

## SHOALHAVEN CITY COUNCIL

### SPECIAL DEVELOPMENT COMMITTEE

To be held on Tuesday, 17<sup>th</sup> March, 2009  
Commencing at 3.30 pm.

11<sup>th</sup> March, 2009

Councillors,

#### NOTICE OF MEETING

You are hereby requested to attend a meeting of the Development Committee of the Council of the City of Shoalhaven, **to be held in Committee Rooms 1, 2 and 3, City Administrative Centre, Bridge Road, Nowra on Tuesday, 17<sup>th</sup> March, 2009 commencing at 3.30 pm** for consideration of the following business.

R D Pigg  
**General Manager**

Membership (Quorum – A majority of members)

Clr Ward – Chairperson  
Clr Young  
Clr Findley  
Clr Bennett  
Clr Fergusson  
Clr Brumerskyj  
Available Councillors

#### BUSINESS OF MEETING

1. Apologies
2. **Report of the General Manager**  
Development & Environmental Services – Shoalhaven Heads Produce Markets
3. **Confidential Report of the General Manager**  
Development & Environmental Services – Shoalhaven Heads Produce Markets
4. **Addendum Reports**

Note: The attention of Councillors is drawn to the resolution MIN08.907 which states:

- a) That in any circumstances where a DA is called-in by Council for determination, then as a matter of policy, Council include its reasons for doing so in the resolution.
- b) That Council adopt as policy, that Councillor voting in Development Committee meeting be recorded in the minutes.
- c) That Council adopt as policy that it will record the reasons for decisions involving applications for significant variations to Council policies, DCP's or other development standards, whether the decision is either approval of the variation or refusal.

Note: The attention of Councillors is drawn to Section 451 of the Local Government Act and Regulations and Code of Conduct regarding the requirements to declare pecuniary and non-pecuniary Interest in matters before Council.

### Cell Phones:

Council's Code of Meeting Practice states that "All cell phones are to be turned off for the duration of the meeting".

## **LOCAL GOVERNMENT ACT 1993**

### **Chapter 3**

#### **Section 8(1) - The Council's Charter**

(1) The council has the following charter:

- to provide directly or on behalf of other levels of government, after due consultation, adequate, equitable and appropriate services and facilities for the community and to ensure that those services and facilities are managed efficiently and effectively
- to exercise community leadership
- to exercise its functions in a manner that is consistent with and actively promotes the principles of multiculturalism
- to promote and to provide and plan for the needs of children
- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development
- to have regard to the long term and cumulative effects of its decisions
- to bear in mind that it is the custodian and trustee of public assets and to effectively account for and manage the assets for which it is responsible
- to facilitate the involvement of councillors, members of the public, users of facilities and services and council staff in the development, improvement and co-ordination of local government
- to raise funds for local purposes by the fair imposition of rates, charges and fees, by income earned from investments and, when appropriate, by borrowings and grants
- to keep the local community and the State government (and through it, the wider community) informed about its activities
- to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected
- to be a responsible employer.

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## TABLE OF CONTENTS

<b>DEVELOPMENT AND ENVIRONMENTAL SERVICES.....</b>	<b>1</b>
1. Section 82A review of refusal to allow the Shoalhaven Heads Hotel to operate a weekly local fresh produce fair - 51 River Road, Shoalhaven Heads - Lot 11 DP 532057. Applicant: Cowman Stoddart on behalf of The Heads Hotel/Motel Pty Ltd. Owner: The Heads Hotel/Motel Pty Ltd. File RD09/1000, DS08/1561 and DA06/2915 .....	1
<b>CONFIDENTIAL BUSINESS PAPER AGENDA .....</b>	<b>15</b>

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**REPORT OF GENERAL MANAGER**  
**SPECIAL DEVELOPMENT COMMITTEE**

**TUESDAY, 17 MARCH 2009**

**DEVELOPMENT AND ENVIRONMENTAL SERVICES**

1. **Section 82A review of refusal to allow the Shoalhaven Heads Hotel to operate a weekly local fresh produce fair - 51 River Road, Shoalhaven Heads - Lot 11 DP 532057. Applicant: Cowman Stoddart on behalf of The Heads Hotel/Motel Pty Ltd. Owner: The Heads Hotel/Motel Pty Ltd. File RD09/1000, DS08/1561, DA06/2915**
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**PURPOSE OF THE REPORT:**

An application under Section 82A of the Environmental Planning and Assessment (EP&A) Act 1979 has been received seeking a review of Council's decision to refuse a S96 amendment to the development consent which would have allowed the operation of a weekly local fresh produce fair at the Shoalhaven Heads Hotel on Saturday mornings for an unlimited period.

In accordance with functions of the Development Committee this S82A application is submitted for the Committee's consideration.

**RECOMMENDED that in respect to S82A Review Application RD09/1000 Council;**

- a) **Adopt the general approach outlined in Option 4 in the Report of the General Manager (Development and Environmental Services) and invite the applicant to amend their S82A application such that Condition 3 of the subject consent be amended to seek an additional 3 year approval period.**
- b) **The subsequent Section 82A application be determined under delegated authority.**

**OPTIONS:**

It is considered that the following options are available for Council to consider:

1. That Council not exercise its discretion in considering the s82A review application;
2. That Council support the s82A application in accordance with the applicants submission and determine the s96 application by granting conditional consent in accordance with the draft amendments outlined in Attachment 'H';
3. That Council determine the s82A application by refusal and reaffirm the previous reasons for refusal of the S96 application.
4. That Council invite the applicant to amend the s82A application to seek the operation of the fair/market for a further limited period not exceeding five years and/or a

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frequency that is more consistent with Council's Operation of Markets Policy (e.g. fortnightly or monthly).

## **DETAILS/ISSUE:**

### **Background**

# The original development application sought approval to conduct a *“Trade Fair – Grower’s and Seafood **Market** for Suppliers to the Shoalhaven Heads Hotel – Only local suppliers are used, stalls will only be used in the licensed retail forecourt area on holidays and Saturdays between 7:00am and noon and only 8 to 15 stallholders will be available”* - Refer to **Attachment ‘A’** - application form and supporting letter.

The application was assessed against Council's Operation of Markets Policy (Markets Policy) at the time and variations were agreed to. Those variations included:

1. The fair/market not being limited to local based non-profit organisations however, the applicant did nominate the local school, Apex and the surf club as benefitting from the proceeds in its letter dated 13 March, 2007 and the fair/market co-ordinator subsequently nominated the Linear Accelerator as the beneficiary of funds;
2. An increase in the frequency of the fair/markets from **fortnightly** to **weekly** on the basis that the hotel/motel benefitted from existing use rights of a commercial nature.

# Development consent was issued on 18 December 2006 on the basis of a weekly local fresh produce fair which was to be conducted on Saturdays from 7:30am to 12:30pm – Refer to **Attachment ‘B’** - development consent. To allow the impact of the market on the local economy to be assessed and consistent with the Markets Policy, the operation of the markets was limited to a one year approved period. As part of the original assessment, objections were received from concerned local business owners that the markets would have a significant and adverse impact on their businesses.

Given the fact that the original fair/market had offered free stalls for local businesses, and that the market was proposing to sell produce that might otherwise be unavailable to the local community, it was considered that the proposal would have a positive impact on the local economy, including that of increasing the number of tourist visitors.

Further, the then proposed fair/market was viewed as an intensification of the existing use rights of the hotel/motel.

### **First S96 Modification Application - DS07/1534 (issued 21 December 2007)**

During the initial period of operation of the fresh produce fair/market, a number of local shop owners had complained that the development was having a negative impact on their businesses. The main concern centred on the frequency of the markets in that they requested that the fair/market be permitted only on a monthly basis. This concern was restated in submissions made to Council during the public exhibition of the s96 Modification application to extend approval for a further twelve months.

During this time, Council was also conducting a review of its Markets Policy and Council subsequently resolved at its meeting held 18 December, 2007 that:

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*“There will be a maximum of one market per month per locality, e.g. Town, suburb or village. Where a second market per month is proposed in a locality, the applicant shall clearly demonstrate that the market will be beneficial to the community, does not impact on financial viability of existing businesses as well as have a majority of the stalls that meet a “Make it, Bake it, Sew it, Grow it criteria”.*

In response to this initial S96 application, development consent was modified on 21 December 2007 allowing the fresh produce market/fair to continue operating for further 12 months but only on a **monthly** basis. This decision was consistent with the revised Markets Policy and in light of the submissions received.

### **Initial Non-Compliance**

The following summary of compliance issues related to this development is included in the report as the applicant seeks the deletion of a limited time condition of consent. This history is relevant to that consideration as such conditions are used, in part, to review an applicant’s performance in terms of compliance with conditions.

From August 2008 Council began receiving sustained complaints from affected businesses at Shoalhaven Heads regarding non-compliance with the monthly restriction of operation of the fair/market condition by the hotel. Staff followed the procedures outlined in the Compliance Policy by sending warning letters and then serving a notice of an intention to serve an Order, considering the operator’s response and then consulting legal services. These actions can be summarised as follows:

- 5 September, 2008 - Letter reminding the Heads Hotel of consent conditions limiting fair/market to operate once per month, not weekly has had been occurring and directing them to comply with consent otherwise a Notice would be served.
- 20 October, 2008 - Letter responding to The Heads Hotel indicating that as the fair/markets have continued to breach Condition 23 of the consent, a Notice of Intention to Serve an Order, along with the draft Order, would be issued to the owner/applicant.
- 21 October, 2008 - Notice served on owner/applicant - 21 days to make representations.
- 23 October, 2008 - Licensee of Hotel advises by letter that “... *we maintained our activities come within our existing usage of retail, and should not be governed by the development consent issued by Council on the 21 December, 2007*” and “... *we believe this DA was not necessary, as the activities conform with normal retail operations*”. Refer to **Attachment ‘C’** - copy of The Heads Hotel letter.
- 26 November, 2008 - Letter to Heads Hotel advising that Council does not agree with the hotel’s opinion and suggesting they get their own legal advice. Furthermore, mentioning that the period for operation will end on 21 December, 2008 without an extension by way of a s96 application.
- 8 December, 2008 - letter to Hotel requesting a copy of its planning/legal advice that it is relying upon to support its position that there is no need to operate under development consent but rather under existing use rights.

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By letter of 23 October 2008 the hotel management had taken the position that it did not require development consent to conduct what it termed a “*Trades Fair*”, staff suggested that they obtain their own legal advice on this question as Council was firmly of the opinion that the subject activity was required to hold an operational development consent and comply with its terms of approval.

*Note: The applicant’s legal advice was not formally received until after the second s96 application was determined and it confirmed Council’s position on the requirement for development consent.*

### **Second S96 Modification Application - DS08/1561 (issued 22 January 2009)**

# On 19 December 2008, a second S96 modification application was lodged seeking approval to operate the market on a weekly basis and to extend the term of the use for another twelve months. In all other respects, the fair/market was to remain unchanged from that originally approved, including the approved number of stall holders (8-15). In support of this S96 application, a planning report prepared by Cowman Stoddart Pty Ltd was submitted wherein it was stated that the applicant had conducted surveys which indicated that 60% of the people visiting the market were not residents of Shoalhaven Heads, and instead arrived from surrounding towns including Berry, Bomaderry, Gerringong and Kiama. Comment was also made on the economic impact of the existing development comparing the products sold at the fair/market with those within existing shops. The conclusion was drawn that there had not been an unreasonable economic impact. Refer to **Attachment ‘D’** - s96 Application and Planning Report.

The assessment report noted that, whilst monthly markets provide benefits from a tourism point of view, a weekly market would potentially threaten the economic viability of a group of businesses within the designated shopping precinct who must provide premises, incur running costs and provide support to the local community on a year round basis. It was, therefore, concluded that the weekly markets would potentially have an adverse economic impact of Shoalhaven Heads Village Centre businesses as a whole particularly having regard for the fact that the fair/market has consistently only operated with 3 to 5 stallholders – far short of the approved 15 stall holders.

In order to maintain the economic equilibrium of the village centre, it was determined that the fresh produce market/fair could continue to operate, but only on a monthly basis in accordance with Council’s Operation of Markets Policy. However, given that the applicant was not prepared to amend the application to operate the market/fair on a monthly basis, the second S96 Modification application was refused. Refer to **Attachment ‘E’** - s96 application refusal.

### **Subsequent Non-Compliance**

The first S96 Modification limited the operation of the fresh produce market fair to a monthly frequency. The market/fair continued to operate on a weekly basis beyond the permitted date of 18 December 2008 without authority and a summary of events follows:

- Council continued to receive complaints from local business owners regarding the on-going weekly operation of the fresh produce market fair in contravention of the S96 refusal.

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- Council's Ranger Service received complaints regarding continuing non-compliances and attended the site on a number of occasions, observed and documented activities taking place.
  - Council staff on 16 January, 2009 contacted the management of the Hotel, who were advised that the continued operation of the market/fair was without authority and the conduct of further markets/fairs without approval would be subject to legal action.
  - Subsequent markets/fairs were held on 17 January, 2009 resulting in a Penalty Infringement Notice (PIN) being issued on 20 January, 2009 to the Hotel owner.
  - Participating stallholders were also advised on 21 & 22 January, 2009 by email and telephone of the details to the background to and status of the market/fair and of the likelihood that PINs would be issued if their market participation continued without proper authorisation. *Note: No PINS have been issued to stall holders given the subsequent representations of the applicant and s82A application lodgement.*

### **Request for a S82A Review**

# On 5 February 2009, a S82A request was submitted to Council to review its refusal of DS08/1561 (the second S96 application) which sought modification to revert back to weekly markets/fair and a further extension of 12 months. The s82A application contends that Council did not undertake a proper planning assessment of the application because it considered the Operations of Markets Policy which, according to the applicant, has no relevance and Council did not undertake a proper planning assessment of the matters for consideration as required under Section 79C. Refer to **Attachment 'F'** - s82A Review Request and Planning Report.

The request is supported by legal advice from RMB Kearns and Garside, a copy of the applicant's previous submission to the Section 96 application and a petition signed by members of the Shoalhaven Heads community who support the operation of the produce fair. Refer to confidential report for copy of applicant's legal advice.

The applicant has also requested Council to consider the following amendments to the original proposal:

- Stallholders to the produce fair be restricted to include only those supplying goods to the Heads Hotel; and
- The number of Stallholders to the produce fair to be restricted to a maximum of **eight** (8) at any one time; and
- Deletion of Condition No. 3 limiting the operational period of the produce fair.

### **Applicant's Submission**

DS08/1561 was determined by way of **REFUSAL** for the following four reasons:

1. Pursuant to consideration under S79C(1)(a)(iii) the operation of the market on a weekly basis is contrary to Council's Operation of Markets Policy;



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According to the applicant, the proposal is not for a market. The applicant contends that the development approved by Council related to the modification of an existing use to enable the conduct of a weekly produce fair.

The applicant argues that the Markets Policy was established, in part, to support established retailers to minimise the economic impacts of more substantial markets that operate using minimal facilities with very few overheads. Thus, the hotel site cannot be compared to that situation given that it has an established commercial use. Council rates are paid on the site, along with business outgoings. According to the applicant, the site is clearly different to sites ordinarily used for markets, such as reserves, playing fields or car parks, most of which are Council owned.

**Council Comment:** *Clause 2 - Need for Approval under Council's Operation of Markets Policy states that Council's Local Environmental Plan requires that development consent (planning approval) be obtained for the use of any land, whether private or public, as a site for a market. It is considered that the Trade Fair - **Grower's and Seafood Market**, as described by the applicant in the original application, is a form of a market for the purposes of Council's Policy as a market is the closest definition of what is being conducted in conjunction with the hotel/motel. The permissibility of the activity relates to the existing use rights, but the nature of the original application can be best defined as a market. Staff have taken advice on this aspect and are confident that it was open to Council to assess the original and subsequent applications against the Markets Policy.*

*It is also worth noting that the subject S82 application relates to the second S96 application, not the original approval, which has been acted on and provided the legal basis to allow the fair/market to operate.*

2. Pursuant to consideration under S79C(1)(b) the operation of the market on a weekly basis is likely to have an adverse impact on the economic viability of a number of existing businesses in the Shoalhaven Heads locality;

The applicant's legal advice states that the "economic impact of a proposed development upon private individual traders is not a planning consideration when assessing development applications under S79C." That is, Council cannot refuse an application based on impacts associated with the economic viability of other businesses.

The applicant submits that all established businesses that were trading at the time the produce fair commenced operation continue to trade to this day. Any adverse economic impacts, therefore, are unlikely to be substantial.

**Council Comment:** *Whilst it is accepted that S79C(1)(b) does not require the consideration of economic impact on individual competitors, there is persistent anecdotal submissions that the hotel fair/market is having a detrimental economic impact in the locality particularly in relation to the long-term viability of the shopping precinct identified under DCP 14 - Shoalhaven Heads Shopping Centre.*

*Submissions reveal that, within the shopping centre businesses, one member of staff has already been retrenched and a number of staff have had their hours reduced as a direct result of the weekly markets operating.*

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*It should be noted that the extent of the local economic impact is difficult to accurately quantify in the absence of a comprehensive Economic Impact Assessment.*

*Once again staff have taken advice on this matter and are confident that in the context of Shoalhaven Heads Village and the location and type of activity proposed, economic impacts are a legitimate consideration under Section 79(c).*

3. Pursuant to consideration under S79C(1)(b) the operation of the market on a weekly basis is likely to have an adverse impact on the residential amenity of the local area;

The applicant states that no particular reason has been given as impacting on the residential amenity of the local area. The applicant further states that, given the ample parking area available on the subject site, there is no reason for vehicles to park within the River Road reserve. In addition, the applicant concedes that loose gravel can easily be removed from the car park driveway entrance to Ravenscliffe Road to reduce noise.

**Council Comment:** *It is noted that the land adjoining and adjacent to the subject site is zoned Residential 2(a1). This zoning represents the highest level of residential amenity that is allocated under the SLEP 1985 and, consequently, provides the highest level of protection that can be afforded to residents from impacts that are likely to adversely affect the local amenity and quality of life in such areas.*

*Council has received a limited number of complaints from residents that vehicles are blocking driveways and that vehicles leaving the subject site generate an unacceptable level of noise.*

*Nevertheless, it is accepted that subject to the above issues being resolved, the submissions did not directly object to the markets being approved.*

4. Pursuant to consideration under S79C(1)(e) the operation of the market on a weekly basis is not in the public interests.

The applicant cannot find any evidence that approval of the development would be contrary to the public interest. Indeed, the market appears to have the overwhelming support of the local community. As evidence, the applicant cites the petition accompanying the S82A review application. The applicant also cites the Shoalhaven Heads Forum meeting on the 4 February 2009 where there was unanimous support expressed by the 50 persons in attendance.

**Council Comment:** *It is recognised that the S82A application has substantial support within the local community. This is evident in the applicant's submission however, it should be noted that the majority of submissions received in relation to the previous S96 modification application did not support the proposed weekly operation of the market.*

*It is also accepted that the Shoalhaven Heads Forum meeting on 4 February 2009 unanimously supported the weekly operation of the market. The petition accompanying the S82A review application and containing over 200 signatures is noted.*

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## Applicant's Amended Proposal

The applicant has also requested Council to consider the following amendments to the original proposal:

- Stallholders to the produce fair be restricted to include only those supplying goods to the Heads Hotel;

**Council Comment:** *In order to reduce any possible future economic impact, the fair/market may have on the development of the DCP 14 - Shoalhaven Heads Business Precinct, it would appear reasonable to restrict stallholders to include only those supplying goods to the Heads Hotel in accordance with the applicant's request. However, it may be difficult to verify whether certain stall holders are genuine suppliers to the hotel.*

- The number of stallholders to the produce fair to be restricted to a maximum of eight (8) at any one time;

**Council Comment:** *In order to mitigate future economic impact the fair/market may have on the development of the Shoalhaven Heads Business precinct, it is a significant step to restrict the number of stallholders to a maximum of eight (8) at any one time in accordance with the applicant's request. This is a substantial reduction from the maximum of 15 approved in the original consent. However, even with 3 to 5 stallholders operating at present, local shopkeepers are claiming adverse impact on their collective businesses.*

- Deletion of Condition No. 3 limiting the operational period of the produce fair.

The applicant has requested the removal of Condition No. 3 to DA06/2915 which limits the operation of the market. The condition was initially imposed to enable Council to review the operations (including compliance with conditions of consent) and to consider its impact on the local economy. This is a standard approach for market developments. The applicant argues that, given that this particular development is not a market, the condition should not apply. According to the applicant, the fair has been in operation for two years and Council is well placed to consider its suitability into the future. Given that the produce fair results in no demonstrable adverse impacts on the local economy, there is no valid reason the fair cannot continue into the future. As a consequence, it is unreasonable that the applicant should be required to lodge further application at considerable expense.

**Council Comment:** *Given that the extent of the potential impact of the fair/market on the local economy is difficult to quantify in the absence of a comprehensive Economic Impact Assessment, it is considered necessary that Council should be in a position to properly assess and control any future economic impact of the development if this becomes necessary. For reasons mentioned before, it is not agreed, both from a planning and legal perspective, that the "trade fair" isn't a market. In fact, the applicant quoted on a number of occasions (within the supporting statement) in the original application that the "trade fair" was a market.*

*The applicant has not undertaken a comprehensive economic impact assessment to justify their claim that the operation of the weekly fair/market has not had a demonstrable*

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*adverse impact on the local economy and is relying upon the planning consultant's observations, which are largely restricted to the impact of the existing stalls*

*A limited consent also provides a useful means of reviewing the applicant's performance in terms of compliance with conditions of approval.*

*For these reasons, some form of limited approval should be retained although a longer period, given the establishment costs, could be considered.*

## **Legal Issues**

A separate confidential Legal Report has been presented to Council in conjunction with the Development Committee's consideration of this S82A Review Report.

One issue that the legal report addresses is Council's ability to consider a s82A review of a s96 application determination. The applicant's solicitor has raised an appeal period matter which inadvertently now casts some doubt on Council's ability to deal with the s82A review as submitted.

## **S79C Assessment**

### **Shoalhaven Local Environmental Plan 1985 (SLEP 1985)**

The subject land is zoned Residential 2(a1) under SLEP 1985. The proposed use would normally be prohibited within the 2(a1) Residential Zone, however the original application was assessed as a modification and intensification of the existing use rights which apply over the subject land in respect of the hotel/motel commercial use.

The market/fair constituted a use of land that involved a modification and intensification of an existing use and in accordance with clause 42 of the Environmental Planning and Assessment Regulations that required separate development consent being obtained from Council.

Therefore, in summary, the prevailing existing use rights for the hotel/motel provided the basis for modification and intensification so that the market/fair was able to be permitted with consent despite these uses being ordinarily prohibited in the residential zone.

How Council considered the original and subsequent S96 applications was dependent upon what policies Council sought to apply and how it used them to guide its deliberations on the application before it. Council applied the Markets Policy as the relevant policy document to all application assessments.

### **Development Control Plan 14 - Shoalhaven Heads Shopping Centre (DCP 14)**

DCP 14 focuses on the existing village centre and surrounding vacant State land and public recreation areas. The DCP recognises the area identified in the SLEP 1985 as the principal shopping centre for Shoalhaven Heads, with appropriate zonings to allow for a shopping village and expansion to the west.

The prime objective of the DCP 14 is to integrate the existing shopping groups into a discrete shopping precinct. The purpose of both the DCP and the village centre zoning

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under SLEP 1985 is to provide clear land use planning direction for the broader community which guides commercial investment within the village of Shoalhaven Heads.

The conduct of a weekly local fresh produce market/fair within this relatively small coastal village of Shoalhaven Heads in a location that is distanced from the nominated village centre has a greater potential for adverse economic impact on that centre than that of larger towns such as Nowra with a much larger population to draw from which tends to dilute overall economic impacts.

### **Applicability of Council's Operations of Markets Policy**

Council has taken the view that the approved use is a "market" even though it is called Trade Fair. The applicant in the original application referred to the proposed use on a number of occasions, both in the application form and supporting documentation, as a "market".

In the absence of a definition for "market" in the Shoalhaven Local Environmental Plan 1985 or in the EP&A Model Provisions 1980, the Oxford Dictionary defines "markets" as the "gathering of people for the sale and purchase of provisions, livestock, etc. or the space of building used for such a purpose". Accordingly, under SLEP 1985, a market would fall within the generic definition of "commercial premises" – a form of business not elsewhere defined in the SLEP or Model Provisions. It is noted that draft SLEP 2009 will have a specific definition for a "market" once it is gazetted.

The Markets Policy indicates that the SLEP 1985 requires that planning approval must be obtained for the use of any land, whether private or public, as a site for a market. As mentioned above, markets operated on a weekly basis would need to rely upon existing use rights being modified and intensified as a basis for permissibility in the zone. Whereas, markets conducted on a monthly or even a fortnightly basis (as the Policy previously allowed) could be conducted pursuant to cl.39C of SLEP which allows temporary uses.

Between determining the original development application on the 18 December 2006 and issuing the first S96 approval on the 21 December 2007, Council revised its Operations of Markets Policy (revised Policy adopted 18 December 2007). Essentially, the revised Policy provided for only one market per locality on a monthly basis.

The objectives of Operations of Market Policy are:

- Controlling and regulating the conducting of markets throughout the City of Shoalhaven.

*Comment: It is noted that there is no mention of the Policy applying to public land only.*

- Ensuring that the concerns of the community are considered when assessing applications.

*Comment: The wishes of the local community are to be taken into account when deciding whether to approve or refuse an application for a market. In this particular case, it is recognised that a substantial number of local residents and the Community*

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*Consultative Body (Shoalhaven Heads Community Forum) support the weekly operation of the fresh produce market/ fair.*

- Reducing adverse effects upon the local area by providing guidelines for traffic, access, car parking and hours of operation.

*Comment: There appears to be adequate car parking for people attending the markets within the Shoalhaven Heads Hotel car park.*

- Recognising the importance of markets as a source of income to local community/charity groups and shopping centres whilst also appreciating the economic implications that markets can have upon existing commercial undertakings.

*Comment: The application concludes there is no adverse economic impact on the existing shops in the Shoalhaven Heads village centre. According to a number of submissions from local shop owners, this is not their experience and they strongly contend this assertion.*

*Without a comprehensive economic impact assessment undertaken by the applicant, the shopkeepers or Council, there is little likelihood of knowing with some degree of certainty what the factual impacts are currently and will be in the future with an expanded number of stallholders (from an average participation of 4 stallholders to 8) . Mindful that such an Assessment would be quite costly to undertake, some caution needs to be exercised particularly in terms of having an opportunity to review any decision made.*

- To encourage the stall and product type to be from locally and regionally produced sources and to be of a “Make it, Bake it, Sew it, Grow it” criteria.

*Comment: It appears that the produce sold at the Shoalhaven Heads Hotel market satisfy this objective in that the products sold are essentially locally sourced and regionally produced, although, some concern has been raised in the submissions regarding the extent of fruit and vegetables and seafood sourced from Sydney and regional markets.*

In addition, Council’s Operations of Markets Policy requires that markets may only be conducted by locally based non-profit organisations such as:

- A community group;
- A charity;
- A sporting body; or
- A Chamber of Commerce.

*Comment: The Shoalhaven Heads Hotel Fresh Produce Markets Fair is conducted by none of the abovementioned groups. To satisfy this part of the Policy, the original consent required that a charitable organisation should be nominated by the Heads Hotel to receive the funds collected for the provision of the temporary stalls to the stallholders within the Heads Hotel grounds. The initial consent resulted in the Linear Accelerator being nominated by the market co-ordinator as one of the beneficiaries however, there*

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*has been no nominations provided in the last 12 months and this should be clarified with the operator as a normal compliance requirement.*

It is also noted that Council's Operations of Markets Policy suggests that local retailers be invited by the applicant to participate with the proposed market.

*Comment: This issue was raised by the applicant as part of the original development application however, shopkeepers were concerned at that time that this didn't suit many of the existing businesses as they carry such a diversity of product line that it was impractical to commit due to the need to carry additional staff to participate in the market.*

The applicant now argues that Council's Operations of Markets Policy is not relevant in part because the proposal is not a market but a fair. In addition, the applicant considered the stallholders were now employees of the Hotel and, therefore, this was not a "market" and was not affected by Council's Operation of Markets Policy.

*Comment: It is not agreed that the applicant's fine distinction between a market and a fair (if there is one) precludes the application of the policy, or at least being used as a guide. The relationship between the stallholders and the hotel is unclear given that no details have been provided to clarify the proposed arrangement.*

In summary, the principal elements of the Markets Policy that the operator is not conforming with remains the frequency of the market/fair and the fact that the operator is not a nominated non-profit organisation such as a community or charitable group, sporting body or Chamber of Commerce. However, the operator in the past indicated community organisations benefitting from its market/fair.

### **Environmental Considerations - Impact on Residential Amenity**

One of the submissions raises the issue of noise caused by vehicles accessing the hotel car park over loose gravel from Ravenscliffe Road. However, this is a matter which is unrelated to the s82A review and should be rightfully taken up as a compliance matter for the hotel/motel seeking the removal of the loose gravel to minimise noise in the interests of maintaining the residential amenity of the adjoining area.

### **Legal and Economic Considerations - Competition**

The economic viability of individual rival traders within a shopping centre is normally not a matter for consideration under S79C(1). However, given that the approval of this application has the potential to result in an economical short fall within the village centre as a whole, which could have wider social and economic implications, it is considered to be a relevant consideration.

Whilst it is agreed that there appears to be little factual evidence of an economical short fall within the village, anecdotal evidence from local business owners, supports the view that the weekly market does adversely impact on the local economy. In this regard, one local businessman has had to release one of his casual employees, whilst another is considering dismissing one of his permanent staff.

In the absence of a comprehensive economic analysis, it is difficult to establish accurately, whether the weekly operation of up to eight stallholders could potentially

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compromise the economic integrity of the commercial centre as identified under Development Control Plan 14. It is clear however that, given the current economic climate, competition from the weekly markets has the potential to exacerbate an already difficult economic situation. If, in fact, this led to existing shop owners shutting down, there could be serious impacts on services offered to the local community on a daily basis and the overall viability of the village shopping centre.

### **Public Interest**

Public interest is considered to be a very broad head of consideration by the Courts and would certainly include the interest that has been expressed both in support and against the proposal. Objectively, there appears to be a substantially greater number of supporters for the market and for the S82A review than objectors. In this regard there does appear to be a stronger public interest case to support this application than was apparent with the previous S96 applications. The weight that is attached to this aspect of consideration is, again, a matter for the Council.

It is also recognised that the hotel/motel forecourt area does provide a congenial and pleasant atmosphere within which local residents and visitors can meet and take part in relaxed shopping and social activities.

### **Consultation - Community Forum**

Councillors may note that the matter of the markets was discussed at a Shoalhaven Heads Community Forum meeting held on 4 February, 2009 which was attended by approximately 50 to 60 people. The Forum unanimously resolved to strongly support the continuation of the "Fresh Produce Fair" on a weekly basis.

# Details on all other submissions received is set out in **Attachment 'G'** - Summary of Public Submissions.

### **Conclusion**

It is clear that the weekly fresh produce market fair is supported by a substantial number of local residents and the local CCB and in this respect there is a strong public interest case to support the application. Nevertheless, it is pointed out that the operation of a weekly fresh produce market fair retains the potential to impact adversely on the economic viability of a number of local businesses within the designated shopping centre and could compromise the future services offered to the local residents on a daily basis from the village shopping precinct.

Given the planning and legal advice submitted by the applicant, it would be reasonable to assume that the economic impact of fresh produce market fair operating on a weekly basis could be sustained at least in the medium term, particularly given the impact in the recent past. It is also acknowledged that the fresh produce market fair does indeed bring local residents together to socialise in a friendly and relaxed atmosphere and does attract visitors to the village.

Whilst it is recognised that many residents support the weekly operation of the fresh produce market/fair, the local community should be aware that there may be undesirable economic consequences as a result of such support.



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Accordingly, it is concluded that the Option 4 be supported by Council which will allow the operator to continue in the confidence that there is a longer term approval on a weekly basis but it does provide a mechanism whereby Council can review the economic impact on existing businesses and the village centre as well as compliance with conditions of consent.

Tim Fletcher  
**DIRECTOR, DEVELOPMENT AND ENVIRONMENTAL SERVICES**

R.D Pigg  
**GENERAL MANAGER**

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## CONFIDENTIAL BUSINESS PAPER AGENDA

### DEVELOPMENT & ENVIRONMENTAL SERVICES

1. **Section 82A Review of Refusal to allow the Shoalhaven Heads Hotel to operate a weekly local fresh produce fair – 51 River Road, Shoalhaven Heads – Lot 11 DP 532057. Applicant: Cowman Stoddart on behalf of The Heads Hotel/Motel Pty Ltd. Owner: The Heads Hotel/Motel Pty Ltd**

**Reason**

Section 10A(2)(g) - Advice concerning litigation, or advice that would otherwise be privileged from production in legal proceedings on the ground of legal professional privilege

Pursuant to Section 10A(4) the public will be invited to make representation to the Council meeting before any part of the meeting is closed, as to whether that part of the meeting should be closed.

**ADDENDUM REPORT OF GENERAL MANAGER**

**SPECIAL DEVELOPMENT COMMITTEE**

**TUESDAY, 17 MARCH 2009**

**STRATEGIC PLANNING AND INFRASTRUCTURE**

**1. Heritage Estates - Environment Protection & Biodiversity Conservation Act  
Decision - EPBC 2007/3448 File 1446-10**

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This report is submitted as an addendum to the meeting given the decision was made last Friday after the close of the business paper and the need to urgently formalise Council's position on the matter.

**Purpose of the Report:**

On 13<sup>th</sup> March 2009, the Federal Environment Minister, the Hon. Peter Garrett MP, refused the Heritage Estates proposal (EPBC ref: 2007/3448) under the *Environment Protection and Biodiversity Conservation Act, 1999 (EPBC Act)*. The purpose of this report is to inform Council of the decision and to formalise Council's position to pursue the possible option of joint Government acquisition of the land for inclusion in the National Parks system.

**RECOMMENDED that:**

- a) **Council acknowledge the refusal of the Heritage Estates rezoning proposal under the EPBC Act by the Federal Minister for the Environment on 13<sup>th</sup> March 2009.**
  
- b) **Council urgently seek discussions with the Commonwealth Director of National Parks and the NSW Department of Environment and Climate Change (DECC) to discuss the option of Government acquisition of the Heritage Estates.**

**Options:**

1. The 'do nothing' option

Leaving the land in its current status is clearly unacceptable to all stakeholders. The land is being degraded by uncontrolled vehicle and trail bike access, illegal dumping, vegetation removal, firewood collecting etc., all of which place a burden on Council's compliance resources. The landowners are also required to pay rates on land they cannot use and which now has no prospect of being rezoned to residential.

## 2. Continue to pursue rezoning with the NSW Government

It would appear to be pointless to continue to pursue the proposed rezoning of the land under the NSW planning system knowing that an outright refusal has been issued under the EPBC Act that precludes future residential development.

## 3. Pursue Government Acquisition of the Heritage Estates Land

In its resolution of 24<sup>th</sup> February 2009, Council flagged its desire to pursue the option of Government acquisition to resolve the long term tenure of the land and alleviate financial impacts on the landowners should the rezoning be refused, which has now occurred.

## 4. BioBanking

In addition to the option of joint Government acquisition and addition to National Park system, the other potential option outlined in the PER for securing the conservation values of the land while providing some remuneration to landowners is to use of the land as a BioBank site. (Refer to section 4.4 of the PER).

The fragmented land ownership would make negotiating an arrangement difficult and protracted process. There would also be the question of who would manage the land in the long term. The land is contiguous with Jervis Bay National Park and acquisition is the more likely of these two options. The Minister's decision and DEWHA's Recommendation Report do not make any recommendations relating to these conservation options.

### **Details/Issue:**

# On 13<sup>th</sup> March 2009, the Federal Minister for the Environment Peter Garrett AM refused Council's proposed rezoning and associated public works to facilitate residential development at the "Heritage Estates", Worroving Heights under the Environment Protection and Biodiversity Conservation Act, 1999, due to its impact on threatened species and Commonwealth land (Booderee National Park). The legal instrument and accompanying letter from the Minister is provided in Attachment "A". Explanation of the refusal is provided in DEWHA's Recommendation Report which is provided in the Councillor's information folder.

Council was notified of the proposed decision to refuse the proposal on 23<sup>rd</sup> February and given 10 business days to provide any additional information to the Minister. On 24<sup>th</sup> February 2009, Council resolved to:

- a) *Council make a submission requesting that stronger consideration be given to the proposal on social and economic grounds and urging a joint Government solution in the event that the Minister remains unwilling to approve the rezoning proposal;*
- b) *The Mayor urgently seek a deputation with the Minister for the Environment, Heritage and the Arts, Hon. Peter Garrett MP.*

A submission dated 3<sup>rd</sup> March was made to the Minister in accordance with part a) of the resolution. Council's submission stated:

*"If the proposal is not ultimately approved, Council strongly believes joint Government acquisition would be an appropriate solution to allow the land to be managed for conservation purposes whilst alleviating the financial impacts on the landowners. If the Commonwealth does not take immediate proactive action to resolve the land ownership matter, I believe the continued preservation of the biodiversity values could be jeopardised."*

The decision to refuse the proposal was partly based on potential impacts on Booderee National Park. As stated in Council's submission to the Minister, even though the proposal has been refused, the land's environmental values are not secure at present. It would therefore appear to be in the Commonwealth's interest to assist in acquiring the land for addition to the National Park system given the significance attributed to the land via the outright refusal under the EPBC Act.

One potential source of funding to acquire the land could be the Commonwealth's 'Caring for our Country' program. Council would need to discuss this and other potential funding sources with the Federal Government's Director of National Parks.

Council would also need to seek discussions with the NSW Department of Environment and Climate Change (DECC) as without DECC's support and involvement, the option of joint Government acquisition would not be viable. The land would also need to be rezoned to the "E1 National Parks and Nature Reserves" requiring the involvement of the Department of Planning (DoP).

#### Appeal mechanisms

It is understood that there is no merits-based appeal mechanism under the *EPBC Act* for proposed assessed by PER. The decision to refuse the proposal therefore appears to end any prospect that the land could be rezoned for residential purposes under the NSW planning system. It would be pointless to pursue the rezoning with the NSW Government knowing that an outright refusal has been issued under the EPBC Act that would stop any future residential development.

#### **Economic, Social & Environmental (ESD) Consideration:**

As opposed to leaving the land unmanaged and in private ownership, addition of the land to the National Park system would secure and enhance the land's role as a biodiversity link to Booderee National Park.

The expansion of the National Park system would help to consolidate the area's attractiveness as a tourist attraction, providing a range of social and economic benefits to the local economy.

Joint Government acquisition would help to alleviate the economic loss and related social and psychological impacts on the landowners. As documented in

the PER, many of the landowners are disadvantaged in terms of income, education and employment status, for whom impacts will be greatest if the land is not ultimately acquired.

At this stage, individual landowners have not been formally informed of the decision. The Shoalhaven Landowners Association (SLA) and a number of landowners have been verbally advised of the decision. Landowners will be formally advised once Council has formally considered the matter. The Minister's decision (via a link to DEWHA's website) and DEWHA's recommendation report have been placed on Council's website. People enquiring about the decision have been directed to the recommendation report where appropriate.

### **Financial Considerations:**

#### Rates and Special Rates

A separate report will be prepared on the financial implications and options available to Council concerning rates and special rates.

#### Council land in the Heritage Estates

Council now owns 34 of the 1200 properties in the Heritage Estates. Of these, 15 located in the area ruled out by the COI were acquired through the sale of land for unpaid rates held in November 2008. Council could consider contributing these as part of a joint Government acquisition arrangement.

#### Policy on 'Transfer of land in lieu of unpaid rates' (Policy no. POL07/18)

Landowners can volunteer their land to Council in lieu of unpaid rates under Policy no. POL07/18 ('Transfer of land lieu of unpaid rates').

Alternatively, Council can auction the land if any rate or charge has remained unpaid on a property for more than five years. Policy no. POL07/18 does not currently allow properties in the investigation areas to be included in the sale of land for unpaid rates. The purpose of this has been to avoid any conflict of interest on Council's behalf. This may no longer be relevant and the policy could now be amended to include all properties within the overall Heritage Estates area.

This would provide a short term opportunity for Council to resolve the issue of unpaid rates on a number of properties within the investigation areas. At the earliest opportunity a separate report will be prepared to Council on the financial implications of the EPBC decision.

### **Conclusions:**

On 13<sup>th</sup> March 2009, the Heritage Estates rezoning proposal was refused under the EPBC Act. The reasons for the refusal included potential impacts on biodiversity of Booderee National Park. Despite the importance of the Heritage Estates land to Booderee National Park, neither the Minister's decision nor the Recommendation Report provides any recommendation for future ownership and management of the land.

Allowing the land to remain in private ownership with the same zoning is not considered appropriate for a range of reasons. Government acquisition of the land for inclusion in the National Park system would be the most appropriate solution. Thus, Council should urgently commence negotiations with the Federal Government's Director of National Parks and DECC to discuss this possibility.

A separate report on the financial implications arising from the refusal and options for Council will be submitted at the earliest opportunity.

E J Royston  
**DIRECTOR, STRATEGIC PLANNING & INFRASTRUCTURE**

R D Pigg  
**GENERAL MANAGER**