

COUNCIL ASSESSMENT REPORT

Panel Reference	
DA Number	DA20/0419
LGA	Penrith City Council
Proposed Development	Clause 4.56 Modification Application – Proposed re-wording of Condition 2 related to registering of an easement to drain water over Council land – Related to an Approved Residential Aged Care Facility
Street Address	5-7 Floribunda Avenue, Glenmore Park NSW 2745
Applicant/Owner	Owner-Applicant - Principal Healthcare Finance P/L
Date of DA lodgement	23 June 2020
Number of Submissions	No submissions
Recommendation	Approval, subject to the amendment to Condition 2
Regional Development Criteria (Schedule 7 of the SEPP (State and Regional Development) 2011)	Development with a CIV >\$20 million
List of all relevant s4.15(1)(a) matters	• State Environmental Planning Policy (State and Regional Development) • State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 • Rural Fires Act 1997 • Penrith Local Environmental Plan 2010 • Penrith Development Control Plan 2014
List all documents submitted with this report for the Panel's consideration	• Appendix A – Section 34 Court Conditions • Appendix B – Owner's consent Council land • Appendix C – Applicant Town Planner's Letter
Clause 4.6 requests	Not applicable
Summary of key submissions	Not applicable, no submissions.
Report prepared by	Kathryn Saunders – Senior Development Assessment Planner
Report date	17 August 2020

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report?

Yes

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report?

Not Applicable

e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report?

Not Applicable

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (\$7.24)?

Not Applicable

Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment?

Not applicable

Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

SWCPP Ref. No.:	PPSSWC-97
DA No.:	DA19/0419.01
PROPOSED DEVELOPMENT:	Section 4.56 Modification of Consent Condition 2 for Approved Residential Aged Care Facility including Ancillary Car Parking, Landscaping & Stormwater & Civil Works - Lot 1 DP 825553,5 - 7 Floribunda Avenue, GLENMORE PARK NSW 2745
APPLICANT:	Principal Healthcare Finance Pty Ltd
REPORT BY:	Kathryn Saunders, Senior Development Assessment Planner, Penrith City Council

Assessment Report

Executive Summary

Council is in receipt of a Section 4.56 modification application of a Court issued consent which approved the construction of a residential aged care facility 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 ats Principal Healthcare Finance Pty Limited - LEC No. 2019/321826).

The approval included the construction of a stormwater scheme for the site which involved the installation of a stormwater outlet pipe and headwall located in land at Rotary Park, a Council owned property, adjacent to the site's boundary. The Approval required, by Condition, the creation of an easement over Council's property, which will allow for stormwater to drain from the subject site.

The modification application seeks approval to alter the wording of Condition 2 of that consent (DA19/0419) which requires:

- the creation of an easement to drain water over an adjacent Lot owned by Council, to contain a stormwater outlet pipe and headwall, and
- that suitable documentary evidence that indicates the creation of the easement be provided to Council indication that the easement has been registered with NSW Land Registry Services, prior to the issue of a Construction Certificate,

to allow the above mentioned easement, to be registered with NSW Land Registry Services, prior to the issue of a Occupation Certificate.

Under Penrith Local Environmental Plan 2010 (PLEP), the proposal is defined as development ancillary to an approved residential care facility and is permissible in the R2 Low Density Residential zone under PLEP, with consent. The proposal is also permissible under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

Clause 120 of the Regulation requires that as soon as practicable after receiving an application for the modification of a development consent, a consent authority must cause a copy of the application to be given to each concurrence authority and approval body for the development to which the application relates. A copy of the modification application (CNR-10370) was provided to the Rural Fire Service (RFS) via the NSW Government's ePlanning Portal, who were a concurrence authority to the original application. The RFS have confirmed that no objection is raised.

The application has also been referred to Council's development engineers who have raised no objection to the proposal. The proposal is supported subject to the wording being 'prior to the issue of *any* Occupation Certificate'.

The application has been notified to each person who made a submission in respect of the relevant development application of the proposed modification (being the subject of a Class 1 Appeal to the NSW Land and Environment Court) in accordance with the requirements of Section 4.56(1)(c) of the Environmental Planning and Assessment Act 1979, with the exhibition period being between 20 July and 3 August 2020. No submissions were received.

This application is to be determined by the Sydney Western City Planning Panel as the cost of works of 'the development' has a Capital Investment Value of greater than \$30 million, being \$39,917,436.

An assessment under Section 4.15 and Section 4.56 of the Environmental Planning and Assessment Act 1979 has been undertaken and the application is recommended for approval subject to the recommended modified condition wording of Condition 2.

Site & Surrounds

The subject site is approximately 10,000sqm's in area and is currently occupied by a former privately operated facility for the education of children. The site is sloped to the rear and has a fall of approximately 6.5m, and has vehicular and pedestrian access from Floribunda Avenue via two driveway crossings. The Council owned Floribunda Community Centre adjoins the site to the north and Rotary Park and Glenmore Loch are located to the site's immediate east. The site shares its southern most boundary with the rear yards of 5 dwelling houses which front Freesia Place to the south.

Single residential dwellings are located opposite the subject site, on the western side of Floribunda Avenue. The Glenmore Park Town Centre is located approximately 600 metres to the south of the site.

Surrounding land uses are predominantly low density residential dwellings consisting of 1-2 storey single dwelling house.

Court issued consent no. DA18/0419 approved the demolition of all structures on the site and construction of a part 1 part 2 storey residential aged care facility on the site. The consent approved a mixture of surface and undercroft car parking and extensive landscaping of the site including some tree removal and replacement tree planting. As part of the approved development various stormwater works were approved, and Council gave its consent as the land owner of the site to the rear, to allow for the construction of stormwater drainage and the creation of a related easement.

Proposal

The proposal is for a Section 4.56 modification application of a Court issued development consent which was approved the construction of a residential aged care facility at 5-7 Floribunda Avenue, Glenmore Park.

The Court approved (by way of a Section 34 agreement) a stormwater scheme for the site that included the construction of a a stormwater outlet pipe and headwall in land at Rotary Park (Council's property) adjacent to the site's boundary, and the creation of an easement over Council's property, which will allow for stormwater to drain from the subject site.

The Section 4.56 modification application seeks approval to alter the wording of Condition 2 of that consent which requires:

- the creation of an easement to drain water over an adjacent Lot owned by Council, to contain a stormwater outlet pipe and headwall, and
- that suitable documentary evidence that indicates the creation of the easement be provided to Council indication that the easement has been registered with NSW Land Registry Services, prior to the issue of a Construction Certificate,

to allow the above mentioned easement, to be registered with NSW Land Registry Services, prior to the issue of a Occupation Certificate.

The application was submitted with written advice from Willowtree Planning, which states that the proposed amendment to Condition 2 *'seeks to negate any delay to the commencement of construction on the site'* and further notes that *'The creation of the easement is required to facilitate the approved stormwater management arrangement as per the approval granted by the Land and Environment Court. It is therefore considered unnecessary to impose this requirement prior to the issue of a Construction Certificate as it will have no material impact or benefit to the construction of the development'*.

Plans that apply

- Local Environmental Plan 2010 (Amendment 4)
- Development Control Plan 2014
- State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004
- State Environmental Planning Policy No 55—Remediation of Land
- Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

Planning Assessment

- **Section 2.12 – Sydney Western City Planning Panel (SWCPP)**

The application has been assessed in accordance with Section 2.12 of the Environmental Planning and Assessment Act 1979 and the application will be determined by the Sydney Western City Planning Panel as the approved development (as is proposed to be modified) has a Capital Investment Value (CIV) greater than \$20 million.

- **Section 4.15 - Evaluation**

The development has been assessed in accordance with the matters for consideration under Section 4.15 and Section 4.56 of the Environmental Planning and Assessment Act 1979 (the Act).

Section 4.56 of the Act states at (1) that 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 -

(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

(b) it has notified the application is 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 control plan that requires the notification or advertising of applications for modification of a development consent, and

(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

(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.

With regard to the above, and owing to the minor nature of the proposed modification, being the alteration to wording of a consent condition (with no related physical implications to the approved development), Council can be 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.

Notification

In relation to (b) and (c) above, Council's Development Control Plan does not require the exhibition, notification or advertisement of the Section 4.56 application and as such, the proposal has been notified to each person who made a submission in respect of the original development application (DA19/0419), with the

exhibition period being between 20 July and 6 August 2020, as is required by 4.56 (1)(c) of the Act.

No submissions have been received requiring consideration under Section 4.56(1)(d).

Matters for Consideration

In accordance with the requirements of Section 4.56(1A), the Act states that in determining an application for modification of a consent under this section, the consent authority must take into consideration such matters referred to in section 4.15(1) as are of relevance to the application. An assessment of the modification application has been undertaken against the matters in section 4.15(1) as follows.

- **Section 4.46 - Integrated development**

The original application was integrated development as the site is identified as bush fire prone land. The original application was referred to the NSW RFS and their General Terms of Approval were provided. The 4.56 modification application was required under the Regulations to be referred to the NSW RFS who have confirmed that they raise no objection to the proposed modification.

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

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

The modifications proposed do not raise any matters which require further consideration of the approved development under the Policy. The proposal is considered satisfactory.

State Environmental Planning Policy No 55—Remediation of Land

The modifications proposed do not raise any matters which require further consideration of land contamination or remediation under the Policy. The proposal is considered satisfactory.

Sydney Regional Environmental Plan No.20 - Hawkesbury Nepean River

An assessment has been undertaken of the application against relevant criteria with Sydney Regional Environmental Plan No. 20—Hawkesbury-Nepean River (No. 2—1997) and is found to be compliant with the general planning considerations of the Policy.

Local Environmental Plan 2010 (Amendment 4)

Provision	Compliance
Clause 4.4 Floor Space Ratio	
Clause 1.2 Aims of the plan	Complies
Clause 2.3 Permissibility	Complies
Clause 2.3 Zone objectives	Complies
Clause 4.3 Height of buildings	Complies - See discussion
Clause 7.16 Glenmore Park Stage 2	Complies

Clause 4.3 Height of buildings

The modification application proposes an alteration to the timing of the registration of an easement with Land Registry Services NSW and in this respect, the modification will not alter the approved height of buildings consented to under DA19/0419.

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

Draft Environment State Environmental Planning Policy

The Draft Environment SEPP was exhibited from 31 October 2017 to 31 January 2018. This consolidated SEPP proposes to simplify the planning rules for a number of water catchments, waterways, urban bushland, and Willandra Lakes World Heritage Property.

Changes proposed include consolidating the following seven existing SEPPs:

- State Environmental Planning Policy No. 19 – Bushland in Urban Areas
- State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011
- State Environmental Planning Policy No. 50 – Canal Estate Development
- Greater Metropolitan Regional Environmental Plan No. 2 – Georges River Catchment
- Sydney Regional Environmental Plan No. 20 – Hawkesbury-Nepean River (No.2-1997)
- Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
- Willandra Lakes Regional Environmental Plan No. 1 – World Heritage Property.

The proposed modification to the original consent is not inconsistent with the provisions of this Draft Instrument.

Draft Remediation of Land State Environmental Planning Policy (SEPP 55)

The Department of Planning and Environment has announced a Draft Remediation of Land SEPP, which will repeal and replace the current State Environmental Planning Policy No 55—Remediation of Land.

The main changes proposed include the expansion of categories of remediation work which requires development consent, a greater involvement of principal certifying authorities particularly in relation to remediation works that can be carried out without development consent, more comprehensive guidelines for Councils and certifiers and the clarification of the contamination information to be included on Section 10.7 Planning Certificates.

Whilst the proposed SEPP will retain the key operational framework of SEPP 55, it will adopt a more modern approach to the management of contaminated land. The Draft SEPP will not alter or affect the findings in respect to contamination of the Site.

The proposed modification is not inconsistent with the provisions of this Draft Instrument.

Draft Housing Diversity State Environmental Planning Policy (Housing Diversity SEPP)

The Department is exhibiting an Explanation of Intended Effect (EIE) for a proposed new Housing Diversity SEPP that aims to facilitate the delivery of diverse housing that meets the needs of the State's growing population and will support the development of a build-to-rent sector.

The proposed Housing Diversity State Environmental Planning Policy (Housing Diversity SEPP) would consolidate three current SEPPs and update some planning provisions in response to community and council concerns about boarding house and seniors housing development. Changes to facilitate more social housing are also proposed and three new diverse housing types – build-to-rent housing, student housing and co-living – are being introduced to provide more housing options for the people of NSW. The Explanation of Intended Effect is on exhibition until **9 September 2020**.

The Draft Policy has been considered with no further action required, and will not impact the recommendations of this report.

Planning Proposal - Phase 1 Review of Penrith LEP 2010

The Phase 1 amendments to the Penrith LEP were on exhibition between 1 May - 29 May 2020 and include alterations to lot sizes in residential zones, alterations to permissible uses in identified areas, changes in the zoning of particular allotments and minor housekeeping amendments. The amendments sought do not impact the subject application.

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

Development Control Plan 2014

Provision	Compliance
DCP Principles	Complies
C1 Site Planning and Design Principles	Complies
C2 Vegetation Management	N/A
C3 Water Management	Complies
C4 Land Management	Complies
C5 Waste Management	N/A
C6 Landscape Design	Complies
C7 Culture and Heritage	N/A
C8 Public Domain	N/A
C9 Advertising and Signage	N/A
C10 Transport, Access and Parking	N/A
C11 Subdivision	N/A
C12 Noise and Vibration	N/A
C13 Infrastructure and Services	Complies

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

There are no planning agreements in place that apply to the subject modification application.

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

The proposal under Section 4.56 of the Act has been assessed against the relevant sections of the Regulations and is compliant.

Clause 117 of the Regulations applies to an application under Section 4.55(1A) of the Act or under section 4.56 of the Act in respect of a modification which, in the opinion of the consent authority, is of minimal environmental impact. Clause 117(2) states that if an application to which this clause applies is required by a community participation plan to be notified or advertised and the development consent was granted by the Court on appeal, the application must be so notified or advertised by the consent authority to which the original development application was made.

Clause 117(3) requires, for such applications, that the consent authority is to notify the Court of -

- (a) the manner in which the application was notified or advertised,*
- (b) any submission period required by the community participation plan, and*
- (c) the date (or dates) on which the application was notified or advertised.*

As Council's Development Control Plan does not require notification or advertisement of the section 4.56 modification application, Council is not required to notify the Court of the matters referred to above, noting that the Act requires under 4.56(1)(c), that the application be notified to persons who have made submissions to the original application. This notification was carried out, with the exhibition period being between 20 July and 3 August 2020, and the application documentation was made available on Council's DA Tracker, with no submissions received.

Clause 120 of the Regulation requires that an application for the modification of a development consent, is to be provided to each concurrence authority and approval body for the development to which the application relates. A copy of the modification application was provided to the Rural Fire Service, who were a concurrence authority to the original application and no objections were raised.

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

The proposal to amend the wording of Condition 2 of the consent will not materially alter the development which has been approved by the Court, and will not result in any environmental impacts which have not already been considered of the proposal thus far. The likely impacts resulting from the proposal are limited to a change in timing of the registering of an easement for stormwater on Council's land, and thus are acceptable.

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

No material changes to the approved development will result from the proposal to alter the wording of Condition 2 to change the timing of the required registration of an easement for stormwater and in this respect, the site is suitable for the proposed modification.

Section 4.15(1)(d) Any Submissions

Community Consultation

In accordance with the requirements of the Regulations and Penrith Development Control Plan 2014, the proposed development was notified to those which had previously registered a submission against the original application, with the exhibition period being between 20 July and 3 August 2020. No submissions were received in response.

Referrals

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

Referral Body	Comments Received
Development Engineer	No objections - subject to conditions

Section 4.15(1)(e)The public interest

The proposed amendment to the consent condition will not generate any issues which would be contrary to public interest.

Section 94 - Developer Contributions Plans

Development contributions under Section 7.11 of the Environmental Planning and Assessment Act 1979, do not apply to this modification application.

Conclusion

The Section 4.56 modification application has been assessed against the matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979 and is found to be acceptable and is not in conflict with the public interest. The proposal is also found to be substantially the same development as that which the Land and Environment Court of NSW approved by way of a Section 34 agreement on 19 May 2020 (Penrith City Council ats Principal Healthcare Finance Pty Ltd - LEC No. 2019/321826) and in this respect, can be considered under Section 4.56 and is assessed to be minor in nature.

The proposed alteration to Condition 2 of the Court approved conditions will not result in any physical changes to the development as was approved by the Court and simply seeks to alter the timing of the required registration of an easement for stormwater drainage, to be prior to the issue of an Occupation Certificate, as opposed to being prior to the issue of a Construction Certificate.

The proposal is not in conflict with any environmental planning instruments or draft environmental planning instruments and is suitable for the site. The Section 4.56 modification application is recommended for approval, subject to the recommended amended wording to Condition 2.

Recommendation

1. That the modification application received under clause 4.56 of the *Environmental Planning and Assessment Act 1979*, for the amendment to Condition 2, be approved subject to the attached amended wording of Condition 2.

CONDITIONS

General

- 1 The development must be consistent with the plans and other documentation as provided by the NSW Land and Environment Court, as are Annexed to the Court Judgement of Appeal No. 2019/321826, and as amended by the below Condition.
- 2 Prior to the issue of **any Occupation Certificate**, the Applicant must:
 - (a) Ensure the creation of an easement to drain water (minimum of 2.5 metres wide) over Lot 10 DP 832179 in favour of Lot 1 DP 825553 to contain the stormwater outlet pipe and headwall delineated on Plan 19117_DA_C101, revision 11, dated 06.03.2020, prepared by Henry & Hymas.
 - (b) Submit to Council suitable documentary evidence that indicates the creation of the above mentioned easement as being registered with NSW Land Registry Services.