certainty and efficiency through a **consistent planning regime** for educational establishments and early education and care facilities, and*
- (b) simplifying and **standardising planning approval pathways** for educational establishments and early education and care facilities (including identifying certain development of minimal environmental impact as exempt development), and*
- (c) establishing **consistent State-wide assessment requirements and design considerations** for educational establishments and early education and care facilities to improve the quality of infrastructure delivered and to minimise impacts on surrounding areas" (emphasis added)*

12. The consistent imposition of levies by the Minister throughout the State would be in harmony with the aims of the Policy, and this discretion provides a mechanism to get around the parochial interests of councils who seek to extract the levy on State significant school developments within their local government areas. In circumstances where the imposition of a levy is discretionary, that discretion should be exercised consistently by the Minister.

#### Council's comments

13. In Council's letter dated 29 January 2020, it advises that the payment of a development levy in accordance with its Development Contributions Plan 2011 "*is applicable*". Whilst it may be applicable, there is no requirement for the levy to be imposed and as we have discussed above it is discretionary.
14. Whilst section 7.12(4) may not require the application of the Newbury test which ordinarily applies as a test on the legitimacy of a contribution, whether the condition fairly and reasonably relates to the development and the whether a sufficient nexus exists provide a useful proxy for determining whether the condition should be imposed.
15. In response to our letter the Council has also introspectively referred to a number of schools within the Woollahra local government area. However, the Council's narrow focus on school's within its local government area is precisely why our client seeks that the levy not be imposed - it is unfair and unreasonable for schools within Woollahra to be subject to the contribution for State significant development whilst schools in close proximity but outside the local government area avoid it. Reference to schools only within the Woollahra local government area is at cross purposes with our client's primary argument against the imposition of the condition. As we have said above, the imposition of the levy by the Minister for a school within one local government area but not in any other, is simply unfair.

#### Lindsay Taylor Lawyers advice

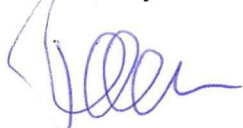
16. The Council has also obtained legal advice from Lindsay Taylor Lawyers addressing both Cranbrook and the Scots College's applications. Similar to the Council's letter, that advice does not adequately explain why the Minister should exercise his discretion to impose a levy (or a "tax" as stated by Lindsay Taylor Lawyers) on The Scots College. Rather, the advice:
- (a) Analyses whether the condition was lawfully imposed and the standard of legal reasonableness. This respectfully misses the point given the discretion to delete the condition may be based on general fairness and reasonableness. Whilst it may be legally reasonable (which we do not concede), that does not mean it ought to be imposed.

- (b) Did not contain thorough research and is predicated on inaccurate understanding of the degree of unfairness. Council's lawyers relied on our initial research which did not canvass the full number of other schools not subject to the levy which our more recent analysis attached supplements.
  - (c) Relies on the Council's analysis of development where the levy has been imposed within the Woollahra local government area.
17. Neither Council's comments, nor Lindsay Taylor Lawyers advice assists the Department and the consent authority in answering whether the discretion should be exercised to impose a levy on The Scots College when the same levy is not imposed on other State significant school developments outside the Council area. That question is at the heart of the modification sought by our client.

## Conclusion

18. We see no rational basis for the Minister, as the consent authority, to impose a levy on schools in the Woollahra local government area while exempting schools in other local government areas. When it comes to schools carrying out State significant development across NSW, parity in government charges is an important discretionary consideration in favour of granting consent to our client's application.
19. Both the Council and our client concede that the Minister has the discretion to delete the condition. No persuasive reasons have been identified by the Council itself or through its lawyers which should lead to the refusal of our client's modification application.
20. Condition C32 ought to be deleted.
21. Whilst it is not our client's preference to pursue other legal avenues that may be available to it, our client reserves its rights in relation to the validity of the condition given its manifest unreasonableness and unfairness is plain.
22. Please contact us if you wish to discuss this submission.

Yours faithfully



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## Attachment A

List of identified independent school State significant developments approved by the Minister's delegate **without** the imposition of a section 7.12 levy.

No.	School	SSD No.	LGA
1	MLC School	6484	Burwood
2	Pymble Ladies College	5314	Ku-ring-gai
3	Wenona School	6952	North Sydney
4	St Josephs College	8970	Hunters Hill
5	Wahroonga Adventist School	5535	Ku-Ring-Gai
6	St Aloysius' College	8669	North Sydney
7	Loreto School	7919	North Sydney
8	Shore School	7507	North Sydney
9	SCEGGS Redlands	6454	North Sydney
10	St Ignatius College	7140	Lane Cove