

2019NTH015

DA 10.2018.650.1 Mixed use development, Jonson Street, Byron Bay

ATTACHMENTS TO COUNCIL REPORT

3. CLAUSE 4.6 VARIATION REQUEST – BUILDING HEIGHT

**CLAUSE 4.6 VARIATION
REQUEST
BYRON LEP 2014
CL. [4.3] [BUILDING HEIGHT]**

**98-106 JONSON STREET,
BYRON BAY**

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1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of *Mercato on Byron Pty Ltd*, the applicant for a development application comprising the demolition of the existing building and associated car parking on the site and construction of a mixed-use development comprising tourist and visitor accommodation, function centre and retail premises (shop and food and drink premises).

The request seeks to vary the maximum height of building development standard prescribed for the subject site under Clause 4.3 of the *Byron Local Environmental Plan 2014* (BLEP 2014).

The variation request is made pursuant to Clause 4.6 of the BLEP 2014.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF BYRON LOCAL ENVIRONMENTAL PLAN 2014

Clause 4.6 of BLEP 2014 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that 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, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document is a Clause 4.6 written request as required by clause 4.6(3) and seeks to justify the contravention of the height of buildings development standard in Clause 4.3. The assessment of the proposed variation has been undertaken in accordance with the requirements of the BLEP 2014, Clause 4.6 Exceptions to Development Standards.

2.2. RELEVANT TEST TO BE APPLIED

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgments have refined the manner in which variations to development standards are required to be approached.

The correct approach to a request under clause 4.6 is set out in the Land and Environment Court decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. Preston CJ set out the test in paragraphs [13] to [29] of that judgment.

This clause 4.6 request has been prepared in accordance with the approach described by Preston CJ.

3. CLAUSE 4.6 VARIATION REQUEST: (HEIGHT OF BUILDINGS)

The following sections of the report provide an assessment of the request to vary the development standard relating to the height of buildings in accordance with Clause 4.6 of BLEP 2014.

3.1. CLAUSE 4.3 (HEIGHT OF BUILDINGS)

The height of buildings development standard under BLEP 2014 is 11.5m. This development standard will be contravened by the proposed development.

Clause 4.3(2) of BLEP 2014 which describes the development standard relating to height of buildings is as follows:

(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 objectives of the development standard as per subclause 4.3(1) of BLEP 2014 are as follows:

- a) *to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,*
- b) *to ensure the height of buildings complements the streetscape and character of the area in which the buildings are located,*
- c) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.*

3.2. VARIATION TO HEIGHT OF BUILDINGS DEVELOPMENT STANDARD

The Height of Buildings Map sets a height of buildings standard of 11.5m across the site. The building proposed as part of this DA is subject to the maximum 11.5m height control.

Michel Group Services have reviewed the Level and Feature Survey that they prepared prior to the construction of the Mercato on Byron Shopping Centre. The Level and Feature Survey identifies the existing ground level across the site. From this plan, they have determined that the *Ground Level (Existing)*, as defined by the BLEP 2014.

The project Surveyor and Architect have collaborated to ensure that the existing ground level and maximum building height plane is accurately documented. This equates to the following maximum building heights:

- Jonson Street (North): The subject building of this report
 - Excluding Parapet: RL 14.3 (10.5m)
 - Including Parapet: RL 14.5 (10.7m)
 - Balustrade (setback): RL 14.8 (11m)
- Rear (West)
 - Excluding Parapet: RL 14.3 (10.7m)
 - Including Parapet: RL 14.5 (10.9m)
 - Balustrade (setback): RL 14.8 (11.2m)

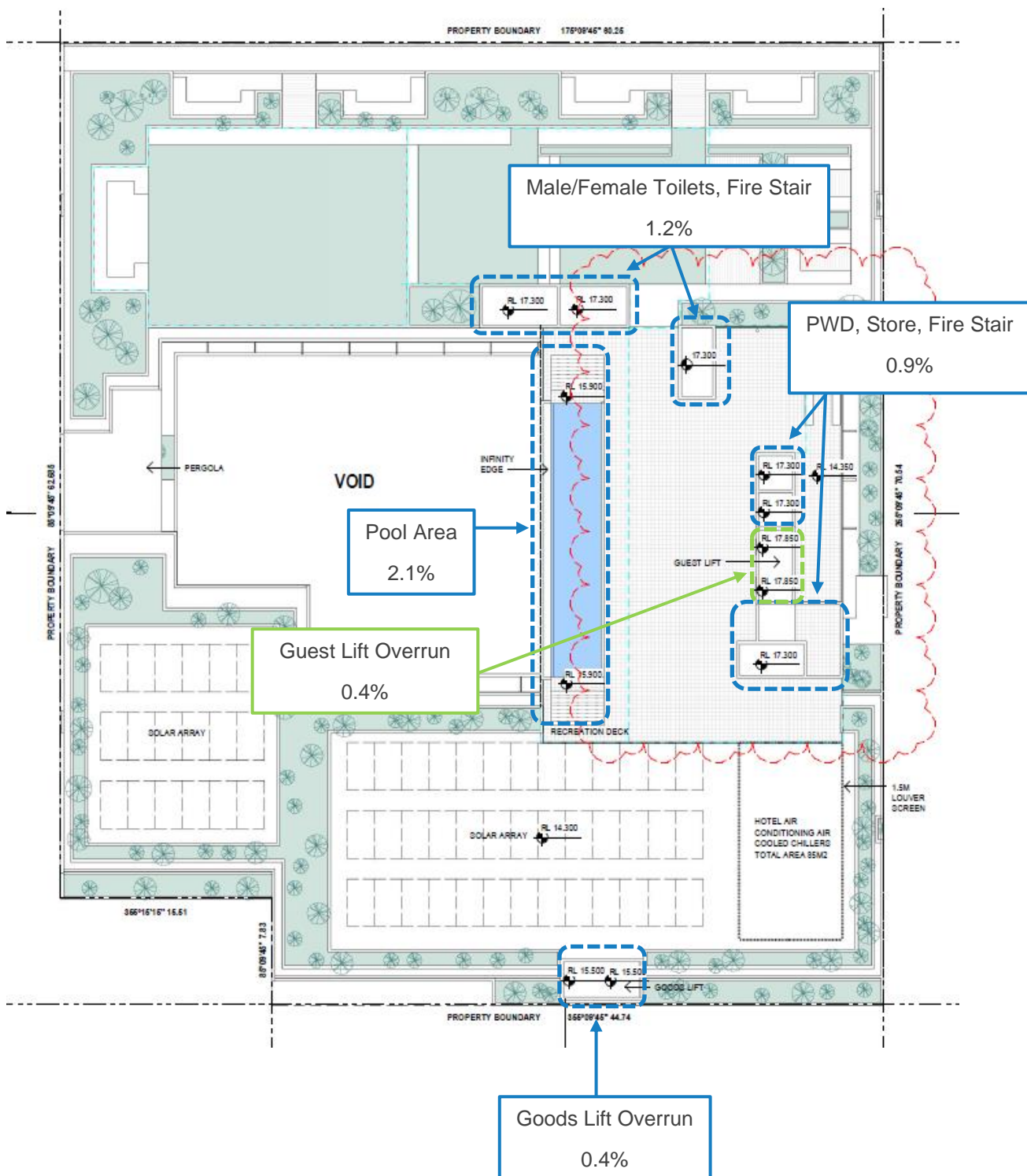
The maximum heights are identified in **Table 1** and **Figure 2**.

Table 1 – Proposed Maximum Heights

Proposed Hotel – Design Levels	Existing Ground Level RL	Maximum Allowed Building Height RL	Height of Building RL	Height (m)	Building Height Above Allowed Maximum	% Height Above Area/Total Building Footprint Area of 4094m²
Goods Lift Overrun	3.6	15.1	15.50	11.9m	0.40	0.4%
Pool Area	3.8	15.3	15.90	12.1m	0.60	2.1%
PWD, Store, Fire Stair	3.8	15.3	17.30	13.5m	2.00	0.9%
Female/Male Toilet, Fire Stair	3.8	15.3	17.30	13.5m	2.00	1.2%
Guests Lift Overrun	3.8	15.3	17.85	14.05m	2.55	0.4%
TOTAL						5%

The partially rooved recreational amenities for the hotel, namely, a pool, rooftop bar and associated amenities contravene the development standard. The passenger and goods lifts, which provide access to the rooftop also exceed the development standard. With the exception of the lift overrun on the western boundary, the parts of the building that exceed 11.5m have been setback from parapet.

Figure 1 – Roof Plan



3.3. KEY QUESTIONS

Is the Planning Control a Development Standard?

The height of buildings control prescribed under Clause 4.3 of the BLEP 2014 is a development standard capable of being varied under Clause 4.6 of BLEP 2014.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 as it is not listed within Clause 4.6(6) or Clause 4.6(8) of BLEP 2014.

What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the relevant LEP as set out in **Section 3.4** of this letter.

3.4. CONSIDERATIONS

3.4.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the 'five-part test' outlined in *Wehbe v Pittwater [2007] NSWLEC 827*.

An applicant does not need to establish all of the tests or 'ways'. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

This test was upheld by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 who stated at [12] and [13] of that judgement:

12. As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

13. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

The development is justified against the first of the Wehbe tests as set out below.

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objectives of the development standard as outlined within **Table 2**.

Table 2 – Assessment of consistency with the objectives of the standard

Objectives	Assessment
<i>To achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,</i>	<p>Objective (a) of the standard is a restatement of the standard, which is not met. However, clause 4.6 allows the standard to be exceeded (in certain circumstances).</p> <p>The proposed components that exceed the height standard comprise just 5% of the site area. The components of the building that exceed the height control are associated with lift overruns, the pool deck and the roof over the outdoor bar and recreation area. The roof level comprises just 70m² GFA which consists of storage and bathrooms.</p>
<i>To ensure the height of buildings complements the streetscape and character of the area in which the buildings are located,</i>	<p>As demonstrated in the Height Analysis Plans at Appendix A, the proposal complies with 11.5m development standard fronting Jonson Street. The proposed parapet also complies at the northern and southern (side) boundaries. With the exception of a minor 0.4m exceedance associated with the western lift overrun, the western (rear) parapet complies.</p> <p>The balustrading proposed around the perimeter of the roof level is also located below 11.5m. With a consistent RL of 14.8, the height of the balustrade ranges between 11m to 11.2m above Ground Level (Existing).</p> <p>The perspectives demonstrate that the proposed height to Jonson Street is appropriate and is consistent with the Mercato on Byron Shopping Centre.</p> <p>The components of the building that exceed the height control are associated with lift overruns, the pool area, the lift overruns and the bathroom facilities. With the exception of the minor variation associated with the goods lift, the remaining components that exceed 11.5m are setback from the parapet. The perspectives at Appendix A demonstrate that these will not be readily (if at all) visible from surrounding streets.</p> <p>The proposal is consistent with the use and intensity of built form anticipated in this part of Byron Bay, being the main commercial street of the town. As detailed above, the street parapet height is less than the maximum permitted and the development is of a similar bulk and scale to the neighbouring development.</p> <p>The area in which the proposed development is located is along the main commercial street of Byron Bay whereby it contains the core of retail, commercial and tourist businesses. The character intent of the area reflects this primary local centre function.</p> <p>The BLEP 2014 states the maximum building height for the area is 11.5m, however, it is noted there have been a number of other</p>

developments in the locality which appear to exceed the 11.5m development standard. As documented in **Appendix B**, these include:

- 1 Byron Street: 12.89 to 13.08m
- 6 Marvell Street: 12.08m
- 11 Marvell Street: 13.35m
- 156 Jonson Street: 11.8m to 13.35m
- 108-112 Jonson Street: 12.48m

These buildings are shown in **Figure 3** and **Figure 4**.

In relation to the future character, a mixed use development (predominantly comprising tourist and visitor accommodation) at 4 Marvell Street, Byron Bay (primary a tourist hotel) was approved on 27 June 2019 subject to conditions (NSWLEC 1297). This approval includes the following height exceedances:

- Lift overrun to a maximum height of 13.87m (a 20.61% exceedance);
- Roof over the rooftop deck to a maximum height of 12.67 (a 10.17% exceedance); and
- Up to 12.09m to the top of the pool deck (a 5.13% exceedance).

As per the proposed the development, the main roof over the building is height complaint. The rooftop elements and lift overrun breach the limit and constitute a partial fourth storey. The approved exceedances are generally consistent with the exceedances as part of this DA.

In the context of the existing built form, the height of the proposal is considered appropriate and compatible with the existing and future character of the locality.

To minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.

Visual Impact

A comprehensive visual analysis has been prepared at **Attachment A**. This includes views towards the development from surrounding streets including:

- Carlyle Street;
- Jonson Street; and
- Butler Street.

As above, when viewed from Jonson Street the components that exceed the building height plane are unlikely to be visible from the northern or southern approach. Similarly, as demonstrated by the section at **Figure 2**, these components are not visible from the opposite side of Jonson Street.

On approach from Carlyle Street, glimpses of the components above the height control would be visible. However, the existing street trees

	<p>are expected to filter most of this view. Again, the significant setback would ensure that these elements are not dominant.</p> <p>The perspectives demonstrate that from the northern end of Butler Street, the landscaping on the roof would be visible. It is noted that the perspectives do not include the existing dense vegetation and trees that separate the site and Butler Street. These are expected to block any view of the proposal from this location.</p> <p>When looking towards the site from the southern end of Butler Street, the perspective demonstrates that the proposal is consistent in form and scale to the neighbouring shopping centre. Whilst, the lift overrun and outdoor roof area is visible in the perspective, the dense vegetation and trees are expected to block any view of the proposal from this location.</p> <p>Privacy</p> <p>The components that exceed 11.5m are located at the roof level. There are no adverse privacy impacts associated with these building components, noting that the:</p> <ul style="list-style-type: none"> • The fire stair, storage area and lift overruns do not result in privacy impacts. • The swimming pool is located within the centre of the site and significantly separated from surrounding uses, noting that the nearest residential use is approximately 80m from this point. <p>Solar Impacts</p> <p>The proposed development is located on Jonson Street north of the Mercato on Byron Shopping centre. The proposed development therefore has integrated with the development to the south and is not at risk of creating shadow impacts as it will only shadow the shopping centre.</p> <p>To the west the site is adjoined by the Byron Railway corridor, which is currently undeveloped, underutilised land that currently does not have any activity and therefore will not be affected by the components that exceed the height.</p>
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Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

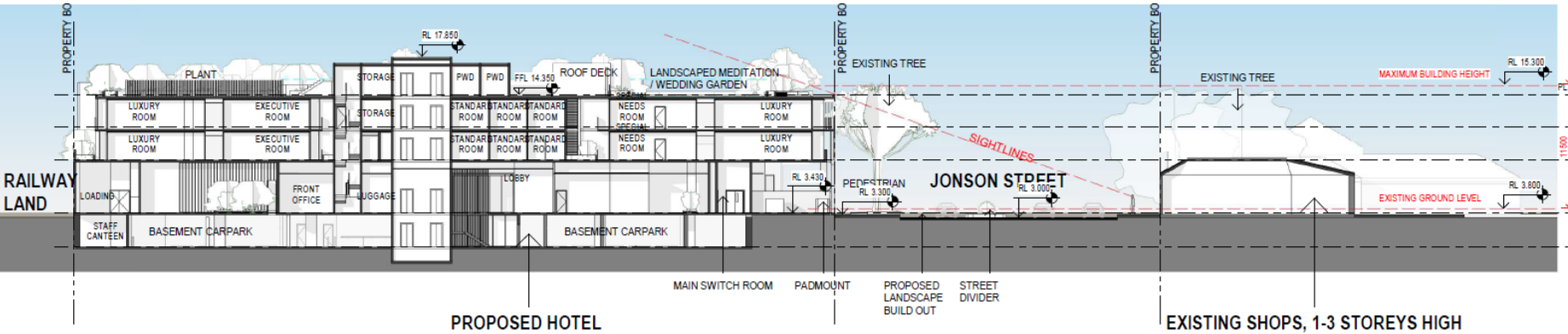
Test 4: The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable

Not relied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Not relied upon.

Figure 2 – Street Section



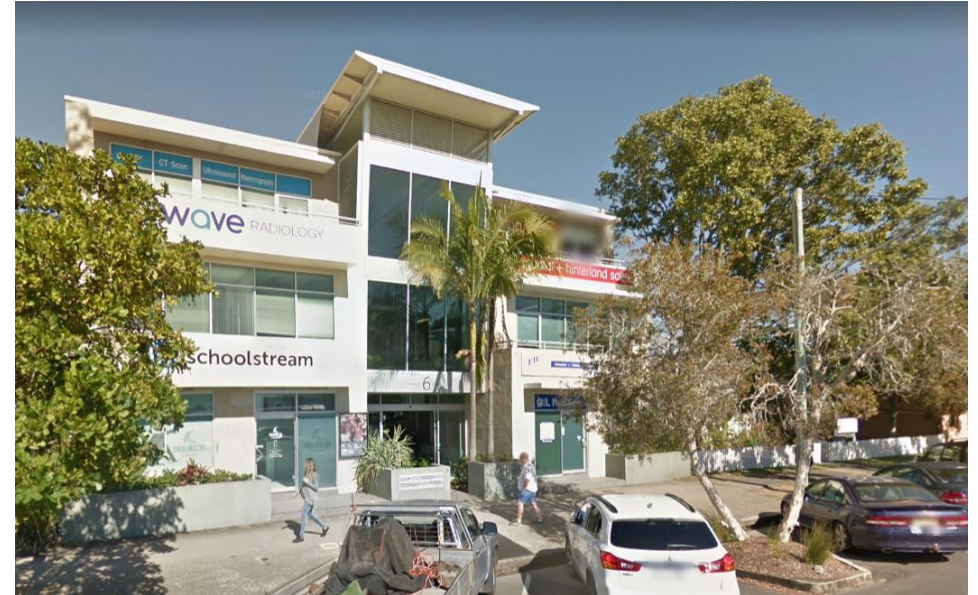
Source: NRA Collaborative

Figure 3 – Photographs of Other Sites Which Exceed the Height Standard



Picture 1 – 1 Byron Street, Byron Bay

Source: Google Earth



Picture 2 – 6 Marvell Street, Byron Bay

Source: Google Earth

Figure 4 – Photographs of Other Sites Which Exceed the Height Standard



Picture 3 – 11 Marvell Street, Byron Bay
Source: Google Earth



Picture 4 – 156 Jonson Street, Byron Bay
Source: Google Earth

3.4.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variations to the development standard. The additional building height provides a key benefit to the development, providing internal and functional amenity whilst creating negligible impacts. This is demonstrated in the following points:

- The development is consistent with the objectives of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land by delivering new tourist accommodation, function facilities, retail and entertainment offerings. The full utilisation of the site is reasonable given this is commercial zoned land in the Byron Town Centre, where land is at a premium.
- The proposed development achieves objectives (b) and (c) of the development standard prescribed in clause 4.3 of BLEP 2014 as described in **Section 3.4.1** and achieves the objectives of the B2 Local Centre zone as described within **Table 3**.
- The proposal is consistent with the use and intensity of built form anticipated in this part of Byron Bay, being the main commercial street of the town. The street parapet height is less than the maximum permitted, and the development is of a similar bulk and scale to the neighbouring development. The perspectives demonstrate that the proposed height to Jonson Street is appropriate and is consistent with the Mercato on Byron Shopping Centre.
- The variation to the development standard allows the delivery of an activated and permeable Ground Floor by delivering the hotel amenities on the rooftop. It is reasonable for a hotel of this calibre to deliver a rooftop bar, swimming pool and associated amenities. These are required to be accessed via passenger and goods lifts and consequently a variation is also necessary to accommodate the lift overruns. The rooftop represents the optimal location within the development for these facilities.
- The alternate location for the hotel amenities would be at the Ground Floor. The location at the Ground Floor would compromise the restaurant and conference facilities. The restaurant and conference facilities can be accessed by members of the public and therefore these components are best suited to the Ground Floor.
- All of the hotel rooms are contained below a height of 11.5m. The proposal is for a three storey hotel with rooftop features. Habitable floorspace is not proposed above 11.5m.
- The proposed development has been carefully designed to include structural elements that require additional space within the middle of the rooftop and allowing recreation space to engage with the streetscape. The massing strategy for the site is reasonable appropriate given the mass and scale of the adjoining development shopping centre.
- If the proposed development is to provide private communal open space on the roof level within the building height requirements, it would be mean the development is not able to provide a rooftop pool, terrace and entertainment space, compromising the tourist drawcard and economic opportunity of the proposal.
- The proposed building height will have negligible material impacts compared to a compliant scheme in terms of built form, overshadowing, view impacts as:
 - The use of the roof as proposed is only classified as a storey by technical definition in BLEP 2014 but that use is limited to partially rooved recreational amenities for the hotel, namely, a pool, rooftop bar and associated amenities. The height breach includes lift access to these facilities. Such uses do not materially add to the bulk and scale of the building considering that with the exception of the goods lift, these are all setback and on the main roof. The goods lift is located at the rear of the site and is separated by the Byron Railway corridor.
 - The proposed development is located on Jonson Street, north of the Mercato on Byron Shopping centre. The proposed development therefore has integrated with the development to the south and is not at risk of creating shadow impacts as it will only shadow the shopping centre. To the west the site is adjoined by the Byron Railway corridor which is currently undeveloped, underutilised land that currently does not have any activity and therefore will not be affected by the components that exceed the height.

- The components that exceed 11.5m are located at the roof level. There are no adverse privacy impacts associated with these building components, noting that the fire stair, storage area and lift overruns do not result in privacy impacts. The swimming pool is located within the centre of the site and significantly separated from surrounding uses, noting that the nearest residential use is approximately 80m from this point.
- Given approximately 5% of the building footprint exceeds the 11.5m height control and that these components are, for the most part, setback from the parapet, the proposed variation would result in a negligible reduction in sky views from the public domain. Similarly, for the same reason, impacts on views from private properties are expected to be negligible.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development

3.4.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

The proposed development is consistent with the objectives of the development standard as outlined within **Section 3.4.1.**

The proposal is also consistent with the land use objective that applies to the site under BLEP 2014 as demonstrated within **Table 3** below. The site is located within the B2 Local Centre zone.

Table 3 – Assessment of Compliance with Land Use Zone Objectives

Objective	Compliance
<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area</i>	The development will provide retail and entertainment uses for people who work and visit the local area and entertainment for visitors and locals through the restaurant (food and drink premises). Conference facilities (function centre) will also be available for hire by members of the public. The design has therefore had regard to both occupants and the public.
<i>To encourage employment opportunities in accessible locations</i>	<p>The proposed development encourages employment in an accessible location, being the Byron Town Centre. The variation to the height of building standard allows rooftop recreation and amenities to be provided in an optimal location on the site. These facilities and their placement is anticipated to meet the anticipated demand.</p> <p>The development provides 146 hotel rooms across two levels, with restaurants, function and conference facilities. These uses will create more employment opportunities within Byron Bay</p> <p>The proposal will create further opportunity to support other commercial development within the surrounding area by providing additional hotel beds. Given the location it also provides opportunity to integrate with the adjoining shopping centre and nearby commercial shops. This will encourage employment new opportunities.</p>
<i>To maximise public transport patronage and encourage walking and cycling</i>	It will provide employment opportunities in a location that is reasonably accessible, including by walking and cycling. The site is also located directly adjacent to a bus stop that is catchment to all the major bus services within Byron Bay

Objective	Compliance
<i>To encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises</i>	The proposal will encourage vibrancy, given the uses proposed and with the design at the ground level in particular, and it specifically proposes tourist accommodation above commercial premises (shop and food and drink premises), as the objectives seek.

The proposal is considered to be in the public interest because the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

3.4.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

3.4.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the height of building development standard and the land use zoning objectives despite the non-compliance, and the contravention has been demonstrated to be appropriate and supportable in the circumstances of the case.

As such, there is no public benefit in maintaining the development standard in the circumstances of this case.

3.4.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

The Planning Circular PS 18-003, issued on 21 February 2018, outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.

DISCLAIMER

This report is dated 19 June 2020 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd's (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of *Mercato on Byron Pty Ltd* (**Instructing Party**) for the purpose of Clause 4.6 Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

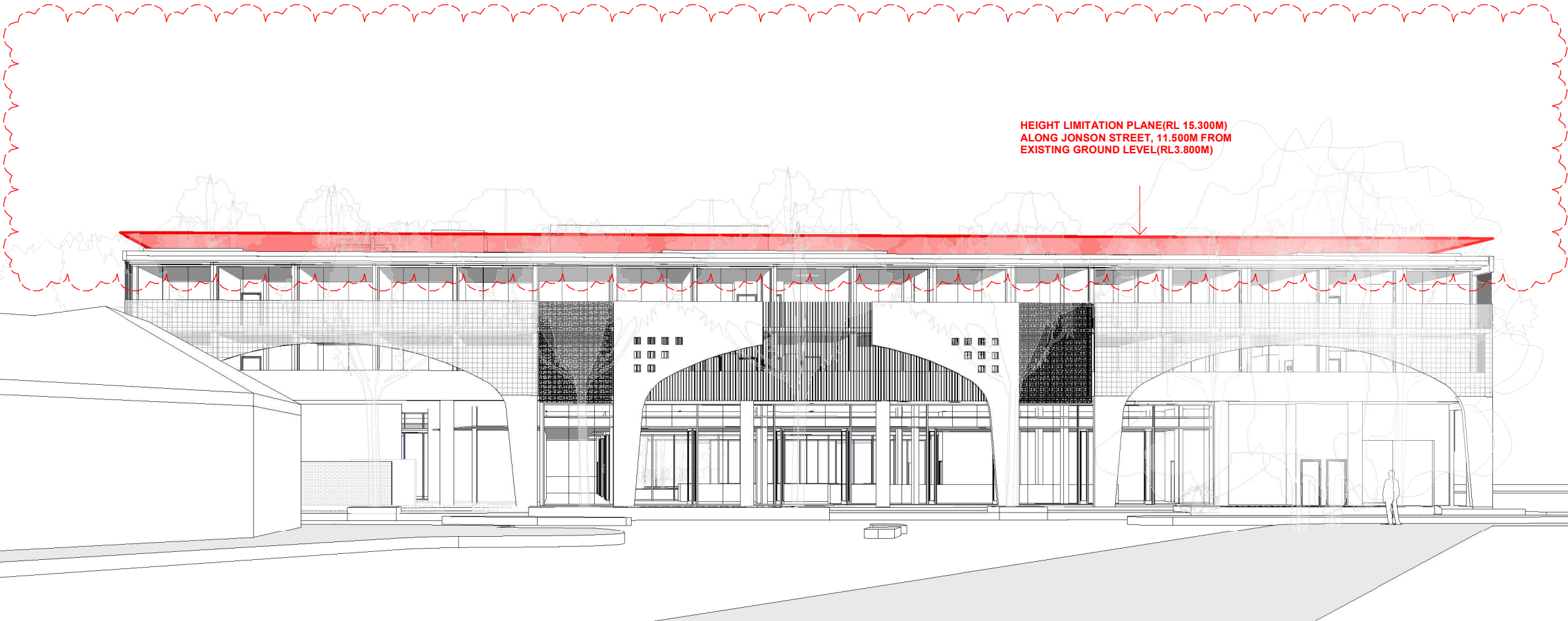
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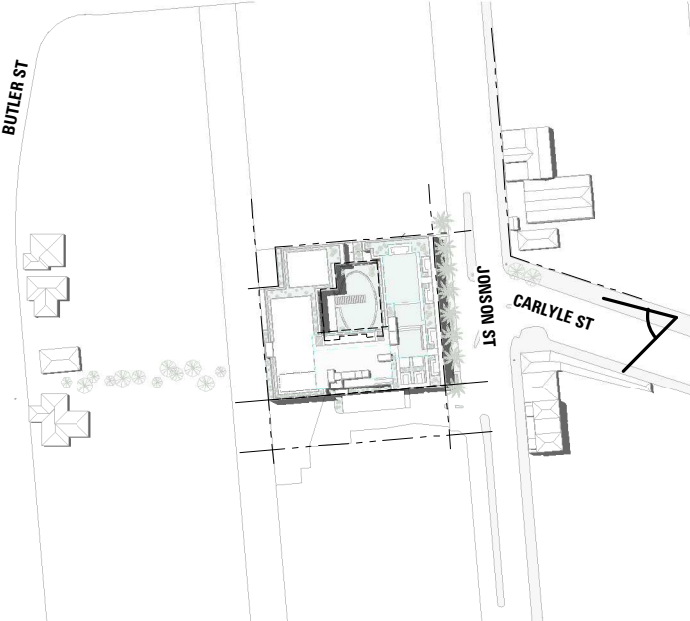
This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

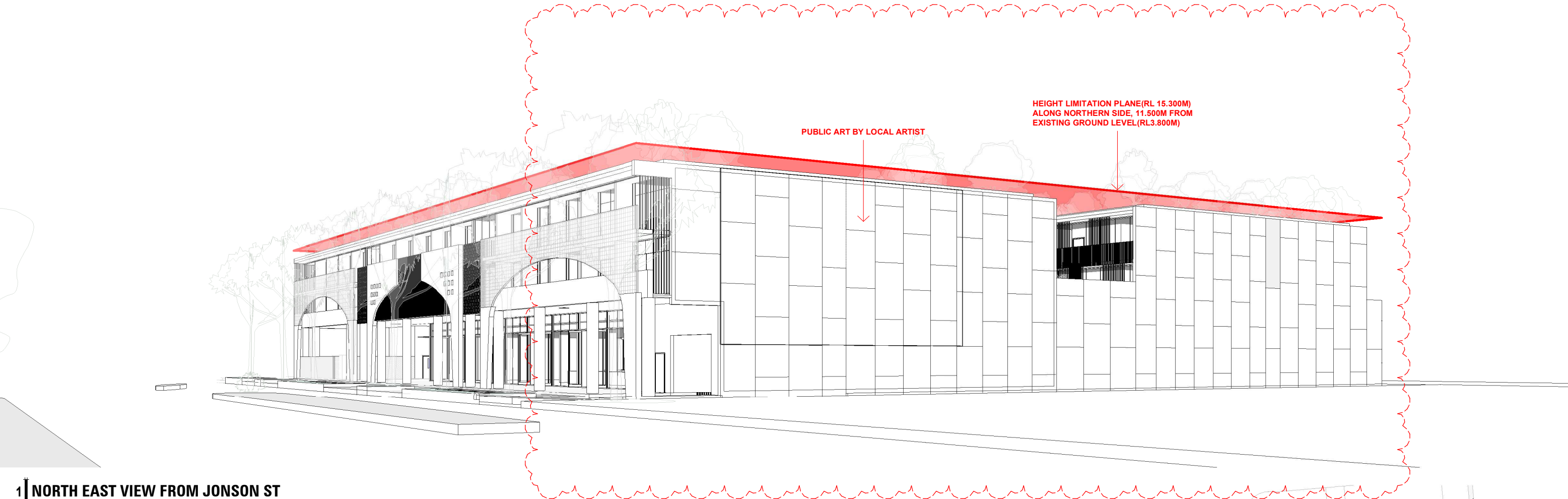
APPENDIX A

BUILDING HEIGHT ANALYSIS DRAWINGS

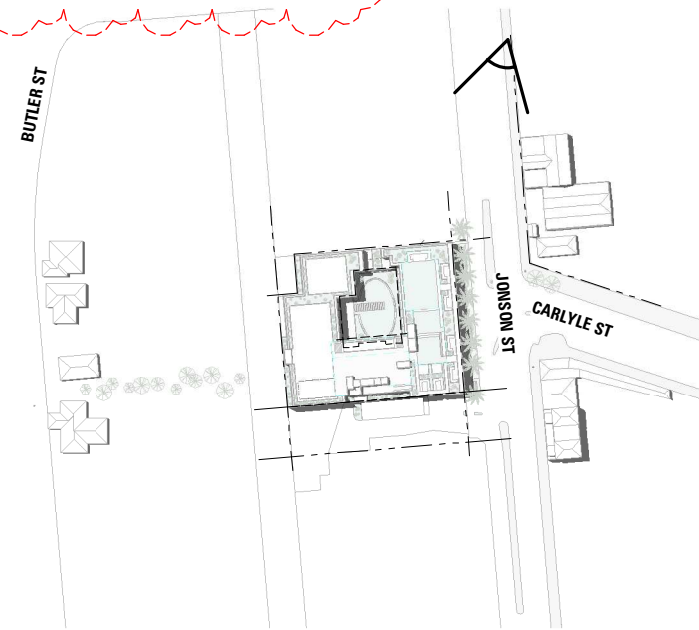


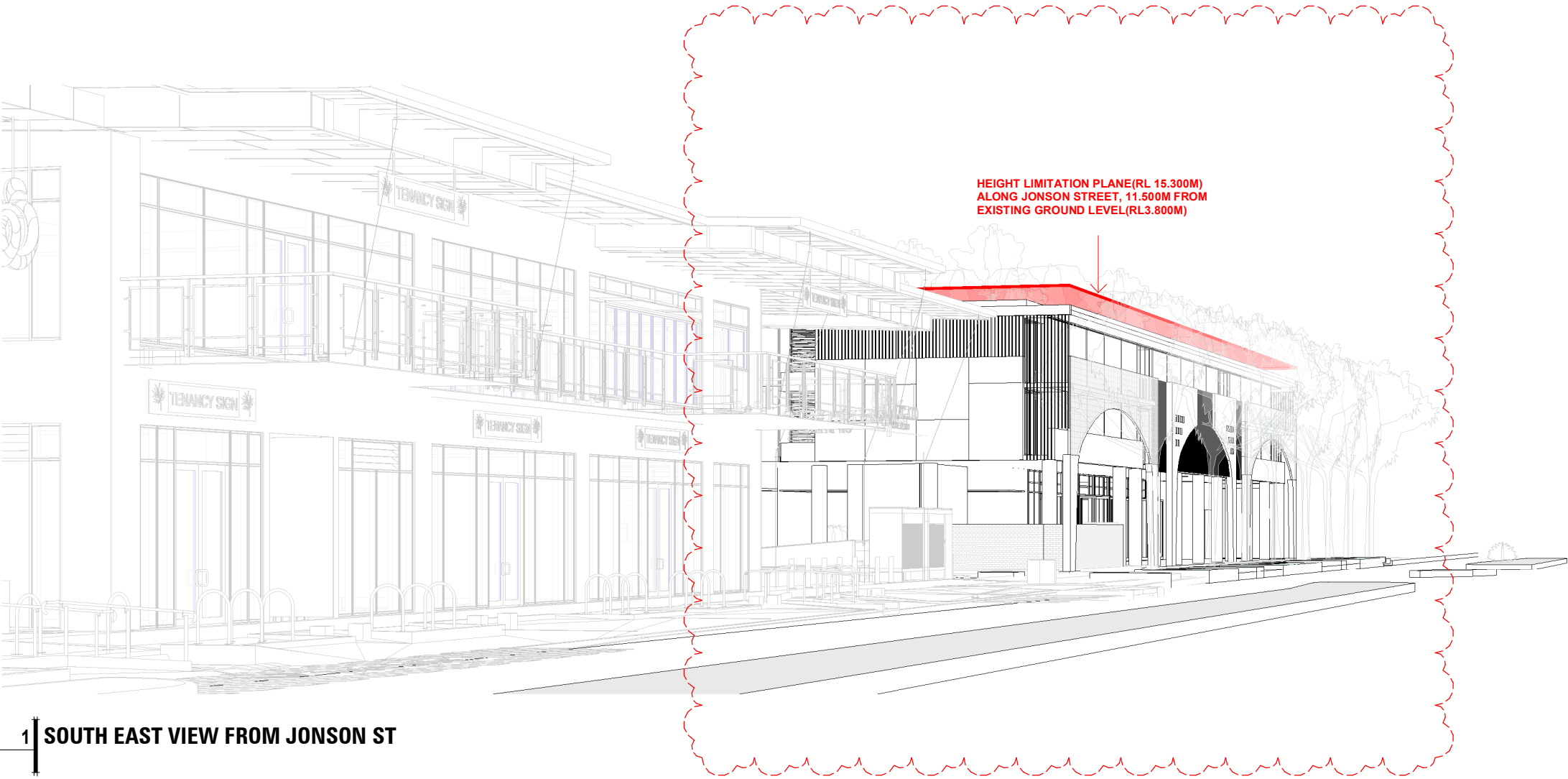
4 | EAST VIEW FROM CARLYLE ST



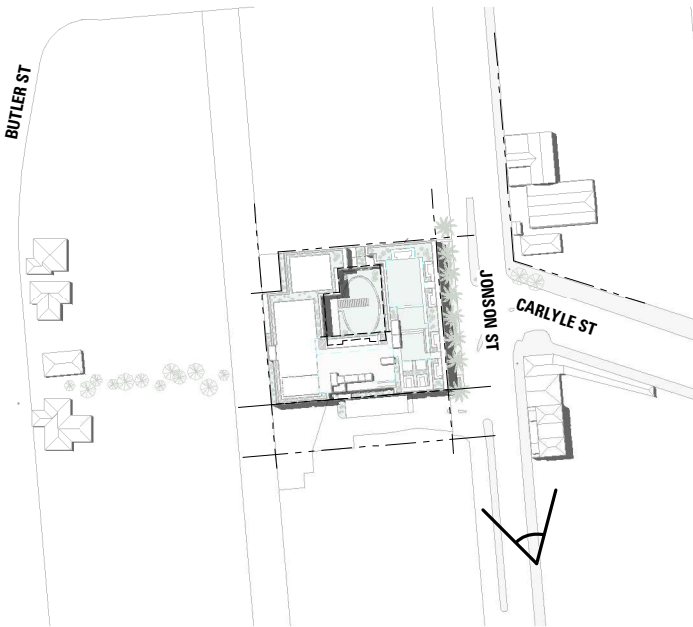
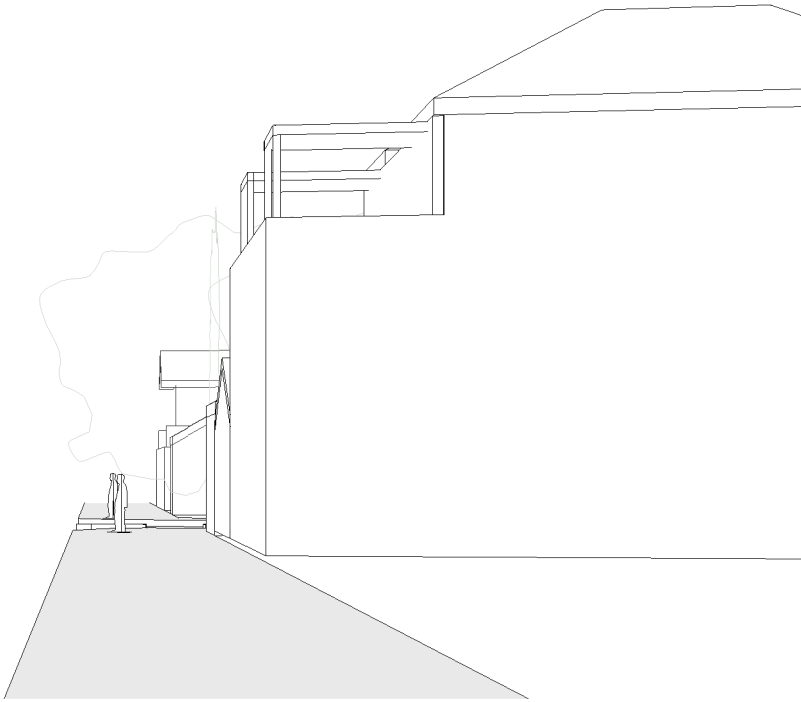


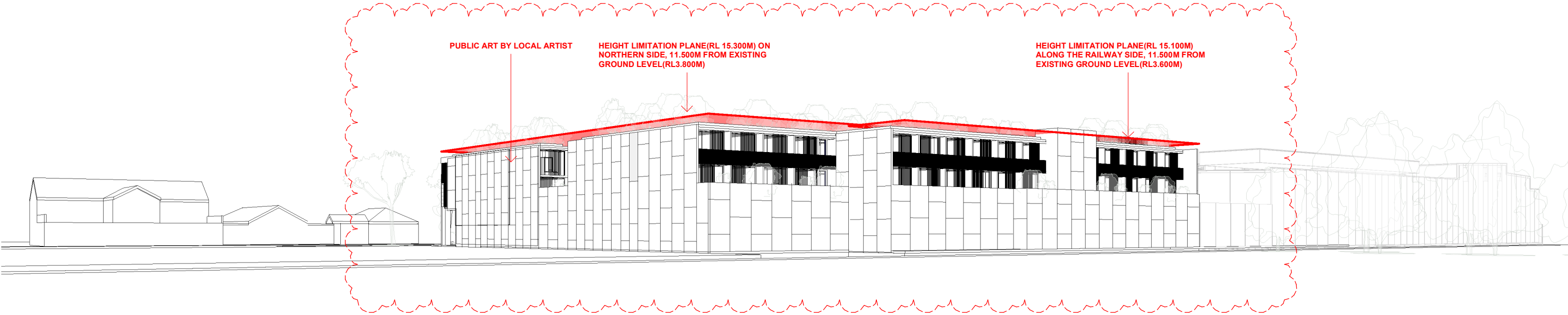
1 NORTH EAST VIEW FROM JONSON ST



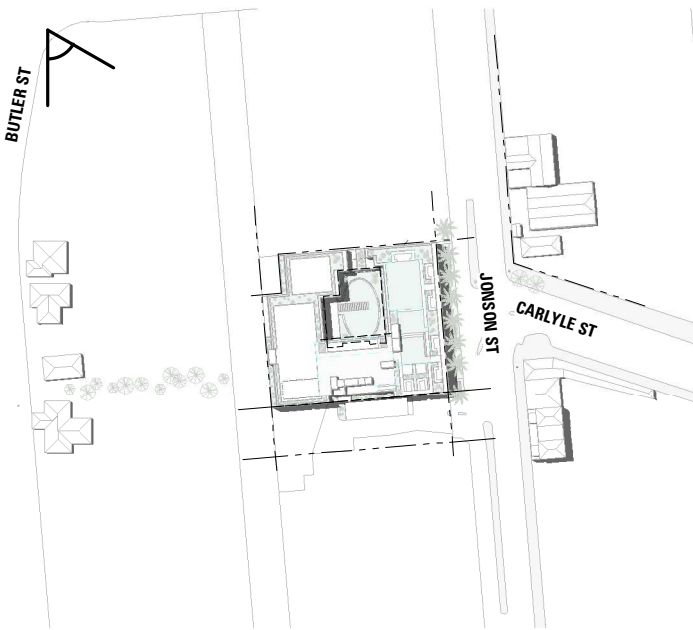


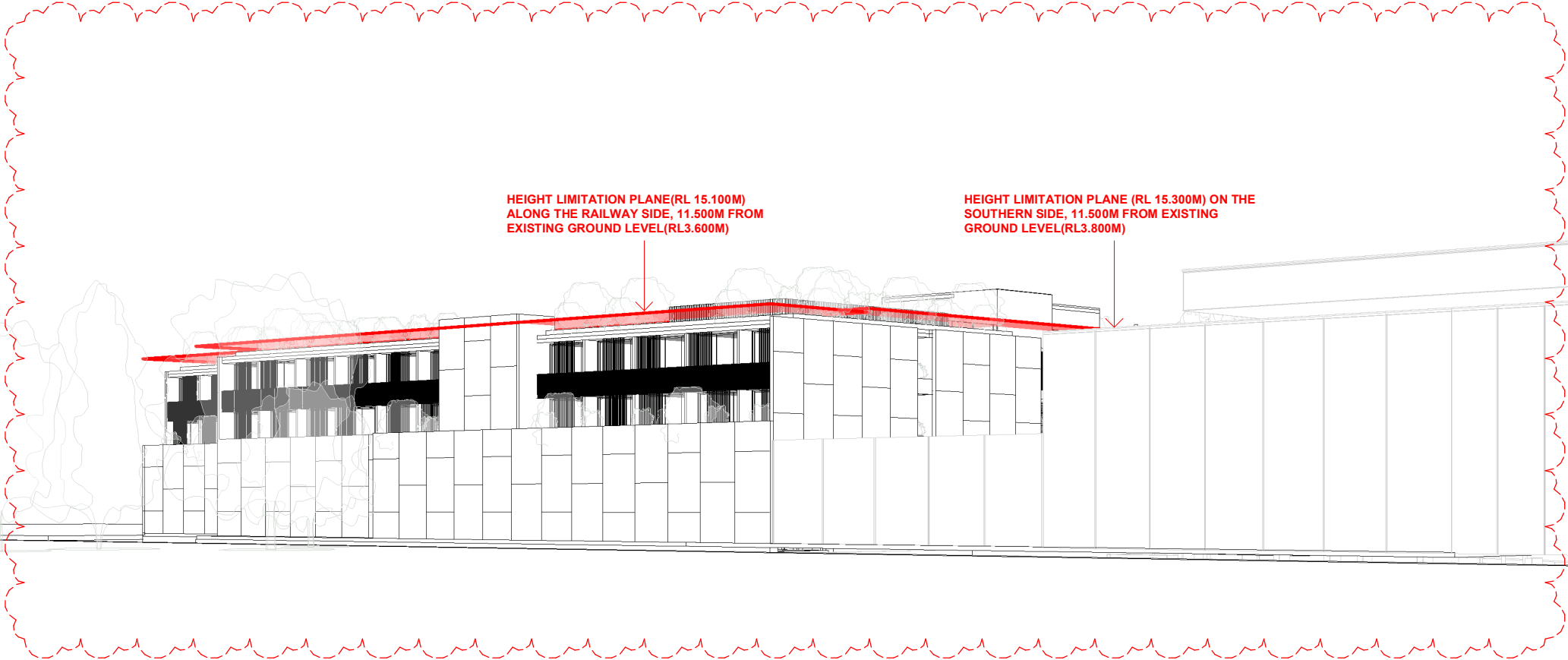
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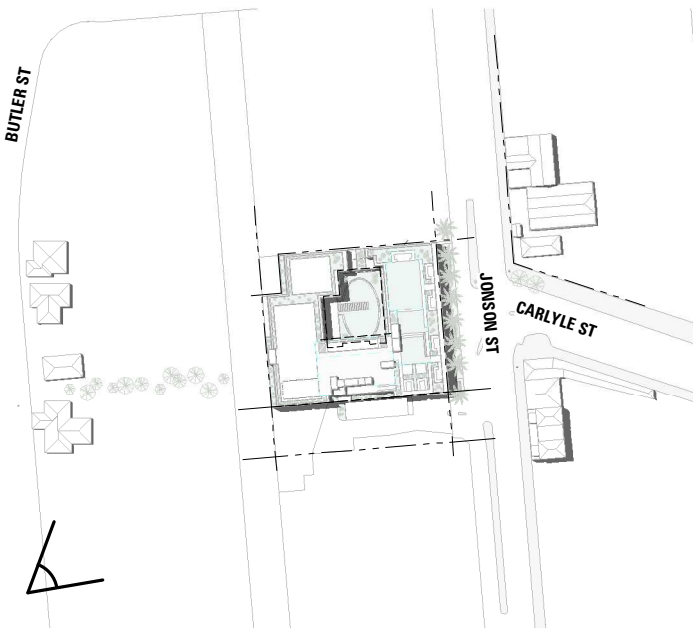


1 WEST VIEW FROM BUTLER ST





1 | SOUTH WEST VIEW FROM BUTLER ST



APPENDIX B

BUILDING HEIGHT REPORT



2nd April 2019

Our Ref: 9024

Mercato on Byron Pty Ltd
P.O Box 1528
BROADBEACH QLD 4218

MEMBERSHIPS:

Spatial Industries
Business Association

Urban Development
Institute of Australia

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Reg. Surv. NSW.

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IT / Drafting

ASSOCIATE:

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Surveying Associate Qld.
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CONSULTANT:

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Quality Assurance:
ANZSIC ISO 9001:2008
ACSIS Reg. No. 411

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admin@mgs-gc.com.au

Web Site
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Attention: Mr James Vallis

RE: DA 10.2018.650.1
RFI ITEM 1 BUILDING HEIGHT

Dear Sir

We refer to your instructions to prepare a report on the building heights of the proposed Essence at Byron Hotel and examples of heights of existing buildings.

The Byron LEP 2014 Clause 4.3(2) Height of Buildings states "the height of a building on any land is not to exceed the maximum height shown for the land on the Height of Building Map"

The Byron LEP 2014, Dictionary states "building height (or height of building) means:

(a) In relation to the RL 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 Byron LEP 2014, Height of Buildings Map - Sheet HOB_003cc shows the maximum building height in area L is 11.5m.

ESSENCE OF BYRON HOTEL

Ground Level (Existing)

Plan 9024-43 is a combined Level & Feature Survey of the Existing Ground Levels prior to construction of the Mercato on Byron Shopping Centre with the proposed roof level as an overlay. From this plan and the Roof Plan by NRA we have determined the Ground Levels (Existing) as follows:

Western Boundary	Goods Lift Overrun Area: RL 3.6
Southern Boundary	Guest Lift Area: RL 3.8
Eastern Boundary	Female/Male Toilets Area: RL 3.8
Northern Boundary	Solar Array/Meditation Wedding Garden: RL 3.8

The maximum building height in Area L is 11.5m. This equates to the following maximum Building Height RLs:

Western Boundary	Goods Lift Overrun Area: RL 15.1
Southern Boundary	Guest Lift Area: RL 15.3
Eastern Boundary	Female/Male Toilets Area: RL 15.3
Northern Boundary	Solar Array/Meditation Wedding Garden: RL 15.3

The Roof Plan identifies the following levels:

• Goods Lift Overrun Roof	RL 15.50
• Pool Area	RL15.90
• PWD Roof, Storage Roof and Fire Stair Roof	RL 17.30
• Female/Male Toilet Roof and Fire Stair Roof	RL 17.30
• Guest's Lift Overrun Roof	RL 17.85

Examples of some Existing Building Heights

From the Lidar Data supplied by RPS Australia East P/L, dated 19/01/2019, we have determined the Ground Levels (Existing) and the RL's of the highest point at six (6) existing buildings in Area L.

We have also included the approved design levels for Mercato Byron Shopping Centre.

The results of this data are shown in the attached Byron Existing Buildings Sections and Byron Heights Table 1.

Summary

95% of the proposed Hotel Development complies with the BSC Height Limitations as shown on the Byron Heights Table 1. All of the areas, of the height above the allowed maximum, are generally located towards the centre of the building plate, except for the Goods Lift Overrun and are all beneath the 11 Marvell Street, Byron Bay maximum building height.

Kind Regards

MICHEL GROUP SERVICES



ANTHONY DAVID CULLANE
Registered NSW Surveyor



Byron Local Environmental Plan 2014

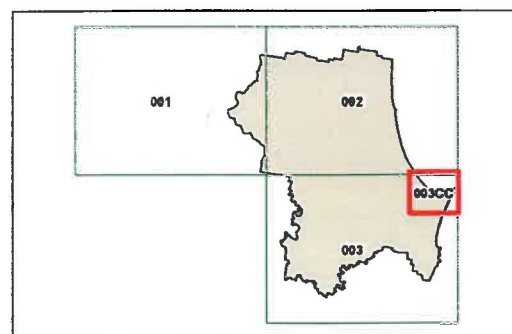
Height of Buildings Map - Sheet HOB_003CC

Maximum Building Height (m)

- 9
- 11.5

Cadastre

Base data 01/07/1991 © Land and Property Information (LPI)
Addendum data 30/09/13 © Byron Shire Council



0 200 400 Metres
Scale: 1:20,000 @ A3

Projection: GDA 1994
Zone 56

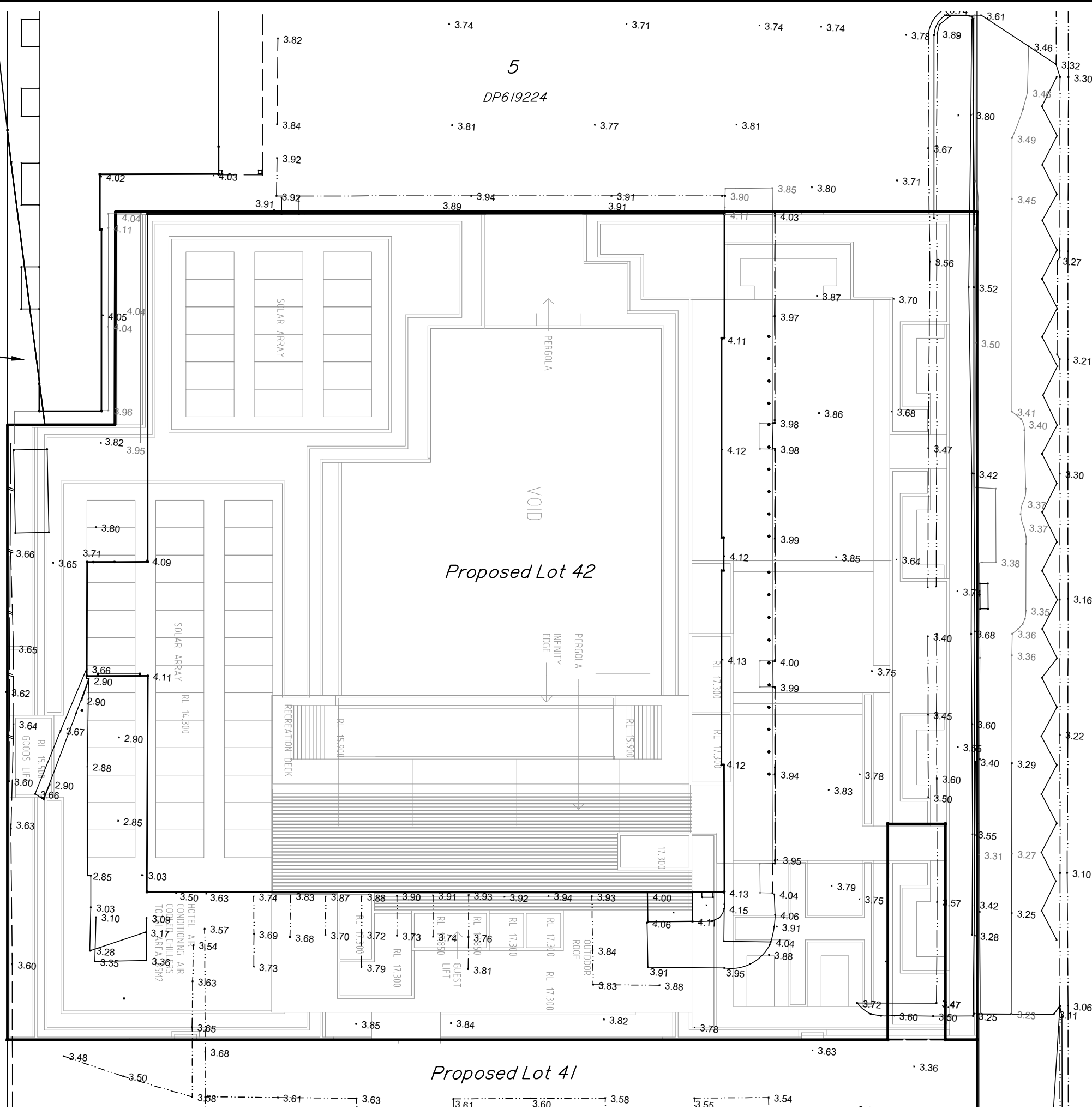
Map identification number:
1350_COM_HOB_003CC_020_20140311





RAILWAY

10
DP617509



ISSUE	SUBJECT	BY	DATE
AMENDMENTS			

- NOTES & DISCLAIMERS
1. This plan was prepared for MERCATO ON BYRON PTY LTD from a combination of field survey and existing records for the purpose of a D.A to B.C.S and must not be used for any other purpose, particularly demolition, excavation or construction.
 2. The title boundaries shown on this plan were not surveyed as part of this survey and have been compiled from DP617509 & DP619224 and not by field measurement and therefore could be subject to error.
 3. Some levels have not been shown for clarity purposes.
 4. This note is an integral part of this plan.



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PROJECT
THE ESSENCE OF BYRON HOTEL

CLIENT
MERCATO ON BYRON PTY LTD

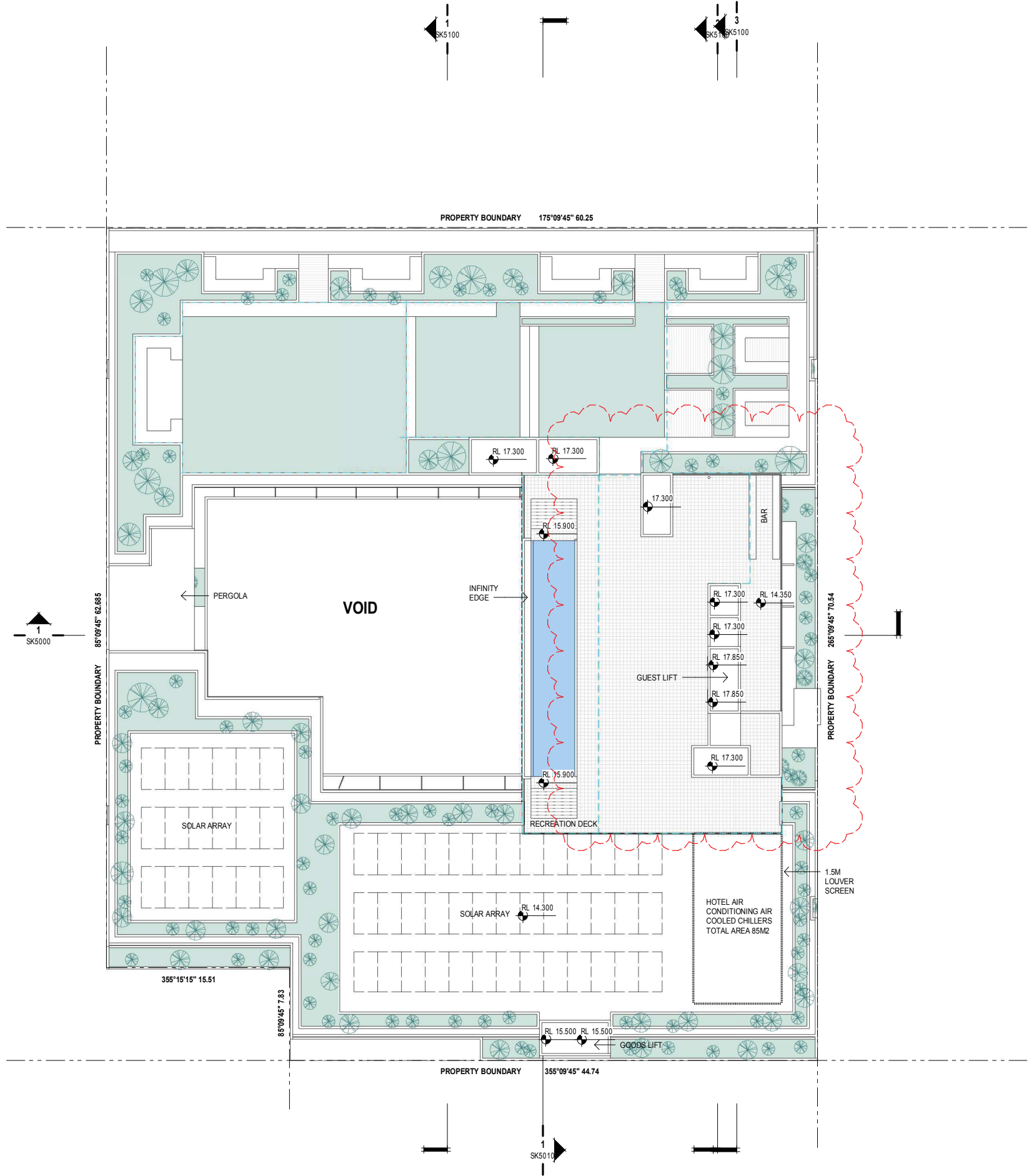
DRAWING
TITLE
**COMBINED LEVEL SURVEY
PRE MERCATO ON BYRON
CONSTRUCTION OVER PROPOSED
LOT 42
JONSON STREET, BYRON BAY**

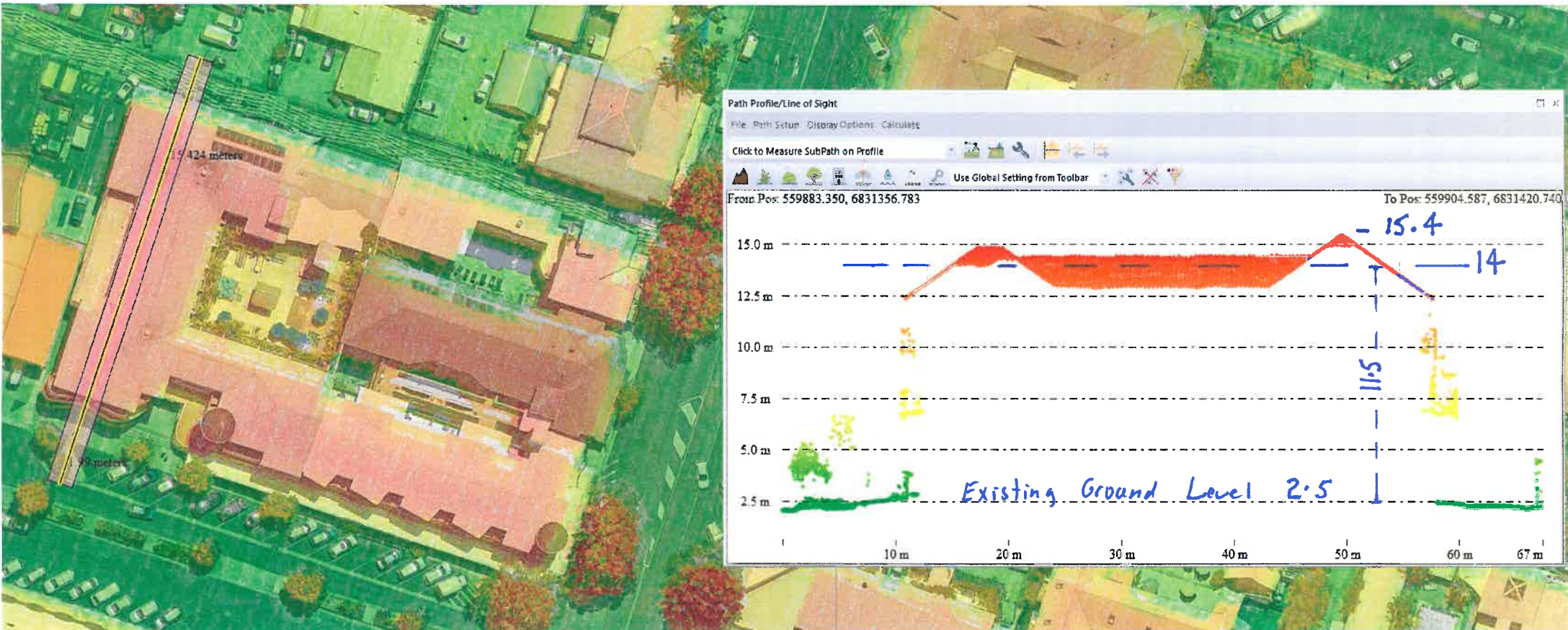
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SCALE 1:300 @ A3	DATE 25/03/19	DRAWN JW/AD
LEVEL DATUM AHD	LEVEL ORIGIN PM 30283	ORIGIN RL 2.980
AZIMUTH	CO-ORD SYSTEM LOCAL	CO-ORD ORIGIN
EASTING	NORTHING	SURVEYOR RB
AUTOCAD FILE 9024-43	SURVEY FILE 14006083	JOB No. 9024
CHECKED AD	QT AD	DATE IMAGED 25/03/19

SHEET NUMBER 1 OF 1

PLAN No. 9024-43
ISSUE

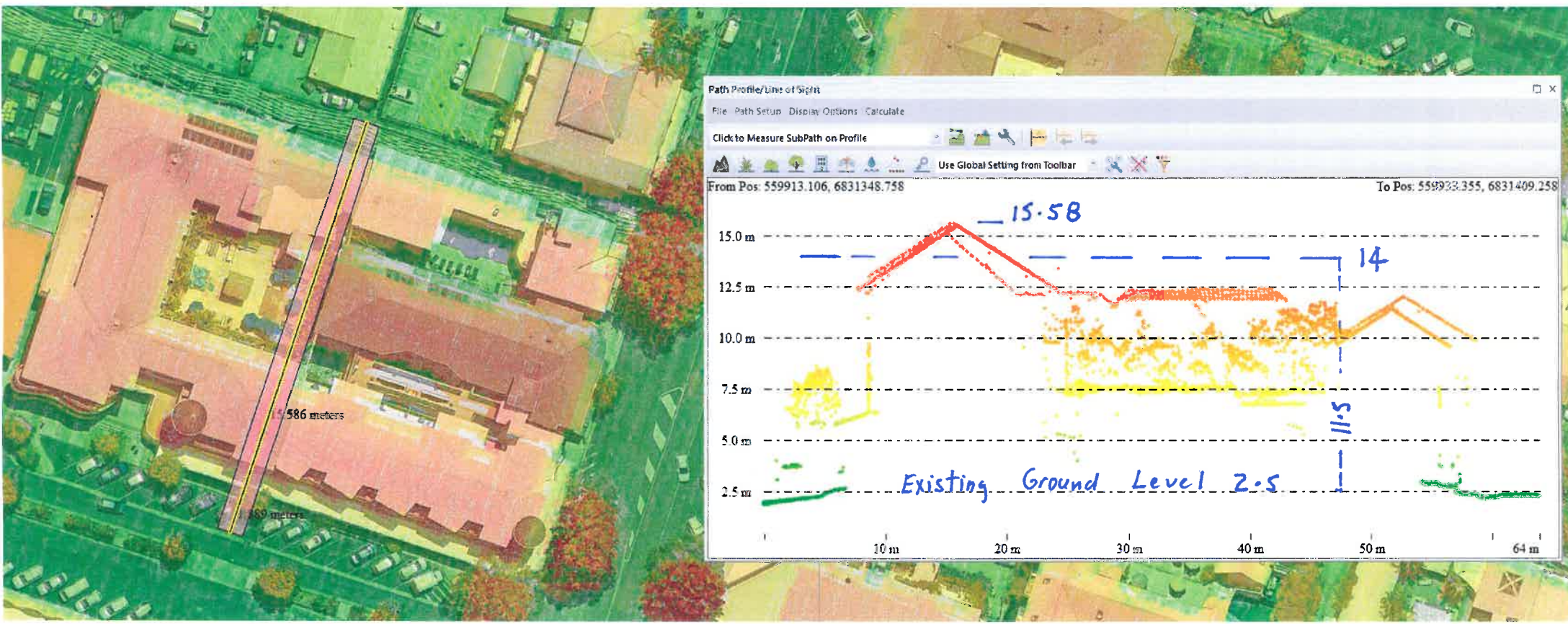
REV.	DATE	DESCRIPTION	DRAWN	CHECKED
13	181119	Preliminary	JG	GD
14	181121	DA	JG	GD
15	181129	DA	JG	GD
16	181219	DA	JG	GD
A	190107	DA	JG	GD
C	190318	DA	JG	GD
E	190401	DA	JG	GD





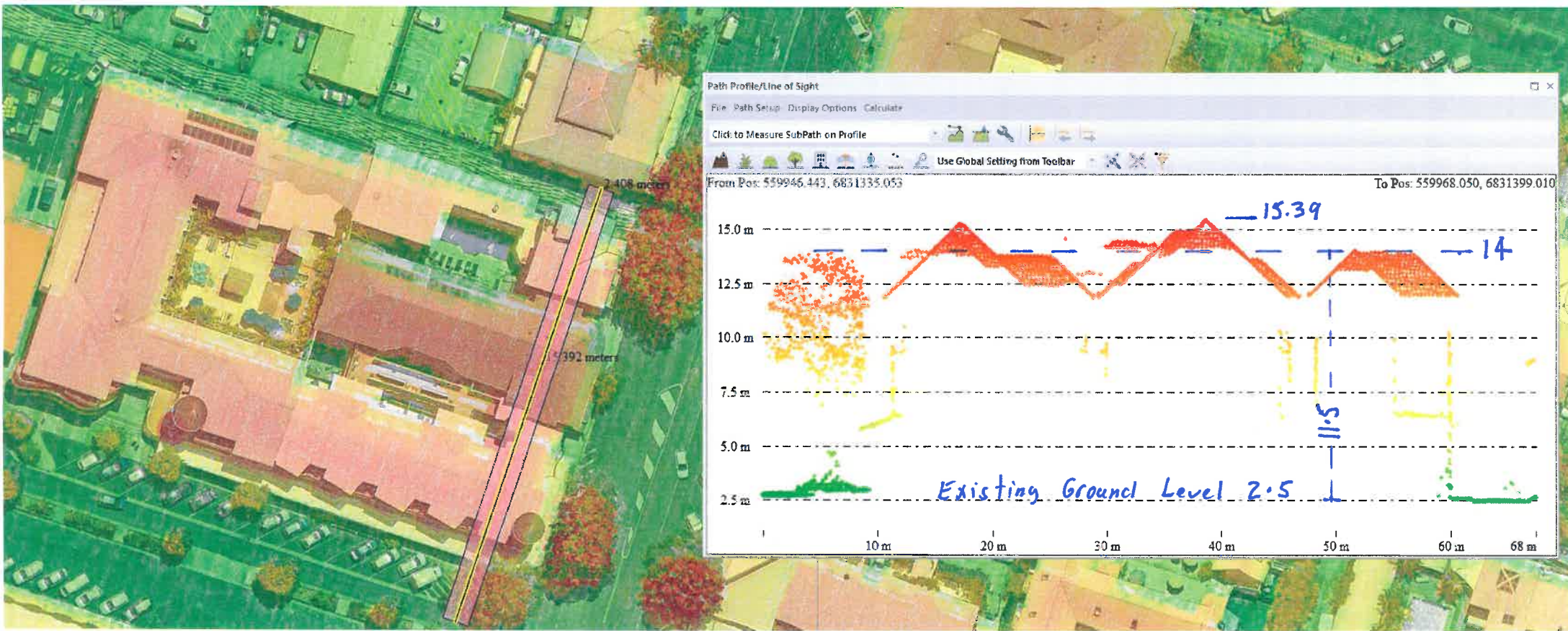
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(A)



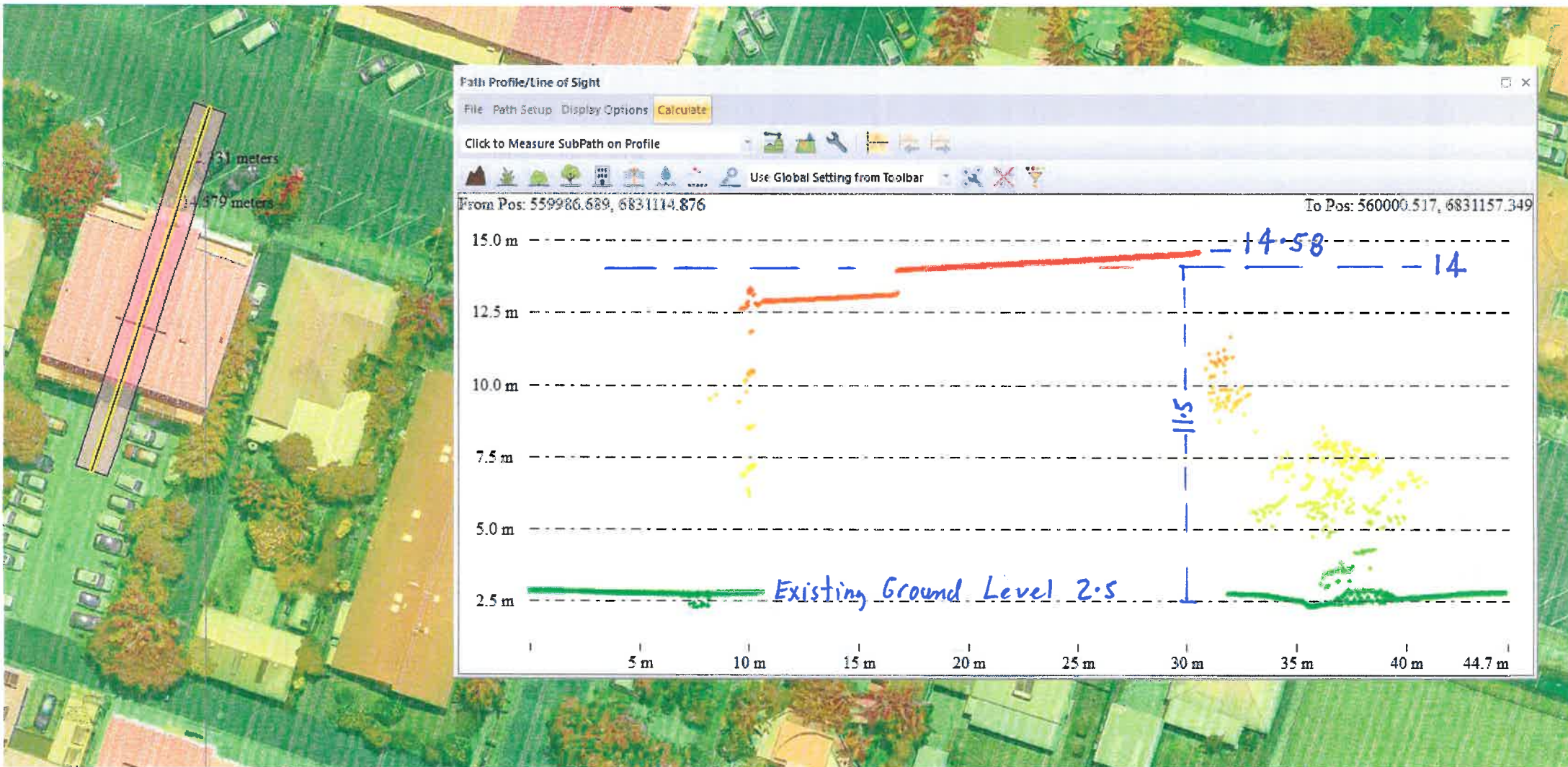
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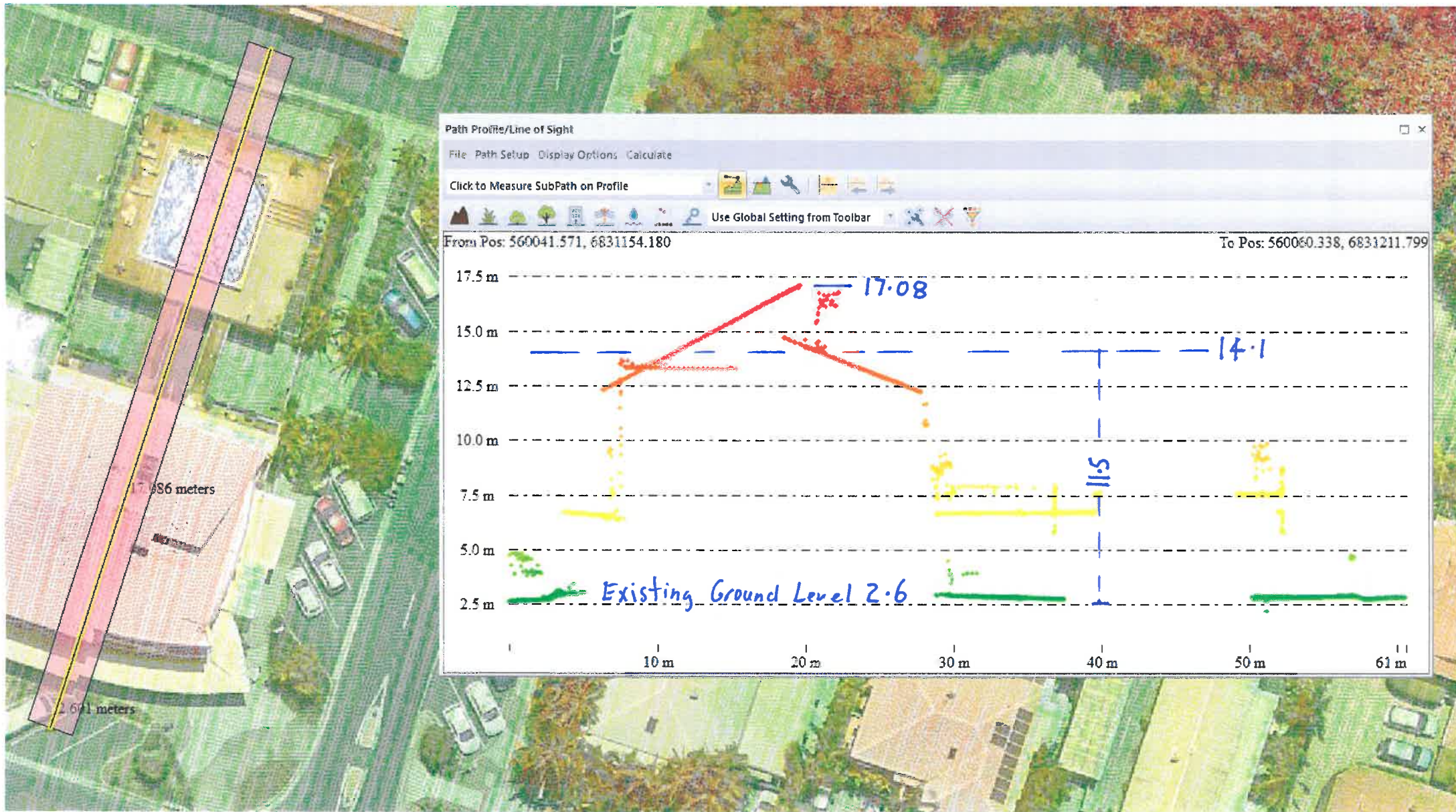
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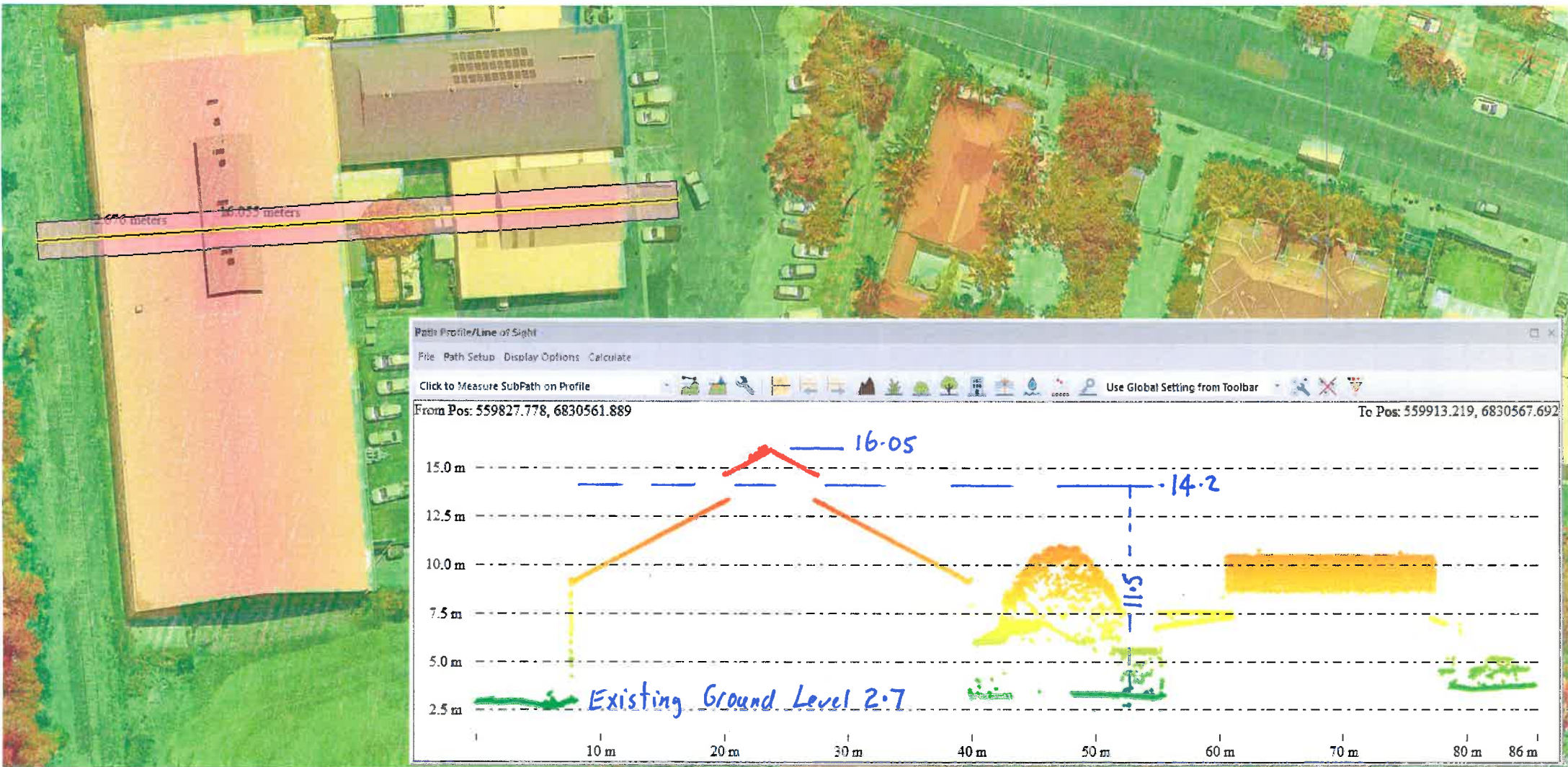
6 Marvell St

ⓓ



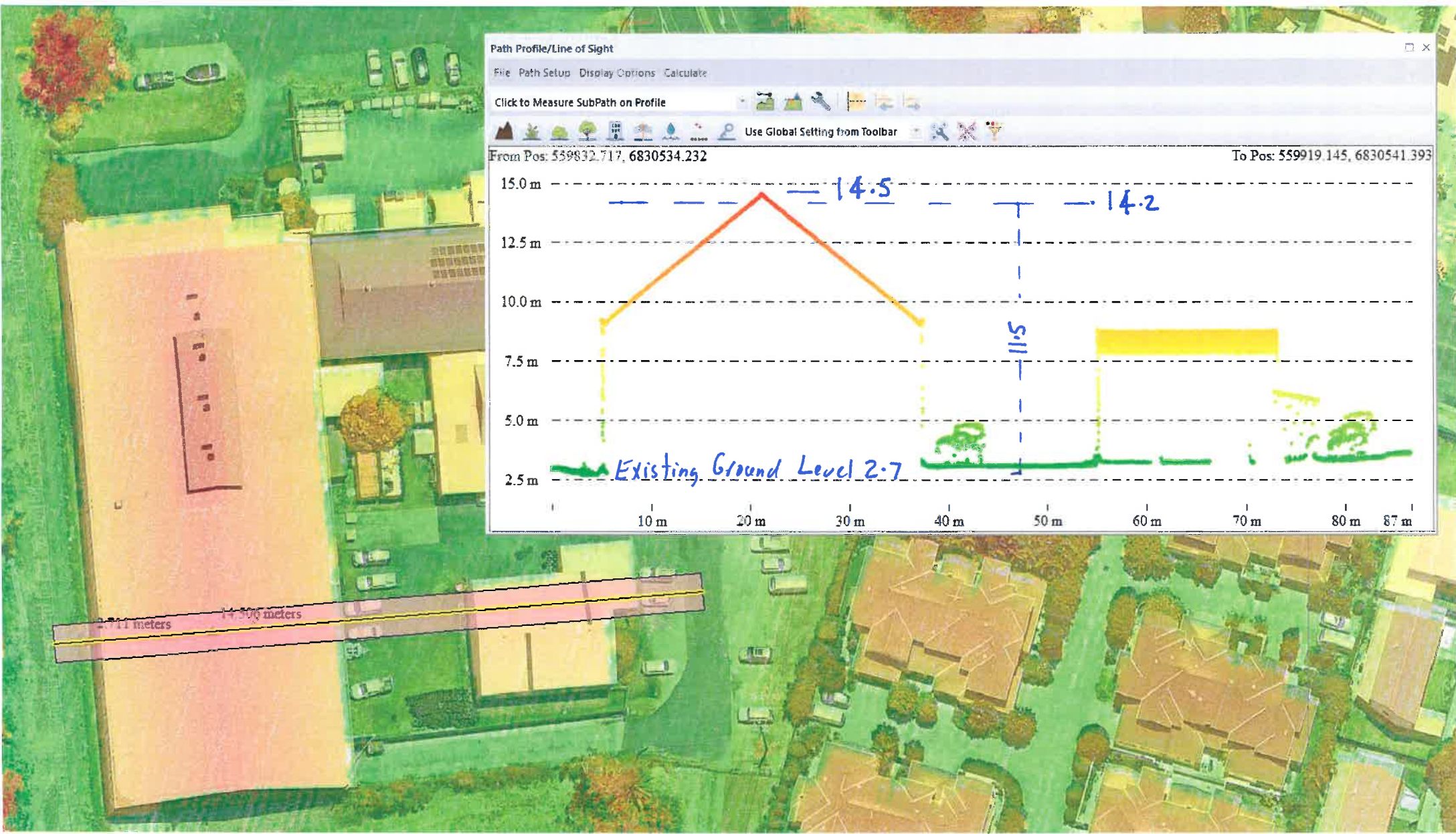
11 Marvell St

E



156 Jonson St

(F) Section 1



156 Sonson St

(F) Section 2

Design Levels

determinate, then however the membership fee, if above that of Germany is not
 proportional to the amount of all shares per 100, which and stop if all
 members of the firm share immediately, have to be taken from
 construction and the other of the construction.

a) subject

ALLEANZA




HUTCHINSON
BUILDERS

MERCATO ON BYRON

108 - 110 JONSON STREET, BYRON
BAY NSW 2481

MERCATO ON BYRON PTY LTD

ROOF PLAN

	sheet	date	12/06/2010
		scale	1:100
		drawn	JF
		checked	DN
		verified	CV
17317 project no.	A-1050 sheet no.	15	15

10. *Journal of the American Statistical Association*, 1997, 92(439), 1093-1103.

BYRON HEIGHTS

TABLE 1

ADDRESS	EXISTING GROUND LEVEL RL	MAXIMUM ALLOWED BUILDING HEIGHT RL	HEIGHT OF BUILDING	BUILDING HEIGHT ABOVE ALLOWED MAXIMUM	% HEIGHT ABOVE AREA/ TOTAL BUILDING FOOTPRINT AREA OF 4094m ²
1 Byron St – Building A	2.5	14.0	15.4	1.4	
1 Byron St – Building B	2.5	14.0	15.58	1.58	
1 Byron St – Building C	2.5	14.0	15.39	1.39	
6 Marvell St – Building D	2.5	14.0	14.58	0.58	
11 Marvell St – Building E	2.6	14.1	17.08	2.98	
156 Jonson St – Building F Section 1	2.7	14.2	16.05	1.85	
156 Jonson St – Building F Section 2	2.7	14.2	14.5	0.3	
108-112 Jonson St – Building G Mercarto on Byron Shopping Centre Design Levels	3.2	14.7	15.78	1.08	
PROPOSED ESSENCE OF BYRON HOTEL - DESIGN LEVELS					
Goods Lift Overrun	3.6	15.1	15.50	0.40	0.4%
Pool Area	3.8	15.3	15.90	0.60	2.1%
PWD, Store, Fire Stair	3.8	15.3	17.30	2.00	0.9%
Female / Male Toilet, Fire Stair	3.8	15.3	17.30	2.00	1.2%
Guests Lift Overrun	3.8	15.3	17.85	2.55	0.4%
TOTAL				5.0%	

Note: Unable to calculate % of the existing buildings.



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2019NTH015

DA 10.2018.650.1 Mixed use development, Jonson Street, Byron Bay

ATTACHMENTS TO COUNCIL REPORT

4. CLAUSE 4.6 VARIATION REQUEST – FLOOR SPACE RATIO

**CLAUSE 4.6 VARIATION
REQUEST
BYRON LEP 2014
CL. [4.4] [FSR]**

**98-106 JONSON STREET,
BYRON BAY**

URBIS STAFF RESPONSIBLE FOR THIS REPORT WERE:

Director	Mathew Schneider
Associate Director	Liam Campbell
Senior Consultant	Sam Down
Project Code	P0002524
Report Number	1

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Appendix A GFA Drawings

1. INTRODUCTION

This Clause 4.6 variation request has been prepared by Urbis on behalf of *Mecarto on Byron Pty Ltd*, the applicant for a development application comprising the demolition of the existing building and associated car parking on the site and construction of a mixed-use development comprising tourist and visitor accommodation, function centre and retail premises (shop and food and drink premises).

The request seeks to vary the maximum floor space ratio (FSR) development standard prescribed for the subject site under Clause 4.4 of the *Byron Local Environmental Plan 2014* (BLEP 2014).

The variation request is made pursuant to Clause 4.6 of the BLEP 2014.

2. ASSESSMENT FRAMEWORK

2.1. CLAUSE 4.6 OF BYRON LOCAL ENVIRONMENTAL PLAN 2014

Clause 4.6 of BLEP 2014 includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are:

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

Clause 4.6 provides flexibility in the application of planning provisions by allowing the consent authority to approve a development application that does not comply with certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve better outcomes for and from the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 requires that the consent authority consider a written request from the applicant, which demonstrates that:

- a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- b) There are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must be satisfied that 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, and the concurrence of the Secretary has been obtained. In deciding whether to grant concurrence, subclause (5) requires that the Secretary 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 Secretary before granting concurrence.*

[Note: Concurrence is assumed pursuant to *Planning Circular No. PS 18-003 Variations to Development Standards* dated 21 February 2018].

This document is a Clause 4.6 written request as required by clause 4.6(3) and seeks to justify the contravention of the floor space ratio development standard in Clause 4.4. The assessment of the proposed variation has been undertaken in accordance with the requirements of the BLEP 2014, Clause 4.6 Exceptions to Development Standards.

2.2. RELEVANT TEST TO BE APPLIED

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgments have refined the manner in which variations to development standards are required to be approached.

The correct approach to a request under clause 4.6 is set out in the Land and Environment Court decision of Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118. Preston CJ set out the test in paragraphs [13] to [29] of that judgment.

This clause 4.6 request has been prepared in accordance with the approach described by Preston CJ.

3. CLAUSE 4.6 VARIATION REQUEST: [FLOOR SPACE RATIO]

The following sections of the report provide an assessment of the request to vary the development standard relating to the floor space ratio in accordance with Clause 4.6 of BLEP 2014.

3.1. CLAUSE 4.4 [FLOOR SPACE RATIO]

The FSR development standard under BLEP 2014 is 1.3:1. This development standard will be contravened by the proposed development.

Clause 4.4 (2) of BLEP 2014 states:

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

The objectives of the development standard as per subclause 4.4(1) of BLEP 2014 are as follows:

- a) *To ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,*
- b) *To enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,*
- c) *To provide floor space in the business and industrial zones adequate for the foreseeable future,*
- d) *To regulate density of development and generation of vehicular and pedestrian traffic,*
- e) *To set out maximum floor space ratios for dual occupancy in certain areas.*

3.2. VARIATION TO FLOOR SPACE RATIO DEVELOPMENT STANDARD

The Floor Space Ratio Map sets a maximum FSR of 1.3:1 across the site.

The FSR has been calculated based on the total site area of the new lot created as part of the subdivision (Lot 42 on Plan NRA—84169-DD-SK1000 Rev 15). The FSR has been calculated using a site area of 4,128m².

The GFA has been calculated in accordance with the BLEP 2014 definition. Drawings showing the areas that have been included or excluded from GFA have been prepared (refer **Appendix A**). As documented on these drawings, the proposal has a total GFA of 7,331m². Based on a site area of 4,128m², this results in an FSR of **1.77:1**.

The proposed departure from the FSR development standard is summarised in **Table 1**.

Table 1 – FSR Compliance

	Permitted	Proposed
Gross Floor Area	5,366.4m ²	7,331m ²
Floor Space Ratio	1.3:1	1.77:1

3.3. KEY QUESTIONS

Is the Planning Control a Development Standard?

The FSR control prescribed under Clause 4.4 of the BLEP 2014 is a development standard capable of being varied under Clause 4.6 of BLEP 2014.

Is the Development Standard Excluded from the Operation of Clause 4.6?

The development standard is not excluded from the operation of Clause 4.6 as it is not listed within Clause 4.6(6) or Clause 4.6(8) of BLEP 2014.

What is the Underlying Object or Purpose of the Standard?

The objectives of the standard are clearly established in the relevant LEP as set out in **Section 3.4** of this letter.

3.4. CONSIDERATIONS

3.4.1. Clause 4.6(3)(a) – Compliance with the Development Standard is Unreasonable or Unnecessary in the Circumstances of the Case

The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are listed within the ‘five-part test’ outlined in *Wehbe v Pittwater* [2007] NSWLEC 827.

An applicant does not need to establish all of the tests or ‘ways’. **It may be sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.

This test was upheld by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 who stated at [12] and [13] of that judgement:

12. As to the first matter required by cl 4.6(3)(a), I summarised the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in Wehbe v Pittwater Council at [42]-[51]. Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.

13. The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].

The development is justified against two of the Wehbe tests as set out below.

Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard

The proposed development achieves the objectives of the development standard as outlined within **Table 2**.

Table 2 – Assessment of consistency with the objectives of the standard

Objectives	Assessment
<i>To ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,</i>	<p>The proposed development is appropriate to the locality in which it is located as it provides efficient use of existing infrastructure and supports surrounding local businesses with additional tourist accommodation.</p> <p>The hotel has been accommodated with a number of ancillary uses including a function centre and retail premises (shop and food and drink premises) to ensure the proposed development can sufficiently integrate with the</p>

Objectives	Assessment
	<p>surrounding character at the ground level, as well as add to the tourist and entertainment offer of the town.</p> <p>The proposed scale and form of the development is compatible with the adjacent Mercado on Byron Shopping Centre.</p> <p>Whilst it is noted that the lift overruns, the pool deck and the roof over the outdoor bar and recreation area exceed the maximum height standard, the roof level comprises just 70m² GFA. No habitable floorspace is proposed at the roof level. This GFA is associated with storage and bathrooms, which are setback from the parapet. With the exception of 70m², all of the remaining GFA is contained within the envelope parameters set under BLEP 2014. This suggests that the proposed GFA is appropriate for this site.</p> <p>Council have previously acknowledged that FSR is a poor planning mechanism for achieving built form where the objective is to conserve and enhance character and local amenity, noting:</p> <ul style="list-style-type: none"> • The Byron Bay Town Centre Masterplan (Masterplan) was adopted by Council in June 2016. The Masterplan identifies the need to introduce new planning controls, including amendments to BLEP 2014 and the Byron Development Control Plan 2014 (DCP 2014). • The Masterplan identified that there was a need to amend or remove the FSR across the Town Centre (including the site) to achieve the outcomes sought. We understand that this resulted in a Planning Proposal which was endorsed by Council at its Ordinary Meeting of 20 September 2018. Public notification of these amendments to the DCP and/or LEP is anticipated to occur in late 2019. • The Planning Proposal submitted to the Department of Planning and Environment (DPE) sought to remove the FSR development standard to land within the Byron Town Centre, including the site. The justification provided by Council for this amendment is as follows: <p><i>“Unlike design controls for building height envelope, building alignments, setbacks, privacy distances, roof forms or landscaped areas, a maximum FSR is a poor planning mechanism for achieving built form when the objective is to conserve and enhance character and local amenity.</i></p> <p><i>For this reason, it is considered acceptable to remove the FSR control from land in Byron Bay Town Centre, and that this be deleted from the Floor Space Ratio Map, which gives effect to Clause 4.4 Floor space ratio, and Clause 4.5 Calculations of floor space ratio under Byron LEP 2014.</i></p> <p><i>Clause 4.4 Floor Space Ratio (FSR) in Byron Local Environmental Plan (LEP) 2014 is an optional provision in the NSW Standard Instrument LEP Order 2006.</i></p> <p><i>FSR is a numeric figure obtained when the area of the floors of the buildings on a site is divided by the area of the site.”</i></p> <p>This admission by Council that FSR is a poor planning mechanism is supported by the Applicant considering all but 70m² of GFA is below the 11.5m building height plane, being the key envelope control established</p>

Objectives	Assessment
	<p>under BLEP 2014. As discussed in Section 2, the proposal does not result in unreasonable adverse environmental impacts.</p> <p>The FSR standard for commercial floor space, has largely unchanged since it was a control in Council's Development Control Plan prepared in the late 1980's. Byron has since had large commercial growth especially along Jonson Street and has seen exceedances of the FSR with other commercial development on the same street.</p> <p>It is anticipated that the FSR development standard will not be used in future as a means to regulate new development within the Byron Town Centre. The actions by Council to remove the FSR development standard to land in the Byron Town Centre suggests that new development must be assessed on its merits, having regard to its relation to the character, amenity and environment of the locality, as opposed to a numeric standard.</p> <p>Despite the exceedance of the FSR development standard, the proposed built form and scale is in character with surrounding buildings. There are a number of other buildings along Jonson Street that are three storeys in height including both commercial and residential buildings. Similarly, the scale and intensity of development are commensurate to a town centre environment. Considering this, we are of the opinion that objective (a) is achieved.</p>
<i>To enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,</i>	The proposed development is not for residential development; however, the proposed development for the hotel does provide tourist accommodation within the core and most convenient and intensive activity precinct of the town.
<i>To provide floor space in the business and industrial zones adequate for the foreseeable future,</i>	The proposed development is located within the B2 – Local Centre Zone and therefore with the exceedance of the FSR is seen as appropriate to maximise the commercial and tourist capacity of the town into the future.
<i>To regulate density of development and generation of vehicular and pedestrian traffic,</i>	<p>The development is located in the commercial and tourist core of the town, which is the location for the most intensive urban activity. The density of development proposed will generate a desirable level of pedestrian activity.</p> <p>The Traffic Impact Assessment prepared by Bitzios Consulting concludes that all intersections are expected to operate within acceptable performance limits for the background and design traffic volumes for the expected year of opening (2020) and 10-year design horizon (2030).</p>
<i>To set out maximum floor space ratios for dual occupancy in certain areas.</i>	Not Applicable.

Test 2: The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary

Not relied upon.

Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable

Not relied upon.

Test 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

Not relied upon.

Test 5: The zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary

Council have previously taken steps to rezone the site and Byron Town Centre to from B2 Local Centre to B3 Commercial Core to differentiate Byron Bay from the smaller local centres of Bangalow, Brunswick Heads, Mullumbimby, and Ocean Shores. This is considered a deliberate strategic planning intention to establish that that Byron Town Centre is a higher order centre, capable of the most intense form of urban development in the locality.

3.4.2. Clause 4.6(3)(b) - Are there Sufficient Environmental Planning Grounds to Justify Contravening the Development Standard?

There are sufficient environmental planning grounds to justify the proposed variations to the development standard. The additional FSR provides a key benefit to the development, providing internal and functional amenity whilst creating negligible impacts. This is demonstrated in the following points:

- The development is consistent with the objectives of the *Environmental Planning and Assessment Act 1979* by promoting the orderly and economic use and development of the land by delivering new tourist accommodation, function facilities, retail and entertainment offerings. The full utilisation of the site is reasonable given this is commercial zoned land in the Byron Town Centre, where land is at a premium.
- The proposed development achieves objectives of the development standard prescribed in clause 4.4 of BLEP 2014 as described in **Section 3.4.1** and achieves the objectives of the B2 Local Centre zone as described within **Table 3**.
- The proposed development is located within the core business district of Byron Bay and therefore has an obligation to maximise the commercial and tourist capacity within this precinct. The proposed excess GFA is a necessary function of providing a viable hotel of this calibre with a reputable operator. Whilst the development standard has not been abandoned by Council, the strict application of the FSR would limit the quality and offering of the redevelopment of the site into a modern quality hotel with a number of integrated uses.
- The increase in FSR results in a built form and activity which is consistent in scale and intensity to existing activities on Jonson Street as the primary commercial precinct. It will not undermine the character and intent for central Byron Bay.
- The additional GFA is unlikely to have an adverse economic impact. The additional tourist accommodation will support existing businesses. The excess GFA is essentially a result of back-of-house and ancillary services located in the basement and required to support the hotel. The increased FSR therefore allows for services like housekeeping and commercial kitchen. The additional GFA also allows complementary commercial offers to be accommodated within the development. These include conference facilities and functions and weddings space, supporting and diversifying the tourist economy of Byron Bay.
- The proposed development maintains the character of the surrounding area with a commercial ground floor that integrates into the pedestrian network with larger footpaths and bicycle infrastructure. With the

exception of 70m² which is used for storage and bathrooms, all of the GFA is contained below the 11.5m height plane established under clause 4.3 of BLEP 2014. All habitable floorspace is contained within the building envelope established by BLEP 2014.

- The proposal is consistent with the use and intensity of built form anticipated in this part of Byron Bay, being the main commercial street of the town. The street parapet height is less than the maximum permitted, and the development is of a similar bulk and scale to the neighbouring development. The perspectives demonstrate that the proposed height to Jonson Street is appropriate and is consistent with the Mercato on Byron Shopping Centre.
- The proposed FSR will have negligible material impacts compared to a compliant scheme in terms of built form, overshadowing, view impacts as:
 - A comprehensive visual analysis has been prepared and submitted with this application. This includes views towards the development from surrounding streets including:
 - Carlyle Street;
 - Jonson Street; and
 - Butler Street.
 - When viewed from Jonson Street the proposal will read as a three storey development, which is commensurate to the form and scale anticipated in a town centre environment. Whilst there are components that exceed the building height plane, these are unlikely to be visible from the northern or southern approach. As demonstrated by the section drawings these components are not visible from the opposite side of Jonson Street. Again, we note that only the storage and bathrooms contribute to GFA at the roof level.
 - On approach from Carlyle Street, the proposal would read as a three-storey building. Whilst glimpses of the components above the height control would be visible, these are predominately attributed with components of the building that do not contribute to GFA.
 - The perspectives demonstrate that from the northern end of Butler Street, the landscaping on the roof would be visible. It is noted that the perspectives do not include the existing dense vegetation and trees that separate the site and Butler Street. These are expected to block any view of the proposal from this location.
 - When looking towards the site from the southern end of Butler Street, the perspective demonstrates that the proposal is consistent in form and scale to the neighbouring shopping centre, which suggests the proposed GFA is appropriate on this site. Whilst, the lift overrun and outdoor roof area is visible in the perspective, these components do not contribute to GFA. Notwithstanding, existing dense vegetation and trees are expected to block any view of the proposal from this location
- The GFA exceedance does not result in adverse privacy impacts. The proposal has been designed to address the street and provide surveillance of the former railway reserve to the rear. There are no privacy impacts on the adjoining neighbours to the north or south considering openings are not proposed along these elevations and the adjoining uses are commercial.
- The proposed development is located on Jonson Street north of the Mercato on Byron Shopping centre. The proposed development therefore has integrated with the development to the south and is not at risk of creating shadow impacts as it will only shadow the shopping centre. Importantly, the building does not overshadow the street or any sensitive dwellings. To the west the site is adjoined by the former railway corridor which is currently undeveloped, underutilised land that does not have any activity. A three-storey built form is reasonable considering the location of the site and is unlikely to result in any adverse solar impacts on this site.

In conclusion, there are sufficient environmental planning grounds to justify contravening the development

3.4.3. Clause 4.6(4)(a)(ii) – Will the Proposed Development be in the Public Interest Because it is Consistent with the Objectives of the Particular Standard and Objectives for Development within the Zone in Which the Development is Proposed to be Carried Out?

The proposed development is consistent with the objectives of the development standard as outlined within **Section 3.4.1**.

The proposal is also consistent with the land use objective that applies to the site under BLEP 2014 as demonstrated within **Table 3** below. The site is located within the B2 Local Centre zone.

Table 3 – Assessment of Compliance with Land Use Zone Objectives

Objective	Compliance
<i>To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area</i>	The development will provide retail and entertainment uses for people who work and visit the local area and entertainment for visitors and locals through the restaurant (food and drink premises). Conference facilities (function centre) will also be available for hire by members of the public. The design has therefore had regard to both occupants and the public.
<i>To encourage employment opportunities in accessible locations</i>	<p>The proposed development encourages employment in an accessible location, being the Byron Town Centre. The variation to the FSR standard is necessary to accommodate 146 hotel rooms, restaurants, function and conference facilities. The scale of the offering will provide significant new employment opportunities.</p> <p>The proposal will create further opportunity to support other commercial development within the surrounding area by providing additional hotel beds. Given the location it also provides opportunity to integrate with the adjoining shopping centre and nearby commercial shops. This will encourage employment new opportunities of at least around 80 new jobs.</p>
<i>To maximise public transport patronage and encourage walking and cycling</i>	It will provide employment opportunities in a location that is reasonably accessible, including by walking and cycling. The site is also located directly adjacent to a bus stop that is catchment to all the major bus services within Byron Bay
<i>To encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises</i>	The proposal will encourage vibrancy, given the uses proposed and with the design at the ground level in particular, and it specifically proposes tourist accommodation above commercial premises (shop and food and drink premises), as the objectives seek.

The proposal is considered to be in the public interest because the development is consistent with the objectives of the development standard, and the land use objectives of the zone.

3.4.4. Clause 4.6(5)(a) - Would Non-Compliance Raise any Matter of Significance for State or Regional Planning?

The proposed non-compliance with the development standard will not raise any matter of significance for State or regional environmental planning. It has been demonstrated that the proposed variation is appropriate based on the specific circumstances of the case and would be unlikely to result in an unacceptable precedent for the assessment of other development proposals.

3.4.5. Clause 4.6(5)(b) - Is There a Public Benefit of Maintaining the Planning Control Standard?

The proposed development achieves the objectives of the height of building development standard and the land use zoning objectives despite the non-compliance, and the contravention has been demonstrated to be appropriate and supportable in the circumstances of the case.

As such, there is no public benefit in maintaining the development standard in the circumstances of this case.

3.4.6. Clause 4.6(5)(c) – Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

The Planning Circular PS 18-003, issued on 21 February 2018, outlines that consent authorities for SSD may assume the Secretary's concurrence where development standards will be contravened.

Nevertheless, there are no known additional matters that need to be considered within the assessment of the clause 4.6 request and prior to granting concurrence, should it be required.

DISCLAIMER

This report is dated 19 June 2020 and incorporates information and events up to that date only and excludes any information arising, or event occurring, after that date which may affect the validity of Urbis Pty Ltd's (**Urbis**) opinion in this report. Urbis prepared this report on the instructions, and for the benefit only, of *Mercato on Byron Pty Ltd* (**Instructing Party**) for the purpose of Clause 4.6 Variation Request (**Purpose**) and not for any other purpose or use. To the extent permitted by applicable law, Urbis expressly disclaims all liability, whether direct or indirect, to the Instructing Party which relies or purports to rely on this report for any purpose other than the Purpose, and to any other person which relies or purports to rely on this report for any purpose whatsoever (including the Purpose).

In preparing this report, Urbis was required to make judgements which may be affected by unforeseen future events, the likelihood and effects of which are not capable of precise assessment.

All surveys, forecasts, projections and recommendations contained in or associated with this report are made in good faith and on the basis of information supplied to Urbis at the date of this report, and upon which Urbis relied. Achievement of the projections and budgets set out in this report will depend, among other things, on the actions of others over which Urbis has no control.

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Whilst Urbis has made all reasonable inquiries it believes necessary in preparing this report, it is not responsible for determining the completeness or accuracy of information provided to it. Urbis (including its officers and personnel) is not liable for any errors or omissions, including in information provided by the Instructing Party or another person or upon which Urbis relies, provided that such errors or omissions are not made by Urbis recklessly or in bad faith.

This report has been prepared with due care and diligence by Urbis and the statements and opinions given by Urbis in this report are given in good faith and in the reasonable belief that they are correct and not misleading, subject to the limitations above.

APPENDIX A GFA DRAWINGS

GFA BY LEVELS			
Comments	Level	Name	Area
PROPOSED HOTEL	Basement Level 1	GFA COMMERCIAL	45 m ²
PROPOSED HOTEL	Basement Level 1	GFA STAFF	116 m ²
PROPOSED HOTEL	Ground Level	GFA COMMERCIAL	1347 m ²
PROPOSED HOTEL	Ground Level	GFA HOUSE KEEPING	97 m ²
PROPOSED HOTEL	Ground Level	GFA STAFF	439 m ²
PROPOSED HOTEL	Ground Level	GFA STORAGE	57 m ²
PROPOSED HOTEL	Level 1	GFA COMMERCIAL	2228 m ²
PROPOSED HOTEL	Level 1	GFA CORRIDOR	308 m ²
PROPOSED HOTEL	Level 1	GFA HOUSE KEEPING	39 m ²
PROPOSED HOTEL	Level 2	GFA COMMERCIAL	2228 m ²
PROPOSED HOTEL	Level 2	GFA CORRIDOR	310 m ²
PROPOSED HOTEL	Level 2	GFA HOUSE KEEPING	45 m ²
PROPOSED HOTEL	POOL DECK	GFA COMMERCIAL	46 m ²
PROPOSED HOTEL	POOL DECK	GFA STORAGE	24 m ²
			7331 m ²

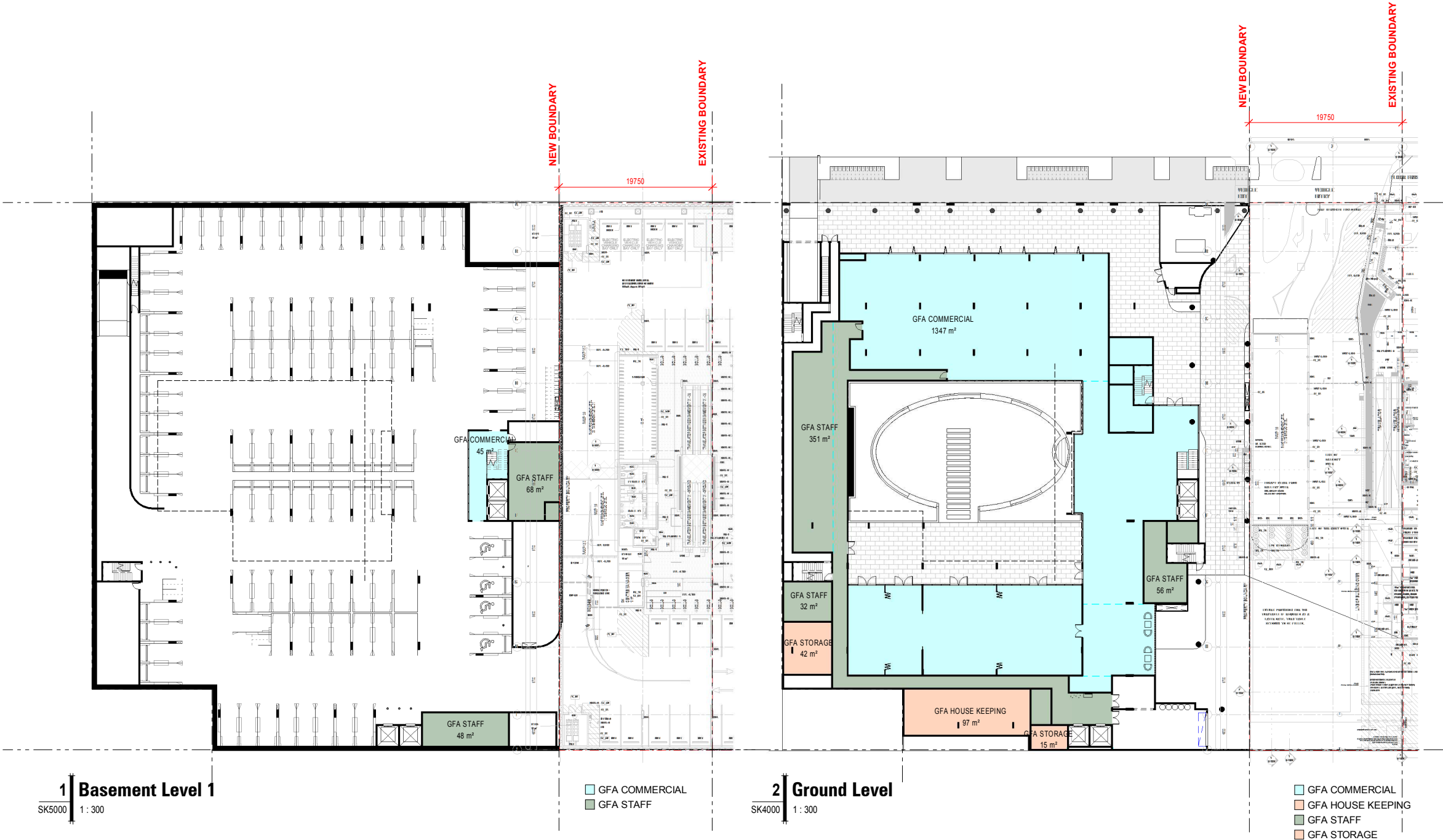
GENERAL NOTES:

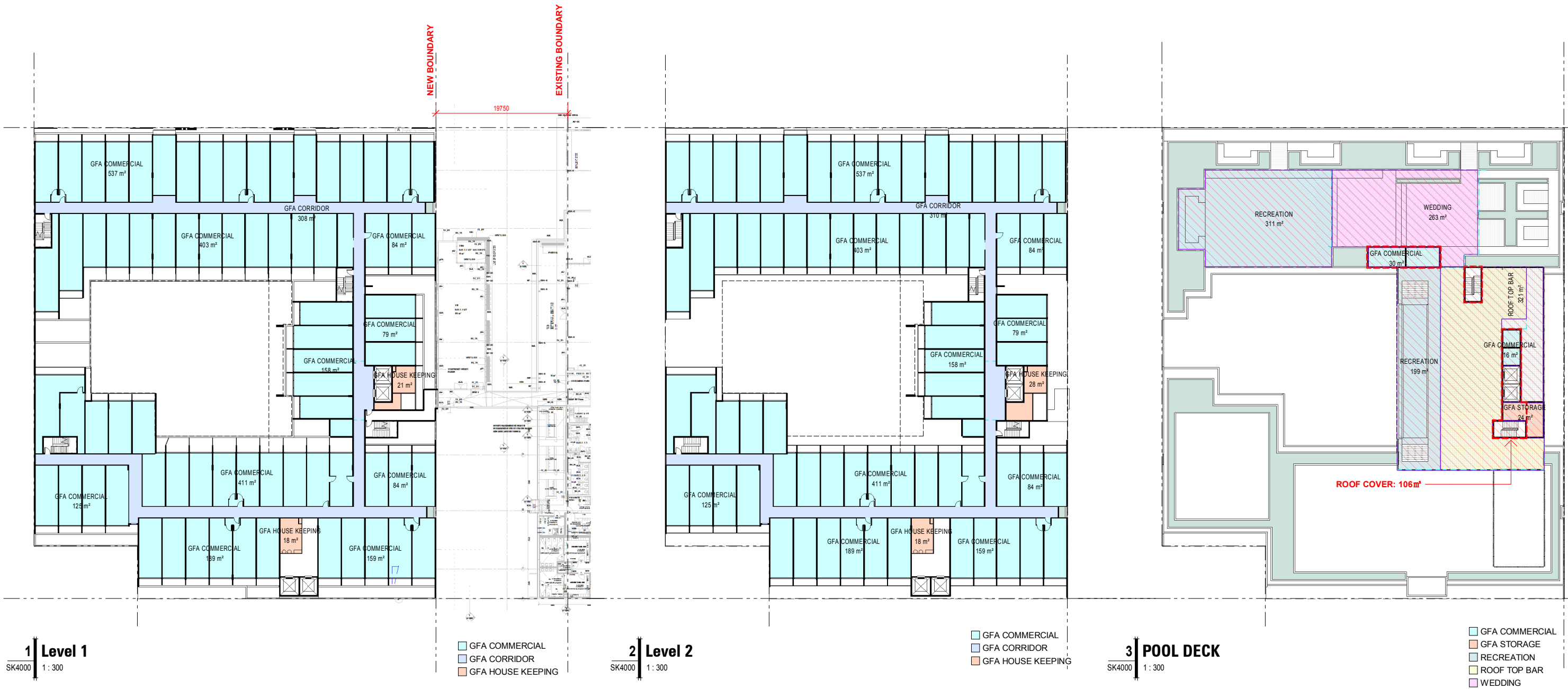
GFA COMMERCIAL INCLUDING RESTAURANT, CONFERENCE, HOTEL ROOMS AND ETC.

GFA STAFF INCLUDING FRONT OFFICE, LOCKER, TOILETS AND OTHER STAFF FACILITIES.

GFA AREA IS MEASURED BY INTERNAL LINE OF EXTERIOR WALL AND INTERNAL LINE OF SEPARATING WALL.

GFA:7331m²







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