

29 November 2016

Mr Tony McCabe  
Group Director - Capital Works  
NSW Department of Education  
35 Bridge Street  
SYDNEY NSW 2000

Our ref: MBP/AVD  
Matter no: 9611800

Dear Sir

**Re: Power of Consent Authority to Refuse a Development Application or Impose a Condition of Consent**

Any development application made by or on behalf of the Department of Education (**Department**) is properly characterised as a "Crown development application" as defined in Section 88 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). In support of such development, we provide the following commentary in relation to Part 4 Division 4 of the EP&A Act.

**Crown Development and Conditions of Consent**

The current provisions of the EP&A Act relating to Crown Development commenced operation on 1 July 2009. Inter alia, Section 89 of the EP&A Act sets out specific provisions relating to the determination of Crown development applications. It states:

- (1) *A consent authority (other than the Minister) must not:*
- (a) *refuse its consent to a Crown development application, except with the approval of the Minister, or*
  - (b) *impose a condition on its consent to a Crown development application, except with the approval of the applicant or the Minister.*

Therefore, in response to any Crown Development Application, the consent authority has no power to issue a refusal or issue an approval subject to conditions of consent to which the Department of Education does not agree.

The limitation on the power to impose a condition of consent extends to the consent authority's ability to require contributions be paid, including contributions pursuant to Sections 94 and 94A. Contributions occur by way of conditions of consent therefore neither Council nor a Planning Panel can impose conditions relating to contributions without the Department's consent.

Planning Panels to which a Development Application is referred similarly have no power to refuse its consent or impose a condition on its consent, except with the approval of the applicant or the Minister. Assessment of a modification application under section 96 is subject to identical limitations on the consent authority.

***Circular D6 – Crown Development Applications and Conditions of Consent***

Circular D6, issued by the then Department of Urban Affairs and Planning, sets out the circumstances in which it is appropriate for a Consent Authority to seek the approval of the applicant or the Minister to impose conditions of consent.

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Circular D6 notes that where a consent authority intends to levy contributions on Crown Development, they must be justified and consideration should be given to the Crown's role in providing a community service, the cost of which is accountable to all taxpayers in the State.

The currency of Circular D6 is confirmed in *Development Contributions Practices notes – July 2005* which states at page 3, "the current limitation on imposition of levies on Crown Developments as outlined in Circular D6 .... remain in force."

### Timing provisions

It is noted that if the consent authority fails to determine this DA within 70 days, the Department may refer the application to the Minister (if the consent authority is not a council) or the relevant Planning Panel (if the consent authority is a council). If the Planning Panel fails to determine the Subject DA within 50 days of referral from Council, the Department may refer it to the Minister.

### Conclusion

Any Department of Education Development Application is to be assessed as a Crown Development Application, and is therefore subject to the provisions of Part 4, Division 4 of the EP&A Act. This means that the consent authority has no power to refuse its consent. It also has no power to impose a condition on its consent, unless the Department approves. This includes conditions requiring the payment of development contributions.

If the Department of Education does not consent to a condition or conditions of consent proposed to be included in any consent, the consent authority can only refer the development application to the Minister or planning panel to determine. The consent authority can neither refuse the development application nor impose a condition of consent without the approval of the Department of Education.

Simply put:

1. If the consent authority (Council or a Planning Panel) wants to refuse a development application the DA must be referred to the Minister for determination.
2. If the consent authority (Council or a Planning Panel) wants to impose a condition of consent to which the Department objects, the DA must be referred to the Minister for determination.

This legislation has been developed over time in recognition of the role Crown Development plays in providing essential community services. Crown Development such as that undertaken by the Department of Education involves the provisions of a public service or facility which will lead to significant benefits for the public in terms of essential community services and employment opportunities. These activities are not likely to require the provision of public services and amenities in the same way as development undertaken with a commercial objective.

Yours faithfully

**Hunt & Hunt**



**Maureen Peatman**  
Partner