

## 17.1

### CONFIDENTIAL REPORT

#### BUFFALO SITE DEVELOPMENT

*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: 339/18 Buffalo Site Development 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: 339/18 Buffalo Site Development 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 SITE DEVELOPMENT**

Date: 9 October 2018

Written By: Team Leader, Leasing & Commercial Operations

General Manager: City Assets and Services, Mr H Lacy

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## 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.

The Licensee submitted Development Application 110/00146/15 to Administration on 20 February 2015, which proposed to construct a *kiosk, alfresco bar and dining area, toilet facilities, outdoor dining timber deck, boat platform, gangway and undertake landscaping*. The application was referred to the State Commission Assessment Panel (SCAP) for assessment on 4 March 2015, and Planning Consent was granted on 10 August 2017.

On 9 July 2018, Administration was advised by SCAP that they had received an application from the Licensee seeking a further 12 months in which to obtain Building Rules Consent (BRC). However, following the advice of Administration, SCAP approved an extension until the end of the Licence term (13 April 2019).

Following this, due to ongoing community complaint about the general condition of the site and the deteriorating state of the vessel, as well as Council's increasing frustration with the Licensee's protracted approach toward the redevelopment, on 24 July 2018 Council resolved to serve a 'Notice of Breach' on the Licensee for failure to comply with repair and maintenance obligations pursuant to the Licence Agreement.

While, to date, Administration has not received a response from the Licensee regarding to Notice of Breach, and no action has been undertaken on site to remedy the respective breaches, on 25 September 2018, Administration received the required BRC documents to complete Development Application 110/00146/15. As such, final Development Approval for the redevelopment of the site was granted on 26 September 2018.

Though section 48 of the *Development Regulations 2008* allows the applicant 12 months in which to substantially commence the redevelopment, and thereafter allows a subsequent three (3) years in which to substantially complete the project, Clause 14.7 of the Agreement requires the Licensee to complete the entirety of "*all approved renovations and refurbishment works within 12 months of the date final development approval is granted*".

This in mind, in order for the redevelopment to finally proceed, Council will be required to renew the Licence Agreement. Administration has now obtained further legal advice pertaining to this matter and Council's options moving forward.

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## RECOMMENDATION

1. That Council notes the attached Legal Advice (Attachment 3);
2. That Administration writes to the Licensee:
  - a. noting that to date no action has been taken to remedy the breaches outlined in the Notice of Breach sent to the Licensee 8 August 2018;
  - b. further noting that the Notice of Breach deadline was 8 October 2018;
  - c. acknowledging that Development Approval was granted 26 September 2018;
  - d. outlining the obligation pursuant to Licence Clause 14.7 which requires all approved renovations and refurbishment works are to be completed within 12 months of the date final development approval;
  - e. requesting that a project plan and redevelopment works schedule be submitted to Administration within 14 days from the date of the letter and to confirm the Licensee's commitment to undertake all approved renovations and refurbishment works within the 12 month timeframe as specified in the Licence Agreement; and
  - f. advising that if no action is taken to remedy the breaches and/or reasonable redevelopment works have not commenced within 30 days, Council will take action to terminate the Licence Agreement.

### RETAIN IN CONFIDENCE - Section 91(7) Order

3. That having considered Agenda Item: 17.1 Report No: 339/18 Buffalo Site Development 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: 339/18 Buffalo Site Development be retained in confidence for a period of 12 months.
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## 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.: 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).

### ***Licence Agreement Renewal***

In order for the Licensee to exercise their 'right of renew' for the first term of renewal they must serve written notice on Council not less than three months before the expiration of the Agreement (ie by 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 either in breach of the licence agreement at the time of serving notice of their intention to exercise their right of renewal or is in breach at the time the licence is to be renewed, or if the Licensee has not remedied any breach for which they have previously been served notice of, Council is under no obligation to renew Agreement.

***Breach of Licence Agreement***

Due to ongoing community complaints about the site, and the deteriorating state of the vessel, in accordance with Resolution C240718/1233 a Notice of Breach was served on the Licensee on 9 August 2018, as was as a letter from the Acting CEO outlining Council's increasing disappointment with the Licensees protracted approach towards the development.

*Refer Attachments 1 & 2*

To date, Administration has not received a response to Notice of Breach, and no action has been undertaken on site to remedy the respective breaches.

***Development Application***

Development Application 110/00146/15 was submitted to Administration on 20 February 2015, which proposed to construct a *kiosk, alfresco bar and dining area, toilet facilities, outdoor dining timber deck, boast platform, gangway and undertake landscaping*. However, due to Council's declared interest of the site, the application was referred to the State Commission Assessment Panel (SCAP) for assessment on 4 March 2015.

Due to the Licensee's protracted approach to the development, and delayed submission of required documents, Planning Consent for the Buffalo redevelopment was granted by SCAP 10 August 2017 (2.5 years after the original application submission date).

In accordance with development guidelines the applicant was required to submit Building Rules Consent (BRC) in order to obtain full development approval within 12 months of the date Planning Consent was granted (VIZ 9 August 2018). However, as a result of further delays, on 9 July 2018, Administration was advised by SCAP that they had received an application from the Licensee seeking a further 12 months in which to obtain BRC. Following the advice of Administration however, SCAP only approved an extension until the end of the current Licence term (13 April 2019).

On 25 September 2018, Administration received the require BRC documentation from the proponent and final Development Approval was granted 26 September 2018.

***Essential Development Time Restrictions***

Pursuant to section 48 of the *Development Regulations 2008*, an applicant has 12 months in which to substantially commence the redevelopment, and thereafter has three (3) years in which to substantially complete the project. However under 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*".

This contractual obligation takes precedence over section 48 of the Development Regulations, hence the Licensee must complete all works by 25 September 2019, unless the council grants an extension.

***Points of Discussion – Renewal of Licence Agreement, Development of the Site, and Legal Advice***

Now that Development Approval has been granted, in order for the redevelopment to finally proceed Council will be required to renew the Licence Agreement beyond its current expiry date of 14 April 2019 so that the Licensee has occupancy rights to undertake the works.

Administration has obtained legal advice regarding this matter, and in particular whether Council still retains its right to terminate the agreement for non-compliance. A copy of the advice is attached for member's reference, but in summary, Council still retains the right to terminate or not renew the agreement if the Licensee fails to undertake the work outlined in the Notice of Breach, by the deadline of 8 October 2018.

*Refer Attachment 3*

**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**

Should Council determine to terminate or not renew the Agreement, 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.

# 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](mailto:jcarroll@mellorolsson.com.au)

Phone: 8414 3411 (Adelaide)

Copy to: Mr Troy De Young  
[troy@deyoungs.com.au](mailto: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 *8<sup>th</sup>* day of *August* 2018.

The Landowner by its solicitors  
**MELLOR OLSSON**

Per:   
JANINE CARROLL

# Attachment 2





[holdfast.sa.gov.au](http://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](mailto: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

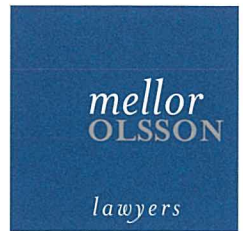
**Roberto Bria**  
**A/CHIEF EXECUTIVE OFFICER**



# Attachment 3



28 September 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 your email of 26 September 2018, and respond to your queries separately below.

**1. Is the Notice to Remedy Breach still enforceable now that Development Approval and Building Rules Consent has been issued?**

Short answer: it depends whether the Licensee has complied with all obligations set out in the Notice to Remedy Breach.

The Notice to Remedy Breach sets out breaches of clauses 9.1, 9.2 and 14 of the Licence only.

The Notice to Remedy Breach can therefore, only be 'discharged' if the Licensee remedies all breaches set out in the Notice by 5pm on 8 October 2018. That is, the Licensee must do all of the following:

- (a) complete the maintenance required by clauses 9.1 and 9.2;
- (b) obtain Development Approval as required by clause 14; and
- (c) pay to the Council \$440 for issuing the Notice.

As Development Approval and Building Rules Consent has now been granted, the Licensee has a further 12 months to undertake the restoration and refurbishment works set out in clause 14 of the Licence.

If the Licensee has not complied with clauses 9.1 and 9.2, and paid \$440 for issuing the Notice, then the Notice has not been fully complied with, and Council may elect to exercise its rights. Although, if clauses 9.1 and 9.2 have been complied with, and the \$440 is the only item outstanding, terminating the Licence would not be advisable.



**2. Can Council terminate the Licence after 8 October 2018?**

Short answer: it depends if the Licensee has complied with the Notice to Remedy Breach.

If the Licensee fails to comply with its obligation relating to clauses 9.1 and 9.2 as set out in the Notice to Remedy Breach, then the Council may terminate the Licence.

**3. Does s.48 of the Development Regulations 2008 prevail over the Licence?**

Short answer: no.

Whilst the Development Regulations reflect the statutory requirements in relation to timeframes, the parties have contractually agreed to a timeframe of 12 months from the date that Development Approval has been granted.

**4. Is Council obligated to renew the Licence in order for the refurbishment and redevelopment works to be completed?**

Short answer: It depends if the Licensee remedies the current breaches, and if so, commits any further breaches before the commencement of the renewal term.

The Licensee has 3 consecutive rights to renew the term of the Licence, each for a period of 5 years, commencing on 14 April 2019, 14 April 2024 and 14 April 2029 respectively.

The Licensee is not entitled to exercise its right of renewal if:

- (a) at the time of giving its renewal notice to the Council, the Licensee has received notice of breach and not remedied that breach in the given timeframe; or
- (b) after giving its renewal notice to the Council, but before the commencement of the renewal term, the licensee commits a breach of its obligations under the Licence.

**5. Any other issues?**

We understand that the Licensee has not complied with other obligations pursuant to the Licence, including:

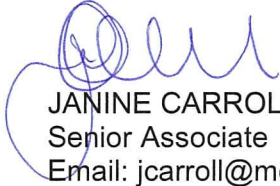
- (a) the obligation to keep open, use, maintain and occupy a portion of the vessel for the trade and business of a restaurant (see clause 7.3);
- (b) the obligation to keep the premises and the vessel clean and tidy (see clause 9.5).

It is not clear to us how the Council intends to manage or address the breaches not specified in the existing Notice.

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](mailto:jcarroll@mellorolsson.com.au)

Phone: (08) 8414 3411 (Adelaide)