



## **SPECIAL COUNCIL MEETING AGENDA**

To be held on

**Thursday 18 May 2023**

Commencing at 6.00pm

Shire of Boyup Brook Shire Council Chambers, Boyup Brook

A handwritten signature in black ink, appearing to read "Peter Clarke".

**Peter Clarke**  
Acting Chief Executive Officer

## **NOTICE OF SPECIAL COUNCIL MEETING**

To:

Cr Richard F Walker – Shire President  
Cr Helen C O'Connell – Deputy Shire President  
Cr Sarah E G Alexander  
Cr Steele Alexander  
Cr Charles A D Caldwell  
Cr Philippe Kaltenrieder  
Cr Darren E King  
Cr Kevin J Moir  
Cr Adrian Price

Peter Clarke	Acting Chief Executive Officer
Carolyn Mallett	Deputy Chief Executive Officer
Jason Forsyth	Manager Works & Services
Adrian Nicoll	Urban and Regional Planner
Lauren Carlin	Project Officer
Maggie Le Grange	Executive Assistant

A Special Council Meeting of the Shire of Boyup Brook will be held on Thursday 18 May 2023 in the Shire Council Chambers, 55 Abel Street, Boyup Brook – commencing at 6.00pm.

The purpose of this meeting is to re-consider a Development Approval Application submitted by Forest Products Commission for a Pine Tree Plantation on Lots 1182, 2944, 3944 and 2, Cunningham Road, Wilga. The Development Application was previously presented to the April 2023 Ordinary Meeting of Council.

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**1. DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS AND DISCLAIMER**

We acknowledge and pay our respects to the traditional custodians of the land on which we meet and work.

Special Council Meetings are public meetings.

The Council Chambers are not a parliament and Parliamentary Privilege does not apply.

Elected Members and staff risk being held personally liable if their comments are defamatory, or breach any duty of confidentiality.

Statements made during Council meetings are solely those of the person making them. Nothing expressed at a Council Meeting can be attributed to the Shire, unless it is adopted by a resolution of Council.

The Confirmed Minutes of a Council Meeting are the official record of that Council meeting. Verbatim Minutes are not required.

May I ask everyone here today, to make sure your mobiles are turned off or on silent for the duration of the Meeting.

**2. RECORD OF ATTENDANCE**

Present:	Shire President Deputy Shire President Councillor	Richard F Walker Helen C O'Connell Sarah E G Alexander Steele Alexander Charles A D Caldwell Philippe Kaltenrieder Darren E King Kevin J Moir Adrian Price
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Staff:	Acting Chief Executive Officer Deputy Chief Executive Officer Manager Works & Services Urban and Regional Planner Project Officer Executive Assistant	Peter Clarke Carolyn Mallett Jason Forsyth Adrian Nicoll Lauren Carlin Maggie Le Grange
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APOLOGIES:

LEAVE OF ABSENCE:

MEMBERS OF PUBLIC:

David Guille (Forest Products Commission)  
Greg Hodgson (Forest Products Commission)

**3. PUBLIC QUESTION TIME**

**4. DISCLOSURE OF INTEREST**

The following Declarations of Interest were submitted:

**Declarations of Interest (Proximity)**

<b>Officer/Elected Member</b>	<b>Order of Business/ Report No</b>	<b>Agenda Page No</b>	<b>Item Details</b>	<b>Nature of Association</b>
Cr Walker	5.1	6	Development (Tree Farm-Pine Trees) Cunningham Rd Wilga	Farming property directly adjoining east end northern boundary of subject land
Cr Moir	5.1	6	Development – (Tree Farm-Pine Trees) Cunningham Rd Wilga	Properties separated by road and rail reserve.

## 5. REPORT

### 5.1 Development (Tree Farm – Pine Trees) – Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga

Location:	Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga
Applicant:	Forest Product Commission
File:	A3200
Disclosure of Officer Interest:	None
Author:	A. Nicoll, Urban and Regional Planner
Authorising Officer:	Peter Clarke, Acting Chief Executive Officer
Attachments:	1. Report Item 10.2.1 presented to Ordinary Council Meeting dated 27 April 2023 2. Plantation Management Plan

#### **SUMMARY**

The purpose of this report is to put before Council the request to develop a 'Tree Farm' of pine trees, on land zoned 'Rural', in the Wilga area.

The proposed plantation area, which has previously been utilised as a manuka honey enterprise with the majority of the originally cleared area planted to *Leptospermum* species (Tea tree).

See attached Report presented by A. Nicoll, Urban and Regional Planner at the April 2023 Council Meeting.

#### **BACKGROUND**

The above Development Applicant was presented to the Ordinary Meeting of Council held on Thursday, 27 April 2023 for consideration. At this meeting an Amendment to the Officers Recommendation was put to the meeting as follows:-

#### **AMENDMENT TO RECOMMENDATION**

**That Council grants development approval for Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga, for the purpose of Development (Tree Farm - Pinus), subject to the following Notice:**

*Planning and Development Act 2005*

**Shire of Boyup Brook**

**NOTICE OF DETERMINATION ON APPLICATION FOR DEVELOPMENT APPROVAL**

Location: Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga

Description of proposed development:

**Tree Farm (Pinus Radiata – 275.9ha)**

The application for development is approved subject to the following conditions.

Conditions:

- 1) All development shall occur in accordance with the approved Plantation Management Plan, unless varied by a condition of approval or a minor amendment, to the satisfaction of the Shire of Boyup Brook.
- 2) **INCLUSION OF ADDITIONAL CONDITION**  
Prior to commencement of development, the plantation management plan and plantation map are modified to indicate a 50m firebreak on the southern side of the plantation (adjacent to the Wilga Settlement), to the satisfaction of the Shire of Boyup Brook.
- 3) As an ongoing condition, the plantation map, which shows the location of tanks, access and planting areas, is to be maintained on-site in red PVC tubes located at each access point.
- 4) The owner/operator is responsible for the repair of any undue damage to public roads caused by harvesting operations and or movement of machinery associated with the plantation operation.

Advice:

- 1) If grazing is proposed within the site, then good quality fencing would be required to prevent grazing stock from entering adjacent DBCA-managed land. If the proponent considers improving/upgrading any existing fencing that adjoins DBCA-managed land, the proponent should liaise with the DBCA District Manager (blackwood@dbca.wa.gov.au) prior to any fencing construction works being undertaken to check whether there are any requirements.

Date of determination: 27 April 2023

Note 1: In accordance with the Shire of Boyup Brook Firebreak Notice:

- a) Clear a 15m wide bare earth firebreak immediately inside all external boundaries of the land by removing all inflammable matter and vegetation to a height of 5m;
- b) Where a plantation is divided into compartments –
  - (i) if the compartments do not exceed 30ha, a 6m wide bare earth firebreak between compartments must be cleared by removing all inflammable matter and vegetation within the 6m firebreak between the ground and 5m above the ground;
  - (ii) if compartments exceed 30ha, a 10m wide bare earth firebreak between compartments must be cleared by removing all inflammable matter and vegetation within the 10m wide firebreak between the ground and 5m above the ground;
- c) Clear a 50m wide bare earth firebreak around all buildings and fuel storage areas by removing all inflammable matter and vegetation within the 50m firebreak between the ground and 5m above the ground;
- d) Where power lines pass through the plantation, clear firebreaks in accordance with Western Power specifications (consult Western Power – phone 13 10 87).

Note 2: The removal of any native vegetation will require the approval of the Department of Water and Environmental Regulation.

Note 3: If the development the subject of this approval is not substantially commenced within a period of 2 years, or another period specified in the approval after the date of determination, the approval will lapse and be of no further effect.

Note 4: Where an approval has so lapsed, no development must be carried out without the further approval of the local government having first been sought and obtained.

Note 5: If an applicant or owner is aggrieved by this determination there is a right of review by the State Administrative Tribunal in accordance with the *Planning and Development Act 2005* Part 14. An application must be made within 28 days of the determination.

Signed:

Dated:

\_\_\_\_\_  
for and on behalf of the Shire of Boyup Brook.

**MOVED: Cr King**

**SECONDED: Cr Caldwell**

**CARRIED 7/0**

**Res 23/04/059**

**THE AMENDMENT WAS CARRIED WHICH THEN BECAME THE SUBSTANTIVE MOTION;**

**THE MOTION WAS THEN PUT AND LOST 4/3 Res 23/04/060**

**Following the above meeting there was some concern raised as to whether Council had followed correct meeting procedure in relation to this matter and in consideration of this uncertainty, the A/CEO, in consultation with Council's Town Planning Consultant, did not issue formal advice to the Applicant of Council's decision.**

Since the April 2023 Ordinary Meeting of Council, the A/CEO has sought advice from WALGA's Governance Team in relation to the processes undertaken by Council at the April meeting relating to this Development Application.

The above advice indicates the following:-

**Summary of legal advice previously sought by WALGA:**

1. In construing council resolutions in relation to development applications, it is not sufficient to rely only on the bare words of the resolution disengaged from the events that led to and resulted from it being passed. It is necessary to look at the circumstance in which a resolution is made if it is given its fair and natural meaning.
2. It is necessary to make several assumptions about the circumstances in which the decision is comprehended including that the council:
  - a. received a report from the administration that raised any planning issues with the proposed development.
  - b. is fully across the local planning scheme and associated policies.
  - c. the administration has recommended conditional approval be granted.
  - d. the officer's recommendation is moved at the meeting and lost by a majority of votes.
  - e. no alternative motion was moved, including a motion to defer the item to a subsequent meeting.
  - f. written notice has been provided to the applicant under clause 70(1) of the Deemed Provisions.
3. The effect of the decision to reject a recommendation for conditional approval must be considered having regard to the statutory requirements for decision making on development applications in accordance with Schedule 2 of the *Planning and Development (Local Planning Scheme) Regulations 2015* (Deemed Provisions).
4. By reference to these options, the rejection of an officer recommendation for conditional or non-conditional approval could only be interpreted as a refusal to grant development approval.



5. The absence of a reference in Council's decision to refusing the development application, would not itself indicate any other decision other than a refusal.
6. Council's can avoid creating ambiguity in their decisions on development applications by expressing their decisions in one of the ways permitted by Clause 68(2) of the Deemed Provisions.
7. A Council's decision under clause 68(2) of the Deemed Provisions can be revoked or varied at any time prior to the receipt of the notice of determination by the applicant.

**Further:-**

**Good governance considerations:**

Good governance principles indicate that the process of voting as undertaken both in private industry and local government is as follows:

- a motion (i.e., the effect of something being moved) relates to a matter which it is proposed be put forward to a meeting and discussed, then voted on; and
- a resolution (i.e., the result of something being resolved) is the outcome of what is voted on when it is carried (passed) by those at the meeting.

If a motion is not passed, then it never becomes a resolution of Council.

However, in accordance with the legal advice, this is not the case for decisions on planning matters. Planning matters must be considered having regard to the statutory requirements for decision making on development applications in accordance with Schedule 2 of the Deemed Provisions.

**Legal considerations:**

Following legal compliance principles, Clause 68(2) of the Deemed Provisions sets out the only decisions which a local government may make in determining a development application.

These are:

- a. grant development approval without conditions; or
- b. grant development approval with conditions; or
- c. refusal to grant development approval.

It can be concluded from the legal advice that any decision of council to reject an officer recommendation under (a) or (b), would be construed as a decision under (c).

Following a decision under (c) the local government is required to provide written notice to the applicant to convey the Council's decision under clause 70(1) of the Deemed Provisions. A local government may unilaterally decide to reconsider the development application and make a different determination prior to the receipt of the notice of determination by the applicant. Similarly, deferring consideration of the development application for an extended period, may result in a deemed refusal.

Local governments should be alive to the risk that, if the decision of Council is construed as a refusal, the applicant can take the next step in the process to ask for a review by the State Administrative Tribunal (SAT), and SAT may make a costs order against the local government. The usual position in review proceedings is that each party bears its own costs. Costs orders in the context of development approval appeals are rare and are generally only made where a party has acted very unreasonably.

In the recent case of *Ransberg Pty Ltd v City of Bayswater [2016] WASAT 43*, the solicitors for the applicant successfully argued that the City of Bayswater had acted unreasonably in its consideration of the development by failing to genuinely make a determination of the proposed

development on its merits. The background to each case is very important and applications for costs orders will be dealt with on a case-by-case basis.

WALGA therefore suggests that it is essential for local governments to ensure that any decisions made by Council, development applications or otherwise, are worded to the effect that they are an actionable decision suitable for implementation by the CEO in accordance with s.5.41(c) of the *Local Government Act 1995*.

As no Formal Notification of Council's determination has yet to be relayed to the Applicant, Cr O'Connell has submitted the following rescission motion for consideration by Council.

**PROPOSED MOTION TO RESCIND COUNCIL RESOLUTION 23/04/060**

**Submitted by Cr O'Connell with appropriate support in writing from Councillors Steele Alexander and Darren King**

***That Council Rescinds Council Resolution 23/04/060 of the Ordinary Council Meeting held on 27 April 2023 to allow for further consideration on the Development Application to develop a 'Tree Farm' of pine trees, on land zoned 'Rural', in the Wilga area.***

***Supporting information to Proposed Rescission Motion:-***

- 1. That as Formal Notification of Council's previous decision has yet to be forwarded to the Applicant (Clause 68(2) of the Deemed Provisions, Planning and Development (Local Planning Schemes) Regulations 2015), it allows Council to further consider the DA Application based on legal advice obtained by the Western Australian Local Association's Governance Division in respect to approving/refusing Development Applications;***
- 2. In rescinding the previous Motion 23/04/060, it will allow further consideration of the matter and provide Council with the confidence that due diligence has been given to the Development Application before Council, no matter what the final outcome will be as determined by Council.***

Dependent upon the outcome of the above proposed Rescission Motion, the A/CEO has provided the original Officer Recommendation submitted by Council's Town Planning Consultant at the 27 April 2023 Ordinary Council Meeting.

**ORIGINAL OFFICER RECOMMENDATION FROM 27 APRIL OCM AGENDA**

**That Council grants development approval for Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga, for the purpose of Development (Tree Farm - Pinus), subject to the following Notice:**

<p><i>Planning and Development Act 2005</i></p> <p><b>Shire of Boyup Brook</b></p> <p><b>NOTICE OF DETERMINATION ON APPLICATION FOR DEVELOPMENT APPROVAL</b></p> <p>Location:        Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga</p> <p>Description of proposed development:</p> <p><b>Tree Farm (Pinus Radiata – 275.9ha)</b></p> <p>The application for development is approved subject to the following conditions.</p> <p>Conditions:</p> <ol style="list-style-type: none"><li>1) All development shall occur in accordance with the approved Plantation Management Plan, unless varied by a condition of approval or a minor amendment, to the satisfaction of the Shire of Boyup Brook.</li><li>2) As an ongoing condition, the plantation map, which shows the location of tanks, access and planting areas, is to be maintained on-site in red PVC tubes located at each access point.</li><li>3) The owner/operator is responsible for the repair of any undue damage to public roads caused by harvesting operations and or movement of machinery associated with the plantation operation.</li></ol> <p>Advice:</p> <ol style="list-style-type: none"><li>1) If grazing is proposed within the site, then good quality fencing would be required to prevent grazing stock from entering adjacent DBCA-managed land. If the proponent considers improving/upgrading any existing fencing that adjoins DBCA-managed land, the proponent should liaise with the DBCA District Manager (blackwood@dbca.wa.gov.au) prior to any fencing construction works being undertaken to check whether there are any requirements.</li></ol> <p>Date of determination: <del>27 April 2023</del> <b>18 May 2023</b></p> <p>Note 1:        In accordance with the Shire of Boyup Brook Firebreak Notice:</p> <ol style="list-style-type: none"><li>a) Clear a 15m wide bare earth firebreak immediately inside all external boundaries of the land by removing all inflammable matter and vegetation to a height of 5m;</li><li>b) Where a plantation is divided into compartments –</li><li>c) if the compartments do not exceed 30ha, a 6m wide bare earth firebreak between compartments must be cleared by removing all inflammable matter and vegetation within the 6m firebreak between the ground and 5m above the ground;</li><li>d) if compartments exceed 30ha, a 10m wide bare earth firebreak between compartments must be cleared by removing all inflammable matter and vegetation within the 10m wide firebreak between the ground and 5m above the ground;</li></ol>
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	e) Clear a 50m wide bare earth firebreak around all buildings and fuel storage areas by removing all inflammable matter and vegetation within the 50m firebreak between the ground and 5m above the ground;
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Note 5:	If an applicant or owner is aggrieved by this determination there is a right of review by the State Administrative Tribunal in accordance with the <i>Planning and Development Act 2005</i> Part 14. An application must be made within 28 days of the determination.
Signed:	Dated:
_____	
for and on behalf of the Shire of Boyup Brook.	

**6. CLOSURE OF MEETING**

There being no further business the Shire President, Cr Walker thanked all for attending and declared the meeting closed at \_\_\_\_\_ pm.