

5.1.4 LATE ITEM: No. 71 (Lot: 200: D/P: 92012) Edward Street, Perth – Concrete Batching Plant (Use Not Listed) – Extension of the Term of Approval and Modification to Conditions

Ward:	South	Date:	26 April 2017
Precinct:	East Perth Redevelopment Authority – Precinct 15 Claisebrook Road North	File Ref:	5.2016.497.1
Attachments:	1 – Consultation and Location Map 2 – Copy of Minister’s Planning Approval Dated 2012 3 – Timetable of Events 4 – Application including Proposed Schedule of Modified Conditions 5 – Summary of Submissions		
Tabled Items:	Nil		
Reporting Officer:	R Narroo, Senior Statutory Planning Officer		
Responsible Officer:	P Di Perna, Acting Director Development Services		

RECOMMENDATION:

That following the consideration of the preliminary legal issue as presented as part of the State Administrative Tribunal proceedings, if the State Administrative Tribunal determines that the application is capable of being considered under Clause 77 of Schedule 2, *Planning and Development (Local Planning Scheme) Regulations 2015*, then the Council’s position is as follows:

Council, through its legal representative convey to the State Administrative Tribunal that Council AGREES to resolve the review proceeding for No. 71 (Lot: 200: D/P: 92012) Edward Street, Perth on the basis that:

1. The application be approved under Clause 77 subject to the matters referred to in paragraph 2 below;
2. All conditions and advice notes detailed on the development approval granted by the Minister for Planning on 21 May 2012 included in Attachment 2 continue to apply to this approval, except as follows:
 - a) Condition 1 of the development approval is amended as follows:

“1. This approval is granted for a term expiring on 16 October 2018”
 - b) Additional Condition 9 is included on the development approval as follows:

“9. The Traffic Management Plan referred to in Condition 4 be updated to the satisfaction of the City to include reference to truck movements as follows:

All Truck traffic is not to utilise Claisebrook Road north of Caversham Street unless truck movements are to provide local supplies of concrete within the Claisebrook Precinct. All truck traffic is to access and egress the Claisebrook Precinct via Edward Street to Lord Street”

PURPOSE OF REPORT:

To consider pursuant to Section 31 of the State Administrative Tribunal an application for an amendment of the approval so that it would operate indefinitely and to modify the approval conditions for the concrete batching plant at No. 71 Edward Street, Perth.

BACKGROUND:

Landowner:	Hanson Construction Materials Pty Ltd
Applicant:	Allerding and Associates
Date of Application:	18 November 2016
Zoning:	MRS: Urban City of Perth Planning Scheme No.2 - East Perth Redevelopment Scheme No.1 : Zone: Residential R-Code: R80 LPS2: Zone: Residential Commercial R-Code: R160
Built Form Policy Area	Mixed Use Transit Corridor
Existing Land Use:	Batching Plant – “Use not Preferred or Contemplated”
Proposed Use Class:	Batching Plant - “Use Not Preferred or Contemplated”
Lot Area:	5,968m ²
Right of Way (ROW):	Not applicable
Heritage List:	No

The subject site is located at the corner of Lord Street/Edward Street/Graham Farmer Freeway, Perth as shown in **Attachment 1**. The site and adjoining properties are zoned ‘Residential’ R80 and the area consists of residential, commercial and mixed-use developments. The site is currently occupied by the Hanson Concrete Batching Plant.

Concrete Batching Plant Use

The concrete batching plant commenced operations, albeit in a smaller capacity, from the locality in the mid 1960s. The East Perth Redevelopment Authority (EPRA) was established in 1992, with responsibility through its Act for the planning and redevelopment of the East Perth Redevelopment Area and assumed the role for decision making in a planning capacity.

The Hanson (previously Pioneer Construction Materials) plant moved to its current location in the mid-1990s due to the need for their sites to be resumed for the Graham Farmer Freeway project. Development approval for the plant was issued by the then EPRA and included a time limitation, which expired in mid-2012.

In 2001, EPRA commenced “normalisation” of land within the EPRA Scheme area, which involved returning planning authority for the area to the City of Perth. The subject site was included in the normalisation on 17 January 2002. The provisions of the EPRA Scheme and Policies were incorporated in the City of Perth Scheme No 2 by order of the then Minister.

Between April 2002 and June 2007, the City of Perth, granted conditional approval for time extensions to the use to enable the site to continue to operate as a concrete batching plant. Each time the approval was generally issued for a further 12 months, allowing a continued review of the impact of the unrestricted hours and associated vehicle movements on the surrounding area, given that the area was in a gradual transition towards increased residential development. On 19 January 2005, conditional approval was granted by the Council for the proposed extension to the concrete loading facility, in the south west corner of the existing Hanson site at 71 Edward Street, Perth.

The site was transferred to the jurisdiction of the City of Vincent on 1 July 2007 as part of the local government municipal boundary adjustment. As part of the transfer the City would continue to administer the City of Perth Scheme (and policies) applicable to the area until such time that the City of Vincent Town Planning Scheme No 1 was amended.

In 2011 an application was lodged to enable the plant to operate indefinitely. As the City did not determine the application within the statutory time frame set out in its planning scheme, an application for review to the State Administrative Tribunal (SAT) was lodged in August 2011 and subsequently called in by the then Minister for Planning. Following SAT's hearing of the application, it provided the Minister for Planning with recommendations and included conditions should the Minister grant approval.

On 21 May 2012, conditional approval was granted by the Minister to allow the plant to operate for a further five years until 16 October 2017, as documented in **Attachment 2**. The reason for the Minister's decision was that a five year period would provide sufficient time to enable the necessary strategic planning framework for the subject site to be finalised to indicate clearly the ultimate development intent for the subject land.

Further to the application referred to above, other development applications for additional hours of operation, the addition of a Silo Storage Building and the ongoing use of the site have been considered since then as summarised below:

- In 2009, the State Administrative Tribunal (SAT) approved the application for the Silo Storage Building.
- On 5 May 2015 the Council conditionally approved the demolition of an existing 'slumping' building and construction of a new 'slumping' building at the subject site.
- On 16 February 2016 the City conditionally approved Light Industry (Organic Recycling Equipment and Sheds) and Associated Car Parking on adjoining lots to the batching plant facing Edward Street.

A more comprehensive summary is provided in **Attachment 3**.

Strategic Planning Framework

Since the Minister's decision in 2012 to conditionally approve the development for a five year period the City has progressed the development and adoption of its strategic local planning framework. The key milestones are outlined as follows:

- In October 2011 the City forwarded draft Local Planning Scheme No. 2 (LPS2) to the Western Australian Planning Commission (WAPC) for consent to advertise. The draft LPS2 incorporated the concrete batching plant sites into Scheme Map 4 - Mount Lawley/Highgate with a zoning of 'Residential/Commercial'.
- In September 2013, the Minister granted approval to advertise the draft LPS2 subject to various modifications including amending the zoning of the concrete batching plant sites to 'Special Use - Concrete Batching Plant' and the surrounding area from 'Residential/Commercial' to 'Commercial'.
- The draft LPS2 was advertised in 2014 with comments being received from the community regarding the discontinuation of the concrete batching plants and support for Council's proposal to create a mixed use area.
- On 18 November 2014, Council endorsed the draft LPS2 for forwarding to the WAPC for determination. At that time, Council recommended the concrete batching plant sites be zoned Residential/Commercial R160 with "Special Use" for Concrete Batching Plant with a sunset clause (coinciding with the existing terms of approval - October 2017) and the surrounding area be zoned Residential/Commercial R100.
- Still no determination has been made by the Minister for Planning regarding the City's draft LPS2 since its lodgement with the WAPC in December 2014.

A more comprehensive summary of the timetable of events is provided in **Attachment 3**.

It is noted that from a State and Regional planning perspective, consideration is also given to WAPC's Directions 2031 Document and the Economic and Employment Land Strategy (EELS). The EELS represents the State Government's response to an identified shortage of supply of light and general industrial land. The aim of the Strategy is to ensure that adequate forward planning is undertaken to provide employment land in both the Perth metropolitan and Peel regions over the next 20 years and beyond. EELS makes reference to the importance of setting aside non-heavy industrial land in close proximity to the Perth Central Area, and it refers to the batching plants as an example.

Other Development Approvals within the Locality

Since the Minister's Approval in 2012, there have been numerous development approvals granted which have resulted in an increase in the extent of residential development within the locality, including the following:

- 2 Edward Street, Perth- mixed use development comprising 5 multiple dwellings;
- 17 Gladstone Street, Perth – 8 multiple dwellings development;
- 150-158 Claisebrook Road, Perth- mixed use development comprising 116 multiple dwellings;
- 159 Claisebrook Road, Perth- mixed use development comprising 9 multiple dwellings; and
- 60, 62, 62A Cheriton Street, Perth – mixed use development comprising 35 multiple dwellings.

The City is currently processing an application at No.123 Claisebrook Road, Perth for 12 multiple dwellings which will not be determined prior to the consideration of this application.

These approvals are also referred to in the comprehensive summary in **Attachment 3**.

Current Amendment Application

On 18 November 2016, the City received an application which proposes to remove the time limit on the Minister's approval so that the plant can operate indefinitely and to modify conditions of the existing approval. The application, including the applicant's Schedule of Modified Conditions is included as **Attachment 4**.

As outlined in the proceeding section, at the time of lodgement, the City was anticipating that LPS2 would be finalised and gazetted. This factor influenced the timeframe for processing of the application. As the current application was not determined within the statutory timeframe, the applicant lodged an application for review with the SAT on the 21 February 2017 for the deemed refusal. The decision sought for review is as follows:

“Pursuant to s.31 (2) (c) of the State Administrative Tribunal Act 2004, set aside the deemed refusal and in substitution thereof grant approval to the application to change development approval conditions.”

In respect of this matter the City has appointed the legal services of McLeods Barristers and Solicitors to represent the City. Should the matter progress to final hearing the City will be engaging a Senior Barrister.

On 20 March 2017 SAT issued orders pursuant to Section 31 of the *SAT Act 2004* inviting the City to determine the application by no later than 2 May 2017. The SAT also included orders to enable the matter to progress to a Final Hearing, scheduled on 15, 16 and 19 June 2017.

As part of the SAT proceedings the City's Legal Representative has applied to the SAT to determine a preliminary legal issue. This issue relates to the ability of the decision maker, be it the Council or SAT, to rely on Clause 77 of Schedule 2 of the *Planning and Development (Local Planning Scheme) Regulation 2015* to amend the 2012 decision by the Minister. The consideration of this matter by SAT will not be finalised before Council's reconsideration under Section 31. As a result, the recommendation to Council has been worded in such a way to contemplate the resolution of this issue should SAT determine that approval can be granted under Clause 77. It is noted that should the SAT determine Clause 77 cannot be relied upon then a new development application and determination would be required.

DETAILS:

Summary Assessment

The table below summarises the planning assessment of the proposal against the provisions of the City of Perth Planning Scheme No.2 and East Perth Redevelopment Scheme No.1.

Planning Element	Use Permissibility/ Deemed-to-Comply	Requires the Discretion of Council
Land Use		✓

Detailed Assessment

The deemed-to-comply assessment of the elements that require the discretion of Council is as follows:

Land Use	
Deemed-to-Comply Standard	Proposal
City of Perth Planning Scheme No. 2 – East Perth Redevelopment Scheme No. 1 “Preferred” Use	Not Contemplated - Batching Plant

The above elements of the proposal that do not meet the specified deemed-to-comply standards are discussed in the Comment section below.

CONSULTATION/ADVERTISING:

Consultation was undertaken for a period of 21 days in accordance with the *Planning and Development (Local Planning Scheme) Regulations 2015*, from 28 March 2017 until 21 April 2017. A total of 1,269 letters were sent to owners and occupiers, as shown in **Attachment 1**. Notice of the proposal was also included “The Guardian Express” newspaper.

Following the SAT orders, the City through its Legal Representatives liaised with the applicant to enable the commencement of community consultation. Notwithstanding that the need for consultation was identified the applicant did not respond to the City's request for the sign to be erected and the notice to be placed in the local newspaper. The risk associated with not undertaking consultation in accordance with the legislative framework was considered by the Administration and as a result the City arranged for the sign and notice to be displayed to meet the timeframes of the SAT orders. Given the time constraints imposed by the SAT, it has not been possible to extend the consultation period.

A Community Information Session was organised on 19 April 2017 at the City's Administration and Civic Centre to provide more information to the local community about the development proposals and the possible course the applications for the Concrete Batching Plants may follow. The meeting was attended by approximately 35 members of the public.

A total of 82 submissions were received in relation to the proposal comprising of 77 objections, 2 neither support nor object and 3 submissions of support. The matters raised in the submissions are as follows:

- Impact of the Land use.
- Inconsistent with Local Planning Framework.
- Impact of Dust.
- Impact of Noise and Traffic.

The main issues raised in the submissions are discussed in the Comment section below. A summary of the submissions received and Administration's response to each is contained in **Attachment 5**.

Design Advisory Committee (DAC):

Referred to Design Advisory Committee: No

LEGAL/POLICY:

- *Planning and Development Act 2005*;
- *Planning and Development (Local Planning Schemes) Regulations 2015*;
- City of Perth Planning Scheme No. 2;
- East Perth Redevelopment Scheme No.1; and
- Policy No. 4.1.5 – Community Consultation.

The applicant has lodged an appeal to the State Administrative Tribunal (SAT) in accordance with Part 14 of the *Planning and Development Act 2005*.

Community Consultation

It is noted that the need for consultation was considered based on the following legislative provisions, noting that (unless otherwise stated) references to clauses are those contained in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015*:

- Clause 77(2) requires that such applications be made in accordance with the requirements of Part 8 and dealt with under Part 9 as if they were development applications.
- Clause 64(1)(e) (a Part 8 provision) requires that a development application be advertised if the proposed development is of a type that the scheme requires to be advertised.
- Under cl 5.2.4(a) of the EPRA Planning Scheme as referenced in the City of Perth Town Planning Scheme No 2, where a category of use is not stipulated in regard to a particular precinct as either a preferred use or a contemplated use, then the application may only be considered after advertising has taken place.
- In *Hanson and Town of Vincent [2008] WASAT 71* at [49-50], the SAT found that a concrete batching plant was not a preferred or contemplated use in Precinct 15 and was therefore subject to the compulsory advertising requirement in cl 5.2.4.
- The methods of advertising are now controlled by Clause 64. Clause 64(3) allows a local government to require an applicant to undertake the advertising in one or more of the ways described in sub-clauses (a) to (d).

Delegation to Determine Applications:

This matter is being referred to Council for determination as the proposal is for use which is not "Preferred or Contemplated" under the City of Perth Scheme No 2 (which incorporates the East Perth Redevelopment Scheme).

RISK MANAGEMENT IMPLICATIONS:

In responding to the SAT invitation, Council may decline the invitation to determine the application, may agree to amend the current approval with or without conditions or may refuse to amend the current approval.

Should Council decline the invitation to determine the application, the application for review with the SAT is likely to proceed to a full hearing, with uncertainty as to what are the key areas of concern. This may also increase the City's exposure of costs being awarded as it could be argued that there was no genuine attempt to make a decision on the merits of the application.

Should Council refuse or approve (with or without condition) the application, the matter may proceed to a hearing and the scope of the hearing will be guided by Council's decision.

STRATEGIC IMPLICATIONS:

The City's Strategic Plan 2013-2023 states:

"Natural and Built Environment

1.1 *Improve and maintain the natural and built environment and infrastructure."*

SUSTAINABILITY IMPLICATIONS:

Nil.

FINANCIAL/BUDGET IMPLICATIONS:

Costs have been and will continue to be incurred representing the City on this matter to date and in defending the position that is adopted by Council.

COMMENTS:

Planning Framework and Land Use

Pursuant to Clause 77 of Schedule 2 of the *Planning and Development (Local Planning Scheme) Regulations 2015*, this application seeks to amend conditions of the 2012 Ministerial approval, to enable the plant to operate indefinitely and to modify some of the other conditions. The key aspects are summarised as follows:

- Removal of the time limit applying under the Minister's approval so that the approval will operate indefinitely;
- Provide for ongoing review of the Environmental Management Plan and the Noise Management Plan;
- Make minor changes to current conditions of approval; and
- Add a new condition for the re-routing of trucks away from Claisebrook Road north of Caversham Street.

A key reason stated by the Minister for granting a time limited approval and how in 2012 was the view that during the term of that approval the necessary strategic planning framework for the subject site would be finalised which would indicate clearly the ultimate development intent for the subject land. How and whether this strategic planning framework has changed is therefore a pivotal consideration in the determination of this application.

State and Regional Framework

It is noted that from a State and Regional perspective, consideration is also given to WAPC's Directions 2031, the Economic and Employment Land Strategy (EELS) and Capital City Planning Framework.

The Draft LPS2, as adopted by Council provides a character statement for the precinct which acknowledges that the area is unique from other areas in the City because of its proximity to public transport nodes and the predominant mix of light and service industrial land uses. Promoting transit oriented development and increasing residential development within the inner and middle metropolitan region accords with various State planning policies. It is also consistent with the evolution of East Perth into a more diverse, cosmopolitan area with the development of the former East Perth Redevelopment Authority's Claisebrook Village Project and Metropolitan Redevelopment Authority's (MRA's) proposed Riverside and East Perth Power Station Projects.

The EELS represents the State Government's response to an identified shortage of supply of light and general industrial land. The aim of the Strategy is to ensure that adequate forward planning is undertaken to provide employment land in both the Perth metropolitan and Peel regions over the next 20 years and beyond. EELS makes reference to the importance of setting aside non-heavy industrial land in close proximity to the Perth Central Area, and it refers to the batching plants as an example. The EELS also identifies the vacant land to the rear of the former East Perth Power Station as the designated 'Industrial Centre' servicing central Perth, which presents an opportunity for the relocation of the plants whilst satisfying the objectives and the intent the EELS document. Notwithstanding, the interpretation and weight to be afforded to the batching plants reference is a point of contention.

Local Planning Framework

The applicable local planning framework under which this determination is made remains unchanged from the earlier determination of the Minister, being the City of Perth Scheme No 2 (which incorporates the East Perth Redevelopment Scheme). The submissions received by the City during the community consultation period raised some concerns regarding the use ongoing of the subject site as a concrete batching plant.

The City has progressed the development and adoption of its own strategic planning framework (LPS2) however, it is yet to be finalised. There were significant delays with the time taken by the WAPC and the then Minister for Planning to grant consent to advertise (requested in 2011 and provided in 2013). Draft LPS2 has been with the WAPC since 2014 and is yet to be finalised. Administration understands that LPS2 was presented to the Statutory Planning Committee (SPC) of the WAPC in early November 2016. Whilst the City continues to advocate to the WAPC and the Minister for Planning to have Draft LPS2 finalised, the delay in approval of LPS2 is outside the City's control.

Given the above, the batching plant use is considered to be inconsistent with the City's future vision for the locality transitioning to a mixed-use area. However, as Draft LPS2 was modified for advertising at the instruction of the then Minister, that Council recommended further modifications after the advertising of LPS2 (including that affect the plant and its surrounds) it is not certain or imminent what the zoning for the subject site may be. On this basis, it is considered premature for the permanency of the batching plant use to be determined.

Dust, Noise and Traffic

The submissions received by the City during the community consultation period raised some concerns regarding the impact of the ongoing use of the subject site with respect to dust, noise and traffic. In addition to the current management plans, the operator has a statutory obligation to comply with the provisions of the *Environmental Protection (Concrete Batching and Cement Products Manufacturing) Regulations 1998* and *Environmental Protection (Noise) Regulations 1997*.

The City has maintained a register of complaints received relating to the concrete batching plants. Over the past 5 years the City has received 13 concerns/complaints in total (from concerns relating to the two plants in the locality) regarding dust, noise and traffic, with at least one complainant raising concerns on multiple occasions. The City has followed up all the concerns with the operators, who have been responsive in addressing the issues. Since February 2016, the City has not received any concerns or complaints in relation to the batching plant operations.

The operator of the concrete batching plant, in accordance with the 2012 approval, is required to submit to the City on an annual basis self-monitoring Environment Audits. This consists of internal audits which include a range of environmental considerations including the approved management plans for noise and dust. The operator has complied with this requirement since the approval date.

The submissions received by the City also raised some concerns regarding traffic impacts. The applicant has submitted a Traffic Management Assessment and the impacts of plant related traffic movements can be managed through the traffic management plan. The applicant as part of their application has proposed an additional condition relating to truck movements along Edward Street. This will assist in minimising impacts to local residents and is supported as outlined in the recommendation to Council.

Modifications to Conditions other than Timeframe

The applicant has proposed the re-wording of Conditions 2 to 6 as part of this application to change the tense of the conditions which includes reference to plans which have already been submitted and approved by the City. Administration raised no objections to the changes however considers little value to be derived from the changes.

Conclusion

The application seeks the amendment of the existing approval from the Minister to extend the terms of approval indefinitely and to modify some of the conditions of the existing approval and to add a new condition for the re-routing of trucks away from Claisebrook Road north of Caversham Street. The new condition is supported as it is considered to assist in minimising potential the impact truck movements to local residents and has been incorporated into the recommendation to Council.

The concrete batching plant use is not preferred or contemplated under the City of Perth Town Planning Scheme No 2. Although the strategic planning framework for the locality has progressed has yet to be finalised. It is considered premature for the permanency of the batching plant use to be determined at this point in time. Should the SAT determine the preliminary legal issue to find Clause 77 of Schedule 2 *Planning and Development (Local Planning Schemes) Regulations 2015* can be relied upon, it is recommended that Council agree to extend the current term of the approval be extended for a 12 month period, until 16 October 2018, to enable the strategic planning framework to be finalised.
