



**WRITTEN REQUEST PREPARED PURSUANT TO
CLAUSE 4.6 OF PARRAMATTA LOCAL
ENVIRONMENTAL PLAN 2011 IN RELATION TO A
VARIATION WHICH IS SOUGHT OF THE HEIGHT
DEVELOPMENT STANDARDS IN CLAUSE 40 OF
HOUSING FOR SENIORS SEPP**

(amended)

**Submitted in Support of a Development Application
for a Residential Aged Care Facility at Toongabbie
Sports Club**

Wentworth Avenue, Toongabbie, NSW, 2146

**Prepared for
Opal Aged Care**

**by
BBC Consulting Planners**

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Amended Clause 4.6 Variation Request Station Road Toongsbbie.docx
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FIGURES

- Figure 1: Location
Figure 2: Site



ATTACHMENTS

Attachment 1: Site Layout Plan

1. INTRODUCTION

1.1 The proposed development

This written request accompanies a Development Application (“DA”) for a 124 bed Residential Aged Care Facility (“the proposal”) and associated works and subdivision at the Toongabbie Sports Club site, Nos. 4-10 Wentworth Avenue and No. 12 Station Road, Toongabbie (“the site”).

The location of the site is shown on **Figure 1**. The site boundaries are shown on **Figure 2**.

Pursuant to Clause 40 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (“HSSEPP”), that part of the site that is zoned R3 Residential (the eastern part of the site) is subject to a development standard being a maximum height limit of 8m for buildings in zones where residential flat buildings are not permitted and where a building located in the rear 25% area of the site must not exceed 1 storey in height.

1.2 The building height standards

Clause 40(4) of HSSEPP states:

(4) Height in zones where residential flat buildings are not permitted

If the development is proposed in a residential zone where residential flat buildings are not permitted:

(a) the height of all buildings in the proposed development must be 8 metres or less, and

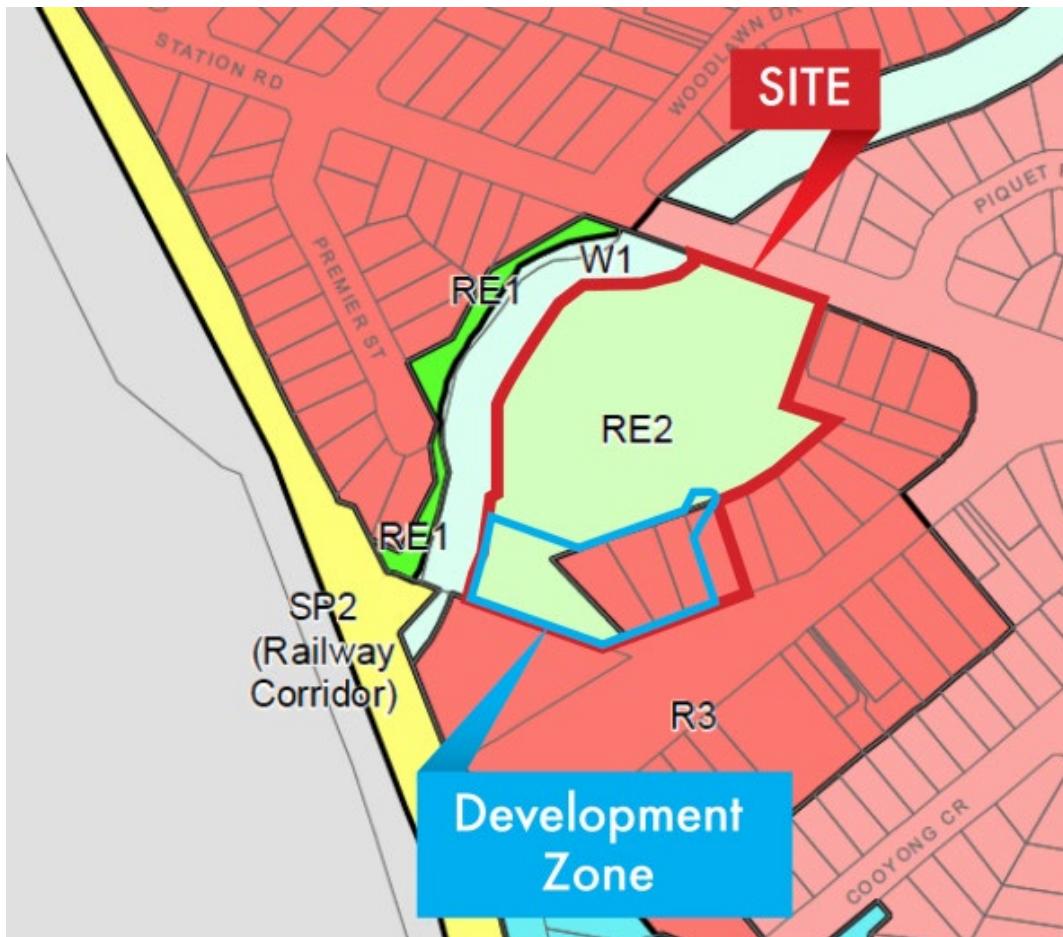
Note. Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

These height controls apply to development applications lodged under the SEPP in all residential zones in NSW where area residential flat buildings are not permitted – typically R2 and R3 zones in some cases. The R3 zone applying to part of the site (see below) does not permit residential flat buildings.



There is no height control on the remainder of the site within Zone RE2. The diagram contained in **Attachment 1** indicates that part of the site to which the Seniors SEPP height control applies and an outline of the proposed building.

Under the Seniors SEPP height, in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

This Clause 4.6 variation request has been prepared in relation to this non-compliance with clause 40(4)(a), (b) and (c) of the HSSEPP.

1.3 Principles and relevant authorities

The principles and relevant authorities which have been considered in the preparation of this replacement Clause 4.6 variation request are those found in:

- Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;
- Wehbe v Pittwater Council [2007] NSWLEC 827 (“Wehbe”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009 (“Four2Five No 1”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 (“Four2Five No 2”);
- Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 (“Four2Five No 3”);

- Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;
- Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;
- Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC118; and
- Al Maha Pty Ltd v Huajun Investments Pty Ltd.

2. RELEVANT DEVELOPMENT STANDARDS

Pursuant to Clause 40(4) of the HSSEPP the following controls apply to that part of the site within zone R3 (see above diagram):

- (a) the height of all buildings in the proposed development must be 8 metres or less, and
- (b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and
- (c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

The HSSEPP contains the following relevant definitions:

height in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

ground level means the level of the site before development is carried out pursuant to this Policy.

3. EXCEPTIONS TO DEVELOPMENT STANDARDS (Clause 4.6)

Clause 4.6 of the LEP permits consent to be granted for development even though the development would contravene a development standard imposed by the LEP.

The objectives of clause 4.6 are:

- (a) *“to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.”*

Clause 4.6 of the LEP relevantly states:

“(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the consent authority is satisfied that:*
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Clause 1.9 of Parramatta LEP 2011 states that State Environmental Planning Policy No 1—Development Standards do not apply to the land to which this Plan applies. The plan applies to the site. Further clause 4.6(2) provides in part that:

*development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by **this or any other environmental planning instrument**.*

Accordingly, Clause 4.6 can be used to vary (to the extent required) the building height development standards in Clause 40(4) of the HSSEPP which applies to the part of the site.

4. IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE AND ARE THERE SUFFICIENT PLANNING GROUNDS TO JUSTIFY CONTRAVENING THIS STANDARD?

4.1 Extent of non-compliance

The ceiling of the top most floor has a height of RL 42.47m AHD whereas the ground level varies slightly and is around RL 29.25m AHD, giving a maximum height of 13.3m compared to a maximum building height of 8 metres.

4.2 What is the purpose/object of the height standard?

There is no specifically stated purpose or object expressed in Clause 40(4) of the HSSEPP. The note to Clause 40(4)(b) states:

Note. The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

It can be assumed that the objective of the standard in clause 40(4)(c) regarding the rear 25% area is to minimise amenity impacts of overshadowing and overlooking on adjoining detached dwellings and their private open space and to maintain a low scale residential form.

Although not objectives of the development standards, clause 33 provides design principles regarding neighbourhood amenity and streetscape:

33 Neighbourhood amenity and streetscape

The proposed development should:

- (a) recognise the desirable elements of the location's current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and*
- (b) retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in a local environmental plan, and*
- (c) maintain reasonable neighbourhood amenity and appropriate residential character by:*
 - (i) providing building setbacks to reduce bulk and overshadowing, and*
 - (ii) using building form and siting that relates to the site's land form, and*
 - (iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and*
- (iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and*
- (d) be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and*
- (e) embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape, and*
- (f) retain, wherever reasonable, major existing trees, and*
- (g) be designed so that no building is constructed in a riparian zone.*

The proposal is consistent with the objectives (see below).

4.3 Is compliance with the development standard unreasonable or unnecessary in the circumstance of the case

4.3.1 The proposal is consistent with the intent of the standard

The amended proposal is consistent with the objectives of the height standards as set out in Section 4.2 above for the following reasons.

The proposal has been designed to avoid an abrupt change in the scale of development in the streetscape. The maximum height of the building measured in accordance with the HSSEPP

definition is 13.2 metres. The height of the building measured to the top of the plant area toward the centre of the building is 16.1 metres.

The height of the main part of the building of four levels measured to the building parapet is 14.4 metres. The height of eastern part of the building closest to the adjoining residential lots to the east is 11.2 metres – comparable to the maximum height of 11 metres allowed on these medium density sites. The building is setback some 10 metres from the eastern boundary to an adjoining residential building (which forms part of the site) for the three-level element and 19 metres to the four-storey element.

In the western part of the site (where there are no height controls), the site adjoins an existing apartment development comprising buildings of three storeys near to the boundary and four storeys to the centre of the development.

The design respects this interface by stepping and by presenting narrow façades to the south with an indented courtyard breaking the building mass. The building bulk aligns with the location of buildings to the south. This transition has been further improved with the amendments to the design to increase the building setback from 3.9 metres to a minimum of 7.9 metres enabling the retention of existing trees.

To the south the building presents as a highly modified façade with deep recesses and narrow building frontages. There will be no negative bulk and scale impacts as a consequence of the proposal with the building resulting in an appropriate relationship to adjoining development.

The building form is arranged as a combination of 3 and 4 storeys with the greater height towards the north-western end of the site. The building then steps down to 3 storeys adjacent to the neighbouring residential properties to the east. The 3-storey building height is consistent with the zoning of the area and the medium density character of nearby residential development along Cornelia and Wentworth Avenues.

The proposal avoids an abrupt change in the scale of development in the streetscape.

It is difficult to define and identify the rear 25% area of this site given the shape of the site and the underlying objectives of the control. In our view this control is intended for smaller sites in a residential context.

The rear 25% area is taken to be the area defined by a line parallel to the street frontage boundary within which 25% of the site area is contained. It is not considered that this building is adjacent to the boundary in the terms meant by clause 40. Similarly, strict application of the rear 25% rule is unnecessary in this case given the nature of adjoining and adjacent development. It is noted that the site has a frontage to Wentworth Avenue. The rear 25% are of the site adjoins the Toongabbie Sports Club site.

The relationship of the proposed development to the street can be seen from the elevation drawings. The combination of articulated façade, building separation to the street frontage and building setback result in a change of scale that is acceptable and not inconsistent with character of the streetscape.

The development has been designed having regard to the site characteristics and its context including proximity to the station, nature of surrounding uses, the desired future character of the area as reflected in the local planning controls and will contribute to the quality and identity of the area.

It is considered that there will be no significant adverse amenity impacts arising from the proposal in relation to overlooking, obstruction of light or air, obstruction of views or any other such impacts on nearby residential properties.

Privacy impacts on the existing 2 storey dwelling house along the eastern boundary and the 3-6 storey apartments along the southern boundary have been mitigated by means of a large setback, existing and proposed vegetation, orientation of windows and the potential for screening of window openings.

The development would result in additional overshadowing. However the orientation of the site and buildings and the location of adjoining development results in a development that maintains reasonable solar access to adjoining residential properties. In mid-winter, the property to the east would receive good solar access in the morning and begin to be affected by overshadowing in the afternoon. The apartments to the south would be affected by overshadowing in the morning (mid-winter) and would receive good solar access in the afternoon. In mid-summer, the proposed development would not impact on solar access in relation to either properties to the south and east.

It is considered that the overshadowing impacts of the development are acceptable.

Future residents of the proposed RACF will experience excellent amenity with level access to communal areas on each floor and also access to the ground floor courtyards via paved walking paths. The proposed courtyards include landscaped gardens and have seating areas for resting and contemplation.

4.3.2 The extent of the non-compliance is acceptable and reasonable

Compliance with the height development standards under the Seniors SEPP including the maximum building height of 8m, the 2 storey and single storey height limit for a building within the rear 25% area of the site, is unreasonable and unnecessary in the circumstances of this case for the following reasons:

- The development will be visually attractive and sympathetic to the existing and emerging character of the area;
- The development will maintain the neighbourhood amenity and character of the local area;
- The development is four storeys in height which is compatible with the neighbouring development to the south and transitions in height to residential sites to the north east;
- The development reflects the desired future character of the area as reflected in Council's exhibited strategic planning documents;
- The development has an attractive and appropriate presentation to the street;
- The bulk and scale of the building is considered appropriate;
- The site is of sufficient size to accommodate the proposed development;
- The proposed RACF will meet an important social need in providing aged care services in the local community.

In these circumstances, the extent of the non-compliance with the height standard is considered acceptable and reasonable.

4.3.3 The non-compliance results in a better planning outcome

The non-compliance results in a better planning outcome in that it facilitates the provision of seniors housing on the site of a registered club in an accessible location consistent with the aims and objectives of HSSEPP. This is consistent with the orderly and efficient use of land.

On this basis the proposal, notwithstanding its non-compliance with the height limit results in a better planning outcome. (Following the decision in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, it can be noted here however, that Clause 4.6 does not require that a proposed development which relies on a variation to a development standard must have a better (or neutral) environment planning outcome than one which is compliant with the standard).

4.3.4 There is an absence of significant adverse impact

There is an absence of significant adverse impacts for the reasons set out above in 4.3.1 and 4.3.2 above.

4.4 Are there sufficient environmental planning grounds to justify contravening the height standard?

The contravention of the above height development standards is justified on environmental planning grounds specific to this development for the following reasons (and for the reasons outlined in 4.3 above):-

- The bulk and scale of the proposal is compatible with the neighbouring development to the south and is considered consistent with the desired future character of the area;
- The proposed building setbacks have been designed to reduce perceived bulk and overshadowing, and the form and configuration of the proposal is sympathetic to the land form;
- The proposed building ranges from 3 to 4 storeys in height with the lower height portion of the building located adjacent to neighbouring properties to the east. In addition, the incorporation of a contemporary materials palette, the retention of existing tree plantings and the provision of new landscaping will enhance the visual aesthetics of the proposed building;
- Buffer tree and shrub planting is proposed along the northern and southern boundaries of the site as well as new multi layered tree, shrub, and groundcover planting adjacent to car park and driveway, maintaining privacy to properties adjacent to the site as well as future residents of the RACF;
- A contemporary palette of materials will be utilised including the use of face brickwork, glazed brickwork, facing brick tile, aluminium windows and doors, coloured cladding panels, sunshade elements, powder-coated balustrading and concrete roofing. This will contribute to the modulation of the building façade;
- It is anticipated that there will be no negative bulk and scale impacts as a consequence of the proposal;
- The building will result in an appropriate relationship to adjoining development;

- It is considered that there will be no significant adverse amenity impacts arising from the non-compliance in relation to overlooking, obstruction of light or air, obstruction of views or any other such impacts on nearby residential properties; and
- It is considered that the overshadowing impacts of the development are acceptable.

The proposal is considered to be consistent with the objectives of relevant planning instruments and will result in no significant adverse environmental planning impacts. The inherent characteristics of the site, including its size, existing use and surrounding development, make the proposal eminently suitable and entirely justifiable on environmental planning grounds.

4.5 Has this written request adequately addressed the matters required to be demonstrated by sub-clause 4.6(3)?

Yes.

5. Is the development in the public interest because it is consistent with the objectives of the height standard and the objectives for development within the zone in which the development is proposed to be carried out?

5.1 Consistency with the objectives of the standard

The proposal is consistent with the objectives of the height standard for the reasons set out in Section 4.3.1 above and having regard to all other relevant considerations is therefore in the public interest.

5.2 Consistent with the objectives of the zone

The site is located within the R3 Medium Density Residential and RE2 Private Recreation zone under PLEP 2011.

The objectives of the R3 Medium Density Residential zone are as follows:-

“To provide for the housing needs of the community within a medium density residential environment.

To provide a variety of housing types within a medium density residential environment.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

To provide opportunities for people to carry out a reasonable range of activities from their homes if such activities will not adversely affect the amenity of the neighbourhood.

To allow for a range of community facilities to be provided to serve the needs of residents, workers and visitors in residential neighbourhoods.”

The objectives of the RE2 Private Recreation zone are as follows:-

“To enable land to be used for private open space or recreational purposes.

To provide a range of recreational settings and activities and compatible land uses.

To protect and enhance the natural environment for recreational purposes.

To identify privately owned land used for the purpose of providing private recreation, or for major sporting and entertainment facilities which serve the needs of the local population and of the wider Sydney region.”

The proposal is consistent with the above objectives, in that:-

- the site is in a location appropriate for development of this type;
- the proposal will provide for aged care health related infrastructure and services;
- the proposal will provide a high quality aged care facility that meets the needs of the community;
- the proposal will provide a development that is compatible with the amenity of the site and with the adjoining area; and
- the site is located within walking distance of public transport and local shops.

Seniors housing is prohibited in the RE2 Private Recreation zoned part of the site. Notwithstanding the provisions of the LEP, a residential care facility is permissible with consent in a RE2 Private Recreation zone under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

A site compatibility certificate was approved on 23 November 2018 which permits development on the site for the purposes of seniors housing with development consent.

The density of proposed development is higher than that would otherwise be permitted in the R3 zone. However the location of the site in the context of the nearby shops, Toongabbie train station and given the mixed residential forms in the locality (including the neighbouring six storey apartments), this density is considered appropriate.

6. The ‘Five Part Test’

In addition to the above requirements, a consent authority may choose to not only use the principles of Clause 4.6 but also the ‘five part test’ established by the Land and Environment Court. (See *Wehbe v Pittwater Council* [2007] NSWLEC 827)

Court cases dealing with applications to vary development standards resulted in the Land and Environment Court setting out a five part test for consent authorities to consider when assessing an application to vary a standard to determine whether the objection to the development standards is well founded. The ‘five part test’ is outlined as follows:-

- “1. the objectives of the standard are achieved notwithstanding noncompliance with the standard;*
- 2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- 3. the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 4. the development standard has been virtually abandoned or destroyed by the council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*
- 5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the*

particular parcel of land. That is, the particular parcel of land should not have been included in the zone."

In relation to point (1):-

The test is satisfied for the reasons set out in Section 4.3.1 above.

In relation to point (2):-

No reliance is placed on this point. When assessed against the underlying objective of the standard, the amended proposal satisfies the intent in terms of suitability in relation to neighbourhood amenity and character and limited and acceptable visual impacts, privacy impacts and overshadowing impacts.

In relation to point (3):-

If strict compliance was to be required with the height standard then the building would not be sufficiently responsive to the site context and benefits of the development would not be achieved.

In relation to point (4):-

No reliance is placed on this point.

In relation to point (5):-

No reliance on this point.

7. CONCLUSION

Compliance with the height development standards in clause 40(4) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 is unreasonable and unnecessary in the circumstances of the proposed RACF at the Toongabbie Sports Club site, Nos. 4-10 Wentworth Avenue and No. 12 Station Road, Toongabbie.

There are sufficient environmental planning grounds to justify the non-compliance, and the proposal is in the public interest because it is consistent with the objectives of both the height standard and the zoning of the land under the Parramatta LEP 2011.

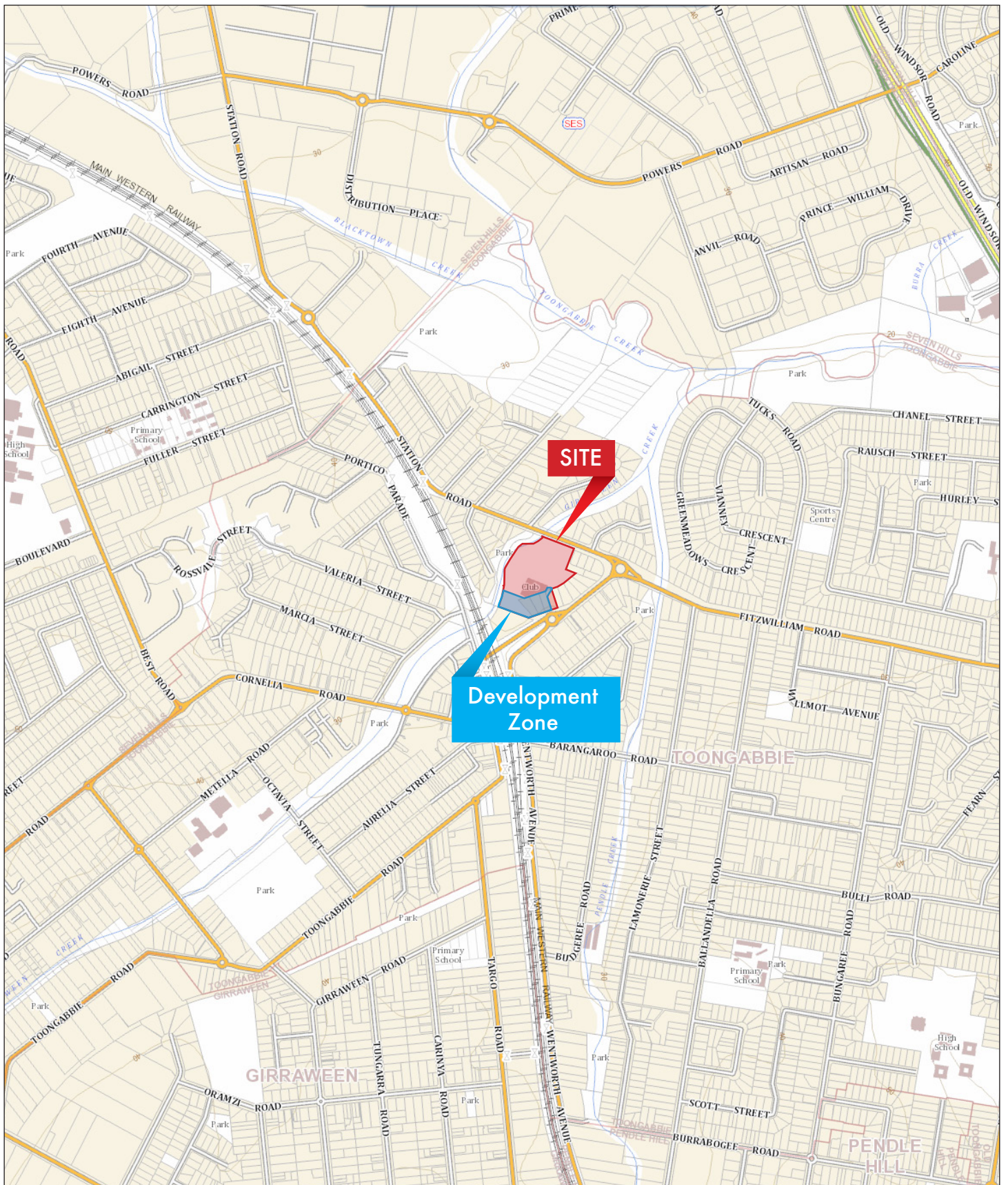
Further, consistently with the objectives of clause 4.6, it is considered that strict adherence to the development standards to this particular development is not warranted and relaxing the standards results in a better development.

The objection to the standards Clause 40(4) is well founded for the following reasons:

- the development is appropriate in this location;
- the development does not undermine the underlying objectives of the standard;
- the non-compliance does not result in any significant adverse environmental impacts on the amenity of the surrounding area in general, or on the amenity of nearby residential properties in particular; and
- the scale of the proposal, notwithstanding the non-compliance, is compatible with the desired future character of the area and is appropriate in the current context.



Figures



Source: <http://maps.six.nsw.gov.au>

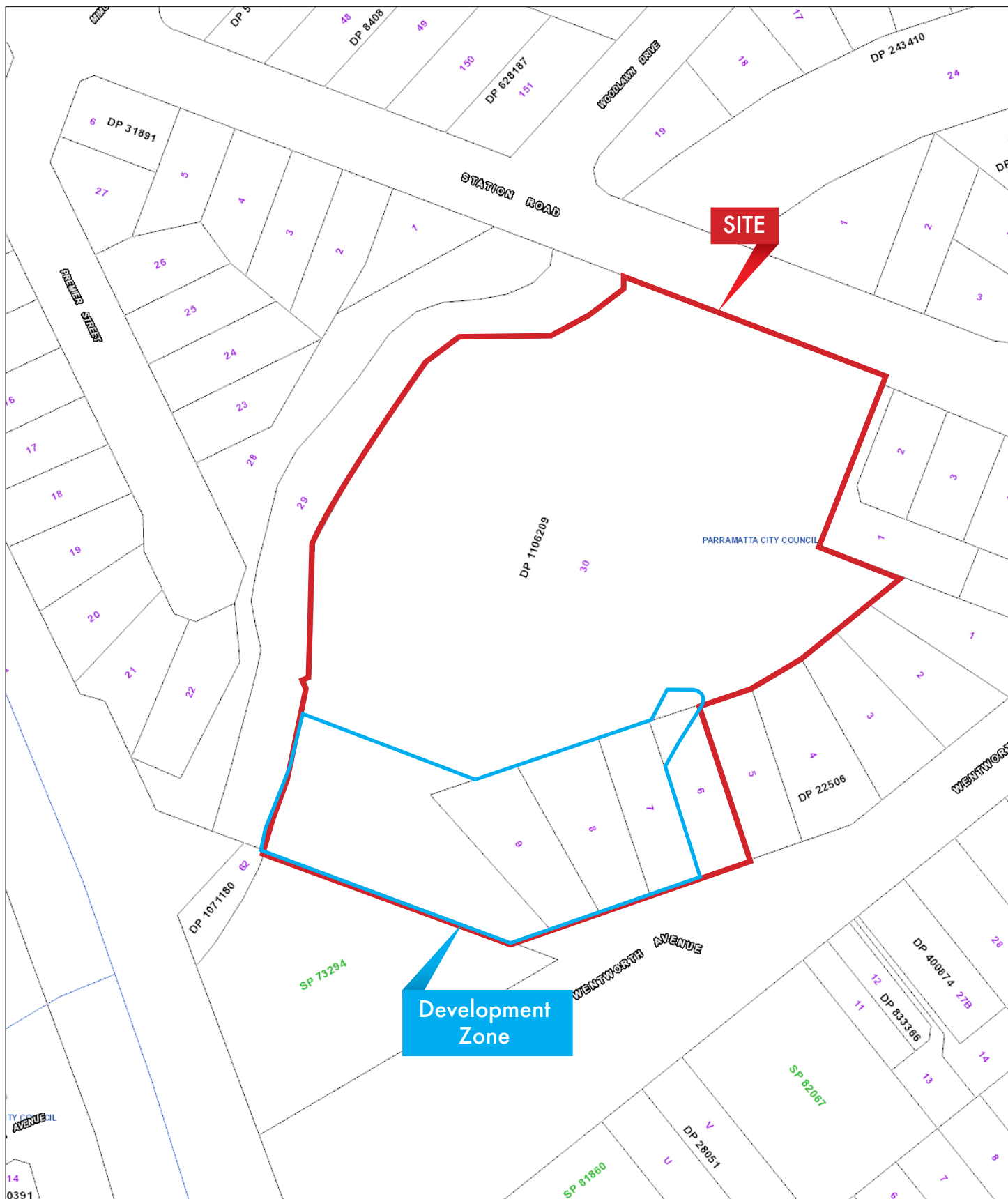


STATEMENT OF ENVIRONMENTAL EFFECTS

Opal Aged Care, Wentworth Avenue, Toongabbie

FIGURE 1
Location

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Source: <http://maps.six.nsw.gov.au>

STATEMENT OF ENVIRONMENTAL EFFECTS
Opal Aged Care, Wentworth Avenue, Toongabbie

FIGURE 2
Site

Prepared For - Opal Aged Care



Attachment 1

