

17.2

CONFIDENTIAL REPORT

BUFFALO LICENCE AGREEMENT

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 & h) 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: 389/18 Buffalo Licence Agreement 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: 389/18 Buffalo Licence Agreement 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: **BUFFALO LICENCE AGREEMENT**

Date: 11 December 2018

Written By: A/Team Leader, Leasing & Commercial Operations

General Manager: City Assets and Services, Mr H Lacy

SUMMARY

The Licence Agreement ("*Agreement*") held between Council and DeYoungs Jamestown Pty Ltd ("*Licensee*") commenced 14 April 2014 for an initial period of five (5) years. The purpose of the Agreement was so that the Licensee could develop the vessel and adjacent land as a commercial venture; to construct a '*kiosk, alfresco bar and dining area, toilet facilities, outdoor dining deck, boat platform, gangway and undertake landscaping*'.

Following an extensive and protracted application process, Planning Approval was granted by the State Commission Assessment Panel on 10 August 2018, and final Development Approval was granted 26 September 2018.

Pursuant to Clause 14.7 of the Agreement, the Licensee is required to complete the entirety of '*all approved renovations and refurbishment works within 12 months of the date final development approval is granted*' (VIZ 25 September 2019).

As a result of lack of repair and maintenance works undertaken to the vessel, on 8 August 2018 and 9 October 2018 Council resolved to serve breach notices to the licensee. To date, the notices remain ignored.

On 12 November 2018, following further discussions with the Licensee's lawyer, Administration was advised that the Licensee now seeks to execute a mutual termination of the Agreement, subject to:

- the Licensee removing the vessel and remediating the land;
- both parties reaching a mutually agreed consistent media release.

The termination is sought on the basis that the licensee is no longer able to complete the redevelopment of the site.

This in mind, given the Licensee's protracted approach to the development, disregard for the maintenance of the vessel, his apparent disregard for the Notices of Breach, the ongoing community complaint regarding the condition of the site, and Council's frustration with the lack of progress and deteriorating condition of the replica vessel, it is recommended that Council support the mutual termination.

It should be noted that as the Licensee is the owner of the vessel (not Council), pursuant to the terms and conditions of the Agreement, the Licensee is responsible for removing the vessel from the location, and remediating the immediately adjacent land back to the reasonable condition that would deem it fit-for-purpose for community use.

RECOMMENDATION

1. That Council endorses the proposal to execute a mutual Deed of Termination subject to the agreed terms;
2. That the Mayor and Chief Executive Officer be authorised to execute and seal any documents required to give effect to this termination;
3. That the Deed of Termination be executed prior to the next Council Meeting (29 January 2019), and if not done so through fault of the Licensee, Council unilaterally terminate the Licence Agreement for breach and failure to remedy breach;

RETAIN IN CONFIDENCE - Section 91(7) Order

4. That having considered Agenda Item: 17.2 Report No: 389/18 Buffalo Licence Agreement 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 any details outlined in Report No: 389/18 Buffalo Licence Agreement and associated minutes that pertain to the Licensee, Licence Agreement and/or Commercial Operations be retained in confidence for a period of 12 months;
 5. However, that the Mayor, Chief Executive Officer and Elected Members be authorised to discuss with the community details pertaining to the removal of vessel, as well as any mutually agreed media release(s) after the Deed of Termination has been executed.
-

COMMUNITY PLAN

Placemaking: Creating vibrant and safe places

COUNCIL POLICY

Commercial Leasing Policy.

STATUTORY PROVISIONS

Development Act 1993.

Local Government Act 1999.

Retail and Commercial Leases Act 1995.

BACKGROUND

Previous Reports, Applications and Decisions

- Council Report No.: 339/18; Item No.: 17.1, *'Buffalo Site Redevelopment'*, 9 October 2018 (Resolution No's.: C091018/1304 & C091018/1306);
- Council Report No.: 253/18; Item No.: 17.1, *'Buffalo Licence Agreement and Proposed Site Redevelopment'*, 24 July 2018 (Resolution No.: C240718/1233);
- Question on Notice, Report No.: 37/17; Item No.: 9.1.2, *'Buffalo Lease'*, 12 June 2018;
- Council Report No.: 59/15; Item No.: 14.3, *'The Buffalo – Proposed Alterations and Amendment to Licence'*, 10 March 2015 (Resolution No.: C100315/065);
- Confidential Council Report No.: 40/14; Item No.: 17.1, *'The Buffalo – Surrender of Licence and New Licence'*, 11 February 2014 (Resolution No.: C110214/1037);

REPORT

Licence Agreement

The Licence Agreement (*"Agreement"*) held between Council and DeYoungs Jamestown Pty Ltd (*"Licensee"*) commenced 14 April 2014 for an initial period of five (5) years; with a current expiry date of 13 April 2019. The Agreement includes three (3) subsequent consecutive five (5) year terms of renewal (each respectively commencing 14 April 2019, 14 April 2024, and 14 April 2029).

Development Application

Development Application 110/00146/15, which proposed to construct a *kiosk, alfresco bar and dining area, toilet facilities, outdoor dining timber deck, boat platform, gangway and undertake landscaping* was submitted on 20 February 2015 and after lengthy negotiations and amendments, received Planning Approval on 10 August 2018 from the State Commission Assessment Panel, with final Development Approval granted 26 September 2018.

Essential Development Time Restrictions

Pursuant to Clause 14.7 of the Agreement, the Licensee has to complete the entirety of *"all approved renovations and refurbishment works within 12 months of the date final development approval is granted"* (VIZ 25 September 2018).

Breach of Licence Agreement

Due to ongoing community complaints about the site, and the deteriorating state of the vessel, Council resolved (refer Resolution C240718/1233) to issue a Notice of Breach which was served

on the Licensee on 8 August 2018, together with a letter from the Acting CEO outlining Council's increasing disappointment with the protracted approach towards the development.

Refer Attachments 1 & 2

As no action had occurred on site to remedy said breaches by the stated deadline (8 October 2018), on 9 October 2018 Council again resolved (refer Resolution No.: C091018/1306) to issue a subsequent notice *"advising that if no action [was] taken to remedy the breaches and/or reasonable redevelopment works [had] not commenced within 30 days, Council will take action to terminate the Licence Agreement"*.

Refer Attachment 3

Proposed Termination of Licence

On 12 November 2018 the Licensee approached Administration seeking to terminate the licence on mutually acceptable terms, subject to: preparation and execution of an agreed Deed of Termination; the Licensee removing the vessel and remediating the land; and both parties agreeing a mutually acceptable media position.

Conclusion

Given the Licensee's protracted approach to the entire development, his lax attitude toward the maintenance of the vessel, his apparent disregard for the Notices of Breach, the ongoing community complaints received by Council regarding the state of the site and replica vessel, combined with Council's continual frustration with the lack of maintenance and delays in the redevelopment, it is recommended that Council support the mutual termination of the Licence Agreement.

BUDGET

Under the draft Deed of Termination, all costs associated with the removal of the replica vessel, site remediation and disposal costs are to be borne by the Licensee. The Licensee will also be responsible for settling any outstanding debts to Council, including but not limited to any costs associated with issuing of breach notices.

The Licensee's share of any carpark rental income will be forfeited for any period that the Licensee was in breach, from 8 August 2018.

Council will be responsible for its own legal fees, however there is an annual budget allocation provided to City Assets & Services for the review and implementation of property leases, including legal advice and other services when and where necessary.

LIFE CYCLE COSTS

Should Council determine to terminate the agreement, the HMS Buffalo will be removed from the location by the vessel's owner. Once the location has been remediated and returned to usable community land, Council will be responsible for the ongoing maintenance the location.

Attachment 1



Our Ref: JC1:LS2:M181613

8 August 2018

mellor
OLSSON
lawyers

BY REGISTERED MAIL

De Youngs Jamestown Pty Ltd
74 Baden Terrace
O'SULLIVAN BEACH SA 5166

Dear Mr DeYoung

LICENCE TO DE YOUNGS JAMESTOWN PTY LTD (HMS BUFFALO)

We act for the City of Holdfast Bay, the landowner of your premises at Adelphi Terrace, Glenelg.

We are instructed that despite several communications with our client, you remain in default of your obligations pursuant to your Licence.

We *enclose a Notice to Remedy Breach.

To avoid our client exercising further rights against you including the right to terminate the Licence, we urge you to comply with the Notice.

Yours faithfully
MELLOR OLSSON



JANINE CARROLL
Senior Associate
Direct Email: jcarroll@mellorolsson.com.au
Phone: 8414 3411 (Adelaide)

Copy to: Mr Troy De Young
troy@deyoungs.com.au

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Adelaide
Level 5 80 King William Street Adelaide SA 5000
GPO Box 74 Adelaide SA 5001 DX 543
Phone: +61 8 8414 3400
Fax: +61 8 8414 3444

Port Lincoln
11 Mortlock Terrace Port Lincoln SA 5606
PO Box 411 Port Lincoln SA 5606 DX 51050
Phone: (08) 8682 3133
Fax: (08) 8682 6030

Clare
165 Main North Road Clare SA 5453
PO Box 671 Clare SA 5453
Phone: (08) 8842 1833
Fax: (08) 8842 1811

Regional Offices (By Appointment Only)
Bordertown Kadina Keith
McLaren Vale Nuriootpa
Phone: 1300 414 414
Fax: (08) 8414 3444

DE YOUNGS JAMESTOWN PTY LTD
74 Baden Terrace
O'SULLIVAN BEACH SA 5166

FROM:

CITY OF HOLDFAST BAY

NOTICE TO REMEDY BREACH

MELLOR OLSSON
Solicitors
80 King William Street
ADELAIDE S.A. 5000

Solicitors for the Lessor

Telephone : 8414 3400
Facsimile : 8414 3444

SOLICITOR: J Carroll

NOTICE TO REMEDY BREACH

TO: **DE YOUNGS JAMESTOWN PTY LTD** (ACN 132 283 213) of 74 Baden Terrace,
O'Sullivan Beach SA 5166 ("**You**")

FROM: **CITY OF HOLDFAST BAY** ABN 62 551 270 492 of PO Box 19, Brighton SA 5048
("**Landowner**")

By a Licence Agreement dated 12 May 2014 as varied by agreement dated 17 March 2015 ("**the Licence**") between You (as the licensee) and the City of Holdfast Bay (as licensor), the Landowner agreed to licence and You agreed to accept a licence over a portion of the land in Certificate of Title Volume 5935 Folio 965 ("**Premises**").

TAKE NOTICE that the Landowner **HEREBY REQUIRES** You to remedy at Your cost Your breaches in observance of the terms of the Licence as set out below within the time set out below and also to pay the Landowner's costs occasioned by the said breaches and by the giving of this notice.

AND FURTHER TAKE NOTICE that if you do not comply with the requirements of this notice the Landowner may without further notice to You exercise its rights pursuant to the Licence or at law including the right to terminate the Licence as a consequence of Your breach.

BREACHES

- Pursuant to clause 9.1 and 9.2 You are required to maintain items in or attached to the Premises.
- Pursuant to clause 14 of the Licence, You were required to restore and refurbish the HMS Buffalo vessel (including structural works) to a good commercial standard from which the permitted use may be lawfully carried on before 13 October 2015 (being 18 months of the Licence commencement date), or where approvals are required, within 12 months of development approval being granted (which You have not taken reasonable steps to obtain).

MANNER OF RECTIFICATION

1. Comply with and take all necessary steps to address the requirements of clauses 9.1, 9.2 and 14 of the Licence regarding maintenance and refurbish the HMS Buffalo vessel.
2. To pay to the Landowner the sum of \$400.00 and GST of \$40.00 as per the attached invoice for the legal costs incurred in issuing this notice to You.

TIME FOR RECTIFICATION

On or before 5.00pm on **8 October 2018** in which respect time is of the essence.

This notice is issued without prejudice to all other rights and remedies our client has pursuant to the Licence and at law.

DATED this *8th* day of *August* 2018.

The Landowner by its solicitors
MELLOR OLSSON

Per: 
JANINE CARROLL

Attachment 2





holdfast.sa.gov.au

Brighton Civic Centre 24 Jetty Road, Brighton SA 5048

PO Box 19 Brighton SA 5048

P 08 8229 9999 F 08 8298 4561

Glenelg Customer Service Centre and Library

2 Colley Terrace, Glenelg SA 5045

9 August 2018

Mr Troy DeYoung
c/- 74 Baden Terrace
O'SULLIVAN BEACH SA 5166

Email: troy@deyoungs.com.au

Dear Mr DeYoung

Further to the notice of breach sent to you by our Lawyers 8 August 2018 regarding your occupancy of the HMS Buffalo at Glenelg, Council has resolved to also send this correspondence.

The City of Holdfast Bay continues to receive ongoing complaints about the deteriorating state of the vessel and adjacent areas, and while we acknowledge the recent lodgment of Building Rules Consent documentation with PBS for final certification, Council grows ever increasingly disappointed and frustrated with the overall protracted approach to this development.

One of the Council's and the community's primary concerns is the lack of general maintenance and repairs that have occurred onsite. Pursuant to Clause 9 of the Licence Agreement held between you and the City of Holdfast Bay, you (as Licensee) are fundamentally required to maintain the premises and vessel in good repair, keep it in a clean and tidy state, and keep it free from vermin, insects and other pests.

The current deteriorated state of premises and vessel is clear evidence that reasonable maintenance and/or repairs have not occurred onsite during the term of the Licence Agreement.

Council is now of the opinion that you (as Licensee) are in breach of your maintenance and repair obligations pursuant to Clause 9 of the Licence Agreement, and now requires you to rectify these breaches while also installing development signage on site, and finally providing council with a project plan for the redevelopment of the site.

I note that any further delays on the project will result in Council considering its position in supporting any renewal of the Licence Agreement.

Yours sincerely

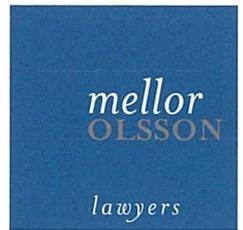
Roberto Bria
A/CHIEF EXECUTIVE OFFICER



Attachment 3



17 October 2018



Foreman Legal
69 Mount Barker Road
STIRLING SA 5152

Attention: Phil Foreman

By email only: phil@foremanlegal.com.au

Dear Mr Foreman

LICENCE TO DE YOUNGS JAMESTOWN PTY LTD (HMS BUFFALO)

1. We refer to your telephone discussion with the writer on Thursday 11 October 2018.
2. By the abovementioned telephone discussion, you informed us that you act for De Youngs Jamestown Pty Ltd, and your client requested an extension of time to comply with the Notice to Remedy Breach (**Notice**).
3. We have obtained our client's further instructions and comment as follows:
 - (a) Your client failed to comply with the Notice to Remedy Breach by 8 October 2018.
 - (b) Your telephone call was made to us, three days after the date that your client was required to comply with the Notice.
 - (c) Whilst Development Approval was granted on 26 September 2018, your client has not complied with the requirements of the Notice. The outstanding breaches relate to the obligation to comply with the maintenance and repair obligations set out in clauses 9.1 and 9.2 of the Licence, and the failure to pay our client's costs of \$440 for issuing the Notice (**Outstanding Breaches**). A copy of the relevant invoice is attached.
 - (d) As at the date of this letter, your client has not informed us (or our client) any action it may have taken to rectify the Outstanding Breaches.
 - (e) As at the date of this letter, your client has not rectified the Outstanding Breaches.
4. As a result of your client's failure to rectify the Outstanding Breaches, our client is entitled to terminate the Licence.

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17 October 2018

5. Our client will allow your client an extended period of time to comply with the Notice, strictly on the terms outlined in paragraph 6 below.
6. Unless each of the following are satisfied, we anticipate being instructed to terminate the Licence forthwith:
 - (a) Your client pays to our client, costs of \$440 for issuing the Notice (to be paid in the same manner as the licence fee). Payment (and proof of payment) must be made by **4:00pm on 31 October 2018**.
 - (b) Your client provides a detailed project plan in respect of the refurbishment and structural works to be carried out pursuant to clause 14. The program should include details of all refurbishment and structural works, the names of all contractors your client seeks to appoint for each component of those works, the commencement and completion dates for all stages of those works and a practical completion date no later than 25 September 2019 (being 12 months from Development Approval). The project plan is required by **4:00pm on 31 October 2018**.
 - (c) Your client completes the maintenance and repair obligations as required by clauses 9.1 and 9.2 of the Licence, and as required by the Notice. To show compliance with this obligation, your client may provide us with copies of contracts for materials purchased, and contracts for services (such as consultants and trades). In any event, our client requires a physical inspection of the premises by **4:00pm on 16 November 2018**. In this regard, kindly confirm the dates and times available for our client to inspect the premises.
 - (d) Your client provides sufficient documents and details (to our client's reasonable satisfaction) to show that the repair and maintenance works required by clause 14 of the Licence, have commenced. The documentation may include copies of contracts for materials purchased, and contracts for services (such as consultants and trades). The documents and details must be provided by **4:00pm on 16 November 2018**.
7. If your client fails to satisfy the requirements set out in paragraph 6 of this letter, our client may without further notice exercise its rights to terminate the Licence.
8. Time is of the essence.
9. Our client reserves its rights in all respects.

Yours faithfully

MELLOR OLSSON



JANINE CARROLL

Senior Associate

Email: jcarroll@mellorolsson.com.au

Phone: (08) 8414 3411 (Adelaide)



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ABN - 62 551 270 492

TAX INVOICE

De Youngs Jamestown Pty Ltd
21 Seaford Road
SEAFORD MEADOWS SA 5169

Customer Number 199059
Invoice Number 222202
Date 17/10/2018

Description of Goods and/or Service	Qty	Cost	GST	Total
Notice to Remedy Breach	0	\$ 400.00	\$ 40.00	\$ 440.00

\$400.00 \$40.00 \$ 440.00

Total Due \$ 440.00

TRADING TERMS 30 DAYS FROM DATE OF INVOICE

Customer Number	Name:	Invoice No:	Date:	Total:
199059	De Youngs Jamestown Pty Ltd	222202	17/10/2018	\$ 440.00

Pay Online through www.holdfast.sa.gov.au