

**DIS439: AMENDMENT OF CONDITIONS - P2160670 INDUSTRY -
EXTRACTIVE (LIME) AT LOT 9005 EDEN ROAD, NULLAKI**

Land Description	: Lot 9005 Eden Road, Nullaki.
Proponent / Owner	: Graeme Robertson & Great Southern Lime Partnership.
Business Entity Name	: Great Southern Lime (WA) Pty Ltd & The Trustee for B.G Camarri Family Trust & The Trustee for Graeme Robertson Trust – ABN 47 614 073 910. <ul style="list-style-type: none">• Directors being Kenneth Court, Scott Smith and Annette Howie.
Attachments	: <ol style="list-style-type: none">1. Copy of Development Application2. Copy of existing DA conditions.3. Consultation Main Themes & Objections.4. Applicant's response to Consultation Themes & Objections.5. DWER Technical (Review) Report.
Supplementary Information & Councillor Workstation	: <ol style="list-style-type: none">1. State Administrative Tribunal decision WASAT 3 2019.2. Schedule of Submissions Table.3. Government agency responses.4. Case Law references
Report Prepared By	: Senior Planning & Development Compliance Officer
Authorising Officer:	: Executive Director Infrastructure, Development & Environment

STRATEGIC IMPLICATIONS

1. Council is required to exercise its quasi-judicial function in this matter.
2. In making a decision on the proposed development, the Council is obliged to draw conclusion from its adopted *City of Albany Local Planning Strategy 2019* and *City of Albany Strategic Community Plan 2032*.
3. This item relates to the following elements of the *City of Albany Strategic Community Plan* or *Corporate Business Plan* informing plans or strategies:
 - **Pillar:** Leadership. A well-governed city that uses resources wisely to meet local needs.
 - **Outcomes:** A well-informed and engaged community.

Maps and Diagrams:



In Brief:

- Council is asked to consider an application to amend condition 4 and delete condition 17 of P2160670 for Industry – Extractive (Lime) at Lot 9005 Eden Road, Nullaki.

Condition	Current Wording	Proposed Amendment
Condition 4 – Time Restrictions on Activity	<p>Extractive industry activity hours:</p> <p>a) Area A (Excavation, processing/screening):</p> <ul style="list-style-type: none"> • 7:00am – 5:00pm (Mon–Fri) • 8:00am – 5:00pm (Sat) • No activity on Sun/Public Holidays <p>b) Transport of lime onsite (Area A → Area B):</p> <ul style="list-style-type: none"> • 2 Jan – 31 Aug (inclusive) • Same hours as above <p>c) Transport of lime offsite:</p> <ul style="list-style-type: none"> • 2 Jan – 30 Apr (inclusive) • Same hours as above 	<ul style="list-style-type: none"> • General extractive industry operation: • 7:00am – 5:00pm (Mon–Fri) • 8:00am – 5:00pm (Sat) • No operation on Sun/Public Holidays
Condition 17 – Volume and Vehicle Movement Limits	<ul style="list-style-type: none"> • Transport offsite must not exceed 50,000 tonnes/year. • Laden vehicle movements: <ul style="list-style-type: none"> – Max 84 vehicles per 7-day period – Max 20 vehicles on any one day 	Remove restriction

- This is an existing non-conforming land use on this lot.
- The application was advertised for public comment via direct mail out to nearby landowners and by email to known interested parties including those who have commented previously. There was also a notice on the City of Albany website with the details of the application.
- The majority of the 105 response submissions received were opposed to the requested changes.
- The requested change and deletion of conditions have been assessed against the relevant regulations, guidelines and policies. Advice from State agencies and relevant matters raised during the advertising period have been considered as part of the City's assessment.
- The supporting information provided with the application is limited in some elements of its detail, so must be considered in this context.
- Due to the number of concerns raised, the application is being referred to Council for determination.
- The requested changes would allow a relative intensification of the extractive industry activity with resulting implications for the amenity, values and attributes of the locality.
- Staff therefore recommend that Council refuse the requested change to condition 4 and deletion of condition 17 of P2160670.

RECOMMENDATION

DIS439: AUTHORISING OFFICER RECOMMENDATION

THAT Council resolves to ISSUE a notice of REFUSAL for development application P2240364 seeking amendment of Condition 4 and deletion of Condition 17 of P2160670 for Industry – Extractive (Lime) at Lot 9005 Eden Road, Nullaki, for the following reasons:

- 1) The proposal does not satisfy the following matters to be considered as identified in Schedule 2, Part 9, Clause 67 of the Planning and Development (Local Planning Schemes) Regulations 2015, namely;**

- a) the aims and provisions of this Scheme and any other local planning scheme operating within the Scheme area;
 - b) the requirements of orderly and proper planning including any proposed local planning scheme or amendment to this Scheme that has been advertised under the Planning and Development (Local Planning Schemes) Regulations 2015 or any other proposed planning instrument that the local government is seriously considering adopting or approving;
 - c) any approved State planning policy;
 - n) the amenity of the locality including the following:
 - i. environmental impacts of the development;
 - ii. the character of the locality;
 - iii. social impacts of the development;
 - o) the likely effect of the development on the natural environment or water resources and any means that are proposed to protect or to mitigate impacts on the natural environment or the water resource;
 - t) the amount of traffic likely to be generated by the development, particularly in relation to the capacity of the road system in the locality and the probable effect on traffic flow and safety;
 - x) the impact of the development on the community as a whole notwithstanding the impact of the development on particular individuals;
 - y) any submissions received on the application;
 - z) the comments or submissions received from any authority consulted under clause 66;
- 2) The proposal does not comply with the general objectives of the Environmental Conservation Zone as set out in Local Planning Scheme No.2;
- 3) The proposal does not provide adequate technical evidence (e.g. acoustic, environmental, and traffic assessments) to demonstrate that the impacts of the proposed changes can be satisfactorily mitigated;
- 4) Development approval cannot be granted on an application for approval of development that is a class X use in relation to the zone in which the development is located

BACKGROUND

- 4. The subject site lies to the western side of Lower Denmark Road and to the southern side of Eden Road, approximately 40km west of Albany City centre. Access is provided by the recently constructed and upgraded Lee Road. The lot has an area of approximately 437 hectares and is zoned 'Environmental Conservation' being part of the wider zoning identified as area 93 in Figure 16 of Schedule 10 of City of Albany *Local Planning Scheme No. 2 (LPS2)*.
- 5. The subject lot adjoins reserved land to the south and east. The land to the north and west is also part of the Environmental Conservation zone. The Bibbulmun Track runs through the reserve to the east of the subject site.
- 6. Due to the environmental properties of the land, and in order to secure long term land use protection, the Nullaki Peninsula is zoned Environmental Conservation under *LPS2* and was previously zoned Conservation under *Local Planning Scheme No.1 (LPS1)*.

7. The lot has an existing land use right (non-conforming land use) for an 8-hectare area towards the south-east corner of the lot to be used for an extractive industry producing lime.
8. The existing extractive industry was granted development approval by the State Administrative Tribunal in January 2019, subject to 45 conditions.
9. On 24 May 2019 Local Planning Scheme amendment 29 (AMD29) of LPS1 was gazetted. In addition to other matters, AMD29 clarified that an Industry – Extractive was to be considered an 'X' use within Conservation Zone CZ1. An 'X' use means the land use is not permitted by the Scheme.
10. The 'X' designation against the Industry – Extractive land use has been continued in the Environmental Conservation zone in LPS2.
11. The Industry – Extractive use on part of Lot 9005 was lawful following approval by the Tribunal on 10 January 2019, but it became a non-conforming use after the gazettal of LPS1 AMD29 on 24 May 2019. A non-conforming use can lawfully continue operating, subject to meeting specific criteria set out under the local planning scheme.
12. In December 2023 Council considered and granted amendments to conditions 2, 4, 17 & 43 of Development Approval P2160670. This included creating a 3ha stockpile area at the base of the steep hill so road going trucks would not have to climb the steep gradient to the pit location and instead could be loaded in this stockpile area. Approval of this change overcame safety concerns raised by the Mines Safety Inspectors of The Department of Energy, Mines, Industry Regulation and Safety (DEMIRS).
13. This application is seeking approval for the Industry – Extractive to operate year-round (12-months of the year) with no limitation on tonnage extracted and no limit on vehicle movements removing extracted material from the property.

DISCUSSION

14. This application is seeking modifications to conditions of the development approval for an Industry – Extractive for lime from the 8-hectare area subject to the existing non-conforming use right.
15. This proposal seeks to be less restricted than the existing approved use through full operation of all aspects of the extractive activity for 12 months of the year within standard hours of operation Monday to Saturday, with no operation on Sundays or Public Holidays.
16. The proponent also seeks no limit on the volume or weight of material extracted each year and no limit on the number of vehicles removing material from the site each day or over a given period of time.
17. There are two (2) ways this application can be viewed. Firstly, is that it is a new application for an Industry – Extractive or secondly that it is an amendment of the existing approval seeking variation or removal of specific conditions.

New Application

18. The original approval, obtained by the proponent through the previous SAT process, was subject to strict limitations—specifically, that the entire operation would only function for four (4) months of the year, with additional restrictions on output in terms of tonnage and laden vehicle movements. Consequently, for the remaining eight (8) months of the year, the land use would cease to operate.
19. The unrestricted operation now sought through this application would allow such a significant intensification of the use that it could be considered to have little resemblance to the limited activity originally considered by the Tribunal in its approval. As such, this might be viewed afresh as an entirely new application.

20. Accordingly, if treating this application as an application for new development, one must look to the Zoning Table in LPS2 to determine the permissibility of the proposed land use. The Zoning Table is Table 3 under clause 17 in Part 3 of LPS2. The Zoning Table informs that in the Environmental Conservation Zone the Industry - Extractive land use is an 'X'. Clause 18 in Part 3 of LPS2 informs that the 'X' symbol in the zoning Table means that the use is not permitted by this Scheme.
21. If the application is considered to be a new application by reason of the significant intensification; as an 'X' use the City and Council has no discretion, it cannot be approved, and the application must be refused.

Amendment of Existing Approval

22. Another way to view this application is that despite the significant intensification sought, the application is not a new application, but an amendment or alteration of the existing non-conforming use approved by the Tribunal.
23. Deemed Provision clause 77 in Schedule 2, Part 9 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (the Regulations) deals with amending and cancelling development approvals as follows:

Amending or cancelling development approval

- (1) An owner of land in respect of which development approval has been granted by the local government may make an application to the local government requesting the local government to do any or all of the following —
 - (a) to amend the approval so as to extend the period within which any development approved must be substantially commenced;
 - (b) to amend or delete any condition to which the approval is subject;
 - (c) to amend an aspect of the development approved which, if amended, would not substantially change the development approved;
 - (d) to cancel the approval.
- (2) An application under subclause (1)
 - (a) is to be made in accordance with the requirements in Part 8 and dealt with under this Part as if it were an application for development approval; and
 - (b) may be made during or after the period within which the development approved must be substantially commenced.
- (3) Despite subclause (2), the local government may waive or vary a requirement in Part 8 or this Part in respect of an application if the local government is satisfied that the application relates to a minor amendment to the development approval.
- (4) The local government may determine an application made under subclause (1) by:
 - (a) approving the application without conditions; or
 - (b) approving the application with conditions; or
 - (c) refusing the application.
24. Although the proponent's request would significantly increase the activity, clause 77(1)(b) of the Deemed Provisions allows a landowner to apply to the local government to amend or remove any condition of an existing development approval. This applies in this case because the Tribunal's decision replaced the City's original decision and is now considered the City's decision.
25. Furthermore, clause 23 (1)(a) of LPS2 reflects the Model Provisions of the Regulations, and provides that a person must not, without development approval, alter or extend a non-conforming use of land.

26. As previously advised in DIS376 (para.37) there is case law and legal precedent on similar considerations that lends weight to this view including:
- Re Shire of Carnarvon: Ex Parte Humphrey (2005) WASCA 182
 - City of Mitcham v Fusco (2002) 124 LGERA 196
 - Prestige Car Sales Pty Ltd v Walkerville Town Corporation (1979) 20 SASR 514
 - Royal Agricultural Society (New South Wales) v Sydney City Council (1987) 61 LGRA 305.
27. The requested development proposed would be a significant intensification of the land use activity. Whilst it would still be the same activity, as there is no change in the essential nature of the existing use – extraction of lime, the increased duration of the activity bears little resemblance to that envisaged in the original approval. This could legitimately be considered as a new land use proposal.
28. Accordingly, it is important for this application to be considered and assessed from both perspectives – as a new proposal and as an alteration of the existing non-conforming use with the Proponent's request being to amend or delete specific conditions.

Alterations sought

Condition 4 – Time Restrictions on Activity

29. The existing condition, following the previous amendment in December 2023 reads:
- Except as otherwise approved by the City of Albany, the hours of operation of the various elements of the extractive industry activities shall be restricted as follows:
 - a) Excavation, processing/screening and associated activities within Area A between the hours of 7.00am - 5.00pm Monday to Friday, and 8.00am - 5.00pm Saturday, with no operation of the extractive industry permitted on Sundays or Public Holidays;
 - b) Transportation of lime onsite from the extraction site (Area A) to the stockpile area (Area B) within the period of 2 January to 31 August (inclusive) between the hours of 7.00am - 5.00pm Monday to Friday, and 8.00am - 5.00pm Saturday, with no operation of this activity permitted on Sundays or Public Holidays;
 - c) Transportation of lime offsite within the period of 2 January to 30 April (inclusive) between the hours of 7.00am - 5.00pm Monday to Friday, and 8.00am - 5.00pm Saturday, with no operation of this activity permitted on Sundays or Public Holidays.
30. The requested amendment to this condition is:
- Except as otherwise approved by the City of Albany, the hours of operation of the extractive industry shall be restricted to the hours of 7.00am – 5.00pm Monday to Friday and 8.00am – 5.00pm Saturday with no operation of the extractive industry permitted on Sundays or Public Holidays
31. This change to condition 4 seeks to remove the specific limited season restrictions that apply to this extractive operation and instead align it with generic activity timing that generally applies to most extractive industries.

Condition 17 – Volume and Vehicle Movement Limits

32. The existing condition reads:
- Transportation offsite of extracted lime shall not exceed 50,000 tonnes in any 12 month period. Laden vehicle movements removing lime from the Lot shall not exceed eighty-four (84) vehicles over a seven (7) day period, with a maximum of twenty (20) vehicles on any one (1) day.
33. The requested amendment to this condition is to delete this condition entirely.

34. This change seeks to remove the lime processing and production limitation as well as the limitation on number of vehicles (trucks) hauling the extracted material from the lot. This would allow unlimited production and export within the hours of operation sought through the requested change to condition 4.
35. The following is a summary of the proponent's reasons behind the requested changes:
- The lime is urgently needed for agricultural production to combat soil acidity.
 - The business is severely restricted by the conditions in terms of production, limited volume and delivery vehicle movements.
 - The capacity to only earn income for 4 months a year restricts the business.
 - They want to diversify to offer road base as well as aglime as there is strong demand and they have received a request to supply 20,000 tonnes per year.
 - They anticipate the demand for their aglime will exceed the 50,000 tonne annual limit and as this is required by farmers each year, if they cannot supply it they will lose customers.
 - They want to be a reliable supplier with capacity to respond to changing demands.
 - An increase above 50,000 tonnes can be accommodated within the existing operational footprint.
 - They had to upgrade the local road network to accommodate the truck traffic and the roads are now fit for purpose.
 - Other extractive industries are not limited to supplying their product during only 4 months per year.
 - They believe the expanded operations will not impact on the Australasian Bitterns at Eungedup.

Public Consultation

36. The concerns or objections raised that are directly relevant to the requested condition amendments relate primarily to the following themes:
- Environmental Concerns – particularly the impact on endangered species and the wetland ecosystem.
 - Development Suitability – does not align with the Conservation focus of the Nullaki area.
 - Traffic, Road Safety & Infrastructure – increased traffic and suitability of the local road network.
 - Planning & Zoning Compliance – original approval on strict conditions now sought to be weakened.
 - Community Impact – amenity degraded by increased activity.
 - Fire Risk & Emergency Response – increased activity raises the hazard risk, increased traffic and degraded roads can delay emergency response.
 - Business & Economic Arguments – business decision to proceed on original constraints. Community should not compromise for private profitability.
37. The proposal was also referred to the Department of Water and Environmental Regulation (DWER), the Department of Biodiversity, Conservation and Attractions (DBCA), the Department of Primary Industries and Regional Development (DPIRD), the Department of Energy, Mines, Industry Regulation & Safety (DEMIRS) and to Main Roads WA.

Assessment

38. Due to the change in onsite operation methodology contemplated by the variation approved by Council in December 2023 where stockpiles in an area at the base of the hill are created and replenished for the loading of offsite transport; the proponent commissioned a noise monitoring report that was undertaken during the time of construction of the stockpile area (Area B).

39. This noise monitoring report was undertaken on 3 August 2024 with a moxy haul truck operating on the haul road between Areas A and B. The suggestion is that this is representative of the onsite activity. The report claims to demonstrate that the haul truck does not generate significant noise to impact wildlife at the Eungedup Wetlands or be disruptive to users of the Bibbulmun Track campsite.
40. However, this report only covers one part of the onsite operations and doesn't represent all activities, such as crushing and screening, multiple trucks using the haul road, stockpiling, loading trucks, and transporting material offsite. Many of these activities may happen at the same time and could have a combined and compounding impact.
41. As this noise monitoring report only covered one aspect of the overall operation, its findings must be considered in this context and as such it is suggested they are of limited relevance and should be given appropriate weighting in the consideration of this application.
42. As the subject lot is zoned Environmental Conservation and the land use of Industry - Extractive as an 'X' is not permitted by the Scheme, the general community expectation would be that this activity could not and would not be permitted at this location.
43. Having said this however, the existing non-conforming use right cannot be ignored and must be accepted for what it is. On the whole, the community have reluctantly accepted this limited non-conforming use subject to the restrictions including on the period of operation and the controls over traffic associated with the operation. Any intensification of the extractive operation through increased traffic or the period of operation would conflict with the aims and objectives of the zoning and the expectations of activities in this locality.
44. The requested changes to both conditions 4 and 17 have very similar planning considerations but still need to be examined and assessed separately.

Condition 4 – Time Restrictions on Activity

45. The existing approved period of operation (January to April for offsite transport and January to August for onsite operations) is already approved and accepted, it is only the requested additional operating time that can be considered as part of this request. The requested four (4) month increase for onsite operational activity and eight (8) month increase for offsite haulage becoming a full-time year-round operation of the extractive industry is a significant change and increase in activity.
46. Whilst it would allow flexibility for the operator in no longer having a limited window of opportunity to conduct its operation, there would be impacts from the extended operation within and beyond the site that would be wide reaching and need to be considered carefully.
47. In December 2023, Council considered a request for year-round onsite operations, with transport offsite still limited to four months (January to April). After reviewing all the information, Council decided not to support year-round operations. Instead, it approved eight months of onsite work, with no activity from September to January. Transport of material offsite stayed limited to four months. Since then, little has changed in the matters Council needs to consider for this site.
48. Consultation responses raised concerns about noise impacts on the Bibbulmun Track and the Nullaki camp shelter. While the shelter is about 600 metres from the stockpile loading ramp, it is only around 450 metres from the nearest part of the haul road. The Bibbulmun Track also runs close to the haul road in places, coming within 5 metres at one point on a steep slope.
49. The haul truck is a slow-moving vehicle. Getting loaded at the pit and making the 3km round trip to unload at the stockpile area to return to the pit takes between 20-30 minutes. Therefore, a single haul truck uses the haul road up to 6 times per hour during the hours of operation. During the period of peak demand for lime for agricultural purposes, the operator has been running two (2) haul trucks.

50. Given the hours of operation of the site are 7am to 5pm Monday to Friday and 8am to 5pm on a Saturday, it is expected that most users of the shelter would be walking the track between shelters during the greater part of these times and therefore would not be at the shelter. It is also recognised that walking the Bibbulmun Track is not an entirely traffic or noise free experience. Walkers continuing through on this track section may experience around 4 haul truck movements as they pass through during the daytime operating period.
51. The noise report tried to show there would be no noticeable impact at the Nullaki shelter, but its limitations have been discussed. City staff visited the shelter during operations and confirmed that noise from the haul truck and other activities could clearly be heard above the usual background sounds. While not loud or disturbing, it was a mildly noticeable and unnatural noise in the area.
52. The Department of Biodiversity, Conservation and Attractions (DBCA) in its response to this application has reiterated that the period October to December each year are the peak months of usage of the Bibbulmun Track. Currently there is no extraction related activity occurring on this site during this period, so the current peak usage time would have no noise or traffic related to extraction operations. Any change from the current status would likely have a level of impact on users of this section of the track during this time.
53. In addition to the noise impact on users of the Bibbulmun Track, the noise impact on fauna, in particular the Australasian Bitterns, continues to be raised as a concern and needs to be considered. These endangered birds nest and breed in the area between September and December. Their successful breeding relies on females hearing the males' booming calls. The concern is that noise may have a significant disruptive impact.
54. With the Bittern habitat being further away from the haul road than the Bibbulmun Track Nullaki shelter, it is reasonable to anticipate that onsite operating vehicle noise will be less noticeable at this location.
55. In response to the previous concerns raised regarding the Australasian Bitterns, the proponent's Environmental Consultant has updated the research and analysis of the limited published scientific data on this species. The research suggests that any noise from onsite activities is unlikely to affect the Bitterns breeding, as their 'booming' calls are mostly at dawn and dusk during the mating season and they stay hidden during the day.
56. The Consultant says the operation won't affect the Australasian Bitterns, but this is based on the noise report and seems to use only some of the available information.
57. In section 3.1 of their report they have quoted the Report of the Appeals Convenor to the Minister for Environment (July 2024) and have stated:

I believe it will assist you to know that the conclusions I have reached in preceding sections are validated by other assessments and by advice published in the technical literature.

In the report Appeals Committee Report to the Minister for Environment: Appeals objecting to L9381/2023/1 and CPS 10188/1, Nullaki Limestone Quarry, City of Albany (July 2024) the committee found as follows:

"In considering the potential impacts of the operation on the Australasian Bitterns, the Appeals Committee accepts DWER's position that the sanctuary mentioned by the appellant does not appear in any relevant database, and that due to its purported distance from the facility, its inclusion would not have altered the outcomes of the risk assessment in any case. The Appeals

Committee noted that the City of Albany also considered impacts on the bittern in its assessment of revisions to the DA, and it is for this reason that the DA prohibits operations between September and December each year, coinciding with the bitterns mating season.

The Appeals committee concludes that Appeal 039/23 should be dismissed."

I note that the information I have presented earlier, confirms that the prohibiting of operations between September to December will not have the effect of further protecting Australasian Bitterns during breeding season.

58. In the same Appeals Committee Report and in relation to impacts on the Australasian Bitterns it is written:

"Although not explicitly raised by the appellant as a concern, it is worth noting that the City of Albany in its assessment of the proposed DA amendments in December 2023 considered the potential impacts of noise on the Australasian Bittern. The City's Development and Infrastructure Committee noted that the breeding season for the Australasian Bitterns runs from September to December and that:

Their success breeding relies on females hearing the males' booming calls, so there is concern that noise may have a significant disruptive impact.

The scientific information on which the City relied suggests that the booming calls occur mostly, but not exclusively at dawn and dusk, which would be outside the operating hours of the quarry. However, the City felt there was still a risk of unacceptable impacts on bittern breeding, and for this reason denied the operator its request of 12 months' operation. Condition 4 of the DA prohibits extraction or transport activity between September and December, coinciding with the bittern mating season. This is an important control that reflects a precautionary approach. The proponent is also required to comply with the requirements of the *Environmental Protection (Noise) Regulations 1987*."

59. City Staff consider the second to last sentence is worthy of note and relates to Council's previous decision "This is an important control that reflects a precautionary approach". There is no sustainable supporting information in this application to suggest this precautionary approach should not be continued.
60. The report from the Environmental Consultant provided as part of the application focuses on the noise from the onsite operational activity and the limited noise monitoring report where only 1 haul truck was operating for the purposes of the data collection. This focus on the onsite activity follows the considerations of the *Environmental Protection (Noise) Regulations 1997* (Noise Regulations), which apply prescribed standards to protect human health and amenity. The standards apply at the noise sensitive premises, usually people's homes. In this case the closest home is over 1km away from the Lee Road access gate on to the subject site. The Noise Regulations do not apply standards for the protection of fauna.
61. The Noise Regulations also only apply to onsite noise generating activities. The traffic going to and leaving from the site on public roads are not subject to consideration under the Noise Regulations. But while onsite they do fall within and would form part of the consideration under the Noise Regulations. This was not included in the Noise Monitoring Report and not considered by the Environmental Consultant in their report.
62. Although outside of consideration under the Noise Regulations, the trucks and other vehicles travelling on the public roads associated with the extractive operation can be considered by Council in deliberations on this matter as noise is only one aspect of this element of associated activity.

63. The City has traffic count data to help quantify the increase in traffic that is largely attributable to the extractive operation.
64. A temporary traffic count was undertaken on Browns Road over 15 days commencing on 19 April 2018. This predates the Tribunal's decision approving the land use. The data from this traffic count informs the following:

Average Weekday vehicles	16
Average Weekend Day vehicles	9
Short Vehicles	91.75%
Short Vehicles Towing	8.25%
Medium Vehicles	0%
Long Vehicles	0%
Combination Vehicles	0%

65. The City now has a permanent traffic count device installed on Lee Road beyond the access to the last property with a residence. This device records traffic data for vehicles likely to be there in connection with the extractive operation as there is no other property access beyond that point.
66. The data from this device for the period 2 January 2025 to 7 April 2025 informs the following:

Average Weekday vehicles	37
Average Weekend Day vehicles	7
Short Vehicles	39.03%
Medium Vehicles	4.35%
Long Vehicles	10.76%
Combination Vehicles	45.86%

67. In comparing this data, it needs to be acknowledged that whilst it was recorded in the same vicinity, the two (2) sets of data are not from the same location. Along the length of Browns Road and Lee Road there has been no subdivision or residential development with the only development of note to attribute changes in traffic type and numbers to being the extractive industry operation on the subject property. As already noted, the latest data is taken from the road beyond any residences and can be primarily attributed to the operation of the extractive land use.
68. From the data it is clear that in addition to there being a significant increase in traffic volume, trucks now make up over 56% of that traffic, whereas previously no trucks were recorded during the period. This represents a change to the traffic profile in the area over this period.
69. This data informs and shows the changes in traffic profile with the current operation that is limited to four (4) months per year of haulage from the site. A significant change such as requested through this operation would ordinarily be accompanied by a Traffic Impact Assessment (TIA). A TIA has not been produced to assess the anticipated changes to traffic patterns that would arise from the compounding effects of the requested changes to these two (2) conditions.
70. Without a TIA prediction of these changes, it is left to planning staff and Council to speculate (informed by current activity) as to the possible traffic increases that would likely result from the requested changes of these conditions.

71. The traffic to and from the extractive operation pass a lot closer to the wetland habitat of the Bitterns. The intersection of Browns Road and Lee Road is part of the transport route for all visiting traffic and is only 200m from Lake Saide and some 400m from the Eungedup Wetlands.
72. Traffic, trucks in particular, generate noise. The existing approved operation has already brought a change to the traffic and resulting noise experienced in this area. This has been limited to the four (4) month operating period with the remaining eight (8) months of the year returning to local traffic only.
73. The requested increase would bring a year-round increase in traffic and the noise of this traffic would be heard from and impact on the Eungedup Wetlands. It is the increased traffic noise rather than the noise from onsite operations that is more likely to impact on the Australasian Bitterns.
74. The Noise Monitoring Report, whilst limited in its subject recorded data, does in section 7 provide information on noise impacts on wildlife. This presents mixed results across different studies with some indicating increased noise being a positive outcome for some species. However, in the section 10, discussion in relation to noise it is stated "...the tolerance of the Australasian Bittern is unknown."
75. Due to limited studies and lack of species-specific data on the endangered Australasian Bittern, the impact from close proximity traffic noise, including heavy haulage, is an unknown. It is suggested a precautionary approach as previously acknowledged should be continued.
76. In addition to passing close by the wetland habitat of the endangered Australasian Bitterns, the traffic passes the residential properties of many local residents along the haulage route. This area can be typically described as lifestyle properties and low intensity hobby farm agriculture as well as the Environmental Conservation properties further west.
77. Currently it is accepted there is the extractive operation and associated traffic from January through to the end of April, but this request seeks to extend this year-round. Such a change of land use operation would be contrary to the established character and amenity of the area.
78. As previously stated, the Noise Regulations prescribe standards to protect human health and amenity, but the noise from traffic on public roads falls outside of this consideration. So, whilst noise from this traffic is not something that can be considered, other associated impacts are.
79. Before the extractive operation, these roads mostly saw light rural and residential traffic, with trucks appearing only occasionally, such as during harvest for some select properties. Now, trucks—mainly double trailer road trains—travel the route daily (six days a week) due to its inclusion in the RAV network.
80. While road trains are common on major roads, they are unusual on narrow, winding rural roads. These roads previously carried mainly cars, 4WDs, tractors, horses, and bikes, so the current truck traffic is a stark change from the area's typical lifestyle use.
81. The use of the road by heavy haulage vehicles brings with it additional risks which is why the use by these vehicles is subject to specific restrictions. One of these restrictions is that the maximum speed these vehicles should be doing is 40km/h. This speed limit was set as it was the achievable safe design speed due to the natural and physical constraints that impacted the design for the road upgrades resulting from the original extractive industry approval.
82. Although the speed limit for RAVs is 40km/h, there is community concern that many of the trucks don't adhere to the limit. Information from the City's traffic counter informs that in the 4 weeks to 7 April 2025 there were 142 long combination vehicles (RAVs) and of these 133 were exceeding the 40km/h limit with most doing between 41-60km/h at the recording location.

83. With the majority of the heavy haulage vehicles exceeding the limit applied to them, there is concern for road safety for these drivers as well as other road users. These concerns have been referred to the relevant authorities to follow up.
84. This has also been raised with the proponent and their onsite operator. The response received is that they will continue to advise customers of the rules that apply as orders are taken, but they feel they cannot be held responsible for the truck operators on the public roads.
85. Although this is a snapshot within the current four (4) month limited operation season, it can reasonably be anticipated that this level of non-compliance would likely continue through an extended extractive operating period.
86. The extractive heavy haulage traffic is currently limited to a four (4) month window meaning the remaining eight (8) months of the year are free of this traffic and the local community have this period of respite from these impacts. Allowing the haulage trucks beyond the current four (4) month limited operation season would extend this impact on the local community to be year-round with no break from it.

Condition 17 – Volume and Vehicle Movement Limits

87. The two (2) elements to this condition are closely linked. The tonnage limit and laden vehicle movements were set as the number of vehicles over the four (4) month operating season were what would be required to transport the anticipated product demand on the assumption the majority of vehicles would be double trailer road trains.
88. Deleting this condition as requested would remove these limits and allow unlimited annual production and truck movements within the hours of operation. The only constraint on the resulting increase in extractive related traffic would be the ability onsite to load the trucks.
89. The impacts discussed above relating to road traffic and disturbance from onsite operations would be exacerbated by the increased activity and output of the originally limited operation, which is now a non-conforming use.
90. As mentioned in the previous report to Council, any significant increase in truck movements will have an impact on the local community using these relatively quiet rural roads. Through that previous consideration, Council approved what was considered to be a reasonable and justified concession on laden vehicle movements leaving the site. To remove this limit entirely given all the circumstances relating to the location of this operation would exceed this determined acceptable position.
91. Whilst the current conditioned approval is not exactly what the proponent had originally sought in 2016, it is reflective of concessions made during the previous State Administrative Tribunal process. It was these changes in the form of limitations and restrictions that resulted in the Tribunal considering the proposal acceptable and capable of approval on this limited basis. The approval was then conditioned as such. The proponent chose to develop the site and commence operation of the use in full knowledge of the constraints and limitations inherent in the original approval. This shows an acceptance and apparent willingness to comply. However, they are now suggesting the limited operation under that original approval is not a sound basis for their business to operate.
92. It is the proponent's view and advanced as their justification position that they need to meet a demand. The City understands the need for lime for agricultural purposes and is aware this site is not the only available resource. This site is not recognised at State level as a Significant Geological Supply under State Planning Policy 2.4 – Planning for Basic Raw materials (SPP 2.4).

93. SPP 2.4 also has an objective to ensure extraction avoids, minimises or mitigates any adverse impacts on the community, water resources and biodiversity values. The status quo of the existing conditions allows extraction to occur to continue to service the demand from the agricultural sector and balances this with minimising the adverse impacts. Any change relaxing these restrictions and limitations risks increasing the impacts on the community as well as potentially eroding the biodiversity values of the Eundegup Wetlands.
94. Taking all of the above into consideration, it is the officer's opinion that the proposed alteration and removal of the existing limitations and restrictions would result in unacceptable impacts on the amenity, values, and attributes of the area. The introduction of additional heavy haulage traffic over an extended period would constitute an incongruous disruption to the established ambience of the locality, with unknown—but potentially detrimental—impacts on an endangered species.

GOVERNMENT & PUBLIC CONSULTATION

95. As there were two (2) ways to consider this application as discussed in paragraphs 17-28 above with one (1) of these being changes to a non-conforming use; clause 23 (2) of LPS 2 requires the application to be advertised. The advertising was carried out in accordance with Clause 64 of the deemed provisions as not a complex application.
96. The application was advertised for public comment via direct mail out to nearby landowners along the haulage route as far as Lower Denmark Road. A notice was also placed on the City of Albany website and was emailed to people with a known interest in this land use on the subject property including people who had commented on the previous proposal. This advertising was open for 14 days, but any submissions lodged after this time have also been accepted.
97. Community Engagement

Type of Engagement	Method of Engagement	Engagement Dates	Participation (Number)	Statutory Consultation
Inform	Mail Out	25/11/24 – 9/12/24	129	Yes
Inform	Email – Community group mailing list and previous respondents	25/11/24 – 9/12/24	59	Yes
Inform	Website	26/11/24 – 9/12/24	Unknown	Yes

98. A total of 105 public submissions were received in relation to the proposal. Of these 5 were supportive of the changes requested in the application, whilst the other 100 were opposed to the application.
99. The broad issue themes raised in the submissions are set out above under Public Consultation, and many of these are discussed under the Assessment in relation to the specific matters.
100. In addition to the public consultation, the proposal was also referred to the Department of Water and Environmental Regulation (DWER), the Department of Biodiversity, Conservation and Attractions (DBCA), the Department of Energy, Mines, Industry Regulation and Safety (DEMIRS), the Department of Primary Industries and Regional Development (DPIRD) and to Main Roads WA.

101. DWER advised that the requested changes to the conditions are not covered by the existing approvals/licences/permits or the variation currently being assessed. The proponent will need to seek an update to or amend these other approvals or obtain new approvals prior to commencing work in accordance with any changed detail. DWER will not consider the scope of the proposal during their assessment of the current licence amendment process. They also make the following points:
- A new dust management plan is required to address expanded operations and additional haulage.
 - Concerns with regard to impact on water supply if this is used for dust management operations.
 - Potential concern for stormwater discharge from roads due to increased operations and haulage. Site specific erosion and sediment control plans would be required to minimise the environmental impacts of run-off.
102. Additionally, DWER have provided a Technical (Review) Report providing advice on the acoustic assessment reports. This is mainly the Herring Storer report(s) (not provided as part of this application) and to a lesser extent the Aurora Noise Monitoring report.
103. DBCA advised they object to the requested changes having already objected to the original proposal and the previous variation. They have concerns for the welfare and amenity of hikers using the Bibbulmun Track and the Nullaki Shelter. Also, that the extended operation overlaps with the Australasian Bittern breeding season and the noise monitoring was not representative of mining activities or when conditions would carry noise towards the wetland.
104. Of the other consulted agencies; DPIRD does not object to the requested changes; Main Roads has no comment to make; and DEMIRS did not respond to the consultation.
105. The proponent has been informed of the advice from the various Government Agencies.
106. Several Elected members and the CEO attended a meeting organised by community members on 29 April 2025. The purpose of the meeting was for community members to better understand the planning process associated with this current application and for them to share their concerns. During this meeting, they were informed about issues related to the impacts of the current operation and matters raised in submissions concerning the proposed modifications.

STATUTORY IMPLICATIONS

107. As discussed in paragraphs 17-28, the existing Industry - Extractive is recognised as a non-conforming use on this lot and this application could be considered as an amendment or alteration of the existing approval rather than an application for a new development. The fact the zoning table of the Scheme has the Industry – Extractive land use as an 'X' (not permitted) for the Environmental Conservation zone is one element of consideration of this proposal, but it has also been fully assessed as an alteration of the existing non-conforming use.
108. As the application relates to an extension of the duration of the existing activity rather than a physical extension of where the activity is undertaken, many of the usual considerations are not applicable. Instead, it is more the impact on amenity, the local community, the environment, and traffic and road safety arising from the extended operating period and limitless haulage that needs to be considered.
109. This is a quasi-judicial decision informed by the requirements for consideration of application by local government as set out in clause 67 in Schedule 2 of the Regulations.
110. Voting requirement is a **Simple Majority**.

POLICY IMPLICATIONS

111. The primary assessment criteria for an application for an Industry – Extractive is the relevant general development standards as set in Table 13 of Schedule 6 of LPS 2. This is enhanced through the requirements as set out in the Extractive Industries Local Law 2009.
112. However, these considerations are primarily targeted towards new development rather than extended duration of existing development.
113. *State Planning Policy 2.4 – Planning for Basic Raw Materials* has a number of objectives. Many of these relate to protecting resources from incompatible development. Whilst these are not relevant in the context of this application, one objective is. This is to ensure extraction avoids, minimises or mitigates any adverse impacts on the community, water resources and biodiversity values.
114. The Department of Planning, Lands and Heritage *SPP 2.4 – Planning for Basic Raw Materials Guidelines (2021)* explains basic raw materials categories grouped as Significant Geological Supply (SGS) areas and Extractions Sites (ES). Whilst Albany has some SGS areas, this site is not recognised as one and would be considered an ES area.

RISK IDENTIFICATION & MITIGATION

115. The risk identification and categorisation relies on the City's Enterprise Risk and Opportunity Management Framework.

Risk	Likelihood	Consequence	Risk Analysis	Mitigation
Organisational Operations and Reputation. Risk: Approval may generate a variety of detrimental impacts on the amenity of the area. Opportunity: Balancing competing interests in arriving at a decision that allows an industry to continue to operate whilst minimising detrimental community impacts.	Likely	Moderate	High	The application has been assessed against the relevant statutory framework and staff have recommended it be refused.

FINANCIAL IMPLICATIONS

116. Should the proponent be aggrieved by Council's decision and seek a review of that decision or conditions through the State Administrative Tribunal. If an application for review is accepted by the Tribunal, the City could be liable for costs associated with defending the decision at a State Administrative Tribunal hearing.
117. The proponent has already lodged an application for review at the State Administrative Tribunal on the grounds of no decision having been made on the application within 90 days. As part of this process Council is required to make a decision prior to 6 June 2025 in advance of the Directions Hearing scheduled at 9:30am on Friday 13 June 2025.

Regulatory Cost Implications:

118. There has been significant community concern regarding non-compliance with the existing conditions of approval. This has had an impact on resourcing estimated to be equivalent to 0.2 FTE over the four (4) month period of operation. If this were to be extended to a full-time year-round operation as requested, it is readily foreseeable that there would be a resulting increased compliance burden that would need to be accommodated within the budget and resourced, otherwise this diminishes resources that could be applied elsewhere.

LEGAL IMPLICATIONS

119. Council is at liberty to use its discretion to approve or refuse the proposal. An applicant aggrieved by a decision or condition may apply for a review to the State Administrative Tribunal, in accordance with Section 252 of the *Planning and Development Act 2005*.
120. The proponent has the right to seek a review of the Council's decision, including any conditions attached to an approval. The City of Albany may be required to defend the decision at a State Administrative Tribunal hearing.
121. As stated above at paragraph 117, the proponent has already commenced the State Administrative Tribunal process.

ENVIRONMENTAL CONSIDERATIONS

122. DWER are the responsible body for the assessment of the environmental impacts of the proposal. The current works approval and the amendment currently under consideration do not reflect this current request.
123. Separately, DWER has advised that this proposal would require revision/amendment of existing permits and works approvals in relation to this property.
124. Concerns continue in relation to impacts on the endangered Australasian Bittern that may arise from the requested changes. There is insufficient data from studies of this species to know their tolerance of disturbance and what if any impact the requested changes to the operating conditions may have. A continued precautionary approach is recommended.

ALTERNATE OPTIONS

125. Council has the following alternate options in relation to this item, which are:
 - a) To approve the request to amend condition 4 and delete condition 17 of P2160670. This would allow year-round operation of all aspects of the extractive industry without a weight limit on material extracted from the site and also remove the current limit of eighty-four (84) laden vehicles removing lime from the lot over a seven (7) day period with a maximum of twenty (20) vehicles on any one (1) day.
 - b) To approve one or the other of the proposed changes.
 - c) If choosing either of the above options, Council may consider imposing additional conditions to address potential impacts from the development.
126. If the recommendation to refuse is followed, the requested changes will not apply and control over the land use onsite will continue under the existing conditions 4 and 17 previously set by Council in December 2023.

CONCLUSION

127. If the proposed changes are considered to constitute a new application due to the significant intensification of use, the City and Council have no discretion to approve it, as the land use is classified as an 'X' (not permitted) under the Local Planning Scheme in the Environmental Conservation Zone.
128. However, if it is instead considered a variation to the existing non-conforming use, the proposed year-round operation would still result in unaddressed impacts on and beyond the site. The only mitigation currently in place is through the existing conditions of approval.

129. Therefore, it is recommended that Council refuse the proposed changes to Condition 4 and the deletion of Condition 17 of P2160670 and retain the existing conditions that manage this non-conforming land use.

Consulted References	:	<ol style="list-style-type: none"> 1. <i>Local Planning Scheme No.2</i> 2. <i>Local Planning Scheme No.1</i> 3. <i>Planning and Development (Local Planning Schemes) Regulations 2015</i> 4. <i>DIS376 from Ordinary Council Meeting December 2023</i> 5. <i>Environmental Protection (Noise) Regulations 1997</i> 6. <i>State Planning Policy 2.4 – Planning for Basic Raw Materials</i> 7. <i>State Planning Policy 2.4 – Planning for Basic Raw Materials Guidelines</i> 8. <i>City of Albany Extractive Industries Local Law 2009</i>
File Number	:	A200151
Previous Reference	:	<p>DIS047, OCM September 2017</p> <p>DIS106, OCM July 2018</p> <p>DIS376, OCM December 2023</p>