

ITEM NUMBER: 18.3

CONFIDENTIAL REPORT

KINGSTON PARK AGREEMENT TO LEASE

Pursuant to Section 83(5) of the Local Government Act 1999 the Report attached to this agenda and the accompanying documentation is delivered to the Council Members upon the basis that the Council consider the Report and the documents in confidence under Part 3 of the Act, specifically on the basis that Council will receive, discuss or consider:

- b. Information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and would, on balance, be contrary to the public interest.**
- d. commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information, or to confer a commercial advantage on a third party; and would, on balance, be contrary to the public interest.**

Recommendation – Exclusion of the Public – Section 90(3)(b & d) Order

1. That pursuant to Section 90(2) of the *Local Government Act 1999* Council hereby orders that the public be excluded from attendance at this meeting with the exception of the Chief Executive Officer and Staff in attendance at the meeting in order to consider Report No: 329/22 Kingston Park Agreement to Lease in confidence.
 2. That in accordance with Section 90(3) of the *Local Government Act 1999* Council is satisfied that it is necessary that the public be excluded to consider the information contained in Report No: 329/22 Kingston Park Agreement to Lease on the following grounds:
 - b. pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which would prejudice the commercial position of the Council; and
 - d. pursuant to section 90(3)(d) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information.

In addition, the disclosure of this information would, on balance, be contrary to the public interest. The public interest in public access to the meeting has been balanced against the public interest in the continued non-disclosure of the information. The benefit to the public at large resulting from withholding the information outweighs the benefit to it of disclosure of the information.
 3. The Council is satisfied, the principle that the meeting be conducted in a place open to the public, has been outweighed by the need to keep the information or discussion confidential.
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Item No: 18.3
Subject: **KINGSTON PARK AGREEMENT TO LEASE**
Date: 23 August 2022
Written By: Property Officer
General Manager: Strategy and Corporate, Ms P Jackson

SUMMARY

On 8 December 2020, Council endorsed that Administration seek expressions of interest for an operator to participate in the design process of the proposed kiosk at Kingston Park (**Kiosk**) and, should the development proceed, provide café services from the Kiosk.

Five (5) expressions of interest were received by Administration during the two week submission period in April 2021. Three (3) of the submissions were short listed and were assessed by a tender evaluation panel, consisting of two Elected Members, using an appropriate and equitable process to determine the preferred applicant.

Administration has worked through the preferred applicant's expression of interest and an acceptable proposal has been negotiated and is presented herein for Council's approval.

RECOMMENDATION

That Council:

- 1. appoints The Seller Door Pty Ltd as the café service provider for the Kingston Park Kiosk;**
- 2. enters into an Agreement To Lease with The Seller Door Pty Ltd pursuant to which Council agrees that it will, in the future, grant a lease to The Seller Door Pty Ltd in respect of that portion of land comprised in Certificate of Title Volume 6616 Folio 560 as delineated in red on the plan annexed hereto as Attachment 1 and more particularly situated in the south western corner of the Brighton Beachfront Holiday Park for a term of five (5) years subject in all respects to practical completion of the Kiosk and otherwise on the terms and conditions outlined herein; and**
- 3. authorises the Mayor and the Chief Executive Officer to execute and seal any documents required to give effect to the Agreement For Lease.**

RETAIN IN CONFIDENCE - Section 91(7) Order

4. That having considered Agenda Item 18.3 Kingston Park Agreement To Lease (Report No: 329/22) in confidence under section 90(2) and (3)(b & d) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the Report, Attachments and Minutes be retained for the duration of the approved lease period (provided always that the release of the Report, Attachment and Minutes is subject to the redaction of any financial information contained therein).
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STRATEGIC PLAN

The recommendation supports the Vision in that it protects our heritage and beautiful coast, while activating the space as a welcoming and healthy place for all.

COUNCIL POLICY

Procurement Policy
Commercial Leasing Policy

STATUTORY PROVISIONS

Local Government Act 1999 (SA)
Retail and Commercial Leases Act 1995 (SA)

BACKGROUND

Previous Relevant Reports

- Confidential Council Report No. 417/20; Item No. 18.2, "*EOI For Café Services At Proposed Kingston Park Kiosk*", 8 December 2020 (Resolution No. C081220/2180); and
- Confidential Council Report No. 368/20; Item No. 18.1, "*Kingston Park Kiosk*", 10 November 2020 (Resolution No. C101120/2130).

On 10 November 2020, having considered a multi-phase feasibility study and business case which examined options for a food and beverage outlet on the Kingston Park Foreshore, Council endorsed that Administration develop a detailed concept design for a proposed kiosk to be located in the south western corner of the Brighton Beachfront Holiday Park subject to a financial feasibility assessment and final budgetary approval (**Kiosk**).

On 8 December 2020, to assist with the development of the final concept and finalisation of the financial feasibility assessment, Council endorsed that Administration seek expressions of interest for an operator to participate in the design process of the Kiosk and to provide café services from the Kiosk should the development proceed.

REPORT

The expression of interest process opened on 6 April 2021 and closed on 23 April 2021 and sought a suitably experienced operator with the necessary skills to:

- provide input in the Kiosk building design and how the Kiosk could function from an operational perspective; and
- manage and deliver sustainable and functional café services from the Kiosk should the development proceed.

Five expressions of interest were received by Administration during the two-week submission period in April 2021. Three of the submissions were short listed. The short-listed proposals were submitted by The Seller Door Pty Ltd, Unique Hospitality Group Pty Ltd and Chiwawa Pty Ltd respectively. These proposals were assessed by a tender evaluation panel, consisting of two Elected Members, using an appropriate and equitable process and in accordance with the Local Government Act 1999 (SA) and Council's procurement policy. Upon completion of that process, The Seller Door Pty Ltd (**Seller Door**) emerged as the preferred applicant and Administration entered into discussions with the Seller Door in respect of the kiosk building design and future leasing arrangements.

Agreement To Lease

As the Kiosk is yet to be constructed and the proposed leasing arrangement is subject to construction being approved and completed, it is preferable and strongly recommended that, at this stage, the parties enter into an agreement to lease rather than, and distinct from, a lease.

An agreement to lease is basically a promise. It is a contract between two parties (landlord and tenant) where the landlord agrees that it will, in the future, grant a lease to the tenant on agreed terms subject to specific conditions being met and it is typically used in circumstances where the subject premises is yet to be constructed and/or the landlord has agreed to carry out works on behalf of the tenant.

In comparison, a lease creates more than just contractual rights – it gives rise to right of occupancy with the tenant having an immediate right as and from the commencement date of the lease to take possession of the subject premises and occupy that premises to the exclusion of all others including the landlord.

If and when the condition precedents in the agreement to lease are satisfied, the parties will enter into a formal lease. As such, the terms and conditions of the lease must be agreed at the same time, with the lease in its final form to be annexed to the agreement to lease

It is proposed that the agreement to lease include the usual terms and conditions for a premises of this type as well as the commercial terms are detailed below and include the terms to be contained in the formal lease (if granted).

Landlord:	City of Holdfast Bay
Tenant:	The Seller Door Pty Ltd
Premises:	That portion of the land comprised in Certificate of Title Register Book Volume 6616 Folio 560 as delineated in red on the plan annexed hereto as Attachment 1 and situated in the south western corner of the Brighton Beachfront Holiday Park
Condition Precedents:	<p>Council agrees to grant a lease of the premises to the Seller Door subject to:</p> <ul style="list-style-type: none"> • Council approval following presentation of a financial feasibility study; • the tenant signing and returning both the Agreement to Lease and the Lease (with the lease to be held in escrow pending the condition precedents being met); and • practical completion of the construction of a kiosk on a portion of the Brighton Beachfront Holiday Park having an approximately lettable area of 149 square metres on or before the Target Completion Date subject to a maximum delay period of three (3) months.
Target Completion Date:	1 January 2024 (noting that this date is the worst case scenario and can be brought forward after construction starts).
Maximum Delay Date:	31 March 2024, or if the Target Completion Date is brought forward, the day being three (3) months from the date of the Target Completion Date
Defects Liability Period	Three (3) months
<u>Key Terms of Lease (should the development proceed)</u>	
Term of Lease:	Five (5) years
Commencement Date:	The day after practical completion
Option to Renew	A further term of five (5) years
Commencing Rent:	\$50,000.00 plus GST per annum
Payment Terms:	Monthly, in advance
Rent Review:	<ul style="list-style-type: none"> • First anniversary of the Commencement Date: no rent review

	<ul style="list-style-type: none"> • Second anniversary of the Commencement Date: Fixed Review to \$65,000 plus GST; and • Third and fourth anniversaries of the Commencement Date: CPI Review <p>If the Lease is renewed:</p> <ul style="list-style-type: none"> • Fifth anniversary of the Commencement Date: the greater of CPI Review and Market Rent Review (capped at 10%); and • Sixth, seventh, eighth and ninth anniversaries of the Commencement Date: CPI Review
Permitted Use:	The Premises may only be used for a Kiosk providing healthy traditional beachside food and beverages which complement the Brighton Beachfront Holiday Park, for dine in and takeaway.
Special Conditions: Trading Hours	<ul style="list-style-type: none"> • The Lessee must keep the Premises open for business from 7am to 7pm on days of trading, being Monday through to Sunday (inclusive) except Christmas Day when the Premises will be closed for trading. • The trading hours will be seasonally adjusted (including on public holidays) within this span after approval from Council Administration (on behalf of the Lessor). Council Administration will not withhold such approval where it considers a change in the trading hours to be reasonably appropriate and justified. Special trading hours outside this span will be permitted for trading activities that are complementary to the precinct with Council Administration approval (on behalf of the Lessor).

Refer Attachment 1

Rent

A valuation was obtained from McGees Property to assist with determining the commencing annual rent. A copy of the valuation dated 8 March 2022 is annexed hereto as Attachment 2 and provides for an annual net market rental of \$64,725 (plus GST).

Refer Attachment 2

BUDGET

The agreement to lease will not impact the budget.

LIFE CYCLE COSTS

No particular costs are associated with the agreement to lease, although this will change in the event that the development proceeds and Council grants a lease of the premises to the tenant.

ANNEXURE A

PLAN OF PREMISES

