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Via NSW Planning Portal

Attn: Kathryn Saunders – Principal Planner

**SECTION 4.56 APPLICATION FOR MODIFICATION OF DA19/0419  
PROPOSED RESIDENTIAL AGED CARE FACILITY  
5 – 7 FLORIBUNDA AVENUE, GLENMORE PARK (LOT 1 IN DP825553)**

**1. INTRODUCTION**

Dear Kathryn,

This modification application is made under Section 4.56 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) to Penrith City Council on behalf of Principal Healthcare Finance Pty Ltd in support of amendments to Development Consent **DA19/0419**, which relates to the construction of a 2 storey Residential Aged Care Facility, including 142 beds, an allied health facility, at-grade carparking, earthworks and landscaping at 5 – 7 Floribunda Avenue, Glenmore Park. Approval was granted by the Land and Environment Court of NSW by way of a Section 34 Agreement on 19 May 2020 (Penrith City Council at Principal Healthcare Finance Pty Limited - LEC No. 2019/321826) for the proposed development (refer **Appendix 1**).

This application represents the second modification to **DA19/0419**.

The following supporting documentation is provided as part of this application:

- **Appendix 1** Section 34 Agreement (LEC No. 2019/321826)
- **Appendix 2** Updated Architectural Plans

The overall intent of the proposed modification is to seek the provision of two (2) additional balconies on the north-eastern aspect of the ground floor. Aside from providing additional break-out areas for residents, rooms with balconies achieve a far better aesthetic and desirable outcome for residents.

**2. SITE LOCATION AND CHARACTERISTICS**

The subject site is identified as 5 – 7 Floribunda Avenue, Glenmore Park, which is legally described as Lot 1 in DP825553. The subject site exhibits a total area of approximately 10,000m<sup>2</sup> and has frontage to Floribunda Avenue and shares a significant common boundary with the public domain of Rotary Park and the Floribunda Community Centre.

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Figure 1. Aerial Map of Site (Source: Nearmap, 2020)

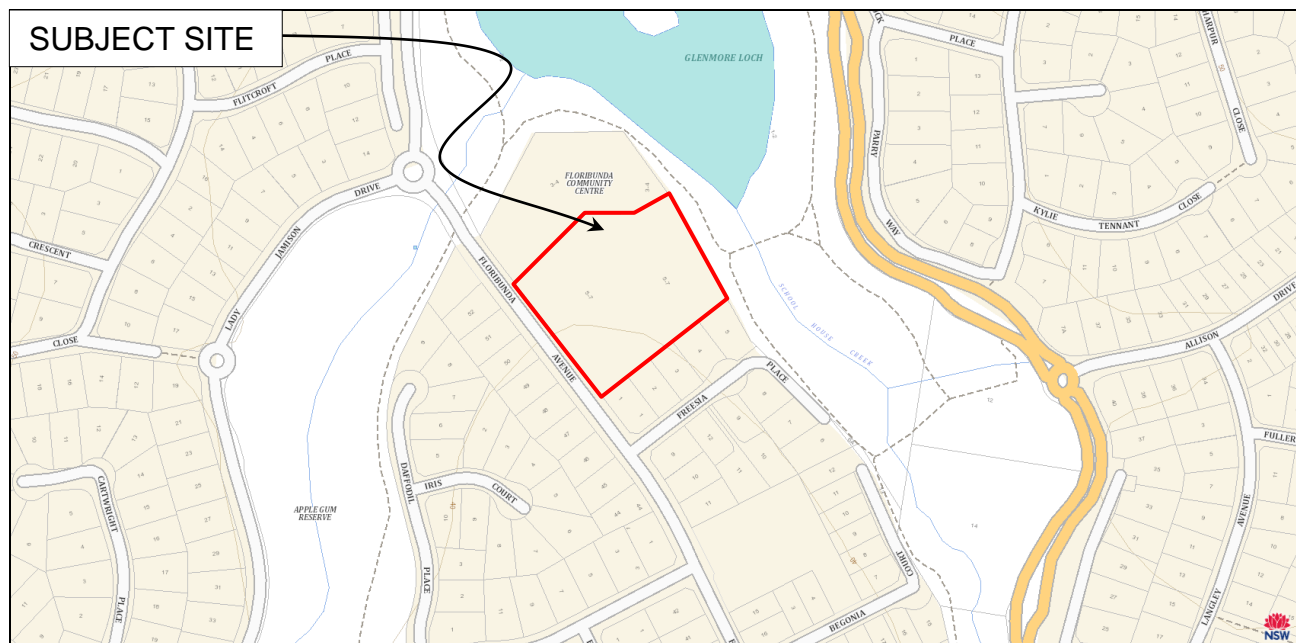


Figure 2. Cadastral Map of Site (Source: SIX Maps, 2020)

### 3. PROPOSED MODIFICATIONS

The proposed modification is to seek the provision of two (2) additional balconies on the north-eastern aspect of ground floor level to allow additional amenity for residents, and provide a number of rooms with balconies to achieve a far better aesthetic and more desirable outcome for residents. The proposed balconies are intended to provide additional break-out areas for residents, overlooking the adjacent public open space.

The modifications sought to Development Consent **DA19/0419**, and approved plans (**Appendix 2**), relates to minor design modifications, resulting in some amendments to conditions of consent.

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The following modifications are proposed to the architectural design:

- Lower ground floor – columns added to support proposed balcony over
- Ground floor – two (2) balconies added, including glazed balustrading and pergolas to match approved

### 4. AMENDED DEVELOPMENT CONSENT

The desired development outcome, as outlined above, requires the following modifications to Development Consent **DA19/0419**.

The proposed amendments are demonstrated in **red**, with deletions as a **strikethrough** and additions as **underlined**.

#### 4.1 Amendments to Conditions of Consent

##### Condition No. 1

- 1 The approved development must be carried out substantially in accordance with the following plans and documents except as may be amended by the following conditions.

Plan/Report No.	Description	Prepared by	Revision	Date
A000	Title Page	CalderFlower	B	-
A002	Site Plan	CalderFlower	B	27.02.2020
A003	Demolition Plan	CalderFlower	B	27.02.2020
A100	Lower Ground Floor	CalderFlower	<del>E</del> <u>D</u>	<del>15.04.2020</del> <u>28.08.2020</u>
A101	Ground Floor Plan	CalderFlower	<del>E</del> <u>D</u>	<del>15.04.2020</del> <u>28.08.2020</u>
A102	First Floor Plan	CalderFlower	B	27.02.2020
A103	Roof Plan	CalderFlower	B	27.02.2020
A200	Elevations	CalderFlower	<del>E</del> <u>D</u>	<del>15.04.2020</del> <u>28.08.2020</u>
A210	Sections	CalderFlower	<del>B</del> <u>C</u>	<del>27.02.2020</del> <u>28.08.2020</u>
A800	Materials	CalderFlower	B	27.02.2020
A901	Photomontages	CalderFlower	C	15.04.2020
LA000	Cover Sheet	Taylor Brammer	B	02.03.2020
LA201	Community Courtyard & Native Courtyard	Taylor Brammer	B	02.03.2020
LA202	Wind and Light & look at	Taylor Brammer	B	02.03.2020
LA203	Landscape Terrace	Taylor Brammer	B	02.03.2020
LA204	Dementia Courtyard	Taylor Brammer	B	02.03.2020
LA301	Landscape Sections	Taylor Brammer	B	02.03.2020
LA302	Landscape Section	Taylor Brammer	B	02.03.2020
LA303	Landscape Sections	Taylor Brammer	A	02.03.2020
LA400	Planting Plan & Schedules	Taylor Brammer	B	02.03.2020
LA700	Typical Details	Taylor Brammer	B	02.03.2020
LA200	Landscape Masterplan	Taylor Brammer	D	09.03.2020
LA500	Tree Retention & Removal Plan	Taylor Brammer	D	09.03.2020
LA600	Finishes Plan	Taylor Brammer	B	09.03.2020
19017	Assessment of Traffic Parking Implications	Transport & Traffic Planning Associates	G	Feb 2020



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HH Ref 19117	Civil Engineering Report	Henry & Hymas	4	Feb 2020
191177	Bio Retention Maintenance Plan	Henry & Hymas	-	-
191177	Stormwater Maintenance Plan	Henry & Hymas	-	-
DA_C000	Cover sheet, Drawing schedule, Notes	Henry & Hymas	05	25.02.2020
DA_C100	Ground Floor Plan	Henry & Hymas	11	08.04.2020
DA_C101	Lower Ground Floor Plan	Henry & Hymas	11	06.03.2020
DA_C110	Site Sections	Henry & Hymas	03	06.03.2020
DA_C200	Stormwater Misc. Details & Pit Lid Sched.	Henry & Hymas	05	25.02.2020
DA_C201	Bio-Retention Basin Plan Section & Details	Henry & Hymas	08	08.04.2020
DA_C250	Stormwater Catchment Plan	Henry & Hymas	05	21.02.2020
DA_C500	Pavement Plan	Henry & Hymas	08	25.02.2020
DA_SE01	Sediment & Erosion Control Plan	Henry & Hymas	05	25.02.2020
DA_SE02	Sediment & Erosion Control Typ. Sections & Details	Henry & Hymas	05	25.02.2020

Condition No. 1 of development consent **DA19/0419** is proposed to be amended to reflect the plans modified by this application.

## 5. STATUTORY PLANNING FRAMEWORK

### 5.1 Environmental Planning and Assessment Act 1979

The EP&A Act is the principle planning and development legislation in New South Wales. The modifications sought to Development Consent **DA19/0419** warrants consideration of the provisions of Section 4.56 of the EP&A Act. The provisions of Section 4.56(1) of the EP&A Act have been considered and addressed in **Table 1**.

Table 1: Section 4.56(1) – (1A) Assessment	
Clause	Response
<i>(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if—</i>	
<i>(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and</i>	The proposed modification will result in the same ultimate development outcome to that previously approved.  <b>Section 5.1.1</b> of this statement demonstrates that the development as modified would result in substantially the same development as the development for which consent was granted under <b>DA19/0419</b> .
<i>(b) it has notified the application in accordance with— (i) the regulations, if the regulations so require, and (ii) a development control plan, if the consent authority is a council that has made a development</i>	It is understood that the application will be renotified in accordance with the <i>Penrith Development Control Plan 2014</i> (PDCP2014).

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<i>control plan that requires the notification or advertising of applications for modification of a development consent, and</i>	
<i>(c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and</i>	It is acknowledged that Council must consider any submissions received, concerning the proposed modifications.
<i>(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.</i>	It is acknowledged that Council must consider any submissions received, concerning the proposed modifications.
<i>(1A) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.</i>	The proposed modifications are consistent with the matters referred to in Section 4.15(1) of the EP&A Act. Refer to <b>Section 5.1.2</b> of this statement.

### 5.1.1 Section 4.56(1) – Substantially the same

The NSW Land and Environment Court has established several precedents as to what may be considered as being substantially the same development, and what should be factored into the consideration of this threshold test.

The scope of a maximum modification of a consent without constituting assessment as a standalone application can be analysed through the ambit of *Michael Standley & Associates Pty Ltd v North Sydney Council [2005] NSWLEC 358*, whereupon Commissioner Mason P. found in relation to modification of development consents that the word “modify” was given the ordinary meaning of “to alter without radical transformation”. Therefore, the extent to which a consent may be modified is that to which the consent, as modified, is as approved without radical transformation or alteration.

The development, as modified, is substantially the same development and will not result in a radical transformation of **DA19/0419** for the following reasons:

- The modification remains retains the approved primary land use as a Residential Aged Care Facility, including 142 beds, an allied health facility, at-grade carparking, earthworks and landscaping, and proposes no substantial change to this fundamental element of the approval.
- There are no substantial quantitative changes proposed to the approved building bulk or scale including no changes to the height, gross floor area, or setbacks of the building.
- The function, form, operations and importantly, public perception of the subject site, as a Residential Aged Care Facility, remains largely unchanged, with the modifications pertaining to just two (2) additional balconies at the ground floor level, with the intention of increasing amenity, but maintaining the original intent of the development as approved.

In light of the above, the proposal as amended, is not considered to result in a “radical transformation” of the consent, as currently approved, satisfying the radical transformation test pursuant to *Michael Standley & Associates Pty Ltd v North Sydney Council [2005] NSWLEC 358*.

Whilst the proposal seeks additional built form elements in the form of balconies, these are not considered to be material or essential elements of the approved development which would constitute a radical change

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to the ultimate development outcome of the subject site. This is further analysed in *Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280* which applies a quantitative and qualitative test to determine what qualifies a development as being “substantially the same”.

*Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280* provides that a comparison of the development as approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is “essentially or materially” the same as the approved development. The comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

Whilst it is acknowledged that the proposal does include some quantitative changes to the approved development, these are not considered to be substantial or comprise a critical element of the development. Further, from a qualitative perspective, the development retains its identity as a Residential Aged Care Facility.

Therefore, the proposal, as amended, will be substantially the same development as approved, and satisfies the requirements for the application to be assessed and approved pursuant to Section 4.56(1A) of the EP&A Act.

### 5.1.2 Section 4.15 – Reasons given by the consent authority for the grant of the consent

Section 4.15(1) of the EP&A Act specifies the matters which a consent authority must consider when determining a development application. The relevant matters for consideration under Section 4.15(1) of the EP&A Act are provided in **Table 2** below.

Table 2: Section 4.15(1)(A) Considerations	
Section	Response
Section 4.15(1)(a)(i) any environmental planning instrument, and	The proposal as amended is deemed to be wholly consistent with the provisions of <i>Penrith Local Environmental Plan 2010</i> (PLEP2010) and <i>State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004</i> (SEPP HSPD).
Section 4.15(1)(a)(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and	There are no applicable draft instruments for consideration.
Section 4.15(1)(a)(iii) any development control plan, and	Refer to <b>Section 6.1</b> of this statement.
Section 4.15(1)(a)(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and	There is no Voluntary Planning Agreement (VPA) that applies to the proposal or subject site.
Section 4.15(1)(a)(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),	There are no matters prescribed by the regulation that are relevant to the proposal.
Section 4.15(1)(b)-(c)	Refer to <b>Section 7</b> of this statement.

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### **5.2 Environmental Planning & Assessment Regulation 2000**

This application has been prepared in accordance with the provisions of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation). Further, the proposed modification does not trigger 'Designated Development' pursuant Schedule 3 of the EP&A Regulation.

### **5.3 Rural Fires Act 1997**

The original proposal was deemed a Special Fire Protection Purpose, and the proposed development triggered Integrated Development under Section 4.46 of the EP&A Act and Section 100B of the *Rural Fires Act 1997*.

A Bushfire Assessment Report was prepared as part of the original DA, and it is considered that no further revision of this report is required for the proposed modification. The recommendations provided within the report, will provide a reasonable and satisfactory level of bushfire protection to the subject proposal as amended, for which the proposed development is considered to be supported on the grounds of anticipated bushfire impacts.

### **5.4 State Environmental Planning Policies**

#### **5.4.1 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004**

The original proposal was submitted pursuant to the provisions of the SEPP HSPD and a Clause 4.6 variation granted to contravene clause 40(4)(c) of the SEPP HSPD. This contravention relates to building height, which would not be altered as part of the proposed modification.

### **5.5 Penrith Local Environmental Plan 2010**

The PLEP2010 is the primary environmental planning instrument that applies to the subject site. The relevant provisions of PLEP2010 as they relate to the subject site as considered below.

#### **5.5.1 Zoning and Permissibility**

The proposal, as modified, is consistent with the objectives of the zone as it will continue to deliver a Residential Aged Care Facility. Given the minor nature of the amendments sought under this application, the proposed modification does not result in any of the objectives of the zone being compromised. The development will continue to achieve these objectives to the same capacity as the Development Consent **DA19/0419**.

### **5.6 Penrith Development Control Plan 2014**

The PDCP2014 supports the PLEP2010 and sets out Penrith City Council's objectives and development controls within the local government area.

Following a review of the PDCP2014, the Part D clauses that are considered of interest are described below.

#### **D2 – Residential Development:**

- Clause 2.5.8 Visual and Acoustic Privacy and Outlook

With consideration of the objectives and controls relating to visual and acoustic privacy and outlook, the following information is provided:

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- The proposed balconies will provide a break-out space from only the bedrooms that directly adjoin the balcony area and will be available to the residents that reside in these bedrooms.
  - The proposed balconies are inward facing, embedded within the wings of the approved building, and would not result in any privacy impacts or perceived acoustic impacts to other nearby residential receivers.
  - All bedrooms are fitted with internal screening devices, which can be utilised to screen the bedroom from the adjacent balcony areas, ensuring that visual privacy is achievable when desired.
  - From the balconies, residents will have the opportunity to look out to the internal landscaped gardens and the neighbouring public open space towards the north-east.
- Clause 2.5.12 Building Design
- The proposed balconies are embedded within the approved building and will not alter the overall built form aesthetic.
  - The glass balustrade and pergola over will assist in achieving a variety of architectural features for the overall built form.

## 6. CONCLUSION

This application seeks consent for modification of Development Consent **DA19/0419**, pursuant to Section 4.56 of the EP&A Act. The proposal has been prepared after taking into consideration the following key issues:

- Development history of the subject site;
- Development Consent **DA19/0419**;
- Site context and locality;
- Relevant heads of consideration under Section 4.56 of the EP&A Act; and
- Relevant statutory and non-statutory planning instruments.

It is considered that the proposed change to include two (2) additional balconies, as detailed through this letter would not result in any environmental impacts. The overall intent is to increase amenity for residents but maintaining the original intent of the development as approved. In this light and for the reasons stated throughout this letter, the proposal should warrant a favourable determination.

Should you require further information, please contact the undersigned.

Yours Faithfully,



Andrew Cowan  
Director  
Willowtree Planning

### Enclosed:

**Appendix 1 – Section 34 Agreement**  
**Appendix 2 – Revised Architectural Plans**





WILLOW TREE  
PLANNING

## **APPENDIX 1**

### **Section 34 Agreement**



WILLOW TREE  
PLANNING

## **APPENDIX 2**

### **Revised Architectural Plans**