



Notice of Commercial Services Committee Meeting

A Commercial Services Committee Meeting will be held in the Ballina Shire Council Chambers, 40 Cherry Street, Ballina on **Wednesday 14 June 2017 commencing at 4.00pm.**

Business

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

A handwritten signature in black ink, appearing to read 'Paul Hickey', with a long horizontal line underneath.

Paul Hickey
General Manager

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1. Apologies
 2. Declarations of Interest
 3. Deputations
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1. Apologies

2. Declarations of Interest

3. Deputations

4.1 Shellys on the Beach Lease - Update

4. Committee Reports

4.1 Shellys on the Beach Lease - Update

Delivery Program Commercial Services

Objective To provide an update on Shellys on the Beach and consider a revised leasing proposal.

Background

On or about 8 May 2017 Councillors received an email from Mr Ralph Mamone, director of Fishheads@Byron Pty Ltd and lessee of Shellys on the Beach, requesting that he be granted a new lease.

Land tenure issues including leasing and land acquisition relating to Shellys on the Beach Café (now known as “Fishheads@Shellys”) have been considered and dealt with by Council at a number of meetings in recent years. A summary of the major actions and resolutions are summarised as follows:

- a) Late 2011 M Sims and R Mamone trading as Fishheads @ Byron Pty. Ltd. purchase the existing lease from E A Keemink. This lease is a land only lease with the tenant owning any improvements. Council does not own or lease the improvements / fixtures (i.e. the building) on the land.
- b) DA 2012/348 for the redevelopment of Shelly Beach Café, as submitted by Fishheads Pty. Ltd., approved by Council at the November 2012 Ordinary meeting. This approval expanded the footprint of the building.
- c) 26 February 2013 - Council resolved to extend the lease term for Fishheads@Shellys from twelve to twenty years (inclusive of lease options) with the final expiry date being 30 June 2033 to allow the tenant more time to amortise their establishment costs for the approved café / restaurant.
- d) 26 September 2013 – Council resolved to grant 100% rental relief to Fishheads@Shellys for a maximum period of six months in recognition of the time needed to finalise the acquisition of Crown land needed for the reconstruction of the expanded building on the site. To date rental relief has not been granted as the General Manager has not been advised as to when construction of the new building will commence.
- e) 26 September 2014 – Acquisition by Council of the portion of Crown land described as Lot 1 DP 1192961 was published in the NSW Government Gazette. Cost of land acquired; \$240,000 + GST. The acquisition of this land was facilitated to allow the proposed development of the tenant to be located entirely on Council owned land and to allow security of tenure.
- f) 1 December 2014 - Council resolved to classify the portion of Crown land acquired (Lot 1 DP 1192961) as “operational land” and that the classification take effect immediately.

4.1 Shellys on the Beach Lease - Update

- g) Land acquired (Lot 1 DP 1192961) and Council's existing land holdings (Lot 1 DP 1095427) are consolidated into one land holding described as Lot 3 DP 1205999 and registered on 27 March 2015.
- h) 28 May 2015 - Council resolved to vary Fishheads' current lease by changing the description of the leased property from Lot 1 DP 1095427 to Lot 3 DP 1205999 and again extend the remaining lease term from fifteen to twenty years (i.e. 5+5+5+5 years) with the final expiry date being 30 June 2035. The initial commencement rental to be \$53,500 p.a. + GST.
- i) 17 November 2015 – An update report was presented to Council in regards to the ongoing delays in redevelopment of the site including another request from Fishheads that Council pay the cost of relocating a stormwater main that runs through the site under the proposed building.

Relocation of the stormwater main is as per Condition 9 of DA 2012/348, for the proposed restaurant. Council resolved to note the contents of this report taking no action in regards to relocation of the stormwater main.

- j) 1 August 2016 – Mr Mamone addressed a Councillor workshop advising he was having problems raising finance for the proposed restaurant to be constructed on Shellys on the Beach Site and put forward the following proposal:

- That Council fund relocation of the stormwater pipe, sewer rising main, and linemarking of the carpark
- That Council fund construction of the new café
- That a new rental be negotiated.

Should that proposal be unacceptable, Mr Mamone suggested that Council contribute \$900,000 towards construction of the proposed restaurant and he would take the risk on funding the balance of the project. He also requested the rental be renegotiated accordingly.

- k) 25 August 2016 – Following on from the Councillor workshop held on 1 August 2016 a report on Mr Mamone's proposal was presented to the Council meeting. A copy of that report is **attached**. The resolution arising from that meeting is as follows:

1. *That Council authorises the General Manager to implement the works associated with Conditions 9 and 14 of DA 2012/348 as well as relocating the sewer rising main that runs through the Shellys on the Beach Site.*
2. *The funds for these works to be allocated from the Property Development Reserve, at an estimated cost of \$80,000.*
3. *That Council confirms that it is not supportive of providing any financing for the construction of a new building / café on this site.*
4. *That the General Manager take all necessary actions, as per the existing lease, to ensure that the lessee maintains the site in a fair and reasonable condition.*

The works in point one are in the process of being finalised.

4.1 Shellys on the Beach Lease - Update

Following on from this latest request (8 May 2017) from Mr Mamone, a confidential report is included later in this agenda.

The report has been listed as confidential to allow Councillors to discuss the commercial aspects of this negotiation in confidence. It is a matter for Councillors as to whether they wish to have those discussions in open Council or in confidence.

Key Issues

- Long term lease tenure
- Rental returns to Council
- Financial risk
- Probity

Information

The confidential report outlines the details of Mr Mamone's latest proposal.

Legal / Resource / Financial Implications

There are no direct implications from this report which provides an overview of the recent history of this leased property.

The tenant continues to pay the existing land lease rental, which is currently \$48,466.12 plus GST. The 28 May 2015 lease, which increased the lease area and rental, has not been executed to date.

Consultation

Council staff have held various meetings with Mr Mamone over the past twelve months and this matter has been reported to Council on numerous occasions.

Options

This report is for noting only. The confidential report later in the agenda deals with the commercial aspects of this latest proposal from Mr Mamone.

In considering the confidential report it is important for Council to acknowledge, in this open Council report, that the tenant acquired the lease from the previous tenant, at a commercially agreed price. That price is a matter between those two parties and the figure is not known to Council.

When acquiring a lease the responsibility is on the purchaser to pay an appropriate price for their proposed business venture. It should not be the responsibility of Council to underwrite any risks associated with a private commercial redevelopment.

4.1 Shellys on the Beach Lease - Update

Council has made a number of concessions to date to assist with supporting the re-opening of the café / restaurant (i.e. extending tenure, acquiring neighbouring land, providing infrastructure that was related to the conditions of consent for the development application, allowing six months free rental) and all of these concessions have still not resulted in the tenant proceeding with their redevelopment.

RECOMMENDATION

That Council notes the contents of this report regarding the status of the Shellys on the Beach lease.

Attachment(s)

1. Council Report - 25 August 2016

10.5 Shellys on the Beach - Site Works

10.5 Shellys on the Beach - Site Works

Delivery Program Commercial Services

Objective To seek Council's concurrence to undertake works on the Shellys on the Beach site to enable construction works to proceed.

Background

The current lease over the Shelly's site was assigned from Elizabeth Anne Keemink to Fishheads@Byron Pty Ltd on 1 May 2012. Details of the lease are summarised as follows:

Lease Commencement Date	1 July, 2010
Lease Term	5 + 5 + 5 years
Current Rental	\$48,466.17p.a. + GST
Property Outgoings	Lessee to pay Council rates and land tax (if applicable).

Fishheads exercised the option to renew their lease on 19 March 2015 for a further time of five years effective from 1 July 2015.

A report was presented to the Council meeting of 28 May 2015 following a request from the lessee of Shellys on the Beach (Fishheads@Byron Pty Ltd) to extend their current lease term to 5 + 5 + 5 + 5 years (i.e.) a total of 20 years and that Condition 9 of DA 2012/348 requiring the applicant (Fishheads) to relocate a stormwater pipe that runs under the proposed building be deleted.

Fishheads sought the total new term of 20 years from 2015 to assist them in securing finance to construct their proposed new restaurant.

Fishheads requested that Condition 9 of DA 2012/348 be deleted as they were unaware of the presence of the pipe when the lease was assigned to them. There is no reason not to believe this as there is no easement for the stormwater pipe on the title to the site. Fishheads also requested that Council be responsible for all costs associated with relocating the stormwater pipe.

The resolution arising from the meeting of 28 May 2015 was as follows:

- 1. That Council approves a variation to the Fishheads' lease to provide a maximum term of twenty years as per option one of this report.*
- 2. That Council does not approve the sourcing of funds from the Property Development Reserve to finance the cost of meeting Condition 9 from DA 2012/348 as outlined in option two of this report, as Council has previously determined that this is not a reasonable proposal to be funded by Council as lessor for this site.*
- 3. That Council approves the use of Council's Common Seal to be attached to the lease and associated documentation and execute same.*

10.5 Shellys on the Beach - Site Works

Following on from that resolution a letter of offer for the new or extended lease term was issued to Fishheads on 17 June 2015. The terms of the proposed new lease agreement are summarised as follows:

Lease Commencement Date	TBA
Lease Term	5 + 5 + 5 + 5 years
Property Outgoings	The Lessee to pay Council rates and land tax (if applicable).
Rent Free Period	The Lessee shall receive six months' rent free from the date the builder formally commences construction of the new café building on the site.

Fishheads signed and returned the letter of offer on 25 June, 2015. This lease has not actually commenced yet as the lease documentation has not been prepared and exchanged, primarily due to the uncertainty as to whether or not Fishheads will proceed with the redevelopment proposal.

Since 2015 Fishheads have sought to secure finance to construct their proposed new café building. To date Fishheads claim they have been unsuccessful in securing finance due to financiers' indifference to lending against leasehold interests as security.

Another issue that has arisen is the discovery of a Council sewer rising main running through the Fishheads Site, further complicating construction. Once again there was no disclosure by Council as to the presence of this rising main when the lease was granted and assigned as its existence in that location was unknown.

On 1 August 2016 a Councillor workshop was held where Ralph Mamone of Fishheads set out the problems he is facing in proceeding with construction of his proposed new building for the Shellys on the Beach Site as per DA 2012/348.

The purpose of this report is to clarify Council's position in respect to the matters raised by Mr Mamone.

Key Issues

- Deletion of Condition 9 of DA 2012/348
- Deletion of Condition 14 of DA 2012/348 (car park line marking)
- Sewer rising main that passes through the site
- Finance and risk

Information

At the Councillor workshop held on 1 August 2016 Mr Mamone advised that he cannot proceed with construction of the new café on the Shellys Site due to a number of factors including:

- a) Financiers' indifference to lending against leasehold interests as security; i.e. an unwillingness to lend funds against a 20 year lease security.
- b) The high cost of constructing the new restaurant.

10.5 Shellys on the Beach - Site Works

- c) The current and proposed rental for the Shellys Site is too high making the project unviable.
- d) Compliance with DA 2012/348 Conditions 9 and 14; i.e. relocation of the stormwater pipe and line marking of the adjoining public car park.
- e) The uncertainty over if and when Council will relocate the sewer rising main running through the Shellys Site.

Mr Mamone put forward the following proposal:

- That Council fund relocation of the stormwater pipe, sewer rising main, and line marking of the carpark
- That Council fund construction of the new café
- That a new rental be negotiated.

Should that proposal be unacceptable Mr Mamone suggested that Council's exposure be limited to \$900,000 and that he would take the risk on funding the balance of the project. He also requested the rental be renegotiated accordingly.

The discussion at the briefing was largely not supportive of the proposal put forward by Mr Mamone due to the high cost of the project, Council having no funds set aside for this work, ongoing maintenance of such a building, along with the overall risk of the project.

However there was some level of support for funding part or all of the relocation of the stormwater pipe, sewer rising main, and line marking of the car park.

The initial cost estimates to comply with Condition 9 of DA 2012/348 (relocation of the stormwater pipe) are in the order of at least \$10,000, however this may vary considerably depending on how where the pipe is re-diverted to.

Initial cost estimates for line marking of the public carpark (Condition 9 of DA 2012/348) are in the order of \$2,000.

Cost estimates for re-diversion of the sewer rising main are in the order of at least \$60,000.

All up the cost of these works (stormwater, line marking and sewer) could be in the order of \$80,000. Should Council resolve to take responsibility for the cost, these works funds could be funded from the Property Development Reserve. There are adequate funds in this Reserve for this work.

It is a fair assumption that any lease negotiated will provide a site free of encumbrances, therefore it could be considered reasonable for Council to finance the stormwater pipe and sewer rising main works.

These works will benefit both the Council owned site, along with our infrastructure.

The line marking also benefits a Council car park and at a relatively small cost, the expenditure of these monies could also seen to be as reasonable.

10.5 Shellys on the Beach - Site Works

It should also be remembered that Council expended approximately \$250,000 acquiring an area of the adjoining crown reserve to allow the longer term lease option to be available to Fishheads, along with providing enough lease area for the proposed building to be located on the site.

This expenditure has resulted in Council now owning the complete site as freehold land which means all lease income is returned to Council, whereas prior to this acquisition the lease income was distributed between Council and the Crown.

If Council does resolve to finance the infrastructure and car parking works, but not the construction of the building, Mr Mamone will then have at least three options open to him:

1. Proceed with his proposed and approved café building as is, or in a scaled down more viable version
2. Sell his lease interest on to a third party who can proceed with the project or another project; or
3. Surrender his current lease back to Council.

Should Mr Mamone seek to proceed with option one, Council could consider offering a lease term longer than 20 years to assist him in securing construction finance.

Sustainability Considerations

- **Environment**
Any development in this location needs to be mindful of the environmental impacts.
- **Social**
The Shellys on the Beach Café, when operating, contributed to the social framework in Ballina Shire.
- **Economic**
A café in this location is a tourism attraction for the Shire, along with providing a revenue stream to Council.

Legal / Resource / Financial Implications

The cost of relocating the stormwater pipe, line marking of the carpark and relocating the sewer rising main could be in the order of \$80,000. Should Council resolve to take responsibility for the cost these works, funds for doing so could be allocated from the Property Development Reserve.

There is a sufficient buffer or contingency in this Reserve to fund works of this magnitude.

Consultation

There have been on-going and extensive discussions with Mr Mamone.

10.5 Shellys on the Beach - Site Works

Options

1. That Council take responsibility for the cost of complying with Conditions 9 and 14 of DA 2012/348 as well as relocating the sewer rising main that runs through the Shellys on the Beach Site. The funds for these works to be allocated from the Property Development Reserve.

This option is recommended as it is considered fair and reasonable for a tenant paying market rental for a site to expect that site to be unencumbered, with the works also benefiting Council assets and infrastructure.

2. That Council not take responsibility for the cost of complying with Conditions 9 and 14 of DA 2012/348 or relocating the sewer rising main that runs through the Shellys on the Beach Site.

This option is not recommended as it is preferred to adopt a co-operative approach.

Finally it is also important that Council makes it very clear that it is not prepared to finance the construction of a new café on this site.

Council does not have funds for this project identified in its Long Term Financial Plan and there is the risk that the café, as proposed by Mr Mamone, may not be financially viable.

Council would need to be generating at least a 5% return on an investment of \$900,000 to make it remotely viable.

Once the value of the existing site and the cost of the new café are combined the overall rental required to generate a reasonable return for Council is not considered viable for this location, with discussions with Mr Mamone highlighting his concerns over any major increase in the existing lease rental.

The one remaining issue that has been discussed is Council paying for the tidying up of this site. The allocation of funding for that work is not supported as it is the lessee's responsibility to maintain the leased area. The infrastructure works proposed may help with tidying up some of the site but in the meantime Council should still ensure that the lessee meets his obligations and maintains the site in a fair and reasonable condition.

10.5 Shellys on the Beach - Site Works

RECOMMENDATIONS

1. That Council authorises the General Manager to implement the works associated with Conditions 9 and 14 of DA 2012/348 as well as relocating the sewer rising main that runs through the Shellys on the Beach Site.
2. The funds for these works to be allocated from the Property Development Reserve, at an estimated cost of \$80,000.
3. That Council confirms that it is not supportive of providing any financing for the construction of a new building / café on this site.
4. That the General Manager take all necessary actions, as per the existing lease, to ensure that the lessee maintains the site in a fair and reasonable condition.

Attachment(s)

Nil

4.2 Disposal of Surplus Council Land

4.2 Disposal of Surplus Council Land

Delivery Program Commercial Services

Objective To determine if Council wishes to dispose of surplus land.

Background

In July 2014 Council resolved at its Ordinary Meeting to commence the process for reclassification of a number of parcels of land from Community Land to Operational Land under the provisions of the Local Government Act 1993).

These parcels of land are generally used for buffer zones and infrastructure such as water reservoirs and pump stations.

This reclassification process has now been completed and the purpose of this report is to examine whether Council wishes to dispose of surplus land.

Key Issues

- Need for land
- Disposal options

Information

Council recently reclassified a number of parcels of land from Community Land to Operational Land as per the provisions of the Local Government Act 1993.

This process allows the classification of the land to be more consistent with its current or proposed land use.

A number of these parcels have been identified as surplus to Council's needs.

An independent valuer was appointed to undertake open market valuations of the parcels of land. This process has now been completed.

Two of these parcels of land adjoin childcare centres and have been under long term leases. These parcels were leased to the childcare centres over twenty years ago, have been fenced off and are not available for general community use.

One of the childcare centre operators approached Council about acquiring the land they lease.

Accordingly, Council staff initiated a sale negotiation process with the operators of both childcare centres, as each lease has expired.

Details pertaining to the parcels of land are noted as follows and plans for same are **attached**:

4.2 Disposal of Surplus Council Land

Property Description	Lessee	Area	Lease Details
Lot 104 DP 871675, rear of 34-36 Links Avenue, East Ballina	Goodstart Early Learning	428m ²	21 year lease, commenced 1 April 1996 Playground for childcare centre
Lot 1 DP 850774, Westland Drive, West Ballina	Roman Catholic Church	936.8m ²	21 year lease, commenced 1 April 1994

Council staff have conducted negotiations with representatives from both childcare centres regarding potential sales.

Sale prices have been negotiated with both childcare centres for the respective parcels they lease. Details pertaining to those prices are contained in a confidential report included in this meeting agenda.

Legal / Resource / Financial Implications

The parcels of land are classified as operational land and as such Council is free to sell them.

Proceeds from the sale of these properties will be allocated to the Community Infrastructure Reserve to assist with funding the provision of community infrastructure.

Consultation

Council has undertaken consultation with both childcare centre operators. A consultation process was also undertaken in respect to the reclassification of the land from community to operational.

Options

This report provides an overview of the land parcels. The confidential report later in this agenda seeks Council approval to sell the land for the negotiated prices.


RECOMMENDATION

That Council notes the contents of this report in respect to the disposal of surplus parcels of land.

Attachment(s)




1. Locality Plan - West Ballina Childcare Centre
2. Locality Plan - East Ballina Childcare Centre

4.2 Disposal of Surplus Council Land



Westland Dr

Barlows Rd

		<p data-bbox="566 1713 1093 1742">Lot 1 DP 850774 - Roman Catholic Church</p>	
<p data-bbox="263 1780 1061 1825"><small>DISCLAIMER © Land & Property Information 2017 Although all care is taken in the preparation of this plan, Ballina Shire Council accepts no responsibility for any misprints, errors, omissions or inaccuracies. The information contained within this plan is for pictorial representation only. Do not scale. Accurate measurements should be undertaken by survey.</small></p>		<p data-bbox="1157 1780 1252 1825">Printed 26/05/2017</p>	

4.2 Disposal of Surplus Council Land



Lot 104 DP 871675 - Goodstart Early Learning



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26/05/2017

5. 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:

5.1 Shellys on the Beach Lease - Update

Refer to item 4.1 of this agenda.

5.2 Disposal of Surplus Council Land - Pricing

Refer to item 4.2 of this 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.

5.1 Shellys on the Beach Lease - Update

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 commercial leasing matters are to be discussed.

5.2 Disposal of Surplus Council Land - Pricing

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 Council is in the process of negotiating a sale for the properties in question.