

Confidential Minutes of the Ordinary Meeting of Council of the City of Holdfast Bay held in the Council Chamber, Glenelg Town Hall, Moseley Square, Glenelg, on Tuesday 24 July 2018.

17. ITEMS IN CONFIDENCE

17.1 Buffalo Licence Agreement and Proposed Site Redevelopment (Report No: 253/18)

Motion

C240718/1232

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: 253/18 Buffalo Licence 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: 253/18 Buffalo Licence 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 Bouchee, Seconded Councillor Aust

Carried

Councillor Smedley left the chamber at 8.21pm

Councillor Smedley rejoined the chamber 8.22pm

Buffalo Licence Agreement and Proposed Site Redevelopment (Report No: 253/18)

Following ongoing community complaint and councillor questions about the site, the deterioration of the vessel, and the licensee's perceived ongoing inactivity to redevelop ship, Administration has obtained legal advice pertaining to Council's position regarding the current licence agreement ahead of the current Licence term expiry.

It should be noted that the licensee has applied to the State Commission Assessment Panel (SCAP) for a 12 month extension to the Development Application. However, acting on Administration's advice SCAP has only approved an extension until the end of the current Licence term (13 April 2019).

During recent project meetings, the Licensee has made a number of promised deadlines for specific works (including but not restricted to) the intention to: lodge engineering documents for Building Rules Consent on Monday 16 July 2018; commence general repair and maintenance site works in August in anticipation of Development Approval; install development signage in August; and provide a project plan timeline for the development in August.

It is suggested that while noting this recent progress, Council take steps to ensure their position should the Licensee again fail to comply with their promises, and/or remain in breach of the Agreement.

Motion

1. That Council notes this report and the licensee's intention to undertake the following:
 - a. lodge Building Rules Consent by Monday 16 July 2018;
 - b. commence general repair and maintenance site works in August;
 - c. install development signage around the site in August;

- d. provide a project plan timeline for the development in August.
2. That Administration pay the outstanding amount of \$5,122.17 to the licensee, and recommence monthly payments to the licensee [in accordance with Clause 22.5] until the expiry of the Agreement;
3. That Administration write to the Licensee:
 - e. acknowledging the Licensee's promised actions (as aforementioned);
 - f. outlining Council's disappointment with the licensee's protracted approach to the redevelopment;
 - g. seeking the licensee's firm commitment to the delivery of the proposed new deadlines; and
 - h. affirming that any further delays on the project will result in Council considering its position in supporting the renewal of the licence agreement.
4. That Administration serve notice on the Licensee advising them they are deemed to be in breach of their 'repair and maintenance' obligations under the Agreement and that the licensee is required to undertake action to remedy these breaches within 14 days.
5. That if the breach is not remedied within the designated timeframe or Planning Approval lapses by the new deadline (13 April 2019) Council considers terminating the licence agreement.

Short Term Suspension of the *Local Government (Procedures at Meetings) Regulations 2013*

Her Worship the Acting Mayor with the approval of all the members present suspended the meeting procedures pursuant to Regulation 20(1) of the *Local Government (Procedures at Meetings) Regulations 2013* for a period of 15 minutes to facilitate informal discussion to seek clarification around the Buffalo Licence Agreement and will resume at the discretion of Her Worship the Acting Mayor.

Amendment

Motion

C240718/1233

1. That Council notes this report and the licensee's intention to undertake the following:
 - a. lodge Building Rules Consent by Monday 16 July 2018;
 - b. commence general repair and maintenance site works in August;
 - c. install development signage around the site in August;
 - d. provide a project plan timeline for the development in August.
2. That Administration pay the outstanding amount of \$5,122.17 to the licensee, and recommence monthly payments to the licensee [in accordance with Clause 22.5] until the expiry of the Agreement.
3. That Administration write to the Licensee:

- e. acknowledging the Licensee's promised actions (as aforementioned);
 - f. outlining Council's disappointment with the licensee's protracted approach to the redevelopment;
 - g. seeking the licensee's firm commitment to the delivery of the proposed new deadlines; and
 - h. affirming that any further delays on the project will result in Council considering its position in supporting the renewal of the licence agreement.
4. That Administration serve notice on the Licensee advising them they are deemed to be in breach of their 'repair and maintenance' obligations under the Agreement and return the vessel to a good commercial standard and that the licensee is required to undertake action to remedy these breaches within 14 days.
5. That if the breach is not remedied within the designated timeframe Council considers terminating the licence agreement forthwith.

Moved Councillor Smedley, Seconded Councillor Charlick

The amendment on being put was

Carried

The motion, as amended, on being put was

Carried

Division called:

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

Those voting for: Councillors Bouchee, Aust, Bradshaw, Charlick, Patton, Smedley and Yates (7)

Those voting against: Councillor Clancy (1).

Her Worship the Acting Mayor declared the motion

Carried


RETAIN IN CONFIDENCE - Section 91(7) Order

C240718/1234

That having considered Agenda Item: 17.1 Report No: 253/18 Buffalo Licence 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 Report No: 253/18 Buffalo Licence be retained in confidence for a period of 12 months.

Moved Councillor Clancy, Seconded Councillor Patton

Carried



ITEM NUMBER: 17.1

CONFIDENTIAL REPORT

BUFFALO LICENCE AGREEMENT AND PROPOSED SITE REDEVELOPMENT

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: 253/18 Buffalo Licence 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: 253/18 Buffalo Licence 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.
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Item No: **17.1**

Subject: **BUFFALO LICENCE AGREEMENT AND PROPOSED SITE REDEVELOPMENT**

Date: 24 July 2018

Written By: Team Leader, Leasing & Commercial Operations

General Manager: City Assets and Services, Mr H Lacy

SUMMARY

Following ongoing community complaint and councillor questions about the site, the deterioration of the vessel, and the licensee's perceived ongoing inactivity to redevelop ship, Administration has obtained legal advice pertaining to Council's position regarding the current licence agreement ahead of the current Licence term expiry.

It should be noted that the licensee has applied to the State Commission Assessment Panel (SCAP) for a 12 month extension to the Development Application. However, acting on Administration's advice SCAP has only approved an extension until the end of the current Licence term (13 April 2019).

During recent project meetings, the Licensee has made a number of promised deadlines for specific works (including but not restricted to) the intention to: lodge engineering documents for Building Rules Consent on Monday 16 July 2018; commence general repair and maintenance site works in August in anticipation of Development Approval; install development signage in August; and provide a project plan timeline for the development in August.

It is suggested that while noting this recent progress, Council take steps to ensure their position should the Licensee again fail to comply with their promises, and/or remain in breach of the Agreement.

RECOMMENDATION

- 1. That Council notes this report and the licensee's intention to undertake the following:**
 - a. lodge Building Rules Consent by Monday 16 July 2018;**
 - b. commence general repair and maintenance site works in August;**
 - c. install development signage around the site in August;**
 - d. provide a project plan timeline for the development in August;**

- 2. That Administration pay the outstanding amount of \$5,122.17 to the licensee, and recommence monthly payments to the licensee [in accordance with Clause 22.5] until the expiry of the Agreement;**

3. **That Administration write to the Licensee:**
 - e. acknowledging the Licensee's promised actions (as aforementioned);
 - f. outlining Council's disappointment with the licensee's protracted approach to the redevelopment;
 - g. seeking the licensee's firm commitment to the delivery of the proposed new deadlines; and
 - h. affirming that any further delays on the project will result in Council considering its position in supporting the renewal of the licence agreement;
4. **That Administration serve notice on the Licensee advising them they are deemed to be in breach of their 'repair and maintenance' obligations under the Agreement and that the licensee is required to undertake action to remedy these breaches within 14 days;**
5. **That if the breach is not remedied within the designated timeframe or Planning Approval lapses by the new deadline (13 April 2019) Council considers terminating the licence agreement;**

RETAIN IN CONFIDENCE - Section 91(7) Order

6. **That having considered Agenda Item: 17.1 Report No: 253/18 Buffalo Licence 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 Report No: 253/18 Buffalo Licence 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

- 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);
- Question on Notice, Report No.: 37/17; Item No.: 9.2.1, *'The Buffalo'*, 14 February 2017;

REPORT

Licence Agreement

On 11 February 2014 Council endorsed a new licence agreement with DeYoungs Jamestown Pty Ltd for the operation of the HMS Buffalo and adjacent land.

Licence Term & Fee

The Licence Agreement ("*Agreement*") commenced 14 April 2014 for an initial period of five years and in accordance with Item 5 of the Agreement the licensee is responsible for paying the following licence fees to Council:

- Year 1 (14 April 2014 – 13 April 2015): \$10 payable on demand;
- Year 2 (14 April 2015 – 13 April 2016): \$10 payable on demand;
- Year 3 (14 April 2016 – 13 April 2017): \$10 payable on demand;
- Year 4 (14 April 2017 – 13 April 2018): \$36,000; and
- Year 5 (14 April 2018 – 13 April 2019): \$46,000.

Permitted Use

The permitted use of the site is restricted to "restaurant/café and museum and associated activities".

Licensee Obligations

In accordance with the provisions outlined in the Agreement, the Licensee is fundamentally obligated to:

- Pay the licence fee in advance of each payment date;
- Keep open, use, maintain and occupy a portion of the vessel for trade and business of a restaurant;
- Keep open, use, maintain and occupy a portion of the vessel used as a museum;
- Maintain the vessel and items attached to the vessel; and
- Keep the premises and vessel in a clean and tidy state.

Car Park Meter Clause

Pursuant to Clause 22.5 of the Agreement, Council are responsible for paying to the Licensee 70% of all car parking fees collected from the adjacent car park meter. To date the Licensee has been

paid a total amount of \$9,076.64 (for the period between 4 May 2016 and 31 August 2017). However, in January 2018 it was agreed by both parties that the payment of subsequent amounts be delayed until such time the lease renewal was reviewed. As of 6 July 2018, Administration has held an amount totalling \$5,122.17 that is owed to the Licensee.

It is recommended that Council pay the outstanding amount to the Licensee and recommence monthly payments to ensure compliance with the Agreement.

Licence Renewal

The Agreement includes three subsequent consecutive five year terms of renewal (each respectively commencing 14 April 2019, 14 April 2024, and 14 April 2029. In order for the Licensee to exercise their 'right of renew' for the first term of renewal they must serve written notice onto Council not less than three months before the expiration of the Agreement (VIZ 13 January 2019). If the Licensee does not serve notice by the specified date, Council is not obligated to renew the licence agreement.

Subsequently if the licensee is in breach of the licence agreement once they have exercised their right of renewal, or has not remedied any breach for which they have been served notice of, Council is under no obligation to renew Agreement.

Development Application

The Licensee lodged Development Application 110/00146/15 with the State Commission Assessment Panel (SCAP) on 9 March 2015. Due to the applicant's inactivity and delays in supplying further requested information, Planning Approval was not granted until 10 August 2017 (2.5 years after submission).

In accordance with development provisions, once planning approval is granted, the applicant has 12 months in which to finalise the Development Approval (by submitting Building Rules Consent (BRC)). If BRC is not submitted by 9 August 2018, then the development application lapses. However, the applicant is afforded the opportunity to apply to SCAP for an extension of time.

It should be noted, that on 9 July 2018, SCAP received an application from the proponent seeking an extension to the existing development application deadline (9 August 2018). However, following the advice of Administration, SCAP has only approved an extension until the expiry date of the existing licence agreement (13 April 2019).

Essential Development Time Restrictions – Licence Agreement

Though once full Development Approval is granted, the applicant has a subsequent 12 months in which to substantially commence the redevelopment, and thereafter has three years in which to substantially complete the project, 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".

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.

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

Refer Attachment 1

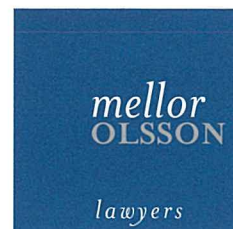
At the expiry of the existing lease term, Council will have received a total income of \$82,030 in Licence Fee income from the Licensee. Comparatively, as at the date of this report, the Licensee has entitled to a total of \$14,198.81 from the Car Park Meter.

LIFE CYCLE COSTS

Under the terms of the Agreement (Clause 16.2.1.4), at the expiry of the licence the licensee is required to complete any repairs which they are obligated to undertake in accordance with the lease.

Following this, the HMS Buffalo will return to the possession of Council. Should this occur, then the determination of the ship and site's future will be at the discretion of Council.

29 June 2018



City of Holdfast Bay
PO Box 19
BRIGHTON SA 5048

Attention: Scott Reardon

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

Dear Scott

LICENCE TO DE YOUNGS JAMESTOWN PTY LTD (HMS BUFFALO)

We refer to our recent communications.

It is our understanding that De Youngs Jamestown Pty Ltd (licensee) has not complied with its various obligations contained in the Licence Agreement dated 12 May 2014.

In particular, it is our further understanding that the licensee has not complied with the following obligations:

1. the obligation to pay the licence fee in advance on each payment date (see clause 4.1);
2. the obligation to keep open, use, maintain and occupy a portion of the vessel for the trade and business of a restaurant (see clause 7.3);
3. the obligation to maintain items in or attached to the premises (see clauses 9.1 and 9.2);
4. the obligation to keep the premises and the vessel clean and tidy (see clause 9.5); and
5. the obligation to restore and refurbish the vessel (including structural works) to a good commercial standard from which the permitted use may be lawfully carried on before 12 November 2015, or 12 months of development approval being granted (see clause 14).

Considerations

We draw your attention to the following provisions within the Licence:

- the licensee has 3 consecutive rights to renew the term of the Licence, each for a period of 5 years commencing 14 April 2019, 14 April 2024 and 14 April 2029 respectively. Pursuant to clause 4.9.1, the licensee can only exercise its right of

renewal by giving notice to the Council not less than 3 months and not more than 9 months before expiry of the then current term. In relation to the first right of renewal, the licensee would need to give notice to the Council strictly between 13 December 2018 and 13 January 2019 (time being of the essence as outlined in clause 4.9.1).

- pursuant to clause 17, Council may issue a notice on the licensee which sets out any breach required to be remedied, but that notice must allow at least 14 days for the licensee to remedy that breach. If the breach is not remedied within that timeframe, the Council may terminate the Licence and re-enter the premises.
- clause 12.5 allows Council to do anything which the licensee is responsible for, but has not done (or properly done).
- pursuant to clause 17.7, the Council may charge interest on overdue amounts owed by the licensee.

General comments

If Council requires the licensee to remedy its breaches, then one or more notices must be issued to the licensee. If the licensee does not comply with the notice(s) then Council:

- may distrain against any assets of the licensee on the premises (for unpaid rent). This is only recommended where the licensee has assets on the premises with a commercial value which is likely to exceed inherent auction costs);
- may terminate the licence;
- will not be obliged to renew the Licence (if the licensee seeks to exercise its rights of renewal).

The Council is not obliged to grant the right of renewal if the licensee has not remedied any breach (as notified by the Council), or the licensee breaches the Licence after giving the renewal notice but before commencement of the renewal term.

If the Licence is not renewed (such that the Licence expires on 12 May 2019) or the Licence is terminated by the Council then clause 16 requires the licensee to remove its equipment including the vessel from the premises, and repair any damage caused by such removal.

If the Licence is terminated, or expires and the licensee does not remove its equipment (and in particular, the vessel) as required by the Licence, then pursuant to clause 16.3, the Council may deal with those items as abandoned goods in accordance with s.76 of the Retail and Commercial Leases Act. Section 76(1)(a) of the Act would allow the Council to dispose of all perishable goods, and those goods where a fair estimate of the cost of removal, storage and sale exceeds their value. Otherwise, the Act sets out specific timeframes and a process for storing the goods, providing the owner an opportunity to reclaim the goods, sale by public auction and distribution of the sale proceeds.

If you have any queries or require further advice, please contact us.

Yours faithfully

MELLOR OLSSON



JANINE CARROLL

Senior Associate

Email: jcarroll@mellorolsson.com.au

Phone: (08) 8414 3411 (Adelaide)