Submission to Parliamentary inquiry into local economic development initiatives

Local government barrier to a major supermarket redevelopment

Haydn Wood
Managing Partner
Wood Hughes Strickland Partnership
Po Box 2399 Brighton North 3186

17 August 2012
**Issue**

The public carpark at 16-22 Bradley Street Kyabram is crucial to the success of the town’s central business district. No-one thinks 16-22 Bradley Street should or could be changed from its current use as a carpark for the customers of the many Kyabram businesses that rely upon it. The initiative by nearby property owners to establish this carpark in the late 1970’s was probably Kyabram’s best ever investment as measured by rate of return, and all parties think its contribution to the town’s economic development should continue into the foreseeable future.

The problem is simply that there is no legal, on-paper, means of giving certainty regarding continuation of the carpark to potential investors and lenders. Investors in properties or businesses relying on this carpark, and lenders to these investors, understandably want adequate assurance the carpark will remain. This need is most obvious where investments are very long term or in the multi-million dollar range, as with the planned redevelopment of the adjacent Safeway property. It also applies though to other commercial properties and businesses reliant on the carpark, where investments are at a lesser scale but often constitute the investor’s major asset.

The means used to establish this carpark (a special rate on nearby property owners paid the estimated land cost) results in existing ‘public trust’ rights, which is a form of legal certainty. Unfortunately the high legal cost of defending the right if a Council attempted to override it makes this unattractive as a means of assurance.

No covenant or other instrument for giving concrete assurance about the continuation of the carpark is in place. The likelihood of a future Shire of Campaspe Council removing or reducing the carpark within the foreseeable future is extremely low, but the risk of a very damaging change nevertheless remains.

All parties involved agree that Kyabram’s economic development should be supported by reducing this element of uncertainty – the disagreement is about how.

**Background**

The need to address this matter was brought to light by the proposed redevelopment of the nearby Safeway, Target Country and associated carpark properties, entailing new investment of more than $7 million by the owner of the properties – Wood Hughes Strickland partnership (WHS) -and more than $4 million by Woolworths. WHS proposed a Section 173 Agreement under the Planning and Environment Act, which is a commonly used measure in this circumstance. Other nearby property owners are now also making this request.

The Council has instead approved an officer’s recommendation to offer a 'non-exclusive licence' for access to the carpark to the owner of the Safeway property, but this requires payment of a large annual licence fee for up to 45 years and fulfilment of other licence conditions.

WHS, a property developer that had offered to buy the WHS properties and development plans – Superlative Group – and Woolworths have all refused to meet the cost of the licence fee. All three regard a licensing approach as wrong in principle as well as unaffordable. The agreed sale of the WHS properties to Superlative was conditional on resolution of this issue and has now been terminated.
The intended sale and redevelopment of the WHS properties are now on hold. In addition to termination of an agreed multi-million dollar sale, WHS has incurred large costs attempting to gain an acceptable resolution. Kyabram’s business leaders and other community organisations are highly concerned that this barrier to Kyabram’s economic development has not been overcome and are united in strongly disagreeing with the Council’s position.

**Overall economic development environment**

The proposed major upgrade of Kyabram’s Safeway and Target stores should have been treated by the Shire as an economic development matter as much as a planning and building matter. With some helpful exceptions, it has not been supported in this way to date. Instead the project has been subject to unnecessary costs and time delays. The Shire has a high quality planning team, but it appears a development will only gain proactive support if it enters the Shire system under an economic development label. The applications for the planning permits for the redevelopment of WHS’s Safeway, Target Country and carpark properties were essentially treated like any other applications despite their unprecedented scale for Kyabram and their importance to the town’s retailing heart.

Specifics of the economic development environment of Kyabram as experienced by the Safeway development to date include:

- water supply – inadequate for fire protection – supplementary tank and pumps required
- electricity supply – insufficient – extension to substation required
- roads – wrong referral to VicRoads resulting in a clearly unjustifiable demand that WHS reconstruct an intersection several hundred metres away in front of the rival supermarket – expensive costs to resolve
- planning permit process – not adaptable to an atypically large scale project – inadequate outcome from pre-application review, etc.
- stormwater management – inadequate infrastructure relative to roof runoff – large property owner expense to manage stormwater
- Bradley Street carpark – neglected, particularly relative to its economic importance: shade trees removed and not replaced, Council signage in poor condition, etc.

**Analysis**

At present there are 77 car spaces on the 16-22 Bradley Street land. Under the planning permit for the existing Safeway property, WHS is providing 75 car spaces on its 60-66 Union Street and 17-19 Bradley Street blocks. Under the new planning permits for the redevelopment, there will be 66 spaces on 16-22 Bradley (11 spaces will no longer be accessible via 60-66 Union) and WHS will be supplying 118 spaces on 14 Bradley, 17-19 Bradley, 74 Union and 76 Union. The increase from 152 to 184 off-street car spaces includes a small increase in the vital carparking area on the south side of Bradley and a large increase on the north side. This gain in carparking would alone have been an important step forward for economic development in Kyabram, but has been blocked by the Council resolution.

Even when considered in the narrowest possible light, the Shire is financially worse off as a result of this decision. The Safeway, Target and associated carpark properties owned by WHS already pay around $30,000 per year in rates and the redevelopment will roughly double the rates payable. Trying to obtain $22,500, the Shire is foregoing a $30,000 windfall gain in rates from the WHS properties alone.
Foregone gains in other Kyabram businesses affected by the performance of the Safeway will also result in foregone gains in their rates.

The non-exclusive licence rent recommendation to Council is apparently based on the idea that if Council land is committed to a particular use then a rent or licence fee should be paid, and the amount should be a market rate of return on the value of the property. That is a narrow, accounting, perspective on this matter, lacking consideration of the broader economic picture or the economic development steps behind Council owning this land.

**Misapplication of commercial leasing approach**

In addition to being wrong in principle, the Shire’s attempt to apply a commercial leasing approach is clearly questionable.

Given the Shire decided to take a commercial leasing approach to this matter, the real market value of the property should have been the basis for its calculation of a fee.

Commercial property developers buy land if they can make money from it. How can someone benefit from buying this land when it is already a carpark and the practical reality is that it has to remain a carpark for the foreseeable future? In addition the land is subject to existing public trust rights (arising from it being bought to become a carpark through a special rate) and is criss-crossed by carriageway easements. The Shire’s instructions to its valuer must have included a hypothetical premise.

The fact that no-one would wish to buy this land – because its only beneficial use is already in place - is another way of showing it should be treated as a public asset for Kyabram retailing, just like the adjacent road.

The annual fee was further derived by applying an 8% rate of return to 50% of the valuation total.

Fifty per cent of the valuation (i.e. $281,250) was applied because the licence is non-exclusive. According to the Shire officer’s report to Council, “Valuer General precedents, Court precedents and VicTrack history” were drawn on by the valuer for the 50% decision, but contributions to Council carpark schemes are normally pro rata based on Capital Improved Valuations for the properties included in the schemes. The CIV of the Safeway property (60-66 Union Street) that would be required to pay the licence fee is much less than 50% of the combined values of the commercial properties that rely on this carpark.

An 8% rate of return has been applied, whereas 5% or less would be commercially realistic return for a carpark property in this circumstance. Eight per cent normally only applies where the return needs to consider provision for depreciation of buildings etc.

Given the importance of the carpark valuation to this matter, Councillors should have been given full information about the facts and methodology behind the proposed licence fee, including the valuation report and the instructions to the valuer. This did not occur at the time of the 15 May 2012 Council decision to require a large fee as a condition of the proposed non-exclusive licence and has not been fully provided subsequently – see excerpt from Council report below.
“Officers agreed to contact the Valuer to ensure the limited development potential of the site (due to existing use rights of the adjoining land owners) was taken into account when establishing the licence fee. It was also agreed that the application of a 50% reduction in the licence fee that had been applied was to be queried with the Valuer.

Officer response:
The valuation provided to Council of $22,500 had been discounted by 50% to reflect the non-exclusivity of the agreement and the other beneficiaries involved with the use of the car park.

The Valuer was interviewed the following day and asked to provide further rationale in regard to the questions posed during the meeting. The Valuer has provided the following responses:

The 50% reduction in price was based on an industry acceptable standard of Valuer General precedents, Court precedents and VicTrack history.

The Valuer believes the proposed CPI increases and review to market would be an acceptable methodology in the circumstances so long as the reviews were not conducted any more frequently than five yearly. The Valuer’s reasoning is to do with the developer not being prepared to contribute to the maintenance of the car park. “

The main question that was to be investigated by recontacting the valuer – that is, ensuring the limited development potential was taken into account in the valuation – is not answered in the officer’s report.

The comment about “the developer not being prepared to contribute to the maintenance of the carpark” is surprising given the large Council rates already paid by the developer, the increase in the developer’s rates if the redevelopment takes place, the developer’s carpark landscaping and other obligations under the planning permit and the obligation of other beneficiaries of the carpark to contribute to its maintenance (which occurs via their rates).

**Misapplication of the Planning & Environment Act**

On 21 July 2011 WHS emailed a request for establishment of a Section 173 Agreement under the Planning & Environment Act as a means of giving certainty about continuation of the carpark. A Section 173 Agreement is the typical tool employed in this circumstance.

On 5 August 2001, the Shire of Campaspe responded:

... The redevelopment of the Safeway Supermarket is recognised as a valuable project for the Kyabram district and the Shire of Campaspe more broadly. Council is committed to assisting you with this project wherever possible, and has now considered your request to have a Section 173 Agreement over the Council-owned Bradley St car park.

To explore your request fully, Council has considered the practicality of the application of Section 173 Agreements where Council is the landowner. Section 183 of the Planning & Environment Act enables the Register of Titles to remove the Section 173 Agreement at Council’s request without referral or notification. Therefore, we do not believe that a Section 173 Agreement on the land is appropriate or will achieve your desired outcome.
In other words, the Shire was saying such an agreement would be too weak as a form of assurance, because it could be easily removed. When WHS responded that it and Woolworths were nevertheless happy with a Section 173 Agreement, WHS was then told the Shire was legally unable to establish a Section 173 in this situation.

WHS has obtained legal advice from a leading specialist in planning law strongly contradicting the Shire’s position on both aspects. The advice states that a Section 173 Agreement cannot be removed without referral or notification and that it can legally be applied in this case – see attached. The advice also affirms the existing ‘public trust’ rights over the carpark land held by property owners that paid a special rate for its purchase.

Poor process and consultation

The process adopted by the Shire to administer this matter has clearly exacerbated the problem.

As a result of the Shire classifying the matter as ‘commercial to Council’, WHS, Superlative Group and other stakeholders have had far too little opportunity to engage in roundtable discussion to resolve this matter.

WHS and Superlative met with Shire representatives on 11 April prior to the 15 May Council decision and on 29 May in response to the decision. In both cases we expected to have followup discussions but this was not allowed by the Shire. The Kyabram Councillor who proposed the 15 May resolution regarding the licence and fee was informed by the Shire officer involved that it “was what we wanted”, which obviously was not the case. The saga has included misstatements in the press and elsewhere.

Questions

1. Morally and legally the Shire is in effect holding this land in trust for the Kyabram commercial property owners who arranged and have paid for the property to become and remain a town carpark. Why should one of these property owners have to again pay a special fee (on top of rates) for up to 45 years to gain assurance about the carpark?
2. Given the obvious major benefit of a $11+ million new investment to develop an expanded and completely renewed Woolworths supermarket in the small town of Kyabram, why is the Shire treating the request for adequate assurance about the carpark as a commercial leasing matter versus an economic development matter?
3. Is it equitable that just one property owner pay a fee for certainty about use of the carpark, when 50 to 60 businesses rely on the customer visitors enabled by this carpark?
4. Why did the Shire claim (in a letter of 5 August 2011) that it could remove a Section 173 Agreement “without referral or notification”, when advice from a leading solicitor in planning law argues strongly this is not the case?
5. Is WHS’ legal advice that a Section 173 Agreement can be applied in this situation correct or – as stated in a Shire officer’s report to Council for its 26 June 2012 meeting – incorrect?
6. It appears the only way a valuer could arrive at a $562,500 valuation for this land is by being given a hypothetical basis for the valuation. Why did this occur?