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The General Manager
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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 (the Applicant) 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 third 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** Tree Retention & Removal Plan

The overall intent of the proposed modification is to seek the removal of two (2) trees that conflict with the approved built form.

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 10,000m² 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)

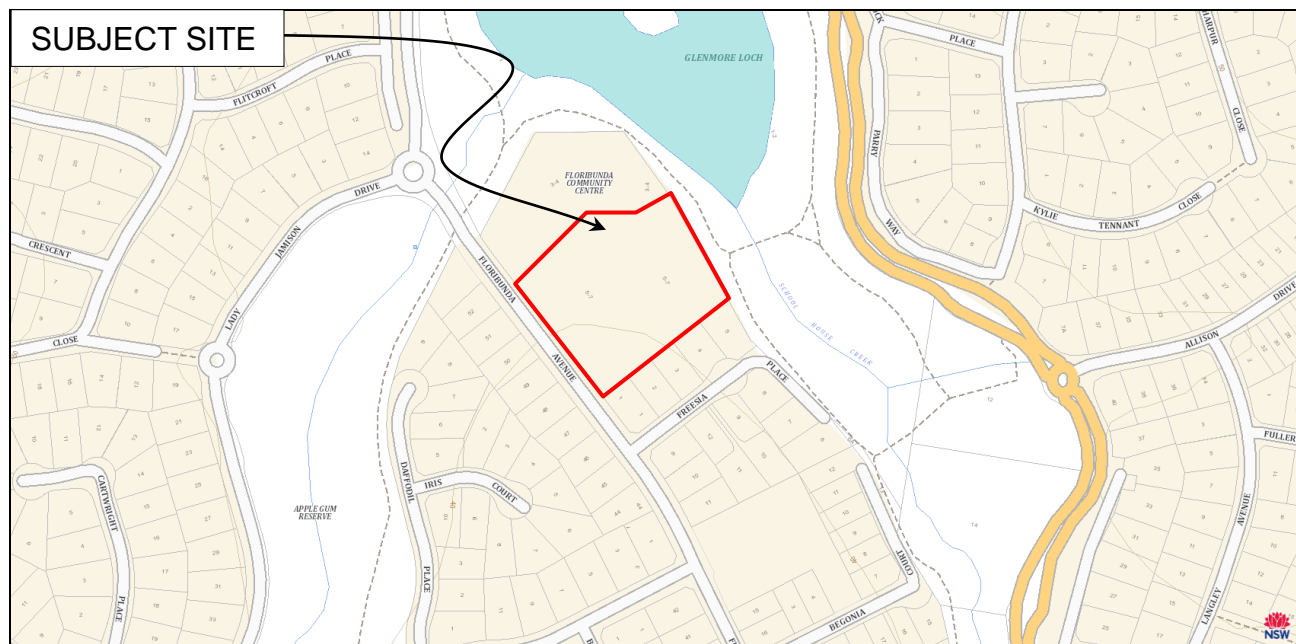


Figure 2. Cadastral Map of Site (Source: SIX Maps, 2020)

3. PROPOSED MODIFICATIONS

The proposed modification is to permit the removal of two (2) trees, that currently conflict with the approved built form.

Since consent has been granted for the subject site, intensive site surveys have found inaccuracies in the original surveyed tree locations, resulting in some minor conflicts with the approved built form. The most recent intensive tree survey, carried out by Ramsay Surveyors (and confirmed by Penrith City Council officers at a site visit), is included in this modification application.

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Appendix 2 contains the updated Tree Retention & Removal Plan, prepared by Taylor Brammer, which now accurately locates all existing trees on site. It is noted that the updated Tree Retention & Removal Plan has been confirmed again by McArdle Arboricultural Consultancy, and Penrith City Council have also been to site and verified all trees in the locations identified in the attached updated plan.

On the basis of these findings, the following two (2) trees are sought to be removed:

- **Tree T1** (Chinese Elm or *Ulmus parvifolia*): This tree is located wholly under the most northern additional balcony (approved under **DA19/0419.02**). As detailed above, this tree was incorrectly located initially, with its accurate location only being identified as works have started to progress on site.
- **Tree T11a** (Illawarra flame tree or *Brachychiton acerifolius*): This tree is located adjacent to the approved rear facility pathways and 'Tree House'. The identified tree protection zone (TPZ) for this tree is encroached by footings, pavement and work area. The Applicant has investigated the possible relocation of the 'Tree House', however the overland flow paths restrict any alternate locations within its vicinity.

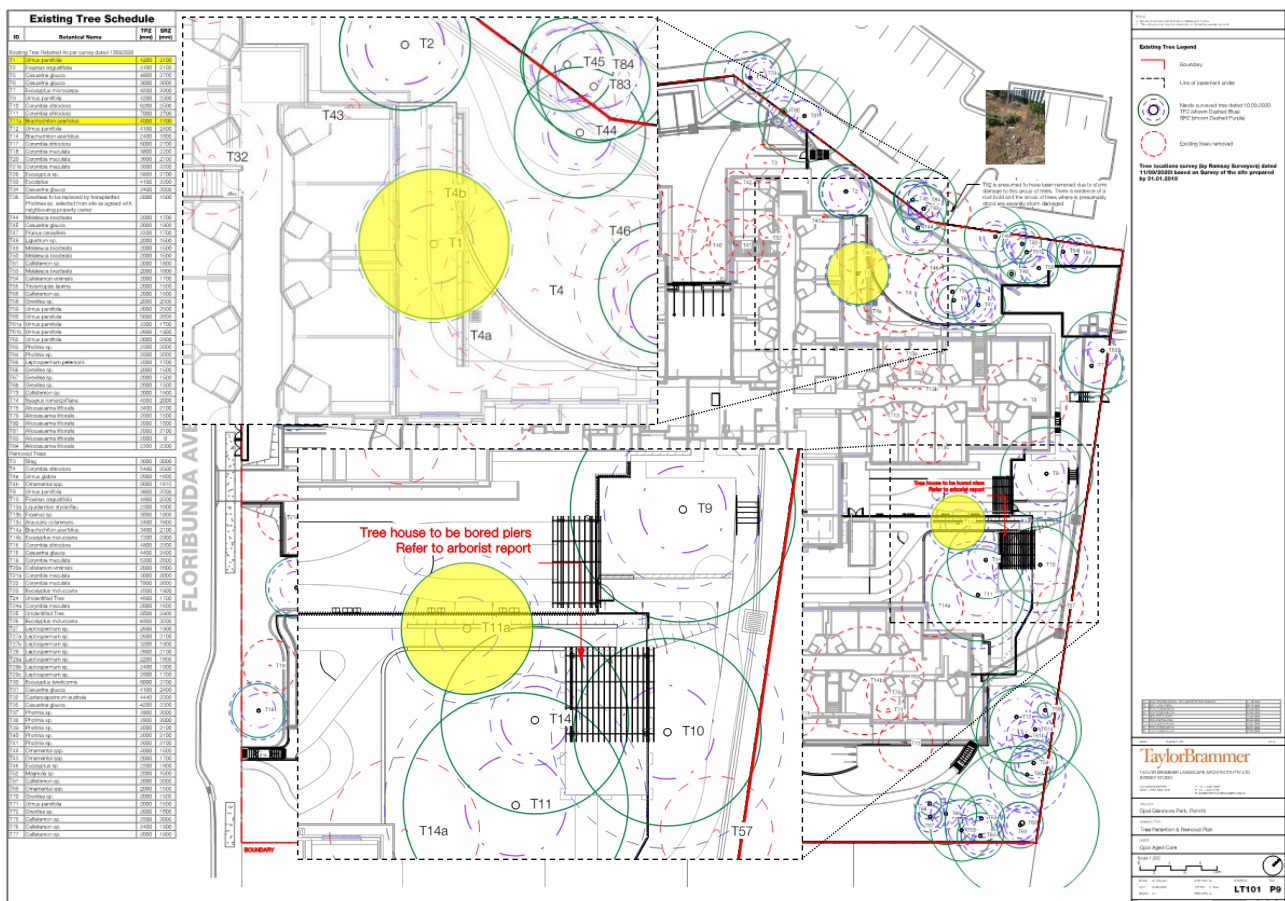


Figure 3. Extract of updated Tree Retention & Removal Plan (Source: Taylor Brammer, 2020)

The modification sought to Development Consent **DA19/0419**, relates to removal of two (2) trees, resulting in some amendments to conditions of consent.

There are no modifications sought to the built form of the approved development.

It is also noted, that whilst not forming part of this application, the Applicant is currently exploring the retention of the following trees:

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- **Tree T17** (dead Gum): Whilst this tree has been approved for removal, Penrith City Council's on-site inspection resulted in a request for this tree to remain, as local fauna appear to be using it as habitat. The proponent would revisit this tree removal once 'fauna leaves the nest', in line with the Penrith City Council Tree Management Policy.
- **Tree T19** (Gum): Whilst this tree has been approved for removal, on review of building footprint and the corrected tree locations, this tree may be retained.

As noted above, no modifications to the status of T17 or T19 are proposed as part of this application. The Applicant is currently exploring their options in relation to these trees.

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	D	28.08.2020
A101	Ground Floor Plan	CalderFlower	D	28.08.2020
A102	First Floor Plan	CalderFlower	B	27.02.2020
A103	Roof Plan	CalderFlower	B	27.02.2020
A200	Elevations	CalderFlower	D	28.08.2020
A210	Sections	CalderFlower	C	28.08.2020
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 <u>LT101</u>	Tree Retention & Removal Plan	Taylor Brammer	D <u>P9</u>	09.03.2020 <u>22.10.2020</u>
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 NSW. 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>	<p>The proposed modification will result in the same ultimate development outcome to that previously approved.</p> <p>Section 5.1.1 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 DA19/0419.</p>
<i>(b) it has notified the application in accordance with—</i> <i>(i) the regulations, if the regulations so require, and</i> <i>(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications</i>	<p>It is understood that the application will be renotified in accordance with the <i>Penrith Development Control Plan 2014</i> (PDCP2014).</p>

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<i>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 Section 5.1.2 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 would 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 unchanged.

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 to remove two (2) trees, these are not considered to be material or essential elements of the approved development which would constitute a radical change 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 quantitate and qualitative test to determined what qualifies a development as being “substantially the same”.

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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 minor quantitative changes (in the number of trees to be removed), 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 Section 5.6 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 Section 6 of this statement.

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.

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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, Part C2 – Vegetation Management are is considered of interest. Pursuant to Clause 2.1 Preservation of Trees and Vegetation, development consent is sought for the removal of vegetation.

It is noted that the proposed tree clearing (two trees only) is in conjunction with a permissible use that has already been approved by Council. The two (2) trees sought to be removed, conflict with the approved development.

6. ENVIRONMENTAL ASSESSMENT

6.1 Flora and Fauna

The proposed modification is to allow for the removal of two (2) trees, that conflict with the approved built form.

Appendix 2 contains the updated Tree Retention & Removal Plan, prepared by Taylor Brammer. It is noted that the updated Tree Retention & Removal Plan has been confirmed again by McArdle Arboricultural

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Consultancy, and Penrith City Council have also been to site and verified all trees in the locations identified in the attached updated plan.

On the basis of these findings, and as a result of some tree locations differing, the following two (2) trees are sought to be removed:

- **Tree T1** (Chinese Elm or *Ulmus parvifolia*): This tree is located wholly under the most northern additional balcony (approved under **DA19/0419.02**). As detailed above, this tree was incorrectly located initially, with its accurate location only being identified as works have started to progress on site.
- **Tree T11a** (Chinese Elm or *Ulmus parvifolia*): This tree is located adjacent to the approved rear facility pathways and 'Tree House'. The identified tree protection zone (TPZ) for this tree is encroached by footings, pavement and work area.



Figure 4. Images of T1 and T11a (Source: Grindley, 2020)

It is also noted, that whilst not forming part of this application, the proponent is currently exploring the retention of the following trees:

- **Tree T17** (dead Gum): Whilst this tree has been approved for removal, Council's on-site inspection resulted in a request for this tree to remain as local fauna appear to be using it as habitat. The proponent would revisit this tree removal once 'fauna leaves the nest', in line with the Penrith City Council Tree Management Policy.
- **Tree T19** (Gum): Whilst this tree has been approved for removal, on review of building footprint and the corrected tree locations, this tree may be retained.

As noted above, no modifications to the status of T17 or T19 are proposed as part of this application. The proponent is currently exploring their options in relation to these trees.

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6.2 Design and Appearance

The modifications sought as part of this application would not alter the design, bulk or scale of the approved development.

The proposed two (2) trees to be removed are isolated from one another, and within the vicinity of other trees that are to be retained and enhanced through additional complementary landscaping. Given the nature of the approved built form and the scattered trees to be retained, it is considered that the proposed removal of two (2) additional trees would not significantly alter the appearance of the proposed development.

By comparison, the original development consent (**DA19/0419**) granted approval for the removal of 53 trees, which equates to 47.32% of the existing trees on site. The proposal, as modified, seeks to increase the number of trees to be removed to 55 trees (49.1% of the existing trees on site), which is an increase of just 1.78% across the site.

Without the removal of these two (2) trees, the development cannot proceed as approved.

7. 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 modification to remove two (2) trees that conflict with approved built form, as detailed through this letter, would result in minimal environmental impacts. Without the removal of these two (2) trees, the development cannot proceed 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

Enc.

Appendix 1 – Section 34 Agreement
Appendix 2 – Revised Tree Retention & Removal Plan



WILLOW TREE
PLANNING

APPENDIX 1

Section 34 Agreement



WILLOW TREE
PLANNING

APPENDIX 2

Revised Tree Retention & Removal Plan