



BYRON SHIRE COUNCIL

**COUNCIL ASSESSMENT REPORT – MODIFICATION
APPLICATION**
NORTHERN REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSNTH-409 – DA10.2022.371.4
PROPOSAL	Modification to residential flat building including increase in building height within R3 Medium Density Residential and 7(F2) Urban Coastal Land zones and increase in size of rooftop areas across all buildings.
ADDRESS	<p>Lot 2 DP 582519 29 Shirley St Byron Bay. The address of the subject site at the time of the original development consent was 29 Shirley Street, 2 & 4 Milton Street Byron Bay, comprising the following lots:</p> <p>Lot 8 Section 52 DP758207 Lot 9 Section 52 DP758207 Lot 2 DP582819 Lot 7 DP841611 Lot 12 DP1138310 Lot 1 DP582819 Lot 1 DP780935 Lot 8 DP841611 Lot 9 DP841611</p>
APPLICANT	Urbis Pty Ltd
OWNER	29 Shirley Street Pty Ltd
MOD LODGEMENT DATE	14 February 2025
ORIGINAL DA DETERMINATION DATE	16 October 2023
APPLICATION TYPE	Modification Application under Section 4.55(2)
REGIONALLY SIGNIFICANT CRITERIA	Clause 2.18(1), Schedule 6 of <i>State Environmental Planning Policy (Planning Systems) 2021</i> : General development over \$30 million
CIV	\$54,750,000 (excluding GST)

CLAUSE 4.6 REQUESTS	<ul style="list-style-type: none"> • Variation to maximum 9m Height of Building Control Clause 4.3 BLEP 2014. • Variation to maximum building height standard of 9m and floor of topmost floor level not to exceed 4.5m above existing ground level Clause 40(b)(ii) of Byron Local Environmental Plan 1988 (BLEP (1988)).
KEY SEPP/LEP	<p>Relevant Environmental Planning Instruments</p> <ul style="list-style-type: none"> • State Environmental Planning Policy (Housing) 2021 • State Environmental Planning Policy (Planning Systems) 2021 • State Environmental Planning Policy (Resilience and Hazards) 2021 • State Environmental Planning Policy (Transport and Infrastructure) 2021 • State Environmental Planning Policy (Sustainable Buildings) 2022 <p>Relevant Local Environment Plan</p> <ul style="list-style-type: none"> • Byron Local Environment Plan 1988 • Byron Local Environmental Plan 2014 <p>Relevant Development Control Plan</p> <ul style="list-style-type: none"> • Byron Development Control Plan 2010 • Byron Development Control Plan 2014
TOTAL & UNIQUE SUBMISSIONS ISSUES SUBMISSIONS	1 in objection
DOCUMENTS SUBMITTED FOR CONSIDERATION	<ul style="list-style-type: none"> • Architectural Plans • Statement of Environmental Effects and amendments summary • S4.6 and s64A Variation Requests • Visual Impact Statement • Statement of Landscape Intent • Public Submissions
RECOMMENDATION	Refusal
DRAFT CONDITIONS TO APPLICANT	No

SCHEDULED MEETING DATE	14 July 2025
PLAN VERSION	4 February 2025 Rev A
PREPARED BY	Council Planner- Alissa Magnifico
DATE OF REPORT	26 June 2025

EXECUTIVE SUMMARY

The modification application has been lodged pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') and seeks consent for amendments to a consent granted under DA10.2022.371.1 approved by the Panel on 16 October 2023. This consent approved to demolish existing development and clear the site, including existing buildings and trees to facilitate a residential flat building development comprising of 25 three-bedroom dwellings distributed across four separate two and three-storey buildings with basement car parking, associated landscaping and amenities at 4 Milton Street Byron Bay, 29 Shirley Street Byron Bay, 2 Milton Street Byron Bay, 1 Cavvanbah Street Byron Bay – Now known as 29 Shirley St Byron Bay ('the site'). The modification application includes the relevant information required by Clause 100 of the *Environmental Planning and Assessment Regulation 2021* ('2021 EP&A Regulation').

The application is referred to the Northern Regional Planning Panel ('the Panel') as the development is '*regionally significant development*', pursuant to Section 2.19(1) and Clause 2 of Schedule 6 State Environmental Planning Policy (Planning Systems) 2021 as it comprises a residential flat building with an estimated development cost of more than \$30 million. The proposed modification satisfies the criteria to be considered by the Panel in the Instruction issued pursuant to Clause 275(2) of the EP&A Regulation 2021.

The proposed modification relates to Modification to residential flat building including increase in building height within R3 Medium Density Residential and 7(F2) Urban Coastal Land zones and increase in size of rooftop areas across all buildings. The proposed modification is not considered to satisfy the substantially the same development test required by Section 4.55 of the EP&A Act.

The application was placed on public exhibition from 4 March 2025 to 24 March 2025 , with 1 submissions received. These submissions raised issues relating to noise and amenity impacts and is considered further in this report.

A briefing was held with the Panel on 20 May 2025 where key issues were discussed, including

- Application history outlined, noting split zoning and controls relating to height and rooftop terrace size
- Modification request to increase height and size of roof top areas across all buildings

- Floor to ceiling heights and basement slab depth noted
- Size of roof top terraces - non-compliances noted
- Site located in residential area
- Improvements noted in the design
- Proposed multiple gate access onto rail corridor
- Appeal lodged
- Assessment to be undertaken to determine if substantially the same development
- Roof top landscaping
- Options for alternate access to roof top terraces available
- 1 submission received
- Internal and external referrals received

The key issues associated with the proposal identified in the assessment of the application include:

- Proposed modified development not substantially the same
- Excessive building height
- Impacts on aural amenity
- Visual impacts on streetscape, character, and built environment
- Impacts on natural environment and coastal zone
- Design Verification and Quality
- Access into railway corridor
- Public Interest

Following consideration of the matters for consideration under Section 4.15(1) and 4.55 of the EP&A Act, it is considered that the proposed modifications **cannot** be supported and it is recommended the modification application be refused.

1. THE SITE AND LOCALITY

- **The Site**

The site is currently known as 29 Shirley St, Byron Bay 2481, being Lot 11 in Deposited Plan ("DP") 1313566, after 10 lots (LOT: 1 DP: 582819, LOT: 2 DP: 582819, LOT: 8 DP: 841611, LOT: 12 DP: 1138310, LOT: 8 SEC: 52 DP: 758207, LOT: 9 SEC: 52 DP: 758207, LOT: 1 DP: 780935, LOT: 9 DP: 841611, LOT: 11 DP: 1138310, LOT: 7 DP: 841611) were consolidated as required by condition of consent number 28 of DA 10.2022.371.1 (as modified).

The site has frontage to Milton Street and Shirley Streets generally to the south, adjoins a 30-metre wide (and variable) rail corridor to the north, with Belongil Beach beyond. The site is flanked to the east and west by established residential development.

The site has an area of 5937m². The site is currently vacant as structures on the site have been demolished and vegetation removed.



Figure 1: Aerial photograph of site (Source: Nearmap, imagery taken 5 April 2025).

Site topography generally falls in a gently undulating manner from Shirley and Milton Streets towards to the rail corridor and vegetated back dune environment of Belongil Beach.

The site has split zoning and is within Zone 7(f2) Urban Coastal Land under *Byron Local Environmental Plan 1988* (BLEP 1988) in the north of the site and Zone R3 Medium Density Residential under *Byron Local Environmental Plan 2014* (BLEP 2014) to the south.



The site is mapped as containing High Environmental Value Vegetation.

The site is located within Byron Bay, within the broader Northern New South Wales region, and sits approximately 400 metres from the Byron Bay Town Centre and 5.8km from the Pacific Motorway. The site sits along the eastern approach of Shirley Street, which is a classified road and a key thoroughfare for vehicles travelling into and out of Byron Bay.

The property is part of the urban area and is adjacent to the Shirley Street Heritage Conservation area on the southern side and adjacent to a non operational rail corridor and Belongil Beach on the northern side. This part of the urban area is generally residential in nature and consists of a mix of single storey and double storey residential dwellings, residential flat buildings and multi dwelling housing.

2. THE PROPOSAL AND BACKGROUND

• The Proposed Modification

The modification application DA10.2022.371.4 (subject modification) was lodged on 14 February 2025 pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') and seeks consent for amendments to a consent granted under DA 10.2022.371.1 (original consent) approved by the Northern Regional Planning Panel on 16 October 2023. The consent was granted to Demolish an existing development, including existing buildings and trees to facilitate a residential flat building development comprising of 25 x three-bedroom dwellings distributed across four separate, two and three-storey buildings with basement car parking, associated landscaping and amenities.

A previous modification application, DA10.2022.371.2 was lodged on 24 July 2024 pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') to modify DA10.2022.371.1 for Modification to residential flat building in relation to basement layout, addition of wellness centre, internal floor plan layout changes, addition of rooftop pools changed rooftop terraces and landscaping. The modification application was approved, subject to conditions of consent on 13 December 2024, but a number of changes to the height of the building, similar to this current proposal, were not supported.

General details of the subject modification are set out below and are situated in parts of the property in the 7(F2) Urban Coastal Land Zone under the *Byron Local Environmental Plan 1988* and parts of the property in the the R3 Medium Density Residential Zone under the *Byron Local Environmental Plan 2014*.

Modifications within 7(F2) Urban Coastal Land (BLEP 1988)

- Amend condition 9(a) to allow height exceedances over 9 metres measured from ground level (existing) and amend condition 9(a) such that the topmost part of the northern building does not exceed 9 metres above RL 5.0.
- Amend condition 9(c) to increase the useable area of all the roof top terraces from 40m² including pools to a maximum of 63.5m² for Apartment 105, 40.8m² for Apartment 106, 40.8m² for Apartment 107, 40.8m² for Apartment 108 and 44.9m² for Apartment 109 excluding pools;

Modifications the R3 Medium density residential Zone (BLEP 2014)

- Increase in height of all buildings including a lift overrun located on roof top of unit 201.
- Increase in the area of all roof top terraces
- Amendment to condition 9(b)(i) and 9(b)(ii) wording are requested to address building height in terms of RL levels and reflect extrapolated interpretation of ground level (existing) addressed as part of the clause 4.6 variation request forming part of the originating approval;
- Amendment to condition 9(b)(i) wording to allow marginal increase to the building height measured to the top of roof from RL14.2 (approved) to RL 14.66 (0.466m increase);
- Amendment to condition 9(b)(ii) wording to allow roof top glass balustrade height increased by 0.150m to comply with pool fence requirements (new proposed RL 15.86);
- Amendment to condition 9(c) wording to include DDA compliant lift overrun to dwelling 201 (new proposed RL 18.05); and
- Amendment to condition 9(c) wording to increase the useable area of all the roof top terraces from 40m² including pools to a maximum of 41.3m² for Apartment 210, and 40m² for Apartments 201, 202, 203 and 204 excluding pools.

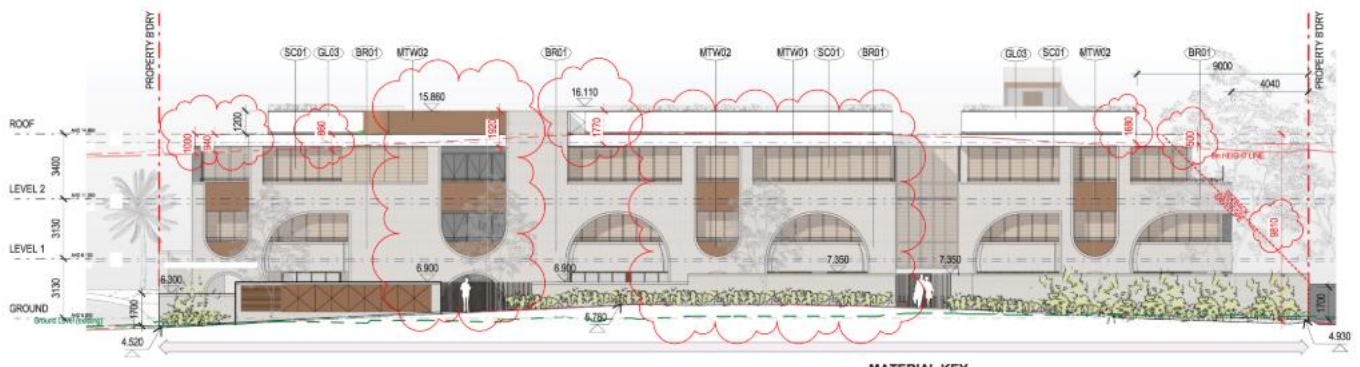


Figure 3: Proposed Shirley St Elevation (R3 zone)

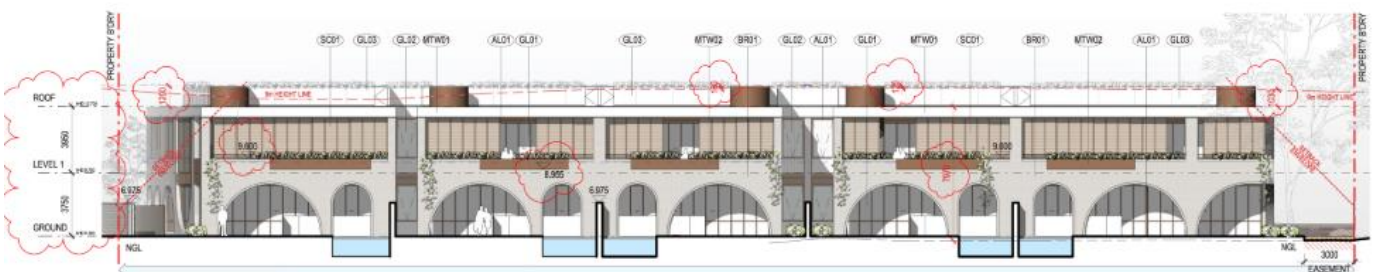


Figure 4: Proposed North Elevation (7F2 zone)



Figure 5: Proposed Rooftop terraces (7F2 zone)



Figure 6: Proposed Rooftop terraces (R3 zone)

Table 1: Development Data

Control	DA 10.2022.371.1 as approved	Modification Proposal 10.2022.371.4
Site area	5937m ²	No change
GFA	4,810m ²	4,767m ²
FSR (R3 zoning)	0.66:1	0.65:1
Clause 4.6/64A Requests	Height in both zones FSR in R3	Height in both zones
No of apartments	25 x 3 bedroom dwellings	no change
Max Height R3 zoning (max 9m)	<p>DA10.2022.371.1 approved a maximum height of up to 10.7m from the existing ground level, only for a few elements as shown on the stamped approved plans.</p> <p>This was subsequently modified as per condition 9(b) of consent DA10.2022.371.2:</p> <p>i. The maximum height of the building for any lift over runs shall not exceed 10.7 metres above the existing ground level.</p> <p>ii. The maximum height of any other elements including balustrading, pools or rooftop planters shall not exceed 10.25 metres above the existing ground level.</p>	<p>A maximum height from existing ground level of:</p> <ul style="list-style-type: none"> • 13.05m measured to the top of unit 201 lift overrun • 10.86m to other lift overrun • 9.66m to the top of the roof • 10.86m to the top of the balustrade
Max Height – 7(F2) Zone - permissible (Max 9m or 4.5m from topmost floor level)	<p>Condition 9 of DA10.2022.371.1 and Condition 9(a) of consent DA10.2022.371.2 required amended plans to demonstrate maximum height of 9m from existing ground level.</p> <p>The SEE with DA10.2022.371.4 incorrectly states a maximum of height 10.1m (RL 15.10) was</p>	<p>Proposing a maximum height of 9.6m from the existing ground level as shown on plans. However when extrapolated, the maximum height appears to be up to approximately 9.8m from existing ground level.</p> <p>The proposed RLs are:</p>

	approved under DA10.2022.371.1.	<ul style="list-style-type: none"> • RL12.7 Roof • RL12.7 rooftop terrace • RL13.3 rooftop terrace • RL13.9 rooftop balustrade
Rooftop terraces	<p>Condition 9 (a) of DA10.2022.371.1 required the northern building (7f2 zone) to have a maximum trafficable area of 40m2.</p> <p>Rooftop terraces within the R3 zone were approved as shown on plans. No roof top pools were approved as part of the original consent.</p> <p>DA10.2022.371.2 consent condition 9 e approved:</p> <p>Roof top terraces in 7(F2) and R3 to have a maximum useable area of 40m2 only. <u>Including</u> any pool, bbq, entertaining and seating areas, <u>excluding</u> rooftop maintenance circulation areas. The remainder of the roof top area inside the maintenance circulation area is to be planted with low scale green roof landscaping.</p>	<p>Rooftop terraces with pools within 7(f2) zone proposed with a useable area between 40.8m2 to 63.5m2 <u>excluding</u> the area of the pools and 'maintenance circulation areas'.</p> <p>Rooftop terraces with pools within R3 zone proposed with roof top terraces with useable area between 40m2 and 41.3m3 <u>excluding</u> the area of pools and 'maintenance circulation areas'.</p>
Landscaped area	<p>1,392m2 including 527.32 deep soil,</p> <p>71 trees</p>	<p>1,437.24m2 of landscaping including 551 m2 of deep soil zone.</p> <p>72 trees on ground level 26 trees level 2 18 trees on rooftop</p>

Car Parking spaces	69	No change
Setbacks	As approved by development consent	No change

- Background**

DA10.2022.371.1

The original development consent was issued on **16 October 2023**, with the key issues considered in the assessment of the original development comprising the following:

- Stormwater Management*

The initial architectural scheme proposed its legal point of discharge towards the rail corridor. Following further discussions with Council and Transport for New South Wales (**TfNSW**) in relation to concerns of stormwater impacts on the rail corridor to the north, properties downstream of the corridor and the dune environment of Belongil Beach, new stormwater management infrastructure was incorporated within the scheme to discharge stormwater to the south of the site to avoid any impacts to the rail corridor. Therefore, the approval in its current form does not discharge stormwater into the rail corridor. No changes to the approved development are proposed in this regard as part of the current s4.55(2) request.

- Clause 4.6 Variation Request in the R3 Zone - Height*

The development application sought a height variation of 1.7m, resulting in a maximum approved height of 10.7m, equivalent to a variation of 18.9%. The height exceedance was to facilitate the top of a lift overrun, fire staircase and rooftop balustrading. The exceedance was justified, supported and approved.

- Clause 64A Variation Request in the 7(f2) Zone*

The development application sought a variation to the height of the building by an additional 1.1m in exceedance of the 9m, equivalent to a variation of 13.9%. The height exceedance was to facilitate the top of the lift overrun and fire staircase and was not supported. A maximum height of 9m within the 7(f2) zone was approved via condition of consent No. 9.

The Clause 64A request also sought to propose a third floor level of units which was not supported and amended within a revised development scheme to comply with the maximum of 2 floor levels permitted within the 7(f2) zone.

Further increases to the height exceedance are proposed as part of this S4.55(2) request.

- Clause 4.6 Variation Request in the R3 Zone – Floor Space Ratio*

The development application sought a variation to the floor space ratio of the development by an additional 208.4m² of GFA, equating to a 0.66:1 FSR.

No material change to the FSR is proposed as part of the current modification request.

- *Density within the 7(f2) Zone*

The development application initially sought approval for a total of 26 dwellings, with 14 of these located within the 7(f2) zoning. To achieve compliance, a reduction of density within the 7(f2) zoning was sought from a total of 14 to 10 units approved. No changes to the density is proposed as part of this s4.55(2) request.

- *Building Height Plane encroachment*

The development application sought a minor variance to the building height plane provision (D1.2.1) for the minor encroachment of balcony areas within the eastern setback (4m setback to boundary) and balcony areas within the western setback (4.8m setback to boundary). During the previous assessment process, Council considered this variation to be minor and consistent with the relevant objectives and supporting performance criteria. No changes to the building height plane are proposed as part of this s4.55(2) request.

- *Proximity to Escarpment*

The development application sought a building footprint that would be located approximately 80m from the Belongil coastal escarpment, as identified within the mapped Erosion Precinct 2. Given the site's separation distance from the escarpment line and the presence of the railway corridor further to its northern boundary, a development condition of consent was imposed to restrict the future land use on the site should the escarpment come within 50m of the future building. The approved setbacks are retained in the current s4.55 request.

- *Vegetation Clearing*

The approved development includes the removal of existing vegetation in order to facilitate the extent of the development, including a Moreton Bay Fig tree, subject to appropriate compensatory landscaping. No changes to vegetation removal is proposed as part of the s4.55 request.

DA10.2022.371.2

A S4.55(2) modification application 10.2022.371.2 was lodged on **24 July 2024** for Modification to residential flat building including in relation to basement layout, addition of wellness centre, internal floor plan layout changes, addition of rooftop pools and changed rooftop terraces and landscaping.

- *Height Variation request in the R3 zone*

The proposed modification to increase in building height within the R3 zone to 13.02m to highest lift overrun and 11.06m to top of pools and balustrades was found to be unjustified and not supported. The proposed lift overrun to unit 201 was also not supported.

A maximum height within R3 zone of 10.7m for any lift overrun and 10.25m for any other elements was approved via condition 9a of consent.

- *Height Variation Request in the 7(f2) Zone*

The modification application sought a variation to the height of the building by an additional 1.1m in exceedance of the 9m, equivalent to a variation of 13.9%. The height

exceedance was sought to facilitate the top of a lift overrun and fire staircase. The exceedance was not supported and the maximum approved height of 9m from existing ground level in the 7(f2) zone was retained via condition of consent No. 9(a).

- *Increase in rooftop activation from new pools, size of rooftop terraces and landscaping*
Increase in size of all rooftop terraces, new rooftop pools and extensive rooftop landscaping was supported, subject to conditions of consent to protect the amenity of residents and the visual impacts.

Ultimately roof top terraces in 7(F2) and R3 zone were approved with pools with a maximum useable area of 40m² only via condition of consent no.9(e). Further conditions of consent were also applied to protect the amenity of neighbours via restriction on hours of use of the rooftop.

The extensive rooftop landscaping including 1.2m planter boxes and mature trees was not supported, with condition 9 (f) of consent requiring rooftop landscaping to have a maximum planter depth of 600mm, with no trees permitted and planting restricted to ground covers and shrubs.

Modified development consent was granted on **13 December 2024**, subject to conditions of consent.

DA10.2022.371.3

A s4.55(2) modification application 10.2022.371.3 was received on **22 January 2025** and was subsequently returned by Council on 24 January 2025 as the application was incomplete and could not be accepted for lodgement.

DA10.2022.371.4

The proposed modification application was lodged on **14 February 2025**. The proposed modification to increase building heights, a lift overrun to unit 201 and increase the size of rooftop terraces within this modification (DA10.2022.371.4) are very similar to what was previously proposed and not supported within DA10.2022.371.2 and DA10.2022.371.1.

A chronology of the modification application since lodgement is outlined below in **Table 3** including the Panel's involvement (briefings, deferrals etc) with the application:

Table 1: Chronology of the Modification Application

Date	Event
14 February 2025	Modification application lodged
25 February 2025	Application referred to external agencies
4 March 2025 to 24 March 2025	Exhibition of the application
8 April 2025	Class one appeal against deemed refusal of DA10.2022.371.4 lodged by applicant

20 May 2025	Panel briefing
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3. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in 4.55(2) of the EP&A Act in relation to modification of consents provisions, Section 4.15(1) of the EP&A Act in relation to matters for consideration for applications and Part 5 of the 2021 EP&A Regulation in relation to information requirements and notification. These matters are considered below.

- **Section 4.55 of the EP&A Act**

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 number of matters are satisfactorily addressed pursuant to Section 4.55(2) of the EP&A Act. The matters include the following:

- (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) (s4.55(2)(a)), and*

Comment:

Council is not satisfied, as:

- The proposed increase in building heights, additional lift overruns and intensive rooftop activation substantially alter the approved development and results in significant qualitative changes to the amenity, streetscape and built form. The proposed modifications result in a development that departs from the objectives of the zones and medium density character of the streetscape.
- Essential to the granting of the original application was compliance with the objectives of the zones and medium density character of the streetscape, and those characteristics would no longer be part of the application if the modification application were to be approved. Compliance with the relevant height limits was also essential to the granting of the original application.
- Compliance with the Principles in Schedule 9 of the SEPP Housing were also essential to the granting of the original application.
- The form, bulk and intensity of development now proposed in the Zone 7(f2) Urban Coastal Land Zone is inconsistent with the objectives of that zone.

- The amendments proposed are not consistent with a medium density residential environment, as required by the objectives of Zone R3 Medium Density Residential.
- The intensive rooftop activation, introduced by the modification application has new and unreasonable visual and aural amenity impacts to neighbouring properties.
- The proposed modification application as a whole, if approved, would result in the modification not being substantially the same 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 (s4.55(2)(b)), and*

The proposal is not integrated development.

- (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 (s4.55(2)(c)), and*

Notification was undertaken in accordance with the Council's Community Participation Plan, Division 2 of Part 5 of the 2021 EP&A Regulation.

- (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 (Section 4.55(2)(d)).*

The modification application was notified between 4 March 2025 until 24 March 2025 and 1 submission was received. The issues raised in this submission is considered in Section 4 of this report.

- (e) *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 (Section 4.55(3)).*

The matters required to be considered include:

- Matters for consideration pursuant to Section 4.15(1) of the EP&A Act – these matters are considered below in Section 3.2 of this report; and
- Reasons given by the consent authority for the grant of the consent that is sought to be modified – outlined below.

Reasons for Granting of Consent

The NORTHERN REGIONAL Planning Panel granted consent to the original development in a notice of determination dated 16 October 2023. The reasons outlined in the Statement of reasons for this decision included the following:

- the development is permissible with consent in both relevant zones: namely R3 Medium Density under BLEP 2014 and the 7(f2) Urban Coastal Land zone under BLEP 1988,
- the proposal is generally consistent with the SEPP 65 Design Quality Principles and satisfies the requirements and objectives of the relevant controls,
- the development, subject to the recommended conditions, will not result in unacceptable adverse impacts upon the natural or built environments, and
- the development is consistent with the objects of the Environmental Planning and Assessment Act 1979.

In respect of the R3 Medium Density Residential land, the Panel agrees that:

- exceedance of the height and floor space ratio controls under BLEP 2014 are justified,
- the proposed exceedances are minor and will enable additional dwellings consistent with the R3 zoning and existing medium density character fronting the northern side of Shirley Street, and
- The FSR exceedance is also justified as it enables improved landscape and communal open space outcomes across that portion of the site.

In respect of the Deferred Matter - 7(f2) Urban Coastal Land, the Panel:

- agrees that the provision of 10 dwellings across two floors is acceptable, noting this is a minor exceedance of the minimum site area per dwelling ratio of 300m² of site area for each dwelling greater than 85m² in floor area under BDCP 2010 Chapter 1 Part C.7.2 for residential flat buildings.
- The proposed density (resulting in 10 dwellings vs 8.2 dwellings under the DCP control) is considered acceptable because the building mass is contained in one uniform level structure surrounded by generous landscaping and open space and subject to the height control issue (see below) will result in a development not out of character with the typical lower form, bulk and amenity of development on adjoining 7(f2) Urban Coastal Land, and
- is not satisfied the request to exceed the cl. 40 (2)(b)(ii) height control is justified. The Panel agrees with Council that the 4m floor to ceiling heights proposed for the residential floors could be reduced to have the uppermost

roof level (including parapets and balustrades) conform with the height control and still provide adequate internal spaces, and

- concluded that, subject to all building elements including balustrading conforming with the 9m height control, and submission of adequate landscape designs, accessible rooftop gardens with modest trafficable areas are acceptable and will have insignificant adverse amenity or environmental impacts.

The proposed modification is **inconsistent** with these reasons for the decision on this consent in that

- the proposed development is inconsistent with the height planning controls and expectations for the site given the zoning and other planning controls for the site.
- The proposed development will likely have adverse amenity and environmental impacts

- **Section 4.15(1) of the EP&A Act**

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.55(3), which are of relevance to the application.

These matters include the following, which are considered in detail below:

- (a) *the provisions of—*
 - (i) *any environmental planning instrument, and*
 - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
 - (iii) *any development control plan, and*
 - (iiia) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
 - (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),**that apply to the land to which the development application relates,*
- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

3..1 **Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations**

The relevant provisions under s4.15(1)(a) are considered below.

(a) Environmental planning instruments (s4.15(1)(a)(i))

The following Environmental Planning Instruments are relevant to this application:

Relevant Environmental Planning Instruments

- State Environmental Planning Policy (Housing) 2021
- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- State Environmental Planning Policy (Sustainable Buildings) 2022

Relevant Local Environment Plan

- Byron Local Environment Plan 1988
- Byron Local Environmental Plan 2014

Relevant Development Control Plan

- Byron Development Control Plan 2010
- Byron Development Control Plan 2014

A summary of the key matters for consideration arising from these State Environmental Planning Policies are outlined in **Table 4** and considered in more detail below.

Table 2: Summary of Applicable State Environmental Planning Policies (Preconditions in bold)

EPI	Matters for Consideration	Comply (Y/N)
SEPP BASIX 2004	A BASIX Certificate was submitted	Y
State Environmental Planning Policy (Sustainable Buildings) 2022	This policy does not apply as the modification was submitted after 1 October 2023, and saving provisions apply under s4.2(f).	N/A
State Environmental Planning Policy (Housing) 2021 Previously SEPP 65	Chapter 4: Design of Residential apartment development <ul style="list-style-type: none"> • Clause 147- Design Quality Principles - The proposal is contrary to the design quality principles 1, 2 and 6 of Schedule 9 	N Refer to Key Issues

State Environmental Planning Policy (Planning Systems) 2021	Chapter 2: State and Regional Development <ul style="list-style-type: none"> Section 2.19(1) declares the proposal regionally significant development pursuant to Clause 2 of Schedule 6. 	Y
SEPP (Resilience & Hazards)	<p>Not compliant with:</p> Chapter 2: Coastal Management <ul style="list-style-type: none"> Section 2.11 - Development on land within the coastal use area <p>Appears compliant with:</p> Chapter 4: Remediation of Land <ul style="list-style-type: none"> Section 4.6 - Contamination and remediation has previously been considered and the proposal is satisfactory subject to conditions. 	<p>N Refer to Key Issues</p> <p>Y</p>
State Environmental Planning Policy (Transport and Infrastructure) 2021	Chapter 2: Infrastructure <ul style="list-style-type: none"> Section 2.48(2) (Determination of development applications—other development) – electricity transmission Section 2.119- Development with frontage to classified road Section 2.120 Impact of road noise or vibration on non-road development Section 2.122 - Traffic-generating development Section 2.98 - Development Adjacent to rail corridors Section 2.99 -Excavation in, above or adjacent to rail corridors 	Y
Environmental Planning and Assessment Act 1979	Section 4.55(2) Other Modifications <p>Not satisfied the proposed modification is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified.</p>	<p>N Refer to Key Issues</p>
Byron LEP 1988	<p>Not compliant with:</p> <ul style="list-style-type: none"> Clause 9 -Zone objectives of 7F2 zone Clause 32 form and bulk in relation to impact on coastal processes within 7F2 zone Clause 40 – height Clause 64A request to vary height 	<p>N Refer to Key Issues</p>
Byron LEP 2014	<p>Not compliant with:</p> <ul style="list-style-type: none"> Clause 4.3 Height of Buildings Clause 4.6 variation request to increase height of buildings 	N

	There is a slight reduction proposed for approved FSR - Clause 4.4 Floor Space Ratio	Refer to Key Issues
Byron DCP 2010	Not compliant with: Clause 2.2 Chapter 1 Part C Height of Buildings Clause 3.1 Chapter 1 Part C Visual Impact	N Refer to Key Issues
Byron DCP 2014	Not compliant with: chapter D1.2.6 objectives of character and visual impact Chapter C1.1.3 Aims of non indigenous heritage Chapter C1.3.1 Heritage streetscape Chapter E5.8.3 residential character	N Refer to Key Issues

Consideration of the relevant SEPPs is outlined below:

- *State Environmental Planning Policy (Sustainable Buildings) 2022*

This policy does not apply as the modification was submitted after 1 October 2023, and saving provisions apply. Thus SEPP (BASIX) 2004 must be taken into consideration.

- *State Environmental Planning Policy (BASIX) 2004.*

The objectives of this Policy are to ensure that the performance of the development satisfies the requirements to achieve water and thermal comfort standards that will promote a more sustainable development.

The modification application is accompanied by an updated BASIX Certificate 1288442M_04 prepared by ADP Consulting dated 29 November 2024 committing to environmentally sustainable measures.

- *State Environmental Planning Policy (Housing) 2021*
Chapter 4 Design of residential apartment development

Section 147 development consent must not be modified unless the consent authority considers

- (a) The quality of the design of the development as set out in Schedule 9
- (b) The Apartment Design Guide

The modification application is accompanied by a design verification statement prepared by David Hansford DAH Architecture. The statement did not provide sufficient information to support how the proposed modifications comply with the design principles for residential apartment development, and the objectives in the Apartment Design Guide.

The SEE provided, "*The proposed modification application does not seek to further vary any of the ADG benchmarks, and also remains consistent with the nine (9) design quality principles of the SEPP65. The proposed modifications and outcomes of the design remain reflective of the design responses achieving compliance*".

Based on the following assessment of the modified development against Schedule 9 and the Apartment Design Guideline it is concluded that the proposal does not achieve compliance with the relevant provisions of the SEPP.

It is considered the proposed modification to increase building height and further intensification of the rooftop terraces are not consistent with Principle 1 context and neighbourhood character, Principle 2 built form and scale and Principle 6 Amenity, Principle 9 Aesthetics for the reasons outlined below. The non compliance with these Principles is a recommended reason for refusal.

PRINCIPLE	ASSESSMENT OF DESIGN RESPONSE
Principle 1: Context and Neighbourhood Character	<p>Inconsistent</p> <p>Shirley Street is part of the main 'gateway,' entrance to Byron town. The northern end of Shirley Street is characterised by a mix of visitor and medium density residential developments on landscaped sites. The proposed modified development with excessive building heights and extensive rooftop activation does not sit appropriately within this context.</p> <p>Adjacent development across Shirley Street to the south are lower rise, more reflective of the lower density zoning and the controls of the Shirley Street Heritage Conservation Area. The proposed modification to increase height of the buildings and increase the rooftop activation is not consistent with this context.</p>
Principle 2: Built Form and Scale	<p>Inconsistent</p> <p>The proposed increase in maximum building heights of up to 13.05m in the R3 zone and approximately 9.6m in the 7F2 zone is not consistent with the existing or desired future character of the street and surrounding buildings.</p>
Principle 3: Density	<p>Consistent</p> <p>No change to density is proposed.</p>

	The development retains an acceptable density relative to the site and its context.
Principle 4: Sustainability	Consistent A BASIX certificate is provided.
Principle 5: Landscape	Generally consistent The concept landscaping solutions are of high quality and generally respond to the proposed built environment, with the exception of the proposed rooftop landscaping.
Principle 6: Amenity	Inconsistent The proposed increase in building heights and increase in rooftop activation does not positively influence the internal and external amenity for neighbours. All dwellings will have lift access and levelled outdoor living areas to internal spaces to facilitate ease of access for all age groups and degrees of mobility. The proposed development complies with BDCP 2014 Chapter B13: Access and Mobility.
Principle 7: Safety	Consistent The proposed modifications raise no concerns.
Principle 8: Housing Diversity and Social Interaction	Consistent The proposed modifications raise no concerns.
Principle 9: Aesthetics	Inconsistent The proposed modifications are appropriate in terms of the composition

	of building elements, textures, materials and colours. However the proposed increase in height of buildings is not consistent with, and not respond to the environment and context, or contribute to the desired future character of the area.
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Assessment against Apartment Design Guide (ADG)

The SEPP requires consideration of the ADG which supports the associated design quality principles by giving greater detail as to how those principles might be achieved. The assessment below considers the proposal generally consistent.

Element	Compliance
4B: Natural Ventilation	Modification remains consistent Plans submitted show that appropriate cross-ventilation is provided for. This is achieved through openable walls to balconies which allow for breezes through each unit.
4C: Ceiling Heights	Modification remains consistent. The development will incorporate minimum floor to ceiling heights of 2.7m. These high ceilings enhance cross-ventilation and sunlight penetration.
4D: Apartment layout	Modification remains consistent. No change to apartment layouts proposed.
4E Private open space and balconies	Modification remains consistent. All balcony sizes comply with the design standards for units, with each above ground unit having balconies located immediately off living areas. Level 2 apartments have private roof terraces in addition to covered balconies.
4J	Modification can remain consistent, if approved, subject to recommended conditions of consent to ensure compliance.

Noise and Pollution	The application includes an acoustic report which recommends construction methods/materials/treatments to be used to meet the criteria for the site, given both internal and external noise sources.
4O: Landscape design	<p>Modification generally consistent, except for proposed rooftop landscaping.</p> <p>Updated Statement of Landscape Intent provided. Proposed landscaping features extensive compensatory native landscaping suited to the local environment and balanced against fire safety constraints. Landscaping is considered to be viable and sustainable. Landscaping will enhance the streetscape as well as contributing to amenity for occupants.</p> <p>Proposed landscaping of trees on rooftop terrace is not supported. Refer to 4P below. The proposed planters up to 1200mm deep, with mature trees increases the scale and height of the building, will be visually prominent from the public domain and is inconsistent with the built and will negatively impacts on the</p>
4P Planting on structures	<p>The proposed plantings on the rooftops is not supported. However if approved, existing and further conditions of consent could be applied.</p> <p>An updated Statement of Landscape Intent was provided. Rooftop planting proposes planters from 600mm to 1200mm deep, which is capable of supporting large trees of 12-18m high, (as per table 5 of Apartment Design Guide).</p> <p>It is considered the planting of large trees on the rooftop will increase the bulk and scale of the building, will be visually prominent from the public domain, negatively impact on the amenity of public open space and the streetscape.</p> <p>Insufficient information by way of view lines has been provided to assess the impact of plantings on the visual amenity of adjoining dwellings.</p> <p>Existing condition 9(f) of consent is recommended to be retained to restrict rooftop plantings as follows:</p> <p>9(f) Low Scale Green Roof Landscaping</p> <p>An amended landscaping plan that specifies the following:</p> <ol style="list-style-type: none"> All planters greater than 600m deep are to be deleted from the plans. All trees on the rooftop are to be deleted from the plans. Detail of the planting medium to be used for the low scale green roof including depth and composition. Planters to be a maximum of 600mm deep. A planting schedule detailing the native species to be used for the low scale green roof. Planting to be restricted to ground covers and shrubs only. A maintenance plan detailing the ongoing maintenance and servicing of the low scale green roof.

	<u>Note</u> : Landscaping to the site is to comply with the principles of Appendix 5 of Planning for Bushfire Protection 2006.
4Q Universal Design	Modification remains consistent. No change to the number of adaptable units.

Section 148 (2)- The modified development will remain compliant with the non discretionary provisions of:

- (a) car parking for the building is greater than the recommended minimum amount specified in Part 3J of Apartment Design Guide
- (b) the internal area for each apartment is greater than the recommended minimum internal area for the apartment type specified in Part 4D of the Apartment Design Guide
- (c) the ceiling heights for the building are equal to the recommended minimum ceiling height specified in Part 4C of Apartment design Guide.

- *State Environmental Planning Policy (Planning Systems) 2021*

Chapter 2: State and Regional Development

The proposal is *regionally significant development* pursuant to Section 2.19(1) as it satisfies the criteria in Clause 2 of Schedule 6 of the Planning Systems SEPP as the proposal is development for a Residential Flat Building. Accordingly, the Northern Regional Planning Panel is the consent authority for the application. The proposal is consistent with this Policy.

- *State Environmental Planning Policy (Resilience and Hazards) 2021*

Chapter 4: Remediation of Land

The provisions of Chapter 4 of *State Environmental Planning Policy (Resilience and Hazards) 2021* ('Resilience and Hazards SEPP') have been considered in the assessment of the development application. Section 4.6 of Resilience and Hazards SEPP requires consent authorities to consider whether the land is contaminated, and if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out.

Council's Environmental Health Officer has reviewed the modification and raised no concerns. Existing conditions of consent in relation to contamination to remain.

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

Section 2.98 required consent authorities to consider the likely impact of development on land adjacent to a rail corridor. A referral was sent to TfNSW who raised no concerns, subject to the imposition of conditions of consent.

- *Applicable Local Environmental Plans*

The site is mapped partially as 7 (f2) Urban Coastal Land zoning under the Byron Local Environment Plan 1988 (BLEP 1988) and partially in R3 Medium Density Residential under the Byron Local Environment Plan 2014 (BLEP 2014). The following is an assessment of the application against both LEP's.

BLEP 2014

BLEP 2014 Permissibility, zone objectives, relevant clauses and s4.6 variation assessment.

In accordance with LEP 2014 clauses 1.4 and 2.1 – 2.3:

- (a) The proposed development is defined as **residential flat building** in the BLEP 2014 Dictionary, meaning *a building containing 3 or more dwellings, but does not include an attached dwelling, co-living housing or multi dwelling housing*.
- (b) Part of the land is within the R3 Medium Density Residential zone according to the Land Zoning Map;
- (c) The proposed development is permissible with consent; and
- (d) Regard is had for the Zone Objectives as follows:

Clause 2.3 Zone Objective	Assessment
To provide for the housing needs of the community within a medium density residential environment.	By providing twenty-five three-bedroom dwelling units the proposed development will contribute to providing for the housing needs of the community within a medium density residential environment.
To provide a variety of housing types within a medium density residential environment.	The proposed development will contribute to providing a variety of housing types within a medium density residential environment
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	Other than residential, no other land uses are proposed within this development

General Controls and Development Standards (Part 2, 4, 5 and 6)

The LEP also contains controls relating to development standards, miscellaneous provisions and local provisions. The controls relevant to the proposal are considered in **Table 5** below. Non compliance with clauses are considered in the key issues section of this report

Table 3: Consideration of the BLEP 2014 Controls

Control	Requirement	Approved DA10.2022.371.1	Modification Proposal DA10.2022.371.4	Comply
Height of buildings (CI 4.3(2))	9 metres	Top Roof 9.2m Top Balustrade 10.25m Top Lift Overrun 10.7m	Top Roof 9.66m Top Balustrade 10.86m Top Lift Overrun 10.86m and 13.05m	No Refer to key Issues
FSR (CI 4.4(2))	0.6:1	0.66:1	No change	N/A No changes proposed
Variation Request (CI 4.6)	-	Variation request to height and FSR	Variation request to height. Refer to detail assessment below.	No Refer to key issues
Heritage (CI 5.10)	The development site is across the road from the Shirley Street Heritage Conservation Area and therefore within the vicinity of a heritage conservation area	Heritage Management Report provided	Not addressed	Yes

Acid sulphate soils (CI 6.1)	Development consent must not be granted for the carrying out of works unless an acid sulfate soils investigation management plan (ASSIMP) has been prepared in accordance with the Acid Sulfate Soils Manual. Previously assessed	Assessed and conditions of consent applied	No change	Yes
Earthworks (CI 6.2)	Consent authority to consider the effects of the proposed development on the environment and surrounding area because of any proposed earthworks.	Assessed and conditions of consent applied.	No change proposed	Yes
Stormwater Management (CI 6.4)	Previously assessed	Assessed and conditions of consent applied.	No change proposed	Yes
Essential Services (CI 6.6)	Consent authority to be satisfied that essential	Previously assessed and conditions of consent applied.	No change proposed	Yes

	services are available for the proposed development			
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Written requests to vary development standards are not required for s4.55 applications, however the reasoning for the original approval of a variation to the height of buildings is considered as follows:

Exceptions to Development Standards

Clause 4.6 provides that development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard, by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

The applicant submitted justification for the further contravention of the maximum height development standard on the following basis:

"The amended development scheme proposes an increased total building height of 0.466m. This change is a result of increasing the floor to ceiling heights in order to achieve a 2.7m clear ceiling height as a requirement under the SEPP65 Apartment Design Guidelines. As such, this compliance requires a marginal increase in total building height as depicted in the figures below.

It is specifically noted that:

- The proposed building footprint has not changed. Therefore, the location of the building relative to the interpretation of 'natural ground level' has not changed from the approved scheme. It is therefore relevant to address changes based on RL levels.*
- A building height increase of 0.466m is proposed due to design development and the need to retain 2.7m clear ceiling heights to meet SEPP 65 design requirements per Section 4C of the Apartment Design Guide. Meeting this requirement retains the proposals' ability to achieve "good daylight, access and natural ventilation to residential apartments" as outlined within the guide.*
- The new lift over run height extended to match RL height of rooftop balustrade. This results in a marginal increase of 0.150mm (the same increase as balustrade heights).*
- The proposed increase of 0.150mm to the top of the balustrade height is required for pool safety compliance and is in response to condition 80 of the current approval.*

- The height variation will increase from 2.2% to 7.3% to the top of the roof.
- The Visual Impact Assessment prepared by SLR confirms that the increase in building height within the R3 Zone will result in no material impact in the context of the development, will not materially change the height, bulk, scale and form of the building under the current approval, and will not result in any substantial additional visual impacts on its surrounding context.
- Additionally, a DDA compliant lift overrun is proposed exclusively for dwelling 201 and has a total height of 13.05m (RL 18.05). Whilst this is equivalent to a variance of 4.05m or 45% above the 9m building height line, this exceedance is notably in one marginal area of the development only”.

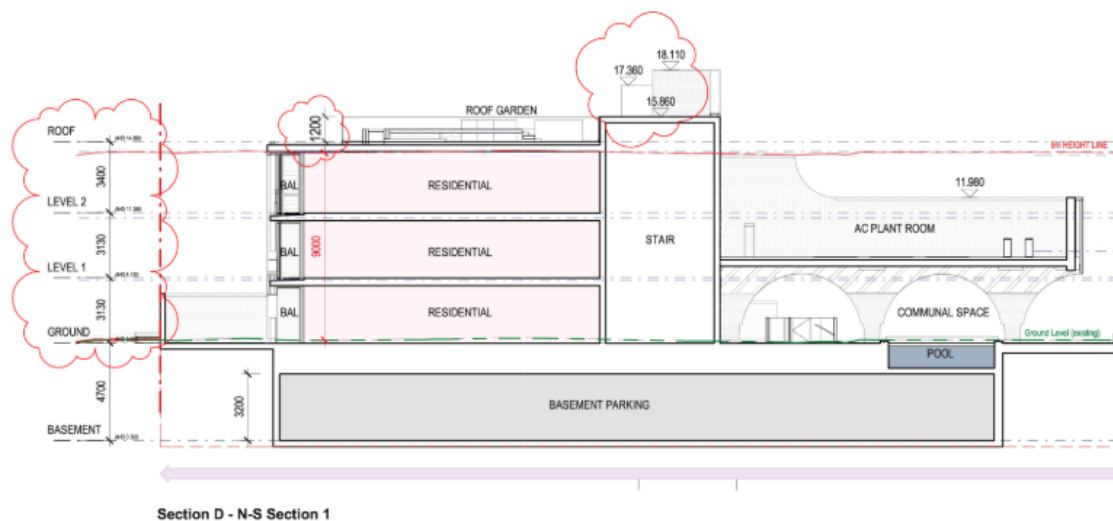
Response

Figure 7: Proposed height R3 zone

The previous modification application DA10.2022.371.2 sought a similar increase in height and was not approved. The floor to ceiling heights can be reduced and a minimum clear floor to ceiling height of 2.7m can be achieved on all floors within the approved height limit. **The thickness of the basement slab at approximately 1.5m appears excessive and no reason has been given for why such a thick slab is required.** Options exist for this slab to be reduced to allow for the lowering of the ground floor level. The approved height is consistent with the existing medium density character of Shirley St and was a key reason for the granting of consent to the original application.

The lift overrun for unit 201 was also proposed in the previous modification DA10.2022.371.2 and was not approved. The proposed lift overrun results in a height exceedance of 4.05m. The addition of a lift overrun to the rooftop terrace of unit 201 results in excessive height and visual impacts notwithstanding it has approved access via stairs. A lift to a rooftop terrace is not a requirement of the BCA, BDCP 2014 Chapter B13 Access

and Mobility or AS 4299 Adaptable Housing. Access to the rooftop terrace can be achieved via alternative means such as a chair lift without compromising accessibility.

The applicant's argument that the height exceedance is required to provide compliant pool fences for the roof top pools does not override or negate the requirement for the development to comply with the legislated height controls. The floor to ceiling heights can be reduced as well as the thickness of the basement slab in order to comply with height controls. Compliance with the approved maximum height was a key reason for the granting of consent to the rooftop terraces and pools.

The applicant has not demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify further contravention of the development standard.

BLEP 1988 Zone objectives, relevant clauses and s64A variation assessment.

In accordance with LEP 1988 clauses 5, 8 and 9:

- (a) The proposed development is defined in the LEP 1988 Dictionary as residential flat building(s);
- (b) The land is within the LEP1988 7(f2) zone according to the map under LEP 1988;
- (c) The proposed development is permitted with development consent ; and
- (d) The proposed development is on balance consistent with the relevant objectives of the Zone for the following reasons:

Part 2.9 Zone Objectives	Assessment
<p>Zone No 7 (f2) - (Urban Coastal Land Zone)</p> <p>1 Objectives of zone</p> <p>The objectives of the zone are—</p> <p>(a) to identify urban land likely to be influenced by coastal processes,</p> <p>(b) to permit urban development within the zone subject to the council having due consideration to the intensity of that development and the likelihood of such development being adversely affected by, or adversely affecting, coastal processes,</p> <p>(c) to permit urban development within the zone subject to the council having due consideration to—</p>	<p>1 (a) The site, and therefore the proposed development is identified as being likely to be influenced by coastal processes based on mapping in the BDCP 2010 / BLEP 1988. The site is located within the BDCP 2010 mapped '50-year impact line' band or Erosion Precinct 2.</p> <p>Existing condition of consent ensuring that if the coastal escarpment comes within 50m of the development footprint, the consent will cease, and all buildings will be removed. A section 88E restriction on title is conditioned.</p>

<p>(i) the need to relocate buildings in the long term,</p> <p>(ii) the need for development consent to be limited to a particular period,</p> <p>(iii) the form, bulk, intensity, and nature of the development, and</p> <p>(iv) continued safe public access to the site, and</p> <p>(d) to allow detailed provisions to be made, by means of a development control plan, to set aside specific areas within the zone for different land uses and intensities of development.</p>	<p>Ten (10) dwellings were approved and considered acceptable. No change to density proposed.</p> <p>The resulting form and bulk of the proposed development, by increasing height of buildings within the 7(f2) zone above the 9m height limit is not consistent with the objectives of the zone.</p>
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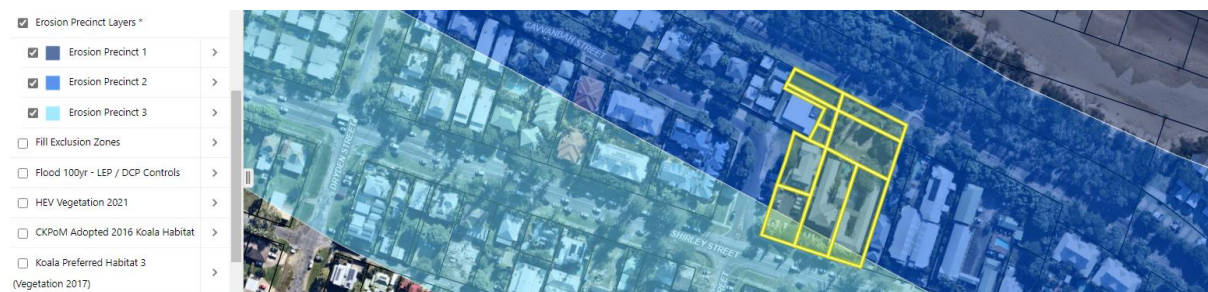


Figure 8: Location of site in Erosion Precinct 2

General Controls and Development Standards

The controls relevant to the proposed modification are considered in **Table 5** below.

Table 4: Consideration of the BLEP 1988 Controls

Control	Requirement	Approved DA10.2022.371.1	Modification Proposal DA10.2022.371.4	Comply
Height of buildings (CI 40)	<p>Council must not consent to the erection of any building—</p> <p>(b) on land within any other zone (in this case 7(f2), if—</p> <p>(i) the floor of the topmost floor level</p>	Condition of consent imposed requiring maximum height of 9m.	“Amend condition 9(a) to allow height exceedances over 9 metres measured from ground level (existing) and amend condition 9(a) such that the topmost part of the northern building does not exceed 9	No Refer to Key Issues

	of the building exceeds 4.5 metres above the existing ground level, or (ii) the vertical distance between the topmost part of the building and the existing ground level below exceeds 9 metres.		metres above RL 5.0". Architectural plans show the maximum height proposed of 9.6m above existing ground level, however by extrapolation the maximum height appears to be up to 9.8m from existing ground level.	
Provision of Services (CI 45)	-	-	No change	Y
Variation Request (CI 64A)	-	Variation request to height not approved. Variation request to density approved	Variation request to height. No change to density proposed	N Refer to assessment below.

Clause 64A Exceptions to Development Standards

The application is supported by a BLEP 1988 Clause 64A variation request which seeks to vary the height of building control prescribed within clause 40(b) of BLEP 1988 and the associated Height of Buildings Map.

The height control which is the subject of this Clause 64A Variation Request states:

40 Height

(1) The objectives of this clause 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 that the height and scale of development is appropriate to its location, surrounding development and the environmental characteristics of the land.

(2) The council must not consent to the erection of any building—

- (a) on land within Zone No 3 (a), if -
 - (i) the floor of the topmost floor level of the building exceeds 7.5 metres above the existing ground level, or
 - (ii) the vertical distance between the topmost part of the building and the existing ground level below exceeds 11.5 metres, or
- (b) on land within any other zone, if—
 - (i) the floor of the topmost floor level of the building exceeds 4.5 metres above the existing ground level, or
 - (ii) the vertical distance between the topmost part of the building and the existing ground level below exceeds 9 metres.

The definition of **existing ground level** within the BLEP 1988 Dictionary is:

the ground level, or any lawfully lowered or raised ground level, at the date the development application is lodged with the council.

The application seeks to vary prescribed height control by changing the interpretation of ground level (existing) to use an extrapolated ground level (existing) interpretation and use RL5.0 as the nominated existing ground level:

“Change to condition 9(a) to allow marginal height exceedances over 9 metres measured from ground level (existing). The interpretation of ground level (existing) addressed as part of the clause 64A variation request should adopt the extrapolated ground level (existing) interpretation and therefore condition wording is requested to be amended to ensure the topmost part of the northern building does not exceed 9 metres above RL 5.0”.

The proposal to use an arbitrary extrapolated RL of 5.0 as the ground level does not comply with the definition of existing ground level within BLEP1988 and is not supported. The survey plan lodged with the original development, prepared by Byron Bay Surveying Pty Ltd rev D dated 27/02/2023 shows existing ground RLs within the 7(f2) zone to be varied, particularly within the north east corner of the site where the RLs are significantly lower than RL5.0.

By extrapolating the proposed building height and against the true existing ground level from the survey points provided, it appears the proposed maximum height is closer to 9.8m in some areas and is not supported.



Figure 9: Overlay of survey with rooftops plans in 7(f2) zone

The request to vary the maximum overall height development standards has not demonstrated that compliance with the development standards is either unreasonable or unnecessary in the circumstances of the case. It has not been demonstrated that there are any sufficient environmental planning grounds to justify the proposed roof top balustrades, at up to 0.8m above maximum height.

The rooftop terrace areas which constitute a topmost floor level, are significantly higher than the 4.5m maximum as per clause 40 (2)(b)(i) of BLEP1988. The private rooftop terraces are not required to satisfy the minimum private open space requirements. Each above ground unit has private open space balconies located directly off each living area as well as access to the ground floor communal recreational areas.

The proposed height does not comply with the objectives (1)(a) and (b) in Clause 40 of BLEP1988 to ensure the height and scale of the development is appropriate to its location, surrounding development and environmental characteristics of the land.

The proposed floor to ceiling heights of 3.4m for the ground floor and 3.5m for level 1 could be reduced to 2.7m and still enable the uppermost roof level including all elements including balustrades to conform with the maximum 9m height control and provide positive design outcomes.

The excessive height does not demonstrate compliance with BDCP2010 Chapter 1 Part C3.1 Visual Impact performance criteria as there is not a reasonable degree of integration with the existing built and natural environment, balanced with the need to provide variety in streetscapes.

The development is located within the coastal use area under SEPP (Resilience and Hazards) 2021 and it has not been demonstrated that the proposed height is unlikely to impact on the visual amenity of the coast and that the proposed modification has considered the surrounding coastal and built environment as required by objective (1)(iii).

The proposal is considered to be inconsistent with the LEP.

(b) Provisions of any Proposed Instruments (s4.15 (1)(a)(ii))

There are no proposed instruments are relevant to the proposal.

(c) Provisions of any Development Control Plan (s4.15(1)(a)(iii))

The following Development Control Plans are relevant to this modification application:

- *Byron Shire Development Control Plan 2014* ('the 2014 DCP')
- *Byron Shire Development Control Plan 2010* ('the 2010 DCP')
- DCP 2014 is an applicable matter for consideration in the assessment of the subject development application in accordance with subsection 4.15(1) of the EP&A Act because it applies to the land to which LEP 2014 applies. The DCP 2014 Parts/Chapters that are of relevance only to the proposed modified development are addressed below:

BDCP 2014 Chapter		Compliance	Comment
B1	Biodiversity	Yes	No changes proposed.
B3	Services	Yes	No changes proposed.
B4	Traffic Planning, Vehicle Parking, Circulation and Access	Yes	No changes proposed.

BDCP 2014 Chapter		Compliance	Comment
Chapter B9 Landscaping		Compliance	Comment
B9.2.2	Landscape Plans for Development Applications	Generally yes	Updated Statement of Landscape Intent provided. Proposed rooftop landscaping is not supported due to bulk and scale and visual impact from the public domain and streetscape. Existing condition 9(f) of consent restricts rooftop planting.
B9.2.3	Further Requirements for more Complex Developments	Yes	As above.
B9.4	Landscaping Residential Flat Buildings	Variation approved in original consent. 1,392m2 communal landscaping and 527.32m2 deep soil zone approved	Minor increase to communal landscaping to 1437 m2 proposed and 551m2 deep soil area.
B9.4.2	Common Landscaped Area – Deep soil areas Prescriptive measure - 75% of the total common landscaped area of the site must consist of deep soil areas	Variation approved 527m2 in original consent.	Minor increase to 551m2 of deep soil area proposed. DCP objectives/performance criteria and remains supported.
B9.12.4	Existing Vegetation	All existing vegetation approved to be cleared in original consent.	No change proposed

BDCP 2014 Chapter		Compliance	Comment
B9.12.5.2	A minimum 90% of landscaping plants to be locally indigenous.	Yes	No change proposed
B9.12.5.3	<p>No species listed as undesirable in Chapter B2 Preservation of Trees and Other Vegetation shall be used in landscaping on any site, and</p> <p>Species listed as threatened species under the Threatened Species Conservation Act 1995 should not be used for landscaping purposes unless the genetic provenance can be demonstrated in terms of locally sourced seed stock.</p>	Yes	No change proposed
Chapter C1 Non Indigenous Heritage		Compliance	Comment
C1.3.1	<p>General Streetscape Context</p> <p>New developments must respect and complement the existing heritage character of the streetscape by maintaining the general scale, height, articulation, bulk and proportions of traditional and new buildings in the streetscape.</p>	No	<p>The site is adjacent to the Shirley St Heritage Conservation Area.</p> <p>The proposed modifications to height of buildings does not respect and complement the existing heritage character of the streetscape as it does not maintain the general scale and height in the streetscape.</p> <p>The proposed height of the development does not sympathetically respond to the character of the streetscape.</p> <p>Refer to key issues.</p>

BDCP 2014 Chapter		Compliance	Comment
	Infill development should sympathetically respond to the character of the streetscape and should remain subservient to any Heritage or character items (especially in relation to height).		
Chapter D1 Residential Accommodation		Compliance	Comment
D1.2.1	Building Height Plane (BHP) Prescriptive measure 2m & 45° applies to all boundaries	Variation approved in original consent	No change proposed
D1.2.2	Setbacks from boundaries – prescriptive measures Classified Road (Shirley Street) 9m. Corner allotments and secondary roads (Milton Street) 3m.	Variation approved in original consent	No change proposed
D1.2.2.4	Minimum Setbacks for Residential Flat Buildings and Multi-Dwelling Housing – prescriptive measures Side and rear 1.5m for single storey otherwise controlled by BHP. 3m between building on site.	Variation approved in original consent	No change proposed
D1.2.2.4	Minimum Setbacks for Swimming Pools and Spas – prescriptive measure	Variation approved in original consent	No change proposed

BDCP 2014 Chapter	Compliance	Comment
<p>1.0m from coping & 1.5m from water line to boundary.</p>		
<p>D1.2.3 Privacy – prescriptive measures</p> <p>D1.2.3.1 Where a direct view exists into the private open space of an adjoining dwelling, the outlook from windows, landing stairs, terraces, decks and balconies must be screened by privacy screens which achieve at maximum 50% transparency, or obscured by landscaping, and</p> <p>D1.2.3.2 Decks, terraces, balconies, and other external living areas within 4 metres from a side or rear boundary and with a floor level greater than 1.0m above ground level (existing) will require a privacy screen unless it can be demonstrated that there will be negligible overlooking and/or privacy impacts.</p>	Generally yes	No sight lines from the proposed rooftop terraces have been provided, however it is unlikely that there will be overlooking issues in the adjoining dwellings being 27 Shirley St and 1 Cavvanbah St.
<p>D1.2.4 Solar Access – prescriptive measures</p> <ol style="list-style-type: none"> 1. Developments 2 storeys or greater must be accompanied by shadow diagrams which demonstrate. 2. a) two hours sunlight between 	Yes	An updated shadow analysis has been provided with the application.

BDCP 2014 Chapter	Compliance	Comment
<p>9am and 3pm on June 21 for private open spaces; and b) three hours of sunlight between 9am and 3pm on June 21 over a portion of their north-facing living areas (decks, living rooms, bedrooms, kitchens etc.), and</p> <p>3. a) two hours of sunlight to at least 50% of private open spaces between 9am and 3pm on June 21; and b) three hours of sunlight between 9am and 3pm on June 21 over a portion of north facing living areas (decks, living rooms, bedrooms, kitchens etc.). c) where overshadowing by existing buildings is greater than the abovementioned, sunlight is not to be further restricted.</p> <p>4. New dwelling design should minimise overshadowing</p>		

BDCP 2014 Chapter		Compliance	Comment
	on existing adjacent solar panels where other reasonable design alternatives are possible.		
D1.2.6	Character & Visual Impact	No	<p>The proposed modification includes an updated visual impact assessment.</p> <p>The proposed increase in height and increase in rooftop activation does not respect and complement the area's natural and built environment that are important to its existing character.</p> <p>Insufficient information provided within the visual impact assessment report to fully assess the visual impact from the public domain and the adjoining dwellings.</p> <p>Refer to Key Issues.</p>
D1.2.7	<p>Fences – prescriptive measures</p> <p>Height of fences.</p> <p>Front - 1.2m, side 1.2m within the building line setback and 1.8 metres for the remainder. Rear, 1.8m.</p> <p>Corner allotments - Secondary Frontage, 1.8m.</p> <p>Sight Lines at Intersections - minimum corner splay of 4m x 4m must be provided in the fence.</p>	Variation approved in original consent.	No changes proposed

BDCP 2014 Chapter		Compliance	Comment
D1.2.8	Balconies	Yes	No changes to balconies proposed- only rooftop terraces
D1.2.9	Pedestrian and cycling	Yes	No changes proposed
D1.2.11	Energy Efficiency	Yes	BASIX certificate and NatHERS certificate provided.
D1.2.12	Internal access between storeys in residential development – prescriptive measure Each habitable floor of a multi-storey dwelling house must be connected by an internal staircase (garage and laundry excluded).	Yes	No changes proposed
D1.6 MULTI DWELLING HOUSING (INCLUDING MANOR HOUSES AND TERRACES), RESIDENTIAL FLAT BUILDINGS AND ATTACHED DWELLINGS			
D1.6.1	Private Open Space Courtyards	Yes	No changes proposed
D1.6.3	Deep Soil Areas At least 25% of the site must consist of deep soil areas.	Variation approved in original consent for Deep Soil Area of 527.m2 (8.88%)	Deep soil areas of 551m2 proposed. The shortfall is the direct result of utilising basement parking. It is considered that this shortfall does not compromise the landscape outcomes of the site. The requested variation remains supported.
D1.6.5	Sound Proofing	Yes	A Noise Impact Assessment Report by ATP Consulting Engineers dated September 2024 was provided with the application and assessed by Council's EHO who raised no concerns, subject to further conditions of consent.

BDCP 2014 Chapter		Compliance	Comment
D1.6.10	Character - Prescriptive measure To facilitate good design a Design Verification Statement will be required. In demonstrating how the built form of the development contributes to the character of the local area, the statement should articulate how it is consistent with the relevant locality narrative as contained in the applicable locality chapter in Part E of this DCP	No	A Design Verification Statement was provided stating compliance however insufficient justification and demonstration as to how the proposed modifications comply was provided. The architectural plans were reviewed by Council against the ADG requirements and Design Quality Principals. The assessment of them found the modified development to be inconsistent with the Design Quality, Built Form and Scale Principles & Amenity Refer to Key Issues.

Byron Shire Development Control Plan 2010 (DCP2010)

BDCP 2010 is an applicable matter for consideration in the assessment of the application in accordance with subsection 4.15(1) of the EP& A Act because it applies to the land to which BLEP 2010 applies. It is noted that the majority of the BDCP 2010 controls applicable to the Residential Flat Building land use and other general development provisions have been superseded by the BDCP 2014, these are addressed above. Consequently, the assessment against BDCP 2010 has been limited to the site-specific controls identified below.

C7 Medium Density and Residential Flat Buildings		Compliance	Comment
C7.2	Dwelling Densities in Byron Bay and Suffolk Park – Prescriptive Measure Large (over 85m ² floor area) dwelling units require a site	8.2 dwellings permitted, 10 dwellings approved	No change proposed

area per dwelling of 300sqm.		
Part J Coastal Erosion Lands		
J2.2 Precinct 2 - Between the Immediate Impact Line and the 50 Year Erosion Line	Conditions of consent applied to ensure compliance	No change proposed

The following contributions plans are relevant pursuant to Section 7.18 of the EP&A Act and have been considered in the recommended conditions (notwithstanding Contributions plans are not DCPs they are required to be considered):

- Byron Shire Developer Contribution Plan 2012 (Including Amendment 4)

This Contributions Plan has been previously considered and included in existing consent conditions.

- Water and Sewer Equivalent Tenements Policy 2022

This policy has previously been considered by Council's ET Engineer and additional ETs will be applicable. Included in the existing consent conditions.

(d) Planning agreements under Section 7.4 of the EP&A Act (s4.15(1)(a)(iia))

There have been no planning agreements entered into and there are no draft planning agreements being proposed for the site.

(e) Provisions of Regulations (s4.15(1)(a)(iv))

In relation to section 61 of the Environmental Planning and Assessment Regulation 2021, given that the proposal involves demolition of a building, existing conditions of consent are in place requiring compliance with Australian Standard AS 2601—2001: *The Demolition of Structures*.

3..2 Section 4.15(1)(b) - Likely Impacts of Development

The likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above and the Key Issues section below.

The consideration of impacts on the natural and built environments includes the following:

- Access and traffic – The modification application proposes no changes to approved access.
- Water/air/soils impacts – The modification application proposes no changes.
- Context and setting – As discussed in the SEPP 65 assessment and detailed review of the development against Councils planning instruments above, the proposed increases in building height and impacts on amenity are not considered appropriate in its context and setting.
- Utilities – The modification application proposed no changes to approved utilities.
- Heritage – the site is adjacent to Shirley St Heritage Conservation Area and the proposed increase in height is likely to negatively impact on the streetscape and heritage values of the conservation area.
- Flora and fauna impacts – No changes proposed.
- Noise and vibration – The application included a noise impact assessment report which was reassessed by Council's Environmental Health Officer (EHO) and considered acceptable subject to additional conditions of consent.

Existing conditions of consent relating to noise attenuation are:

- Condition 10 which requires an amended noise impact assessment report to be provided to demonstrate noise attenuation measures and compliance with noise levels
- Condition 88B Plan of Management how the building will operate in accordance with all conditions of consent.
- Condition 96 Must not interfere with the amenity of the neighbourhood
- Condition 98 Swimming Pool Pump Locations
- Condition 103 Use of rooftop terrace hours restricted to 7am to 9pm

If supported, Councils EHO recommends the following additional conditions of consent be applied:

- *Independent noise monitoring and compliance confirmation*
Independent noise monitoring must be undertaken by a suitably qualified person to confirm that the noise from plant and equipment complies with the Project amenity noise levels, as specified within Table 5.5 of the approved acoustic report.

The submitted report should also provide confirmation that the recommendations of the approved acoustic report have been fully implemented in the construction and design of the development.

- *Noise impacts associated with the development*
Noise emissions of plant and equipment, and activities located within the development shall not exceed the Project Amenity Noise levels, as specified within Table 5.5 of the approved acoustic report.
- *Use of communal and pool areas*
The communal, recreational and pool areas are not to be used for events. They are for the sole use of residents and their guests.
- *Permitted use times*
Communal, pool, recreational spaces and the wellness centre are permitted for use between 7am and 10pm only.
- Social impact – The modified development will generally retain a positive social impact.
- Economic impact – The construction of the development will be a major contributor to Byron's local economy also contribute medium density housing supply.
- Site design and internal design – The proposed increase in height and intensity of rooftop activation is not considered to be appropriate for the site.
- Construction – Potential impacts from construction remain managed by appropriate conditions of consent.
- Cumulative impacts – The proposed increase in building heights, increase size of roof top terraces is likely to have cumulative negative visual and aural impacts on the locality and amenity of neighbouring residences.

Accordingly, it is considered that the proposed modification will result in adverse impacts in the locality as outlined above and is not supported.

The likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered.

3..3 Section 4.15(1)(c) - Suitability of the site

The site remains adequately serviced and is generally considered suitable for the site with the exceptions of the proposed increased heights of the buildings.

3..4 Section 4.15(1)(d) - Public Submissions

There was 1 submission received. This submission is considered in Section 4.3 of this report.

3..5 Section 4.15(1)(e) - Public interest

On balance, the impacts of the excessive height, undesirable precedent, impacts on the streetscape and built environment and amenity impacts on the locality result in the proposed modified development being contrary to the public interest.

- Part 5 of the 2021 EP&A Regulation**

There are a number of matters required to be addressed in an application for modification of development consent pursuant to Division 1, 2 and 3 of Part 5 of the 2021 EP&A Regulation. These matters are considered in **Table 7** below.

Table 5: Consideration of the Requirements under the Regulation

Matter	Comment	Comply
Clause 100 Application for modification of development consent		
May be made by— (a) the owner of the land to which it relates, or (b) another person, with the consent of the owner of the land (CI 98(1))	The application has been made by Urbis Pty Ltd. The consent of the owner of the land has been provided.	Y
NSW Aboriginal Land Council consent required for land owned by a Local Aboriginal Land Council (CI 98(6)).	The land is not owned by a Local Aboriginal Land Council and consent is not required.	Y
Form approved by Planning Secretary and on portal (CI 99).	The application has been provided in accordance with the Regulation.	Y
Applicant details (CI 100(1)(a))	Provided on the NSW Planning Portal	Y
Description of the development (CI 100(1)(b))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Address and title details (CI 100(1)(c))	Provided on the Portal and outlined in Section 1 of this Report.	Y
Description of the proposed modification (CI 100(1)(d))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Whether to correct a minor error, mis-description or miscalculation, or some other effect (CI 100(1)(e))	The proposed modification is to modify the original consent under Section 4.55(2) to allow Modification to residential flat building including increase in building height within R3 Medium Density Residential and 7(F2) Urban Coastal Land zones and increase in size of rooftop areas across all buildings and	Y

	is not to correct a minor error, misdescription or miscalculation.	
Description of the expected impacts of the modification (CI 100(1)(f))	<p>The applicant expects that the modified proposal will not cause adverse environmental, social or economic impacts.</p> <p>Council considers the modification will cause adverse impacts to the natural and built environment and is not supported.</p> <p>Refer to key issues section.</p>	N
Undertaking that modified development will remain substantially same as development originally approved (CI 100(1)(g))	<p>The applicant is of the opinion the modified development will remain substantially the same development as that originally approved.</p> <p>Council is <u>not satisfied</u> that the modified development as a whole will remain substantially the same as the development originally approved.</p> <p>Refer to Section 3.1 of this Report.</p>	N Refer to key Issues
Owner's consent (CI 100(1)(i))	An undertaking has been provided on the Portal.	Y
Whether the application is being made to the Court (under section 4.55) or to the consent authority pursuant to Section 4.55(2) of the EP&A Act. (under section 4.56) (CI 100(1)(j)).	This Application is made to the consent authority pursuant to Section 4.55(2) of the EP&A Act.	Y
BASIX Certificate (CI 100(3))	The proposed modification does involve BASIX development and a BASIX Certificate has been provided.	Y
Qualified designer statement for residential apartment development (CI 102)	The proposed modification does involve residential apartment development and a qualified designer statement has been provided. However the Statement does not adequately address the requirements and is considered unsatisfactory.	N Refer to Key Issues
Notification and exhibition requirements (CII 105-112)	Refer to Section 4.3 of this report.	Y

Notification of concurrence authorities and approval bodies (CI 109) (to be undertaken by Council)	The modification application has been referred to the relevant concurrence and approval bodies as outlined in Section 4.1 of this Report.	Y
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4. REFERRALS AND SUBMISSIONS

• Agency Referrals and Concurrence

The modification application is:

- Requiring concurrence/referral (s4.13)

Accordingly, the modification application was referred to various agencies for referral as required by the EP&A Act and Clause 109 of the 2021 EP&A Regulation and outlined in **Table 8**.

There are no outstanding issues arising from these concurrence and referral requirements.

Table 6: Concurrence and Referral Agencies

Agency	Concurrence/referral Trigger	Comments (Issue, resolution, conditions)	Resolved
Concurrence Requirements			
Rail authority for the rail corridor	S2.98 of the <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i>	The proposal involves the excavation of ground to a depth of at least 2m below ground level (existing) on land within, below or above a rail corridor. Concurrence has been granted.	Y

• Council Referrals

The modification application was referred to various Council officers for technical review as outlined **Table 9**. The outstanding issues raised by Council officers are considered in the Key Issues section of this report.

Table 7: Consideration of Council Referrals

Officer	Comments	Resolved
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Environmental Health	<p>Council's Environmental Health Officer assessed the modification and advised.</p> <p>"The Noise Impact Assessment provided appears to be incorrect in that it has not utilised the correct Project Trigger Noise Level. It has utilised the higher of the Intrusiveness and Amenity noise levels. The noise impacts at 27 Shirley St would be in excess of the correct criteria. Further attenuation of the Plant Deck may be required.</p> <p>The acoustic consultant was contacted, and it was confirmed that the noise emission exceedance would be from use of the pool area. And that the plant deck emissions would not exceed 35dB(A) at 27 Shirley St".</p> <p>Application is supported, subject to additional conditions of consent being applied to protect amenity from noise impacts.</p>	Y
Building	<p>Council's Building Surveyor was asked to provide comments in relation to the proposed rooftop lift for apartment 201 and confirmed the BCA does not require an accessible lift to be provided within sole occupancy unit of a class 2 building and there is no mandatory need for a lift within an adaptable housing unit to service the roof top pool/ entertaining area.</p>	Y

• Notification and Community Consultation

The modification application was notified in accordance with the Council's Community Participation Plan from 4 March 2025 until 24 March 2025. The notification included the following:

- A sign placed on the site;
- Notification letters sent to adjoining and adjacent properties
- Notification on the Council's website.

The Council received a total of 1 unique submission, comprising 1 objection. The issues raised in these submissions are considered in **Table 10**.

The issues raised in the community submissions have been addressed in this report and

in the recommended conditions of consent in **Attachment A**.

Table 8: Community Submissions

Issue	No of submissions	Council Comments
Noise and emissions Submission raised concern the noise and placement of the air conditioning units and pool filters will adversely impact neighbouring amenity.	1	<p>The application proposes air conditioning units to be located above the roof of the communal pool area, in proximity to the eastern boundary of the site.</p> <p>Council's Environmental Health Officer has reviewed the proposal and the provided Noise Impact Assessment report and raised no objections, subject to further conditions of consent.</p> <p>Outcome: If approved, this issue can be satisfactorily addressed subject to the imposition of further recommended conditions of consent.</p>

5. KEY ISSUES

The following key issues are relevant to the assessment of this application having considered the relevant planning controls and the proposal in detail:

- **Proposed modified development is not substantially the same**

The proposed modifications result in a development that is not substantially the same development for which consent was originally granted as required by s 4.55(2)(a) of the EPA Act.

As discussed in section 3.1 of this report, the proposed increase in building heights, additional lift overruns and intensive rooftop activation substantially alter the approved development and results in significant qualitative changes to the amenity, streetscape and built form. The proposed modifications result in a development that departs from the objectives of the zones and medium density character of the streetscape and is no longer consistent with the reasons given for the granting of consent.

Recommendation:

The proposed modification does not comply with S4.55 (2) (a) and S4.55(3) of *Environmental Planning and Assessment Act 1979* as:

- The proposed modification result in a development that is not substantially the same development for which consent was originally granted.
- The proposed modified development is not consistent with the reasons given by the consent authority for the granting of the consent that is sought to be modified.

This is a recommended reason for refusal of the application.

- **Excessive Building Height**

The proposed modification raises the same height issues which were also raised in the assessment of the original development.

The applicant proposes to further increase the building height of the buildings within the R3 and 7(f2) zoning as follows:

Maximum Building Height R3 zone

Maximum Height 9m	Approved DA10.2022.371.1	Approved DA10.2022.371.2	Proposed modification DA10.2022.371.4
Top Roof	9.2m (RL14.2)	9.2m (RL14.2)	9.66m
Top balustrade	10.25 (RL 15.25)	10.25 (RL 15.25)	10.86m
Top Lift Overrun	10.7m (RL 15.7)	10.7m (RL 15.7)	10.86 and 13.05m

In the assessment of the original DA10.2022.371.1, the Panel approved minor exceedances of building height within the R3 zone as it found the height exceedance justified. The exceedance was considered to be minor and consistent with the R3 zoning and existing medium density character fronting the northern side of Shirley Street.

The previous modification DA10.2022.371.2 then sought to further increase the height within the R3 zone of:

- 9.89m (RL14.66) to the top of the roof level proposed. (Maximum non-compliance of 0.89m).
- 11.1 m (RL 15.95) to the top of the rooftop pool and 11.836 to top of balustrade. (maximum non-compliance of 2.1m).
- 13.05m (RL18.110) to the top of the lift overrun. (Maximum non-compliance of 4.05m).

This increase in height request and lift overrun to unit 201 was unsupported by Council and ultimately the Panel agreed that the further exceedance of building height within the R3 zone was not justified.

This subject modification proposes very similar height increases to what was found to be unjustified in DA10.2022.371.2.

The proposed lift overrun for unit 201 results in a height exceedance of 4.05m. The addition of a lift overrun to the rooftop terrace of unit 201 results in excessive height and visual impacts notwithstanding it has approved access via stairs. A lift to a rooftop terrace is not a requirement of DCP 2014 Chapter B13 Access and Mobility or AS1428 Design for Access and Mobility. Access to the rooftop terrace can be achieved via alternative means such as a chair lift without compromising accessibility.

The height exceedance is not demonstrated to provide any better amenity outcomes. The proposed floor to floor heights can be effectively reduced to still provide a finished floor to ceiling height of 2.7m on each level without resulting in any design or amenity impacts, whilst resulting in a built form that complies with the objectives of the zone.

The proposed height exceedances involve the majority of the roof structure, rooftop balustrades, lift overruns, roof top pools, roof top planter boxes and landscaping and terraces. These rooftop elements are for the private use of individual units and not required in order to comply with private open space requirements. These elements will be able to be seen from the street frontage and will impose unacceptable visual and amenity impacts on the surrounding area.

The written request did not demonstrate sufficient environmental planning grounds to justify a further increase to the building heights.

The proposed increased building form presents an unsympathetic response to the streetscape and is of an excessive bulk and scale that does not positively contribute to the desired future character of the area.

Maximum Building Height 7(F2) Zone

Maximum permitted 9m	Approved DA10.2022.371.1	Approved Da10.2022.371.2	Proposed
Top balustrade and lift over run	9m	9m as per condition 9(a) of consent of DA10.2022.371.1	Up to approx. 9.8m (extrapolated from section plans) Section D – N-S Section 2; North Elevation DA

It is noted the original DA10.2022.371.1 proposed heights within the 7F2 zone of:

- 9.2m (RL14.2) to the top of the roof level.
- 10.25m (RL 15.25) to the top of the balustrade.
- 10.7m (RL15.7) to the top of the lift overrun and fire staircase.

The Panel was not satisfied the request to vary height was justified as the floor to ceiling heights could be reduced to enable the uppermost floor level included parapets and balustrading to conform to the height control, and **subject to** all elements conforming with the 9m height limit and adequate landscape designs that accessible roof top gardens with modest trafficable areas are acceptable.

In DA10.2022.371.2 further modifications to height proposed

- 9.2m (RL14.2) to the top of the roof level.
- 10.25m (RL 15.25) to the top of the balustrade.

The Panel found in DA10.2022.371.2 that the further exceedances of the building height control are not justified on environmental grounds, and that the scale and cumulative amenity impacts of the additional roof elements are likely to unacceptably compromise neighbourhood amenity.

The written request did not demonstrate sufficient environmental planning grounds to justify further variation to the development standard being proposed. A variation to height was considered as part of the original assessment and not justified. No additional environmental grounds have been raised. Refer to variation request assessment above.

Similar height exceedances were proposed and not supported within the previous modification DA10.2022.371.2. The modification proposes similar increases in building heights, with no new justifications. The further increases in building height remain unjustified on environmental grounds, compromise the low and medium density residential area, and would be incompatible with the existing and desired residential streetscape character and that of the adjoining Shirley St heritage conservation area.

The proposed modification to increase building heights in both the R3 and 7F2 zone does not comply with:

- i. Clause 2.11 of SEPP (Resilience and Hazards) 2021
- ii. Principle 1 Context and Neighbourhood Character Principle 2 Built form and Scale and Principle 6 Amenity, of Schedule 9 as required by section 147 of SEPP (Housing) 2021.
- iii. Zone objective (1)(c)(iii) of BLEP1988 Zone 7(f2) and
- iv. Clause 32 (3)(d) of BLEP1988 Zone 7(f2), the form bulk of the development in relation to impact on coastal process
- v. Objective (1)(a) and (b) in Clause 40 of BLEP1988 to ensure the height and scale of the development is appropriate to its location, surrounding development and environmental characteristics of the land
- vi. Clause 40(2)(b) of BLEP 1988
- vii. A maximum overall height of 9m required by clause 40(2)(b)(ii) of BLEP1988
- viii. Clause 2.2 of BDCP 2010 for Height of Buildings
- ix. Clause 3.1 of DCP 2010 Chapter 1 Part C Visual Impact
- x. Objectives (1)(a), (b), (c) of Clause 4.3 of BLEP2014 for the height of buildings

- xi. A maximum height of 9m as required by clause 4.3 of BLEP 2014
- xii. Objectives of D1.2.6 Character and Visual Impact of BDCP2014

Recommendation: The issue has not been resolved and warrants refusal of the application.

- **Aural Impacts on Amenity**

The modification application proposes to increase the 'useable area' of the 10 roof top terraces:

- i. in 7(f2) zone from the approved 40m2 including pools to a proposed 63.5m2 for Apartment 105, 40.8m2 for Apartment 106, 40.8m2 for Apartment 107, 40.8m2 for Apartment 108 and 44.9m2 for Apartment 109 excluding pools and other trafficable roof top areas within the confines of the rooftop balustrading.
- ii. in R3 zone from the approved 40m2 including pools to a proposed 41.3m2 for Apartment 210, and 40m2 for Apartments 201, 202, 203 and 204 excluding pools and other trafficable roof top areas within the confines of the rooftop balustrading.

The increase in the size of the useable rooftop areas, together with the communal recreation pools and spaces will likely result in cumulative unacceptable noise impacts on the amenity of the adjoining neighbours, particularly 27 Shirley St, as well as neighbours within the development itself, and those adjacent. There is concern as to how noise levels within the common recreation and rooftop levels will be managed in order to remain acceptable, particularly when the units are likely to be used for short term holiday rental.

The Panel's reason for the granting of consent for the roof top terraces/gardens within the 7F2 zone for DA10.2022.371.1 were,

"subject to all building elements including balustrading conforming with the 9m height control, and submission of adequate landscape designs, accessible rooftop gardens with modest trafficable areas are acceptable and will have insignificant adverse amenity or environmental impacts".

Modification DA10.2022.371.2 proposed pools within the rooftop terraces which were only approved subject to restrictions and conditions of consent to protect the aural amenity of neighbours and the locality:

Existing conditions of consent relating to noise attenuation are:

- Condition 10 which requires an amended noise impact assessment report to be provided to demonstrate noise attenuation measures and compliance with noise levels
- Condition 88B A Plan of Management that details how the building is to operate in accordance with **all conditions** of this consent including the

Wellness Centre, communal and outdoor areas, including rooftop areas to be approved by Council prior to the issue of the Occupation Certificate.

- Condition 96 Must not interfere with the amenity of the neighbourhood- at all times
- Condition 98 Swimming Pool Pump Locations
- Condition 103 Use of rooftop terrace hours restricted to 7am to 9pm- at all times

The submitted Noise Impact Assessment prepared by ATP Consulting Engineers dated September 2024 was assessed by Council's Environmental Health Officer, who recommended support, subject to the below additional conditions of consent being applied to protect the aural amenity of neighbours and the building's occupants:

Conditions are to be complied with prior to occupation of the building:

- *Independent noise monitoring and compliance confirmation*
Independent noise monitoring must be undertaken by a suitably qualified person to confirm that the noise from plant and equipment complies with the Project amenity noise levels, as specified within Table 5.5 of the approved acoustic report.
The submitted report should also provide confirmation that the recommendations of the approved acoustic report have been fully implemented in the construction and design of the development.

Conditions to be complied with at all times:

- *Noise impacts associated with the development*
Noise emissions of plant and equipment, and activities located within the development shall not exceed the Project Amenity Noise levels, as specified within Table 5.5 of the approved acoustic report.
- *Use of communal and pool areas*
The communal, recreational and pool areas are not to be used for events. They are for the sole use of residents and their guests.
- *Permitted use times*
Communal, pool, recreational spaces and the wellness centre are permitted for use between 7am and 10pm only.

The proposed increased in size and intensity of the rooftop entertaining areas, together with the communal pool and entertaining areas and wellness centre requires strict compliance with these conditions of consent and the Plan of Management in order to provide sufficient certainty as to the protection of aural amenity to adjoining neighbours and those within the development itself. The building is located within the SEPP STRA 365 zone and all units are able to be used for short term holiday rentals.

In reality, it is unlikely that holiday guests will act in a manner in accordance with the development controls in order to protect aural amenity. There is no on site management

proposed within the building, thus Council questions how compliance with the plan of management and conditions of consent will be controlled and complied with.

Recommendation: The issue has not been resolved and accordingly, warrants refusal of the application.

5.5 Visual Impacts on streetscape, character and built environment

The proposed building form presents an unsympathetic response to the streetscape and is of an excessive bulk and scale that does not positively contribute to the desired future character of the area.

The proposed modification does not respect the heritage context and does not reflect the medium density character of the area and adversely impacts on the character of the streetscape.

The Visual Amenity Statement prepared by SLR Consulting Australia dated 3 October 2024 does not provide sufficient information for Council to be satisfied that there will be no negative visual impacts from the proposed modification.



Figure 5 Viewpoint Locations from the previous report

Figure 10: Viewpoints from Visual Impact Assessment

The photomontages provided do not show all of the proposed rooftop elements and are taken from view points obscured with artist impression vegetation which blocks out what is really going to be seen from the streetscape, as shown in figure 11 below.



Figure 11: Viewpoint 3 extracted from Visual Impact Assessment

Insufficient viewpoints are provided from the public domain and streetscape, and no viewpoints from Milton and Cavvanbah Streets towards the buildings within the 7(f2) zone provided.

No view/sight lines from the proposed rooftop terraces have been provided to demonstrate no privacy or overlooking impacts onto the neighbouring dwellings of No 27 Shirley St and 1 Cavvanbah St. However this is unlikely to be a concern.

The increase in building height, size of rooftop terraces, and proposed mature trees in planters large enough to support trees of 15-18m high (as per the ADG table) on the rooftop exacerbates the perceived bulk and scale of the building. The building's height and rooftop features will be visually prominent from the streetscape and public domain as shown in figure 12 and 13 below, and is incompatible with the existing and desired residential streetscape character, which comprises a low and medium-density residential area.



Figure 12: Proposed viewpoint 6 from Shirley St extracted from Visual Impact Assessment



Figure 13: Proposed render from Shirley St (extracted for Statement of Landscape Intent)

The proposed development is inconsistent with

- a) residential character narrative of BDCP2014 Chapter E5.8.3 Design Considerations.
- b) BDCP2014 Chapter C1.1.3 (5) The proposal does not respect the heritage context and is not sympathetic in terms of its form, scale, character, bulk, and is likely to adversely affect the components of Heritage Conservation Areas and their settings.

- c) proposed development is inconsistent with BDCP2010 Chapter 1 Part C3.1 Visual Impact. The proposed development does not reasonably integrate with the existing built and natural environment.
- d) objective 2 of Chapter D1.2.6 Character and Visual Impact of BDCP2014. The proposed development does not respect and complement the area's natural and built environment that is important to its existing character.

Recommendation: The issue has not been resolved and accordingly, warrants refusal of the application

5.6 Impacts on natural environment and coastal zone

- a) The application does not comply with Chapter 2 Coastal Management, Section 2.11 of the State Environmental Planning Policy (Resilience and Hazards) 2021:
 - i. The proposed modification is likely to adversely impact on the visual amenity and scenic qualities of the coast which is adjacent to the proposal. S2.11(1)(a)(iii)
 - ii. The additional height and bulk together with the appearance of people at an upper level, adjacent to the coast is inconsistent with the existing scenic qualities of the coast. S2.11(1)(a)(iii)
 - iii. The proposal has not demonstrated it does not have an adverse impact on the adjacent heritage conservation area. S2.11(1)(a)(v)
 - iv. The bulk, scale and size of the proposed development impacts negatively on the surrounding coastal and built environment. S2.11(1)(c)
- b) the proposed development is inconsistent with Clause 32 (3)(d) of BLEP1988.

Recommendation: The issue has not been resolved and accordingly, **warrants refusal of the application**

5.6 Design Verification and Quality

- a) As required under Cl 102 of EP&A Regulation 2021, an updated qualified Designer Statement was provided by DAH Architecture dated 14/11/2024, however it is considered unsatisfactory.

The statement did not :

- i) verify that the qualified designer designed, or directed the design of, the modification of the development, and
- (ii) verify if the qualified designer designed, or directed the design of, the development for which the original development consent was granted (the original development), and
- iii) provide sufficient detail to explain how the modified development addresses the design principles for residential apartment development, and the objectives in the Apartment Design Guide

- b) The application does not comply with Chapter 4 and Schedule 9 Principle 1, 2 and 6 of Design of residential apartment development of the *State Environmental Planning Policy (Housing) 2021*.
 - i) The modifications do not achieve good design that responds to and contributes to its context (Schedule 9, Principle 1).
 - ii) The modifications do not result in good design that achieves a scale, bulk and height appropriate to the existing or desired future character of the street and surrounding buildings (Schedule 9, Principle 2).
 - iii) The modifications do not positively influence internal and external amenity for residents and neighbours or contributes to positive living environments and resident well-being (Schedule 9, Principle 6).
- c) The modifications do not achieve better built form and aesthetics of buildings, streetscapes and public spaces. The modifications do not maximise the amenity, safety and security of the community as required by cl 142(1)(b) and cl 142(1)(c) of *State Environmental Planning Policy (Housing) 2021*.

Recommendation: The issue has not been resolved and accordingly, **warrants refusal of the application.**

5.6 Access into railway corridor

The initial plans included access from the site directly into the railway corridor. An amended plan was subsequently provided by the applicant with the access onto the railway corridor removed.

Recommendation: The issue been resolved.

5.7 Public Interest

The proposed modification is not in the public interest for the reasons listed above and warrants refusal of the application.

6. CONCLUSION

This modification application has been considered in accordance with the requirements of the EP&A Act and the 2021 EP&A Regulation as outlined in this report. Following a thorough assessment of the relevant planning controls, issues raised in submissions and the key issues identified in this report, it is considered that the application cannot be supported.

It is considered that the key issues as outlined in Section 5 have not been resolved as per the recommended reasons for refusal at **Attachment A**.

7. RECOMMENDATION

It is recommended:

- That the Modification Application DA No 10.2022.371.4 for Modification to residential flat building including increase in building height within R3 Medium Density Residential and 7(F2) Urban Coastal Land zones and increase in size of rooftop areas across all buildings at 29 Shirley St Byron Bay be **REFUSED** pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* subject to the reasons for refusal attached to this report at Attachment A; and
- Pursuant to Clause 118 of the *Environmental Planning and Assessment Regulation 2021*, a notice of determination is to be prepared by Council following the Panel's determination of this modification application.

The following attachments are provided:

- Attachment A: Reasons for refusal
- Attachment B: Architectural Plans collated
- Attachment D: Public Submissions