

To: The CEO, Shoalhaven City Council

DS22/1239 - Modifications to DA11/1386 – 75 and 79 Queen Street, Berry 2535

The current application (DS22/1239) for modifications to DA11/1386 (as previously modified under DS15/1291) applies to an existing and current development consent for the construction of a new service station.

The applicant claims that the development for which consent is sought -

- will include the same key elements and features of the existing development consent,
- will serve the same purposes, and
- the nature and scale of the development is substantially the same as before.

However, the planned alterations to the conditions and approved site layout and facilities are significantly changed and will have consequent impacts on the streetscape and the heritage character of Berry, including:

- the setting of the heritage items in the immediate vicinity of the proposal
- the streetscape
- the future character of Berry (Illustrations in Berry Character Statements, *Shoalhaven Character Assessments* include the Donut Van and 81 Queen St)
- the amenity of the adjoining businesses
- the amenity of the adjacent residential areas to the north
- the safety of pedestrians on both the footpath and the proposed pedestrian crossing outside 81 Queen Street , bus passengers waiting at the bus shelter, and customers of the Donut Van, and
- the heritage character tourism attraction of Berry.

All elements of the approved development DA11/1386 (DS15/1291) have been modified in DS22/1239:

Underground tanks, Fuel dispenser pumps, Pay-point, Retail shop, Carwash-bay and plant room, Car parking, Landscaping and Noise attenuation.

Conditions, number 3 (Use of Retail Shop (additional approvals required), 60(a)(risk management), 24, 27 (Signage details), and 45 have been deleted.

DS22/1239 is not '*substantially the same development as before*'.

Site Plans

The escalating changes to the application in the three iterations of planning over the site can be seen in Figures 1 -3:

- Figure 1 shows a largely cleared site with a small service station structure and bowsters.
- Figures 2 and 3 show reducing fuel-sale capacity and incrementally larger retail structures.

The architectural clouding in Figure 3, the subject of **DS22/1239**, indicates modification in every area of the site plan.

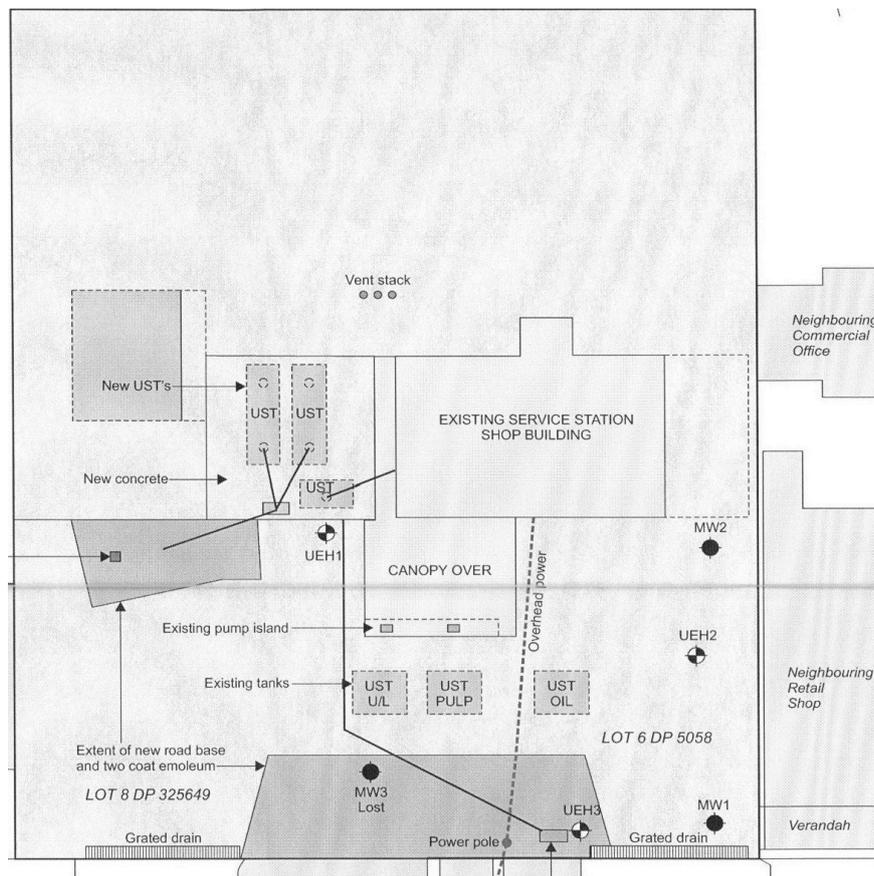


Figure 1. Site plan of the original Service Station.

Whilst the most serious impacts of DS22/1239 will be on the heritage character of Berry, there will also be character and place-related impacts on Streetscapes, Safety Considerations and Amenity.

DCP 2014, Chapter G18 – Streetscape Design for Town and Village Centres stresses the importance of ensuring that future development protects and enhances existing strengths and reinforces the existing ‘sense of place’.

Redevelopment presents an opportunity to enhance and strengthen the streetscape, but the current proposal demonstrates no sympathy with the general surrounds, nor does it mitigate its impact with a design that complements the general pattern and character of the street.

Heritage

The impact of the development on the heritage character of Queen Street is apparent in the site plans which show the changing relationship of the development to Queen Street and to the neighbouring Heritage building at 81 Queen Street, to the east and the iconic Donut Van to the west.

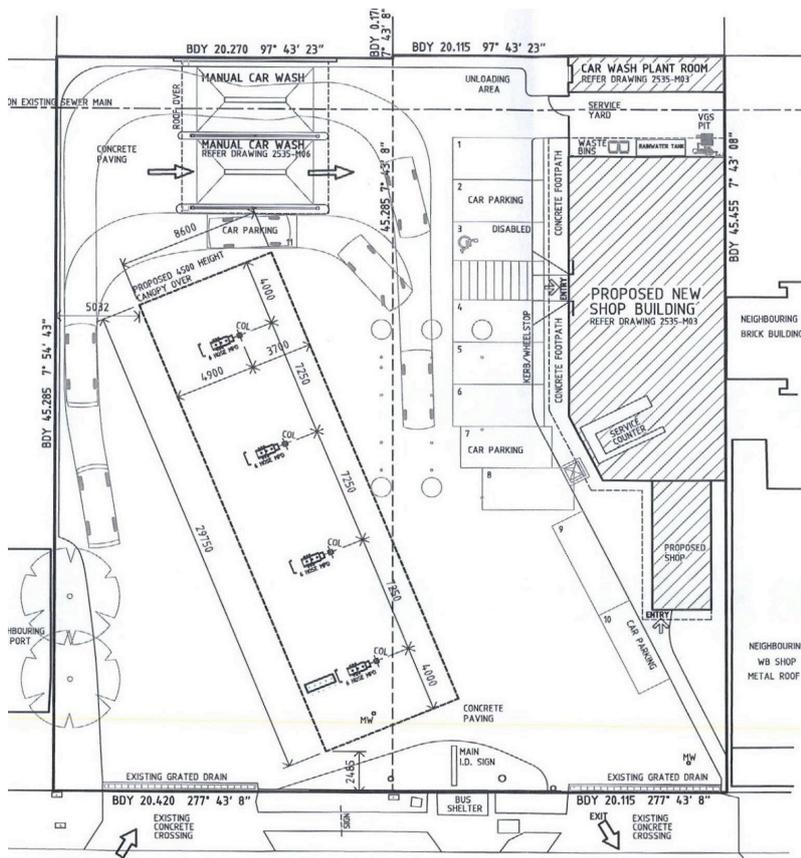


Figure 2. Modified site plan DA11/1386 (DS15/1291)

- List of Material Built Form Changes**
- 1 To western boundary:
 - Relocated car wash plant
 - Relocated refuse enclosure
 - 2 Fuel canopy:
 - Fuelling positions reduced (8 to 6)
 - Re-align fuel canopy
 - 3 Control building and car parking
 - Total floor area increase – 222m² to 279m²
 - Increase car parking from 11 to 13 (including staff car park)
 - Additional landscaping to control building frontage
 - 4 Crossovers and signage:
 - Relocation of main site ID pylon to south-western corner of site



NEW SERVICE STATION COMPLEX
75-79 QUEEN STREET, BERRY, NSW

PLANNING

14.08.22
20:01:46:000

ADS Architects
93 Gillies Street Adelaide 5000 T:82232244

Figure 3. Modifications proposed to the modified site plan DA11/1386 (DS14/1291)

Additionally, since determination of DA11/1386, there have been many significant changes to the LEP, DCP, Supporting Documentation, Environmental Conditions and Traffic Infrastructure, which would have significant weight in Council's consideration and determination of the development proposal, were it to be tendered today:

- Amendment 43 to SLEP 2014 to include additional heritage items at 51 and 54 Queen St and Queen Street Heritage Conservation Area which are in the vicinity of the proposal
- Chapter N2 of the DCP: Berry Town Centre
- Chapter G18: Streetscape Design for Town and Village Centres
- Shoalhaven 2040 Our Strategic Land-Use Planning Statement
- Illawarra Shoalhaven Regional Plan
- Guiding Future Growth - Shoalhaven Character Statements
- Berry Bypass which reduces through-traffic
- No provision for electric vehicles
- Highest and best use of commercially zoned land
- PP056 which investigated and reconsidered houses at 53, 59, 68 and 70 Queen Street (in the vicinity of the proposal) for inclusion in SLEP 2014

Heritage Assessment

A heritage assessment provided with **DA11/1386** noted:

"The proposals will impact the general streetscape and the setting of heritage items to the west. This stretch of Queen Street is characterised by the early, small scale, former residences that are now generally in commercial use. The redevelopment presents an opportunity to enhance the streetscape and the current proposal makes no attempt to marry in with the general surrounds

The proposed shops are set tight to the western boundary and will impact negatively on the heritage item at 81 Queen Street

Recommendation - Applicant be requested to reconsider the design of the shop element to reduce the impact on the adjoining heritage items."

Since DA11/1386, additional items in the vicinity of the proposal and Queen Street Heritage Conservation Area have been added to SLEP 2014.

SLEP Clause 5.10 Heritage Conservation states:

Under sub-clause 1 **Objectives**:

(b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views

and requires under sub-clause (5) **Heritage assessment**:

The consent authority may, before granting consent to any development—

(a) on land on which a heritage item is located, or

(b) on land that is within a heritage conservation area, or

(c) on land that is within the vicinity of land referred to in paragraph (a) or (b),

require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.

A new Statement of Heritage Impact should be required, and the recommendation of the earlier Heritage Assessment should be taken into account.

Heritage Items in the vicinity of the Proposal

81, 78, 68, 65, 89, 83 Queen Street



Streetscape images east and west of the proposal



Streetscapes

Berry's streetscapes define its heritage character.

The Future Character of Berry, Shoalhaven Character Assessments

"Berry, the 'Town of Trees' will continue to be an iconic heritage town that people love to live in and visit. The town values, respects and relies on its unique physical characteristics and rural, boutique character to attract visitors, which underpins its identity and economy."

Shoalhaven Development Control Plan 2014

Chapter G18 – Streetscape Design for Town and Village Centres

5.1 Streetscape Character and Function

Towns and villages in Shoalhaven have unique character, features and functions. The quality and character of the streets therefore play a significant role in the experience of the town or village centre. It is important that these existing strengths are protected and enhanced to ensure that future development reinforces the existing 'sense of place'.

The specific objectives are to:

i. Improve the quality of streetscapes in town and village centres.

iii. Protect and enhance elements which positively contribute to the existing character and function of the centre.

v. Encourage and promote development that integrates and contributes to the function, vitality, and character of town and village centres.

Comments

The proposal does not reference or consider Chapter G18 of the DCP.

The nature of the proposal is such that it will not integrate with and protect (or enhance) the existing quality and character of Queen Street. It makes no concession to reinforcing the existing sense of place and it will seriously impact on the two immediately adjacent businesses that do: 81 Queen Street and the Donut Van.



81 Queen Street, immediately east of the proposal, will be overshadowed by the 7.05m high 'control building' which will completely obscure the federation cottage's western elevation and disrupt its century plus relationship to the character of Queen Street.

Its business sign (designed and installed consistent with Chapter G22: Advertising Signs and Structures, 5.1.7 Design Guidelines for Heritage Buildings), will also be obscured.

The Donut Van immediately west of the proposal, will be impacted by the pylon sign proposed for the western boundary. The Donut Van is not heritage listed but is significant in terms of regional and local character, tourism attraction and the local economy. It is a Berry icon.

Its reputation reaches far beyond Berry and is responsible for attracting visitors to the village, a fact referenced on the Supplementary Tourist and Directional Sign located at the northern turn-off to Berry on the Highway.

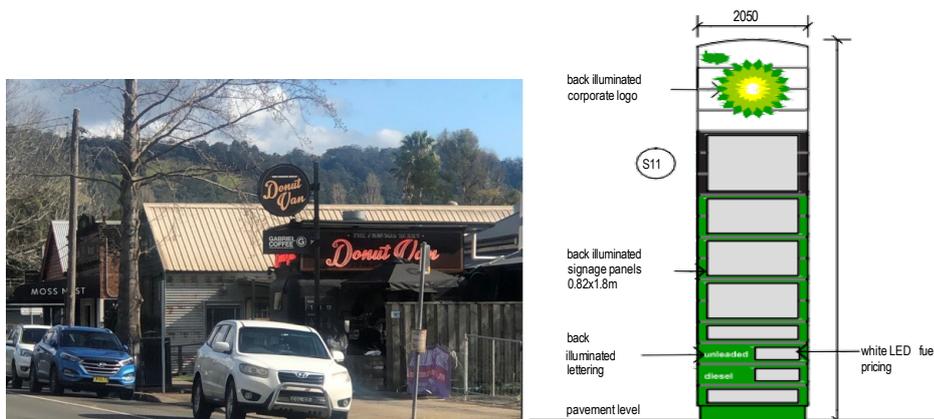
Supplementary Tourist and Directional Signs ensure the positive promotion of tourism and reflect the image of Shoalhaven together with the individual character of its towns and villages.

A 9m X 2.05m pylon sign proposed for the south western corner of the site, sits hard by the Donut Van. The sign -

- exceeds the allowable maximum height (by 2m);
- exceeds the allowable maximum sign face area of Free-Standing Signs (by more than 30%);
- sits well inside the minimum side boundary setback of 3m specified in Chapter G22. *(Chapter G22: Advertising Signs and Structures, 5.5 General Controls, A1.4, A1.7)*

The pylon sign will obscure and dominate the Donut Van business. The mandated positioning clause 27(a) in the conditions of consent, which located the sign between the driveways, has been deleted.

The 9m X 2.05m pylon sign is sited next to the paling fence on the rhs of the image below.



The sign will be as wide as the paling fence is high and will be more than 4 times the height of the fence (approx. as high as the power pole), much higher than the small scale former historic residences (now businesses) beyond the Donut Van.

DS22/1239 demonstrates no sensitivity to Berry's character or the rights of the two neighbouring businesses. The pylon sign is not of a suitable bulk or scale to adjoining development and will have negative visual impacts on the businesses operating in the early, small scale former historic residences which positively contribute to the existing character and function of Berry Town Centre.

Chapter G22: Advertising Signs and Structures, 5.5 General Controls, Performance Criteria, P1 requires:

Ensure advertising signs/structures:

- relate well to and integrates with existing built and vegetated forms
- do not dominate the streetscape or skyline
- do not obstruct sightlines to signs on adjoining property
- do not detract from the heritage significance of the building or place

The assertion that the proposed free-standing pylon sign complies with these performance criteria is not supported.

The question should be asked:

Will the Donut Van experience be the same when it is dominated by an oversized, illuminated pillar sign? Berry's boutique character attracts visitors because it offers experiences which are different from the brightly lit, 24/7 experience to be found in 160+ OTR outlets.

Berry and Shoalhaven's economy depends on such differences.

Chapter N2: Berry Town Centre

The purpose of this chapter is to reinforce the role of Berry as a service centre and to ensure that development in Berry Town Centre is compatible with the historic character of Berry.

4. Objectives

The objectives are to:

ii. Ensure that new development is complementary to, and respects, the heritage characteristics of the town.

iii. Retain the visual importance and setting of heritage items and conservation areas.

xi. Encourage development which is of a suitable bulk and scale to adjoining development.

Comments

The proposal fails to demonstrate consistency with the objectives of Chapter N2.

Claims that the proposal will not affect the relationship of the development to the setting of nearby heritage items, and that it does not materially alter the bulk and scale of development, are not supported.

Safety Considerations

The Traffic and Parking Impact Assessment found that the proposal will generate hundreds of vehicle crossings of the footpath daily, noting "*that there will be no detrimental impact to the performance of the interface of the subject land with Queen Street...*"

However, the Traffic Report only assessed the traffic and parking impacts onsite. It did not consider any broader impacts such as:

- The western ingress footpath crossing is close to the Donut Van which (as previously noted) regularly attracts large numbers of patrons who congregate on the footpath. (See below)
- The eastern egress footpath crossing will be close to the proposed raised pedestrian crossing outside Number 81, which will concentrate pedestrians to the area and slow and condense traffic on Queen Street.
- The main bus stop in Berry (largely used by school children) is located between the two footpath crossings.

The Traffic and Parking Impact Assessment takes none of these factors into account.



Donut Van patrons queuing along the footpath past the bus shelter towards the pedestrian crossing. During holidays and peak periods in fine weather, the crowd is often considerably larger.

Amenity

Conditions of consent concerned with maintaining the amenity of the area and minimising the adverse impacts of the service station development on the adjoining and adjacent residential areas to the north have been modified and minimised:

- 3.5m Noise attenuation barriers replaced with 2.1m Colorbond fencing
- operation in compliance with a multilevel risk management assessment clause has been deleted (60(a))
- restrictions on the operating hours of the service station and the associated attached retail shop (6am to 10pm daily) have been deleted
- the operating hours of the car wash facility located immediately behind existing residences to the north have been extended by two hours until 10pm
- there is no landscape plan
- there is no streetscape study
- there is no Statement of Heritage Impact

Unintended Consequences

An unintended consequence of attracting customers to a quiet area of Berry which is generally deserted when all other businesses are closed, is the potential for rowdy behaviour which will impact on the amenity of the local residents as well as on the amenity of guests in the motel opposite the site. Disruption of the amenity of motel guests has serious implications for the motel's business.

Residents of North Street have experienced similar unintended consequences associated with late night disruptive behaviours in Boongaree Nature Park. The police are now conducting a Community Safety Assessment.

Shoalhaven Development Control Plan 2014

Chapter G17 – Business, Commercial and Retail Activities

Objectives and Controls relevant to the proposed development require:

4. (ii) Safeguard the amenity of the area and, in particular that of immediately adjoining and adjacent property owners.
 - (iii) Moderate environmental impacts
5. P8. The hours of operation:
 - Do not have an unreasonable adverse impact on any neighbouring premises.
 - Encourage employment and street activation outside of standard business hours, in appropriate locations.

The proponent claims, that as modified, the approved development will comply with these objectives and Performance Criteria by -

- minimising potential amenity impacts with a 2.1m Colorbond fence;
- allowing for passive and active surveillance from the control building across the subject land and onto the surrounding streets; and
- by reason of its 24 hour, 7 day per week operation, the proposed development will contribute to the safety of the environs.

Comments

Currently, safety of the environs is not an issue. There is NO disruptive and antisocial behaviour in that area of Queen Street such that it would require *passive and active surveillance*.

The proposal, however, has the potential to attract rather than mitigate such behaviours. There is no assurance for residents and the other businesses that noise or anti-social behaviour (including graffiti, petty vandalism and rubbish) won't be attracted by DS22/1239 to this historic precinct.

Modifications

The application seeks consent to modify the Existing Development Consent under the provisions of EPA Act Division 4.9 Post -consent Provisions, section 4.55(2):

(2) Other modifications. A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified

The proponent states at **4. Proposed Modifications**

"The development, which will be allowed if the proposed modifications are approved, will include the same key elements and features, and will serve the same purposes, as does the Existing Development consent.

While the relative proportions of some of the elements are being varied (some take a larger proportion of the site, some a smaller proportion), the nature and scale of the development will remain substantially the same as the development which is approved under the Existing Development Consent"

However, the proponent contradicts the above statement at **7. Conclusion:**

"The proposed modification makes substantial changes and improvements to the development as currently approved....."

Comments

Council must be satisfied that the development will remain substantially the same development as the development for which consent was originally granted.

Land Use term "service station"

The land use term "service station" is defined in the LEP Dictionary:

"Service station means a building or place used for the sale by retail of fuels and lubricants for motor vehicles, whether or not the building or place is also used for any one or more of the following –

- (a) the ancillary sale by retail of spare parts and accessories for motor vehicles,*
- (b) the cleaning of motor vehicles,*
- (c) installation of accessories,*
- (d) inspecting, repairing and servicing of motor vehicles (other than body building, panel beating, spray painting, or chassis restoration),*
- (e) the ancillary retail selling or hiring of general merchandise or services or both."*

Development consent relating to 75 and 79 Queen Street, Berry exists for the purpose of the construction of a new service station, whether or not the building or place is also used for ancillary retail selling or hiring of general merchandise.

That is, the dominant purpose of the development is 'service station' and the ancillary 'selling of general merchandise' is subservient to that dominant purpose.

Ancillary Retail Sales

The proponent provides the following information:

"Condition 3 of the Existing Development Consent requires additional information to be provided in relation to the "Retail Shop Outlet" proposed in the Existing Development Consent.

The following further information is provided in respect of ancillary retail sales:

- The proposed modification does not include any "Retail Shop Outlet" as part of the development.*
- All land use on the subject land will be encompassed within the defined land use term "service station", including "ancillary retail selling or hiring of general merchandise..."*
- Ancillary retail sales will include coffee, juice and other beverages, pre-prepared foods such as sandwiches, pies, salads and wraps and other snacks, and convenience grocery items.*
- Ancillary retail sales are included within the defined land use term "service station" which has been approved for the subject land*
- Ancillary retail sales are integrated with and ancillary to the use of the subject land as a service station..."*

Planning Circular PS 13-001- How to Characterise Development:

PS 13-001 counsels that the concept of ancillary use is important when development involves multiple components on the same land, noting that if a component serves its own purpose, it is not a component of the dominant purpose but an independent use on the same land. It is a dominant use in its own right.

PS 13-001 details the following considerations regarding characterisation of "ancillary":
A component of a development may have features that are both ancillary and independent. If this is the case, consider the following:

- Is the component going to serve the dominant purpose of the development or is it independent?

Response: No. The Control Centre component does not serve the dominant purpose of the development. It is independent and serves its own purpose. OTR describe its business as "*fuel and convenience chain*". Claims that "*Ancillary retail sales are integrated with and ancillary to the use of the subject land as a service station*" are not supported.

Independent functioning is evidenced in the SEE at 6.1 (p13)

"Need a good coffee, some hot food, or an urgent grocery item? OTR is making life easy"

"the proposed development in the town centre will encourage and enable customers to walk in to the site";

"it is highly unlikely that customers will seek an on-street car park to use the convenience store element of the proposed development."

"it will provide opportunities for customers and employees to walk or cycle from nearby residential areas or accommodation facilities within Berry"(p7)

Purchase of fuels and lubricants for motor vehicles generally requires use of a motor vehicle. Walking or cycling to a Control Centre *convenience store* is consistent with *convenience store* being a dominant use in its own right.

- What is the amount of land to be used for a certain component, relative to the amount of land proposed to be used for other purposes? If the amount of land is relatively small, it is more likely to be ancillary.

Response: The amount of land to be used for the dominant purpose (sales of fuel and lubricants) in the proposed modifications has been reduced to 196m² under canopy (a reduction of 31%), whereas the relative amount of land proposed to be used for the ancillary purpose (retail sales) has been increased to 279m² floor area (an increase of 20%).

- Evidence of a purpose that is inconsistent with the dominant purpose is likely to undermine a claim that a component is ancillary.

Response: Explanation provided on OTR's website evidences a purpose that is inconsistent with the dominant purpose, where OTR describes its business thus:

"OTR is a fully Australian owned & operated convenience store brand with 170 stores"

- If the component is temporary, it is more likely to be ancillary; if it is regular (that is, will constitute an ongoing use for a long period of time), it is likely to be an independent use.

Response: It is regular and will constitute an ongoing use.

- If the component goes beyond what is reasonably required in the circumstances for the development to implement the dominant purpose, it is likely to be an independent use (regardless of whether it has ancillary qualities).

Response: The Control Centre goes beyond what is reasonably required in the circumstances for the development to implement the dominant purpose.

The provision of "*great supermarket deals, hot barista-made coffee, refreshing cold drinks, delicious food*" (OTR website) goes beyond what is what is reasonably required for the sale of fuels and lubricants and beyond what is reasonably regarded as 'general merchandise'.

The SEE refers to the ancillary sale of pre-prepared food ('*sandwiches, pies, salads and wraps*').

The OTR website explains the nature of the pre-prepared food:

"Much more than just a service station or convenience store, OTR also brings together a host of quality food and drink offerings under the one roof, including Hungry Jack's, Subway submarine sandwiches, Oporto Portuguese style chicken and burgers, Guzman y Gomez Mexican food, wokinbox Asian food, C Coffee barista-made coffee, Krispy Kreme donuts, EAT fresh and healthy food, and Moe's Dog and Shake."

Comments

Planning Circular PS 13-001 states:

if a component serves its own purpose, it is not a component of the dominant purpose but an independent use on the same land. It is a dominant use in its own right. In such circumstances, the development could be described as a mixed-use development.

Council must be satisfied that the development will remain substantially the same development as the development for which consent was originally granted and that the Control Centre function is ancillary to the dominant purpose, taking into account -

- Matters discussed in PS 13-001 regarding ancillary and mixed-use development.
- Deletion of Condition 3 of the Existing Development relating to a "Retail Shop Outlet" and substitution of "Control Centre"
- Removal of half the fuel dispenser pumps and 20% increase to the ancillary Control Centre.

Conclusion

The proposed modifications to DA11/1386(DS15/1291) required by DS22/1239 will not deliver development that remains substantially the same as that for which consent was determined.

The proposed modifications will have unacceptable adverse impacts in the locality on the -

- heritage character of Berry
- setting of the heritage items and the streetscape
- future character of Berry
- amenity of the adjoining businesses and the adjacent residential areas to the north
- safety of pedestrians
- tourism attraction of Berry
- economy of Berry and the wider LGA

Recommendations

1. DS 22/1239 should be refused on the grounds that -
 - a. It will not deliver development that remains substantially the same as that for which consent was determined
 - b. It will have adverse impacts on the heritage character, streetscape, amenity and economy of Berry
 - c. It fails to provide a Statement of Heritage Impact as required by Objective (b), 5.10(1)(b), 5(c), SLEP 2014
2. In line with **Note** at 1. PART A, General require a fresh Development Application.
3. In line with Condition 3, DA 11/1386 (DS 15/1291) require additional approval for use of Retail Shop Outlet.
4. In line with Objective (b), 5.10(1)(b), 5(c), SLEP 2014 require a Statement of Heritage Impact.