

**4.9: VARIATION OF LEASE – THREE ANCHORS PTY LTD – PORTION OF
RESERVE 26149, MIDDLETON BEACH**

Land Description : Portion of Crown Reserve 26149 and being Lot 651 on Deposited Plan 191343 and being portion of land comprised in Crown Land Title Volume LR3119 Folio 892, Middleton Beach

Proponent : Three Anchors Pty Ltd

Owner : Crown

Business Entity Name : Three Anchors Pty Ltd

Director of Owner Company : Jonathon Sylvester Marwick, Kate Patricia Marwick, Kathryn Elizabeth Brown, Kevin Wayne Brown, Christine Hanna Smith and Grant Joseph Smith

Responsible Officer(s) : Executive Director Corporate Services (G Adams)

Maps and Diagrams:



IN BRIEF

- Council is requested to consider a variation of the lease for Three Anchors Pty Ltd to amend the existing permitted use of Commercial Cafe, Restaurant, Meeting and Function Room, Gallery and Office to include Tavern.
- Subject to City as Landlord granting approval and the City as local health and planning authority granting approval, the Lessee intends to apply to the Department of Racing, Gaming and Liquor for a Tavern licence.

ITEM 4.9: RESPONSIBLE OFFICER RECOMMENDATION

VOTING REQUIREMENT: SIMPLE MAJORITY

That Council **APPROVE** a variation of the lease for Three Anchors Pty Ltd over portion of Crown Reserve 26149 and being Lot 651 on Deposited Plan 191343 at 2 Flinders Parade, Middleton Beach, subject to:

1. Lease variation to amend the existing permitted use of Commercial Cafe, Restaurant, Meeting and Function Room, Gallery and Office to include Tavern in accordance with Council decision on planning application (P2130009) reported to this Council meeting Item 2.3.
2. All other approvals including the City as local health and planning authority and the Department of Racing, Gaming and Liquor being obtained.
3. All costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the Lessee, Three Anchors Pty Ltd.
4. All costs associated with the ongoing operations of the lease premises being payable by the Lessee.

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. 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 on portion of Crown Reserve 26149 for the permitted use of Commercial Cafe and Restaurant.
3. 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.
4. 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.
5. The Lessee and their architect presented the development and design to the Council's Planning and Development Committee on 24 April 2012. The Lessee sought 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.
6. At Special 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.

****REFER DISCLAIMER****

7. At Council Meeting 19 June 2012 Council approved a variation and assignment of lease for:
 - Increase in lease area from 1261m² to approx 1351m²;
 - Rent abatement;
 - Development clause;
 - Lease permitted use of Commercial Cafe and Restaurant to include Meeting and Function Room, Gallery and Office; and
 - Assignment from the Marwick Family Trust to Three Anchors Pty Ltd.
8. The majority of the redevelopment was completed in December 2012 allowing the premises to open for trading. There are still some outstanding minor works consisting of brick paving at the front wall, asphalt repair works and associated clean up of grassed area that are required to be completed to the City's satisfaction prior to commencement of the rent abatement.
9. The premises currently have a Restaurant liquor licence (with liquor without a meal permit) which allows for the consumption of liquor by way of table service to patrons seated at a table. It is City understanding that the Restaurant has operated under the licence without incidence or breach.
10. The Lessee, Three Anchors Pty Ltd has requested a variation to the lease to include Tavern as a permitted use for the premises.

DISCUSSION

11. If Tavern is approved as a permitted use under the lease by the City as Landlord, the Department of Racing, Gaming and Liquor would require further approvals relating to liquor licensing also being sort from the City as local health and planning authority (in the form of signed Section 39 & 40 Certificates).
12. The Lessee does require a Section 39 Certificate approved and issued by the City as local health authority which states that the premises comply with all relevant requirements under the *Health Act 1911*.
13. The Lessee does require a Section 40 Certificate approved and issued by the City as local planning authority which states that the selling of liquor is in accordance with planning requirements.
14. The Lessee has submitted an application for Planning Scheme Consent (P2130009) for change of use to Tavern for consideration. This is being reported to this Council meeting Item 2.3 as a separate agenda item. The option of restricting the Tavern use by prohibiting takeaway sales of packaged liquor is discussed in the report. Officer Recommendation supports the change of use to Tavern.
15. A Tavern licence authorises:
 - the sale and supply of liquor for consumption on the premises;
 - the sale and supply of packaged liquor to patrons for consumption off the licensed premises.

16. The proposed change of use to Tavern will assist with the service of liquor on the premises by allowing patrons to purchase a drink over the bar without the requirement to be seated at a table.
17. It is noted that Council Officers do not have delegated authority to approve variations to leases and that all such requests be submitted to Council for consideration.

GOVERNMENT CONSULTATION

18. 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 of Lease on portion of Crown Reserve 26149.

PUBLIC CONSULTATION / ENGAGEMENT

19. No consultation with the public for the variation of lease is required.
20. The Planning application (P2130009) was advertised in the local paper on 17 January 2013 with the public submission period closing on 7 February 2013. This is being reported to this Council meeting Item 2.3 as a separate agenda item.

STATUTORY IMPLICATIONS

21. 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.
22. 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.
23. Section 3.58 of the *Local Government Act 1995* defines the requirements for the disposal of property, including leased land and buildings.
24. Under the City's Town Planning Scheme 1A, the subject land is reserved as "Parks and Recreation". A Commercial Cafe, Restaurant, Meeting and Function Room, Gallery, and Tavern are an approved use in accordance with the Scheme.

STRATEGIC IMPLICATIONS

25. This item relates directly 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

26. Council adopted a revised Property Management – Leases and Licences Policy in September 2012.
27. The 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.
28. The recommendation is consistent with Council Policy – Property Management – Leases and Licences.

RISK IDENTIFICATION & MITIGATION

29. The risk identification and categorisation relies on the City's Risk Management Framework:

Risk	Likelihood	Consequence	Risk Rating	Mitigation
<i>Council does not approve variation of lease – reputational loss to the City</i>	<i>Unlikely</i>	<i>Moderate</i>	<i>Medium</i>	<i>Further negotiate with Lessee to reach a mutually agreeable outcome.</i>
<i>Council does not approve planning application - Lessee entitled to seek a review by State Administrative Tribunal</i>	<i>Likely</i>	<i>Moderate</i>	<i>Major</i>	<i>Decision to refuse is based on sound reasoning.</i>
<i>Council approves Tavern with takeaway sales of packaged liquor may lead to anti social activities in the adjacent public areas of the playground, amphitheatre and beach</i>	<i>Likely</i>	<i>Moderate</i>	<i>High</i>	<i>Restrict takeaway sales of packaged liquor.</i>

FINANCIAL IMPLICATIONS

30. All legal costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the Lessee, Three Anchors Pty Ltd.

31. It is anticipated that the legal costs will be approximately \$300 plus GST plus disbursements (if any).

LEGAL IMPLICATIONS

32. The agreement with the Lessee is a formal Deed of Lease which grants an interest in the land and buildings with enforceable conditions. It is good practice, particularly when amending variables such as permitted use to be by way of a Deed of Variation of Lease.
33. The proposed Deed of Variation of Lease will be prepared by the City's lawyers.

ALTERNATE OPTIONS

34. Council may:
- a. Refuse the request to vary the lease to include Tavern as a permitted use; or
 - b. Approve the request.
35. Should Council refuse the request then the Department of Racing, Gaming and Liquor would not progress any application for Tavern licence for the Lessee, on the subject site, until Landlord consent was obtained.

SUMMARY CONCLUSION

36. The subject land with buildings is leased to Three Anchors Pty Ltd for term of 21 years commencing 9 December 2011 and expiring 8 December 2032 for the permitted use of Commercial Cafe, Restaurant, Meeting and Function Room, Gallery and Office.
37. The Lessee has requested a variation to the lease to include Tavern as a permitted use as they intend to apply to the Department of Racing, Gaming and Liquor for a Tavern licence.
38. The Lessee also requires City as local health and planning authority (in the form of signed Section 39 & 40 Certificates) when applying for a Tavern licence.
39. The Lessee has submitted an application for Planning Scheme Consent (P2130009) for change of use to Tavern for consideration. This is being reported to this Council meeting Item 2.3 as a separate agenda item. The option of restricting the Tavern use by prohibiting takeaway sales of packaged liquor is discussed in the report. Officer Recommendation supports the change of use to Tavern.
40. Staff recommend that the lease variation to include Tavern be in accordance with Council decision on planning application (P2130009) reported to this Council meeting Item 2.3.
41. Council has previously endorsed the redevelopment to the premises with the Lessee recently completing the improvements to the City owned building.
42. There are some outstanding minor works of the surrounding land to be completed to the City's satisfaction prior to commencement of the rent abatement.

Consulted References	<ul style="list-style-type: none"> • Council Policy – Property Management – Leases and Licences • <i>Local Government Act 1995</i> • <i>Local Government (Functions and General) Regulations 1996</i> • <i>Land Administration Act 1997</i>
File Number (Name of Ward)	PRO0070, A223660 (Frederickstown Ward)
Previous Reference	SCM 06/12/2011 Item 6.1 SCM 01/05/2012 Item 6.2 OCM 19/06/2012 Item 4.4