

## URGENT BUSINESS: 16.1

### CONFIDENTIAL REPORT

#### BUFFALO – UPDATE

*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.

CONFIDENTIAL

**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: 185/19 Buffalo - Update 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: 185/19 Buffalo - Update 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: 16.1  
Subject: BUFFALO – UPDATE  
Date: 14 May 2019  
Written By: Property Management Officer  
General Manager: City Assets and Services, Mr H Lacy

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## SUMMARY

On 11 December 2018 Council resolved to enter into a mutual Deed of Release and Termination ("*Deed*") with DeYoungs Jamestown Pty Ltd ("*Licensee*"). This Deed was executed Tuesday 29 January 2019 and released both Council and the Licensee from their respective obligations under the Agreement; subject to the Licensee removing the vessel from the site, and remediating the land by 14 April 2019.

On 9 April 2019, following a request from the Licensee Council resolved to enter into a Deed of Extension ("*Deed*") with the Licensee in order for them to complete the necessary demolition and remediation works.

To date, since the execution of the Deed (Monday 15 April 2019), the Licensee has undertaken little of the prescribed works required under the Deed, until Friday 10 May 2019 where an internal strip out of the vessel commenced and Asbestos was identified on site. It should be noted that further works have been scheduled to occur Monday 13 May and Tuesday 14 May 2019. The Acting CEO has approved temporary access to the site so that works can progress.

On Thursday 9 May 2019, the Licensee approached Administration seeking an additional eight (8) week extension in order to complete the works, including general salvage, asbestos removal process and final mechanical demolition.

It is recommended that the (8) week extension be granted by Council. However, should Council resolve terminate the Deed and consider stepping in to demolish and remove the Buffalo, then Council will need to separately approve the expenditure not to support an extension, the costs of demolition, transport and remediating of the land estimated at around \$203,500 (excl GST). Administration would then seek legally to recover these costs from the Licensee.

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## RECOMMENDATION

1. That Council grants an additional eight (8) week extension in order to allow the Licensee to undertake the necessary asbestos removal (subject to Safework SA approval), demolition, and remediation works subject to the Licensee:

- a. Providing a full and complete works schedule and timeline;
  - b. Providing names of the contractors to be used for the demolition;
2. That the Mayor and Chief Executive Officer be authorised to execute and seal any such documents required to give effect to the extension;
3. That should the works required under the Deed not be completed by the expiry of the extended term, Council's Lawyer's serve notice on the Licensee stating:
- a. that the Licensee is deemed to be in breach of the Deed of Release and Termination;
  - b. that the Licensee has seven (7) days in which to undertake the works outlined in the Deed of Release and Termination;
  - c. that if the Licensee fails to undertake the works in the associated timeframe, Council proposes to:
    - i. arrange for the demolition and removal of the vessel and any remaining facilities on-site;
    - ii. dispose of the vessel and any other goods in accordance with the prescribed process; and
    - iii. seek to recover any/all costs associated with the demolition and removal, as well as any resulting from the Licensee's breach of Licence Agreement and/or the Deed of Release and Termination.
4. That a report be brought back to Council following completion of steps as outlined in items 1, 2 and 3 above for further consideration.

RETAIN IN CONFIDENCE - Section 91(7) Order

5. That having considered Agenda Item: 17.1 Report No: 185/19 Buffalo – Update in confidence under section 90(2) and (3)(b, d & h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act, orders that any details outlined in Report No: 185/19 Buffalo – Update and associated minutes that pertain to the Licensee, Licence Agreement and/or Commercial Operations 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*

- Confidential Council Report No.: 145/19; Item No.: 17.3, *'Buffalo Licence Agreement – Application for Extension of Time'*, 9 April 2019 (Resolution No's.: C090419/1449, C090419/145 & C090419/1451);
- Council Report No.: 389/19; Item No.: 17.2, *'Buffalo Licence Agreement'*, 11 December 2018 (Resolution No's.: C111218/1338 & C111218/1339);
- Council Report No.: 339/18; Item No.: 17.1, *'Buffalo Site Redevelopment'*, 9 October 2018 (Resolution No's.: C091018/1304 & C091018/1306);
- Council Report No.: 253/18; Item No.: 17.1, *'Buffalo Licence Agreement and Proposed Site Redevelopment'*, 24 July 2018 (Resolution No.: C240718/1233);
- Question on Notice, Report No.: 37/17; Item No.: 9.1.2, *'Buffalo Lease'*, 12 June 2018;
- Council Report No.: 59/15; Item No.: 14.3, *'The Buffalo – Proposed Alterations and Amendment to Licence'*, 10 March 2015 (Resolution No.: C100315/065);
- Confidential Council Report No.: 40/14; Item No.: 17.1, *'The Buffalo – Surrender of Licence and New Licence'*, 11 February 2014 (Resolution No.: C110214/1037);

## REPORT

### *Licence Agreement*

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

### *Termination of Licence*

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

On 11 December 2018 Council resolved to enter into a mutual Deed of Release and Termination with Licensee. This Deed was executed Tuesday 29 January 2019, subject to the agreed terms.

***Deed of Extension – Application for Extension of Time (9 April 2019)***

On 9 April 2019, following a request from the Licensee Council resolved to enter into a Deed of Extension (“Deed”) with the Licensee in order for them to complete the necessary demolition and remediation works.

Council endorsed this request on Tuesday 9 April (Resolution C090419/145) and the Deed was executed Monday 15 April 2019.

***Subsequent Deed of Extension – Application for Additional Extension of Time (13 May 2019)***

On Monday 13 May 2019, the Licensee again made contact with Administration seeking an additional eight (8) week extension in order to complete the works, stating that:

- Extensive asbestos had been identified and would require up to 3 to 4 weeks to remove and obtain clearance from Safework SA, prior to mechanical demolition.
- DeYoungs will be undertaking a final salvage strip out; and
- A third party contractor has been engaged to do the final mechanical demolition.

***Works Undertaken***

Since the execution of the Deed, the Licensee has (at his cost) hoarded the work site area, removed the three (3) masts, rigging and the bowsprit, and also stripped out the internals area of the vessel.

The Licensee’s contractors were on site 10 May 2019 undertaking a further strip out of the vessel. Upon the request of the Licensee, the CEO has granted temporary access to the site on Monday 13 May 2019 and Tuesday 14 May 2019, so that works can continue on site, until Council resolves either way.

An Asbestos analysis was conducted on site on 10 May 2019. The subsequent identification report was provided to Administration on Monday 13 May 2019 and identifies Asbestos in the kitchen ceiling lining and the upper level as well as organic fibre and SMF.

Pursuant to the terms of the Deed of Release and Termination (dated 29 January 2019), prior to 14 April 2019, the Licensee is still required to:

- Remove the HMS Buffalo, its support pillars and other fixtures, fittings and chattels installed in or brought on to or kept in the Premises by the Licensee, and repair and damage caused by such removal;

- Leave the [Council owned] external paving area and surround in a clean, tidy and safe condition and weed free.

#### ***Asbestos Identification Report***

Provided by Greencap to the Licensee on 10 May 2019. Attached for Council's reference.

*Refer Attachment 1*

#### ***Estimated Demolition Costs***

Administration requested that Buttrose Earthmovers visually assess the Vessel and provide a quotation for demolition and removal. The estimated quote totals \$203,500 (excl GST), but may be subject to variables once a pre-demolition inspection is undertaken.

*Refer Attachment 2*

#### ***Legal Advice***

Administration has obtained subsequent legal advice regarding Council's options moving forward. The advice is attached for Council's reference.

*Refer Attachment 3*

#### **BUDGET**

Council has an annual budget allocation provided to City Assets & Services for the review and implementation of property leases, including legal advice and other services when and where necessary. These funds are sufficient to cover the administrative and legal costs associated with progressing the Buffalo Deed:

However should Council resolve terminate the Deed and consider stepping in to demolish and remove the Buffalo, then Council will need to separately approve the expenditure not to support an extension, the costs of demolition, transport a remediating of the land estimated at around \$203,500 (excl GST) will initially be incurred by Council. Administration would then seek legally to recover these costs from the Licensee. Council would therefore need to authorise this further expenditure in advance so that works could proceed.

#### **LIFE CYCLE COSTS**

Once the location has been remediated and returned to usable community land, Council will be responsible for the ongoing maintenance the location.

# Attachment 1





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## Asbestos Identification Report: 32181

**CLIENT:** DeYoungs  
**ATTENTION:** John Lawton  
**ORDER NO:** J10088  
**LOCALITY:** Buffalo Restaurant

**CLIENT CONTACT:** (08) 8186 3093  
**RECEIVED IN LAB:** 10 May 2019  
**DATE ANALYSED:** 10 May 2019  
**SAMPLED BY:** John Lawton

All sample analysis was performed using polarised light microscopy, including dispersion staining, in our Adelaide Laboratory by the method of Australian Standard AS 4964-2004 and supplementary work instruction in-house method LAB04 Asbestos Identification by PLM.

Client ID		Sample Size	Description	Asbestos	Organic Fibre	SMF
1	Kitchen ceiling lining	20x20x6mm	Off-white cement sheet	Chrysotile & Amosite	Yes	
2	Upper level	20x20x4.5mm	Off-white cement sheet	Chrysotile	Yes	
3	Roof, waterproofing	20x20x1mm	Pale grey flexible membrane, painted dark grey	No		Yes
		20x20x1mm	Orange compressed paper layer	No	Yes	

- \* Chrysotile is commonly known as white asbestos
- \* Amosite is commonly known as brown asbestos
- \* SMF (Synthetic Mineral Fibre) is commonly known as glass fibre

Approved Identifier and Signatory

Michael Till

Please note that the results contained in this report relate only to the sample(s) submitted for testing. Sample Size and Descriptions are approximate only. Chrysotile is commonly known as white asbestos, Amosite is commonly known as brown asbestos and Crocidolite as blue asbestos. SMF (Synthetic Mineral Fibre) is commonly known as glass fibre. Organic Fibre includes natural fibres and synthetic organic fibre. A blank in the Organic Fibre or SMF column implies not detected.

32181, JL10088, Buffalo Restaurant, ID, 2019-05-10

Report Date: 10 May 2019

Page 1 of 1

Any and all services carried out by Greencap for the Client are subject to the Terms and Conditions listed on the Greencap website

<https://www.greencap.com.au/terms-conditions> and are governed by our statements of limitation available at <https://www.greencap.com.au/statements-limitation>.

# Attachment 2

**CITY OF HOLDFAST BAY - BUFFALO BOAT DEMOLITION**

Scope of Works: Demolition Works

Item	Quantity	Unit	Rate	Total
<b>Preliminaries</b>				
Mobilisation	1	Item	\$ 2,600.00	\$ 2,600.00
Site Establishment	1	Item	\$ 1,000.00	\$ 1,000.00
Site Amenities	4	Weeks	\$ 500.00	\$ 2,000.00
Implementation of QA, WHS, Environmental	4	Weeks	\$ 1,000.00	\$ 4,000.00
Project Management	4	Weeks	\$ 500.00	\$ 2,000.00
Supply & Installation of Floating Silt Fence	1	Item	\$ 5,000.00	\$ 5,000.00
Demobilisation	1	Item	\$ 2,600.00	\$ 2,600.00
<b>Subtotal</b>				<b>\$ 19,200.00</b>
<b>Demolition Works</b>				
Excavator	200	hr	\$ 180.00	\$ 36,000.00
Labour (2 men on the ground at all times)	400	hr	\$ 75.00	\$ 30,000.00
Purchasing of Minor Hand Tools	1	Item	\$ 4,000.00	\$ 4,000.00
<b>Subtotal</b>				<b>\$ 70,000.00</b>
<b>Transport &amp; Dumping Fees</b>				
Transport of C&D Waste	1	Item	\$ 36,800.00	\$ 36,800.00
Dumping of C&D Waste (tonnage is estimated)	500	T	\$ 155.00	\$ 77,500.00
<b>Subtotal</b>				<b>\$ 114,300.00</b>
<b>TOTAL</b>			<b>** \$ 203,500.00</b>	<b>ex GST</b>

\*\* Tender valid for 90 days from 8/05/19

\*\* Exclusions & Inclusions as per email sent on 8/05/19

# Attachment 3

Our Ref: JC1:LS2:M181613

9 May 2019

City of Holdfast Bay  
PO Box 19  
BRIGHTON SA 5048**Attention: Scott Reardon****By email only: sreardon@holdfast.sa.gov.au**

Dear Scott

**HMS BUFFALO**

We refer to our recent letters and communications in relation to the HMS Buffalo.

The background details are as follows:

1. the Council and De Young entered into a Deed of Release and Termination dated 29 January 2019 (**Termination Deed**) whereby De Young Jamestown Pty Ltd (**De Young**) is required to remove the vessel, its support pillars, fixtures and fittings and undertake the other works set out in clause 1 (**Works**) of the Termination Deed.
2. At De Young's request, on or around 12 April 2019, the Termination Deed was varied by extending the date for completion of the Works to 12 May 2019 (**Variation**).
3. De Young has not yet completed the Works and it is not logistically possible to do so by 12 May 2019.
4. De Young will be in breach of his obligations pursuant to the Termination Deed and Variation if the Works are not completed by 12 May 2019.
5. Despite Council's efforts to contact De Young, Council has not received any communications from De Young that clarifies his intentions, or the cause of any unforeseen delay.
6. Council wishes to have the Works completed as a priority.

If De Young does not complete the Works on or before 12 May 2019, then the Council may resolve to undertake the Works itself, and seek to recover its costs directly from De Young. On this basis, as De Young would not have complied with the Termination Deed,

Adelaide  
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Adelaide SA 5000Port Lincoln  
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P 08 8414 3400

P 08 8682 3133

P 08 8842 1833

P 1300 414 414

F 08 8414 3444

F 08 8682 6030

F 08 8842 1811

F 08 8414 3444

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De Young is not released from any liability to the Council pursuant to the Licence (see clause 3).

Therefore, the next steps would be as follows:

- a letter should be issued to De Young which notifies him of his breach of the Termination Deed and Variation, and that Council will undertake the Works but reserving its rights to claim its losses against De Young. It is recommended that De Young be given a further 7 days to remedy his breach before Council exercises its rights, but in the circumstances, it may not be necessary to do so.
- Council must procure a valuation of the Buffalo (and any other belongings of De Young), and also the transportation and storage costs.
- If the value of the Buffalo (and any other items) and their transportation and storage costs is likely to exceed the removal costs, then Council needs to store the Buffalo (and any other items) in a safe place for 60 days. After that time, the Buffalo (and any other items) must be sold by public auction.
- If however the costs of removing the Buffalo (and any other items abandoned by De Young, and their transportation and storage costs) is likely to exceed their market value then the Council can immediately dispose of them.
- De Young must be given 21 days' notice before Council can initiate legal proceedings in the Court to recover its costs and losses. We can provide further advice on risks and the Court process once the amount of Council's losses are known. This is partly because, the amount of the loss will dictate whether legal proceedings would be in the Magistrates or Supreme Court. Whilst the initiation of legal proceedings should be carefully considered, on our knowledge of the matter we would anticipate a favourable outcome at any trial, but only if De Young is financially viable to pay any amount ordered by the Court.

For any queries please contact me.

Yours faithfully  
MELLOR OLSSON



JANINE CARROLL  
Senior Associate  
Email: jcarroll@mollawyers.com.au  
Phone: (08) 8414 3411 (Adelaide)