

**CONFIRMED MINUTES**

**FOR THE**

**GREATER SHEPPARTON CITY COUNCIL**

**DEVELOPMENT HEARINGS PANEL**

**Meeting No. 4/2024**

**HELD ON**

**Friday 10 May 2024**

**at 11am**

**(Boardroom & Via Teams)**

**CHAIR**

**Councillor Shane Sali**

## ACKNOWLEDGEMENT

Welcome everyone to Development Hearings Panel meeting number 4 for 2024.

Any technical issues that may result in the Teams connection failing will cause a delay or adjournment to this meeting.

I would like to begin with an acknowledgement of the traditional owners of the land.

We, Greater Shepparton City Council, acknowledge the Yorta Yorta Peoples of the land which now comprises Greater Shepparton, we pay our respect to their tribal elders, we celebrate their continuing culture and we acknowledge the memory of their ancestors.

## COMMITTEE MEMBERS PRESENT

Committee members present today are:

- Cr Shane Sali (Chair) – **Boardroom**
- Patricia Garraway– Acting Manager - Building, Planning & Compliance - Greater Shepparton City Council – **Boardroom**
- Nilesh Singh — Manager Development - Benalla Rural City Council – **Teams**
- Kahlia Reid - Manager - Building and Planning – Campaspe Shire Council – **Teams**

## OFFICERS AND OTHERS PRESENT

The Planning Officers that will be in attendance for today's hearing are:

- **Andrew Dainton**

I would also like to acknowledge all other parties present today. We will get you to introduce yourself when your turn comes to present.

## APOLOGIES

Nil

## DECLARATIONS OF CONFLICTS OF INTEREST

Are there any panel members who wish to declare a conflict of interest?

## ORDER OF PROCEEDINGS

For those of you who are attending the DHP for the first time the process is as follows

- The proceeding is being minuted and recorded.
- Out of courtesy for all other attendees any recording devices should be turned off during the course of the hearing unless the chair has been formally advised that a party wishes to record proceedings.
- The DHP operates under Local Law No 2, with such modifications and adaptations as the DHP deems necessary for the orderly conduct of meetings.
- All DHP panel members have 1 vote at a meeting.
- Decisions of the DHP are by ordinary majority resolution. If a vote is tied the Chair of the DHP has the casting vote.
- The process for submitters to be heard by the Panel shall be:
  - The planning officer to present the planning report recommendation
  - Any objectors or representatives on behalf of the objectors present to make a submission in support of their objection (should they wish to)
  - The applicant or representatives on behalf of the applicant to present in support of the application
- For the purpose of today's hearing the officer, objectors and applicant will be limited to a maximum of 6 minutes per person with no extension.

## MATTERS FOR CONSIDERATION

There is **1 item** listed for consideration in this session of the DHP:

- 1 Planning Permit Application – **2023-339 – 23 Hanlon Street, Tatura** - Two (2) Lot Subdivision in the General Residential Zone

## 10. LATE REPORTS

None

## 11. NEXT MEETING

**Friday 31<sup>st</sup> May 2024**

Thank you - That now concludes today's DHP.

## INDEX

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## Extension of time request - IGA Numurkah Road

Author                      Statutory Planner  
Purpose                     For Decision at DHP

### Disclosures of Conflict of Interest in Relation to this Report

Under section 130 of the *Local Government Act 2020* officers, delegates and persons engaged under a contract providing advice to Council must disclose any conflicts of interests.

No Council officers or contractors who have provided advice in relation to this report have declared a conflict of interest regarding the matter under consideration.

### RECOMMENDATION

That the Development Hearing Panel:

1. **Adopt the position at VCAT that it would have refused to extend Permit No. 2017-177/A, having regard to the relevant legal tests relevant to the consideration of the extension of a planning permit.**
2. **Would have refused an extension of the permit had an appeal for failure not been lodged with VCAT before it was able to make a formal decision on the following grounds:**
  - a) **There has been a change in policy (Amendment C245) since the grant of the permit.**
  - b) **If a fresh application were to be made, a permit would probably not issue.**

## RECOMMENDATION

That the Development Hearing Panel:

1. **Adopt the position at VCAT that it would have refused to extend Permit No. 2017-177/A, having regard to the relevant legal tests relevant to the consideration of the extension of a planning permit.**
2. **Would have refused an extension of the permit had an appeal for failure not been lodged with VCAT before it was able to make a formal decision on the following grounds:**
  - a) **There has been a change in policy (Amendment C245) since the grant of the permit.**
  - b) **If a fresh application were to be made, a permit would probably not issue.**

**Moved:**

**Second:**

**CARRIED UNOPPOSED**

## Executive Summary

Planning permit 2017-177/A (the permit) authorised the redevelopment of the IGA site on Numurkah Road to allow a supermarket-based shopping centre.

Conditions of the permit required that the development commence within 3 years of the date of the permit. Officers under delegation extended the commencement date to 4 August 2022 (**the First Extension Request**).

On 4 August 2022, the permit holder applied to further extend the commencement date by two years, which if allowed would require that the development be started by no later than 4 August 2024 (**the Second Extension Request**).

The landowner sought review of the Council's failure to determine the Second Extension Request.

The application was heard before VCAT on 23 January 2023.

At the time of the Hearing, and premised also on the assessment of Council officers at the time of the second request, the Shepparton North Activity Centre Structure Plan (**Structure Plan**) had not significantly advanced beyond a stage that would have it incorporated into the planning scheme and that could be genuinely considered as a seriously entertained document.

In the Tribunal's Order of 20 February 2023, Member Birtwistle resolved to set aside the Council's recommendation to refuse to grant the extension to the planning permit for the following reason:

*45. I have reached this conclusion mindful of matters including the relatively unchanged planning policy in the Scheme and physical context of the site, the*

*total elapse of time since the permit was granted, the adequacy of the original time limit for commencing development in the circumstances of this case where there is a commercial imperative to obtain a tenant prior to development works commencing, and my view that, on balance, there is a greater probability of a fresh permit being issued than refused if a new permit was sought today.*

*46. On the material and affidavit evidence before me, including the signed Board approval (in late 2022) by Coles, I have some confidence that the applicant is now in a position to proceed within the requested extension timeframe. On the basis that a tenancy arrangement has been entered into which sets out dates consistent with that sought in the EoT request, I am satisfied that providing the additional two years sought for commencement and completion of the development is appropriate.*

In July 2022, an application was lodged with Council to amend the planning permit.

The amendments to the plan sought in principle, to reposition the supermarkets from 2 detached buildings displayed in a north-south arrangement, to a single building form sleeved towards the northern boundary in an east-west orientation.

Following Council's failure to determine the application, a Section 79 (failure) application was lodged with VCAT [P864/2023] in June 2023.

The Tribunal granted the amendment.

On 24 January 2024 a further request for extension of the Permit was made (**the Third Extension Request**). It is this Third Extension Request that is addressed in this Officer Report.

Notably, the Planning Panel for Amendment C245 released its Panel Report dated 22 March 2024. In the course of officers considering the implications of the Panel Report, the Applicant has filed a failure application under section 81 of the *Planning and Environment Act 1987*.

As the permit holder has lodged a VCAT application in regards to this extension request, it is not Council's role to decide on this extension request, Council is setting the responsible authority's position at the VCAT hearing.

Officers have undertaken an assessment of the extension request against the relevant considerations which include:

- Whether there has been a change in planning policy
- Warehousing of the permit
- Intervening circumstances
- Total elapse of time since the permit was granted and whether the time limit was adequate
- Economic burden on the permit holder
- Probability of a fresh permit issuing

Officers recommend that Council oppose the extension of time request as:

- a) There has been a change in policy (Amendment C245) since the grant of the permit.

- b) If a fresh application were to be made, a permit would probably not issue.

To assist officers in their consideration of the merits of the extension request, through Holding Redlich officers sought independent advice from Mr Robert Shatford of Urban Fields Consulting.

Mr Shatford prepared a town planning report which officers have considered and which informs the assessment undertaken by officers for the purposes of this officer report. A copy of Mr Shatford's report is included as an attachment to this Officer Report. Mr Shatford has made a recommendation against extension.

### Application Details

Application Number:	2017-177/A
Applicant Name:	Shepparton Pty Ltd
Permit issue date	27 April 2018
Permit expiry date	Commencement by 4 August 2024. Completion by 4 August 2026
Date extension request received:	24 January 2024
Has the development commenced?	No
How much additional time is requested?	2 years

Land/Address:	177-193 Numurkah Road, Shepparton
Land size:	4.445ha
Zoning & Overlays:	Commercial 1 - Schedule 1 (C1Z) Abuttal to Transport Zone 2 (TRZ2) Specific Controls Overlay - Schedule 3 (Goulburn-Murray Water: Connections Project and Water Efficiency Project Incorporated Document, November 2021) (SCO3) Land Subject to Inundation Overlay - Schedule 1 (LSIO)
Why was a permit required at the time of issue (include Permit Triggers):	CI 34.01-1 (C1Z): Use of the land for retail exceeding 8000m <sup>2</sup> CI 34.01-1 (C1Z): Use of the land for gymnasium CI 34.01-4 (C1Z): To construct a building or to construct or carry out works CI 44.04-1 (LSIO): To construct a building or to construct or carry out works CI 52.02 (Easements, Restrictions & Reserves): Removal of easement CI 52.05 (Signs): To construct or put up a sign CI 52.17 (Native Vegetation): To remove, destroy or lop native vegetation



What does the permit allow?	Use and development of the land for a shop (including two supermarkets and bottleshops) and gymnasium, use of land for the sale of liquor under clause 52.27 of the Greater Shepparton Planning Scheme, development of a community centre and associated buildings and works, alteration of access onto a Transport Zone 2, business identification and internally illuminated signage, removal of Easement E-3 and removal of three Grey Box trees
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## Proposal in Detail

The application seeks a two-year extension to the commencement date of the development.

The cover letter attached to the application provides the following explanation of the request:

*The permit will expire if the development is not commenced by 4 August, 2024 and completed by 4 August, 2026. We request an extension of time of two years to start the development. We believe that this is reasonable given that:*

- *a decision by VCAT on the amended plans is unlikely to be received before February, 2024;*
- *it will take at least six months to achieve compliance with the various conditions of the planning permit;*
- *there may be additional land acquisition and design processes associated with dual right lane movements into Hawkins Street, as identified at the VCAT hearing in December, 2023;*
- *following compliance with the planning permit conditions, it will take a further six months to complete detailed construction plans and the construction tender process.*

Officers confirm that the extension request was made before the permit expired and it is therefore open to VCAT to decide on the application.

In April 2024, the applicant lodged a failure to decide appeal with VCAT. As a VCAT application has been lodged, Council cannot decide on the extension of time request, Council's role is to set a position for the VCAT proceeding.

## Assessment

### Background

Council has received an application for extension of planning permit no. 2017-177/A (Permit).

The Permit allows:

*Use and development of the land for a shop (including two supermarkets and bottleshops) and gymnasium, use of land for the sale of liquor under clause 52.27 of the Greater Shepparton Planning Scheme, development of a community centre and associated buildings and works, alteration of access onto a Transport Zone 2, business identification and internally illuminated signage, removal of Easement E-3 and removal of three Grey Box trees*

Planning Permit 2017-177 was issued by the Council on 27 April 2018. The Permit granted approval to use and develop the land with additional retail floor space, including a second supermarket.

The subject land is relevantly currently occupied by an IGA supermarket.

The subject land has an area of approximately 4.4 hectares with frontages to Numurkah Road of approximately 176 metres and a frontage to Hawkins Street of approximately 244 metres.

Plans were endorsed by the Council under condition 1 of the Permit on 14 May 2020. The permit contained an expiry provision which required development to start within three years of the date of the permit (27 April 2021) and the development to be completed within five years of the date of the Permit (27 April 2023).

The development had not started by 27 April 2021. Following a request for an extension of time of the Permit (**first extension**), the commencement date was extended by Council to 4 August 2022 and the completion date extended to 4 August 2024. On 4 August 2022, the applicant applied for a further two year extension of the Permit in which to commence the development (**second extension**).

In *Shepparton Pty Ltd v Greater Shepparton CC* [2023] VCAT 150 the applicant was granted a further extension. The time in which the development approved under the Permit was extended to 4 August 2024 and the time within which the development is to be completed to 4 August 2026.

Currently, the Permit will expire if the development is not commenced by 4 August 2024 and completed by 4 August 2026.

On 24 January 2024 a further request for extension of the Permit was made (current extension application). The reasons for extension are summarised as follows:

- a) There was an application to amend plans on foot at VCAT (the decision was made on 16 February 2024 in *Shepparton Pty Ltd v Greater Shepparton CC* [2024] VCAT 133).
- b) It will take at least six months to achieve compliance with the various conditions of the Permit.
- c) There may be additional land acquisition and design processes associated with dual right lane movements into Hawkins Street, as identified at the VCAT hearing in December 2023.
- d) Following compliance with the Permit conditions, it will take a further six months to complete detailed construction plans and the construction tender process.

Amendment C245gshe is proposed to amend the Greater Shepparton Planning Scheme and is directly relevant to the IGA site.

The Panel Report for Amendment C245gshe has now been released and is dated 22 March 2024.

Council at its April 2024 Ordinary Council Meeting adopted C245.

## RECOMMENDATION

That the Council:

1. note that Amendment C245gshe to the Greater Shepparton Planning Scheme received 17 submissions, that these submissions and Amendment C245gshe were referred to an independent Planning Panel, and that the independent Planning Panel has now prepared a Panel Report which is dated 22 March 2024, as attached;
2. adopt the Planning Panel's recommendations as outlined in the Panel Report;
3. adopt Amendment C245gshe to the Greater Shepparton Planning Scheme with changes as recommended in the Panel Report, in accordance with Section 29 of the *Planning and Environment Act 1987*; and
4. in accordance with section 31 of the *Planning and Environment Act 1987*, submit Amendment C245gshe with changes to the Greater Shepparton Planning Scheme, as adopted, to the Minister for Planning for approval.

Relevantly in regard to the IGA site and the development scheme authorised by the Permit, as recently amended following VCAT's decision in *Shepparton Pty Ltd v Greater Shepparton CC* [2024] VCAT 133, the Panel (constituted by Kathy Mitchell AM as Chair, and Member Marshall) stated as follows:

*The Panel notes there have been several permits issued for the Shepparton Pty Ltd site in Precinct 1, but none have been acted upon. The Panel was advised a further time extension for the two already permitted supermarkets is currently being sought. There has been no change in retail activity on that site since the first Panel Hearing in 2017, and it has not delivered on its promise to the surrounding community. The most recent permit turns it back on the Activity Centre and from a connectivity and integration perspective, it is an unfortunate outcome. If that permit is acted upon as a catalyst development in the 'heart' of the Activity Centre, it will look outwards, not inwards and the north facing walls will present as an impenetrable barrier to the north.*<sup>1</sup>

...

*However, the Panel notes that despite many years of Hearings, commitments and permits issued (including permit modifications and time extensions), the existing IGA remains the same and the proposed second supermarket on the IGA land has not eventuated. This is frustrating to all. Of further concern is that the recently approved permit by VCAT proposes a development scenario where the two supermarkets have their backs in a north facing position, meaning the layout and design has its back to the Structure Plan area. This will negate the opportunity for structural and visual integration and connectivity to the north, which is a poor outcome. While the Panel accepts the permits have been issued, it considers it is incumbent upon Council to work with Shepparton Pty Ltd to explore opportunities to better integrate the Precinct 1 site with the north.*<sup>2</sup>

The Precinct 1 precinct plan, which the Panel has endorsed, specifies a north south alignment for two supermarkets at the IGA site. The VCAT decision in *Shepparton Pty Ltd v Greater*

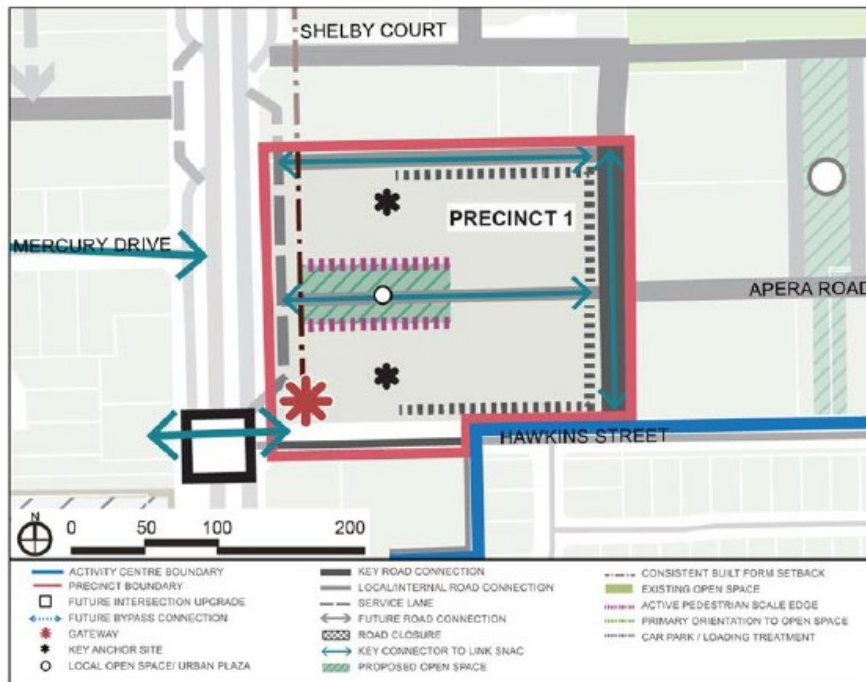
<sup>1</sup> Page 8

<sup>2</sup> Page 35

Shepparton CC [2024] VCAT 133 supported an amendment of the Permit to allow two supermarkets at the IGA site in an east west alignment. Copies of these relevant plans are below. As such, the Precinct 1 precinct plan endorsed by the Panel in the Panel Report for Amendment C245 is now in conflict with the east west alignment now allowed under the Permit for the IGA site.

**Precinct 1 – Core Southern Anchor**

**Precinct map**



**Principles for consideration in extension request**

The Supreme Court in *Kantor v Murrindindi SC* [1997] 18 AATR 285 has set out a summary of what are generally accepted to be the criteria that should be considered. A summary of the Kantor principles are as follows:

- a) Whether there has been a change of planning policy.
- b) Whether the land owner is seeking to warehouse the permit.
- c) Any intervening circumstances which bear upon grant or refusal of the extension request.
- d) The lapse of time between the permit and the request.
- e) Whether the time limit imposed was adequate.
- f) The economic burden imposed on the land owner by the permit.
- g) The probability of a permit issuing should a fresh application be made.

*AMV Homes Pty Ltd v Moreland CC* (Includes Summary) (Red Dot) [2015] VCAT 1699 also notes further principles as follows:

- a) An applicant should advance good reasons as to why an extension should be granted; a request should not be approved simply because it has been asked for.
- b) The Kantor “tests” are not mandatory nor exhaustive.
- c) There may be other relevant considerations to those articulated in Kantor, including matters of natural justice and equity.
- d) Each case needs to be decided on its own facts and circumstances including whether and how the development in question would undermine or offend the changed policy or planning control regime.

To assist officers in their consideration of the merits of the extension request, through Holding Redlich officers sought independent advice from Mr Robert Shatford of Urban Fields Consulting. Mr Shatford prepared a town planning report which officers have considered and which informs the assessment undertaken by officers for the purposes of this officer report. A copy of Mr Shatford’s report is included as an attachment to this Officer Report. Mr Shatford has made a recommendation against extension. His key conclusion is:

*As described in AMV Homes, the purpose of applying a life on planning permits is to bring an end to a permit to ensure that it will not survive unacted upon and then be revived at such time that it is inconsistent with a change in circumstances. Whilst the application for an extension of time may survive alone on several of the Kantor principles, the underlying principle of a change in circumstances and Policy arising from Amendment C245 is strong enough to warrant a refusal to the request for an extension of time. These significant circumstances find the unacted permit sits inconsistent with the Policy visions of the ACZ2 and the Structure Plan.*

*Though an amended permit was recently granted by the Tribunal for alterations to the design response, that amendment was assessed only on the scope of the changes before the Tribunal and the assessment of the entire development may have informed a different position. In considering the development in its totality against the current framework, I reach a different conclusion that an extension to the existing permit will facilitate an outcome inconsistent with existing and seriously entertained planning policy framework and will result in an inferior outcome for the site and precinct and should be refused.*

Having regard to Mr Shatford’s report, officers recommend refusal on the following grounds:

- a) There has been a change in policy (Amendment C245) since the grant of the permit.
- b) If a fresh application were to be made, a permit would probably not issue.

## Conclusion

Officers having completed an assessment of the extension request, recommend that DHP oppose the two-year extension to the commencement date of the permit.