

## Form 2: Responsible Authority Report (Regulation 17)

### Notes for Author

This template is provided to assist in the formulation of a Responsible Authority Report (RAR) for a Development Assessment Panel (DAP) application under Regulation 17 of the *Planning and Development (Development Assessment Panel) Regulations 2011*. This template should be used for all RARs prepared under r.17. An application under Reg 17 is not an application for a review of the original decision or a reconsideration of the original decision, please use the State Administrative Tribunal (SAT) Reconsideration template for those reports.

An application may be made under r.17 to:

- (a) amend the approval so as to extend the period within which any development approved must be substantially commenced;
- (b) amend or delete any condition to which the approval is subject;
- (c) amend an aspect of the development approved which, if amended, would not substantially change the development approved;
- (d) cancel the approval.

This template contains guidance to assist the author prepare a report that is comprehensive, succinct and addresses the key issues required for a decision to be made under the relevant Local Planning Scheme and Region Scheme (where applicable). The guidance notes should be deleted once the RAR is prepared and do not form part of the report.

The RAR template also provides for some sections to be deleted if they are not required. Where other sections are not relevant to a particular report and there are no specific notes, please insert either "not relevant" or "not applicable" under those headings.

Where the RAR template is submitted to a Council meeting, please note:

- The officer's recommendation may be placed either first or last in accordance with the usual requirements of the Council meeting.
- For the submission of the RAR to the DAP Secretariat, the heading "Responsible Authority Recommendation" must contain the Council's recommendation.
- If the officer recommendation is different from the Council recommendation, this should be shown under the heading "Officer Recommendation".
- The "Reasons for Responsible Authority Recommendation" section should be completed after the Council meeting and should reflect why the recommendation differs from the reasons as shown in the minutes of the Council meeting.
- Where local government officers have delegation to provide the RAR to the DAP secretariat, only the "Responsible Authority Recommendation" should be completed and the "Officer Recommendation" section can be deleted.

**STREET NAME, STREET NO. (LOT NO.) SUBURB –  
APPLICATION DESCRIPTION**

**Form 2 – Responsible Authority Report  
(Regulation 17)**

<b>DAP Name:</b>	Metro Outer Joint Development Assessment Panel	
<b>Local Government Area:</b>	Shire of Serpentine Jarrahdale	
<b>Proposed Amendments:</b>	Extension of commencement Timeframe	
<b>Applicant:</b>	Element	
<b>Owner:</b>	J and S Piipponen and Skukuza Ventures Pty Ltd	
<b>Value of Amendment:</b>	\$ N/A	
<b>Responsible Authority:</b>	Shire of Serpentine Jarrahdale	
<b>Authorising Officer:</b>	Director Development Services	
<b>LG Reference:</b>	PA22/263	
<b>DAP File No:</b>	DAP/18/01394	
<b>Date of Original DAP decision:</b>	29 October 2018	
<b>Application Received Date:</b>	21 March 2022	
<b>Application Statutory Process Timeframe:</b>	90 Days	
<b>Attachment(s):</b>	<p>Insert UNSECURED attachments as appropriate. Delete those that are not applicable. Hyperlinks are encouraged where possible.</p> <ol style="list-style-type: none"> <li>1. Application Details</li> <li>2. Current Approval</li> <li>3. Summary of submissions</li> <li>4. Council Resolution</li> <li>5.</li> </ol>	
<b>Is the Responsible Authority Recommendation the same as the Officer Recommendation?</b>	<input type="checkbox"/> Yes	Complete Responsible Authority Recommendation section
	<input type="checkbox"/> N/A	
	<input type="checkbox"/> No	Complete Responsible Authority and Officer Recommendation sections

### Responsible Authority Recommendation

Ensure that there is an appropriate delegation for the RAR.

Where there is a Council resolution, this is the Responsible Authority Recommendation. If the Council resolution differs from the Officer Recommendation, the Officer Recommendation section of this report also needs to be completed.

Where local government officers have delegation to provide the RAR to the DAP secretariat, the Officer Recommendation section in the body of the report can be deleted and only the section below needs to be completed.

That the Metro Outer Joint Development Assessment Panel resolves to:

1. **Accept** that the DAP Application reference Insert DAP reference number as detailed on the DAP Form 2 dated Choose date is appropriate for consideration in accordance with regulation 17 of the *Planning and Development (Development Assessment Panels) Regulations 2011*;

2. **Refuse** DAP Application reference Insert DAP reference number and accompanying plans (Plan No, Rev No - if applicable) in accordance with Clause 68 of Schedule 2 (Deemed Provisions) of the *Planning and Development (Local Planning Schemes) Regulations 2015* , and the provisions of Clause no. of the Shire of Serpentine Jarrahdale Town Planning Scheme No. 2, for the proposed minor amendment to the approved Service Station at Lot 504 and Lot 506 Thomas Road, Oakford, for the following reasons:

## Reasons

### Reasons for Responsible Authority Recommendation

Complete this section where the Council resolution differs from the Officer Recommendation and provide the reasons as shown in the Council minutes here. The Officer Recommendation section below, including reasons, will also need to be completed.

Include a brief summary of key issues and provide clear and succinct reason/s for the recommendation. If the recommendation is for a refusal, this section may be used to emphasise the reasons in the recommendation if required.

### Details: outline of development application

Region Scheme	Metropolitan Region Scheme
Region Scheme Zone/Reserve	Rural
Local Planning Scheme	Town Planning Scheme No.2
Local Planning Scheme Zone/Reserve	Rural
Structure Plan/Precinct Plan	N/A
Structure Plan/Precinct Plan Land Use Designation	N/A
Use Class (proposed) and permissibility:	'Service Station'
Lot Size:	Lot 504 – 1.04 Lot 506 – 1.31ha
Net Lettable Area (NLA):	220m <sup>2</sup>
Number of Dwellings:	N/A
Existing Land Use:	'Residential'
State Heritage Register	No
Local Heritage	<input checked="" type="checkbox"/> N/A <input type="checkbox"/> Heritage List <input type="checkbox"/> Heritage Area
Design Review	<input checked="" type="checkbox"/> N/A <input type="checkbox"/> Local Design Review Panel <input type="checkbox"/> State Design Review Panel <input type="checkbox"/> Other
Bushfire Prone Area	Yes
Swan River Trust Area	No

## Proposal:

The application seeks to amend the approval so as to extend the period within which the approved development must be substantially commenced. Specifically, it seeks to extend this from 29 October 2022 to 31 December 2024. The application details are contained within **attachment 1** and the approval within **attachment 2**.

The approved development comprises of the following:

- Retail building 220m<sup>2</sup>;
- Four light vehicle fuel bowsers with eight refuelling bays;
- Three heavy vehicle fuel bowsers with two refuelling bays;
- An enclosed plant yard;
- One left-in/left-out crossover to Thomas Road;
- One left-in/left-out crossover to Nicholson Road;
- Eleven standard car parking bays;
- Three caravan parking bays;
- Three truck parking bays;
- Landscaping; and
- Signage.

The 'Service Station' is approved to operate 24 hours a day, 7 days a week. The service station has been designed to cater for vehicles up to 36.5m in length. The current approval included specific conditions to provide both interim and ultimate access arrangements, and a specific advice note explaining this aspect. The advice note states that:

*The applicant is reminded that upon the roundabout being constructed to its ultimate configuration, the existing access on Nicholson Road will be removed and all access into the petrol station development will be achieved via a dedicated service road accessed from the north of Lot 50.*

The associated conditions securing interim access were conditions 11 and 12, as follows:

### *Nicholson Road Access*

*11. Prior to occupation, one 11m wide crossover, located within Lot 50 and positioned where possible near the northernmost cadastral boundary of Lot 50, shall be designed and constructed to the satisfaction of the Shire of Serpentine Jarrahdale on the advice of the Department of Planning Lands and Heritage and Main Roads Western Australia. This requirement is to protect the functional area of this intersection in accordance with Austroads 2017 Guide to Road Design Part 4 Intersections and Crossings General, section 7.2 Property Access.*

*This access shall operate as left in/left out turning movements for light vehicles and left out only turning movements for heavy vehicles and shall have suitable signage advising motorists of these restricted movements. No right in or right out turning movements shall be made from or to Nicholson Road.*

*The developer shall be responsible for all costs involved in the land acquisition, design and construction of the left turning pocket and solid median to prevent right in and right out turning movements onto Nicholson Road. This includes signage, road markings, relocation of services and street lighting on the advice of Main Roads Western Australia to the satisfaction of the Shire of Serpentine Jarrahdale.*

### Thomas Road Access

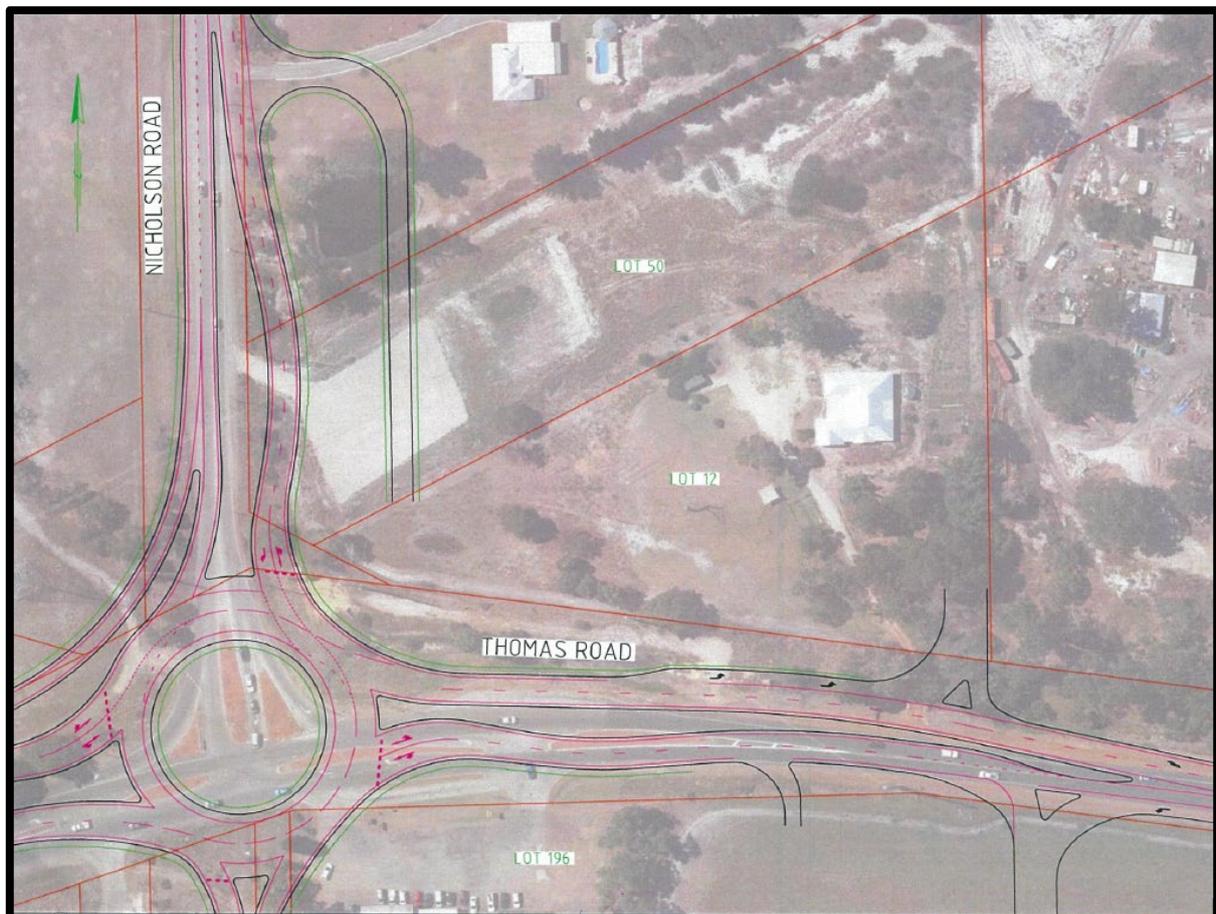
12. Prior to occupation, one 11m wide crossover, located within Lot 12 and positioned where possible near the easternmost cadastral boundary of Lot 12, shall be designed and constructed to the satisfaction of the Shire of Serpentine Jarrahdale on the advice of Main Roads Western Australia. This requirement is to protect the functional area of this intersection in accordance with Austroads 2017 Guide to Road Design Part 4 Intersections and Crossings General, section 7.2 Property Access.

*This access shall operate as left in/left out turning movements for light vehicles and left in only turning movements for heavy vehicles and shall have suitable signage advising motorists of these restricted movements. No right in or right out turning movements shall be made from or to Thomas Road.*

*The developer shall be responsible for all costs involved in the land acquisition, design and construction of the left turning pocket and solid median to prevent right in and right out movements onto Thomas Road. This includes signage, road markings, relocation of services and street lighting on the advice of Main Roads Western Australia to the satisfaction of the Shire of Serpentine Jarrahdale.*

Accordingly, the approval facilitates development to occur without the need to await the ultimate works being delivered by MRWA.

Since the approval, MRWA have advanced design of the roundabout, which is depicted below:



The plan shows a service road accessing the subject site from Nicholson Road to ensure the crossover is located a sufficient distance from the roundabout. The service road would be accessed through former Lot 11 Nicholson Road, the portion of which has now been acquired by MRWA for this purpose.

## Background:

Conditional approval was granted by the DAP on 29 October 2018 for a 'Service Station'. The proposal included interim and ultimate access arrangements given the proposed roundabout construction by Main Roads Western Australia (MRWA) at the corner of Thomas Road and Nicolson Road.

A further development application was submitted on 17 December 2019 requesting an extension of time for which development must commence. The justification provided in that application was due to MRWA timeframes to undertake road works. This application however did not proceed, due to the Minister issuing the Clause 78H Notice of Exemption from Planning Requirements During State of Emergency. This Notice of Exemption automatically granted a two year extension to commencement timeframes for current development approvals, resulting in works being required to be substantially commenced by 29 October 2022. This application now seeks to further extend that timeframe to 31 December 2024.

## Existing Development

The subject site is zoned 'Rural' under the Shire of Serpentine Jarrahdale Town Planning Scheme No.2 (TPS2) and is located within Oakford over two parcels of land. The lots were formally known as Lot 12 Thomas Road and Lot 50 Nicolson Road however since the initial approval, portions of these lots have been acquired by MRWA for the roundabout construction. These areas are Lot 505 and Lot 507, and the lots subject to this application are now Lots 504 and Lot 506 Thomas Road, as depicted below:



Lots 506 Thomas Road is currently developed with a dwelling and Lot 504 comprises of an easement and contains power lines. Thomas Road runs along the southern boundary of the site and Nicholson Road to the west. The surrounding area consists of rural and rural residential lots, with Oakford Traders Liquor Store located opposite, on the southern side of Thomas Road. An approved service station on the south side of Thomas Road has commenced development, with both a sand pad and concrete foundation poured.

**Legislation and Policy:**Legislation

- *Planning and Development Act 2005;*
- *Planning and Development (Development Assessment Panels) Regulations 2011*
- *Planning and Development (Local Planning Schemes) Regulations 2015;*
- *Environmental Protection (Noise) Regulations 1997;*

State Government Policies

- *State Planning Policy 2.5 Rural Planning (SPP2.5)*
- *State Planning Policy 3.7 – Planning in Bushfire Prone Areas (SPP3.7)*
- *Environmental Protection Authority Guidance for the Assessment of Environmental Factors Separation Distances between Industrial and Sensitive Land Uses (2005)*

Structure Plans/Activity Centre Plans

N/A

Local Policies

- Shire of Serpentine Jarrahdale Town Planning Scheme No.2; (TPS2)
- Local Planning Strategy
- Draft Local Planning Scheme No.3 (LPS3)
- Local Planning Policy 4.11 - Advertising (LPP4.11)
- Local Planning Policy 1.6 - Public Art (LPP1.6)

**Consultation:**Public Consultation

The application was advertised to surrounding landowners within a radius of 500m for a period of 21 days from 28 March 2022 to 18 April 2022, in accordance with Local Planning Policy 1.4 – Consultation for Planning Matters. During this period one submission was received.

Issue Raised	Officer's comments
<ul style="list-style-type: none"> <li>• The use is prohibited under proposed LPS3;</li> <li>• An extension of time does not allow for careful consideration to be made in</li> </ul>	<p>It is a fact that the land use of 'service station' is recommended to be a prohibited use under draft LPS3.</p> <p>LPS3 has reached a stage that it constitutes a seriously entertained planning proposal and is therefore a relevant matter for consideration as to orderly and proper planning. In considering this, the application should be refused as it would not be consistent with orderly and proper planning to grant an</p>

Issue Raised	Officer's comments
<p>relation to the road upgrades in the area and the impacts of the freight route (West Port). A new application should be submitted for assessment; and</p> <ul style="list-style-type: none"> <li data-bbox="213 651 480 925">• The need for a service station in the area is already satisfied by there being one located directly to the south.</li> </ul>	<p>extension of time that would see a development take place that is expressly prohibited within the Rural zone under the imminent and certain draft LPS3.</p> <p>Officers acknowledge that there is a service station to the south of the site however Clause 67 of the <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> does not list commercial competition as a matter to be considered as part of a development assessment. This matter does not reflect those very narrow circumstances where commercial competition may be considered a relevant planning issue.</p>

#### Referrals/consultation with Government/Service Agencies

##### Department of Planning Lands and Heritage (DPLH)

DPLH has no objections to the proposal

##### Main Roads Western Australia (MRWA)

MRWA has no objections to the proposal

##### Water Corporation (Water Corp)

Water Corp advised that the site is not included in its adopted long-term water or wastewater planning and therefore are unable to speculate on servicing requirements. It is also advised that the applicant will be required to protect all existing drainage as the Birrega Drain is located on the southern boundary of the site. Rural drains are not designed to give flood protection at all times and some inundation of land can be expected.

Developments within this catchment are required to contain flows from a 1:100 year storm event on site. Discharge to Water Corp drains must be compensated to pre-development flows. This should be demonstrated to the Water Corp at the time of development.

The proposal will require approval by Water Corp's Building Services section prior to commencement of works.

Design Review Panel Advice

N/A

Other Advice

N/A

**Planning Assessment:**

The subject application is made in accordance with r17(1)(a) of the *Planning and Development (Development Assessment Panels) Regulations 2011*. This provides for an application to be made “to amend the approval so as to extend the period within which any development approved must be substantially commenced”.

In assessing such an application, consideration should be given to the following:

- Whether the planning framework has changed substantially since the development approval was granted;
- Whether the development would likely receive approval now; and
- Whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval.

For the purposes of this Report, discussion is confined to these matters.

Whether the planning framework has changed substantially since the development approval was granted, and if so how does this affect consideration of the application

Schedule 2, Part 9, Clause 67(b) of the *Planning and Development (Local Planning Schemes) Regulations 2015* requires a Local Government to consider the principles of orderly and proper planning including any proposed Local Planning Scheme. Draft LPS3 has been advertised, had submissions considered, endorsed by Council and is currently with the Western Australian Planning Commission (WAPC) for final approval. It is anticipated that approval will be forthcoming from the WAPC mid 2022. Furthermore, the Shire’s Local Planning Strategy received final approval from the WAPC on 18 March 2022. Both these documents are therefore material in the consideration of the current application.

*Draft Local Planning Scheme No.3 and Local Planning Strategy (LPS):*

The site would remain zoned ‘Rural’ under LPS3. The ‘Service Station’ land use is a prohibited land use in the ‘Rural’ zone under draft LPS3.

The objectives of the ‘Rural’ zone under LPS3 are:

- *“To provide for the maintenance or enhancement of specific local rural character.*
- *To protect and accommodate broad acre agricultural activities such as cropping and grazing and intensive uses such as horticulture as primary uses, with other rural pursuits and rural industries as secondary uses in circumstances where they demonstrate compatibility with the primary use.*
- *To maintain and enhance the environmental qualities of the landscape, vegetation, soils and water bodies including groundwater, to protect sensitive areas especially the natural valley and watercourse systems from damage.*
- *To provide for the operation and development of existing, future and potential rural land uses by limiting the introduction of sensitive land uses in the Rural zone.*

- *To provide for a range of non-rural land uses where they have demonstrated benefit and are compatible with surrounding rural uses.”*

The objectives of rural land under the LPS are to provide for a full range of rural uses, tourism, rural enterprise and the preservation of the rural character. The LPS emphasises the importance of protecting large rural lot sizes for agriculture.

It is considered that the proposal is generally inconsistent with the objectives of the ‘Rural’ zone under the LPS and LPS3 except *“to provide for a range of non-rural land uses where they have demonstrated benefit and are compatible with surrounding rural uses.”* As the LPS and LPS3 have been formed upon ‘Service Station’ as a prohibited use in the Rural zone, it is not considered an appropriate non-rural use.

LPS3 has however introduced the use class of a ‘Road House’, which is defined as:

*“premises that has direct access to a State road other than a freeway and which provides the services or facilities provided by a freeway service centre and may provide any of the following facilities or services -*

- (a) a full range of automotive repair services;*
- (b) wrecking, panel beating and spray painting services;*
- (c) transport depot facilities;*
- (d) short-term accommodation for guests;*
- (e) facilities for being a muster point in response to accidents, natural disasters and other emergencies.”*

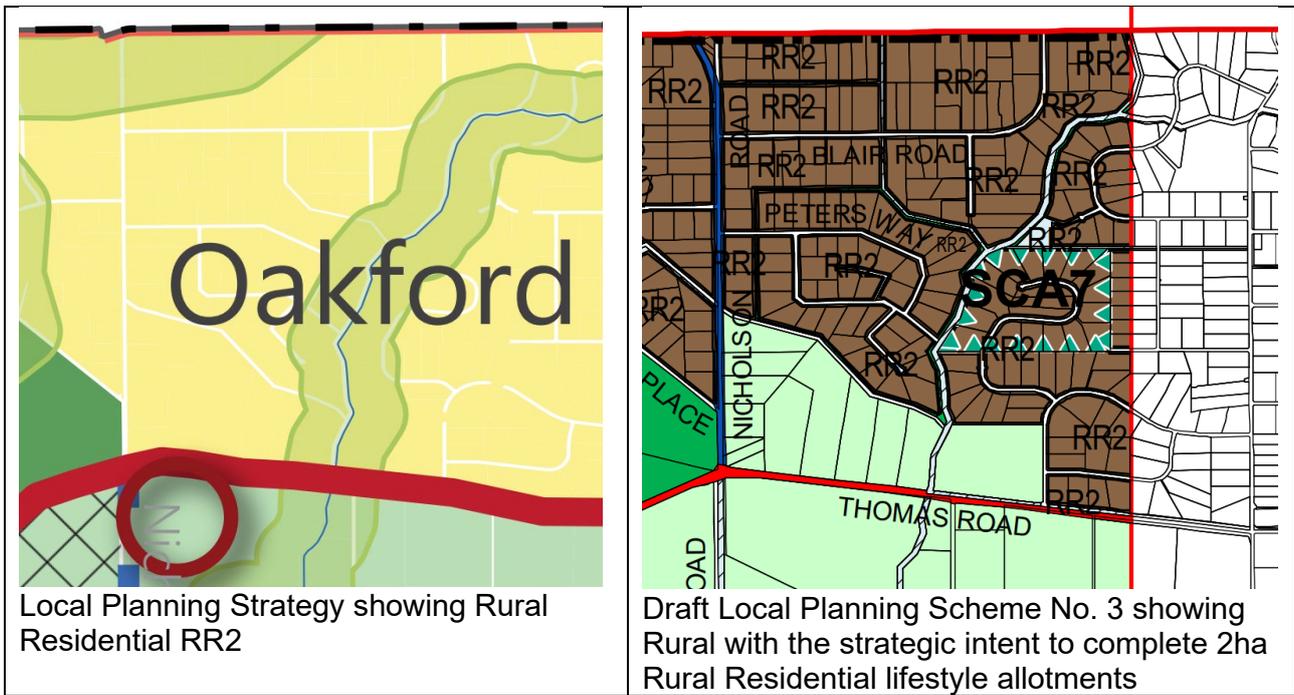
The freeway service centre is defined as:

*“premises that has direct access to a freeway and which provides all the following services or facilities and may provide other associated facilities or services but does not provide bulk fuel services -*

- (a) service station facilities;*
- (b) emergency breakdown repair for vehicles;*
- (c) charging points for electric vehicles;*
- (d) facilities for cyclists;*
- (e) restaurant, cafe or fast food services;*
- (f) take-away food retailing;*
- (g) public ablution facilities, including provision for disabled access and infant changing rooms;*
- (h) parking for passenger and freight vehicles;*
- (i) outdoor rest stop facilities such as picnic tables and shade areas.”*

The ‘Road House’ land use is an ‘A’ use in the ‘Rural’ zone under LPS3 and therefore is capable of approval subject to advertising. Based on its definition, for a development to be considered a ‘Road House’ it must provide the services or facilities provided by a Freeway Service Centre, as listed above. The subject development does not include (b), (c), (d) or (g) above and therefore could not be considered a ‘Road House’.

In terms of the LPS, the subject site is designated as ‘Rural Residential’ (RR-2). A ‘Service Station’ is furthermore a prohibited use in the ‘Rural Residential’ zone under draft LPS3. The purpose of the Rural Residential area is to provide for a range of lifestyle whilst preserving and enhancing the rural character. According to the LPS, the intent is for this land to ultimately be rezoned and structure planned to provide 2ha Rural Residential lifestyle allotments. The extract showing of both the approved LPS and the Draft LPS3 are shown following:



The proposal to extend the timeframe of an expressly prohibited use, is contrary with the principles of orderly and proper planning. It is also further contrary to the strategic intent set out under the LPS. Given the imminence of LPS3 and the approval of the LPS, both documents have to be given significant weight when exercising discretion in relation to a proposed extension of time request pertaining to what will be a prohibited use.

This approach has been applied through the *Coty principle* as cited in Nicholls and Western Australian Planning Commission (2005) (WASAT40) which states “it is important, in the public interest, that whilst the respondent Council’s local scheme is under consideration this Court should, in the exercise of its appellate jurisdiction..... avoid, as far as possible, giving judgement or establishing any principle which would render more difficult the ultimate decision as to the form the scheme should take. It is also important in the public interest, that during that period this Court should, in the exercise of the jurisdiction referred to, arrive at its judgement, so far as possible, in consonance with the town planning decisions which have been embodied in the local scheme in the course of its preparation”. Therefore, Officers consider to extend the approval would be contrary to the established *Coty Principle*.

The applicant considers, as part of the response to the submission, that LPS3 cannot be considered ‘imminent’. The applicant makes reference to a submission that was made to the WAPC as part of the LPS and LPS3 for retaining the use of ‘service station’ within the ‘rural’ zone. The applicant also refers to the Statutory Planning Committee (SPC) meeting of the WAPC where the agenda report states as follows:

Element on behalf of Claradon Property - Lot 12 Thomas Road & Lot 50 Nicholson Road, Oakford	29	DRAFT LOCAL PLANNING STRATEGY & DRAFT LOCAL PLANNING SCHEME NO. 3 SUBMISSION - LOT 12 THOMAS ROAD & LOT 50 NICHOLSON ROAD, OAKFORD element on behalf of Claradon Property (Claradon) has prepared this submission in response to the Shire of Serpentine-Jarrahdale (the Shire) draft Local Planning Strategy (draft Strategy) and	The Shire’s objective in the Rural zone is to prevent the proliferation of service stations, rather supporting the development of a more strategic road house uses. While the objectives of the	<b>Disagree with the Shire’s response. However as the submission does not require any modifications to the Strategy and relates to the draft Local Planning Scheme No. 3 it</b>
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		draft Local Planning Scheme No.3 (draft LPS 3) that are being advertised for public comment. The submission has been prepared with regard to Lot 12 Thomas Road and Lot 50 Nicholson Road, Oakford (subject site).	Rural zone allow for some non-rural land uses to be considered where they have demonstrated benefit and are compatible with surrounding rural uses, officers do not consider that the land use of service station provides such benefit or is compatible with rural uses.  A Road House is a discretionary use within the 'Rural' zone and can therefore be accommodated subject to planning approval. Existing approvals can continue under non-conforming land uses rights.	<b>will be considered at a later date when the draft Local Planning Scheme No. 3 is assessed.</b>
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The applicant states *“Moreover, the Agenda Report from the Statutory Planning Committee (SPC) meeting of the Western Australian Planning Commission (WAPC) of 29 June 2021 disagrees with the Shire’s response on the proposed uses on the subject site.”* It is however noted that the WAPC have not confirmed they disagree with the proposed use on the site however state that it will be considered as part of the assessment of LPS3 and that it does not relate directly to the LPS. This report relates to the LPS and does not provide any indication as to the finality of the use under LPS3.

Officers consider that the applicant has not acknowledged that the decision of the SPC was to support the LPS which designated the subject land within the Rural Resident RR-2 area. This is now secured as part of the approved LPS. In terms of advancing further development on the subject land, the LPS indicates that those lots remaining zoned Rural under LPS3 would have a strategic intent for rezoning to Rural Residential RR2, and a structure plan prepared, to complete the 2ha rural residential development that exists in the precinct.

Noteworthy, in addition to the LPS allowing for *“a range of non-rural land uses where they have demonstrated benefit and are compatible with surrounding rural uses”*, section 3.5.1 Road and Freight of the Strategy recognises the importance of the Thomas Road upgrade in creating strong regional linkages to support the economy. This will also be increased as further planning for Westport along the Thomas Road and Anketell Road linkage progresses. The applicant considers that this supports the proposal for the ‘Service Station’ use as it *“builds on the future infrastructure to be provided and given the potential amenity impacts of the intersection (visual amenity, noise etc) the proposed use is commensurate with the future amenity of the locality”*. Whilst it is acknowledged that the road network may have an impact on the future amenity of the area, it is also the case that the future amenity of the locality is intended to be rural and later

rural residential. The future amenity therefore is not considered to be so substantially different to warrant support of a prohibited land use and set aside the strategic intent of the planning framework. The impact of the road upgrades on the amenity of the locality will be relevant to the assessment of a use at that time at which point LPS3 is likely to be in force and a service station prohibited.

In respect of the vision for the Thomas Road and Anketell Road Westport freight corridor, a fly-through video has been released which depicts a vision for how the intersection of Nicholson Road and Thomas Road may look.



DPLH have raised no objections to the location. Officers of the Shire do however note that the concept for the road upgrades are still subject to community consultation, and in the absence of a firm and committed design, it is not clear how the long term access arrangements would function.

Should the DAP approve an extension of time, and should the use of 'Service Station' proceed as a prohibited use in the 'Rural' zone under the proposed LPS3, Council should note that Clause 22(1)(b) of proposed LPS3 would protect a non-conforming use right to carry out the development in the stated circumstances below:

## 22. Non-conforming uses

- (1) Unless specifically provided, this Scheme does not prevent -
- (a) the continued use of any land, or any structure or building on land, for the purpose for which it was being lawfully used immediately before the commencement of this Scheme; or
  - (b) the carrying out of development on land if -
    - (i) before the commencement of this Scheme, the development was lawfully approved; and
    - (ii) the approval has not expired or been cancelled.

### Whether the development would likely receive approval now

As mentioned, since the approval of the development, the LPS has been approved by the WAPC and LPS3 is awaiting final approval, expected mid year. Based on these changes to the planning framework, Officers do not consider that approval of the application would be received now as proposed. If the planning framework was in place as currently proposed, such application would be immediately refused due to it being a prohibited use.

### Whether the holder of the development approval has actively and relatively conscientiously pursued the implementation of the development approval

The landowner has received a Building Permit for works to commence construction however MRWA have advised that the road upgrades are anticipated to be completed by mid 2023 and therefore no trade from the property can commence until these works are complete. As such the Applicant has provided information that factors outside of the Applicant's control have resulted in the delay in the construction. The Applicant considers that they should not be "*penalised by not granting an extension of time to the Development Approval. Moreover, the Applicant is not seeking a gratuitous extension rather one to ensure that the road works are completed*". The Applicant refers to a matter heard in the State Administrative Tribunal (SAT) as follows:

In respect to the above it is important to consider *AMI Enterprises Pty Ltd and Presiding Member of the MWWJDAP* [2018] WASAT 130. At paragraph 79 of this matter the Tribunal commented that:

*There is nothing in the statutory framework which expressly, or by implication, prohibits a DAP (or the Tribunal on review) from **considering whether the circumstances in which the period for substantial commencement originally imposed was adequate changed significantly, through no fault of the applicant, with the consequence that the period originally imposed was inadequate for substantial commencement to take place. It is, therefore, not an irrelevant consideration in the exercise of discretion as to whether to amend a development approval so as to extend the period within which the development must be substantially commenced and falls within the 'wide range of permissible considerations which the decision-maker may weigh or disregard without committing an error of law'**.*

Bold above is the Author's emphasis.

Further the Tribunal's comments at paragraph 179 are further relevant:

*However, we accept the applicants' submission that although the period for substantial commencement originally imposed was adequate in the circumstances existing at the time when the development approval was granted, the circumstances changed significantly, through no fault of the applicants, with the consequence that the period originally imposed was inadequate for substantial commencement to take place.*

Whilst Officers acknowledge the road upgrades are outside of the Applicant's control, there have been lawful conditions imposed on the current approval to provide both interim and ultimate access arrangements. The approval thus enables development to proceed without any contingent basis of the road works being completed.

### **Conclusion:**

The application seeks approval to extend the timeframe for when the 'Service Station' development must be substantially commenced from 29 October 2022 to 31 December 2024. Since the approval of the development by the DAP, the Shire has adopted a new Local Planning Strategy (now approved) and the draft Local Planning Schemes (approval imminent). The proposal is inconsistent with both these. Officers do not hold the opinion that approval of the application would be received now. This is primarily on the basis that the 'Service Station' land use is a prohibited use in the 'Rural' zone. For the reasons discussed in the Report, the proposal is not supported.

## Officer Recommendation

It is recommended that the Metro Outer JDAP resolves to:

1. **Accept** that the DAP Application reference DAP/18/01394 as detailed on the DAP Form 2 dated 24 March 2022 is appropriate for consideration in accordance with regulation 17 of the *Planning and Development (Development Assessment Panels) Regulations 2011*;
2. **Refuse** DAP Application reference DAP/18/01394 and accompanying plans (PA22/263) in accordance with Clause 68 of Schedule 2 (Deemed Provisions) of the *Planning and Development (Local Planning Schemes) Regulations 2015*, and the provisions of the Shire of Serpentine Jarrahdale Town Planning Scheme No. 2, for the proposed minor amendment to the approved Service Station at Lot 504 and 506 Thomas Road, Oakford, for the following reasons:

### Reasons

1. The land use of 'Service Station' is a prohibited use in the 'Rural' zone under draft Local Planning Scheme No. 3. It is not consistent with orderly and proper planning to grant approval for a use which is imminently designated to become a prohibited use in the zone under the new Scheme.
2. The land use of 'Service Station' is inconsistent with the objectives of the 'Rural' zone in draft Local Planning Scheme No.3;
3. The land use of 'Service Station' does not reflect the approved strategic intent of the Local Planning Strategy, which designates the subject land within the Rural Resident 2 precinct under the approved Local Planning Strategy.
4. The land use would make implementation of the strategic intent of the approved Local Planning Strategy more difficult, through allowing a use which is inconsistent with the objectives of the Rural Residential zone.

### Reasons for Officer Recommendation

The Shire has adopted a new Local Planning Strategy (now approved) and the draft Local Planning Schemes (approval imminent). The proposal is inconsistent with both these. Officers do not hold the opinion that approval of the application would be received now. This is primarily on the basis that the 'Service Station' land use is a prohibited use in the 'Rural' zone. For the reasons discussed in the Report, the proposal is not supported.