



Cranbrook School Redevelopment Mod 1



State Significant
Development Modification
Assessment
(SSD 8812 MOD 1)

July 2020

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Glossary

Abbreviation	Definition
Applicant	Cranbrook School
AFC	Aquatic and Fitness Centre
CBD	Central Business District
CBP Lawyers	Colin Biggers & Paisley Lawyers
CIV	Capital Investment Value
Consent	Development Consent
Council	Woollahra Municipal Council
Department	Department of Planning, Industry and Environment
DCP 2011	Woollahra Section 94A Development Contributions Plan 2011
DPI	Department of Primary industries
EIS	Environmental Impact Statement
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EP&A Regulation	<i>Environmental Planning and Assessment Regulation 2000</i>
EPI	Environmental Planning Instrument
EPL	Environment Protection Licence
LGA	Local Government Area
LEC	Land and Environment Court
Woollahra LEP 2014	Woollahra Local Environmental Plan 2014
Minister	Minister for Planning and Public Spaces
RtS	Response to Submissions
SEARs	Secretary's Environmental Assessment Requirements
Secretary	Secretary of the Department of Planning and Environment
SEPP	State Environmental Planning Policy
SRD SEPP	<i>State Environmental Planning Policy (State and Regional Development) 2011</i>
SSD	State Significant Development
The Commission	Independent Planning Commission



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1. Introduction

This report provides an assessment of an application to modify the State significant development (SSD) consent for the Cranbrook School redevelopment in Woollahra. The modification application has been lodged by Cranbrook School (the Applicant) under section 4.55 (1A) *Environmental Planning and Assessment Act 1979* (EP&A Act).

The modification application seeks to delete condition B3 of the consent which requires payment of a section 7.12 contribution of \$1,106,460 to Woollahra Municipal Council (Council).

1.1 Background

The application site is Cranbrook School, located at 5 Victoria Road, Bellevue Hill (the site) in the Woollahra Local Government Area (LGA) approximately four kilometres (km) from the Sydney Central Business District (CBD) (**Figure 1**). The site is legally described as Lot 1 in DP 663630, Lots 9-18 in DP 9005, and Lots A-C in DP 186768. The site has an area of approximately 4.34 hectares (ha) and is a prominent feature along New South Head Road as shown in **Figure 2**.

The site is bounded by New South Head Road to the north and west, Victoria Road to the south and Rose Bay Avenue to the east. Surrounding development is mainly residential with waterfront uses in close proximity including marinas, Council owned pools and beaches. The Scots College is located around 150 metres (m) to the south-east of the site.

The site currently is characterised by a range of heritage buildings with some modern and contemporary buildings intermixed. The school buildings are generally located in the southern portion of the site with the Hordern Oval dominating the sites northern extent. The main vehicular and pedestrian access to the campus is via Victoria Road and exit is via a driveway onto Rose Bay Avenue. Additional pedestrian entrances are located off Rose Bay Avenue and New South Head Road.

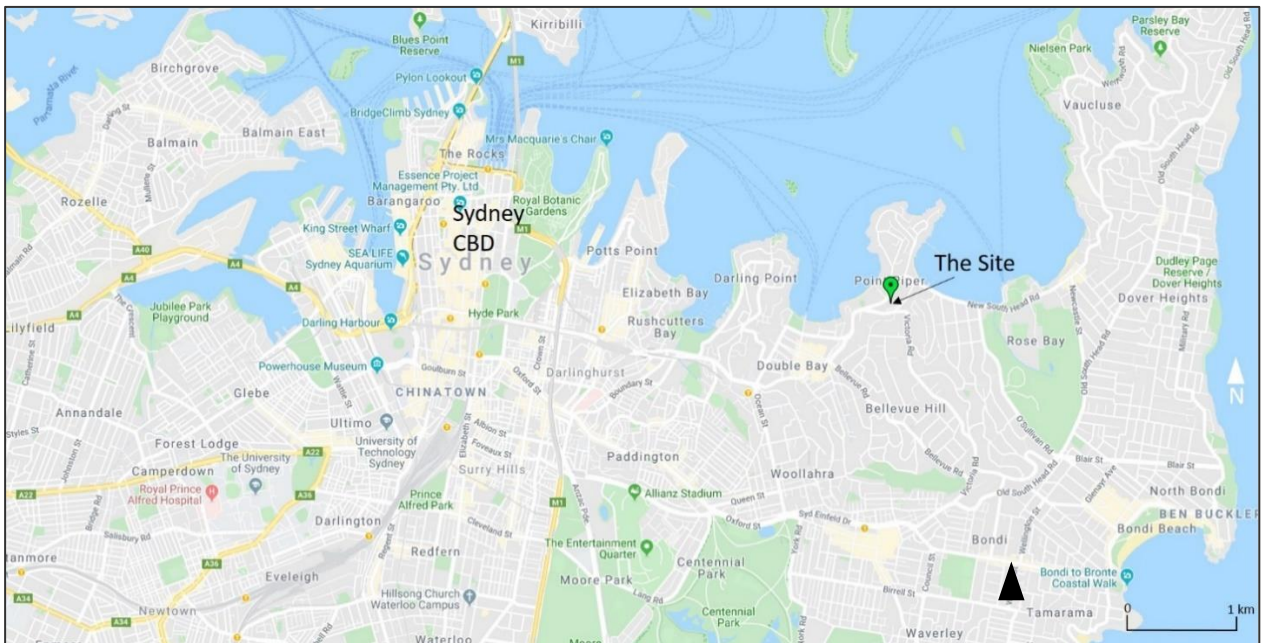


Figure 1: Site Location (Source: Google Maps 2020)



Figure 2: Aerial view of site and surrounds (Source: Nearmap 2020)

1.2 Approval History

On 13 September 2019, development consent was granted by the Executive Director, Infrastructure Assessments (as a delegate of the Minister for Planning and Public Spaces) for the redevelopment of the Cranbrook School (SSD 8812). The development consent permits the following works:

- site preparation works involving demolition of buildings and structures including the War Memorial Hall and Mansfield buildings, tree removal and site remediation.
- construction of the New Centenary Building teaching facility and school chapel.
- excavation of Hordern Oval to facilitate the construction of a subsurface car park and new Aquatic and Fitness Centre (AFC).
- new access driveway to the proposed carpark from the northern arm of Rose Bay Avenue.
- use of the internal driveway between Victoria Road and Rose Bay Avenue to accommodate an on campus 'kiss and ride' facility to reduce traffic congestion around the school.
- reinstatement of the Hordern Oval as a playing field.
- public domain, landscaping and general site improvements.



Figure 3: View Southwards over School Site and Development (Source: Applicant's EIS 2020)

The development consent has not been previously modified. Works associated with the development have commenced.



2. Proposed Modification

The proposed modification seeks to amend the consent under section 4.55 (1A) EP&A Act by deleting condition B3 (Development Contribution) which requires the payment of development contributions totalling \$1,106,490. The condition is:

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.

The modification application relies on legal advice provided by Collins Biggers Paisley Lawyers (CBP Lawyers) on behalf of the Applicant in the form of a letter dated 14 November 2019 (see **Appendix A**). The Applicant's justification for the deletion is based on the reasons set out in this legal advice which suggests the condition is unreasonable for three main reasons (as described in the Applicant's modification application):

- 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.*
- 3) *reduction of the 1% levy fails to take into consideration all of the public benefits of the development.*

The Applicant's legal advice lists several SSD applications outside the Woollahra Local Government Area, which the Minister or his delegate did not impose conditions of consent requiring the payment of development contributions and where no increases to student numbers above existing levels were proposed.



3. Strategic Context

The Department does not consider the proposed modification would create any change to the strategic context described in the original assessment report for the SSD 8812, as the proposal would continue:

- to be consistent with A Metropolis of Three Cities – The Greater Sydney Plan, as it provides improved school facilities to meet the growing needs of Sydney.
- to be consistent with the NSW Future Transport Strategy 2056, as it provides an improved educational facility in an accessible location.
- to be consistent with the vision outlined in the Greater Sydney Commission’s Eastern City District Plan, as it would support the provision of services and social infrastructure to meet the changing needs of the school.
- to be consistent with the State Infrastructure Strategy 2018 - 2038 Building the Momentum.
- provide direct investment in the region of approximately \$125,000,000 which would support up to 296 construction jobs and eight operational jobs.

However, the proposed modification is not considered to be consistent with the Woollahra section 94A Development Contributions Plan 2011 (DCP 2011) as it requests the deletion of condition B3 which requires the levying of a contribution in accordance with the plan.



4. Statutory Context

4.1 Scope of Modifications

Section 4.55(1A) EP&A Act provides that a consent authority may, on an application being made by the Applicant, modify a development consent granted by it, involving minimal environmental impact. Any application must be made in accordance with clause 115 Environmental Planning and Assessment Regulation 2000 (EP&A Regulation).

The Department has reviewed the scope of the modification application and considers that the application can be characterised as a modification involving minimal environmental impacts as the proposal:

- would not increase the environmental impacts of the project as approved;
- is substantially the same development as originally approved; and
- would not involve any new works outside the already approved areas for the project.

The Department's matters for consideration are shown in **Table 1** below.

Table 1 | Matters for consideration

Section 4.55(1A) matters for consideration	Comment
(a) That the proposed modification is of minimal environmental impact	The proposed modification does not seek to modify the consent in a manner that would create additional environmental impact.
(b) That the development to which the consent as modified relates, is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all).	The proposed modification would not result in significant external changes to the approved built form or use. The proposed modification seeks to delete condition B3 and the requirement to pay development contributions. On this basis, the proposed modification is substantially the same development as was originally approved.
(c) The application has been notified in accordance with the regulations.	Clause 117(3B) Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) specifies that the notification requirements of the EP&A Regulation do not

apply to SSD. Accordingly, the application was not advertised.

However, in this instance the modification application was referred to Council and it was made publicly available on the Department's website. Details of the notification are provided in **Section 5**.

(d) Any submission made concerning the proposed modification has been considered.

Council was afforded an opportunity to comment on the proposal within 14 days and subsequently provided comments objecting to the proposal (as detailed in **Section 5**).

The Department is satisfied the proposed modification is within the scope of the modification power in section 4.55(1A) EP&A Act and does not require its own separate development application. Accordingly, the Department considers that the application should be assessed and determined under section 4.55(1A) EP&A Act

4.2 Mandatory Matters for Consideration

The following Environmental Planning Instruments (EPIs) are relevant to the application:

- State Environmental Planning Policy (State & Regional Development) 2011.
- State Environmental Planning Policy (Educational Establishments & Child Care Centres) 2017.
- State Environmental Planning Policy No.55 – Remediation of Land.
- Draft State Environmental Planning Policy (Environment).
- Wollahra Local Environmental Plan 2014.

The Department undertook a comprehensive assessment of the proposed development against the relevant EPIs in its original assessment. The Department notes that the proposed modification application would not result in significant changes that would alter the mandatory matters for consideration (of relevance to the development) under section 4.15 EP&A Act. However, the proposed modification would detrimentally alter the conclusions made as part of the original assessment as to why the development was appropriate subject to payment of contributions and which were adopted by the Minister's delegate in their reasons for granting consent (as discussed in **Section 6**).

4.3 Consent Authority

In accordance with clause 8A State Environmental Planning Policy (State & Regional Development) 2011 and section 4.5 EP&A Act, the Minister for Planning and Public Spaces is the consent authority.



5. Engagement

5.1 Department's Engagement

Clause 117(3B) of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) specifies that the notification requirements of the EP&A Regulation do not apply to State significant development. Accordingly, the application was not advertised. However, in this instance the modification application was referred to Council and it was made publicly available on the Department's website on 3 December 2019.

5.2 Summary of Submissions

The Department received one submission from Council in the form of two letters and legal advice (see **Appendix B**).

Key Issues – Council

In a letter dated 16 December 2019, Council sought an extension to the notification period to seek legal advice, but also responded to the Applicant's three primary reasons for the modification noting that, in their view:

- section 7.12 contributions have been imposed on other school redevelopments (approved by Council, the Regional Planning Panel, the Land and Environment Court (LEC) and the NSW Minister for Planning and Public Spaces (through a delegate)) within the Woollahra Municipality and the examples referenced in the CBP Lawyers advice, where contributions were not imposed, are outside the Woollahra Municipality.
- the imposition of condition B3 is reasonable.
- the Works Schedule which accompanies DCP 2011 was based on studies, surveys and investigations. The works proposed under the Cranbrook School redevelopment are not identified in the Works Schedule, except for the proposed concrete paved footpath to Rose Bay Avenue.

On 16 January 2020, Council provided the Department with a copy of legal advice prepared by Lindsay Taylor Lawyers commenting on the Minister's power to impose a contribution on SSD consents. Council's legal advice responds to the Applicant's modification justification and contends that just because other independent school redevelopments outside of the relevant Council's area were not required to pay a levy is not a proper basis for deciding that all such developments should no longer be required to pay 7.12 contributions. This was forwarded to the Applicant for comment. On 12 February 2020, Council confirmed that its submission should be considered as an objection to the modification.

5.3 Response to Submissions (RtS)

The Applicant responded to Council's submission to the Department on 3 February 2020. This included a further letter from CBP Lawyers prepared on behalf of the Applicant and responding to Council's legal advice (see **Appendix C**) suggested that the Minister (and his delegate) has discretion in relation to the imposition of requirements for the payment of contributions and that in this instance that discretion should be exercised by removing the requirement to impose a contribution. The Applicant's justification for not imposing a levy in this instance as noted by CBP Lawyers is:

- no increase to student or staff numbers were proposed or approved.
- the imposition of the levy ignores the inherent educational benefit provided by the Cranbrook School.
- the current condition only accepts the public benefit of the proposal to the upgrade of footpaths and ignores the significant educational and recreational benefit to the community that Cranbrook provides in the Woollahra LGA.
- apart from the renewal of educational facilities, new facilities such as the learn to swim pool, the Aquatic and Fitness Centre, the car park and the Chapel will have direct benefits to members of the community beyond secondary school students and staff.
- Council has justified the imposition of condition B3 by referring to other local developments within the Woollahra LGA where development contributions were imposed, instead of considering other state significant development by independent schools both within and outside Council's boundaries.
- Council's position does not address the issue raised by the School, namely that the Cranbrook School is being treated differently to other State significant school redevelopments outside of Woollahra where the consent authority is the Minister.
- Council's requested approach seeking the Minister consider the plan in force within Woollahra LGA lacks conformity, promotes unfairness across independent school developments within the State and increases the cost of development without any tangible benefits.
- there is no rational basis for the Minister to impose a levy on schools in one local government area in NSW while exempting others in other LGAs, as this unfairly impacts independent schools in the LGA where Council's contributions plans impose a levy.

The Applicant's legal advice also provided an updated list of SSD applications outside the Woollahra Local Government Area, which the Minister (or his delegate) did not impose conditions of consent requiring the payment of development contributions and where no increases to student numbers above existing levels were proposed. These ten SSD applications include projects in:

- Burwood LGA.
- Ku-ring-gai LGA.
- North Sydney LGA.
- Hunters Hill LGA.
- Lane Cove LGA.



6. Assessment

In assessing the merits of the modification proposal, the Department has considered:

- the modification application, including the Applicant's legal advice from CBP Lawyers and the RtS provided to support the modification (see **Appendix A** and **C**).
- the assessment report for the original development application (SSD 8812).
- Council's submissions (see **Appendix B**).
- relevant EPIs, policies and guidelines.
- requirements of the EP&A Act.

6.1 Department's Assessment

Section 7.12 EP&A Act provides a consent authority the means to impose as a condition of consent, a requirement that an applicant pay a levy (calculated as a percentage of the cost of development) to be used for the provision, extension or augmentation of public facilities authorised within the framework of a contributions plan.

The payment of development contributions and levies within the Woollahra LGA is covered by the 94A (7.12) Development Contributions Plan (DCP 2011). DCP 2011 requires payment of a 1% levy on the cost of carrying out any development in the LGA. Developments which have a cost of development of less than \$100,000 or developments listed in a Ministerial direction under section 7.17 EP&A Act are exempted from paying section 7.12 contributions in the LGA. Any contributions levied under DCP 2011 must be used to fund projects listed in the Works Schedule. Section 4.2 of DCP 2011 specifically states that development on lands occupied by large private schools in Special Use Zones is expected to be levied contributions.

As the cost of development exceeds \$100,000 and there are no Ministerial directions relating to the development under section 7.17 EP&A Act, the Department imposed a condition of consent requiring the payment of development contributions. The cost of carrying out the works associated with SSD 8812 was \$125 million and therefore a 1% contribution equating to \$1.25 million could have been levied in relation to the development. However, the Department considered the proposed works within Rose Bay Avenue specifically listed in the Works Schedule of DCP 2011, including footpath and kerb and gutter works, were to benefit the public and that this cost should be deducted. As such, a reduction of \$143,510 was applied, resulting to a contribution of \$1,106,490 being imposed.

The Applicant's RtS expands upon the justification for the deletion of condition B3 in relation consistency, fairness and reasonableness. The RTS also focuses on the potential benefit of the use of facility by the public when it is not being used by the school .

Consistency, Fairness and Reasonableness

The modification application suggests the imposition of condition B3 is inconsistent with other determinations made by the Department for independent schools in other LGAs.

A consent authority must consider each development application on its merits and impose conditions of consent in accordance with section 4.17(h) EP&A Act, which specifically lists the imposition of section 7.12 contributions as a valid condition to be imposed on a development consent. In accordance with section 4.17(h) EP&A Act, the Department imposed condition B3 on the development consent, requiring the Applicant to pay a contribution to Council.

The Department considers the consistent application of legislation, policies and plans within an LGA to be in the public interest. DCP 2011 has consistently been applied on other development applications determined by Council and complying development certificates in the LGA, including several independent schools (listed in **Appendix B**) which were levied a 1% development contribution.

Public Benefit

DCP 2011 contains a Works Schedule which lists several public projects which are intended to be delivered through section 7.12 contributions. Some of these projects are near Cranbrook School, including the upgrade of footpath and kerb and guttering works in Rose Bay Avenue adjacent to the site.

The proposal under SSD 8812 includes constructing a portion of the works in Rose Bay Avenue, and in consideration of the provision of these works the Department reviewed the public benefit of the proposal accordingly. Subsequently, the quantum of the levy was reduced in consultation with Council. The modification application argues there are additional public benefits associated with the proposal that the Department did not consider, including the Chapel and AFC would both be open to the public at suitable times.

The Department is not satisfied that the Chapel and AFC would provide sufficient public benefit to the residents in the locality or across the Woollahra. The public use of the facilities would be restricted through the Applicant's Operational Plan of Management submitted with the SSD 8812 application, which states:

'The School however is limited in its capacity to provide unrestrained public access to facilities as a result of its duty of care to student's safety and the schools teaching requirements for these areas'.

The Department does not consider that limited access to the Chapel and AFC to some members of the public provides sufficient grounds to further reduce or delete the required section 7.12 contribution.

Conclusion

The Department considers the proposed modification should not be approved on the basis that the:

- condition was imposed in accordance with the EP&A Act and DCP 2011 to assist Council in funding projects in Schedule 2 of its contributions plan, which includes public projects near the site.
- facts relating to the development have not substantially changed since the consent was granted.

- restricted use of the Chapel and AFC by the public does not justify deleting condition B3, as the public's use of the facilities would be restricted through the Applicant's Operational Plan of Management.

Accordingly, the Department recommends that the modification be refused.



7. Evaluation

The Department has assessed the modification application and supporting information in accordance with the relevant requirements of the EP&A Act. The Department has considered the modification application on its merits taking into consideration the submissions made by Council and the Applicant.

The Department does not consider there is merit in deleting condition B3, which requires the payment of a contribution in accordance with DCP 2011. The quantum of the levy was already reduced in consideration of the public benefit of the development, in particular the works to be carried out which are listed in the Works Schedule of DCP 2011.

For these reasons, the modification application should be refused.



8. Recommendation

It is recommended that the Group Deputy Secretary, Planning and Assessment, as delegate of the Minister for Planning and Public Spaces:

- **considers** the findings and recommendations of this report;
- **accepts and adopts** all findings and recommendations in this report as the reasons for making the decision to refuse the modification application;
- **agrees** with the key reasons for refusal;
- **refuses** the modification; and
- **signs** the attached instrument of modification refusal.

Recommended by:

Karen Harragon

Director

Social and Infrastructure Assessments

Recommended by:

David Gainsford

Executive Director

Infrastructure Assessments



9. Determination

The recommendation is: **Adopted by:**

02/07/2020

Marcus Ray

Group Deputy Secretary

Planning and Assessment



Appendices

The following supporting documents and supporting information to this assessment report can be found out the Department of Planning, Industry and Environment's website as follows.

Appendix A – Modification Application

<https://www.planningportal.nsw.gov.au/major-projects/project/26116>

Appendix B – Council's Submissions

<https://www.planningportal.nsw.gov.au/major-projects/project/26116>

Appendix C – Applicant's Response to Submissions and additional information

<https://www.planningportal.nsw.gov.au/major-projects/project/26116>