



Bunbury City Council

Notice of Meeting and Agenda 21 July 2015



CITY OF BUNBURY

4 Stephen Street
Bunbury WA 6230
Western Australia

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Nature of Council's Role in Decision Making

- Advocacy:** When Council advocates on its own behalf or on behalf of its community to another level of government/body/agency.
- Executive/Strategic:** The substantial direction setting and oversight role of the Council, e.g. adopting plans and reports, accepting tenders, directing operations, setting and amending budgets.
- Legislative:** Includes adopting local laws, town planning schemes and policies.
- Review:** When Council reviews decisions made by Officers.
- Quasi-Judicial:** When Council determines an application/matter that directly affects a person's rights and interests. The Judicial character arises from the obligations to abide by the principles of natural justice.

Examples of Quasi-Judicial authority include town planning applications, building licences, applications for other permits/licences (e.g. under Health Act, Dog Act or Local Laws) and other decisions that may be appealable to the State Administrative Tribunal.

Bunbury City Council Notice of Meeting

The next Ordinary Meeting of the Bunbury City Council will be held in the Council Chambers, City of Bunbury Administration Building, 4 Stephen Street, Bunbury on Tuesday, 21 July 2015 at 5.30pm.



Andrew Brien
Chief Executive Officer
(Date of Issue: 10 July 2015)

Agenda 21 July 2015

Note: The recommendations contained in this document are not final and are subject to adoption, amendment (or otherwise) at the meeting.

Council Members:

Mayor Gary Brennan
Deputy Mayor Councillor Brendan Kelly
Councillor Murray Cook
Councillor Wendy Giles
Councillor James Hayward
Councillor Judy Jones
Councillor Betty McCleary
Councillor Neville McNeill
Councillor Jaysen Miguel
Councillor Sam Morris
Councillor David Prosser
Councillor Michelle Steck
Councillor Karen Steele

1. Declaration of Opening / Announcements of Visitors

2. Disclaimer

All persons present are advised that the proceedings of this meeting will be recorded for record keeping purposes and to ensure accuracy in the minute taking process, and will also be streamed live via the internet to the public.

3. Announcements from the Presiding Member

4. Attendance

4.1 Apologies

4.2 Approved Leave of Absence

Cr Karen Steele is on approved leave of absence from all Council-related business from 13 July 2015 to 24 July 2015 inclusive.

Cr Michelle Steck is on approved leave of absence from all Council-related business from 7 July 2015 to 17 July 2015 inclusive.

4.3 Applications for Leave of Absence

Request for Leave of Absence – Cr Michelle Steck

Applicant/Proponent:	Internal
Author:	Andrew Brien, Chief Executive Officer
Executive:	Andrew Brien, Chief Executive Officer
Attachments:	Nil

Summary/Background

Cr Steck requests leave of absence from all Council-related business from 18 July 2015 to 23 July 2015 inclusive.

Section 2.25 of the *Local Government Act 1995*, allows a council to grant leave of absence to one of its members provided that the period of leave does not exceed six (6) consecutive ordinary meetings of the Council.

Executive Recommendation

Pursuant to Section 2.25 of the *Local Government Act 1995*, Cr Steck is granted leave of absence from all Council-related business from 18 July 2015 to 23 July 2015 inclusive.

5. **Declaration of Interest**

Members should fill in Disclosure of Interest forms for items in which they have a financial, proximity or impartiality interest and forward these to the Presiding Member before the meeting commences.

Section 5.60A: *“a person has a **financial interest** in a matter if it is reasonable to expect that the matter will, if dealt with by the local government, or an employee or committee of the local government or member of the council of the local government, in a particular way, result in a financial gain, loss, benefit or detriment for the person.”*

Section 5.60B: *“a person has a **proximity interest** in a matter if the matter concerns –*

- (a) a proposed change to a planning scheme affecting land that adjoins the person’s land; or*
- (b) a proposed change to the zoning or use of land that adjoins the person’s land; or*
- (c) a proposed development (as defined in section 5.63(5)) of land that adjoins the person’s land.”*

Regulation 34C (Impartiality): *“**interest** means an interest that could, or could reasonably be perceived to, adversely affect the **impartiality** of the person having the interest and includes an interest arising from kinship, friendship or membership of an association.”*

Cr Prosser declared a financial interest in the item titled “10.4.2 Development Application seeking Planning Approval for a Change of Use – Unit 3 Lot 501 #15 Sandridge Road, East Bunbury” as he is a beneficiary of a family trust that is financially associated with Citygate Properties (Landowner). Cr Prosser will vacate chamber for the discussion and the vote on the matter.

6. **Public Question Time**

In accordance with Reg. 7(4)(a) of the Local Government (Administration) Regulations 1996, members of the public in attendance at the meeting may stand, state aloud their name and address, and ask a question in relation to any matter over which the municipality of Bunbury has jurisdiction or involvement.

In accordance with Standing Order 6.7(3)(a) a person wishing to ask a question, must complete a question form which is provided in the trays at the back of the public gallery and on the City’s website. The completed form must include your name and address and contain no more than three (3) questions. If your question requires research or cannot be answered at the meeting, it will be taken on notice and you will receive a written response and a summary of your question (and any responses provided) will be printed in the minutes of the meeting.

6.1 **Public Question Time**

6.2 **Responses to Public Questions Taken ‘On Notice’**

Nil.

7. Confirmation of Previous Minutes and other Meetings under Clause 19.1

7.1 Minutes

7.1.1 Minutes – Ordinary Council Meeting

The minutes of the Ordinary meeting of the Bunbury City Council held 7 July 2015 have been circulated.

Recommendation

The minutes of the Ordinary meeting of the Bunbury City Council held 7 July 2015 be confirmed as a true and accurate record.

7.1.2 Minutes – Council Advisory Committees and Working/Project Groups

Nil.

8. Petitions, Presentations, Deputations and Delegations

8.1 Petitions

Pursuant to clause 6.10(2) of the City of Bunbury Standing Orders 2012, upon receiving a petition, the Council is to either:

- a) Receive the petition and refer to the relevant officer for a report to be submitted within the next two (2) rounds of Council meetings; or
- b) Reject the petition

8.2 Presentations

Nil.

8.3 Deputations

8.4 Council Delegates' Reports

Nil.

8.5 Conference Delegates' Reports

Nil.

9. Method of Dealing with Agenda Business

10. Reports

10.1 Recommendations from Advisory Committees

Nil.

10.2 Chief Executive Officer Reports

10.2.1 Major Projects Update Report for the period 1 April 2015 to 30 June 2015

Applicant/Proponent:	Internal
Author:	Andrew Brien, Chief Executive Officer
Executive:	Andrew Brien, Chief Executive Officer
Attachments:	Appendix CEO-1: Major Projects Report 1 April to 30 June 2015

Summary

The report (**attached** at Appendix CEO-1) provides an overview of Councils endorsed major projects for period 1 April 2015 to 30 June 2015 and is proposed to be the final report in the current format and reporting cycle.

Executive Recommendation

That Council:

1. Receives and notes the circulated Major Projects update report for the period ending 30 June 2015.
2. Approves a schedule whereby the Major Projects Updates be presented to Council in conjunction with the two budget reviews and a final report after the end of the financial year.

Background

The Major Projects report is a positive tool to help effectively manage and report on current year Major Projects being undertaken by the City of Bunbury, and has been being submitted to Council on a six weekly interval and to allow time for works to be actioned. It has been noted that the majority of the major projects previously reported on will conclude and given the reduced capital program moving forward the requirement report on a six weekly basis is no longer considered necessary.

The proposed reporting arrangements will see all major projects aligned to the budget review timetables when Council will be able to assess progress and make any necessary adjustments to budgets or project scope in a consistent and informed manner. The proposed changes will not prevent the Councillors seeking an update at any time on any project, it will simply further streamline the reporting processes.

Council Policy Compliance

Not Applicable.

Legislative Compliance

Not Applicable

Officer Comments

This amended report format will be provided to Council for endorsement and actioning of any amendments to project scope of budget variations and is considered to be a more consistent approach to effective project management and monitoring. In the event that there are issues that require addressing in the intervening periods, separate reports will be provided to Council.

Analysis of Financial and Budget Implications

Not Applicable.

Community Consultation

There is no requirement for community consultation.

Councillor/Officer Consultation

Not Applicable.

10.2.2 Endorsement of Appointments to Bunbury Regional Theatre Inc.

Applicant/Proponent:	Internal
Author:	Andrew Brien, Chief Executive Officer
Executive:	Andrew Brien, Chief Executive Officer
Attachments:	Appendix CEO-2 – Letter requesting endorsement of Board Management members

Summary

On 7 July 2015, the City received correspondence from the Bunbury Regional Entertainment Centre seeking Council endorsement of the appointment of members to the Bunbury Regional Theatre Inc. (copy **attached** at Appendix CEO-2).

Executive Recommendation

Pursuant to the constitution of the Bunbury Regional Theatre Incorporated, the City of Bunbury endorses appointment of the following members to the Theatre's Board for a two (2) year term to expire 1 July 2017:

- Ray Frisina
- Nicola Waite
- Michel Greenhalgh
- Brian McLoughlin

Background

The Bunbury Regional Entertainment Centre is a City of Bunbury asset. It opened in 1990 and provides the people of Bunbury and the South West Region with the opportunity to view and participate in performances staged in a top-class facility.

The Bunbury Regional Theatre Inc. is an independent, not-for-profit community organisation charged with management of the Bunbury Regional Entertainment Centre. The Management Board is comprised of ten (10) interested members of the community with a commitment to the performing arts.

The City of Bunbury contributes funding annually to support operation of the Bunbury Regional Entertainment Centre. Accordingly, the Bunbury Regional Theatre Inc. constitution permits at least one (1) sitting Bunbury City Councillor to be a member of its Management Board (this is currently a position occupied by Cr Brendan Kelly). The Constitution also requires all appointments to the Board to be endorsed by the Council.

Due to existing members' term expiring five (5) positions on the Board became vacant on 1 July 2015. The Bunbury Regional Theatre Inc. advised that it called for nominations to fill these vacancies via advertisements in the press and online. It received nominations from four (4) of the retiring members plus three (3) community members.

A Selection panel consisting of two (2) existing board members (Dr Robyn McCarron and Simon Jacob) and one (1) community member (Don Punch) was formed to assess the applications.

During the Selection Panel process, the panel agreed that the three (3) new applications unfortunately did not meet the requirements to assist in implementing the desired strategic engagement for a sustainable future direction that Bunbury Regional Entertainment Centre is moving in. As a result, the panel agreed that the remaining vacant Board position not be filled until a candidate with suitable skills be identified.

The Panel's recommendation was endorsed at the last Board meeting held in 25 June 2015. Accordingly, the Bunbury Regional Theatre Inc. now requests that the recommendation be moved at this meeting.

Council Policy Compliance

There is no Council Policy in relation to this matter.

Legislative Compliance

The constitution of the Bunbury Regional Theatre Inc. requires Council endorsement of appointments to its Management Board.

Community Consultation

The Bunbury Regional Theatre Inc. called for nominations for membership of the Board via public notices in the print media and online.

Officer Comments

In endorsing this recommendation, the City has fulfilled its obligation under the terms of the current Deed of Management.

Analysis of Financial and Budget Implications

Appointment of members to the Board will have no effect on the City's existing budget for the Bunbury Regional Entertainment Centre-

10.2.3 City of Bunbury Support to the Bunbury Wellington Economic Alliance

Applicant/Proponent:	Internal Report
Author:	Andrew Brien, Chief Executive Officer
Executive:	Andrew Brien, Chief Executive Officer
Attachments:	Nil.

Summary

The purpose of this report is for Council to consider its annual support contribution to the Bunbury Wellington Economic Alliance as well as a proposed new model of calculation of membership contributions from the 2016/17 financial year.

Executive Recommendation

That Council continues to support the Bunbury Wellington Economic Alliance and as a result will:

1. Renew its membership for the 2015-2016 financial year being \$22,050; and
2. Supports the proposed change of calculation of membership for future financial years to a base contribution by each local government and balance based around population.
3. Request a review of the strategic direction of the Alliance prior to March 2016 to allow for consideration of future involvement of the City of Bunbury.

Background

The Bunbury Wellington Economic Alliance is a joint venture partnership between Bunbury, Capel, Collie, Dardanup, Donnybrook-Balingup and Harvey Councils, along with private organisations, with the aim of the organisation being to facilitate economic development of the region. Deputy Mayor, Brendan Kelly represents the City of Bunbury on the Board of Management and the Council contributes funds to its operations.

The City of Bunbury has been a member since its inception in 2001 and contributed the following:

2000/01 to 2007/08	\$20,000 per annum
2008/09 to 2011/12	\$21,000 per annum
2012/13 to 2014/15	\$22,050 per annum
2015/16	\$22,050 (Proposed)

Officer Comments

Supporting regional economic development initiatives assists in meeting Council's objective of having Bunbury recognised as a place to live, work and invest.

Council is one of the sponsors of the Bunbury Wellington Economic Alliance with the other local authorities contributing being the Shires of Collie, Dardanup, Harvey, Donnybrook-Balingup and Capel.

Advice was received that at the BWEA Board meeting held 18 June 2015, the board resolved that the aggregate local government contribution in the 2015/16 budget should remain unchanged on the 2014/15 level.

BWEA requested that the participating six (6) Councils be requested to work out an agreed formula for the respective contributions from each authority. At a meeting of CEO's held on 29 June 2015 the issue of a revised funding model for local government contributions. At present the funding is based roughly around the following contributions:

Bunbury	\$22,050
Harvey	75% of Bunbury
Capel	50% of Bunbury
Dardanup	50% of Bunbury
Collie	50% of Bunbury
Donnybrook	33% of Bunbury

It was recommended that the current arrangements should remain in place for the 15/16 year and allow for review going forward into future years. Whilst a number of options were considered, it was considered that a revised funding arrangement to be implemented for the 16/17 financial year should be established around a fixed contribution (based on the WALGA model) by each local government and then the balance based around population.

The following is an example of how a base fixed Fee equal to 40% of local government funding and population contribution 60% of local government funding required may work:

Local Govt.	Fixed 40%	Population 60%	Total Fee
Bunbury	5,267.50	15,028	20,296
Harvey	5,267.50	11,757	17,025
Capel	5,267.50	7,490	12,758
Dardanup	5,267.50	6,210	11,478
Collie	5,267.50	4,314	9,582
Donnybrook	5,267.50	2,607	7,875
	31,605	47,406	79,011

In addition to the funding issues, there was a general consensus that there is a need to undertake an assessment of the current and future directions for the Bunbury Wellington Economic Alliance. This should be undertaken by March 2016 to allow local governments the opportunity to consider the longer term view of the relevance of the Alliance and whether ongoing membership will be considered.

The CEO met with Matt Granger on 3 July 2015 and discussed the outcomes of the CEO meeting and advised that the general view was for no change for 15/16 and also flagged the issue of the strategic relevance of the Alliance going forward from the City of Bunbury perspective.

Policy Compliance

Not applicable.

Financial Implications

Council pays an annual contribution of \$22,050 to Bunbury Wellington Economic Alliance. The total contribution made by all local authorities in the 2014/15 year was \$79,012 ex GST and this figure is to remain unchanged in the 2015/16 financial year.

The new calculation proposal will actually see a reduction to the annual contribution that the City of Bunbury makes to the Bunbury Wellington Economic Alliance.

10.2.4 Schedule of Accounts Paid for the Period 1 June 2015 to 30 June 2015

Applicant/Proponent:	Internal Report
Author:	David Ransom, Manager Finance
Executive:	Andrew Brien, Chief Executive Officer
Attachments:	CEO-3 – Schedule of Accounts Paid

The City of Bunbury "*Schedule of Accounts Paid*" covering the period 1 June 2015 to 30 June 2015 has been issued to elected members (copy **attached** at Appendix CEO-3). The schedule contains details of the following transactions:

1. Municipal Account – payments totalling \$9,469,810.00
2. Advance Account – payments totalling \$6,516,487.09
3. Trust Account – payments totalling \$38,752.92
4. Visitor Information Centre Trust Account – payments totalling \$40,312.70
5. Bunbury-Harvey Regional Council Municipal Account – payments totalling \$366,695.36
6. Bunbury-Harvey Regional Council Advance Account – payments totalling \$283,490.02

Executive Recommendation

The Schedule of Accounts Paid for the period 1 June 2015 to 30 June 2015 be received.

10.3 Director Corporate and Community Services

Nil.

10.4 Director Planning, Development and Regulatory Services Reports

10.4.1 Request to Initiate Scheme Amendment 76 – Rezoning Lots 3, 4, 100, 104 and 105 Forrest Avenue from “Residential Zone” to “Special Use Zone No.59 – Residential Mixed Use”

File Ref:	A00398
Applicant/Proponent:	City of Bunbury on Behalf of landowners of lots 3, 4, 100, 104, 105 Forrest Avenue , South Bunbury
Author:	Kelvin Storey, Team Leader Strategic Planning and Urban Design
Executive:	Bob Karaszekwych, Director Planning, Development and Regulatory Services
Attachments:	DPDS-1 Scheme Amendment 76 Report

Summary

The City has received a scheme amendment request from Mr Robert Vinci, landowner of lots 104 and 105 Forrest Avenue to rezone those lots from “Residential Zone” with a density coding of R60, to a “Special Use Zone” that will facilitate mixed use development. A number of adjacent landowners have subsequently expressed interest in being included within the rezoning proposal, and as a result five (5) consecutive lots fronting Forrest Avenue situated between Higgins Street and Doris Street now form the subject site, as identified within the draft Scheme Amendment Report No.76 (**attached** at Appendix DPDS-1).

In preparing this scheme amendment proposal in advance of the formalisation of the revised Scheme, care has been taken to ensure that the requirements and development standards of the special use zone are consistent with the objectives and provisions prepared for the “Mixed Use Frame Zone” introduced within the draft Local Planning Scheme No.8, initiated by the Council on 31 March 2015.

As a secondary matter, the scheme amendment proposal provides an opportunity to up-date and make minor corrections to the scheme map within this location that have emerged since Town Planning Scheme No.7 was gazetted in 2002.

Executive Recommendation

That Council:

1. In accordance with the *Planning and Development Act 2005*, resolves to initiate proposed Scheme Amendment 76 to the City of Bunbury Town Planning Scheme No.7 by:
 - (a) amending the Scheme Text by inserting additional text in the table under Schedule 2 –Special Use Zones at No. 59 with associated provisions included in the “Special Use(s)” and “Conditions” columns of the table;

- (b) modifying the Scheme Map by rezoning:
 - (i) portion of Lot 100(#27) Forrest Avenue and Lots 104(#29), 105(#31), 4(#33) and 3(#35) Forrest Avenue, South Bunbury from “Residential Zone” R60 to “Special Use Zone No. 59 – Residential Mixed Use”;
 - (ii) portion of Lot 100(#27) Forrest Avenue from “Public Purposes Reserve” (Drainage) to “Special Use Zone No.59 – Residential Mixed Use”;
 - (iii) portion of Lot 101(#1) Higgins Street from “Public Purposes Reserve” (Drainage) to “Residential Zone” R20/40; and
 - (iv) land adjacent to Lot 100(#27) Forrest Avenue from “Residential Zone” R60 to “Access Road Reserve”.
- 2. Notify the Western Australian Planning Commission of Council’s decision to initiate proposed Scheme Amendment 76, and provide the Commission with a copy of the scheme amending documentation prior to proceeding to public advertising.
- 3. Refer a copy of the proposed Scheme Amendment 76 documentation to the Environmental Protection Authority, and any other relevant public authority, for consideration and comment.
- 4. Subject to formal assessment not being required by the Environmental Protection Authority and no objection received from the Western Australian Planning Commission, proceed to advertise proposed Scheme Amendment 76 for public comment with a submission period of not less than 42 days in accordance with the Planning and Development Act 2005 and Town Planning Regulations 1967.
- 5. Further consider the proposal together with any public submissions lodged with the City of Bunbury following the conclusion of the statutory public advertising

Background

The owner of lots 104 and 105 Forrest Avenue has submitted a request to the City to amend the Scheme in a manner that would facilitate mixed use outcomes. The proposal is generally in keeping with the City’s strategic planning intent to create a mixed use activity corridor along this part of Forrest Avenue. Landowners of adjacent properties fronting Forrest Avenue have indicated their willingness to be included in the scheme amendment proposal.

The lots that make up the subject site of the scheme amendment comprise five detached single dwellings situated on irregular shaped lots that directly front on to Forrest Avenue and situated approximately 150 metres south west of the Bunbury Plaza neighbourhood centre, between the junctions of Forrest Avenue with Higgins Street and Doris Street.

Special Use Zone No.59 and accompanying conditions have been prepared in a form that complements the mixed use zoning provisions proposed along this part of Forrest Avenue within the draft Local Planning Scheme No.8 (LPS8). Accordingly, the special use zone if approved is expected to seamlessly transition into a dedicated “Mixed Use Frame Zone” upon gazettal of the revised Scheme.

The scheme amendment also includes up-dates to the Scheme map comprising a rezoning of:

- * The “Public Purpose Reserve” that no longer fulfils a formal drainage function, and was sold by the City in 2011 to adjacent property owners at Lot 100(#27) Forrest Avenue and Lot 101(#1) Higgins Street; and
- * A triangular parcel of land adjacent to Lot 100(#27) that functions as a road truncation/site line at the junction of Higgins Street and Forrest Avenue from “Residential Zone” to “Access Road Reserve”.

Council Policy Compliance

The scheme amendment as proposed is consistent with the City’s adopted Local Planning Strategy for Activity Centres & Neighbourhoods (LPS-ACN) which recommends mixed use outcomes as a transition between commercial and residential zones in key activity centres, activity corridors and existing residential ‘Frame Areas’. The LPS-ACN informed the preparation of the draft Local Planning Strategy and draft LPS8, and notably the initiated draft of the revised Scheme identifies this part of Forrest Avenue as a mixed use activity corridor, which is consistent with the intent of the proposal.

Legislative Compliance

Proposals to amend a Local Planning Scheme are required to be undertaken in accordance with the *Planning and Development Act 2005* and associated *Town Planning Regulations 1967*, and are to be advertised for public comment with a submission period of not less than 42 days.

Under the *Planning and Development Act 2005* and associated *Town Planning Regulations 1967*, scheme amendment proposals are required to be referred to the EPA and the WAPC for their review prior to any formal public advertising period.

Once public advertising is concluded, should Council then resolve to adopt the scheme amendment, the scheme amending documentation together with the schedule of submissions and Council’s resolution is to be referred to the WAPC for its endorsement and to the Minister for Planning for final approval to gazette.

Officer Comments

Forrest Avenue fulfils an important east–west connection (on route to/from the city centre) between Blair Street and Spencer Street. With vehicular access along Strickland Street restricted, Forrest Avenue has naturally assumed the role of a higher order “Local Distributor Road” (whilst not formally recognised as such) and in 2010 was carrying an average of 11,600 vehicles per day. In responding to the high volume of vehicular traffic, the this section of Forrest Avenue is undergoing transition from a more a traditional residential streetscape character to that of a mixed use activity corridor - comprising small scale community purposes and commercial activities.

The subject site is surrounded by a range of services and facilities, notably:

- * public transport network with a regular bus service provided along Forrest Avenue;
- * convenience shopping at Bunbury Plaza within a short walking distance;
- * local employment opportunities offered by an array of commercial activities associated with the “Shopping Centre Zone” and nearby “Mixed Business Zone”;
- * a range of social services located nearby, including the South Bunbury Primary School; and
- * passive and active recreational opportunities in Forrest Park and Big Swamp Park, which are located within approximately 250 metres and 680 metres walking distance respectively.

For reasons related to the above, Forrest Avenue between its intersections with Spencer Street and Blair Street was identified as a “mixed use activity corridor” within the LPS-CAN. This has culminated in the current TPS7 “Residential” zoning being proposed to be changed to a “Mixed Use Frame Zone” within the draft LPS8.

Whilst the scheme amendment proposal is in keeping with the strategic intent of the draft Local Planning Strategy and draft LPS8, it is important that development provisions are also complementary. Development standards proposed in conjunction with Special Use Zone No.59 aim to establish appropriately scaled and compatible activities, encourage a quality streetscape, and protect the amenity of neighbouring residential properties to the rear of the site. Depending on the future scale of development, a structure plan may be required to be adopted by Council prior to subdivision or development.

The approach is similar to that adopted with respect to Scheme Amendment no.73 that proposed to create a “Special Use Zone - Commercial Mixed Use” along a portion of Strickland Street in advance of the formalisation of the revised Scheme. That amendment was approved by Council in August 2014 and is currently awaiting a decision by the Minister of Planning.

Analysis of Financial and Budget Implications

The procedure for considering a scheme amendment or draft proposed structure plan has no associated financial or budgetary implications other than meeting the costs of public advertising.

Community Consultation

Scheme amendments are required to be advertised for public comment for a minimum period of 42 days in accordance with the provisions of the *Planning and Development Act 2005* and associated *Town Planning Regulations 1967*. The public advertising period occurs once the scheme amendment has been initiated by Council and a notice is published in a local circulated newspaper.

It is currently the intent to publicly advertise the draft scheme amendment documents together with the draft LDP once this has been presented to Council for its consideration.

Councillor/Officer Consultation

The proposed scheme amendment has been referred to the Development Coordination Unit (DCU) for professional advice and technical assessment. No significant concerns have been raised.

**10.4.2 Development Application Seeking Planning Approval for a Change of Use -
Unit 3 Lot 501 #15 Sandridge Road, East Bunbury**

File Ref:	P054367, DA/2015/111/1
Applicant/Proponent:	SPBY Pty Ltd (trading as SportsPower Bunbury) Land Owner: Citygate Properties Pty Ltd
Author:	Bob Karaszekwych, Director Planning, Development and Regulatory Services
Executive:	Bob Karaszekwych, Director Planning, Development and Regulatory Services
Attachments:	Appendix DPDS-2: Location Plan Appendix DPDS-3: Letter and Floor Plan Appendix DPDS-4: Revised Floor Plan Appendix DPDS-5: Comparison 'Bulky Goods' vs 'Shop' areas Appendix DPDS-6: SAT decision on The Rusticana 'Shop'

Summary

At the Council meeting of 7 July 2015, Council resolved to defer this matter, which is now returned to Council for consideration and decision.

The application for planning approval is for the proposed change of use of the subject site, Unit 3 Lot 501 #15 Sandridge Road, East Bunbury.

The subject site currently has planning approval for a 'showroom'/ 'warehouse' use previously tenanted by a hardware store (Mitre 10) in the 'Mixed Business Zone'.

An earlier proposal was subject to a State Administrative Tribunal (SAT) appeal, which the applicant at the time, the landowner, Citygate Properties Pty. Ltd. withdrew the appeal before the matter proceeded to hearing for a decision. The applicant for the new application for planning approval for a change of use is the business owner of the SportsPower Bunbury store, which is part of a nation-wide sporting footwear, apparel and equipment retailing group.

SportsPower stores in Western Australia are typically located in areas where other shops are permitted, such as in shopping centres in metropolitan areas and on the main-street of regional town centres. As such, the format of SportsPower stores are classified as being a 'shop/retail' Planning Land Use Category (PLUC) under the Western Australian Planning Commission's (WAPC) Commercial Land Use Survey (1997).

Consequently, the proposal being predominantly a 'shop' use is deemed by the City of Bunbury Town Planning Scheme No. 7 (the Scheme) is an 'X' prohibited use in the 'Mixed Business Zone'. Accordingly, the Scheme requires that the local government must refuse to approve any 'X' use of land.

For the reasons outlined above, the application is recommended for refusal.

Executive Recommendation

That Council:

1. Refuse the application for planning approval for the proposed change of use of Unit 3, Lot 501 #15 Sandridge Road, East Bunbury, (application reference DA/2015/111/1) in accordance with City of Bunbury Town Planning Scheme No. 7, for the following reasons:
 - (a) The proposal falls within the definition of 'shop' use class as contained in Schedule 1 of the Scheme. The use class of 'shop' is listed in Table No. 1 – Zoning Table of the Scheme, as an 'X' (not permitted) use in the 'Mixed Business Zone'.
 - (b) The proposal is contrary to the intent of the City of Bunbury Local Planning Strategy for Activity Centres and Neighbourhoods (December 2010).
 - (c) The proposal is contrary to the objectives of the Western Australian Planning Commission's Activity Centres for the Greater Bunbury Policy (April 2012), and as such, is not in accordance with Clause 10.2.1(e) of the Scheme.
 - (d) The proposal does not represent "orderly and proper planning", and as such is not in accordance with Clause 10.2.1(b) of the Scheme.
2. Advise the applicant and landowner of Council's decision.

Alternate Recommendation

That Council:

1. Grant the application for Planning Approval for a change of use of the Showroom at Unit 3, Lot 501 #15 Sandridge Road, East Bunbury, (application reference DA/2015/111/1), in accordance with City of Bunbury Town Planning Scheme No. 7, subject to the following conditions:
 - (a) The development (Change of Use) is approved on the condition that it will be conducted within premises having a maximum floor area of 874sqm², as a 'Showroom' for the display and sale of 'Bulky (sports) Goods' and "incidental accessories and items", such as clothing apparel/ accessories/ sports equipment/ boxing equipment/ fitness equipment and shoes associated with the sale of 'Bulky (sports) Goods', and only associated with those uses and activities shown on the approved Plan.

References to areas of the premises are references to the areas as shown on the approved Plan.

Prior to the commencement of any works associated with the change of use, a measured and dimensioned floor Plan is to be submitted to the satisfaction of the City of Bunbury, for approval.
 - (b) Development shall be in accordance with the approved Plan that forms part of this approval and shall be read conjunction with each condition of approval.

- (c) The floor area shown for “incidental accessories and items” (referred to in 1.a.) associated with the display and sale of ‘Bulky (sports) Goods’, is not to exceed 174.8sqm² (20%) of the total floor area of the premises (874sqm) shown on the approved Plan.
- (d) “Incidental accessories and items” (referred to in 1.c.) associated with the display and sale of ‘Bulky (sports) Goods’ shall only occur within the floor area of 174.8sqm² (20%), and is to be maintained at a level and form that is manifestly ancillary and incidental to the sale of ‘Bulky (sports) Goods’.
- (e) The total floor area of the premises shown on the approved Plan 276sqm² (31.58 %) for the sale of Bulky Sports Equipment/ Boxing Equipment/ Bike Sales/ Fitness Equipment/ and Seasonal Bulky Sports Equipment shall not to be used for any other purpose, other than for Access for Bulky (sports) Goods.

This access shall be maintained of a minimum 1.5m in width for a length of 22m, without obstruction, at all times to enable access from the front of the premises through to the rear of the premises.

Reference to this access area shall not be used for the display of bulky goods; this represents a 33sqm² (3.77%) reduction of the floor area to 243sqm² (27.80%).

- (f) Those areas shown on the approved plan as Air Lock/ Service Desks/ Office Amenities/ Bike and Fitness Repairs/ Storage and Change Rooms is not to reduce below 238sqm² (27.23%) of the total floor area of the premises, and shall not be used for any other purpose, including the display and sale of “incidental accessories and items”.
- (g) The floor area shown as Access for Bulky Goods, towards the rear of the premises, is not to reduce below 27sqm² (3.09%) and shall be maintained of a minimum 1.5m in width and without obstruction, at all times.

Reference in this condition includes the continuation of the access through to the front of the premises at the same minimum width, and shall not be used for any other purpose.
- (h) An additional 158.2sqm² (18.10%) of the total floor area of the premises, as shown on the approved plan, can be used for the display and sale of Bulky (sports) Goods.
- (i) Customers and members of the public generally are not to have access to the Storage area.
- (j) The layout of the premises and the activities conducted on the premises are not to be changed from what is shown in the approved Plan, including discontinuance of any element, without the planning approval of the City.
- (k) This approval will expire if the approved development (change of use) has not substantially commenced within two (2) years, from the date of issue of this approval, or within any extended period of time the City has granted prior written consent.

2. Advise the applicant that, pursuant to Clause 9.4.3 of TPS7, any variation to the approved Plan shall require notice of the application for proposed use or development for planning approval, served on owners and occupiers of premises who, in the opinion of the local government, are likely to be affected by the granting of planning approval.
3. Advise the applicant and submitters of Council's decision.

Background

The application for planning approval for the proposed change of use of Unit 3, Lot 501 #15 Sandridge Road, East Bunbury (the subject site), was received on 30 April 2015. A summary table of the details relating to the subject site are as follows:

Property Address:	Lot 501 #U3/15 Sandridge Road, East Bunbury
Zoning:	Mixed Business Zone
Existing Land Use:	Showroom/Warehouse
Lot Area:	3,769m ²
Floor Area (Unit 3):	874m ² approximately

The subject site contains three (3) attached units fronting on to Sandridge Road situated near the traffic light controlled intersection of Sandridge Road, Picton Road and King Road. The previous tenant of Unit 3 was the hardware store Mitre 10. A location plan showing the subject site is **attached** at Appendix DPDS-2.

The application for planning approval is for the change of use of Unit 3, with no proposed changes to the existing building, landscaping or car parking configuration. Additionally, no signage or details on advertising is proposed with the application.

The proposed tenant of Unit 3, SportsPower Bunbury describes the business as "selling sporting footwear, apparel and equipment". SportsPower stores currently operate in metropolitan and regional locations nationwide, including in the south-west region where they are currently operating in Eaton Fair Shopping Centre, and within the Busselton, Margaret River and Manjimup shopping centres.

The proposed floor plan and supporting letter from the applicant are (**attached** at Appendix DPDS-3).

The proposal for a SportsPower store to operate out of Unit 3 was subject to a previous SAT appeal submitted in October 2014 on behalf the landowner Citygate Properties Pty. Ltd. Prior to this, the City of Bunbury had advised the applicant that as the "responsible authority" under the *Planning and Development Act 2005* having responsibility for the enforcement of the Scheme, it could not support the proposal. At that time, it was indicated that the primary reason for this was that the proposal conformed to the definition of a 'shop' land use class, which is an 'X' use 'not permitted' in the 'Mixed Business Zone'.

If the proposal was able to be approved in the 'Mixed Business Zone', it can be expected that other existing sporting goods retailers within the City would seek to relocate to similar fringe areas where commercial floor space rents are usually cheaper. The proposal does not represent "orderly and proper planning", and would likely undermine the retail primacy of the city centre and economic viability and competitiveness of other activity centres (where 'shop' use is permitted in both the 'City Centre Zone' and 'Shopping Centre Zone').

Below is a summary table outlining the chronology of events relating to the proposal leading up to the lodgement of the latest application for planning approval for the change of use of the subject site:

Date	Event
15 May 2009	The subject site received planning approval for a 'showroom' / 'warehouse' use.
07 Aug 2014	A written planning advice application was submitted (by a planning consultancy on behalf of the landowner) seeking written confirmation that 'SportsPower' could operate at the subject unit under the planning approval granted in 2009.
19 Aug 2014	The City of Bunbury provide written planning advice, advising that in its opinion the SportsPower proposal would be classified as a 'shop' use which is an 'X' not permitted use in the 'Mixed Business Zone'; and therefore, a SportsPower could not operate under the 2009 approval for a 'showroom' / 'warehouse' use.
02 Sept 2014	A change of use application (lodged by a planning consultancy on behalf of the landowner) for a change of use to 'showroom' / 'warehouse' use for a SportsPower was submitted.
04 Sept 2014	The City of Bunbury wrote to the applicant advising that the change of use application could not be accepted, as no change of use is proposed, and reiterated the opinion that SportsPower would be classified as a 'shop' use which is an 'X' use not permitted in the zone.
08 Sept 2014	A change of use application (by a planning consultancy on behalf of the landowner) for a change of use to 'showroom' / 'warehouse' uses and incidental use of 'shop' for a SportsPower was submitted.
10 Sept 2014	The City of Bunbury wrote to the applicant advising that the change of use application with the addition of the incidental use could not be accepted, as no change of use is proposed, and advised that incidental uses do not require planning approval. Additionally, the City of Bunbury reiterated that a SportsPower would be classified as a 'shop' use and refuted the assertion that the 'shop' use would be incidental.
12 Sept 2014	A change of use application (by a planning consultancy on behalf of the landowner) which did not nominate the proposed use was submitted.
23 Sept 2014	The City of Bunbury wrote to the applicant again advising that a SportsPower is classified as a 'shop' use which is an 'X' not permitted use in the zone and returned the application.
23 Oct 2014	An application for review of the City of Bunbury's decision was made on behalf of the landowner to the SAT.
01 Dec 2014	A SAT directions hearing was held, the outcome of which was that the matter would be referred to a hearing for a decision.
15 Jan 2015	Applicant (the landowner) decides to vacate the SAT hearing for a decision and proceed with mediation to resolve matter.
19 Feb 2015	SAT mediation session, with the outcome being that the applicant was to provide within specified timeframe additional information for the City of Bunbury's consideration.
17 Mar 2015	SAT mediation session where the additional information provided was discussed. Resolution between the City of Bunbury and the applicant did not occur. The outcome being that the matter would be referred back to a SAT hearing for a decision.
23 Apr 2015	SAT appeal was withdrawn by the then applicant (the landowner) prior to the matter being referred to hearing for a decision.

30 Apr 2015	A new change of use application was submitted, with the applicant being the proprietors of SportsPower Bunbury.
07 May 2015	The new application for planning approval for a change of use was accepted by the City of Bunbury for assessment, after legal advice from City's solicitor was obtained due to the previous history of the proposal.

Council Policy Compliance

An application for planning approval to permit a change of use is required to be in compliance with the Scheme and applicable provisions of both the State and Local Planning Policy Framework.

The proposal is not compliant for the following reasons:

- * In accordance with the Scheme definitions, the proposal is classified as being predominantly a 'shop' use. The use class of 'shop' is listed in Table No. 1 – Zoning Table of the Scheme as an 'X' (not permitted) use in the 'Mixed Business Zone'. The explanatory note to clause 4.3.2 of the Scheme states that the local government must refuse to approve any 'X' use of land.
- * The proposal may not be considered to represent orderly and proper planning, as required under clause 10.2.1(b) of the Scheme, due to the fact that approving development not permitted in a zone undermines the specific objectives of that zone and other affected zones.
- * The proposal does not satisfy the objectives of the WAPC's Activity Centres for Greater Bunbury Policy (April 2012), which is contrary to the Scheme at clause 10.2.(e).
- * The proposal does not accord with the intent of the City of Bunbury Local Planning Strategy for Activity Centres and Neighbourhoods (December 2010).

Officer Comments

At the Council meeting of 23 June 2015, the Mayor commented that Officers, the Owner and the Applicant needed to work together towards a solution that allowed for a maximum 20% retail floor space.

Prior to the meeting on 23 June 2015, Planning Solutions (acting on behalf of the applicant) was requested to consider the Kalgoorlie model of the SportsPower store. That store predominantly sold bulky sports goods with incidental clothing apparel and items associated with bulky sports equipment. Planning Solutions had intimated that that was the intended model. However, this is not reflected in the information provided or plan submitted with the application.

On 26 June, the City wrote to Planning Solutions on Council's resolution requesting to modify the application to reflect the requested maximum 20% retail floor space that is categorised as a Shop. Consideration was to be given to arguments presented at the SAT during mediation on the previous SportsPower DA, and the SAT decision on The Rusticana 'Shop' as representing the preferred outcome for the City.

The response from Planning Solutions for the applicant was in summary as follows:

"Specifically I have requested a plan from SportsPower to show the maximum 20% apparel floor area as discussed on Tuesday.....I noted in the agenda there were some comments about incidental items associated with the bulky good which are offered,

as being (if I understand it correctly) acceptable, so we are specifically referring to the apparel which was the area of contention.”

Planning Solutions sought clarification from the applicant on the scenario someone seeking to purchase a bike, for example would have the ability to purchase a light, panniers or similar accessories in the same shop rather than have to go elsewhere to do so. Similarly, with regard to chains, bandages, elastic bands for boxing equipment.

Planning Solutions has mistakenly come to the view that **“incidental items associated with bulky goods as being acceptable”**.

Planning Solutions has provided a modified plan. Those modifications include:

- * Moving the shoes to the rear wall.
- * Moving the rear wall closer to the front of the store, to increase the size of the storeroom.
- * Introducing a central corridor through the apparel to provide access between the rear store and the bulky shopfloor displays.
- * Replacing the central service counter with seasonal bulky sports goods.
- * The apparel and clothing now has a floor area of 170m² – 19.5% of the tenancy area.

The City sought information on the composite area of all areas set aside for incidental items, such as bike/fitness/sports/bulky sports’ accessories, boxing and fitness equipment. Further, the term *“seasonal bulky sports equipment”* requires clarification, as well as, what is intended for that area located along the frontage of the premises identified for ‘fitness accessories’ also what is intended for the area behind the Service Desk.

A calculation of the floor areas of the above represents some 64% floor area as a retail ‘Shop’ use, whereas 20% for bulky goods. A revised floor plan is (**attached** at Appendix DPDS-4). A generalised comparison of ‘Bulky Goods’ (coloured Orange) vs ‘Shop’ (coloured Blue) floor areas is (**attached** at Appendix DPDS-5).

Total area of the premises (as calculated on the submitted Plan) is 720sqm, comprising:

- * Apparel/accessories/ sports equipment/ boxing equipment/ fitness equipment/shoes 463m² (64.30%), retail Shop.
- * Bulky goods 140sqm (20%)
- * Change Rooms 9.72sqm
- * Service Desk 32.43sqm
- * Back of House/ Storage 192.48sqm

Total floor area comprising the above elements is approximately 837.63m² exceeding the total area of the premises as calculated on the submitted Plan by some 117.63m², without explanation.

The proposition that the sale of “bulky goods” must be sold with incidental accessories to make a sale is not persuading reasoning. The sale of bulky goods with accessories was not supported by the SAT in previous similar applications in the Mixed Business Zone. It was made clear that 20% is to relate to the display and sale of non-bulky goods, as being the benchmark of acceptability within the Mixed Business Zone. For a planning authority to make a reasoned and practical planning decision it is appropriate to refer to precedents and discussions at the SAT.

Planning Solutions has stated that it believes the City has not properly or correctly interpreted its representations and submissions.

The City's view is that there is insufficient reasoning to appreciate that there may be a 'point of difference'. To allow the proposal is to allow an unfettered retail 'Shop' activity in the Mixed Business Zone as the proposed conditions of approval are so nebulous to be meaningless in terms of future enforcement as nothing could be 'measured' by area or % floor area of the premises distinguishing bulky goods from incidental accessories.

The application, as has been amended since the Council meeting, is still predominantly a "Shop", and as such, should be refused. The correct way of looking at this is to see the SportsPower proposal as an application to change the use from the approved Showroom use to the not permitted Shop use, unless further modified as is suggested below.

If the applicant was prepared to modify the 'change of use' application in such manner that on Plan demonstrates the premises is predominantly for the display and sale of 'bulky (sports) goods' incorporating incidental accessories, a conditional approval is only then, possible.

It is noted that no Planning Approval is required for the display and sale of 'bulky goods', with incidental accessories to an acceptable maximum 20% floor area within the existing Showroom in the Mixed Business Zone.

The reference to 20% is founded in the decision of the SAT in relation to the matter that granted approval for The Rusticana 'Shop' in the Mixed Business Zone. The SAT decision is (**attached** at Appendix DPDS-6).

Should the applicant press for a Planning Approval for the "change of use", this calls up the requirement for a new Plan with specific floor areas for the 'bulky (sports) goods' and incidental equipment, accessories and items expressed in square metres and as a percentage % of the floor area of the entire premises on the same principle as the SAT decision, for The Rusticana 'Shop'.

Such a Plan would specifically distinguish between 'bulky (sports) goods' and limiting the floor space for incidental items and accessories that represent a 'Shop' use. Only in those circumstances, could the application be considered to satisfy the requirements of the planning scheme and State and local planning policy framework.

An approval, incorporating conditions of approval, should require:

That Council:

1. Grant the application for Planning Approval for a change of use of the Showroom at Unit 3, Lot 501 #15 Sandridge Road, East Bunbury, (application reference DA/2015/111/1), in accordance with City of Bunbury Town Planning Scheme No. 7, subject to the following conditions:
 - (a) The development (Change of Use) is approved on the condition that it will be conducted within premises having a maximum floor area of 874sqm², as a 'Showroom' for the display and sale of 'Bulky (sports) Goods' and "incidental accessories and items", such as clothing apparel/ accessories/ sports equipment/ boxing equipment/ fitness equipment and shoes associated with the sale of 'Bulky (sports) Goods', and only associated with those uses and activities shown on the approved Plan.

References to areas of the premises are references to the areas as shown on the approved Plan.

Prior to the commencement of any works associated with the change of use, a measured and dimensioned floor Plan is to be submitted to the satisfaction of the City of Bunbury, for approval.

- (b) Development shall be in accordance with the approved Plan that forms part of this approval and shall be read conjunction with each condition of approval.
- (c) The floor area shown for “incidental accessories and items” (referred to in 1.a.) associated with the display and sale of ‘Bulky (sports) Goods’, is not to exceed 174.8sqm² (20%) of the total floor area of the premises (874sqm) shown on the approved Plan.
- (d) “Incidental accessories and items” (referred to in 1.c.) associated with the display and sale of ‘Bulky (sports) Goods’ shall only occur within the floor area of 174.8sqm² (20%), and is to be maintained at a level and form that is manifestly ancillary and incidental to the sale of ‘Bulky (sports) Goods’.
- (e) The total floor area of the premises shown on the approved Plan 276sqm² (31.58 %) for the sale of Bulky Sports Equipment/ Boxing Equipment/ Bike Sales/ Fitness Equipment/ and Seasonal Bulky Sports Equipment shall not to be used for any other purpose, other than for Access for Bulky (sports) Goods.

This access shall be maintained of a minimum 1.5m in width for a length of 22m, without obstruction, at all times to enable access from the front of the premises through to the rear of the premises.

Reference to this access area shall not be used for the display of bulky goods; this represents a 33sqm² (3.77%) reduction of the floor area to 243sqm² (27.80%).

- (f) Those areas shown on the approved plan as Air Lock/ Service Desks/ Office Amenities/ Bike and Fitness Repairs/ Storage and Change Rooms is not to reduce below 238sqm² (27.23%) of the total floor area of the premises, and shall not be used for any other purpose, including the display and sale of “incidental accessories and items”.
- (g) The floor area shown as Access for Bulky Goods, towards the rear of the premises, is not to reduce below 27sqm² (3.09%) and shall be maintained of a minimum 1.5m in width and without obstruction, at all times.

Reference in this condition includes the continuation of the access through to the front of the premises at the same minimum width, and shall not be used for any other purpose.

- (h) An additional 158.2sqm² (18.10%) of the total floor area of the premises, as shown on the approved plan, can be used for the display and sale of Bulky (sports) Goods.

- (i) Customers and members of the public generally are not to have access to the Storage area.
 - (j) The layout of the premises and the activities conducted on the premises are not to be changed from what is shown in the approved Plan, including discontinuance of any element, without the planning approval of the City.
 - (k) This approval will expire if the approved development (change of use) has not substantially commenced within two (2) years, from the date of issue of this approval, or within any extended period of time the City has granted prior written consent.
2. Advise the applicant that, pursuant to Clause 9.4.3 of TPS7, any variation to the approved Plan shall require notice of the application for proposed use or development for planning approval, served on owners and occupiers of premises who, in the opinion of the local government, are likely to be affected by the granting of planning approval.
3. Advise the applicant and submitters of Council's decision.

For Elected Members reference Officer's previous comments are listed below;

The main point of contention concerning this proposal centres on the appropriate land use classification, and subsequently whether or not the proposed use is permitted in the relevant zone.

When considering the appropriateness of the proposed land use classification, reference must be made to the land use definitions provided in Schedule 1 of the Scheme in order to determine which land use class the activity most reasonably falls within. Interpretation of the land use definitions is further guided by established planning law principles and precedents in case law set by previous SAT decisions.

From assessing the provided floor plan and the applicant's supporting letter (**attached** at Appendices DPDS-3) detailing the types of goods to be sold, estimated percentage of floor area for the sale and display of goods and estimated percentage of sales between different types of goods – it is reasonably concluded that the proposal represents a distinct and predominate 'shop' use, hence is a 'not permitted' use in the zone.

The applicant puts forward that the proposal should be classified as being predominantly a 'showroom' use with an incidental 'shop' use. The applicant's justification for the proposal is (**attached** at Appendix DPDS-3), which can be summarised as follows:

"The predominate use of the SportsPower premises will be as a 'showroom' comprising of the sale and hire of bulky goods – a use which Council has the ability to approve. The sale of sporting footwear and apparel and sporting accessories, and the repair of bicycles and fitness equipment, is incidental".

By way of context, the Scheme at Schedule 1 defines a 'shop' use as:

"... means a premises used to sell goods by retail, hire goods, or provide services of a personal nature (including a hairdresser or beauty therapist) but does not include a showroom or a fast food outlet".

Whereas, a ‘showroom’ use is defined under Schedule 1 of the Scheme as:

“... means a premises used to display, sell by wholesale or retail, or hire, automotive parts and accessories, camping equipment, electrical light facilities, equestrian supplies, floor coverings, furnishings, furniture, household appliances, party supplies, swimming pools or goods of a bulky nature”.

Furthermore, an ‘incidental use’ is defined under Schedule 1 of the Scheme as:

“... means a use of premises which is ancillary and subordinate to the predominate use”.

Therefore, as the nature of products sold in SportsPower stores (i.e. the retail sale of “sporting footwear, apparel and equipment”) are not explicitly referenced in the Scheme’s definition for a ‘showroom’ use - in order for a premises to be classed as such - it must predominately display and sell ‘goods of a bulky nature’.

The expanded definition of ‘bulky goods retail or showroom’ given in the WAPC’s Activity Centres for the Greater Bunbury Policy (April 2012) provides some clarification as to the meaning of the term ‘goods of a bulky nature’ as that requiring:

“... a large area for handling, display or storage; or direct vehicle access to the site of the premises by the public for the purpose of loading goods into a vehicle after purchase or hire, but does not include Shop/retail.”

The subject site is located within the ‘Mixed Business Zone’, which primarily serves the purpose of catering for large format trading, including bulky goods retailing.

As is clearly articulated in the WAPC’s policy, bulky goods are displayed and sold from showrooms that typically comprise extensive display and storage areas with direct vehicle access and car parking. Bulky goods retailing does not include the sale of food, clothing or personal effects goods. Moreover, the Commission’s policy states that areas dedicated for bulky goods retailing or showrooming do not reflect pedestrian friendly characteristics, and hence, locating such development in an adhoc manner or as ribbon development along regional roads should be discouraged.

Although ‘shop’ use, in accordance with the Scheme’s zoning table, is listed as an ‘X’ use ‘not permitted’ in the ‘Mixed Business Zone’, the premises may have an incidental ‘shop’ use element. An incidental use does not need to be considered under the Zoning Table of the Scheme or explicitly referenced in the determination notice.

The determination that a ‘shop’ use may be incidental and therefore permissibility is based on fact and degree, and there is no prescribed standard for establishing the relative proportion of floor space area that can be relied upon. Nevertheless, the following factors are to be assessed when considering if a use is in fact incidental to the predominant use of a premises:

- (a) whether the incidental use relies on the predominate use or can operate independently;
- (b) the type and proportionate breakdown of floor space areas;
- (c) the proportion of sales and/or profit between the uses; and
- (d) the number of bulky goods and non-bulky goods displayed and sold.

For the following reasons, the proposal predominantly falls into the ‘shop’ land use Class, as opposed to being an incidental use:

- * The ‘shop’ use could operate independently and does not rely on the ‘showroom’ use.
- * The floor plan provided by the applicant references ‘bulk apparel’, ‘bulk stack hardware’, ‘bulk ball and product display’ and ‘ball bins bulk’. Whilst the word ‘bulk’ is used frequently, this term can be deceiving, as these items individually are not bulky in nature (i.e. a T-shirt or football) and would therefore be classified as items normally sold in a ‘shop/ retail’ premises, as defined under the Planning Land Use Category (PLUC) of the WAPC’s Commercial Land Use Survey (1997).
- * The applicant states that 25% of the total floor area will be allocated to the display and sale of non-bulky items. From reviewing the provided table of floor area breakdown and percentage figures, it can be determined that approximately 50% of the total floor area would be allocated to ‘shop/ retail’ activity (i.e. a floor space area calculation of 40.7% being dedicated to the display and sale of non-bulky items and a proportion of floor area dedicated to the associated storage, administration and service desks). As this figure is approximately half of the total floor area, it cannot reasonably be considered as representing an incidental use of the premises.
- * On face value, it cannot be determined that the “associated accessories” referred to in the application can be classified within the ‘showroom’ use definition. It is assumed that the term “associated accessories” refers to items, such as bicycle helmets, table tennis paddles, boxing gloves, etcetera.
- * Further to the floor space area calculation, there needs to be consideration given to the number of items displayed for retail sale. For example, there would only be a relatively small number of basketball hoops (a bulky item) displayed in the same amount of area that a relatively large number of T-shirts (a non-bulky item) would be displayed in.
- * In relation to projected sales calculations in dollar amounts for the ‘shop’ use, the applicant states that 23% of total sales will be related to non-bulky items. From reviewing the provided table of projected sales breakdown and percentage figures, it can be determined that approximately 44.2% of the total projected sales will be related to non-bulky items. Again, this is nearly half of the total projected sales and cannot be considered to be akin to an incidental use. Notwithstanding, a consideration of the volume of sales alone is problematic, as bulky items are generally higher in price than non-bulky items.
- * The repair of fitness equipment and bicycles is incidental to the ‘showroom’ use, being an ‘industry-service’ use (1.7% of total floor area and 3.7% in total projected sales). Therefore, this activity has not been included in the City of Bunbury’s assessment calculations for ‘showroom’ use.

Albeit that the applicant has provided an estimated percentage breakdown of floor space areas and projected sales figures between bulky goods and other shop/ retail items, the ongoing operation of the business as a ‘showroom’ use in accordance to those estimations would be problematic to enforce, due to exposure to unavoidable market forces (i.e. changing customer demands, prices, trends, etc.).

In the circumstance where the grant of planning approval was possible, the ‘responsible authority’ would need to be certain that the proposal demonstrated beyond reasonable doubt:

- * veracity of land use classification as a ‘showroom’; and

- * that the floorspace estimates for predominate and incidental uses were correct and fixed, and not subject to significant variation, over time, as this would potentially invalidate any planning approval.

Also, as outlined above, there are discrepancies between the classification of items and percentage breakdowns. There would need to be consensus between the “responsible authority” granting planning approval and the applicant on what type of goods would be established as being bulky and non-bulky items.

At the time of writing this report, there are number sports and surf equipment/ apparel retailers in the Bunbury city centre. Those retailers are classified under the Scheme as a ‘shop’ use, and are located in the ‘City Centre Zone’ where a ‘shop’ use is permitted. Site visits have established that those retailers normally display and sell a range of bulky and non-bulky products similar to the proposal in question (e.g. basketball hoops, trampolines, gym weight machines, kayaks, surfboards, etc.).

If operated as a ‘shop’ use in the ‘Mixed Business Zone’, the proposal would be contrary to the Scheme, as well as, the objectives of the WAPC’s Greater Bunbury and City of Bunbury strategic planning documents, particularly as a ‘shop’ use in the ‘Mixed Business Zone’ is likely to have a marked adverse economic impact on the future mix of retailers in the city centre and other suburban activity centres. Conversely, the function and affordability of land in the ‘Mixed Business Zone’ may be compromised as large format traders, such as genuine showrooming and warehousing business, are priced out of this dedicated area due to market forces, if shops were permitted to compete for the same tenancies.

It is recommended that the change of use application should be refused, due to the land use being ‘not permitted’ in the zone and contrary to the objectives of both Commission and Council adopted planning frameworks.

Analysis of Financial and Budget Implications

The application for planning approval to permit the change of use relates to a private lot, and therefore, the development and or use of the land itself has no direct budgetary or financial implications for the City of Bunbury.

The City of Bunbury has incurred legal costs for advice and representation in relation to a very similar application the subject of a previous SAT appeal withdrawn by the then applicant (the landowner) in April 2015.

Should the current applicant be aggrieved by the Council decision to refuse the application then they may seek an appeal for a review of the decision by the SAT. If the decision is forwarded to SAT for an appeal, the City of Bunbury may incur some legal costs.

The Development Application was lodged on the 30 April 2015. The City is required to determine the application within 60 days (29 June 2015). If the application had been advertised this would have extended the period for decision to 90 days. The applicant can regarded this application as a deemed refusal as the timeframe for decision has expired. The applicant has not advised of an extension of time for Council’s consideration, hence the opportunity to refer this matter to the SAT, regardless of Council’s decision on 7 July.

Should a third party, for example a business competitor, government agency or a person be aggrieved by the Council decision to approve an application "beyond its powers", they may challenge that decision in the Supreme Court by way of a *Writ of Certiorari*, a form of judicial review to the Supreme Court, whereby a person may seek an order to be issued by the Court against a tribunal, local government, public body or official, requiring it to perform a duty that it has failed to perform (i.e. the Council failing to implement the Scheme correctly). Should judicial review of Council's decision occur then the City of Bunbury would incur significant legal costs.

The City of Bunbury has a statutory duty under the *Planning and Development Act 2005* to properly administer its Local Planning Scheme by making "orderly and proper" planning decisions.

Community Consultation

The recommendation is to refuse the application for planning approval for a change of use of the subject site as proposed. Accordingly, the application has not been advertised for public comment.

Councillor/Officer Consultation

The proposal has been referred to the City of Bunbury's Development Coordination Unit (DCU) for professional advice and technical assessment, prior to the finalisation of this report.

Delegation of Authority

The proposed change of use is referred to the Council for decision, as officers of the City of Bunbury do not have delegation to refuse applications for planning approval.

Relevant Precedents

In 2014, an application for planning approval (reference DA/2013/289/1) was lodged for the proposed change of use of a tenancy to support the relocation of the business Rusticana to the Homemaker Centre, which is located in the 'Mixed Business Zone'. The application was refused at the Ordinary Council Meeting on 18 February 2014, as the proposal:

- * fell within the definition of 'shop' use class, and in accordance with the Scheme's zoning table, was an 'X' a 'not permitted use' in the 'Mixed Business Zone'; and
- * was considered to be contrary to strategic land use policy objectives, and hence, not consistent with "orderly and proper planning".

The decision was appealed at the SAT, resulting in the tribunal directing the Council to reconsider the application with the benefit of additional information supplied by the applicant to the Ordinary Council Meeting on 19 August 2014, where the previous decision of refusal was upheld.

In 2010, an application for planning approval (reference number: DA/2010/88/1) was lodged for the proposed establishment of an additional use class not listed, namely 'other retail – apparel' in the 'Mixed Business Zone'. This application was refused at the Ordinary Council Meeting on 08 June 2010 as the proposal involved a retailing element that fell within the 'shop' use class, and in accordance with the Scheme's zoning table, was deemed to be an 'X' 'not permitted use' in the 'Mixed Business Zone'.

10.5 Director Works and Services Reports

Nil.

11. Applications for Leave of Absence

Nil.

12. Motions on Notice

No Motions on Notice had been received at the time of printing.

13. Questions on Notice

13.1 Response to Previous Questions from Members taken on Notice

Nil.

13.2 Questions from Members

14. New Business of an Urgent Nature Introduced by Decision of the Meeting

15. Meeting Closed to Public

15.1 Matters for which the Meeting may be Closed

15.2 Public Reading of Resolutions that may be made Public

16. Closure