



Notice of Commercial Services Committee Meeting

Notice is hereby given that a Commercial Services Committee Meeting will be held in the Ballina Shire Council Chambers, 40 Cherry Street, Ballina on **Monday 19 November 2012 commencing at 4.00 pm.**

Business

1. Apologies
2. Election of Chair
3. Declarations of Interest
4. Deputations
5. Committee Reports

A handwritten signature in black ink, appearing to read 'Paul Hickey', with a long horizontal line extending from the end of the signature.

Paul Hickey
General Manager

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1. Apologies
 2. Election of Chair
 3. Declarations of Interest
 4. Deputations
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1. Apologies

2. Election of Chair

The Committee should elect a new Chair and decide if the term for the Chair should be 12 months or the term of the current Council (ie until September 2016). Either option is acceptable.

3. Declarations of Interest

4. Deputations

5.1 Agreements for Signage and Ancillary Items on Council land

5. Committee Reports

5.1 Agreements for Signage and Ancillary Items on Council land

Delivery Program Commercial Services

Objective To advise Council of signage and ancillary items located on Council owned or controlled land.

Background

At the Finance Committee meeting held 23 April 2012, the following recommendation was put to Council:

“That Council receive a report on leases, licences and agreements held with Council for use of Council owned and controlled land for items such as signs and other ancillary items.”

The recommendation was subsequently adopted at the Ordinary Meeting held 26 April, 2012. The matter was raised in response to a question regarding the Homestead Motel sign located on the road reserve at the corner of Fox and Cherry Street, Ballina. Advice was provided that the sign, which occupies an area of approximately 4m² of road reserve, has been in existence for many years. The Motel proprietors pay an annual fee to Council, and mow and maintain the road reserve fronting the Motel, which is a cost saving to Council.

This report has been compiled to provide tenure and rental information to Council on signs and ancillary items located on Council land and Council controlled land to comply with the April 2012 resolution.

Key Issues

- Nature of tenure and rental arrangements

Information

In responding to this resolution the following ancillary uses of Council and Crown land has been identified:

- Use of Council land for the miscellaneous purposes of footpath dining and merchandise display is permissible under the Commercial Use of Footpaths Policy (F07), with formal agreements in place for the commercial and retail premises that have approvals. Current rentals and licence fees being collected; \$13,737 p.a. incl. GST.
- Homestead Motel sign, cnr. Fox and Cherry Street, Ballina. \$124 p.a. incl. GST. The Motel is also responsible for mowing and maintaining the road reserve.
- Airspace lease in place with the Lennox Point Hotel for the veranda above the road reserve. Current rental \$7,040 p.a. incl. GST.

5.1 Agreements for Signage and Ancillary Items on Council land

- The West Tower Shopping Centre sign, West Ballina, located on part private land and part road reserve. There is no formal agreement in place.
- The covered walkway over Hackett Lane, Ballina, between two areas of the RSL Lifecare Aged Care complex. There is no formal agreement in place and on the surface this appears to be a not for profit use of this airspace, however is worthy of further investigation.
- Sporting club signage such as at Kingsford Smith Oval (Seagulls Rugby League Club) and the (Geoff Watt Oval) Alstonville Soccer Club. These are not for profit organizations and there may well be similar uses elsewhere in the Shire.

Due to Council's extensive land holdings there may well be other situations where items are installed on Council owned or control land and Council is either not aware of the item and / or it has not been approved.

The items listed in this report represent the identified ancillary uses and if there are other items known to Councillors they should be raised with staff either as part of this report or at any other time. This will then allow staff to research the history of the structure or use of the land and formalise the arrangements, if necessary.

In addition to these ancillary uses there are also many formalised leases and licences for properties etc which all have appropriate agreements in place.

Sustainability Considerations

- **Environment**
Not Applicable
- **Social**
Not Applicable
- **Economic**
It is important where there is a commercial use of Council land that the community receives some form of return from that use.

Legal / Resource / Financial Implications

Encroachments onto Council land, or land controlled by Council, by commercial signage, or commercial ancillary items, are dealt with on merit with a view to removal, or initiation of formal lease or licence agreements with appropriate rentals negotiated and or determined.

Consultation

There has been consultation with a range of staff in preparing this report to identify known uses of Council land.

5.1 Agreements for Signage and Ancillary Items on Council land

Options

This report responds to the April 2012 resolution and identifies known ancillary uses of Council land. The research has identified the following issues:

- a) West Tower Tavern Signage – There is no agreement in use for a part use of Council land – On this basis the owners should be approached to enter a formal lease or remove the structure. In respect to rental terms Council staff are reluctant to expend public monies on a valuation due to the small area and due to the similarities with the Homestead Motel arrangements it is recommended that the annual rental be set at the same value. This at least ensures consistency in the rentals for similar leases.
- b) Use of land by not for profit groups use such as Kingsford Smith and Geoff Watt Ovals, along with the airspace at Hackett Lane, Ballina - Even though these appear to be not for profit uses, as it is Council land being used or occupied, it is appropriate that a licence agreement be established. This has the benefit of ensuring all parties understand their responsibilities and also provides some insurance protection to Council in case of accident. If the use is for not for profit the recommended licence fee would be nil, with the agreement effectively only ensuring that a binding legal agreement is in place. The agreement would be much the same as many other agreements in place for not for profit groups using community facilities such as sports club houses, halls etc.

It has understood that the need for the April 2012 resolution may have arisen from concerns that there were a large number of agreements in place similar to the Homestead Motel. This report has confirmed that in fact there are very few agreements in place and if anything the bigger issue is in identifying unauthorised use of Council land. That is a never ending process that both Council and the broader community need to monitor and to resolve issues as and when they arise.

The recommendations that follow direct the General Manager to formalise agreements for the ancillary uses identified in this report, with any agreed terms and conditions to be eventually resubmitted back to Council, when approval is sought for the use of the Council seal.

RECOMMENDATIONS

1. That Council notes the contents of this report in respect to ancillary uses of Council land.
2. That the General Manager implement the necessary actions to either formalise or remove the signage on Council land for the West Tower Tavern. Any licence agreement is to be based on similar conditions to the agreement for the Homestead Motel.
3. That the General Manager formalise the use of Council land by the not for profit groups associated with the Kingsford Smith and Geoff Watt Oval sporting signage and the use of airspace at Hackett Lane, Ballina. Any licence agreements are to be based on similar terms and conditions applicable to other not for profit groups.

Attachment(s)

Nil

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Delivery Program Commercial Services

Objective To determine if Council wishes to acquire or licence an additional portion of Crown Land for the Shelly's on the Beach Cafe.

Background

Shelly's on the Beach Café ("Shelly's") is situated on a beachfront site at Shelly Beach, East Ballina. The café footprint is partly on Council operational land (Lot 1 DP 1095427 – 260.3m²) and partly upon the adjoining Crown reserve (Reserve No. 1010068 – 81.7m²).

Tenure for Shelly's is by way of a lease from Council and a licence from the Crown (see survey plan highlighting subject sites in **Attachment 1**). The lease and licence were recently assigned by the previous tenant to R Mamone & M Sims of Fishheads @ Byron Pty Ltd.

It is noted that Lessee/Licensee (Fishheads) owns all building and site improvements. Council and the Crown only lease and licence their respective sites to the Lessee/Licensee.

To resolve tenure issues involving the tenant, the Crown and itself, Council has previously considered the option of acquiring the 81.7m² portion of Crown land amalgamating it with Council's 260.3m² site to create a 342m² site. The amalgamated 342m² site could be leased to Fishheads under a single lease.

Since taking possession of Shelly's, Fishheads have lodged a development application to demolish the existing building improvements and build a new café over both sites. Awnings pertaining to the building structure proposed in the development application will encroach upon the Ballina Coastal Reserve by approximately 66.75m² (see **Attachment 2**).

This report considers the options of Council either acquiring the portions of Crown land required by Fishheads for their proposed building, or the existing licence being varied to incorporate those portions of land.

Details pertaining to the Council lease with Fishheads are summarised as follows:

Lessee:	Fishheads at Byron Pty Ltd
Term:	5 + 5 + 5 years
Comm. Date:	1 July 2010
Current Rental:	\$33,915 p.a. + GST (equates to \$130.29/m ² p.a. + GST)
Rent Reviews:	Annual CPI, Review to market upon exercise of lease option
Outgoings:	Payable by the Lessee

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Details pertaining to the licence between the Crown, Council (as Reserve Trust Manager) and Fishheads are summarised as follows:

Licensee:	Fishheads at Byron Pty Ltd
Term:	15 years
Comm. Date:	1 July 2010
Current Rental:	\$10,645.52 p.a. + GST (equates to \$130.30/m ² p.a. + GST)
Rent Reviews:	Annual CPI, Review to market upon exercise of lease option
Outgoings:	Payable by the Lessee

Key Issues

- Tenure arrangements over Council and Crown lands

Information

Council has on previous occasions reviewed the tenure arrangements pertaining to Shelly's on the Beach Café.

In December 2007 Council considered purchase of the 81.7m² portion of Crown land. An independent valuation obtained at the time attributed \$245,000 + GST to the portion of land. The resolution from the December 2007 Ordinary Council meeting was:

"That the matter be deferred to allow for further options to be considered regarding the road reserve to the north and south of Council operational land described as Lot 1 DP 1095427."

Council staff investigated this resolution but it was deemed unviable as the licensee/lessee's building improvements were located on the 81.7m² portion of Crown land to the east, and the licensee/lessee was unwilling to relocate their building improvements to either the north or south of the existing building.

Council staff and staff from the Department of Primary Industries - Crown Lands Division ("DOPI") met in June this year to discuss the ongoing problems of the Shelly's Café site being in two separate ownerships.

DOPI and Council staff concluded that a reasonable solution could be for Council to acquire the Crown's 81.7m² and amalgamate it with Council's 260.3m² site to create a 342m² site.

Both parties agreed to jointly instruct and appoint an independent valuer to assess the market value of the 81.7m² parcel of Crown Land which would then be adopted as the purchase price if Council were to acquire it.

The value assessed by the independent valuer was \$190,000 + GST which has been given in-principle support for by DOPI (see **Attachment 2**). Council staff considers this value to be fair and reasonable in the current market.

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Since obtaining that valuation, Fishheads have lodged a development application to demolish the existing building improvements and build a new café over both sites. Awnings pertaining to the building structure proposed in the development application will encroach upon the Ballina Coastal Reserve by an additional 66.75m².

The total area of Crown land that could be acquired by Council or licensed by Fishheads to facilitate development of their proposed new café equates to 148.45m² (i.e. 81.7m² plus 66.75m²).

A financial analysis of purchase versus licence is detailed below.

The current rental for the licence area (81.7m²) is \$10,645.52 (excl GST) of which 50%, being \$5,322.76 is to be returned to the Crown.

The additional rental for the encroachment area (66.75m²) is proposed to be \$8,697.53(excl. GST) of which 50%, being \$4,348.77 would be returned to the Crown. This is a net gain in rent of \$4,348.74.

Sustainability Considerations

- **Environment**
Not Applicable
- **Social**
Not Applicable
- **Economic**

Resolution of these tenure issues is required to enable development if Fishheads proposed new building to proceed and assist in creating a showcase restaurant on the NSW Far North Coast. This is considered important in the context of Ballina Shire's tourism industry.

Legal / Resource / Financial Implications

Legal

A subdivision would be required by way of a boundary adjustment if Council were to acquire or lease the Crown land required by Fishheads for their development. DOPI has advised that Native Title and/or land claim issues may arise if a subdivision were to be undertaken.

The current licence Fishheads have over 81.7m² of Crown land could be varied to include the 66.75m² of land required for the awning overhang. Fishheads has advised they would be satisfied with a licence over both areas of land.

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Financial Implications

A significant matter for Council to consider is that it acts as Trust Manager for the Crown Reserve. 50.00% of any rental or licence fees collected by Council is generally required to go to the Crown, and Council retains the balance. The financial returns to Council in regards to rental versus purchase are noted as follows:

Purchase

As noted above Council and the Crown jointly instructed a valuer to undertake a market valuation of the 81.7m² currently licenced to Fishheads. The value attributed to this portion of land was \$190,000 equating to \$2,326/m².

If Council were to also acquire the 66.75m², i.e. a total of 148.45m², the outlay and return are estimated as follows based upon the valuation referred to above:

Land purchase/outlay; 148.45m² @ \$2,326/m² = \$345,000

Estimated rental return; \$345,000 @ 6.00% = \$20,700 p.a.

For an outlay of \$345,000 Council could expect a rental return of \$20,700 p.a. A return of 6.00% is derived from the valuation report commissioned on the property.

Licence

If Fishheads were to vary their current licence to include the 66.75m² of Crown land, i.e. a total of 148.45m², the return to Council is calculated as follows based upon the licence fee/rental currently being paid:

a) Current lic. fee/rental; 81.7m² @ \$130.30/m² = \$10,645 p.a.

Share to Council @ 50.00% = \$5,322 p.a.

b) Proposed lic. fee/rental; 148.45m² @ \$130.30/m² = \$19,343 p.a.

Share to Council @ 50.00% = \$9,671 p.a.

Based upon this analysis, licencing of the Crown land would provide a better and less risky financial return to Council than purchasing the land; i.e. the return to Council would increase from \$5,322 p.a. to \$9,671 p.a. without any financial outlay.

Consultation

Council staff have consulted with DOPI staff and Mr Ralph Mamone of Fishheads. An independent property valuation has also been obtained to assist in determining property values and rental returns.

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Options

Option 1

Council as Reserve Trust Manager can resolve to recommend to the Crown to vary Fishheads' current licence to include the additional area of 66.75m², i.e. a total of 148.45m² at an initial annual licence fee of \$19,343 p.a. + GST. All other terms and conditions of the current licence agreement shall prevail.

This option is recommended as Council would increase its return from \$5,322 p.a. to \$9,671 p.a. without any financial outlay, and allows Fishheads to redevelop the site to its potential and create a showcase restaurant for the Shire.

Option 2

Council can resolve to purchase the 148.45m² portion of Crown land at a price in the order of \$345,000 + GST and lease it to Fishheads at a rental of approximately \$20,700 p.a.

This option is not recommended as the forecast return on capital outlay is not financially viable. Furthermore, from a legal perspective acquisition of Crown land may potentially result in having to deal with Native Title and Land Claim issues which could be costly and time consuming.

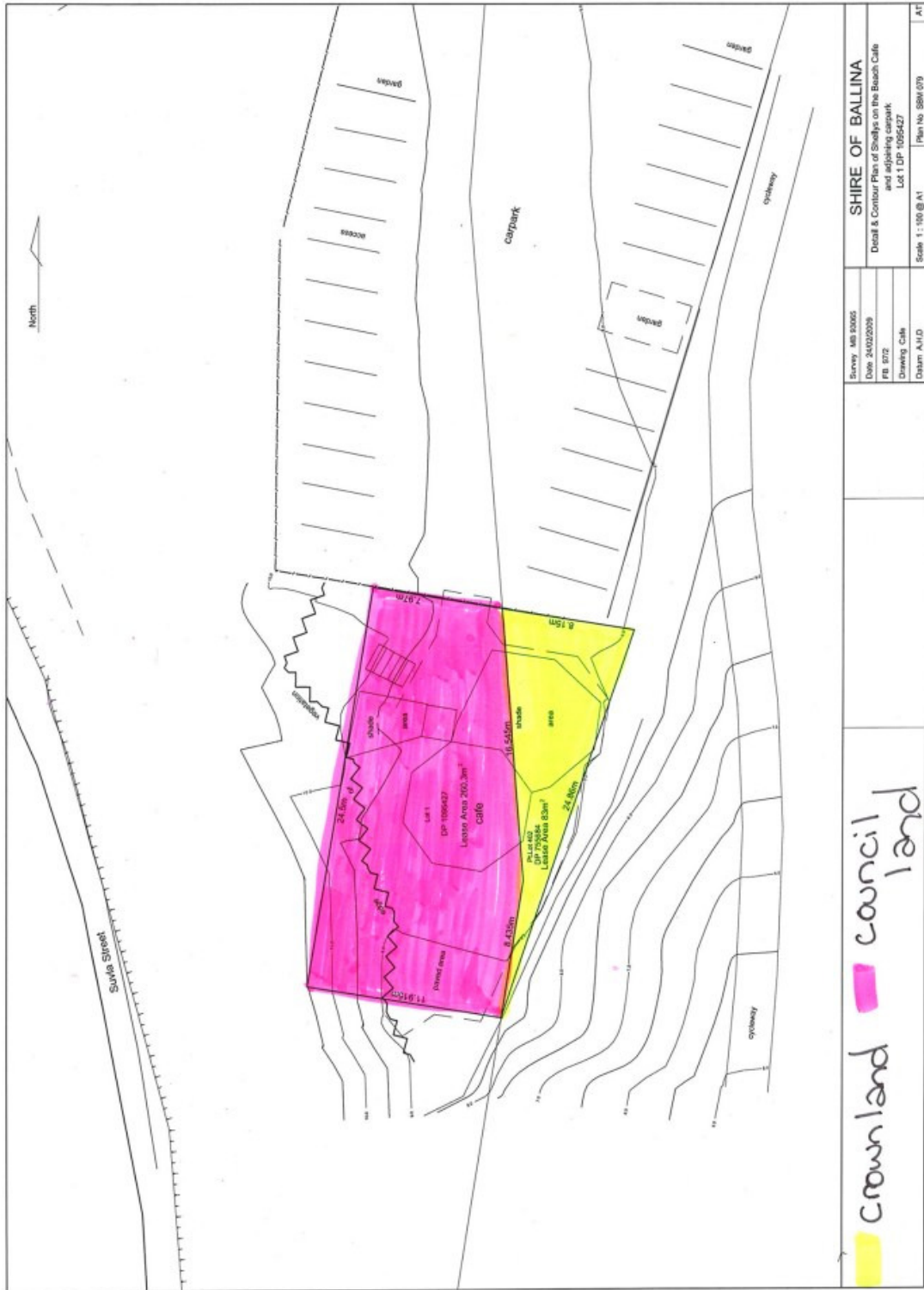
RECOMMENDATIONS

1. That Council, as Reserve Trust Manager, recommends to the Crown to vary Fishheads' current licence to include the additional area of 66.75m², i.e. a total of 148.45m² at an initial annual licence fee of \$19,343 p.a. + GST. All other terms and conditions of the current licence agreement shall prevail.
2. That Council authorises the General Manager to finalise negotiations with the Crown, and approve the use of the Council Seal to be affixed to the Licence Agreement and any other associated documentation.

Attachment(s)

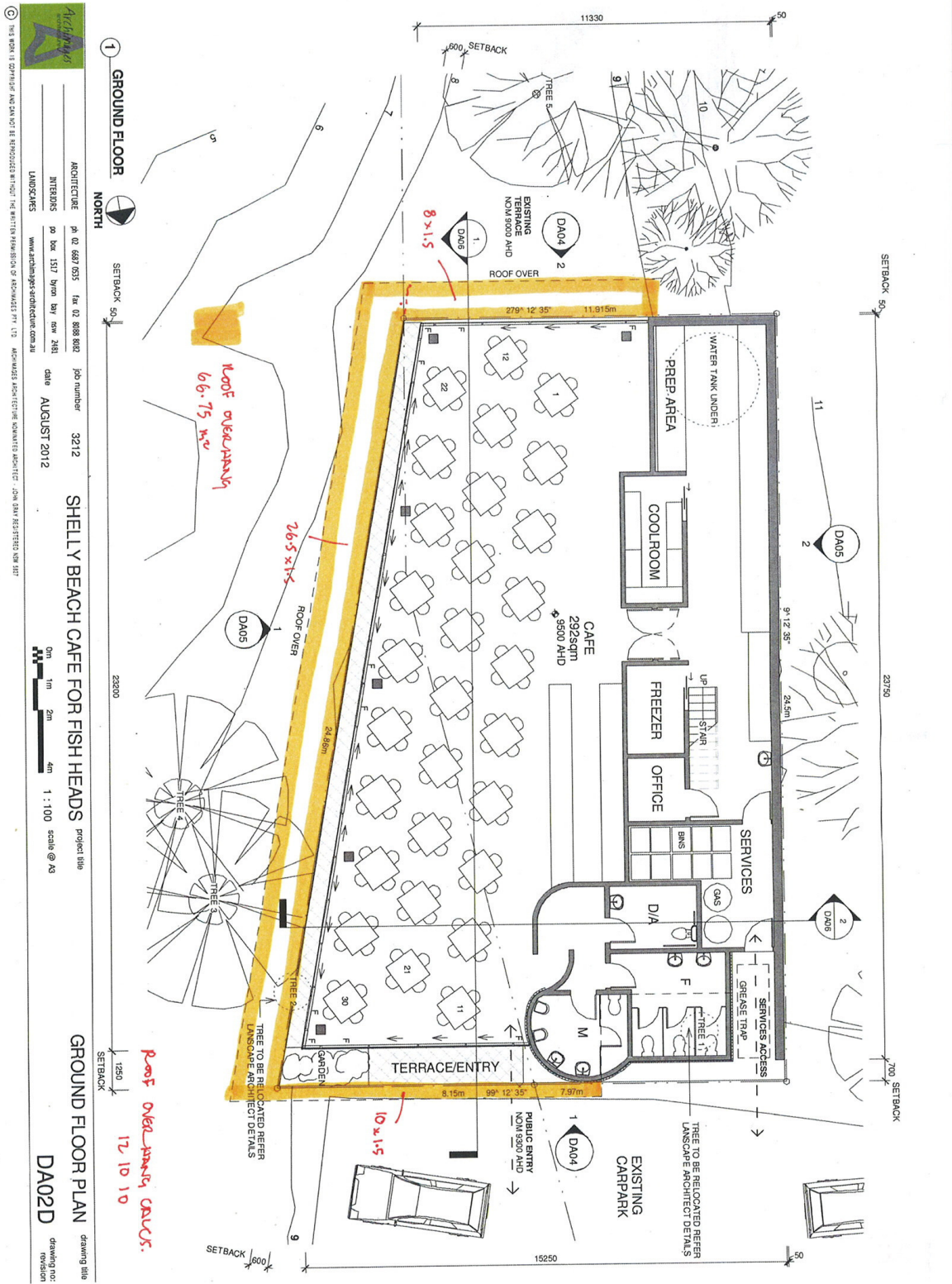
1. Shelly's on the Beach Site Plan
2. Shelly's on the Beach Awning Plan
3. Department of Primary Industries In-Principle Support Letter

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land



Survey MB 30065	SHIRE OF BALLINA
Date 24/02/2009	Detail & Contour Plans of Shelly's on the Beach Cafe
FB 872	Shelly's on the Beach Cafe
Drawing Cafe	Lot 1 DP 1085427
Datum AULD	Scale 1:100 @ A1
	Plan No. SBM/079
	AT

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land





Department of
Primary Industries
Catchments & Lands

The General Manager
Ballina Shire Council
PO Box 450
BALLINA NSW 2478

Our Ref: Doc12/115729
Your Ref: Paul Tsikleas

Dear Mr Hickey

**Re: Proposed Acquisition of Crown Land – Shelleys on the Beach, East Ballina
Part Lot 402 DP 755684**

I refer to the above matter and email received from Paul Tsikleas, Commercial Services Manager, 13 August 2012. I am writing to confirm in principle support for the proposed acquisition of the above Crown Land, subject to Councils agreement to pay compensation in the amount of One Hundred and Ninety Thousand Dollars (\$190,000) exclusive of GST.

To assist Council in their considerations I wish to bring to Councils attention that it is possible that Native Title interests in the land to be acquired may not have been extinguished by a past valid act of the Crown. Whilst a lease for the purpose of "Kiosk" is an exclusive possessory act that would extinguish Native Title pursuant to the terms of the Commonwealth Native Title Act 1993 CNTA, a licence for the same purpose does not extinguish Native Title under the terms of the CNTA.

Council should however rely on its own investigations to form a determination as to whether or not Native Title has been extinguished. Ballina Shire Council may have an obligation under section 24MD of the Commonwealth Native Title Act 1993 to accord potential native title holders with certain procedural rights in relation to the proposed acquisition. In particular, section 24MD requires that notice of the proposed future act (in this case, acquisition) must be given to any representative Aboriginal and Torres Strait Islander bodies for the area concerned and any registered native title claimants in relation to land or waters in the area concerned.

Accordingly, in NSW a notice should be sent to both the NSW Aboriginal Land Council (formally appointed as the representative Aboriginal body) and NSW Native Title Services Limited (the entity that currently performs the functions of the Aboriginal representative body but which has not been formally recognised).

Notices to the NSW Aboriginal Land Council should be addressed as follows:

Manager, Legal Division
NSW Aboriginal Land Council
33 Argyle Street
PARRAMATTA NSW 2150

Department of Primary Industries
Catchments and Lands
Crown Lands Far North Coast

Level 1, 76 Victoria Street, Grafton NSW 2450
Tel: 02 6640 3400 | Fax: 02 6642 5375
www.crownland.nsw.gov.au | ABN: 335 377 620 19

5.2 Shelly's on the Beach - Purchase or Licence of Crown Land

Notices to NSW Native Title Services Limited should be addressed as follows:

Manager
NSW Native Title Services Ltd
Suite 15, 245 Chalmers Street
REDFERN NSW 2016

Catchments & Lands is not aware of any current registered Native Title claims.

Given the complexities involved with dealing the elements of the CNTA applying to the Crown lands it may well be in Council's interest to consider relocating the facility so as to construct the whole of the facility clear of the Crown estate. To this end Council could consider making an application to close an area of about 80 m2 of the Council public road lying to the north-west of Council's current holdings within Lot 1 DP 1095427 and shifting the new structure to a consolidated Council holding. Council's application for such road closure would be dealt with as a matter of expedition.

I look forward to receiving Council's subsequent advice before proceeding further.

Yours sincerely,



Brad Crispin
Acting Senior Manager - Far North Coast
20 September 2012

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6. Confidential Session

6. 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:

6.1 Land Sale and Acquisition

This report contains information relating to land sale negotiations.

6.2 Options Review - 64 Crane Street, Ballina

This report contains information relating to the negotiations of a new lease for 64 Crane Street, Ballina.

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.

6.1 Land Sale and Acquisition

Reason for Confidentiality

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

- c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business

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 negotiations are being conducted on a commercial in confidence basis.

6.2 Options Review - 64 Crane Street, Ballina

Reason for Confidentiality

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

- c) information that would, if disclosed, confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business

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 it may adversely impact on the commercial negotiations currently underway.