

14 November 2019

The Hon Rob Stokes, Minister for Planning and Public Spaces
NSW Department of Planning and Environment
320 Pitt St
Sydney NSW 2000

Dear Minister Stokes

**Cranbrook School Redevelopment (SSD 17_8812)
Modification application - Development contributions**

1. We refer to the above state significant development (**SSD**) application, and confirm that we act for Cranbrook School (**the School**).
2. Consent to SSD 17_8812 was granted by the Department on 13 September 2019 (**Consent**).
3. Our client is preparing a modification application regarding the Consent. The modifications sought will involve minor environmental impact.
4. We have been instructed to provide our opinion on the reasonableness of Condition B3 of the Consent. That condition states:

"B3. Prior to the issue of any construction certificate, a Section 94A levy totalling \$1,106,490, is to be paid to Council in accordance with Section 7.12 of the EP&A Act and Schedule 1 of Woollahra Section 94A Development Contributions Plan 2011. Prior to payment Council can provide the value of the indexed levy."
5. As the Department would be aware, a condition under section 7.12 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) cannot be appealed by merits review. Without any merit appeal right, it is all the more important that this submission be considered, particularly given the additional cost burden the contribution imposes for the School.
6. We are instructed to set out why, had such an appeal right existed, Condition B3 would be held to be unreasonable in accordance with the principles set out in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 - the commonly applied test for determining the reasonableness of a condition. For completeness, those principles are:
 - (a) The condition must have a planning purpose, and not be for an ulterior purpose.
 - (b) The condition must be fairly and reasonably related to the permitted activity.

- (c) Condition must not be so unreasonable that no reasonable planning authority could have imposed it.
7. The imposition of condition B3 adds another level of cost to this development, which other school redevelopments outside the suburb of Woollahra have been able to avoid, which goes to the reasonableness of the condition.

Unreasonableness of Condition B3

No contributions imposed in other recent independent school redevelopments

8. As our client has previously set out in its submission to the Department dated 20 May 2019 before the consent was granted, similar conditions imposing contributions under local contributions plans were not imposed in the following similar state significant developments:
- (a) MLC school - SSD 6484;
 - (b) Pymble Ladies College - SSD 5314; and
 - (c) Wenona School - SSD 5314.
9. Moreover, the only times similar contributions have been levied have been where an application seeks to increase the student cap. That is not the case with our client's development, which does not seek to increase student numbers. In that regard, Condition A23 even states:

"This consent does not approve any increase in student numbers above any existing consents restricting staff and/or student numbers on the site."

10. The Department's Assessment Report regarding SSD 17_8812, adopted by David Gainsford on 13 September 2019, does not respond to those inconsistencies, but only notes that:

"The Applicant responded by providing legal advice analysing a number of previous SSD determinations from 2013 to 2016 in LGAs with development contributions plans, where they were not applied to certain projects."

(see pages 51-52 of the Assessment Report).

11. There is no sufficient nexus between Condition B3 and the development, as this development does not create an increased demand for public services or facilities. The condition places Cranbrook at a disadvantage compared to other independent schools. On this basis alone, in our view, the condition should be removed. However, there are other reasons also.

Reduction of the 1% levy did not take all public benefits into account

12. The Department's Report reduces the 1% contributions (\$1.25 million) by \$143,570 to result in a total amount of \$1,106,490 payable as the development contribution. The reduction is explained as being due to the provision of the footpath, kerb and gutter works along Rose Bay Avenue, which would provide a public benefit.
13. If the Department were to apply this logic consistently, it would further reduce the contributions given the other considerable public benefits that have not been accounted for. These overlapping benefits include:
- (a) new chapel; and

- (b) Aquatic and Fitness Centre, including off street car parking, which will include a Learn to Swim Pool (which has no obvious benefit to Cranbrook whose students have moved beyond that stage).
14. These facilities will be open to the general public at suitable times.
15. The Department itself concluded in the Assessment Report that the proposal is in the public interest for several reasons, including:
- "delivering increased new and improved education and recreational facilities to cater for increased demand in the Woollahra Municipal LGA."* [Emphasis added].
16. For the reasons set out above, in our view Condition B3 is unreasonable and our client's modification application should be supported.

Yours faithfully



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