



AKD/ KT  
14291  
20 December 2016

Mr Anthony Witherdin  
Director  
Modification Assessments  
Department of Planning and Environment  
GPO Box 39  
SYDNEY NSW 2001

Attention: Robin Ward, Planning Officer

Dear Anthony,

**METHODIST LADIES COLLEGE – SSD 6484 MOD 1  
45 PARK ROAD, BURWOOD**

The modification application (SSD 6484 MOD 1) for the MLC Senior School Campus was publicly exhibited between 2 November and 15 November 2016.

In total, four (4) agency submissions were received. Neither RMS nor Transport for NSW raised any concerns regarding the proposed modification. Sydney Water provided generic comments, which the applicant would be willing to accept as a condition of consent.

In an email dated 24 November 2016, Burwood Council has questioned whether the proposed modification can be considered substantially the same development, and has raised some concerns regarding the proposed variation to the height and floor space standards contained in *Burwood Local Environmental Plan 2012* (BLEP 2012). This letter sets out the proponent's response to these matters. At the Department's request, this response focuses on Council's comments relating to substantially the same development. This response should be read in conjunction with the attached legal advice prepared by Addisons.

**1.0 SUBSTANTIANLLY THE SAME DEVELOPMENT**

In accordance with section 96(2)(a) of the *Environmental Planning & Assessment Act 1979* a consent authority may modify a development consent if *"it is satisfied 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 consent has not been modified from its original form. The modification application provided a detailed assessment of the proposal against the planning principles established by the Land and Environment Court when considering what constitutes a modification.

The response below considers the additional comments raised by Council.

**The proposed height increase to the Teaching and Learning Building that takes the height from three (3) storeys to four (4) storeys radically changes the appearance of the building when viewed from Grantham Street and Park Road. Although the façade is similar in regards to materials and expression, it is considered the additional storey substantially changes the appearance of the approved building, particularly given the narrow setback to Park Road.**

Due consideration has been given to ensuring the appearance of the additional storey is consistent with the original building. The additional storey adopts an identical architectural expression and materiality to that of the approved development. Consequently, the additional storey appears as an integral part of the building. Furthermore, the proposal continues to appropriately address the street frontage of Park Road. The additional storey adopts the same setback as the approved Teaching and Learning Building, ensuring the siting of the building continues to be in keeping with the building line along Park Road. The visual impact of the building as proposed to be modified on the streetscape is not, in our opinion, considered to be substantially different to the approved building.

**Combined the proposed increase in floor space (of 862m<sup>2</sup>) and height (3.9m) are not considered to be minor and will substantially alter the development visually and quantitatively. Due to the visibility of the development and the minimal setback to Park Road, the perceived bulk and scale of the development is substantially greater.**

Quantitatively the modifications are not considered to result in a substantially different development. When determining if the proposed modifications will radically transform the approved development, the modifications need to be assessed against the development in its entirety. Given the approved development provides an overall GFA of 11,462m<sup>2</sup>, the additional 862m<sup>2</sup> of GFA is considered modest, representing a mere 7.5 percent change. It needs to be recognised that the extent of the numerical change and whether it is minor is not the test that the consent authority needs to consider.

The perceived bulk and scale of the modified development is not substantially different to that of the approved development. The additional storey to the Teaching and Learning Building will align with the height of the Independent Learning Centre (ILC), which is the tallest building on the site with a height of RL 43.3 metres. When viewed from Grantham Street, the Middle School Building will present as smaller in scale due to the proposed removal of the approved additions. The amended envelopes will continue to be consistent with the existing scale of the development on the campus. As such, when viewed from Park Road, the bulk and scale of the development across the entirety campus will not appear substantially different.

**The impacts from the proposed scale of the development are considered to result in substantial changes to shadow impacts. The proposed outdoor learning area on the upper storey also has the potential to reduce aural privacy of surrounding developments.**

The proposed change to the building envelope of the Teaching and Learning Building results in shadow impacts that are minor in nature. As shown in the Revised Architectural Plans at Attachment A of the modification application, the additional shadow impacts to the south occur only in the late afternoon from 3pm onwards on the summer and winter solstice, with all additional shadow impacting the school's tennis courts. Due to the limited duration of the overshadowing and the absence of any impacts on private property, the impacts can reasonably be considered to be minor in nature.

The approved Teaching and Learning Building incorporated outdoor roof terraces on the eastern side of the building at Level Two. The modification proposes to relocate these terraces to Level Three and will continue to incorporate privacy screening. The noise impacts to the surrounding developments, particularly 31 Park Road will be reduced. Specifically, as the surrounding uses are low in scale, the proposed elevation of the terraces further above ground level will limit acoustic impacts. Furthermore, the modified building envelope adopts the approved setbacks to 31 Park Road and therefore a building separation distance of 9.25 metres continues to be maintained. Given this, it is considered the modification will not result in additional aural privacy impacts to surrounding developments.

**The proposed increase in floor space and height, and the projected long term growth of the school would lead to an increase in student numbers and staff.**

The proposed increase in floor space and height is necessitated by the need to provide educational facilities capable of delivering collaborative learning spaces. The modifications are not proposed to accommodate additional students or staff. Consequently, the proposed modifications will have no additional impact on traffic generation or traffic movements.

## **2.0 REQUEST TO VARY HEIGHT AND FLOOR SPACE DEVELOPMENT STANDARDS**

As Council notes in their submission, clause 4.6 variations are not required to support a section 96 modification. However, Council then goes on erroneously in law to consider that the applicant has not demonstrated that compliance with the standard is unreasonable or unnecessary, on the basis that the development does not achieve the objectives of the R2 Low Density Residential zone.

**The proposed height and FSR increase is not considered to promote a bulk and scale that is compatible with low scale residential development. The site is located close to the street alignment and adjacent to low scale residential development. A comparison in the scales shows that there is no similarity between the two. Therefore, any reduction to the FSR of the middle school building cannot be seen to counterbalance the increased FSR to the Teaching and Learning Building.**

The changes to the bulk and scale of the modified development should be understood in the context of the broader development rather than the Teaching and Learning Building in isolation.

The modified development is considered to be compatible with both the educational uses contained within the site and the surrounding residential developments, and is consistent with the approach being adopted across Sydney of providing taller educational buildings on constrained inner-Sydney sites. Adequate separation distances are provided between the Teaching and Learning Building and the adjoining residential uses, including a 9.25 metre building separation to the dwelling at 31 Park Road. The development will present as visually distinct from the surrounding residential uses and will reflect the institutional nature of their use. Furthermore, it should be noted that the modified Teaching and Learning Building will not exceed the tallest building located within the campus and that it sits cohesively within the educational campus.

The impacts to the residential dwellings located along Park Road are not substantially different to the impacts associated with the approved development. Specifically, there will be no overshadowing on private property (refer to Attachment A of the modification application). Given the limited impacts to the low scale residential development, it is considered reasonable that the reduction in the GFA of the Middle School counterbalances the increased scale of the Teaching and Learning Building.

**The use of Park Road is not limited to school related traffic and pedestrian activity. Accordingly, the proposed increase to the height of the building will result in undesirable impacts to the Park road streetscape**

The additional impacts to the Park Road streetscape are considered minor for the following reasons:

- as illustrated in the shadow diagrams provided at Attachment A of the modification application, the additional shadow impacts are minor, occur only in the late afternoon and fall only on the school's outdoor space;
- there is no change to student and staff numbers and therefore no additional traffic impacts;
- the additional storey to the Teaching and Learning Building will appear as an integral part of the approved building and not substantially change the appearance of the building when viewed from the streetscape;
- whilst the additional bulk and height will not be concealed, landscaping and a landscape buffer to the residential uses located east of the site will soften the appearance of the building within its setting; and

- whilst Park Road does accommodate some through traffic to Parramatta Road and Burwood Town Centre, the road is predominantly used by school related pedestrian and vehicle traffic, and is located within a locality which has an institutional school character.

**Any further erosion of the standards applicable to the R2 zoning would reduce the importance of the standards in the zone. The applicant should therefore seek to rezone the land or amend the development standard.**

The MLC School was founded on the site in 1886, prior to the introduction of BLEP 2012. Educational facilities with an increased bulk and scale relative to the low scale residential uses have long existed on the site in proximity to neighbouring residential uses. Furthermore, it should be recognised that the revised height of the Teaching and Learning Building does not exceed the tallest building on the site known as the ILC. The proposed modifications continue to promote the established scale on the site. Given this, any rezoning of the land or amendment to the development standard is considered to be unnecessary.

**The increase in height and density is not considered in the public interest as the development is not compatible with the R2 zoning and the surrounding development. The additional bulk and scale will undermine the validity of the standards of the zone.**

The development standards of the R2 zone have been set with residential development in mind and do not recognise the development standard should be applied in wide degree of flexibility recognising the historical use of the site as an educational facility. The incompatibility of the site's use to its zoning should not negate other significant benefits delivered by the modification, including:

- a modern educational facility that does not exceed the height of building's currently contained within the site, and is in keeping with the established built form on the site;
- providing adaptable and collaborative educational facilities that achieve modern educational standards;
- consolidate the learning facilities of the science and language schools into one building for the purpose of improving the efficiency of the school's operations; and
- improving the overall amenity provided by the school, whilst not adversely impacting on neighbouring uses.

### 3.0 CONCLUSION

The proponent has considered the concerns raised by Council in relation to the public exhibition of the proposal.

We trust that the responses provided above will enable the Department to finalise their assessment of the modification application. Given the environmental planning merits (and the ability to suitably manage and mitigate any potential impacts) and significant public benefits proposed, it is requested that the Minister approve the application.

Should you have any queries about this matter, please do not hesitate to contact me on 9956 6962 or [ktudehope@jbaurban.com.au](mailto:ktudehope@jbaurban.com.au).

Yours faithfully,



Kate Tudehope  
*Principal Planner*

Attached – Legal advice prepared by Addisons

16 December 2016

Our ref: NER:MLC001/4304

Mr Anthony Witherdin  
Director  
Modification Assessments  
Department of Planning and Environment  
320 Pitt St  
SYDNEY NSW 2000

Attention: Robin Ward, Planning Officer

Dear Mr Witherdin

**Methodist Ladies College – SSD 6484 MOD 1**

We act for MLC School in relation to the modification application to State Significant Development Application SSD 6484 (**SSD Approval**) pursuant to section 96(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (**Modification Application**).

**Introduction**

1. The SSD Approval was granted on 3 March 2015 by the Department of Planning and Environment (**Department**). The SSD Approval granted consent for:
  - (a) The demolition of:
    - (i) residential dwellings at 31A and 33 Park Road; and
    - (ii) six school buildings.
  - (b) Construction and use of a new Teaching and Learning Building;
  - (c) Construction of a new Art Building;
  - (d) Alterations and additions to the existing Year 6 Building;
  - (e) Refurbishment of the Independent Learning Centre to provide a seniors room and staff common room;
  - (f) Landscaping, including the planting of approximately 64 new trees; and
  - (g) Removal of 55 trees (including 20 trees which are exempt species).
2. The SSD Approval approved variations to the maximum FSR and height controls under the Burwood Local Environmental Plan 2012 (**BLEP**).
3. The Modification Application proposes to modify the SSD Approval by:
  - (a) Introducing a fourth storey to the approved Teaching and Learning Building (currently approved at three storeys). The additional storey will increase height from 15.26 metres to 19.16 metres and will incorporate a library space, teaching and learning spaces, a collaborative learning space, a staff room, two outdoor roof terraces, two balconies on the eastern elevation and one balcony on the western elevation;

- (b) Deleting the approved additions to the Middle School Building (this involves deleting the items listed in paragraphs 1(c) and 1(d) only). These elements are minor in terms of scale, scope and cost and represent less than 15% of the cost of the works for the SSD Approval; and
  - (c) Increasing the overall GFA of the School from 11,462 to 12,324 square metres.
4. The Modification Application proposes changes that will provide improved learning and teaching spaces. The proposed modification will also better suit the current and future needs of MLC Burwood.
  5. This letter has been prepared to address concerns raised in an email of 24 November 2016 from Burwood Council (**Council**) to the Department regarding whether the development proposed in the Modification Application can be considered to be substantially the same development as that approved by the SSD Approval.

### Section 96(2)

6. Pursuant to section 96(2) of the EP&A Act:

#### (2) Other modifications

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and [Emphasis added].

7. Accordingly, the key test in determining whether a modification can be approved pursuant to section 96(2) is whether the proposal as modified would be "*substantially the same development as the development for which consent was granted*".

### Case law and judicial guidance regarding the section 96(2) and "substantially the same development" test

8. The Courts have given significant guidance as to the breadth of the power under section 96(2) to modify a development consent. We provide a summary of the leading authorities which set out the principles considered by the Courts in determining whether an application is within the scope of the modification power.
9. In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8 (**Vacik**), Justice Stein considered the modification power in the context of a merit appeal in the Land and Environment Court. His Honour held:

Is the proposed modified development substantially the same development as that in the development consent (as already amended)? In my opinion 'substantially' when used in the section means essentially or materially or having the same essence. The applicant for modification bears the onus of showing that the modified development is substantially the same, see *Seaforth Services Pty. Ltd. v. Byron Shire Council* (No. 2) ((1991) 72 LGRA 44) and *C.S.R. v. Wingecarribee Shire Council* (No. 2) (Unreported 17 December 1991).

In assessing whether the consent as modified will be substantially the same development one needs to compare the before and after situations. A significant difference is one of sequencing. The existing consent requires rehabilitation at the end of the excavation of material. By contrast the amendment proposes progressive rehabilitation over time and while the excavation of clay/shale continues. This has obvious implications for environmental impacts.

10. In *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 (**Moto**), Justice Bignold considered a modification application under section 96(2). His Honour held at [54] to [56]:

54. The relevant satisfaction required by s 96(2)(a) to be found to exist in order that the modification power be available involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development.

55. The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

56. The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

11. In *Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd (No 3)* [2015] NSWLEC 75 (**Agricultural Equity**), Justice Pepper considered the section 96(2) power in relation to a consent for a gold mining operation. Her Honour helpfully set out the legal principles governing the exercise of the power contained in section 96(2) of the EP&A Act by reference to case law:

[173] The applicable legal principles governing the exercise of the power contained in s 96(2)(a) of the EP&A may be stated as follows:

(1) first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333 ; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley* at 440);

(2) the modification power is beneficial and facultative (*Michael Standley* at 440);

(3) the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Realty* at [16]);

(4) the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);

(5) the term "substantially" means "essentially or materially having the same essence" (*Vacik endorsed in Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 ; (1999) 106 LGERA 298 at [30]);

(6) the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);

(7) the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilene Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);

(8) in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);

(9) the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and

(10) a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52]).

12. In considering whether section 96(2)(a) gives rise to an objective jurisdictional fact as to the consent authority's satisfaction that the developments were substantially the same, Her Honour considered the relevant case law and concluded:

161. Applying these principles, and the cases referred to above, leads to the conclusion that the jurisdictional fact contained in s 96(2)(a) of the EPAA is of the "special", limited, or subjective kind. Indicators include, that s 96(2)(a) is expressed in subjective terms ("if it is satisfied that"), and that there is an evaluative element and some potential complexity in resolving the fact contemplated by s 96(2)(a), upon which reasonable minds might differ, as to whether the proposed modified development is substantially the same as the original development. [Our emphasis].

13. Accordingly, it has been acknowledged by the Land and Environment Court that the assessment as to whether a proposed modification is substantially the same as the original development requires a subjective evaluation by the relevant consent authority. It may be possible for an assessment to differ within the realms of reasonable decision making.

#### **Matters raised in the Burwood Council Submission**

14. Council's email raised concern as to whether the development proposed in the Modification Application can be considered to be substantially the same development as that approved by the SSD Approval.
15. Council was concerned that the building envelope on Grantham Street and the Learning and Teaching Building on Park Road are different to that originally approved and would result in a radical change to the appearance. Council also raised a concern that the increase in floor space and height would substantially alter the form of the development from a visual and quantitative sense.
16. Following a review of the plans approved by the SSD Approval and the plans proposed under the Modification Application, the plans demonstrate a consistency between the two proposals in terms of materials and expression to the street. It is also apparent that the change to streetscape impact will be limited and largely imperceptible.
17. Council's concern that the impacts from the development are different given the increase in floor space and height of the development. In our view, the changes resulting from a three to four storey building have been assessed and do not materially change the impacts resulting from a shadowing and scale perspective.
18. Although the Modification Application proposes a net increase in GFA and height to the development proposed under the SSD Approval, the intention of the modified proposal is to increase amenity for students and teachers by improving teaching and learning spaces to enable the more efficient operation of the school, including by providing adaptable classrooms and collaborative learning spaces. Accordingly, Council's concern regarding impacts from additional students and teachers is unfounded.

#### **Is the Modification Application within the scope of section 96(2)?**

19. The case law indicates that the onus is on the applicant to demonstrate that a proposal is within the scope of section 96(2) including by undertaking a before and after analysis of the qualitative and quantitative elements of the approved development and the development proposed after the modification.
20. From a quantitative perspective:
  - (a) The Modification Application does not propose changes to Level -01(basement), Level 00 (ground) or Level 01 of the Teaching and Learning Building. Changes proposed to level 02 are confined to converting the external roof terraces to internal collaborative learning spaces.
  - (b) The increase in total GFA approved in the SSD Approval and proposed in the Modification Application is 7.5% of the GFA and is considered minor.



- (c) Further detail as to the quantitate changes between the SSD Approval and the Modification Application are provided in Table 3 to the JBA report.

21. From a qualitative perspective:

- (a) A comparison of the photomontages prepared for the original development and the modified development illustrates visually similar development in terms of architectural features, materials and style.
- (b) The same setbacks from boundaries are proposed. Landscaped areas remain unchanged.
- (c) The essential elements of the original development are retained. The foot print and layout of the MLC Senior School development will be generally unchanged. No buildings are proposed to be added and no further demolition is proposed, rather the Modification Application proposes a rearrangement of floor space.
- (d) The bulk and scale of the built form across the site will not significantly increase. The increase in height to the Teaching and Learning Building will align with the existing highest building on the site. There will be no material increased impacts of the development such as overshadowing of private property.
- (e) The use of the buildings continues to be for an educational facility. Further, the changes proposed are intended to increase amenity for students rather than to accommodate additional numbers of students. Accordingly, the modification would not result in an intensification of the use of the school or any additional environmental impacts such as increases to traffic movements.

22. The Design Principles upon which the SSD Approval was based were:

- (a) Create a new heart for the school: This principle aims to position the new buildings to form the new edges of the two new courtyards which will become the focus of the new teaching and learning spaces.
- (b) Showing the learning: The pop-outs on the Teaching and Learning Building aim to display seminar rooms and balconies and allow the learning spaces within the building to engage with the courtyard.
- (c) Internal connectivity: The atrium within the Teaching and Learning Building acts as an internal courtyard that will activate and connect the internal areas of the building and enable learning to be seen between levels and spaces.

23. The Modification Application continues to respect and further these Design Principles by improving the amenity of the school and maximising open space, for example:

- (a) The Learning and Teaching Building continues to provide a built edge to the central courtyard;
- (b) The pop-outs have been carried through to the new Level 3, and will continue to enhance the function and amenity of the Learning and Teaching Building;
- (c) The internal atrium has been retained, and continues to form a key component of the Learning and Teaching Building; and
- (d) The external landscaped area remains unchanged.

24. The consent authority can reasonably reach the requisite state of satisfaction because:

- (a) A comparison of before and after qualitative and quantitative impacts has been undertaken and this indicates that the development will be "essentially, or materially the same essence" (Moto Projects at [56]).
- (b) The same use is proposed in the modified development. This is relevant to the assessment as to whether the modified development is substantially the same, although not determinative (Vacik).
- (c) The modified proposal is within the meaning of the term "modify" which means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 (**Michael Standley**) at [474] and Moto at [27]).
- (d) No radical transformation of the original development is proposed. The Modification Application proposes improvements to the development that enhance useability and amenity without introducing additional adverse environmental impacts.
- (e) The Modification Application proposes to modify elements of the original development, none of the elements proposed to be modified are key elements that change the overall nature of the development.
- (f) This is the first modification of the SSD Approval.

25. Section 96(2) requires the consent authority to undertake an evaluative element. Justice Pepper acknowledged in *Agricultural Equity* that resolving whether a proposed modified development is substantially the same as the original development is something upon which reasonable minds might differ. Although contrary views might be possible, the applicant has demonstrated that the consent authority may be reasonably satisfied that the development proposed by the Modification Application is substantially the same development as that approved by the SSD Approval.

## Conclusion

26. The modification power is intended to be beneficial and facultative (**Michael Standley** at [440]). The present facts indicate a scenario where the modification of the SSD Approval is justified and within the scope of section 96(2).
27. For all of the reasons set out above, it is submitted that:
- (a) the applicant has established that the modified development is substantially the same as the original development; and
  - (b) the consent authority can reasonably form the requisite degree of satisfaction under section 96(2) of the EP&A Act that the development proposed by the Modification Application is substantially the same development as that approved by the SSD Approval.

Please do not hesitate to contact us if you would like to discuss.

Yours sincerely



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