



# Regional Joint Development Assessment Panel Agenda

**Meeting Date and Time:** Thursday, 3 February 2022; 9:30am  
**Meeting Number:** RJDAP/44  
**Meeting Venue:** Electronic Means

To connect to the meeting via your computer - <https://zoom.us/j/98033194609>

To connect to the meeting via teleconference dial the following phone number -  
**+61 8 7150 1149**

Insert Meeting ID followed by the hash (#) key when prompted - **980 3319 4609**

*This DAP meeting will be conducted by electronic means (Zoom) open to the public rather than requiring attendance in person.*

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## **Attendance**

### **DAP Members**

Ms Kanella Hope (A/Presiding Member)  
Ms Lee O'Donohue (A/Deputy Presiding Member)  
Mr Justin Page (Third Specialist Member)  
Cr Julia Meldrum (Local Government Member, Shire of Augusta-Margaret River)  
Cr David Binks (Local Government Member, Shire of Augusta-Margaret River)

### **Officers in attendance**

Ms Angela Satre (Shire of Augusta-Margaret River)  
Ms Harriet Park (Shire of Augusta-Margaret River)

### **Minute Secretary**

Ms Adele McMahon (DAP Secretariat)

### **Applicants and Submitters**

Mr Tayne Evershed (Planning Solutions)

### **Members of the Public / Media**

Nil.

#### **1. Opening of Meeting, Welcome and Acknowledgement**

The A/Presiding Member declares the meeting open and acknowledges the traditional owners and pay respects to Elders past and present of the land on which the meeting is being held.

This meeting is being conducted by electronic means (Zoom) open to the public. Members are reminded to announce their name and title prior to speaking.

#### **2. Apologies**

Mr Paul Kotsoglo (Presiding Member)

#### **3. Members on Leave of Absence**

Nil.

#### **4. Noting of Minutes**

Signed minutes of previous meetings are available on the [DAP website](#).

#### **5. Declarations of Due Consideration**

Any member who is not familiar with the substance of any report or other information provided for consideration at the DAP meeting must declare that fact before the meeting considers the matter.



## 6. Disclosure of Interests

Member	Item	Nature of Interest
Mr Paul Kotsoglo	9.1	Direct Pecuniary Interest – Mr Kotsoglo is the Managing Director of Planning Solutions, the applicant for this application

## 7. Deputations and Presentations

- 7.1 Mr Tayne Evershed (Planning Solutions) presenting against the recommendation for the application at Item 9.1. The presentation will address the reasons in support of deleting condition 6.

The Shire of Augusta-Margaret River may be provided with the opportunity to respond to questions of the panel, as invited by the A/Presiding Member.

## 8. Form 1 – Responsible Authority Reports – DAP Applications

Nil.

## 9. Form 2 – Responsible Authority Reports – DAP Amendment or Cancellation of Approval

### 9.1 Lot 2953 (168) Clews Road and Strata Lot 1 (261A) Fifty One Road, Cowaramup

Development Description:	Proposed Winery, Restaurant and Cellar Door, and Special Events
Proposed Amendments:	Deletion of Condition 6 of originally approved Form 1 application (DAP Ref: 21/0194)
Applicant:	Planning Solutions
Owner:	HAT Southwest Investments Pty Ltd
Responsible Authority:	Shire of Augusta-Margaret River
DAP File No:	DAP/21/01945



## 10. State Administrative Tribunal Applications and Supreme Court Appeals

Current SAT Applications				
File No. & SAT DR No.	LG Name	Property Location	Application Description	Date Lodged
DP/14/00039 DR 65/2020	Shire of York	Lots 4869 (2256), 5931, 9926 (2948) and 26934 Great Southern Highway, St Ronans	Construction and Use of Allawuna Farm for the purposes of a Class II Landfill	28 July 2020
DAP/21/02063 DR241/2021	Shire of Dardanup	Lot 2 Banksia Road, Crooked Brook	Cleanaway Dardanup Landfill Facility	5 November 2021
DAP/21/02102 DR11/2022	City of Busselton	Lot 108 (No.57) Dunn Bay Road & Lot 109 (No. 6) Cyrilleen Way, Dunsborough	Mixed Use Development (Office, Shops, Restaurant/Cafe, Liquor Store – Small & 42 Multiple Dwellings)	13 January 2022

## 11. General Business

In accordance with Section 7.3 of the DAP Standing Orders 2020 only the Presiding Member may publicly comment on the operations or determinations of a DAP and other DAP members should not be approached to make comment.

## 12. Meeting Closure



## Presentation Request Form

[Regulation 40\(3\)](#) and [DAP Standing Orders 2020](#) cl. 3.5

**Must be submitted at least 72 hours (3 ordinary days) before the meeting**

### Presentation Request Guidelines

Persons interested in presenting to a DAP must first consider whether their concern has been adequately addressed in the responsible authority report or other submissions. Your request will be determined by the Presiding Member based on individual merit and likely contribution to assist the DAP's consideration and determination of the application.

Presentations are not to exceed **5 minutes**. It is important to note that the presentation content will be **published on the DAP website** as part of the meeting agenda.

Please complete a separate form for each presenter and submit to [daps@dplh.wa.gov.au](mailto:daps@dplh.wa.gov.au)

### Presenter Details

Name	Tayne Evershed
Company (if applicable)	Planning Solutions
Please identify if you have any special requirements:	<b>YES</b> <input type="checkbox"/> <b>NO</b> <input checked="" type="checkbox"/> If yes, please state any accessibility or special requirements: Click or tap here to enter text.

### Meeting Details

DAP Name	Regional Joint Development Assessment Panel
Meeting Date	03.02.2022
DAP Application Number	DAP/21/01945
Property Location	168 Clews Road, Cowaramup
Agenda Item Number	9.1

### Presentation Details

I have read the contents of the report contained in the Agenda and note that my presentation content will be published as part of the Agenda:	<b>YES</b> <input checked="" type="checkbox"/>
Is the presentation in support of or against the <u>report recommendation</u> ? ( <i>contained within the Agenda</i> )	<b>SUPPORT</b> <input type="checkbox"/> <b>AGAINST</b> <input checked="" type="checkbox"/>
Is the presentation in support of or against the <u>proposed development</u> ?	<b>SUPPORT</b> <input checked="" type="checkbox"/> <b>AGAINST</b> <input type="checkbox"/>
Will the presentation require power-point facilities?	<b>YES</b> <input type="checkbox"/> <b>NO</b> <input checked="" type="checkbox"/> <b>If yes, please attach</b>



### **Presentation Content\***

These details may be circulated to the local government and applicant if deemed necessary by the Presiding Member. Handouts or power points will not be accepted on the day.

Brief sentence summary for inclusion on the Agenda	<i>The presentation will address:</i> The reasons in support of deleting condition 6.
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In accordance with Clause 3.5.2 of the [DAP Standing Orders](#), your presentation request must also be accompanied with a written document detailing the content of your presentation.

*Please attach detailed content of presentation or provide below:*

Click or tap here to enter text.

# DAP Presentation Summary

<b>To:</b>	Development Assessment Panel	<b>From:</b>	Planning Solutions
<b>Attention:</b>	Presiding Member and Panel Members	<b>Job No:</b>	7208
<b>Copy to:</b>	DAP Secretariat	<b>Date:</b>	31 January 2022
<b>Subject:</b>	Proposed condition 6 deletion Winery, Cellar Door Sales, and Restaurant Lot 2953 (168) Clews Road and Strata Lot 1 (261a) Fifty One Road, Cowaramup		

Planning Solutions acts on behalf of HAT Southwest Investments P/L, the proponent and operator of a proposed Winery, Restaurant and Cellar Door Sales at the above site.

We do not agree with the Shire's recommendation to retain condition 6 and respectfully request the condition be deleted. In support of this request, we make the following points:

## Inclusion of our submission as a RAR attachment

1. It is regrettable our full submission has not been appended to the Responsible Authority Report (RAR) and instead has been paraphrased. **A copy of our submission attached** (the submission appendices have been removed to reduce this document size).

## Reference to court decision

2. The RAR references "*the findings of the Tribunal in the decision of Permanent Trustee Australia Ltd v City of Wanneroo (1994) 11 SR(WA) 1*". It is unclear what relevance this decision has on the matter because:
  - (a) We understand the case related to the weight to be given to a planning instrument. The matter before the DAP does not relate to a planning instrument as the 'Public Art Policy' has been adopted under the *Local Government Act 1995 (LG Act)*. Given the policy **has not** been adopted as a planning instrument (ie. a Local Planning Policy (LPP)) we say the case has limited application.
  - (b) Even if the case were to apply, the first criteria set down is whether a policy it is based on sound town planning principles. The Shire's policy fails on this point as it has not been adopted under the planning framework.

## Shire's disclosure relating to public art

3. The conclusion in the RAR states the Shire was completely transparent throughout the initial assessment process about its intent to impose the public art condition. We do not dispute this, nor do we dispute the fact we did not object to the imposition of the condition at the original DAP meeting.
4. However, after discussions with the Shire on how best to implement the condition, we undertook a more detailed analysis of the 'Public Art Policy'. It became apparent the policy is not a LPP adopted under the Scheme, nor did it appear to contain any policy objective or provision that would establish a nexus between the development and a need for public art.

## Need and Nexus

5. Clause 67(2)(g) of the deemed provisions requires due regard to be given to "*any local planning policy for the Scheme area*". However, the 'Public Art Policy' is adopted under the LG Act and **is therefore not a LPP**. There is no specific provision under the deemed provisions to give due regard to a policy made under the LG Act.

6. Whilst it may be possible to enliven the Shire's 'Public Art Policy' through the application of clause 67(2)(zb) of the deemed provisions as is suggested in the RAR, there is no nexus between the development and any perceived need to provide public art as a consequence of the development.
7. The 'Public Art Policy' contains a series of objectives. The only objective that could in any way draw a link between the development and the provision of public art would be objective dot point two:
  - *Ensure growth results in a **pleasant built environment** through establishing requirements for Percent for Art Scheme of a way of development. [emphasis added]*
8. The proposed development is of a high standard and has been thoughtfully planned to integrate into its agricultural context with minimal impacts on the landscape. Furthermore, the use is consistent with the character of the locality. Given the standard of development, it would be entirely appropriate to characterise the development as resulting in a pleasant built environment. If this proposition is accepted, then the policy objective is met through the building's architecture without the need to provide public art to enhance the 'pleasantness' of the buildings.
9. In addition, the RAR concludes that, amongst other things:

*...the need for public art arises from the significant change in the cultural tourism landscape with regard to **greater visitor numbers** the development will attract and due to the significant scale of the development. [emphasis added]*
10. The 'Public Art Policy' does not include any objectives or provisions that draw a need and nexus between the number of visitors to a site and the provision of public art. Therefore, the Shire's argument for a "need" is not supported by any provision within the policy.

## CONCLUSION

In conclusion the Shire's 'Public Art Policy' has not been adopted as a Local Planning Policy and therefore does not form part of the planning framework. On this basis alone the policy does not apply.

If the 'Public Art Policy' was to be given some regard through clause 67(2)(zb) of the deemed provisions it should be 'read down' and given little to no weight as it does not serve a proper planning purpose. This is because it does not contain any policy objectives or provisions that demonstrate a need and nexus between the development and provision of public art.



**TAYNE EVERSHED**  
**DIRECTOR**



PS Ref: 7208  
LG Ref: P221048  
DAP Ref: DAP/21/01945

24 November 2021

The Chief Executive Officer  
Shire of Augusta Margaret River  
PO Box 61  
Margaret River WA 6285

Attention: Angela Satre, Statutory Planning Coordinator ([asatre@amrshire.wa.gov.au](mailto:asatre@amrshire.wa.gov.au))

Dear Sir/Madam,

**DAP FORM 2 APPLICATION – REQUEST TO DELETE CONDITION 6  
BROCKMAN WINERY; LOT 2953 (168) CLEWS ROAD AND STRATA LOT 1 (261A) FIFTY ONE  
ROAD, COWARAMUP**

Planning Solutions acts on behalf of the proponent of the approved winery, restaurant and cellar door at Lot 2953 (168) Clews Road and Strata Lot 1 (261a) Fifty One Road, Cowaramup (**subject site**). Approval was granted by the Regional Joint Development Assessment Panel (**JDAP**) on 4 June 2021.

In support of this request to delete condition 6 of the JDAP approval please find enclosed / appended the following documentation:

1. DAP Form 2 application form (enclosed).
2. Certificate of Title applicable to the subject site (**appendix 1**).
3. This submission in support of the condition deletion.

Pursuant to regulation 17(1)(b) of the *Planning and Development (Development Assessment Panel) Regulations 2011 (DAP Regulations)*, this application seeks to delete condition 6 of the planning approval. We respectfully the Shire accepts the application for assessment and forwards it on to the JDAP for processing.

**REASONS FOR DELETING CONDITION 6**

1. Condition 6 of the JDAP approval (**appendix 2**) requires a Public Art contribution in accordance with the Shire's *Governance and Business Excellence Policy 5.8 – Public Art Policy*. The condition states the following:
  6. *Prior to issue of a building permit for the development, the proponent shall make a contribution toward public art in accordance with the Shire's Governance and Business Excellence Policy 5.8 – Public Art Policy based on the cost of the development, excluding works associated with the development of the winery.*
2. The reasons for seeking the deletion of the condition are as follows and expanded on in this submission:
  - (a) A review of the Shire's Policies indicates that no such policy titled Shire's *Governance and Business Excellence Policy 5.8 – Public Art Policy* exists.

- (b) If the policy named in the condition was an error, and the Shire intended to reference its *Corporate and Community Services Policy 15 Public Art (CCSP15)* the policy does not apply as it has not been adopted as a Local Planning Policy under the Shires Local Planning Scheme No. 1 (LPS1).
- (c) Even if the Shire sought to apply the CCSP15 through clause 67(zb) of schedule 2 (**deemed provisions**) of the *Planning and Development (Local Planning Schemes) Regulations 2015, (LPS Regs)* there is no established nexus between the policy and any perceived need to provide public art as a consequence of the development.
- (d) The requirement for a developer contribution for public art does not form part of any Developer Contribution Plan (DCP) within the LPS1.

#### **Policy named in condition does not exist**

- 3. A review of the Shires policies indicates that no such policy titled *Governance and Business Excellence Policy 5.8 – Public Art Policy (GBEP5.8)* currently exists. The GBEP5.8 was adopted by Council at its meeting held on 27 August 2014 (**appendix 3**).
- 4. It appears that sometime between initial adoption of the GBEP5.8 and adoption of the *Corporate and Community Services Policy 15 Public Art (CCSP15)* by Council on 8 April 2020 there was a change to the title and content of the policy. This is likely to have occurred on either 1 November 2019 or 10 February 2020 (as noted in the version history of the CCSP15). However, a review of the Council meeting minutes around November 2019 and February 2020 indicates the November 2019 and February 2020 policy changes were not endorsed by Council and don't appear to have been advertised.
- 5. Given the policy referred to in the Shire's condition does not exist the condition is not enforceable and should be deleted for clarity.

#### **In any event, the GBEP5.8 is not a Local Planning Policy**

- 6. Having reviewed the GBEP5.8 and associated report to Council on 27 August 2014, it is clear the policy was not adopted as a Local Planning Policy under LPS1. In adopting the policy no reference was made to the *Planning and Development Act 2005 (P&D Act)* and LPS1.
- 7. The last page of the GBEP5.8 references the following legislation: The Local Government Act 1995; Heritage of Western Australia Act 1990; National Trust of Australia (WA) Act 1964; and Aboriginal Heritage Act 1972 (Note: no reference to the P&D Act or LPS1).
- 8. Given the GBEP5.8 has been adopted without a head of power under LPS1 or the P&D Act it cannot be relied upon to form the basis or rationale to impose a condition of planning approval.

#### **The CCSP15 is not a Local Planning Policy**

- 9. The current version of the Public Art Policy, titled *Corporate and Community Services Policy 15 Public Art (CCSP15)* was adopted by Council on 8 April 2020 (**appendix 4**), with part 2 of Council's resolution stating that Council: *"Approves the updated Public Arts Policy CCSP15 as shown in Attachment 1."*
- 10. Firstly, under the report heading *"Statutory Environment / Legal Implications"* the only legislation referred to is the *Local Government Act 1995*. The report makes no reference to the P&D Act or LPS1, including the deemed provisions which set out the procedure for making and adopting Local Planning Policies. Therefore, the CCSP15 has not been adopted as a Local Planning Policy.

11. Secondly, in accordance with clause 4 and 87 of the deemed provisions a Local Planning Policy is required to be publicly advertised for a minimum period of 21 days, made available online and with a notice published in the newspaper. Under the report heading “*Consultation and Advice – External Consultation*” the report states “*Nil*”, meaning no public advertising has been undertaken in accordance with the deemed provisions. Whilst the report references workshops and forums these appear to have been part of the policy review process, and not part of the public advertising of the amended policy prior to Council adoption. Therefore, the CCSP15 does not appear to have been advertised in accordance with the requirements of the deemed provisions.
12. In accordance with clause 4(4) - (5) if the Shire resolves to proceed with the Local Planning Policy, then it must publish a notice of its decision in a newspaper, with the policy having effect on the day the notice is published. We have not been able to ascertain whether such a notice has been published. Given the procedures of the deemed provisions do not appear to have been followed we have serious doubts that clause 4(4) - (5) have been adhered to.
13. From our above analysis we have formed the opinion that the Shires CCSP15 is not a Local Planning Policy for the purposes of LPS1 and therefore holds no statutory weight in the planning process and consequently must be given no regard.

### **Need and Nexus**

14. Whilst it may be possible to enliven the CCSP15 through the application of clause 67(zb) of the deemed provisions there is no established nexus between the development and any perceived need to provide public art as a consequence of the development.
15. The CCSP15 contains a series of objectives. The only policy objective that could in any way draw a link between the development and the provision of public art would be objective dot point two:
  - *Ensure growth results in a **pleasant built environment** through establishing requirements for Percent for Art Scheme of a way of development. [emphasis added]*
16. The proposed development is of a high standard and has been thoughtfully planned to integrate into its agricultural context. The building is subtle, well setback from the road, designed to have a minimal impact on the landscape, and the use is consistent with the character of the locality. Given the standard of development, it would be entirely appropriate to characterise the development as resulting in a pleasant built environment. If this proposition is accepted, then the policy objective is met through the building’s architecture without the need to provide public art to enhance the ‘pleasantness’ of the buildings.
17. The policy states that a ‘Developer Contribution’ triggers from any development that exceeds \$1M in value. The ‘Implementation’ section of the policy sets out how the contribution is made and the method of calculating the contribution (1% of the development cost).
18. The implementation section does not draw any link back to the policy objectives. The only criterion for a contribution is the value of the development, rather than an objective analysis of whether the development in some way warrens the provision of public art to somehow make the built environment more pleasant or offset any specific amenity impact.
19. In the absence of the policy having any provisions that meaningfully articulate how the an individual development above \$1M is to achieve the policy objectives it if difficult to see how there is a nexus between the development and an arbitrary contribution based on development value.

## Developer Contributions

20. The April 2020 report under the heading “*Planning Framework*” has a single line as follows: “*Local Planning Strategy – Developer Contributions Scheme*”. It is unclear what is meant by this reference. The Shire has adopted several community infrastructure development contribution plans for development contribution areas; these are listed in Schedule 10 of LPS1.
21. The subject site is within an area covered by DCA1. All properties within the Shire’s municipal boundaries are subject to DCA1. In accordance with the Shire’s Development Contribution Plan and Cost Apportionment Schedule for DCA1 contributions are payable on a lot or dwelling basis. As the proposed development is not creating any additional lot or dwelling no developer contribution is payable.
22. The only DCA that references public art is ‘DCP5 – Witchcliffe’ which allocates a budget of \$181,000 for public art to be funded from a per lot / dwelling contribution from within the DCP area. The subject site is not within DCP5.
23. If it was the intention for the Shire to source funds for public art through a Developer Contributions Plan the approved DCP applicable to the subject site should have included such a provision, which it does not. Furthermore, the subject site is not within an area that would trigger such a contribution.

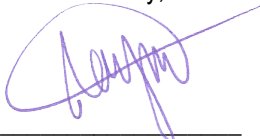
## CONCLUSION

In conclusion the Shire does not appear to have adopted a ‘public art’ Local Planning Policy under LPS1 that can be relied upon to justify the imposition of condition 6. Even if the policy was able to be given due regard through clause 67(zb) of the deemed provisions it drawn no nexus between the development and requirement to provide public art.

Considering the above, condition 6 must be deleted.

Should you have any queries or require further clarification in regard to the above matter please do not hesitate to contact the undersigned.

Yours faithfully,



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**TAYNE EVERSHED**  
**DIRECTOR**

211124 7208 Form 2 - Condition 6 deletion



## Clews Road 168 (Lot 2953) Cowaramup and Fifty One Road 261A (Strata Lot 1) Cowaramup – Proposed Winery, Restaurant and Cellar Door, and Special Events

### Form 2 – Responsible Authority Report (Regulation 17)

<b>DAP Name:</b>	Regional Joint Development Assessment Panel	
<b>Local Government Area:</b>	Shire of Augusta Margaret River	
<b>Proposed Amendments:</b>	Deletion of Condition 6 of originally approved Form 1 application (DAP Ref: 21/0194)	
<b>Applicant:</b>	Planning Solutions	
<b>Owner:</b>	Hat Southwest Investment Pty Ltd	
<b>Responsible Authority:</b>	Shire of Augusta Margaret River	
<b>Authorising Officer:</b>	Manager Planning and Regulatory Services	
<b>LG Reference:</b>	P221902	
<b>DAP File No:</b>	21/01945	
<b>Date of Original DAP decision:</b>	4 June 2021	
<b>Application Received Date:</b>	30 November 2021	
<b>Application Statutory Process Timeframe:</b>	60 Days	
<b>Attachment(s):</b>	<i>Corporate and Community Services 15 Public Art Policy – April 2020</i>	
<b>Is the Responsible Authority Recommendation the same as the Officer Recommendation?</b>	<input checked="" type="checkbox"/> Yes	Complete Responsible Authority Recommendation section
	<input type="checkbox"/> N/A	
	<input type="checkbox"/> No	Complete Responsible Authority and Officer Recommendation sections

### Responsible Authority Recommendation

That the Regional Joint Development Assessment Panel resolves to:

- Accept** that the DAP Application reference DAP/21/01945 as detailed on the DAP Form 2 dated 30 November 2021 is appropriate for consideration in accordance with regulation 17 of the *Planning and Development (Development Assessment Panels) Regulations 2011*;
- Approve** DAP Application reference DAP/21/01945 and accompanying plans in accordance with Clause 68 of Schedule 2 (Deemed Provisions) of the *Planning and Development (Local Planning Schemes) Regulations 2015*, and the Shire of Augusta Margaret River Local Planning Scheme No. 1 subject to the following conditions:

### Amended Condition

- Prior to issue of a building permit for the development, the proponent shall make a contribution toward public art in accordance with the Shire's *Corporate and Community Services Policy 15 Public Art Policy* based on the cost of the development, excluding works associated with the development of the winery.

## New Advice Notes

1. All other conditions and requirements detailed on the previous approval (DAP Ref: DAP/21/01945) dated 4 June 2021 shall remain unless altered by this application.

## Details: outline of development application

Region Scheme	N/A
Region Scheme Zone/Reserve	N/A
Local Planning Scheme	Shire of Augusta Margaret River Local Planning Scheme No. 1
Local Planning Scheme Zone/Reserve	Priority Agriculture Development Contribution Area 1 (DCA)
Structure Plan/Precinct Plan	N/A
Structure Plan/Precinct Plan Land Use Designation	N/A
Use Class (proposed) and permissibility:	Licensed Restaurant – ‘A’ Winery – ‘P’ Rural Produce Sales – ‘D’
Lot Size:	Strata Lot 1 – 16.5ha Lot 2953 Clews Road – 76.2ha
Existing Land Use:	Agriculture Intensive (Vineyard) Rural Industry (Wine Storage)
State Heritage Register	No
Local Heritage	<input checked="" type="checkbox"/> N/A <input type="checkbox"/> Heritage List <input type="checkbox"/> Heritage Area
Design Review	<input checked="" type="checkbox"/> N/A <input type="checkbox"/> Local Design Review Panel <input type="checkbox"/> State Design Review Panel <input type="checkbox"/> Other
Bushfire Prone Area	Yes
Swan River Trust Area	No

## Proposal:

The applicant requests deletion of Condition 6 of the previous approval relating to public art. Condition 6 reads as follows:

- 6. Prior to the issue of a building permit for the development, the proponent shall make a contribution toward public art in accordance with the Shire’s Governance and Business Excellence Policy based on the cost of the development, excluding works associated with the development of the winery.*

## Background:

Approval for a proposed Winery, Restaurant and Cellar Door, and Special Events was issued by the Regional JDAP on 4 June 2021 subject to a suite of conditions.

## Legislation and Policy:

### Legislation

Clause 77 of the Deemed Provisions of the *Shire of Augusta Margaret River Local Planning Scheme No.1* (the Scheme) - Amending or Cancelling development approval.

### State Government Policies

Not relevant.

### Local Policies

*Corporate and Community Services 15 Public Art Policy* – April 2020 (CCSP15)

The Policy requires that one per cent of the value of all developments (excluding private homes, subdivision, rural and industrial development) above a value of \$1,000,000 (including GST) be provided towards the development of public art.

It is noted that in Condition 6 of the original approval, the wording of the condition inadvertently referred to *Governance and Business Excellence Policy 5.8 – Public Art Policy*. The wording of the Condition 6 should have referred to CCSP15 as the applicable policy to apply the per cent for art condition for the development.

The reviewed policy was adopted by Council at the Ordinary Meeting held on 8 April 2020 (reference OM2020/59). Council's adoption of CCSP15 was in accordance with the provisions of s2.7(2)(b) *Local Government Act 1995* s2.7. Role of Council:

- (1) The council —
  - (a) governs the local government's affairs; and
  - (b) is responsible for the performance of the local government's functions.
- (2) Without limiting subsection (1), the council is to —
  - (a) oversee the allocation of the local government's finances and resources; and
  - (b) determine the local government's policies.

Before adoption by Council, CCSP15 was the subject of a wide range of community consultation including but not limited to:

- forums, workshops and meetings with stakeholders in the community;
- listing of the draft policy on the 'Your Say' page on the Augusta Margaret River website for receipt of public feedback; and
- presentation of the consultation process and findings to Council.

It is noted that CCSP15 is not a local planning policy. The CCSP15 policy has been developed with regard to the best practice model *West Australian State Government Percent for Art Scheme Guidelines*, prepared by the Department of Finance. The CCSP15 is reflective of the Percent for Art Scheme that is part of a '*...broad government strategy to stimulate greater use of art in the built environment...*'. This Council Policy is binding on employees and is Council's standing or permanent instructions.

## **Consultation:**

### Public Consultation

The Form 2 application has not been the subject of public consultation. It is noted that the original Form 1 application was the subject of extensive public consultation.

### Referrals/consultation with Government/Service Agencies

The proposal has not been re-referred to relevant government agencies.

### Design Review Panel Advice

Not applicable in this instance.

## **Planning Assessment:**

The applicant has set out reasons as to why Condition 6 should be removed which are addressed in turn as follows:

### Policy named in condition does not exist.

It is accepted that the wording of Condition 6 should be modified to correctly refer to *Corporate and Community Services 15 Public Art Policy*. This matter can readily be resolved and is not a reason as to why the condition should be deleted.

### Corporate and Community Services 15 Public Art Policy – not a planning policy

The applicant has not identified any part of the planning framework which would specifically exclude the consideration of 'non-planning' policies from consideration in the planning decision making process.

Clause 67 (2) (zb) of the *Planning and Development (Local Planning Schemes) Regulations 2015* Deemed Provisions, the local government is required to have due regard to “*any other planning consideration the local government considers appropriate*”. In this case, this includes the provision of public art.

In accordance with the findings of the Tribunal in the decision of *Permanent Trustee Australia Ltd v City of Wanneroo* (1994) 11 SR(WA) 1, and notwithstanding that CCSP15P was not adopted under the Scheme as a planning policy, it:

- is based on sound town planning principles and appropriately identifies the development application process as a means of applying the requirement for a contribution;
- is a public policy which is available on the Shire's website and was known to the applicant prior to the determination of the application by the JDAP;
- was conceived after a public consultation process and adopted at a public meeting of the Council;
- has been in place for seven years; and
- has been continuously applied.



### Need and Nexus

It is generally accepted throughout Western Australia that development over a certain value should contribute towards the provision of public art. This is evidenced by the number of Local Governments with a Public Art Policy. These include Busselton, Vincent, East Fremantle, Belmont, Bayswater, Perth, Swan, Cambridge, Stirling, and Melville.

In all cases, the test as to whether the contribution is necessary is determined by the value of the development. Contributions are generally only sought from 'high value' developments of \$1 million or more. This approach has been well established and accepted throughout the State.

### Developer Contributions

The applicant argues that if a contribution towards public art is required it should have been concluded in a Developer Contributions Plan. State Planning Policy 3.6 (Infrastructure Contributions) specifically identifies that public art is not an appropriate inclusion in a DCP (section 6.10.5 - Scope of Items of Infrastructure in a DCP).

### **Conclusion:**

The request to delete condition 6 of the original JDAP application is not supported.

The requirement for the contribution was raised with the proponent at the earliest stages of the proposal including in initial Shire advice as early as 16 October 2020. The requirement was also referenced in emails from the proponent on 16 December 2020 and, while questions about the calculation of the contribution were raised, its application to the development project was not objected to at any time prior to submission of the development application or during processing of the application. The application of the condition has been transparent on behalf of the Shire, was not objected to by the proponent, and has come about due to the significant change to the cultural tourism landscape that will be brought about in the locality as a direct consequence of the development.

The application of the condition is considered to be sound and consistent with the relevant statutory framework. The condition fairly and reasonably relates to the approved development because the need for public art arises from the significant change in the cultural tourism landscape with regard to greater visitor numbers the development will attract and due to the significant scale of the development.

The application of the condition will be of benefit to the broader community and is an important planning consideration for which the Shire is required to apply to the development approval.

Condition 6 is recommended to only be amended to reword the subject condition to include the correct reference in the updated policy CCSP15.

# CCSP15 Public Art Policy



April 2020

*This policy was adopted by Council to set governing principles in place that align the strategic direction of the organisation with “Welcoming, inclusive and healthy communities and Effective leadership and governance”.*

## Objectives

Through the application of this Public Art Policy, the Shire propose to:

- Identify suitable public art opportunities throughout the Shire
- Ensure growth results in a pleasant built environment through establishing requirements for Percent for Art Scheme of a way of development
- Support local art, artists and the cultural industries to develop high quality works
- Celebrate and tell the story of history and culture within the Shire through meaningful public art
- Continue to enhance cultural life through public art, community art and ephemeral art projects that enliven and engage with the community within public spaces.

## Policy

### Definitions

#### Art

Art is the product of practitioners who intend their work and activities to be seen, read and experienced as art. Art embraces material and immaterial products and concepts from the imaginative thinking of artists.

#### Artist

Only Artists will be eligible to carry out public art commissions. The term artist for the purpose of this policy is defined as a person who meets a minimum of two of the following criteria:

- a) A person who has a Bachelor’s Degree or Diploma in visual arts or any similar field;
- b) A person who has a track record of exhibiting their own original artwork at reputable art galleries that sell or exhibit the work of professional artists;
- c) A person who has had their own original artwork purchased by major public collections, including (but not limited to) the Art Gallery of Western Australia.
- d) A person who earns more than 50% of their income from arts related activities, such as teaching, selling artwork or undertaking public art commissions.
- e) A person engaged in an activity related to creating art, practicing the arts, or demonstrating an art.

Sometimes it will be appropriate to be more flexible and seek people other than professional artists to carry out artwork commissions. This may apply in instances when young, emerging (see definition) and Indigenous artists or students may be considered appropriate.

### **Contentious Public Art**

People's interpretation of art will be influenced by their personal feelings, tastes, or opinions and art that achieves its objective of provoking thought is often controversial.

While the Shire aims for public art to provoke thought, it aims not to offend.

Proposals incorporating any of the following will not be supported:

- Negative racial stereotypes
- Political messages
- Sexually provocative nudity (general nudity is not considered provocative)
- Sexist
- Discriminatory

The responsibility of determining what is contentious rests with the Art Panel and the CEO.

### **Community Art**

Community art is a collaboration between professional artists and non-professional artists, often around dealing with a social issue, community building initiative, or as a form of community consultation. Community arts, also sometimes known as "dialogical art" involves exchanges between people as they interact with information, objects, and each other.

### **Construction Cost**

Construction Cost means the estimated cost of

- a) All goods (including manufactured goods for part of the work)
- b) Labour
- c) Services necessary
- d) Fees payable
- e) Overheads to be met
- f) Profit margin

or

Contract price where the work is to be carried out under a contract as the contract price includes the value for at least each of the relevant components (a to f above) – the estimated value of the work is the contract price (including GST).

### **Development**

Development means the development or use of any land, including

- a) Any demolition, erection, construction, alteration of or addition to any building or structure on the land;
- b) The carrying out on the land of any excavation or other works;

### **Developer Contributions**

Developer Contributions are a commitment to provision of funds towards public art from any development above the value of \$1,000,000.

### **Ephemeral art**

Ephemeral artwork describes non-permanent work that may include temporary installations, performance art, dance, exhibition, experiential and/or participatory art.

### **Emerging artist**

An artist who is at an early stage in their career, who has specialised training in the art form or who has created a modest body of artistic work.

## Public Art

The term public art refers to artwork in any medium specifically created to be experienced in the public realm. Public art is typically located in highly accessible public spaces and can include sculpture, painting, installation, multimedia, sound or performance; it may also be integrated into architectural surfaces and landscaping.

## Commitment

The Shire of Augusta Margaret River will develop public art projects funded through a Per Cent for Art Scheme as part of Developer Contribution and/or by setting aside funds annually to contribute towards public art. The amount will be determined through the annual budgeting process.

Assessment for any public art component will take place on all major infrastructure projects around town centres and recreation areas or any other identified space.

The Shire of Augusta Margaret River will always attempt to consult early on in any public art project with traditional owners to ensure cultural values and heritage are considered within public art commissions.

## Scope

This policy applies to all staff managing or coordinating development projects that require a public art component and those managing or coordinating current public art or spaces that include public art owned or invested in the Shire of Augusta Margaret River.

## Implementation

Funding of public art will generally be by one of the following means:

1. Shire contributions via moneys set aside annually to contribute towards public art. The amount is to be determined through the annual budgeting process or via access to grant funding for public art projects.
2. Developer Contributions which facilitates the provision of public art works through the requirement for all developments (excluding private homes, subdivisions, rural and industrial development) above a value of \$1,000,000 (including GST) to allocate one per cent of the value of the development to public art.

This requirement may be satisfied by either:

- a) Include one per cent of the construction cost for public art in the designs of development, in locations accessible to the public. Developers must ensure that their proposals meet the definition of art and the artwork has been designed by an artist ; or
- b) Provide the cash equivalent to the Shire. This funding may be pooled and the public art placed in identified suitable locations with reasonable proximity to the development.

The Per Cent for Art requirement also applies to Shire funded developments above a construction cost of \$1,000,000 (including GST).

3. Donation or gift of public artworks funded through cash or other philanthropic measures but will be required to be the subject of public art assessment via the assessment process outlined.

## Forms of public art

Public art may take many forms including but not limited to the following categories.

### Stand Alone

Artworks of a three dimensional nature embedded into a building or public space and may be a single or multiple installation works. This style of work has been traditionally associated with

public artworks. A local example would be Forest Stand outside the Shire of Augusta Margaret River Council office.

### Integrated

Artworks that are integrated into a building or building space either interior or exterior. They may be imbedded in ceilings, floors, railings, screens and/or assist to define or separate spaces. A local example would be the commissioned works inside the Shire of Augusta Margaret River Council offices.

### Applied

Works that are applied to interior or exterior surfaces, including commissioned paintings, tapestries and murals. A local example would be the community art murals located on the exterior of the Zone Room at Margaret River Youth Precinct.

### Installation

These works are where the work and the site are integral to each other. The work may be created to respond or compliment a space or draw attention or intervene in a particular environment. A local example would be Eurybia by Russell Sheridan at the south end of Surfers Point.

### Ephemeral

These are works that are non-permanent works that may include temporary installations, performance, participatory or experiential works.

## Copyright, legal title and ownership

An artist's rights are protected under the *Copyright Amendment (Moral Rights) Act 2000* (the Act). Under the Act, all original artwork must be attributed to the artist.

The ownership of the public artwork and copyright will be determined within the commissioning process, the contract and the land on which it is located.

Unless otherwise agreed, copyright of both the preliminary visual material and the work itself should be retained by the artist.

The Australian Copyright Council provides advice on copyright and ownership in relation to public art: <http://www.copyright.org.au/>

## Application

Responsibility for the implementation of this policy rests with the Chief Executive Officer and Director Corporate and Community Services.

### Document and version control table

<b>Strategic outcome</b>	Key Result Area 2 – Welcoming, inclusive and healthy communities – Outcome 1 - Evolving cultural values are respected and adopted. Key result area 5 – Effective leadership and governance – Outcome 2 – Effective and integrated strategy, planning, financial and asset management.
<b>Responsible Directorate</b>	Corporate and Community Services

<b>Authority of original issue</b>	Council	
<b>Date of original issue</b>	27 August 2014 (OM2014/187)	
<b>Contact officer</b>	Coordinator Community Development and Planning	
<b>Date of next review</b>	2023	
<b>Document No.</b>	<b>File No.</b>	COR/11 & COR/175
<b>Version</b>	<b>Date issued</b>	<b>Brief description</b>
1.0	27 August 2014	Initial endorsement by Council
2.0	1 November 2019	Table top policy review
2.1	10 February 2020	ELT feedback incorporated into document
3.0	8 April 2020	Major review and template update including feedback from table top reviews conducted 1/11/2019, 10/2/2020

#### Resources

<http://www.dca.wa.gov.au/DevelopingArtsandCulture/publicart/>

<https://www.dlgsc.wa.gov.au/culture-and-the-arts/regional-arts>

<http://www.artsource.net.au/About/Advocacy/Artsource-NAVA>

<https://www.amrshire.wa.gov.au/region/public-art-trail>