

ORDINARY MEETING OF COUNCIL

6 FEBRUARY 2019



12.2 ST KILDA MARINA INTERIM LEASE - PUBLIC NOTICE, AS REQUIRED BY SECTION 190 OF THE LOCAL GOVERNMENT ACT 1989, FOR THE INTENTION TO PROVIDE A SHORT TERM INTERIM LEASE TO THE EXISTING ST KILDA MARINA LEASE HOLDER

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

PREPARED BY: MICHELLE RYSANEK, SENIOR PROPERTY PROJECT MANAGER

1. PURPOSE

- 1.1 To seek Council's authorisation for the CEO or delegate to publish a public notice under Section 190 and invite submissions from interested parties under Section 223 of the Local Government Act, in relation to Council's intention to provide an interim three-year lease to the current lease holder of St Kilda Marina.

2. EXECUTIVE SUMMARY

- 2.1 The work to procure a new long-term lease arrangement for the site is proceeding in line with the Project Approach and associated timeline approved in a Council Meeting on 7 February 2018. The timeline forecasts that the new lease arrangement will likely not be in place until at the earliest 2021, and potentially 2022 to cover any potential planning or legislative issues that may arise.
- 2.2 An interim short-term lease arrangement is required to cover the gap between the expiry of the existing lease and the commencement of a new lease arrangement.
- 2.3 An assessment of a number of options for a short term interim arrangement has been undertaken by Council officers and our advisors. The assessment determined that the most suitable approach from a time, cost, operational and risk perspective was to pursue a new short-term interim lease with the current lessee.
- 2.4 Council, at the meeting on 13 September 2016, approved the development of a short-term lease if required to provide certainty to current operators at the site while a new lease is secured, with the rent for the short-term lease to be based on market value.
- 2.5 Following the assessment of possibilities for the short-term lease arrangement it was determined that market value was not an opportunity that could reasonably be pursued given the short-term nature of the extension and the importance of the focus being on the procurement of a long-term lease rather than a protracted short-term lease negotiation.
- 2.6 A set of principles have guided the development of a short-term lease with the current lease holder. These are:
 - Provide continuity for the function of the site whilst the leasing process is underway.



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- Minimise disruption to the site.
 - Minimise change in the short term with terms based on the existing lease.
 - A rental amount that does not disadvantage either party.
 - Facilitates the project requirements for procuring a new long-term lease (site visits, transition and handover requirements, if applicable).
- 2.7 A term of three years for the short-term lease is being proposed on the basis that this term supports both the tenant and sub-tenants short term requirements for the site, and the requirements of the process being undertaken by Council for a new long-term lease arrangement.
- 2.8 At a confidential Council Report on 21 November 2018 Council approved the proposed approach to implementing the interim lease arrangements for the St Kilda Marina with all the key terms as listed in this report with the exception of a confirmed rental amount which has since been agreed by the tenant. These terms are detailed in Item 3. Recommendation.
- 2.9 Under the existing lease agreement, the tenant owns essential key marina infrastructure and is entitled to remove this infrastructure, which includes the wet berths, security gates and fencing and dry store boat mounts. Purchase of this infrastructure was approved by Council in a confidential report on 21 November 2018 to secure the continuity of the continued operation of the site at the end of the proposed 3 year lease, if Australian Marinas exits the site. We believe this will be seen as beneficial by an incoming tenant, enabling the opportunity to continue operations and revenue generation during any redevelopment of the site.
- 2.10 In order to comply with the requirements of the Local Government Act 1989, a public notification process must be undertaken in line with Section 190 and S223 to notify and hear any submissions from the public about the intention to lease the St Kilda Marina site on a short term (interim) basis to the current tenant before Council can make a decision on whether to grant the short-term lease.

3. RECOMMENDATION

That Council:

- 3.1 Resolves that the statutory procedures be commenced under Section 190 of the *Local Government Act 1989* (Act) for the proposed interim lease with the existing tenant, Australian Marinas (A/Asia) Proprietary Limited for the St Kilda Marina by publishing a notice in the local newspaper inviting persons to make a submission under Section 223 of the Act, with the proposed lease terms outlined below;
- Proposed Tenant: Australian Marinas (A/Asia) Proprietary Limited, the existing St Kilda Marina Lease Holder.
 - Demised Premises: St Kilda Marina



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- Permitted Use: Marina
 - Commencement Date: 1 May 2019 (to follow on from the current lease expiry)
 - Term: 3 years
 - Rental: \$134,000 per annum plus 7% of gross receipts associated with car parking, boat launching, rental of boat pens, parking of cars with trailers and dry storage rentals.
- 3.2 Authorises the Chief Executive Officer to delegate to undertake the administrative procedures necessary to enable Council to carry out its functions under Section 223 of the Act and;
- 3.3 Resolves to hear and consider any submissions received pursuant to Section 223 of the Local Government Act 1989 at a Council meeting to be held in March 2019.

4. KEY POINTS/ISSUES

- 4.1 The St Kilda Marina is and has been located at 42 A - E Marine Parade, Elwood since 1969. The Marina occupies approximately 8Ha (80,000 m²) of foreshore Crown Land for which Council is appointed as the Committee of Management. Existing uses include marine services (boat storage and launch infrastructure, repairs, fuel for boats and sales), restaurants/cafes, service station and car parking.
- 4.2 The 50 year 'head lease' between Council and Australian Marinas (A'Asia) Pty Ltd (Australian Marinas), began on 18 March 1968 and, through a supplemental agreement to the original lease, expires on 30 April 2019.
- 4.3 In an Ordinary Council Meeting dated 13 September 2016 Council:
- Approved the selection of a tenant for a long-term lease of the St Kilda Marina to be undertaken through a competitive selection process.
 - Directed officers to develop a leasing process for the site for approval by Council that includes extensive community engagement in the development of the strategic objectives and leasing principles for the site.
 - Directed officers to develop principles for the selection of a tenant for the St Kilda Marina for approval by Council that include optimising community benefit and providing an appropriate commercial outcome for the site.
 - Approved in principle the development of a short-term lease, if required, to provide certainty to current operators at the site to cover any period between the expiry of the lease and the implementation of a new lease arrangement.
- 4.4 It should be noted that a Council Meeting on 13 September 2016 approved in principle the development of a short-term lease, if required, to provide certainty to current operators at the site while a new lease is secured, with the rent for the short-term lease to be based on market value". Following the assessment of possibilities for the short-



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term lease arrangement it was determined that market value was not an opportunity that should reasonably be pursued. This is explained in more detail in a later section of the report.

- 4.5 The work to procure a new long-term lease arrangement for the site is proceeding in line with the Project Approach and associated timeline approved in a Council Meeting on 7 February 2018 (provided in Attachment 1 for reference). This timeline forecasts procurement of a new lease in 2020, with a yet to be determined transition period between existing and new lease/s, if required. The new lease arrangement will likely not be in place until 2021, and potentially 2022 to cover any additional time required for any planning or legislative issues that may arise.
- 4.6 To cover the gap between the expiry of the existing lease and the commencement of a new lease it was determined that an interim short-term lease arrangement is required.
- 4.7 At a confidential Council Report on 21 November 2018 Council approved the proposed approach to implementing the interim lease arrangements for the St Kilda Marina with all the key terms as listed in this report endorsed with the exception of a confirmed rental amount which has since been agreed by the tenant.

Objectives and Options Assessment

- 4.8 A set of objectives were developed to frame the development of a short-term lease. These are:
 - Provide continuity for the function of the site whilst the leasing process is underway.
 - Minimise disruption to the site.
 - Minimise change in the short term with terms based on the existing lease.
 - A rental amount that does not disadvantage either party.
 - Facilitates the project requirements for procuring a new long-term lease (site visits, transition and handover requirements, if applicable).
- 4.9 An assessment of the various options for an interim arrangement for the site was undertaken in 2017 to inform the development of a new lease. The assessment considered a range of approaches and the associated risks and benefits.
- 4.10 The assessment determined that a short-term interim lease with the current lessee that minimised change to the current arrangement was the most suitable approach from a time, cost, operational and risk perspective that achieved the objectives for the short-term lease.

Key Issues to Consider for the Interim Lease with the Existing Tenant

- 4.11 The key issues and differences that would apply to the short-term interim lease versus the current lease were explored by officers and the advisory team.



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4.12 Key issues identified that need to be addressed through the short-term interim lease to minimise risk, secure continuity of operations and best support the long-term leasing process include:

- Application of the *Retail Leases Act 2003* (RLA)
- Type of agreement – deed of extension (lease extension) or new lease.
- Length of term to support the transition to new long-term lease arrangement
- Appropriate rental amount
- Ownership of key marina assets and impacts on ability to operate the site at end of lease
- Clarification of the required condition of assets at the end of the current lease and short term interim lease.

Type of agreement

4.13 There are two options for an interim lease arrangement with the existing tenant:

- a) Document the arrangement as a new lease document
- b) Document the arrangement as a deed of extension (lease extension).

4.14 For both interim lease arrangements, the following applies:

- Approval of the Governor in Council under the St Kilda Land Act 1965 is required.
- Unless the annual occupancy costs (i.e. rent and outgoings) are greater than \$1M, the interim lease will be subject to the Retail Leases Act 2003 (RLA).
- Having regard to Council's approach to granting leases under the Crown Land Reserves Act 1978, public notice under S 190 of the Local Government Act 1989 would be expected for the new interim lease.

4.15 An assessment of both options identified that, given that the RLA is a new Act applying in both cases, the option that provided the most clarity and certainty is a new interim lease.

Key Terms

4.16 The approach taken to address the key issues to minimise risk for all parties, secure continuity of operations in the interim and best support the long-term vision for the Marina is outlined in the table below.

Key Term	Description
Proposed Tenant	Australian Marinas (A/Asia) Proprietary Limited

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Demised Premises	St Kilda Marina
Permitted Use	Marina
Commencement Date	1 May 2019 To immediately follow expiry of existing lease
Term	3 years Agreed on the basis that this term supports both the tenant and sub-tenant short term requirements from the site, and the requirements of the project works being undertaken by Council for a new long-term lease arrangement.
Rental	\$134,000 per annum plus 7% of gross receipts associated with car parking, boat launching, rental of boat pens, parking of cars with trailers and dry storage rentals. This is a sub-market rent, however, increased from the previous rent. It was arrived at by having regard to various factors detailed in the confidential report presented to Council on 21 November 2018 including the principle that neither party should be disadvantaged by the provisions in the interim lease. It should also be noted that a Council Meeting on 13 September 2016 “approved in principle the development of a short-term lease, if required, to provide certainty to current operators at the site while a new lease is secured, with the rent for the short-term lease to be based on market value”. Following the assessment of possibilities for the short-term lease arrangement it was determined that market value was not an opportunity that should reasonably be pursued.
Maintenance and Renewal	The agreement has been revised to reflect the application of the Retail Leases Act where the landlord (Council) is responsible for the structure of and fixtures, and the plant and equipment at the Marina.
Essential infrastructure and ownership of assets	As per current lease conditions, Tenant owns wet berth infrastructure and may remove it at the end of current lease. All other improvements (permanent infrastructure) are to revert to landlord at end of lease. The wet berths, security gates and fencing and dry store boat mounts will be purchased by Council, or the new tenant (long term lease tenant), at the end of the 3 year lease, if Australian Marinas exits the site, for the purposes of securing continuity of operations until such time as the site is redeveloped.
Access to site	Access for site visits by those interested in tendering (effectively coordinated with all parties) Allowance for a smooth transition, if required



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Public Notice as Required by Section 190 and 223 of the *Local Government Act 1989*

- 4.17 In order to comply with the requirements of the Local Government Act 1989, a public notification process must be undertaken in line with Section 190 and S223 to notify and hear any submissions from the public about the intention to lease the St Kilda Marina site on a short term (interim) basis to the current tenant.
- 4.18 Section 190 of the *Local Government Act 1989* requires that Council must, at least 4 weeks before the lease is made, publish a public notice of the proposed lease.
- 4.19 A person has a right to make a submission under 223 on the proposed lease:
- 4.20 Section 223 of the Local Government Act 1989 requires Council to publish a public notice that:
 - Details the matter.
 - Provides a time by which submissions in response to the matter are to be submitted, being a date which is not less than 28 days after the date on which the public notice is published.
 - States that a person making a submission is entitled to request in the submission that the person wishes to appear in person, or to be represented by a person specified in the submission, at a meeting to be heard in support of the submission.

5. CONSULTATION AND STAKEHOLDERS

- 5.1 This report is to approve the undertaking of a public notification process as required by S.190 of the Local Government Act 1989.
- 5.2 This process enables consultation with key stakeholders and other interested parties to inform the development of a new long-term lease.

6. LEGAL AND RISK IMPLICATIONS

- 6.1 A short term interim lease arrangement with the current tenant based on the proposed key lease terms was determined through an extensive risk assessment process as presenting least risk to the continuity of the site while the project works proceed.
- 6.2 The key lease terms and the interim lease documentation was developed by the legal representatives of both parties.

7. FINANCIAL IMPACT

- 7.1 The rental income is \$134,000 per annum plus 7% of gross receipts associated with car parking, boat launching, rental of boat pens, parking of cars with trailers and dry storage rentals.



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- 7.2 This is a sub-market rent; however, increased from the previous rent to support the principle that neither party should be disadvantaged by the provisions in the interim lease.
- 7.3 Council has agreed to purchase the wet berths, fencing and dry store boat mounts at the end of the interim lease should the current tenant be required to exit the site. This is to enable continuity of the site if and while it transitions to a new lease arrangement. Council may opt for the new long-term tenant to purchase the equipment as part of the long-term lease agreement.
- 7.4 The assets to be purchased have been assessed as being in good condition with significant useful life. An independent assessment of the value of the assets identified that the agreed sum provided best value for Council.
- 7.5 The estimated cost of legal fees for developing a new interim lease is \$10,000 to \$20,000.

8. ENVIRONMENTAL IMPACT

- 8.1 No impact or change from current arrangements

9. COMMUNITY IMPACT

- 9.1 It is expected that existing operations will be maintained on the Marina site for the length of the interim lease so the impact on the community is nil.

10. ALIGNMENT TO COUNCIL PLAN AND COUNCIL POLICY

- 10.1 This report contains information that aligns with Strategic Direction 4, "We are growing and keeping our character". It supports the delivery of the specifically identified Council Plan key outcome, "a city of diverse and distinctive neighbourhoods and places". The St Kilda Marina Lease is a specific priority in the Council Plan.
- 10.2 It also aligns with Strategic Directions 3 (We have smart solutions for a sustainable future) and 6 (Our commitment to you) by supporting delivery of the following outcomes:
 - A financially sustainable, high-performing and well-governed organisation that puts the community first.
 - A city that is adapting and resilient to client change
 - A water sensitive city
- 10.3 St Kilda Marina is a key strategic site within Council's property portfolio and presents a significant opportunity in terms of social, environmental, economic and cultural possibilities for the St Kilda foreshore, the municipality and the State.

11. IMPLEMENTATION STRATEGY

- 11.1 TIMELINE



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- 11.1.1 12 February 2019 – public notice of interim lease commences
- 11.1.2 12 March 2019 – public notice period concludes
- 11.1.3 20 March 2019 – Council meeting to hear submissions
- 11.1.4 End March 2019 – formal briefing to Minister of the final lease arrangements to instigate Governor in Council process, as required by the St Kilda Land Act
- 11.1.5 Mid to late April 2019 – Governor in Council process to approve interim lease arrangement
- 11.1.6 Late April 2019 – Execute lease

11.2 COMMUNICATION

- 11.2.1 The tenant will be advised of Council's decision immediately following Council endorsement.
- 11.2.2 Should a sub-tenant contact Council Officers for information about the status, the sub-tenant will be advised of Council's decision regarding the public notification of the interim lease, and requested to contact the head tenant for further information about the lease.
- 11.2.3 Dates regarding the public notification process are provided above.

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: 20/15/63

ATTACHMENTS 1. Project Approach and Timeline