

TITLE: [PR-CM] Development Application DA03/0476.02 for an Amendment to Development Consent DA03/0476 for the Establishment of an Art Gallery/Coffee Shop to Include a Refreshment Room & Extend Trading Hours on Saturdays Including the Option of Live Music at Lot 2 DP 575934 No. 17 Bambery Street, Fingal Head

SUBMITTED BY: Development Assessment

FILE NUMBER: DA03/0476 Pt4



Civic Leadership

SUMMARY OF REPORT:

Approval was granted in October 2003 for an art gallery/coffee shop to include a refreshment room and extend trading hours to 11.30pm on Saturdays including the option of live music.

Along with an outdoor dining area within the road reserve, the approval required three car spaces to be provided on site.

Following a complaint, the applicant was asked to re-instate the three spaces for the purposes of parking, as required under the conditions of development consent.

The applicant subsequently has lodged this application, proposing to delete all parking requirements from the subject site, as well as extending trading hours on Friday nights to 9.00pm and Sunday nights to 8.00pm.

Council staff have undertaken a thorough assessment of the proposed modifications against the provisions of Council's parking policy and do not support the removal of parking requirements from the development site.

Given the substantial amount of public submissions on this development application, Council's Director Planning and Regulation considered that it was appropriate to refer the matter to Council for determination.

This report highlights the issues raised by the proposed development and provides reasons for refusal of the proposed modifications.

RECOMMENDATION:

That:

A. Development Application DA03/0476.02 for an amendment to Development Consent DA03/0476 for the establishment of an art gallery/coffee shop to include a refreshment room and extend trading hours on Saturdays including the option of live music at Lot 2 DP 575934; No. 17 Bambery Street, Fingal Head be refused for the following reasons:

- 1. The proposed modification is not considered to be consistent with the provisions of Clause 8(1)(c) of Tweed Local Environmental Plan 2000, in that the deletion of onsite parking provisions would 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.**

- 2. The proposed modification is not considered to be in accordance with the provisions of Council's Development Control Plan Section A2 – Site Access and Parking Code, in that onsite parking provisions are not being maintained.**
- 3. The proposed modifications are considered not to be in the public interest, with regard to the precedent the proposal would set if parking requirements were removed.**
- 4. The proposed modification to extend trading hours is not supported, given the non-compliance with existing approved trading hours.**
- 5. The proposed modification to use the approved parking area for alternate uses is not supported, in that the area is required for on site car parking purposes.**

B. The applicant is formally advised in writing that:

- The three approved car spaces are to be reinstated on site;**
- The use of live music on a Sunday is to cease;**
- The development must comply with existing approved trading hours;**
- A Section 138 application must be submitted to Council for approval within 60 days of the date of the written notification in relation to all structures within the road reserve;**
- A development application must be submitted within 60 days of the date of the written notification in relation to all signage associated with the development.**

REPORT:

Applicant: Ms A McKay
Owner: Mr Richard B Steenson
Location: Lot 2 DP 575934 No. 17 Bambery Street, Fingal Head
Zoning: 2(a) Low Density Residential

BACKGROUND:

The subject site is located on Fingal Road, adjacent to the intersection with Bambery Street, overlooking the Tweed River to the west and adjacent reserve. The following is a summary of the history of the development of the site.

Existing Use

- 8 September 1993 – Council acknowledged that the marine showroom (Fingal Head Marine) had existing use rights.

D93/487

- Approved 25 March 1994 for the “*conversion of an existing commercial vacant building to two (2) separate occupancies being **retail plant nursery, arts and craft shop and an office** for business development advice*”.
- The application noted that there was provision for three car spaces on site.
- Council’s Development Assessment Panel (DAP) minutes acknowledge that the provision of on-site parking is limited and not in accordance with Development Control Plan (DCP) 2, however it also notes the existing use situation.
- A condition of consent (Condition 14) required “*the provision of **three (3) on site car spaces** to be suitably located and marked out to the satisfaction of Council’s Director of Development Services*”.

D93/487.01

- Proposed amendments to engineering conditions and proposed change of use to ‘Shop 1’ from Business Consultancy to a Real Estate office.
- The assessment noted no objection to the change of use – no change to parking requirements.
- Approved 8 July 1994 for the “*conversion of an existing commercial vacant building to two (2) separate occupancies being **retail plant nursery, arts and craft shop and a Real Estate office** for business development advice*”.
- A condition of consent (Condition 14) remained the same, requiring “*the provision of three (3) on site car spaces to be suitably located and marked out to the satisfaction of Council’s Director of Development Services*”.

K99/96

- This application proposed to locate the three car spaces at the rear of the existing dwelling, accessed off Bambery Street. This design was not supported and the applicant was requested to provide the three spaces on the existing concrete slab accessed off Fingal Road. The applicant was also requested to provide turning areas to allow vehicles to turn and leave in a forward direction.
- Approved 11 May 1999 for the “***addition of a staircase to an existing dwelling and amenities to a commercial building***”.

K00/0303

- The applicant proposed a change of use to 'Shop 1' for a tea and coffee shop to allow for serving beverages and cakes. The proposal also requests an extension of art gallery opening hours. Also included provision of an outdoor eating area containing five tables and 20 seats within the road reserve – consent not required for this component.
- The DAP report notes the conversion of 21m² of office area to a kitchen for the provision of tea and coffee. No indoor seating proposed – only outdoor seating in road reserve, which did not trigger parking requirements.
- The DAP report acknowledged that three car spaces exist on site for the commercial building, which has existing use rights. The report concludes that no additional parking is required.
- The report also notes the following:

"On street parking in front of the site will not be able to be provided due to the width of the road and the location of the site. However, the site is in close proximity to the Fingal boat ramp which has ample car parking. It is noted that Council's Engineering Services Division has raised no objections to the application in this regard."
- A Deferred Commencement approval was issued on 28 April 2000 for the purposes of a "**coffee shop and extension of art gallery opening hours**".
- The approved plan indicates the three car spaces (as approved under K99/96). **No specific conditions were applied with regard to car parking.**
- Condition 5 states that '*no customer seating for the coffee shop is to be provided within the boundaries of the subject land*'.
- The deferred commencement condition stated that '*the toilet facilities approved by way of development consent K99/96 are to be installed and operational to the satisfaction of the Director Environment and Community Services*'. Council records do **not** show that the deferred commencement conditions were met.

K00/0303.01

- The applicant proposed an amendment to the operating hours of the gallery in July 2002. The applicant was trying to change the nature of the coffee shop to a refreshment room, which was a change of use. The applicant was request to withdraw the application and submit a new Development Application. The Section 96 was withdrawn in August 2002.

DA03/0476

- Fresh application for use of a refreshment room (as opposed to the approved coffee shop) and art gallery. The application also requested an extension to trading hours to 11.30pm on Saturdays with live music on Saturdays to 10.30pm.
- The DAP report notes the following:
 - *DCP 2 does not generate the need for on-site parking to be provided for alfresco dining. The existing development operates under a footpath dining agreement with Council. All of the existing seating is located on the road reserve and is therefore regulated by the footpath dining agreement.*
 - *The existing development and the proposed refreshment room with extended hours will utilise the same area of land regulated by the footpath dining agreement, and therefore the proposed development does not generate any on-site car parking requirements.*

- *The existing consent for the site requires the provision of three (3) on-site car parking spaces accessed by a driveway from Fingal Road. These exist on the site however casual seating has been placed over these spaces. Conditions of consent would be imposed ensuring that these three car parking spaces are provided.*
- A Deferred Commencement approval was issued on 27 October 2003 for the establishment of an “**art gallery/coffee shop to include a refreshment room & extend trading hours to 11.30pm on Saturdays including the option of live music**”. The consent was limited to a 12 month period from when it becomes operational.
- Condition 10 required ‘*the provision of **three off street car parking spaces** as identified on the approved plan for Development Consent K2000/303. The layout and construction standards to be in accordance with DCP2*’.
- Condition 5 states that ‘*no customer seating for the coffee shop shall be provided within the boundaries of the subject land*’.
- The deferred commencement condition stated that ‘*the applicant shall demonstrate compliance with all of the conditions of consent contained in K2000/303. This shall include providing proof of payment for monetary contributions and a written submission demonstrating compliance with other conditions. **The site shall be provided with the on-site car parking as identified on the approved plan***’. Council records do show that the deferred commencement conditions were met and the **consent was operation from 1 November 2004**.

DA03/0476.01

- Proposed amendment to remove Condition 2, which limited the consent to a period of 12 months only.
- Prior to the assessment being determined, Council staff met with the applicant to resolve outstanding matters such as:
 - The post and rail fence running parallel with Fingal Road is to be removed and reinstated on the agreed outdoor dining lease alignment;
 - Vegetation outside the correctly aligned fence alignment had to be removed to improve sight lines for motorists exiting Bambery Street; and
 - Car parking requirements were not being kept clear for use as customer car parking.
- All of the above issues were resolved prior to approval being issued.
- It was also noted that the description of the development consent had erroneously noted the proposed trading hours as opposed to the approved hours. The amended consent revised the description appropriately.
- Approved 9 May 2006 for the “**establishment of an “art gallery/coffee shop to include a refreshment room & extend trading hours on Saturdays including the option of live music**”.
- No changes to parking requirement – 3 on site spaces.

PROPOSAL:

Following a complaint being lodged in June 2011 against the Sheoak Shack business not operating in accordance with its development consent (in terms of car parking provisions), Council initiated an investigation into the non-compliance.

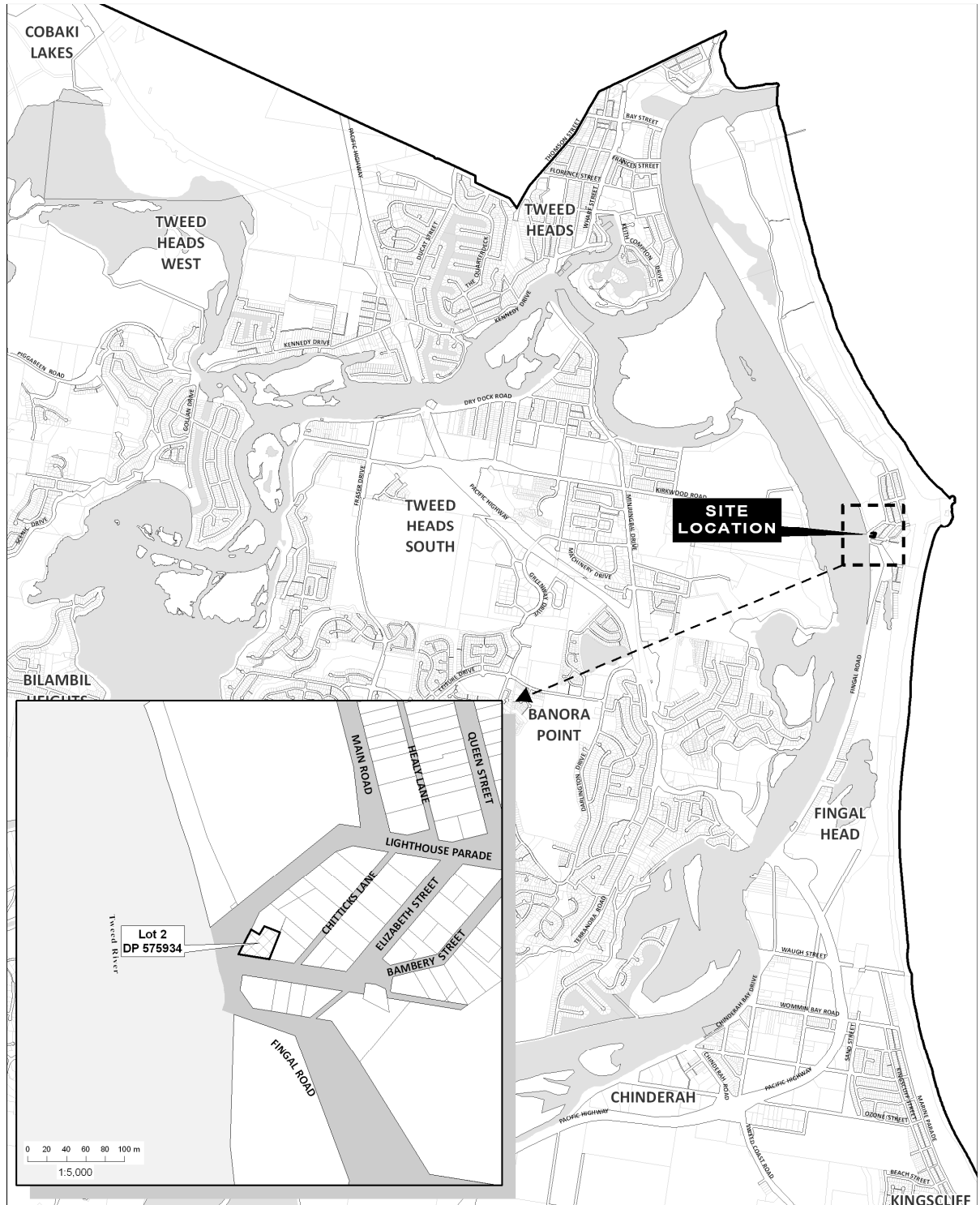
A site inspection on 17 August 2011 concluded that the required three car spaces were not being utilised in accordance with the approved plans for the business. The business owner was requested on 21 September 2011 to reinstate the three approved car spaces, as there no other options considered to be available for onsite parking.

Following several meetings with various Council staff and requests for extension of time, the business owner lodged this Section 96 application on 9 March 2012 to modify the approved development. The application seeks the following:

- The deletion of the requirement for the provision of three on-site parking spaces (Condition 10);
- To use the parking area as an informal area for such uses as reception area, separated seating area for dog owners and smokers, dancing area, staff amenities, and community events such as exhibition openings also during inclement weather conditions; and
- Amend the trading hours of the business to 9.00pm on Friday and 8.00pm on Sunday (Condition 22).

Included with the application was 1000 letters of support from...*'concerned customers, staff and artists'*.

SITE DIAGRAM:



Locality Plan

Lot 2 DP 575934
No. 17 Bambery Street, Fingal Head

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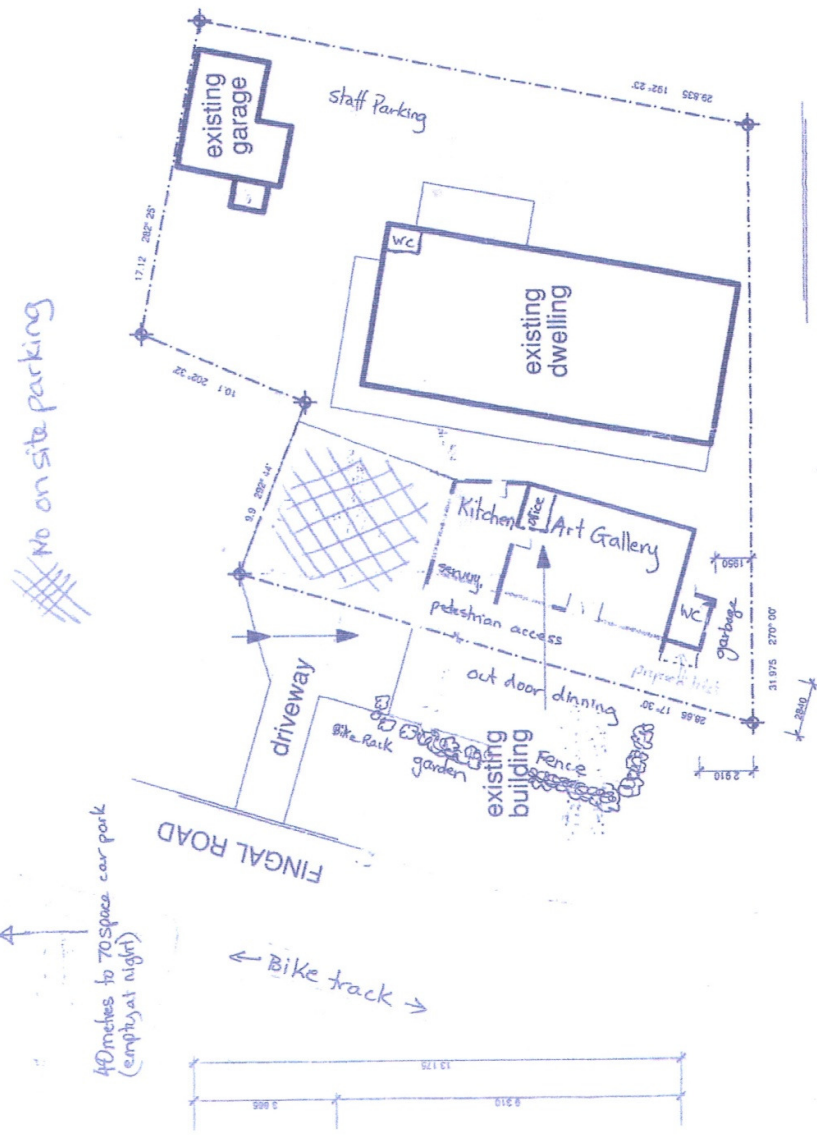
Cadastre: 04 July, 2012
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Boundaries shown should be considered approximate only.

0 0.5 1 Km
1:40,000 @ A4 Portrait
DO NOT SCALE
COPY ONLY - NOT CERTIFIED
Map Projection: Universal Transverse Mercator
Horizontal Datum: Geodetic Datum of Australia 1984
Grid: Map Grid of Australia, Zone 56

Civic and Cultural Centre
3 Tumbulgum Road
Murwillumbah NSW 2484
PO Box 816
Murwillumbah NSW 2484
T | (02) 6670 2400 | 1300 292 872
F | (02) 6670 2429
W | www.tweed.nsw.gov.au
E | planning@tweed.nsw.gov.au



PROPOSED AMENDED PLAN:



BAMBERY STREET
 ↓ 10m
 LOT 2 DP 575934

SITE PLAN scale 1:200

scale 1:100

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

(a) (i) The provisions of any environmental planning instrument

Tweed Local Environmental Plan 2000 (TLEP 2000)

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 below, the proposed modifications are considered to be consistent with the primary objective of the 2(a) zone.

Other relevant clauses of the TLEP 2000 have been taken into consideration.

The proposed deletion of parking provisions is considered to 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(1)(c) of the TLEP 2000.

Clause 11 – Zone Objectives

The subject land is zoned 2(a) Low Density Residential under the Tweed Local Environmental Plan 2000.

The objectives of the zone are:

- *To provide for and maintain a low density residential environment with a predominantly detached housing character and amenity.*
- *To allow some diversity of housing types provided it achieves good urban design outcomes and the density, scale and height is compatible with the primary objective.*
- *To allow for non-residential development that is domestically based, or services the local needs of the community, and does not detract from the primary objectives of the zone.*

The existing use of the site and proposed continuing use of the site are non residential uses. In assessing the original application, Council was satisfied that the proposed development would not detract from the primary objective of the zone being a predominantly low density residential environment, subject to conditions of consent.

The change in hours of operation relates to Friday night trading to 9.00pm and Sunday night trading to 8.00pm. The proposed modification to trading hours is not considered to be a significant impact to the residential environment and is not considered to undermine the objective of the zone.

(a) (iii) Development Control Plan (DCP)

Tweed Development Control Plan

A2-Site Access and Parking Code

With regard to **car parking requirements**, the applicant has noted the following:

“The requirement for the provision of 3 on-site parking spaces exceeds the requirements of the Tweed DCP Section A2 – Car Parking Code (DCP) for the use of the property.

The approved consent for the property requires all dining to be accommodated on the adjoining road reserve, which has been undertaken by means of successive licences from Council for an area of 44m² in front of the gallery. The latest licence was granted on 7 November 2011.

The DCP requires a footpath dining area to be considered in accordance with council's Footpath Dining Policy which makes no provision for parking.

The DCP requirements for an art gallery are 2 customer car parking spaces per 100m² of display area, and 0.5 space per staff.

As the approved art gallery display area totals 50m² it requires 1 parking space. In respect of staff parking the proprietor of the gallery lives in the existing dwelling on the site and therefore it is considered that the required parking is met by the parking associated with that dwelling.

Consequently, the total parking requirement for the current use of the Shack is 1 space and not 3 spaces as required by development consent DA03/0476.”

Comment

The subject site has three uses on it, these being: residence, gallery and refreshment room. In addition to standard residential requirements, the subject site must incorporate the following parking provisions:

	Bicycle	Service Vehicle	Staff	Customers
Gallery	2	1	*	1
Cafe		**	4*	***
Total	2	1	4	1

* As the owner resides on site, one (1) additional staff spaces is not required

** Service vehicle requirements for the Café can be combined with the Gallery

*** Customer parking is not required for footpath dining

Although it is acknowledged that the footpath dining component of the business associated with the refreshment room does not trigger any parking requirements, the kitchen associated with the refreshment room generates the need for one car space per staff at peak operating time.

The applicant has not provided sufficient information to date with regard to staff numbers. However, Council staff has estimated that the café would utilise five staff at peak operating times. This generates a need for four staff spaces for the refreshment room (allowing for the owner of the business being a staff member and not requiring a car space as they reside on the subject site).

In addition to the staff and customer spaces, the development requires parking provisions for service vehicles. Council's Traffic Engineer requested further information with regard to service vehicles for the existing development. The applicant provided the following comment:

“Appendix 1 to the Town Planning Assessment sets out the planning history of the subject property. This highlights the existing use rights emanating from the original marine showroom on property, which have formed the

basis for subsequent development approvals. None of those approvals have required provision for service vehicle parking, including the approval for the establishment of an art gallery/coffee shop (DA03/0476). This did not include any requirement for service vehicles, nor did the approved plan include any such arrangements. Moreover, the relevant DAP notes do not include any discussion in respect of this parking.

Notwithstanding the lack of any requirement the following additional comments are made:

- The nature of the activities at the Gallery do not require delivery in a vehicle other than a car*
- For the reasons outlined in the Town Planning Assessment to use of the approved 3 parking spaces on the site are not considered to be safe and are therefore inappropriate for use for deliveries to the gallery.”*

In terms of never requiring a service vehicle before under previous assessments, the applicant has essentially requested a re-assessment of parking requirements applicable to the proposed development. As such, all aspects of applicable parking, including service vehicles and bicycle parking, has been undertaken.

In response to the applicant's submission, Council's Traffic Engineer notes the following:

“Service delivery by smaller vehicles is reasonable; however, this still needs to be catered for on site. Although there are no parking requirements to the Outdoor Dining area it is not unreasonable to assume that these activities require deliveries for consumables.”

As such, the development requires a total of two bicycle spaces and six car spaces (4 staff + 1 customer + 1 service). This figure is obviously well in excess of the single space being calculated by the applicant, largely as a result of Council incorporating staff requirements for the café. Although it is recognised that there are staff parking opportunities at the rear of the existing dwelling, the applicant has not delineated the number of spaces available, despite being requested to do so at a pre-lodgement meeting.

It should also be noted that staff have been observed by various Council staff on several occasions parking in the reserve across the road, which suggests that the available parking at the rear of the site is unlikely to be used by staff. In any case, even if the staff parking can be accommodated on site, the applicant must still provide two off-street spaces within the subject site in relation to customer parking and service vehicle.

In terms of **potential impact**, the applicant has noted the following:

“The required car parking arrangements are considered to be inappropriate because of the potential impact on traffic safety and the safety and amenity of patrons, including exhaust fumes being blown onto diners as well as into the kitchen.

Figure 1 details the parking arrangements required by DA03/0476, which include:

- a vehicular access on the inside bend of Fingal Road, which has a ‘no right turn’ restriction at Bamberry Street*
- a turning area on the road reserve to allow vehicles to leave the parking area in a forward gear, and*

- *parking spaces and turning area alongside the dining area, servery and kitchen.*

As a consequence the proprietor has concerns that:

- *access is difficult being located on the inside of a bend, with limited sight distances from inside of the corner*
- *manoeuvring on-site is unsafe because of the conflict with pedestrians entering the Shack.*
- *manoeuvring on-site is unsafe because of the proximity of car parks to tables etc*
- *manoeuvring on-site is unsafe because of inadequate turning space to allow vehicles to leave the Shack in a forward gear*
- *the proximity of vehicles to dining area/kitchen is a health hazard*

Originally the gallery had on-site parking and for a number of years this area was reserved for parking for the gallery patrons as required but nobody parked there because it was safer to park across the road. As patronage grew this empty area gradually became an area for exhibition openings, dog owners and smoking. It is also used as an alternative on windy days. More lately this area has been used for dining.

The issues concerning the provisions of parking at the property has been addressed by Council over many years. Appendix 1 sets out the planning history of the property. The relevant elements of that history are as follows.

In September 1993 Council acknowledged "that the marine showroom on the subject land has "existing use rights" under the provisions of Part IV Division 2 of the Environmental Planning and Assessment Act 1979."

When assessing DA93/487 for the conversion of an existing commercial vacant building to two (2) separate occupancies (a retail plant nursery, arts and craft shop and an office for business development advice), the Development Assessment Panel on 16 March 1994 noted that "the most contentious aspect of this proposal relates to the location of the subject site and less than desirable traffic conditions existing and the potential for the proposed use to exacerbate the situation."

The Panel notes state that, "on balance the Engineer has recommended certain upgrading requirements which should improve the traffic situation both on site and in respect to general flows along Fingal Road." These recommendations were included as conditions in the consent.

The submitted plans included 3 parking spaces.

In respect of concerns raised in submissions the DAP notes make the following comments:

"Provision for onsite off-street parking is limited and not in accordance with the normal requirements of Development Control Plan No. 2 – Parking Controls. However this is an existing use situation and as outlined in the Engineers comments, subject to adherence to conditions of consent regarding formalising of access arrangements and flow through conditions the on-site situation in relation to car parking provision should be improved."

At a later date when assessing K2000/303 for a coffee shop and extension of art gallery opening hours the Panel Notes dated 28 April 2000 state that the,

“proposed change of use does not require any additional on-site parking.

Parking is limited on site and would not meet Council’s current requirements if the proposal was for a new building. As the commercial component of the building has existing use rights no additional parking is required.

On street parking in front of the site will not be able to be provided due to the width of the road and the location of the site. However, the site is in close proximity to the Fingal boat ramp which has ample car parking. It is noted that Council’s Engineering Services Division has raised no objections to the application in this regard.”

The clear inference to be drawn from this is not only that Council have known of the problems of providing on-site parking but also been aware of the availability of parking at the boat ramp.”

Comment

The applicant has raised the issue of potential impact on traffic safety and amenity of patrons. Whilst it is acknowledged that the site is located on the inside of a bend, sight distances can be achieved to safely enter and exit the site in a forward manner.

In terms of manoeuvrability on site, Council staff has acknowledged in pre-lodgement discussions with the applicant that the approved car parking layout is undesirable given its proximity to table and chairs. However, measures could be put in place to reduce any potential impact. Bollards could be utilised to ensure that vehicles do not enter the dining area. The area of tables and chairs could be reduced to increase the separation between the dining and carparking. The entrance to the café could be relocated to encourage customers to enter the site through the middle of the dining area.

With regard to manoeuvring on site, Council’s Traffic Engineer has noted the following:

“It is the responsibility of the applicant to ensure that vehicle parking movements associated with the development are able to be carried out safely. This requirement would include provisions for vehicles to enter and leave the property in a forward direction and clearly defined separation of parking areas and pedestrian/customer facilities.”

In terms of proximity of vehicles to the dining area/kitchen, it should be noted that the Sheoak Shack is very similar in nature to outdoor dining experiences across the Shire. The images below in Figure 1 provide examples in Kingscliff where outdoor dining customers are located directly adjacent to cars being parked and driven along Marine Parade.





Figure 1: Existing footpath dining along Marine Parade, Kingscliff

The applicant's argument that no-one has parked in the approved parking area for a number of years is not supported as being a valid argument for not providing such spaces. Customers are unlikely to park their vehicles on the subject site when various structures inhibit the use of the car spaces. The following images (in Figure 2 below) indicate the structures that have been in place, which are considered to discourage customers from parking on site.



Figure 2: Existing structures at entrance of Sheoak Shack

With regard to **existing parking facilities**, the applicant has noted the following:

"There is ample supply of parking in area around the Shack. The council have built a 70 space car park only 40 metres away, dedicated for recreational boat users. This car park is empty at night, at the same time that Sheoak Shack is at its busiest. In particular there is a row of 9 car spaces fronting Fingal Road which are too small for car-and-boat trailer parking following the construction of the bike track.

This parking area could easily accommodate the one parking space which is proposed not to be provided at the Shack, without causing any adverse impacts on current usage.

The DCP provides specific opportunities for relaxation of parking standards, which cannot be applied to the Shack as it is not included

- *in the area covered by CP 23, or*
- *the specific areas nominated for concessions by Section 2.4.8.*

Whilst not explicitly stated the reasons for these parking concessions include the desire to

- 1. foster development in town and village centres*
- 2. foster economic development*

Fingal Head has no easily definable village centre or location where the community can congregate. Over the years the Shack has been operating it has come to fill an important niche. In particular it has brought the people of Fingal together. Since the gallery first started 12 years ago the community have used this as a meeting place.

The gallery has a strong focus on supporting the Indigenous and non Indigenous locals with their art and music. It provides an important outlet for artists and is the longest running private art gallery in the Tweed.

The area identified in the Tweed LEP 2000 for commercial development in Fingal Head is inappropriate, as witnessed by the lack of any commercial development there since the land was first zoned approximately 30 years ago. The Shack is the only viable and available location for a café/gallery, as proven by 12 years of successful trading without complaint.

Motor vehicles are not the sole means of transport to the Shack: a combination of local residents and visitors (particularly to Council's caravan park) are choosing to walk and cycle to the premises.

Therefore although the specific concessions of the DCP cannot be applied to the Shack it is considered that the concession as proposed in this application fits with the overall intention of the DCP. Hence the proposal to include a dedicated bicycle parking area.

The existing commercial use of this property in this residentially zoned area is not causing any problems and only adds to the social, cultural and economic well-being of the area."

Comment

With regard to the existing parking facilities raised by the applicant, it should be noted that the boat ramp car park is in fact located a minimum of 80m walking distance from the café (as opposed to 40m noted by the applicant). Council does not consider the boat ramp to be an acceptable solution for parking associated with the Sheoak Shack. In Council's experience, the general public are generally unlikely to want to walk a distance of 80m to their destination. It should be noted that customers dining at the licensed premises in the evening would be required to walk over 80m in a poorly lit area, with no designated pedestrian crossing facility.

Although not stated by the applicant, the majority of Sheoak Shack customers and some staff regularly park in the reserve across the road (adjacent to the Tweed River), as shown the aerial photo in Figure 3 below.

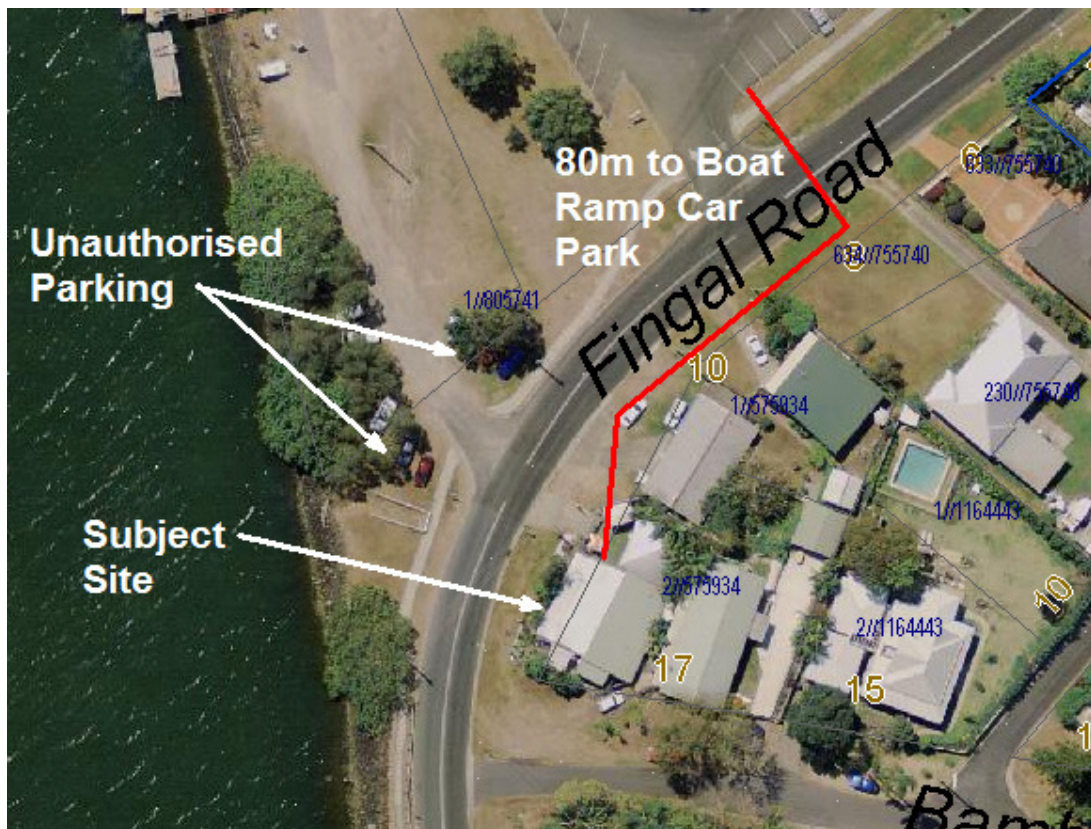


Figure 3: Aerial Photo indicating location of parking across from the subject site

The issue of the Sheoak Shack being a meeting place for the Fingal (and surrounding) community is not disputed. The issue is the disregard for compliance with the conditions of consent in relation to this development. The proprietor has consistently chosen not to provide car spaces on site. Rather, the proprietor has filled this area with tables and chairs and utilised the area for unlawful purposes without consent.

Whilst it is acknowledged that parking for outdoor dining areas can generally be absorbed by surrounding on street parking, it is not considered acceptable for this development to simply supply no customer parking on site. Council has consistently required development to provide off street parking, as per the provisions of DCP A2. Those applications that cannot do so, without the support of a detailed traffic report to accompany any variation to DCP A2, are generally not supported.

It is noted that the nearby Fingal General Store (D93/0499) was required to provide off street parking. There are many other instances where developments are required to provide off street parking provisions. To ignore the provisions of DCP A2 is to set an unacceptable precedent.

As noted above, customers and staff regularly use the reserve directly across from the business, as there are no longer any off street parking spaces being provided and the existing boat ramp car park is seemingly too far for people to walk. It is considered unreasonable to allow one business to profit from the unauthorised use of the community foreshore and again sets an unacceptable precedent.

The use of the reserve across the road from the subject site is not considered to be safe in its current form. Council's Traffic Engineer notes the following in this regard:

“There is however a significant risk to pedestrians crossing Fingal Road, particularly at night, to access the (unauthorised) parking area.”

Previous pre-lodgement meetings have been held with the applicant and Council staff to determine if any acceptable parking alternatives are available.

The area to the south of the outdoor dining (adjacent to the Bambery Street intersection) was taken into consideration. However, this area was ruled out as a potential car parking area for several reasons:

- A single access point off Bambery Street would be required (set back from the intersection);
- There would need to be provision for cars to turn around. This was unlikely to be achieved on such a slope without the need for a retaining wall (on the road reserve);
- There would also be a need to accommodate the loss of street parking along Bambery Street; and
- Any proposal in this area would need to address how customers would access the parking area, as they could not turn right into Bambery Street. This area would be unlikely to be used by patrons (due to the existing no right turn into Bambery Street).

Taking all of the above into consideration, the proposed deletion of the onsite parking requirements is considered to be contrary to the provisions of DCP A2 and is not supported. Given that there does not appear to be any other opportunity to provide parking elsewhere on the site, the previously approved car parking spaces should be reinstated and used as such in perpetuity.

A4-Advertising Signs Code

The original assessment of this application did not incorporate any proposed signage. The following standard signage condition was applied as Condition 3:

3. *Advertising structures/signs to be the subject of a separate development application, where statutorily required.*

Council records indicate that no application has been submitted in relation to proposed signage. Figure 4 below demonstrates that unauthorised signage has been erected for the development, within the road reserve.



Figure 4: Existing signage

A11-Public Notification of Development Proposals

The proposed modifications were advertised for a period of 14 days. Further details are provided later in this report.

(b) The likely impacts of the development and the environmental impacts on both the natural and built environments and social and economic impacts in the locality

Access, Transport and Traffic

The issues raised under the DCP A2 assessment clearly indicate that the proposed modifications will result in an unacceptable precedent and as such, the proposed deletion of parking provisions is not supported.

Trading Hours

As noted above, the applicant has requested an extension of trading hours on Fridays and Sundays. Condition 22 of the development consent notes the following:

22. *Hours of operation are limited to the hours 8.30am - 5.00pm Monday to Sunday inclusive, except Saturdays where trading hours are 8.30am - 10.30pm. In addition the art gallery is permitted to be open until 9.30pm on ten nights of every calendar year.*

The applicant has provided the following justification for the proposed extension of trading hours:

“The community expectations for refreshment rooms are extended trading hours at weekends. The consent only allows this on Saturday evening. Therefore a modification to condition 22 is requested to provide for trading until 9.00pm on Friday and 8.00pm on Sunday. This would allow the Shack to extend to the local community similar hours to those enjoyed by other village and town centres in the Shire, without community members having to leave Fingal Head and to cater for visitors to this recognised major recreational area. The extended trading hours would not require any additional facilities at the Shack.

There have been no adverse impacts of the extended trading on Saturday and therefore the proposed modification is considered to be reasonable.”

Council’s Environmental Health Unit has assessed the proposed modification of Condition 22 and has provided the following comments:

“The application requests that the permissible trading hours be modified to 9.00pm on Friday nights and 8.00pm on Sunday nights.

The matter has been discussed with Grant Seddon, Licensing Sergeant, Tweed Heads Police. Sergeant Seddon advised that the current Liquor License permits trading up until midnight 7 days, except Sunday which is restricted to 10.00pm. Therefore the trading hour restrictions are created under Condition 22 of the development consent. Sergeant Seddon also advised that is familiar with the premise and has not received any notifications regarding the premise in his capacity as Licensing Sergeant. He did not raise any objection to the proposed amendment to permissible hours.

No complaints about the premise were identified in Dataworks, except one historical notification from one individual about several matters, including permissible trading hours.

It is noted that as the premise has a liquor license, the Office of Gaming and Racing is responsible for any noise or amenity notifications. Having regard for the above information and the fact that the Licensing Sergeant has not raised any concerns about the modified hours, no objection is raised by the Environment and Health Unit.

Further, it is noted that condition 23 will remain unchanged, which restricts the playing of live or amplified music to Saturday nights before 9.30pm.”

Although the extended trading hours are not being opposed by Council's Environmental Health Unit, the issue of live music is of concern. Condition 23, as shown below, clearly states that live music is only permitted on Saturday nights.

23. *Outdoor amplified music may only be played on Saturday night. This may only occur up until 9.30pm and speakers shall be directed away from residential premises. The playing of amplified or live music must cease upon request by any Council or Police officer.*

Despite this, the proprietor currently disregards Condition 23 by way of allowing live music to be played on a Saturday and Sunday. As shown in Figure 5 below, the website for the business clearly notes that live music is on Saturdays and Sundays, with a listing of upcoming gigs for June and July. It is also noted that the current trading hours for Sundays is 6.00pm (rather than 5.00pm as required by Condition 22). As such, the proposed extension of trading hours is not supported.

The figure consists of two screenshots from the Sheoak Shack website. The left screenshot shows the 'Winter Hours' section, which is currently 'OPEN'. It lists contact information for Andrea McKay (phone 0755 231130, www.sheoakshack.com, andrea@sheoakshack.com) and the address (64 Fingal Road, Fingal Head, NSW 2487). It also states 'live music Saturday 2pm & Sunday 2pm'. The right screenshot shows a 'LIVE MUSIC July' schedule for Fingal Head. It lists various gigs starting at 2pm during winter, including Bill Jacobi (foot stomping blues), The Norman & Louise Band (7 piece funk/pop), Andrew Morris (alternative/blues), Frank Năstri (Afro-beat / Ambient / Fusion), Jim Dowling (blues), Phil Barlow (indierock reggae & blues), Ashleigh Mannix (blues soul), Elektrik Lemonade (funk rock), and Felicity Lawless (reggae folk). It also lists trading hours: Wed 11.00-5.00, Thu 11.00-5.00, Fri 11.00-5.00, Sat 11.00-6.00, Sun 9.30-6.00. Contact information is provided at the bottom: www.sheoakshack.com, andrea@sheoakshack.com, Phone 07 55231130, 64 Fingal Rd Fingal.

Figure 5: Opening hours and live music information from Sheoak Shack website

Noise

As noted above, Condition 23 stipulates that live music can only occur on Saturdays. Although Council has not received any recent official complaints regarding noise, the current situation is not compliant and may result in unnecessary noise impact, particularly given the low density residential zoning of the surrounding locality.

During the original assessment, it was noted that Council's Environmental Health Unit advised that the proposed amplified music could be directed away from the residential premises and that through conditions of consent (Condition 23) the impact of the proposed live music would be minimal. The live music was been assessed as being reasonable for **Saturday nights only** with time limited to 10.30pm.

The applicant should immediately cease any live music on a Sunday. Council's Environmental Health Unit has verbally advised that they would be unlikely to support a future application for live music on a Sunday, particularly without a full acoustic report supporting the application.

Use

The proposed use of the existing car parking area is of concern. As a result of the original application only proposing dining within the road reserve, the following condition was applied:

5. *No customer seating for the refreshment room shall be provided within the boundaries of the subject land.*

The applicant was advised at a pre-lodgement meeting that any on site seating (i.e. seating where the three car spaces should be) will trigger car parking requirements in addition to the 3 spaces currently required by the development.

During the assessment of this application, the applicant was requested to indicate the proposed use of the parking area, so that Council could determine if any additional parking was generated, which would thereby exacerbate the existing parking non-compliance.

The applicant responded by way of the following:

“The parking area is proposed to be used as an informal area for the kind of uses listed in the Statement of Environmental Effects. This descriptive list I suggest is self explanatory: the area will essentially be devoted to seating, with some open areas for dogs. In a similar manner this area will provide relaxation and a smoking area for staff, i.e. ‘staff amenities’. There are no additional structures in this area, As the layout will be flexible to allow the area to be adapted to daily requirements I do not consider it is realistic to provide a layout plan. The use of the area could be controlled by a condition attached to any amended development consent.”

The applicant’s response is not considered to be acceptable. As is the case with a multi use area, the use generating the highest level of parking should be taken as the use for the purposes of calculating parking provisions. If the area is to be seating for dining purposes (which the applicant has acknowledged is currently the case as is shown in Figure 6 below), then applicable parking provisions apply at a rate of 1 space per 7m² of dining area for a refreshment room.



Figure 6: Seating located within the approved car parking area

The carparking area (where seating is currently located) is estimated at approximately 20m². Therefore an additional three car spaces are required for customer parking. This raises the carparking provisions to 1 service vehicle, 4 staff and 4 customer spaces, equating to a total of nine spaces.

This is obviously well beyond the 1 customer car space calculated by the applicant. The provision of the 4 customer spaces, 4 staff spaces and 1 service vehicle space must be provided on site, as per the requirements of DCP A2.

If such parking provisions are unachievable, this suggests an overdevelopment of the site. The deletion of any on site car parking provisions from this development is opposed. The off street parking spaces should be reinstated, rather than being used as additional dining area (or any other traffic generating use).

If Council was in support of the proposed use of the parking area, Condition 5 of the development consent would need to be deleted.

Structures within the Road Reserve

The outdoor dining area is surrounded by various structures providing shade, fencing, signage etc, as shown in Figure 7 below. At a pre-lodgement meeting, the applicant was requested to provide structural certification all of the structures with the road reserve. The documentation provided by the applicant was not considered to be adequate.



Figure 7: Examples of structures within the road reserve

During the assessment of this application, it was noted that Council's Footpath Trading policy requires development consent for all permanent structures in association with a footpath trading area. The applicant was requested to provide any previous written approval from Council for structures that are currently in place on the road reserve.

The applicant provided the following comment:

"The use of the road reserve for out-door dining has been the subject of separate approvals process. A series of footpath dining licences have been granted by Council, the most recent on 7 November 2011 (ref S68/FT000007).

The structures within the road reserve were erected following the grant of the first licence. Having spoken to Council at the time I was under the belief that as these structures were lashed together on all sides and are removed during winter to allow more sunshine they are not permanent structures and therefore did not require approval. However, I understood that an approval was required for the fencing fronting the dining area for which approval was sought when I faxed to Council details of the fencing on 28 August 2000. These details were approved by Council. The structures within the road reserve have subsequently been maintained and replaced as necessary.

Following the original licence for the use of the road reserve for out-doors dining my premises have been visited and inspected by Council officers on a number of occasions. But until Sept. 2011 there have been no comment on the structures in the reserve. In a letter dated 21 September 2011, Council required require engineering details of all of the structures in the road reserve (with the exception of the front fence), for consideration by Council's Coordinator Planning & Infrastructure Unit. An engineers report

was submitted to Council in response to this request in November. To date there has been no response to this material and therefore I am unable to respond further to the request for any written approval for these structures."

In response to the applicant's submission, Council's Traffic Engineer noted the following:

"It is noted that the applicant was unable to provide any evidence of prior approval of the structures placed within the road reserve. A separate s138 application should be submitted for all structures contained within the road reserve. The application is to include a report on the existing structure's integrity, by a suitably qualified and experienced structural/civil engineer or other appropriately qualified person."

(c) Suitability of the site for the development

Whilst the existing approved development is considered to be suitable for the site, the proposed modifications are not considered to result in a suitable development, in terms of acceptable parking provisions. The use of the parking area as additional dining area generates even more parking requirements. If these are unable to be provided on site, the proposal is clearly an overdevelopment and as such, not suitable for the subject site.

The proposed trading hours are considered to be suitable, subject to live music only on Saturdays, as required by Condition 23 of the development consent.

(e) Public interest

Whilst the proposal has received overwhelming support from the local community, there is a public expectation that Council upholds the provisions of the relevant Council policies and controls. Having undertaken a thorough assessment of the development, particularly in terms of car parking requirements, the proposed modifications are not considered to be in the public interest.

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 Section 79c considerations, Council's Development Assessment Unit and Traffic Engineer have undertaken a detailed assessment of the proposed modifications. The proposal is not supported, given its likely environmental impact with particular regard to car parking.

Substantially the Same Development

An assessment needs to be undertaken in terms of whether the proposed development is “substantially the same” as the originally approved development, pursuant to the provisions of the Environmental Planning and Assessment Act.

The proposed modifications seek to remove the need to provide on-site car parking, which has the effect of freeing up an area for other purposes/uses, such as additional dining area, which in itself generates additional parking requirements.

Therefore, the proposed modifications are not considered to meet the provisions of being substantially the same development as originally approved and as such, the proposed modifications are recommended for refusal.

Notification/Submissions

The proposed development was advertised for a period of 14 days, during which 213 submissions were received, many of which were in the form of a pro forma letter. Of those submissions, only three were objections to the proposed modifications. The issues raised by the objections are noted below.

ISSUE	RESPONSE
The business is in breach of current council laws by allowing unleashed dogs to roam freely around tables and eat off the floor. The kitchen area is in breach of several health regs e.g. the area is not enclosed with screens as requested.	Regarding the food related matters, Council's Environmental Health Unit has advised that there is an insect screen in place across the kitchen servery and screen doors on all doorways, as required by Condition 7 of the development consent. They have also advised that the proprietor has also been made aware of the regulations regarding dogs in an outdoor dining area.
Other developments within the Fingal area have been required to provide off street parking at considerable expense. The proposed development should be required to do the same. Consistency by the Council should prevail.	Council officers recognise that other developments have consistently been required to provide off-street parking at their expense. The proposed modifications are not supported in this regard.
The Development Application states that this establishment must provide three off street car spaces and as such should be enforced. As to the argument that “it would be impossible to run the café with the parking so close to the kitchen and dining area” then this should have been identified long ago and the owner should not have incorporated dining and customer seating in close proximity to the parking area.	As noted within the body of this report, it is considered that there are solutions to improving the parking area in proximity to the outdoor dining area.
The points put forward that manoeuvring on site is unsafe because of the proximity of car parks and tables can be resolved by removing the tables from the “designated car parking spaces” and put up safety rails or barrier to stop pedestrian access to the area.	As above
The owner has admitted that the proximity of cars to the food preparation area and dining area is a health hazard. The owner should be made to correct this issue by possibly erecting a separate partition/wall that will stop any potential health issues.	The existing development consent requires the development to operate in accordance with the requirements of the Food Act. Council's Environmental Health officers ensure compliance with this condition of consent.
The submission notes the comments by the Fingal Head Community Association re: there being “over 100 available parking spaces around the Sheoak Shack that are never full.” The submission states that this is totally misleading as there are numerous times especially on fine weather weekends when the parking is at a premium in the boat harbour area.	Council officers do not consider that parking in the boat ramp is acceptable. The proposal to delete onsite parking for the Sheoak Shack is opposed.

ISSUE	RESPONSE
On one hand the owner of the business wants to reduce the parking, yet they also want to extend the trading hours and increase patron numbers.	This issue has been addressed within the body of the report. The use of the approved parking area as additional dining is not supported, as it will only add to the parking issues.
The extended trading hours should also be looked at to ensure that any modifications to the original approvals are strictly adhered to.	This issue has been addressed within the body of the report. Live music on Sundays is not supported.

It should be noted that many of the submissions to Council in support of the proposal have asked Council not to enforce the “parking changes” on the Sheoak Shack. It should be clarified that Council is not trying to make any “changes”. Rather, simply enforce the conditions of development consent. The applicant has always been aware of the requirement for three car spaces on site and has simply chosen to ignore such requirement.

OPTIONS:

1. Refuse the proposed modifications; require the originally approved three car spaces to be reinstated on site; require the use of live music on a Sunday to cease; require the development to comply with existing approved trading hours; require the submission of a Section 138 application to be submitted for approval; and require the submission of a development application for all signage associated with the development, or
2. Approve the proposed modifications as proposed by the applicant, in principle and bring back a further report to Council with suitable modified conditions.

CONCLUSION:

Despite the overwhelming support for the development, the proposed deletion of car parking requirements is not considered to be acceptable. The support of this application would set an unacceptable precedent in terms of off street parking provisions.

COUNCIL IMPLICATIONS:

a. Policy:

Corporate Policy Not Applicable.

b. Budget/Long Term Financial Plan:

Not Applicable.

c. Legal:

Should the applicant be dissatisfied with the determination by Council they have an opportunity to appeal to the NSW Land and Environment Court. Should Council defend such an appeal costs would be incurred.

d. Communication/Engagement:

Not Applicable.

LINKAGE TO INTEGRATED PLANNING AND REPORTING FRAMEWORK:

- 1 Civic Leadership
 - 1.1 Ensure actions taken and decisions reached are based on the principles of sustainability
 - 1.1.1 Establish sustainability as a basis of shire planning and Council's own business operations
 - 1.1.1.3 Assessment of new developments (Development Assessment unit)

UNDER SEPARATE COVER/FURTHER INFORMATION

Nil.
