

**STRATEGY AND POLICY REVIEW COMMITTEE**

**1 JUNE 2009**

**GOVERNANCE AND COMPLIANCE**

<b>A13</b>	<b>PROPOSED LEASE AGREEMENT TO WEST BEACH DEVELOPMENT CONSORTIUM PTY LTD - WEST BEACH PAVILION</b>
<b>LOCATION/ADDRESS:</b>	<b>330A BEACONSFIELD PARADE, ST KILDA WEST</b>
<b>RESPONSIBLE EXECUTIVE DIRECTOR:</b>	<b>SALLY CALDER, EXECUTIVE DIRECTOR ORGANISATION SYSTEMS AND SUPPORT</b>
<b>AUTHOR:</b>	<b>JEANENE SIMMONS, SENIOR PROPERTY ADVISOR</b>
<b>FILE NO.:</b>	<b>20/01/96</b>
<b>ATTACHMENTS:</b>	<b>ATTACHMENT 1 - NOTICE OF INTENTION TO LEASE. ATTACHMENT 2 - SUBMISSIONS.</b>

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**1. EXECUTIVE SUMMARY**

- 1.1. To advise Council of the outcome of the advertising and submission process under Sections 190 and 223 of the Local Government Act 1989 for the proposed lease of West Beach Pavilion (330A Beaconsfield Parade St Kilda West) to West Beach Development Consortium Pty Ltd.

**2. RECOMMENDATION**

- 2.1. That the Strategy and Policy Review Committee having heard and considered submissions notes that a supplementary report will be prepared for the Ordinary Meeting of Council on 22 June 2009.

**3. DISCUSSION**

- 3.1 Council is the appointed Committee of Management under the provisions of the Crown Land (Reserves) Act 1978 for the West Beach Pavilion site at 330A Beaconsfield Parade, St Kilda West.
- 3.2 The West Beach Pavilion ("the Pavilion") was built in 1927/28 and was one of three similarly constructed sea baths at the time.
- 3.3 In 2002, Council determined that a public-private partnership was an appropriate mechanism to facilitate the restoration of the locally significant Pavilion.

- 3.4 Following an Expression of Interest and Invitation to Tender process in late 2003/2004, West Beach Development Consortium Pty Ltd was appointed as the successful proponent.
- 3.5 A Development Agreement for the subject site was executed by Council and West Beach Development Consortium Pty Ltd in 2005. The Development Agreement included a proposed lease and conditions with respect to insurance and construction works.
- 3.6 On 25 June 2008, Council provided its consent to West Beach Development Consortium Pty Ltd for the commencement of construction works at the site. Over the past 12 months, the works have progressed and the Pavilion is now scheduled for practical completion in August 2009.
- 3.7 Council officers met with the Department of Sustainability and Environment (“DSE”) on 25 March 2009 to provide an update on the West Beach Pavilion matter. DSE advised that following the outcome of the statutory advertising process and Council's decision on the matter, any proposed lease paperwork should be re-submitted for review / consideration.
- 3.8 Legal advice was also sought from Minter Ellison Lawyers in late March 2009 with respect to the statutory advertising process and the Development Agreement with West Beach Development Consortium Pty Ltd. This advice indicated that Council should proceed with the Notice of Intention to Lease and consider any submissions received on their merits.
- 3.9 At a Special Meeting of Council on 6 April 2009, Council resolved:
- 3.9.1 To commence the statutory procedures under Section 190 and 223 of the Act and publish a notice in The Age and local newspapers advising of Council's intention to grant a lease and inviting interested persons to make a submission under Section 223 of the Act for the proposed lease of West Beach Pavilion (330A Beaconsfield Parade, St Kilda West) to West Beach Development Consortium Pty Ltd on the following terms:
- Area: approximately 1000 square metres.
- Permitted use: Mixed – ie food and beverage use, retail use, public facilities etc.
- Term: 15 years.
- Options: 2 further terms of 3 years each.
- Rental: \$1.00 per annum if demanded. Turnover rent at a rate of 5% applies from the 5<sup>th</sup> anniversary commencement date. Gross sales from food and beverage and retail elements need to exceed \$2.3 million and \$1.4 million respectively; and
- 3.9.2 To appoint its Strategy and Policy Review Committee to hear and consider any submissions made under Section 223 of the Act at its meeting to be held on 1 June 2009.

- 3.10 Notices regarding the intention to lease to West Beach Development Consortium Pty Ltd and the proposed lease terms were subsequently published in The Age, The Port Phillip Leader and The Emerald Hill Weekly on the 18, 20 and 22 April 2009 respectively. (Refer to Attachment 1 – Notice of Intention to Lease).
- 3.11 A total of 10 submissions were received by the closing date of 20 May 2009. (Refer to Attachment 2 – Submissions). Key areas of concern include the proposed rent (including turnover thresholds) and the ultimate benefit to rate payers and the community from this development on prime foreshore Crown Land. In addition, three submitters requested that an independent review be undertaken with respect to the entire project and the proposed lease.
- 3.12 The following table provides a general summary of the issues raised by the submitters and responses to each item:

Table 1 - Issue Summary: Notice of Intention of Lease, West Beach Pavilion.

Item	Issues Raised by Submitters	Officer Response
Proposed Rent	<p>Figures appear to favour West Beach Development Consortium Pty Ltd.</p> <p>Rental appears too low for prime foreshore real estate.</p> <p>An average retail turnover of \$26,923 per week and \$44,230 per week for food and beverage would need to be exceeded before any rent in excess of \$1 was paid.</p> <p>There is no incentive for West Beach Consortium Pty Ltd to make a large profit.</p> <p>What happens to the rental if the retail elements are unsuccessful?</p>	<p>The proposed rental of \$1.00 per annum if demanded with a turnover component post Year 5 (if certain targets are exceeded) is on face value relatively low compared to other like properties along the St Kilda Foreshore.</p> <p>This rent structure was accepted and embedded in the Development Agreement in 2005 to balance the significant private investment required and the community benefits derived from the project.</p> <p>The Pavilion was in a dilapidated state and a multi million dollar level of investment is expected to deliver a quality asset, community space, public amenities with the full maintenance burden being assumed by West Beach Development Consortium Pty Ltd for the life of the proposed lease.</p> <p>If the turnover thresholds are not reached it is possible that under the terms of the proposed lease West Beach Development Consortium Pty Ltd will only pay \$1.00 per annum over the full lease term.</p>

Item	Issues Raised by Submitters	Officer Response
Proposed Lease	A draft version of the lease was not available for comment.	In most cases a draft lease has not been prepared at the Notice of Intention to Lease stage. In this instance the West Beach lease document was not circulated as it is only in draft format subject to further review and approval by DSE (if Council decides to proceed with the lease). Furthermore, the draft document contains commercial business information which is normally treated as confidential. The Notice of Intention to Lease provided an overview of the key elements.
Process	Advertising the lease now appears unusual – isn't the matter already finalised?	It would have been prudent for Council to decide about the lease before the Development Agreement was finalised.
Scope of the Development	<p>Approved construction plans have not been released. Is the finished work consistent with the approved plans?</p> <p>The original proposal was for a 200 seat tea room / kiosk etc. The concept has changed significantly into a large retail and function centre seating 390 patrons.</p>	The plans are consistent with the planning permit issued for the facility.
Commercial and Community Use	The terms of the lease should include a requirement for the whole facility including dining and deck areas to be made available to the public without any obligation to purchase goods or services.	The draft lease proposes that visitors will not be required to buy food or beverages in order to use the facility.
Business Equity	Do other traders in the area have similar commercial advantages?	The rentals for other developments along the St Kilda Foreshore are a mix of both market rental and ground rental. Ground rent (ie where the rent is calculated on the unimproved land value) is normally applied in instances where the Tenant has taken over a building shell and invests significant funds in building renovations / structural works.

Item	Issues Raised by Submitters	Officer Response
Council's Expenditure to Date on West Beach	<p>It is understood that Council has already expended or intends to expend the following amounts on the site:</p> <p>\$300,000 – preliminary drainage works</p> <p>\$50,000 – landscape plans</p> <p>\$250,000 – landscaping works adjacent to the Pavilion</p>	<p>Council is running a separate project to upgrade the landscape around the Pavilion area. The amounts to be expended fall outside the area under consideration for the lease.</p>
Reporting and Auditing	<p>How will the turnover figures be audited / verified?.</p>	<p>An audited statement of gross sales (by category) is to be provided by West Beach Development Consortium Pty Ltd each financial year under the terms of the proposed lease.</p>
Car Parking and Rubbish Collection	<p>Site activation will lead to parking problems for residents. Was a Traffic Impact Study undertaken?</p> <p>The areas and processes relating to the removal of rubbish should be reviewed.</p>	<p>These are matters that were considered in the planning application. A permit was issued for this proposal after a Council Notice of Decision to grant a permit and the subsequent VCAT determination (following an objector appeal).</p>
Lease Assignment and On-selling	<p>What conditions apply if West Beach Development Consortium Pty Ltd decides to on-sell part or all of its activities?</p>	<p>The DSE standard lease contains assignment and sub-letting provisions (ie the lease cannot be assigned to another party or the premises cannot be sub-let without the prior written permission of Council and the Minister).</p>

- 3.13 In light of the submissions received, Council may elect to:
- 3.13.1 Proceed with the proposed lease to West Beach Development Consortium Pty Ltd on the stated terms;
  - 3.13.2 Abandon the proposed lease to West Beach Development Consortium Pty Ltd; or
  - 3.13.3 Seek to re-negotiate the proposed lease terms with West Beach Development Consortium Pty Ltd to address the issues raised particularly with respect to rental.
- 3.14 All options listed above have risk and legal implications for Council. Proceeding with the proposed lease on the stated terms may result in dissatisfied parties issuing legal proceedings against Council. It is likely that abandoning the proposed lease will result in legal action from West Beach Development Consortium Pty Ltd who have invested considerable funds in

re-developing the site on the basis of the 2005 Development Agreement. Attempts to re-negotiate any lease terms such as the rent may not be supported by West Beach Development Consortium Pty Ltd who have proceeded in good faith on the basis of its dealings with the previous Council.

- 3.15 To ensure that Council can make a fully informed decision on this matter, further analysis and evaluation will be undertaken regarding the risk profile associated with each option listed in 3.13. This advice will be presented in the form of a supplementary report and recommendation to the Ordinary Meeting of Council on 22 June 2009.