

ITEM NUMBER: 18.2

CONFIDENTIAL REPORT

MAWSON OVAL – RENEWAL OF JOINT USE AGREEMENT (Report No: 358/20)

Pursuant to Section 90(2) 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:

- h. legal advice.**

Recommendation – Exclusion of the Public – Section 90(3)(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: 358/20 Mawson Oval – Renewal of Joint Use 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: 358/20 Mawson Oval – Renewal of Joint Use Agreement on the following grounds:
 - 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 provided by Kelledy Jones.

 - 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: **18.2**

Subject: **MAWSON OVAL – RENEWAL OF JOINT USE AGREEMENT**

Date: 24 November 2020

Written By: Property Officer

General Manager: City Assets and Services, Mr H Lacy

SUMMARY

Pursuant to a Joint Use Agreement dated 16 February 2004, Council granted to The Catholic Church Endowment Society Incorporated (**CCESI**) a licence over Mawson Oval for a term of twenty one (21) years to enable the adjoining registered non-government school (now known as McAuley Community School - having previously been known as Marymount College) to utilise Mawson Oval for both school curriculum and recreational sporting activities during specified times.

Whilst the initial term of the Joint Use Agreement expires on 31 December 2020, Clause 4 of the Joint Use Agreement contains a right of renewal in favour of CCESI for a further term of twenty one (21) years.

CCESI has written to Council advising that it wishes to exercise their right of renewal and this report seeks Council's approval to extend the Joint Use Agreement for a further term of twenty one (21) years commencing on 1 January 2021 and expiring on 31 December 2041 in accordance with clause 4 of the Joint Use Agreement.

The right of renewal is only exercised at CCESI's sole discretion. The Joint Use Agreement does not permit Council to refuse the exercise of the option or to change any of the conditions of agreement (except where agreed in writing between CCESI and Council).

RECOMMENDATION

That:

- 1. Council, as landowner, approves an extension of the Joint Use Agreement with The Catholic Church Endowment Society Incorporated over Mawson Oval for a term of twenty one (21) years commencing on 1 January 2021 but otherwise on the same terms and conditions as the Joint Use agreement except for the exclusion of Clause 4.2;**
- 2. the Mayor and Chief Executive Officer be authorised to execute and seal any documents required to give effect to the extension of Joint Use Agreement; and**

RETAIN IN CONFIDENCE - Section 91(7) Order

3. **having considered Agenda Item 18.2 Mawson Oval – Renewal of Joint Use Agreement Report No: 358/20 in confidence under Section 90(2) and 90(3)(h) of the *Local Government Act 1999*, the Council, pursuant to Section 91(7) of that Act orders that the Agenda Item 18.2 Mawson Oval – Renewal of Joint Use Agreement Report No: 358/20, being the report and attachments but excluding the recommendation, be retained in confidence for a period of 24 months and the Chief Executive Officer is authorised to review whether these documents and information can be released after 12 months.**
-

COMMUNITY PLAN

Placemaking: Creating vibrant and safe places

Community: Fostering an engaged and contributing community

Economy: Supporting and growing local business

COUNCIL POLICY

Not Applicable.

STATUTORY PROVISIONS

Local Government Act 1999.

Retail and Commercial Leases Act 1995.

BACKGROUND

In late 1998, Council approved the purchase of the old Mawson High School oval from the State Government for use as a community open space. At the same time, the Catholic Church Endowment Society Incorporated (**CCESI**), which owns all land occupied by Church owned Catholic Schools in SA, was negotiating to purchase the old Mawson High School buildings and site from the State Government for use as a school.

The purchase price for the oval was around \$1.25m. Council provided \$500,000 cash funding and \$250,000 in kind support. CCESI provided the remaining \$500,000 towards the purchase price.

Council was granted full title to the oval land for use as community land. In return for their contribution towards the purchase price, CCESI was granted access rights to the oval (subsequently renamed to Mawson Oval) under terms negotiated and approved at the time under what was titled the Joint Use Agreement (JUA).

The Joint Use Agreement, dated 16 February 2004, granted to CCESI a licence over Mawson Oval for a term of twenty one (21) years with a right to renew the Agreement for a further 21 years at

the expiry of the initial term. The JUA enabled the adjoining registered non-government school (now known as McAuley Community School, having previously been known as Marymount College) to utilise Mawson Oval for both school curriculum and recreational sporting activities during specified times.

The Catholic Church Endowment Society Incorporated (**CCESI**) owns land on which the McAuley Community School is located and the buildings located thereon. CCESI also operates the school under the auspices of the Catholic Education South Australia. As such, CCESI is the legal entity that is the signatory to the Joint Use Agreement.

The Joint Use Agreement notes a commencement date of 16 February 2004, however, by way of a Deed of Variation dated 13 December 2010, the parties agreed to amend the commencement date of the Joint Use Agreement to 1 January 2000 with the effect that the initial 21 year term of the Joint Use Agreement (as varied) expires on 31 December 2020.

A copy of the Joint Use Agreement and the original Deed of Variation are annexed hereto as Attachment 1.

Refer Attachment 1

REPORT

Clause 4 of the Joint Use Agreement (JUA) provides that:

“Upon the request of Marymount made at any time prior to the expiration of the initial term and PROVIDED ALWAYS there is not at the time of such request any existing breach or non-observance of any of the covenants or conditions herein contained and on Marymount’s part to be observed and performed the Council will grant an extension of this agreement for a further term of twenty one (21) years (“the renewed term”) subject to and upon the same terms and conditions as are herein contained”.

Pursuant to Clause 4 of the Joint Use Agreement, CCESI have exercised their right of renewal for a further term of twenty one (21) years by way of email dated 21 October 2020.

As CCESI exercised their right of renewal before 31 December 2020 and is not in breach of any of the terms and conditions of the Joint Use Agreement, Council is required to grant CCESI an extension of the Joint Use Agreement for a further term of twenty one (21) years commencing on 1 January 2021 and expiring on 31 December 2041 subject to any provisions of the *Local Government Act 1999*.

Legal Advice

The Joint Use Agreement (JUA) does not give Council any rights to vary the term or any other conditions of the JUA except by mutual agreement between the parties or if required by law.

Similarly, under the JUA Council cannot refuse to grant extension unless CCESI is in breach of the agreement at the time (and they are not) or unless the Local Government Act prohibits or restricts the granting of the extension.

Section 202 of the Local Government Act 1999 establishes that Council has the power to grant the renewal of the Joint Use Agreement up to the proposed maximum term of 42 years. However s202 also requires Council to undertake community consultation before granting the extension.

An extract of s202 from the Local Government Act 1999 is presented in Attachment 2.

Refer Attachment 2

The question therefore arises as to whether Council should undertake community consultation before considering whether to grant the extension to the JUA. Administration sought legal advice from our lawyers, Kelledy Jones, to confirm whether Council had the power to extend the JUA as envisaged in the Agreement and whether community consultation was required.

A copy of Kelledy Jones advice is presented in Attachment 3.

Refer Attachment 3

In summary, Kelledy Jones advised that:

- 1) *A contractual obligation is not sufficient to displace any legislative obligation under the LG Act (or other law). That said, my advice is that the LG Act does not include any relevant provision that is inconsistent with the contractual entitlements conferred by the JUA. You will note that the LG Act, when it provides for a term being granted subject to other requirements of the LG Act or other law, is relevant to any licence granted after the total term of 42 years. Further, when consideration is given to the fact that at the time the JUA was entered into, public consultation would have occurred or would have been 'forgiven' by a relevant statutory provision at that time (let me know if you require me to research this point), including as to the proposed initial and further terms, my advice is that the further term, subject to the conditions identified above being satisfied, can be agreed to by the Council without a requirement for public consultation.*
- 2) *Given my advice above, the Council is not required to undertake public consultation in relation to the grant of the further term, as contemplated by the JUA. The issue of any variation to the term or the conditions arising from consultation is not, therefore, a matter warranting consideration. Although, I do draw to your attention that upon a renewal, it is necessary to exclude clause 4 because a further right of renewal is not permissible in the circumstances.*

Deed of Extension

A formal Deed of Extension is required to grant the right of renewal as exercised by CCESI so that McAuley Community School can continue using Mawson Oval in accord with the Joint Use Agreement.

The Deed of Extension will generally be on the same terms and conditions as the existing Joint Use Agreement (as varied) save for the following:

- 1) the commencement and expiry dates will be amended to reflect the renewal term
- 2) Clause 4 will be excluded as no further renewal rights exist once the second 21 year term expires
- 3) references to "*Marymount*" within the document will be changed to "*McAuley*".

Subject to Council's approval, Administration will proceed to have the Deed of Extension drawn up and duly executed.

BUDGET

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

LIFE CYCLE COSTS

Under the terms of the Joint Use Agreement, Council is already responsible for forty four per centum (44%) of alterations, additions and replacement of shared facilities at Mawson Oval. Council is also responsible for emptying the oval's rubbish bins. These costs are included in the Long Term Financial Plan.

COPY

CITY OF HOLDFAST BAY

("Council")

and

THE CATHOLIC CHURCH ENDOWMENT SOCIETY INCORPORATED

("Marymount")

JOINT USE AGREEMENT – MAWSON OVAL

HYND & CO PTY LTD

Solicitors
66 Wyatt Street
Adelaide SA 5000

Telephone: (08) 8223 6499

Facsimile: (08) 8223 4679

Email: hyndco@camtech.net.au

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JOINT USE AGREEMENT – MAWSON OVAL

THIS AGREEMENT is made

16th FEBRUARY 2004

2003

BETWEEN

CITY OF HOLDFAST BAY of 24 Jetty Road, Brighton 5048 in the State of South Australia (hereinafter called "the Council")

AND

THE CATHOLIC CHURCH ENDOWMENT SOCIETY INCORPORATED of 39 Wakefield Street, Adelaide in the said State (hereinafter called "Marymount")

RECITALS

- A. The Council is the registered proprietor of the Council Land upon which playing fields and other facilities are situated known as Mawson Oval.
- B. Marymount is the registered proprietor of the Marymount Land upon which Marymount conducts a registered non government school known as Marymount College.
- C. The Council Land and the Marymount Land are adjacent and Marymount desires to have the use of certain of the facilities situated on the Council Land on an exclusive basis during certain hours to amongst other things satisfy the requirements of the Non Government School Registrable Board in respect of Marymount College.
- D. Marymount desires to access the bore situated on the Council Land for the purpose of watering grassed areas on the Marymount Land.
- E. The Council wishes to ensure the Council Land on which the facilities are situate are adequately maintained and utilised at times when not used by Marymount.
- F. Council and Marymount wish to record their agreement as to this joint use and maintenance of the Shared Facilities.

IT IS AGREED AS FOLLOWS:

1. DEFINITIONS & INTERPRETATION

1.1 Definitions

In this Agreement unless a contrary intention appears;

Commencement Date means the 16th day of FEBRUARY 2004
July 2003.

Council Land means the whole of the land comprised in Certificates of Title Registered Book Volume 5530 Folio 730 and Volume 5663 Folio 228.

Marymount Land means the whole of the land comprised in Certificate of Title Registered Book Volume 5530 Folio 728.

Shared Facilities means the land delineated and outlined in red on the plan in Schedule 1 and the grassed oval and play space, cricket nets and tennis courts established and erected thereon and the bore situated thereon.

Parties means the parties to this Agreement.

Schedule 1 means Schedule 1 to this Agreement.

Schedule 2 means Schedule 2 to this Agreement.

1.2 Interpretations

In this Agreement, unless the context shall otherwise require;

- (a) words importing the singular include the plural and vice versa
- (b) words importing a gender include any gender;
- (c) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (d) a reference to any thing (including but not limited to any right) includes a part of that thing;
- (e) a reference to a statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (f) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (g) a reference to a party to a document includes that party's successors and permitted assigns;
- (h) no provision of this Agreement will be construed adversely to a party on the ground that the party was responsible for the preparation of this Agreement or that provision;
- (i) a covenant or agreement on the part of two or more persons binds them jointly and severally;

- (j) a reference to an agreement other than this Agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding, whether or not in writing;
- (k) a reference to an asset includes all property of any nature, including, but not limited to, a business, and all rights, revenues and benefits;
- (l) a reference to a document includes any agreement in writing, or any certificate, notice, instrument or other document of any kind;
- (m) where any term covenant or condition of this Agreement or the practical application thereof is or shall become invalid or unenforceable the remaining conditions terms and covenants of this Agreement shall not be affected thereby. In so far as any term covenant or condition shall be or become invalid or unenforceable for any reason the whole or any portion of such term or condition as may be invalid or unenforceable may at the option of either party be severable and severed from the remainder of this Agreement to the extent that this may be permitted by law leaving all other terms covenants and conditions intact and enforceable; and
- (n) the headings contained herein are for convenience only and shall not affect the construction of this Agreement.

2. GRANT OF LICENCE

The Council hereby grants and Marymount hereby accepts an exclusive licence to use the Shared Facilities on the provisions of this agreement and at the times and on the days identified in the timetable in the Schedule 2 for a term of twenty one (21) years commencing on the Commencement Date for an annual licence fee of \$1.00 per annum receipt whereof is acknowledged by the Council.

3. SUB LICENCES

Marymount may agree to enter into a sub-licence agreement with a third party or third parties in relation to the use by such third party or third parties of the Shared Facilities at times during which Marymount has an exclusive licence to use the Shared Facilities. If Marymount agrees to enter into such an agreement any sub-licencee shall pay such fees and charges in relation to the sub-licence as may be levied by Marymount from time to time. Sub-licence fees paid pursuant hereto shall be paid into the Account established pursuant to clause 7 hereof. Before entering into a sub-licence agreement pursuant hereto Marymount shall do all things to establish that the licensee has effected a public risk insurance policy in accordance with the provisions of clause 15 hereof.

4. RENEWAL

4.1 Upon the request of Marymount made at any time prior to the expiration of the initial term and PROVIDED ALWAYS there is not at the time of such request any existing breach or non-observance of any of the covenants or conditions herein contained and on Marymount's part to be observed and performed the Council will grant an extension of this agreement for a further term of twenty one (21) years ("the renewed term") subject to and upon the same terms and conditions as are herein contained

4.2 The parties acknowledge that the agreement to extend the term of the licence provided for in clause 4.1 is subject to the Council having power in that regard pursuant to the provisions of the Local government Act 1999 and if not then clause 4.1 shall be severed.

4.3 Upon the expiration of the term (if clause 4.1 is severed) or any renewed term (if clause 4.1 is not severed) the Council will negotiate exclusively with Marymount for a period of six months about a new licence of the Council Land premised on fundamentally the same terms and conditions as this licence.

5. HIRE BY MARYMOUNT

The Council will subject to availability (and Marymount shall be the preferred hirer in that respect) enter into a hire agreement with Marymount on the same terms as offered to members of the local community from time to time should Marymount wish to the use the Shared Facilities at times and on days not referred to in Schedule 2. Hire fees paid pursuant hereto and pursuant to any other hiring by the Council of the Council Land shall be paid into the Account established pursuant to clause 7 hereof.

6. ACKNOWLEDGMENT

The parties acknowledge that the Council shall at all times have exclusive use of that portion of the Council Land outlined in green on the plan in Schedule 1.

7. SHARED FACILITIES MAINTENANCE ACCOUNT

As soon as possible after the commencement of this agreement the parties shall establish a Shared Facilities Maintenance Account ("the Account"). The account shall be operated by Marymount and any sum credited thereto shall be used by Marymount to discharge its obligations pursuant to clause 9 hereof.

8. MANAGEMENT COMMITTEE

8.1 As soon as possible after the commencement of this agreement the parties shall establish a Management Committee ("the Management Committee") comprising:

- (a) Two (2) representatives of the Council (one of which shall be chairperson) and
- (b) Two (2) representatives of Marymount who until otherwise determined by Marymount and advised to the Council will be the nominees of the Marymount College Board.

8.2 The Management Committee shall oversee and monitor the performance by the Parties of their obligations and in this regard the Management Committee may make and amend rules relating to the use of the Shared Facilities and make such recommendations to the parties as the Management Committee thinks fit.

8.3 The Management Committee shall meet as often as it considers necessary and, in any event, at least once in each year during the term of this agreement and each and every renewal thereof.

8.4 The members of the Management Committee shall each be appointed for a term of two (2) years and shall be eligible for re-appointment. If a casual vacancy shall occur the party who was responsible for appointing the person to the position which has become vacant shall promptly appoint another person to fill the vacancy.

8.5 If the chairperson of the Management Committee is not present at a meeting then the Management Committee shall appoint a chairperson for that meeting from any of the members present.

8.6 The Council shall appoint a person to act as secretary to carry out the secretarial requirements of the Management Committee.

8.7 The Management Committee shall on at least one (1) occasion in each year during the term of this agreement and each and every renewal thereof provide to the parties a report concerning the matters considered by the Management Committee in the year immediately preceding such report.

9. MAINTENANCE

9.1 Subject to subclause 9.2 and 9.5 Marymount shall during the term of this agreement keep the Shared Facilities in good and tenable repair and condition (fair wear and tear excepted) provided that nothing in this subclause 9.1 will render Marymount liable in respect of replacement of the Shared Facilities or any part thereof unless the requirement for replacement arises out of a default by Marymount of the terms hereof...

9.2 Each party shall remove any litter or rubbish from the Shared Facilities or cause the same to be placed in receptacles provided for that purpose by the Council at the end of each period the relevant Party has the use of or has available to them for use, the Shared

Facilities. In particular the Council will regularly empty receptacles for rubbish generated on the Council Land and ensure the grassed oval is clear of rubbish each Monday morning during term time.

- 9.3 Each party shall pay the whole cost of repair or replacement of any damage to the Shared Facilities to the extent that such damage is caused or contributed to by any willful act, neglect, default or omission of the party, its agents, contractors, employees, students or invitees.
- 9.4 The parties shall not do or permit to be done any act matter or thing nor shall they bring onto or into the Shared Facilities anything (included, but not limited to, any dangerous substance) which may in any way increase the risk of damage to the Shared Facilities or any part thereof.
- 9.5 Without in any way limiting the generality hereof the parties agree that the portion of the Shared Facilities comprising grassed areas will be:
- (a) mowed by Marymount once every three weeks in autumn and winter and once every two weeks in spring and summer during the term of this agreement and each and every renewal thereof.
 - (b) cored by Marymount at such times as are mutually agreed between the parties.
- 9.6 In the event that the Council resolves to ensure that the Shared Facilities are maintained to a standard greater than that detailed in clause 9.1 hereof the Council shall bear sole responsibility for the cost of providing the further and better level of maintenance.
- 9.7 The parties agree that Marymount will keep the bore situated on the Council Land in good and tenable repair and condition (fair wear and tear excepted) provided that nothing in this subclause 9.7 will render Marymount liable in respect of replacement of the bore or any part thereof.

10. **ALTERATIONS ADDITIONS AND REPLACEMENT TO SHARED FACILITIES**

In the event that the Council and Marymount agree to alter, add to or replace the Shared Facilities including the bore or any part thereof and without limiting the generality hereof in the event that the bore casing or pump, irrigation equipment, goal posts, court backs tops and surface and cricket pitch and nets require replacement the cost of same shall be shared by the Council and Marymount in the following percentages:

The Council	44%
Marymount	56%
	100%

or such other percentages as the parties may from time to time agree in writing.

11. RELOCATION

If at any time within five (5) years after the date of commencement of this Agreement the Council wishes to relocate the hockey field and tennis courts which form part of the Shared Facilities to a position to the south of their present site Marymount will enter into negotiations with the Council in relation thereto in good faith PROVIDED HOWEVER that such relocation of the hockey field and tennis courts results in minimal encroachment upon and disturbance to the Marymount Land and FURTHER PROVIDED HOWEVER that the total cost of any work whatsoever involved in the relocation and without limiting the generality hereof any site and construction work and work involved in reinstating and making good the Shared Facility is borne solely by the Council

12. DISPUTE RESOLUTION

If a dispute arises between the parties as to the terms of or operation of this agreement or as to the rights and obligations of the parties under this agreement, then:

- 12.1 The dispute may be referred to the Management Committee with a view to the Management Committee making a recommendation to the parties for the purposes of resolving the dispute;
- 12.2 Failing resolution of the dispute by the Management Committee within fourteen (14) days, the dispute may be referred to the Chief Executive of the Council and the delegate of Marymount who until otherwise determined and notified to the Council will for the purposes of this sub-clause be the person holding the position of Chief Executive of Catholic Education S.A. (or his nominee) with a view to the Chief Executives making a recommendation to the parties for the purposes of resolving the dispute;
- 12.3 Failing resolution of the dispute by the Chief Executives within twenty eight (28) days, the dispute may be referred to an independent mediator mutually agreed by the parties for resolution.

Failing resolution of the dispute by any of the means set out in subclauses 12.1, 12.2, 12.3, the Council and Marymount may have the dispute determined according to law (including, if appropriate by reference to a court).

13. RELEASES

Subject to clause 14 hereof each party shall use and occupy the Shared Facilities at their own risk in all things and they shall each release and discharge, to the extent permitted by law, the other parties in the absence of any neglect, default or omission by those other parties or by their agents, employees, students or invitees, from claims of every kind resulting from any loss of life, accident, injury to persons or loss of or damage to property

whatsoever or howsoever occurring in, upon or in any way connected with the use of the Shared Facilities by the party giving the release (including any loss or damage to any of the party's fixtures and fittings or to any personal property of the party or of any person lawfully authorised by the party to use the Shared Facilities pursuant to this agreement).

14. **INDEMNITIES**

Each party shall indemnify and keep indemnified the other parties hereto from and against all and any claims of any nature whatsoever which the other party hereto may suffer or incur in connection with any loss of life, personal injury and/or loss of or damage to property arising from or out of any occurrence in, upon or about the Shared Facilities or arising out of or in connection with the use by the party giving the indemnity of the Shared Facilities or any part thereof but only to the extent that such loss of life, personal injury and/or loss of or damage to property is occasioned by any neglect, default or omission by the party giving the indemnity, its agents, employees, contractors, students or invitees.

15. **INSURANCE**

15.1 The Council and Marymount shall at its respective cost and expense in all things, effect and maintain throughout the term of this agreement and each and every renewal thereof public risk insurance or indemnity cover in respect of the Shared Facilities in which the limits of public risk shall not be less than ten million dollars (\$10,000,000.00) in respect of one event or such further sum as either party may demonstrate to the other party is reasonably necessary in all the circumstances and give thirty days notice to the other party.

15.2 The Council warrants that it is a member of the Local Government Association Mutual Liability Scheme which satisfies its requirements with respect to clause 15.1.

15.3 Marymount warrants that it is insured through the Catholic Church Insurance Limited for the purposes of clause 15.1.

16. **NATURE OF RIGHTS CREATED PURSUANT TO THE AGREEMENT**

The parties intend that the rights and obligations contained in this agreement shall, during the term of this agreement and each and every renewal thereof, create interests of a proprietary nature and constitute an encumbrance on the Land.

17. **CAVEAT**

The Council agrees and consents to Marymount registering a caveat over the Council Land at the Lands Titles Registration Office protecting Marymount's rights and interests in relation to the use of the Council Land pursuant to this Agreement.

18. **TERMINATION**

If either party breaches any of the terms and conditions of this agreement, then the other party may give notice in writing to the party committing the breach to rectify such breach within three (3) calendar months of the date of such notice and if the party committing the breach fails to rectify such breach or make diligent progress towards rectifying any such breach which is incapable of rectification within the time so limited then and in any of the said cases the other party may at any time thereafter terminate this Agreement by notice in writing to the party committing the breach but without prejudice to the rights of the other party in respect to any breach antecedent to such termination.

19. **TIME OF THE ESSENCE**

Time shall of the essence in respect of any time, date or period specified either in this agreement or in any notice served under or pursuant to the provisions of this agreement.

20. **EMPLOYEES & AGENTS**

Any act, matter or thing which either is required to be performed or done by a party or is permitted to be performed or done by a party may be performed or done by a party's duly authorised employees, agents, delegates or contractors.

21. **FURTHER ASSURANCES**

The parties shall do all acts, matters and things and sign all documents and shall cause to be done all acts necessary to give full effect to the terms of this agreement.

22. **ENTIRE AGREEMENT**

This agreement contains the entire agreement between the parties in respect of the subject matter of this agreement and the parties agree that this agreement supersedes and extinguishes any prior agreement or understanding (if any) between the parties in respect of this subject matter. Further, no other agreement, whether collateral or otherwise, shall be taken to have been formed between the parties by reason of any promise, representation, inducement or undertaking (if any) given or made by one party to the other prior to the date of this Agreement.

23. **WAIVER**

23.1 A waiver of a provision of this agreement must both be in writing and be signed by each party or by a person duly authorised to execute such a document on behalf of a party.

23.2 No waiver by a party of a breach of a provision of this agreement shall operate as a waiver of another breach of the same or of any other provision of this Agreement.

23.3 No forbearance, delay, indulgence or partial exercise by a party in enforcing the provisions of this agreement shall be a waiver of or prejudice or restrict the rights of that party in any way.

24. **MODIFICATION**

This agreement shall not be amended or varied other than by a written instrument expressed both to be a deed and to be supplemental to or in substitution for the whole or a part of this agreement. Further, any such instrument shall be signed by each party or by a person duly authorised to execute such an instrument on behalf of a party.

25. **READING DOWN AND SEVERANCE**

25.1 If a sentence, subparagraph, paragraph, subclause, clause or other provision of this agreement is reasonably capable of an interpretation which would render that provision not be unenforceable, illegal, invalid or void and an alternative interpretation which would not have one or more of those consequences, then that provision shall be interpreted or construed, so far as is possible, to be limited and read down such that its meaning is that which does not render it unenforceable, illegal, invalid or void.

25.2 Subject to subclause 25.1, if a provision of this agreement is for any reason, illegal, void, invalid or unenforceable, then that provision shall be severed from this agreement without affecting the legality, validity or enforceability of the remainder of this agreement..

26. **CUMULATIVE RIGHTS**

A right, power or remedy granted to a party under or pursuant to this agreement is cumulative with, without prejudice to and not exclusive of any other right, power or remedy either granted under or pursuant to this agreement or granted by law.

27. **RELATIONSHIP BETWEEN THE COUNCIL AND MARYMOUNT**

27.1 No party has the authority to act for or to incur any liability or obligation pursuant to this agreement as agent for and on behalf of any other party except as expressly provided in or contemplated by this agreement.

27.2 Each party shall indemnify and keep indemnified the other from and against all claims arising as a consequence of one party incurring any obligations or liabilities for and on behalf of the other party otherwise than pursuant to this agreement or with the express written consent of the other party.

28. NOTICES

28.1 Any notice to be given or made pursuant to this provision of this agreement shall be in writing and may be signed by the authorised agent of the party giving the same.

28.2 Notices may be served by delivery or by certified mail to the address of the party as detailed herein.

28.3 All such notices and communications shall be effective and be deemed to have been received in the following circumstances:

- (a) If delivered, upon delivery; or
- (b) If sent by certified mail, upon posting;
- (c) If sent by facsimile, upon the sender's facsimile machine producing a transmission report that the notice was sent to the addressee's facsimile number specified pursuant to this clause.
- (d) A party may modify its address or facsimile number, from time to time, by a written notice served on the other party .

29. COSTS

Each party shall bear their own costs incurred in and incidental to the preparation, perusal, negotiation and execution of this Agreement.

30. STAMP DUTY

The parties shall be responsible for and pay one half of any stamp duty assessed or charged in respect of this Agreement or any other instrument to be executed pursuant to this agreement or to give effect to its provisions.

31. LAW APPLICABLE

This Agreement shall be construed and take effect in accordance with and the rights and obligations under this Agreement of the parties hereto shall be governed by the law of the State of South Australia. Each of the parties hereby submit to the jurisdiction of the Courts of the State of South Australia including all Courts of appeal therefrom.

32. FIRST RIGHT OF REFUSAL

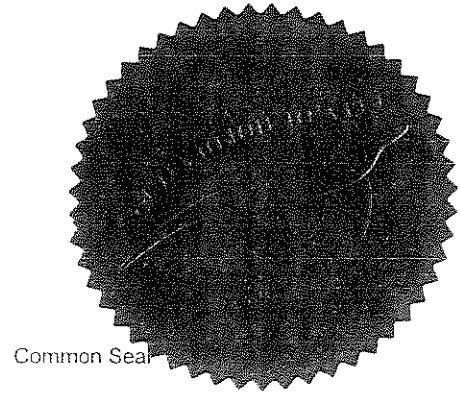
In the event that the Council Land cease to be classified as community land pursuant to the Local Government Act 1999 at any time during the term of tis agreement he College shall have first right of refusal to purchase the Council Land. The Council may not sell the

Council Land unless it has first offered to sell it to the College. The Council's offer is to remain open for a period of fourteen days. Following expiration of the Council's offer the Council agrees that it will not sell the Council Land to any third party on terms less favourable than terms previously rejected by the College.

EXECUTED as an agreement.

THE COMMON SEAL OF CITY OF
HOLDFAST BAY was affixed in the
presence of:)
)
)

Kenneth Rollond
.....
Kenneth Rollond
Mayor
Steven Gawler
.....
Steven Gawler
Chief Executive Officer



Common Seal

THE COMMON SEAL of CATHOLIC)
CHURCH ENDOWMENT SOCIETY)
INCORPORATED was hereunder)
affixed by PHILIP EDWARD WILSON,)
Archbishop of Adelaide, sole trustee, in)
the presence of:)
)

+ *Philip Wilson*
.....
SCVice
.....

Corporate Seal

SCHEDULE 1

THE PLAN

SCHEDULE 1

THE PLAN

WATTLE AVENUE

DEDICATED RESERVE

CRICKET
NETS

LOT 103
LOT 102

LOT 100
LOT 101

BORE
& PUMP

BUILDING B
RESOURCE CENTRE

ADMIN/
STAFF

EXISTING
CARPARK

EXISTING
CARPARK

COMMUNITY
CENTRE
CARPARK

BUILDING A
2 STOREY CLASSROOM BLOCK

BUILDING D
MUSIC
ART
CENTRE

BUILDING C
PHYS. EDUC/
DRAMA

3 BASKETBALL/NETBALL COURTS

CANTEEN

EXISTING
COMMUNITY FACILITIES

NEW BOUNDARY LINE

RESIDENTIAL DEVELOPMENT

KING GEORGE AVENUE

COLTON AVENUE

1/2

SCHEDULE 2

The Timetable

	Weekdays		Weekends	
	0745-1715 hrs	1715-0745 hrs	0745-1200 hrs	1200-0745 hrs
School Terms	Marymount	Council	Saturday Marymount Sunday Council	Council
School Holidays	Council	Council	Council	Council

THIS DEED is made the

13th

day of

December

2010

BETWEEN:

CITY OF HOLDFAST BAY of 24 Jetty Road Brighton SA 5048 ("the Council")

and

THE CATHOLIC CHURCH ENDOWMENT SOCIETY INCORPORATED of
39 Wakefield Street Adelaide SA 5000 ("Marymount")

BACKGROUND:-

- A. The Council and Marymount entered into a Joint Use Agreement in relation to the Mawson Oval on the 16th day of February 2004 ("the Agreement").
- B. The Council had resolved on the 8th day of April 2003 (and communicated to Marymount on the 15th day of April 2003) that the commencement date for the Agreement would be the 1st day of January 2000.
- C. Marymount incorrectly and unilaterally inserted by hand a commencement date of the 16th day of February 2004 into the Agreement.
- D. The parties now wish to rectify the error and insert the correct commencement date into the Agreement.

IT IS AGREED as follows:-

- 1. The parties acknowledge the accuracy of the Background of this Deed and agree that in so far as they are capable they shall form part of and be read with this Deed.
- 2. The parties hereby acknowledge and agree that the commencement date for the Agreement is the 1st day of January 2000 and the exclusive licence to use the shared facilities as defined in the Agreement will run for a term of twenty one (21) years from the 1st day of January 2000.
- 3. The parties acknowledge that in all other respects the terms of the Agreement are unchanged subject to any incidental variation resulting from the change to the commencement date of the Agreement.
- 4. Each party shall bear their own costs of an incidental to the preparation of this Deed.

EXECUTED as a Deed.

The Common Seal of **CITY OF HOLDFAST BAY**)
was affixed in the presence of:)



Mayor



Chief Executive Officer



THE CORPORATE SEAL OF CATHOLIC)
CHURCH ENDOWMENT SOCIETY)
INCORPORATED (ABN 29 608 297 012) was)
hereunto affixed by Most Reverend Philip)
Wilson DD JCL, Archbishop of the Archdiocese)
of Adelaide:)


.....
Archbishop Wilson's Signature

In the presence of:


.....
Witness Name


.....
Witness Signature

CITY OF HOLDFAST BAY

("the Council")

and

**THE CATHOLIC CHURCH ENDOWMENT
SOCIETY INCORPORATED**

("Marymount")

DEED OF VARIATION

Extract

Local Government Act 1999—1.3.2018

Chapter 11—Land

Part 1—Local government land

Division 6—Disposal and alienation of local government land

202—Alienation of community land by lease or licence

- (1) A council may grant a lease or licence over community land (including community land that is, or forms part of, a park or reserve).
- (2) Before the council grants a lease or licence relating to community land, it must follow the relevant steps set out in its public consultation policy.
- (3) However, a council need not comply with the requirements of subsection (2) if—
 - (a) the grant of the lease or licence is authorised in an approved management plan for the land and the term of the proposed lease or licence is five years or less; or
 - (b) the regulations provide, in the circumstances of the case, for an exemption from compliance with a public consultation policy.
- (4) A lease or licence is to be granted for a term not exceeding 42 years and the term of the lease or licence may be extended but not so that the term extends beyond a total of 42 years.
- (4a) Subsection (4) does not prevent a new lease or licence being granted at the expiration of 42 years (subject to the other requirements of this Act or any other law).
- (5) A lease or licence may provide for—
 - (a) the erection or removal of buildings and other structures for the purpose of activities conducted under the lease or licence;
 - (b) the exclusion, removal or regulation of persons, vehicles or animals from or on the land, and the imposition of admission or other charges;
 - (c) any other matter relevant to the use or maintenance of the land.
- (6) A lease or licence must be consistent with any relevant management plan.
- (7) This section operates subject to the provisions of the Adelaide Park Lands Act 2005 in respect of the Adelaide Park Lands under that Act.

From: [Michael Kellely](#)
To: [Howard Lacy](#)
Subject: RE: Extension of Mawson Oval Joint Use Agreement (KJ 200193)
Date: Tuesday, 17 November 2020 11:55:58 AM
Attachments: [image001.png](#)
[image002.jpg](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image007.jpg](#)

Hi Howard

I refer to your email below. I have considered the documentation provided by you and relevant statutory provisions, for the purposes of this advice.

The *Joint Use Agreement for Mawson Oval* ('JUA') was entered into on 16 February 2004 albeit, by later amendment, for a term commencing on 1 January 2000. At the time the JUA was entered into, the relevant version of the *Local Government Act 1999* ('LG Act') that was in operation was that for the period 24 November 2003 to 2 June 2004. Within that version, section 202, relevantly, provided that a licence of community land could be granted or renewed for a term (not exceeding 21 years), as stated in the licence.

The JUA relates to community land, is in the nature of a licence for specified periods of use by The Catholic Church Endowment Society Inc and is for an initial term of 21 years with a right of renewal for Marymount College of a further term of 21 years. The right of renewal is stated to be on the same terms and conditions subject to the request for extension being made before the expiration of the initial term, there then being no existing breach or non-observance of the JUA by Marymount and the Council having the power under the LG Act to extend the term, as contemplated, at the requisite time. Therefore, the JUA clearly provides for a total term of the JUA, as extended, of 42 years.

The current version of the LG Act (1 July 2020 to present), relevantly, provides at section 202, that a licence can be granted for a term that does not exceed 42 years and may be extended, provided that the total term does not extend beyond 42 years – also recognising that a new licence may, subject to the requirements of the LG Act, then be granted for up to a further term of 42 years, subject to complying with any legislative provisions relevant to the grant.

In my view, whilst there was debate in the earlier years of the LG Act as to whether a licence (and a lease) of community land could be for a maximum term of 21 years or for a maximum initial term of 21 years and a further extended term of 21 years (i.e. 42 years in total), that is a matter that, in my view, is not required to be reconsidered at this juncture. This is because the current legislative provision clarifies earlier debate and, as contemplated by clause 4.2 of the JUA, recognises a maximum term of 42 years, precisely the total term currently under consideration.

With the above in mind, my advice in response to your specific questions, adopting the same numbering, is as follows –

1. A contractual obligation is not sufficient to displace any legislative obligation under the LG Act (or other law). That said, my advice is that the LG Act does not include any relevant provision that is inconsistent with the contractual entitlements

conferred by the JUA. You will note that the LG Act, when it provides for a term being granted subject to other requirements of the LG Act or other law, is relevant to any licence granted after the total term of 42 years. Further, when consideration is given to the fact that at the time the JUA was entered into, public consultation would have occurred or would have been 'forgiven' by a relevant statutory provision at that time (let me know if you require me to research this point), including as to the proposed initial and further terms, my advice is that the further term, subject to the conditions identified above being satisfied, can be agreed to by the Council without a requirement for public consultation.

2. Given my advice above, the Council is not required to undertake public consultation in relation to the grant of the further term, as contemplated by the JUA. The issue of any variation to the term or the conditions arising from consultation is not, therefore, a matter warranting consideration. Although, I do draw to your attention that upon a renewal, it is necessary to exclude clause 4 because a further right of renewal is not permissible in the circumstances.
3. Yes, for the reasons set out above.

Let me know if I can assist further.

Michael

Michael Kelledy
Lawyer

T. 08 8113 7103 | M. 0417 653 417

Level 6/19 Gilles Street Adelaide SA 5000 | GPO Box 2024 SA 5001

kellyjones.com.au



Please note that our offices will be closed from 12.00 pm, Wednesday 23 December 2020, reopening Monday 11 January 2021.

The team at Kelledy Jones wish you a safe and happy festive season.

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From: Howard Lacy <HLacy@holdfast.sa.gov.au>
Sent: Monday, 16 November 2020 12:39 PM
To: Michael Kelledy <mkelledy@kelledyjones.com.au>
Cc: Lisa Olsen <LOlsen@holdfast.sa.gov.au>; Jillian Conner <jconner@holdfast.sa.gov.au>
Subject: FW: Extension of Mawson Oval Joint Use Agreement

Dear Michael,

Hope you are well. We are seeking your advice on a matter please.

Council approved the purchase of the whole of the land known as Mawson Oval (**Land**) from the Minister for Education and Children's Services on 22 September 1998. The Catholic Church Endowment Society Incorporated (**CCESI**) contributed 50% of the purchase price (contribution of \$500,000 payable on 1 January 2000) on the basis that Council grant CCESI a 20 year licence with the right of renewal for a second term on 20 years to enable the adjoining Catholic school to utilise the Land for school curriculum and recreational sporting activities during specified times.

A copy of Council's confidential resolution (dated 22 September 1998 – resolution C98/205) is attached.

A Joint Use Agreement (JUA) was drawn up and executed by both parties commencing on 16 February 2004 for a term of 21 years with one right of renewal for a further term of 21 years.

The JUA notes a commencement date of 16 February 2004 however, by a further Deed of Variation dated 13 December 2010 (**Deed of Variation**) the parties agreed to vary the JUA commencement date to 1 January 2000. On that basis, the first term of the JUA will expire on 31 December 2020.

Pursuant to clause 4.1 of the JUA, CCESI have exercised their right of extension and Council would like to grant that extension. However, the subject land is community land and clause 4.2 of the JUA provides that the extension is expressly subject to Council having the power to grant the extension under the Local Government Act 1999. This has raised queries as to whether public consultation is required. It is Council's position that as the licence will be extended pursuant to a right contained within the JUA, the extended period is simply a continuation of the original lease and community consultation is not required, however, it would be much appreciated if you can please provide advice as to the below.

1. Given that Council has a contractual obligation with CCESI to grant the extension, is Council is required to undertake community consultation before granting the extension?
2. If Council does not undertake community consultation, what effect will it have? From our reading of the JUA, Council cannot vary the term or vary any conditions of the JUA except by mutual agreement between the parties. Council cannot indeed refuse to grant extension unless CCESI is in breach of the agreement at the time, and they are not. So if Community Consultation would serve no practical purpose, why would it be needed?

3. Does Council have the power to grant the extension under the *Local Government Act 1999* particularly if it decided not to undertake community consultation?

To assist with the above, please find attached copies of the original motion approving the deal and lease, the subsequent JUA and the Deed of Variation. Please also note that we have no record of whether public consultation was undertaken in respect of the initial term of the JUA, although the commencement date suggests that public consultation was not required by virtue of the *Local Government (Implementation) Act 1999*.

In terms of timing, we would like to prepare a report for the next Council meeting which has report cut-off date of 20 November 2020. Accordingly, if you can please provide your advice no later than COB Monday 19 November 2020, it would be much appreciated.

In the meantime, please do not hesitate to contact me if you have any queries.

Regards



HOWARD LACY

General Manager City Assets & Services

City of Holdfast Bay

08 8229 9940

0417 861 826

hlacy@holdfast.sa.gov.au

holdfast.sa.gov.au



Brighton Civic Centre

24 Jetty Road, Brighton SA 5048

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