3.8 PROPOSED MODIFICATIONS TO RESTAURANT (CHILDREN’S PLAY AREA, KIOSK, CANOPIES, LANDSCAPING) - LOT 211 (NO.2931) WEST SWAN ROAD, CAVERSHAM (DA927-15/A)

Ward: (Swan Valley/Gidgegannup Ward) (Statutory Planning)

Disclosure of Interest: Nil.

Authorised Officer: (Executive Manager Planning & Development)

KEY ISSUES

• Council previously approved an application (DA 927/2015) for a Restaurant on this property, at the Ordinary Council Meeting of 10 May 2017. The applicants now seek approval for various minor amendments to the approved plans, comprising a children's playground, kiosk, new shade sails and canopies, and amendments to the previously approved landscaping plan.

• The application was advertised for public comment and no objections were received. The owner of the adjoining lot expressed concerns about customers trespassing into his property. The applicants’ addition of a fence around the proposed children's play area is considered to address this concern.

• The Swan Valley Planning Committee (SVPC) resolved not to support the application at their meeting of 6 May 2019. They considered that the proposed development was incompatible with the rural character of the area. Furthermore, they objected to additional development within 10m of the northern boundary on the basis it could inhibit agricultural activities on the adjoining Lot 210 (No.3003) West Swan Road, as well as generating a noise nuisance for neighbours there.

• The previous application for a Restaurant on this property was approved by the Western Australian Planning Commission (WAPC), after the SVPC resolved not to support it. The existing approved development includes a large alfresco dining area which is set back 5m from the northern boundary.

• Since the current application was reviewed by the SVPC, the applicants have revised their plans to remove all proposed structures within 5m of the northern boundary, and to retain two rows of vines within this area. They have also deleted a proposed verandah at the western end of the building.

• The SVPC’s concern about development within the 10m northern setback is considered to be misplaced for the following reasons:
  - The WAPC has already approved the alfresco area within this location. The playground and other new developments (as per the revised plans) do not encroach any closer to the northern boundary.
  - The closest vines under active cultivation on the adjoining lot are approximately 45m from the common boundary, and the most affected neighbour does not object to the proposal. Accordingly, the proposal is not considered to inhibit existing agricultural activities there.
o It is considered unreasonable and arbitrary to refuse the development based on the idea it may inhibit the "future" use of the adjoining lot for agriculture. This principle was emphasised in a recent WA State Administrative Tribunal decision (WASAT 24 [2019]) over another property within the Swan Valley.

o There is currently no house on the adjoining Lot 210 (No.3003), and thus no residents who would be affected by noise from the children's play area.

- The revised proposal is considered to be consistent with the protection of viticulture and the preservation of the rural character of the area. Accordingly, it is considered to be consistent with the objectives of the Swan Valley Rural zone under Local Planning Scheme No.17, and the Planning Objectives for Area B under the Swan Valley Planning Act 1995.

It is recommended that the Council resolve to approve the proposed Modifications to the Restaurant (Children's Play Area, Kiosk, Canopies, Landscaping) at Lot 211 (No.2931) West Swan Road, Caversham subject to conditions as previously applied, and new conditions, and to refer the application to the Western Australian Planning Commission for determination under the Metropolitan Region Scheme.

**AUTHORITY/DISCRETION**

Pursuant to cl.30B(5) of the Metropolitan Region Scheme (MRS), where the City of Swan does not accept the advice/recommendation of the Swan Valley Planning Committee (in relation to an application), the City of Swan is required to refer the application together with any recommendations provided by all bodies consulted, and the reasons why the advice/recommendation of the Committee is not accepted by the City of Swan, to the Western Australian Planning Commission for determination under the MRS.

Notwithstanding this, the City of Swan and/or its Council is still required pursuant to cl.10.3 of Local Planning Scheme No.17 (LPS17) to determine the application under LPS 17. In this regard, Council has discretion to approve (with or without conditions) or refuse the application.

**DETAILS OF THE PROPOSAL**

| Applicant: | Edit Architecture (Robert Olivieri) |
| Owner: | Menchetti Nominees Pty Ltd (Director: Gino Menchetti) |
| Zoning: | LPS17 - Swan Valley Rural (Area B) |
| Strategy/Policy: | NA |
| Development Scheme: | Local Planning Scheme No 17 |
| Existing Land Use: | Single House, Restaurant (under construction), Vineyard |
| Lot Size: | 25,011m² |
| Use Class: | Restaurant 'D' |
Ordinary Meeting of Council
03 July 2019

The existing approved Restaurant development is conceived as a family-oriented development which will offer a lower-budget dining experience than many other establishments in the Swan Valley. Its centrepiece is a vintage Italian pasta making machine. Patrons will be able to see how pasta is made and children can try their hands at making pasta with their parents, while they visit the restaurant.

The Restaurant as already approved comprises:

- An internal floor area of approximately 498m²;
- 87 car parking bays, including three (3) disabled bays and two (2) bus parking bays, which would cater to up to 348 persons when assessed against the City's parking standards;
- Seating capacity for 270 - 300 patrons;
- Landscaped areas with grape vines, to screen parking areas and the building from the street; and to allow diners to eat among the vines.
- The building is tilt up concrete, with a mixture of stone cladding, timber look colorbond cladding, and painted concrete finishes.

The amendments / additions proposed under the current application comprise:

- New children's play area (playground, adjoining artificial turf area, and shade sails) to the west of the building;
- A new kiosk next to this, at the western end of the building. The kiosk is envisaged to sell ice cream and soft drinks.
- A new entry canopy leading from the carpark to the main entrance.
- A new canopy over the existing servery at the front of the building.
- Alterations to the previously approved landscaping plan:
  - The approved landscaping plan maintained the same number of vines on the property pre- and post development, by replacing vines which were removed to facilitate the development, elsewhere on the property. The revised plan removes most of the "replacement vines" to the west of the playground area, and some along the West Swan Rd frontage. Overall there would be a total of 78 vines lost from the property.

Removal of grape vines in itself does not require planning approval under LPS17. However, as the vines effectively form the landscaping component of the development, changes may affect how compatible the development is with its rural setting.
DESCRIPTION OF SITE

The subject site is located approximately 3km north of the Guildford Town Site on West Swan Road and backs onto Taylors Estate (a new residential estate in Caversham). It is 150m south west of Sandalford Winery and many of the surrounding nearby properties also have vineyards.

The property accommodates the approved Restaurant development (currently under construction), a single house and a shed, and also includes an area under vine which produces seeded grapes.

The development on the adjoining lot to the north (Lot 210, No.3003 West Swan Road) is also relevant to this application. This lot has some active viticulture on it, with six (6) rows of vines just inside the northern boundary of the property (some 45m away from the common boundary with the subject lot) and another area of vines at the rear of the property (over 150m from the proposed playground). There is no house, but there is a shed. There are also rows of stumps on the property from grape vines which have been culled.

OTHER RELEVANT PREVIOUS DECISIONS OF COUNCIL

The original application DA927/15 was approved at the Council Meeting of 10 May 2017. The major issue for consideration was whether the proposal was compatible with the rural character of the area, and the protection of viticulture, in accordance with the Swan Valley Planning Act Objectives for Area B.

In approving the application, Council went against the advice of the SVPC. The application was then referred to the WAPC for final determination under the Metropolitan Region Scheme, and was approved.

CONSULTATION

Public Advertising

Public consultation was completed as per the following:

Duration - 14 days from 17 April 2019 to 1 May 2019.

Method - Sign on Site (on West Swan Road), notification letters to owners and occupiers of nine (9) nearby properties, notification letters to five (5) Interest Groups (Swan Valley Tourism Alliance, Swan Valley Progress Association, Swan Valley Regional Networks, Grape Growers Association of WA (Inc) and Swan Valley and Regional Winemaker’s Association)

Submissions Received - None during the public comment period. The neighbouring landowner to the north made a late submission (after being contacted) in which he confirmed that he had no objection to the proposal, but did have some concerns about customers trespassing on his property. He also provided advice about the agriculture activities on his own property.
Swan Valley Planning Committee (SVPC)

The application was referred to the SVPC, who at their meeting of 6 May 2019 resolved to recommend that the proposal be refused for the following reasons:

"The application is inconsistent with the planning objectives for Area B as listed in the Swan Valley Planning Act 1995, specifically clause 8.6.

Advice: The development of the northern side 10 metre setback area for alfresco or playground areas is inappropriate and may impact existing and future agricultural productivity and quiet enjoyment of the abutting rural property to the north."

It is noted that the applicants have submitted revised plans, since the version that was reviewed by the SVPC. The revised plans now show: a playground area which is reduced in size, so that it now extends no closer than 5m to the northern boundary; removal of shade sails previously proposed along the north side of the building; deletion of a new verandah at the western end of the building; retention of both existing rows of vines along the north side of the restaurant (previously one (1) was proposed to be removed); and changes to the landscaping plan showing vines around the restaurant and carpark.

DETAILS

Zoning and Permissibility of Land Use

The subject property is zoned 'Rural' under the Metropolitan Region Scheme (MRS) and 'Swan Valley Rural' under the City's Local Planning Scheme No.17 (LPS 17).

The existing development (approved under DA927/2015) is classified as a 'Restaurant' under LPS17 and as such is a 'D' use within the Swan Valley Rural zone. This means that the use is not permitted unless the local government has exercised its discretion by granting planning approval.

The current proposal represents minor extensions and alterations to the existing approved 'Restaurant' on the site.

Planning Framework

The Restaurant on site has already been approved. Concerns raised by the SVPC relate to the proposed development not being compatible with the rural character of the area, and potentially impacting on nearby agricultural activities.

The following objectives of LPS17 and the Swan Valley Planning Act 1995 are relevant to consideration of the proposed amendments:

LPS17 - Objectives for the Swan Valley Rural Zone

a. Promote the core area of the Swan Valley primarily as a horticultural, recreation, tourism and landscape resource

b. Ensure that the development and use of land accords with the planning objectives for Area B as specified in the Swan Valley Planning Act 1995.
Swan Valley Planning Act (1995) - Objectives for Area B

1) The protection of viticulture.

6) The compatibility of design, siting and landscaping with the character of the area.

7) The discouragement of uses that are incompatible with the rural character and traditional agricultural activities of the area.

Compatibility with Rural Character

The following discussion is a technical assessment of the proposed modifications' impact on rural character and their appropriateness.

Visual impact

The proposed modifications are considered to have minimal visual impact on surrounding properties, or on West Swan Road. The modifications are all well set back from West Swan Road, and will be screened by many rows of vines around the building. The largest elements (play area and kiosk) will be screened from the road by the existing building. No neighbouring landowners or community groups have submitted any concerns about the visual impact of the development, including the most affected neighbour, immediately to the north.

The applicants have amended their plans since the SVPC meeting. The revisions, including deletion of shade sails along the northern facade of the building, restoration of a second row of vines in the same location, and a minor reduction in size to the play area so that it is now 5m from the northern boundary, will further reduce any visual impact on the property to the north.

Changes to the landscaping plan reduce the number of vines proposed on the property, in order to preserve an existing access track at the rear of the building. However, the vines remaining will still effectively screen the development from view of West Swan Road and from adjoining properties.

There are no planning guidelines for building design within the Swan Valley. It is considered that the proposed modifications are well integrated with the existing development, well screened from public view, and consistent with the rural amenity of the area.

Noise and security

The SVPC have raised concerns about the development's impact on the "quiet enjoyment" of the adjoining lot to the north.

The applicants have explained that the children's play area is proposed to be in line with the existing building, so that parents sitting in the alfresco area can maintain direct supervision of their children as they play.

The children's play area and kiosk is likely to generate additional noise and activity in the area close to the northern boundary. However, there is no house on the adjoining property at present, and thus no residents to be affected.
The adjoining landowner confirmed he had no objection to the proposal, but had concerns about customers trespassing into his property. In response, the applicants have proposed a fence around the play area, on the revised plans. It is considered that this would adequately prevent customers from wandering out of the play area. This is the only new element under the current proposal likely to attract customers to the area near the northern boundary.

Compatibility with Viticulture

The SVPC has raised concerns about the development's potential to impact on the future agricultural productivity of the adjoining property to the north (Lot 210). Presumably, they are concerned that activities which attract customers to the northernmost area of the subject lot may inhibit agricultural activities next door, due to conflict with noise / dust / spray drift or odour, generated by agricultural activities.

The alfresco area has already been approved in this location. The question is how much "more" would the addition of a play area and kiosk inhibit nearby agricultural activity.

A recent WA State Administrative Tribunal case examined the issue of "protection of viticulture" in an appeal over a City of Swan refusal of a Place of Worship application in the Swan Valley (Radha Soami Satsang Beas Australia and City of Swan [2019] WASAT 24). At paragraphs 55 to 66 (inclusive) of the published decision, the SAT found that the objective of the protection of viticulture should be interpreted as the protection of viticulture that already exists and not construed as prohibiting a use that would prevent land from being used for future viticulture.

The SAT noted that the decision maker should generally be inclined towards approving uses that are to be encouraged under the Objectives, with regard to any other relevant objectives. They ruled that it was unreasonable (and likely to be unlawful) to impose restrictions (such as buffer zones) on a development because it could affect "future" agriculture nearby, as there was too much uncertainty involved. They stated that it would be the responsibility of future developers applying for new agricultural development, to incorporate buffers on their own land, if they were required.

Currently, the adjoining lot to the north (Lot 210) has some limited viticultural activity. There are six (6) rows of vines just inside its northern boundary, some 45m from the common boundary with the subject lot; and vines at the very rear of the property (over 150m from the proposed playground). There are also some rows of dormant vines (chopped back to stumps) throughout the property. The adjoining landowner advises that he has culled most of his grape vines due to issues controlling birds and damage to farm equipment from intruders. The only grapes that he sprays are those near the northern boundary, but he sprays and slashes the rest of the property for weed control.

This neighbour has not raised any concerns about the development impacting on his agricultural activities. Given the distance to the vines (50m from the proposed play area), it appears unlikely that the development would inhibit his existing activities. If there is any impact from spray drift 50m away, it seems unlikely that a 5m increase in setback, as the SVPC desires, would make any significant difference.

It would be unreasonable to refuse the proposal, or to require modifications, on the basis of speculative "future" development on the adjoining lot. The adjoining landowner has a right to continue to carry out activities to maintain his lot, and if this impacts on the amenity of the restaurant, it would fall on the restaurant to take steps to protect the amenity of their customers.
Car Parking and Occupancy Limits

Generally, applications for Restaurants are approved subject to a condition which specifies maximum occupancy. The City's Vehicle Parking Standards for a Restaurant are based on the number of occupants, not total floorspace.

The existing approval has no such condition and thus no mechanism to ensure the development does not grow beyond its capacity. The current application proposes to add useable area to the Restaurant.

The existing approved development was described as a development which would cater for up to 300 patrons, and was advertised and assessed on that basis. It has 87 parking bays, and two (2) bus parking bays, which would accommodate up to 348 persons when assessed against the City's parking standards. Condition 4 of the existing approval states that a minimum of 75 parking bays shall be provided.

As the Restaurant has already been assessed for its suitability to cater to 300 people, it is recommended that a new condition specifying a maximum occupancy of 300 people be applied.

Aircraft Noise

The property falls within the ANEF 20-25 noise contour. Under State Planning Policy 5.1 - Land Use Planning in the Vicinity of Perth Airport, a Public Building is a land use which is "Conditionally Acceptable" within this noise contour. ("Public Building" being the best fit among those listed, for the proposed Restaurant).

Accordingly, a new condition is recommended for a notification on the title to alert future owners to the aircraft noise nuisance, in line with the policy requirements.

OPTIONS AND IMPLICATIONS

Option 1: That Council resolve to approve the application for the proposed Modifications to the Restaurant (Children's Play Area, Kiosk, Canopies, Landscaping) at Lot 211 (No.2931) West Swan Road, Caversham, subject to conditions pursuant to its Local Planning Scheme No.17; and to refer the application to the WAPC with a recommendation to approve it under the Metropolitan Region Scheme.

Implications: In accordance with Clause 26(3) of the Metropolitan Region Scheme, the application is forwarded to the WAPC for determination pursuant to the MRS.

This is the recommended option.
Option 2: That Council resolve to refuse the application for the proposed Modifications to the Restaurant (Children's Play Area, Kiosk, Canopies, Landscaping) at Lot 211 (No.2931) West Swan Road, Caversham, for the following reasons:

1. The proposal is considered to be inconsistent with the Planning Objectives for Area B of the Swan Valley Planning Act 1995 and therein is incompatible with the objectives of the Swan Valley Rural zone as outlined in the City's Local Planning Scheme No.17 on the grounds that:

   i. The proposed development is incompatible with the rural character of the surrounding area; and

   ii. may impact on existing and future agricultural productivity and quiet enjoyment of the abutting rural property to the north.

Implications: In accordance with Clause 26(2) of the MRS, a decision consistent with the advice of the Swan Valley Planning Committee by the City of Swan under the Local Planning Scheme is taken to be a determination under the MRS. If the application is refused and the applicant is aggrieved by this determination, the applicant will have a right of review at the State Administrative Tribunal.

This is not the recommended option.

CONCLUSION

The proposal comprises relatively minor additions and alterations to an existing approved development. The proposed modifications are considered to meet the LPS17 objectives for the Swan Valley Rural zone, inclusive of the planning objectives for Area B under the Swan Valley Planning Act 1995. They are considered to be consistent with the protection of viticulture and the preservation of the rural character of the area.

The SVPC does not support development within 10m of the northern boundary of the property, due to perceived impact on "rural character" and its potential to inhibit future agricultural activities, and "quiet enjoyment" on the adjoining lot to the north. The City considers this is unreasonable, given that:

- The development already has approval for an alfresco area set back 5m from the northern boundary, and the proposed development is a logical extension of it;

- The modifications will have minor additional visual impact compared to the existing building, and are well screened from public view by vines;

- The proposal was widely advertised, and no neighbours or community members have expressed objections;

- The existing viticulture operations on the adjoining property to the north are located 50m away from the proposed development, and the landowner of that property has clearly expressed no objection to the proposal; and

- The WA State Administrative Tribunal has recently ruled that it is unreasonable to impose restrictions on a proposed development due to concerns about impact on "future" agricultural / viticultural use nearby.
Approval is recommended, subject to the same conditions as the original approval, plus new conditions for:

- Maximum occupancy (as explained above); and
- Aircraft Noise notification (as explained above);
- A fence around the play area, to restrict customers wandering into the neighbouring property; and
- Implementation of the landscaping plan (this was not required as a condition on the original approval).

ATTACHMENTS

Location plan (aerial photo)
Aerial photo showing locations of existing vines on adjoining property
Plans submitted for approval
Site photos - showing development near northern boundary, and viticulture on adjoining property

STRATEGIC IMPLICATIONS

Nil.

STATUTORY IMPLICATIONS

Planning and Development Act 2005
Swan Valley Planning Act 1995
Local Planning Scheme No 17
Local Planning Policy POL-TP-129 – Vehicle Parking Standards
Local Planning Policy POL-TP-126 – Building and Development Standards Rural Zones

FINANCIAL IMPLICATIONS

The average cost for a Hearing to defend Council's decision at the State Administrative Tribunal is $60,000.
VOTING REQUIREMENTS

Simple majority

RECOMMENDATION

That the Council resolve to:

1) Not accept the advice of the Swan Valley Planning Committee, and approve the application for the proposed Modifications to the Restaurant (Children's Play Area, Kiosk, Canopies, Landscaping) at Lot 211 (No.2931) West Swan Road, Caversham, subject to the following conditions:

1. This approval is for “Restaurant” as defined in the City’s Local Planning Scheme No.17 and the subject land may not be used for any other use without the prior approval of the City.

2. There shall be no more than 300 persons on the premises at any one time (including staff and customers). If it is proposed to increase numbers, a further planning approval will be required.

3. Prior to a building permit being issued, a Notification under Section 70A of the Transfer of Land Act 1893 must be registered over the certificate of title to the land the subject of the proposed development to notify current and prospective land owners of the implications of aircraft noise in the area.

4. A 1.2m high wire mesh fence shall be installed along the boundary of the playground (as shown on the approved plan) to prevent children / customers entering into the neighbouring property Lot 210 (No.3003) West Swan Road, Caversham, to the satisfaction of the City of Swan.

5. The approved landscaping plan (Drawing DA2, showing vines to be retained and new vines planted) must be fully implemented within the first available planting season after the initial occupation of the development, and maintained thereafter, to the satisfaction of the City of Swan. Any species which fail to establish within the first two planting seasons following implementation must be replaced in consultation with and to the satisfaction of the City of Swan.

6. Landscaping, drainage, parking areas, pavement, kerbing, line marking as depicted on the approved plans shall be maintained at all times to the satisfaction of the City.

7. Provision must be made for access and facilities for use by people with disabilities in accordance with provisions of the Building Code of Australia and AS 1428.1.

8. A minimum of 75 parking bays shall be provided, clearly marked on the ground. Disabled bays to comply with Australian Standard 2890.6.

9. Vehicle access onto the site shall be restricted to that shown on the approved site plan.
10. Any existing vehicle crossover not included as part of the proposed development on the approved plan shall be removed, and the verge and kerb reinstated prior to the practical completion of the development to the City’s satisfaction.

11. Hardstand pavement is to be designed to withstand anticipated loads and drained to the satisfaction of the City’s engineering department.

12. Vehicle parking area, access and circulation areas must be sealed, kerbed, drained and maintained to the satisfaction of the City, in accordance with the approved plans.

13. All stormwater produced on the site shall be disposed of on the site to the satisfaction of the Chief Executive Officer.

14. All crossovers must be built and maintained in accordance with City’s specifications.

15. All construction works within the road reserve including crossovers, drainage infrastructure, service adjustment, landscaping and footpath placement or reinstatement, must be built and maintained in accordance with the City’s specifications. Failure to do so may result in these works being removed and reinstated by the City at the applicant’s expense.

16. At occupancy, the owner is responsible for the maintenance of the crossover, landscaping and reticulation in the verge.

17. The applicant is to ascertain the location and depth of any services that may interfere with this development. Any adjustment to these services required as part of this approval, must be arranged by the applicant prior to works commencing on the site. Any adjustment must be approved by the relevant service authorities and will be at the applicant’s expense.

18. Any additional development, which is not in accordance with the application (the subject of this approval) or any condition of approval, will require further approval of the City.

2) Forward the complete application and the resolution of Council to the Western Australian Planning Commission, recommending approval under the Metropolitan Region Scheme.

3) Advise the applicant / owner of the resolution of Council.

4) Advise all those who lodged a submission of the Council's decision accordingly.

CARRIED
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Aerial photo
2931 West Swan Road highlighted in red

28/05/2019
1:2500
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Location of vines under active cultivation on adjoining No. 3003 West Swan Rd.

31/05/2019
1:2000
LOT 211 WEST SWAN ROAD, CAVERSHAM
PROPOSED RESTAURANT

Revised plans received 5/6/2019 at City of Swan
Revised plans received 5/6/2019 at City of Swan
Revised plans received 5/6/2019 at City of Swan
Revised plans received 5/6/2019
at City of Swan
View towards West Swan Rd, from northern side of restaurant building. Alfresco area on right.

Site visit undertaken 23.5.19.
Adjoining lot to north (No. 3003 West Swan Rd), view from West Swan Rd to west.

Grapevines under active cultivation:
1. 6 rows on the northern lot boundary (right of photo).
2. An area at the rear of the lot (approx. 285m from West Swan Rd).

There are some vines in the middle of the property (stumps) but not apparently under active cultivation.

Site visit undertaken 28.5.19.
Adjoining lot to north (No. 3003 West Swan Rd). View east towards West Swan Rd.

Vines in the centre of the property do not appear to be under active cultivation. Some rows of stumps remaining.

Site visit 28.5.19
Adjoining lot to north (No. 3003 West Swan Rd). View west - from behind green shed.

Tall vines to left are on subject lot (2931 West Swan Rd).

There are more vines at the very rear of No. 3003 (rearmost 75 m or so, immediately in front of gum trees)

Site visit 28.5.19
Adjoining lot to north (No. 3003 West Swan Rd). View across area immediately north of restaurant / alfresco.

It appears no vines are under active cultivation in this area, although there are some stumps.

Site visit 28.5.19