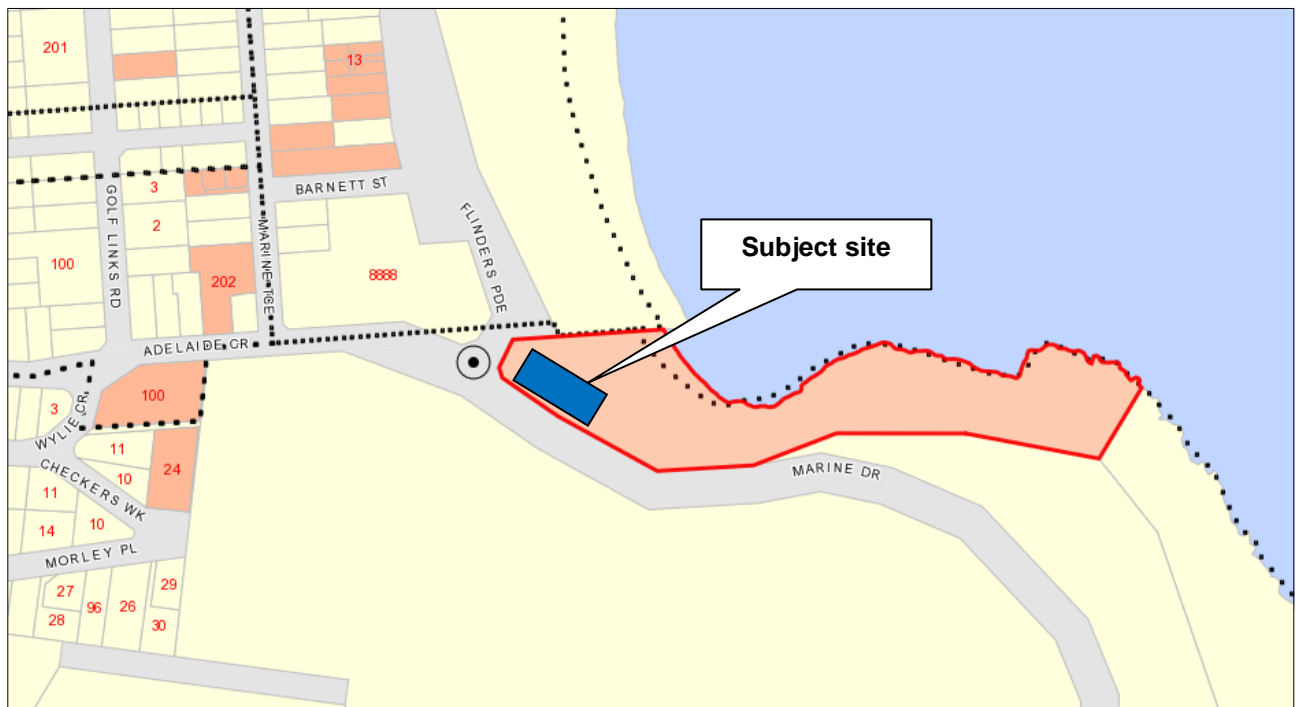


**4.4: VARIATION AND ASSIGNMENT OF LEASE – MIDDLETON BEACH CAFE (FORMERLY CALAMARI'S) – RESERVE 26149, MIDDLETON BEACH**

This Report has a Confidential Attachment, which discloses Commercial-in-Confidence information regarding a commercial lease of the City of Albany, and the business affairs of third parties.

- Land Description** : Crown Reserve 26149 and being portion of Lot 651 on Deposited Plan 191343 and the whole of land contained in Certificate of Title Volume LR3119 Folio 892
- Proponent** : Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustees for the Marwick Family Trust
- Owner** : Crown
- Attachment(s)** : SCM 01.05.2012 Item 6.2  
Confidential Deed of Partnership
- Responsible Officer** : Executive Director Corporate Services (G Adams)

**Maps and Diagrams**



<b>CEO:</b>	<b>RESPONSIBLE OFFICER:</b>
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**IN BRIEF**

- Assignment of Lease
  - a. The existing Lessee Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustees for the Marwick Family Trust (Assignor) seek to assign the lease to Three Anchors Pty Ltd as Trustees for Kate Marwick Trust, Kathryn & Kevin Brown Trust, and Marnasky Family Trust, (Assignee) with all Directors JS Marwick, KP Marwick, KE Brown, KW Brown, CH Smith and GJ Smith as Guarantors.
  - b. A Deed of Partnership (dated 18 April 2012) detailing the partners respective rights and obligations and how the business is to be conducted by the partners in the partnership has been presented to the City for its information.
- Variation of Lease
  - a. Increase to lease area - the Lessee seeks to expand the existing lease area from 1261 square metres to approximately 1345 square metres (subject to completed survey) to accommodate improvements to the property.
  - b. Rent abatement - to support the redevelopment, the Lessee has been granted by Council a financial contribution up to a maximum amount (plus GST) towards the redevelopment of the City owned property and adjoining City managed Reserve. The contribution amount will be through abatement of monthly lease rental payments owed by the Lessee to the City, until the contribution amount is totally accounted for. If approved, it is anticipated abatement of monthly lease rental will commence in July 2012 and cease in April 2016, subject to annual rent reviews.
  - c. Development works - a development clause will be included detailing the Lessee's development works and improvements; details of Lessee's bank guarantee or similar financial instrument (to the satisfaction of the City); to indemnify the City of Albany in respect of the satisfactory completion of the proposed works and the City's obligations to undertake environmental health building works.
  - d. Lease purpose - the Lessee seeks to amend the lease purpose of commercial cafe and restaurant to include meeting room, gallery and office.

**RECOMMENDATION**

**ITEM 4.4: RESPONSIBLE OFFICER RECOMMENDATION**

**VOTING REQUIREMENT: SIMPLE MAJORITY**

**THAT Council APPROVE the variation and assignment of lease on Crown Reserve 26149 and being portion of Lot 651 on Deposited Plan 191343, Middleton Beach subject to:**

- 1. Assignment of the existing lease from Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustees for the Marwick Family Trust (Assignor) to Three Anchors Pty Ltd as Trustees for Kate Marwick Trust, Kathryn & Kevin Brown Trust, and Marnasky Family Trust (Assignee) with all Directors JS Marwick, KP Marwick, KE Brown, KW Brown, CH Smith and GJ Smith as Guarantors, once the City of Albany is satisfied with the financial capacity of the incoming Assignee and Guarantors.**
- 2. Additional lease area being approximately 84 square metres subject to completed survey plan.**
- 3. Lease purpose amended to be commercial cafe, restaurant, meeting room, gallery and office.**
- 4. Pursuant to Section 18 of the *Lands Administration Act 1997*, the Minister for Land's consent is obtained.**
- 5. All costs associated with the ongoing operations and maintenance of the lease property (other than structural maintenance and electrical wiring) to be payable by the Lessee.**
- 6. All costs associated with the preparation, execution and completion of the Deed of Variation and Assignment of Lease to be payable by the Lessee.**
- 7. Notes it previous resolution in relation to Council's financial contribution to the development (OCM 01.05.2012 Item 6.2 – Attachment A).**

**BACKGROUND**

1. Crown Reserve 26149 is under a Management Order H633658 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of "Recreation" for a term not exceeding twenty one years and subject to the consent of the Minister for Lands.
2. The existing lease area of 1261 square metres on portion of Crown Reserve 26149 is located at street address 2 Flinders Parade, Middleton Beach.
3. The City of Albany owns the building located within the lease area. The City of Albany is responsible for all structural maintenance including electrical wiring of the lease premises with the Lessee responsible for all other repairs and maintenance.
4. At Council Meeting 6 December 2011 Council approved a new lease to the Marwick Family Trust for a 21 year term over the City of Albany property formerly known as Calamari's.
5. When entering the lease, the Lessee intended to undertake some renovations to the property to make it more amenable to customer service with the City undertaking building works to meet environmental health standards.
6. While undertaking the design work for those renovations, the design became more expansive than originally intended by the Lessee, as the Lessee saw opportunity to

considerably improve the amenity, customer service facilities, and provide other benefits through a more expanded redevelopment, with benefits accruing to both the Lessee and the City of Albany, as property owner.

7. The Lessee and their architect presented the development and design to the Council's Planning and Development Committee on 24 April 2012. The Lessee sort a financial contribution from the City towards the development works given the development will improve the amenity in the Middleton Beach Reserve generally and improve the City owned property.
8. At Council Meeting 1 May 2012 Council agreed to support the redevelopment by contributing up to a maximum amount (plus GST) by way of abatement of monthly lease rent.

#### **DISCUSSION**

9. The Lessee seeks to assign the lease to Three Anchors Pty Ltd as Trustees for Kate Marwick Trust, Kathryn & Kevin Brown Trust, and Marnasky Family Trust, (Assignee) with all Directors JS Marwick, KP Marwick, KE Brown, KW Brown , CH Smith and GJ Smith as Guarantors.
10. To comply with clause 7.1 of the lease the Lessee has been advised that the assignment will be considered and will not be unreasonably withheld subject to the Lessee providing financial evidence to the City's satisfaction of the financial respectability of the incoming Assignee and all Directors who will be guaranteeing the performance of the Lessee's (Company's) obligations under the lease.
11. The Lessee seeks to vary the lease to amend the lease area from the existing 1261 square metres to approximately 1345 square metres to accommodate improvements to the property.
12. The increased lease area of approximately 84 square metres can be dealt with by way of a lease variation provided the lease is not being registered with Landgate. The Landgate procedure for a variation to a lease area is to surrender the existing lease and grant a new lease including the additional area.
13. The contribution amount will be through abatement of monthly lease rental payments owed by the Lessee to the City, until the contribution amount is totally accounted for. Abatement of monthly lease rental will commence in July 2012 and cease in April 2016, subject to annual rent reviews by Consumer Price Index.
14. The City requires a new clause in the lease, under the heading "Development Works", dealing with the works required to be completed. This clause will include:
  - Nature, scope and standard of works;
  - Time for completion;
  - Costs to be borne by the Lessee;
  - Provision of a bank guarantee or similar financial instrument for the surety of completion of the development;
  - Consequences of non-completion of works;
  - Improvements to form part of the property; and
  - Incorporate the City's obligations to undertake building works in the food preparation and food service areas to comply with environmental health standards and delete existing Item 9 of the Schedule relating to works by the City and closure of the leased premises.

15. The Lessee is seeking to amend the existing lease purpose for commercial cafe and restaurant to include meeting room, gallery and office.
16. The Lessee has committed to meeting all costs associated with the Deed of Variation and Assignment of Lease.
17. The proposed development was referred for land and heritage consideration. The South West Aboriginal Land & Sea Council, the Department of Indigenous Affairs and the Department of Regional Development and Lands have no objection to the proposal.
18. A development application has been lodged by H & H Architects on behalf of the Lessee, the Marwick Family Trust for the proposed extension and alterations to the existing property at 2 Flinders Parade, Middleton Beach and adjacent Reserve 26149 is being reported as a separate item in this agenda by the Planning and Development Services Team.

#### **GOVERNMENT CONSULTATION**

19. Pursuant to Section 18 (1) of the *Land Administration Act 1997* the Department of Regional Development and Lands has been consulted and in-principle Minister for Land's consent has been sort for the proposed Deed of Variation and Assignment of Lease on portion of Crown Reserve 26149.
20. The proposed development land works were referred for land and heritage consideration. The South West Aboriginal Land & Sea Council, the Department of Indigenous Affairs and the Department of Regional Development and Lands have no objection to the proposal. There are no *Native Title Act 1993* and the *Aboriginal Heritage Act 1972* implications.

#### **PUBLIC CONSULTATION / ENGAGEMENT**

21. Section 3.58 of the *Local Government Act 1995* deals with the disposal of property including leased land and buildings. This Section requires there to be local public notice of the proposal for a period of two weeks inviting submissions from the public. Any submissions are to be considered by Council and their decision with regard to those submissions, to be recorded in the minutes.
22. Section 30 of the *Local Government (Functions & General) Regulations 1996* deals with dispositions to which the advertising requirements of section 3.58 of the Act does not apply. Section 30 (1 & 2) (a) (i & ii) states that Section 3.58 of the Act is exempt if:
  - (a) *The land is disposed of to an owner of adjoining land (the transferee) – and*
    - (i) *its market value is less than \$5,000; and*
    - (ii) *the local government does not consider that ownership of the land would be of significant benefit to anyone other than the transferee;*
23. The additional area of land of approximately 84 square metres has been valued by Opteon Property Advisors who confirm that the market value of the additional land is less than \$5,000.
24. The additional area of land is being leased to an existing Lessee in agreement with the City and is valued under \$5,000 and therefore exempt from the advertising requirements of Section 3.58 of the *Local Government Act 1995*.
25. The development application was advertised in the local paper with advertising finishing on 24 April 2012.

### **STATUTORY IMPLICATIONS**

26. Section 18 (1) of the *Land Administration Act 1997* states that a person must not, without the prior approval in writing of the Minister assign, sell, transfer or otherwise deal with interests on Crown land.
27. As this is Crown land, under Management Order H633658 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of “Recreation”, Minister for Land’s consent will be required.
28. Section 3.58 of the *Local Government Act 1995* deals with the disposal of property, including leased land and buildings.
29. Under the City’s Town Planning Scheme 1A, the subject land is reserved as “Parks and Recreation”. A commercial cafe, restaurant, meeting room, gallery and office is an approved use in accordance with the Scheme.

### **STRATEGIC IMPLICATIONS**

30. This item relates to the following elements of the City of Albany Strategic Plan (2011-2021):

#### ***Key Focus Area***

- *Organisational Performance*
- *Sustainability and Development*

#### ***Community Priority***

- *Policy and Procedures*
- *Tourism Development*

#### ***Proposed Strategies***

- *Develop clear processes and policies and ensure consistent, transparent application across the organisation.*
- *Improve and expand tourism infrastructure and attractions.*

### **POLICY IMPLICATIONS**

31. Council adopted a Property Management – Leases Policy in 2008. This Policy aims to ensure that all requests for leases/licences, for whatever purpose, will be treated in a fair and equitable manner using open and accountable methodology and in line with statutory procedures.
32. The Officer’s recommendation is consistent with Council Policy.

**RISK IDENTIFICATION & MITIGATION**

<b>Risk</b>	<b>Likelihood</b>	<b>Consequence</b>	<b>Risk Rating</b>	<b>Mitigation</b>
<i>Assignment of lease not approved by Council because of dissatisfaction with Assignee</i>	<i>Unlikely</i>	<i>Moderate</i>	<i>Medium</i>	<i>Approve lease after collaborating closely with proposed Assignee to ensure mutually agreeable outcomes</i>
<i>Additional lease area not approved by Council</i>	<i>Unlikely</i>	<i>Moderate</i>	<i>Medium</i>	<i>Liaise with Lessee to gain agreement on additional lease area to proceed with development</i>
<i>Variation of lease – financial contribution by abatement of rent is approved by Council</i>	<i>Unlikely</i>	<i>Major</i>	<i>Medium</i>	<i>Council propose alternate method to abatement of rent for previously Council endorsed financial contribution – overall impact minimised by abatement over a 4 year period</i>
<i>Redevelopment not approved by Council - reputational loss to the City</i>	<i>Unlikely</i>	<i>Moderate</i>	<i>Medium</i>	<i>Seek to amend redevelopment and approve to demonstrate the City's commitment to the tourist precinct and businesses servicing the community</i>

**FINANCIAL IMPLICATIONS**

33. Council has agreed to contribute to the development, fixed at an amount up to a maximum (plus GST). This financial contribution will be way of abatement of monthly lease rental owed by the Lessee to the City for lease of the property.
34. An updated rental valuation from Opteon Property Advisors given the proposed increase in lease area has been obtained. Opteon confirm that the additional lease area of approximately 84 square metres rental has not significantly affected the rent and should remain at \$68,000 plus GST as valued in November 2011.
35. All costs associated with the ongoing operations (inclusive of all outgoings such as rates, insurance, public toilet usage contribution and insurance) of the commercial cafe, restaurant, meeting room, gallery and office will be payable by the Lessee.
36. All costs associated with the preparation, execution and completion of the new lease documentation including but not limited to legal, and survey fees will be payable by the Lessee.

**ALTERNATE OPTIONS & LEGAL IMPLICATIONS**

- 37. Council has the following options in relation to this item:
  - a. Approve the variation and assignment of lease.
  - b. Reject the variation and assignment of lease.
- 38. Should Council reject the variation and assignment of lease, the development doesn't proceed and the original lease terms will continue.
- 39. Should Council reject the variation and assignment of lease, depending on the reason, Council may direct staff to clarify some aspects of the request and/or provide further information.

**SUMMARY CONCLUSION**

- 40. The Lessee wishes to undertake redevelopment to the property owned by the City and adjoining City managed Reserve.
- 41. Council has agreed to contribute to the development, fixed up to a maximum amount (plus GST) by way of abatement of monthly rental owed by the Lessee to the City.
- 42. The variation and assignment of lease will formalise the lease arrangements for the proposed development.
- 43. The development will be beneficial to the Middleton Beach area generally, and to the property owned by the City of Albany.
- 44. All buildings or improvements permanently fixed to the Leased Premises or constructed by the Lessee and approved by the City will form part of the Leased Premises and will vest absolutely with the City.

<b>Consulted References</b>	<ul style="list-style-type: none"> <li>• Council Policy – Property Management – Leases</li> <li>• <i>Local Government Act 1995</i></li> <li>• <i>Land Administration Act 1997</i></li> </ul>
<b>File Number (Name of Ward)</b>	PRO070 (Frederickstown Ward)
<b>Previous Reference</b>	SCM 06.12.2011 Item 6.1 SCM 01.05.2012 Item 6.2