



SPECIAL COUNCIL MEETING MINUTES

Held on

Thursday 18 May 2023

Commenced at 6.00pm

Shire of Boyup Brook Shire Council Chambers, Boyup Brook



Peter Clarke
Acting Chief Executive Officer

INDEX PAGE

1.	DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS AND DISCLAIMER	3
2.	RECORD OF ATTENDANCE.....	3
3.	PUBLIC QUESTION TIME	4
4.	DISCLOSURE OF INTEREST.....	4
5.	REPORT.....	6
5.1	Development (Tree Farm – Pine Trees) – Lots 1182, 2944, 2945, 3944 and 2, Cunningham Road, Wilga.....	6
6.	CLOSURE OF MEETING	12

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 Councillor	Richard F Walker Sarah E G Alexander Steele Alexander Charles A D Caldwell Philippe Kaltenrieder Darren E King Kevin J Moir Adrian Price
----------	-------------------------------	---

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
--------	--	--

APOLOGIES:	Deputy Shire President	Helen C O'Connell
------------	------------------------	-------------------

LEAVE OF ABSENCE:	Nil
MEMBERS OF PUBLIC:	Susan Miliauskas (left 6.23pm) Peter Jose (left 6.23pm) William Jackson (left 6.23pm) Elizabeth Roney David Guille (via MS Teams) Greg Hodgson (via MS Teams)
	Forest Products Commission

3. PUBLIC QUESTION TIME

Opened 6.01pm

Question from William Jackson

Mr Jackson advised that as a member of the Wilga Progress Association and speaking on behalf of residents in the Wilga townsite, residents were not happy with even an extension of the original 25 metre buffer to a 50 metre buffer as proposed by Council.

Mr Jackson referred to documentation from August 2012 where it stated that “a minimum of a 300 metre buffer should be applied to plantations adjoining townsites to avoid spray drift, dust, smoke and ash”.

Mr Jackson also referred to plantations on both sides of the Wilga townsite and Wilga East Road putting residents at potential risk in the event of fire.

Response from the Shire President

This question be taken on notice.

Question from Susan Miliauskas

Ms Miliauskas alerted Council to the fact that the proposed Tree Farm will significantly increase vegetation around the Wilga townsite as it will effectively join up with the native reserves and increase the fire hazard in the area.

Response from Shire President

This statement was acknowledged by the Shire President.

Closed 6.05pm

4. DISCLOSURE OF INTEREST

The following Declarations of Interest were submitted:

Declarations of Interest (Proximity)

Officer/Elected Member	Order of Business/ Report No	Agenda Page No	Item Details	Nature of Association
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.

Proximity Interest

Shire President, Cr Walker, and Cr Moir declared a Proximity Interest in item 5.1 and departed the Shire Council Chambers, the time being 6.05pm.

At this time, the Shire President vacated the Chair.

REQUIREMENT TO NOMINATE CHAIRPERSON

The A/CEO advised that in the absence of the Shire President, who had vacated the Chamber, and with the Deputy Shire President being an apology to this meeting, Councillors would need to elect a Chairperson to Chair the remainder of this Special Meeting.

Cr King nominated Cr Caldwell as Chair in the absence of the Shire President and Deputy Shire President.

There being no further nominations, the A/CEO declared Cr Caldwell elected to Chair the meeting.

Cr Caldwell took the Chair.

FOREST PRODUCT COMMISSION ATTENDEES

Cr Caldwell noted that Messrs Guille and Hodgson from the Forest Products Commission (FPC) were in attendance via MS Teams, to respond to any questions posed by Councillors in respect to the matter before Council.

Question from the Acting Chief Executive Officer

The A/CEO queried as to why FPC had proposed to plant seedlings now when initial discussions with representatives from the Shire and Bush Fire Brigade members was that planting would not begin until the next seedling rotation. Why has this changed?

Response from David Guille

Circumstances have changed with respect to this Tree Farm proposal with FPC having 3 million seedlings in the nursery ready for planting, including the availability of contractors, and therefore the timing is right should approval be granted.

Question from Cr Caldwell

Cr Caldwell questioned the suitability of a 50m buffer zone being satisfactory due to the Tree Farms proximity to the Wilga townsite and in the event of a fire, was FPC aware that evacuation routes for residents is via only one entry/exit point?

Response from Greg Hodgson

Grazing of the property will be encouraged and the area will not be wholesale planted. There is a significant Powerline easement on the property which will add to the buffer area between the trees and Wilga townsite. FPC takes its obligations seriously in respect to Bush Fire control and protecting its immediate neighbours and will work with the community during the whole process.

Question from Cr Kaltenrieder

Queried the original Plan presented to Council and enquired as to what did the purple line on the Epping plan depict?

Response from David Guile and Greg Hodgson

It highlighted the Powerline easement on and through the property which did increase the overall buffer area.

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 OFFICER 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*.

The A/CEO had previously advised Councillors that as no Formal Notification of Council's determination has yet to be relayed to the Applicant, Cr O'Connell has submitted the following recission motion for consideration by Council to ensure correct processes were followed in respect to the DA Application.

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 Recission 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.***

The A/CEO advised that in consideration of Cr O'Connell being apology to the meeting, and being the original proposer to the Recission Motion, it would be necessary to seek the support of an additional Councillor for the recission Motion to proceed.

Cr Sarah Alexander indicated her support for the Recission Motion to be presented to Council.

MOTION TO RESCIND COUNCIL RESOLUTION 23/04/060

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.

MOVED: Cr Steele Alexander

SECONDED: Cr King

CARRIED BY ABSOLUTE MAJORITY 6/0 Res 23/05/074

The Chairperson then indicated that as the Recission Motion had been passed by Council, it could now proceed to further consider the Development Approval Application originally submitted by the proponent.

Cr Steele Alexander advised the Chair that he was of the opinion and, believed that this was the opinion of other Councillors also, that this Special Meeting had been called to only consider the Recission Motion and that any further consideration of the Development Approval Application would be undertaken at a later stage.

General discussion then ensued as to the process that Council would undertake to re-consider the Development Approval Application.

It was agreed that as Councillors had been misinformed of the Special Council Meetings purpose and that DA Application would be re-considered at a further meeting, it would be prudent to refer the Application to the Ordinary Meeting of Council to be held on Thursday, 25 May 2023 to allow Councillors further time in which to consider the matter.

6. CLOSURE OF MEETING

The Acting Chair declared that as there was no further business, the meeting was closed at 6.23pm.