



# zone

Planning Group

## Section 4.55(2) Modification Request

Development Consent DA10.2021.384.1

- Demolition of Existing Buildings
- Construction of a 3-Storey Mixed Use Retail/Residential Development including Basement

Prepared for Project Bohemian Pty Ltd AFT  
Bohemian Unit Trust

June 2023  
N22095

90-96 Jonson Street,  
Byron Bay



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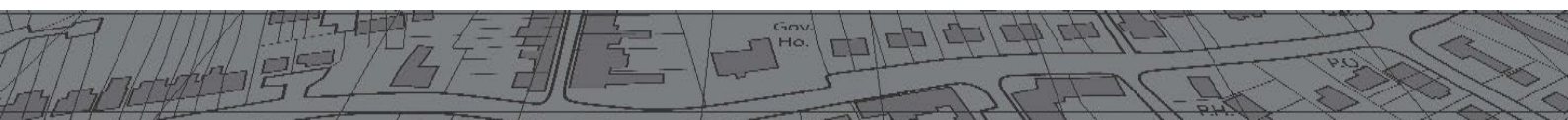
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## Executive Summary

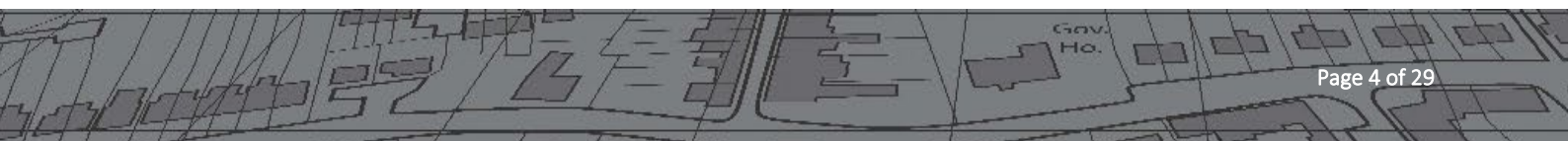
Zone Planning NSW on behalf of Project Bohemian Pty Ltd AFT Bohemian Unit Trust ('the Applicant'), seeks to modify Development Consent 10.2021.384.1 which was determined by the North Regional Planning Panel on 27 May 2022. Development Consent 10.2021.384.1 approves the demolition of existing buildings and construction of a 3- storey mixed use retail/ residential development including basement parking over the site referred to as 90-96 Jonson Street, Byron Bay. The Consent has not been operated on nor has a Construction Certificate been issued with respect to the approval.

In summary, this application seeks a Clause 4.55(2) modification pursuant to the *Environmental Planning and Assessment Act 1979* with respect to Development Consent 10.2021.384.1. The changes are sought to improve residential amenity (internally and externally) for residents and visitors and proposes the following main changes:

- › Reduction in the number of units (six) from 50 to 44;
- › Removing the sky homes living arrangements;
- › Increasing the number of north facing living and private open space areas;
- › Moving to a more traditional natural cross flow ventilation arrangement;
- › Increased residential lift cores throughout;
- › More legible movement throughout including widening the openings to the arcade;
- › Improved visibility over public areas and internally creating a more comfortable usable space, benefiting social interaction and enables passive surveillance;
- › Increased communal open space for the enjoyment of residents and visitors;
- › Increase size of ground level piazza including for the north-western pocket and creating an activation point centrally; and
- › Singular architectural expression for all shopfronts.

A detailed comparison Table is provided in Section 3.1 of this report and the revised Architectural Plans are provided in **Attachment 1**. It is noted that a greater number of 3-bedroom units is proposed as part of the unit mix whilst also generally maintaining the same height and floor space ratio and providing compliant car parking rates consistent with Council's Development Control Plan. The design changes sought require the amendment of five conditions to 10.2021.384.1. Section 5 of this report notes these conditions and the suggested changes. There are no conditions that require modification that have been imposed by North Regional Planning Panel and as a result, Byron Shire Council remains the consent authority.

Having regard to the proposed amendments, it is submitted that the proposal is 'substantially the same' as originally approved and complies with Clause 4.55(2) of the EP& A Act. Assessment and determination can be made by Byron Shire Council as the consent authority.





## 1.0 Site & Surrounding Environment

### 1.1 Site Details

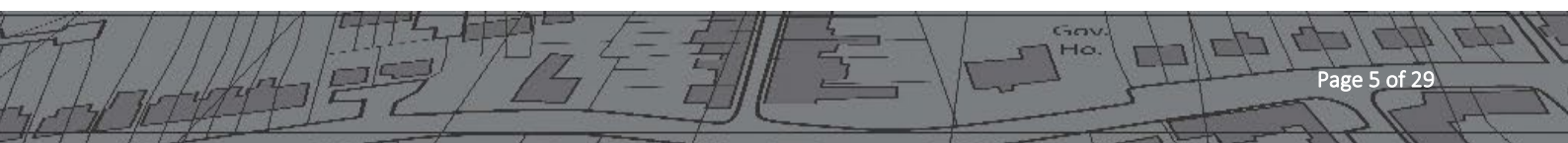
Table 1: Site Details

<b>Address</b>	90-96 Jonson Street, Byron Bay
<b>Real Property Description</b>	Lot 5 DP619224
<b>Site Area</b>	5,390m <sup>2</sup>
<b>Land Owner</b>	Multiplicity Byron Bay Pty Ltd
<b>Existing Use</b>	Business Premises
<b>Local Government Area</b>	Byron Shire Council
<b>Local Planning Instrument</b>	Byron Local Environmental Plan 2014
<b>Zone</b>	B2 Local Centre
<b>Height of Building</b>	11.5m above ground level (existing)
<b>Floor Space Ratio</b>	1.3:1
<b>Coastal Zone</b>	N/A

### 1.2 Site Description

The subject allotment is a regular shaped Lot that provides an area of 5,390m<sup>2</sup>. The site provides frontage to Jonson Street to the east with a distance of 76.19m and has a rear common boundary with the North Coast Railway. Directly to the north of the site is Spice Alley providing a pedestrian corridor for local commuters and those residing on the western side of the railway line. Beyond this laneway is a Heritage Cottage (Local Item 1077), commercial development, Rails Hotel and associated parking. Byron Bay Railway Station and Yard is located further to the north and is a State Heritage item comprising State Item 1078.

The site is currently home to Byron Plaza and consists of a single storey commercial building bounding the northern and western portions of the site with a car park to the south-east of the lot and other hardstand areas. The site is generally flat reaching a maximum RL of approximately 4.0m within the north-eastern area of the site and grading to 3.50m AHD at the centre of the site.



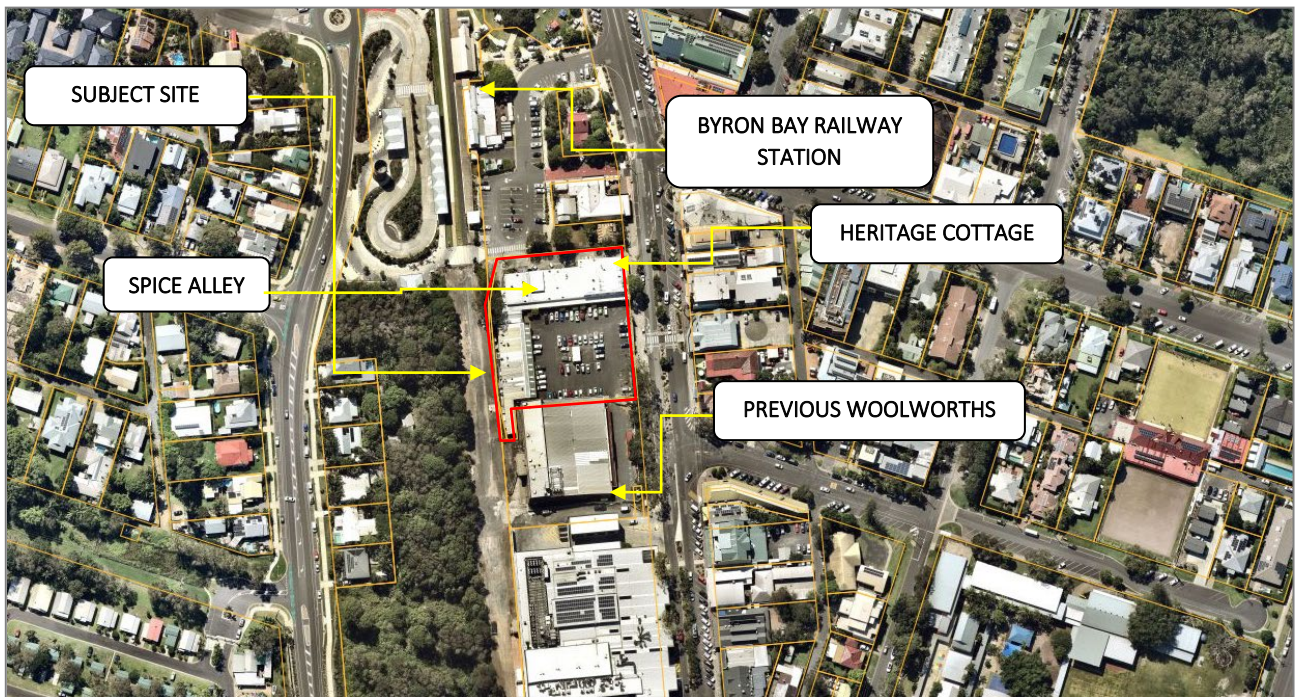


Figure 1: Subject Site & Associated Adjacent Facilities





## 2.0 Background

### 2.1 Previous Approval

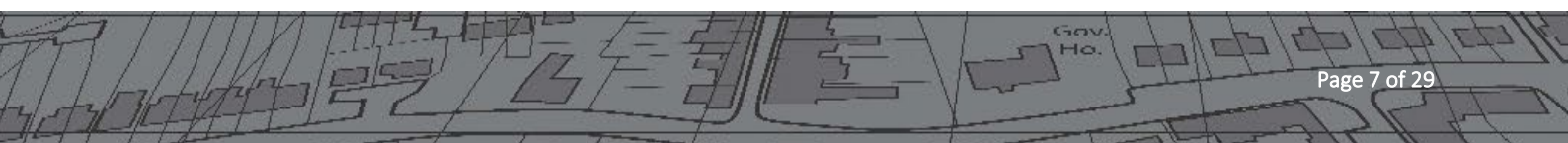
On 27 May 2022, Development Consent was issued for the Demolition of Existing Buildings and Construction of a 3-storey mixed Use Retail/ Residential Development including Basement Parking. The Development Consent is to operate from 31 May 2022 and is to lapse on 31 May 2027. A copy of the Development Consent is No. 10.2021.384.1 is provided in **Attachment 2**.

Multiple applications have been made over the subject site, however, relate to the existing business operations and Change of Use or Alterations and Additions to Commercial premises application.

This Clause 4.55(2) Modification Application seeks to amend Development Consent DA No. 10.2021.384.1. An overview of the proposed modifications is provided in Section 3.0 and proposed modification to conditions to facilitate the design changes are provided in Section 5.0 of this report.

### 2.2 Commencement of Development

Development under DA No. 10.2021.384.1 is yet to commence construction and no Construction Certificate has been issued.





## 3.0 Proposed Modification & Justification

### 3.1 Overview of Proposed Modifications

The proposed modified design retains a 3-storey mixed use development including open plaza with ground level commercial and residential floors above and a rooftop terrace and pool. However, the main premise for the amended scheme is for improved residential amenity (internal and external), despite a reduction in the unit yield, by way of the following changes:

- Removing the sky homes arrangements;
- Increasing the number of north facing living and private open space areas;
- Moving to a more traditional natural cross flow ventilation arrangement- i.e. greater cross through ventilation has been afforded;
- Increased residential lift cores throughout;
- More legible movement throughout the revised design by widening the openings to the arcade. This improves visibility including better connection to the public realm;
- Improved visibility throughout the site creates a more comfortable, usable space benefiting social interaction and enables passive surveillance;
- Increased communal open space and facilities for the enjoyment of residents and visitors. Softened by landscaped areas and deep soil locations;
- Increase size of ground level piazza including for the north-western pocket and creating an activation point centrally, enabling greater usable communal area and space for casual interaction, and
- Singular architectural expression for all shopfronts.

The above these are noted for the reasons for the amended. **Table 2** below includes a more detailed comparison of the key development changes from the approved scheme (DA10.2021.384.1).

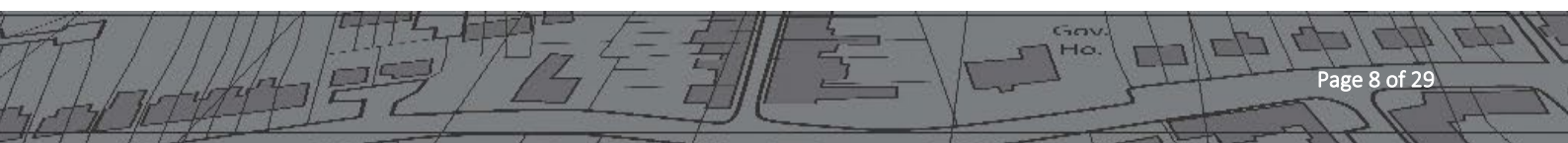




Table 2: Development Summary Comparison

ASPECT	APPROVED DEVELOPMENT		PROPOSED DEVELOPMENT	
<b>Unit Number</b>	50		44	
<b>Unit Mix</b>	2-bedroom units: 42 (84%) 3-bedroom units: 6 (12%)		2-bedroom plus study units: 4 (9.09%) 2-bedroom units: 20 (45.45%) 3-bedroom units: 20 (45.45%)	
<b>Residential GFA</b>	5,040 m <sup>2</sup>	Lvl 1 GFA = 2,520m <sup>2</sup>  Lvl 2 GFA = 2,520	5,177.94m <sup>2</sup>	GF GFA=77.83 m <sup>2</sup> Lvl 1 GFA = 2,541.39m <sup>2</sup>  Lvl 2 GFA = 2,541.39m <sup>2</sup>  Gym Amenities = 17.33m <sup>2</sup>
<b>Total Retail GFA</b>	1,960m <sup>2</sup>	Amenities, Waste, Lobby GFA = 245m <sup>2</sup>  Retail GFA = 1,715m <sup>2</sup>	1,914.70m <sup>2</sup>	Amenities, Waste, Lobby GFA = 171.25m <sup>2</sup> Retail GFA= 1,743.25m <sup>2</sup>
<b>Total GFA</b>	7,000m <sup>2</sup>		7,092.64m <sup>2</sup>	
<b>FSR</b>	1.3:1		1.31:1	
<b>Residential Car Parking</b>	6 x Class 4 accessible parking  50 x Class 1A parking  8 x visitor parking/ carwash  8 x shared visitor/ retail	Total = 72	5 x accessible parking  59 x class 1A parking  3 x visitor  8 x shared visitor/ retail/ carwash  Total: 75 spaces	1 space per 1 or 2-bed  2 spaces per 3-bed or more  1 visitor space per 4 dwellings  2-bedroom: 24 x 1 = 24 3-bedroom: 20 x 2 = 40 visitor: 44 units /4 = 11  Total Required: 75 spaces
<b>Commercial Parking</b>	2 x class 4 accessible parking  86 class 2 parking  8 x shared visitor/ retail	Total = 96 spaces	2 x accessible parking  85 x class 2 parking  1 x shared visitor/ retail parking  5 x shared visitor/ carwash  Total: 93 spaces	1 space per 20m <sup>2</sup> retail GFA  Required: 87.26 (88)  Car wash bay = 1 per 10 units =4.4  Total required: 92.4(93)
<b>Bicycle Parking</b>	66 spaces		75 spaces	
<b>Motorbike Parking</b>	8 spaces		12 spaces	
<b>Landscaping</b>	1,437m <sup>2</sup>		1,428.36m <sup>2</sup>	



The above table indicates minor variations against most metrics. The dwelling yield has reduced, with the provision of more 3-bedroom units for a greater mix of units whilst also generally maintaining the same height, floor space ratio. Car parking rates are generally consistent with Council's Development Control Plan and are discussed in more detail below.

The headings below provide greater details on key elements of the proposal as identified in the DAP meeting undertaken 9 November 2022 (see Minutes in **Attachment 16**) and include character, appearance of fourth storey, porosity, northern sewer main and materiality.

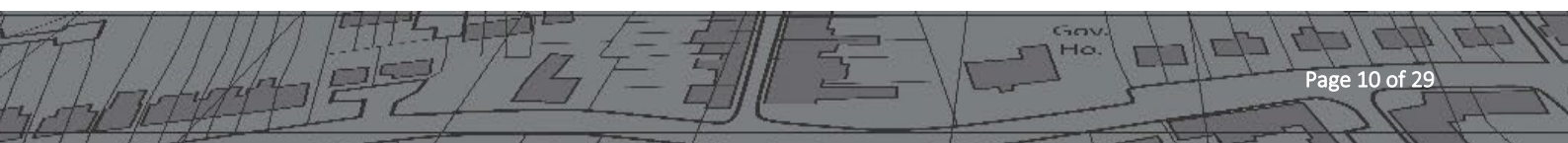
### 3.2 Character & Use of Arches

Consistent with the Urban Design Assessment undertaken by Interplan Architects (**Attachment 17**), the Character of the local area can be defined as below:

- The heart of the town centre (between Bay Street and Byron Street) is primarily characterised by the overall consistent scale and bulk of the built form that is typically built in a contiguous alignment to the street frontages. The frontages are activated by shop fronts beneath awnings that extend across the adjoining footpath. The shop fronts, the awnings, and the articulation of the facades above the awnings by fenestration, architectural elements (including balconies) and the juxtaposition of roof profiles fragments the visual mass of the building bulk to create an assemblage of smaller human scale element.*
- The widths of the buildings along Jonson Street are constrained by the width of the lots. This creates a regular rhythm of frontages. The larger buildings on larger lots reflect this rhythm in the visual modulation of their appearances that address the street. The frontage rhythm establishes a coherent 'grain' of development that contributes to the cohesiveness of the streetscape.*
- The contiguous edge and generally consistent one and two-storey height of the built form along the frontages reinforces the spatial definition of the street to provide a sense of partial enclosure that enhances its amenity as an attractive human scale pedestrian environment.*
- Having regard to its suburban areas, architectural houses and consolidated town centre, Byron Bay is best described as having an 'eclectic' character. There is no particular architectural style that distinguishes Byron Bay from other coastal towns.*

The proposed amended design maintains a consistent character in the locality by way of the massing, height, use of materials and colours. The visual difference between the approved and amended development appear primarily in relation to the more detailed aspects of the proposed visual articulation, including the use of archways for some of the fenestration.

As noted in the Urban Design Assessment, Arches are well established as 'timeless' architectural elements that through their inherent qualities will continue to feature in building design. They are not a visually prominent element within the existing Byron Bay streetscape; however, they are certainly present. Other developments that incorporate arches into their appearance have also been approved by Council. The arch could not be reasonably considered to be alien to the eclectic character of Byron Bay.





### 3.3 Appearance of Fourth Storey

At the DAP meeting held 9 November 2022, the following feedback was provided by Council:

*Roof top elements – details should be included on how the roof top will be used and its important that they do not read as fourth storey components to the development. A Clause 4.6 variation to the height limit is not required, but justification is still required in the same manner as to why the height limit should be varied in this instance if proposed.*

The design has subsequently been amended to reduce the bulk and scale of the proposed roof top elements, despite a greater usable area being afforded. This is to ensure it does not visually appear as a fourth level. Indeed, the removal of pop out roofs has been undertaken as part of the revised design, the dividing screens between private rooftop terraces have been reduced from those previously submitted to DAP as 1.8m high to 1.4m, a greater number of planters have been incorporated to soften the structure. A skydoor rather than a typical door has been added and greater communal area. Furthermore, the design has adjusted the gym on the roof top and relocated the pergola and facilities closer to the lift massing and set them back from the building line, ensuring they are not visible from the street.

Consistent with *Byron Local Environmental Plan (BLEP) 2014*, Storey is defined below.

**storey** means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include—  
(a) a space that contains only a lift shaft, stairway or meter room, or  
(b) a mezzanine, or  
(c) an attic.

The roof top terrace is not considered a storey as the revised design has removed the ‘pop out roofs’ in lieu of greater landscaped planters. As the roof terrace does not contain a floor level or ceiling/roof above, it cannot be considered a storey. When also appreciating 3d visualisations from the public domain the roof top terrace clearly does not appear as a fourth storey. See **Figure 2** and **3** below.



Figure 2: Jonson Street Rendered Elevation

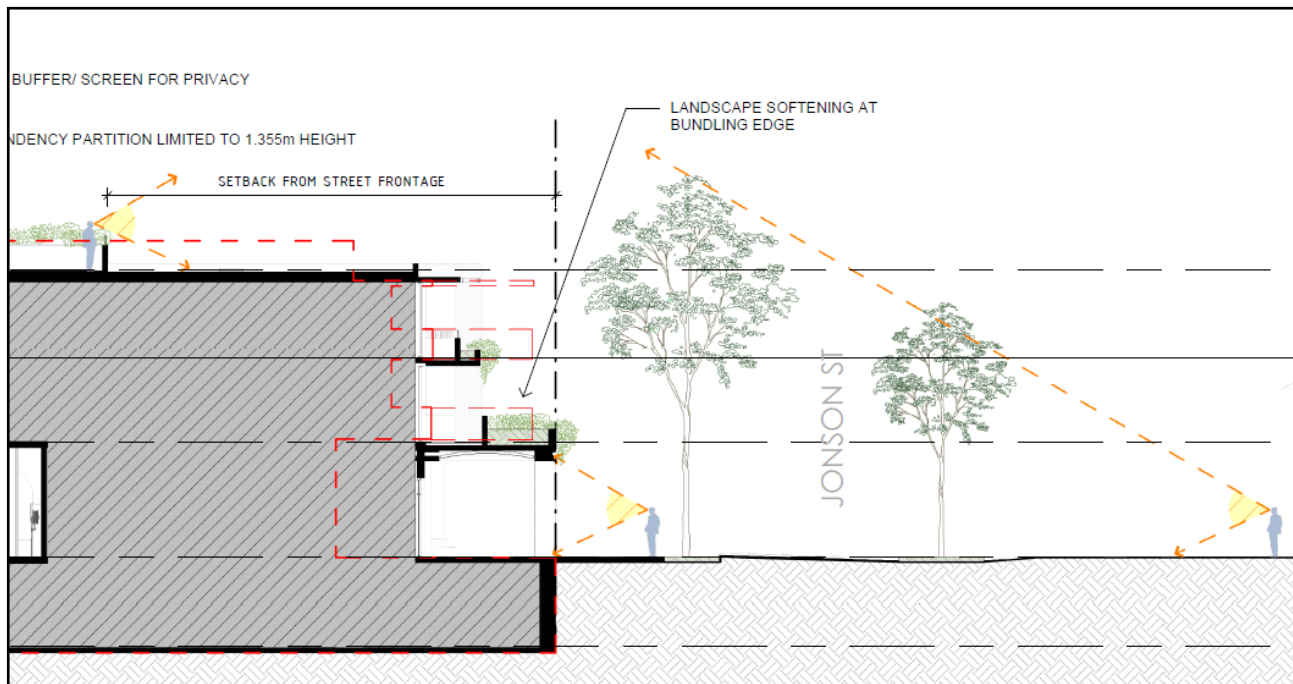


Figure 3: Sight Diagram Demonstrating 3 Storey Perspective

### 3.4 Subtropical Design & Porosity

Consistent with the DAP minutes dated 9 November 2022, Council has identified the need for the design to showcase a level of sub tropical design and porosity with reference to the sub-strategies of Byron Bay Town Centre Master Plan:

- *A Varied and Defined Centre relates to building heights and spatial definition;*
- *A Fine Grain Village Character relates to subdivision pattern or the appearance of a fine grain subdivision pattern; and*
- *A Sub Tropical Built Form relates to materials, colours, architectural forms and elements that are a response to the sub-tropical climate.*

Further, it was noted in the DAP that the “*revised scheme deviates from this emerging style, by introducing arched windows and white rendered masonry. This is reminiscent of the architecture of Noosa, Double Bay in Sydney and some parts of Brisbane and Kingscliff. There is nothing inherently wrong with these buildings, on the contrary there are some very fine pieces of architecture, it is just that they are not ‘Byron’.*”

Council has suggested a highly articulated built form, material selection (face brick, concrete, breeze blocks etc), the use of environmental control devices (louvres, operable screens, trellises), sheltering roofs, canopies and awnings and vegetation within, on and over buildings would be sufficient to be consistent with the ‘sub-strategies’.

The revised design responds to these comments by prioritising sunlight and ventilation along with greater connection and accessibility to the Spice Alley, balconies of units directly overlook the plaza and greater



communal (and private) open space. These elements are significantly increased/strengthened by the current design and are influential in achieving a subtropical design and porosity. These elements underpin the meaning of subtropical living and permeability. The fact that the development has been amended with respect to intricate façade detail and materials does not mean that the development is at odds or contrary to the sub-topical characteristics.

### 3.5 Northern Sewer Main

A sewer main is located adjacent to the northern boundary being a 375mm diameter sewer rising main. Potholing of this main has occurred noting the depth with the results provided in **Attachment 15**.

Consistent with Byron Shires Works in Proximity policy, an offset has been afforded of 1.5m minimum with an increased northern setback greater than what was originally approved under Development Consent No. 10.2021.384.1. As a result, the revised basement and ground floor complies with works in proximity policy and has been confirmed via Council Correspondence dated 30 January 2023 (refer **Attachment 19**).

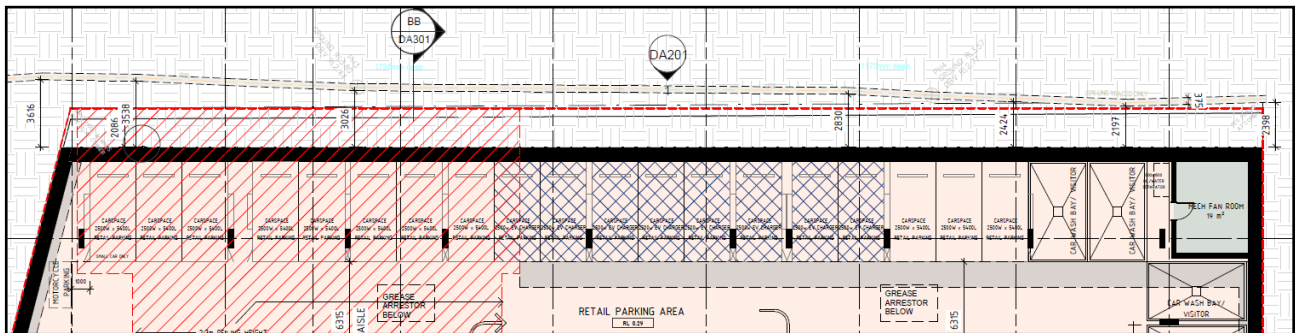


Figure 4: Offset of Sewer Main & Basement Level



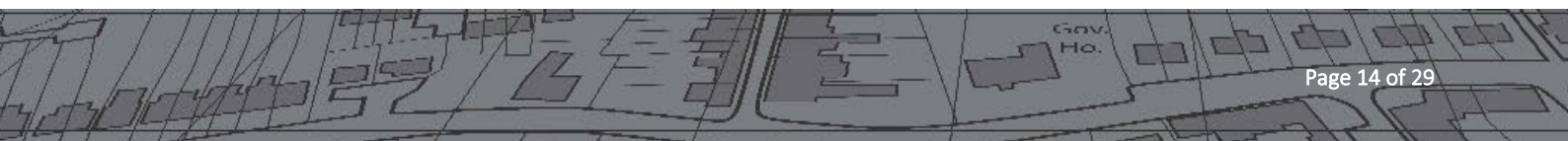
## 4.0 Proposed Modifications to Conditions of Consent

The requested modification seeks to change five conditions currently on the Consent 10.2021.384.1. The conditions are noted below including the suggested change:

- **Condition 1:** Approved Plans and Supporting Documentation.
  - Change Required: Amended plans to be referenced.
- **Condition 11:** Developer Contributions to be paid.
  - Change Required: Amended ETs to be appreciated in the calculation of the contributions based on the revised unit totals.
- **Condition 15:** Car parking layout, vehicle circulation and access plans required.
  - Change Required: Changes required to the Residential and Commercial Parking Requirements noting the reduced units now proposed. Need to remove the requirement to convert parking No. 52 into 2 x motorcycle spaces.

Below car parking is the minimum rates in which need to be incorporated in the revised condition:

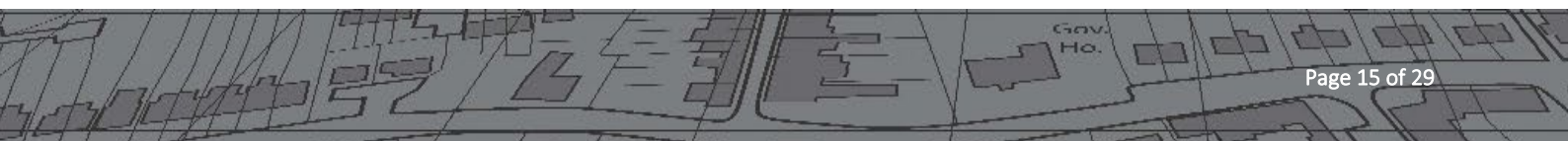
- **Residential parking**  
Total Required: 75 spaces
  - **Commercial parking**  
Total Required: 92.4 (93)
- **Condition 31:** Landscaping Plan
    - Change Required: Amend the approved plans to reference plans submitted as part of this modification application.
  - **Condition 94:** Use of Dwellings
    - This condition prohibits dwellings to be used as tourist and visitor accommodation or holiday let (Short – Term Rental Accommodation (STRA)) and if the development is Strata Subdivided, by- laws are to include such restrictions.
    - Removal required: Tourist and Visitor Accommodation is a permissible land use in the zone. Further, restricting this type of use via a condition impairs the use of Part 6 Short -term Rental Accommodation within the Housing SEPP as Exempt Development. There is no need for this condition to regulate an otherwise separate compliance matter. The outcome of the proposal for the cap of STRA will not have an inherent impact on the removal of this condition.
  - **Condition 95:** Car Parking spaces are to be available for the approved use.
    - Change Required: Amend the total number of parking spaces required as part of the application and to reference the revised numbers.







Further, it is noted that a Voluntary Planning Agreement (VPA) was made with DA10.2021.384.1 in lieu of public art consistent with Chapter B15 for development having an estimated cost greater than \$2,000,000. A VPA is permissible to be provided in lieu of the public art and is implied in this Chapter. We invite Council to provide a suitable condition prior to the issue of the Construction Certificate for the need to amend the Planning Agreement that will also reference the latest plans and any other programming amendments required.





## 5.0 Statutory Planning Framework

### 5.1 State Planning Policies

Whilst the application relates to a modification and no inherent need to assess each State Planning Policy (SEPP) is required, it is noted the following SEPP's are applicable to the application:

- ***State Environmental Planning Policy (State and Regional Development) 2011***

Comment: The development remains Regionally Significant Development for which the Joint Regional Planning Panel determined No. 10.2021.384.1. Consistent with the Sydney District & Regional Planning Panels Operational procedures, Planning Panels determine applications to modify consents for Regionally Significant Development under Clause 4.55 (2) of the EP&A Act which seek to modify:

- new or amended conditions of consent imposed by the Panel;
- development for which the applicant or landowner is the Council, a Councillor, a member of Council staff who is principally involved in the exercise of Council's functions under the Act etc.;
- a development that is subject to 10 or more submissions by way of an objection; or
- a development that contravenes a development standard imposed by an EPI by more than 10% or a non- numerical development standard.

As the modification does not seek to modify the Consent to such extent, Byron Shire Council remains the assessment and determining authority in respect of this modification request. Should the development attract 10 or more unique submissions then it will be determined by North Coast Regional Planning Panel.

- ***State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004***

Comment: An updated BASIX accompanies this application and is provided in **Attachment 9**.

- ***State Environmental Planning Policy (Transport and Infrastructure) 2021***

Comment: Clause 2.98 – Development adjacent to rail corridors, Clause 2.99 – Excavation in, above, below or adjacent to rail corridors are applicable to the modified application. Notwithstanding the current north coast rail line is not operational, the development remains substantially the same as that previously approved by way of DA No. 10.2021.384.1 and should the service resume operation, no further adverse impact will be caused on the rail land or services by way of the modified development.

Clause 2.48 - works within proximity of underground powerlines has been considered as part of the original DA No. 10.2021.384.1 and it is noted that no further safety concern is to be imposed to the mains appreciating the development is within the original building envelope and no further excavation is proposed.

- ***State Environmental Planning Policy 65 Design Quality of Residential Apartment Development***

Comment: Consistent with Clause 30, the consent authority must not refuse an application (including modification application) if the following matters are achieved:



- If the car parking is equal to, or greater than the recommended minimum amount per Part 3J of the Apartment Design Guideline.  
Comment: The development generally complies with the required car parking for the residential and the commercial component consistent with Byron Development Control Plan 2014 Chapter B13. With 75 residential parking required and 75 parking spaces afforded. A total of 88 commercial spaces are required and 93 spaces have been proposed. A reduction in the basement floor area has been proposed due to the requirement to consider and retain the sewer main to the northern portion of the site.
- If the internal area for each apartment will be equal to, or greater than, the recommended minimum internal areas for the relevant apartment type per Part 4D of Apartment Design Guideline.  
Comment: All internal areas are consistent with the minimum per Part 4D of Apartment Design Guideline and noted in Sheet DA001 of **Attachment 1**. No apartment provides an internal area of less than 70m<sup>2</sup>.
- If the ceiling heights for the building will be equal to, or greater than, the recommended minimum ceiling heights in Part 4C of Apartment Design Guide (ADG).  
Comment: All apartments achieve the minimum ceiling heights per Part 4C of ADG.

Further, consistent with Clause 30 (2), Development Consent must not be granted if the development including modification does not demonstrate that adequate regard has been given to:

- The design quality principles; and
- The objectives specified in the Apartment Design Guide for the relevant design criteria.  
Comment: A detailed SEPP 65 Design Verification Statement has been prepared and a copy is provided in **Attachment 3** of this report and prepared consistent with Clause 29 of the *Environmental Planning and Assessment Regulation (the Regulation) 2021*. The Statement details how the development achieves the design quality principles contained in Schedule 1 of this Policy. The statement also addresses how the development achieves the objectives contained in Apartment Design Guidelines. The development therefore complies with Clause 30(2) of this Policy.

Finally, in respect to Clause 28 of the Policy, the development retains compliance with ADG including affording greater cross ventilation of 84% of apartments, with cross through apartments not exceeding 18m glass to glass line. A total of 70.45% of apartments receive 3 hours of solar access for living rooms and private open space and just 13.63% receive no direct sunlight. Ample communal open space is afforded by way of a larger roof top terrace than previously approved with greater than 50% affording solar access. Deep soil zones are provided on the Ground Floor, Level 1, Level 2 and the roof top with a total of 885.68m<sup>2</sup> or 16.43% being more than double what is required under ADG. A variety of storage types are provided, accessed off living rooms and circulation corridors within the apartments and study areas. Storage locations are also allocated within basement levels as part of the proposal. The basement storage zones available meet ADG requirements.



## 5.2 Local Environmental Plan

*Byron Local Environmental Plan (BLEP) 2014* is applicable to the modification. The following Clauses are relevant to the development and remain substantially the same as Development Consent No. 10.2021.384.1 and as a result, remain compliant:

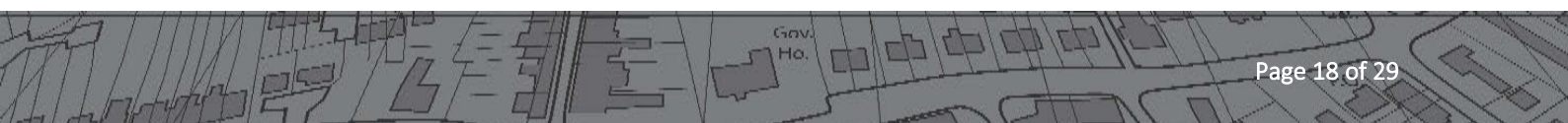
- Clauses 4.3 Height of Buildings
- Clause 4.4 Floor Space Ratio
- Clause 4.6 Exceptions to Development Standards
- Clause 5.10 Heritage Conservation
- Clause 6.1 Acid Sulfate Soils
- Clause 6.2 Earthworks
- Clause 6.7 Affordable Housing in Residential and Business Zones

Comment: Clause 4.4 Floor Space Ratio (FSR) and Clause 4.3 Height of Buildings within BLEP 2014 have been discussed below. The development seeks minor increases to both the FSR and the height beyond that previously approved and contained within BLEP.

BLEP 2014, identifies the site as having a maximum Floor Space Ratio (FSR) of 1.3:1, enabling a maximum gross floor area (GFA) of 7,007m<sup>2</sup>. The revised development provides a maximum floor space ratio of 7,092.64m<sup>2</sup> exceeding the maximum by 85.64m<sup>2</sup> or 1.22%.

It is acknowledged that a Clause 4.6 of *BLEP 2014* is not required for a Section 4.55 modification and therefore this application, however sufficient justification is nonetheless required to be demonstrated. In this regard, strict compliance with the development standard is unreasonable/ unnecessary in the circumstances as identified below:

- The variation represents a very minor departure from the permitted FSR being 1.22% of that allowed in the zone. The departure is also over three (3) storeys and distributed throughout the development;
- The minor departure is one of technical appreciation of the FSR definition and those items included in the measurement consistent with Clause 4.5 of *BLEP 2014* rather than the aspiration for an expanded development or footprint that has the ability to more readily impact the local amenity/ character;
- The minor departure will not adversely impact the streetscape character of the locality, acknowledging the buildings massing including footprint remains substantially the same as originally approved;
- The minor departure in the FSR does not create additional overshadowing, noise or privacy concerns to those land uses surrounding and therefore strict adherence to the control is unnecessary in this circumstance.
- The development is appropriately setback and separated from the public domain to mitigate the bulk and scale of the development. Indeed, the development remains compliant with the required front, side and rear setbacks consistent with Chapter E10: Byron Bay Town Centre and appropriately separates the ground level commercial with the residential above and breaking up the building mass maintaining a 'human scale' development. As a result, of these design initiatives







and compliance with relevant controls, the minor additional floor space is considered negligible and will not adversely impact the amenity of the area.

In regard to the Clause 4.3 of *BLEP 2014*, the revised development proposes a maximum building height of RL of 18.55 for the lift overrun on the roof top terrace with a maximum height of 14.75m above ground level (existing). This is generally consistent with the maximum height of the previously approved development DA10.2021.384.1 at 14.58m above ground existing and the minor increase in height would be imperceptible to the casual observer. Effectively, the main difference in the proposed plans with respect to building height is the provision of more usable space on the roof top terrace, however not all of the additional floor area is over the 11.5m building height, indeed most of this useable trafficable area (2,366.14m<sup>2</sup>) is 1m below the height plane. Whilst on face value (comparison of the approved DA10.2021.384.1 plans and that proposed in **Attachment 1**) there is an additional area of 316.82m<sup>2</sup> of additional usable space that is above the building height plane compared to the exiting approval, it appears that the previous approved plans have incorrectly noted 1,310m<sup>2</sup> of pop-out roofs as under the maximum height however when indeed these structures exceed the 11.5m height limit. In this regard, a total of 588.65m<sup>2</sup> in area that exceeds the height limit has been removed due to the removal of the pop-out roofs in lieu of the planter boxes.

So, subtracting the proposed additional area above the height limit (316.82m<sup>2</sup>) with the difference in area now below the height (588.65m<sup>2</sup>), there is in fact a net reduction in area exceeding the height limit beyond the previous approval of 271.83m<sup>2</sup>. This reduction is a preferred planning outcome and seeks to further reduce any amenity concerns and appearance as a fourth floor.

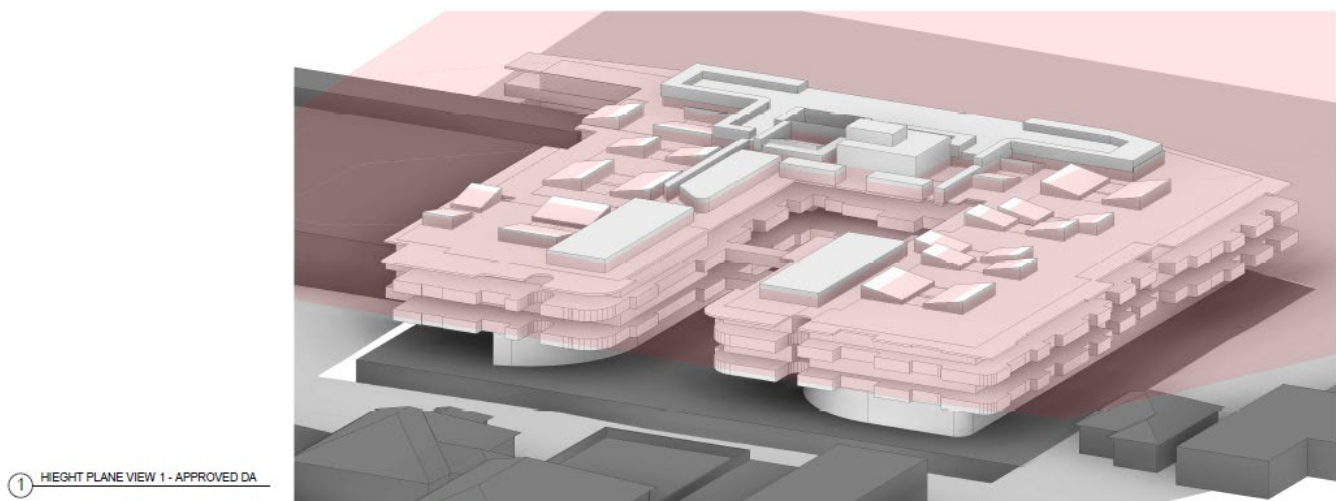


Figure 5: Height Plane on Approved DA Showing Pop-Out Roofs Greater than Height Limit



Figure 6: Previously Approved Height Plan -DA10.2021.384.1

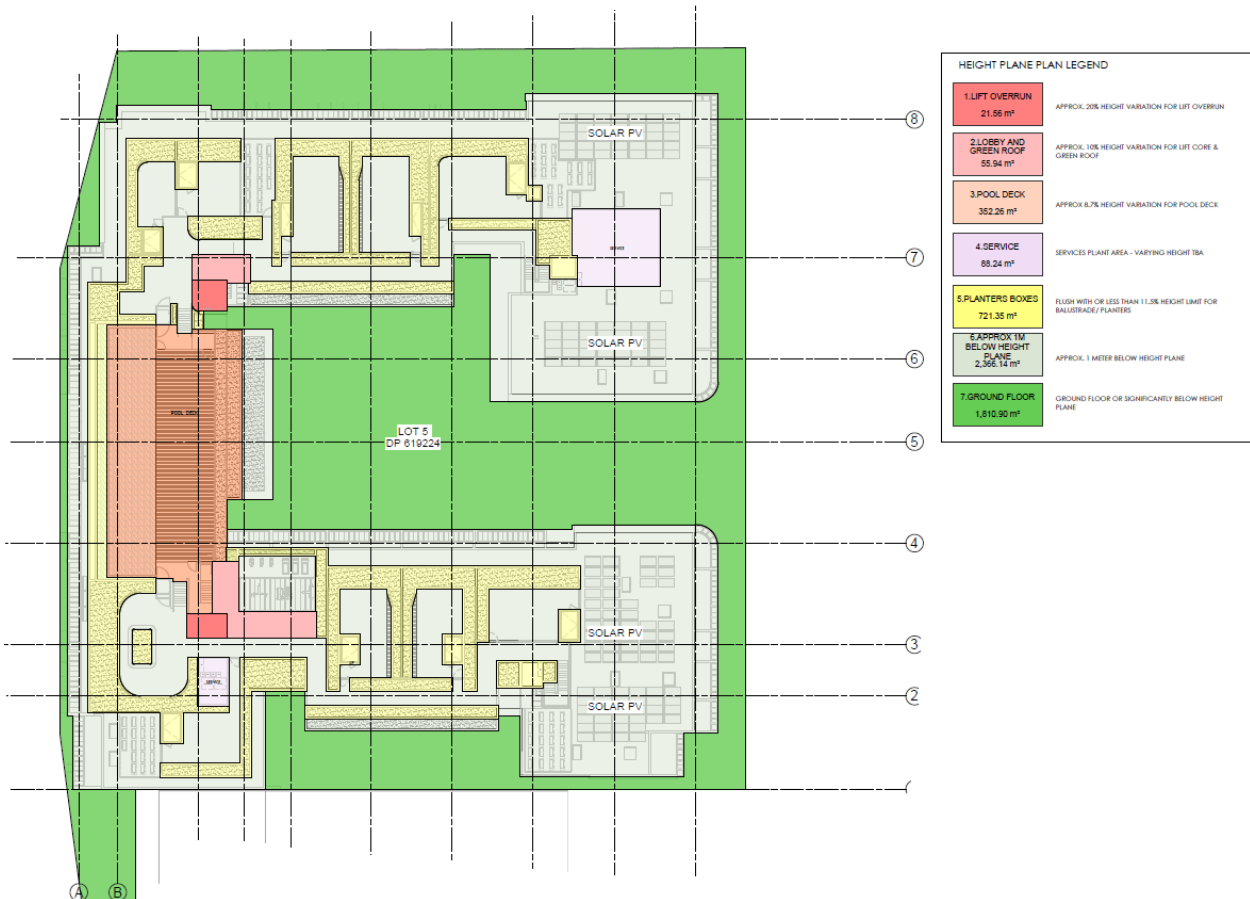


Figure 7: Proposed Height Plan Analysis



It is noted that a revised Clause 4.6 of *BLEP 2014* is not required for the exceedance in building height as confirmed by the DAP dated 9 November 2022. However, compliance with the development standard is unreasonable or unnecessary in the circumstance as follows:

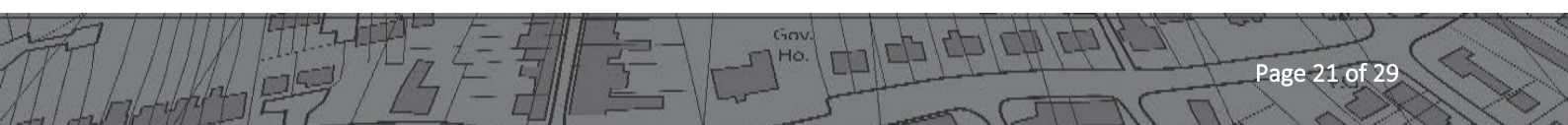
- The approved development exceeds the applicable height limit, and the proposal is generally consistent with the approved maximum height per DA10.2021.384.1.
- By deduction, there is in fact a reduction in the total area of rooftop elements that exceed the 11.5m maximum height limit.
- The varied building elements which exceed the maximum building height of 11.5m are some 49m from the public domain of Jonson Street and well setback from the western boundary and as a result, will not impact the streetscape character of the locality. This is demonstrated in **Attachment 18** noting the exceedance in height is generally not visible from street and typical 'eye' level.
- The central location of the height exceedance ensures no adverse impacts will result with respect to overshadowing and privacy of the surrounding adjacent properties.
- A request to strictly comply with the maximum building height would potentially jeopardise the 'substantially the same development' test and thereby impact whether a modification could be proposed.
- A requirement to strictly comply with the 11.5m building height would likely require a compensatory reduction of the publicly accessible areas on ground floor that is encouraged for the site from an urban design point of view, including creating a through-site pedestrian link to the Transit Centre.
- Strict compliance with the 11.5m building height would significantly amend the approved design removing much needed amenities including private open space consistent with Apartment Design Guidelines.

The proposal effectively maintains the status quo with respect to approved height and actually reduces the total built area exceeding the maximum height limit for the site. Given the above, the continuation of the variation of the building height is appropriate and strict compliance with the 11.5m building height is unreasonable and unnecessary in the circumstances of the case.

## 5.3 Development Control Plan

Byron Development Control Plan (BDCP) 2014 applies to the site including:

- › *Part A: Preliminary*
- › *Chapter B3: Services*
- › *Chapter B4: Traffic Planning, Vehicle Parking, Circulation and Access*
- › *Chapter B8: Waste Minimisation and Management*
- › *Chapter B9: Landscaping*
- › *Chapter B13: Access and Mobility*
- › *Chapter B14: Excavation and Fill*
- › *Chapter B15: Public Art*
- › *Chapter D1: Residential Accommodation in urban, Village & Special Purpose Zones*
- › *Chapter D4: Commercial and Retail Development*





› Chapter E10: Byron Bay Town Centre

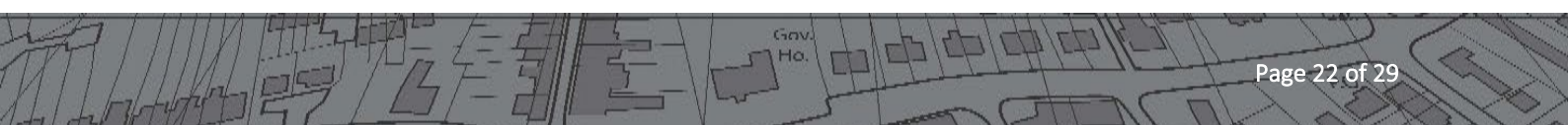
The amended proposal remains compliant with Chapter E10: Byron Bay Town Centre in so far as the development retains the front, side and rear setbacks, retains public domain street activation through large windows and entrances along the street and does not seek for any greater excavation than what has been previously approved through DA10.2021.384.1. The development retains the provision of a ground level piazza with the entrance from Jonson Street and creating a pedestrian link to the Transit Centre. The revised design maintains a 'human scale', including retention of ground level awnings and colonnade separating the retail component from the residential floors above, as well as embellished green spaces in the central plaza for public use and has been designed suitable for climate by way of improved solar access and cross ventilation considerations, upper level and rooftop landscaping for privacy and amenity, as well as select materials and colours. As detailed above, the use of arches does not impair or in any way diminish the existing and emerging character of the locality.

With respect to waste management, the development retains access for a medium rigid vehicle to service the site at ground level along the northern portion of the site. Vehicle turn paths have been applied to the plans demonstrating that waste vehicles can enter and exit the waste operation area in a forward direction with out the need for more than a three-point turn. The waste storage areas are sufficient for the proposed commercial and residential land uses and exceed the areas afforded as part of DA10.2021.384.1. In this respect the following commercial and residential waste areas have been proposed:

- Residential Waste: 34m<sup>2</sup>
  - Storage of:
    - 4 x 660L general waste bins
    - 4 x 240L food organic bins
    - 8 x 240L combined recycling bins
- Commercial Waste: 50m<sup>2</sup>
  - Storage of:
    - 7 x 2,000L General waste bins
    - 9 x 660L food organic bins
    - 2 x 1,500L combined recycling bins
    - 2 x 1,500L cardboard bins

The general bin locations have been identified on the plans demonstrating sufficient ability to manoeuvre and maintain the bins and waste area. The waste storage areas and bin zones are consistent with Chapter B8: Waste Minimisation and Management, Better Practice Guide for Waste Management in Multi-Unit Dwellings, NSW Department of Environment & Climate Change 2008 and Better Practice Guidelines for Waste Management and Recycling in Commercial and Industrial Facilities.

With respect to Chapter B15 - Public Art, it is noted the application triggers the need for public art to the value of 2.5% of the development costs with the need for a Public Art Plan showing details and particulars of the art and also meet the Design Selection Criteria. However, the revised development, as previously noted in this report seeks to continue the Voluntary Planning Agreement (VPA) option which has been supported via DA10.2021.384.1 enabling an equivalent financial contribution for the installation of public art in a suitable alternative location. In this regard, we invite Council to consider a new condition for the need to amend the endorsed VPA prior to the issue of the Construction Certificate.







In relation to car parking and Chapter B4: Traffic Planning, Vehicle Parking, Circulation and Access, the car parking rates of Table B4.1 have been applied and the development complies with the minimum rates. See **Table 3** below as extract from Revised Architectural Plans. Further, the basement provides for suitable width driveway of 5.8m facilitating two-way vehicle movement greater than the minimum of 5.5m per this Chapter and the revised basement layout complies with Australian Standard 2890, Austroads and the Northern Rivers Local Government Development and Design Manual.

Table 3: Car Parking Requirement (Minimum Rates)

CAR PARKING REQUIREMENTS (Minimum Rate)				
	Rate (per unit)	No. of Units / Area	Required (Min.)	Proposed
<b>Residential</b>				
2 Bed+S	1	4	4	
2 Bed	1	20	20	
3 Bed	2	20	40	
<b>TOTAL RESIDENTIAL</b>			<b>64</b>	<b>64</b>
<b>Others</b>				
Accessible Retail	2 per 50 spaces	86	2	2
Accessible Residential	10% units must be adaptable	44	4.4	5
Visitor	0.25	44	11	11
space shared with Retail & car wash bays				8
<b>Retail</b>				
Retail - Shops	1 space per 20m <sup>2</sup>	294.24 m <sup>2</sup>	87.26	88
Retail - F&B	1 space per 20m <sup>2</sup>	1,450.99 m <sup>2</sup>		(85 RETAIL & 1 SHARED SPACE & 2 ACCESSIBLE)
Car Wash (shared with Visitor)	per 10 units(Double as Visitor) 7.6m	44	4.4	5
<b>TOTAL DEVELOPMENT</b>			<b>166.6615</b>	<b>168</b>



No further excavation is proposed beyond that previously supported by way of DA10.2021.384.1 and therefore no further assessment is required with respect to Chapter B14: Excavation and Fill of BDCP 2014.

## 5.4 Section 4.55 Environmental Planning & Assessment Act

This modification seeks to amend Development Consent No.10.2021.384.1. The proposed amendments seek for greater residential amenity (internal and external) and functionality for the intended residents and visitors, despite a reduction in the unit yield proposed.

The revised development is appreciated to have minimal environmental impact; however, the application has been sought pursuant to Clause 4.55(2) of the EP&A Act 1979 (rather than Clause 4.55(1A)) consistent with Councils DAP minutes dated 9 November 2022. Notwithstanding this, the development is substantially the same as originally approved which is demonstrated below.

### (2) Other Modifications

**A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:**

**(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and**

**Comment:** Before the consent authority can modify the consent, it must be satisfied that "the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified".

In *Moto Projects (No. 2) Pty Ltd v North Sydney Council* (1999) Bignold J described the following test in determining 'substantially the same':

*"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is essentially or materially the same as the currently approved development; and*

*The comparative task does not merely involve the comparison of the physical features or components of the development as currently approved and modified where the comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."*

Following on from the tests established in this case and based on numerous Land and Environment Court decisions, it is apparent that the following key principles apply:

- The comparison is undertaken at a general level rather than between detail;
- The question is whether the development as a whole is essentially or materially similar to the original development;



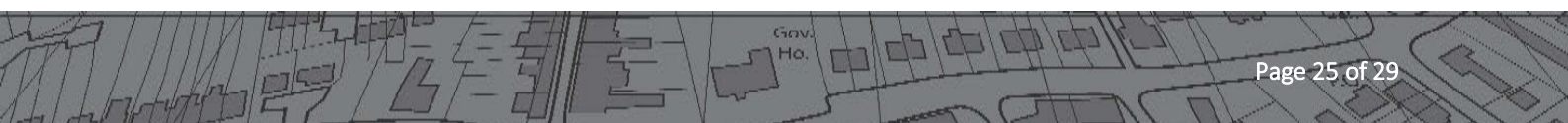
- If the impacts of the modifications are minor, the modified development is more likely to be essentially or materially the same development;
- It is relevant to consider the magnitude of any physical changes to the development and any changes to the use of the land;
- The extent of any impacts arising from the modifications are matters for consideration on the merits of the application; and
- The development as modified must be essentially or materially the same or have the same essence as the approved development and the variations must not radically transform or alter the approved development.

Having regard to the proposed amendments, and the key principles discussed above, it is submitted that the proposal is 'substantially the same' on the basis that:

- The land uses approved under Development Consent No.10.2021.384.1 remain unaltered by the modification request.
- The revised development retains a very similar bulk and scale, exhibited through key elements of the approval including retention of a three storey shop top housing development not exceeding the previous maximum building height, provides a generous piazza at ground, does not exceed and generally maintains the approved building footprint.
- The revised development seeks to increase the residential amenity of the development (internally and externally) and has sought changes to achieve this providing increased internal and external amenity for a high-quality Architectural design. For example, the number of units has reduced from 50 to 44 units, the revised design increases the number of north facing units, moves to a more traditional natural cross flow ventilation arrangement, provides for greater private open space including roof top terrace and provides for greater legible movement throughout the revised design by widening the openings to the arcade. All of these amendments are more consistent with the key environmental planning instruments and guidelines that are applicable to the land use approval.
- No additional non-compliances arise with the relevant planning benchmarks. The modification does not introduce any additional variations to relevant development controls.
- The proposed amended design maintains a consistent character in the locality by way of the massing, height, use of materials and colours. The visual difference between the approved and changed development appear primarily to the more detailed aspects of the developments visual articulation including the use of archways for some of the fenestration. This alone is not considered a significant departure from the previous design and is entirely permissible in the locality.

It is concluded that the proposed modifications sought will result in substantially the same development as the development for which consent was originally granted.

***(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and***





**Comment:** The proposed amended development does not seek to vary any conditions provided in No.10.2021.384.1 by a relevant Minister, public authority or approval body.

**(c) it has notified the application in accordance with:**

**(i) the regulations, if the regulations so require, or**

**(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and**

**Comment:** The original development undertook Pre-DA lodgement Community Consultation and further notification was undertaken as part of the DA assessment process and consistent with Byron Community Participation Plan 2019. Consistent with Byron Community Participation Plan 2019 Council are expected to notify and exhibit modification application in the same manner as the original development application.

**(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.**

**Comment:** As per comments in response to item (c) above, public notification of this modification will be required and any submissions received, these must be considered by Council.

**(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.**

**Comment:** It is noted the proposal has been assessed in detail against the matters contained in Section 4.15 of the *EP&A Act 1979* including applicable environmental planning instruments, the development control plan, the Environmental Planning and Assessment Regulation and importantly the likely impacts of the development.

This section 4.55(2) modification raises no issues relative to any controls within a State Environmental Planning Policy, Local Environmental Plan or Development Control Plan applying to the site above what has already been assessed in the original Statement of Environmental Effects.

It is therefore submitted that based on the modifications being sought, no further assessment against the relevant controls of the above documents is required.

Refer Section 6.2 for discussion of Statement of Reasons.

**(4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.**

**Comment:** Noted

Considering the above comments, this proposed Section 4.55(2) Modification accords with the relevant provisions of the *EP&A Act 1979* and therefore modified consent can be granted by Byron Shire Council.



## 6.0 Statement of Reasons

As per Section 4.55(3) in determining an application for modification of a consent under this section, the consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. The reasons for the grant of Development Consent 10.2021.384.1 are identified as:

Table 4: Statement of Reasons

Statement of Reasons
The proposed development complies with the provisions of Byron Local Environmental Plan 2014.
The proposed development complies with relevant State Environmental Planning Policies
The proposed development complies with relevant provisions of Development Control Plan 2014
The proposed development complies with Environmental Planning & Assessment Regulation 2000 considerations.
The proposed development will not have significant adverse impact on the natural, built or social environment or economic impacts on the locality.
The proposed development is considered suitable for the proposed site.
The development application was notified/advertised in accordance with Council's Community Participation Plan. Issues raised in the submissions have been addressed during assessment of the application.
The proposed development is unlikely to prejudice or compromise the public interest.

In this instance the statement of reasons is very broad, and the modification sought will not be inconsistent with the reasons for approval, i.e., that on balance the proposal remains suitable to be determined by way of approval including the modifications sought.





## 7.0 Conclusion

Zone Planning NSW on behalf of Project Bohemian Pty Ltd AFT Bohemian Unit Trust ('the Applicant'), seeks to modify Development Consent 10.2021.384.1 which was determined by the North Regional Planning Panel on 27 May 2022. Development Consent 10.2021.384.1 approves the demolition of existing buildings and construction of a 3-storey mixed use retail/ residential development including basement parking over the sites of 90-96 Jonson Street, Byron Bay. The Consent has not been operated on nor has a Construction Certificate been issued with respect to the approval.

In summary, the application seeks a Clause 4.55(2) modification pursuant to the *Environmental Planning and Assessment Act 1979* with respect to 10.2021.384.1. The changes are sought to improve residential amenity (internally and externally) for residents and visitors. A detailed comparison Table is provided in Section 3.1 of this report. It is acknowledged more 3-bedroom units are proposed as part of the unit mix whilst also generally maintaining the same fundamental built form elements, height, floor space ratio, footprint and providing compliant car parking rates consistent with Council's Development Control Plan.

The design changes sought require the change of five conditions currently on 10.2021.384.1. Section 5 of this report notes these conditions the suggested changes. There are no conditions that require modification that have been imposed by North Regional Planning Panel as of the original assessment and determination.

Having regard to the proposed amendments, it is submitted that the proposal is 'substantially the same' as originally approved and complies with Clause 4.55(2) of the EP& A Act. Determination can be made by Byron Shire Council as the consent authority.