

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Councillor Patton rejoined the Chamber at 8.12pm

17.2 Application to Renew Lease – Rimhart Nominees Pty Ltd (Report No: 232/18)

Recommendation – Exclusion of the Public – Section 90(3)(b & d) Order
C100718/1215

1. That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd in confidence.

2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd on the following grounds:
 - b. pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be

expected to confer a commercial advantage on a person with whom the Council is

conducting business; or
would prejudice the commercial position of the Council

- d. pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected

to prejudice the commercial position of the person who supplied the information, or
to confer a commercial advantage on a third party.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.

- h. pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice which has been provided by Mellor Olsson on instructions from the Council.

3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.

Moved Councillor Aust, Seconded Councillor Donaldson

Carried

Division called:

A division was called and the previous decision was set aside.

Those voting for: Councillors Aust, Lonie, Patton, Yates, Clancy, Donaldson, Bouchee, Charlick, Smedley and Snewin (10)

Those voting against: (0).

Deputy Mayor Bradshaw declared the motion

Carried

Application to Renew Lease – Rimhart Nominees Pty Ltd

On 26 September 2006 Council endorsed the Lease Agreement for Rimhart Nominees Pty Ltd ("*Lessee*") over the portion of land in Colley Reserve South on which the Ferris wheel was erected.

The Lease commenced 1 September 2008 for an initial term of five years, but also included two subsequent consecutive five year renewal terms (each respectively commencing 1 September 2013, and 1 September 2018). On 28 May 2013 Council resolved to support the first lease renewal (Resolution C280513/941) which is now due to expire on 31 August 2018.

On Tuesday 22 May 2018, the lessee exercised their intention to renew the second five year renewal term in accordance with Clause 4.9.1 of the Lease Agreement. However, on the basis that the Ferris wheel has been inactive for in excess of 12 months; the structure is falling into a state of disrepair; and the lessee has been in arrears of their rent obligations on multiple occasions; Council has previously received and refused two separate applications for rent reduction/relief from the lessee, it is recommended that Council exercise their right to refuse the lease renewal.

Motion

C100718/1216

1. That Council refuses the Lessee's application to renew the lease agreement;
2. That Administration serve notice on the Lessee, requiring them to remove all fixtures and fittings from the land, and remediate the condition of the land upon expiration of the lease.

Moved Councillor Aust, Seconded Councillor Donaldson

Carried

RETAIN IN CONFIDENCE - Section 91(7) Order

C100718/1217

That having considered Agenda Item: 17.2 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd in confidence under section 90(2) and (3)(b, d & h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the : 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd be retained in confidence for a period of 12 months.

Moved Councillor Lonie, Seconded Councillor Snewin

Carried

CONFIRMED

Tuesday 24 July 2018

DEPUTY MAYOR

ITEM NUMBER: 17.2

CONFIDENTIAL REPORT

APPLICATION TO RENEW LEASE – RIMHART NOMINEES PTY LTD

Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this agenda and the accompanying documentation is delivered to the Council Members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that Council will receive, discuss or consider:

- b. Information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and would, on balance, be contrary to the public interest.**
- d. Commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and would, on balance, be contrary to the public interest.**
- h. Legal advice.**

Recommendation – Exclusion of the Public – Section 90(3)(b & d) Order

- 1** That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd in confidence.

 - 2.** That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd on the following grounds:
 - b.** pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council is

conducting business; or
would prejudice the commercial position of the Council

 - d.** pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected

to prejudice the commercial position of the person who supplied the information, or
to confer a commercial advantage on a third party.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.

 - h.** pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice which has been provided by Mellor Olsson on instructions from the Council.

 - 3.** The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.
-

Item No: **17.2**

Subject: **APPLICATION TO RENEW LEASE – RIMHART NOMINEES PTY LTD**

Date: 10 July 2018

Written By: Team Leader, Leasing & Commercial Operations

General Manager: City Assets and Services, Mr H Lacy

SUMMARY

On 26 September 2006 Council endorsed the Lease Agreement for Rimhart Nominees Pty Ltd ("*Lessee*") over the portion of land in Colley Reserve South on which the Ferris wheel was erected.

The Lease commenced 1 September 2008 for an initial term of five years, but also included two subsequent consecutive five year renewal terms (each respectively commencing 1 September 2013, and 1 September 2018). On 28 May 2013 Council resolved to support the first lease renewal (Resolution C280513/941) which is now due to expire on 31 August 2018.

On Tuesday 22 May 2018, the lessee exercised their intention to renew the second five year renewal term in accordance with Clause 4.9.1 of the Lease Agreement. However, on the basis that the Ferris wheel has been inactive for in excess of 12 months; the structure is falling into a state of disrepair; and the lessee has been in arrears of their rent obligations on multiple occasions; Council has previously received and refused two separate applications for rent reduction/relief from the lessee, it is recommended that Council exercise their right to refuse the lease renewal.

RECOMMENDATION

1. **That Council refuses the Lessee's application to renew the lease agreement;**
2. **That Administration serve notice on the Lessee, requiring them to remove all fixtures and fittings from the land, and remediate the condition of the land upon expiration of the lease.**

RETAIN IN CONFIDENCE - Section 91(7) Order

3. **That having considered Agenda Item: 17.2 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd in confidence under section 90(2) and (3)(b, d & h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the : 232/18 Application to Renew Lease – Rimhart Nominees Pty Ltd be retained in confidence for a period of 12 months.**
-

COMMUNITY PLAN

Placemaking: Creating vibrant and safe places

COUNCIL POLICY

Commercial Leasing Policy.

STATUTORY PROVISIONS

Local Government Act 1999.

Retail and Commercial Leases Act 1995.

BACKGROUND

Previous Reports, Applications and Decisions

- Council Report No.: 348/17; Item No.: 16.1, 'Lease – Rimhart Nominees Pty Ltd Application for Rent Relief', 10 October 2017 (Resolution No.: C101017/934);
- Council Report No.: 107/15; Item No.: 14.4, 'Glenelg Colley Reserve – Lease to Rimhart Nominees Pty Ltd for Ferris Wheel (Application for Rent Reduction)', 14 April 2015 (Resolution No.: C140405/076);
- Council Report No.: 172/13; Item No.: 14.9, 'Rimhart Nominees Pty Ltd – Extension of Lease', 28 May 2013 (Resolution No.: C280513/941);
- Economic & Corporate Committee Report No.: 460/06; Item No.: 8.8, 'Lease – Rimhart Nominees Pty Ltd (Colley Reserve South Ferris Wheel', 26 September 2006 (Resolution No.: EC260906/096).

REPORT

On 26 September 2006 the Economic & Corporate Committee endorsed the Lease Agreement currently held between Council and Rimhart Nominees Pty Ltd ("*Lessee*").

The Lease commenced 1 September 2008 for an initial term of five years and incurred an annual commencing rental of \$15,780 (plus GST). The rental was subject to annual CPI increases.

The lease agreement also included two subsequent consecutive five year renewal terms (each respectively commencing 1 September 2013, and 1 September 2018). On 28 May 2013 Council resolved to support the first lease renewal (Resolution C280513/941), which is now due to expire on 31 August 2018. The current annual rent payable by the lessee is \$17,796 (plus GST).

In accordance with Clause 4.9.1 of the Lease Agreement, in May 2018 the lessee exercised their intention to execute the second five year renewal term. However, the Ferris wheel has been

inactive for in excess of 12 months, has fallen into as state of disrepair as the lessee has not maintained the structure, Council have received and refused two applications for rent reduction/relief, and the lessee has been in arrears of their numerous rent obligations on multiple occasions, it is recommended that Council reserve their right to refuse the lease renewal.

Grounds for Refusal

Administration has sought and obtained legal advice regarding this mater. A copy of this advice is attached for member's reference.

Refer Attachment 1

Though the Lease Agreement does not specifically require the lessee to operate the Ferris wheel, the terms of the agreement do require the Tenant to "maintain, repair, replace, clean and keep in good and substantial repair, order and condition including good working order all structures and improvements on the leased land".

As the Ferris wheel has not operated for in excess of 12 months, has significantly deteriorated, and the tenant has, for all intents and purposes, operationally vacated the premises, Council may:

- issue a notice of breach for the tenant's failure to maintain the structure, and/or their abandonment of the premises, allowing the Council (as Landlord) to re-enter and repossess the premises;
- refuse to grant the renewal term on the grounds that the Tenant was in breach or has otherwise failed to comply with its obligations under the Lease at the time of requesting the renewal; or alternatively
- grant the renewal term, with Council either exercising its rights, or not exercising its rights for the various provisions within the Lease, of which the Tenant has not complied.

Renewal of Lease – Alternate Use of Site

The lessee has speculated that they wish to renew the lease in order to utilise the site for an alternate use. It should be noted that no official proposal has been submitted.

In accordance with the Agreement the permitted use of the site is for a "Single Arm Ferris Wheel". As such, any renewal that permits an alternative use of the site is not consistent the intention of the agreement. On this basis, any subsequent use of the site will require Council to enter into a new lease agreement with the lessee.

BUDGET

An annual budget allocation is provided to City Assets & Services for the review and implementation of property leases. This budget includes the engagement of legal advice and services when and where necessary.

LIFE CYCLE COSTS

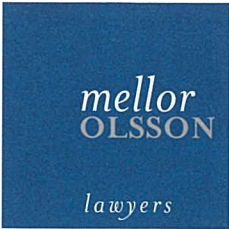
Under the terms of the lease, the lessee is responsible for all costs associated with the removal of the structure, remediation of the land.

CONFIDENTIAL

Attachment 1



31 May 2018



City of Holdfast Bay
PO Box 19
BRIGHTON SA 5048

Attention: Scott Reardon

By email only: sreardon@holdfast.sa.gov.au

Dear Scott

FERRIS WHEEL

I refer to our telephone discussions on Wednesday and Thursday last week and summarise the background details as follows:

- Council is the owner of the land in Certificate of Title 5972/927 which is located on Colley Terrace at Glenelg.
- Rimhart Nominees Pty Ltd (**Tenant**) leases a portion of the land for the purpose of operating a ferris wheel.
- The Tenant has not maintained the ferris wheel in recent years.
- The ferris wheel is inactive, and has been inactive for in excess of 12 months.
- The Council received an email from the Tenant on 22 May 2018 seeking to exercise their right to renew a term of 5 years, pursuant to clause 4.9 of the Lease (Renewal).

Some relevant provisions of the Lease are outlined as follows:

1. Clause 2.7 requires the Tenant to maintain, repair, replace, clean and keep in good and substantial repair, order and condition including good working order all structures and improvements on the leased land. In addition, the Council (as landlord) may reasonably require the Tenant to enter into service or maintenance contracts where appropriate.
2. Clause 4.1.2(e) states that if the premises are left unoccupied for more than one month or more without the Council's consent then the Council may terminate the Lease and re-enter and repossess the premises (among other rights the Council may have).
3. The Tenant has a right to renew the term of the Lease for a period of 5 years commencing 1 September 2018 and expiring 31 August 2023. Pursuant to clause 4.9.1, the Tenant's right of renewal is subject to the Tenant giving notice to the Council not less than three months and not more than nine months before expiry

of the current term. The Tenant's right of renewal is also subject to the Tenant not being in breach (or other noncompliance) of its obligations under the Lease at that time.

4. Clause 4.11 requires the Tenant within 7 days of the expiry of the Lease to remove all of its structures, alterations, fixtures, equipment and additions to the premises, make good any resulting damage and reinstate the premises to their condition prior to the Tenant entering into occupation.

We understand that the Tenant owns the ferris wheel structure, and accordingly, unless the Council agrees otherwise, the Tenant is responsible for removing the structure.

5. If the Tenant's breach (or other noncompliance) continues after 7 days following any written notice from the Council, then the Council may remedy that breach and recover such costs in the same way as the recovery of rent (see clause 4.6).

Next steps

It is our understanding that the Council is dissatisfied that the ferris wheel has not been maintained, the ferris wheel is not operational, and that the Tenant has not indicated if it intends to operate the ferris wheel in the foreseeable future. On this basis, the Council may consider the following possible action:

- Issue a notice of breach to the Tenant for its failure to maintain the ferris wheel structure, and/or its abandonment of the premises. Failure to comply within 14 days from the date of the notice will entitle the Council (as Landlord) to re-enter and repossess the premises.
- Refuse to grant the renewal term on the grounds that the Tenant was in breach or has otherwise failed to comply with its obligations under the Lease at the time of requesting the renewal.
- Grant the renewal term, with Council either exercising its rights, or not exercising its rights in respect of those various provisions within the Lease, which the Tenant has not complied.

If you have any further queries please contact us.

Yours faithfully

MELLOR OLSSON



JANINE CARROLL

Senior Associate

Email: jcarroll@mellorolsson.com.au

Phone: (08) 8414 3411 (Adelaide)