



Land and Environment Court New South Wales

Medium Neutral Citation:

**29 Shirley Street Pty Ltd ATF The 29 Shirley Street
Trust v Byron Shire Council [2026] NSWLEC 1045**

Hearing dates:

Conciliation conference on 18 September 2025, 16, 23
January 2026

Date of orders:

06 February 2026

Decision date:

06 February 2026

Jurisdiction:

Class 1

Before:

Dickson C

Decision:

The Court orders that:

- (1) The appeal is upheld.
- (2) Modification Application DA10.2022.371.4 for the
modification of Development Consent
DA10.2022.371.1 is approved. The Development
Consent is modified in the terms in Annexure A.
- (3) Development Consent DA10.2022.371.1 for
demolition of the existing development to facilitate a
residential flat development comprising of 25 of
three-bedroom units over four separate two and
three-storey building with basement parking and
associated works as modified by the Court is
Annexure B.

Catchwords:

MODIFICATION APPLICATION – Modification to a
residential flat building to accommodate an increase in
building height and the size of the roof top communal area
– conciliation conference – amended plans and documents
– agreement between the parties – orders made

Legislation Cited:

Environmental Planning and Assessment Act 1979 (NSW),
ss 4.15, 4.55, 8.9

Land and Environment Court Act 1979 (NSW), s 34

Byron Local Environmental Plan 2014, cl 4.3, 4.6, 5.10
Environmental Planning and Assessment Regulation 2021
(NSW), ss 38, 100, 102

	State Environmental Planning Policy (Housing) 2021, Ch 4, ss 146, 147, Sch 9
	State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 2, ss 2.4, 2.8, 2.9, 2.10, 2.11, 4.6
Cases Cited:	<i>Al Maha Pty Ltd v Huajun Investments Pty Ltd</i> (2018) 233 LGERA 170; [2018] NSWCA 245 <i>Lido Real Estate Pty Ltd v Woollahra Council</i> (1997) 98 LGERA 1 <i>McMillan v Taylor</i> (2023) 111 NSWLR 634; [2023] NSWCA 183 <i>North Sydney Council v Michael Standley & Associates Pty Ltd</i> (1988) 43 NSWLR 468; [1998] NSWSC 163 <i>SDHA Pty Ltd v Waverley Council</i> (2015) 209 LGERA 233; [2015] NSWLEC 65
Texts Cited:	NSW Department of Planning and Environment, Apartment Design Guide (July 2015)
Category:	Principal judgment
Parties:	29 Shirley Street Pty Ltd ATF The 29 Shirley Street Trust (Applicant) Byron Shire Council (Respondent)
Representation:	Counsel: G Hugo (Solicitor) (Applicant) D Taylor (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Wilshire Webb Staunton Beattie (Respondent)
File Number(s):	2025/128301
Publication restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.9 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) against the deemed refusal of DA10.2022.371.4 (the Modification Application). The Modification Application seeks to modify development consent DA10.2022.371.1 (the Development Consent) which granted approval for demolition of the existing development to facilitate a residential flat

development comprising of 25 of three-bedroom units over four separate two and three-storey building with basement parking and associated works. The development is proposed at 29 Shirley Street, Byron Bay (Lot 11 in DP 1313556) (the site).

- 2 The Modification Application seeks consent to increase the building height and increase the useable area of the rooftop terrace.
- 3 Following the conciliation conference, an agreement under s 34(3) of the *Land and Environment Court Act 1979* (NSW) (LEC Act) was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The agreement was subsequently filed on 13 January 2026, and the matter was listed for a further conciliation conference on 16 January 2026. The final orders in this appeal, outlined below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 4 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' signed agreement if the Court could have made that decision in the proper exercise of its functions. The preconditions relevant to the exercise of the Court's power to make the proposed final orders are addressed in a joint jurisdictional submission (Jurisdictional Note) annexed to the written agreement. In that regard, I note the following matters.

Jurisdictional preconditions to consent

- 5 The Modification Application was made pursuant to s 4.55(2) of the EPA Act.
- 6 The pre-requisites in s 4.55(2) of the EPA Act include:

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

- (a) it is satisfied that the development to which the consent as modified relates is the same or substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and
- (c) it has notified the application in accordance with-
 - (i) the regulations, if the regulations so require, or
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (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.

Substantially the same development: s 4.55(2)(a) of the EPA Act

- 7 The parties submit, and I accept, that the development to which the consent as proposed to be as modified relates is substantially the same development as the development for which consent was originally granted (and before that consent as originally granted was modified). In forming that view, I have had regard to the following:
- (1) In terms of a qualitative and quantitative assessment, the proposed modifications do not alter critical elements of the original development such to require a new development application. The amendment of the material utilised in the southwest stair and roof top balustrade is a minor amendment to the streetscape presentation of the building. The floor to floor height amendments will result in an amendment to the overall height of the building which in the context of this development is minor.
 - (2) I am satisfied that the modifications are minor and do not introduce any new uses, increase density, or alter the approved land use or intensity of development.
- 8 I am satisfied that on the basis of the amendments made by the Applicant, 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).

Consultation: s 4.55 (2)(b) of the EPA Act

- 9 The second jurisdictional requirement under s 4.55(2)(b) of the EPA Act relates to consultation with relevant approval bodies.
- 10 The Modification Application is not integrated or designated development. The Modification Application was referred to Transport for NSW on 25 February 2025 as the site adjoins land zoned as SP2 Infrastructure (Rail Corridor) under Byron Local Environmental Plan 2014 (LEP 2014). Transport for NSW confirmed in correspondence that the Modification Application raises no new impacts and that the conditions imposed on the Development Consent require no amendment.
- 11 The requirements of s 4.55(2)(b) of the EPA Act are met.

Notification: s 4.55(2)(c) of the EPA Act

- 12 The third jurisdictional requirement under s 4.55(2)(c) of the EPA Act relates to the notification of the Modification Application. The Modification Application was notified to adjoining neighbours and objectors to the original development application on 26 February 2025. The Modification Application was placed on public exhibition from 4 to 24 March 2025.
- 13 One submission was received objecting to the Modification Application. That submission raised concerns in relation to amenity and noise impacts arising from the air conditioning and pool filtering systems proposed in the development. The Modification Application does not seek to amend these components of the development; however, I note that the Development Consent includes requirements for an Amended Noise Impact Assessment.

Consideration of submissions: s 4.55(2)(d) of the EPA Act

- 14 The fourth jurisdictional requirement under s 4.55(2) of the EPA Act is the requirement for the consent authority to consider any submission made concerning the Modification Application.
- 15 As detailed in [4], in circumstances where the parties have reached agreement in proceedings, the role of the Court is to ensure that the decision agreed is one which the Court could have made in the proper exercise of its functions. In this case, the relevant matter to be satisfied is that the submissions have been considered in accordance with s 4.55(2)(d) of the EPA Act. With the assistance of the modification application documents and reports and the Jurisdictional Note provided by the parties, I accept the agreement of the parties that the submissions have been considered. The requirements of s 4.55(2)(d) of the EPA Act are met.

Relevant matters in s 4.15(1) of the EPA Act: s 4.55(3) of the EPA Act

- 16 Pursuant to s 4.55(3) of the EPA Act in determining an application for modification of a consent under this section, the consent authority must take into consideration the matters referred to in s 4.15(1) of the EPA Act as are of relevance to the development in the subject of the application. My consideration of those matters is detailed below.
- 17 The Modification Application has been made with the consent of the owner of the site: s 100(1)(i) of the Environmental Planning and Assessment Regulation 2021 (NSW) (EPA Regulation). The Applicant of the Modification Application is the same as the Development Consent, and written consent was provided with the lodgement of the Modification Application.
- 18 The Development Consent incorporated a requirement for the development to be implemented in accordance with the applicable BASIX certification. A revised BASIX Certificate has been prepared in respect of the Modification Application and is current.

The requirements of s 100(3) of the EPA Regulation are met.

- 19 Chapter 4 of the State Environmental Planning Policy (Housing) 2021 (SEPP Housing) applies to the Modification Application. As required by s 146(2) of SEPP Housing, the Modification Application includes a statement from a qualified designer within the meaning of s 102(1) of the EPA Regulation. There is no requirement for the consent authority to refer the Modification Application to the design review panel before determining the Modification Application pursuant to s 146(2) of SEPP Housing as there is no panel operating.
- 20 Section 147(1) of SEPP Housing contains three requirements that must be satisfied before the grant of consent to Modification Applications for residential apartment development. As required by s 147(1)(a) of SEPP Housing, I have considered the quality of the design of the development when evaluated in accordance with the design principles at Sch 9 of SEPP Housing. With the assistance of the Design Verification Statement that accompanies the Modification Application, I am satisfied it is consistent with those principles. Further, in determining the Modification Application I have considered the Apartment Design Guide relevant to the application. The final requirement is that the consent authority must consider the advice provided from the Design Review Panel. As detailed at [19] that requirement is otiose in this case.
- 21 The Modification Application is subject to the provisions of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) as the location of the proposed works is within the mapped Coastal Use Area. Chapter 2 of SEPP RH applies. However, the site is not identified as land that is:
- (1) mapped as “coastal wetlands” or “littoral rainforest” (s 2.4 of SEPP RH);
 - (2) as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” (s 2.8 of SEPP RH);
 - (3) within the coastal vulnerability area (s 2.9 of SEPP RH); or
 - (4) within the coastal environment area (s 2.10 of SEPP RH).
- 22 Given the site is mapped as within the Coastal Use Area, s 2.11 of SEPP RH applies. That provision states that:
- 2.11 Development on land within the coastal use area
- (1) Development consent must not be granted to development on land that is within the coastal use area unless the consent authority—
- (a) has considered whether the proposed development is likely to cause an adverse impact on the following—
 - (i) existing, safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability,
 - (ii) overshadowing, wind funnelling and the loss of views from public places to foreshores,
 - (iii) the visual amenity and scenic qualities of the coast, including coastal headlands,
 - (iv) Aboriginal cultural heritage, practices and places,

- (v) cultural and built environment heritage, and
- (b) is satisfied that—
 - (i) the development is designed, sited and will be managed to avoid an adverse impact referred to in paragraph (a), or
 - (ii) if that impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that impact, or
 - (iii) if that impact cannot be minimised—the development will be managed to mitigate that impact, and
- (c) has taken into account the surrounding coastal and built environment, and the bulk, scale and size of the proposed development.

(2) This section does not apply to land within the Foreshores and Waterways Area within the meaning of *State Environmental Planning Policy (Biodiversity and Conservation) 2021*, Chapter 6.

- 23 I accept the agreement of the parties that the Modification Application has reduced the proposed increased height of the lift shaft and proposes minor modifications to the building portion within the areas of the site where the coastal use area designation applies. The Modification Application is accompanied by a visual impact assessment prepared by SLR Consulting and a heritage impact assessment produced by Weir Phillips. With the assistance of these documents and the scope of the Modification Application, I am satisfied that the requirements of s 2.11 of SEPP RH are met.
- 24 I accept the agreement of the parties that the scope of the Modification Application does not affect the determination of the suitability of the site for the proposed development pursuant to s 4.6 of SEPP RH.

Byron Local Environmental Plan 2014

- 25 The site is partially zoned R3 Medium Density Residential where development for the purposes of residential flat buildings is an innominate use permitted with consent in the zone. The Modification Application maintains a permissible use.
- 26 The site is subject to a maximum building height control of 9 metres pursuant to cl 4.3 of LEP 2014. The Modification Application proposes to increase the building height, exceeding the height development standard. A written request pursuant to cl 4.6 of LEP 2014 is not required for the contravention of a development standard arising as a result of a modification application. See: *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65 at [34] - [35]. Cf: *Lido Real Estate Pty Ltd v Woollahra*

Council (1997) 98 LGERA 1 at [4] per Talbot J; *North Sydney Council v Michael Standley & Associates Pty Ltd* (1988) 43 NSWLR 468; [1998] NSWSC 163 at [480] - [481].

- 27 Further, the portion of the site zoned R3 Medium Density Residential is subject to a floor space ratio (FSR) standard of 0.6:1. The Modification Application has a proposed FSR of 0.65:1. On the same reasoning as at [26] a written request pursuant to cl 4.6 of LEP 2014 is not required for the contravention of a development standard arising as a result of a modification application.
- 28 As required by cl 5.10 'Heritage Conservation' in LEP 2014 in determining the modification application, I have given consideration to the potential impact of the proposed development on the heritage significance of the proximate heritage conservation area (HCA). With the assistance of the assessment produced by Weir Phillips, I accept the agreement of the parties that any impact arising from the proposed development on the HCA does not warrant the refusal of the Modification Application.
- 29 In considering the relevant matters under s 4.55(3) of the EPA Act, I accept the agreed submission of the parties that the remaining matters are matters of which the Court is not required to address under s 34(3) of the LEC Act: *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, at [215]; *McMillan v Taylor* (2023) 111 NSWLR 634; [2023] NSWCA 183, at [62]-[65]. I record that these matters are addressed in the parties' Jurisdictional Note which demonstrates each are complied with or do not warrant the refusal of the Modification Application.
- 30 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to "dispose of the proceedings in accordance with the decision". The LEC Act also requires me to "set out in writing the terms of the decision" (s 34(3)(b)).
- 31 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of, any jurisdictional impediment to the making of these orders.

Notations

- 32 The Court notes that Byron Shire Council, as the relevant consent authority, has approved, under s 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW), to the Applicant amending the Modification Application in accordance with the documents listed below:

Amended Landscape Plans				
Plan name	Drawing ref	Revision	Date	Prepared by

Cover Sheet (As annotated by Council)	000-CS	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	020-LE	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	021-LE	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	022-LE	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	023-LE	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	024-LE	2	20.10.2025	Urbis
Legend & Schedule (As annotated by Council)	025-LE	2	15.09.2025	Urbis
Plant Schedule (As annotated by Council)	031-PS	2	20.10.2025	Urbis
Finishes Plan Ground Level (As annotated by Council)	201-FI	2	20.10.2025	Urbis
Finishes Plan Ground Level (As annotated by Council)	202-FI	2	20.10.2025	Urbis
Finishes Plan Ground Level (As annotated by Council)	203-FI	2	20.10.2025	Urbis
Finishes Plan Ground Level (As annotated by Council)	204-FI	2	20.10.2025	Urbis
Finishes Plan Level 01 (As annotated by Council)	211-FI	2	20.10.2025	Urbis

Finishes Plan Level 01 (As annotated by Council)	212-FI	2	20.10.2025	Urbis
Finishes Plan Level 02 (As annotated by Council)	221-FI	2	20.10.2025	Urbis
Finishes Plan Level 02 (As annotated by Council)	222-FI	2	20.10.2025	Urbis
Finishes Plan Roof Level (As annotated by Council)	231-FI	2	20.10.2025	Urbis
Planting Plan Ground Level (As annotated by Council)	501-PL	2	20.10.2025	Urbis
Planting Plan Ground Level (As annotated by Council)	502-PL	2	20.10.2025	Urbis
Planting Plan Ground Level (As annotated by Council)	503-PL	2	20.10.2025	Urbis
Planting Plan Ground Level (As annotated by Council)	504-PL	2	20.10.2025	Urbis
Planting Plan Level 01 (As annotated by Council)	511-PL	2	20.10.2025	Urbis
Planting Plan Level 01 (As annotated by Council)	512-PL	2	20.10.2025	Urbis
Planting Plan Level 02 (As annotated by Council)	521-PL	2	20.10.2025	Urbis
Planting Plan Level 02 (As annotated by Council)	522-PL	2	20.10.2025	Urbis
Planting Plan Roof Level (As annotated by Council)	531-PL	2	20.10.2025	Urbis

Amended Architectural Plans				
Plan name	Drawing ref	Revision	Date	Prepared by
GROUND LEVEL PLAN	AR-902001	G	25.09.2025	DAH.A
LEVEL 1 PLAN	AR-902002	F	25.09.2025	DAH.A
LEVEL 2 & DEFFERED MATTER ZONE - ROOF PLAN	AR-902003	L	25.09.2025	DAH.A
R3 ZONE - ROOF PLAN	AR-902004	N	25.09.2025	DAH.A
DEFFERED MATTER ZONE - POOL FENCE DIAGRAM (As annotated by Council)	AR-902100	J	25.09.2025	DAH.A
R3 ZONE – POOL FENCE DIAGRAM (As annotated by Council)	AR-902101	J	25.09.2025	DAH.A
ELEVATIONS	AR-903000	J	25.09.2025	DAH.A
ELEVATIONS	AR-903001	J	25.09.2025	DAH.A
ELEVATIONS	AR-903002	I	25.09.2025	DAH.A
ELEVATIONS	AR-903003	F	25.09.2025	DAH.A
ELEVATIONS	AR-903004	F	25.09.2025	DAH.A
ELEVATIONS	AR-903005	F	25.09.2025	DAH.A
ELEVATIONS	AR-903006	F	25.09.2025	DAH.A
SECTIONS	AR-904000	F	25.09.2025	DAH.A
SECTIONS	AR-904001	F	25.09.2025	DAH.A

SECTIONS	AR-904002	F	25.09.2025	DAH.A
SECTIONS	AR-904003	F	25.09.2025	DAH.A
SECTIONS	AR-904004	F	25.09.2025	DAH.A
OVERALL SECTIONS	EADE-DAH- DRW-AR- 400001	1	10.10.25	DAH.A
Amended Documents				
Document name	Ref	Revision	Date	Prepared by
Amended BASIX Certificate No. 1815592M	-	-	02.10.2025	ADP Consulting
Amended BASIX Report	-	10	02.10.2025	ADP Consulting
Amended NatHERS Certificate No. #HR- 61PJ00-01	-	-	02.10.2025	ADP Consulting
Plan of Management	-	4	11.12.2025	Urbis
Floor to Floor Height Report	-	1	12.08.2025	Allan Harriman
Heritage Response to Statement of Facts and Contentions	-	-	15.08.2025	Weir Phillips Heritage
Request to Lower Ground Floor Level to Attain More Height	24421/lt	-	14.07.2025	SJM Hydraulics

Orders

33 The Court orders that:

- (1) The appeal is upheld.
- (2) Modification Application DA10.2022.371.4 for the modification of Development Consent DA10.2022.371.1 is approved. The Development Consent is modified in the terms in Annexure A.
- (3) Development Consent DA10.2022.371.1 for demolition of the existing development to facilitate a residential flat development comprising of 25 of three-bedroom units over four separate two and three-storey building with basement parking and associated works as modified by the Court is Annexure B.

D Dickson

Commissioner of the Court

[Annexure A \(139 KB, .pdf\)](#)

[Annexure B \(580 KB, .pdf\)](#)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 06 February 2026