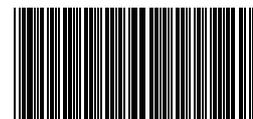




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Statement of Facts and Contentions

COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2019/00153305

TITLE OF PROCEEDINGS

First Applicant	Lismore Venture Pty Ltd
First Respondent	Byron Shire Council

FILING DETAILS

Filed for	Byron Shire Council, Respondent 1
Legal representative	Adam Joseph Seton
Legal representative reference	
Telephone	02 4626 5077

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Statement of Facts and Contentions (Final Statement of Facts and Contentions.PDF)

[attach.]

Form A (version 1)

STATEMENT OF FACTS AND CONTENTIONS**COURT DETAILS**

Court Land and Environment Court of New South Wales
 Class 1
 Case number 2019/153305

TITLE OF PROCEEDINGS

Applicant **LISMORE VENTURE PTY LTD**
 Respondent **BYRON SHIRE COUNCIL**

FILING DETAILS

Filed for **Byron Shire Council**, respondent
 Legal representative Adam Joseph Seton
 Marsdens Law Group
 Legal representative reference PCN: 21609 Ref: PDH:ANF:422237
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 Contact email jcorradini-bird@marsdens.net.au

PART A: FACTS**THE PROPOSAL**

- Development Application No. 10.2018.161.1 seeks consent for the construction of a multi dwelling housing development containing 17 dwellings, comprising 8 x 2 bedroom dwellings ("terrace units"), 4 x 1 bedroom dwellings ("row units") and 5 x 1 bedroom studio apartments, arranged in 3 separate buildings, together with associated at grade parking accommodating 14 car spaces (8x residential and 6x visitor) and 24 bicycle spaces.
- A summary of the proposed dwellings is provided below in Table 1:

DWELLING	INTERNAL SIZE	DECK	OUTDOOR SPACE	BEDROOMS	CAR PARKING
T1	93m ²	8m ²	78m ²	2	1
T2	93m ²	8m ²	28m ²	2	1
T3	93m ²	8m ²	28m ²	2	1
T4	93m ²	8m ²	28m ²	2	1
T5	93m ²	8m ²	28m ²	2	1
T6	93m ²	8m ²	28m ²	2	1
T7	93m ²	8m ²	28m ²	2	1
T8	93m ²	8m ²	66m ²	2	1
R1	52m ²	2m ²	16m ²	1	0
R2	52m ²	2m ²	17m ²	1	0

R3	52m ²	2m ²	17m ²	1	0
R4	52m ²	2m ²	36m ²	1	0
S1	32m ²	2m ²	9m ²	1	0
S2	32m ²	2m ²	9m ²	1	0
S3	32m ²	2m ²	9m ²	1	0
S4	32m ²	2m ²	9m ²	1	0
S5	32m ²	2m ²	9m ²	1	0

Table 1: Summary of proposed dwellings.

Studio Apartments

- The 5 x 1 bedroom “studio apartments” are proposed to be situated in a building located toward the mid-point of the site’s south-western side boundary.
- The key characteristics of the proposed “studio apartments” are summarised below in Table 2:

GROUND FLOOR	FIRST FLOOR	TOTAL INTERNAL AREA
<ul style="list-style-type: none"> • Kitchen and dining • Lounge room • 1x bathroom • Roofed front porch on north-eastern side • Private fenced yard and clothes drying area on south-western side 	<ul style="list-style-type: none"> • 1x mezzanine bedroom • Storage 	32m ²

Table 2: Summary of proposed “studio apartments”.

- Laundries are not shown on the plans submitted with the development application in respect of the “studio apartments”.

Row Houses

- The 4 x 1 bedroom “row houses” are proposed to be situated in a building to the east of the “studio apartment” building, separated by an internal driveway.
- The key characteristics of the proposed “row houses” are summarised below in Table 3:

GROUND FLOOR	FIRST FLOOR	TOTAL INTERNAL AREA
<ul style="list-style-type: none"> • Kitchen and dining • Lounge room • Laundry • Front porch • Private fenced yard on northern side 	<ul style="list-style-type: none"> • 1x bedroom • 1x dressing room • 1x bathroom 	52m ²

Table 3: Summary of proposed “row houses”.

Terrace Houses

- The 8 x 2 bedroom “terrace houses” are proposed to be situated within a building set along the rear boundary.

9. The key characteristics of the proposed “terrace houses” are summarised below in Table 4:

GROUND FLOOR	FIRST FLOOR	TOTAL INTERNAL AREA
<ul style="list-style-type: none"> • 1x bedroom • 1x bathroom and laundry • 1x car space and storeroom • Private fenced yard 	<ul style="list-style-type: none"> • 1x bedroom • Kitchen and dining • Lounge room • Private deck • 1x bathroom 	93m ²

Table 4: Summary of proposed “terrace houses”.

THE SITE

10. The property is legally described as Lot A DP376877, with a street address of 23 Lismore Road, Bangalow.
11. The site is orientated north-west to south-east and is situated on the southern end of the village of Bangalow.
12. The site is irregular in shape and is in two (2) parts, comprising a rectangular section toward the Lismore Road frontage with a width of 22.555m and a length of 40.335m and a wider section toward the rear with a width of 37.275m and a length of 38.425m. The site has a total area of 2,341.6m².
13. The site is presently vacant, with the exception of an existing Telstra Corporation Exchange box located toward the Lismore Road frontage.
14. The site is subject to restrictions on the use of the land pursuant to section 88B of the Conveyancing Act 1919 benefitting Telstra Corporation Ltd, including a telecommunications easement, an easement for sewage and water drainage and a right of carriageway 5 metres in width.
15. There is no substantial vegetation on the land, other than landscape plantings.
16. The property has a gentle fall away from the Lismore Road frontage which sits at a high point at approximately. RL 48.6m AHD, towards a low point at the south-western corner sitting at a level of approximately RL 44m AHD.
17. The property is situated within Zone R2 Low Density Residential pursuant to the provisions of Byron Local Environmental Plan 2014. An extract of the Land Zoning Map referred to in clause 2.2 of Byron Local Environmental Plan 2014 with the subject site outlined in blue is provided below at Figure 1:

storey detached dwellings predominantly dating from the early 20th century situated on lots of approximately 500m² in area with generous rear yards.

22. The site and surrounding area is situated within the Bangalow Conservation Area pursuant to the provisions of Byron Local Environmental Plan 2014 which covers a large portion of the Bangalow Village. The New South Wales Office of Environment and Heritage database provides the following Statement of Significance in relation to the heritage conservation area:

“A rare, largely intact early twentieth century village built in a picturesque setting of green hills and sub tropical vegetation with a main street of high quality public and commercial buildings grouped on both sides and an unusually steep sloping street. The village area has a high concentration of quality dwellings, public buildings, streets, back lanes, street trees and landscaping, which taken together, illustrate an identifiable pattern of domestic, industrial and commercial settlement in Bangalow by early pioneering settlers, and a pattern of development of civic infrastructure.”

23. The site is located in the vicinity of the following local heritage items identified in Schedule 5 to Byron Local Environmental Plan 2014:
- (a) “Blanch’s House” at 27 Lismore Road, Bangalow (Item I033);
 - (b) George Reading building at the corner of Lismore Road and Robinson Street, Bangalow (Item I031), a commercial building previously comprising a rural supplies store which anchors the block.
 - (c) Catholic Church “St Kevin’s” and Catholic Hall at 1 Lismore Road, Bangalow (Item I032);
 - (d) “Hartford House” at 14 Charlotte Street, Bangalow (Item I023).
24. An extract of the Heritage Map referred to in clause 5.10 of Byron Local Environmental Plan 2014 with the subject site outlined in blue is provided at Figure 3 below:

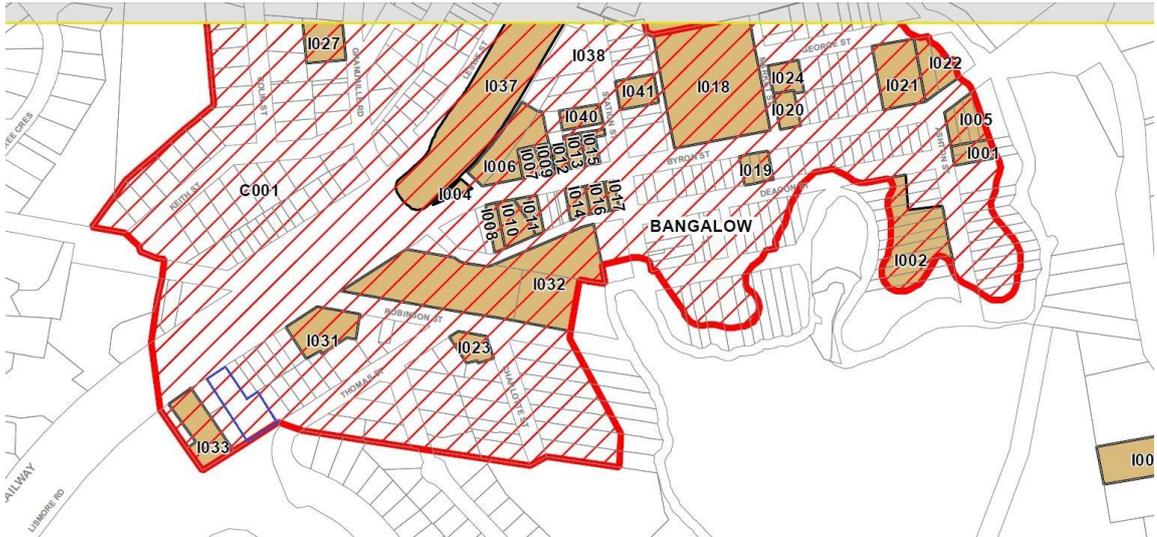


Figure 3: Extract from Heritage Map (HER_003CBB) with the subject site outlined in blue.

25. A newer residential subdivision is located to the south-east of the site, containing approximately 40 residential lots. This subdivision is not situated within the Bangalow Conservation Area and predominantly contains single dwellings, with some elevated given the slope. A number of these dwellings are relocated 'Queenslanders' and many of the newer homes also reflect a heritage character.
26. The site is situated approximately 300 metres from the retail and commercial uses in Bangalow town centre.

THE STATUTORY CONTROLS

27. Environmental Planning and Assessment Act 1979 ("EP&A Act").
28. Environmental Planning and Assessment Regulation 2000 ("EP&A Regulation").
29. State Environmental Planning Policy No 55 - Remediation of Land ("SEPP 55").
30. State Environmental Planning Policy (Affordable Rental Housing) 2009 ("SEPP ARH").
31. State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
32. Byron Local Environmental Plan 2014 ("BLEP 2014").
 - (a) The site is situated within Zone R2 Low Density Residential pursuant to the provisions of BLEP 2014. An extract of the Land Zoning Map referred to in clause 2.2 of BLEP 2014 is provided at Figure 1 above.
 - (b) Development for the purpose of "multi dwelling housing" is permissible with consent pursuant to the provisions of BLEP 2014.
 - (c) The maximum permissible height of buildings on the site is 9 metres pursuant to the Height of Buildings Map referred to in clause 4.3(2) of BLEP 2014.

- (d) The maximum permissible floor space ratio on the site is 0.5:1 pursuant to the Floor Space Ratio Map referred to in clause 4.4(2) of BLEP 2014.
- (e) The site is identified as “Drinking water catchment” on the Drinking Water Catchment Map referred to in clause 6.5(2) of BLEP 2014.

33. Byron Shire Development Control Plan 2014 (“BDCP 2014”).

- (a) Part A: Preliminary.
- (b) Part B: Controls Applying Generally to Development Applications.
- (c) Part C: Further Controls Applying to Land with Specific Constraints and Environmental Characteristics:
 - (i) Chapter C1: Non-Indigenous Heritage.
 - (ii) Chapter C4: Development in a Drinking Water Catchment.
- (d) Part D: Further Controls Applying to Specific Land Uses:
 - (i) Chapter D1: Residential Accommodation in Urban, Village & Special Purpose Zones.
- (e) Part E: Further Controls Applying to Specific Localities:
 - (i) Chapter E2: Bangalow.

34. Seniors Living Policy – Urban Design Guidelines for in-fill development.

ACTIONS OF THE RESPONDENT

- 35. On 5 April 2019, Development Application No.10.2018.161.1 was lodged with the Respondent seeking consent for development described as “*multi dwelling housing containing seventeen dwellings*” (“**the development application**”).
- 36. On 9 April 2019, the Respondent issued correspondence to the Applicant acknowledging the lodgement of the development application and requesting amended plans demonstrating compliance with apron width requirements per clause 4.5 of AS2890.1 2004.
- 37. On 9 April 2019, the development application was referred to NSW Roads and Maritime Services.
- 38. The development application was publicly notified to adjoining and nearby owners between 18 April 2019 and 8 May 2019. The Respondent received 116 submissions comprising of 97 submissions objecting to the proposed development and 19 in support of the proposed development. One (1) of the submissions of objection was in the form of a petition containing 24 signatures, with another containing 15 signatures.

39. On 17 April 2019, the Respondent issued correspondence to the Applicant seeking clarification as to the nomination of five (5) studio apartments as infill affordable housing pursuant to SEPP ARH on the basis that the combined floor space of studio apartments comprised 14.4% of the total GFA of the proposed development, being an amount less than the 20% specified in clause 13 of SEPP ARH.
40. On 17 April 2019, the Applicant issued correspondence to the Respondent amending the development application to nominate three (3) of the proposed terrace units as infill affordable housing pursuant to SEPP ARH, with a combined floor space of 279m² which constitutes 25% of the total proposed gross floor area.
41. On 29 April 2019, Roads and Maritime Services issued correspondence to the Respondent providing comments in relation to the development application, primarily regarding access into the site.
42. On 16 May 2019, the Applicant commenced proceedings in Class 1 of the Land and Environment Court's jurisdiction appealing against the Respondent's deemed refusal of the development application.
43. The development application has not been determined by the Respondent.

PART B: CONTENTIONS

Inconsistent with the character of the locality

1. The development application should be refused because the density and scale of the development is incompatible with the character of the local area.

Particulars

- (a) Clause 16A of State Environmental Planning Policy (Affordable Rental Housing) 2009 (“**SEPP ARH**”) provides as follows:

“16A Character of local area

A consent authority must not consent to development to which this Division applies unless it has taken into consideration whether the design of the development is compatible with the character of the local area.”

- (b) The site and surrounding area is situated within the Bangalow Conservation Area pursuant to the provisions of Byron Local Environmental Plan 2014 (“**BLEP 2014**”). An extract of the Heritage Map referred to in clause 5.10 of BLEP 2014 is provided at Figure 3 above.
- (c) The Bangalow Conservation Area possesses historic, aesthetic and social significance. The character of the local area in the vicinity of the subject site is strongly influenced by the heritage conservation area listing pursuant to the provisions of BLEP 2014.
- (d) The New South Wales Office of Environment and Heritage database provides the following Statement of Significance in relation to the heritage conservation area:

“A rare, largely intact early twentieth century village built in a picturesque setting of green hills and sub tropical vegetation with a main street of high quality public and commercial buildings grouped on both sides and an unusually steep sloping street. The village area has a high concentration of quality dwellings, public buildings, streets, back lanes, street trees and landscaping, which taken together, illustrate an identifiable pattern of domestic, industrial and commercial settlement in Bangalow by early pioneering settlers, and a pattern of development of civic infrastructure.”

- (e) The part of Lismore Road in the vicinity of the subject site forms the southern gateway of the town entry to Bangalow. The streetscape is composed of a group of predominantly historic, single storey, traditional hipped and gabled roofed dwellings on traditional sized lots, punctuated by the historic former Temperance Hall.

- (f) Surrounding developments on the lots comprising the small residential block between Lismore Road and Thomas Street are all set back from the street with landscaped grounds and low fences. The road reserve contains a formal footpath edged by grass verge, kerb and guttering. At the top of the hill, the group is anchored by the George Reading building, an item identified as being of local heritage significance pursuant to the provisions of BLEP 2014 (Item I031). Blanch's house, another item of local heritage significance pursuant to BLEP 2014 (Item I033), anchors the southern end of the group
- (g) The rear of the site lies in proximity to Thomas and Charlotte Streets, a relatively recent subdivision which includes relocated timber dwellings and new infill development including several two storey homes.
- (h) The built character of the new subdivision has utilised the timber and iron material palette, and features gabled roofs of traditional pitch, and joinery details which are consistent with the built character of the Bangalow village setting.
- (i) A historic timber dwelling which was relocated from Byron Bay adjoins the northern side of the site at 15 Thomas Street, Bangalow.
- (j) The proposed development of 17 dwellings is a significant departure from the character of the local area where single dwellings are the norm.
- (k) The proposed two storey terrace unit building is larger in bulk than most buildings in the surrounding Bangalow Conservation Area precinct. It has a length of 32m, which contrasts significantly with the lesser scale and bulk and frontage of the adjoining single dwellings on either side of the land at 15 Thomas Street and 25 Lismore Road, Bangalow.
- (l) Two storey terraced buildings are a noted built element of the commercial main street precinct of Bangalow. However, they are not representative of the residential areas of the Bangalow Conservation Area, which are characterised by predominantly single or one and half storey buildings stepping down the hill, along with some two storey dwellings.
- (m) A building of two storeys in height with a length of 32m, is a departure from the character of the locality, particularly in terms of its relationship to the size of adjoining dwellings. This aspect of the proposal, together with the density of the proposed development of the land, renders the design of the proposal not compatible with the character of the local area and the application should therefore be refused.

Amenity – solar access, private open space and dwelling sizes

2. The development application should be refused because the proposed development does not provide an acceptable level of amenity for future residents.

Particulars

- (a) Clause 14 (1)(e) of SEPP ARH states:

“14 Standards that cannot be used to refuse consent

(1) Site and solar access requirements

A consent authority must not refuse consent to development to which this Division applies on any of the following grounds:

(e) solar access

if living rooms and private open spaces for a minimum of 70 per cent of the dwellings of the development receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter.”

- (b) The living areas, internal and external, provided for Terrace Units 1-7 will not receive any direct sunlight in mid-winter between 9:00am and 3:00pm. It has not been demonstrated that 70 per cent of the dwellings of the development will receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter, which is a minimum requirement that the Respondent contends should be met to ensure adequate amenity is afforded to residents of the proposal.
- (c) Clause D1.6.1 of the Byron Development Control Plan 2014 (“**BDCP 2014**”) provides as follows with respect to private open space:

“D1.6.1 Private Open Space Courtyards

Objectives

1. *To ensure that residents have access to private, useable, landscaped open space.*

...

Prescriptive Measures

1. *Each dwelling must have access to an individual courtyard at ground level having a minimum area of 30m² and a minimum length and width each of 4 metres, not including any area used exclusively for the circulation or parking of vehicles. The courtyard must be designed to facilitate access to winter sunshine and must be landscape to Council’s satisfaction.*

...”

- (d) The private open space areas provided are significantly smaller than the 30m² required by clause D1.6.1 of BDCP 2014, with 7m² provided per studio apartment, 14.4m² provided per row unit and 18.4m² provided per terrace unit. Further, the private open space areas provided are not a minimum length and width of 4 metres.
- (e) Solar access is restricted to the private open space for the studio units and not available at all to the private open space areas for most of the terrace units.
- (f) Clause D1.6.6 of BDCP 2014 provides as follows with respect to clothes drying facilities:

“D1.6.6 Clothes Drying Facilities

Objectives

1. *To ensure that adequate, effective space is provided and provision is made for clothes drying.*

Performance Criteria

Outdoor clothes drying facilities must be provided to meet projected needs and located to facilitate privacy and sunlight access.

Prescriptive measures

The minimum provision of clothes drying facilities must be at the rate of 7.5 metres of line per dwelling, located in suitably screened external drying areas.”

- (g) The clothes drying areas provided in respect of the dwellings are inadequate and inconsistent with Clause D1.6.6 of BDCP 2014. The lack of solar access to the outdoor space for the terrace houses results in no effective external drying areas.
- (h) The proposed common landscaped area is situated in a narrow section of land adjoining the internal driveway, located between the bin storage and bike storage area. This area is remote from most of the units and will therefore be of limited use and amenity.
- (i) Clause 14(2) of SEPP ARH states:

(2) General

A consent authority must not refuse consent to development to which this Division applies on any of the following grounds:

(b) dwelling size

if each dwelling has a gross floor area of at least:

- (i) 35 square metres in the case of a bedsitter or studio, or
 - (ii) 50 square metres in the case of a dwelling having 1 bedroom, or
 - (iii) 70 square metres in the case of a dwelling having 2 bedrooms, or
 - (iv) 95 square metres in the case of a dwelling having 3 or more bedrooms.
- (j) The proposed studio dwellings, which each contain one bedroom, have a gross floor area (GFA) of 32 square metres. Having regard to the minimum standards set by clause 14 of SEPP ARH, the Respondent contends that the studio dwellings are insufficient in size, which will have an adverse impact on the amenity of future residents.
- (k) Having regard to the above, an unacceptable level of amenity will be afforded to future residents of the proposal and the development application should be refused.

Height of Buildings

3. The development application should be refused because insufficient information has been submitted to enable a proper assessment of the height of the terrace house building, having regard to the requirements of clause 4.3 of BLEP 2014.

Particulars

- (a) Clause 4.3 of BLEP 2014 provides as follows:

“4.3 Height of buildings

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

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

(b) to ensure 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.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”

- (b) Pursuant to the Height of Buildings Map referred to in clause 4.3(2) of BLEP 2014, the maximum permissible height of buildings on the site is 9 metres.
- (c) The Dictionary to BLEP 2014 provides the following definition of “building height”:

“building height (or height of building) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.”

- (d) The section plan submitted with the development application (Site Section C as shown on Site Sections, Plan No. D-E-03, prepared by The Kollektive, dated 21 January 2019) indicates that the ridge height of the proposed terrace unit building is at RL 54.9m.
- (e) The survey plan submitted with the development application (Sketch Showing Contours and Detail, prepared by Kennedy Surveying, dated 5 March 2019) indicates that the existing ground level is at approximately RL 45m at the south-western corner of the proposed terrace house building, in the approximate location underneath the ridge of the building.
- (f) On the basis of the information submitted with the development application, the Respondent contends that the vertical distance from ground level (existing) to the highest point of the building is 9.9 metres, which does not comply with the maximum permissible height of buildings on the site pursuant to clause 4.3 of BLEP 2014.
- (g) Insufficient information has been provided to enable a full assessment of the measurement of the height of the terrace house building at this location.
- (h) The Applicant has not provided a written request that seeks to justify the contravention of the development standard in clause 4.3 of BLEP 2014 in accordance with clause 4.6 of BLEP 2014.
- (i) The Court, having the functions of the consent authority for the purposes of hearing and disposing of this appeal, cannot grant development consent in circumstances where it has not been demonstrated that the proposed development complies with the height of buildings development standard in clause 4.3 of BLEP 2014 and a written request pursuant to clause 4.6 of BLEP 2014 in relation to the contravention of clause 4.3 of BLEP 2014, which adequately addresses the following matters required to be demonstrated, has not been provided:

- (i) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and
 - (ii) That there are sufficient environmental planning grounds to justify the contravention of the development standard.
- (j) The Court would not be satisfied that the proposed development will be in the public interest because it is consistent with the objectives for development within Zone R2 Low Density Residential or with the objectives of clause 4.3 of BLEP 2014.

Encroachment into the Building Height Plane

4. The development application should be refused because the proposed development does not comply with the controls relating to the Building Height Plane in clause D1.2.1 in BDCP 2014. Approval of the development application will result in adverse overlooking and privacy impacts in relation to the adjoining property to the west.

Particulars

- (a) Clause D1.2.1 of BDCP 2014 provides as follows with respect to the Building Height Plane:

“D1.2.1 Building Height Plane

Objectives

1. *To ensure that residential development is designed to minimise impacts on solar access and privacy on adjoining properties, and on the views from adjacent existing buildings.*
2. *To ensure that the occupants of the building or buildings will enjoy the optimum use of winter sunlight and summer shade.*

Performance Criteria

1. *Developments must be set back progressively from the site boundaries as height increases so that they do not adversely affect existing or future development on adjoining properties by way of overshadowing, impinging on privacy or obstructing views.*
2. *Developments must be designed so that they will promote energy efficiency and so that residents may enjoy optimum use of winter sunlight and summer shade.*
3. *Development applications must demonstrate that the windows of living areas (decks, living rooms, bedrooms, kitchens, etc.) of development*

on adjoining properties will, as a minimum, retain full solar access between the hours of 9:00am to 3:00pm on any day.

Prescriptive Measures

1. *The building height plane in combination with boundary setbacks prescribed in this DCP, and building height prescribed in the Byron LEP 2014, form the maximum building envelope for all residential development other than for shop top housing and ancillary dwellings in Zones IN1, IN2 and B7.*
 2. *An exemption from the building height plane may be considered in relation to one or more boundaries in the following circumstances:*
 - a) *Where the floor level is required to be above ground level to comply with Council's requirements for flood protection; or*
 - b) *For the zero lot line boundaries of semi-detached dwellings and attached dwellings; or*
 - c) *In circumstances referred to Prescriptive Measure 2. of Section D1.2.2."*
- (b) The Dictionary to BDCP 2014 defines the term "Building Height Plane" as follows:
- "the plane projected at an angle of 45° over the land to be built upon, measured from a vertical distance of 1.8 metres above ground level (existing) at the site boundary"*
- (c) The Building Height Plane of the proposed development is plotted on the elevations plan submitted with the development application (Elevations 1, Plan No. D-E-01, prepared by The Collective, dated 05 March 2019). This plan indicates that the western end of Terrace House 1, including a portion of the upper level external deck, encroaches into the Building Height Plane in relation to the western property boundary.
- (d) The property to the west contains a one storey dwelling adjoining the common boundary, with that dwelling's private open space (rear yard) directly adjacent to the proposed terrace building.
- (e) The existing ground level in this corner of the subject site is at approx. 44.5m AHD. While levels have not been provided, the rear yard of the adjoining property appears to continue to fall to the south-west from this level.
- (f) The terrace building is proposed to be built on retained fill in this location, with the ground floor level set at 46.00m AHD, i.e. 1.5m above existing ground level. This

results in the upper floor level (i.e. the level of the external deck) being at 48.6m AHD, which is approximately 4.1m above existing ground level. The western edge of the building is set at 2.4m from the common boundary.

- (g) Future residents of Terrace House 1 would have a clear, direct view from the external deck down onto the adjoining rear yard which results in unacceptable overlooking and privacy impacts on the adjoining properties.

Equity of access and mobility

5. The development application should be refused because the proposed development does not provide for adaptable housing, accessible car parking or a continuous accessible path of travel within the development in accordance with the requirements of Chapter B13 of BDCP 2014.

Particulars

- (a) Chapter B13.2.2 provides as follows with respect to the access and mobility requirements of multi dwelling housing:

“B13.2.2 Multi Dwelling Housing, Attached Dwellings, Residential Flat Buildings, Shop Top Housing and Serviced Apartments

Objectives

1. *To implement the requirements and objectives of the Disability Discrimination Act, 1992, relevant equitable access legislation and the Byron Disability Access and Inclusion Plan 2008 – 2013.*
2. *To nominate adaptable housing standards for multi unit residential development in Byron Shire.*

Performance Criteria

There are no Performance Criteria.

Prescriptive Measures

1. *Design and Access in accordance with AS1428.1 – Design for Access and Mobility – General Requirements for Access – New Buildings (for class 3, 5, 6, 7, 8 and 9 buildings) and AS 4299 –Adaptable Housing must be provided to and within new developments and major alterations for residential development to which this Section applies as follows:*

- a) *Dwelling Units: A minimum of 10% of units, rounded up to the nearest whole number should be adaptable housing. Where a*

development is undertaken in stages after commencement of this DCP (including where earlier stages have been subdivided subsequently from the subject land) the calculation of the 'minimum 10% of units' shall include the units provided in those earlier stages.

The adaptable housing units must be located throughout the development with a variety of outlooks. Access to the upper level of townhouses can be by lift, stair lift, chair lift, inclinator or platform lift or ramp in accordance with the relevant Australian Standards. Any lift must comply with the relevant Australian Standards.

- b) Access: *a continuous accessible path of travel in accordance with AS1428 or an inclinator/ lift/ hoist (in accordance with AS1735) as appropriate must be provided between the main street entrance to the residential complex, adaptable housing units, access or car parking spaces, letterboxes, garbage storage area, recreation areas and clothes drying areas.*
- c) Car Parking: *At least one accessible parking space for the disabled must be provided for each adaptable housing unit, if a parking space is provided or if it is required pursuant to Chapter B4: Traffic Planning, Vehicle Parking, Circulation and Access or any other Chapter of this DCP. These spaces must be located close to and accessible from the entrance to the adaptable housing units and from the main entrance to the building. The spaces must be attached to the title of the adaptable housing unit in any Strata Plan or Community Title plan. Car parking must be in accordance with the requirements of BCA Section D Part D3.5 and Australian Standard AS/NZS 2890.6:2009 Parking Facilities – Part 6: Off-street parking for people with disabilities...”*

- (b) The Dictionary to BDCP 2014 defines the term “adaptable housing” as follows:

“housing that is designed in such a way that it can be modified easily in the future to become accessible to both occupants and visitors with disabilities or progressive frailties”

- (c) The proposed development comprises 17 dwellings and therefore 2 dwellings are required to be adaptable pursuant to clause B13.2.2 of BDCP 2014. The

Statement of Environmental Effects submitted with the development application (prepared by The Kollektive, dated March 2019) states at page 24 that “Dwelling R1 is capable of compliance with DCP B13 and D1.6.7”. Insufficient information has been provided to demonstrate that this dwelling (or a second dwelling as required) comprises adaptable housing within the meaning of BDCP 2014 as required by clause B13.2.2, particularly for occupants and visitors that are unable to use stairs as kitchen and living areas are provided at ground floor level and a single bedroom and bathroom at first floor level, accessed by an internal stairway.

- (d) No accessible car parking spaces are proposed as required by clause B13.2.2 of BDCP 2014.
- (e) Internal pathways are provided from the street frontage to the two western most studio units, neither of which are nominated as adaptable housing units. Thereafter any continuous path of travel would need to be within the internal vehicle driveway and therefore a continuous accessible path of travel is not provided as required by clause B13.2.2 of BDCP 2014.

Seniors Living Policy

- 6. The development application should be refused because the proposed development is inconsistent with the Seniors Living Policy Urban design guidelines for infill development (“**Seniors Living Policy**”), which is adopted by SEPP ARH.

Particulars

- (a) Clause 15 of SEPP ARH provides as follows:

“15 Design requirements

(1) A consent authority must not consent to development to which this Division applies unless it has taken into consideration the provisions of the Seniors Living Policy: Urban Design Guidelines for Infill Development published by the Department of Infrastructure, Planning and Natural Resources in March 2004, to the extent that those provisions are consistent with this Policy.

(2) This clause does not apply to development to which clause 4 of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development applies.”

- (b) The proposed development does not appropriately respond to the context of the site as required by the Seniors Living Policy on the basis of the issues raised at Contention 1 above.

- (c) The proposed development does not minimise the impacts on neighbouring properties as required by the Seniors Living Policy, given the encroachment into the building height plane and the location of external private open space for the studio apartment directly adjacent to an adjoining dwelling.

Traffic and Access

7. The development application should be refused because insufficient information has been submitted to demonstrate that vehicular access can be provided to the site in a manner that will not impact the safety and efficiency of traffic movements on Lismore Road.

Particulars

- (a) The Traffic Impact Assessment (TIA) submitted with the development application does not investigate the turning warrants in accordance with the AUSTRROADS Guide to Traffic Management, Part 6: Intersections, Interchanges and Crossings to identify the appropriate access treatment required to cater for the background traffic and the development traffic.
- (b) The impact of the proposed development on the surrounding road network has therefore not been quantified or assessed.
- (c) The Traffic Impact Assessment (TIA) has not fully addressed the impact on traffic efficiency and safety on Lismore Road in order to ensure that the existing level of service of the traffic at the development access point will be maintained or improved, in accordance with the AUSTRROADS Guide.
- (d) Insufficient information has therefore been submitted to enable a proper assessment of the application and it has not been demonstrated that the application satisfied clause 6.6 of the BLEP 2014 which states:

“6.6 Essential services

Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

...

(e) suitable vehicular access.”

No Legal Point of Discharge for Stormwater

8. The development application should be refused because it has not been demonstrated that there is a lawful point of discharge for all stormwater emissions from the site, as required by clause 6.6 of BLEP 2014 and Chapter B3 – Services of BDCP 2014.

Particulars

- (a) Clause 6.6 of BLEP 2014 provides as follows:

“6.6 Essential services

Development consent must not be granted to development unless the consent authority is satisfied that any of the following services that are essential for the development are available or that adequate arrangements have been made to make them available when required:

...

(d) stormwater drainage or on-site conservation,

...”

- (b) Clause B2.3.2 of BDCP 2014 provides as follows:

“B3.2.3 Stormwater Management

Objectives

1. *To promote on-site stormwater management practices that support the ‘pre-development’ hydrological regime (surface flow, streams and groundwater).*
2. *To ensure that new development does not reduce the effectiveness of existing drainage patterns (including built infrastructure).*
3. *To minimise the impacts of stormwater runoff from a site on adjoining properties.*
4. *To provide an acceptable level of protection against personal injury and property damage due to localised stormwater runoff.*
5. *To promote on-site retention, detention and infiltration of stormwater.*
6. *To promote stormwater harvesting and other forms of innovative water conservation.*
7. *To promote better integration of stormwater management into development proposals.*

8. *To ensure that on-site stormwater management facilities can be economically maintained, and that adequate arrangements are made for on-going maintenance.*
9. *To provide for the ongoing environmental health of receiving waters;*
10. *To ensure that stormwater management systems protect ground and surface water and other ecological values.*

...

Prescriptive Measures

1. Development Applications

Development applications must contain sufficient information to assess whether the proposed stormwater system is effective and feasible, both within the site and in its connection to the public drainage system.

...

3. Site Drainage

- a) *Site drainage shall be in accordance with the Northern Rivers Local Government Development Design and Construction Manuals, Byron Shire Council Comprehensive Guidelines for Stormwater Management and the relevant Australian Standards.*
- b) *For building works, the piped property drainage system is to capture and convey to a lawful point of discharge all stormwater runoff from the following areas of the development site:*
 - i) *impervious areas including roofs, paved areas and driveways*
 - ii) *areas subject to changes to ground level (existing) including excavation or filled areas*
 - iii) *areas where the natural or pre-development overland flow regime is disrupted to the potential detriment of an adjoining property.*
- c) *The development must not introduce, impede or divert stormwater runoff in such a manner as to increase stormwater flow across a boundary onto adjoining property. Concentrated, collected or diverted stormwater flow onto an adjoining property must be at a lawful point of discharge.*

4. Lawful Point of Discharge

a) *A lawful point of discharge exists at a particular location, if:*

i) *The location of the discharge is under the lawful control of Council or other statutory authority from whom permission to discharge has been received; and*

ii) *In discharging that location the discharge will not cause an actionable nuisance.*

b) *Where a lawful point of discharge is not available in the vicinity drainage may need to be constructed and any easements may need to be acquired to direct collected stormwater to a lawful point of discharge. Negotiations with property owners must be undertaken along feasible easement routes to determine whether an easement can be obtained to provide stormwater system that will drain by gravity to a public drainage system. Where easements are proposed over downstream properties for drainage purposes, a letter of consent from the owner(s) of the downstream properties must be submitted with the development application.*

...”

- (c) The stormwater plan submitted with the development application, Plan No. D-S-05A, dated February 2019 and annexed to the report titled “Assessment of stormwater requirements for proposed development at 23 Lismore Road, Bangalow” prepared by Lucena Civil & Structural Engineers, indicates a proposed discharge point for the “slow release and overflow” from the on-site detention tank out letting at the south-east corner of the site onto adjoining property to the south.
- (d) The stormwater plan also shows a piped outlet in the north-eastern corner of the site onto the same adjoining property.
- (e) An easement is in place in relation to the north-eastern outlet, through the adjoining property, providing a legal point of discharge to Council’s street drainage system in Thomas Street.
- (f) No such easement or legal point of discharge is shown for the south-eastern outlet.
- (g) Clause B3.2.3 in BDCP 2014 requires that where a lawful point of discharge is not available in the vicinity, drainage may need to be constructed and any

easements may need to be acquired to direct collected stormwater to a lawful point of discharge.

- (h) It has not been demonstrated that there is a lawful point of discharge for stormwater from the site, and in that regard that the development satisfies the relevant controls in the BLEP 2014 and BDCP 2014. The development application should therefore be refused.

Public interest

9. The development application should be refused because the proposed development is not in the public interest having regard to the contentions raised above and the submissions made in respect of proposal, which raised concerns with the following matters:
- (a) the intensity of the development;
 - (b) incompatibility with the character of the area, particularly the heritage character;
 - (c) carparking, increased vehicular movements and vehicular and pedestrian safety;
 - (d) encroachment to the building height plane;
 - (e) visual impacts;
 - (f) no guarantee of long term affordability; and
 - (g) impact on adjoining dwellings.

Precedent

10. The development application should be refused because approval of the proposed development will result in an undesirable precedent for similar inappropriate development in the surrounding area.

SIGNATURE

Signature



Capacity

Acting Director Sustainable Environment & Economy

Date of signature

9/7/ 2019