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31 January 2020

Mr Navdeep Shergill
Planner, Social Infrastructure Assessments
Department of Planning Industry and Environment
320 Pitt Street, Sydney
NSW 2001

Dear Navdeep,

RESPONSE TO REQUEST FOR FURTHER INFORMATION FOR SSD 17-8812-MOD 1 FOR CRANBROOK SCHOOL REDEVELOPMENT

We write on behalf of Cranbrook School (**the School**) with regard to The Department of Planning, Industry and Environment's (**the Department**) request for further information (**RFI**) letter dated 20 December 2019. The RFI letter detailed that the Department had received comments from Woollahra Municipal Council (**Council**) dated 16 December 2019. It was requested that the School submit additional information to address the comments made by Council by no later than 16 January 2020.

As we understand, Council contacted the Department and sought additional time to provide further commentary and seek legal advice (**Council's legal advice**). The School subsequently sought an extension to provide a response to the RFI and Council's legal advice until the 31st of January 2020. This request was approved by the Department on 15 January 2020.

In responding to Council's commentary please find enclosed letter from Colin Biggers & Paisley Lawyers (**the School's legal advice**) responding to the RFI and Council's comments. In summary:

- Council has justified the imposition of condition B3 by referring to a number of local developments within the Woollahra local government area where development contributions were imposed, instead of considering other State Significant Development (SSD) by schools both within and outside Council's boundaries.
- Council's position does not address the issue raised by the School, namely that Cranbrook is being treated differently to other State significant school redevelopments outside of Woollahra where the consent authority is the Minister.
- "[Colin Biggers & Paisley Lawyers] *see no rational basis to impose a levy on schools in one local government area in NSW while exempting others, as this unfairly impacts independent schools in the suburb where the levy is applied. There should be a level playing field when it comes to schools carrying out SSD across NSW, rather than one rule for schools in Woollahra, and another for schools outside of Woollahra".*
- Council's approach lacks conformity, promotes unfairness across independent School developments within the State and increases the cost of development without any tangible benefits.

- It is open to the Minister to delete condition B3, and this discretion should be exercised to remove the requirement for the payment of contributions. The Minister's exercising of this discretion will not jeopardise Council imposing s7.12 contributions itself where it is the consent authority on other local development applications for schools. Condition B3 should be removed by way of exercise of the available discretion as it is both lawful, reasonable and fair.

Reference should be had to the **enclosed** legal advice for further justification of this position.

Should you have any queries in regard to this correspondence, please do not hesitate to contact the undersigned on jparker@urbis.com.au or 02 8233 9900.

Yours sincerely,

Jacqueline Parker
Director

CC Mr Todd Ewart, Associate, EPM Projects
Mr Andrew Moore, Chief Operating Officer, Cranbrook School

Enc Legal advice - Colin Biggers & Paisley

Our Ref: TAN.1803398

COLIN BIGGERS & PAISLEY LAWYERS

31 January 2020

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Cc: Navdeep Singh: navdeep.singhshergill@planning.nsw.gov.au.

Dear Sir

Cranbrook School Redevelopment (SSD-8812 Mod 1) - Request for additional information

1. We refer to the Department's letter to Mr Andrew Moore dated 20 December 2019 requesting additional information that addresses the comments made by Woollahra Council in relation to the above modification application (**the Modification Application**). We have been instructed to prepare this letter in response to the Department's request on behalf of Cranbrook School (**the School**).

2. In summary, Council has justified the imposition of the subject condition by referring to a number of local developments within the Woollahra local government area where development contributions were imposed, instead of considering other State significant development by schools both within and outside Council's boundaries. Council's position does not address the issue raised by the School, namely that Cranbrook is being treated differently to other State significant school redevelopments outside of Woollahra where the consent authority is the Minister.

3. Fundamentally, the imposition of the levy ignores the inherent educational benefit provided by the School through the replacement of end of life school facilities, and the fact other school State significant developments have not had the levy imposed due to this public benefit. We see no rational basis for the Minister, as the consent authority, to impose a levy on schools in one local government area in NSW while exempting others in other local government areas, as this unfairly impacts independent schools in the suburb where the levy is applied. There should be a level playing field when it comes to schools carrying out State significant development across NSW, rather than one rule for schools in Woollahra, and another for schools outside of Woollahra.

4. The submission from Council's lawyers dated 16 January 2020 which concludes that the imposition of the levy is legally reasonable and has been lawfully imposed, is at cross purposes with the School's submission. The School's submission focuses practically on why the discretion to remove the contributions should be exercised in the School's favour due to the unfairness it creates, whereas Council's lawyers focus on why it would be lawful to uphold the condition. Both sides concede it is open to the Minister to delete the condition, and for the reasons explained below, we again submit that the discretion should be exercised to remove the contributions.

Background

5. As the Department is aware:

   (a) The School is the proponent of SSD-8812 which comprises a redevelopment (alterations and additions) of part of the existing Cranbrook School campus - involving a new Aquatic and Fitness Centre (replacing an existing end-of-life facility on campus), a 124 space carpark to help reduce on-street demand for public parking, a new school teaching and learning building to replace two existing end-of-life buildings, an assembly hall, drama theatre and a school canteen. No increases to student or staff numbers were proposed or approved, and this is prohibited in any event by the consent.

   (b) The Department's Assessment Report expressly acknowledged that the Cranbrook proposal is in the public interest and will provide several public benefits by delivering increased new improved education and recreational facilities to cater for this increased need in the Woollahra local government area.

   (c) The School has lodged the Modification Application to seek the removal of a condition requiring $1,106,490 in section 7.12 contributions under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (**condition B3**).

   (d) Accompanying the Modification Application was a letter prepared by us dated 14 November 2019 explaining the unreasonableness of condition B3. Amongst other things, our letter pointed out that other State significant school redevelopments had not been required to pay contributions where there were no increases to student and staff numbers and that Cranbrook was therefore being treated differently from these other schools outside of Woollahra.

6. Further to that background, we are instructed as follows:

   (a) Initially Cranbrook had sought to offset any development contributions via a Voluntary Planning Agreement with Woollahra Council that recognised that certain parts of the Cranbrook School redevelopment would provide benefits to the broader community (e.g. the learn to swim pool, Aquatic and Fitness Centre, car park, chapel and public domain works).

   (b) It was suggested to the School by Woollahra Council that the School should apply for a waiver of the "section 94A contributions". It appears however that Council has now decided not to support that position.

Council's comments

7. The Department's letter to our client enclosed a letter that it received from Ms Eleanor Smith of Council dated 16 December 2019 setting out Council's comments on the Modification Application. The School's understanding of Council's position is as follows:

   (a) The condition in the Cranbrook State significant development requiring payment of section 7.12 contributions is "*not negotiable*". The imposition of the condition B3 is reasonable, because similar conditions have been imposed on other school developments within Woollahra's local government area.

   (b) The examples identified by the School are not relevant because they are outside Woollahra and the application of the *Woollahra Section 94A Contributions Plan 2011.*

   (c) The imposition of the condition B3 is reasonable because it is authorised by the EP&A Act.

(d) The broader benefits to the community provided by the Cranbrook redevelopment beyond the footpath works should not be used to offset any contributions payable because those are not identified in Council's Works schedule.

8. We have also been provided with the advice prepared by Council's lawyers (Lindsay Taylor Lawyers dated 16 January 2020) which concludes that the imposition of the levy is at law reasonable and has been lawfully imposed. To that end, their submission is that there is no reason that it should be deleted.

9. We now address Council's comments followed by the advice of its lawyers.

A - Comment about "*not negotiable*"

10. Council's position that *"the payment of the development levy in accordance with Council's Section 94A (now section 7.12) Development Contributions Plan 2011 is not negotiable"* is plainly wrong. Without labouring the point, it fails to acknowledge that section 7.12 cloaks the consent authority with the discretion to impose a condition requiring the applicant to pay a levy of the percentage authorised by a contributions plan. It cannot be said that the Minister is *required* to impose any condition under section 7.12. Council's lawyers also acknowledge this discretion.

11. The Minister's discretion is not fettered by Council's position. The MLC School (SSD 6484) example referred to below is an example of a case where the relevant Council (Burwood in that instance) sought the imposition of contributions, but the Minister in his discretion did not impose them (see paragraphs 20-21 of the Assessment Report for commentary on the issue).

B - Other consents

12. Council's comment that the other school State significant developments were not subject to Woollahra Council's section 94A Contributions Plan does not address the issue at the heart of the School's concern, namely the unfairness of Cranbrook being subjected to this contribution, whilst Schools outside Woollahra's local government area not.

13. Our letter dated 14 November 2019 referred to 3 examples in support of the School's argument where contributions had not been imposed by the Minister (through his delegate) for school redevelopments with no increases to student numbers, being: MLC School (SSD 6484); Pymble Ladies College (SSD 5314); and Wenona School (SSD 6952). All three are in different local government areas (Burwood, Ku-ring-gai and North Sydney). The assessment report for each of those examples provided commentary on the issue.

14. Since that time, we have become aware of an additional example in St Joseph's College (SSD 8970) in yet another local government area to the above schools. In each of these 4 cases, the Minister (through its delegate) decided **not** to impose a condition requiring the payment of development contributions where no increases to student numbers above existing levels were proposed.

15. The commentary in the relevant assessment reports for these school developments demonstrate that the decision not to impose contributions was made on the following basis:

(a) recognition that the school provides an inherent education benefit for the community (see for example, the Assessment Report for MLC School at pages 20-21); and

(b) no sufficient nexus existed between the proposal and an increased demand for public services of facilities.

16. The above is the reason we referred to "*nexus*", as comity in the assessment of these school redevelopments as important in providing confidence to stakeholders in the

planning system. It is also on any view relevant to whether the imposition of the contribution is rational, reasonable and fair. Indeed, "*certainty and efficiency through a consistent planning regime*" is cited as one of the aims of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017.*

17. We have also become aware of other examples of independent school redevelopments where no contributions were imposed in circumstances where there was no increase to student numbers. However these examples do not have any commentary provided in the relevant Assessment Report regarding the issue. These redevelopments include:

    (a) Wahroonga Adventist School - SSD 5535;

    (b) St Aloysius' College - SSD 8669;

    (c) Loreto School - SSD 7919;

    (d) Shore School - SSD 7507;

    (e) SCEGGS Redlands - SSD 6454; and

    (f) St Ignatius College - SSD 7140.

18. These schools fall within three local government areas of Sydney's North Shore indicating Woollahra's position to be the outlier.

19. Council's letter to the Department is inward focused and instead identifies a number of consents granted for school redevelopments in the Woollahra local government area which included conditions requiring the payment of section 7.12 contributions (31 examples are cited). We make the following observations about those examples:

    (a) Only one example is a State significant development (SSD 8922 - granted to the Scots College in 2019), who are understandably now also objecting to the payment of such contributions.

    (b) The remaining examples were all development applications assessed by Woollahra Council, and determined by either Council (26 of 31), the Regional Panel (4 of 31) or the Land and Environment Court (1 of 31).

20. Council's reference to local development applications within the Woollahra local government area as justification for the imposition of condition B3 for a State significant development misses the thrust of the School's argument as to why the condition should be removed. The School's argument is that condition B3 places Cranbrook at a distinct disadvantage compared to other independent schools outside of Woollahra. This is clear from the examples shown above at paragraphs 13 - 17. It appears capricious for the Minister to impose the levy on school redevelopments in one local government area in NSW whilst other schools outside that suburb are exempt from the levy. A level playing field should exist for all schools throughout the State, and it is unfair for different independent schools to start on different footings when undertaking redevelopment.

21. Whilst it might be Woollahra Council's policy to apply its section 94A contributions plan rigidly and impose section 7.12 contributions on school redevelopments in Woollahra (and regardless of whether additional demand is generated), this does not mean that it is reasonable to do so, and the discretion exists in this Modification Application to decide not to impose it. The availability of the discretion is evident in the wording of section 7.12 which states a *"consent authority **may** impose"* (emphasis added), and nor is this disputed by Council's lawyers.

C - Authorisation by the EP&A Act

22. We of course acknowledge that condition B3 has been imposed in accordance with a section 7.12 contributions plan. We also acknowledge that section 7.13(4) of the EP&A Act excludes an appeal against such a condition. The touchstone of reasonableness may also not apply in the same way it does for section 7.11 contributions.

23. However, this simply highlights the importance of the Minister's discretion in this instance as the consent authority. Given the unfairness the levy creates to the School simply because of its location within the Woollahra local government area, as opposed to another area of the State, the discretion should be exercised in favour of our client.

D - Offsets

24. Whilst we consider there to be ample reason not to impose the condition given the unfairness it creates and the clear public benefit a school provides, if for whatever reason the condition requiring the contribution remains, then we also argue it should attract further offsets.

25. Our letter dated 14 November 2019 pointed out that no reduction in the contributions amount had been made to offset the public benefits provided by the Cranbrook SSD with respect to the new chapel, and the new Aquatic and Fitness Centre, given that these facilities will be open to the general public at suitable times.

26. Whilst the Department has reduced the amount of the contribution by $143,510, recognising the value of public domain works (footpath, kerb and gutter works), it appears to have accepted Council's advice that the remainder of the works primarily benefit the School and that development contributions were appropriate as this would fund a variety of projects for the Woollahra local government area. By limiting the public benefit of the proposal to the upgrade of footpaths, this logic ignores the significant educational benefit to the community that Cranbrook provides as an educational establishment. 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.

27. Council's letter addresses this issue bureaucratically - the fact that these benefits are not identified in a works schedule should not be used as justification for not offsetting the contribution amount. Such a view would exclude any benefits that are not physical works from an offset.

E - Comments on the advice prepared by Lindsay Taylor Lawyers

28. The advice from Lindsay Taylor Lawyers does not address the primary position of our client either - that the Minister should delete the condition so that there is a level playing field between schools undertaking State significant developments throughout the State.

29. The difference between independent schools in Woollahra compared to those outside this local government area was not researched, as Council's lawyers have simply relied on our earlier numbers which underrepresented the amount of other schools not subject to the levy. Council's lawyers also relied on the Council's own list of development within Woollahra, which as mentioned above lacks nuance. As such it is predicated partly on a misunderstanding of the extent of the unfairness.

30. But more fundamentally, their submission is at cross purposes with the School's argument as it fails to provide any real reason as to why the Minister should also exercise his discretion to "tax" Cranbrook School for its State significant development when it is not the practice of the Minister to do so for other schools undertaking State significant development throughout the State. In this regard, their submission narrowly focuses on whether it is lawful to impose the condition and the standard of legal reasonableness, but it does not go the next step to adequately explain whether it *ought* to be imposed.

31. The School's submission is clear and simple in that it ought not be imposed as the condition is unreasonable and unfair from a State perspective.

32. Whilst our client reserves its rights in relation to the validity of the condition given its manifest unreasonableness is plain, such legal debate can be avoided by exercising the discretion to level the playing field for Schools within and outside Woollahra. It is for that reason a modification application was lodged at this time, rather than legal proceedings. It is also for this reason that the School's submissions have focused on the tangible reasons the condition should not be imposed, rather than descending into technical legal argument about the powers conferred on consent authorities to impose conditions of consent, and whether it is legally reasonable, of which there are arguments both ways.

33. Council's lawyers have also described the intention of section 7.12 to be "*truly a tax on development*". Although that may be true for local development, it is not the case for State significant development, due to the discretion that exists. Presumably the preservation of some discretion on the part of the Minister was deliberate and was intended to cater for situations like this. The fact this discretion exists means that it is incorrect to speak of the imposition of the contributions as having been "*presupposed*".

34. Exercising the discretion will not jeopardise Council imposing these contributions itself where it is the consent authority. The School simply wishes to be conditioned fairly by the State, something entirely consistent with the first aim of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* under which the application was approved:

> "*(a) improving regulatory certainty and efficiency through a consistent planning regime for educational establishments and early childhood education and care facilities*"

35. Council's approach lacks conformity with this aim, promotes unfairness across independent School developments within the State, and increases the cost of development without any tangible benefits, and redistributes money that would otherwise be spent by the School to Council. It is disingenuous to say there is no residual merit reason why the contributions should be removed from the consent.

36. The condition should be removed in the exercise of the discretion as it is both lawful, reasonable and fair.

37. Please contact us if you wish to discuss any part of this submission.

Yours faithfully

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