

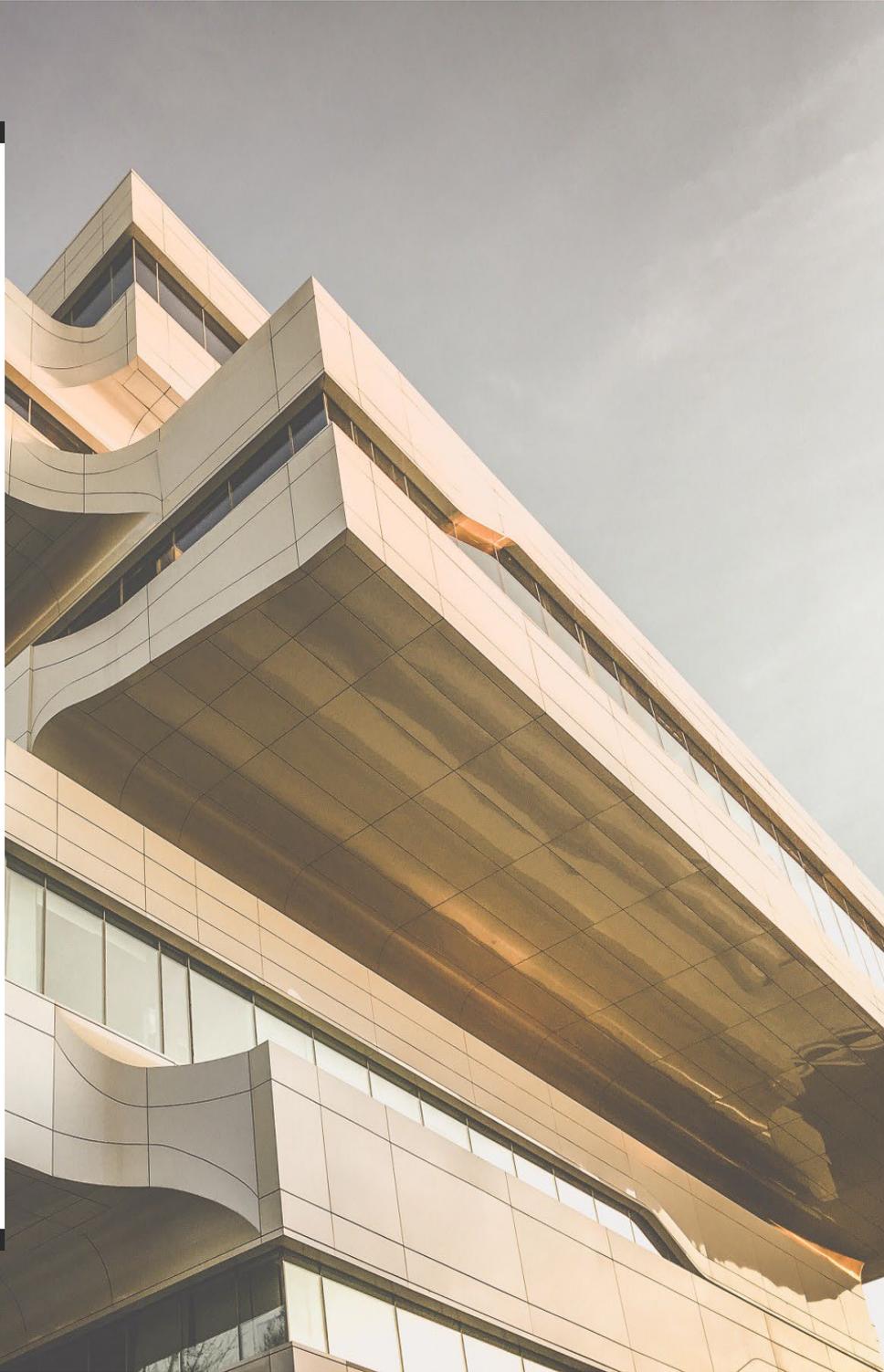
## S4.55(1A)

MODIFICATION REPORT

Site: 2 Kulgun Court, Ocean  
Shores (Lot 11 SP102058)

Prepared for:  
Kulgun Court JV

Ref:  
24025



# DOCUMENT DETAILS

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The information contained in this report is based on independent research undertaken by ELKN. To the best of our knowledge, it does not contain any false, misleading, or incomplete information.

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# ATTACHMENTS

Attachment 1	Amended Architectural Plans
Attachment 2	DA10.2014.743.5
Attachment 3	Updated Traffic Impact Assessment
Attachment 4	Condition Amendment Table

# 1. INTRODUCTION

## 1.1 Overview of Application

Kulgún Court JV seeks to modify development consent DA10.2014.743.5, determined by Byron Shire Council on 8 December 2022. DA10.2014.743.5 approves five (5) lots into three (3) lot consolidation two boundary adjustments, construction, and strata subdivision of thirty (30) multi dwelling houses and a detached dual occupancy over four stages on Lot 954 DP241073, Lot 12 DP1128095, Lot 9 DP1046566, Lot 892 DP241810, Lot 893 DP241810, Lot 944 DP241810; 2 Kulgún Court, 41 Matong Drive and 43 Matong Drive, Ocean Shores.

While development consent DA10.2014.743.5 references multiple lots, the development has commenced and as such titling of the site has now changed. This modification relates to deletion of an item contained within Stage 4 of DA10.2014.743.5. This item is now contained within Lot 11 SP102058. Lot 11 SP102058 is a development lot within SP102058.

This application seeks to modify DA10.2014.743.5 according to Section 4.55(1A) of the *Environmental Planning and Assessment Act* ('EP&A Act') 1979. In summary, the proposed modifications consist of:

### General

1. Delete the approved vehicle access to Brunswick Valley Way.

This modification results in the following changes to the development consent:

- Staging of construction description – Amend
- Condition 1 – Amend
- Condition 23 – Amend
- Condition 25 – Amend

The modifications are discussed further in **Section 3** of this Report.

Concerning Section 4.55(1A) of the EP&A Act 1979, the development remains substantially the same and is of minimal environmental impact. The proposed amendments relate removing a minor element of the proposal that further analysis has revealed is not essential to facilitate the proposal.

The proposed modifications do not significantly alter the projects level of compliance with relevant development provisions and provides an overall outcome of remaining consistent with the statement of reasons provide for approving DA10.2014.743.1.

It is requested that the Council issue a modified Development Consent as sought by this Section 4.55(1A) modification application.

## 1.2 Site Details

The site details relevant to the proposed development are provided in **Table 1**.

**Table 1: Site Details**

Property Address	2 Kulgun Court, Ocean Shores	
Property Description	Lot 11 SP102058	
Registered Owner	Lot 11 SP102058	Status Anxiety Pty Ltd Sked No.2 Pty Ltd Kulgun Court Holdings Pty Ltd Tree Family Pty Limited
Proponent	Kulgun Court JV	
Applicant	ELKN Pty Ltd for and on behalf of the proponent	
Local Authority	Byron Shire Council	
Local Planning Instrument	Byron Local Environmental Plan 2014	
Land Zoning	R2 Low Density Residential	
Building Height	9m	
Floor Space Ratio	0.5:1	
Previous Integrated Referrals	Bushfire Safety Authority (S100B Rural Fires Act 1997)	
Previous Concurrence Referral	No	
SEPP (Transport & Infrastructure) 2021 – Clause 2.48	No	

## 1.3 Further Information

Should Council require any additional information or wish to clarify any technical matter raised by this proposal or submissions made to same, Council is requested to consult with **Mr Lance Newley** on 0411 887 256 or lance@elkn.com.au before determination of this application.

## 1.4 Public Notification

Given the minor nature of the proposed amendments, it is request that Council officer utilise their discretion as contained in the Community Partition Plan and not undertake public notification of the S4.55 modification.

## 2. BACKGROUND

### 2.1 Previous Approvals

Development consent DA10.2014.743.1 was determined by Byron Shire Council on 29 October 2015. DA10.2014.743 has been subject to several modification applications with the most recent being DA10.2014.743.5 approved 9 September 2022. DA10.2014.743.5 approves five (5) lots into three (3) lot consolidation two boundary adjustments, construction, and strata subdivision of thirty (30) multi dwelling houses and a detached dual occupancy over four stages on Lot 954 DP241073, Lot 12 DP1128095, Lot 9 DP1046566, Lot 892 DP241810, Lot 893 DP241810, Lot 944 DP241810; 2 Kulgun Court, 41 Matong Drive and 43 Matong Drive, Ocean Shores.

While development consent DA10.2014.743.5 references multiple lots, the development has commenced and as such titling of the site has now changed. This modification relates to deletion of an item contained within Stage 4 of DA10.2014.743.5. This item is now contained within Lot 11 SP102058. Lot 11 SP102058 is a development lot within SP102058.

### 2.2 Commencement of Development

The development has physically commenced with issue of construction certificates and construction work having been undertaken. Stage 1 and Stage 2 of DA10.2014.743.5 have been completed.

# 3. PROPOSED MODIFICATION

## 3.1 Proposed Modifications

This application seeks to modify DA10.2014.743.5 according to Section 4.55(1A) of the *Environmental Planning and Assessment Act* ('EP&A Act') 1979. In summary, the proposed modifications consist of:

### General

1. Delete the approved vehicle access to Brunswick Valley Way

These modifications are identified in **Figure 1** below:

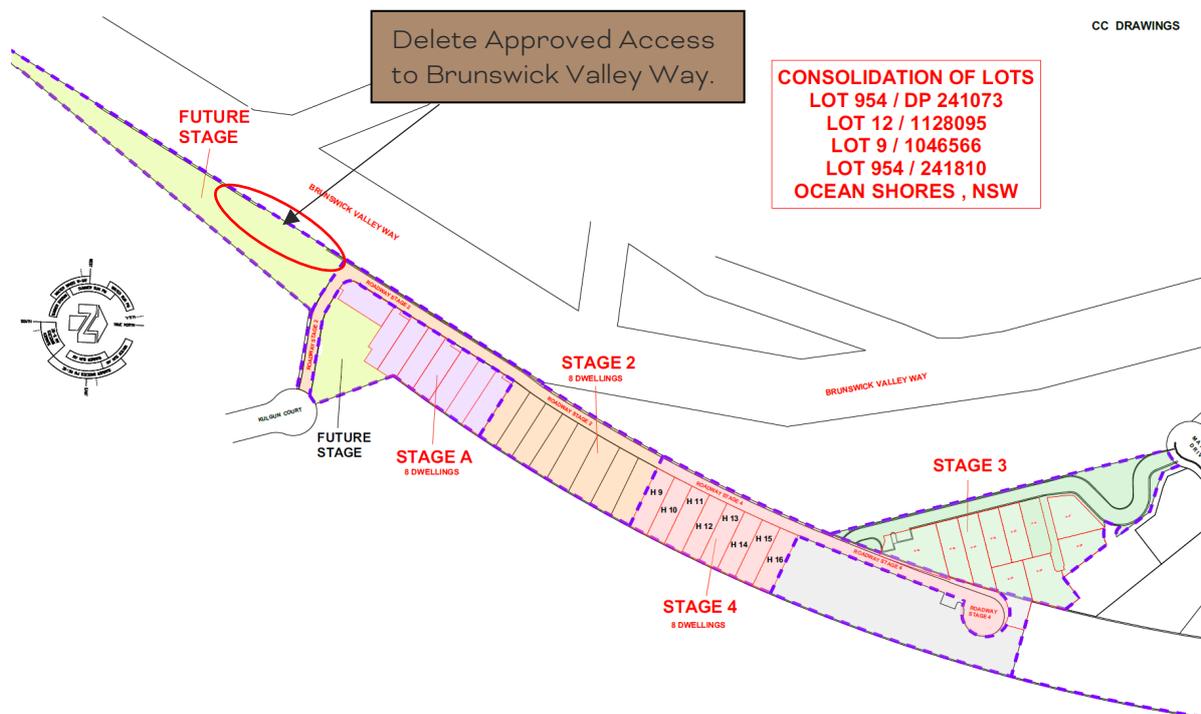


Figure 1: Staging Plan Extract | Brunswick Valley Way Access Delete

Future analysis of the traffic impact of the development indicates this access is not required. Refer to the Updated Traffic Impact Assessment under **Attachment 3**. This modification is sought to remove an item not required to facilitate the development:

## 3.2 Supporting Information

The following supporting information is included with this modification application.

Company	Component
Bitzios Consulting	Updated Traffic Impact Assessment
Story Design Collective	Amended Overall Staging Plan

### 3.3 Proposed Modifications to Conditions

The proposal seeks to amend the following:

- Staging of construction description – Amend.
- Condition 1 – Amend.
- Condition 23 – Amend.
- Condition 25 – Amend.

**Attachment 4** provides a summary of existing vs proposed wording of these items.

# 4. PLANNING ASSESSMENT

The proposal seeks to amend DA10.2014.743.5 under Section 4.55(1A) of the Environmental Planning and Assessment Act 1979. The following section provides an assessment of the relevant items as identified in the EP&A Act 1979.

## 4.1 Section 4.55(1A) Modification Involving Minimal Environmental Impact

This modification seeks to amend Development Consent DA10.2014.743.5. The proposal remains substantially the same development and is of minimal environmental impact. According to the Environmental Planning and Assessment Act 1979 ('EP&A Act 1979'), a section 4.55(1A) Modification is appropriate. Section 4.55(1A) is as follows:

- (1A) Modifications involving minimal environmental impact A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—*
- (a) it is satisfied that the proposed modification is of minimal environmental impact, and*
  - (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
  - (c) it has notified the application in accordance with—*
    - (i) the regulations, if the regulations so require, or*
    - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
  - (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

*Subsections (1), (2) and (5) do not apply to such a modification.*

The relevant parts of Section 4.55 are assessed in detail below:

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and*

**Comment:** The proposed modifications to DA10.2014.743.5 have been outlined in detail in **Section 3** above. It is submitted that the modifications will result in minimal to no environmental impact over that previously assessed.

- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was*

*originally granted and before that consent as originally granted was modified (if at all), and*

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

In applying the 'substantially the same test', the focus is on 'the development'. A comparison must be made between the development as modified and the development that was originally approved (cf *Scrap Realty v Botany Bay City Council* [2008] NSWLEC 333 at [16]).

To pass the test, the result of the comparison must be a finding that the modified development is 'essentially' or 'materially' the same as the approved development (cf *Moto Developments (No 2) v North Sydney Council* [1999] NSWLEC 280 at [55]; *Vacik v Penrith City Council* [1992] NSWLEC 8).

A qualitative and quantitative comparison is required. However, differences in qualitative and quantitative effects do not necessarily mean that the character of a development is changed in a material respect (cf *Davi Development v Leichardt Council* (2007) NSWLEC 106). Even if each of the changes to be made are significant in their own way, the proposed modified development may still be substantially the same (cf *Tyagrah Holdings v Byron Bay Shire Council* [2008] NSWLEC 1420 at [12]).

For example, in each of the following cases the 'substantially the same' test was held to be satisfied:

- *Bassett & Jones Architects Pty Limited v Waverley Council (No.2)* [2005] NSWLEC 530. This case saw the modification of a three-storey mixed-use building to a four-storey mixed-used building.
- *Marana Developments Pty Limited v Botany City Council* [2011] NSWLEC 1110. This case saw changes to the external appearance and layout of five residential flat buildings containing 76 units. The modification increased the number of units to 102 units and added an additional level of basement car parking.
- *Bathla Investments Pty Ltd v Blacktown City Council* [2008] NSWLEC 1506. This case saw a change to a number of eight single-storey townhouses (that presented as four townhouses). The changes increased the height to two storeys, separated several of the dwellings and changed the garage design and car parking layout.
- *Mech v Waverley Council (No.2)* [2005] NSWLEC 363. This case saw the incorporation of a basement level into a three-storey dual occupancy development.
- *Davi Development v Leichardt Council* [2007] NSWLEC 106. This case saw the modification of a 1970s consent for a seven-storey residential flat building with two levels for parking. The number of units was reduced from 42 to 30, and the unit mix throughout the building was altered. The number of residential floors was

reduced by one, and individual rooms' internal layout was changed. The height of the main parapet was increased by 400mm, with an architectural element arising above that for a further 500mm. The car parking layout was entirely different. A lift overrun was removed.

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

- The proposed modification does not introduce new uses that are not currently approved under DA10.2014.743.5. The development remains for the purpose of subdivision, multi dwelling housing and dual occupancy.

As the land uses remain consistent, the development as modified will operate in the locality in a materially similar way to the development as approved.

- The proposed modification retains all infrastructure works that are essential to the appropriate operation of the approved development. The development as modified will result in materially the same vehicle and pedestrian movement patterns in the locality as currently approved.
- The proposal does not increase the footprint of the development or seek to alter any of the approved built form. The development as modified will present the same bulk and scale in the locality as currently approved.
- The modification does not include a change that can be meaningfully summarised in a quantitative manner.

Consistent with the principles established in the NSW Land and Environment Court, if the impacts of modification are minor, the proposal is more likely to satisfy the test of 'substantially the same development'.

The development as modified is 'substantially the same development' as it:

- Does not introduce a new land use.
- Will result in minimal to no environmental impact over that previously assessed, i.e. the impacts of the proposal are minor.
- Will continue to operate in a materially similar way in the locality as the development as approved.
- Will provide materially similar public and private improvements in the locality as the development as approved.
- Will present materially similar bulk and scale in the locality as the development as approved.
- An assessment of the development as modified indicates the impacts associated with it remain consistent with the development as approved, or at most, are minor.

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

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

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

**Comment:** The original development application was subject to public notification. Given the minor nature of the proposed amendments, it is request that Council officer utilise their discretion as contained in the Community Partition Plan and not undertake public notification of the S4.55 modification.

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

*Subsections (1), (2) and (5) do not apply to such a modification.*

**Comment:** As per comments in response to item (c) above, public notification of this modification application should not be required; however, should any submission be received during this process, Council must consider these.

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

**Comment:** The proposed modification raises no issues regarding compliance with any State Environmental Planning Policy, Byron Local Environmental Plan 2014, or Byron Development Control Plan 2014.

Refer to **Section 4.3** of this report for further discussion of relevant matters under 4.15(1) of the EP&A Act 1979.

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

**Comment:** Noted

Considering the above comments, this proposed Section 4.55(1A) Modification accords with the relevant provisions of the EP&A Act 1979, and therefore modified consent can be granted by Byron Shire Council.

## 4.2 Statement of Reasons

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

The statement of reasons provided for the grant of consent to DA10.2014.743.5 are as follows:

Statement of Reasons
The modifications are minor and the development as modified is substantially the same as the originally approved development, with no significant detrimental environmental impacts.

It is considered that the proposed modification sees the development remain consistent with these reasons.

## 4.3 Section 4.15 Matters for Consideration

As per Section 4.55(3), in determining an application for modification of a consent under this section, the consent authority must also take into consideration such of the matters referred to in Section 4.15(1) as are of relevance to the development the subject of the application. In this regard the following comments are noted:

### 4.3.1 State Environmental Planning Policies

#### SEPP (Transport and Infrastructure) 2021

Clause 2.119 of SEPP (Transport and Infrastructure) 2021 deals with development of land with frontage to a Classified Roads. The section of Brunswick Valley Way that fronts part of the site is nominated as a Classified Road. The proposal seeks the removal of the approved vehicular access to Brunswick Valley Way. The proposal will have no impact upon the continued safe operation of Brunswick Valley Way.

The proposal remains consistent with the provisions of the relevant SEPP's.

### 4.3.2 Byron Local Environmental Plan 2014

The proposal remains consistent with the provisions of the BLEP 2014.

### 4.3.3 Byron Development Control Plan 2014

The proposal remains consistent with the provisions of the BDCP 2014. The following comment is provided:

#### **Chapter B4: Traffic Planning, Vehicle Parking, Circulation and Access**

The development complies with the provisions of Chapter B4. The proposal does not alter the existing approved parking provision. An updated Traffic Impact Assessment has been prepared and provided under **Attachment 3**.

## 5. CONCLUSION

Kulgun Court JV seeks to modify development consent DA10.2014.743.5, determined by Byron Shire Council on 8 December 2022. DA10.2014.743.5 approves five (5) lots into three (3) lot consolidation two boundary adjustments, construction, and strata subdivision of thirty (30) multi dwelling houses and a detached dual occupancy over four stages on Lot 954 DP241073, Lot 12 DP1128095, Lot 9 DP1046566, Lot 892 DP241810, Lot 893 DP241810, Lot 944 DP241810; 2 Kulgun Court, 41 Matong Drive and 43 Matong Drive, Ocean Shores.

The modifications identified in this application are sought according to Section 4.55(1A) of the EP&A Act 1979 have been discussed in detail above. The ensuing assessment against the relevant provisions in **Section 3** and **Section 4** of this report confirms the proposal remains substantially the same development and results in minimal environmental impact.

It is requested that the proposed modifications mentioned above and addressed herein be approved.



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