

**Draft State Environmental Planning Policy  
(Educational Establishments and Child Care  
Facilities) 2017**

**The Key Implications for  
Non-Government Schools**

**A White Paper**

**6 April 2017**

**epm Projects Pty Ltd**

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## 1. Introduction

This white paper describes the key implications for non-government schools of the draft *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)*, including the proposed changes to the *Environmental Planning & Assessment Regulation 2000 (Schools Regulation)*, in contrast to the current *State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)*. It provides an overview by Andrew Graham, CEO of EPM Projects Pty Ltd. In doing so, Andrew relies on his 15-year experience in planning and managing property development and building projects for non-government schools and the advice to EPM of other industry experts. It serves as a plain English explanation to school clients of the joint submission by EPM and McCullough Robertson Lawyers to the Department of Planning & Environment in April 2017 about the draft policy that is aimed at influencing government to modify the draft policy for the benefit of school clients.

## 2. Challenge

Government and private enterprise agree that NSW is and will continue to grow at an unprecedented rate with the population forecast to increase by 28% from 2014 to almost ten million people by 2036<sup>1</sup>. Government acknowledges that this growth is placing increasing pressure on our social infrastructure, including all levels of our education system. For this reason, Government is proposing “improvements to the planning framework” so that it is “better-placed to respond to the increasing demand for child care and education services”<sup>1</sup>. Non-government schools are clearly also feeling the pressure of this situation and must have structures, systems and processes to enable them to manage their property and facilities under this pressure.

## 3. Scope

There are a number of benefits of the draft ESEPP and the Schools Regulation for non-government schools. Specifically, these benefits include:

- (a) the expansion of the categories of development that may be carried out by schools as exempt development;
- (b) the ability for school based child care to be carried out as exempt or complying development, thereby allowing these facilities to be provided quickly and at low cost;
- (c) the availability of the pathway of ‘development without consent’ to non-government schools allowing these schools to ‘self-assess’ many forms of development;
- (d) the evidence based principles contained in the Draft Planning Circular regarding imposition of student and staff caps by consent authorities; and
- (e) the new thresholds for school development being classified as State significant development.

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<sup>1</sup> Draft State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017, Explanation of Intended Effect, Department of Planning & Environment

However despite the above benefits there are a number of aspects of the draft ESEPP that as currently drafted will lead to a disadvantage for non-government schools and therefore could be improved. This white paper focuses on those aspects.

## **4. Structure**

This white paper contrasts each of the key disadvantages of the ESEPP and the proposed School Regulation with the ISEPP and the current version of the Environmental Planning & Assessment Regulation under which non-government schools currently undertake the development of land.

## **5. Key Disadvantages of Draft Policy**

### **5.1 Development on Land in a Heritage Conservation Area**

ISEPP does not prevent development of any of the kinds permitted under clause 31A(1)(a) of ISEPP (including a change of use permitted under clause 31A(2)(a)) from being Complying Development simply because the land is located in a Heritage Conservation Area.

In contrast, clause 33(1)(a)(viii) of ESEPP prevents demolition to (for example) facilitate the construction of a new building that in all other respects could be Complying Development from being Complying Development if the demolition is on land that is located in a Heritage Conservation Area. This will in many cases delay development of the types set out in clause 33(1)(a) of ESEPP that can otherwise be Complying Development thereby significantly eroding the benefit of Complying Development.

### **5.2 Development Adjacent to a Rail Corridor**

ISEPP does not limit the nature or extent of building work below natural ground level that can be Complying Development adjacent to a rail corridor e.g. for a carpark, store room or even the foundations of a building.

In contrast, clause 17(2)(i) of ESEPP prevents any part of a structure involved in Complying Development from being more than 2 metres below the existing ground level where the development is within 25 metres of a rail corridor.

### **5.3 Development below Ground Level**

ISEPP does not prevent development from being Complying Development simply because it is below the existing ground level.

In contrast, clause 33(6) of ESEPP prevents development that involves facilities that are below ground from being Complying Development e.g. carparks, store rooms, plant rooms etc.

### **5.4 Complying Development Increasing Student Numbers**

Neither ISEPP nor the EP&A Regulation limits the size of a building that may be constructed as Complying Development by the number of students that the building is capable of accommodating, even for a school for which a student cap has not been imposed by a condition of a Development Consent.

In contrast, the amendments that are proposed to clause 4(1)(j) of the Regulation would limit the size of a building that can be Complying Development to a size that cannot accommodate

more than 50 students unless the school has obtained a certificate from the Roads and Maritime Services that indicates its acceptance of the development. This is the case even for a school for which a student cap has not been imposed by a condition of a Development Consent.

### **5.5 Councils as Accredited Certifiers for issuing Certificates**

Under the current legislation, schools are free to appoint either a Council or a private Accredited Certifier to issue a Complying Development Certificate.

The guidance notes released with the ESEPP indicate that Government is considering an amendment to the EP&A Regulation to restrict an Accredited Certifier from issuing a Complying Development Certificate in relation to schools. This would inevitably result in undue delay to the issue of a Complying Development Certificate as Council would not be able to cope with the workload and respond in the same timeframe as a private certifier.

## **6. Conclusion**

If Government adopts the draft ESEPP and the proposed School Regulation in their current form, then property development, construction and fitout by non-government schools will in many cases take longer and cost more than is the case under current policy and legislation.

EPM and McCullough Robertson Lawyers have made a joint submission to the Department of Planning & Environment in the interest of school clients in an effort to persuade Government to reconsider the aspects of the draft policy and legislation that would impede the objectives of Government to enable schools to be “better-placed to respond to the increasing demand for child care and education services” 1. A copy of the joint submission can be downloaded from the [EPM Projects](#) website.

## **About the Author**

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Dear Sir/Madam

## **Submission on draft Education and Child Care SEPP**

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EPM Projects Pty Ltd (**EPM**) and McCullough Robertson Lawyers (**MCR**) appreciate the opportunity to provide a submission to the Department of Planning and Environment (**DPE**) on the new draft *State Environmental Planning Policy (Education Establishments and Childcare Facilities) 2017* (**Education and Childcare SEPP**).

EPM and MCR act for a number of non-government schools in NSW and regularly advise on planning issues associated with expansions of existing school facilities.

EPM and MCR make this submission on behalf of our school clients and as stakeholders who have an interest in ensuring that we have a planning system that enables the efficient and effective delivery of school development in NSW that meets contemporary design standards and community expectations.

### **Background**

- 1 EPM and MCR have collaborated in a submission to the DPE following review of the following:
  - (a) Draft Education and Child Care SEPP which will replace Division 3 of the State Environmental Planning Policy (Infrastructure) 2007 (**ISEPP**);
  - (b) Draft Environmental Planning and Assessment Amendment (Schools) Regulation 2017 (**Draft Regulation**) which will amend the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**);
  - (c) Draft Standard Instrument (Local Environmental Plans) Amendment Order (No 2) 2016 which will amend the Standard Instrument – Principal Local Environmental Plan;
  - (d) Draft 'Code of Practice for Part 5 activities for registered non-government schools', February 2017;
  - (e) Draft 'Planning Circular – Regulating expansion of schools' (**Draft Planning Circular**);
  - (f) Draft 'Better Schools – A design Guideline for schools in NSW',  
  
collectively referred to as the **Reform Package**.

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- 2 There are a number of aspects of the Reform Package that we consider to be very positive for schools. Specifically we consider the following aspects of the Reform Package to be a positive addition for schools in NSW:
- (a) the expansion of the categories of development that may be carried out by schools as exempt development;
  - (b) the ability for school based child care to be carried out as exempt or complying development, thereby allowing these facilities to be provided quickly and at low cost;
  - (c) the availability of the pathway of 'development without consent' to non-government schools allowing these schools to 'self-assess' many forms of development;
  - (d) the evidence based principles contained in the Draft Planning Circular regarding imposition of student and staff caps by consent authorities; and
  - (e) the new thresholds for school development being classified as State significant development.
- 3 However there are a number of aspects of the Reform Package which we consider could be refined or improved to meet the Department's objectives of simplifying and standardising the approval process for schools. These issues and our recommendations are set out in detail below.

## Key Issues and Recommendations

### Savings and transitional provisions

- 4 There are no savings and transitional provisions for development carried out under Division 3 of Part 3 of the ISEPP before its repeal.
- 5 **Recommendation:** The repeal of Division 3 of Part 3 of the ISEPP under clause 5.3 of schedule 5 of the Educational and Child Care SEPP should be amended to make it clear that:
- (a) The repeal of Division 3 of Part 3 of the ISEPP does not apply to development approved or carried out pursuant to that Division before its repeal; and
  - (b) The repeal of Division 3 of Part 3 of the ISEPP does not apply to any applications for development consent or a complying development certificate lodged but not determined before its repeal.

### Complying development on bush fire prone land

- 6 Clause 11 of Schedule 2 of the Education and Child Care SEPP sets out a development standard for complying development in respect of bush fire prone land, including in relation to development on a lot that is wholly bush fire prone land. Whilst complying development may be carried out on part of a lot where another part of that same lot is mapped as bushfire prone land, under section 100B of the *Rural Fires Act 1997* (NSW) (**RF Act**) development for the purpose of a school cannot be complying development if it is proposed to be carried out on land that is bushfire prone land. Therefore the reference in clause 11 of Schedule 2 to development that is proposed to be carried out on a lot that is wholly on bush fire prone land conflicts with section 100B of the RF Act. Section 100B of the RF Act sets out the requirements for the Commissioner of the NSW Rural Fire Service to issue a Bush Fire Safety Authority for development on bush fire prone land.
- 7 **Recommendation:** Clause 11 of Schedule 2 of the Education and Child Care SEPP should be deleted. It is an unnecessary clause in circumstances where section 100B of the RF Act already regulates development on bushfire prone land. In the alternative, Section 100B of the RF Act must be amended to

reflect the proposed development standard under Clause 11 of Schedule 2 of the Education and Child Care SEPP, and to allow complying development on bushfire prone land subject to compliance with the relevant development standards.

### Complying development on land that comprises an item of heritage

- 8 Clause 17(2)(a) of the Education and Child Care SEPP provides that in order for development to be complying development under the Education and Child Care SEPP, it must *'meet the general requirements for complying development set out in clause 1.17A of the Codes SEPP'*. Clause 1.17A(1)(d) of the Codes SEPP prevents complying development from being carried out on land that comprises a local or State heritage item. Most educational establishments, particularly non-government schools, contain buildings which are listed on the local or State heritage register and as a result often the entire school is mapped or listed as a heritage item for the purposes of the relevant local environmental planning instrument or the State heritage register.
- 9 **Recommendation:** The Education and Child Care SEPP should be amended to allow complying development to be carried out on land that contains a State or local heritage item where the development will not have a material impact on the heritage item. This could be achieved by way of a similar clause to that contained in proposed clause 129AA of Schedule 1 of the EPA Regulation (being item 2 of the Draft Regulation). For example, the clause should provide that where development is proposed on land on which a local or State heritage item is located, a complying development certificate can only be issued if the certifying authority has been provided with a written statement by a qualified heritage consultant that verifies that the development will have no more than minimal impact on the heritage significance of the item, and be in accordance with any applicable heritage conservation management plan.

### Complying development for student accommodation and boarding houses

- 10 The Education and Child Care SEPP does not allow schools to obtain a complying development certificate for boarding houses or student accommodation, nor do the permissibility provisions of the SEPP apply to student accommodation including boarding houses. Boarding houses and student accommodation are ancillary to the use of many educational establishments and are often an integral part of a non-government school and therefore it is appropriate that they be included as part of a 'school' for the purposes of the Education and Child Care SEPP.
- 11 **Recommendation:** The draft Education and Child Care SEPP should be amended to expressly incorporate boarding houses and student accommodation in the definition of 'school'. This is suggested given the increasing demand for student accommodation in NSW and the often complex zoning controls that exist in relation to such a use where such a use is categorised as a 'boarding house'.

### Demolition and complying development

- 12 It is not clear on whether the *'construction of'* works or activities that are capable of being carried out as complying development under clause 33 of the Education and Child Care SEPP includes demolition. For example, it is not clear whether a library can be constructed in the place of an existing classroom under clause 33 of the Education and Child Care SEPP where the construction of the library would necessitate the demolition of the classroom. If schools are given the flexibility to construct a library as complying development under clause 33 of the Education and Child Care SEPP, they should also be given the flexibility to demolish if a building that is in the place of a proposed library in accordance with clause 33 of the Education and Child Care SEPP.
- 13 **Recommendation:** The Education and Child Care SEPP should be amended to allow schools to carry out demolition if it is carrying out complying development in accordance with clause 33 of the Education and Child Care SEPP. Clause 5(3) of the Education and Child Care SEPP clarifies that *'construction works'*

that may be carried out *without consent* includes demolition. That clause could be amended to also clarify that '*construction works*' carried out as complying development includes demolition.

### **Requirement for certificate from RMS for developments leading to an increase of 50 students or more**

- 14 Under the Draft Regulation a complying development certificate cannot be issued in respect of a development within a school that will enable the school to accommodate 50 or more additional students, unless the RMS has first issued a traffic certificate. The traffic certificate is required to certify that any impacts on the surrounding road network as a result of the proposed development are acceptable if specified requirements are met.
- 15 This requirement to refer developments to RMS is likely to lead to delay for applicants in the determination of applications for complying development certificates.
- 16 **Recommendation:** This clause should be deleted from the Draft Regulation due to the additional '*red tape*' and delay that it will create for schools in seeking to obtain complying development certificates for certain forms of development. If the clause is to remain in the Draft Regulation, a timeframe should be included in the regulation by which the RMS have to provide a traffic certificate – it is suggested that 5 days is sufficient given the timeframes for the provision of complying development certificates. In the event that a traffic certificate is not provided within this time frame, it should be considered to be a '*deemed approval*' by RMS and a complying development certificate may then be issued by the accredited certifier or council.

### **Responsible body for issuing complying development certificates**

- 17 The guidance document released with the draft Education and Child Care SEPP indicates that the Department is considering an amendment to the EPA Regulation to restrict accredited certifiers from issuing complying development certificates in relation to schools. This would mean that Council certifiers will be the only responsible body for issuing complying development certificates for schools. In our view this proposal will defeat the purpose of complying development certificates and only slow down the process. In many circumstances due to the limited resources of Councils it is far quicker for a proponent to get an accredited certifier to certify development, rather than going through Council.

Furthermore without additional resources, it is difficult to see how Councils would be able to meet the 10 or 20 day time frame for the determination of complying development certificate applications if all applications for certain types of development had to be made to Councils rather than proponents also having the option of using accredited certifiers. If there is any concern regarding the decisions or processes of accredited certifiers, this matter should be raised with the Building Professionals Board rather than being dealt with through restrictions on proponents.

- 18 **Recommendation:** Complying development certificates for schools should be capable of being issued by an accredited certifier or Council.

### **Complying development for underground development**

- 19 Clause 33(6) of the new Education and Child Care SEPP specifically provides that complying development cannot involve underground development. As such a school cannot construct an underground car park or underground classroom as complying development. However, a school can construct a car park or classroom as complying development in accordance with clause 33 of the new Education and Child Care SEPP.
- 20 **Recommendation:** Given that a school can construct a car park and classroom as complying development, a school should not be restricted from constructing such car park or class room

underground. The Education and Child Care SEPP should be amended to allow a school to construct a underground classroom or car park, with appropriate development standards if necessary.

**Distance of development from the property boundary of land in another zone**

- 21 There are clauses under the Education and Child Care SEPP such as, clauses 30(1)(a), 32(1)(a), (j) and (l)(ii), clause 3 of Schedule 2, clause 6(c) of Schedule 2 and clause 4 of Schedule 3 that prevent development on a school from occurring within a specified distance of a boundary of land zoned residential and or another zone. Schools often own adjoining lots of land within an existing school. A school should not be prevented from carrying out development within a specified distance of a boundary of land that is zoned residential and/or another zone in circumstances where it owns that adjoining land.
- 22 **Recommendation:** The Education and Child Care SEPP should be amended so that a school is not prevented from carrying out development within any distance of a boundary of land that is zoned residential or any other zone in circumstances where it owns that adjoining land. In the alternative, a school should not be prevented from carrying out development within any distance of land in any other zone other than a residential zone in circumstances where it owns that land.

We would be happy to discuss any aspect of this submission with you in more detail if required.

Yours sincerely



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