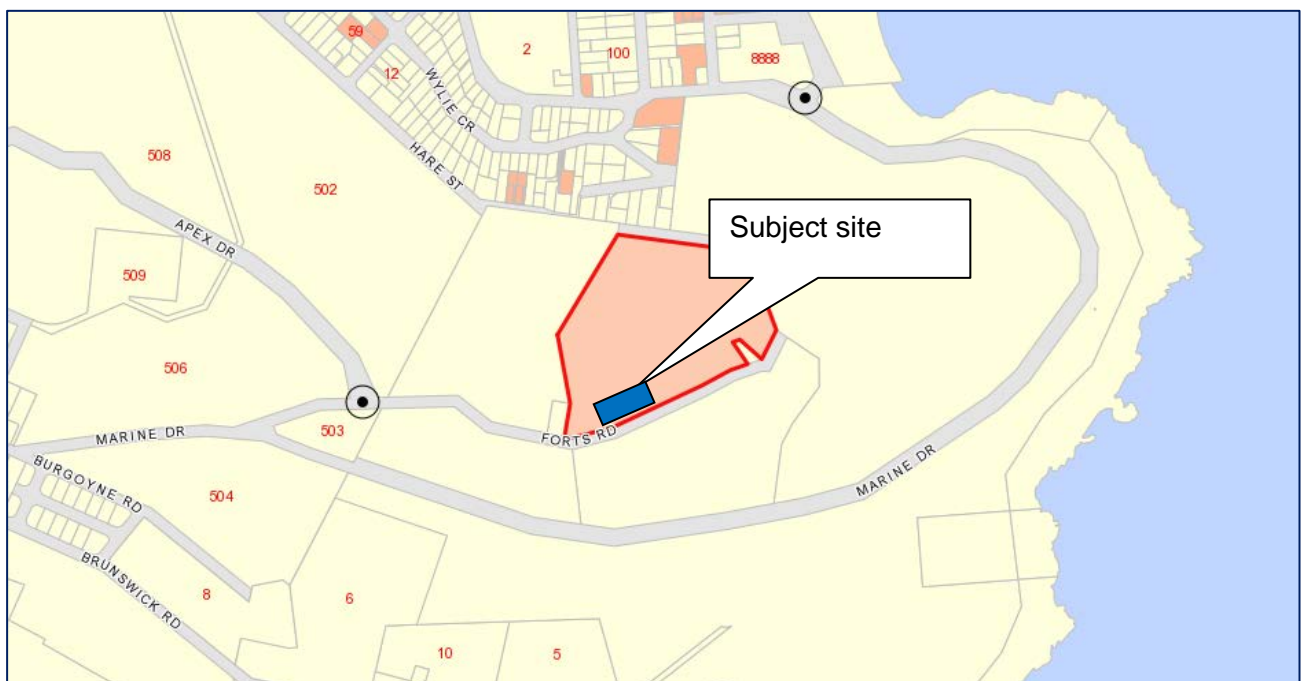


**4.10: VARIATION OF LEASE – FORTS CAFE – PORTION OF RESERVE  
38226, MOUNT CLARENCE**

- Land Description** : Portion of Crown Reserve 38226 and being portion of Lot 1347 on Plan 7800 and being all that land comprised in Crown Land Title Volume LR3121 Folio 583, Mount Clarence
- Proponent** : Johnny Voegeler, Natalie Joy Perrella & Hiede Rene Datlen-Reiter, Proprietors of Forts Cafe
- Owner** : Crown
- Attachments** : Aerial Photograph
- Responsible Officer(s)** : Executive Director Corporate Services (G Adams)
- Maps and Diagrams:**



**IN BRIEF**

- For Council to consider a variation of the lease for Johnny Voegeler, Natalie Perrella & Hiede Datlen-Reiter, Proprietors of Forts Cafe, to extend the lease for a further term of 1 year and 6 months commencing 19 April 2013 and expiring 18 October 2014.

**ITEM 4.10: RESOLUTION**

**VOTING REQUIREMENT: SIMPLE MAJORITY**

**MOVED: COUNCILLOR GREGSON**

**SECONDED: COUNCILLOR HORTIN**

**That Council APPROVE a variation of the lease for Johnny Voegeler, Natalie Joy Perrella & Hiede Rene Datlen-Reiter, Proprietors of the Forts Cafe, over portion of Crown Reserve 38226 and being portion of Lot 1347 on Plan 7800, Mount Clarence subject to:**

- 1. Lease variation to extend the term for a further 1 year and 6 months commencing 19 April 2013 and expiring 18 October 2014.**
- 2. All other terms of the original lease to apply.**
- 3. All costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the City of Albany.**
- 4. All costs associated with the ongoing operations of the lease premises being payable by the Lessee.**

**CARRIED 12-0**

**BACKGROUND**

1. Crown Reserve 38226 is under a Management Order H712682 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of "Parklands, Recreation and Tourism" for a term not exceeding 21 years and subject to the consent of the Minister for Lands.
2. The Forts Cafe is located at Lot 1347 on portion of Crown Reserve 38226, Mount Clarence within the historic Canteen and Military Institute building at the Princess Royal Fortress.
3. The Forts Cafe currently occupies an area of approximately 119m<sup>2</sup> over the areas historically used as the canteen, sergeants mess and billiard room.
4. Princess Royal Fortress is physically located at Mount Adelaide. However the correct locality is Mount Clarence as Mount Adelaide is not a suburb.
5. In April 1995 the former Town of Albany granted a new lease to David and Christine Duvall for the purpose of tea rooms and kiosk for a term of 3 years with an option for a further 5 year term expiring in April 2003.
6. Since this date the lease has been assigned many times.
7. At Council Meeting 18 March 2003 Council approved a new lease to Michael and Sophie Rogers for a 5 year term with an option for a further 5 year term expiring on 18 April 2013.
8. The *Commercial Tenancy (Retail Shops) Agreement Act 1985* applies to the Forts Cafe lease. The Act regulates lease provisions including terms, rent reviews, terminations, outgoings and trading hours. The lease cannot override the requirements of the Act.

9. Since 2003 the lease has again been assigned several times. The lease was assigned to the current Lessee, Johnny Voegeler, Natalie Perrella & Hiede Datlen-Reiter in June 2009.

## **DISCUSSION**

10. In December 2012, given the uncertainty surrounding the Anzac Centre and the future management of the Forts Precinct which could potentially influence future leasing arrangements, City staff met internally to discuss the Forts Cafe lease past expiry on 18 April 2013, as there was no option for a further term under the lease.
11. The option of varying the lease, prior to expiry, to extend the term for a further 12 months was considered. However, it was acknowledged that at this time there were no definitive recommendations regarding the Forts Precinct available. Taking this into consideration it was agreed that the best way forward would be for the City to offer for the Lessee to remain at the property on a holding over basis past the lease expiry (18 April 2013), should they wish to do so.
12. In January 2013 the City wrote to the Lessee to advise that their current lease was due to expire on 18 April 2013 and that the City of Albany was still continuing to consider the status of the Forts Cafe, the proposed Anzac Centre and the future management of the Forts Precinct.
13. Pending determination of these matters by Council, the City offered for the Lessee to remain at the property on a holding over basis on a month to month tenancy. The conditions of the tenancy would preserve the terms of the original lease, except in respect to the term of the lease.
14. In February 2013 City staff met with the Lessee to further discuss and clarify matters relating to the City's holding over offer. The Lessee raised concerns about there being no long term security of tenure at the property past April 2013 however, acknowledged the City's position given no decisions had been made regarding the Forts Precinct, at this time.
15. The Lessees were advised that the holding over can run indefinitely and that the City would keep them informed once further relevant information regarding the Forts Precinct became available.
16. Since that meeting the location of the Anzac Centre has been determined and the Lessee has been offered and has agreed to a variation of the existing lease to extend the term of the lease to October 2014, subject to Council approval.
17. The original lease provides for market rent reviews every 2 years. The last market review was completed in April 2012 with rent determined at \$1,000 plus GST per annum.
18. It is noted that the rent reviews in the original lease are expressed using actual dates so there will be no provision to undertake rent reviews during the further term unless they are included as a variation in the lease.
19. City staff recommend that the provision for a rent review in April 2014 not be included as an additional variation to the lease given the short period of the further term.

20. It is noted that the Anzac Centre business analysis is currently in progress with an outcome anticipated towards the end of March 2013. This is expected to provide advice on the potential business model, ownership and management of the Anzac Centre at the Mount Adelaide Precinct.
21. The offer to the Forts Cafe Lessee is subject to Council consideration and approval. 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**

22. 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 38226.

### **PUBLIC CONSULTATION / ENGAGEMENT**

23. No consultation with the public for the variation of lease is required.

### **STATUTORY IMPLICATIONS**

24. 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.
25. As this is Crown land, under Management Order H712682 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of "Parklands, Recreation and Tourism", Minister for Land's consent will be required.
26. Section 3.58 of the *Local Government Act 1995* defines the requirements for the disposal of property, including leased land and buildings.
27. Under the City's Town Planning Scheme 1A, the subject land is reserved as "Parks and Recreation". A Cafe is an approved use in accordance with the Scheme.

### **STRATEGIC IMPLICATIONS**

28. 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**

29. Council adopted a revised Property Management – Leases and Licences Policy in September 2012.
30. 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.
31. The recommendation is consistent with Council Policy – Property Management – Leases and Licences.

**RISK IDENTIFICATION & MITIGATION**

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

<b>Risk</b>	<b>Likelihood</b>	<b>Consequence</b>	<b>Risk Rating</b>	<b>Mitigation</b>
<i>Council does not approve the variation of lease to extend for a further term – 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 the variation of lease to extend for a further term – loss of business premises for the Lessee</i>	<i>Possible</i>	<i>Moderate</i>	<i>Medium</i>	<i>Offer Lessee a holding over month to month tenancy to allow the Lessee to remain at the property. A holding over can be terminated by either party with one months notice and can run indefinitely.</i>

**FINANCIAL IMPLICATIONS**

33. All legal costs associated with the preparation, execution and completion of the Deed of Variation of Lease being payable by the City of Albany.
34. It is anticipated that the legal costs will be approximately \$500 plus GST plus disbursements (if any).

**LEGAL IMPLICATIONS**

35. 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.
36. The proposed Deed of Variation of Lease will be prepared by the City's lawyers.

**ALTERNATE OPTIONS**

37. Council may:
- a. Refuse the request to vary the lease to extend the term to October 2014;
  - b. Refuse the request but support the Lessee remaining at the property on a holding over basis on a month to month tenancy;
  - c. Approve the request; or
  - d. Approve the request with amendment to the further term period.
38. Should Council refuse the request, the Lessee would be required to remove their fixtures and fittings and vacate the property upon expiration.
39. Council could then invite expressions of interest to lease the Forts Cafe.
40. Should Council refuse the request Council could then support the Lessee remaining at the property on a holding over basis on a month to month tenancy, with termination by one month's notice by either party.

**SUMMARY CONCLUSION**

41. The subject land with buildings is leased to Johnny Voegeler, Natalie Perrella & Hiede Datlen-Reiter, Proprietors of the Forts Cafe, expiring on 18 April 2013.
42. The City has offered and the Lessee has agreed to remain at the property until October 2014 by way of a Deed of Variation of Lease to extend the term of the lease, subject to Council approval.
43. It is acknowledged that the location of the Anzac Centre has been determined and noted that that the Anzac Centre business analysis is currently in progress with outcome anticipated towards the end of March 2013. This is expected to provide advice on the potential business model, ownership and management of the Anzac Centre at the Mount Adelaide Precinct.

<b>Consulted References</b>	<ul style="list-style-type: none"> <li>• Council Policy – Property Management – Leases and Licences</li> <li>• <i>Local Government Act 1995</i></li> <li>• <i>Local Government (Functions and General) Regulations 1996</i></li> <li>• <i>Land Administration Act 1997</i></li> </ul>
<b>File Number (Name of Ward)</b>	PRO057, A171322 (Frederickstown Ward)
<b>Previous Reference</b>	OCM 18/03/2003 Item 12.2.3



Forts Cafe – Lot 1347 on portion of Crown Reserve 38226, Mount Clarence