

ITEM NUMBER: 18.3

CONFIDENTIAL REPORT

**NEW MANAGEMENT AGREEMENT –
SOMERTON SURF LIFESAVING CLUB INC.
(Report No: 161/20)**

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:

- 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.

Recommendation – Exclusion of the Public – Section 90(3)(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: 161/20 New Management Agreement – Somerton Surf Lifesaving Club Inc. 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: 161/20 New Management Agreement – Somerton Surf Lifesaving Club Inc. on the following grounds:
 - 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.
 - 3.** The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.
-

Item No: **18.3**

Subject: **NEW MANAGEMENT AGREEMENT – SOMERTON SURF LIFESAVING CLUB INC.**

Date: 23 June 2020

Written By: Property Officer

General Manager: City Assets and Services, Mr H Lacy

SUMMARY

The Somerton Surf Lifesaving Club Inc (**Club**) has a lease over the Somerton Surf Lifesaving Club building for a term of 21 years from 7 December 2005 to 6 December 2026.

The Club previously operated a bistro and function business on the premises by using paid and/or voluntary staff managed by the Club itself. However this has proved to be unsatisfactory (economically and otherwise) and the club has discontinued bistro operations.

The Club is seeking approval to enter into a Management Agreement with a third party (being Gambell & Sutton Pty Ltd) to manage and operate the bistro and upstairs bar initially under the Club's control and direction, but ultimately for the 3rd party to operate a bistro as a full commercial restaurant the under a sub-lease arrangement.

The request to operate the bistro under a management agreement is generally routine, however the longer term question of whether to allow a fully commercial business to operate from the club under a sub-lease agreement is relatively new to council and issues such planning, development approval, change of land use, liquor licencing and revenue sharing will need to be considered by Council. All current leases require the Lessee to seek landlord approval prior to sub-lease part of their leased premises.

RECOMMENDATION

1. **That the Somerton Surf Life Saving Club be granted approval to enter into a Management Agreement with a third party (being Gambell & Sutton Pty Ltd) to manage and operate a bistro, bar and function business as previously operated by the Club provided that such arrangement:**
 - (a) **must be under the respective club's care and control and consistent with the existing lease conditions and any development approvals;**

- (b) not increase nor exceed the current scale of operations of the existing hospitality/catering business or change its approved hours of operation;
 - (c) operates under the Club's liquor licence and any applicable conditions thereof;
 - (d) must not give rise to a sublease or otherwise constitute a parting of possession of the leased premises;
 - (e) generates revenue by way of a profit share arrangement and cannot take the form of rent or similar payment which may give rise to a sub-lease or otherwise constitute rent.
2. Should the Club wish to enter into a sub-lease agreement or other commercial arrangement with a third party, they shall:
- (a) lodge a separate submission for Council approval as required by their lease, including details of the arrangement and any forecast commercial revenues, so that Council can assess the proposal and if necessary determine the effective community and commercial rent to be applied;
 - (b) submit any necessary Development and Liquor Licence applications.
3. That Administration be requested to develop a range of options to determine commercial rental from sub-lease or other commercial arrangements that might arise under the Sporting and Community Lease Policy and submit same to Council for consideration.
4. That Administration be authorised to issue a letter of approval to the Club.

RETAIN IN CONFIDENCE - Section 91(7) Order

5. That having considered Agenda Item 18.3 (Report 161/20) New Management Agreement – Somerton Surf Lifesaving Club Inc. in confidence under section 90(2) and (3)(d) the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the report, attachments, recommendation and discussion be retained in confidence for a period of 24 months from the date of this decision and that the Chief Executive Officer is authorised to release the documents at the expiry of that period or when the Management Agreement has been signed whichever occurs first and that this order be reviewed every 12 months.

COMMUNITY PLAN

Community: Providing welcoming and accessible facilities

Community: Fostering an engaged and contributing community

Economy: Supporting and growing local business

Economy: Making it easier to do business

COUNCIL POLICY

Sporting and Community Club Leasing Policy (Policy)

STATUTORY PROVISIONS

Local Government Act 1999

Retail and Commercial Leases Act 1995

BACKGROUND

The Somerton Surf Lifesaving Club Inc. (**Club**) has a lease over the Somerton Surf Lifesaving Club building for a term of 21 years from 7 December 2005 to 6 December 2026.

In 2005, the property was redeveloped to provide new facilities for the use of the Club, including a kiosk facility (**Kiosk**) and a bar and seating area (**downstairs licensed area**) on the ground floor and a bar, commercial kitchen, large seating area and balcony on the upper floor (**upstairs licensed area**).

On 11 March 2014, Council resolved (Resolution C110314/1059) to authorise a sub-tenant to operate the Kiosk, which has been successfully running since then.

Although the Club's original intention was not to profit from the commercial operation of the Kiosk, the original sub-lease rental has increased from \$2,865 (plus GST plus outgoings) in 2014 to \$16,500.00 (plus GST plus outgoings) in 2020. This additional revenue contributes to the Club's financial viability.

The rental paid to Council for the clubrooms increased from \$10.00 per annum pre-2014 to \$2,865 pa when the Kiosk sub-lease was approved in 11 March 2014. This was intended to recognise that Council (and through it the broader community) also benefitted from converting part of clubrooms into a commercial operation. Since that time, the community's share of commercial rental has increased at CPI per year, even though the actual sub-lease rental income for the Club has increased from \$2,865 to \$16,500 per annum. The current rent payable to council is currently \$3,096 per annum.

In previous years, the Club has used the upstairs licensed area to operate a bar, bistro (open to both club members and the public), to host club functions (for club members) and for venue hire to the public for weddings, birthdays and other functions (all of which is hereafter called "**the business**").

The Club previously operated the business using paid and/or voluntary staff within the Club itself. However this proved to be unsustainable from an economic and volunteer perspective and the Club has discontinued business operations. The Club's losses from the business have reduced the

financial resources of the Club including funds to maintain its equipment, training and rescue operations.

The Club is now seeking to activate the upstairs licensed area again under a commercial model.

REPORT

Clause 6 of the Lease provides that the Club must not use nor allow any other person to use the property for carrying on a business. Item 8 of the Schedule to the Lease states the intended purpose of the premise as “Surf lifesaving club and associated activities”.

The Club does however regard the business as vital for its ability to:

- provide welcoming and accessible facilities;
- foster an engaged and contributing community; and
- support the long term financial viability of the club.

With this in mind, the Club is seeking Council’s approval to enter into an agreement with a third party (being Gambell & Sutton Pty Ltd) to:

- Stage 1 - initially manage and operate the business under the Club’s control and direction
- Stage 2 – subject to Council, development and other approvals, to sub-lease the upper floor facilities to Gambell and Sutton Pty Ltd to operate a full commercial restaurant, function centre and bar.

Gambell and Sutton Pty Ltd are an experienced and well-versed operator, having previously operated the Glenelg Surf Life Saving Club bistro.

The Club has written to Council seeking landlord’s approval to initially establish a Management Agreement for Gambell and Sutton Pty Ltd to manage and operate the business under the Club’s control and direction commencing from 1 September 2020.

Refer Attachment 1

The Club is then seeking landlord’s approval to progress to Stage 2, subject to Development Approval and Liquor Licencing approvals, and move to a fully commercial model based on sub-leasing of the upper level facilities of the club to a commercial operator.

This will help the Club to concentrate on its core business of life saving while offering a bistro and function space to the local community. The Club has provided a copy of the draft Management Agreement for Council’s information.

Refer Attachment 2

The proposed Management Arrangement would free up members of the Club’s time as they would not be required to manage the business and could focus their time and effort in more suitable areas. The Club members lack the experience and skill to operate a hospitality business

and as such the business is a burden on the club both financially (inadequate meal, alcohol and function costing, disproportionate stock ordering to projected and/or actual income and continual financial loss) and time-wise (lack of experience means that an already time consuming business is even more so and is extremely draining on members time and resources).

Under the terms of the proposed Management Agreement, the business will be distinct from the Kiosk with the third party operator obligated to make all reasonable efforts to ensure that its trading does not interfere with the operations and offerings do not compete with those of the Kiosk.

Change of Land Use

The original Development Approval was assessed based on the predominant land use being for a community club. Operation of bars and bistro were ancillary to the primary land use.

The introduction of a 3rd party operator to run the bistro, bar and function facilities under a Management Agreement with the Club providing management, accepting commercial risk and using the Club's liquor licence, in our view, consistent with the objects of the Club, its original approval and lease. The only change is that the club has hired someone to undertake the functions it would have previously undertaken using hired staff or volunteers.

However if the Club seeks a commercial operator to run the bistro, upper level bar and kitchen as a for-profit commercial restaurant, function centre and bar, it is Administration's view that this will trigger a change of land use. Under current planning legislation this would require a non-complying development application, require advertisement, public consultation, representations and have appeal rights through the ERD Court. Issues such as parking, noise, hours of operation and traffic would all be able to be challenged during the development assessment process.

After the new planning reforms come into effect in late September 2020, the requirements and opportunities for community and resident input are significantly reduced with no appeal rights and limited notification/representation requirements.

Similarly, any change to hours of operation, and to the scale and type of operation, would also require landlord and development approval. Transferring or reissuing the upper liquor licence to a new 3rd party commercial operator will also require approval by the Licencing Commissioner.

Subject to the commercial restaurant proposal being endorsed by Council and approval gained through the Development Assessment process, the Lease would need to be amended to reflect the change of use, to permit a commercial sublease for a restaurant and to update rental.

As the Club has negotiated with Gambell and Sutton Pty Ltd to manage the Club bistro from 1 September 2020, it has proposed that they initially manage and operate the business under the Club's control and direction, and under the Club's liquor license. This will allow time for the Club and operator to lodge subsequent applications for Council's landlord approval, development applications and to seek transfer of the liquor license.

This is likely to be the first request of this type received by Council and it is Administration's understanding that a decision in favour of the Club may result in other sporting and community clubs making similar requests. Accordingly, it is appropriate that Council's views are sought on the merits of clubs engaging third parties to take over and commercialise existing hospitality/catering facilities leased by a club.

It is recommended therefore that Administration to develop a range of options for determining rental for commercial operations under sub-leases or other commercial arrangements so that Council can consider these and incorporate one or more into the Sporting and Community Lease Policy.

Kiosk Sub-lease Renewal

As the Kiosk sublease expired on 30 April 2020, the Club has also sought Council's consent to enter into a new sub-leasing arrangement with the same sub-tenant on similar terms to those previously consented to by Council. A separate report will be presented to Council in the next few weeks.

BUDGET

Council is not a party to the Management Agreement and is only required to provide landlord's approval by way of a letter to the Club.

Any proposal to adjust the Club's rent based on a commercial sub-lease or other commercial arrangement will be considered at the time of any subsequent application from the Club. This report recommends that Council request Administration to develop options for determining such commercial rental for inclusion in the Sporting and Community Leasing Policy.

Somerton SURF LIFE SAVING CLUB

Repton Road Somerton Park SA 5044
P.O.BOX 1069 GLENELG SOUTH S.A. 5045
ABN: 85 241 889 464

21st May 2020

To: The Mayor and Councillors
City of Holdfast Bay

**Re: Management Agreement
between Somerton Surf Life Saving Club "the club"
and Gambell and Sutton Pty Limited "the manager"**

The club leases its clubhouse from the Council and is asking the Council as landowner to approve the above agreement.

The upstairs floor of the clubhouse includes a commercial kitchen and bar which in the past has been used to hold bistros and functions for the benefit of members and to generate income for the club. This practice has fallen into disuse over the last 18 months due to inadequate returns and the burden placed on volunteers.

Following a review, the Board of Management of the club has decided that an experienced and professional operator is better suited to run these activities than paid staff and/or volunteers, who have done so previously.

The club has chosen the manager from a long list of applicants and proposes to enter into a sub-lease with the manager to run its own business. The sub-lease requires approval from;

- the Council as landowner,
- development approval, and
- licensing approval.



Development approval for the sub-lease has been held up due to an anomaly in the development plan and current planning regulations. This has imposed an unacceptable legal and financial risk to the club, which has been forced to delay its application until a new development code comes into effect later this year.

The management agreement is intended as an interim measure until all approvals for the sub-lease are obtained. It will allow the club to commence operations under the club's liquor licence in time for the 2020/21 life saving season with profits shared between the club and the manager. When the sub-lease is fully approved, the agreement will terminate and the manager will run its own business under its own licence and will pay rent to the club.

Benefits to the club of the sub-lease and outsourcing of the business include;

- transferring business risk to the new operator,
- replacing an uncertain income with the greater certainty of rent,
- having skilled and experienced people run the business,
- improved financial outcomes,
- attracting new members to the club with its improved offering, and
- removing the burden on volunteers and allowing them to concentrate on the club's core life saving functions.

The community will benefit from a revived and upgraded hospitality service, which will provide an additional attraction to users of the Council's recently constructed plaza in front of the clubhouse. The plaza and the associated path behind the Minda dunes are already proving to be exceedingly popular.

I trust that you will find the management agreement worthy of approval.

Thank you



Warwick Holland

President

Somerton Surf Life Saving Club

THIS MANAGEMENT AGREEMENT is made

BETWEEN

SOMERTON SURF LIFE SAVING CLUB INCORPORATED

(the club)

AND

GAMBELL & SUTTON PTY LTD ACN 637 647 940

(the manager)

BACKGROUND

- A. The club leases its two storied clubhouse ("the clubhouse") from the City of Holdfast Bay.
- B. It holds a club liquor licence which includes in the licensed area a commercial kitchen, bar, large seating area and balcony on the upper floor ("the upstairs licensed area") and a smaller bar and surrounds on the ground floor ("the downstairs licensed area")
- C. In previous years the club has used the upstairs licensed area to hold bistros (open to both club members and the public) and club functions (for club members) and for the hire to the public for weddings, birthdays and other functions (all of which is hereafter called "the business"). The club has used paid and/or voluntary staff in the business but this has proved unsatisfactory and the club has discontinued business operations. Instead the club has reached an agreement with the Manager to sub-let the upstairs licensed area to the Manager for it to operate the business on its own behalf under its own restaurant liquor licence.

- D. The proposed sub-lease ("the sub-lease") involves obtaining certain approvals including an approval under the Development Act for change of use of the premises. This approval could be difficult and costly to obtain under the current law, but a change in the law is expected to enable approval to be obtained more readily. For this reason the club has delayed making the application for development approval until the new law comes into effect, which is expected to be the 1st September 2020.
- E. The parties wish to re-commence operation of the business on 1st September 2020, which is shortly before the life saving season for 2020/2021 commences. As development approval is not expected for some months after that date, this agreement is a temporary measure to enable the business to resume on 1st September and continue to be operated under the club's liquor licence until development approval is obtained and the proposed sub-lease can come into effect.

IT IS AGREED between the club and the manager

Duration of Agreement

1. This agreement comes into effect on the 1st day of September 2020 (or such later date as the parties agree) and continues until the day following the last day on which;
 - i. The last of all necessary approvals are obtained for the sub-lease to come into effect, and
 - ii. the manager obtains a restaurant licence for it to sell or supply liquor in the upstairs licensed area.

Management of the Business

2. The manager shall manage the business on behalf of the club and in the name of the club during the duration of this agreement.
3. The club shall open a special purpose bank account and all revenue of the business shall be paid into that account.

4. The manager shall provide the club with a sales report and invoice for its share of revenue, for each week finishing at the close of trading on Sunday, with payment to be made by the club as soon as practicable and at least no later than 7 days from receipt of the sales report and invoice.
5. Operating hours for the business shall be,
- | | |
|------------------------|------------------|
| Wednesday and Thursday | 5pm to 11pm |
| Friday | 5pm to midnight |
| Saturday and Sunday | 11am to midnight |
- unless otherwise mutually agreed.
6. On production of a current membership card the manager shall provide to a member of the club a discount of 10% on regular food and beverage prices.
7. The club shall have preference to use the upstairs licensed area for up to five functions and 10 training or assessment days in a year. The dates for the ensuing twelve months shall be determined by the club, in consultation with the manager, at the beginning of the surf life saving season. If requested by the club, the manager shall provide catering and bar services at each function. The training and assessment days shall take place on days or times when the manager is not otherwise trading.
8. The club may open its downstairs bar during the surf life saving season on any day when the club is holding a carnival or other special event and until 6-00 pm on Saturday afternoons.

Liquor Licensing

9. The club will at all times remain the Licensee pursuant to Licence No. 57210525 .
10. The parties shall comply with the provisions of the Liquor Licensing Act 1997 (the "Act") and in particular sections;
- 36 - Club Licence;
 - 71 - Approval of Management and Control;
 - 97 - Supervision and Management of Licensee's business;
 - 99 - Prohibition of Profit Sharing;
 - 105 – Prescribed Entertainment on Licensed Premises.

- .
11. Pursuant to section 99 (3) of the Act the manager shall at all times ensure that the business is conducted under the personal supervision and management of a natural person approved by the licensing authority.

Purchases

12. The manager shall be responsible for;
- i. ordering all liquor, non alcoholic drinks and other bar stock, which shall be paid for by the club; and
 - ii. ordering and paying for all food and other catering and cooking supplies.

Revenue

13. The club shall be entitled to 50% of revenue from bar sales (which includes alcoholic and non alcoholic drinks and chips, nuts and other like snacks).
14. The manager shall be entitled to,
- i. 50% of revenue from bar sales, and
 - ii. all other revenue.

Staff

15. The manager, at its cost, must at all times employ adequate and competent staff to the extent necessary to carry out its obligations to the standard required pursuant to this agreement and must;
- i. observe all legal requirements as to payment of staff salaries, wages, PAYG tax, contributions to superannuation and other entitlements,
 - ii. comply with all legal requirements relating to occupational health and safety,
 - iii. comply with all workplace and employment requirements under the Registered and Licensed Clubs Award or other applicable award;
 - iv. register as an employer pursuant to the Return to Work Act 2014, promptly pay all levies and other amounts payable under the Act and

when requested by the club, provide to the club proof of registration and/or payment.

- v. Ensure that all staff present whilst on duty or in the environs of the club behave in an appropriate manner.

Conduct of the Business

- 16. The manager;

- i. must not use the upstairs licensed area other than for carrying on the business, which it must conduct in a proper and prudent manner, and
- ii. must observe and comply with all legislative provisions, rules or policies relating to the business including, without limiting the generality of this clause, with respect to:

- iii. The Food Act 2001
- iv. The Work Health and Safety Act 2012
- v. Emergency drills and procedures
- vi. Discrimination and harassment
- vii. Security
- viii. Privacy

Fixtures and Fittings

- 17. The Manager must use the club's, fixtures, fittings, plant, furnishings and equipment carefully so as to maintain them in good repair order and condition, fair wear and tear excepted and must promptly report to the club any such items in need of repair or replacement.

Cleaning

- 18. The manager shall ensure that the kitchen and other parts of the upstairs licensed area (including the western balcony) are kept in a clean and tidy state and filters for the extractor fan in the kitchen are cleaned on a regular basis.

Insurances

19. The manager must effect and keep current a public liability and product risk policy in an amount of not less than twenty million dollars (\$20,000,000) per claim or such other sum as the club may reasonably require from time to time and must deliver to the club a certificate of currency when requested by the club.

Alterations and Additions

20. The manager shall not make any alteration or addition to the clubhouse or install or alter any partitions, fixtures, fittings, signs or notices or undertake any painting or decorating without the prior written consent of the club

Indemnities

21. The manager hereby indemnifies the club and agrees to keep the club indemnified from and against all claims, damages, costs and expenses for which the club may be or become liable in respect of:
 - i. The negligent use, misuse, waste or abuse of the club's, fixtures, fittings, plant, furnishings and equipment by the manager,
 - ii. loss, damage or injury to any property or person caused or contributed to by the manager during the operation of the business,
 - iii. any claim, proceeding or complaint made by a customer or other person in relation to goods and services sold or provided by the manager;and for the purposes of paragraphs i –iii of this clause the term “manager” includes any officer, employee, agent, or contractor of the manager.

Kiosk

22. The manager shall make all reasonable efforts to ensure that its trading does not interfere with the operations of the kiosk and that its offerings do not compete with those of the kiosk.

Early Termination

23. If the manager is in breach of any obligation under this agreement, the club may serve on it a notice requiring it to rectify the breach within 14 days and if it fails to do so the club may serve another notice on the manager forthwith terminating the agreement.
24. If any of the stipulations for ending this agreement set out in clause 1 have not occurred by the 31st March 2021 either party may serve a notice on the other to terminate the agreement upon the expiration of 14 days.
25. Service of a notice shall be by email sent to both addresses of the other party as set out below:

The club - president@somertonsurfclub.com.au
secretary@somertonsurfclub.com.au

The manager kate@gambell.io
cheffi1984@hotmail.com

Approvals

26. This agreement is subject to approval by;
- i. the City of Holdfast Bay as the lessor of the clubhouse, and
 - ii. the Liquor and Gambling Commissioner pursuant to section 99 (2) of the Act.

EXECUTED AS AN AGREEMENT

SIGNED on the _____ day of _____ 2020

by authorized Somerton Surf Life Saving Club Inc directors

SIGNED on the _____ day of _____ 2020

by authorized Gambell & Sutton Pty Ltd directors
