



LATE ITEM

Ordinary Meeting 24 January 2019

**Held at Ballina Shire Council Chambers
40 Cherry Street Ballina**

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10.11 Shellys on the Beach Cafe - Lease Termination Update

10. General Manager's Group Reports

10.11 Shellys on the Beach Cafe - Lease Termination Update

Delivery Program Commercial Services

Objective To provide an update on the Council resolution to terminate the lease for Shellys on the Beach cafe.

Background

At the December 2018 Ordinary meeting Council resolved as follows in respect to the Shellys on the Beach Café lease:

- 1. That consistent with Council's legal advice, the General Manager is authorised to terminate registered lease number AF808187Y to Fishheads@Byron Pty Ltd over Lot 3 DP 1205999 in accordance with Section 36 (1)(c) of the NSW Retail Leases Act 1994, and to affix the Council seal to all relevant documentation.*
- 2. Upon finalisation of termination of the lease with Fishheads@Byron Pty Ltd, the Council is to call for expression of interests from experienced operators to lease Lot 3 DP 1205999 and construct and operate a café.*

The termination notice was subsequently issued resulting in the lessee lodging an application to the NSW Civil & Administrative Tribunal (NCAT) in respect to an interim order being placed on Council to suspend the termination of the lease.

NCAT heard this matter on 22 January 2019 and the interim order was declined.

A copy of that determination is included as Attachment 1.

This means the lease is now terminated.

Following this determination the solicitors for Fishheads@Byron Pty. Ltd. have submitted a without prejudice offer to Council that requires a response by 8 February 2019.

A confidential report has been drafted in respect to that offer, subject to Council resolving to deal with this report and the confidential report, as a matter of urgency, as the required response date is before the February 2019 Ordinary meeting.

Key Issues

- Overview of the process to terminate the lease

Information

The confidential report provides Council an opportunity to discuss the without prejudice offer in closed session due to the commercial aspects of that offer, as well as the legal implications.

Legal / Resource / Financial Implications

As this matter has not been listed on the agenda for the January 2019 Ordinary meeting, Council will need to firstly resolve to consider this open Council report and the confidential report, as matters of urgency, due to the response date.

Consultation

The confidential report is recommended for consideration in a closed session as it relates to on-going commercial negotiations and confidential legal advice, consistent with Sections 10(a) 2 (d) and (g) of the Local Government Act.

Options

This report is for noting only.

Prior to considering this report Council will need to resolve whether it wishes to consider this matter as a late urgent item.

The preference is to note the contents of the report once an urgency motion is passed.

RECOMMENDATION

That Council notes the contents of this report in respect to the Shellys on the Beach lease update.

Attachment(s)

1. NCAT Determination



NCAT
NSW Civil &
Administrative Tribunal
Consumer and Commercial Division

NOTICE OF ORDER

BALLINA SHIRE COUNCIL
clarissa@chuegill.com

File No: COM 18/53365
Quote in all enquiries
eNumber: 37774RV73

Application to the Tribunal concerning FISHHEADS @ BYRON PTY LTD - BALLINA SHIRE COUNCIL

Applicant: FISHHEADS @ BYRON PTY LTD
Respondent: BALLINA SHIRE COUNCIL

On 22-Jan-2019 the following orders were made:

1. The Tribunal declines to continue the interim order made on 19 December 2018. While it is at least arguable that there are serious issues to be tried in the substantive application, the Tribunal is not persuaded that the balance of convenience favours the continuation of the interim order. This finding arises in circumstances where the respondent has terminated the Lease the subject of the application on the grounds of the fire damage to the cafe building premises on 2 November 2018 which it says has made repair of the premises impracticable or undesirable, and also where the applicant can proceed in the applicant's application for substantive relief with a claim for damages against the respondent arising from any wrongful termination of the Lease.
2. The issue of the costs of this application for interim orders is reserved for the consideration of the Tribunal at the hearing of the application for substantive orders (File No. COM 18/53367).
3. Otherwise, this application for interim orders is dismissed.

D Charles, Senior Member

22/01/19

For further information about your rights and obligations in relation to this order please read NCAT's Rights and Obligations Guideline available on the NCAT website at www.ncat.nsw.gov.au

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16. Confidential Session

In accordance with Section 9 (2A) of the Local Government Act 1993, the General Manager is of the opinion that the matters included in the Confidential Business Paper, and detailed below are likely to be considered when the meeting is closed to the public.

Section 10A(4) of the Local Government Act, 1993 provides that members of the public are allowed to make representations to or at a meeting, before any part of the meeting is closed to the public, as to whether that part of the meeting should be closed.

A brief summary of each of the reports recommended for consideration in confidential session follows:

16.2 Shellys on the Beach Cafe - Lease Termination Update

Refer to Item 10.11 of the Late Item Agenda.

RECOMMENDATION

That Council moves into committee of the whole with the meeting closed to the public, to consider the following items in accordance with Section 10A (2) of the Local Government Act 1993.

16.2 Shellys on the Beach Cafe - Lease Termination Update

Reason for Confidentiality

This report is **CONFIDENTIAL** in accordance with Section 10A(2)(d) (g) of the Local Government Act 1993. which permits the meeting to be closed to the public for business relating to the following:-

- d) commercial information of a confidential nature that would, if disclosed:
 - (i) prejudice the commercial position of the person who supplied it, or
 - (ii) confer a commercial advantage on a competitor of the council, or
 - (iii) reveal a trade secret; and
- g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege

and in accordance with 10D(2)(c), on balance, the discussion of the matter in an open meeting is not considered to be in the public interest as the discussion of this information in open Council may prejudice Council's on-going commercial negotiations and any potential litigation.