

TITLE: [PR-PC] Development Application DA05/0223.05 for an Amendment to Development Consent DA05/0223 for a Restaurant at Lot 1 DP 553728, No. 4 Wharf Street, Tweed Heads

ORIGIN:

Development Assessment

FILE NO: DA05/0223 Pt2

SUMMARY OF REPORT:

In late 2008, Council was made aware of unauthorised building works at the existing approved restaurant adjacent to the Jack Evans Boatharbour. An investigation into the works was undertaken, with the proprietor of the premises being advised that an application to modify Development Consent DA05/0223 was required. This was to be accompanied with a Building Certificate application for the unauthorised works, as well as a Construction Certificate for any further building works. In addition, all outstanding contribution fees relating to DA05/0223 were to be paid immediately. It has also since come to Council's attention that there are lap dancing activities being conducted within the premises, which requires development consent for the purposes of entertainment.

An application to modify the original approval by way of internal and external building modifications and use of the premises was subsequently lodged by the applicant. An assessment of the S96 application has determined that the proposed modifications are not substantially the same as the original approval. Council has also received several letters of complaint about the use of the existing building, being unauthorised and inappropriate in this locality, adjacent to the family oriented Chris Cunningham Park and Jack Evans Boatharbour.

In addition, the applicant has declined to make any further payment of contribution fees or submit the appropriate development application relating to Place of Public Entertainment (POPE) requirements. The following report addresses the issues and reasons for recommending refusal of the proposed amendments.

RECOMMENDATION:

That: -

- A. Development Application DA05/0223.05 for an amendment to Development Consent DA05/0223 for a restaurant at Lot 1 DP 553728, No. 4 Wharf Street Tweed Heads be refused for the following reasons: -**
- 1. The proposed modification is not considered to be in accordance with the provisions of Clause 8 and 11 of the Tweed Local Environmental Plan 2000, relating to consent considerations and zone objectives.**
 - 2. The proposed modification is not considered to be in accordance with the provisions of Section 96(1)(a) of the Environmental Planning & Assessment Act 1979, in that it is not substantially the same development as that originally approved under DA05/0223.**

3. The proposed modification is not considered to be in the public interest.
- B. Council initiates legal action through Council's Solicitors in relation to:**
1. Unauthorised building works;
 2. The premises being used in a different manner from the original consent; and
 3. Outstanding contribution fees.

REPORT:

Applicant: Mr A Wright
Owner: Mr AB Warner and Mrs AM Warner
Location: Lot 1 DP 553728 No. 4 Wharf Street, Tweed Heads
Zoning: 3(e) Special Tourist (Jack Evans Boat Harbour)
Cost: Nil

BACKGROUND:

The subject site is located adjacent to the Chris Cunningham Park and Jack Evans Boat Harbour, opposite Centro Tweed (Tweed Mall) on Wharf Street, Tweed Heads. The existing single storey building was previously a Tourist Information Centre, as well as the sales office for the Latitude 28 proposal, which is now the Ultima site.

On 8 June 2005, Council's Development Assessment Panel issued development consent DA05/0223 for a restaurant known as "*Wright on the Water*" at 4 Wharf Street, Tweed Heads. The original approval was for the installation of a commercial kitchen to run a Steakhouse Restaurant from the existing building. The approval was for two stages of development. Stage 1 involved: the installation of a kitchen and bar within the existing building; the replacement of part of the northern and eastern external walls with retractable doors; and the installation of the services and refuse enclosure on the southern side of the building. Stage 2 incorporated: the construction of a 4.5m wide roofed terrace along the northern and eastern elevations for alfresco dining; and an additional unisex disabled toilet.

At the request of the applicant (and due to parking limitations on the subject site), the proposed use of the restaurant was limited to 40 diners as a condition of consent. The applicant had requested such a limit as it would allow them to '*provide a comfortable dining experience rather than catering for volume*'. The approval included 24 hour trading to allow the restaurant to cater for: late shift workers in the hospitality trade and late night eaters; and to offer early morning breakfast to shift workers and early morning risers. A condition of consent was applied limiting the 24 hour trading to a period of twelve months.

The approval also incorporated development contribution fees, to be paid prior to the release of Construction Certificates for both stages. It should be noted that a substantial amount (\$31, 249.20) of contribution fees remain outstanding to date.

Council's Compliance Officer investigated a complaint regarding unauthorised construction activities in December 2008. The Lessee of the premises (Mr Adrian Wright) and Lessor (Mr Warren Armstrong) were advised that Council records indicated that a Construction Certificate had not been issued for Stage 2 of the development, contribution fees were to be paid (after being recalculated) and the external colour scheme and signage details had to be approved prior to the release of the Construction Certificate for Stage 2.

Further investigation in January 2009 revealed that unauthorised works (beyond that approved under DA05/0223) had been undertaken, involving the following:

- An increase in deck area (and construction of timber deck rather than masonry deck).
- The disabled toilet as constructed does not comply with Australian standards.

- The approved internal configuration of the restaurant has been altered. The changes relate to: a new office (constructed without approval & is not in accordance with BCA requirements); the deletion of kitchen & cool room; and new bar location.
- The external plant area has not been constructed in accordance with approved plans. It is now much larger and incorporates a cool room (which does not comply with the BCA) and unauthorised plumbing works involving a hot water service and basin.
- No roof water drainage provided over the external plant area, which is now partially located over the trade waste treatment device.

A site meeting was held on 17 February 2009 between the Lessor (Warren Armstrong) and several Council officers. Mr Armstrong stated at the meeting that the Lessee (Adrian Wright) was no longer involved with the running of the restaurant (now known as the “iBar”). Mr Armstrong was advised of the abovementioned outstanding issues relating to unauthorised works and payment of contributions. It was agreed at that site meeting that an application to modify Development Consent DA05/0223 and Building Certificate application were required for the unauthorised works immediately (based on the use of the premises as a ‘restaurant’). It was also verbally agreed that the restaurant could continue to operate while the S96 application was being processed, noting that the outstanding contribution fees were also to be immediately paid.

At the abovementioned site meeting, Mr Armstrong briefly discussed whether ‘lap dancing’ would be permissible within the restaurant. Council’s Development Assessment Unit advised that all uses of the site should be incorporated within the S96 application, to be assessed on merit. Mr Armstrong was also advised that a Place of Public Entertainment (POPE) licence would be required and that the use of a building as a place of public entertainment could be carried out only with development consent (separate to the S96 application).

Further written confirmation of the requirements (S96 application, outstanding contribution fees etc) were issued to Mr Armstrong in March 2009, noting that legal action may be instigated if urgent action was not undertaken to resolve the matters.

PROPOSED DEVELOPMENT:

An application to modify Development Consent DA05/0223 was submitted to Council on 19 March 2009. It should be noted that the applicant has been identified as the Lessee rather than the Lessor of the premises.

The modifications sought are as follows:

- Replace the approved external masonry deck with a timber deck, by way of constructing the timber deck above and over the existing masonry deck. In addition, it is proposed to increase the size of the timber deck by an additional 18m²;
- Extend the roof area over the deck area to cover the entire deck. The roof is proposed to be pitched;
- The internal dining area is to be removed and all dining now on the external deck, with casual dining inside. The stacking doors removed and replaced with walls. Other internal dining walls to lounge area also proposed;
- Bar area moved and increased in size, and kitchen moved;
- Waiting area deleted;

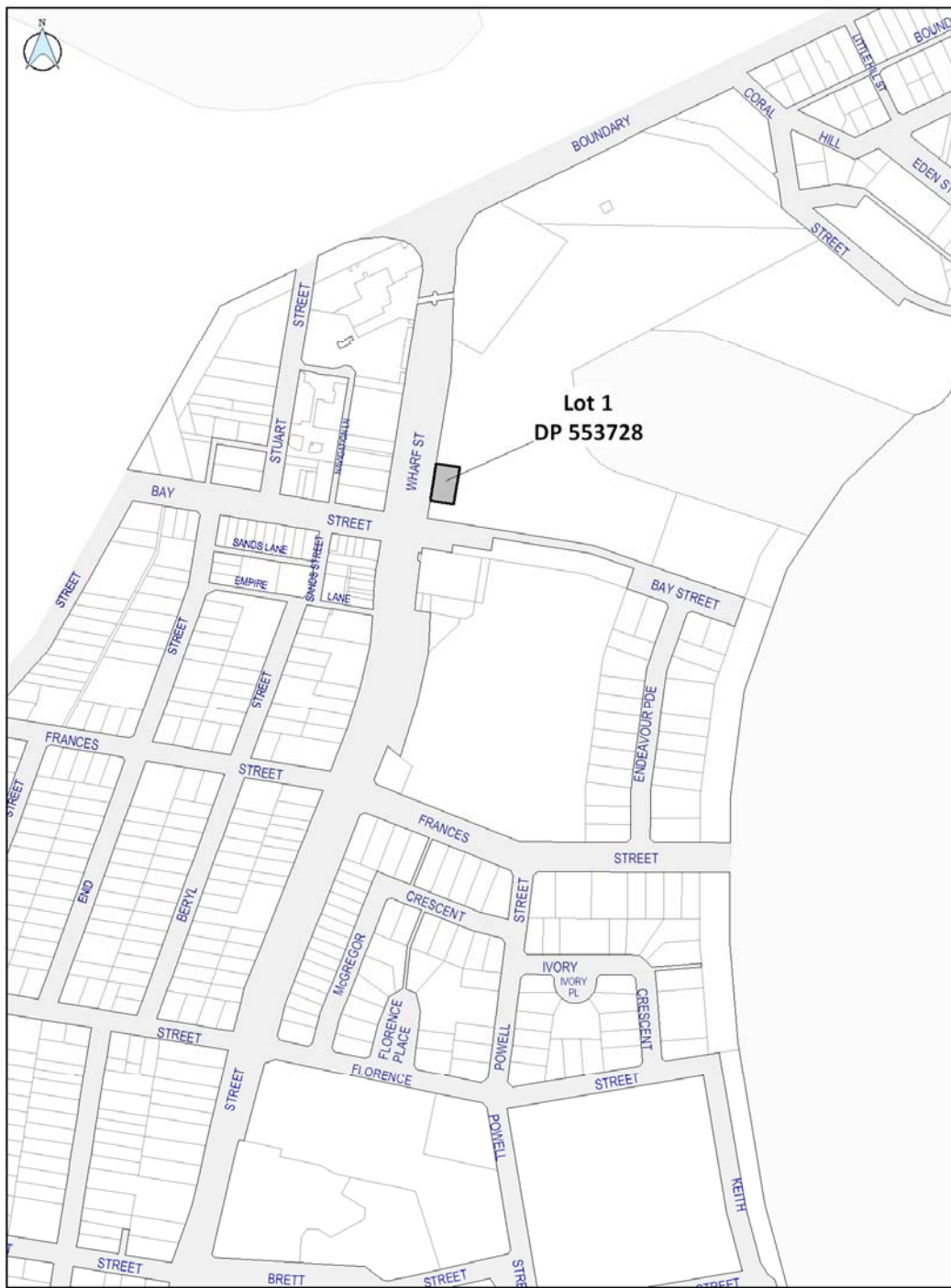
- Office added near entry, adjacent to toilet facilities. An external fan proposed to meet BCA requirements;
- Additional unisex toilet added;
- Increase area of the approved service and refuse area on southern side of the building from 6m² to 43m², to be used for storage, refuse, cool room and cleaners amenities;
- Relocate the cool room from within the main building to the service and refuse area noted above;
- Continue 24 hour trading, requiring the removal of Conditions 6 and 7 from the consent.

Rather than submitting documentation for approval regarding external colours and proposed signage, the applicant submitted photos of the external appearance of building with regard colours and signage already undertaken.

A Building Certificate (for the unauthorised building works already undertaken), an amended Construction Certificate (for any additional building works yet to be constructed), a Sewer application and POPE application (lodged under the Local Government Act 1993) were also submitted to Council for consideration.

Payment of outstanding contribution fees did not accompany the lodgement of the S96 application, despite repeated requests from Council.

SITE DIAGRAM:



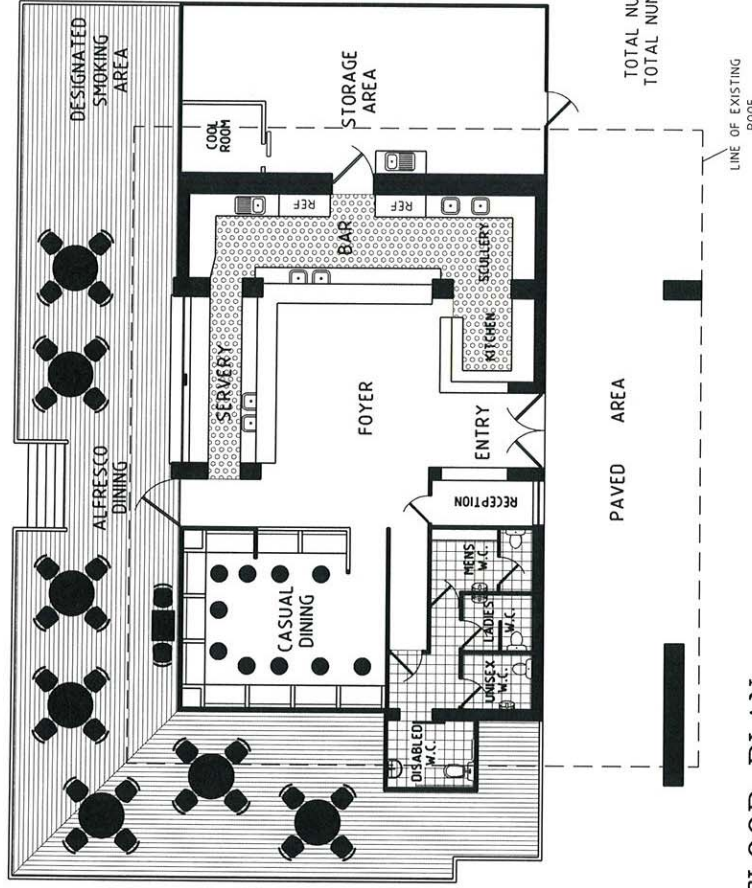
**Lot 1
DP 553728**

<p>© TWEED SHIRE COUNCIL 2009 Although all care has been taken with the production of this map, the TWEED SHIRE COUNCIL, its Employees, Officers and Consultants can not be Responsible for any Errors, Omissions or Inaccuracies in respect to the information supplied in this map. DO NOT SCALE COPY ONLY - NOT CERTIFIED</p>	<p><i>Tweed Shire Council</i> Lot 1 DP 553728 4 Wharf Street, Tweed Heads</p>	<p>Site Plan  </p>
<p>P.O. Box 816 Murwillumbah NSW 2484 Tel: (02) 6670 2409 Fax: (02) 6670 2483</p>	<p>File: Z:\GIS_Jobs\Site Plan.Wor Author: J. Batchelor Date: 30/March/2009 Scale: 1:5,000</p>	<p>Sheet: 1 of 1</p>

PROPOSED INTERNAL LAYOUT:

RECEIVED 15.5.09
BY E-MAIL.

NOTE - ALL DIMENSIONS TO BE
VERIFIED BY BUILDER PRIOR TO
COMMENCEMENT OF WORK



FLOOR PLAN

TOTAL FLOOR AREA - 186.6 m²

TOTAL ALFRESCO DECK AREA - 134.3 m²

NOTE - ALL BUILDING WORKS SHALL COMPLY WITH THE RELEVANT
AUSTRALIAN STANDARDS AND THE REQUIREMENTS OF
THE BUILDING CODE OF AUSTRALIA.
ALL LEVELS ARE IN METRES AND ARE BASED ON AN
ASSUMED HEIGHT DATUM.

TOTAL NUMBER CASUAL DINERS ~ 10
TOTAL NUMBER ALFRESCO DINERS ~ 30

CLIENT	I BAR		
PROPERTY DESCRIPTION	PROPOSED RESTAURANT ON LOT 1 D.P. 553728 No. 4, WHARF STREET, TWEED HEADS.		
SCALE	1:100	REF	G2650
DATE	20.4.09	DATE	20.4.09
SHEET	1 of 1	DATE	20.4.09
<p>GAVIN DUFFIE CONTRACT DRAFTSMAN</p> <p>26 MURRABA CRES. TWEED HEADS 2485. PH.-07 55368203 FAX.-07 55362800</p>			

CONSIDERATIONS UNDER SECTION 79C OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

Tweed Local Environmental Plan 2000

Clause 11 – Zone Objectives

Clause 11 of the LEP relates to zone objectives. The subject land is zoned 3(e) Special Tourist (Jack Evans Boatharbour) under the provisions of the LEP. The primary objective of the zone is to:

‘Provide for tourist orientated commercial, retail, service, residential and waterfront facilities and activities and public buildings which support and are an integral part of the renewal of certain areas in the vicinity of the Jack Evans Boatharbour, but only at a scale which enhances the character of the locality’.

A restaurant is defined as a Refreshment Room, which is permissible with consent under the provisions of the Tweed LEP 2000. The applicant has proposed modifications the original approval for a restaurant on the subject site. However, the proposed use of the existing building is not considered to be consistent with the zone objectives. Although the proposed modifications state that the use of the site is that of a restaurant, the nature of the ‘explicit restaurant’ is not considered to enhance the character of the locality.

The original approval related to a ‘Steakhouse Restaurant’ was based on a maximum of 40 diners at any one time. The main intent of the restaurant was to provide diners with a meal in a unique position within Tweed Heads CBD. The proposed modifications result in the premises no longer being a dining experience. Rather, the internal configurations result in the premises largely being a bar, with minimal kitchen facilities proposed.

The additional use of the premises as a Place of Public Entertainment (incorporating lap dancing) is not considered to meet the provisions of the zone objectives. The number of complaints and submissions received against the development support this view.

The proposed Jack Evans Boatharbour Revitalisation Project is currently on public exhibition. The Boatharbour project will create a diverse, vibrant, culturally rich, recreational and tourism centrepiece for the Tweed Heads Town Centre. It is unlikely that the proposed ‘explicit restaurant’ would enhance the character of the ‘centrepiece’ of Tweed Heads or entice tourists to visit the recently approved Tweed Heads Tourist Information Centre (located directly adjacent to the subject site), which is soon to be constructed. As such, the proposed development is not considered to meet the objectives of Clause 11 and the S96 application is not supported.

Clause 8 – Consent Considerations

This clause specifies that the consent authority may grant consent to development (other than development specified in Item 3 of the table to clause 11) only if:

- (a) *it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and*
- (b) *it has considered that those other aims and objectives of this plan (the TLEP) that are relevant to the development, and*
- (c) *it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.*

As noted above, Council's Development Assessment Unit is not satisfied that the development is consistent with the primary objective of the 3(e) zone, thereby the proposal is not considered to be consistent with Clause 8(a) of the LEP and the application is recommended for refusal.

Other relevant clauses of the TLEP have been considered elsewhere in this report.

In addition to the above, Council's Development Assessment Unit is not satisfied that the proposed development would not have an unacceptable cumulative impact on the locality or the community as a whole. As such, the proposal is not considered to meet the provisions of Clause 8(c) of the LEP.

Clause 17 - Social Impact Assessment

The objective of Clause 17 is to ensure proper consideration of development that may have a significant social or economic impact. The clause notes that when a proposed development is considered likely to have a significant social impact in the locality, a socio-economic impact statement in respect of the proposed development is required. The applicant has not provided a socio-impact statement for Council's consideration. In light of the likely impacts (noted below) and submissions received against the proposed use of the premises, the proposal is not considered to have met the provisions of Clause 17 of the LEP, and as such is not supported.

Likely Impacts

Car Parking

The subject site has provision for only five (5) off-street car spaces. The original application identified a maximum of 40 diners only, which generated a need for 16 car spaces. However, significant deductions (70%) were applicable at the time, reducing the requirement to five spaces. Those reductions are no longer applicable under the current Car Parking Code (DCP A2). If the same application for 40 diners (based on 166m² in floor area + 3 staff) was lodged today, the minimum car parking requirement would be nineteen (19) spaces. Given the subject site only has provision for five spaces, it would be unlikely to be supported.

Although the proposed amendments identify the modified 'dining' area to now be 106m², no detail has been provided regarding staff numbers. As such, a final carparking analysis cannot be undertaken. However, based on the customer provisions alone, 106m² of dining area generates a minimum of sixteen (16) car spaces on site. Even if the Tweed Heads Local Area Concession (30% reduction) was applied to this figure, eleven (11) spaces are required for customers, in addition to staff parking. As such, the proposed modifications are not considered to meet the provisions of DCP A2.

Further to the above, the proprietor of the building has identified the premises as having 200 customers on site. This is corroborated by a recent POPE application lodged by Mr Armstrong (which has since been rejected), which notes internal seating and standing as 20 persons and 50 persons respectively, and external seating and standing as 50 persons and 80 standing respectively. In addition, recent inspections carried out by Tweed Police have identified at least on one occasion, approximately 200 patrons at the premises.

In light of the above, the proposed modifications and use of the subject site are not considered to meet the provisions of DCP A2, and are not supported.

Noise Impact

The original approval was conditioned such that no live or amplified music was permitted without the prior approval of Council. This condition was applied to ensure the amenity of existing and future residents within nearby residential development on the western side of Wharf Street (Ultima) and to the east (Seascope). Council officers have been made aware of live music being played at the premises on occasions, and an A-frame notice board identifying live music seen outside the premises when the unauthorised works were taking place. The proposed modifications make no reference to noise impact at all, therefore no further assessment can be undertaken in this regard. As such, the proposal is not supported.

Hours of Operation

As a result of the original applicant requesting 24 hour trading to allow the restaurant to cater for: late shift workers in the hospitality trade and late night eaters; and to offer early morning breakfast to shift workers and early morning risers, Council's Environment & Health Unit applied a condition of consent limiting the 24 hour trading to a period of twelve months. This would allow Council to assess the impact of the trading hours and modify the hours of operation accordingly. An additional condition was applied, requiring the applicant to lodge a S96 application 90 days prior to the 12 month period lapsing. No application was received within the 12 month time frame.

The proposed modifications have requested a continuation of the 24 hour trading provision. However, as the application is not considered to be substantially the same (as discussed in detail later in this report) this issue has not been forwarded to Council's Environment & Health Unit for further consideration. In any event, recent advertisements within local newspapers have identified the premises as operating from 5pm til late.

Number of Patrons

As noted above in the carparking assessment, the original approval was limited to 40 diners. Although no provision was made within the S96 application with regard to patron numbers, Council records indicate that the proprietor has every intention of providing for up to 200 patrons. This leads to potential impacts from lack of off-street parking; noise; and potential security issues arising when customers leave the premises. In the absence of confirmed patron numbers and proposed management plan in place, the proposed development is not supported.

Place of Public Entertainment

The proposed use of the premises for the purposes of lap dancing results in the need for a Place of Public Entertainment (POPE) licence. The proposed internal reconfiguration identifies a 'casual dining area' inside the building, where lap dancing takes place. In accordance with the provisions of the Department of Planning's Planning Circular PS08-012, an area for entertainment purposes which has '*a character of its own*' or is a '*distinctly separate room*', that part of the premises may be properly described as being used '*for the purpose of entertainment*' and would need to be approved for that use under the Environmental Planning & Assessment Act 1979.

As such, the use of the casual dining area for lap dancing purposes is considered to be defined as a place of public entertainment. The subject site does not have a POPE licence that was granted before 26 October 2007. Therefore, development consent is required for a POPE, as noted above. Further to the applicant being made aware of this requirement, Council has been advised that the internal walls of the lounge area have been removed, seemingly in an effort to bypass POPE requirements. However, lap dancing continues within the premises, with Tweed Police advising that the...'*lap dance area is clearly visible from the front door now*'. When asked about the removal of the internal walls, the applicant acknowledged that they had been taken down and that an

amended floor plan will be submitted. The amended floor plan was received on 15 May 2009.

Despite the removal of the internal walls, development consent is still required for the premises as it is being used for the purpose of entertainment, as noted above. Council's Building Unit has also notified the applicant that his POPE application (lodged under the Local Government Act) is rejected and a development application must be lodged with Council for the proposed use and assessed against the provisions of State Environmental Planning Policy (Temporary Structures and Places of Public Entertainment) 2007.

Site Suitability

As noted above under zone objectives, the proposed use of the subject site is not considered appropriate for the surrounding area. The use is not considered to meet the objectives of the zone in that it does not enhance the character of the adjacent Jack Evans Boatharbour.

Contribution Fees

Appropriate contribution fees were applied to the original restaurant, based on the approved layout. Only S94 (TRCP) contributions were paid for Stage 1, with S64 (Water and Sewer) contributions remaining as unpaid contributions. Out of date Stage 2 contributions were paid prior to them being recalculated. As such, a substantial amount (\$31,249.20) of recalculated fees is yet to be paid, despite continual requests from Council. The figure of \$31,249.20 is based on the original layout approved under DA05/0223.

The proposed modifications result in additional floor area to that originally calculated. Based on the applicant's reconfigured layout, an assessment has been undertaken with regard the modified contributions (taking into account fees already paid), resulting in a combined contribution fee of \$38,864.20 being applicable if the proposed development was supported.

CONSIDERATIONS UNDER SECTION 96(1)(a) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979:

Section 96 (1A) of the Act states that in order to grant consent, the consent authority must consider the following:

- "(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 and*
- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations."*

Likely Environmental Impact

As noted above under S79c considerations, Council's Development Assessment Unit is not satisfied that the proposed modifications are of minimal environmental impact, such that refusal of this application is recommended along with legal action regarding unauthorised works and unpaid contributions.

Substantially the Same Development

The applicant has noted the following:

'It is considered that the proposed modifications are substantially the same development to that approved by DA05/0223 and do not raise any significant planning implications. As such it is considered that the modifications can be determined under Section 96 of the Environmental Planning and Assessment Act, 1979'.

The above statement provided by the applicant is not supported. The changes to the internal layout and additional building works undertaken to date, along with the use of the premises are not considered to be substantially the same as that approved under DA05/0223.

The original restaurant included: a 30m² commercial kitchen and internal coolroom; a 6.6m² bar area; internal dining area; 125m² external terrace; and a 6m² external services & refuse enclosure. The proposed development incorporates: a 12m² preparation area identified as a 'kitchen'; a 30m² bar area; an internal casual dining area (lap dancing); an external timber deck (18m² larger than originally approved); and a 43m² external services / refuse area (including cool room). In addition to the physical changes to the building not being substantially the same, the use of the premises is questionable in terms of not having the same 'essence or character' as the originally approved development.

The applicant was notified in writing on 8 April 2009 that the proposed S96 application was not acceptable in terms of the proposed development not being 'substantially the same' development and should be withdrawn. In addition, the applicant was advised that a new development application should be lodged, clearly identifying the proposed new layout of the premises and the use of each part of the building. The new application would have to address issues such as zone objectives, parking, noise, trading hours, patron numbers, POPE requirements and payment of contributions.

Despite Council's advice, the applicant has disregarded the issues raised by Council in terms of a new development application and have requested that the S96 application proceed as lodged.

Notification/Submissions

As a result of the proposed modifications not being considered as 'substantially the same' as the original approval, the application to modify DA05/0223 has not been placed on public exhibition. Despite this, Council records indicate that MP Justine Elliot's office has received several complaints about the proposed use of the premises, in addition to several written submissions lodged directly to Council. The following is a summary of the issues raised by the submissions:

- Complaints from customers (locals & tourists) of nearby retail premises that this type of establishment is allowed to operate;
- Noise impact during the unauthorised construction;
- Noise impact from live & amplified music on Friday and Saturday nights, often until after midnight;
- No security / management in place when customers leave the premises;
- The premises is a pub, not a restaurant;
- Often have large crowds – fire hazard;
- Scantily clad women soliciting out the front of the premises; and
- Lap dancing premises in full view of the adjoining family park.

PUBLIC INTEREST:

As noted above, the proposed modifications are not supported in terms of non compliance with regard to: zone objectives; potential impacts upon the surrounding environment; site suitability; and satisfying S96 provisions. The applicant has been repeatedly requested to withdraw this application and lodge a new development application. The applicant's disregard of these requests, the continual unauthorised use of the premises and non payment of outstanding contribution fees is not considered to be in the public interest.

OPTIONS:

1. Refuse the proposed modifications to Development Consent DA05/0223; and
2. Initiate legal action through Council's Solicitor's in relation to: unauthorised building works; unauthorised use of the building; and outstanding contributions fees; or
3. Approve the S96 application.

LEGAL/RESOURCE/FINANCIAL IMPLICATIONS:

The applicant has a right of appeal in the NSW Land and Environment Court if dissatisfied with the determination.

POLICY IMPLICATIONS:

Nil.

CONCLUSION:

The proposed modifications to amend Development Consent DA06/1442 are not considered to meet the provisions of S79C or S96 (1A) of the Environmental Planning and Assessment Act 1979. As such, the proposed modifications are not supported and

are subsequently recommended for refusal. Legal action is recommended with regard to unauthorised building works; unauthorised use of the building; and outstanding contributions fees.

UNDER SEPARATE COVER/FURTHER INFORMATION:

*To view any "**non confidential**" attachments listed below, access the meetings link on Council's website www.tweed.nsw.gov.au or visit Council's offices at Tweed Heads or Murwillumbah (from Friday the week before the meeting) or Council's libraries (from Monday the week of the meeting).*

Nil.
