



ORDINARY MEETING OF COUNCIL 6 MAY 2020

14.5 MARLBOROUGH STREET HEADS OF AGREEMENT - HOUSING FIRST REQUEST FOR VARIATION

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER, CUSTOMER AND CORPORATE SERVICES

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1. PURPOSE

- 1.1 To recommend a response to a request, by HousingFirst as trustee of the Port Phillip Housing Trust ("HousingFirst"), to vary the Heads of Agreement dated 20 April 2018 for the sale and redevelopment of land at 46-58 Marlborough Street, Balaclava, ("the Heads of Agreement").

2. EXECUTIVE SUMMARY

- 2.1 The Marlborough Street venture with HousingFirst to redevelop a Council carpark at 46-58 Marlborough Street, Balaclava, is envisaged to deliver forty-six community housing dwellings, if the project receives State government construction funding.
- 2.2 HousingFirst has made considerable efforts and incurred significant costs to fulfil its obligations under the Heads of Agreement – including preparing and lodging a development application, and applying and continuing to advocate for construction funding.
- 2.3 Very substantial progress has been made, and the parties remain hopeful that the State will fund the project.
- 2.4 Accordingly, HousingFirst seeks to vary the deal contemplated by the Heads of Agreement, to extend the deadline for obtaining:
 - a development permit from 1 April 2020 to 18 December 2020; and
 - construction funding from 20 October 2020 to April 2022.
- 2.5 It also seeks a right to withdraw from the deal should a Preliminary Environmental Assessment Report recommend a Certificate or Statement of Environmental Audit and the result is onerous soil contamination remediation works with a value exceeding \$600,000.
- 2.6 Further, it seeks to Substantially Commence construction not within twelve months of securing a Planning Permit, but within twelve months of securing a Planning Permit or Construction Funding, whichever occurs last. (The Heads of Agreement assumes that the Construction Funding is secured prior to the Planning Permit).
- 2.7 Officers recommend that: the proposed variations be partially accepted; and that additional contamination investigation be carried out now, to provide stakeholders a higher level of contamination cost certainty.



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3. RECOMMENDATION

That Council:

- 3.1 Vary the Heads of Agreement for the sale and redevelopment of land at 46-58 Marlborough Street, Balaclava, dated 20 April 2018 ("the Heads of Agreement"), to extend the target construction funding date to 1 March 2021.
- 3.2 Vary the Heads of Agreement to extend the planning permit target date to 18 December 2020.
- 3.3 Vary the Heads of Agreement for Substantial Commencement to be within 12 months from the issue of the development permit and HousingFirst's procuring of construction funding, whichever is the latter.
- 3.4 Authorise relevant Council Officers to negotiate and execute the Heads of Agreement as necessary to achieve these variations and to execute the document(s), affixing the Common Seal if necessary.
- 3.5 Undertake a Detailed Site Investigation of contamination at 46-58 Marlborough Street, Balaclava.

4. KEY POINTS/ISSUES

Background

- 4.1 The Marlborough Street project is a venture with Registered Housing Association HousingFirst to redevelop a Council carpark at 46-58 Marlborough Street, Balaclava.
- 4.2 It is envisaged to deliver forty-six community housing dwellings, provided it receives State government financial support.

Heads of Agreement

- 4.3 The venture was established in 2018, when City of Port Phillip entered into a Heads of Agreement with HousingFirst for the sale and redevelopment of land, (Attachment 1).
- 4.4 Under the Heads of Agreement, the transfer of land is conditional upon HousingFirst receiving the planning permit and construction funding approval, carrying out construction and having it subdivided.

Progress made

- 4.5 Since the Heads of Agreement was entered into:
 - the preliminary concept has been developed into a planning permit application;
 - the State government announced the Victorian Social Housing Growth Fund (on the Marlborough Street site);
 - Housing First has applied for that funding;
 - Council resolved to provide additional support of up to \$15,000 per dwelling delivered in City of Port Phillip, to applicants of this Victorian Social Housing Growth Fund funding round;
 - Council resolved to approve the planning permit application.



- However, despite this progress, and the commitment of the parties, the construction funding contribution from the State government has not yet been secured.

Proposed variation

- 4.6 At the Project Control Group meeting between HousingFirst and Council officers held on the 26 February 2020, HousingFirst requested amendments to the Heads of Agreement, and subsequently clarified and detailed these in writing on 18 March 2020.
- 4.7 The effect of these amendments is to: provide about eight additional months for HousingFirst to obtain a planning permit; provide about 18 additional months to obtain construction funding; require that construction commence twelve months from *either* the planning permit or the construction funding (whichever is the latter); and allow HousingFirst to exit the deal should an Environmental Audit be required and the estimated contamination remediation works are likely to exceed \$600,000.

General considerations

- 4.8 Council needs to express caution around making unilateral contractual concessions and leniency. Disciplined enforcement of agreements builds community and market trust, and reduces the propensity of counterparties to lobby for further concessions.
- 4.9 The opportunity cost for the project needs to be considered – what other market opportunities is the Council passing on by remaining bound to the current agreement.

Specific considerations – State funding

- 4.10 Construction is to be funded by HousingFirst using its capital and debt, and through the State's Victorian Social Housing Growth Fund.
- 4.11 It is reasonable to suggest that HousingFirst will be able to deliver the project by the 2025 *In Our Backyard* initiative timeframe. However, this is only if they receive funding in this round, or very shortly thereafter.
- 4.12 The State Government has made no announcement of winning bids. It is therefore unclear whether HousingFirst has won its funding bid for Marlborough Street.
- 4.13 The next State Government funding round decision date is unknown. This is a fundamental uncertainty for the project. The implications of the coronavirus (COVID-19) pandemic on the State's priorities and funding capabilities are yet to be seen.
- 4.14 The new timeframe proposed by HousingFirst to extend the construction funding approval date is an additional eighteen months. Such a long extension is not warranted. The recommendation is for a shorter timeframe.

Specific considerations – development application

- 4.15 In December 2019 Council resolved to issue a permit for the development. A submission was subsequently made to the Victorian Civil and Administrative Tribunal ("VCAT") to appeal the determination. The VCAT hearing is not likely until mid August 2020. There is some risk that the hearing may be postponed due to the pandemic of novel coronavirus (COVID-19).
- 4.16 HousingFirst has not met the deadline for obtaining the planning permit.
- 4.17 That said, HousingFirst has made steps to perform. It has contributed project management, staff time, and money to the front-end development process. The lack of



a development permit to date is somewhat understandable, and partly the result of its efforts to engage with objectors and address their concerns.

Specific consideration – contamination

- 4.18 A soil contamination due diligence report was completed by Council Officers in 2011.
- 4.19 The report although informative does not conform to current legislation, and did not consider the specific current development scenario.
- 4.20 HousingFirst seeks to include a provision for it to terminate if a Preliminary Environmental Assessment and subsequent Certificate or Statement of Environmental Audit results in onerous remediation works and or exceeding the value of \$600,000.
- 4.21 One of the intended benefits of the project is that it will deal with contamination of the site. It is in Council's interests to clarify/confirm the contamination profile of the site – to reduce ambiguity and provide a higher degree of certainty that HousingFirst's budgeted contamination costs are appropriate.
- 4.22 A Detailed Site Investigation will clarify the remedial work required to accommodate the proposed use. It will build on previous data, and is anticipated to cost approximately \$35,000, though would increase if further clarifying studies are necessary.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 This Report arises from the Project Control Group meeting held on the 26 February 2020 with HousingFirst and Council officers. On the 18 March 2020 HousingFirst made a formal request in writing and provided amendments to the draft Contract of Sale, Access Licence and Section 173 Agreement for review.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 Under the venture, HousingFirst has the role and responsibilities of developer. This intentionally limits City of Port Phillip's exposure to significant risks for which it has neither the organisational capacity nor appetite to take on. The separation of roles is reinforced by the associated governance arrangement.
- 6.2 Under the Heads of Agreement, City of Port Phillip can concurrently rescind.
- 6.3 Disciplined enforcement of contract terms risks opening Council to requests for further contractual concessions – from this party or others. Accepting unilateral concessions to contracts is also a reputational risk. However, this needs to be balanced against flexibility and pragmatism.

7. FINANCIAL IMPACT

- 7.1 The costs of development are intended as entirely for HousingFirst. The project objectives are explicit: "Council commits only the site [and internal project management] – not soil remediation, replacement car-parking, or any other only development costs". The recommended contamination investigation is therefore not currently budgeted by City of Port Phillip.
- 7.2 If HousingFirst does not secure substantial funding from the State (under the Social Housing Growth Fund) by the milestone date, the development contemplated by the Heads of Agreement will not proceed. Efforts and funds contributed to date towards the project will have been wasted.



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8. ENVIRONMENTAL IMPACT

- 8.1 A recommendation of this report relates to contamination risk, and the clarifying of that risk.

9. COMMUNITY IMPACT

- 9.1 Affordable housing – including community housing – is important to the health and well being of Port Phillip’s residents. It contributes to a diverse, inclusive and equitable community.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 Council’s affordable housing strategy is articulated in *In Our Backyard: Growing Affordable Housing in Port Phillip 2015-2025*. It prescribes the use of Council real estate for affordable housing.
- 10.2 Under *Council Plan 2017-2027* it is a near term priority to progress the site’s *development*, and thereby facilitate the delivery of new community housing by local housing associations.
- 10.3 This report supports the continued commitment to affordable housing in the City of Port Phillip and best aligns with direct 6:” Our commitment to you”.

11. IMPLEMENTATION STRATEGY

11.1 TIMELINE

- 11.1.1 Should Council accept the recommendation Officers will proceed to amend the Heads of Agreement.

- 11.1.2 Officers will simultaneously engage an appropriate specialist to carry out the relevant environmental testing. It is anticipated that the results of such testing will be available in two to three months.

11.2 COMMUNICATION

- 11.2.1 Council is committed to ensuring our City is a welcoming and safe place for all.

- 11.2.2 The delivery of community housing is a priority of the Council Plan.

12. OFFICER DIRECT OR INDIRECT INTEREST

- 12.1 No officers involved in the preparation of this report have any direct or indirect interest in the matter.

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ATTACHMENTS 1. Heads of Agreement