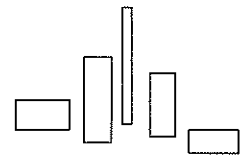


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PIKES & VEREKERS
LAWYERS

30 August 2013

The Director General
Department of Planning & Infrastructure
GPO Box 39
SYDNEY NSW 2001

SUBMITTED ONLINE

Dear Sir

SUBMISSION LETTER TO THE OXFORD FALLS VALLEY AND BELROSE NORTH STRATEGIC REVIEW
Our ref JF:KC:130635

We act for John Colet School, the operators of an independent primary school located on Wyatt Avenue, Belrose, and make this submission to the Draft Oxford Falls Valley and Belrose North Strategic Review ("the Review") being conducted by the Department of Planning and Infrastructure ("the Department") together with Warringah Council ("the Council").

On behalf of the John Colet School, we congratulate the Department on conducting the Review, being an important strategic planning consideration for the environmental protection and economic growth of the Sydney North region. The deferral of these lands from the Warringah Local Environmental Plan 2011 ("the LEP") has left it in a state of vacuum with landowners uncertain of the strategic planning intention for the area. Accordingly, we welcome the opportunity to comment on the Review.

This submission should be read in conjunction with the submission made by the John Colet School made on 7 August 2013 (a copy of which is attached).

The John Colet School, which has been operating in its current location for 15 years, wishes to raise concerns that the Review, and the draft recommendations therein, do not properly address planning concerns involved in the operation of educational establishments. Particularly, we are of the opinion that the Review's suggestions for reliance upon the State Environmental Planning Policy (Infrastructure) 2007 ("SEPP (Infrastructure)") or existing use rights is not feasible.

In summary, our recommendations to the Review are as follows:

- To zone the John Colet School land for the purposes of "educational establishment" under the SP1 Special Activities or SP2 Infrastructure zones of the LEP; or alternatively
- To list the John Colet School land as an additional permitted use under Schedule 1 of the LEP; or further in the alternative

- To zone the John Colet School land as a prescribed zone pursuant to cl 27 of SEPP(Infrastructure).

Zoning as E3 Environmental Management

Under the Strategic Review it is proposed to zone the land on which the John Colet School is located as E3 Environmental Management. We note that the LEP, which is a standard instrument local environmental plan, does not permit educational establishments, either with or without development consent in the E3 Zone.

The rezoning of the land from Category 3 lands under the Warringah LEP to E3 Environmental Management is essentially a "down zoning" contrary to Ministerial Direction No. 13, issued pursuant to s 117 of the *Environmental Planning and Assessment Act 1979* ("the Act").

Whilst it might be said that overall the Review complies with that direction, the same cannot be said of the approach taken to the subject site. The subject land has never been identified as being of significance for the purposes of environmental protection. The site is not presently constrained by the existing of ecologically endangered communities and is of limited ecological value for the purposes of preservation. This is reflected in the various maps contained in the Review which identify the location of particular environmental constraints.

The Review appears to simply adopt a blanket rezoning for much of the lands under consideration. This is inappropriate as a matter of strategic planning. The C8 Belrose North Locality is not a land use zone, as identified in the Review. Whilst the desired future character of a locality (the real purpose of the C8 Locality Statement being to describe that desired future character) is a relevant and important consideration when considering how land in that locality is zoned, it cannot be the only consideration, and a simple adoption of a single zone for the entirety of a locality is not a complete or properly reasoned approach to the adoption of planning controls.

This is emphasised by the Review's specific consideration of other zones (such as the R2 Low Density Residential zones along Forest Way, and the R5 Large Lot Residential zones immediately west of the John Colet School) and other specific uses (such as the school use in Area 11, also along Forest Way) on other lots within the locality. There is no meaningful distinction that can be drawn between the land in Area 11 and the Covenant Christian School and our clients' site. We urge that the Department give due consideration, as a matter of balancing strategic concerns, and apply individually meritorious rezoning rather than applying the present method of blanket rezoning to the site.

If the rezoning proceeds, there is an element of procedural unfairness in that other uses and landholdings in the locality are given specific consideration in achieving their development potential. On the contrary, the vast majority of other lands, such as the John Colet School's, is subjected to a blanket zoning which has little or no regard as to the strategic considerations involved.

Further there does not appear to be any planning utility or environmental benefit in adopting the E3 zone on our client's land. Conversely the changed zoning has the potential to seriously constrain any future development of the school site. Whilst the school use is not inconsistent with the E3 zone objectives and whilst the continued operation of the school or a potential future expansion thereof will not undermine those objectives, the simple fact of the existence of the school means that little is achieved by zoning the school for environmental protection purposes in terms of actively promoting the environmental outcomes sought by the zone objectives.

Whilst the continued use of the school and any future redevelopment will not detract from those objectives, that is a matter about which the school will need to satisfy any consent authority in the future, which is, in all of the circumstances, a needless and expensive burden on our client, with no public benefit resulting.

Having regard to not only the objects of the E3 zone, but also the objects of the Act, namely:

- *The protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats; and*
- *The promotion and coordination of orderly and economic use and development of land.*

the rezoning will do little to achieve the first object, but will, in respect of this particular site, fundamentally undermine the second listed object. In all of those circumstances we urge the Department to consider a more appropriate zoning to the site or to at the very least make educational establishments a specifically permitted use.

Future Planning Intention

Whilst it is clearly not Council's or the Department's intention (having regard to the Review's references to existing use rights and SEPP (Infrastructure) in the Review and the intention that the school use continue), by effectively prohibiting the use of "educational establishments" on the land and in the locality the change in the planning controls alters the apparent desired future character of the site and its surrounds.

Whilst the Review makes clear that it is intended that the school (and indeed other non-conforming uses) be permitted to continue operating and indeed to expand or be altered in reliance on existing use rights or SEPP (Infrastructure), the Review itself will not be document easily relied on in the future. The planning controls must speak for themselves. Any consideration of a future application for development of the school under either existing use rights provisions or SEPP (Infrastructure) will be informed by whether the proposed development is consistent with the desired future character of the area. That desired future character will be determined by the other applicable planning controls.

The Review recognises a desired future character which includes schools by acknowledging allotments that contain existing educational establishments, and that those educational uses should be catered for into the future. Planning documents must speak for themselves however, and reliance on the terms of the Review once the controls are finalised will be difficult. As extrinsic materials may not be considered for the purposes of construing any future planning instrument, it may simply be interpreted on its face that educational establishments are prohibited and therefore any expansion or continuation of that use may be restricted: see *Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71 at [17]. There is a strong chance that the real desired future character will be obscured by the blanket rezoning.

It is therefore imperative that permissible and non-permissible uses be clarified and dealt with explicitly in any new planning instrument, rather than deferring such matters to other measures such as the SEPP in order to properly achieve the outcomes sought by the Review.

If the Department sees existing educational establishments, including the John Colet School, as an integral part of the locality, it should specifically zone those sites as such rather than leave the desired planning intention of the lands in limbo. Again this has been recommended for other sites in the Review area, and there is no reason why that approach cannot be taken here.

Existing Use Rights

The creation of a prohibited use, whilst saved by existing use rights for ongoing permissibility, is not as straightforward as the Strategic Review suggests.

As noted in the submission of John Colet School, the reliance on existing use rights will require the school to have to prove existing use rights as a matter of formality in each new application for further development consent. This can include preparation and collation of documents such as historical land uses, statements to support that any existing use rights, historical development documents, prevailing planning instruments at grant of consent, and many more.

As the land use of "educational establishment" will be prohibited under the proposed zoning, it is a jurisdictional fact for the consent authority, prior to granting any approval, to be satisfied of the various documents above not normally required of developments that do not rely upon existing use rights.

We draw the Department's attention to relevant objects of the Act, quoted above, for the *promotion and co-ordination of the orderly and economic use and development of land*. The proposed rezoning of the land, leaving the John Colet School (and many others in the Belrose North area) to rely upon existing use rights to ensure their continued use and existence, does not represent orderly and economic use of land.

It is simply a better management of the present use to expressly allow it to continue as a permitted use under relevant planning instruments, rather than requiring the

John Colet School, and many others like it, to prove existing use rights, for what could be a relatively straight forward development application for matters such as relocation of buildings, renovations and the like. Further, more complex development applications for its continued operation and growth then do not become entangled in costly approvals processes (which invariably result in litigation) over what existing use rights are available, and the applicability of relevant planning instruments, and the desired future character issues outlined above.

The most sensible option to allow the continued use of the site as an educational establishment is not through existing use rights, but as a particularised use (as an educational establishment) under the SP1 Special Activities or SP2 Infrastructure zones under the LEP.

Infrastructure

The Review, at 3.3.5 (p19), draws attention to the ability of educational establishments to obtain consent pursuant cl 28(2) of SEPP (Infrastructure).

We note that SEPP (Infrastructure) makes different provision for the permissibility of development for the purposes of education establishments dependent on the zoning of the land. Despite the Review purporting to rely on SEPP (Infrastructure) to permit school development, these zoning differences are not considered.

We draw the Department's attention to the fact that the E3 Environmental Management Zone, unlike the SP1 or SP2 Zones, is not a prescribed zone for the purposes of Part 3 Division 3 of SEPP (Infrastructure).

Educational establishments in prescribed zones (such as the SP1 Special Activities or SP2 Infrastructure Zones) have the ability to undertake exempt or complying development, or development permitted without consent. Some of this development in prescribed zones includes minor alterations or additions (as provided by cl 29). However, this would not be possible under the E3 Zone, and it is not apparent from the Review that such issues have been considered.

This puts the school at a distinct and unfair disadvantage as against other schools across the State which enjoy the benefit of properly considered and reasoned zoning. Those schools, unlike the John Colet School, will be able to undertake comparatively minor development without the need to jump through the bureaucratic hoops, and the commensurate time delays and costs, associated with the development application process.

That result is entirely inconsistent with the Department's expressed intention to streamline and simplify the development process, with the real decision-making being made at the strategic stage. In this regard we refer to the White Paper for the New Planning System for NSW, particularly Chapter 5 of the White Paper, which opens with the following statement:

The new planning system will create a major shift towards evidence based strategic planning in the preparation of plans, community and

stakeholder engagement and decision making. The transformation to upfront planning is the key tool for better facilitating the delivery of housing and jobs in the right locations, while protecting and managing the environment and people's way of life.

In our opinion, the Review and the proposed zoning of the John Colet School land does not sit comfortably with the above statement in the White Paper.

Conclusions

The John Colet School, as well as other independent educational establishments, play a vital role in supporting the needs of local residents. The provision of schools, including a mix of public and private operations, is an infrastructure necessity that contributes to the greater economic, social and cultural welfare of the area through such community facilities.

The continued operation of the school, including the potential for future development and expansion should be ensured. Whilst not fatal to that continued operation, the approach recommended by the Review does not provide the necessary certainty and casts the future of the school in doubt.

It is our opinion that, failing to find that there is any ecological preservation value in the subject land, and the fact that the subject land cannot achieve any of the objectives of an E3 zone, it is futile to rezone it as such, and the Department should explore options that support the continuing uses as existing at the site.

If the Review's proposed zoning is to take place, there will be an element of procedural unfairness, noting that some landholdings have been given specific consideration, yet the John Colet School is rezoned as part of a blanket approach.

Further, the Review and the proposed rezoning does not accord with the future intentions of the planning system to provide for an upfront strategic planning approach that is based on evidence and stakeholder engagement.

We submit on behalf of the School that the subject land be zoned SP1 or SP2, for the purposes of educational establishments, to allow the continuation of a use that contributes to the infrastructure and growth of the local communities.

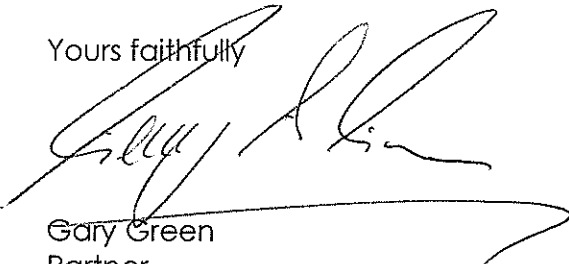
A further alternative is to include the subject land to the additionally permitted uses under Schedule 1 of the LEP as an educational establishment.

A final alternative is to rezone the subject land to one that is capable of supporting educational establishments under pursuant to cl 27 of the State Environmental Planning Policy (Infrastructure) 2007. However, we would suggest that the Department and the Council have a better opportunity in regulating the subject land use by allowing for its permissibility under the LEP.

As the above submission discusses detailed planning and legal considerations, we are happy to further discuss or elaborate on the issues identified. Should further

clarification or discussions be required on the above, or the matter more generally, please do not hesitate to contact our offices.

Yours faithfully



Gary Green
Partner

Attachments: submission by John Colet School dated 7 August 2013

CC: The Hon Brad Hazzard MP
Member for Wakehurst
Minister for Planning and Infrastructure

Draft Oxford Falls Valley and Belrose North Strategic Review

- submission by John Colet School, 6-8 Wyatt Avenue, Belrose.

John Colet School is an independent primary school located on Wyatt Avenue and has been operating as a school in its current address for 15 years, and before that the property had a similar use as a Christian training centre.

Under the Draft Belrose North Strategic Review ("Review"), John Colet School is proposed to be zoned E3 Environmental Management. Under the proposed E3 zone, "educational establishments" are prohibited. The Review states that schools in this scenario can rely upon the provisions of Clause 28 of the Infrastructure SEPP and existing use rights for ongoing permissibility.

John Colet School would like to ensure that it will be able to carry out the activities of an educational establishment. Typically, educational establishments are constantly in a state of change, as student numbers vary and teaching requirements regularly need review and updating. This means that the School regularly reviews its accommodation needs, and occasionally requires more building work.

Whilst the Review states that this can be easily addressed by utilising the Infrastructure SEPP or existing use rights for any new development associated with a school, we do not consider this to be an efficient way of preserving the school's continued use of the land.

In the first instance, the Infrastructure SEPP was originally introduced to prevail over restrictive and preventive planning provisions in Local Environmental Plans (LEPs), ensuring the delivery of important infrastructure, such as schools. We do not believe that where a new LEP is prepared, that it should rely on this State policy to preserve existing and guide future infrastructure provision in the local government area. Rather we submit that a more appropriate strategic planning outcome for a local environmental plan to adequately reflect and permit existing land uses where appropriate. We consider this to be the case for John Colet School.

In the second instance, the Review states that existing use rights would preserve the rights of schools such as John Colet School to continue to operate as an existing educational establishment, notwithstanding the prohibition under the proposed E3 zoning. The underlying purpose of defining existing use rights is to control historical and now non-conforming uses, allowing them to continue to operate in spite of land use zoning changes. Again, we consider it to be an inefficient approach to strategic land use planning to rely upon existing use rights for developments such as John Colet School, which are steeped in historical operations and contribute greatly to the surrounding locality in the provision of an important educational service. Especially when the strategic planning process allows the regularisation of

permissibility as the Review currently provides. Relying on existing use rights would require every application made to the Council to demonstrate evidence of development consent and possibly, records of activity relating to the land that relies of the existing/continuing use rights. Whilst this is not necessarily an issue for John Colet School, we consider it to be unnecessary and inefficient in view of this current opportunity to make the school a permitted use on the land under the proposed Review. With existing use rights also tightening over the past years, relying on existing use rights could potentially limit the amount of additional expansion the school could seek approval for .

The Belrose North Strategic Review and its recommendations should not restrict these normal requirements of an educational establishment.

With this in mind, it would be reasonable and appropriate planning practice, for the school to be listed as an "additional permitted use" in Schedule 1 of the Draft LEP. It is commonly known that Schedule 1 is appropriate to be used providing it can be demonstrated that the proposed land use is appropriate on the particular parcel of land, but not generally within the zoning. This is certainly the case with John Colet School, as has been demonstrated by many previous development consents.

Our proposed approach would be similar to that marked as "Area 11" in Map 008 "Additional Permitted Uses". This can specifically relate to the parcel of land held by John Colet School and will therefore not set a precedent (refer to page 12, clause 5. Special Purpose Zones and Schedule 1 (Additional Permitted Uses). In Map 006 "Secondary Constraints Analysis", John Colet School has already been annotated as "Land for further zoning consideration", as this land is the least constrained in the study area" (p.33). This would be consistent with Clause 3 on page 40 "Schedule 1 Additional Permitted Uses" – (2) Development for the purposes of educational establishments, ... is permitted with consent." And it would also be consistent with Map 003 "Landuse Analysis", where the property is already noted as Educational. This is similar to the nearby Kamaroi School, Yanginanook School and any other schools within the proposed E3 area.

Further to the above, we note that there appear to be a few inconsistencies with the mapping in the Review. Please refer below for discussion.

- John Colet School notes that the extent of the property as indicated on Map 003 "Landuse Analysis" is incorrect, and the pink colour demarcating it as Educational should cover the entire property. There is an area to the west of the pink marking that forms part of the school but is not classified as "Educational". We request that this map be amended to adequately reflect the extent of the school's existing boundaries.
- John Colet School also notes that on Map 005 "Outcome of the Primary Environmental Constraints Analysis", the extent of the red area marking it as prohibitive, severe or significant environmental constraints to development, is incorrect and extends too far south within the School's property.

We trust that in the preparation of the revised Warringah Local Environmental Plan 2011 the comments made in this submission are taken into account.