



14.2 **PROPOSAL FOR MANAGING FUTURE LEASE PROCESS -
129A BEACONSFIELD PARADE ALBERT PARK**

GENERAL MANAGER: **CHRIS CARROLL, CUSTOMER AND CORPORATE SERVICES**

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1. PURPOSE

- 1.1 To seek Council approval to enter into a short term lease with 129A Beaconsfield Parade, Albert Park, currently known as “Nshry” whilst planning for the site is undertaken to identify the preferred use of the site for the future.

2. EXECUTIVE SUMMARY

- 2.1 The land at 129A Beaconsfield Parade is Crown Land for which the City of Port Phillip is the Committee of Management. Please refer to Attachment 1 for a view of the site.
- 2.2 The Lessee “Mosh Foods P/L” is the current operator of a kiosk/café business known as “Nshry”. The current lease commenced in 1997 and expires on 6 November 2018.
- 2.3 This report responds to a Lessee proposal for a new long term lease.
- 2.4 The proposal includes replacement of the current building structure with a new and larger building inclusive of publicly accessible toilets, supported by a 21 year lease with an increased rent based on ground rental (*note; larger footprint would include the area currently used for outdoor seating*).
- 2.5 The existing building was constructed in 1997. In 2011, the Lessee undertook a refurbishment. The Lessee indicated at the time that he would like to undertake further redevelopment of the s site.
- 2.6 Under the lease the permitted use is a *Kiosk facility for the supply of refreshments to the public: including food of all kinds, confectionery, ice-cream, beverages of all kinds and such other products and services as may be mutually agreed to by the parties from time to time.*
- 2.7 The actual use is a café/restaurant.
- 2.8 The existing building has condition and functionality problems not limited to:
- The steel structural frame is rusting heavily
 - Water leaks
 - No toilets
 - DDA non-compliance
- 2.9 Over time there has been an incremental change of the use and an increase in the building footprint. The building also has degradation and compliance issues. It is also



unclear whether there is a future need for a permanent food and beverage offering to be located at this site or whether there is enough provision along the foreshore without it, removing the need to replace the existing structure.

- 2.10 It is recommended that a Community Engagement process is undertaken prior to a decision being made regarding the future lease of the property. This will assist in identifying the preferred option for the future of the site within the broader context of the foreshore.

3. RECOMMENDATION

That Council:

- 3.1 Authorises a community engagement process to be undertaken for 129A Beaconsfield Parade to determine the preferred outcomes for future use of the site.
- 3.2 Authorises Officers to proceed to a short term Lease with the incumbent Lessee on the same terms and conditions as the current Lease whilst a community engagement process occurs.
- 3.3 Resolves that any future commercial arrangements for the site will be procured through a competitive and transparent process to ensure best value is achieved for the community in alignment with best practice of Crown Land leasing principles.

4. KEY POINTS/ISSUES

Summary of Existing Lease Conditions & History

- 4.1 The café at 129A Beaconsfield Parade, Albert Park known as “Nshry”, is operated by “Mosh Foods P/L” subject to a 21 year lease. The lease commenced 6 November 1997 with an initial term of 14 years and a further term of 7 years. The lease is due to expire on 5 November 2018.
- 4.2 The property is on the foreshore side of the intersection of Beaconsfield Parade and Kerferd Road, near the Albert Park Yachting and Angling Club.
- 4.3 The lease is for premises on Crown land for which Council is landlord as the Committee of Management.
- 4.4 The existing building was constructed in 1997 by the original Lessee. The cost of investment by the Lessee is reflected in the low rent. The lease provides for a commencement rent of \$10,000 per annum increasing annually by CPI with an increase to \$17,000 per annum in November 2004 and annual CPI increases thereafter.
- 4.5 The current rent is \$25,890.98 per annum plus GST which is considered below the market and is a legacy from a long lease that has not had opportunity to be reviewed to market.
- 4.6 Under the present lease the permitted use is Kiosk facility for the supply of refreshments to the public: including food of all kinds, confectionery, ice-cream, beverages of all kinds



and such other products and services as may be mutually agreed to by the parties from time to time.

- 4.7 Actual use of the premises is more aligned to a café/restaurant rather than a kiosk. The Premises as identified within the lease is also not consistent with the actual area occupied as the Lessee occupies a larger footprint to accommodate outdoor seating.
- 4.8 These issues will need to be clarified and addressed as part of any future short or long term lease. Work is also underway to identify any other properties where there may be boundary issues or where the use has exceeded the agreed use.
- 4.9 Under the lease, Council is responsible for the maintenance of the exterior of the building and the Lessee is responsible for all other maintenance obligations. However, when the Lessee exercised the option for the further term, the lease was subject to the Retail Leases Act 2003 (RLA2003), which places a higher responsibility upon the Lessor.
- 4.10 The RLA2003 requires that the Landlord maintain and repair the building structure, plant and equipment, services and fixtures in a condition that is consistent with the condition of the premises at the time the lease for the retail premises was entered into.
- 4.11 The lease has been assigned several times across the term with “Mosh Foods Pty Ltd” taking over the premises in May 2010. Since 2010, Mosh Foods Pty Ltd has proposed to extend the existing building and leased area and now seeks to replace the building.
- 4.12 Mosh Foods P/L undertook permitted internal and external renovations in 2011. One of the desired outcomes was to increase the kitchen servery space and reduce the internal seating space.
- 4.13 At the time, the Lessee considered the renovations to be “stage one” of expansion plans even though they were advised future plans would require further approvals which could not be assumed or guaranteed.

Building Condition (present built form)

- 4.14 The property was a kiosk prior to 1997 (see images in Attachment 2). The current lease was based on the footprint of the building constructed in 1997 and it required the Lessee to fit out the shell.
- 4.15 G.C Nixon & Assoc carried out an independent structural assessment of the building in May 2018 on behalf of CoPP and found that the building appears to be generally in a good condition, however the following areas require attention:
 - 4.15.1 The structural steelwork has numerous areas containing significant surface corrosion.
 - 4.15.2 The exposed ends of the timber purlins contain significant decay, and sections are completely missing. These appear to be decorative only, and do not provide any structural support.
 - 4.15.3 The steel brackets supporting the roof gutters contain significant corrosion.



- 4.15.4 The roof sheeting appears to be in good condition.
- 4.15.5 There are signs of corrosion in the roof gutters.
- 4.15.6 There are some minor shrinkage cracks in the floor slab, and a repaired section.
- 4.15.7 The masonry wall to the external service yard has a diagonal crack. This crack appears to be due to the corrosion of the lintel expanding and lifting the masonry above.
- 4.15.8 The top of the storm water drainage pit on the west side, is damaged and the steel grating cover is no longer properly supported.
- 4.15.9 The external timber decking along the west side appears to be laid directly on the ground and contains numerous areas of decay.
- 4.16 Responding to prior reports, Council has undertaken maintenance including the painting (anti-rust) of the steel frame, rectifying leaks and repairing the sliding doors where required.
- 4.17 There is Workplace Health and Safety, Disability Discrimination and Building Act non compliance issues, some related to the building not being fit for purpose for the current use as a café and not as a kiosk.
- 4.18 A structural engineer's report was commissioned by the Lessee in 2017 and it was included in the Lessee's proposal.
- 4.19 The 2017 report noted that the structural steel frame is corroding and will need to be replaced but there is no imminent risk for the structural integrity of the building.

Lessee Proposal

- 4.20 The Lessee has approached council a number of times since 2011 with different proposals for redevelopment of the site and to secure a new long term lease, with improved business viability being one of the key drivers.
- 4.21 The Lessee advises that the business is not presently viable as it is weather dependent and the current built form does not provide sufficient covered space to attract customers when the weather is inclement. The history of lease transfers supports this contention.
- 4.22 In July 2017 the Lessee submitted an updated proposal for a direct negotiation, offering to demolish the existing building and replace it with a new expanded facility over two levels.
- 4.23 A ground rent is proposed by the Lessee. The Lessee has offered to demolish the existing building and construct a new building at its own cost. In return the Lessee seeks a new lease with conditions including:
 - 4.23.1 Lease Term – 21years



- 4.23.2 Permitted Use – Licenced bar/café/restaurant
- 4.23.3 Lessee to be responsible for the cost of constructing a new building.
- 4.23.4 Lessee to construct publicly accessible toilets

Direct negotiation or market process to secure a new lease

- 4.24 The Lessee has submitted an unsolicited proposal for a new lease and redevelopment of the site. The proposal requires a direct negotiation with the existing Lessee for a new long term lease that will require the Lessee to redevelop the site.
- 4.25 When considering whether or not to undertake a direct negotiation with the existing Lessee, the primary consideration is whether or not this would result in a better outcome than if Council were to go to market at the end of the current lease.
- 4.26 The State Government’s Leasing Policy Crown Land in Victoria 2010 states that:

“The final decision to allocate a lease through a direct negotiation process instead of a competitive allocation process rests with the Minister at the time of the Approval in Principle to lease. The Minister may require as a condition of the Approval in Principle that the Crown land manager or the proponent undertake a public notification process of the intention to negotiate directly.”
- 4.27 There are historical circumstances where direct negotiations have been deemed appropriate. These include the Stokehouse, Donovans and the Vineyard. In each of these cases, it was considered that there was justification for a direct negotiation. In the case of the Stokehouse and Donovans, new leases were required to support rebuilding of the restaurants post fire events.
- 4.28 For the subject site - 129a Beaconsfield Parade - there is no apparent unique circumstance or other compelling reason for undertaking a direct negotiation with the existing Lessee.
- 4.29 If a new lease is deemed appropriate, then an opportunity exists to test the market at end of lease through an Expression of Interest process to select the best value offer that aligns with Council’s vision for the site.

Identifying future need and options for service provision

- 4.30 An assessment of the key terms proposed by the Lessee is provided in Attachment 2. The terms summarised in 4.23 would require further negotiation and the presentation of the proposed terms in this paper are for noting only.
- 4.31 Prior to considering lease terms however, it is proposed that Council first consider:

Preferred Use: Whether the current food and beverage offer is required in the future or whether there is a different use for the site that will provide more value to the community over time.



Infrastructure requirements: What the options are for provision of this service if it is required – permanent infrastructure (existing or new), pop-up seasonal provision etc.

Preferred Use

- 4.32 The current use of the building has changed from a kiosk to a fully licensed café over time.
- 4.33 Prior to deciding to upgrade or replace the existing infrastructure and enter into a new lease, more information is required to understand the need for the current use.
- 4.34 Information that could assist decision making might include:
 - 4.34.1 Assessment of the proximity of other food and beverage offers along the foreshore.
 - 4.34.2 Resident and visitor feedback on satisfaction with current provision of food and beverage offers along that section of the foreshore and perceived impact of removal or modification of the existing offer.
 - 4.34.3 Alternate uses such as return to open space, seating, exercise station, etc.
 - 4.34.4 Assessment of other tourism, economic development and foreshore management considerations.
- 4.35 A change of the current permitted use may allow for the provision of a full line restaurant which could then trade beyond the current Tuesday to Sunday 8am – 4pm.
- 4.36 Alternatively, the use could be reduced to a much smaller offer than is there now (permanent or seasonal), with other uses incorporated such as a public toilet, seating etc.

Infrastructure requirements

- 4.37 Undertaking a review of preferred use and then options for providing whatever service is identified, may lead to a rationalisation of the infrastructure that is there and reduce the need for new infrastructure with associated planning and community engagement processes and long term asset management requirements.
- 4.38 If a food and beverage provision is suitable for the location in the long term, the options for how this is delivered can be tested with the community. Options might include a larger or smaller building; a new building over 2 levels, a space for one or two permanent or rotating food trucks etc.
- 4.39 The opportunities with delivering the use in a different manner, could result in savings to Council as expensive infrastructure may not be required. Income could still be derived if a mobile food solution is preferred with premium charges over the high tourist season.
- 4.40 The cost to maintain this type of building in this particular location is and will continue to be substantial. If the tenant is a retail tenant, the responsibility for maintaining the structural integrity of the building will be the landlords.



- 4.41 The decisions regarding the scale and use of any building at this location could be tested with the community.
- 4.42 The existing building is problematic both for the Lessee and Council as the physical condition is deteriorating and there are significant non-compliances. The materials used in the initial construction of the building are unsuitable for longevity in a coastal location.
- 4.43 Issues that would need to be resolved with the existing building include:
 - 4.43.1 The current building has certain limitations; space is limited indoors, so the external seating is provided which is subject to weather conditions.
 - 4.43.2 The public toilet is located on the external western side of the building. This is also the toilet used by Nshry patrons.
 - 4.43.3 The building is presenting with surface rusting and corrosion to its metal fixings consistent with its foreshore location.

Other considerations for a future re-development of the site as a café/restaurant

- 4.44 A total demolition of the building will trigger the requirement for a new planning permit in turn requiring a statutory advertising process for the design. This process may become time and cost prohibitive to an incumbent or a prospective party that submits through an EOI process.
- 4.45 It is unlikely that a proposal to build above the existing height would be allowed under the planning scheme. The current built form sits comfortably underneath the canopies of the palm trees in situ.
- 4.46 Coastal consent will be required from DELWP for any future proposal.
- 4.47 Grant and purpose approval will be required from DELWP for a new lease regardless of any development proposal.
- 4.48 There is an opportunity with a future re-development proposal to incorporate public amenity services and to retire the existing Exeloo.
- 4.49 Whilst potentially coming at the expense of better sight lines from Kerferd Road this addition would be acceptable.
- 4.50 As opportunity exists for Council to determine guidelines and scope for a proponent to adhere to inclusive of the scale and quality of construction, architectural features, materials and finishes aligning with the foreshore environment.
- 4.51 Building design proposals should be carefully considered to ensure the internal infrastructure (ie: kitchen facilities, waste management facility) are suitable to service a business model with increased patronage and turnover. A failure to adequately plan these steps may result in a requirement for a proposed Lessee to seek more land or produce a sub-optimal outcome.



- 4.52 As part of a re-development proposal the concept of visual permeability should be a major consideration to improve the sight lines from Kerferd Road to Port Phillip Bay.
- 4.53 It should be investigated if the proposal can incorporate a Kiosk like service for convenience to those foreshore users in the warmer months.
- 4.54 Any proposed development should broadly align with the current footprint with potential for minor increases to meet contemporary access requirements and for the inclusion of public conveniences.
- 4.55 Community preference for a larger building footprint can be tested through the Community Engagement process.
- 4.56 Over-development of the foreshore area will impact the character of the Foreshore and regard should be given to the CoPP Foreshore Management Plan 2012, namely “over commercialisation” of the Foreshore.

Options Assessment

- 4.57 There are three options available to Council. These are:
 - 4.57.1 **Option 1:** Undertake a Community Engagement process to identify the preferred use of the site and options for delivery of that use.
 - 4.57.2 **Option 2:** Undertake an Expression of Interest process for a new lease for the existing use.
 - 4.57.3 **Option 3:** Undertake a direct negotiation with the Lessee to secure a new lease.
- 4.58 The options are described in more detail below.
- 4.59 **Option 1 – Community engagement and site analysis (recommended)**
 - 4.59.1 Further work to determine the community’s preferred use for the site within the Port Phillip foreshore.
 - 4.59.2 To date high level analysis has been undertaken with internal stakeholders.
 - 4.59.3 Other uses could be considered for the site and public engagement is required to identify any service delivery or amenity gaps.
 - 4.59.4 A public engagement process provides transparency and will assist Council in making a decision that will suit a long term favourable outcome.
 - 4.59.5 Examples of public engagement may include “intercept survey in the neighbourhood” or “have your say”.
 - 4.59.6 A short term, lease could be offered to the incumbent Lessee whilst the planning is undertaken. There is a risk for Council to enter into medium term,



binding agreement due to non-compliances of building and ageing infrastructure.

- 4.59.7 If the incumbent Lessee is not interested in entering into any short term arrangement beyond the expiry of the present lease term, the space could be utilised as a seasonal “pop-up” space (retail or otherwise).
- 4.59.8 At the conclusion of this Community Engagement process, a report on the findings would be presented to Council with options for progressing the preferred direction.

4.60 4.60 Option 2 – Expression of Interest to secure new lease

- 4.60.1 An open, transparent and competitive process for a new lease gives the community confidence that Council seeks to obtain best value and it helps to avoid a perception of bias.
- 4.60.2 In consideration of the reported building condition and potential economic challenges associated with a seasonal dependant business, a competitive lease process inclusive of a redevelopment of the site may be warranted. By controlling this process Council can set parameters to guide a preferred outcome including the size and scale of redevelopment and the terms for the service provision including opening hours and licencing restrictions.
- 4.60.3 Utilising Crown land to generate income through leasing, offsets some of the costs of managing the Port Phillip foreshore.
- 4.60.4 A public engagement process is proposed for this option to guide the parameters within the EOI.
- 4.60.5 Examples of public engagement may include “intercept survey in the neighbourhood” or “have your say”.
- 4.60.6 Public will also be notified through the statutory process relevant to Local Government Act 1989 and the Planning and Environment Act 1987.
- 4.60.7 An expression of interest campaign is a publicly advertised process inviting submissions from any interested parties both in and outside the Municipality.
- 4.60.8 It should be noted Council will not be obliged to proceed to contract with any tendering parties if the proposals tendered are deemed to be inappropriate for the site and a suitable long term outcome.
- 4.60.9 With public land, a public tender process is in alignment with the best practice of Crown Land Leasing principles.

4.61 4.61 Option 3 – Direct Negotiation with the Lessee for a new lease

- 4.61.1 Negotiate with the incumbent Lessee to progress the proposal received and be consistent with the previous feedback provided by Councillors. It should be noted the proposal has changed significantly since that 2015 feedback.



- 4.61.2 The Lessee proposal is one view of a development for the site, however it lacks detail at this stage. An increase in visual bulk of the built form, including a proposed second level may be perceived as an over development and would require significant justification for consideration.
- 4.61.3 The proposed lease and re-development may be considered on face value as being appropriate to Council, however may not represent the best value for money as it is not tested in the open market.
- 4.61.4 No public engagement process has been proposed for this option.
- 4.61.5 The public would be notified of the proposed lease and redevelopment through undertaking of statutory process relevant to Local Government Act 1989, Planning Environment Act 1987.

4.62 Option One is recommended, as it ensures that due consideration is given to whether the existing use is the preferred use for the community for the future.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 Internal consultation has been undertaken to ensure is a mutual understanding of complexities of the site.
- 5.2 External Stakeholders
 - 5.2.1 To date there has been no public engagement around the community's preferred use of the space and there is an opportunity to understand community needs through engagement.
 - 5.2.2 There is opportunity to engage with neighbouring clubs (Albert Park Yachting & Angling Club) to understand if there is appetite to consolidate amenities.
 - 5.2.3 In a direct negotiation, public will be notified through undertaking statutory advertising of a planning permit and a S223 submission process to satisfy requirements of LGA 1989.
 - 5.2.4 The public would be notified through the planning permit process in accordance with Planning & Environment Act 1987
 - 5.2.5 The public would be notified through the permit process for any proposed changes to a liquor licence.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 Development risk – unforeseen circumstances may arise when undertaking a development project that may become cost prohibitive and reduce the feasibility of the project.
- 6.2 Reputational risk to Council – a lack of transparency with managing the long term future use of the site may lead to some public concern (especially to the residents that would be immediately affected by the visual bulk of a re-development proposal).



- 6.3 Financial risk – it is important that both Council and proposed lessee understand the financial impact across the life cycle of operation of any building (both in current built form or proposed re-development), ensuring that all financial obligations are documented for the avoidance of doubt.
- 6.4 Independent due diligence processes should be undertaken by the respective parties.
- 6.5 Legal risk –It is essential that as part of any proposal the appropriate provisions are put in place and set out in a detailed “Heads of Agreement” to be transitioned to any lease or deed.
- 6.6 Obsolescence risk – it is important that any proposal considered for the future of the site is seen to be progressive, keeping with character of the existing surrounds yet agile to ensure the service and functional amenity deliver long into the future in a sustainable manner.

7. FINANCIAL IMPACT

- 7.1 Council will require Officer resources to engage in the Community Engagement process. These costs are unquantified
- 7.2 An independent market valuation of the site is required to understand any opportunity costs. Cost of a market rental assessment is approximately \$1,500 + GST.
- 7.3 An expression of interest campaign would require capital outlay for external agency fees, marketing costs and time for officer resources to undertake any negotiations. These costs are anticipated to be circa \$15,000.
- 7.4 An independent condition audit is required on the building to determine the condition in the present built form (as an addition to the 2015 report already done). This is estimated at a cost of approximately \$1,000 + GST
- 7.5 Building consultancy fees (including, but not exclusive to) quantity surveyor, disabled access consultant and building surveyor will be payable.
- 7.6 An increase in the passing rental considering contemporary market conditions would be favourable to Council however should be weighed against future benefits gained from the site.
- 7.7 No capital outlay required by Council if a direct negotiation is proposed in accordance with the incumbent Lessee proposal.
- 7.8 As the market has not been tested, it is not known if any other proposals for utilising site will require capital outlay from Council. This would ultimately be at Council discretion pending a proposed outcome

8. ENVIRONMENTAL IMPACT

- 8.1 An increase in scale of operation at the site will may proportionally increase the volume of waste (both single use and recyclable). A suitable waste management process can be mutually agreed upon by both parties.



- 8.2 Should the preferred outcome for the site, include the existing or enhanced built form, then Council's environmental and sustainable design preferences will be a requirement.
- 8.3 An increase in patronage to the restaurant may increase the demand for car parking in the immediate area.

9. COMMUNITY IMPACT

- 9.1 A public engagement process can assist in achieving an improved outcome for the site that increases the offering of amenity (community or otherwise) being provided.
- 9.2 An increase in the building footprint or an increase in the building height will have an impact to the sight line from Kerferd Road however this cannot be quantified entirely at this time without detailed design schematics.
- 9.3 An increase in patronage may increase demand on parking in the immediate area.
- 9.4 An increase in trading hours and liquor licensing may introduce noise through late night patronage.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 Direction 4 – “we are growing and keeping our character”
- 10.2 Direction 6 – “our commitment to you” – sustainable financial and asset management.

11. IMPLEMENTATION STRATEGY

11.1 TIMELINE

- 11.1.1 Council consideration for the issues raised in this report will inform the process.
- 11.1.2 If Council decides to undertake planning associated with the future use of the site, then the Lessee will be advised of this position and if the Lessee is desirous, arrangements made for a short term agreement.
- 11.1.3 If Council decides to undertake an Expression of Interest, the Lessee will be advised of this decision and provided with an opportunity to remain on the site in an overholding position under the same terms and conditions as the current lease until the Expression of Interest process is nearly conclusion.
- 11.1.4 If Council decides to negotiate directly with the Lessee, then this will occur soon after and a report will be brought back to Council on negotiated terms and conditions of a new lease.

11.2 COMMUNICATION

- 11.2.1 Council is committed to balance commercialisation of the foreshore area and consider long term amenity requirements.



ORDINARY MEETING OF COUNCIL 4 JULY 2018

11.2.2 The management of public land should be on an equitable basis with regard to the Crown Leasing principles set by DELWP

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.

TRIM FILE NO: 20/15/87

ATTACHMENTS

1. Nshry Images
2. 129A Beaconsfield Parade