



**WRITTEN REQUEST PREPARED PURSUANT TO
CLAUSE 4.6 OF PENRITH LOCAL ENVIRONMENTAL
PLAN 2010 IN RELATION TO A VARIATION WHICH IS
SOUGHT OF THE MAXIMUM BUILDING HEIGHT
DEVELOPMENT STANDARD IN CLAUSE 4.3 OF THE
PENRITH LEP**

**Submitted in Support of a development application
for a residential care facility at Explorers Way St.
Clair**

**Prepared for
by
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1. INTRODUCTION

1.1 The proposed development

This written Clause 4.6 variation request accompanies a Development Application (“DA”) for a new residential care facility at Explorers Way St Clair Park as described in the SEE accompanying the development application. The proposed residential care facility includes:

- 154 aged care beds;
- Associated facilities for the care of residents including kitchen and laundry facilities, dining rooms, lounge rooms, activity areas, an allied health area, nurse stations, utility rooms, staff facilities, café for residents and their visitors;
- Vehicular access from Explorers Way to car parking spaces, a loading area and a separate porte cochere access for drop offs, ambulance and courtesy bus;
- Site landscaping and purpose designed gardens suitable for seniors with high care needs (including dementia);
- Associated works including stormwater management.

1.2 The site

The site is located within St Clair which is located 39km south-west of the Sydney CBD, in the Local Government Area (LGA) of Penrith. It is adjacent to the M4 Motorway (see **Figures 1 and 2**) with access to the motorway via east facing ramps at Erskine Park Road approximately 1 km to the east of the site.

The urban structure and built form of the area is predominantly single and two storey detached dwelling houses that are 20-40 years old with evidence of some urban renewal. The urban structure is influenced by the location of collector and sub-arterial roads that provide access from the precinct to surrounding areas. The site is located on Explorers Way which feeds onto Erskine Park Road which provides direct access to the M4 Motorway, providing a high level of accessibility and an appropriate location for a residential care facility.

The site comprises Lot 36 in DP 239502, as shown on **Figure 2** and has an area of approximately 1.057 hectares. The site is generally rectangular in shape and has a frontage to Explorers Way of approximately 79.5m (including a partly unformed section of road).

The topography of the site slopes downwards from a high point of RL 56.66m AHD (along the south-western boundary to Explorers Way) to a low point of RL 52.8m AHD (along the north-eastern boundary of the site (towards the M4 Motorway) resulting in a gentle 1 in 40 slope.

The site contains a drainage depression across the northern part of the site draining from the residential subdivision to the west and this is exposed to flooding from overland flow.

1.3 Site zoning and permissibility

The site is located within the R2 Low Density Residential Zone pursuant to Penrith Local Environmental Plan 2010 (“PLEP”) (**Figure 4A**). The objectives of this zone are as follows:

- To provide for the housing needs of the community within a low density residential environment.

- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.
- To enhance the essential character and identity of established residential areas.
- To ensure a high level of residential amenity is achieved and maintained.

Development for the purposes of a residential care facility is permissible with consent pursuant to PLEP. This is the only form of seniors housing permissible in the R2 Low Density Residential zone. A residential care facility is a form of seniors housing and is defined in the PLEP as:

residential care facility means accommodation for seniors (people aged 55 years or more) or people with a disability that includes—

(a) meals and cleaning services, and

(b) personal care or nursing care, or both, and

(c) appropriate staffing, furniture, furnishings and equipment for the provision of that accommodation and care,

not being a dwelling, hospital or psychiatric facility.

1.4 DA lodged pursuant to the PLEP

The DA for the proposal has been lodged pursuant to, and relies upon, the provisions of Penrith Local Environmental Plan 2010.

1.5 The maximum building height development standard

Pursuant to Clause 4.3 of the LEP, the site is subject to a maximum building height of 8.5m (see **Figure 4C**). The proposal has a maximum building height of 9.84m which does not comply with the maximum building height development standard. The exceedance of the maximum building height occurs at the northern part of the building and at the location of the roof top plant..

Clause 4.6 of PLEP allows approval to be granted for a development application, even though a proposed development contravenes a development standard in the PLEP, including the maximum building height standard in Clause 4.3. The height standard in clause 4.3 is not expressly excluded from the operation of clause 4.6 under PLEP.

This written request addresses the requirements of Clause 4.6 of PLEP in relation to the noncompliance with the development standard in clause 4.3 of PLEP.

1.6 Principle and relevant authorities

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

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

- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (“Four2Five No 2”);
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (“Four2Five No 3”);
- *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386;
- *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC118; and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245.

2. RELEVANT DEVELOPMENT STANDARD

Clause 4.3 of PLEP establishes a maximum building height as a development standard. This clause states:

4.3 Height of buildings

(1) *The objectives of this clause are as follows—*

- (a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
- (c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- (d) *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

(2) *The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.*

The PLEP contains the following relevant definitions:

building height (or height of building) means—

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
 - (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*
- including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.*

ground level (existing) means the existing level of a site at any point..

The maximum building height is specified on the Height of Buildings Map an extract of which is contained in **Figure 4C**. The specified maximum building height is **8.5 metres**.

3. EXCEPTIONS TO DEVELOPMENT STANDARDS (Clause 4.6)

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

The objectives of clause 4.6 are:

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

Clause 4.6 of the PLEP relevantly states:

- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless—*
 - (a) *the consent authority is satisfied that—*
 - (i) *the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Planning Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Planning Secretary must consider—*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant’s written request referred to in subclause (3).*

Accordingly, Clause 4.6 can be used to vary (to the extent required) the 8.5 metre maximum building height development standard in Clause 4.3 of PLEP which applies to this site.

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

4.1 Extent of non-compliance

The majority of the building is compliant with the 8.5 metres maximum building height standard.

The non-compliance relates to the roof area in the northern part of the site and a minor part of the plant area in the roof of the building where the plant enclosure protrudes above the height limit. The proposal has a maximum building height of 9.8m which does not comply with the maximum building height development standard. The exceedance of the maximum building height occurs at the location of the roof top plant enclosure in the centre of the building and to a lesser extent at the northern part of the building.

The non-compliance relates to the elements as identified in the following diagram:

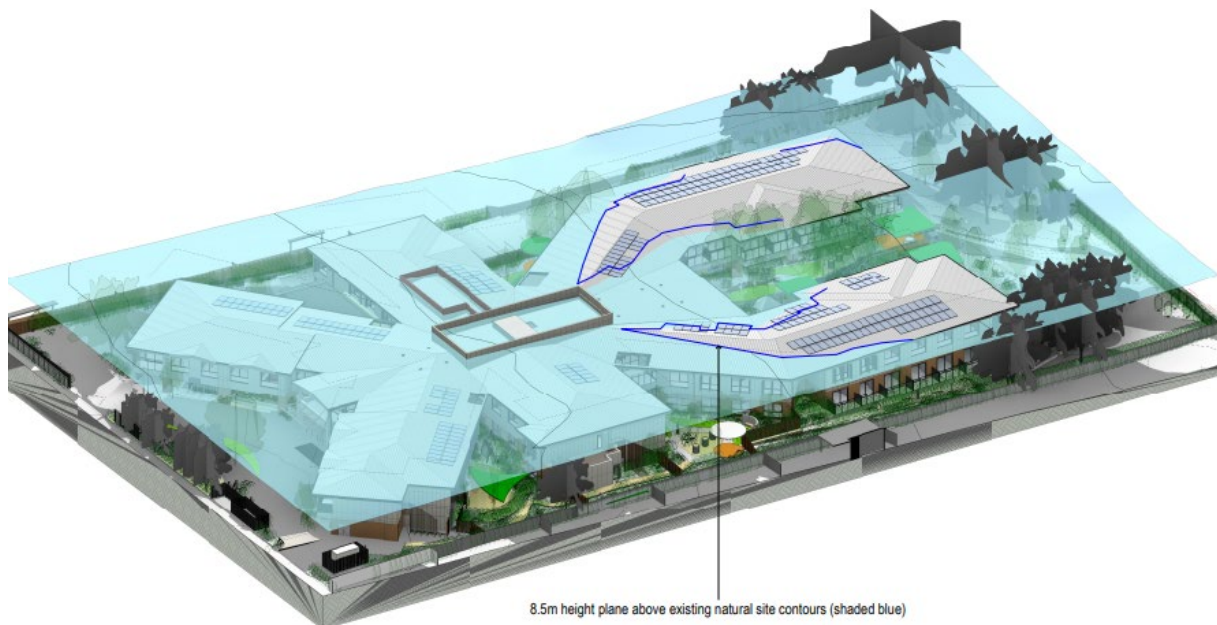


Diagram 1 –showing non-compliance in the area of plant room and roof to the north

The areas of non-compliance are the roof form at the north eastern and north western ends of the building and the roof plant enclosure in the centre of the building. The north western part of the building is setback some 23 metres from the northern boundary adjoining the motorway and 13 metres from the western boundary. Non-compliant roof areas adjoin vacant land expected to be developed for residential purposes subject to managing stormwater flows. The north eastern part of the building is setback some 26 metres from the northern boundary adjoining the motorway and 6 metres from the western boundary. Non-compliant roof areas adjoin a local park.

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

The objectives of the height of buildings clause are:

- (a) to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
- (c) to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- (d) to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

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

4.3.1 The proposal is consistent with the intent of the standard

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

In relation to Objective (a):

The height, bulk and scale of development is compatible with the existing and desired future character of the locality and is appropriate for the context for the following reasons:

- The building facades to the street and to side and rear boundaries are highly articulated and broken onto different components:
- The materials of each of the building components provide further articulation with weatherboard panels, coloured fibre cement panels, glass, metal panels and brick. Sun blades and hoods provide additional articulation to the façade.
- All components are grounded by a brick base (also preferred for maintenance purposes) and the panels on level one are differentiated by contrasting elements. The sitting rooms also have their own colour that continues inside. Timber look battens and aluminium blades and screens are applied to the façade.
- Separate building components and recesses create breaks in the elevation. These changes reduce the perceived length of the building.
- Generous setbacks are provided to all boundaries and the building complies with the building controls except to the north of the site where there are no adjoining residential buildings.

The bulk and scale and visual impact of the building is acceptable having regard to the articulated façade design, the building setback and the opportunities for landscaping.

The building design and on site arrangement will result in development that is consistent with the character of the St Clair locality.

In relation to Objective (b):

The proposed additional height has minimal visual impact for the following reasons:

- The non-compliance relates predominantly to the roof and roof mounted plant;
- The non-compliant elements of the building are mostly recessed behind the building façade and eaves height and thus would not generally be visible from the adjoining public domain or from adjoining sites;
- The non-compliant plant elements are integrated into the design of the building with the plant areas recessed into the roof with roof cut-outs provided for plant areas which are to be screened;
- The building has been designed with a pitch roof form consistent with the residential character of the area;
- There is no significant loss of views created by the non-compliance;
- Impacts on solar access to the adjoining park and to adjoining residences have been minimised by building setbacks and orientation;
- Privacy of adjoining residences is maintained and is not impacted by the extent of non-compliance;
- The non-compliance is minimal and localised.

In relation to Objective (c):

The development does not affect any heritage items, heritage conservation areas or areas of scenic or visual importance.

In relation to Objective (d):

The development provides an appropriate transition in urban form through the provision of generous setbacks and maintaining a two storey built form. The relationship with adjoining lands enables an appropriate transition from the proposed development to adjoining development including open space and dwelling houses.

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

The extent of non-compliance is limited to part of the building as outlined in Section 4.1. Non-compliance with the 8.5 metres maximum building height standard in Clause 4.3 of the PLEP is acceptable and reasonable in the circumstances of the case for the following reasons.

- The development will be visually attractive and sympathetic to the existing and emerging character of the area;
- The development is two storeys in height which is compatible with the existing and expected neighbouring development;
- The residential suburb of St Clair includes a number of other land uses set in a detached residential environment including churches (St Clair Anglican, St Clair Uniting, Holy Spirit Catholic), schools (St Clair public and high schools, Clairgate public, Blackwell public, Holy Spirit), child care centres (Stepping Stones, Little Smarties, Academy, Kindana) and the shopping centres. These more institutional forms also influence the character and diversity of built form in the area;
- The development has an attractive and appropriate presentation to the street;

- The bulk and scale of the building is considered appropriate;
- The site is of sufficient size at 10,570 square metres to accommodate the proposed development;
- The proposed RCF will meet an important social need in providing aged care services in the new establishing local community.

The development will maintain the neighbourhood amenity and character of the local area presenting as a two storey building in a landscaped setting.

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

In this instance the context of the site is important particularly in terms of streetscape character, desired future character and the objective of the R2 Low Density Residential Zone - *to provide for the housing needs of the community within a low density residential environment*. It occupies a large site atypical of the area and is for a residential care facility being the only form of seniors housing permitted in the R2 zone.

4.3.3 The non-compliance results in a better planning outcome

The non-compliance results in a better planning outcome in that it facilitates the provision of a well-designed and functional residential care facility seniors housing in an established neighbourhood.

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

4.3.4 There is an absence of significant adverse impact

There is an absence of significant adverse impacts for the reasons set out above in 4.3.1 and 4.3.2 above. The proposal will result in no significant adverse environmental planning impacts as a consequence of non-compliance with the standard.

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

The focus of this question is on the element of the development that contravenes the development standard, in this case the height of the roof form and plant. The contravention of the maximum building height development standard is justified on environmental planning grounds specific to this development for the following reasons (and for the reasons outlined in 4.3 above):

- As is shown in the survey plan, and as shown in the drawings and sections submitted with this proposal, the existing ground level of the site slopes up from south to north. The ground floor level of the building was set by the need to allow level vehicular and pedestrian access from Explorers Way.
- Because the development is for a residential aged care facility, it is appropriate that the floor levels are at a consistent RL, thus avoiding the need for ramps and stairs

within the building and at the main entry to the building from the street which would otherwise cause accessibility and potential health and safety issues for residents.

- This results in a ground floor level of the building at RL55.8 metres. The ceiling height requirements, structure and services within the ceiling spaces inform the architectural design. A dimension of 3.5m floor to floor is required to accommodate ceiling space, services and structure. Once these levels are determined, the roof form is designed across the facility. The roof form is mostly below the 8.5m height limit.
- These carefully considered design factors lead to circumstances where the roof breaches the height standard in the north eastern and north western wings of the building.
- The plant which is non-compliant with the height standard services the building.
- The plant has been deliberately located approximately at the centre of the building so that it minimises the length and size of ducting needed to service the building.
- The plant, which consists of air conditioning plant, is located on the roof so as to achieve the most operationally efficient and unobtrusive outcome.
- Air conditioning units were selected to be the minimum size required to enable satisfactory ventilation of the building in accordance to both AS1668.2 and Opal standards. The small protrusion above the maximum height of building development standard includes an exhaust duct which is part of the unit heat exchanger which enables system to reclaim exhaust energy that would otherwise be wasted. This is an important component of fresh air processing unit that will greatly improve system energy efficiency to reduce carbon foot emission.
- The roof form and plant are acceptable in terms of bulk and scale.
- The extent to which the roof and plant exceeds the maximum building height does not change the relationship of the development to adjoining land.
- It is considered that there will be no significant adverse amenity impacts arising from the extent to which the building exceeds the maximum building height development standard in relation to overlooking, overshadowing, obstruction of light or air, obstruction of views or any other such impacts on nearby existing or future residential properties as a result of the height of the plant.

The height of the building where it exceeds the development standard is considered to be consistent with the objectives of relevant planning instrument and will result in no significant adverse environmental planning impacts. The need for a residential care facility to be constructed with a level building floor plate and the need for efficiently located plant results in a building height that departs from the maximum building height development standard by 1.8m and the contravention of the development standard by the roof and plant height is therefore justifiable on environmental planning grounds.

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

Yes. As discussed in S4.3 and 4.4 above, there are proper planning grounds to vary the standard in the circumstances of this case.

5. IS THE DEVELOPMENT IN THE PUBLIC INTEREST BECAUSE IT IS CONSISTENT WITH THE OBJECTIVES OF THE HEIGHT STANDARD AND THE OBJECTIVES FOR DEVELOPMENT WITHIN THE ZONE IN WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT?

5.1 Consistency with the objectives of the standard

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

5.2 Consistent with the objectives of the zone

The site is located within a R2 Low Density Residential Zone. The objectives of this zone are as follows:

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.
- To enhance the essential character and identity of established residential areas.
- To ensure a high level of residential amenity is achieved and maintained.

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

- the proposal meets community needs for residential care facility accommodation for frail aged within a low density residential environment;
- it complements the low density residential character of the surrounding area and is compatible with the character and identity of the established St Clair residential area; and
- it provides a high level of residential amenity to future residents and protects the amenity of adjoining residences.

6. THE 'FIVE PART TEST'

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

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

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

In relation to point (1):-

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

In relation to point (2):-

No reliance is placed on this point. When assessed against the underlying objective of the standard, the proposal satisfies the intent in terms of suitability in relation to neighbourhood amenity and character with no adverse impacts.

In relation to point (3):-

No reliance is placed on this point.

In relation to point (4):-

No reliance is placed on this point.

In relation to point (5):-

No reliance is placed on this point.

In *Initial Action*, the Chief Judge clarified that an applicant does not need to establish all of the 5 elements above but that if more than one part of the 5 part test was relevant, this would suggest that compliance with the development standard is certainly unreasonable or unnecessary. In this regard, the Chief Judge said:

These five ways are not exhaustive of the ways in which an applicant might demonstrate that ‘compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways.

7. CONCLUSION

Compliance with the maximum building height development standard in Clause 4.3 of PLEP is unreasonable and unnecessary in the circumstances of this case.

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

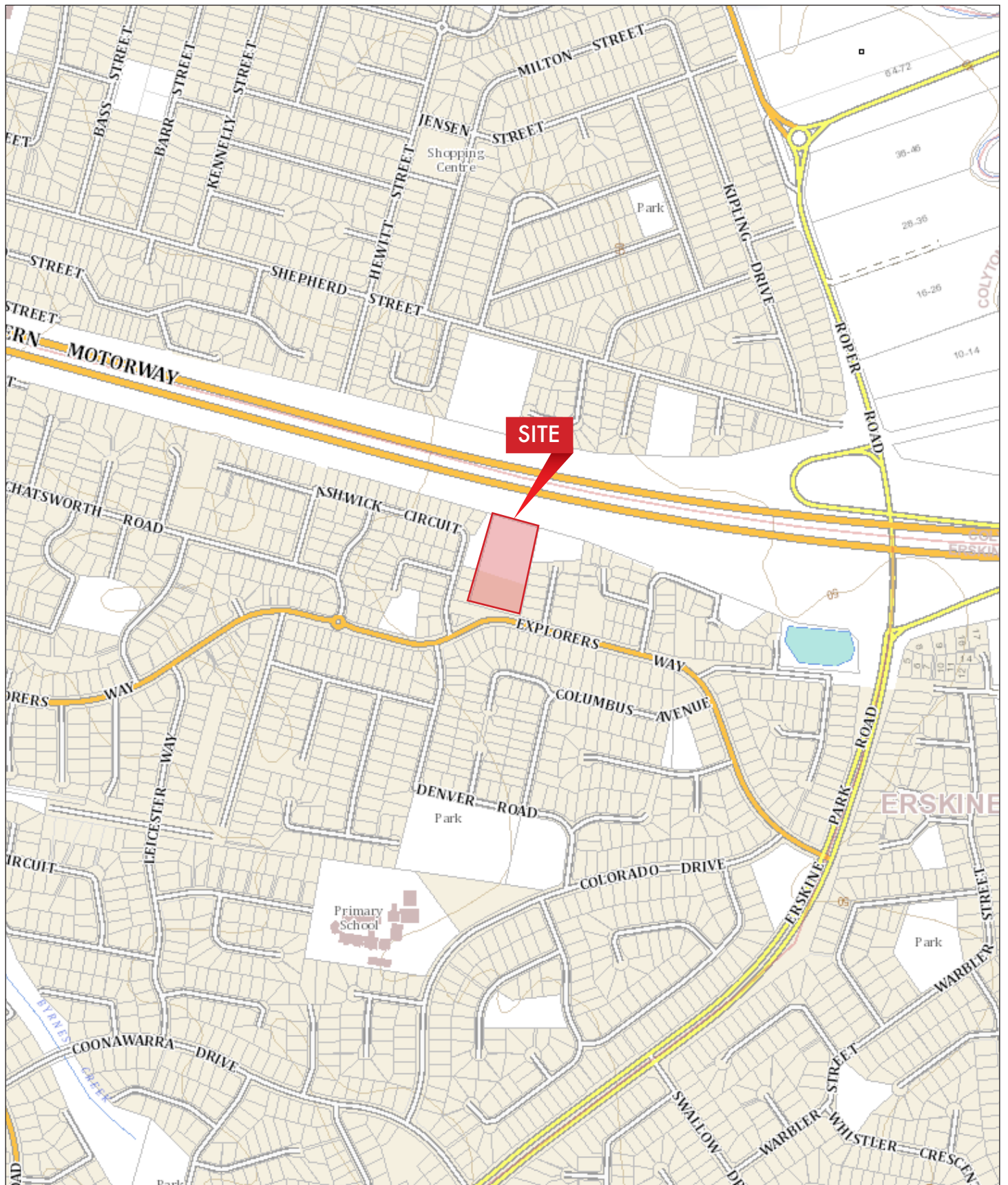
Further, consistently with the objectives of clause 4.6, it is considered that strict adherence to the development standard to this particular development is not warranted and relaxing the standard results in a better development.

The objection to the standard Clause 4.3 of PLEP is well founded for the following reasons:

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



Figures



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



STATEMENT OF ENVIRONMENTAL EFFECTS
94-100 Explorers Way, St Clair

FIGURE 1
Location

Prepared For - Opal Aged Care



CONSULTING PLANNERS



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

STATEMENT OF ENVIRONMENTAL EFFECTS
94-100 Explorers Way, St Clair

FIGURE 2
Site

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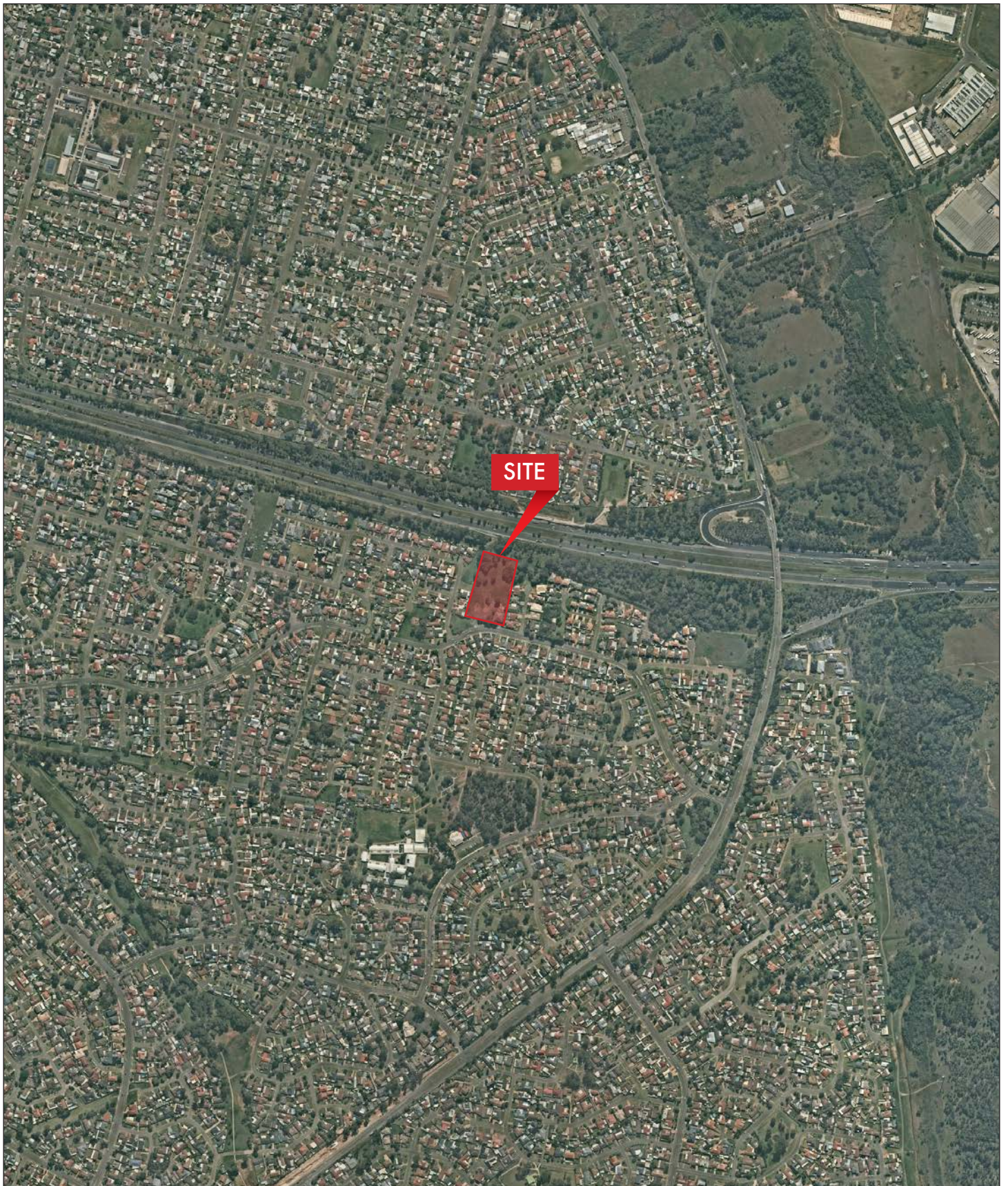
Source: NearMap 7 April 2019

STATEMENT OF ENVIRONMENTAL EFFECTS
94-100 Explorers Way, St Clair

FIGURE 3A
Aerial Photo - Detail

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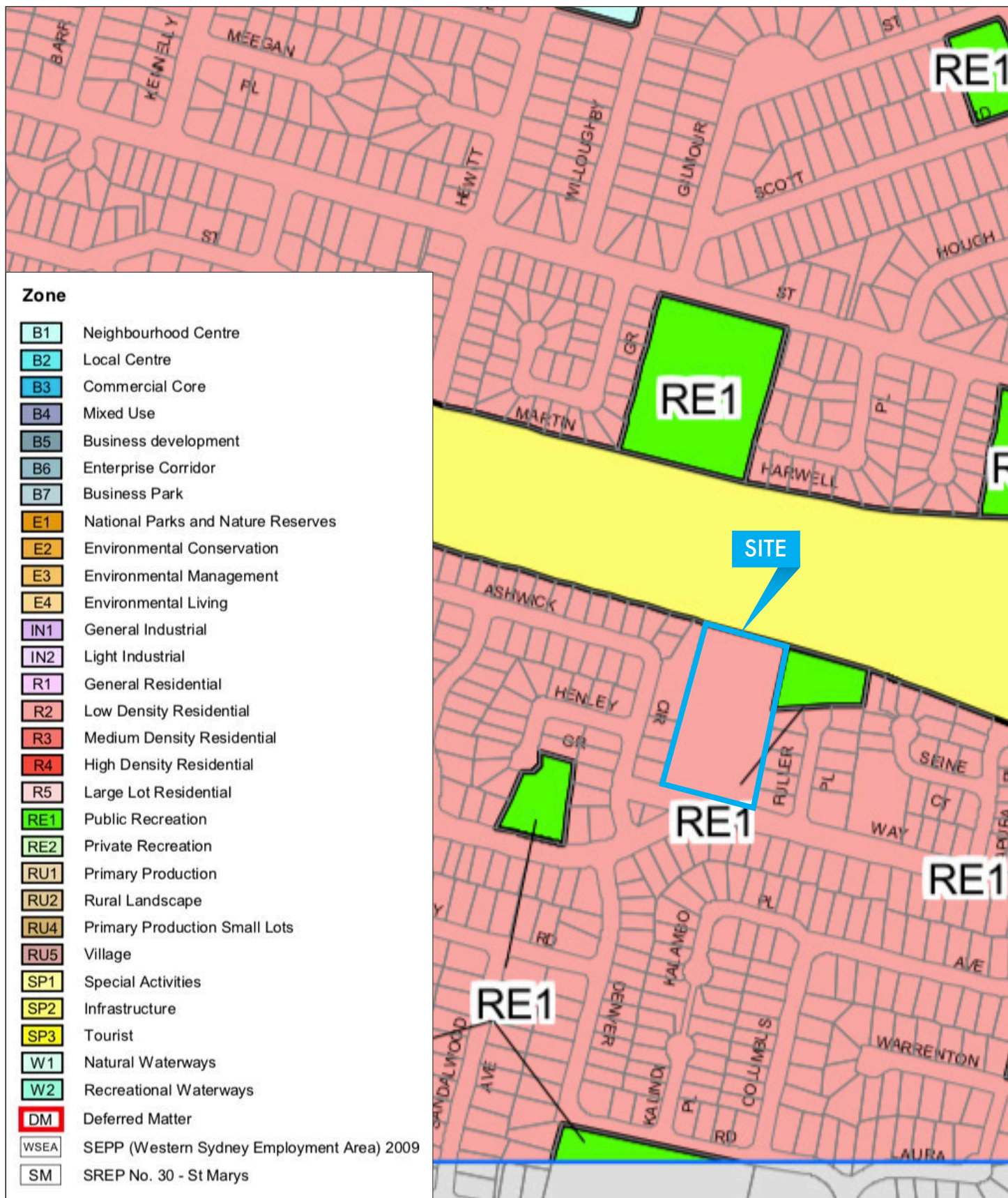
Source: NearMap 7 April 2019

STATEMENT OF ENVIRONMENTAL EFFECTS
94-100 Explorers Way, St Clair

FIGURE 3B
Aerial Photo - Wider Area

Prepared For - Opal Aged Care





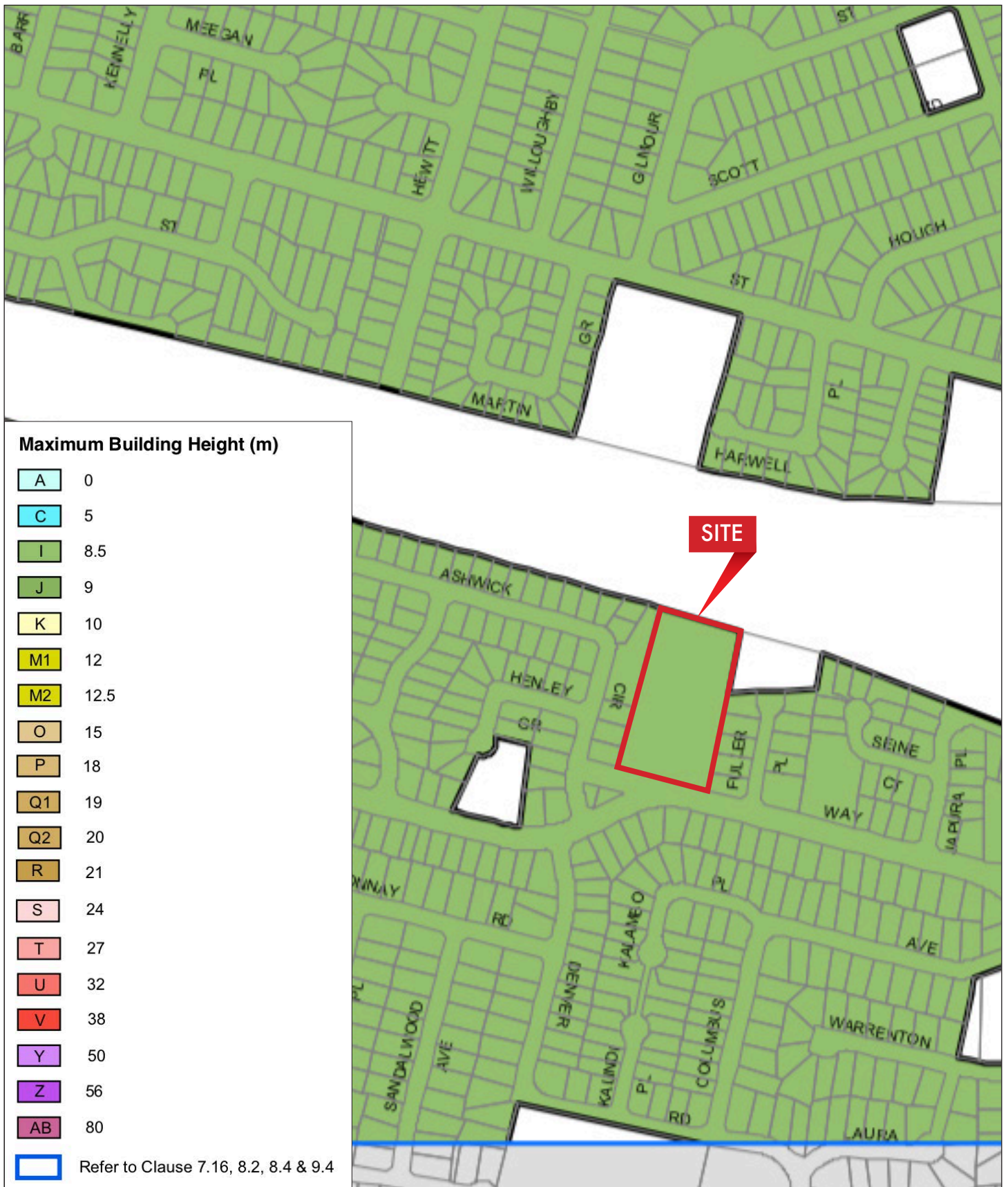
STATEMENT OF ENVIRONMENTAL EFFECTS

94-100 Explorers Way, St Clair

FIGURE 4A

Zoning Map - Penrith LEP 2010

Prepared For - Opal Aged Care



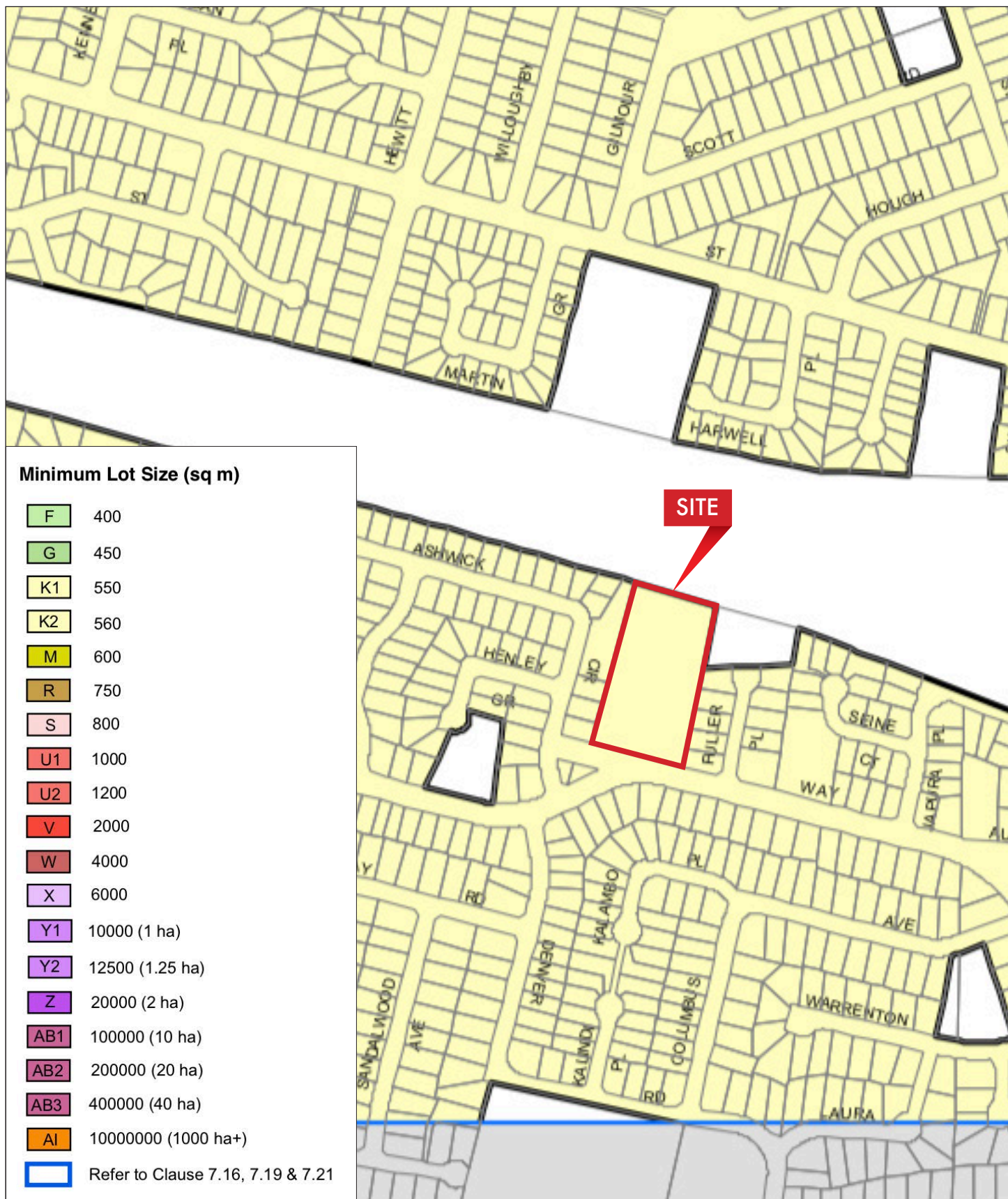
STATEMENT OF ENVIRONMENTAL EFFECTS

94-100 Explorers Way, St Clair

FIGURE 4B

Height of Buildings Map - Penrith LEP 2010

Prepared For - Opal Aged Care



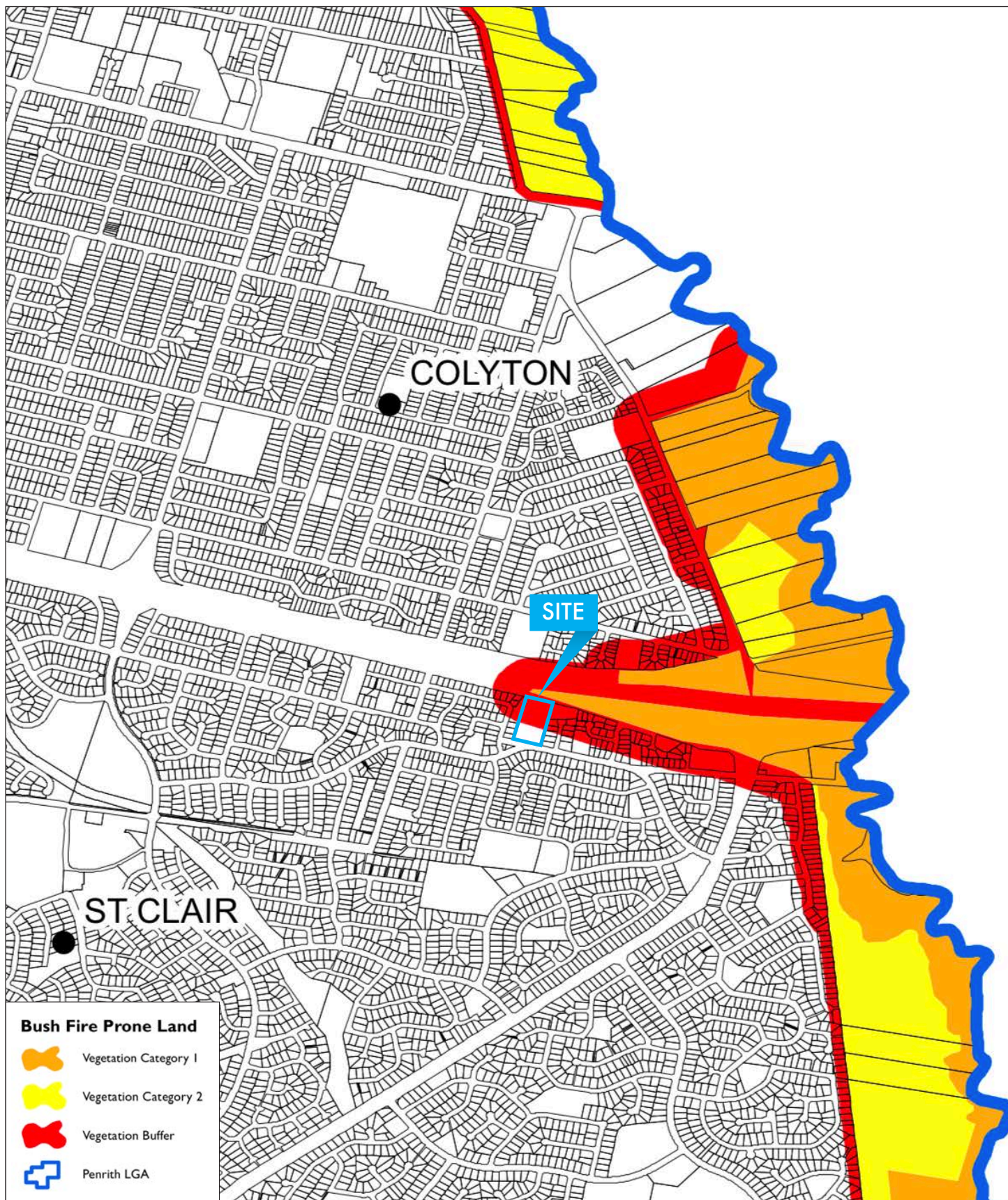
STATEMENT OF ENVIRONMENTAL EFFECTS

94-100 Explorers Way, St Clair

FIGURE 4C

Lot Size Map - Penrith LEP 2010

Prepared For - Opal Aged Care



STATEMENT OF ENVIRONMENTAL EFFECTS
94-100 Explorers Way, St Clair

FIGURE 5
Bushfire Prone Land Map - NSW Rural Fire Service

Prepared For - Opal Aged Care