

L K A D V I S O R Y

Urban & Regional Planning | Strategy | Policy | Governance | Performance

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Dear Paul,

Shire of Toodyay – Extractive Industries Local Law Review

Our engagement to review how the Shire of Toodyay deals with extractive industries includes a review of the Shire's existing Extractive Industries Local Law, to ensure alignment with current planning standards, best practices and the draft Local Planning Policy that we recently prepared.

We have now completed our comprehensive review of the Shire's Local Law and are pleased to provide our observations, comments and recommendations in numbered paragraphs below.

Desktop Review of Extractive Industries Local Laws

1. To ascertain Local Law best practices within Western Australia, we undertook a desktop review of 43 Local Governments across Western Australia, with an emphasis on the most recently gazetted Extractive Industries Local Laws listed below:
 - Shire of Harvey Extractive Industries Local Law (2017)
 - Shire of Mingenew Extractive Industries Local Law (2017)
 - Shire of Victoria Plains Extractive Industries Local Law (2018)
 - Shire of Morawa Plains Extractive Industries Local Law (2018)
 - Shire of Dandaragan Extractive Industries Local Law (2019)
 - Shire of Waroona Extractive Industries Local Law (2021)
 - City of Kalamunda Extractive Industries Local Law (2021)
 - Shire of Boddington Extractive Industries Local Law (2023)
 - Shire of Gingin Extractive Industries Local Law (2025)
2. Based on this review and notwithstanding that the Shire's local law is among the six oldest local laws of the 43 we inspected, we found that the Shire's Local Law does not significantly depart from other equivalent local laws across the state.
3. This is likely due to the former existence of various versions of the *Local Government Model By-laws (Extractive Industries)* from 21 June 1974 until the repeal of version No. 9 on 17 October 2005. The availability of a model local law under s.3.9 of the *Local Government Act 1995* (LG Act) enabled Local Governments to adopt the provisions of that by-law without needing to make a local law in accordance with s.3.12(2) of the Act. This has resulted in a relatively homogenous set of extractive industries local laws across the state.
4. Despite the repeal of the model by-law in 2005, Extractive Industries Local Laws created or amended today largely conform to the same standard provisions as existing in those by-laws, with minor variations to suit individual circumstances. This is likely because Local Governments typically use existing local laws from other similar districts as a basis for reviews, which are generally still rooted in the repealed model Local Law.

Local Law Necessity

5. Repeal of the model by-law and advances in the robustness of the local and state planning frameworks since 1974 have, in our opinion, substantially diminished the need and value of Extractive Industries Local Laws and their associated Extractive Industries Licences (EILs).
6. Our draft Local Planning Policy does not contemplate or require the Shire to retain an Extractive Industries Local Law, or to continue the practice of imposing a 'road maintenance fee' paid by operators on a per-tonne basis. Instead, we recommend the Shire adopts a differential rate for extractive and other industrial/non-agricultural activities in the rural zone. This will allow Council to more defensibly, simply and effectively recover the added costs for maintaining roads impacted by extractive industry operations.
7. We do not support imposing development approval conditions to levy annual road maintenance charges on extractive industry operators (as stipulated in the Shire's current local planning policy) as this would arguably not pass the established legal test for validity of a planning condition. Furthermore, requiring a proponent to pay for the maintenance of public roads beyond their development site also raises a contradiction with the principles espoused in State Planning Policy 3.6 Infrastructure Contributions (SPP 3.6), which states (emphasis added):

"...contributions are for the initial capital requirements only and not for ongoing maintenance or operating costs of the infrastructure..."

8. Our view on this matter is underpinned by the following considerations:
 - a. One of the primary purposes of rates revenue is to maintain roads, as established under Section 55(2) of the *Land Administration Act 1997* (LAA), which assigns responsibility to local governments for the care, control and management of local roads.
 - b. Section 6.2 of the LG Act requires local governments to prepare comprehensive annual budgets including adequate provision for infrastructure maintenance, ensuring that essential services and assets such as roads, are sustainably funded over the long term.
 - c. The haulage vehicles used in extractive industry operations are typically 'as of right' vehicles that are permitted to freely use local public roads under the *Road Traffic Act 1974*.
9. In our opinion, the most appropriate mechanism for the Shire to levy extra charges against extractive industry operators to offset the added wear and tear impacts their haulage operations may have on the local road network, is to impose a differential rate on those activities under s.6.33 of the LG Act, and/or a service charge under s.6.38 of the Act.
10. Separately, if roads adjoining the subject land of a proposed extractive industry need to be upgraded to safely accommodate the proposed operation, then it would be fair and reasonable for the Shire to impose such upgrading requirement as a condition of development approval, provided there is a demonstrable need for that upgrade and nexus with the development being proposed.
11. If the Shire accepts our draft Local Planning Policy and agrees with our advice that it should no longer charge road maintenance fees through development approval conditions and should instead use the cost recovery mechanisms available under the LG Act, then there would be no value in retaining the Extractive Industries Local Law. In that case, the local law could be repealed, taking care to not compromise the ongoing management and compliance regime for extractive industries operating under existing Extractive Industries Licences.
12. If the Shire is open to imposing a differential rate for extractive industry and/or mining activities and/or non-agricultural activities in the rural zone, then it may wish to review (for reference) the equivalent differential rates being charged by other local governments, including the Shire of Serpentine-Jarrahdale and the Shire of Boddington.

Local Law Review

13. If the Shire decides to retain its Extractive Industries Local Law (1999), we note that a formal review is well overdue, as s.3.16(1) of the LG Act requires local laws to be reviewed every 15 years. This requirement has not been met and we urge the Shire to commence this review as soon as possible, given the review timeframe is now more than 10 years overdue.
14. The local laws listed in paragraph 1 earlier serve as a solid foundation for the Shire to review its current local law. Those other local laws are recent and relate to local governments with similar characteristics to the Shire of Toodyay.
15. The Shire of Gingin's Extractive Industries Local Law is the most recently gazetted local law of its kind and could inform the Shire of Toodyay's local law review, given that Gingin is geographically close to Toodyay (separated only by the Shire of Chittering), and the two local governments share similar characteristics, including their proximity to the Perth Metro Area and exclusion from *State Planning Policy 2.4: Basic Raw Materials* (SPP 2.4).
16. We have compared the Shire of Toodyay's existing local law with the Shire of Gingin's new Extractive Industries Local and identified changes which Council should consider making if it intends to retain and review its current ageing local law. The results of this review and our recommended changes are set out in Attachment 1.

Conclusion and recommended next steps.

17. The Shire's Extractive Industry Local Law is similar to other local laws and, if retained, is well overdue for review. There are clear improvements that can be made to the local law, having regard to equivalent, more recent local laws in other Local Government areas.
18. For the reasons explained earlier, we recommend that Council considers revoking its Extractive Industries Local Law, ceasing the practice of levying charges on extractive industry operators through development approval or licence conditions, and instead introduces a differential rate and/or charge relating to these activities, as Council is entitled to do under the LG Act.
19. If Council agrees to repeal the Local Law, then before formally doing so, consideration will need to be given to the transitional mechanisms needed to preserve management and compliance regimes for extractive industries operating under pre-existing extractive industries licence.

Please do not hesitate to contact me on (08) 6500 7800 or via email at len@lkadvisory.com.au if you have any queries or would like to discuss this matter further.

Yours sincerely



LEN KOSOVA
Director

Attachment 1 – Comparison Table of Shire of Toodyay and Shire of Gingin Local Laws

Attachment 1 LK Advisory Comparison Table | Shire of Toodyay and Shire of Gingin Extractive Industries Local Law

Shire of Gingin clause	Shire of Toodyay equivalent clause	Comment	Recommendations
1.3 Application	1.2 Application	Consistent	None
1.4 Repeal	1.3 Repeal	Consistent	None
1.5 Transitional provisions	-	The Shire of Toodyay Local Law does not contain transitional provisions that deal with applications or renewal of licences made before the commencement of the local law. The Shire of Toodyay would benefit from including this as it would provide clarity for applicants and current licensees.	Include transitional provisions addressing pre-commencement applications/renewals to provide clarity for existing applicants and licensees.
2.1 Extractive industries prohibited without licence	2.1 Extractive industries prohibited without licence	Consistent	None
3.1 Applicant to advertise proposal	3.1 Applicant to advertise proposal	The Shire of Gingin Local Law contains an additional two subclauses in this section that specify the information to be contained in the public notice and enable the local government to undertake a public consultation process.	Expand the clause to detail the required public notice information and outline a public consultation process.
3.2 Application for licence 3.4 Plan of excavation site 3.5 Works and evacuation program 3.6 Rehabilitation and decommissioning program 3.7 Certificate of a licensed surveyor	2.3 Application for licence	The Shire of Gingin Local Law separates application requirements into specific clauses, but the content remains consistent.	Option to separate application requirements into individual clauses for improved clarity and ease of assessment. Check for consistency with the final adopted Local Planning Policy
3.3 Applications by community or sporting organisation	-	The Shire of Toodyay Local Law does not contain this clause which allows the local government to waive any local law provision if the proposal is for the benefit of a community or sporting organisation and not for commercial activity. This clause may be beneficial for the Shire to adopt as it offers a simplified process for extractive industry activity not for commercial benefit. There may also be an opportunity to explore additional or clarified circumstances in which small-scale extractive industries might be specifically exempted from the application of the local law.	Include a clause permitting waiver of certain local law provisions for community/sporting organisation proposals (non-commercial activity).
3.8 Security for restoration of excavation site and for road infrastructure	5.1 Security for restoration and reinstatement	This clause is relatively consistent, except for the Shire of Gingin Local Law including a subclause that covers road infrastructure.	Incorporate a subclause addressing road infrastructure security requirements.
4.1 When an application may be determined 4.2 Determination of application 4.3 Conditions which may be imposed	3.1 Determination of application	The Shire of Gingin Local Law separates this clause into three subclauses; however, the content is relatively consistent. The only key difference is the licence period, with the Shire of Gingin Local Law limiting the licence period to a maximum of 5 years whilst the Shire of Toodyay Local Law has a maximum of 21 years. The Shire of Toodyay may benefit from reducing the licence period to a 5-year maximum as doing so would obligate licensees to apply for a renewal of licence sooner and more frequently, thus providing the Shire with updated plans and information for its recurrent assessment and determination.	Reduce the maximum licence period to 5 years and consider separating the determination process into distinct clauses for clarity and for ease of assessment. Consider framing the clause to allow an extended period to align with any prescribed premises licence and/or development approval granted for the project. If the licence expiry is framed as a condition, then the below intervention would allow for the licence to be extended subject to a variation to the condition during the annual review/annual licence payment process.
4.4 Variation of conditions	-	The Shire of Toodyay Local Law does not contain this clause but would benefit from its inclusion as it enables the local government to vary, delete or impose a condition upon an active licence after receiving an annual report update on the status of extractive industry activity. This would entitle the Shire to delete, add or edit conditions without having to wait until a licence renewal, which (if the Shire of Gingin's licence period is adopted) could be at a maximum 5 years.	Include a clause that allows variation of conditions on an active licence following annual report reviews and before acceptance of annual licence fees.
4.5 Transport of materials	-	The Shire of Toodyay Local Law briefly mentions transport in clause 4.3 'Conditions which may be imposed', however clause 4.5 in the Shire of Gingin Local Law expands on the conditions the local government can impose regarding transport and maintenance costs.	Add a dedicated clause on transport of materials specifying conditions and responsibilities regarding transport and maintenance costs.
4.6 Renewal of licence	4.3 Renewal of licence	The Shire of Gingin Local Law requires a renewal application to be submitted at least 90 days before the date of expiry, whereas the Shire of Toodyay Local Law requires 45 days for the same. The remaining content of these clauses is consistent with each other. The Shire should consider extending the minimum submission time for licence renewals, to provide more time for assessment, referrals/advertising and determination.	Extend the minimum renewal submission period to 90 days before expiry.
4.7 Variation of licence	-	The Shire of Toodyay Local Law does not contain this clause which sets out the process to vary a licence. This process is identical to the process outlined in clause 4.6 'Renewal of licence'.	Include a clause specifically outlining the process for licence variation, which may be integrated with the process to vary a licence condition.
4.8 Transfer of licence	4.1 Transfer of licence	This clause is relatively consistent, apart from an additional subclause in the Shire of Gingin Local Law that sets out the procedure for the local government if a transfer of licence application is denied.	Add a subclause specifying the procedure for handling denied transfer applications.

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Shire of Gingin clause	Shire of Toodyay equivalent clause	Comment	Recommendations
4.9 Cancellation of license	4.2 Cancellation of licence	<p>The Shire of Gingin Local Law contains the same content as the equivalent clause in the Shire of Toodyay Local Law, in addition to subclauses that allow the cancellation of licences where the licensee has –</p> <ol style="list-style-type: none">1. Ceased to operate for over 12 months or has not advised the local government of cessation of operations.2. Attempted to or completed a transfer of licence without local government consent.3. Fails to make an annual report to local government as set out in a later clause. <p>The Shire of Toodyay may benefit from implementing these provisions as it would:</p> <ul style="list-style-type: none">• Encourage licensees to continue their operations, accelerating the completion time for extractive industry activities and potentially releasing the land for development and/or a subsequent land use sooner;• Ensures Shire oversight over the transfer of licences; and• Compels licensees to deliver their annual report to the Shire promptly.	Expand the cancellation clause to include cancellation if operations cease for over 12 months or notification is not provided, unauthorised licence transfers, and failure to submit required annual reports.
5.1 Obligation of the licensee 5.3 Prohibitions	6.2 Prohibitions	<p>The Shire of Gingin Local Law separates this clause into two specific clauses; however, the content is consistent, apart from the Shire of Gingin prohibiting the removal of trees or shrubs within 40 metres of the boundary of any thoroughfare on land, whereas the Shire of Toodyay prohibits the removal of trees and shrubs within 100 metres of the boundary of any road reserve on land.</p>	Further review is recommended to rationalise setback distances for vegetation removal to ensure consistency and appropriateness with the adopted Local Planning Policy.
5.2 Limits of excavation	6.1 Limits on excavation near boundary	<p>The two local governments vary on excavation distances. The Shire of Gingin Local Law prohibits excavation within 50 metres of any watercourse, whilst the Shire of Toodyay has a 100-metre prohibition distance. The Shire of Gingin has an additional subclause that prohibits excavation within 2 metres of the estimated maximum groundwater level, while the Shire of Toodyay has an extra subclause that prohibits excavation within 50 metres from all lot boundaries.</p>	Further review is recommended to rationalise excavation setback distances and consider incorporating a groundwater level restriction similar to Gingin’s approach, ensuring consistent with the adopted Local Planning Policy.
5.4 Blasting	6.3 Blasting	<p>These clauses are relatively consistent. The Shire of Gingin Local Law contains updated government Acts and laws that blasting must accord with.</p>	Update the blasting clause to reference current government Acts and regulations governing blasting activities.
6.1 Notification of cessation of operations by licensee 6.2 Cessation of operations – permanent 6.3 Cessation of operation – temporary	7.3 Notice of cessation of operations	<p>The two clauses are generally consistent however the Shire of Gingin Local Law includes additional subclauses that outline what is to accompany a notification of cessation, including current licensee details, plans, advice, and ongoing requirements.</p>	Expand the cessation notification clause to require detailed licensee information, operational plans, and any ongoing requirements.
6.4 Works to be carried out on permanent cessation of operations	6.4 Works to be carried out on cessation of operations	<p>Consistent</p>	None
7.1 Public liability	7.1 Public liability	<p>These clauses are generally consistent apart from the insurance amount whereby the Shire of Gingin requires a minimum of \$20,000,000 and the Shire of Toodyay requires \$10,000,000.</p> <p>This likely relates to the Toodyay local law having been created in 1999. Assuming a long-run average CPI inflation rate of around 2.7% per annum, the value of \$10,000,000 in today's money is approximately \$20,000,000. So, this change would only return the public liability requirement to its intended level.</p>	Increase the minimum public liability insurance requirement to \$20,000,000.
7.2 <i>Mines Safety and Inspection Act 1994 and Environmental Protection Act 1986</i>	7.2 <i>Mines Safety and Inspection Act and Environmental Protection Act</i>	<p>Consistent</p>	None
7.3 Annual Report	-	<p>The Shire of Toodyay Local Law does not contain this clause which requires licensees to annually report to the local government. The Shire would benefit from including this clause that allows the Shire to receive annual progress updates on extractive industry activities, which would otherwise only be required during licence renewal applications unless imposed as a development approval condition.</p>	Include an annual reporting clause requiring licensees to provide yearly progress updates on extractive activities. This would be consistent with the provisions of our draft Local Planning Policy and recommended potential conditions of approval.
7.4 Use of secured sum by the local government	5.2 Use by the local government of secured sum	<p>These clauses are relatively consistent.</p>	None
7.5 False or misleading statement	-	<p>The Shire of Toodyay Local Law does not contain this clause that provides additional circumstances where the local government can refuse any type of license application.</p>	Include a clause that addresses false or misleading statements in licence applications.
8.1 Notice to remedy non-compliance 8.2 Notice requirements 8.3 Local government may undertake requirement of notice 8.4 Offence to fail to comply with notice	-	<p>The Shire of Toodyay Local Law does not contain this clause that enables the local government to place a requirement not contained or permitted by the local law on a licensee.</p>	Add a clause enabling the local government to impose additional remedial notice requirements on a licensee.
9.1 Objection and review rights	8.1 Objections and appeals	<p>Consistent</p>	None

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Shire of Gingin clause	Shire of Toodyay equivalent clause	Comment	Recommendations
10.1 Offences 10.2 General penalty 10.3 Modified penalties 10.4 Forms	-	Penalties are generally consistent across the two local laws. The Shire of Toodyay Local Law does not have dedicated clauses for penalties and offences; however, rates are mentioned in their respective clauses.	Insert a dedicated penalties and offences section to improve clarity and consistency in enforcement.