

COUNCIL ADDENDUM ASSESSMENT REPORT
SYDNEY EASTERN CITY PLANNING PANEL

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| PANEL REFERENCE & DA NUMBER | PPSSEC-151 – DA/40/2020/A |
| PROPOSAL | S4.55 (2) Modification Application of approved development to amend condition 24 (d) so that the school is required to discourage students driving to school on weekdays rather than prohibiting it. |
| ADDRESS | Lot 1 and Lot 2 DP 709332 - 18-20 Stanley Street, Randwick |
| APPLICANT | Andrew Delany - Emanuel School |
| OWNER | Emanuel School |
| DA LODGEMENT DATE | 20 July 2021 |
| APPLICATION TYPE | S4.55(2) Modification Application |
| REGIONALLY SIGNIFICANT CRITERIA | Clause 123BA(2) of the Environmental Planning and Assessment Regulation 2000 |
| CIV | N/A |
| KEY SEPP/LEP | <u>Original Application</u> State Environmental Planning Policy (Educational Establishments and Child Care Centres) 2017; Randwick Local Environmental Plan 2012. |
| TOTAL & UNIQUE SUBMISSIONS ISSUES KEY IN SUBMISSIONS | Twelve (12) unique submissions received. |
| DOCUMENTS SUBMITTED FOR CONSIDERATION | <ul style="list-style-type: none"> • Original Council Assessment Report; • Statement of Environmental Effects; • Legal Advice; • Operational Transport Management Plan; • Green Travel Plan; • Minutes of the Randwick Traffic Committee meeting 24 November 2020. |
| RECOMMENDATION | Approval |
| DRAFT CONDITIONS TO APPLICANT | N/A |
| SCHEDULED MEETING DATE | 25 November 2021 |

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| PREPARED BY | Angela Manahan |
| DATE OF REPORT | 24 November 2021 |

BACKGROUND

The SECPP Assessment Report in relation to the above application was submitted to the Panel on 11 November 2021.

Further to the submission of the Assessment Report, additional information was provided by the Applicant with regards to the recent NSW Court of Appeal judgement which considers the ability to modify a development consent under the provisions of s4.55 of the EP&A Act.

Furthermore, the SECPP Assessment Report was reported to the Ordinary Council meeting of 23 November 2021 in which a resolution was made in which a further submission is to be put before the Panel for consideration ahead of the determination of the application.

Both these matters are considered below:

RESPONSE TO COUNCIL SUBMISSION

The SECPP Assessment Report for the subject modification application was reported to Council at its ordinary meeting on 23 November 2021 to be received and noted.

At the meeting, the Councillors resolved the following:

RESOLUTION: (Neilson/Shurey) that if the Sydney Eastern City Planning Panel (SECPP) agrees with the request to amend the wording of Condition 24(d), that it be for a trial period of 12 months with a report to come back to the SECPP on the outcome of the trial.

MOTION: (Neilson/Shurey) CARRIED - SEE RESOLUTION.

A copy of the meeting minutes (comprising Councils submission as a result of the outcome of the meeting) on 23 November 2021 are provided separately to the Panel for consideration.

Council Officer's Response to the Resolution

The benefit of imposing a trial period for the discouragement of student drivers is unclear. Unlike a trial period in relation to hours of operation or the like which can be quantified by a register of complaints etc, as discussed within the original assessment report, the monitoring of the condition in relation to students driving is problematic. The Operational Transport Management Plan and Green Travel Plan required by the conditions of consent must ensure a reduction in private car usage by school users, with targets stipulated. Therefore, the implementation of the OTMP and GTP would require the School to take appropriate action if the targets are not being met. As such, in this instance it is considered that the imposition of a trial period would be superfluous as the School will have to impose measures to reduce car usage by its students regardless. Furthermore, if the trial period deems that the "discouraging of" students is ineffective and the condition refers back to prohibiting students, the concerns as identified in the original assessment report would remain, with particular regards to the ability to police and monitor the condition.

In view of the above, Council does not endorse the above resolution and it is considered that a trial period would be unnecessary in this instance.

THE PANELS ABILITY TO MODIFY THE CONSENT

Concerns were raised by Council Officers at the briefing on 21 October 2021 with regards to the Panels ability to modify the development consent in view of the recent NSW Court of Appeal judgement *Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177*. As such, an additional information request was issued to the Applicant from Council on 11 November 2021 in which Council requested the Applicant to provide a formal response which addresses the recent Buyozo judgement, with particular regards to the Panels power and ability to modify the consent (if they are of a mind to do so).

Initially, the Applicant was of the opinion that the application may fall under the provisions of s4.55(1) as it was considered that the condition was imposed in error by Panel given that the Applicant has no jurisdiction to satisfy the condition (as detailed in the Applicant's legal advice from Coleman Greig Lawyers). However, it was advised that Council is of the opinion that the subject application does not fall under the provisions of s4.55(1) for the following reason:

Council does not support the argument that the condition was imposed in error in that the applicant has no jurisdiction to satisfy the condition. As detailed in the original Assessment Report, the legal advice provided is considered to be flawed and Council is of the opinion that the condition can be imposed through the Management Plan (which is a common occurrence in Schools whereby the School has a policy which dictates students actions and behaviour). As such, the condition was not placed in error and was specifically to address the traffic and parking implications associated with the development.

Nor does the application seek to correct a misdescription or miscalculation, and therefore the provisions of s4.55(1) are not applicable to the subject application.

As such, the Applicant provided a further response to consider the Panel's ability to modify the consent under the provisions of s4.55(2) of the EP&A Act as follows:

As no doubt you are aware, Buyozo concerned an appeal against the refusal of a modification application which sought to reduce a development contribution sometime after it had already been paid by the applicant.

The NSW Court of Appeal found that one of the failings of that modification application (there was more than one), was that the proposed modification "could not effect any change to the development the subject of the development consent" [64]. This was because it merely concerned the development contributions payable and had no material effect on the form or operation of the development.

Noting Council's opinion that DA/40/2020/A should be dealt with under s 4.55(2), there is no statutory impediment to doing so in our opinion because DA/40/2020/A seeks to effect a change to the development the subject of the development consent, albeit very minor. The change that is 'effected' concerns the operation of the school as it will allow a very small number of senior students to drive to and from school, notwithstanding that the school will seek to strongly discourage this practice among senior students.

In this regard we are satisfied that the proposal is materially different to the modification application that was the subject of Buyozo and that the proposal can be dealt with under s4.55(2).

Council acknowledges that in this instance, while the proposed modification shall not alter the development in itself, the proposed amendment shall indirectly impact upon the operation of the School and the associated traffic and parking generated by the School. Based on the submission from the Applicant, Council is prepared to support the Applicant's justification in this instance in that the proposed modification shall effect a change to the development, being the operation of the School.