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**Memorandum**

**Date:** 15 December 2020

**To:** Director Infrastructure Policy and Assessment Practice, NSW Department of Planning, Industry and Environment

**From:** Samantha Daly, Partner at Johnson Winter & Slattery and Andrew Graham, CEO at EPM Projects

**Subject:** Review of the State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017

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We refer to the review of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)* that is being conducted by the NSW Department of Planning, Industry and Environment (DPIE). In particular, we refer to the invitation to stakeholders to provide feedback by 17 December 2020 on proposed amendments to the ESEPP which were published on the NSW Planning Portal on 20 November 2020 and are aimed at *“improving the operation, efficiency and usability of the SEPP and supporting documents”*.

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, either build new schools (or school campuses) and/or develop additional or replacement infrastructure within existing schools in reliance on one or more of the approvals pathways provided under the ESEPP.

Given the work that we do for schools, we have a particular interest in seeing that the provisions of the ESEPP are unambiguous and achieve their intended purpose by enabling schools to provide new and improved facilities in an efficient and cost-effective manner. With that in mind, we welcome the opportunity to provide feedback on the review of the ESEPP to ensure that the SEPP is fit for purpose and continues to facilitate the best possible outcomes for schools as they face increased demand on their infrastructure over the next ten years.

## **1 Supported proposed amendments**

The amendments that the DPIE proposes to the ESEPP, along with its supporting documents, are detailed in an Explanation of Intended Effects (EIE).

The EIE states that the amendments are proposed to *“focus on resolving operational issues, clarifying provisions and other housekeeping amendments to clarify the policy intention”* in order to *“modernise, simplify and improve the effectiveness and usability of the SEPP”*. DPIE’s proposals are set out in Table 1 to the EIE. We note that the EIE states that the proposed changes are provisional, subject to legal review, and the outcome of consultation.

JWS and EPM support a number of proposals contained in the EIE, including in particular the proposals relating to:

- (a) **The change in the one-storey limit for DWC** – We support the proposal to increase the current one-storey limit that applies to certain developments under cl 36(1)(a) of the ESEPP to two-storeys. However we note that the EIE refers to an “overall maximum” two-storey facility, which suggests that a school could not construct multiple individual and separate developments (eg a library, with permanent

classrooms on top of it) as development permitted without consent (**DWC**) if those separate components would in total exceed two storeys, even if each development comes within the two storey limit. This restriction (which is not included in the current ESEPP) is unnecessary, particularly given that the impacts of each single development are assessed under the process in Part 5 of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* (and in accordance with the Environmental Assessment Code of Practice ‘*NSW Code of Practice for Part 5 activities – for registered non-government schools*’ (**Code**)) whereby the determining authority has a duty to “examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity”, including in relation to height, bulk and scale and related impacts on amenity. If development is likely to have a significant impact on the environment (and therefore require an environmental impact statement) it will no longer be able to be self-approved by a school under the Code, but would rather require approval from the Minister as State Significant Infrastructure. Furthermore, development may only be DWC if it complies with the requirements in clause 36(2) relating to student/ staff numbers and vehicular access points, and must also comply with the most recent conditions of the most recent relevant development consents applying to any part of the school (cl 36(3)). Therefore given these existing statutory protections and constraints to ensure that development is suitable from an impacts perspective, we think that the two-storey requirement should apply to each type of development permitted under clause 36 rather than the total building size;

- (b) **The combined investment value (CIV) thresholds** – JWS and EPM generally support the proposals to amend cl 15 of Schedule 1 to the *State Environmental Planning Policy (State and Regional Development) 2011 (SRD SEPP)*, however we have the following additional suggestions for how the proposed reforms could be improved:
- (i) Whilst we support the introduction of a CIV threshold for new schools to be classified as State significant development (**SSD**), in our view the relevant CIV threshold should be consistent with the proposal for alterations or additions to existing schools, which is \$50 million; and
  - (ii) The new SSD thresholds should be accompanied by appropriate transitional arrangements (as noted on page 14 of the EIE) so that they will not apply to Development Applications which have been lodged, but not yet determined at the time of the amendments coming into force. For those schools that have already obtained the Secretary’s Environmental Assessment Requirements but have yet to lodge an Environmental Impact Statement for their projects at that time, the applicability of the amended provisions should be optional.
- (c) **Property boundaries** – we support the proposal to change the references to “property boundary” that appear throughout the ESEPP to make it clear that these provisions are not intended to refer to the boundaries of an allotment that comprises only part of a school. Currently the internal setback requirements are a common barrier to the availability of non-DA pathways so this proposal will be of great benefit to schools;
- (d) **Student accommodation** – we also support the proposal to delete cl 34 and amend cl 35 of the ESEPP to allow student housing to be carried out as development permitted with consent within the boundaries of existing schools, as well as provide that stand-alone student housing development applications within the boundaries of existing educational establishments are not SSD, irrespective of their CIV; and

- (e) **Short-term portable classrooms** – we strongly support an increase in the time within which existing schools might use short-term portable classrooms as exempt development (**ED**) under cl 38(1)(l) of the ESEPP from 24 to 48 months as this will provide schools with far greater flexibility to meet increasing student demand whilst more permanent learning solutions are developed.

## 1.2 **Proposed amendments not supported**

There are a number of proposals set out in the EIE which JWS and EPM do not support as in their current form they are likely to result in greater complexity and less clarity and certainty for proponents, and therefore would be inconsistent with the objectives of the reforms. The proposed reforms relate to:

- (a) **Proximity of child care centres in low density residential zones** – the proposal to introduce minimum separation distances between child care centres within Low Density Residential zones – R2 through amendment to cl 25(2)(a) of the ESEPP is not supported. Centre-based child care centres within (or adjacent to) existing schools provide significant benefits for communities and families through the co-location of siblings across different age groups and levels of education, and for schools they provide valuable synergies through being able to extend educational offerings to younger age groups. If any minimum separation distance is to be introduced, it should not apply to centre-based child care facilities associated with existing schools;
- (b) **The 10% student cap (development permitted without consent)** – We support an amendment to clause 36 to allow for development equivalent to 30 students or 10% of the existing student or staff numbers, whichever is the greater in the previous 12 months, to be carried out as DWC (subject to complying with the remainder of the clause). However we consider that in circumstances where the student or staff population of a school is limited by a condition of a development consent, cl 36(2)(b) and cl 36(3) should not operate to prevent the school from increasing its student and staff population to that limit or by 30 students/staff or 10% of the existing student or staff numbers, whichever is the greater. Currently many independent schools in NSW are subject to student and staff caps, many of which are historical in nature and therefore often do not reflect the current demand for educational facilities in an area. In accordance with the DPIE's Planning Circular PS 17-004 dated 20 September 2017, student caps are discouraged and consent authorities are required to consider ways in which to avoid unnecessarily restricting student growth over time. At the very least, a school should not be prevented from increasing its student and staff population to the limit that has already been applied under a development consent. Provided a specific development does not increase student or staff numbers over 10% of existing numbers or 30 students/staff (whichever is the higher), the impacts of the development would not be materially greater than the existing approved school, and therefore should also be permitted under the DWC pathway irrespective of any existing student/staff caps in an applicable development consent; and
- (c) **The consideration of “relevant” conditions of consent for DWC and complying development (CD)** – Currently cll 36(3) and 39(4) of the ESEPP provide that the categories of development set out in those provisions that may be carried out within the boundaries of an existing school as DWC and CD cannot be carried out “in contravention of any existing condition of the most recent development consent (other than a complying development certificate) that applies to any part of the school, relate to [a range of subject matters]”. The references to “the most recent” development consent are clear and should not be replaced by the words “the most relevant” development consent, which would serve to obscure and confuse, rather than clarify the meaning of those provisions.

## 2 Additional areas for reform

Aside from the proposals for reform set out in the EIE, we recommend the following matters be incorporated in the review of the ESEPP to further improve the effectiveness of the planning instrument in facilitating the delivery of unambiguous, cost efficient planning outcomes for schools.

### 2.1 Clause 19(4) of the ESEPP

Clause 19(4) provides that if development falls within clause 15(2) of Schedule 1 to the SRD SEPP, and is therefore declared as SSD, it is not complying development under the ESEPP. Under clause 15(2) of the ESEPP, development that has a CIV 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, which we note is the increased CIV proposed in the EIE. Relevantly, neither school is aware of any objections from neighbours when it notified them about the developments.

In our opinion, projects such as the Knox Grammar Performing Arts Centre and Barker's Rosewood Sports Centre demonstrate that larger school developments (ie including projects in excess of \$50M) 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. Furthermore, development that can be undertaken without a development application has the added benefit of reducing the load on local councils.

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 (or \$50M, if the CIV threshold is increased as proposed under the EIE).

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.

## **2.2 Impacts of complying development on heritage values**

Clause 19 of the ESEPP contains a number of general requirements for CD under the ESEPP, including incorporating the general requirements for CD that are set out in cl 1.17A of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)*.

Under cl 1.17A of the Codes SEPP, complying development for the purposes of any environmental planning instrument must not be carried out on land that is identified as an item of state or local environmental heritage, or on which is located an item that is so identified: cl 1.17(1)(d). However, if items of state or local heritage significance are located on only part of the land sought to be developed, then CD may still be carried out on the remainder of the land: cll 1.17(3) and (4).

In many cases heritage items (in particular items of local heritage significance identified in a Local Environmental Plan (**LEP**)) refer to, and are mapped as, an entire lot in circumstances where those items are located on only part of the lot. For example, the entirety of the large lots on which the majority of Barker College and St Ignatius College are located are mapped in the Hornsby LEP 2013 and the Lane Cove LEP 2009 respectively as having local heritage significance, notwithstanding the fact that the heritage items are a more limited subset of buildings on those sites. As a consequence, in many cases CD is prevented from being carried out on the same lot as a heritage item, despite having little or no impacts on that item. The mapping of these heritage items therefore undermines the intent of cll 1.17(3) and (4) of the Codes SEPP.

As an alternative to the “blanket” prohibition on the carrying out of development on land on which a state or local heritage item is located which is contained in cl 1.17A(1)(d) of the Codes SEPP and cl 19(2)(a) of the ESEPP, school development should be able to be carried out as CD provided it will involve no more than a minimal impact on the heritage significance of the item. This approach would open up the CD pathway for a number of schools that are currently unable to access this pathway due to the nature of heritage listings on their site and therefore improve the usability of the ESEPP, in particular for schools that are located on large lots.

## **2.3 Certification of CD by Roads and Maritime Services**

Under the *Environmental Planning and Assessment Regulation 2000* (NSW), development carried out as CD under cl 39(1) of the ESEPP that will result in a school being able to accommodate 50 or more additional students requires a certificate issued by Roads and Maritime Services (**RMS**) in relation to impacts on the surrounding road network as a result of the development. However, there is no timeframe prescribed in the EP&A Regulation within which RMS must issue the certificate in relation to the acceptability or otherwise of the impacts, which is resulting in often significant delays for schools in obtaining CD certificates. Given that CD is intended to be an efficient and cost-effective approval pathway, the delays in obtaining RMS certification is undermining the benefits of this pathway and impacting on schools' abilities to deliver necessary school facilities on time and on budget. We therefore recommend that the EP&A Regulation be amended by adding a maximum timeframe for RMS certification to be provided (following which it would be a deemed approval).

## **2.4 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 on an Acid Sulfate Soils Map 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.

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 on an Acid Sulfate Soils Map is not justified and is unnecessary.

Thank you again for the opportunity to make a submission on what we consider to be an extremely important planning instrument for the education sector and for the broader benefit of NSW. We would be happy to discuss this submission further with you, or the relevant members of the Department of Planning, Industry and the Environment, if required.

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