

4 June 2018

Mrs Karen Harragon
Director, Social & Other Infrastructure Assessment
Department of Planning & Environment
Level 22
320 Pitt Street
SYDNEY NSW 2000

Our ref: MBP
Matter no: 9621580

Dear Mrs Harragon

State Significant Development Application (SSD 16_8114) for the Lindfield Learning Village at 100 Eton Road, Lindfield

I have been instructed to advise further in relation to this matter. So that my advice is contained in one document, I have incorporated my letter to Mr A Manning, Department of Education of 17 April 2018 into this letter of advice.

The SSD 16_8114 includes development for a school, being a pre-school, infants, primary and high school eventually planned to have 2,100 students.

I have been instructed that the Rural Fire Service (**RFS**) objects to the Department of Education's proposal set out in SSD 16_8114. In coming to this decision, I understand RFS has applied the provisions of Planning for Bush Fire Protection 2006 which is a guideline for councils, planners, fire authorities and developers (PBP 2006). Under the PBP 2006 RFS advised:

- (a) the proposal is defined as a "Special Fire Protection Purpose" (SFPP) in accordance with Appendix 1 paragraph A1.3(6)(a), being Section 100B) of the *Rural Fires Act 1997*;
- (b) applied clauses 4.2.3 - 4.2.5 to the proposal.

As I understand it, RFS have come to this conclusion because they believe the Department of Education's proposal for a school is a change of use. In planning terms there is a distinction between "use" and "purpose" and it appears that the concept of use and purpose have been confused. I refer to the letter from the RFS to the Director General, Department of Planning and Environment (**Department of Planning**) dated 4 July 2017 and in particular to the 4th paragraph as follows:

"The proposed development has been incorrectly assessed as an SFPP infill development. As noted in section 4.2.5 of PBP 2006, SFPP infill development relates to the alterations and additions to existing SFPP facilities. Under section 4.2.3(a) of PBP 2006, universities and technical colleges are not defined as a school (SFPP facility) within Local Environment Plans (LEPs). As such, the proposed development does not meet the prerequisites for SFPP infill."

There are 2 apparent errors on the face of the document PBP 2006. The first occurs as the third paragraph under clause 4.2.4 (a) Schools which states: *Universities and technical colleges are not defined as a school within an LEP, however these require careful consideration, and the specific objective above should be applied.* The second error occurs in applying *Infill* development not in accordance with the definition of *Infill* in its Dictionary on page 73: *Infill Development refers to the development of land by the erection of or addition to a residential building (or buildings) which does not require the spatial extension of services including public*

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road, electricity, water or sewerage and is within an existing allotment. PBP2006 applies infill development to buildings other than residential, but its definition of Infill development confines such development to residential.

The Department of Education's bushfire consultant who considered the present development to be infill would clearly be correct on a reading of PBP2006, but the confining definition of "residential" to infill development in the dictionary prevents the application of Infill development to SSD 16_8114.

I have been instructed to advise on whether there has been a change of use, and consider how to meet the concerns of RFS so that the Proposal can proceed.

Is the RFS view that the school is a change of use correct?

1. In coming to the conclusion that the proposed development is a change of use the RFS relies upon its guideline, PBP 2006. I note the PBP 2006 guideline:
 - (a) Defines infill development as *"Refers to the development of land by the erection of or addition to a residential building (or buildings) which does not require the spatial extension of services including public roads, electricity, water or sewerage and is within an existing allotment"*;
 - (b) Development is as defined in the *Environmental Planning & Assessment Act 1979*;
 - (c) Local Environmental Plan (LEP) refers to the LEP prepared under Part 3 of the EP&A Act;
 - (d) Special Fire Protection Purposes (SFPP) are defined variously as:
 - "(a) A school;
 - (b) A childcare centre;
 - (c) ..."
 - (e) Under clause 4.2.4 of the PBP 2006 whilst describing schools the guideline specifically excludes:

"Universities and technical colleges are not defined as a school within an LEP, however these require careful consideration, and the specific objectives above should be applied."
2. The *State Environmental Planning Policy SEPP (Infrastructure) 2007 (ISEPP)* provides for the legislative planning framework for infrastructure and the provision of services in NSW. The relevant definition is in Part 3 Division 3, Section 27 definitions

In this Division:

educational establishment has the same meaning it has in the *Standard Instrument*.

Note

The term **educational establishment** is defined by the Standard Instrument as follows:

educational establishment means a building or place used for education (including teaching) being:

- (a) a school, or
- (b) a tertiary institution, including a university or a TAFE establishment, that provides formal education and is constituted by or under an Act.

3. State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017) (**Education SEPP**) commenced on 1 September 2017, and the relevant section is:

- (a) Section 5 is relevant to the Proposal under the following definitions:

educational establishment has the same definition as set out in ISEPP and the Standard Instrument.

4. Part 3, Division 3 of the ISEPP was repealed on 1 September 2017. However, as SSD 16_8114 was submitted in June 2017, and prior to the commencement of the Education SEPP, and as SSD 16_8114 remained undetermined as of 1 September 2017, the relevant planning instrument for assessment of the proposal is the ISEPP. The savings provisions in the Education SEPP, as per Schedule 5, Clause 1 provide:

- "(1) This Policy does not apply to or in respect of the determination of a development application made under Part 4 of the Act, but not finally determined before the commencement of this Policy.
- (2) Despite subclause (1), before determining a development application referred to in that subclause for development for the purpose of a centre based childcare facility, the consent authority must take into consideration the regulatory requirements and the National Quality Framework Assessment Checklist set out in Part 4 of the Childcare Planning Guideline, in relation to the proposed development.
- ...
- (3A) Subject to subclause (2), an application to which subclause (1), (2A) or (3) applies is to be determined as if this Policy had not been made.

Further, clause 4 of Schedule 5 of the ISEPP provides:

"The amendments made to this Policy by the State Environmental Planning Policy (Infrastructure) Amendment (Review) 2017 do not apply to:

- (a) development for which an application for development consent was lodged, or the carrying out of development that was commenced, before the commencement of those amendments, or

(b) *an activity under Part 5 of the Act that a determining authority commenced to consider before the commencement of those amendments."*

5. Therefore, the applicable planning instrument for determining SSD 16_8114 is the ISEPP as it was at 31 August 2017.
6. The use of the site is as an educational establishment.
7. But what is the purpose? The Supreme Court of New South Wales, Court of Appeal considered question of "use" and "purpose" in the matter of *El Boustani v The Minister Administering the Environmental Planning and Assessment Act 1979* [2014] NSWCA 33 where Beazley P, Gleeson JA agreed with the judgment of Preston CJ of the LEC and held in [129] that the primary judge conflated the concepts of the use of land and the purpose for which the land is used.

[130] *The purpose of a use is the end which is seen to be served by a particular use of land. It describes a character which is imparted to the land on which the land is pursued: Shire of Perth v O'Keefe (1964) 110 CLR 529 at 534. The characterisation of the purpose of a use needs to be done at the appropriate level of generality, not too narrow and not overly wide. The test is not so narrow that it requires characterisation of the purpose in terms of the detailed activities, transactions or processes which have taken or which may take place, but not so general that the characterisation can embrace activities, transactions or processes which differ in kind from the use which the activities, transactions or processes as a class have made or may make of the land: Royal Agricultural Society of NSW v Sydney City Council (1987) 61 LGRA 305 at 310.*
8. PBP 2006 incorrectly excludes universities and technical colleges from the definition of *educational establishment*. Educational establishment includes a school and a tertiary institution, including a university or TAFE establishment, that provide formal education and is constituted by or under an Act.
9. The use of this land is as an educational establishment. The purpose is for a school.
10. Therefore, the RFS has an incorrect statement in the PBP 2006 which misconstrues the definition of educational establishment which leads to it believing that the change of purpose from university to school is a change of use. It is not a change of use.

RFS issues

11. However, for the purposes of this application it is necessary to consider the submissions by RFS and the applicable controls to Special Fire Protection Purpose Developments.
12. The school falls within the Special Fire Protection Purpose Development (**SFPP**). Infill development by its definition is confined to residential properties. Technically it is not a change of use, it is an adaptive reuse of a university to a school. Adaptive reuse would usually attract a lesser control than the controls being pressed by RFS. As per The Hon. Anthony Bernard Kelly, MLC in the Forward to the PBP 2006 states, inter alia:

Key features of the revised edition include the emphasis on a performance based approach to development through focusing on safer outcomes rather than simply meeting prescriptive requirements.

This approach to planning allows for considerable flexibility and innovation that links the bush fire hazard for a site with the implementation of appropriate bush fire protection measures.

13. There is no change of use. Technically it is not an infill development because of the "Infill" definition. However, it has the characteristics of an infill development, and less stringent controls should be applied ie. Bushfire protection measures in combination, defensible space, and deemed to satisfy APZ measures.

RtS

14. This letter requests:

- i. Removal of the Childcare Centre from SSD 16_8114;
- ii. Full approval of Construction Stages 1 and 2, as set out below;
- iii. The amended SSD 16_8114 (minus the Childcare Centre) is as follows:

Construction Stage 1, Phase 1 will comprise:

- (a) 1 home base totalling up to 350 students from K-12 in the eastern wing of the building as identified on the plan annexed hereto and marked (A);
- (b) all requisite technical spaces to support a full primary and secondary curriculum for up to 350 students;
- (c) administration space for approximately 20-30 staff;
- (d) Construction of a 4m wide access trail for bushfire trucks to the south of the building;
- (e) fencing of the green space around the perimeter of the site;
- (f) remediation of targeted roof areas to create additional outdoor play areas; and
- (g) traffic and transport infrastructure associated with the parking and drop-off/pick-up area.

Construction Stage 1, Phase 2A and 2B will comprise:

- (a) Phase 2A includes the remainder of the original Construction Stage 1, while Construction Stage 2B includes the repurposing of the Phase 1 area;
- (b) 3 home bases totalling approximately 1,000 students from K-12, (inclusive of the 350 students in Phase 1) in the eastern wing of the building;
- (c) all requisite technical spaces to support a full primary and secondary curriculum for 1,000 students;

- (d) administration space for approximately 160 staff;
- (e) fencing of the green space around the perimeter of the site, if any remains to be fenced after Phase 1 fencing has been completed;
- (f) remediation of any targeted roof areas to create additional outdoor play areas if they have not already been remediated under Phase 1; and
- (g) traffic and transport infrastructure associated with the parking and drop-off/pick-up area if it has not been provided under Phase 1.

Construction Stage 2 will comprise:

- (a) 3 home bases totalling approximately 1,100 students from K-12 in the western wing of the building; and
- (b) Remediation of targeted roof areas to expand outdoor play areas.

15. Having regard to the RFS issues, DoE will accept a Conditions of Consent in the following terms:

Construction Stage 1, Phase 1:

- 1. Consent to utilise those buildings in Construction Stage 1, Phase 1 as shaded blue and marked Phase 1 on the plan **attached Appendix 1** and marked "*Blue zone on the plan above represents portions of the building and site greater than 100 metres from unmanaged vegetation. The green dashed line represents the extent of the APZ management within the site or secured under covenants on adjoining land.*"
- 2. A certificate can be issued under s.6.28 for Construction Stage 1, Phase 1 after consultation with RFS.

Construction Stage 1, Phase 2A and 2B:

- 1. ***Prior to the issue of a Construction Certificate***
Department of Education shall deliver a Bushfire Management Plan after consultation with RFS to the Secretary setting out how it will comply with Planning for Bushfire Protection, NSW Rural Fire Services 2006.
- 2. *A certificate can be issued under s.6.28 for Construction Stage 1, Phase 2A and 2B.*

Construction Stage 2:

- 1. ***Prior to the issue of a Construction Certificate***
Department of Education shall deliver a Bushfire Management Plan after consultation with RFS to the Secretary setting out how it will comply with Planning for Bushfire Protection, NSW Rural Fire Services 2006.
- 2. *A certificate can be issued under s.6.28 for Construction Stage 2.*

16. This approach will allow the Department of Education to open a school for 350 students from K-12 for the commencement of first term 2019 (Construction Stage 1, Phase 1).

This phasing of Construction Stage 1 is supported by Mr Lew Short of Blackash Bushfire Consulting.

17. In accordance with the plan annexed to this letter, the 100m APZ surrounding Construction Stage 1, Phase 1 of the development consists of an inner and outer APZ.
18. Until Construction Stage 1, Phase A2A and 2B, and Construction Stage 2 can be implemented the remaining built form will be isolated from the operational school.
19. As the Department of Planning and RFS is aware, there is an existing APZ varying from 40, 60, and 100+m at present which clearly separates the buildings from the hazards. In planning for bush fire protection DoE will work with RFS in relation to the BFPs and adopt its recommendations set out in 3.2 in the PBP 2006:

"In summary, the provision of an APZ, clearly separating buildings from hazards, and reducing fuel loads, is the first step. In exceptional circumstances, trading off APZ for increased construction standards and/or evacuation measures can be proposed, but how these will meet the objectives of PBP and the intent/performance criteria of each element must be clearly demonstrated."
20. Clearly, DoE will consider the bushfire behaviour as explained in Figure 3.2 Bushfire Protection Measures in combination. The primary importance at all times for DoE is the safety of its students and staff.
21. I note under PBP 2006 4.2.4 DoE will take the following into account:
 - (a) *In general, office buildings for administration are not afforded the same protection as classrooms or assembly point buildings used for evacuation. Likewise, toilet blocks can be located within the APZ area.*

Sporting fields, and amenities blocks should form part of the APZ between the hazard and the classrooms. Car parking should be near a clear exit away from the bushfire threat.

Efforts must be made to improve the resilience of buildings, and new classrooms should not be extended towards bushland where they do not comply with the setback requirements of Appendix 2. Where existing schools do not meet setback requirements, any upgrades should incorporate improved fire protection measures within existing building footprints.
 - (b) As the Department of Planning is aware, DoE has engaged Lew Short of Blackash Bushfire Consulting as its bushfire consultant to assist in the planning for a safe environment. Mr Short has an intimate knowledge of the bushfire guidelines, including Planning for Bush Fire Protection.
22. As a final comment, the Department of Education is required to consult with RFS and to consider the recommendations made by RFS. The Department has demonstrated a desire to meet the RFS requirements but it also has a core obligation to provide a new school in the area nominated.

23. For Construction Stage 1, Phases 2A and 2B DoE accepts the position that the APZ cannot be extended into the land owned by NPWS, and alternate BFPMs will need to be implemented.

Alternative approval pathway

24. In the alternative in regard to the modified SSD_8114, the Department of Planning may partially approve Construction Stage 1, Phase 1, and postpone a decision on Construction Stage 1, Phase 2A and 2B, and Construction Stage 2 until a later date.
25. The power to determine a development application and also to grant a partial consent is found in s 4.16 of the *Environmental Planning and Assessment Act 1979* which provides:

(1) *A consent authority is to determine a development consent by:*

- (a) *granting consent to the application, either unconditionally or subject to conditions, or*
- (b) *refusing consent to the application.*

....

(3) *"Deferred commencement" consent: A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.*

(4) *Total or partial consent: A development consent may be granted:*

- (a) *for the development for which the consent is sought, or*
- (b) *for that development, except for a specified part or aspect of that development, or*
- (c) *for a specified part or aspect of that development.*

(5) *The consent authority is not required to refuse consent to any specified part or aspect of development for which development consent is not initially granted under subsection (4), but development consent may subsequently be granted for that part or aspect of the development.*

...

The power of partial approval was considered by the Land and Environment Court in *Butler Street Community Network Incorporated v Northern Region Joint Regional Planning Panel & Ors* [2017] NSWLEC 51 where Robson J held that it was well within the Court's power under section 80(4) of the EPA Act to grant consent to only part of a development application, applying *Addenbrooke Pty Limited v Woollahra Municipal Council (No. 2)* [2009] NSWLEC 134. Section 80(4) is the forerunner of section 4.16(4).

In Addenbrooke Justice Biscoe found at [102]:

The language of s 80(4) is plain. In my opinion, it empowers the Court to approve the RBM proposal except for the eastern arm and specified berths ...

And [105]:

I consider that it is appropriate to exercise the s 80(4) power by granting approval for the proposed RBM except for the eastern arm (including the walkway in front of it) and the berths to which I have referred on the middle and western arms, subject to conditions including a maximum height for berthed boats and subject to consideration of the visual impact on Rose Bay beach.

26. Therefore, as an alternative DoE is seeking partial consent for Construction Stage 1, Phase 1 in accordance with the amended SSD 16_8114 of the RtS, with Construction Stage 1, Phase 2A and 2B, and Construction Stage 2 remaining undetermined at this time.

Conclusion

DoE primarily seeks full approval to the amended SSD 16_8114 and would accept conditions of consent as set out in paragraph 15 above.

In the alternative, DOE seeks partial approval to the amended SSD_8114 being Construction Stage 1, Phase 1, with Construction Stage 1 Phase 2A and 2B, and Construction Stage 2 to be determined at a later date.

Yours faithfully

Hunt & Hunt

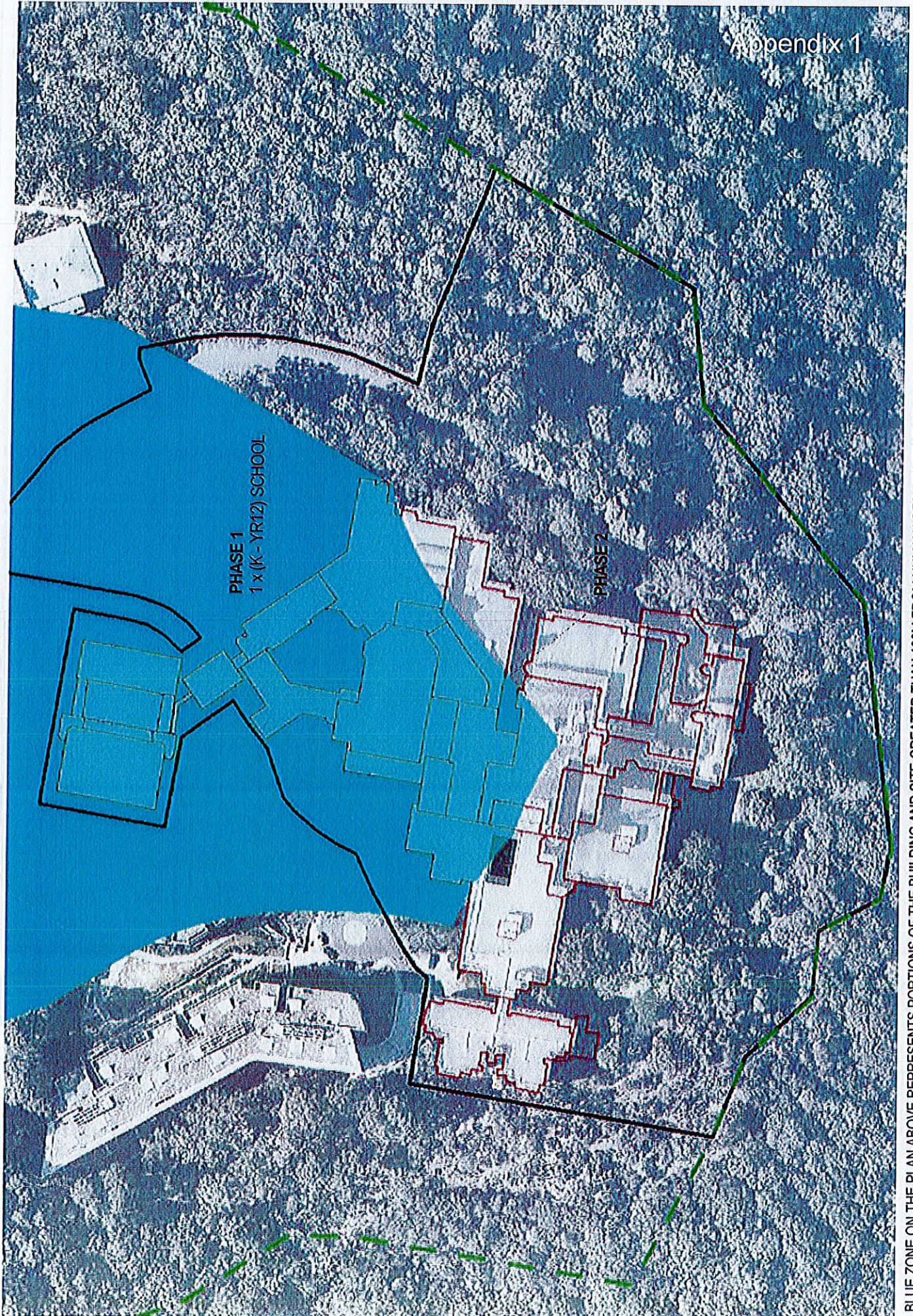


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BLUE ZONE ON THE PLAN ABOVE REPRESENTS PORTIONS OF THE BUILDING AND SITE GREATER THAN 100M FROM UNMANAGED VEGETATION.
THE GREEN DASHED LINE REPRESENTS THE EXTENT OF APZ MANAGEMENT WITHIN THE SITE OR SECURED UNDER COVENANTS ON ADJOINING LAND.