10 December 2020

epm projects

CLIENT COMMUNIQUÉ

Education SEPP – Flexibility & Challenge

This communiqué addresses two questions that were asked at a webinar hosted by Westpac on 3 December 2020 for independent schools in NSW at which EPM Projects presented about the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (Education SEPP).

To what extent can Development permitted without consent under clause 36 of the Education SEPP, Exempt Development under clause 18 or clause 38, and Complying Development under clause 39 be amended or changed once development has commenced? Can the amendment happen after works have commenced?

Exempt Development – there is no requirement for consent to be obtained under this pathway (from a local Council, or otherwise) and such development can be amended after works have commenced, provided that applicable exempt development standards continue to be met. Such standards may be specific to the category or purpose of development (e.g. a storage shed erected under clause 38(1)(j) of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (ESEPP) must be no more than 1 storey high and meet certain setback requirements) and other requirements that apply to all kinds of exempt development (e.g. the general requirements imposed by clause 17 of the ESEPP which include the requirement that exempt development must involve no more than minimal impact on the heritage significance of heritage items or areas).

Development permitted without consent (DPWC) – schools are required to undertake environmental assessment under Part 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to carry out development as DPWC, and such development must not "significantly affect the environment". Assessment is conducted pursuant to the *NSW Code of Practice for Part 5 activities for registered non-government schools* dated August 2017 (Code). The Code provides for changes to development proposals after determination; however, any changes need to be self-approved (by way of a new Decision Statement issued by the school), and potentially self-assessed prior to the relevant works being commenced. Where changes result in increased environmental impacts, they must be re-assessed under the Code, however re-assessment is limited only to those aspects of the activity that have been materially modified.

Complying Development – Modification of a complying development certificate (CDC) requires a fresh application to be made under the EP&A Act. Obtaining a modified CDC is much like obtaining a new CDC. If a modified CDC is required, this should occur prior to the relevant works commencing.

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Can any of the non-DA pathways be challenged by either local councils or neighbours? And if so, what might be considered an appropriate response and actions?

Neighbours – Neighbours have standing under the EP&A Act to seek a court declaration that a CDC is invalid on the basis that it authorises development for which a CDC cannot be issued.

Such proceedings must be brought within 3 months after the issue of the CDC. In addition, any person has open standing to bring court proceedings to remedy or restrain a breach of the EP&A Act (whether or not that person is affected by the breach). Accordingly, development carried out under each of the non-DA pathways is subject to third-party challenge if a third party takes the view that the development requires development consent and development consent was not obtained, or in the case of DPWC that the school did not examine and take into account to the fullest extent possible the environmental impacts of the development as required under the EP&A Act.

Councils – Councils have the same standing as neighbours in relation to bringing proceedings relating to the validity of a CDC or to remedy or restrain a breach of the EP&A Act, as described above. Councils also have broad enforcement powers under the EP&A Act, including to issue "development control orders" which include orders requiring a party to stop building work carried out in contravention of the Act or stop the use of premises for a purpose for which a planning approval is required but has not been obtained.

The appropriate response to either civil enforcement action by a neighbour or enforcement by Council would depend upon the particular circumstances of the case. For instance, responding to a vexatious complaint from an adjoining landowner would necessitate a different response to any order issued by Council.

Depending on the circumstances, such matters could be resolved informally (e.g., through the exchange of correspondence or meetings in person with Council officers) or through the defence of court proceedings.

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Acknowledgement:

EPM is grateful to Johnson Winter & Slattery for advising on these questions.

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