

enquiries refer
David Kitson

in reply please quote

Amendment Requests Exempt & Complying Development

2 September 2010



PGF000532



Regional Director
Department of Planning
Locked Bag 9022
GRAFTON NSW 2460

Received

- 3 SEP 2010

10/18259

North Coast

Dear Sir

Re: Request to make minor amendment to Ballina Local Environmental Plan 1987.

The purpose of this letter is to request the Minister for Planning make a minor amendment to the *Ballina Local Environmental Plan 1987* pursuant to Section 73a of the *Environmental Planning and Assessment Act 1979*.

The requested amendment is for the date in Clause 35(5) of the *Ballina Local Environmental Plan* to be amended from 26 October 2006 to 26 August 2010, to reflect the amendment to the *Ballina Shire Development Control Plan - Exempt and Complying Development (Exempt & Complying DCP)* adopted by Council on this date.

Background

Draft Ballina Shire Development Control Plan - Exempt and Complying Development (Amendment 8) (Draft DCP) was exhibited and made available for public comment between 15 April 2010 and 27 May 2010 in accordance with Clause 18 of the *Environmental Planning & Assessment Regulation 2000*.

The exhibited *Draft DCP* proposed that the following landuse be made exempt development:

"Commercial use of footpaths

- (1) *Must be located on the footpath within a road reserve for which Council is the Road Authority under the Roads Act 1993.*
- (2) *Must comprise small scale commercial/business activity such as alfresco dining, display of merchandise and the like.*
- (3) *Must not occupy an area greater than 30 m² per operator.*
- (4) *Must be operated in a manner compatible with authorised adjoining uses.*
- (5) *Must not involve the erection of permanent enclosures/structures.*
- (6) *Must not interfere with the free passage of other users of the footpath.*
- (7) *Must not involve the loss of any on street car parking."*

No comments or public submissions were received in respect to the exhibited *Draft DCP* and Council resolved to adopt it as exhibited.

I attach a copy of the exhibition document for your records, as well as a copy of the relevant Council report and resolution.

Conclusion

In conclusion it is respectfully requested that the Department amend Clause 35(5) of the *Ballina Local Environmental Plan 1987* to reflect the current date of the *Exempt & Complying Development DCP*. i.e. 26 August 2010.

Should you wish to discuss the matter please contact David Kitson in Council's Strategic and Community Services Group on telephone 6686 1214.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'Stephen Barnier', written over a horizontal line.

Stephen Barnier
Group Manager
Strategic and Community Services Group

**MINUTES OF THE ORDINARY MEETING OF BALLINA SHIRE COUNCIL
HELD IN THE COUNCIL CHAMBERS, BALLINA, ON
26/08/10 AT 9.00 AM**

3. The shortfall of \$2500 is to be funded from Council's community donations budget.
4. The funding for the Alstonville Apex function has exceeded the 50% criterion due to the benefits of the event in reducing anti-social behaviour on New Years Eve.

FOR VOTE - All Councillors voted unanimously.
ABSENT. DID NOT VOTE - Cr Cadwallader

10.10 Coastal Cycleway and Walk - Funding

260810/ 23 RESOLVED

(Cr David Wright/Cr Keith Johnson)

This matter is to be referred to the same workshop as the Mayoral Minute on the Coastline Shared Path (Item 7.1).

FOR VOTE - All Councillors voted unanimously.
ABSENT. DID NOT VOTE - Cr Cadwallader

10.11 Commercial Use of Footpaths Policy

260810/ 24 RESOLVED

(Cr Keith Johnson/Cr David Wright)

1. That Council adopt the following documents relating to the commercial use of footpaths in Ballina Shire and associated fee structure:
 - a) The exhibited draft Commercial Use of Footpaths Policy, inclusive of the amendments as per the attachment to this report
 - b) The exhibited amendment to Ballina Development Control Plan - Exempt & Complying Development
 - c) The exhibited amendment to Ballina Shire Combined Development Control Plan and
 - d) The exhibited draft Local Approvals Policy and that the required consent from the Director-General of Local Government be immediately sought.
 - e) Fee structure in accordance with precinct plans:

2011/12

50.00% of rental rate value assessed

FOR VOTE - All Councillors voted unanimously.
ABSENT. DID NOT VOTE - Cr Cadwallader

Commercial Use of Footpaths Policy

File Reference	Development Control Plan Amendment Exempt & Complying Development
CSP Linkage	Responsible and efficient use of resources
Delivery Program	Administration
Objective	To review the assessment and approval process that currently applies to alfresco dining and to provide a policy document for the commercial use of footpaths, otherwise known as street vending.

Background

Council resolved at its Ordinary Meeting held on 25 March 2010 to exhibit a *Draft Commercial Use of Footpath Policy (Draft Policy)* for public comment (Minute No. 250310/22).

The *Draft Policy* sets out the proposed requirements and approval process for small scale commercial use of footpaths, such as street vending and alfresco dining. A number of consequential statutory actions are required to be undertaken to achieve the proposed regulatory framework under the *Draft Policy*. These statutory actions include:

- The amendment of the *Ballina Shire Development Control Plan - Exempt and Complying Development* to exempt small scale commercial use of footpaths from requiring development consent under the *Environmental Planning and Assessment Act 1979*
- The amendment of the *Ballina Shire Combined Development Control Plan* to remove the current provisions applying to alfresco dining and to clarify that car parking requirements shall be in accordance with the *Draft Policy*
- The preparation of a draft local approvals policy under the *Local Government Act 1993* to remove the requirement for an activity licence for street vending and footway restaurants.

In summary, it is proposed to simplify the regulatory framework for small scale commercial use of footpaths so that such activities/landuses are administered by Council's Commercial Services Section exclusively under the *Roads Act 1993*.

The *Draft Policy* and consequential statutory actions were placed on public exhibition and available for public comment between 15 April 2010 and 27 May 2010.

In these circumstances the application for approval will be judged upon its merits.

Licensing/Charge

The current Alfresco Dining Policy requires the applicant to obtain a licence to occupy the subject footpath area.

Council's legal advice suggests that it should avoid a contractual framework involving leasing and licensing of footpath areas, which can confer unintended rights under the *Retail Leases Act 1994*. This advice is based on the judgement in the NSW Court of Appeal matter of *Manly Council v Malouf (2004) NSWCA 299 (2 September 2004)*.

The requirement to charge for the use of the footpath can still be inserted as a condition of an approval/consent.

The annual licensing fee for alfresco dining is currently \$60 per chair per annum as per Council's fees and charges. This rate was the charge determined by Council at the commencement of the Alfresco Dining Policy inclusive of CPI increases.

It is recommended that a \$ per square metre per annum ("\$/m² p.a.") rental rate may be a more appropriate and relevant method to charge for the commercial use of footpaths. This would provide a standardized approach to both alfresco dining and street vending. The \$/m² p.a. rental rate would be calculated based upon a 5.00% return on market land value plus the estimated value of footpath structure thereon. This approach to licencing is far more cost effective as it removes the burden from Council to enforce compliance, i.e. rangers are not to required monitor the number of chairs a café may have upon a footpath.

Council appointed an independent valuer to undertake rental valuations for the various CBD precincts in Alstonville, Ballina and Lennox Head (see CBD precinct maps **attached** hereto). The \$/m² p.a. rental rates assessed for the various CBD precincts are noted as follows:-

Ballina	Location	Rental Rate Value p.a.
Area A	River Street - Martin Street to Cherry Street	\$56.25/m ² + GST
Area B	River Street - Cherry Street to Moon Street	\$86.25/m ² + GST
Area C	River Street - Moon Street to Grant Street	\$48.75/m ² + GST
Area D	River Street - Grant Street to Kerr Street	\$43.75/m ² + GST
Area E	Tamar Street - Martin Street to Cherry Street	\$41.25/m ² + GST
Area F	Tamar Street - Cherry Street to Moon Street	\$43.75/m ² + GST
Area G	Tamar Street - Moon Street to Grant Street	\$38.75/m ² + GST
Area H	Tamar Street - Grant Street to Kerr Street	\$33.75/m ² + GST
Area I	Cherry Street - River Street to Tamar Street	\$56.25/m ² + GST

Sustainability Considerations

- **Environment**

It is important that any commercial use does not impact negatively on the environment.

- **Social**

A policy to allow and encourage alfresco dining and street vending will increase the amenity and services in the business areas of the shire for residents and visitors.

- **Economic**

A policy to allow and encourage alfresco dining and street vending will contribute to the viability of the commercial areas of the shire and provide Council with an economic return on its assets.

Legal / Resource / Financial Implications

The adoption of the exhibited *Draft Policy* and the consequential statutory actions will provide clear direction to both Council staff and operators and therefore should result in a more efficient approval process.

Consultation

The draft policy and the associated statutory actions were placed on exhibition for public comment between 15 April and 27 May. Existing licence holders and chambers of commerce were provided with written notification of the draft policy and invited to comment during this same period.

One submission was received during the exhibition period requiring clarification of part of the Policy.

Council staff also consulted and attended the Access Reference Group Meeting in August 2010 to present the draft Policy.

Two submissions were received following this meeting.

The two submissions related to ensuring the Policy considers the needs of people with disabilities.

Council staff believe the standard conditions of the Policy address the concerns of the submitters.

Since advertising the draft Policy a number of changes to the Policy are required to include amendments to the Companion Animals Act and the Alcohol Free Zones. The changes are highlighted in the amended policy attached to this report. It is believed that the changes do not require the Policy to be placed on public exhibition again as they are mainly minor legislative changes.

Options

1. Defer consideration of the *Draft Policy* and consequential statutory actions.