



**ANGEL PLACE
LEVEL 8, 123 PITT STREET
SYDNEY NSW 2000**

URBIS.COM.AU
Urbis Pty Ltd
ABN 50 105 256 228

18 November 2019

The Secretary
NSW Department of Planning, Industry and Environment
320 Pitt Street
Sydney NSW 2000

Attn: Navdeep Shergill

Dear Navdeep,

SECTION 4.55(1A) APPLICATION TO AMEND SSD-8812 FOR CRANBROOK SCHOOL REDEVELOPMENT

Pursuant to Section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), the accompanying application seeks to modify SSD-8812 as outlined in Section 3 of this letter.

This letter has been prepared by Urbis Pty Ltd (**Urbis**) on behalf of the Cranbrook School (**the School**) and seeks to modify consent SSD-8812 relating to development at 5 Victoria Road, Bellevue Hill (legally described as Lot 1 DP663630; Lots 9 – 18 DP9005; and Lots A – C DP186768).

The purpose of this modification is to remove condition B3 relating to the payment of Development Contributions. In order to facilitate the Department of Planning, Industry and Environment's (**the Department**) assessment and determination of this Section 4.55(1A), this report:

- Provides a description of the site and surrounding area.
- Provides a summary of the recent development history affecting the site.
- Provides a description of the proposed modification.
- Identifies the key issues for assessment, providing clear justification of the need for the amendment to the consent and its satisfaction from a merit perspective.
- Validates the assessment process against the Section 4.15 heads of consideration under the EP&A Act.
- Concludes that the proposal is satisfactory and warrants issue of a modified development consent in its current form.

This Section 4.55(1A) has relied upon legal advice provided by Colin Biggers & Paisley Lawyers dated 14 November 2019, which accompanies this letter.

1. SITE ANALYSIS AND CONTEXT

The subject site is located at 5 Victoria Road, Bellevue Hill and is legally described as Lot 1 DP663630; Lots 9 – 18 DP9005; and Lots B and C DP186768. A location plan is provided at **Figure 1**. The site is located within the Woollahra local government area (**LGA**). The campus is located to the south east of New South Head Road, with a 430 metre frontage to New South Head Road, a 140 metre frontage to

Victoria Road and a 370 metre frontage to Rose Bay Avenue, and covers an area of approximately 4.342 hectares.

The site is a prominent feature along New South Head Road due to the scale of the school buildings, the open space and fencing and landscaping associated with the Hordern Oval. The School is located on a site that is predominantly an island site apart from three adjoining houses to the south west. The site is located in the established residential suburb of Bellevue Hill opposite Point Piper.

The context of the site is characterised by:

- **North:** The site is bounded to the north and north-east by New South Head Road, beyond which is medium and low density residential development, and Sydney Harbour.
- **East:** The site is bordered to the east by Rose Bay Avenue, beyond which is low density residential development, and pockets of medium density residential development. Further east of the site is the Scots College, another independent boy’s school.
- **South:** The site is bounded to the south by Victoria Road, beyond which is low density residential development.
- **West:** The site is bordered to the west by low density residential development comprising of three adjoining houses to the south west. The Woollahra Council Chambers and Woollahra Library are located further west of the site on the opposite side of New South Head Road adjacent to a small pocket of medium density residential development.

Figure 1 – Site Aerial.



Source: NearMap and Urbis

2. DEVELOPMENT HISTORY

On 13 September 2019 approval was granted by the Department for the alterations and additions of Cranbrook School. Specifically SSD-8812 sought consent for the redevelopment of the northern portion of the campus through the demolition of the existing Mansfield Building and War Memorial Hall to facilitate the construction of the New Centenary Building and associated landscaping. The proposal also sought consent for the excavation of the Hordern Oval to facilitate the construction of the new aquatic and fitness centre with new public domain interface to New South Head Road, in addition to a 124 space subsurface carpark. No variation to the student cap was sought.

3. THE PROPOSED MODIFICATION

This proposed modification seeks to delete Condition B3 of SSD-8812 in its entirety from the consent as it relates to the requirement to pay Section 94A Development Contributions:

Development Contribution

~~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.~~

4. JUSTIFICATION FOR MODIFICATION

This proposed modification relies on legal advice provided by Collins Biggers Paisley Lawyers (CBP) dated 14 November 2019. The proposed modification seeks to delete Condition B3 of SSD-8812 relating to the requirement to pay Section 94A Development Contributions as it is deemed to be unreasonable. CBP have determined that the condition is unreasonable for three primary reasons:

1. The Department has not imposed contributions under local contributions plans on other recent independent school redevelopments, and as such the imposition of said condition is unreasonable;
2. There is no sufficient nexus between Condition B3 and the development, as the development does not create an increased demand for public services or facilities; and
3. Reduction of the 1% levy fails to take into consideration all of the public benefits of the development.

4.1. CONSISTENCY AND REASONABLENESS

If Condition B3 were to be tested 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, it would be determined to be unreasonable. 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) *The condition must not be so unreasonable that no reasonable planning authority could have imposed it.*

The imposition of condition B3 adds another level of cost to this development, which other school redevelopments outside of the Woollahra LGA have been able to avoid, which goes to the reasonableness of the condition. The Department has not imposed contributions under local

contributions plans on other recent independent school redevelopments, and as such the imposition of said condition is unreasonable. As highlighted in CBP's advice:

"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.*

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." [Emphasis added]

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 2073 to 2076 in LGAs with development contributions plans, where they were not applied to certain projects." (see pages 51-52 of the Assessment Report)"

As such Condition B3 is considered to be unreasonable and the application of its imposition on the consent in this instance is inconsistent with other determinations of a similar ilk made by the Department.

4.2. INSUFFICIENT NEXUS

There is no sufficient nexus between Condition B3 and the development, as the development does not create an increased demand for public services or facilities and does not seek to increase the student cap. As highlighted in CBP's advice:

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."

As such there is no sufficient nexus between Condition B3 and the development and its imposition is unreasonable.

4.3. PUBLIC BENEFIT

The relevant section of CBP's advice is reproduced below for completeness:

"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.

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).*

These facilities will be open to the general public at suitable times.

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]."*

Ignoring the fact that there is no sufficient nexus between Condition B3 and the development, and that the imposition of Condition B3 is both unreasonable and inconsistent; the Department has been inconsistent in its application of logic with regards to this condition. In its assessment and determination of SSD-8812, the Department supported a reduced quantum of total contributions payable in recognition of some of the public benefits that the development would provide including footpath, kerb and gutter works along Rose Bay Avenue.

However, if this logic was applied consistently, the Department would have further reduced the quantum of contributions payable given the other considerable public benefits the development will deliver including a Chapel and Aquatic and Fitness Centre, that have not been accounted for in the reduction, and which are specifically identified as contributing to *significant public benefit* as stated in the assessment report:

"The alterations and additions to Cranbrook School would provide significant public benefit to the immediate local and surrounding district through the provision of new and improved education facilities in addition to publicly available facilities in the Aquatic and Fitness Centre."

Given the considerable public benefits the development will deliver to community, unfairly encumbering the School with this condition is against the School's and the public interest. Therefore, the deletion of Condition B3 is in the public interest as it will enable the School to deliver the world-class facilities and benefits including a new Chapel and Aquatic and Fitness Centre, including off street car parking all of which will be open to the general public at suitable times.

5. SECTION 4.55(1A) ASSESSMENT

The application has been assessed in accordance with the relevant requirements of Section 4.55(1A) of the EP&A Act as set out below. The Department may modify a development consent under the provisions of Section 55(1A) of the EP&A Act if it is satisfied that the amendment is of 'minimal environmental impact' and the development remains 'substantially the same' as originally approved.

5.1. ENVIRONMENTAL IMPACT

The potential environmental impacts of the proposed amendment are minimal and effectively administrative in nature and can be considered under the provisions of Section 4.55(1A) as:

- The proposed deletion of Condition B3 relates to the wording of conditions of consent and will not affect the approved physical works or building operation; and
- Beyond Condition B3, all the consent conditions can be satisfied.

5.2. SUBSTANTIALLY THE SAME

The proposed modification will result in substantially the same development as approved under SSD-8812 for the following reasons:

- There are no physical changes proposed to the built form changes to the approved development as part of this modification;
- The proposed amendment relates to the wording of a condition of consent, and will not affect the overall fundamentals of the approval. It is sought on the basis of legal advice that 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; and
- With the exception of the Condition B3 identified in Section 3, all conditions remain satisfied, or remain able to be satisfied as a result of the development.

6. CONCLUSION

This correspondence is prepared in support of a Section 4.55(1A) application lodged on behalf of the Cranbrook School. It demonstrates that:

- The proposed amendment will have no environmental impact.
- The development will remain substantially the same as that approved under SSD_8812.
- The development will continue to meet the objectives of all relevant planning controls.
- There is no sufficient nexus between the imposition of Condition B3 and the development, as this development does not create an increased demand for public services or facilities.
- Beyond the fact that the imposition of 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 Department has been inconsistent in its application of logic with regards to this condition. In its determination of SSD_8812, the Department supported a reduced quantum of total contributions payable in recognition that the development would provide footpath, kerb and gutter works along Rose Bay Ave, which would provide a public benefit. However, if this logic was applied consistently, the Department would further reduce the quantum contributions given the other considerable public benefits including the Chapel and Aquatic and Fitness Centre that have not been accounted for.

Putting aside the legal reason supporting the deletion of the condition, it is reasonable for the Department to delete the condition given 1. The public benefit associated with the proposal and 2. The development will not create an increased demand for public services or facilities.



We trust that the proposed modifications to the development consent are satisfactory and approval can be addressed under the provisions of Section 4.55(1A) of the EP&A Act.

If you have any questions please don't hesitate to contact me at jparker@urbis.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Parker".

Jacqueline Parker
Director - Planning