



Shire of
Serpentine
Jarrahdale

Special Council Meeting Agenda

7.00pm

Monday, 23 November 2020

Purpose: To consider the Responsible Authority Report prepared for the application for an expansion to the existing brickworks facility at Lots 7, 10, 12, 30, 50, 53, and 101 Kiln Road, and Lot 802, South Western Highway, Byford.

Contact Us

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In Person

Shire of Serpentine Jarrahdale
6 Paterson Street, Mundijong WA 6123
Open Monday to Friday 8.30am-5pm (closed public holidays)



www.sjshire.wa.gov.au



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The purpose of this Special Council Meeting is to discuss and, where possible, make resolutions about items appearing on the agenda. Whilst Council has the power to resolve such items and may in fact, appear to have done so at the meeting, no person should rely on or act on the basis of such decision or on any advice or information provided by a Member or Officer, or on the content of any discussion occurring, during the course of the meeting. Persons should be aware that the provisions of the *Local Government Act 1995* (Section 5.25(1)(e)) and *Council's Standing Orders Local Law 2002 (as amended)* – Part 14, Implementing Decisions. No person should rely on the resolutions made by Council until formal advice of the Council resolution is received by that person.

The Shire of Serpentine Jarrahdale expressly disclaims liability for any loss or damage suffered by any person as a result of relying on or acting on the basis of any resolution of Council, or any advice or information provided by a Member or Officer, or the content of any discussion occurring, during the course of the Council meeting.



Councillor Attendance Register

In accordance with Ordinary Council Meeting, 16 December 2019, Resolution OCM293/12/19, clause 5 – “That Council requests the Chief Executive Officer maintain a Councillor Attendance Register recording Councillor Attendances at Ordinary Council Meetings, Special Council Meetings and Policy Concept Forums”.

Council October 2019 -

Date	Type	Cr Rich	Cr Atwell	Cr Byas	Cr Coales	Cr Dagostino	Cr Denholm	Cr McConkey	Cr Strange	Cr Strautins
02/11/20	PCF	A	✓	✓	✓	A	✓	✓	✓	✓
19/10/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
05/10/20	PCF	✓	✓	✓	✓	✓	✓	✓	✓	✓
21/09/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
07/09/20	PCF	✓	✓	✓	✓	✓	✓	A	✓	✓
24/08/20	PCF	✓	✓	✓	✓	A	A	✓	A	✓
17/08/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
03/08/20	PCF	✓	✓	✓	✓	✓	✓	✓	✓	✓
27/07/20	SCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
20/07/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	A
06/07/20	PCF	✓	✓	✓	✓	A	✓	✓	✓	✓
22/06/20	SCM	✓	✓	✓	✓	✓*	✓	✓	✓	✓
15/06/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
18/05/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
23/03/20	SCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
16/03/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
24/02/20	PCF	✓	✓	✓	A	✓	✓	✓	✓	✓
17/02/20	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
03/02/20	PCF	✓	A	✓	✓	A	✓	✓	✓	✓
03/02/20	SCM	✓	A	✓	✓	A	✓	✓	✓	✓
16/12/19	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
18/11/19	OCM	✓	✓	✓	✓	✓	✓	✓	✓	✓



04/11/19	PCF	✓	✓	✓	✓	✓	✓	✓	✓	✓
28/10/19	SCM	✓	✓	✓	✓	✓	✓	✓	✓	✓
21/10/19	SCM	✓	✓	✓	✓	✓	✓	✓	✓	✓

* Councillor Dagostino was an apology for the Special Council Meeting on 22 June 2020, but attended the resumed Special Council Meeting on 29 June 2020 from 7.00pm to 7.05pm, before Declaring an Interest and leaving the meeting.

A – Apology

LOA – Leave of Absence

NA – Non Attendance



Dear Elected Member

A Special Council Meeting of the Shire of Serpentine Jarrahdale will be held on Monday, 23 November 2020 in the Council Chambers, Civic Centre, 6 Paterson Street, Mundijong – commencing at 7:00pm.

Paul Martin
Chief Executive Officer

17 November 2020

Agenda

- 1. Attendances and apologies (including leave of absence):**
- 2. Public question time:**
 - 2.1 Public questions**
- 3. Public statement time:**
- 4. Petitions and deputations:**
- 5. Declaration of Councillors and Officers interest:**



6. Receipt of reports:

6.1 Reports

6.1.1 - Proposed Factory Expansion at Lots 7,10,12,30,50,53,101 Kiln Road and Lot 802 South Western Highway, Byford (PA19/1121	
Responsible Officer:	Manager Statutory Planning and Compliance
Senior Officer:	Director Development Services
Disclosure of Officers Interest:	No officer involved in the preparation of this report has an interest to declare in accordance with the provisions of the <i>Local Government Act 1995</i> .

Authority / Discretion

Quasi-Judicial	When Council determines an application/matter that directly affect a person's right and interests. The judicial character arises from the obligation to abide by the principles of natural justice. Examples of quasi-judicial authority include local planning applications, building licences, applications for other permits/licences (eg under Health Act, Dog Act or Local Laws) and other decisions that may be appealable to the State Administrative Tribunal.
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Proponent:	Austral Bricks
Owner:	Bristle Holdings Pty Ltd
Date of Receipt:	29 November 2019
	Lot 7 Kiln Road - 2.95ha
	Lot10 Kiln Road - 2.6ha
	Lot 12 Kiln Road - 3.8ha
	Lot 30 Kiln Road - 1.7ha
Lot Area:	Lot 50 Kiln Road - 37.7ha
	Lot 53 Kiln Road - 0.68ha
	Lot 101 Kiln Road - 16.6ha
	Lot 802 South Western Highway - 6.16ha
Town Planning Scheme No 2 Zoning:	'Special Use'
Metropolitan Region Scheme Zoning:	'Rural' and 'Urban Deferred'

Report Purpose

The purpose of this report is for Council to consider endorsing the Responsible Authority Report (RAR) prepared for the application for an expansion to the existing brickworks facility at Lots 7, 10, 12, 30, 50, 53, and 101 Kiln Road, and Lot 802 South Western Highway, Byford. The RAR is provided as **attachment 1**.

Council is being requested to consider this RAR as a result of the timetable set by the Metro Outer Development Assessment Panel ("MODAP") following its decision to defer consideration of the application at its meeting on 1 September 2020.



This report presents the RAR, which recommends MODAP further defer the application for 30 days, to enable the Shire to perform its statutory function to give 'proper, genuine and thorough consideration' of the matter.

Council may also resolve to make a separate further submission to the MODAP, apart from the RAR.

Relevant Previous Decisions of Council

Ordinary Council Meeting – 17 August 2020 – OCM249/08/20

That Council endorse the Responsible Authority Report contained within attachment 1, which recommends that the Metro Outer Joint Assessment Panel REFUSE the application for the proposed brickworks expansion at Lots 7,10,12,30,50,53,101 Kiln Road and Lot 802 South Western Highway, Byford for the following reasons:

- a. Insufficient information has been provided to adequately demonstrate that the proposal will not adversely impact the current and intended future amenity of the locality, specifically in respect of amenity impacts associated with dust and air emissions.*
- b. Insufficient information has been provided to adequately demonstrate that the proposal will not adversely impact the environment, specifically being Cardup Brook, the associated riparian vegetation and the quality of groundwater.*
- c. The subject land is designated to be zoned 'Rural' under the Council adopted proposed Local Planning Scheme No. 3. This represents a serious document likely to be adopted, to which regard must be given. The proposal represents a non-conforming use under the 'Rural' zone of the land in the new Scheme. While the new Scheme contains a provision at Clause 23(1)(a) that enables a merits based assessment to be performed to consider an extension of a non-conforming use, there is no precise manner of use intensity or extension prescribed in the new Scheme. Therefore, taking into account Reasons 1 and 2, an extension of a non-conforming use which this proposal would represent under the new Scheme, is not consistent with orderly and proper planning.*

Metro Outer Development Assessment Panel – 1 September 2020

To allow the applicant the opportunity to address the concerns raised by the Shire in the RAR on the information/reporting provided on the impacts of the proposal regarding :-

- dust and emissions*
- Vegetation / groundwater*

And concerns raised by Main Roads WA regarding:

- traffic and intersection treatment at Kiln Road and South West Highway.*



Background

The Shire's first RAR (**attachment 2**) was considered by Council at the August 2020 Ordinary Meeting. The RAR was endorsed by Council, which recommended that the MODAP REFUSE the application for the proposed brickworks expansion at Lots 7,10,12,30,50,53,101 Kiln Road and Lot 802 South Western Highway, Byford for the following reasons:

- a. *Insufficient information has been provided to adequately demonstrate that the proposal will not adversely impact the current and intended future amenity of the locality, specifically in respect of amenity impacts associated with dust and air emissions.*
- b. *Insufficient information has been provided to adequately demonstrate that the proposal will not adversely impact the environment, specifically being Cardup Brook, the associated riparian vegetation and the quality of groundwater.*
- c. *The subject land is designated to be zoned 'Rural' under the Council adopted proposed Local Planning Scheme No. 3. This represents a serious document likely to be adopted, to which regard must be given. The proposal represents a non-conforming use under the 'Rural' zone of the land in the new Scheme. While the new Scheme contains a provision at Clause 23(1)(a) that enables a merits based assessment to be performed to consider an extension of a non-conforming use, there is no precise manner of use intensity or extension prescribed in the new Scheme. Therefore, taking into account Reasons 1 and 2, an extension of a non-conforming use which this proposal would represent under the new Scheme, is not consistent with orderly and proper planning.*

MODAP Meeting

In considering the RAR at the MODAP meeting held on 1 September 2020, the Panel resolved to defer further consideration of the application until 1 December 2020. The decision read:

“To allow the applicant the opportunity to address the concerns raised by the Shire in the RAR on the information/reporting provided on the impacts of the proposal regarding :-

- *dust and emissions*
- *Vegetation / groundwater*

And concerns raised by Main Roads WA regarding:

- *traffic and intersection treatment at Kiln Road and South West Highway.”*

This opportunity for the applicant was intended to enable additional information to be submitted to the Shire, so that the Shire could assess the proposal and recommend a position in respect of sufficient information being submitted.

Following MODAP's decision of deferral for 90 days, Shire Officers sought from the applicant this additional information as early as possible. The following summarises the timeline of engagement between Shire officers and the applicant:

1 September 2020 – Shire officers contacted the applicant, offering to meet to discuss the additional information that will assist the Shire in the assessment of the application.

1 September 2020 – the applicant responded seeking a written outline of additional information by 7 September.



2 September 2020 – as requested by the applicant, a written outline of all the additional information that was required was provided by Shire Officers.

25 September 2020 – Shire Officers contacted the applicant to ascertain how they were proceeding.

1 October 2020 – applicant responded to the Shire seeking to meet when possible after school holidays.

5 October 2020 – arrangements made for a meeting to occur.

8 October 2020 – meeting held at the Shire.

9 October 2020 – Shire Officers sent the record of the meeting, to assist the applicant in clarifying points discussed.

9 October 2020 – applicant responded advising they were seeking to still achieve the November Council meeting and December MODAP meeting.

12 October 2020 – Shire Officers responded advising that more than half the 90 day deferral period had been used with no further information submitted. Shire Officers advised, in accordance with normal process, that it would need to readvertise additional information submitted, including obtaining any updated feedback from DWER, Dept of Health and Main Roads WA.

26 October 2020 – Shire Officers contacted the Chair of the MODAP and the DAP secretariat, advising that the applicant had yet to provide any additional further information and that the Shire would have difficulty in achieving the deadline set by the 1 September 2020 decision. This was due to the Shire not having sufficient time to undertake further referral to submitters and referral authorities, review of the further information by an independent environmental consultant and undertaking the objective merits based planning assessment.

28 October 2020 – Applicant submitted the further information to the Shire. This is provided at **attachment 3**.

29 October 2020 – Officers organised referral of the additional information to submitters and referral authorities. Any further comments have been requested by 20 November. The additional information was published on the Shire website that day. Shire Officers formally appointed an independent environmental consultant to review the additional information.

9 November 2020 – Officers identified that the environmental consultant had a potential conflict of interest, as they prepared a Clay Pit Wind Erosion Study for the applicant's clay pit in Upper Swan. This Study was then used as part of the updated Dust Management Plan prepared by the applicant for this application. As the consultant was appointed to review this Dust Management Plan and other additional information submitted by the applicant, Officers discontinued the consultant's engagement to remove any potential conflict of interest and appointed a new environmental consultant to complete the review of the further information. This consultant requires two weeks to complete such review, which is due to be received by the Shire on 24 November 2020.



Community / Stakeholder Consultation

The Shire's practice is that should additional information be submitted by an applicant for a development application which is currently under assessment, and which attracted submissions as part of the initial advertising, any additional information received is referred for further comment. Recent examples of this practice include:

- Neighbourhood Centre - Lot 9504 Briggs Road, Byford;
- Horse Arena - 2738 South Western Highway, Serpentine;
- Transport depot - Lot 598 and Lot 599 Karnup Road and Lot 597 Walker Road, Serpentine;
- Outbuilding - 81 Park Road, Byford;
- Shed extension - 3 Marginata Parade, Jarrahdale.

In accordance with the Deemed Provisions of the Scheme, the further information was provided to submitters, and also listed on the Shire's website. At the date of writing this report, three further submissions have been received. The submission period remains open until 20 November 2020.

Separate to this, in accordance with the decision of the MODAP, the further information has been sent to Main Roads WA who, while having 42 days to provide a response in accordance with the Deemed Provisions, had been requested to respond by 20 November. Given that additional information was also relevant to dust and air emissions per the MODAP decision, the information was also referred for further comment from the Department of Water, Environment and Regulation.

The re-referral of additional information to referral agencies is a commonplace practice to assist in the assessment of a development application. Recent examples of this include:

- Oakford Traders service station, convenience store and liquor store - 1526 Thomas Road, Oakford;
- Caltex Service Station - 1537 Thomas Road, Oakford;
- Proposed Dams - 206 Firns Road, Serpentine;
- Service Station - 11 Shanley Road, Mundijong;
- Keeping of stock - 97 Bournbrook Avenue, Cardup.



Statutory Environment

Legal advice was obtained in respect of options available to the Shire. This is provided as **confidential attachment 4**.

The following legislation and policy documents are specifically relevant to the assessment of this application:

- *Planning and Development Act 2005*;
- *Planning and Development (Development Assessment Panels) Regulations 2011*;
- *Planning and Development (Local Planning Schemes) Regulations 2015* ;
- *Metropolitan Region Scheme (MRS)*;
- *Shire of Serpentine-Jarrahdale Town Planning Scheme No. 2 (TPS2)*;
- *Draft Shire of Serpentine Jarrahdale Local Planning Scheme No. 3 (LPS3)*;
- *Environmental Protection (Noise) Regulations 1997*.

State Government Policies

- 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);
- State Planning Policy 4.1 - State Industrial Buffer Policy (SPP 4.1).

Local Strategies

- Rural Strategy Review 2013;
- Draft Local Planning Strategy.

Local Policies

- Local Planning Policy 4.3 - Landscape Protection.

Recent legislative change

The Planning and Development Amendment Bill 2020 (WA) received Royal Assent on 7 July 2020, which means that the new provisions in the Planning and Development Act 2005 (WA), to allow the Western Australian Planning Commission (WAPC) to determine development applications for “significant development” proposals, are now law.

New development proposals within the Perth metropolitan area, with an estimated cost of \$20,000,000 or more, are now subject to a new WAPC development approval pathway. This would be in place of the decision making responsibility of the Development Assessment Panel, and also the Shire’s role in preparing the Responsible Authority Report.



Planning Assessment

With the Shire receiving the additional information on day 58 of the 90 day deferral, and the new RAR being required by day 78 (to enable 12 days prior to the MODAP meeting), this provides the Shire 20 days to undertake its statutory responsibilities.

Completion of the RAR involves a number of tasks including:

- Seeking, receiving and collating input from submitters to the original application;
- Seeking, receiving and collating input from referral authorities;
- Seeking, receiving and considering the outcome of the independent environmental consultant's assessment;
- Undertaking the subsequent objective merits based planning assessment;
- Council consideration of the RAR;
- Provision of the RAR to the MODAP at least 12 days prior to the meeting.

Upon receiving the additional information from the applicant on day 58 of the deferral period, Officers explained to the applicant that this did not leave sufficient time for the Shire to complete its statutory responsibilities as outlined above. To complete these, would take a further 30 days (beyond the 90 day deferral period) considering:

- Seeking, receiving and collating input from submitters and referral authorities; (21 days);
- Seeking, receiving and considering the outcome of the independent environmental consultant's assessment (14 days);
- Undertaking the subsequent objective merits based planning assessment (21 days);
- Report to Council to consider RAR (21 days);
- Provision of RAR to MODAP (1 day);
- MODAP meeting (12 days).

In light of when the additional information was received, and the timeframes outlined above, the Shire requires 30 additional days to be able to complete its statutory responsibilities.

A request for this extension was made to the applicant, noting that the applicant has the authority to agree to an extension. The applicant did not agree to the extension request.

In light of this, the RAR results in the recommendation of a further 30 day deferral being requested of the MODAP. Council may choose to make its own separate position to the MODAP in addition to the RAR.

The deferral will enable the proper, genuine and thorough consideration of the additional information provided by the applicant, and the input to this information of submitters, referral authorities and the independent environmental consultant assessment. The additional information is voluminous and includes the following:

- Health and safety policy statement;
- Updated Water Management Plan;
- Updated Dust Management Plan;
- Additional Information Regarding Air Emissions;



- Environmental Policy;
- Transport Impact Statement;
- Intersection Realignment and Upgrade Design Report;
- Intersection Realignment and Upgrade Drawings;
- New Odour Impact Assessment.

The Shire's RAR has been written considering the various risk issues associated with the application. It is important that Council are aware of these risk issues, and what may be done to mitigate such risks. It is also not possible to list every possible risk, but following are considered three of the most relevant:

Risk - That the Shire fails to give 'proper, genuine and thorough consideration' to all mandatory considerations relevant to its statutory function.

Mitigation - This is essentially the basis of the Shire's RAR, to seek a further 30 days to ensure the Shire fulfils its statutory function.

Risk - That the MODAP do not support the RAR, and seeks to make a determination of the application at the meeting.

Mitigation - That Shire Officers attempt to prepare a draft set of without prejudice conditions, noting however that insufficient time has been afforded to complete this task to the normal extent required.

Risk - That the applicant is unwilling to await determination of the application by the MODAP a triggers a deemed refusal and State Administrative Tribunal Process.

Mitigation - Shire Officers are prepared to make submissions to the SAT seeking to register a sufficient interest to be part of the SAT process.

Options and Implications

Option 1

That Council ENDORSES the Responsible Authority Report contained in attachment 1.

Option 2

That Council ENDORSES the Responsible Authority Report contained in attachment 1 and resolves to make its own further submission to the MODAP on the application, that identifies an alternative deferral timeframe for the Shire to complete its objective merits based planning assessment of the additional information, and provision of the RAR.

Option 3

That Council ENDORSES the Responsible Authority Report contained in attachment 1 and resolves to make its own further submission to the MODAP on the application, that recommends refusal of the application due to insufficient time having been afforded to the Shire to complete its objective merits based planning assessment.

Option 1 is recommended.



Conclusion

The timetable given to the Shire is insufficient to enable the Shire to perform its legislative role in giving '*proper, genuine and thorough consideration*' of the application. It is important that the RAR seek an adequate extension of time, and in this regard 30 days is recommended for the reasons explained in this report. Various risks have been carefully considered, and the most significant risk is that associated with the Shire being rushed into a hastened assessment which does not consider all the relevant planning issues, and which potentially result in an ill-informed RAR. The Shire's RAR is recommended for endorsement by Council.

Attachments (available under separate cover)

- **6.1.1 - attachment 1** - New RAR (E20/12914)
- **6.1.1 – attachment 2** - First RAR (E20/4561)
- **6.1.1 – attachment 3** - Additional information (IN20/28431)
- **6.1.1 – CONFIDENTIAL - attachment 4** - Legal advice (E20/13015)

Alignment with our Strategic Community Plan

Outcome 3.1	A commercially diverse and prosperous economy
Strategy 3.1.1	Actively support new and existing local businesses within the district.
Outcome 4.2	A strategically focused Council

Financial Implications

Nil.



Risk Implications

Risk has been assessed on the Officer Options and Implications:

Officer Option	Risk Description	Controls	Principal Consequence Category	Risk Assessment			Risk Mitigation Strategies (to further lower the risk rating if required)
				Likelihood	Consequence	Risk Rating	
1	<i>That the responsible authority fails to give 'proper, genuine and thorough consideration' to all mandatory considerations relevant to its statutory function.</i>	<i>Ensure adequate time to perform this function</i>	Organisational Performance	Rate	Major	LOW	Accept Officer Recommendation
2	<i>That the MODAP do not support the RAR, and seek to make a determination of the application at the meeting.</i>	<i>Shire Officers may be asked at short notice to prepare a draft set of without prejudice conditions by the chair of the MODAP</i>	Organisational Performance	Possible	Major	SIGNIFICANT	<i>Shire Officers attempt to prepare a draft set of without prejudice conditions, noting however that insufficient time has been afforded to complete this task</i>
3	<i>That the applicant is unwilling to await determination of the application by the MODAP and triggers a deemed refusal and State Administrative Tribunal Process</i>	<i>The Shire would not be a respondent to the matter. The MODAP will be the respondent in any review sought by a 'deemed refusal'.</i>	Organisational Performance	Possible	Major	SIGNIFICANT	<i>Shire Officers are prepared to make submissions to the SAT seeking to register a sufficient interest in being part of the SAT process.</i>

Any risks with a **SIGNIFICANT** or **HIGH** risk rating will require ongoing reporting to the Audit, Risk and Governance Committee, and any risks with a **HIGH** risk rating will require a specific risk treatment plan to be developed and ongoing reporting to Council.



Voting Requirements: Simple Majority

Officer Recommendation

That Council **ENDORSES** the Responsible Authority Report contained within attachment 1, which recommends that the Metro Outer Joint Assessment Panel **DEFER** consideration of the application for a period of 30 days, to enable the Shire to give 'proper, genuine and thorough consideration' to all mandatory considerations relevant to its statutory function, and specifically the additional information provided by the applicant in response to the 1 September 2020 decision of MODAP.

7. Motions of which notice has been given:

8. Urgent business:

9. Closure: