epm projects

18 November 2020

Michael Bishop
Office for the Minister for Planning & Public Spaces
Level 18, 52 Martin Place
SYDNEY NSW 2000

Dear Michael,

Potential Improvements to the Operation of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017

I refer to our discussions on Friday 13 November 2020 in which you indicated that Alister Henskens SC MP suggested that I may be willing to propose potential improvements to the operation of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (**ESEPP**).

As I mentioned in our discussion, my practice has a 20-year track record of managing property development and construction projects in the independent education sector in NSW. Our clients range from small pre-schools to large K-12 coeducational schools. We are also a panel project manager for Schools Infrastructure NSW.

Our experience includes managing the full range of approval pathways under the NSW planning system including Exempt Development (cl. 18 and Schedule 1 and cl. 38 of ESEPP); Development permitted without Consent (DPWC) (cl. 36 of ESEPP); Complying Development (cl. 39 of ESEPP); Local Development and State Significant Development.

We acknowledge that one of the objectives of the ESEPP is to simplify and streamline the development approvals process including through providing for certain categories of development to be carried out without development consent, and thereby ease the pressure on delivering new public and private school facilities and upgrading existing facilities[1].

Based on our experience, there are several ways in which the operation of the ESEPP could be improved to achieve its objectives, as follows:

Complying Development

1. Capital Investment Value of Development

Clause 19(4) of the ESEPP and clause 15(2) of Schedule 1 of State Environmental Planning Policy (State and Regional Development) 2011 prevents development for the purpose of alterations or additions to an existing school from being able to be Complying Development if the capital investment value of the development is greater than $20M. In our opinion, this limit is not justified nor is it necessary. This matter is addressed in detail in a joint submission dated 2 November 2020 by EPM and Johnson Winter & Slattery to the Minister for Planning (**Appendix 1**).

2. RMS Certification

Clause 4(j1) of Part 2 of Schedule 1 of the Environmental Planning & Assessment Regulation 2000 (**Regulation**) requires an application for a Complying Development Certificate for a development for a purpose specified in clause 39(1) of ESEPP and that will result in the school being able to accommodate 50 or more additional students to be accompanied by a certificate issued by Roads and Maritime Services (RMS) certifying that any impacts on the surrounding road network as a result of the development are acceptable or will be acceptable if specified requirements are met. There is however no timeframe prescribed in the Regulation in which the RMS must act.

[1] Guide to the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017, December 2017

Furthermore, in our experience, the RMS is unlikely to issue such a certificate unless the Council of the local government area in which the proposed development is located has indicated its support for the development

Considering the objectives of the ESEPP, it would seem appropriate that the Regulation prescribe a timeframe in which the RMS must respond to a request by or on behalf of a school for a certificate.

3. Item of Local or State Heritage Significance

Clause 19(2)(a) of the ESEPP provides that for development to be Complying Development, the development must meet the general requirements for Complying Development set out in clause 1.17A of the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (**Codes SEPP**).

Clause 1.17A(1)(d) of the Codes SEPPP prevents development from being Complying Development if it is on land that is identified as an item of local or state environmental heritage, or on which is located an item that is so identified.

Clause 1.17A(3) of the Codes SEPP provides that if an item listed on the State Heritage Register is not located on, or does not comprise, the whole of the relevant land, subclause (1)(d) applies only to the part of the land that is described and mapped on that register. Clause 1.17A(4) contains a similar provision with respect to items of local heritage significance as identified in a local environmental plan (**LEP**). However, in many cases, listings of heritage items, particularly items of local heritage significance identified in a LEP, may refer to, and be mapped as, the entire lot when in fact the heritage item/s is/are located on only part of the lot. This can be particularly significant in the context of schools which are often located on large lots, which may have resulted from the consolidation of lots over time as the school has expanded. Therefore this restriction in clause 1.17A(1)(d), which is given effect in the ESEPP through clause 19(2)(a), is in many cases resulting in school development not being able to be carried out as Complying Development when it may have no or minimal impact on a local or State heritage item but is in any event caught by the provision through being located on the same lot as a heritage item. I would therefore suggest that as an alternative to the 'blanket' prohibition on the carrying out of development on land on which is located a state or local heritage item as currently contained in clause 1.17A(1)(d) of the Codes SEPP and clause 19(2)(a) of the ESEPP, that school development be able to be Complying Development under the ESEPP provided that the development will have no more than a minimal impact on any item or State or local heritage significance (similar to clause 17(3)(e) of the ESEPP applying to Exempt Development).

4. Depth of Excavation

Clause 11 of Schedule 2 of the ESEPP prevents development that is not on land that is identified as Class 3 or Class 4 Acid Sulfate Soils from being Complying Development if it involves excavation to a depth that is greater than 3 metres below ground level (existing). The economic use of land by schools, particularly in densely populated urban areas, is clearly now more important than ever. In our opinion and experience, the prohibition on development being able to be Complying Development simply because it involves excavation to a depth greater than 3 metres on land that is not Class 3 or Class 4 Acid Sulfate Soils is not justified and is unnecessary.

Development Permitted Without Consent

1. Storey Limit & Mixed School Use Developments

Clause 36(1) of ESEPP allows for certain school development to be carried out without development consent if the development meets certain standards including that the development is not more than one storey high. This provision has been interpreted by some local councils as meaning that only one type of development may be carried out under this provision and schools cannot 'stack' categories of development provided for under this clause (for example, for a proposed one storey library with a one storey classroom above it, only a one storey library **or** a one storey classroom may be constructed under this clause even if each development is only one storey high). In our opinion and experience, there is no justification to this provision which unnecessarily forces development back through a Development Application process contrary to the objectives of the ESEPP. Two school clients including Barker College and Oxford

Falls Grammar School have recently obtained advice from Adrian Gallaso SC that deals with this issue in detail (**Appendix 2**). We ask that Mr Gallasso's advice be kept confidential.

2. Student Limit

Clause 36(2)(b) of ESEPP does not allow for an increase in the number of students a school can accommodate or the number of staff employed at the school that is greater than 10% compared with the average of each of those numbers for the 12-month period immediately before the commencement of the development. It would seem sensible that where the number of students and staff that a school can accommodate is already limited by a condition in a prior Development Consent, that clause 36(2) of ESEPP should not prevent the school from increasing student and staff numbers to that limit.

We trust that the ideas that we have outlined above are helpful to the Minister for Planning & Public Spaces in his deliberations about ways in which the operation of the ESEPP could be improved to better achieve its objectives. I would be more than happy to participate in any further discussion or review as may be helpful to the Minister.

Yours sincerely,
epm Projects Pty Ltd

Andrew Graham
CEO

JOHNSON WINTER & SLATTERY

epm projects

Memorandum

Date:	2 November 2020
To:	The Honourable Robert Stokes MP, Minister for Planning and Public Spaces
From:	Samantha Daly, Johnson Winter & Slattery, and Andrew Graham, EPM Projects
Subject:	State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 - threshold for complying development for schools
Doc ID:	78391056.1

We refer to the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (NSW)* (**ESEPP**) which applies to educational establishments (including schools, universities and TAFE establishments) and early education and care facilities across the State.

In particular, the ESEPP contains a number of provisions enabling educational establishments to carry out certain categories of development as complying development provided a complying development certificate has been issued by a council or a certifier for the development. In the context of schools, clause 39 of the ESEPP provides for a wide range of development that may be carried out as complying development within the boundaries of an existing school, including (but not limited to) a library, an indoor sporting facility , a teaching facility and a hall. These provisions are utilised frequently by schools and provide a mechanism by which schools can expand and improve their existing facilities in order to meet student and staff needs.

Johnson Winter & Slattery (**JWS**) and EPM Projects provide legal services and project management services respectively to a number of non-government schools in NSW. A number of the schools that we assist have, or are proposing to, carry out essential development within existing schools as complying development in reliance on clause 39 of the ESEPP.

Given the work that we do for schools, we have a particular interest in seeing that the provisions of the ESEPP are achieving their intended purpose and enabling schools to provide new and improved facilities in an efficient and cost-effective manner. In carrying out a number of projects for schools, we have identified a material limitation with respect to the availability of the complying development pathway for a number of school developments which we would like to bring to your attention.

Specifically, clause 19 of the ESEPP contains a number of general requirements for complying development (applying to all types of educational establishments). Clause 19(4) provides that if development falls within clause 15(2) of Schedule 1 to *State Environmental Planning Policy (State and Regional Development) 2011* (**SRD SEPP**), and is therefore declared as State significant development (**SSD**), it is not complying development under the ESEPP. Under clause 15(2) of the ESEPP, development that has a capital investment value of more than $20 million for the purpose of alterations or additions to an existing school is declared to be SSD.

As a result of clause 19(4) of the ESEPP, clause 9 of the SRD SEPP does not apply to a school development that exceeds the $20M threshold contained in clause 15(2) of Sch 1 of the SRD SEPP. Clause 9 of the SRD SEPP provides:

> *9 Exclusion of certain complying development*
>
> *If, but for this clause—*
>
> *(a) particular development would be State significant development, and*

(b) a provision of an environmental planning instrument (whether made before or after this Policy takes effect) provides that the particular development is complying development, and

(c) the particular development is not carried out as part of other development that is State significant development,

the particular development is not State significant development.

In our view, the non-applicability of clause 9 of the SRD SEPP to school development that would otherwise be complying development under the ESEPP is unwarranted and in many cases, is preventing the efficient and cost-effective delivery of essential school developments. Relevantly, we note that the limitation contained in clause 19(4) of the ESEPP was not included in the predecessor to the ESEPP, being the *State Environmental Planning Policy (Infrastructure) 2007* (NSW) (**ISEPP**). Under the ISEPP, we are aware of numerous developments that were carried out within schools as complying development that exceeded $20M. By way of example, recent large-scale examples carried out as complying development include the Knox Grammar Performing Arts Centre and Barker's Rosewood Sports Centre. These projects each cost in the vicinity of $50M.

In our opinion, projects such as the Knox Grammar Performing Arts Centre and Barker's Rosewood Sports Centre demonstrate that larger school developments can be undertaken as complying development with acceptable environmental impacts, even though they are not subject to the development consent process (local or state). The ability to carry out these developments as complying development enabled each of the schools to deliver the projects much faster than if they were required to go through the development consent process, and thereby provide valuable facilities to the students to enhance their learning opportunities.

We are of the view that there is a strong case for the current clause 19 of the ESEPP to be amended, particularly given the current need for development, jobs and economic stimulus in NSW during the COVID-19 pandemic.

Specifically we propose that clause 19(4) of the ESEPP be repealed so that clause 9 of the SRD SEPP applies to development within schools that is complying development under the ESEPP. The effect of this would be that if a particular development falls within a category of complying development under clause 39 of the ESEPP, such as a library or a pool, it will not be prohibited from being assessed as complying development simply because it is over $20M.

We also note that this amendment would ensure that schools are treated equally to other educational establishments (ie universities and TAFE establishments) who are currently not subject to a similar provision in the ESEPP preventing complying development in the event that the development exceeds the relevant SSD threshold.

We would be happy to discuss this further with you, or the relevant members of the Department of Planning, Industry and the Environment, if required. We look forward to receiving your response.

Samantha Daly

Partner

Johnson Winter & Slattery

samantha.daly@jws.com.au

0405 260 945

Andrew Graham

Chief Executive Officer

EPM Projects

agraham@epmprojects.com.au

0419 732 021