

SWCPP Ref. No.:	PPSSWC-412
DA No.:	Mod23/0292
PROPOSED DEVELOPMENT:	Section 4.56 Modification Application, to modify a Court granted Development Consent, for a Residential Care Facility
PROPERTY ADDRESS:	94 - 100 Explorers Way, ST CLAIR NSW 2759
PROPERTY DESCRIPTION:	Lot 36 DP 239502,
ZONING:	Zone R2 Low Density Residential - LEP 2010
CLASS OF BUILDING:	Class 9c , Class 5
ASSESSING OFFICER	Robert Walker
APPLICANT:	Principal Healthcare Finance Pty Ltd
DATE RECEIVED:	21 December 2023
REPORT BY:	Robert Walker, Senior Development Assessment Planner, Penrith City Council
RECOMMENDATIONS:	Approve

Assessment Report

Executive Summary

Council is in receipt of Modification Application No. Mod23/0292, which seeks to modify a Development Consent granted by the Land & Environment Court of NSW (Case No. 2023/65908), for a residential care facility, at 94-100 Explorers Way, St Clair.

The proposed modifications maintain the overall built form and general layout of the development. The proposed modifications relate to the repositioning and reconfiguration of various elements / rooms within the building (i.e. of the hair salon, the cafe, the allied health facility, the administration type area and lounge room areas), and minor associated fenestration changes (i.e. changes resulting from elements / rooms being repositioned and / or reconfigured) and the provision of external doors, in lieu of windows, for 4 ground floor rooms.

The application was advertised in a local newspaper, and notified to those who made a submission in respect of the associated Development Application, adjacent property owners and adjacent occupiers, in accordance with the *Penrith City Council Community Engagement Strategy & Community Participation Plan*. Two (2) submissions were received in response to this process. Both submissions raised matters in relation to the overall development which has already been approved and not issues related to the specific proposed modifications. Furthermore, in accordance with Section 105 of the *Environmental Planning & Assessment Regulation 2021*, the Land & Environment Court of NSW were notified of the notification and advertising process which was undertaken.

The building footprint, overall floor area and building height are unchanged by the proposed modifications. Furthermore, it is considered that the fenestration changes do not alter the overall appearance of the development from a streetscape or residential character perspective, and are satisfactory from residential amenity perspective.

The development the subject of the associated Development Application (DA21/0607) was declared to be 'regionally significant development' (being 'general development' with a 'capital investment value' of more than \$30 million). As the '*Functions Exercisable by Council's on behalf of a Sydney District Planning Panel*', provided under Section 275 of the *Environmental Planning & Assessment Regulation 2021*, do not extend to Modification Applications made pursuant to Section 4.56 of the *Environmental Planning & Assessment Act 1979*, the 'Consent Authority' for the subject Modification Application is the Sydney Western City Planning Panel.

The application has been assessed in accordance with the matters for consideration under Section 4.56 of the *Environmental Planning & Assessment Act 1979*, which has found that the proposed modifications are compliant with the relevant provisions, that such does not provide for any additional likely impacts and that the development as modified is substantially the same as for which the consent was originally granted. Accordingly, it is recommended that the application be approved.

Site & Surrounds

The site consists of a single allotment (Lot 36 DP 239502), commonly known as Nos. 94-100 Explorers Way, St Clair. The site is rectangular like in shape and has a site area of approximately 1.057 hectares.

The site fronts and is accessed from Explorers Way (to the south), which leads (to the east) towards Erskine Park Road, nearby its intersection with the M4 Western Motorway.

The site also adjoins the M4 Western Motorway (to the north). Improvements to the site are limited to a 2 storey dwelling, located in the south eastern portion of the site, addressing Explorers Way. The site, particularly within the northernmost part, contains areas with substantial native trees.

The site is subject to an overland flow path, across a defined gully / existing drainage depression and a piped drainage system, draining from the west of the site, to a head-wall in the M4 Western Motorway corridor immediately to the north of the site.

The site is located within an established low density residential area of St Clair, approximately 1.3km (walking distance) from the St Clair Shopping Centre and approximately 600m (walking distance) from the nearest bus stop, which is located on Colorado Drive, near the intersection with Explorers Way. The neighbourhood is characterised by low density residential developments, being single and two storey detached dwelling houses.

Proposal

The Land & Environment Court of NSW granted Development Consent on 17 August 2023, to Development Application No. DA21/0607 (Land & Environment Court of NSW Case No. 2023/65908), which involves the following:

- Demolition of existing structures.
- Tree removal.
- Construction of a two (2) storey residential care facility. The residential care facility comprises of 149 beds, which are spread over 120 rooms, with 91 single rooms and 29 double rooms. All rooms comprise of an open bed / living room and an ensuite. The facility includes a main kitchen, dining rooms, laundry, lounge rooms, sitting rooms, recreation rooms / areas, nursing stations, offices, team rooms, a loading dock, storage rooms, amenities, a function / training room, a hair salon, a cafe, health consulting and treatment rooms, and a therapy room.
- Car parking areas comprising of a total of 36 spaces.
- Associated earthworks, drainage and landscaping works.
- The approved hours of operation of the residential care facility for staff and residents, are 24 hours, seven days a week.
- The overall facility also includes the operation of an associated allied health facility, using various rooms in the south eastern part of the ground floor, which is also open to the public (in addition to residents of the facility). The approved hours of operation for the allied health facility, are Mondays to Fridays, between 9am and 5pm.
- Delivery and service vehicles are restricted to between 7am and 7pm (daily).

The subject Modification Application has been made pursuant to Section 4.56 of the Environmental Planning & Assessment Act 1979 and seeks to modify the existing Development Consent (being that issued by the Land & Environment Court of NSW on 17 August 2023), as follows:

- Repositioning of the hair salon.
- Repositioning of the cafe and minor associated fenestration changes (within the eastern side elevation).
- Reconfiguration of the allied health facility rooms, including a reduced number of associated rooms, a minor reduction in the floor space of such and the repositioning of the external / entry door (within the front / southern elevation).
- Reconfiguration of various ground floor office rooms and spaces (administration type area) and minor associated fenestration changes (within the front / southern elevation).
- Repositioning of a (single) room on the first floor and reconfiguration of adjacent lounge room areas, and minor associated fenestration changes (within the rear / northern elevation and the western side elevation).
- Removal of sectional / dividing wall between lounge rooms on the first floor (to provide a contiguous lounge area).
- Provision of external doors, in lieu of windows, for 4 ground floor rooms (within the eastern side elevation).

It is noted that the building footprint, overall floor area and building height are unchanged by the proposed modifications.

Plans that apply

- Local Environmental Plan 2010 (Amendment 4)
- Development Control Plan 2014
- State Environmental Planning Policy (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004
- State Environmental Planning Policy (Housing) 2021
- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Precincts—Western Parkland City) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Sustainable Buildings) 2022
- State Environmental Planning Policy (Transport and Infrastructure) 2021

- **Section 1.7 - Application of Part 7 of Biodiversity Conservation Act 2016**

The overall development is unchanged, by the proposed modifications, from a 'Biodiversity Assessment' perspective, including when having specific consideration to the provisions of Part 7 of *Biodiversity Conservation Act 2016* (as required by Section 1.7 of the *Environmental Planning & Assessment Act 1979*).

- **Section 4.46 - Integrated development**

The site is mapped as 'bushfire prone land' and the development defined as a 'special fire protection purpose' pursuant to Section 100B of the *Rural Fires Act 1997*. Accordingly the associated Development Application constituted an 'Integrated Development', pursuant to the provisions of Section 4.46 of the *Environmental Planning & Assessment Act 1979*. Following referral of such to the NSW Rural Fire Service, 'General Terms of Approval' and a 'Bush Fire Safety Authority' were issued, pursuant to Section 4.47 of the *Environmental Planning & Assessment Act 1979*.

The proposed modifications provide no changes from a bushfire protection perspective, and do not conflict with the 'General Terms of Approval' or the 'Bush Fire Safety Authority'.

- **Section 4.56 - Modification by consent authorities of consents granted by the Court**

The subject Modification Application has been assessed in accordance with Section 4.56 and the matters for consideration under Section 4.15 of the *Environmental Planning & Assessment Act 1979*, and having regard to those matters, the following issues have been identified for further discussion.

The proposed modifications relate to the repositioning and reconfiguration of various elements / rooms within the building (i.e. of the hair salon, the cafe, the allied health facility, the administration type area and lounge room areas), and minor associated fenestration changes (i.e. changes resulting from elements / rooms being repositioned and / or reconfigured) and the provision of external doors, in lieu of windows, for 4 ground floor rooms. The building footprint, overall floor area and building height are unchanged by the proposed modifications. Overall the proposed modifications are of minimal environmental impact, maintain the general nature of the development and relate to substantially the same development as the development for which consent was originally granted.

The application was advertised in a local newspaper, and notified to those who made a submission in respect of the associated Development Application, adjacent property owners and adjacent occupiers, from the 22 January 2024 until 5 February 2024, in accordance with the *Penrith City Council Community Engagement Strategy & Community Participation Plan*. Two (2) submissions were received in response to this process. Both submissions raised matters in relation to the overall development as already approved and not issues related specifically to the proposed modifications.

The existing Development Consent was granted by the Land & Environment Court of NSW (Case No. 2023/65908). The proposed modifications are not inconsistent with any reason given within the associated 'Judgement' (dated 17 August 2023) issued by the Land & Environment Court of NSW.

Section 4.15(1)(a)(i) The provisions of any environmental planning instrument

State Environmental Planning Policy (Biodiversity and Conservation) 2021

The proposed modifications do not conflict with any of the provisions of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* and are therefore considered acceptable in this regard.

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

While *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, applies to the development, Section 15 of such, outlines that Chapter 3 (which comprises of Sections 14 to 50), specifically allows development for seniors housing, on land zoned primarily for urban purposes, 'despite the provisions of any other Environmental Planning Instrument, if the development is carried out in accordance with this Policy'. As 'residential care facilities' are permitted with Development Consent in the 'R2 – Low Density Residential' zone, pursuant to Clause 2.3 of the *Penrith Local Environmental Plan 2010*, the development is therefore not subject to the provisions of Chapter 3 (i.e. Sections 14 to 50).

The proposed modifications do not conflict with any of the applicable provisions of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.

State Environmental Planning Policy (Housing) 2021

Pursuant to Schedule 7A of *State Environmental Planning Policy (Housing) 2021*, this Policy does not apply to a Modification Application which relates to a Development Application that was made before 26 November 2021 (i.e. the commencement of the Policy). As the associated Development Application (DA21/0607) was made / accepted on 17 August 2021, such does not apply and the provisions of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (the associated repealed instrument) continue to apply.

State Environmental Planning Policy (Planning Systems) 2021

The associated Development Application (DA21/0607) was determined by the Sydney Western City Planning Panel, as the proposed development had a capital investment value of more than \$30 million and was therefore declared to be 'regionally significant development' (i.e. 'general development' with a 'capital investment value' of more than \$30 million). The determination by the Sydney Western City Planning Panel, was made on 8 November 2022, 'by way of refusing consent', pursuant to Section 4.16 of the *Environmental Planning & Assessment Act 1979*.

Subsequently an appeal was made, against the determination, by the Applicant to the Land & Environment Court of NSW (Case No. 2023/65908). Amended plans were provided as part of the Court proceedings, which resulted in the Land & Environment Court of NSW 'granting consent to the Development Application', pursuant to Section 4.16 of the *Environmental Planning & Assessment Act 1979*.

It is noted that the '*Functions Exercisable by Council's on behalf of a Sydney District Planning Panel*', provided under Section 275 of the *Environmental Planning & Assessment Regulation 2021*, do not extend to Modification Applications made pursuant to Section 4.56 of the *Environmental Planning & Assessment Act 1979*.

Accordingly, pursuant to Clause 4.5 (b) of the *Environmental Planning & Assessment Act 1979*, the 'Consent Authority' for the subject Modification Application is the Sydney Western City Planning Panel.

State Environmental Planning Policy (Precincts—Western Parkland City) 2021

The proposed modifications do not conflict with any provisions of *State Environmental Planning Policy (Precincts - Western Parkland City) 2021* and are therefore considered acceptable in this regard.

State Environmental Planning Policy (Resilience and Hazards) 2021

The proposed modifications do not conflict with any provisions of *State Environmental Planning Policy (Resilience and Hazards) 2021* and are therefore considered acceptable in this regard.

State Environmental Planning Policy (Sustainable Buildings) 2022

Pursuant to Section 4.2 of *State Environmental Planning Policy (Sustainable Buildings) 2022*, such does not apply to a Modification Application which relates to a Development Application that was submitted before 1 October 2023 (i.e. the commencement of the Policy). As the associated Development Application (DA21/0607) was made / accepted on 17 August 2021, such does not apply.

State Environmental Planning Policy (Transport and Infrastructure) 2021

The proposed modifications do not conflict with any provisions of *State Environmental Planning Policy (Transport and Infrastructure) 2021* and are therefore considered acceptable in this regard.

Local Environmental Plan 2010 (Amendment 4)

Provision	Compliance
Clause 2.3 Permissibility	Complies - See discussion
Clause 2.3 Zone objectives	Complies
Clause 2.7 Demolition requires development consent	N/A
Clause 4.3 Height of buildings	N/A
Clause 4.6 Exceptions to development standards	N/A
Clause 5.21 Flood planning	N/A
Clause 7.1 Earthworks	N/A
Clause 7.4 Sustainable development	Complies
Clause 7.6 Salinity	N/A
Clause 7.30 Urban Heat	Complies

Clause 2.3 Permissibility

The site is zoned 'R2 – Low Density Residential', pursuant to the *Penrith Local Environmental Plan 2010*. The development for which the consent was originally granted, is defined as a 'residential care facility' and a 'health services facility', and the proposed modifications do not alter such.

It is noted that while 'residential care facilities' are permitted with Development Consent, in the 'R2 – Low Density Residential' zone pursuant to the *Penrith Local Environmental Plan 2010*, 'health services facilities' are prohibited. Notwithstanding this, pursuant to Section 2.60 (1) of *State Environmental Planning Policy (Transport and Infrastructure) 2021*, 'health services facilities' are permitted with Development Consent in the 'R2 – Low Density Residential' zone (as the 'R2 – Low Density Residential' zone is defined as a 'prescribed zone').

Section 4.15(1)(a)(ii) The provisions of any draft environmental planning instrument

There are no Draft Environmental Planning Instruments applying to the site, which are relevant to the proposed modifications.

Section 4.15(1)(a)(iii) The provisions of any development control plan

Development Control Plan 2014

Provision	Compliance
C1 Site Planning and Design Principles	Complies
C2 Vegetation Management	Complies
C3 Water Management	Complies
C4 Land Management	Complies
C5 Waste Management	Complies
C6 Landscape Design	Complies
C10 Transport, Access and Parking	Complies
C12 Noise and Vibration	Complies
C14 Urban Heat Management	Complies

Section 4.15(1)(a)(iiia) The provisions of any planning agreement

There are no Planning Agreements which apply to the site or the development.

Section 4.15(1)(a)(iv) The provisions of the regulations

Part 5 Division 1 - Applications for Modification of Development Consent

The subject Modification Application was made in accordance with the requirements of Sections 98, 99 & 100 (which provide specific requirements in relation to Modification Applications) of the *Environmental Planning & Assessment Regulation 2021*.

Section 105 - Notification and Advertising

The application was advertised in a local newspaper, and notified to those who made a submission in respect of the associated Development Application, adjacent property owners and adjacent occupiers, from the 22 January 2024 until 5 February 2024, in accordance with the *Penrith City Council Community Engagement Strategy & Community Participation Plan*. Two (2) submissions were received in response to this process. Both submissions raised matters in relation to the overall development and not issues related to the specific proposed modifications.

Furthermore, the Land & Environment Court of NSW were notified of the notification and advertising process which was undertaken.

Section 112 - Consent Authority to Notify or Publicly Exhibit Modification Applications

The original (and existing) Development Consent was granted by the Land & Environment Court of NSW. Accordingly, the notification and advertising process for the subject Modification Application was undertaken by Council.

Section 4.15(1)(b)The likely impacts of the development

The proposed modifications maintain the overall built form and general layout of the development, with such relating to the repositioning and reconfiguration of various elements / rooms within the building (i.e. of the hair salon, the cafe, the allied health facility, the administration type area and lounge room areas), and minor associated fenestration changes (i.e. changes resulting from elements / rooms being repositioned and / or reconfigured) and the provision of external doors, in lieu of windows, for 4 ground floor rooms.

The building footprint, overall floor area and building height are unchanged by the proposed modifications. Furthermore, it is considered that the fenestration changes do not alter the overall appearance of the development from a streetscape or residential character perspective, and are satisfactory from residential amenity perspective.

Section 4.15(1)(c)The suitability of the site for the development

It is considered that there are no aspects of the site which are unsuitable for the development in its proposed modified form.

Section 4.15(1)(d) Any Submissions

Community Consultation

The application was advertised in a local newspaper, and notified to those who made a submission in respect of the associated Development Application, adjacent property owners and adjacent occupiers, from the 22 January 2024 until 5 February 2024, in accordance with the *Penrith City Council Community Engagement Strategy & Community Participation Plan*. Two (2) submissions were received in response to this process. Both submissions raised matters in relation to the overall development (i.e. in relation to noise, impact on views, the loss of trees, car parking and driveway location) and not concerns specific or related to the proposed modifications.

Referrals

The application was referred to the following stakeholders and their comments have formed part of the assessment:

Referral Body	Comments Received
Building Surveyor	No objections

Section 4.15(1)(e)The public interest

The proposed modifications will not generate any significant issues of public interest.

Conclusion

As outlined within this report, an assessment of the Modification Application pursuant to the provisions of Section 4.56 of the *Environmental Planning & Assessment Act 1979*, has found that the proposed modifications are compliant with the relevant provisions and that such does not provide for any additional likely impacts.

Recommendation

That Modification Application No. Mod23/0292 be approved, and that the existing Development Consent (DA21/0607 / Land & Environment Court of NSW Case No. 2023/65908), relating to a residential care facility, at 94-100 Explorers Way, St Clair, be modified, as per the attached modified Consent Conditions.