

**5.1 NO. 5 (LOT: 516; PLAN: 2177) BERRYMAN STREET, MOUNT HAWTHORN - CHANGE OF USE FROM SINGLE HOUSE TO SINGLE HOUSE AND RESTAURANT/CAFE****Ward:** North

- Attachments:**
1. Consultation and Location Map
  2. Development Application Plans
  3. Applicant's Justification
  4. Applicant's Operation Management Plan
  5. Acoustic Letter of Advice
  6. 1975 Council Determination
  7. 1997 Council Determination
  8. Summary of Submission - Applicant Response
  9. Summary of Submissions - Administration Response
  10. Determination Advice Notes

**RECOMMENDATION:**

That Council, in accordance with the provisions of the City of Vincent Local Planning Scheme No. 2 and the Metropolitan Region Scheme, APPROVES the application for the Change of Use from Single House to Single House and Restaurant/Cafe at No. 5 (Lot: 516; D/P: 2177) Berryman Street, Mount Hawthorn, in accordance with plans provided in Attachment 2, subject to the following conditions, with the associated determination advice notes in Attachment 10:

**1. Development Approval**

This approval relates to a Change of Use from Single House to Single House and Restaurant/Cafe as shown on the plans dated 12 February 2024. It does not relate to any other development on the site;

**2. Use of Premises**

- 2.1 The development shall be used in accordance with the definition of 'Single House' and 'Restaurant/Cafe' as set out in the City's Local Planning Scheme No. 2;
- 2.2 The Restaurant/Cafe use shall be contained to the 34 square metre room, annotated on the approved plans as 'Proposed Cafe', and the staff and customer car parking areas annotated on the approved plans as 'Tandem Carbays', to the satisfaction of the City. Remaining areas of the building and outdoor areas shall be used as a Single House, unless further development approval is received by the City;
- 2.3 The total number of staff attending the Restaurant/Cafe at any one time shall be limited to two (2) persons, to the satisfaction of the City;
- 2.4 The total number of customers/patrons attending the Restaurant/Cafe at any one time shall be limited to 14 persons, inclusive of dine-in and take-away customers, to the satisfaction of the City; and
- 2.5 The Restaurant/Cafe shall be limited to the following operating hours, to the satisfaction of the City:
  - Monday to Saturday: 7:00am to 4:00pm; and
  - Sunday: 9:00am to 4:00pm and Public Holidays: Closed, unless demonstrated through an Acoustic Report that the premises could operate from 7:00am on Sundays or on Public Holidays, in strict accordance with the *Environmental Protection (Noise) Regulations 1997*, and subject to the implementation of any recommended noise mitigation measures detailed in an Acoustic Report, to the satisfaction of the City;

**3. Operation Management**

- 3.1 The Restaurant/Cafe shall at all times operate in compliance with the Operation Management Plan stamp dated 12 February 2024, to the satisfaction of the City;
- 3.2 At all times, customers shall not queue, wait for take-away orders, or dine, on the adjacent footpaths and/or verge areas, to the satisfaction of the City;
- 3.3 Prior to commencement of the use, an amended Operation Management Plan shall be submitted to and approved by the City, which provides measures regarding how take-away waiting areas would be accommodated within internal areas of the building, to the satisfaction of the City. This should include designated waiting areas as well as signage advising customers that queuing, waiting and dining must occur internal to the building only, in accordance with Condition 3.2, to the satisfaction of the City; and
- 3.4 All deliveries, servicing, food/drink preparation, set-up, pack-down, cleaning, and any other activities associated with the Restaurant/Cafe shall occur within the approved hours of operation, as detailed within Condition 2.5 of this approval, to the satisfaction of the City;

#### 4. Acoustic Report

- 4.1 An Acoustic Report, in accordance with the City's Policy No. 7.5.21 – Sound Attenuation and to the satisfaction of the City, shall be lodged with and approved by the City prior to the operation of the Restaurant/Cafe. The Acoustic Report must address all activities, equipment, and operations at the premises, including but not limited to:
  - Vehicle noise (in accordance with the carpark design required by Condition 6);
  - Customer noise;
  - Noise from mechanical plants;
  - Proposed operating hours, inclusive of public holiday trading; and
  - Noise from glass waste disposal or compacting.

All of the recommended measures included in the approved Acoustic Report shall be implemented as part of the development, to the satisfaction of the City; and

- 4.2 Certification from an acoustic consultant shall be provided to the City that the recommended measures identified in the approved Acoustic Report have been undertaken to the City's satisfaction, prior to the use of the approved development;

#### 5. Building Design

The Proposed Restaurant/Cafe shall comply at all times with the following:

- 5.1 Doors and windows fronting Berryman Street shall maintain an active and interactive relationship with the street, to the satisfaction of the City;
- 5.2 Glazing and/or tinting shall have a minimum of 70 percent visible light transmission to provide unobscured visibility between the street and the interior of the tenancy, to the satisfaction of the City; and
- 5.3 Internal security and privacy treatments shall be located and installed internally behind the glazing line or recessed, and shall be transparent and visually permeable to allow views inside the building and enable internal light sources to be seen from the street, to the satisfaction of the City;

#### 6. Parking and Access

- 6.1 One (1) off-street parking bay shall be provided for use of the Single House, in the location shown on the approved plans, to the satisfaction of the City;
- 6.2 Four (4) off-street parking bays shall be provided for use of the Restaurant/Cafe, in the locations shown on the approved plans, including two (2) parking bays for staff use

and two (2) parking bays for customer use, to the satisfaction of the City. The parking bays shall not be used for storage purposes or the like;

- 6.3 The design of the Restaurant/Café carpark shall be modified and thereafter constructed in accordance with the following specifications, prior to first use of the approved development and to the satisfaction of the City:
- 6.3.1 A 1.5 metre setback provided between the Restaurant/Cafe carpark and the southern lot boundary;
- 6.3.2 A 1.5 metre setback between the long term bicycle bay and the southern lot boundary; and
- 6.3.3 A 0.5 metre setback between the proposed crossover and the existing western power pole located in the verge;
- 6.4 Car parking and access areas associated with Single House and Restaurant/Cafe shall be sealed, drained, paved and respectively marked as 'residential only', 'staff only' and 'customer parking' in accordance with the approved plans and are to comply with the requirements of Australian Standard 2890.1, to the satisfaction of the City;
- 6.5 The operator of the Restaurant/Cafe shall ensure that access to onsite customer parking bays are available during the approved operating hours, to the satisfaction of the City;
- 6.6 A minimum of one onsite bicycle facility shall be provided and designed in accordance with the approved plans and shall comply with AS2890.3, to the satisfaction of the City; and
- 6.7 A minimum of one bicycle bay shall be provided within the Berryman Street verge, adjacent to the Restaurant/Cafe premises and in a location approved by the City. The bicycle bays shall be designed in accordance with Australian Standard 2890.3 prior to the use of the approved development, to the satisfaction of the City (see Advice Notes);

## 7. Landscaping

- 7.1 Prior to occupation of the Restaurant/Cafe, a detailed landscape and reticulation plan for the development site, to the satisfaction of the City, shall be lodged with and approved by the City. The plan shall be drawn to a scale of 1:100, and show the following:
- 7.1.1 The location and type of existing and proposed trees and plants;
- 7.1.2 Areas to be irrigated or reticulated;
- 7.1.3 The provision trees that achieve a minimum of 60 percent (31.8 square metres) canopy coverage at maturity to the Restaurant/Café carpark. The tree species are to be consistent with the City's Tree Selection Tool so as to maximise the provision of canopy coverage, to the satisfaction of the City;
- 7.1.4 The provision of an additional landscaping area along the southern side of the carpark. The landscaping area shall have a minimum width of 1.5 metres; shall include shade providing tree/s to the staff car parking bays; and shall include a selection of fast growing shrubs or similar foliage bushes, to the satisfaction of the City; and
- 7.1.5 The retention and protection of the existing on-site tree located adjacent to "Carpark 3" and all verge trees, to the satisfaction of the City;

7.2 All landscaping works shall be undertaken in accordance with the landscape plan approved in accordance with Condition 7.1, prior to the occupancy or use of the Restaurant/Cafe and maintained thereafter to the satisfaction of the City;

8. **Sight Lines**

Prior to use of the approved development, existing walls and fences shall be truncated or reduced to no higher than 0.75 metres, within 1.5 metres of where walls and fences adjoin the Restaurant/Cafe driveway, to the satisfaction of the City;

9. **Waste Management**

Prior to the operation of the approved development, a Waste Management Plan must be submitted to and approved by the City. The Waste Management Plan shall address the following:

- The location of bin storage areas shall be in accordance with location detailed within the approved Operation Management Plan;
- Screening of the Restaurant/Cafe bin store area from the street; from the outdoor living area of the Single House; and from adjoining properties, to the satisfaction of the City;
- The provision of a private collection service for the Restaurant/Cafe;
- The location of bin collection areas, being provided to the verge area of Berryman Street adjacent to the Restaurant/Cafe premises;
- The number, volume and type of bins, and the type of waste to be placed in the bins;
- Details on the future ongoing management of the bins and the bin storage areas, including cleaning, rotation and moving bins to and from the bin collection areas; and
- Frequency of bin collections to the satisfaction and specification of the City.

Once approved, the Waste Management Plan must be implemented at all times to the satisfaction of the City; and

10. **Stormwater**

All stormwater produced on the subject land shall be retained on site or connected to the City's drainage system at the expense of the applicant/landowner, to the satisfaction of the City.

**CR CASTLE:**

In relation to the provision of toilets on site, can Administration provide information on where a toilet is required. Would the public toilets in Menzies Park be a relevant consideration in the applicant not providing toilets on site?

**A/MANAGER DEVELOPMENT & DESIGN:**

The proposed Restaurant/Café is a Class 6 building under the National Construction Code (NCC) and there would be a requirement for one accessible toilet to be provided on-site.

At the time of the Occupancy Permit, the applicant would be required to either:

- (a) Meet the Deemed-to-Satisfy solution of the NCC by providing one accessible on-site toilet facility for the Restaurant/Cafe; or
- (b) Complete a performance based solution against the NCC, without providing a toilet. A private building surveyor would be required to determine if this is an acceptable alternative.

The Applicant's Building Surveyor has confirmed they would be able to certify the Restaurant/Café without the need for an accessible toilet.

A reason for this acceptability could be that there is a publicly accessible toilet in close proximity to the subject site, located to the northern side of Menzies Park.

The City's Building Services team have confirmed that a performance-based solution proposed by a private certifier would be supported if correctly assessed in accordance with NCC requirements at the time of Occupancy Permit.

The City's acceptable of any Performance Solution cannot be confirmed until this assessment has been undertaken and provided to the City at the time of Occupancy Permit. This is not something that could be required to be provided at the development stage given the provision of toilets is not a planning requirement nor a relevant consideration when making a planning decision. On this basis, the requirement also cannot form a condition of development approval.

The recommended Determination Advice Notes have been updated advising the applicant/landowner of the need to address the requirement for accessible toilet facilities at the time of Occupancy Permit. This includes advice that if a Performance Solution cannot be achieved, an amended development application may be required to accommodate an on-site accessible toilet.

**CR CASTLE:**

In relation to Condition 2.3, it was suggested that there could be a variation to the condition to allow staff who reside at the house to work in the premises. Does Administration have a view on this?

**A/MANAGER DEVELOPMENT & DESIGN:**

Administration are supportive of the proposed amendment to Condition 2.3 to allow residents of the Single House to work at the Restaurant/Café, in addition to two additional external staff members.

The planning report and recommended Condition 2.3 have been updated to specify that two (2) staff members are permitted on-site, who do not reside at the Single House. This would provide no restrictions to the number of additional staff members who also reside at the Single House.

Administration are satisfied that residents of the Single House also working at the Restaurant/ Café would not result in increased parking demand. This is because sufficient parking has been provided for the residents of the Single House in accordance with deemed-to-comply standards of the R Codes. Residents would already be on site and would not result in additional trips to the premises or generate an additional parking demand.

**CR CASTLE:**

There were queries around Condition 2.4 relating to the number of people being restricted and Condition 3.2 which restrictions on queuing outside the premises. How would this impact on an outdoor eating area permit and what would be the impact of removing these conditions?

**A/ MANAGER DEVELOPMENT & DESIGN**

In summary, the removal of Condition 2.4 and Condition 3.2 would result in an uncontrolled commercial use within a residential context, which is not supported by Administration.

This is because, in combination, the scale and intensity of the land use would not be restricted, car parking demand would increase, and there would be an increased risk of off-site amenity impacts from activity occurring within the public realm.

In the absence of clear and enforceable conditions of development approval, Council would need to be accepting of risks associated with reliance on good management by the operator and the potential for off-site amenity impacts to occur to the surrounding residential context.

Commentary Regarding the Removal of Condition 2.4:

Conditions restricting the number of patrons permitted at any given time is a standard condition of development approval applied to the majority of Café/Restaurant proposals.

This is to moderate the intensity and scale of the use that is considered as acceptable during the planning assessment, while also moderating parking demand.

In considering the removal of Condition 2.4, regard to the following matters is required:

- There would be no control on the number of patrons attending the site.
- Increased the intensity of the land use due to additional customers attending the premises.

- An additional shortfall of on-site parking would be triggered in accordance with Non-Residential Parking Policy, which would require:
  - Consideration of the acceptability regarding an increase in parking demand and reliance on parking in the surrounding streets.
  - Consideration of whether additional on-street parking would detrimentally impact the surrounding area.
  - Consideration regarding the requirement for payment-in-lieu of parking, due to the resultant parking shortfall.

Administration is not supportive of the removal of Condition 2.4. This is because the current restriction ensures the Restaurant/Café would operate at an appropriate scale and intensity. A restriction on the number of patrons for this application is of particular importance due to the context of the site being surrounded by residential properties.

#### Commentary Regarding the Removal of Condition 3.2:

Condition 3.2 seeks to prevent noise and activity generated by patrons waiting, queuing or dining outside the premises, impacting upon the adjoining residential properties.

Queuing, waiting and dining of patrons within the public realm has been a key source of nuisance for similar uses within the City and other local governments, where in close proximity to residential areas.

This includes issues such as queues extending down street frontages as well as noise impacts associated with patrons while queuing, waiting for orders or dining.

Based on previous experiences and given the location of the Restaurant/Café within a Residential area, Administration has pre-empted some of the issues that may occur, dependent on the popularity of the premises.

The purpose of Condition 3.2 would ensure that the Restaurant/ Café is complimentary with and compatible to the Residential zone by providing a tangible measure to restrict all queuing, dining and waiting outside the premises. The City's Solicitor advised Condition 3.2 is valid and enforceable.

If Condition 3.2 were removed, the applicant could obtain an Outdoor Eating Permit for dining in the verge, as depicted on the approved plans.

In considering the removal of Condition 3.2, regard to the following consequences is required:

- There are no tangible measures to manage queue lengths. This may result in queues extending beyond the site frontage, dependent on the popularity of the business.
- Increased noise within the public realm, which may provide off-site amenity impacts to adjoining residential properties.
- Acceptance of an uncontrolled commercial use located within a residential context.
- An increased number of patrons attending the site, resulting in an overall increased intensity as well as increased demand on on-street parking.

#### **CR CASTLE:**

In relation to the public holidays being closed, is there a particular reason for that?

#### **A/ MANAGER DEVELOPMENT & DESIGN**

Condition 2.5 seeks to permit operation on public holidays, subject to an Acoustic Report confirming the operation would comply with the Noise Regulations.

An amendment has been made to recommended Condition 2.5 to provide greater clarity regarding this.

This condition of approval would permit the premises to operate on Sundays and Public Holidays between the hours of 9:00am and 4:00pm. The reference to the Acoustic Report in the condition is intended to allow the premises to begin operating from 7:00am, subject to the findings of the Acoustic Report demonstrating that it could operate in accordance with the Noise Regulations. This is because between 7:00am and 9:00am, the proposed operating hours would fall within the night-time period under the Noise Regulations and any operation during this period may provide adverse noise impacts to surrounding properties due to non-compliance with the Noise Regulations.

**CR CASTLE:**

What was the amount of repeat submissions across the three consultation periods and where did the submissions come from in relation to the subject site?

**A/MANAGER DEVELOPMENT & DESIGN:**

At the conclusion of the three consultation periods, a total of 139 submissions were received, 20 of which were from those who had previously made a submission. This included 10 submitters who affirmed their support and 10 submitters who affirmed their objection.

When removing all repeat submissions, the proposal received a total of 119 submissions, including:

- 101 submissions in support
- 17 submissions in objection
- One neither supporting nor objecting but raising concerns.

To protect the anonymity of submitters, the exact location of where submissions were received from cannot be disclosed on the public record. The below table provides a summary of where submissions were received:

Submission Type	Submission Location		
	Within 50m of the subject site	Outside 50m of the subject site	Total
Support	3	98	101
Object	8	9	17
Neither support or object	Nil	1	1
Total	11	108	119

**CR WOOLF:**

Can Administration confirm whether the applicant was notified of the consultation periods.

**A/MANAGER DEVELOPMENT & DESIGN**

Administration confirms that the applicant was notified prior to each community consultation period commencing.

**CR WALLACE:**

Why are Administration accepting of an acoustic letter being provided in lieu of an acoustic report that includes noise modelling?

**A/MANAGER DEVELOPMENT & DESIGN:**

In this particular instance, Administration are supportive of the conditioning of an Acoustic Report to be provided following development approval being issued. This is based on the combination of the following factors, which provide a level of certainty that the proposal would comply with the Noise Regulations and meet the objectives of the Sound Attenuation Policy:

- The favourable location and siting of the Restaurant/Café tenancy would result in the majority of activity being directed to Berryman Street and Menzies Park. This reduces the level of activity and associated noise being directed towards adjoining residential properties.
- The small scale of the tenancy.
- The tenancy was designed and previously used as non-residential development.
- Vehicle movements associated with Restaurant/Café are low. Noise generated from the carpark would be consistent with that expected within the existing context.
- A desktop analysis undertaken by Acoustic Consultant providing and informed analysis that the proposal would comply.

On this basis, there is minimal risk requiring an Acoustic Report to be provided following development approval.

**CR WALLACE:**

What would be the cost to the applicant be when obtaining an Acoustic Report?

**A/MANAGER DEVELOPMENT & DESIGN:**

The applicant has advised that the cost of obtaining an Acoustic Report prepared in accordance with the City's Sound Attenuation Policy would be approximately \$3,000.00. The cost of obtaining an Acoustic Report was not a reason as to why Administration was accepting of the report being provided as a condition of development approval.

The applicant provided the following feedback regarding why an Acoustic Report was not provided as part of the Development Application:

- *The request for the acoustic assessment originated from concerns that the four car bays being provided on the western side of the site resulting in excessive noise impacts, not from concerns that the general operation of the café itself.*
- *This is also why the acoustic advice sought addresses only the impact of the car parking area. Our view is that the four car bays do not warrant a full acoustic assessment, two of these bays are staff bays that would have minimal turnover, and the context of the area is that the affected sites front onto verge parking for a sporting reserve which in our view is likely to see more turnover than the visitor bays. In this context a couple of visitor parking bays seem unlikely to present an undue impact.*

**CR WALLACE:**

Would the acoustic report need to cover off noise from queuing outside the tenancy to comply with the Sound Attenuation Policy?

**A/MANAGER DEVELOPMENT & DESIGN:**

The City's Sound Attenuation Policy does not provide specific standards regarding the attenuation of noise for alfresco dining or patrons waiting/queuing within public realm.

In considering the acceptability of the land use, including associated alfresco dining, it would be reasonable to require any acoustic report to project (model) sound levels from patrons (both when seated or standing, and associated activities such as dining or just standing), to help inform whether the alfresco dining would be suitable for its location.

In considering noise sources that could have an amenity impact, but are difficult to attenuate, such as patron noise, behaviours, set up and pack down of furniture, either of the following options could be considered:

1. Submission of an acoustic report that demonstrate compliance with the assigned levels can be achieved. This would model noise based on an accepted standard; or
2. Conditions on the development approval, that limit the activities on site, that can reasonably concluded amenity impacts would be limited.

In the absence of an Acoustic Report, the effect of Condition 3.2 is intended to restrict queuing, waiting and dining to be within the premises to ensure that noise and activity is contained within the site and to limit noise and amenity impacts to surrounding properties.

In the instance that alfresco dining were permitted, noise emissions within the public realm from the alfresco and activity attributed to the Café/Restaurant could be investigated by the City. While an investigation can be undertaken, the assigned levels of the Noise Regulations cannot be relied on given the noise relates to patron noise/behaviour. Instead, the City would need to rely on the business operator implementing meaningful management measures to mitigate noise. This does not guarantee all amenity impacts will be mitigated. In the instance that alfresco dining were permitted, Administration would recommend a condition of development approval relating to the development and implementation of an Operational Management Plan.

**CR LA FONTAINE:**

What is the frequency of waste pick-up?

**A/MANAGER DEVELOPMENT & DESIGN:**

The applicant has advised waste collection would be expected to occur once a week.

This will be confirmed through the submission of the waste management plan.



**MAYOR ALISON XAMON:**

Concerns have been raised about the state of the verge opposite. I understand that there may be some works planned to deal with that. Is there an indication, whether any of that will incorporate parking, noting that cars park there now – it’s a dust bowl. Can I get an indication of what’s intended to happen with the verge immediately opposite this?

**EXECUTIVE DIRECTOR INFRASTRUCTURE & ENVIRONMENT:**

In response to a motion carried at the Annual Meeting of Electors, Council resolved that “Administration identifies a temporary solution to stabilise and mitigate dust on this section of verge and brings a report back to Council with a recommendation for a permanent solution by no later than March 2025.”

The dust has arisen due to water saving measures taken to address the reduction in the City’s ground water licence.

**MAYOR ALISON XAMON:**

Please indicate a timeframe for a resolution around whether there will be additional parking or not?

**EXECUTIVE DIRECTOR INFRASTRUCTURE & ENVIRONMENT:**

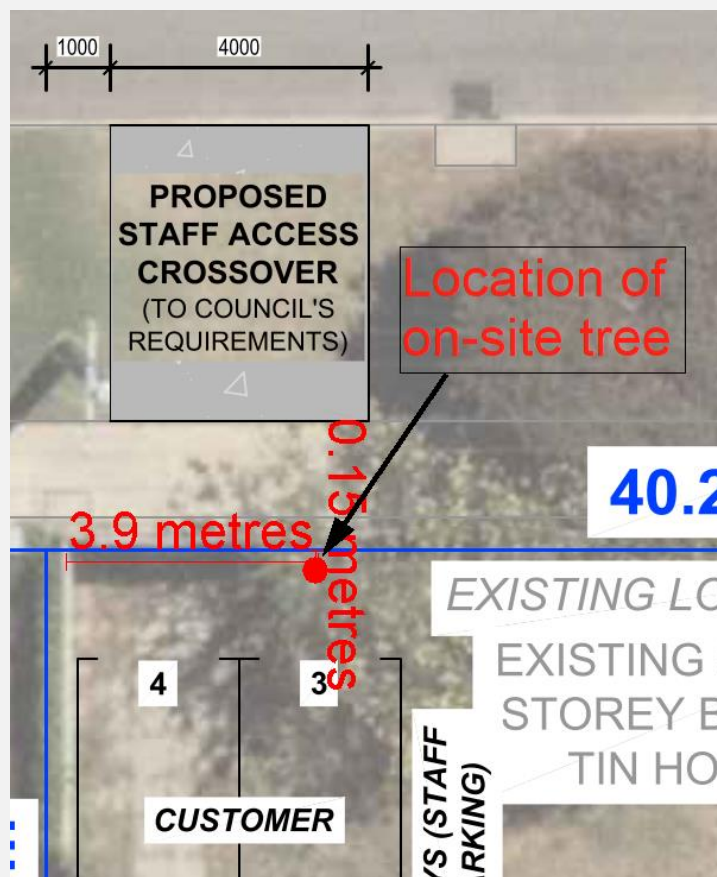
The intention is to design and trial a solution that incorporates car parking on a water permeable surface, stormwater capture and appropriate landscaping/planting. Drainage Design is anticipated to be completed in January 2025.

**OTHER MATTERS:**

Following the Council Briefing session, it came to Administration’s attention that an existing on-site tree would need to be removed to accommodate the proposed Restaurant/Café parking arrangements.

The previous assessment undertaken by Administration, as presented within the Council Briefing report, was based on an understanding that the location of the tree was to the east of the car parking bays. This meant the tree could be retained as it would not conflict with the proposed driveway or any of the car bays.

Following on-site measurements, it has been confirmed that existing on-site tree is setback 3.9 metres from the western lot boundary and 0.15m from the street boundary, as shown in the below image. This means the tree would conflict with the proposed driveway to Car bay 3.



The options to resolve this issue include:

1. Removal of the on-site tree to accommodate Car Bay 1 and 3; or
2. Retention of the existing tree which means Car Bays 1 and 3 could not be provided. This option would result in a new departure regarding a shortfall of two customer parking bays on-site.

In considering the above two options, Administration would not be supportive of the removal of the on-site tree. This is because the proposal would not meet the objectives of the Built Form Policy where the retention of healthy and mature trees should be prioritised. The tree is a mature and healthy specimen with ongoing viability.

Following an assessment against the objectives of the Non-Residential Parking Policy, Administration are supportive of a shortfall of two (2) on-site parking bays. This is because there is sufficient on-street parking available within the immediate context, that would not detrimentally impact the surrounding area.

Option 2 is the preferred way forward as the tree would be retained and relevant parking objectives are achieved. To resolve this issue and proceed with Option 2, the officer report has been updated to reflect the required changes.

Changes to the officer report are summarised as follows:

- Detailed Assessment table updated to identify a new departure of two on-site car parking bay shortfall. The Comments section of the report has been updated to consider the acceptability of this one bay shortfall.
- Comments section updated to consider the design of the amended carparking arrangement.
- Conditions of approval added requiring a modified carpark layout that retains the existing tree.
- Existing recommended Condition 7.1.5 amended to ensure the existing tree is retained.