

18 December 2019

The Chair
Independent Planning Commission NSW
Level 3, 201 Elizabeth Street
Sydney NSW 2000

Dear Sir / Madam

The Scots College Stevenson Library Building alterations and additions (SSD 8922) - submission in support of Modification application - Development contributions

1. We refer to the above state significant development (**SSD**) application, and confirm that we act for The Scots College (**TSC**).
2. Development consent for SSD 8922 was granted by the Independent Planning Commission (**IPC**) on 27 August 2019 (**Consent**). The approved development is for alterations to the existing Stevenson Library Building. No additional student or staff numbers were proposed beyond current levels. The Consent in fact contains a condition that confirms this.

Summary

3. This submission has been prepared to accompany a modification application that our client is preparing in relation to the Consent. The modification application seeks the removal of a condition in the Consent which requires the payment of section 7.12 contributions (**condition C32**). The modification application will be one involving 'minimal environmental impact' (see section 4.55(1) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**)).
4. The basis of the modification application is that condition 32 inconsistent with other consents granted for other independent school redevelopments, as in those cases the consent authority has **not** imposed development contributions where there are no increases to student and staff numbers.

Condition C32

5. Condition 32 reads:

C32. Prior to commencement of works (not including demolition), a Section 7.12 levy totalling \$288,630.68, 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.

6. We acknowledge that section 7.13(4) of the EP&A Act prevents our client from appealing the merits of the imposition of this condition, but had such a right existed, the general test for validity of a condition adopted from the Courts stems from *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (**Newbury**). It nevertheless serves as a useful and instructive criteria for assessing this modification application. The principles from *Newbury* are:
 - (a) The condition must have a planning purpose, and not be for an ulterior purpose.
 - (b) The condition must be fairly and reasonably related to the permitted activity.
 - (c) The condition must not be so unreasonable that no reasonable planning authority could have imposed it.
7. There are two principal reasons why condition C32 does not meet the *Newbury* test:
 - (a) Condition C32 does not fairly and reasonably relate to the SSD, as there is no sufficient nexus between the SSD and an increased demand for public services or facilities (*Newbury* second limb).
 - (b) The imposition of condition C32 is inconsistent with consents granted for other independent school redevelopments, and it is therefore unreasonable to impose it upon TSC where the nexus test is not satisfied (*Newbury* third limb).
8. It is therefore likely that condition C32 would be removed by the Court on appeal, had section 7.13(4) of the EP&A Act not prevented this from occurring.

Nexus test

9. Although we acknowledge the condition is imposed in accordance with a Contributions Plan, condition C32 has been imposed on a development which does not involve any increase to student or staff numbers, and only involves alterations and additions to an existing library building on the TSC campus.
10. Increases to student and staff numbers for this SSD have been restricted by condition A26 of the Consent which states:

A26. *This consent does not approve any increase in student and staff numbers. There must not be any increase in student and staff numbers over and above the existing approved numbers.*
11. The IPC's statement of reasons for decision described the development application in the following way:
 7. *"The Application before the Commission proposed major alterations and additions to the existing Stevenson Library Building at The Scots College, Bellevue Hill. The EIS describes the proposed changes noting: "The Proposed development involves transforming the 5 storey, flat roofed, neo-Brutalist, monolithic, and solid mass of the existing Stevenson Library building into a 6 storey, pitched-roof structure in the Scottish Baronial style".*
 8. *The Department's AR states in more detail that these alterations include: "partial demolition, extensions to existing floor slabs, creation of an atrium void, addition of a sixth storey, new pitched roof, complete interior refitting, recladding of the exterior in a Scottish Baronial architectural style and creation of new entrances from the existing quadrangle and oval".*
12. The IPC's statement of reasons also describes the Applicant's need for the SSD:

10. *"In its meeting with the IPC the Applicant noted that the current Stevenson Library Building is not fit for purpose, with a key issue relating to accessibility. Specifically, the Applicant noted that there is no front door or level entry which creates a long queue as students file in and out. Additionally, the Applicant noted there are no female toilets or lifts and therefore stairs have to be used to gain entry to the building.*
11. *The Applicant also noted that it does not see the building fit for the next 15 to 25 years of use. The Application would therefore provide a functional improvement for accessibility. Additionally, the Applicant notes in its EIS: "The built form and urban design for the proposed alterations and additions are reasonable and appropriate in the circumstance of the case, reflecting the rich Scottish heritage of the College".*
12. *The Applicant states in its EIS that: "The reasons justifying the carrying out of the proposed development are as follows:*
 - *improving, modernising, augmenting, supplementing, and further developing the College's educational infrastructure so that it can better satisfy staff and students needs and deliver improved educational results without giving rise to unreasonable impacts is beneficial and appropriate;*
 - *the existing Stevenson Library building does not meet the current needs of the College and is deficient in various important respects, including its design, its accessibility, and its environmental efficiency; and*
 - *the proposal will result in a (sic) better educational, operational and design outcomes for the College".*
13. Considering the nature of the SSD, and condition A26 above, there is not in our view any nexus between the development and an increase in demand for public services or facilities.

Inconsistency

14. The imposition of condition C32 for this SSD is inconsistent with other consents for SSD granted by the Minister (through its delegate) for independent school redevelopments in recent years. In support of this, we refer the IPC to the following 4 consents, which will be dealt with in turn below:
 - (a) MLC School - SSD 6484;
 - (b) St Joseph's College - SSD 8970;
 - (c) Wenona School - SSD 6952; and
 - (d) Pymble Ladies College - SSD 5314.
15. In each of these examples, the Minister (through its delegate) decided **not** to impose conditions requiring the payment of development contributions, where no increases to student numbers above existing levels were proposed. This was on the basis that no sufficient nexus existed between the proposal and an increased demand for public services or facilities.
16. The SSD in this instance is similar to these other consents, as there is no increase to student numbers, and no sufficient nexus between the SSD and an increased demand for public services or facilities. Therefore, the imposition of condition C23 in the Consent is

- inconsistent with the above consents, and unfair. This places TSC at a disadvantage compared to other independent schools, and on this basis alone, the condition should in our view be removed.
17. The 4 examples cited are discussed in more detail in paragraphs 19 to 34 below.
18. Further, there are also other examples of independent school redevelopments where no contributions were imposed in circumstances where there was no increase to student numbers. We note that these examples do not have any commentary provided in the relevant Assessment Report regarding the issue:
- (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.

MLC School - SSD 6484 - 2015

19. The relevant local government area for the above site is Burwood Council. At the time of the grant of the above consent (3 March 2015), a Contributions Plan was in force under section 94A of the EP&A Act, being the *Burwood Section 94A Local Infrastructure Contributions Plan for the Burwood Local Government Area (Excluding the Town Centre)*. As the IPC would be aware, section 7.12 was formerly known as section 94A prior to the decimalisation of the EP&A Act in early 2018.
20. We have reviewed the development consent granted by the Minister (through its delegate) for this SSD, and note that no condition was imposed requiring the payment of development contributions under either section 94 or section 94A of the EP&A Act. The Secretary's Environmental Assessment Report dated March 2015 for SSD 6484 explains the background to the contributions issue at pages 20-21. It appears from this part of the Report that:
- (a) Burwood Council had requested the imposition of a monetary contribution of \$338,971.18 in accordance with section 94A (i.e. a 1% levy); and
 - (b) the Department (in its discretion) accepted the Applicant's request for development contributions not to be imposed, on the basis that there were no proposed increases to student or staff numbers.
21. An extract from page 21 of that Report is reproduced below, which shows the reasoning behind the decision. In short, the reasoning was based on the fact that there was no proposed increase to student or staff numbers as a result of the SSD application, and that there was not a sufficient nexus between the proposal, and the demand for public services or facilities created by the development:

"The Department is of the view that whilst the proposal is not specifically exempt from Council's s94 Contributions Plan, the school provides an education benefit for the community and sport facilities and recreation space on the school campus. The Department considers that given there will be no increase in student or staff numbers as a result of this proposal, there would be no additional demand placed on Council services or infrastructure. Notwithstanding that a fixed fee applies under s94A, there is not a sufficient nexus between the proposal and demand for public services or

facilities, which is the approach adopted by the Department in its assessment of similar applications for educational establishments. The Department's assessment therefore concludes that the s94 monetary contribution should not be applied in this circumstance."

[Emphasis added].

22. The reasoning behind not imposing contributions for SSD 6484 has obvious parallels with the TSC development the subject of this submission.
23. Regrettably the same reasoning was omitted by the Department in respect of its report for the subject development application.

St Josephs - SSD 8970 - 2019

24. The relevant local government area for this site was Hunters Hill Council. At the time of the grant of consent (19 September 2019), there was a Contributions Plan in force under section 94A of the EP&A Act, being the *Hunters Hill Section 94A Developer Contributions Plan 2014*.
25. We have reviewed the development consent granted by the Minister (through its delegate) for this SSD, and note that no condition was imposed requiring the payment of development contributions under either section 94 or section 94A of the EP&A Act.
26. In essence, (although able to) it appears from the Secretary's Environmental Assessment Report that the Department elected not to impose a contributions condition given the College's not for profit status, and the student number status of this redevelopment (i.e. neutral).
27. The Assessment Report for SSD 8970 provides commentary on the contributions issue at pages 43-44 (reproduced below):
 - *"The Applicant has requested an exemption to pay the developer contributions in accordance with the Hunters Hill Section 94 A Development Contributions Plan 2014 (Development Contributions Plan). Under the Development Contributions Plan the applicable contribution is 1% of the estimated cost of the development.*
 - *Section 7 of the Development Contributions Plan indicates that "development application by non-for-profit charity (as defined by Australian Tax Office) will be assessed on an individual basis and may be exempt from payment contributions". Council has previously exempted St Joseph's College from the payment of contributions as a registered non-for-profit charity organisation.*
 - *Public submission considered that contributions should be paid by the school to enable provision of local infrastructure and considering the fact that this is not a public facility and co-sharing of uses with the community is not encouraged.*
 - *Council had not raised any concerns with the request for an exemption.*
 - *The Department has reviewed the Applicant's request and notes that St Joseph's College is a registered charity organisation.*
 - *The Department considers that while some additional floor space is proposed, the proposed development would result in no change to the capacity of the school.*
 - *Consequently, the Department does not consider that the development would generate additional demand on Council's infrastructure. As such, the application*

demonstrates that existing community uses would continue within the PESP building.

- *On this basis, and due to no concerns/ comments from Council, the Department has not recommended a condition requiring payment of the developer contributions."*

28. Again, the reasoning behind not imposing contributions for SSD 8970 has obvious parallels with the TSC development the subject of this submission.

Wenona School - SSD 6952 - 2015

29. The relevant local government area for this site was North Sydney Council. At the time of the grant of consent (18 December 2015), a Contributions Plan was in force under section 94 of the EP&A Act, being the *North Sydney Section 94 Contributions Plan 2013* (there was no section 94A plan in force).
30. We have reviewed the development consent granted by the Minister (through its delegate) for this site, and note that no condition was imposed requiring the payment of development contributions under section 94 of the EP&A Act. In similar terms to the examples above, the Secretary's Environmental Assessment Report dated December 2015 explains the background to this issue at pages 37-38. It appears from this part of the Report that:
- (a) North Sydney Council had encouraged a voluntary contribution from Wenona School.
 - (b) The Department (in its discretion) recommended against imposing a condition requiring the payment of development contributions on the basis that there were no proposed increases to student or staff numbers.
31. An extract from page 38 of that Report is reproduced below, which shows the reasoning behind the decision. We note that the reasoning is very similar to that which was adopted for the MLC School example above in particular:

"The Department is of the view that whilst the proposal is not specifically exempt from Council's s94 Contributions Plan, the school provides an education benefit for the community and sport facilities and recreation space on the school campus. The Department also considers that given there will be no increase in student or staff numbers as a result of this proposal, there would be no additional demand placed on Council services or infrastructure. The Department considers that there is not a sufficient nexus between the proposal an increased demand for public services or facilities, which is the approach adopted by the Department in its assessment of similar applications for educational establishments. The Department's assessment therefore concludes that the s94 monetary contribution should not be applied in this circumstance."

[Emphasis added].

32. Again, the reasoning behind not imposing contributions for SSD 6952 has obvious parallels with the TSC development the subject of this submission.

Pymble Ladies College - SSD 5314 - 2013

33. Similar to the Wenona example, although the relevant council for this site (Ku-ring-gai) did not have a section 94A Contributions Plan in force at the time when consent was granted in 2013 (and only had a Contributions Plan in force under section 94), we still consider that this example supports TSC's argument in this submission, as it demonstrates consistency across a number of years in its consideration of the issue by the Department.

34. The development consent granted by the Minister (through its delegate) on 9 July 2013 did not impose a condition requiring the payment of development contributions under either section 94 or section 94A of the EP&A Act. The Director General's Environmental Assessment Report dated July 2013 prepared for this SSD explains the basis for the decision. An extract from page 28 of that Report is reproduced below. The reasoning is very similar to that which was adopted by the Department for the examples:

"Ku-ring-gai Contributions Plan 2010 (contributions plan) applies to the Ku-ring-gai LGA. The contributions plan applies to all development that increases the demand for the facilities and amenities in the LGA. The proposed development would not increase student or staff numbers, and therefore the proposal would not increase the demand for facilities or amenities for which the contributions plan provides. Accordingly, the department considers that the proposed development does not attract contributions under the contributions plan."

[Emphasis added].

Contributions imposed in other SSDs coincide with increases to student numbers

35. The only times where contributions for independent school redevelopments have been levied have been where a development application also seeks to increase the student cap. We draw the IPC's attention to the following examples.
- (a) Rouse Hill Anglican College (SSD 8006). This project involved increasing the capacity of the school by a considerable number - 795 students.
 - (b) St Catherine's School at Waverley (SSD 6339), which also involved significant increases to student numbers from 1050 to 1200 students.
36. The increases to student and staff numbers involved in the above examples triggered an increased demand for public services or facilities.
37. In light of condition A26 of the Consent however, the subject SSD can be distinguished from the above examples.

Modification application

38. Without any merit appeal right available to TSC in respect of condition C32, it is all the more important that this submission be considered as part of the assessment of TSC's modification application seeking the removal of condition C32, particularly given the additional cost burden the contribution imposes for the TSC.
39. The alternative is that a condition involving a considerable burden to a School project is imposed creating an obvious unfairness.

40. The report that led to this Commission has not explained or rationalised why it would be reasonable in the present circumstances to impose the contributions. In the absence of any appropriate reasons, the condition should be removed to ensure Schools carrying out redevelopments are on an equal playing field. For all the reasons set out in this submission, Condition C32 is in our view unreasonable, and our client's modification application should be supported.

Yours faithfully



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