



Land and Environment Court  
New South Wales

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Case Name: Ardill Payne & Partners v Byron Shire Council

Medium Neutral Citation: [2019] NSWLEC 1297

Hearing Date(s): 26 – 27 March 2019; submissions on conditions filed 8 April 2019

Date of Orders: 27 June 2019

Decision Date: 27 June 2019

Jurisdiction: Class 1

Before: Smithson C

Decision: The orders of the Court are:  
(1) The cl 4.6 requests to vary the height and FSR standards are upheld.  
(2) The appeal is upheld.  
(3) Development Application No. 10.2017.588.1 for a mixed use development (primarily a tourist hotel) at 4 Marvell Street, Byron Bay is approved subject to the conditions in Annexure “A”.  
(4) The exhibits are returned except Exhibits 3, B, C, D and H.

Catchwords: DEVELOPMENT APPLICATION – mixed use – tourist hotel with rooftop bar and restaurant – compliance with Town Centre Master Plan – height and FSR non-compliance – clause 4.6 variation requests – whether reflecting character of area – whether impacting on adjoining uses – social impact considerations – what parking standards apply – acoustic considerations – plan of management – precedent – public interest

Legislation Cited: Byron Local Environmental Plan 2014  
Environmental Planning and Assessment Act 1979

Cases Cited: Deng v Burwood Council [2018] NSWLEC 1536  
Goldin & Anor v Minister for Transport Administering  
the Ports Corporatisation and Waterways Management  
Act 1995 (2002) 121 LGERA 101; [2002] NSWLEC 75  
Initial Action Pty Ltd v Woollahra Municipal Council  
[2018] NSWLEC 118  
Seaside Property Developments Pty Ltd v Wyong Shire  
Council [2004] NSWLEC 117  
Stockland Development Pty Ltd v Manly Council (2004)  
136 LGERA 254; [2004] NSWLEC 472  
Zhang v Canterbury City Council (2001) 115 LGERA  
373

Texts Cited: Byron Development Control Plan 2014  
Byron Bay Town Centre Master Plan 2016  
Roads and Maritime Services Guide to Traffic  
Generating Developments

Category: Principal judgment

Parties: Ardill Payne & Partners (Applicant)  
Byron Shire Council (Respondent)

Representation: Counsel:  
Dr J Smith (Applicant)

Solicitors:  
McCarthy Young Lawyers (Applicant)  
C Rose, Swaab (Respondent)

File Number(s): 2018/77727

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (the Act) against the deemed refusal by Byron Shire Council (the Council) of development application 10.2017.588.1 (the application) for a mixed use development (primarily a tourist hotel) at 4 Marvell Street, Byron Bay (the site).
- 2 The application was notified but no submissions of objection were lodged.

- 3 In response to conciliation between the parties, amendments to the application were made with the leave of the Court and montages prepared showing the visual impact of the development when viewed from a number of vantage points around the site in locations advised by the Council as warranting visual impact assessment.
- 4 The amended application the subject of the proceedings seeks consent for a 4 storey mixed use building above a basement car park containing 18 cars. The uses proposed comprise a 24 room hotel with associated services and facilities (including a ground floor restaurant and rooftop pool, bar and amenities block) above 2 ground floor retail tenancies. The building is also designed to minimise impact on trees on, and adjoining, the site perimeter.
- 5 The tallest elements of the building adjoin a building to a similar maximum height to the east, known as 6 Marvell Street, with the building otherwise setback from the street and other boundaries.
- 6 The restaurant and hotel foyer open onto an area designed to provide a public 'through site link' for pedestrians and cyclists between Marvell Street and the lanes to the rear. This area is to be landscaped with additional tree planting along the western boundary, described as a green link, and contain bicycle parking facilities.
- 7 The restaurant will be limited to 50 patrons and operate Monday to Saturday 8:30am to 10:30pm and on Sunday from 7am to 3pm. The rooftop bar can accommodate up to 100 patrons with trading until 10pm Tuesday to Thursday and 11pm Friday and Saturday. However, the applicant proposed that patrons of the rooftop bar must be hotel guests or have a restaurant booking, with a maximum of 50 people who were not hotel guests permitted in the restaurant and rooftop bar simultaneously.
- 8 In response to the amended application, an amended Statement of Facts and Contentions (SFC) was filed by the Council (Exhibit H). Remaining contentions, that could not be resolved by conditions of consent, were: the height, floor space ratio (FSR), character and design of the building; the adequacy of the proposed car parking; social and environmental impacts on the surrounding area; precedent; and the public interest. The Council also considered that there

was insufficient information regarding the operation of the restaurant and rooftop bar, particularly in terms of the impact on parking demand.

### **The site and surrounds**

- 9 The site comprises a single rectangular lot of 1012m<sup>2</sup> currently containing an older style cottage used for commercial purposes. The site falls by some 400mm from the rear to the Marvell Street frontage.
- 10 The site is located on the southern side of Marvell Street on the periphery of the Byron Bay Town Centre (the Town Centre). Marvell Lane adjoins to the rear (south). The site is adjoined to the east at 6 Marvell Street by a medical centre of 3 storeys with a built form element above the third storey. The medical centre has a rear car parking area accessed off Marvell Lane.
- 11 To the west of the site is an existing single storey building operating as a Vinnie's shop. Surrounding properties comprise a range of commercial buildings up to 3 storeys, including shop top housing and a relatively new mixed use tourist/residential/commercial development on the opposite side of Marvell Street comprising 3 levels above 2 levels of parking. In relatively close proximity, accessed off Marvell Lane, is a language school and a youth hostel.
- 12 Generally to the west of the site is the Town Centre whilst the area to the east of Middleton Street, on either side of Marvell Street, is zoned Residential R2 and contains predominantly 1-2 storey dwellings interspersed with low scale tourist accommodation.
- 13 Expert Joint Reports were prepared dealing with the outstanding contentions. As a result of a number of these reports, contentions were resolved in terms of acoustic impacts, social impact, and the adequacy of the Plan of Management.
- 14 The remaining contentions in the proceedings can be summarised as follows:
  - (1) Whether the proposed breaches of height and FSR are justified, and whether approval to the breaches would create an undesirable precedent, particularly given they relate to a proposed fourth storey;
  - (2) Whether the proposed development will be compatible with, or have an adverse impact on, the character of the street and area; and
  - (3) The adequacy of the parking provided.

## Legislative context

- 15 The site is located within the B2 Local Centre zone under the Byron Local Environmental Plan 2014 (the LEP) where the proposed uses are permissible with consent. The objectives of the B2 zone are as follows:
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
  - To encourage employment opportunities in accessible locations.
  - To maximise public transport patronage and encourage walking and cycling.
  - To encourage vibrant centres by allowing residential and tourist and visitor accommodation above commercial premises.
- 16 Under the LEP, the maximum permissible height pursuant to cl 4.3 is 11.5m whilst the maximum FSR at cl 4.4 is 1.3:1. The height and FSR are both proposed to be exceeded requiring submission, and upholding, of written requests under cl 4.6 of the LEP in order for consent to be granted. These requests were provided but were not considered by the Council to adequately justify the breaches sought.
- 17 The relevant provisions of cl 4.6 are as follows:

### **4.6 Exceptions to development standards**

(1) The objectives of this clause are as follows:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

(6) ...

18 The LEP height objectives are found at cl 4.3(1):

(a) to achieve building design that does not exceed a specified maximum height from its existing ground level to finished roof or parapet,

(b) to ensure the height of buildings complements the streetscape and character of the area in which the buildings are located,

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

19 The height of development can be exceeded by architectural roof features providing the provisions of cl 5.6 of the LEP are met:

#### **5.6 Architectural roof features**

(1) The objectives of this clause are as follows:

(a) to encourage variety in built form,

(b) to provide for architectural innovation,

(c) to improve the streetscape of urban areas,

(d) to protect the amenity of the streetscape by enabling the development of roof features that are compatible with the natural and built features of the locality.

(2) Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3 may be carried out, but only with development consent.

(3) Development consent must not be granted to any such development unless the consent authority is satisfied that:

(a) the architectural roof feature:

(i) comprises a decorative element on the uppermost portion of a building, and

(ii) is not an advertising structure, and

(iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and

(iv) will cause minimal overshadowing, and

(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.

20 The definition of storey is found in the dictionary of the LEP and is as follows:

**storey** means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include:

(a) a space that contains only a lift shaft, stairway or meter room, or

(b) a mezzanine, or

(c) an attic.

21 The LEP FSR objectives are found at cl 4.4(1):

(a) to ensure that new buildings are appropriate in relation to the character, amenity and environment of the locality,

(b) to enable a diversity of housing types by encouraging low scale medium density housing in suitable locations,

(c) to provide floor space in the business and industrial zones adequate for the foreseeable future,

(d) to regulate density of development and generation of vehicular and pedestrian traffic,

(e) to set out maximum floor space ratios for dual occupancy in certain areas.

22 Development is to be assessed having regard to the Byron Development Control Plan 2014 (the DCP), with a number of DCP provisions relevant to the appeal.

23 Development is also to have regard to the provisions of the Byron Bay Town Centre Master Plan 2016 (the Master Plan) which provides, inter alia, an indicative future built form outcome and vision for the Town Centre.

## **Site view**

- 24 The hearing commenced on site where the Court viewed the site and surrounds in the company of the parties and their experts.
- 25 The site view included views from the locations the subject of the view impact assessment undertaken by the applicant, including from the heritage listed Railway Park in Jonson Street. As the Council was also concerned with the proximity of the site to the R2 zone, and the availability of on-street parking, a view was undertaken of development in Marvell Street within the R2 zone, as well as development on Middleton Street, in Marvell and Keesing Lanes and in Carlyle Street in the vicinity of the site, and on the opposite side of Marvell Street.
- 26 The applicant noted that 6 Marvell Street appeared as 4 storeys to the street albeit the Council argued it was 3 storeys with a rooftop feature. The applicant also pointed out a building at 89 Jonson Street west of the site which was visible from Marvell Street in the vicinity of the site, arguing it appeared to have 4 storey elements, as well as a development at 7 Carlisle Street which also appeared to have a fourth storey component.

## **The contended issues**

- 27 *Height*
- 28 The proposed development exceeds the maximum height in order to accommodate the lift overrun and the rooftop facilities comprising the bar, pool and amenities.
- 29 As indicated, the maximum permissible height under the LEP is 11.5m. The amended application proposes to exceed this height for: the lift overrun to 13.87m (a 20.61% exceedence); to the top of the roof over the rooftop deck to 12.67m (a 10.17% exceedence); and up to 12.09m to the top of the pool deck (a 5.13% exceedence).
- 30 The main roof over the building was agreed to be height compliant and much of the building is below the height limit and only 3 storeys. It was the rooftop elements and lift overrun which breach the limit and constitute a partial fourth storey.



31 The Council contended this excess height had adverse impacts on the area. The applicant disputed this.

32 There was much oral argument on what the elements above the third storey might constitute in the example developments noted on the site view and referenced by the applicant. However, there was no conclusive evidence available as to whether such elements constituted a fourth 'storey', per se.

33 Expert urban design evidence was provided by Mr Graham for the applicant and Ms Docherty for the Council. They filed an expert Joint Report (Exhibit P). Ms Docherty also provided expert planning advice for the Council and filed expert Joint Reports prepared with the applicant's planner, Mr Roberts (Exhibits Q and R).

#### **The applicant's position**

34 A cl 4.6 written request for the height breaches was prepared by the applicant, submitted with the application, and updated in response to the visual impact assessment findings and expert Joint Reports (Exhibit B).

35 The cl 4.6 request, and the applicant's evidence, argued that the excess height was justified and complied with the objectives of the zone and of the standard for the following reasons.

36 Objective 1a) of the standard is a restatement of the standard, which is not being met, however cl 4.6 allows the standard to be exceeded (in certain circumstances). However, the building has been designed so it will not be perceived to exceed the height limit.

37 In terms of the other objectives of the zone and the standard, the building is in a B2 commercial zone and part of the Town Centre in an area characterised by a range of heights up to 3 storeys and with uses, including bars and restaurants, which activate the streetscape. In this context:

- (1) The proposed building is consistent with the bulk, height, scale, external appearance and built form of other recently constructed buildings in the Town Centre;
- (2) The elements that exceed the height are setback from the edge of the building and not readily perceptible to the broader community, particularly when viewed from the adjacent section of Marvell Street. To Marvell Street, the building will present as 3 storeys;

- (3) The height needs to be considered in the context of the adjoining development to the east at 6 Marvell Street which dominates the existing streetscape. The highest element, the lift overrun, is well setback from all other boundaries and will be perceived to be of a height not dissimilar to the building at 6 Marvell Street.
- (4) The proposed building provides a suitable height transition between the higher existing building to the east and the lower existing buildings to the west. It should be anticipated that the buildings to the west will be redeveloped in the foreseeable future;
- (5) As the area develops in accordance with the planning controls and the Master Plan, the building and its height will be consistent with development in the streetscape;
- (6) The Master Plan seeks through site links. In order to provide this, the bar, pool and amenities could not be provided on the ground floor;
- (7) The through site link will encourage (and therefore enhance) cycling and walking including by providing cycle parking for public use. This option would not be available if the building instead complied with the height by concentrating floor space at ground level utilising the full width of the site, as has occurred at 6 Marvell Street next door;
- (8) The proposed variations will not result in any unreasonable amenity impacts for any neighbouring properties in terms of privacy or overshadowing noting that the lack of adverse amenity impacts on adjoining properties is one way of demonstrating consistency with the objectives of the standard. The lot has a long north-south orientation with the bulk of any overshadowing cast over Marvell Lane;
- (9) There will not be any disruption of views and the visual impact is extremely minimal. The building will form part of the Town Centre viewscape and the design minimises visual impacts with the taller elements screened or setback so as not to disrupt or impede general views. Only the lift overrun is likely to be visible from the public domain at street level;
- (10) The uses accommodated on the roof will provide activation and vibrancy in the street and appropriate facilities for guests of the hotel, and need to be equitably accessed by lift; and
- (11) The development will provide local employment in an accessible central location, having a range of uses catering for both locals and visitors, including tourist accommodation above commercial premises, a specific zone objective.

38 These factors were considered to also provide environmental planning grounds to support the proposal. In addition, the cl 4.6 request states that the following also constitute sufficient grounds to support the breaches:

- (1) The height breaches are rooftop elements that include infrastructure required to support the development. By providing these elements on

the roof, the building can be narrowed, the setbacks to Marvell Street increased and space provided for public access and interaction including the through site link which will act as a new, but high amenity, laneway traversing the site connecting to Marvell Lane. It also enables greater setbacks to the neighbour to the west and will ensure tree retention and enhancement on, and in the vicinity of, the site;

- (2) Seeking to maximise an economic return by full utilisation of the site is reasonable given this is commercially zoned land in the Byron Bay Town Centre where land is at a premium;
- (3) The ground floor level has been determined by the need to be flood-immune resulting in the building having a greater height than if the land was not subject to flooding. There is also a change in existing levels across the site;
- (4) The design sets a desirable precedent allowing scope for public interaction and a range of uses providing amenity for occupants and the general public. Therefore, a better outcome is achieved without adverse impact; and
- (5) The high quality of the design, being a 'boutique hotel', will provide a superior visual and streetscape outcome relative to existing older building stock and 6 Marvell Street. Further, other than a minor FSR exceedence, all other planning controls are complied with and the intent and vision of the Master Plan achieved.

39 In the expert Joint Reports of the planners (Exhibits Q and R) and/or in oral evidence, Mr Roberts also argued that: the elevation is articulated and modulated; the design was amended in response to the contentions to lower the height of the eastern façade; there is precedence of the Council allowing height variations or 4 storey elements including for the adjoining medical centre at 6 Marvell Street; and the hotel roof is height compliant. It is only elements on or above the roof that do not comply and this is not habitable GFA.

40 In this regard, examples were given of existing 3 storey buildings in the immediate streetscape which have some form of building element above the third storey, including: 6 Marvell Street, 7 Carlyle Street and 89 Jonson Street.

41 The applicant also argued that the building did not contain a complete fourth storey as contended by the Council. Further, there is no storey control in the DCP and the lift overrun is specifically excluded from the definition of storey in the LEP.

42 Dr Smith, counsel for the applicant, submitted that significant parts of the building are below the height limit and the exceedences are to achieve a

particular design outcome. In this regard, the rooftop bar contributes to the exceedances in only a minor way. Any amenity issues associated with the use of this bar are manageable and there will be little or no impact on surrounding development as agreed by the social impact assessment experts in their Joint Report (Exhibit K) and by the acoustic experts in their Joint Report (Exhibit N).

43 Ms Docherty had acknowledged that the proposal complied with the first three objectives of the B2 zone but argued the use of the pool area would weaken the objectives. However, the issue is whether the development is consistent with the objectives of the standard and zone not whether the objectives are weakened by the development. As case law in the Court has stated, consistency means compatible or capable of existing together in harmony or not being antipathetic. Whichever interpretation is adopted, the test of consistency is less onerous than that of achieving the objectives.

44 Further, Ms Docherty's evidence was based on a misunderstanding of the acoustic assessment whereas the acoustic experts had agreed that the use of the rooftop bar will be able to comply with required noise guidelines. This is evidence which the Court can have regard to and be directly satisfied with.

45 Other relevant considerations include the effect of topography given the slope on the site, the lack of impact on the streetscape, the distance to the R2 zone, and future likely redevelopment in the street.

#### **The Council's position**

46 In the Council's view, the cl 4.6 request had not demonstrated that height compliance would be unreasonable or unnecessary when a compliant building could comply with all of the relevant controls. The Council did not accept that it would result in a more appropriate relationship with Marvell Street and considered 6 Marvell Street to be an anomaly in the street.

47 In oral evidence, the Council argued that the examples of other height breaches cited by the applicant were associated with site topography or architectural roof elements as defined in cl 5.6 of the LEP and did not constitute a fourth storey.

- 48 The Council generally accepted that the development met the objectives of the zone but contended that the proposed height was not compatible with adjoining development contrary to the objectives of the height standard at cl 4.3 resulting in a bulk and scale not in harmony with such development. Objectives (a) and (d) in particular were said not to be met.
- 49 Ms Docherty considered that the non-compliant height added to the building's bulk when viewed from a number of vantage points including from the nearby R2 low density residential area. She accepted, close to the site, that the height of 6 Marvell Street was currently prominent, and the proposed fourth storey elements and lift overrun would largely be behind this building. It was the more distant views of the height breaches that she was concerned with. Further, a 4 storey building could not be said to compliment the streetscape and character of the area or minimise visual impact given the fourth storey elements would be clearly visible from some views.
- 50 Ms Docherty questioned how any building with a 4 storey element and an activated top storey accommodating a significant number of people could be complimentary to the streetscape and character of the area where that character is development to a maximum of 3 storeys, as supported by the Master Plan for the Town Centre. The Master Plan was prepared with considerable community consultation and input.
- 51 The elements which breached the maximum height could have been accommodated at a lower level rather than on the roof breaching the height. In her view, there should be less tolerance from any impacts associated with the use of the rooftop area when these uses resulted in a breach of the height standard.
- 52 Further, if the uses above the maximum permitted height were approved, it would undermine the suitability of other permissible uses in the same zone being located near the rooftop bar, specifically residential accommodation in shop top housing, given the uncertainty of noise and other amenity impacts.
- 53 Ms Docherty argued that there were no site constraints which cause these height breaches. What is proposed is a new building on a flat site. Rather, the height exceedances are driven by the applicant's desire to provide 24 hotel

rooms and rooftop bar and pool elements. It is the design of the ground floor which causes the height breach and there are other design options available which would allow compliance with the height standard.

54 Ms Docherty did accept that the main roof of the building was height compliant but it was the elements on this roof that caused the concern.

55 In summary, the Council argued that the proposal did not achieve the objectives of the height standard because:

- (1) a 4 storey building detracts from an area characterised by 1 to 3 storey buildings;
- (2) the roof form and building scale do not respond to the character of built form in the locality;
- (3) the Town Centre is not a major commercial area and not characterised by large multi-storey development;
- (4) the existing cottage on the site more closely represents the existing character of Byron Bay on the Town Centre edge;
- (5) the site is in a locality close to a low density residential area dominated by 1-2 storey buildings;
- (6) the development with a full fourth storey would have a pronounced impact in this location;
- (7) the proposal does not minimise the visual impact of the building in particular from distant views at ground level including from the state heritage listed Byron Bay railway yard to the west; and
- (8) the visual impact assessment, undertaken by the applicant, skews the perception of the fourth storey.

56 There was also no analysis of how a 4 storey building on the Town Centre edge was in context with the 1-2 storey buildings closest to it, other than the building to the east. Ms Docherty disagreed that the building provided a transition between the bulkier building to the east and the lower buildings to the west given it would be one of the highest buildings in the Town Centre precinct but located on the edge of the Town Centre.

57 In this regard, the Council also submitted that a reduced height may be appropriate as the site was in a transition area, having an interface with the R2 Low Density Residential zone to the east of Middleton Street.

58 In this regard, Ms Rose, lawyer for the Council, referenced *Seaside Property Developments Pty Ltd v Wyong Shire Council* [2004] NSWLEC 117 (*Seaside Property*) at [25]:

“25 As a matter of principle, at a zone interface as exists here, any development proposal in one zone needs to recognise and take into account the form of existing development and/or development likely to occur in an adjoining different zone. In this case residents living in the 2(b) zone must accept that a higher density and larger scale residential development can happen in the adjoining 2(c) or 2(d) zones and whilst impacts must be within reason they can nevertheless occur. Such impacts may well be greater than might be the case if adjacent development were in and complied with the requirements of the same zone. Conversely any development of this site must take into account its relationship to the 2(b) zoned lands to the east, south-east, south and south-west and the likely future character of those lands must be taken into account. Also in considering the likely future character of development on the other side of the interface it may be that the development of sites such as this may not be able to achieve the full potential otherwise indicated by applicable development standards and the like.”

59 She also noted Commissioner Walsh’s comments in *Deng v Burwood Council* [2018] NSWLEC 1536 in referencing *Seaside Property* at [48]:

“48 I see this conclusion as generally consistent with the Court’s Planning Principle on zone interface treatment in *Seaside Property Developments Pty Ltd v Wyong Shire Council* [2004] NSWLEC 117. That is, that lower density areas, adjacent to a higher density zones, can reasonably expect that impacts “within reason” may well occur...But conversely, the Planning Principle supports a view that development in the higher density zone must not go beyond that step of “within reason” impacts, even if it prejudices otherwise development potential...”

60 She claimed these cases were relevant in assessing the development’s impacts having regard to the change in zone at Middleton Street.

61 *FSR*

62 The proposed development with an FSR of 1.33:1 exceeds the maximum FSR of 1.3:1, a 3.3% exceedence.

63 The Council contended the excess FSR had impacts on the area, albeit the concern with the FSR breach was less than with the height breaches. The applicant disputed there would be any impacts from such a minor FSR exceedence.

### **The applicant's position**

- 64 A cl 4.6 written request for the FSR breach was prepared by the applicant, submitted with the application, and updated in response to the visual impact assessment findings and expert Joint Reports (Exhibit C).
- 65 The cl 4.6 request, and the applicant's evidence, argued that the excess FSR should be allowed for the following reasons:
- (1) The development meets the relevant objectives of the standard. It is entirely suitable when regard is had to the character, amenity and environment of the locality – which is one of a Town Centre with a mix of uses. Buildings are of a number of different storeys with single storey buildings being progressively redeveloped in accordance with the current planning controls. For these reasons, the single storey building immediately to the west is likely to be redeveloped in the foreseeable future;
  - (2) The amenity of the locality reflects its character as an active precinct including evening drinking and dining establishments. In the immediate vicinity of the site there are bars and restaurants at ground level which encourage pedestrian activity. The proposed building has rooftop elements with a restaurant and retail at ground floor opening to a through site link to the west of the building connecting Marvell Street to Marvell and Keesing Lanes. This design will encourage public activity at ground level and provide a direct pedestrian access in a north-south direction to other properties in the vicinity;
  - (3) The front façade has a progressive setback, greater than adjoining at 6 Marvell Street, and retains trees on-site, on the street and adjoining the site. These trees will function in conjunction with the through site link, which would be landscaped, to help break up the bulk of the building;
  - (4) What is proposed is a high quality development that utilises the site area in a manner that responds to the controls but has a design approach consistent with the intention for the Town Centre. It provides consistent built form across 3 levels and excellent opportunities for public interaction in and around the building. The density will remain regulated, as will the generation of vehicular and pedestrian traffic, and there is no increase in required parking;
  - (5) The FSR exceedance is minor and does not result in a development which will present as overly dense within its context. This is assisted by the setbacks to the north and west and by the design to the public domain. In this regard, the building has been narrowed with increased setbacks to Marvell Street to allow public access and interaction. A consequence is that there is a slight increase in the FSR;
  - (6) The through site link and public access to land on the site at ground level provides a social benefit to the community including a greater scope for pedestrian and cycle activity. This benefit would not be



available if, for example, the building was to the full width of the site with a corresponding decrease in the height but compliant FSR;

- (7) As the excess FSR is so minor, there is no particular element of the built structure that can be identified as causing the exceedance. As such, the excess floor space would not be perceptible to the broader community in the local landscape or streetscape and the building will otherwise be fully compliant with other provisions of the DCP;
- (8) The proposal reflects the intent of the FSR control for orderly and economic use and development of land having regard to the planning controls;
- (9) The building will set a desirable precedent in terms of good design as a narrower but slightly taller building with significant scope for public interaction at street level and will set a benchmark for design and amenity;
- (10) The development will provide retail and entertainment uses for people who work and visit the local area and entertainment for visitors and locals through the restaurant. The design has therefore had regard to both occupants and the public. It will also encourage employment opportunities in an accessible location;
- (11) There will be no unreasonable amenity impacts for any neighbouring properties including in terms of overshadowing;
- (12) The development provides a suitable transition in terms of height and scale between the higher existing building to the east and existing buildings to the west;
- (13) The development therefore complies with the objective of the standard to ensure development is compatible with the bulk, scale and character of existing and future surrounding development; and
- (14) The report of Council officers to the Council on the application had indicated that the slight exceedance of FSR would not be a ground for refusal.

66 In the first expert Joint Report of the planners (Exhibit Q), Mr Roberts also argued that the development comprises modern architecture with excellent design features including green walls, pedestrian links and generous setbacks. The bulk and scale will be consistent with the streetscape and the building will have less bulk and scale than the compliant development adjoining to the east whilst offering a range of uses supported in the zone. In this regard, 6 Marvell Street fails to achieve similar positive outcomes. It spreads the full width across the lot with minimal articulation in built form presenting much greater impacts on the surrounding streetscape in terms of bulk and scale, yet it complies with the applicable controls.

67 Dr Smith submitted that the exceedance is modest at only 3.3% and that Ms Docherty acknowledged that the variation is relatively minor in the context of land zoned B2 (Expert Joint Report Exhibit R). Further, her argument that the cl 4.6 request should not be accepted was based on the misconception that the rooftop generated additional demand for parking, which was not the case.

**The Council's position**

68 In the Council's view, the cl 4.6 request did not demonstrate that FSR compliance would be unreasonable or unnecessary when a compliant building with reduced floor area could comply with all of the relevant controls.

69 The Council accepted that the development generally met the objectives of the zone but contended that the proposed FSR was not compatible with adjoining development contrary to the objectives of the standard at cl 4.4 resulting in a bulk and scale not in harmony with such development.

70 As a result, Ms Docherty considered that the non-compliant FSR added to the building's bulk when viewed from a number of vantage points including the nearby low density residential area.

71 Ms Docherty argued that there was a shortfall in parking provision for the site which would have a traffic impact on the locality thus not meeting the FSR objective of regulating density and traffic generation. Whilst accepting that the rooftop bar did not constitute GFA, she argued the use attracts people, requires parking and amenities, and impacts the bulk and scale of the building.

72 She did not accept that the proposal demonstrated that there would not be a negative impact on the amenity or environment of the locality. Therefore, the applicant had not demonstrated that the proposal is in the public interest.

*Character of area*

73 The Council's concerns with the character of the area, and the applicant's response to these, were largely a repeat of the issues raised in terms of the proposed height and FSR.

74 In summary, the applicant submitted that the building would be compatible with the design, character and amenity of development in the locality. The

development had been designed to respond to both the existing and anticipated future character of the area.

- 75 In this regard, the elements above the third storey were setback behind the main façade adjacent to 6 Marvell Street and would therefore not be readily perceived from the street. This had been agreed to be acceptable by the urban design experts. Further, the visual impact assessment undertaken, reflected in the photomontages produced by the applicant, also demonstrated the long views from Jonson Street would be similarly acceptable. There would be no issue in terms of noise impacts on residential amenity as had been agreed between the acoustic experts.
- 76 This left the only argument by the Council being that an open bar on the rooftop was somehow incompatible with residential development in the locality. However restaurants, licensed premises, tourist accommodation and other potentially intrusive developments are all permissible in the zone together with shop top housing. They are not inherently incompatible uses.
- 77 However, the Council argued that the objectives and performance criteria at cl D3.2.4 of the DCP were not met, being to ensure that tourist accommodation in the Business zones is compatible with the character and amenity of development in the locality.
- 78 In terms of built form and aesthetics, the Master Plan identifies the community's main concern as having a maximum of 3 storeys in the Town Centre, and that maintaining a 3 storey building height was important. In this regard the proposal was not compatible. It did not minimise visual impact of the building when viewed from the west, identified as an entry point to the town and, when viewed from the east, from the low density residential area, the building would also be perceived as higher than the existing building to the east. There were no other 4 storey buildings in this location at the edge of the Town Centre making the fourth storey elements prominent particularly given the activation of this level.

## *Parking*

- 79 Expert evidence on parking demand was provided by traffic engineers; Mr Payne for the applicant and Mr Pearce for the Council. Their written evidence was summarised in their expert Joint Report (Exhibit L).
- 80 The experts disagreed on the required amount of parking that should be accommodated on-site for the proposed use and the parking rate to be adopted having regard to the DCP requirements relative to those contained in the Roads and Maritime Services Guide to Traffic Generating Developments (the RMS Guide).
- 81 Parking provision rates are contained in Table B4.1 of the DCP. For 'hotel and motel accommodation', the required parking is 1 space per unit plus 1 space per 2 employees (on-site at any one time) plus 1 space per manager. If a public restaurant or function room is included, parking provision (for that component) is to be based on the rate for 'food and drink premises' which, in Business zones, is 1 space per 20m<sup>2</sup> of GFA.
- 82 The RMS Guide states that parking for tourist hotels should be based on 1 space per 4 units (ie hotel rooms) but also suggests that, for both traditional and tourist hotels, comparisons should be drawn with similar developments.
- 83 Mr Payne had undertaken a study of hotel parking in the area and researched the required parking for hotels in other regional centres. The parties disagreed as to the relevance of this material.
- 84 The experts agreed that 2 spaces are required for the retail tenancies, 1 space for the manager and 4 spaces for the restaurant. It was the provision required for the hotel rooms that was in dispute between them.

### **The applicant's position**

- 85 The applicant noted that the only parking supply rate in dispute related to the accommodation component of the development where the applicant sought to provide 6 spaces but the Council sought 15.
- 86 The Council had agreed the DCP rate was not appropriate to apply. Mr Payne argued 6 spaces were all that should be required. His starting point had been the RMS Guide. However, he had then undertaken parking surveys, over an 11

month period, of 3 other hotels in the Town Centre, being the Beach Hotel, the Byron Bay Hotel, and the Great Northern Hotel. He had then looked at the required parking provision for tourist hotels in other regional NSW towns with much higher tourist visitations than residents.

- 87 Mr Payne argued that the development is for a 'tourist hotel' not a traditional hotel or motel as defined in the LEP and DCP. The parking demand generated by a tourist hotel is much less than created by a traditional hotel or motel. The DCP's parking rates for 'hotel and motel' are generic based on studies into hotel and motel uses from as early as 1982. The rates do not differentiate between a motel or a hotel, nor where the establishments might be, what other forms of transport are available to guests, the type of traveller, length of stay, ancillary transport available, the need and desirability of having a car at the hotel, and the like.
- 88 The DCP therefore requires the application of the same parking rate to an overnight motel on a highway outside a regional town with that for a tourist destination hotel in the middle of Byron Bay. Mr Payne argued that these different types of hotels generate very different parking demands, backed up by his research and the RMS Guide.
- 89 He argued that, as the proposed use was not represented in the DCP table or elsewhere in the DCP, the rates under the RMS Guide applied, as stated in the DCP. He therefore assessed the most appropriate rates using the RMS Guide for a tourist hotel in a Town Centre location.
- 90 In this regard, the RMS Guide provides rates based on studies of tourist hotel rates in Sydney but also directs the applicant to investigate studies of similar circumstances. Accordingly, he had undertaken his investigations of similar uses in other regional towns with similar transport facilities, tourist demands and location. This research indicated that the parking rates are well below the DCP required rates.
- 91 Further, occupancy rates of hotels need to be considered as do the alternative transport resources available removing the need for parking. Byron Bay tourists are serviced by a range of transport providers including planes, Uber, shuttle buses, taxis, hire cars, public buses, and tourist operated courtesy buses.

- 92 Further, the applicant had offered a car sharing space. If no car sharing scheme existed, the applicant offered to provide a car to be used by guests managed by the hotel, arguing that such car sharing equated to 10 parking spaces. The Council's expert did not dispute this equation. Six 'accommodation' spaces and 1 dedicated share space with a hotel car (equating to up to 10 spaces) gave a required equivalent provision of 16 spaces thus meeting the 15 spaces sought by the Council for the accommodation component of the use.
- 93 Dr Smith also submitted that the Master Plan had a focus on the Town Centre as a 'village centre' which has Marvell Street as its southern boundary. The Master Plan acknowledged that there is a significant issue in relation to traffic congestion in the Town Centre. Therefore, the Council has resolved to tackle this problem by making it a non-car based destination.
- 94 The Master Plan was intended to be implemented through a proposed DCP (the proposed DCP). One of the key projects of the proposed DCP identified by the Council was to review vehicle, pedestrian and cycle movements within the village centre precinct and identify opportunities for pedestrian prioritisation through reduced traffic and parking. Excess parking provided in the development would likely result in increased car use and therefore increased traffic in the Town Centre, an outcome inconsistent with the Council's stated intent.
- 95 Although accepting that the proposed DCP had yet to be exhibited, and therefore did not have the status of a draft Environmental Planning Instrument required to be considered under s 4.15 of the Act, Dr Smith submitted that, as the contents of the proposed DCP were to enable implementation of the Master Plan, it was relevant to consider only in terms of the Council's intent.
- 96 The applicant also offered, as a condition of consent, to adopt a Sustainable Travel Plan consistent with the provisions of the proposed DCP. With such a Plan, it should be accepted that no additional parking for the accommodation component of the development would be required.
- 97 Finally, Dr Smith submitted that Mr Pearce's opinions in the Joint Report were based on simple assertions to inform his view about demand even though he

accepted that the DCP rate should not be applied. He had not responded to the matters raised by Mr Payne's research.

- 98 So, whilst Mr Pearce had accepted that there was a basis to depart from the DCP rate, he had not done the research, unlike Mr Payne, to determine what an appropriate rate should be.

**The Council's position**

- 99 To arrive at a required 15 car spaces to support the accommodation component of the development, Mr Pearce had used the DCP as a starting point. Based on the DCP's calculation, 24 car spaces would be required however, he agreed this was excessive. He had therefore discounted provision based on an 85% hotel room occupancy rate and to allow some ancillary use between the rooftop bar and the restaurant. He also took into account the car sharing proposal put forward by the applicant and, on the basis that the Council were considering trialling car sharing, he discounted the rate of provision by a further 5 spaces.
- 100 Mr Pearce considered that the DCP was a more appropriate guide for parking provision than the RMS Guide as the RMS Guide was based on 1988 surveys of Sydney CBD hotels. The DCP rates were based on local knowledge and conditions and had been adopted after consultation based on submissions from the public. The RMS Guide was not a product of local information.
- 101 Mr Pearce also noted the RMS Guide makes provision for coach movements and taxi facilities, neither of which were provided as part of the proposal.
- 102 Mr Pearce indicated in oral evidence that, if a guest arrived by car but there was no car space available at the hotel, the only untimed parking would be a distance of between 800m and 1km away.
- 103 Mr Pearce accepted that Mr Payne had undertaken parking surveys of other Byron Bay hotels. However, he was of the opinion that only the Beach Hotel was of similar type and use, and the parking provision of other hotels needed to have regard to their date of approval and the DCP provisions in place at the time, as the parking rates were different.

104 In submissions, Ms Rose, argued that the Court should have regard to *Zhang v Canterbury City Council* (2001) 115 LGERA 373. At [75] there are three important propositions. Firstly, although the Court has wide-ranging discretion, the discretion is not unfettered. Secondly, the provisions of a DCP are to be considered as a fundamental element in, or a focal point to, the decision-making process, particularly if there are no issues relating to compliance with the LEP. Thirdly, a DCP provision directly pertinent to the application is entitled to significant weight in decision-making, albeit not determinative.

105 Ms Rose also referenced Justice McClelland's decision in *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254; [2004] NSWLEC 472 at [87] which deals with the principles relevant to consideration of DCPs, reproduced in part as relevant below:

“87 ...

- A development control plan adopted after consultation with interested persons, including the affected community, will be given significantly more weight than one adopted with little or no community consultation.
- A development control plan which has been consistently applied by a council will be given significantly greater weight than one which has only been selectively applied...”

106 Ms Rose advised that the DCP had been subject to consultation and consistently applied and the Council had not adopted the RMS Guide in respect of ‘tourist or visitor accommodation’. Given these circumstances, it was reasonable to approach the assessment of the appropriate car parking provision on the requirements set out in the DCP.

107 Mr Payne had indicated that a ‘tourist hotel’ was not covered by the DCP’s parking rates. Ms Rose disputed this as ‘tourist and visitor accommodation’ was defined in the LEP to include ‘hotel and motel accommodation’ and ‘hotel and motel accommodation’ was covered in Table B4.1 of the DCP. She noted that the applicant had adopted the DCP rate for ‘food and drink premises’ but not for ‘hotel and motel accommodation’ where a higher rate of provision for such facilities is required by the DCP.

108 There was also no certainty in respect of the car sharing trial as the Council had found it difficult to find an operator who could make the trial viable. Ms Rose submitted that the Court should therefore not reduce the parking



requirement on the basis of the existence of a trial car sharing scheme yet to commence.

- 109 The Court was urged to review the DCP requirements, take account of the likely occupancy rates of the hotel, and consider whether there should be a deduction for car sharing. The Court would conclude after undertaking this assessment that the number of parking spaces proposed is deficient and refuse the application on the basis of that deficiency.

#### *Precedent*

- 110 The Council was concerned that the approval of the development would encourage further height breaches in the area. Further, the community expected the Council to impose applicable development standards and ensure that development did not generate negative impacts on the surrounding area. If approved, this development would set a precedent that undermines the development standards that the community expects to be upheld.
- 111 Ms Rose referenced the Court's decision in *Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* (2002) 121 LGERA 101; [2002] NSWLEC 75 (*Goldin*), which determined that precedent was a valid consideration. As in that case, the Council found the development objectionable. It will impact on the streetscape and there is a real possibility that, in this attractive location of Byron Bay, other applications may seek similar development outcomes.
- 112 Therefore, precedent should be a relevant consideration and the suitability of the proposal assessed having regard to the negative precedent that may arise.
- 113 In this regard, Ms Docherty maintained that the development should not vary from Council standards and controls without sufficient justification as approval would set a precedent for similarly inappropriate development within the B2 zone and in the Town Centre.
- 114 The development would create an additional storey to enable a use (the bar) that could accommodate up to 100 people at any one time. This was more patrons and noise than the controls permit.

- 115 Further, the Council needs to ensure the uses can be managed. Ms Docherty noted that the acoustic experts agreed that noise tests are required to be carried out within 3 months of opening the facility and during summer when the premises are at capacity. Patron numbers may need to be adjusted. In her opinion, this approach does not provide a reasonable degree of certainty. It fails to demonstrate that the proposed development will not generate undesirable amenity impacts. It is an undesirable precedent to rely on ongoing compliance assessment during operation.
- 116 The applicant submitted that cases before the Court of an undesirable precedent typically arise where there is sufficient evidence of an impossibility to stop other applications of an exact nature. That is not the case here.
- 117 In contrast to the situation in *Goldin*, there is no evidence before the Court to support the proposition that there are other sites in the locality where there is an 'inevitable consequence' of a 'similar, undistinguishable application' being made.
- 118 Approval to the application would therefore not set an undesirable precedent, but rather a positive one, given the proposed development was of a high quality design and supports the Council's Master Plan vision for the Business zone, including reducing traffic congestion and providing sustainable transport options.
- 119 In addition, Mr Roberts argued that the Court has determined that each application should be assessed on its merits and therefore precedent cannot be relied upon. The development achieves the objectives of development in the Town Centre, as envisaged in the Master Plan and the B2 zone. It is an excellent example of how good design combined with some flexibility results in a superior design and planning outcome.
- 120 In this regard, the proposed building will be superior to all other buildings in the surrounding locality in terms of its built form and architectural merit and should be considered a desirable precedent. It is also compatible with the diverse multi-functional character of the locality.

- 121 The development has no blank walls along any street frontage, provides extensive architectural merit, and articulation of visual interest along its northern western and southern elevations, and will enhance but not necessarily reflect the existing character of the precinct due to its design in an area that is characterised by older buildings. It would therefore enhance the tourist and beachside character of the Town Centre.
- 122 Further, the applicant had accepted a condition to trial the use of the rooftop facilities and the 100 patron capacity as recommended by the acoustic experts and a Plan of Management would ensure appropriate controls were in place to minimise adverse impacts.

### *Public Interest*

- 123 The Council argued that, having regard to s 4.15(1) of the Act, the proposal should be considered contrary to the public interest. It has combined non-compliances of height and FSR representing over development of the site with resultant impacts, and traffic and parking demands that have not been satisfactorily addressed.
- 124 The applicant noted that, in a community as vocal as Byron Bays', there had been no objections to the development including from residents in the nearby R2 Low Density Residential zone. This was despite notification over an extensive area.
- 125 The applicant also argued it would allow for quality, regulated and much needed 'legal' tourist accommodation in an area in demand for tourist accommodation.

### **Conditions of consent**

- 126 The parties filed conditions of consent after the hearing including their grounds for alternate conditions for those conditions in dispute.
- 127 Proposed condition 25 relates to the car parking layout. The Council sought that the height of the basement car park entrance, to provide flood protection based on estimated 2050 flood levels and applying the precautionary principle, should be to a minimum height of 3.44m AHD.

- 128 The applicant's proposed condition 25 sets a level based on the 1 in a 100 year flood, being RL 3.308. The applicant provided additional advice from Mr Payne which outlined the Council's policy arguing that, on its application, the level should be to RL 3.308 and noting that, in the approval for the youth hostel at the rear last year, the Council had allowed a lower RL than this.
- 129 The second proposed condition in dispute, condition 28, deals with the Landscape Plans which the Council sought to be changed to show removal of two Cadagi street trees, which were initially identified by the applicant as being removed, and their replacement with local native species. The existing trees were not local and overhang the footpath.
- 130 The applicant argued that, if possible, it was desirable to retain the trees which were healthy and valuable in the streetscape. Therefore, the condition should only require their removal if the root systems interfere with the construction of the basement car park. In that circumstance, either one or both of the trees are to be removed and replaced with local native species endemic in the locality, as sought by the Council.
- 131 The third proposed condition in dispute, condition 29, deals with public art. The Council argued that the DCP requires the provision of public art for certain development of a specific value including in the B2 zone which contains retail or tourist facilities, as is the case here. The applicant argued that the public benefits provided by the development, such as the landscaped through site link (which will need to be dedicated, created and maintained), along with the 'section 94A levy', should offset the need for public art. Requiring more public contribution by way of public art is unreasonable.
- 132 Agreed proposed condition 86 is that the rooftop bar operates for a trial period of 3 years. A continuation of that use requires approval and the application must demonstrate that noise level requirements have been achieved in accordance with conditions for operational noise, patron numbers and hours of operation contained elsewhere in the consent or subsequent consents. Further, if during the trial period compliance has not been achieved, and all reasonable and feasible mitigation measures have been explored and exhausted, then the development is to operate in accordance with the provisions of proposed

condition 87 until such time as the approval lodged pursuant to proposed condition 88 is determined.

- 133 Proposed condition 87 reads as follows, with the applicant's proposed changes shown in *italics*:

"87. The development is to operate in accordance with the patron numbers listed below.

**Ground Floor Bar/Restaurant:**

Maximum of fifty (50) patrons at any time.

**Roof Top Bar Area**

Maximum of sixty (60) *eighty (80)* between 8.00am and 5.00pm.

Maximum of fifty (50) *sixty four (64)* between 5.00pm and 10.00pm.

Maximum of thirty (30) *forty (40)* between 10.00pm and 11.00pm.

No patrons permitted between 11.00pm and 8.00am.; *SUBJECT TO the operator being allowed 20 patrons in attendance at the Roof Top Bar Area between 11.00PM and 1.00AM the following day, no more than 4 times per year, including New Years' Eve into New Years' Day. The Operator will give Council no less than 7 days' notice of its intention to operate beyond 11.00pm.*

Patrons using the Roof Top Bar are only permitted to be Patrons who have a at a table at the Ground Floor Restaurant or persons who are booked in as guests staying at the accommodation at the Premises. The Roof Top Bar is not permitted to be used by Patrons who are not guests booked into the accommodation, as a waiting area prior to the commencement of a booking at the Ground Floor Restaurant.

**Roof Top Pool:**

Patron numbers are included in maximum for Roof Top Bar Area"

- 134 The Council argued that the condition reflects that recommended by the applicant and was to preserve local amenity. The times and numbers sought by the applicant were not the subject of any evidence. The applicant argued these were for limitations after the agreed 3 year trial where the trial has converted to permanency and unreasonably sought to reduce the 100 patrons maximum modelled by the acoustic experts to 60 notwithstanding the trial period. Whilst accepting that some reduction would be reasonable, the applicant sought a number that would make the bar viable. Further that, for a maximum of 4 times a year, such as New Years' Eve, hours should be able to be extended.

- 135 Proposed condition 88 deals with patron numbers during the trial period as follows:

“88. In accordance with the Trial Period, condition 86 above, the Roof Top Bar is permitted to operate for a trial period of three (3) years. For the duration of the Trial Period the maximum number of patrons permitted is as follows:

**Ground Floor Bar/Restaurant:**

Maximum of fifty (50) patrons at any time.

**Roof Top Bar Area**

Maximum of one hundred (100) between 8.00am and 5.00pm.

Maximum of eighty (80) between 5.00pm and 10.00pm.

Maximum of fifty (50) between 10.00pm and 11.00pm.

No patrons permitted between 11.00pm and 8.00am.

**Roof Top Pool:**

Patron numbers are included in maximum for Roof Top Bar Area.

As set out in Condition 86 above, a continuation of the use will require Council's approval under the Environmental Planning and Assessment Act 1979 in order for the trial period patrons numbers outlined in this condition to become permanent.”

- 136 The applicant accepted this condition save for also seeking that 20 patrons be allowed to be in the bar area between 11pm and 1am the following day on no more than 4 times per year, including New Years' Eve, with the Council given no less than 7 days' notice of the intention to operate beyond 11pm. If this was accepted by the Court, the hours of operation agreed in proposed condition 92 would need to be amended.
- 137 The final proposed condition in dispute relates to a noise limit in condition 89. The applicant advised that the Council has incorrectly inserted the intrusiveness level rather than the amenity level agreed by the acoustic experts, and the level should be amended accordingly, noting all other levels in the condition also reflect the amenity levels.

**Findings**

- 138 Issues that need to be determined in this appeal are the acceptability of the height and FSR breaches, in particular in terms of the impacts of the height and fourth storey elements on the character of the streetscape and the locality, and the appropriate number of parking spaces to be provided on-site.
- 139 Given the granting of consent is conditional upon satisfaction of cl 4.6 of the LEP in terms of the height and FSR breaches proposed, I will firstly deal with these pre-conditions.

- 140 In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ reiterates that, where LEP standards are not met and cl 4.6 is therefore relied upon, consent cannot be granted unless, in summary, the Court: has considered an applicant's cl 4.6 request and is satisfied that the request has adequately 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 contravening the standard; and that the proposed development will be in the public interest because it is consistent with the objectives for development within the zone and of the standard in question.
- 141 Clause 4.6 written requests for both the height and FSR breaches were submitted and amended to reflect the amended application. The requests address the objectives of the standards and of the zone and provide environmental planning grounds to support the breaches sought.
- 142 For the reasons that follow, I am satisfied that the requests meet the requirements of cl 4.6 and justify the variations to the standards sought and the degree of flexibility to vary the standards provided by cl 4.6(1)(a) is appropriate to apply in the circumstances, providing a better outcome for and from the development.
- 143 I therefore agree that compliance with the height and FSR standards is unnecessary in this instance as there are sufficient environmental planning grounds to warrant the breaches sought.
- 144 Further, concurrence of the Secretary exists and no matters of state or regional significance are raised from the variations sought. There would be no public benefit in maintaining the height or FSR standards in this instance.
- 145 Given the height was of particular concern to the Council, and the more substantive of the breaches, I will deal with the height exceedences first.
- 146 It was agreed that the height breaches were as a result of rooftop elements, comprising the rooftop bar, pool and amenities, and the lift overrun required to service these facilities. The development, in terms of the height of the main roof of the building, was otherwise agreed to be compliant.

- 147 It was also primarily of concern to the Council that the height breaches constituted a 'fourth storey' and would enable use of part of the roof for a bar, and that these elements would have visual and amenity impacts, rather than a concern with adverse amenity impacts on neighbours as a result of the numeric breaches of the height, per se.
- 148 I have already summarised the content of the cl 4.6 written request and indicated that I agree with the findings it contains in terms of demonstrating that the proposed height meets the required LEP objectives.
- 149 Firstly, there can be little argument that the development will meet the objectives of the B2 zone, and the Council largely accepted this. It proposes a range of uses of the kind supported in the zone and will service residents, workers and visitors (tourists). It will provide employment opportunities in a location reasonably accessible including by walkers and cyclists and, to the extent the Byron Bay Town Centre has public transport, will be accessible to that transport. Finally, it will encourage vibrancy, given the uses proposed and with the design at the ground level in particular, and it specifically proposes tourist accommodation above commercial premises, as the objectives seek.
- 150 In terms of the objectives of the height standard, cl 4.6 would have no work to do in allowing height exceedences if the first objective meant the specified maximum height always had to be met.
- 151 Accepting, therefore, that breaches can be considered providing cl 4.6 requirements are met, the written request addresses the remaining two objectives of the standard.
- 152 In this regard, I agree with the statements in the cl 4.6 request that the proposed building will be of a height appropriate in the location having regard to both the existing and the future surrounding development and will, in design and use, complement the Marvell Street streetscape and character of the area being part, albeit on the edge of, a desired vibrant tourist Town Centre.
- 153 Having regard to this context, and in particular noting adjoining development is reflective of an area in transition from older single storey 'beach' cottages to new mixed use Town Centre development in the order of 11.5m in height, I



consider the development's design, including its height, to be a reasonable and appropriate response.

- 154 The height breaches are associated with rooftop uses which are amenity features of a proposed tourist hotel, described as a 'boutique' hotel of only 24 rooms. These uses are to be, reasonably in my view, accessed by a lift and served by amenities. The rooftop uses include a bar. However, the bar can only be patronised by hotel guests and diners of the ground floor restaurant, and the use of which will be managed and monitored in a 3 year trial, by conditions of consent, and by a Plan of Management.
- 155 Further, whilst minimising the general amenity impacts of the uses associated with the height breaches may be a relevant consideration and of concern to the Council, this is not an objective of the standard required to be met.
- 156 The amenity impacts that are required to be considered associated with the height breaches have, in my view, been considered and minimised.
- 157 In this regard, height objective (c) requires that the development minimise visual impact, disruption of views, loss of privacy and solar access. All of these impacts are not only minimised but largely avoided, albeit the objective does not require that there are no impacts, as the Council inferred should be the case.
- 158 It was agreed that the portions of the development in breach of the height will be largely imperceptible from Marvell Street, being located adjoining the existing building at 6 Marvell Street which has elements over the third storey to a similar height. Most of the development is below the maximum height limit and well setback from Marvell Street, the adjoining lane and lower scale development to the west. The Council accepted that the lift overrun would breach the height even if these facilities were deleted and the development was otherwise compliant with the height limit. Such a breach in isolation was indicated as likely to be acceptable to the Council.
- 159 Based on the evidence, I do not accept the visual impact or disruption of views as a consequence of the proposed building have not been minimised or would be unacceptable in a Town Centre location. This is particularly given the

existing adjoining development at 6 Marvell Street was agreed to negatively contribute to the streetscape and character of the area but nevertheless exists. It is highly prominent in the absence of redevelopment in the immediate vicinity to a similar height, as is proposed in this application which is on the same side of Marvell Street. Given the Town Centre location, redevelopment to the maximum height supportable by the LEP is likely in the future in this section of Marvell Street which is an area in transition.

- 160 Part of the justification provided in the cl 4.6 request, and in my view one of the strongest environmental planning ground stated for the height breaches (other than the height of the adjoining building at 6 Marvell Street), is that facilities that would reasonably be expected in a boutique hotel (such as a pool and bar) would generally be provided at ground floor level but have been relocated to the roof in order to provide public amenity at the ground level. This comprises a tree-lined through site link for pedestrians and cyclists activated by the adjoining ground floor restaurant and hotel foyer and containing cycle racks. The through site link will not only provide public amenity but is a feature encouraged by the Town Centre Master Plan and will, in my view, offer a substantially improved pedestrian and cycle link than the current use of the existing adjoining laneways, particularly associated with the youth hostel and language school in Marvell Lane.
- 161 That this design outcome can be achieved with only height breaches in a largely screened location, and with generous setbacks resulting in no adverse amenity impacts to adjoining neighbours (in terms of loss of privacy or overshadowing), is a positive environmental planning ground.
- 162 I also do not accept that the design of the development or use of the rooftop area in the manner proposed will add anything but positive elements in the streetscape and locality.
- 163 The only evidence on social impact was that there would be no such impact. If amenity impacts arise associated with the use of the rooftop bar, in terms of its hours, patron levels or noise levels, the trial period and monitoring agreed to by the applicant, enforced as conditions of consent, would demonstrate this and the applicant would be at risk that this use could not continue.

- 164 I also do not accept the concerns of the Council that seeing the part of the development that breaches the height, including people using the rooftop area, from the R2 Low Density Residential area would warrant refusal.
- 165 Firstly, there were no objections to the development from residents of this area. Secondly, the site would reasonably be expected to redevelop from single storey to something taller akin to its neighbour at 6 Marvell Street. Thirdly, activation of the street and creation of a vibrant Town Centre are objectives of the Master Plan. Finally, based on the site view and visual impact assessment, I did not conclude that what would be viewed would be visually unacceptable.
- 166 The final height objective, (b), is to ensure that the height of buildings complements the streetscape and character of the area in which the building is located.
- 167 In this regard, it was agreed that the development will largely present as a 3 storey building to Marvell Street being the maximum number of storeys sought by the Master Plan controls, noting however, that there are no storey controls in the DCP to be met as such.
- 168 Further, the building will not be to a dissimilar maximum height to that of the adjoining development at 6 Marvell Street which was agreed did not complement the streetscape or character of the area.
- 169 In contrast, the architectural design and appearance of the proposed building were not issues in contention, with the building described by the applicant as of high quality design accommodating a boutique hotel. Such a building could only be considered to complement the streetscape and the character of the area, in particular the desired future character of the locality. The Town Centre Master Plan shows how the area could reasonably be redeveloped over time in response to the current controls, and the height of the proposed development would be appropriate in this context. The height will also allow public use of the ground floor area enhancing the streetscape and area.
- 170 It is, in my view, as important to have a quality design as a numerically compliant one. Whilst it could be that both are achievable on the site, there was no evidence of this. There was however, evidence of the applicant responding

to the Master Plan and to the height of an adjoining building, in a more appropriate way than that adjoining building has responded to its context.

- 171 As indicated, the height breaches will not be visible from the street nor to any significant degree from public vantage points in the vicinity. The site is also in the vicinity of other buildings which, even if not technically 4 storeys, have elements or features above a habitable third storey. I was also not satisfied, on the evidence, that these elements are architectural roof features or are acceptable for that reason.
- 172 Even if what is proposed constitutes a fourth storey, it is only a partial storey, and there are no storey controls required to be complied with.
- 173 Further, each application is required to be considered on its merits. In this instance given the circumstances, including the building's design, site context, nature of uses and public benefits offered, there are sufficient environmental planning grounds provided to support the breaches sought.
- 174 I also accept the applicant's argument that an environmental planning ground is the requirement to design in response not only to existing and likely future development, but having regard to the topography of a flood affected site.
- 175 Finally, I do not accept Ms Doherty's assertion that the existing cottage on the site better reflects the intended character of the area. I was not taken to any provisions of the DCP or Master Plan which indicates the retention of the cottages in the zone or Town Centre were required or desired. Any such outcome would be inconsistent with the permissible development height and scale evident in the LEP planning controls as reflected in the form of redevelopment that has or is occurring in the street and in the zone.
- 176 I therefore consider that the height breaches are not a basis to refuse the application.
- 177 The Council was less concerned with the FSR non-compliance, accepting it was minor and with the concern also largely only relating to the design of the building in terms of the rooftop elements.
- 178 As I have already indicated, the development complies with the objectives of the zone. In terms of the FSR, objectives b) and e) are not applicable to the

application. Of the remaining three objectives, I am satisfied, largely for the reasons I have summarised that are included as justification in the cl 4.6 written request, that these are met.

- 179 The breach is unlikely to be perceptible to the broader community in the streetscape. It is a function of the design of the building and the arrangement of uses particularly restricting the development at the ground floor and will provide a suitable transition in terms of scale between the existing buildings to the east and west with reasonable setbacks and no evident amenity impacts.
- 180 The development will provide (commercial) floor space in the Business zone into the future and the density of development is regulated having regard to the vehicular and pedestrian traffic generated. In particular, it will provide for pedestrian and cycle traffic in an enhanced arrangement to that currently existing in the locality.
- 181 The character of the area is mixed as would be expected in a Town Centre, even on its periphery, with a range of uses permitted and a variety in scale evident. I accept the applicant's evidence that redevelopment of the remaining cottages in the B2 zone in the vicinity, including immediately adjacent to the west, is likely in the foreseeable future given the controls and the Town Centre location, leading to new development of a similar scale.
- 182 I therefore consider that the FSR breach is not a basis to refuse the application.
- 183 In dealing with the height and FSR breaches, I have also addressed the character concerns raised by the Council and concluded that they are not valid concerns in the circumstances or grounds warranting refusal.
- 184 In summary, the development is appropriate given the character of the locality in which it is situated. It is part of Byron Bay's Town Centre which has a mix of uses, vibrant character and eclectic environment, including as a result of development in the lane at the rear, opposite and adjoining. What is proposed will only add to the character of the area in that context.
- 185 In my view, the proposed tourist hotel, with its design, range of uses and through site link, will provide an improved outcome for the area and enhance

the urban environment. It will also improve the amenity for walkers and cyclists, particularly those from the youth hostel and language school at the rear who currently access the Town Centre and Marvell Street via Keesing Lane. Rather than having an adverse impact on the street and area, the activation of the rooftop and at ground level with the restaurant and hotel lobby fronting a public thoroughfare will make a positive contribution to the adjoining streets and lanes, and reflect the intended character sought for the Town Centre.

186 I also do not accept that the site is in a transitional location being an interface between two zones. It is not immediately adjacent to the R2 Low Density Residential zone, being separated by other commercial properties in the B2 zone and Middleton Street.

187 I also note that there are already operating tourist accommodation facilities in the R2 zone so it is not a traditional low density residential area in terms of tolerance for impacts from such uses. Further, in *Seaside*, it is noted that residents adjoining a zone where more intense uses and development is permissible must expect some degree of impact. In this instance, the only impacts cited by the Council were a view of the rooftop elements from some locations (where not otherwise obscured by the building at 6 Marvell Street and with a Town Centre backdrop of buildings over 2 storeys), and the impacts from activating a rooftop area by including a bar which will be limited in use and managed, and is a use contemplated to activate the area.

188 For these reasons, I do not believe there is any basis to refuse the application as a consequence of the proximity of the R2 zone or for any other reasons in terms of the public interest.

189 I have already determined that the development meets the objectives of the zone and therefore is in the public interest but I also note that no objections were made despite the proximity of the R2 zone argued by the Council to warrant a transitional design given potential adverse impacts.

190 As no amenity impacts arise, I cannot see how the development could be otherwise than in the public interest, noting however that I have yet to deal with the parking provision, which I will now turn to.

- 191 Section 4.15(3A) of the Act requires the provisions of the DCP to be flexibly applied and both traffic experts agree this should be the case and that the suggested DCP rate of parking provision for the hotel room component was not appropriate.
- 192 In determining what is appropriate, I prefer the evidence of Mr Payne. In oral evidence, Mr Payne indicated that his consultancy was based in Byron Bay which enabled him to survey parking use of local hotels over an extended period. He had also examined parking rates of centrally based tourist hotels in other NSW towns with similarly high tourist numbers relative to residents, and had had regard to how guests may get to and from the hotel.
- 193 Mr Pearce did not do his own research and largely did not dispute the findings of Mr Payne. Further, Mr Pearce had not appreciated that the bar could only be patronised by hotel guests or restaurant patrons nor the extent of management of this use proposed in the applicant's Plan of Management.
- 194 The Council's own policies, including the Master Plan, seek to address traffic congestion in the CBD, encourage pedestrian and cycle movements and support car sharing and sustainable transport, all of which support a lower not higher rate of parking.
- 195 It was not in dispute that the DCP parking rate equally applies to a motel on the outskirts of town and a central tourist hotel where the demand for on-site parking would be lower, and the experts acknowledged the DCP parking rates were therefore not appropriate to apply in full. Whilst the RMS Guide may be dated, it is still referenced for use by the DCP in the absence of other controls, recognises consideration should be given to the rates of other similar establishments, which Mr Payne did, and was not the sole document relied upon by Mr Payne to determine a rate.
- 196 For all of those reasons, I consider the rate of parking proposed in the application to be adequate and not a basis for refusal.
- 197 I now turn to the issue of precedence that approving the development might create. Whilst I agree with the Council and *Goldin* that precedent is a relevant

consideration, there are a number of factors which need to be considered in the circumstances of the application.

198 In this regard, I understand the concern of the Council that approval of this application may create a precedent for other 4 storey developments in the Town Centre noting the numerous references to limiting development in the Town Centre under the Master Plan to 3 storeys and the community's desire for this height to be maintained. To a large extent, it was this desire that was behind much of Ms Docherty's objection to the height and rooftop uses.

199 However, I also consider that such documents reference storeys because such a concept is easier for the community to understand and relate to than a reference to developments of, say, 11.5 or 12.5 metres in height.

200 I also accept the applicant's claim that, to the layperson in the street, elements that appear as a fourth level above a 3 storey building would be considered 4 storeys to those people. Examples of such buildings include the adjoining development at 6 Marvell Street and at 89 Jonson Street to the west of the site. These were developments the Council argued were 3 storeys with architectural roof features or had height breaches as a result of topography. However, from various vantage points such buildings appear as 4 storeys and, as I have already indicated, there was no evidence of what the elements over 3 storeys constituted.

201 I also note that the proposed partial fourth storey is not habitable floor space. Had the request been for a further floor of hotel rooms in breach of the height, rather than rooftop uses and a lift overrun, my finding would be different. Such a floor would constitute an additional full fourth storey and create a precedent which I accept would make it difficult for Council to refuse similar breaches in the future. The distinction here is that this is not an additional storey of habitable floor space under the main roof, but rather a 3 storey hotel with rooftop features, being a development I consider to be in the spirit of what is intended by the Master Plan and in the B2 zone.

202 Further, the use of the roof as proposed is only classified as a storey by technical definition in the LEP but that use is limited to partially rooved recreational amenities for the hotel, namely a pool, rooftop bar and associated



amenities. The height breach includes lift access to these facilities. Such uses do not materially add to the bulk and scale of the building being setback and on the main roof.

203 Finally, the development would not be a precedent which could be relied upon by other applicants for a fourth storey unless that storey comprised similar non-habitable rooftop facilities associated with tourist accommodation.

204 My decision in supporting the height breach should therefore not be construed as supporting 4 storey development in the Town Centre, per se. I accept such an outcome would not accord with the Master Plan vision or expectations of the Byron Bay community as outlined in the Master Plan.

205 I however, consider that the development will not create an adverse precedent given all of the circumstances of the case.

206 In any event, cl 4.6 exists in the LEP to allow flexibility to vary standards subject to compliance with the requirements of that clause. It would have no work to do if the Council did not allow any variations on the basis of the potential adverse precedent of varying development standards, per se.

207 Given my findings with regard to the contentions raised by the Council, I have determined that the application, as amended, warrants approval. Having determined this, I deal now with the conditions in dispute.

208 Firstly, in terms of the levels set for the basement, I accept condition 25 as sought by the applicant. On the information provided to me, this reflects the proposed plans and the design levels required by Council's policies to meet flood planning requirements. Further, these levels were not raised as a contention by the Council and not the subject of expert evidence accordingly.

209 Secondly, in terms of the requirement to remove the two trees at the front of the site, I also accept the condition as proposed by the applicant. Healthy established trees should not be removed unless there is a design, health or safety requirement to remove them and the evidence did not indicate this. They will assist in screening the development. If however, the trees are required to be removed then the applicant agrees to remove them and replace them with native species as sought by the Council.

- 210 In terms of the requirement for public art, I accept the condition sought by the Council which requires this provision in accordance with such a requirement in the DCP. Whilst I appreciate that there are public benefits associated with the development, as the applicant states, these benefits are not only offered by the applicant but also comprise a substantive part of the justification provided by the applicant, and supported by me, for the height and FSR breaches sought. They were not offered in lieu of the requirement to also provide the public art required by the DCP.
- 211 In terms of the disagreement on the numbers and hours for operation of the rooftop bar after the trial period ends, I accept those proposed by the Council. These only relate if the trial period concludes that the higher patron number approved need to be reduced and no mitigation measures can address the concerns and only apply until a further application can be made to respond to the trial findings.
- 212 Further, I do not accept the additional trading hours sought four times a year. This was not proposed in the application before the Court and therefore not the subject of evidence in terms of acoustic or amenity impacts. Further, if the bar operates without adverse impacts, the applicant can apply to amend the consent to accommodate this additional trading, and such potential impacts can be addressed and assessed at that time accordingly.
- 213 Finally, I accept the applicant's reasoning for the proposed noise limit in condition 89 as it reflects that intended by the acoustic experts, as evident from their Joint Report (Exhibit N). This figure is included on that basis.

## **Orders**

- 214 The orders of the Court are:
- (1) The cl 4.6 requests to vary the height and FSR standards are upheld.
  - (2) The appeal is upheld.
  - (3) Development Application No. 10.2017.588.1 for a mixed use development (primarily a tourist hotel) at 4 Marvell Street, Byron Bay is approved subject to the conditions in Annexure "A".
  - (4) The exhibits are returned except Exhibits 3, B, C, D and H.

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**Jenny Smithson**

**Commissioner of the Court**

Annexure A (176 KB)

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