

Mayor: Cr K Milne

Councillors: P Allsop
R Byrnes
C Cherry (Deputy Mayor)
R Cooper
J Owen
W Polglase

LATE Agenda

**Planning Committee Meeting
Thursday, 5 December 2019**

held at
Harvard Room, Tweed Heads Administration Building, Brett Street, Tweed Heads
commencing at 5.30pm

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 - Section 4.15 Evaluation

(1) **Matters for consideration—general**

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
 - (i) any environmental planning instrument, and
 - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
 - (iii) any development control plan, and
 - (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and
 - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
 - (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations, (e) the public interest.

Note. See section 75P(2)(a) for circumstances in which determination of development application to be generally consistent with approved concept plan for a project under Part 3A.

(2) **Compliance with non-discretionary development standards—development other than complying development.**

If an environmental planning instrument or a regulation contains non-discretionary development standards and development, not being complying development, the subject of a development application complies with those standards, the consent authority:

- (a) is not entitled to take those standards into further consideration in determining the development application, and
- (b) must not refuse the application on the ground that the development does not comply with those standards, and
- (c) must not impose a condition of consent that has the same, or substantially the same, effect as those standards but is more onerous than those standards,

and the discretion of the consent authority under this section and section 4.16 is limited accordingly.

(3) If an environmental planning instrument or a regulation contains non-discretionary development standards and development the subject of a development application does not comply with those standards:

- (a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and
- (b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

Note. The application of non-discretionary development standards to complying development is dealt with in section 4.28 (3) and (4).

(3A) **Development control plans**

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and
- (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and
- (c) may consider those provisions only in connection with the assessment of that development application.

In this subsection, **standards** include performance criteria.

(4) **Consent where an accreditation is in force**

A consent authority must not refuse to grant consent to development on the ground that any building product or system relating to the development does not comply with a requirement of the *Building Code of Australia* if the building product or system is accredited in respect of that requirement in accordance with the regulations.

- (5) A consent authority and an employee of a consent authority do not incur any liability as a consequence of acting in accordance with subsection (4).

(6) **Definitions**

In this section:

- (a) reference to development extends to include a reference to the building, work, use or land proposed to be erected, carried out, undertaken or subdivided, respectively, pursuant to the grant of consent to a development application, and
- (b) **non-discretionary development standards** means development standards that are identified in an environmental planning instrument or a regulation as non-discretionary development standards.

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Items for Consideration of the Planning Committee:

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LATE ITEMS

12 LATE [PR-PC] Breach of Condition of Consent DA06/1014.11 at Lot 3 DP 541945 64 Mount Warning Road, Mount Warning (Mavis's Kitchen)

SUBMITTED BY: Development Assessment and Compliance

mhm



People, places and moving around

Who we are and how we live

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

3	People, places and moving around
3.1	People
3.1.4	Compliance Services - To support a safe and healthy built and natural environment through the enforcement of local government rules and regulations.

ROLE: **Provider**

SUMMARY OF REPORT:

A meeting was held on Wednesday, 20 November 2019 with complainants in respect of the recent operations relating to Mavis' Kitchen.

The key concerns the complainants raised were excessive noise generation, operating outside the hours of consent, and the permissibility of an increasing number of functions and events on the site. A number of these concerns appear to be legitimate, and Council has been conducting compliance investigations in relation to Mavis' Kitchen not operating within the approved consent.

The complainants advised Council staff that Mavis' Kitchen would be operating outside their hours of the approved consent (DA06/1014.11) on Wednesday, 20 November 2019 as it stated on their website that they are 'busy' for that night.

Council's Compliance Officer followed up on this claim with the owners. The owners have admitted that the restaurant operated beyond their approved operating hours on Wednesday, 20 November 2019.

Notwithstanding above, the site owners have agreed to lodge a Development Application (DA) in order to seek approval for uses beyond the original approved DA. The owners have engaged in a planning consultant. A DA has recently been submitted, however Council have requested further information prior to lodgement. At the time of writing this report, it is expected to be received by Council no later than close of business of 29 November 2019.

RECOMMENDATION:

That Council, in respect of the breach of condition 76 of consent DA06/1014.11 at Lot 3 DP 541945 64 Mount Warning Road, Mount Warning (Mavis's Kitchen), endorse the following:

- 1. The property owners be issued with a Penalty Infringement Notice under the *Environmental Planning and Assessment Act 1979* for Development not in accordance with consent – individual being \$3000.00.**
- 2. ATTACHMENT 2 is CONFIDENTIAL in accordance with Section 10A(2) of the Local Government Act 1993, because it contains:-**
 - (g) advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege.**

REPORT:

A meeting was held on Wednesday, 20 November 2019 with complainants in respect of the recent operations relating to Mavis' Kitchen.

The complainants stated that there are ongoing noise amenity impacts. They highlighted that restaurant booking for Wednesday 20 November 2019 was booked out online which was likely to continue beyond the current approved operating hours of the original DA.

On Thursday, 21 November 2019, a Compliance Officer requested in writing that the owners provide information as to what time Mavis' Kitchen operated until on Wednesday, 20 November 2019.

On Monday, 25 November 2019, the owners of Mavis' Kitchen admitted to breaching their consent by operating outside of the approved hours of DA06/1014.11. The owners provided the following information:

Thanks for taking my call on Friday afternoon,

As discussed ,

- Yes Mavises was open for Dinner on Wednesday, 20 November 2019
- It was a private family dinner for Guests who were staying in **our accommodation** & across the road at **Mt Warning B&B**
- The group was 20 guests
- They returned to their accommodation at 10.00pm – or a little before
- Their names are Helen & Dan – I can provide their contact number if you require it?
- To be truthful I was confused with our allowed opening days as we recently were looking at our Liquor licence which allows operating to Midnight – Monday to Saturday
- Where I can see now that the council development consent allows to 6.00pm Monday to Fridays
- This was an honest mistake

Also as discussed we know these complaints are coming from a group of disgruntled residents of Mt Warning Road

They object to everything Mavises does

They have lodged complaints to Council regarding - Camping onsite

They have lodged complaints to Council regarding- Helicopter landings

They have lodged complaints to Council regarding - Functions – community events

They have lodged complaints to Council regarding – Noise complaints

They have lodged complaints to Council regarding – Markets

We have received numerous emails form them – see attached

And one anonymous threatening letter - see scanned copy of it attached

We have had our signs vandalised – see attached pics

I am sorry for this mistake & can honestly say it was NOT Intentional

We have lodged our D.A with the expectation of an extension of trading hours

A desktop analysis has been undertaken and it can be further confirmed via Mavis' Kitchen's website, that the hours of operation are not consistent with the approved conditions of consent.

Website hours

OPENING HOURS:

Breakfast: Wednesdays to Sundays,
8.30am - 11am

Morning tea: Wednesdays to Sundays,
8.30am - 11am

Lunch: Wednesdays to Sundays
from 11.30am

Afternoon tea: Wednesdays to
Sundays, from 2pm

Dinner: Friday & Saturdays from
5.30pm.

The restaurant is closed on Mondays
and Tuesdays.

Condition 76 of DA06/1014.11

76. Hours of operation of the business are restricted to the following hours: -

[USE0185]

- * 9am to 6pm - Mondays to Thursday
- * 9am to 10.30pm Fridays - Saturdays
- * 9am to 5 pm Sundays and Public Holidays
- * All deliveries and pickups relating to the business are to occur within the approved hours

[USE0185]

OPTIONS:

1. The property owners be issued with a Penalty Infringement Notice under the *Environmental Planning and Assessment Act 1979* for Development not in accordance with consent – individual being \$3000.00
2. Council send a warning letter to the property owner regarding compliance with the conditions of the development consent.

Option 1 is recommended

CONCLUSION:

The officers consider that there is sufficient evidence and grounds to issue a penalty infringement notice for this breach, as means of seeking ongoing compliance with the approved hours of consent.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable

b. Budget/Long Term Financial Plan:

If Option 1 is adopted and the penalty infringement notice is challenged, legal expenses will be incurred to defend to penalty infringement notice.

c. Legal:

Legal proceedings may be necessary if the penalty infringement notice is challenged.

d. Communication/Engagement:

Inform - We will keep you informed.

UNDER SEPARATE COVER/FURTHER INFORMATION:

Attachment 1.	Copy of the current consent DA06/1014.11 (ECM 6158877)
<i>Confidential Attachment 2.</i>	Email from owners of Mavis's Kitchen advising that they were not operating within the approved hours on 20 November 2019 (ECM 6158909)
Attachment 3	Combined Submissions (3) - Breach of Consent condition (ECM 6166700).
