



14.2 PROPOSED TENANCY AGREEMENT WITH LADY FORSTER
KINDERGARTEN INCORPORATED AT 63B ORMOND
ESPLANADE, ELWOOD

EXECUTIVE MEMBER: CHRIS CARROLL, GENERAL MANAGER, CUSTOMER,
OPERATIONS AND INFRASTRUCTURE

PREPARED BY: LYANN SERRANO, PROPERTY ADVISOR

1. PURPOSE

- 1.1 To seek Council's approval to commence the statutory procedures under the *Local Government Act 1989 (Vic) (Act)* for the granting of a new tenancy agreement (**Proposed Tenancy Agreement**) with Lady Forster Kindergarten Incorporated (**Tenant**) at 63B Ormond Esplanade, Elwood (**Premises**).

2. EXECUTIVE SUMMARY

- 2.1 The Tenant has been operating out of the Premises for kindergarten and associated activities since 2012.
- 2.2 The Premises subject to the Proposed Tenancy Agreement, as contained in Attachment 1, are on Crown land.
- 2.3 On 18 September 2019, Council formalised its support for the continued use of the kindergarten premises leased by the Tenant and requested Council officers to develop and implement an advocacy strategy for an extension of the Tenant's existing tenancy agreement beyond 2022 on the basis that:
- 2.3.1 demand modelling indicates that there is a need for kindergarten services in the area;
- 2.3.2 at this time, there are no viable facilities that would adequately meet demand for kindergarten services in the area (particularly with the increase of three-year old kindergarten); and
- 2.3.3 the Tenant provides a high-quality kindergarten service to over 100 children and has embraced its beachside location in the development of its curriculum which is dependent on its coastal location.
- 2.4 Officers recommend that the community garden area that is currently on a separate licence issued to the Tenant is now added in to form part of the leased Premises, removing the requirement for separate documentation as the Tenant is the only user of the community garden area.
- 2.5 Officers recommend that the Proposed Tenancy Agreement starts on 1 July 2021 for a period of eight years and six months with an expiry date of 31 December 2029. The proposed term takes into account the state of the building, the Elwood Foreshore Redevelopment Plan and the abutting tenant (that would require an extended term of five years from 1 January 2025 to meet the requirements of the Retail Leases Act 2003 (**RLA**)). This proposed lease term is deemed appropriate for both the Tenant and ongoing Council requirements.
- 2.6 The Premises are on Crown land and grant and purpose approval was obtained from the Department of Environment, Land, Water and Planning (**DELWP**) on 23 April 2021.



- 2.7 The current market rental estimate for the Premises exceeds \$50,000 per annum and the proposed term is greater than one year, therefore the statutory process under the Act applies. This process requires public notification pursuant to sections 190 and 223 of the Act before making a final decision on the Proposed Tenancy Agreement.

3. RECOMMENDATION

That Council:

- 3.1 Resolves that the statutory procedures be commenced under section 190 of the *Local Government Act 1989 (Vic)* (**Act**) for the new tenancy agreement (**Proposed Tenancy Agreement**) summarised below by publishing a notice in The Age newspaper inviting interested persons to make a submission under section 223 of the Act:

Tenant	Lady Forster Kindergarten Incorporated
Premises	All that land shown outlined in yellow and red on the attached plan at 63B Ormond Esplanade, Elwood
Permitted Use	Area outlined in yellow – kindergarten and associated activities Area outlined in red – community garden and associated activities
Term	From 1 July 2021 to 31 December 2029
Rent	\$104 per annum plus GST

- 3.2 Notes that Council at its meeting on 18 September 2019 endorsed support for the Tenant's continued use of the kindergarten premises in line with the Elwood Foreshore Redevelopment Plan and requested that Officers develop and implement an advocacy strategy for an extension of the Tenant's existing tenancy agreement beyond 2022 on the basis that:
- 3.2.1 Demand modelling indicates that there is a need for kindergarten services in the area;
- 3.2.2 At this time, there are no viable facilities that would adequately meet demand for kindergarten services in the area (particularly with the increase of three-year old kindergarten); and
- 3.2.3 The Tenant provides a high-quality kindergarten service to over 100 children and has embraced its beachside location in the development of its curriculum which is dependent on its coastal location.
- 3.3 Notes that the community garden area that is currently on a separate licence issued to the Tenant is now added in to form part of the leased Premises;
- 3.4 Notes that the proposed rent of \$104 per annum plus GST helps support the continuous provision of a kindergarten facility and a community garden which aligns with Council Property Policy;
- 3.5 Notes that the Proposed Tenancy Agreement will be on terms and conditions similar to the current lease and generally in accordance with Council's Property Policy;
- 3.6 Authorises the Chief Executive Officer or delegate to undertake the administrative procedures necessary to enable Council to carry out its functions under section 223 of the Act; and
- 3.7 Resolves to hear and consider any submissions received pursuant to section 223 of the Act at a future Council meeting.



4. KEY POINTS/ISSUES

Background

- 4.1 The Tenant established in 1924 was situated at the former Elwood Beach Community Centre.
- 4.2 The Elwood Beach Community Centre was constructed in 1925 as the Elwood Bowling Club which was then used as a community centre for many years. It was extensively renovated to convert it to a restaurant and kindergarten facility. The overall condition and function of the facility is rated as 'Good'.
- 4.3 The Tenant relocated to the Premises from Port Melbourne in 2012 when Council developed Bubup Womindjeka.
- 4.4 The Premises are on Crown land designated for public recreation.
- 4.5 The relocation was initially intended as a temporary arrangement for a period of two years while Bubup Womindjeka was being developed.
- 4.6 In 2012, the Tenant requested to stay at the Premises and the Department of Environment and Primary Industries (now DELWP) consented to an interim lease (i.e. eight years with a further term of two years from 3 January 2014). The initial term will expire on 2 January 2022.
- 4.7 When the current lease was negotiated, the further two-year option was granted on the understanding that a plan to relocate the Tenant would be provided. All discussions with DELWP have indicated that this would be granted once the report detailing the transition plan has been provided i.e. new premises have been identified.
- 4.8 There are limited options for relocation in Elwood, and as such, Council resolved, at its meeting on 18 September 2019, to formalise its support for the continued use of the Premises by the Tenant.
- 4.9 The Proposed Tenancy Agreement is the implementation of Council's endorsement of the continued use of the Premises by the Tenant.
- 4.10 The Tenant has embraced its beach location and has developed a Coastal Curriculum that draws on the principles of 'bush kinder'. Recently it hosted delegates from South Korea who were guests of the Department of Education and Training to see their curriculum in action.
- 4.11 The Tenant has advised that it has 115 children enrolled at the centre across the programs that it offers (three-year and four-year-old sessional kindergarten program, extended hours four-year-old kindergarten, Friday occasional care and holiday program – up to seven-year-old). It is licensed for 49 places at any time.
- 4.12 The Tenant and Poets Grove Family and Children's Centre are the only centres offering sessional kindergarten programs in the southern end of the municipality. St Kilda/ Balaclava Kindergarten offers extended hours within a long day care setting (similar to the recently opened Barring Djinang Kindergarten). The nearest alternative sessional kindergarten program is outside the municipality in North Brighton.
- 4.13 Demand modelling developed for *Every Child, Our Future: Policy Issues and Options Paper* indicates that demand and supply for four-year-old kindergarten places in Elwood is currently evenly balanced (approximately 50 places) but that demand will increase in 2030 (with an additional 19 places required). This is based on the



assumption that 60% of the four-year-olds will attend kindergarten in a long-day care setting and 40% in a kindergarten program.

- 4.14 This modelling does not account for increased demand that is likely to arise due to the introduction of universal access to three-year-old kindergarten (anticipated to commence in 2022).
- 4.15 There are three centres that provide early childhood/kindergarten in the Elwood area: the Tenant, Poets Grove Family and Children's Centre and Elwood Children's Centre.
- 4.16 The Tenant has advised Council on numerous occasions that it is interested in extending the lease beyond the existing lease term and exploring options to introduce a mixed use of space to meet DELWP requirements.
- 4.17 In late 2018, DELWP advised that the "the use of the existing hall ...for kindergarten and associated activities would not be detrimental to the purpose of the reserve, however, the hall must be made available to the public or particular user groups wherever possible". It also reiterated that the terms of the current lease outline that "Council is to provide a report on the relocation site of the Tenant before the further term of two years is granted" and that it would require this report to "assess the appropriateness of the Tenant remaining at the site in the long term".
- 4.18 At this point in time, there are limited relocation options for the Tenant within the Elwood area. A facility strategy is currently under development that will consider all viable options to support community-managed children's services in the municipality. This will consider options for relocating the Tenant.
- 4.19 Officers will also be developing a masterplan for the Elwood foreshore precinct that will consider community needs and appropriate use over the coming years.
- 4.20 There are some compliance works that would need to be undertaken in the short to medium timeframe that could trigger a complete upgrade. A high-level estimate of the cost to upgrade the building is estimated at \$2.54M. It would be possible to substantially increase spaces at the site.
- 4.21 The Tenant has been provided a funding deed that will expire on 31 December 2022, however, the Tenant has been reluctant to sign the funding deed until the Proposed Tenancy Agreement is completed.
- 4.22 Officers recommend that the community garden area that is currently on a separate licence issued to the Tenant is now added in to form part of the leased Premises, removing the requirement for separate documentation as the Tenant is the only user of the community garden area.
- 4.23 Officers recommend that the Proposed Tenancy Agreement starts on 1 July 2021 for a period of eight years and six months with an expiry date to 31 December 2029. This takes into account the state of the building, the Elwood Foreshore Redevelopment Plan and the abutting tenant (that would require an extended term of five years from 1 January 2025 to meet the requirements of the RLA). This proposed lease term is deemed appropriate for both the Tenant and ongoing Council requirements.
- 4.24 As the Proposed Tenancy Agreement has a proposed term that is greater than one year and the market rent estimate exceeds \$50,000 per annum, the statutory process applies. This process requires public notification pursuant to sections 190 and 223 of the Act before making a final decision on the Proposed Tenancy Agreement.



5. PROPOSED TENANCY AGREEMENT

- 5.1 There are a number of key planning documents, legislation and policy that need to be considered for the Proposed Tenancy Agreement. These include the following:
- Council Plan;
 - Crown Land (Reserves) Act;
 - Every Child, Our Future: Children's Services Policy (**Children's Services Policy**); and
 - Council Property Policy (**Property Policy**).
- 5.2 The Council Plan sets out what Council wants to achieve for the city of Port Phillip by 2027 and how it supports the future health and wellbeing of the city.
- 5.3 The Crown Land (Reserves) Act enables Council as Committee of Management to issue leases and licences that are consistent with the law and principles for leasing and licensing Victorian Crown land.
- 5.4 The Children's Services Policy describes Council's role in children's services and what Council intends to do to support the well-being and development of children and families in the municipality.
- 5.5 The Property Policy provides guidance on entering tenancy agreements. Such principles under this policy align with those of the State Government Leasing Policy.
- 5.6 An assessment of the proposed key terms along with a recommendation against each of the principles is provided below.

Direct Negotiation or Market Process to Secure a New Tenancy Agreement

Key Principle

- 5.7 Direct negotiation will be considered with an incumbent tenant unless there is evidence that conducting a competitive process would increase benefits to the community.

Assessment

- 5.8 On 18 September 2019, Council at its meeting endorsed support for the Tenant's continued use of the kindergarten premises in line with the Elwood Foreshore Redevelopment Plan.

Recommendation

- 5.9 Officers recommend a direct negotiation be undertaken with the Tenant in line with the Council resolution of 18 September 2019, and to add in the community garden area currently on a separate licence issued to the Tenant, to form part of the leased Premises.

Term of the Proposed Tenancy Agreement

Key Principles

- 5.10 The term of a proposed tenancy agreement needs to be appropriate to the tenant and the use of the premises.
- 5.11 A longer-term tenancy agreement may be warranted to support capital investment in the premises or when the use is linked to a specific tenant and the tenant has a history of delivering good outcomes for the community.



- 5.12 The term of a proposed tenancy agreement should consider the effort required by Council and the future tenant to negotiate a new tenancy agreement.

Assessment

- 5.13 The Property Policy allows for a standard term of five (5) years for leases.
- 5.14 The current lease outlines that Council is to provide a report on the relocation site of the Tenant before the further term of two years is granted. There are however limited relocation options for the Tenant within the Elwood area.
- 5.15 Taking into account the state of the building, the Elwood Foreshore Redevelopment Plan and the abutting tenant (which would require an extended term from 1 January 2025 to meet the RLA requirements), the proposed lease term from 1 July 2021 to 31 December 2029 is considered appropriate for both the Tenant and Council for its ongoing requirements.

Recommendation

- 5.16 Officers recommend the Proposed Tenancy Agreement to commence from 1 July 2021 and expire on 31 December 2029.
- 5.17 The existing tenancy agreement for the kindergarten premises and the existing licence for the community garden area will be surrendered and replaced with this Proposed Tenancy Agreement.

Rent

Key Principles

- 5.18 Council's approach to rental amounts reflects the different purpose of Commercial and Community Organisation (as defined in the Property Policy) tenants and is guided by portfolio targets set by Council.
- 5.19 A market rent is desirable, but Council accepts lower than market rent to support community-based organisations that provide community benefits or services on behalf of Council.

Assessment

- 5.20 Current market annual rental estimate exclusive of GST for the Premises is \$225,000.
- 5.21 The Tenant currently contributes rent of \$104 per annum plus GST to support provision of children's services and a community garden.
- 5.22 Under the Children's Services Policy, Council is committed to providing equitable transparent funding agreements and tenancy arrangements to support quality and viable community organisations that provide childcare and kindergarten services. Under these arrangements, the Tenant receives an operating subsidy from Council.

Recommendation

- 5.23 Given that the Tenant continues to fill the need for a kindergarten facility in the area and provide a community garden at the same time, Officers propose that the rent be unchanged at \$104 per annum plus GST, reflected as in-kind contribution, i.e. discounted from market rent value.



Outgoings

Key Principles

- 5.24 It is desirable that tenants pay the running costs (outgoings) of the premises that are associated with their tenancy.
- 5.25 These costs are to be paid directly to the relevant service provider by the tenant, or to Council as a reimbursement for incurring these costs.
- 5.26 Community Organisations, as defined under the Property Policy, may be eligible for an exemption from the payment of all, or some, outgoings considered in line with the Community Funding Policy.

Assessment

- 5.27 The Tenant currently pays the outgoings associated with operating its services out of the premises.
- 5.28 It is considered reasonable that the Tenant pays all outgoings as with any standard operator/ occupier.

Recommendation

- 5.29 Officers recommend that all outgoings applicable to the Premises be paid by the Tenant.

Insurance

Key Principles

- 5.30 Tenants are responsible for insuring any chattels, fixtures or contents within Council property as well as taking out public liability insurance.
- 5.31 It is desirable that Council maintains building insurance for buildings on Council owned or controlled land with the cost of such insurance being reimbursed by the tenant.
- 5.32 Community Organisations may be eligible for an exemption from the payment of all, or some, insurance premiums considered in line with the Community Funding Policy.

Assessment

- 5.33 The Tenant currently maintains its own Public Liability Insurance policy of \$20M and contents insurance as required.
- 5.34 Council currently covers the cost of building insurance for the subject Premises.
- 5.35 It is considered reasonable that the Tenant pays insurance premiums as with any standard operator/ occupier.

Recommendation

- 5.36 Officers propose that insurance for public liability and tenant improvements be obtained by the Tenant and that cost for building insurance continues to be covered by Council.

Maintenance

Key Principles

- 5.37 Council is committed to ensuring Council property remains suitable and safe for its intended use, and that the building lifecycle is extended as far as practicable for the benefit of future communities.



- 5.38 In general, tenants are responsible for keeping Council property clean and in good operating condition with full responsibility for the maintenance and renewal of tenant fittings and improvements.
- 5.39 The extent of landlord contribution to structural maintenance and renewal should consider asset ownership, community benefits, capacity of the tenant to pay and nature of the tenancy.

Assessment

- 5.40 The Proposed Tenancy Agreement does not fall within the RLA.
- 5.41 Council has taken on the responsibility of delivery of Essential Safety Measures inspections and monitoring of all buildings within its portfolio.
- 5.42 Under the Children's Services Policy, Council is committed to providing equitable transparent funding agreements and tenancy arrangements to support quality and viable community organisations that provide childcare and kindergarten services. Under these arrangements, the Tenant receives an operating subsidy from Council.
- 5.43 Council is responsible for building maintenance and renewal.

Recommendation

- 5.44 Officers recommend that Council continues to be responsible for building maintenance and renewal and that the ongoing maintenance costs are considered under the Tenant's funding deed with Council.

Method of Council Support

Key Principles

- 5.45 Council is committed to providing transparent and relevant support through a range of funding mechanisms to Community Organisations aligned with Council Plan priorities, as detailed in the Community Funding Policy.
- 5.46 Council will assess the level of discount/ support required by Community Organisations against the eligibility criteria set by the Community Funding Policy.

Assessment

- 5.47 Under the Children's Services Policy, Council is committed to providing equitable transparent funding agreements and tenancy arrangements to support quality and viable community organisations that provide childcare and kindergarten services. Under these arrangements, the Tenant receives an operating subsidy from Council.
- 5.48 The Tenant has been provided with a funding deed that will expire on 31 December 2022, however, the Tenant has been reluctant to sign the funding deed until the Proposed Tenancy Agreement is completed.
- 5.49 Any future funding deed with the Tenant, interdependent with the Proposed Tenancy Agreement, would need to be developed in accordance with the Children's Services Policy.

Recommendation

- 5.50 Officers recommend that the Tenant be supported through the following measures to support the provision of a kindergarten facility and a community garden and the implementation of the Children's Services Policy:



- discounted rent of \$104 per annum plus GST;
- discounted insurance cost with Council covering the cost of the building insurance; and
- building maintenance service support.

6. CONSULTATION AND STAKEHOLDERS

- 6.1 The Premises are on Crown land and grant and purpose approval was obtained from DELWP on 23 April 2021.
- 6.2 Council will notify the community through a Notice of Intention to Lease to be published in The Age inviting submissions in accordance with statutory procedures.

7. LEGAL AND RISK IMPLICATIONS

- 7.1 The statutory process under the Act requires Council to notify the public before committing to the Proposed Tenancy Agreement.
- 7.2 The Crown land lease template will be used as the basis of all Crown land tenancy agreements, to incorporate any further obligations agreed with the Tenant. This template documents landlord and tenant responsibilities, conforms to legislative requirements and mitigates risk.

8. FINANCIAL IMPACT

- 8.1 While the current annual market rental estimate for the Premises is \$225,000 (exclusive of GST), it is recommended to be discounted to \$104 per annum plus GST under the Proposed Tenancy Agreement to support the continuous provision of a kindergarten facility and a community garden.
- 8.2 The Proposed Tenancy Agreement is contingent upon the Tenant being awarded a funding deed. The Tenant has been provided a funding deed that will expire on 31 December 2022, however, the Tenant has been reluctant to sign the funding deed until the Proposed Tenancy Agreement is completed. Any future funding deed will require the Tenant to fulfil its obligations under the Proposed Tenancy Agreement.

9. ENVIRONMENTAL IMPACT

- 9.1 The Proposed Tenancy Agreement will require the Tenant to implement environmentally sustainable practices and programs that support reduction in energy, waste and water.
- 9.2 Council will work with the Tenant over the term of the Proposed Tenancy Agreement to improve the efficiency of water and energy usage, in particular, to:
- reduce or minimise greenhouse gas emissions;
 - maximise the use of renewable or recyclable materials;
 - reduce waste from operations;
 - implement best-practice storm water management; and
 - reduce single use plastic including eliminating plastic straws and balloons.

10. COMMUNITY IMPACT

- 10.1 Council has the following primary objectives when entering tenancy agreements for the use of Council property:



- to support service delivery and promote health and wellbeing, social, environmental, cultural, recreational or economic opportunities and benefits in the City of Port Phillip by leasing or licensing Council property to Community Organisations; and
- to generate net income to support service delivery across the portfolio by leasing or licensing Council property to Commercial Organisations.

10.2 The funding deed provided to the Tenant has agreed service objectives and key performance indicators to ensure delivery of children's services.

11. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

11.1 The Proposed Tenancy Agreement aligns to:

11.1.1 Direction 1 – “We embrace difference, and people belong”; and

11.1.2 Direction 6 – “A financially sustainable, high performing, well-governed organisation that puts the community first.”

11.2 The Proposed Tenancy Agreement also supports the Children's Services Policy that guides how Council supports, delivers and invests in children's services in the municipality.

12. IMPLEMENTATION STRATEGY

12.1 TIMELINE

12.1.1 If Council resolves to commence the statutory process, a Notice of Intention to Lease as per section 190 of the Act will be published in The Age newspaper.

12.1.2 Under section 223 of the Act, the submission period will be at least 28 days.

12.1.3 Council is required to hear and consider submissions (if any) at a future Council meeting.

12.2 COMMUNICATION

12.2.1 Officers will advise the Tenant's representative of the outcome of the 2 June 2021 Council meeting.

13. OFFICER DIRECT OR INDIRECT INTEREST

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

TRIM FILE NO: 20/13/35

ATTACHMENTS 1. Plan of Premises at 63B Ormond Esplanade Elwood