

# JOHNSON WINTER & SLATTERY

**Partner:** Samantha Daly +61 8274 9524  
**Email:** samantha.daly@jws.com.au  
**Associate:** Angus Hannam +61 2 8247 9678  
**Email:** angus.hannam@jws.com.au  
**Our Ref:** C3102  
**DocID:** 47.5

16 March 2021

Mr Ryan Aitken  
Senior Project Manager  
Oxford Falls Grammar School Ltd  
c/- EPM Projects Pty Ltd  
Level 2, 146 Arthur Street  
North Sydney NSW 2060

**BY EMAIL** ryan.aitken@epmprojects.com.au

Dear Ryan

## **Proposed carpark, amenities/storage and outdoor sports courts at Oxford Falls Grammar School**

We refer to the carpark, amenities/storage and outdoor sports courts (**Development**) proposed to be constructed within the boundaries of Oxford Falls Grammar School located at 1078 Oxford Falls Road, Oxford Falls, and being legally described as Lot 100 in DP 1240806 (**School**).

### **1 Background**

We have previously given advice in relation to the development of a library/administration building and carpark which was proposed to be constructed within the boundaries of the School as development permitted without consent under clause 36 of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)*. In summary:

- (a) On 17 March 2020, we issued a written advice to the effect that the previously proposed development consisting of a one storey administration building and ancillary carpark, on the ground floor, and a library, on the floor above, was permitted under clause 36 of the ESEPP. For the purposes of that advice we examined a series of plans dated 11 March 2020 (marked 'Revision 5'). The School subsequently prepared a Review of Environmental Factors (**REF**) for that development in accordance with the *NSW Code of Practice for Part 5 Activities for registered non-government schools*, August 2017 (**Code**);
- (b) On 1 May 2020, the Northern Beaches Council (**Council**) provided feedback on the REF, raising concerns as to whether the development fell within the criteria of development permitted without consent. On 12 May 2020, we responded to Council's comments in a further written advice, disagreeing with Council's conclusion that the reference to the one storey height limit for each category of development was a reference to overall building height;
- (c) On 27 May 2020, Adrian Galasso SC issued a memorandum of opinion which supported our view that the clause 36 pathway was available to the School. In a

Level 25, 20 Bond Street  
SYDNEY NSW 2000  
T +61 2 8274 9555 | F +61 2 8274 9500  
www.jws.com.au

Liability limited by a scheme approved under Professional Standards Legislation

response dated 26 June 2020, Ms Kerr, Council's Director of Planning and Place, reiterated Council's view as to its interpretation of clause 36 of the ESEPP.

Following the above exchange with Council, the School decided to amend the proposed development so as not to rely solely upon the clause 36 pathway for the construction of a multi-storey building. On 8 March 2021, we were provided with a series of plans labelled REF101 to REF603 (marked as 'Revision 3') which were prepared by Allen Jack and Cottier and dated 2 March 2021 (collectively, the **Plans**). The Plans show that an administration building is no longer proposed on the ground floor of the development and that instead of constructing a library above the carpark/administration building as development permitted without consent, the School intends to instead develop new outdoor sports courts and seating as exempt development. The new proposal as shown in the Plans identifies that the School intends to construct:

- (a) A carpark on the ground floor as development without consent under clause 36 of the ESEPP;
- (b) Amenities, storage and landscaping/courtyard on the ground floor as exempt development under clauses 18 and 38 of the ESEPP; and
- (c) Shade structures, outdoor sports courts, outdoor seating and associated landscaping and a pedestrian bridge on the first floor as exempt development under clauses 18 and 38 of the ESEPP.

## **2 Request for advice**

EPM Projects have asked us to review the Plans which have been prepared for the purpose of the REF (where the REF will relate solely to the carpark on the ground floor) and confirm whether the various components of the Development are permissible as a combination of development permitted without consent and exempt development under the relevant provisions of the ESEPP.

## **3 Summary of advice**

The proposed carpark satisfies the criteria in clause 36 of the ESEPP, subject to confirmation by the School that the Development will not contravene any relevant conditions of the most recent development applying to any part of the School (as required under clause 36(3) of the ESEPP). We understand that this will be confirmed in the REF. In addition, the works described in section 3.4 of this advice fall within the development purposes in cll 18 (and Schedule 1) and 38 of the ESEPP. Therefore, provided that the School complies with the general requirements in clause 17 of the ESEPP with respect to those works, they may be carried out as exempt development.

## **4 Advice**

### **4.1 Clause 36 of the ESEPP**

Clause 36(1)(a) of the ESEPP provides that:

*'(1) Development for any of the following purposes may be carried out by or on behalf of a public authority without development consent on land within the boundaries of an existing school:*

*(a) construction, operation or maintenance, more than 5 metres from any property boundary with land in a residential zone and more than 1 metre from any property boundary with land in any other zone, of:*

...

*(v) a car park that is not more than 1 storey high,*

Further, clauses 36(2) and (3) of the ESEPP provide:

(2) *However, subclause (1) applies only to development that—*

(a) *does not require an alteration of traffic arrangements (for example, a new vehicular access point to the school or a change in location of an existing vehicular access point to the school), or*

(b) *in the case of development referred to in subclause (1)(a)—does not allow for an increase in—*

(i) *the number of students the school can accommodate, or*

(ii) *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).*

(3) *Nothing in this clause authorises the carrying out of development 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, relating to hours of operation, noise, car parking, vehicular movement, traffic generation, loading, waste management, landscaping or student or staff numbers.*

#### **4.2 Clauses 18 and 38 of the ESEPP**

Clause 18 of the ESEPP provides that development for a purpose specified in Schedule 1 of the ESEPP may be carried out as exempt development if it is carried out by or on behalf of a public authority in connection with an existing educational establishment and it meets the development standards for the development specified in Schedule 1. The School is a “public authority” for the purposes of this provision: see clause 277(6)(a) of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EP&A Regulation**).

Clause 38 of the ESEPP provides for development for a number of purposes as exempt development within the boundaries of an existing school, including development for the purpose of an awning or canopy, landscaping, walking paths, stairways, minor pedestrian bridges, and sports courts.

To be carried out as exempt development under clauses 18 or 38, development must also comply with the general requirements in clause 17 of the ESEPP which relate to, among other things, satisfaction of:

- (a) the relevant deemed-to-satisfy provisions of the Building Code of Australia;
- (b) the relevance requirements of the Blue Book;
- (c) the requirement that the development involve no more than a minimal impact on the heritage significance of heritage items; and
- (d) the development does not require the removal or pruning of a tree or other vegetation that requires a permit from council (unless the tree is posing a risk to human health or the safety or of damage to infrastructure).

#### **4.3 Construction of the carpark as development permitted without consent**

With regards to the carpark, we have reviewed the Plans and as previously advised (see our advice dated 17 March 2020) we consider that it may be constructed as development permitted without consent under clause 36(1)(a)(v) of the ESEPP since:

- (a) It is proposed to be carried out within the boundaries of the existing School: see clause 36(1) of the ESEPP;

- (b) It will be carried out by a “public authority”: see clause 36(1) of the ESEPP and clause 277(6)(b) of the EP&A Regulation;
- (c) The car park will be no more than 1 storey high: see clause 36(1)(a) of the ESEPP. We reiterate our previous advice, by reference to the definition of “storey” in the Standard Instrument – Principal Local Environmental Plan (**Standard Instrument**), that the car park is required to have a height that does not exceed one storey, being a space within a building that is situated between one floor level and the floor level or ceiling or roof above;
- (d) We understand that the car park is located at least 5m from the southern boundary (although we note the zoning of the southern boundary is a “Deferred Matter” under the Warringah Local Environmental Plan 2011 so it is not clear as to whether the residential zoning requirements apply to the Development): see clause 36(1)(a)(v) of the ESEPP;
- (e) The Plans show that the entrance and exit to the carpark utilise an existing driveway crossing, and therefore no alteration of traffic arrangements is required. The Development therefore satisfies clause 36(2)(a); and
- (f) On the basis of your previous instruction that the Development will not result in any increase in staff or student numbers, it will therefore be consistent with clause 36(2)(b).

We further understand that the relevant conditions of the most recent development consent applying to any part of the School relating to the matters listed in clause 36(3) are being reviewed as part of the REF to ensure that the Development will not contravene any relevant conditions.

We note that the proposed carpark includes some ancillary elements such as storage, stairways, switch and comms and a lift. In our view these would all be considered to be development for the purpose of the carpark (as they provide essential services to the carpark and/or access to and from the carpark), and therefore would fall within clause 36(1)(a)(v). With regards specifically to the lift from the carpark, we refer to our previous letter of advice to the School dated 19 October 2020 in which we concluded that a lift providing access to the roof of a proposed amenities building would be considered to be part of the amenities building for the purposes of clause 38(1)(j) of the ESEPP. The same reasoning applies here, in that:

- (a) The lift is proposed to be located within the carpark and provide a form of access to the rooftop of the carpark. It would therefore be considered to be part of the carpark and fall within clause 36(1)(a)(v) of the ESEPP;
- (b) Given that the term “storey” as defined in the Standard Instrument does not include a space that contains only a lift shaft, the existence of the lift shaft on top of the carpark would not result in the carpark being greater than one storey high as required under clause 36(1)(a)(v).

Based on the above analysis, in our view the proposed carpark is capable of being carried out as development without consent, subject to completion of a REF and compliance with any conditions applying to the carrying out of the activity as identified in the REF.

#### **4.4 Consideration of components of the Development proposed to be carried out as exempt development**

We have previously advised the School that the REF and the Plans should make clear that Level 1 of the Development is now proposed to be carried out under the exempt development pathways of the ESEPP, rather than as development permitted without consent, and therefore will not form part of the REF. The plan entitled REF202 states:

*“Level 1 to be carried out as exempt development and is not part of the REF – to include shade structures, outdoor sports courts and outdoor seating”*

The plan entitled REF203 also states:

*“Roof to be carried out as exempt development and is not part of the REF – to include shade structures, outdoor sports courts and outdoor seating”*

We recommend that the Plans be amended to clarify the difference between the Level 1 Plan (REF202) and the Roof Plan (REF203) given the description in the two plans is currently identical. Given the Plans are for the purpose of the REF which relates only to the carpark development, the Roof Plan could potentially be omitted from the REF plans subject to confirmation from the town planner that this is acceptable for the purpose of the REF.

We note that sports courts and associated awnings or canopies are development purposes set out in clause 38(1)(g) of the ESEPP. In addition seats, stairways, walking paths and shade structures are also listed in clause 38(1)(f), all of which are proposed to be carried out on level 1 of the proposed development.

We note that the Plans also identify a number of other structures that are proposed to be constructed as exempt development and they also fall within the development purposes set out in clause 38 and Schedule 1 of the ESEPP:

- (a) minor pedestrian bridges connecting the carpark and the outdoor sports courts to the K-block building (see REF101 and REF202) – permissible under cl 38(1)(f). In our previous letter of advice dated 19 October 2020, we explained why the bridges would be considered “minor” for the purpose of clause 38(1)(f). Therefore provided the details of the bridges remain generally the same as depicted in the previous plans (ie elevated covered walkways approximately 3.1 to 3.3m in height that are raised above a creek), in our view they would be considered “minor” for the same reasons as previously expressed, having regard to their scale and the context within which they sit within the School;
- (b) a mini field play area (see REF101) – permissible under cll 38(1)(d) and (g);
- (c) a retaining wall (see REF101) – permissible under cl 18 and Schedule 1 subject to compliance with the development standards in Schedule 1, namely that the wall does not provide for retaining of fill to height above ground level (existing) of more than 2m or excavation to depth below ground level (existing) of more than 1m and that the wall does not prevent the natural flow of stormwater draining/run-off. Ground level (existing) is defined in the Standard Instrument as *“the existing level of a site at any point”*. Therefore assuming the retaining wall is constructed after the sporting field, the development standards set out above will be measured from the existing ground level following construction of the sporting field (see our previous email advice dated 23 October 2019);
- (d) a building attached to the carpark via a breezeway comprised of rooms for storage, carpark amenities, airlocks, a cleaning room and a workshop (see REF201) – permissible under cl 38(1)(j) of the ESEPP; And
- (e) a courtyard (see REF201) – permissible as either landscaping or walking paths under cll 38(1)(c) and (f) of the ESEPP.

Therefore, provided that the School complies with the general requirements for exempt development in clause 17 of the ESEPP in respect of each of the above works, in our view they may be carried out as exempt development under cll 18 and 38 of the ESEPP since they are all works to be carried out by the School as a public authority in connection with an existing educational establishment.

Please contact Samantha Daly or Angus Hannam if you have any queries in relation to the above advice.

Yours sincerely,

A handwritten signature in blue ink that reads "Johnson Winter & Slattery". The signature is written in a cursive style with a long, sweeping tail that ends in a downward-pointing arrowhead.