

CSF037: NEW LEASE – JONATHON SYLVESTER MARWICK AND KATE PATRICIA MARWICK AS TRUSTEE FOR THE MARWICK FAMILY TRUST – PORTION OF RESERVE 22698, EMU POINT CAFE, MERMAID AVENUE EMU POINT

Land Description	: Portion of Reserve 22698 and being Lot 1461 on Deposited Plan 219777 and being portion of the land comprised in Certificate of Title Volume LR3110 Folio 171 Emu Point
Proponent	: Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust trading as Emu Point Cafe
Owner	: Crown
Attachments	: Nil
Responsible Officer(s)	: Executive Director Corporate Services (G Adams)

Responsible Officer's Signature:



STRATEGIC IMPLICATIONS

1. This item relates directly to the following elements of the City of Albany Strategic Community Plan 2023 and Corporate Business Plan 2013-2017:
 - a. **Key Theme:** Civic Leadership.
 - b. **Strategic Objective:** 5.1 To establish and maintain sound business and governance structures.
 - c. **Strategic Initiative:** 5.1.2 Systems Development and Improvement: Improve leased property management.

IN BRIEF

- Council is requested to consider a new lease for Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust trading as Emu Point Cafe over the premises currently occupied in Mermaid Avenue, Emu Point on portion of Crown Reserve 22698.
- Lease term being five years with an option for a further five year term.
- Lease purpose being for commercial cafe and restaurant.
- Initial lease rental as determined by current market valuation being \$44,365.00 per annum plus GST.
- The recommendation proposes that Council approve the new lease.

Maps and Diagrams



CSF037: COMMITTEE RECOMMENDATION VOTING REQUIREMENT: SIMPLE MAJORITY

That Council APPROVE the request from Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust trading as Emu Point Cafe for a new lease on cafe and restaurant premises situated at 1 Mermaid Avenue, Emu Point being portion of Crown Reserve 22698, subject to:

1. Lease term being five years commencing 15 December 2013, with an option for a further five year term.
2. Initial lease rental being, as determined by a current market valuation provided by a licensed Valuer, \$44,365.00 per annum plus GST.
3. Lease area being approximately 389 square metres.
4. Lease purpose being for a commercial cafe and restaurant.
5. Pursuant to Section 18 of the *Lands Administration Act 1997*, the Minister for Lands consent is obtained.
6. Pursuant to Section 3.58 of the *Local Government Act 1995* advertising requirements.
7. In accordance with section 14B of the *Commercial Tenancy (Retail shops) Agreements Act 1985* all costs associated with the preparation, execution and completion of the Deed of Lease being payable by the City of Albany.

CSF037: COMMITTEE RECOMMENDATION

MOVED: COUNCILLOR WILLIAMS
SECONDED: COUNCILLOR BOWLES

That Council APPROVE the request from Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust trading as Emu Point Cafe for a new lease on cafe and restaurant premises situated at 1 Mermaid Avenue, Emu Point being portion of Crown Reserve 22698, subject to:

1. Lease term being five years commencing 15 December 2013, with an option for a further five year term.
2. Initial lease rental being, as determined by a current market valuation provided by a licensed Valuer, \$44,365.00 per annum plus GST.
3. Lease area being approximately 389 square metres.
4. Lease purpose being for a commercial cafe and restaurant.
5. Pursuant to Section 18 of the *Lands Administration Act 1997*, the Minister for Lands consent is obtained.
6. Pursuant to Section 3.58 of the *Local Government Act 1995* advertising requirements.
7. In accordance with section 14B of the *Commercial Tenancy (Retail shops) Agreements Act 1985* all costs associated with the preparation, execution and completion of the Deed of Lease being payable by the City of Albany.

CARRIED 12-0

CSF037: RESPONSIBLE OFFICER RECOMMENDATION

That Council APPROVE the request from Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust trading as Emu Point Cafe for a new lease on cafe and restaurant premises situated at 1 Mermaid Avenue, Emu Point being portion of Crown Reserve 22698, subject to:

1. Lease term being five years commencing 15 December 2013, with an option for a further five year term.
2. Initial lease rental being, as determined by a current market valuation provided by a licensed Valuer, \$44,365.00 per annum plus GST.
3. Lease area being approximately 389 square metres.
4. Lease purpose being for a commercial cafe and restaurant.
5. Pursuant to Section 18 of the *Lands Administration Act 1997*, the Minister for Lands consent is obtained.
6. Pursuant to Section 3.58 of the *Local Government Act 1995* advertising requirements.
7. In accordance with section 14B of the *Commercial Tenancy (Retail shops) Agreements Act 1985* all costs associated with the preparation, execution and completion of the Deed of Lease being payable by the City of Albany.

BACKGROUND

2. Crown Reserve 22698 is under Management Order H224437 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of "Recreation and Associated Business Purposes" for any term not exceeding 50 years and subject to the consent of the Minister for Lands.
3. Reserve 22698 an area of approximately 27.3 hectares is located at Lot 1460 and 1461 Mermaid Avenue, Emu Point.
4. The Emu Point Cafe premises, an area of approximately 389 square metres, is located within Reserve 22698 with the street address being 1 Mermaid Avenue, Emu Point.
5. In 1965 the former Emu Point (Albany) Reserve Board granted a new lease to TC Humphrey & Co for a 21 year term for the purpose of tea rooms and refreshment rooms.
6. Commencing 1 January 1976, the control and administration of the Emu Point Reserve, including all commercial leases, passed from the Emu Point (Albany) Reserve Board to the former Town of Albany.
7. In 1986 the former Town of Albany granted a new lease to TC Humphrey & Co for a 21 year term. At this time the leased premises were divided into cafe and restaurant areas.
8. In 1988 the lease was assigned to Mallorca Pty Ltd. In 1989 the restaurant area was sub leased to J Farrugia. In 1990 the cafe area was sub leased to M & S Vivian. Since this date the two areas have been subleased many times to individual businesses, including the former Cravings Waterfront Bistro, and in 1999 the Japanese Restaurant.
9. The head lease was surrendered in 1992 to allow for a new longer term lease to Head Lessee, Mallorca Pty Ltd given proposed building extensions including new public toilet facilities.
10. In December 1992 the former Town of Albany granted a new lease to Mallorca Pty Ltd for the purpose of Restaurant, Tea and Refreshment Rooms for the sale of meals and goods, for a term of 21 years expiring on the 14 December 2013. The rental at this time was set at a base rate of \$1050.00 per annum with rent adjusted by Consumer Price Index every five years. Both cafe and restaurant areas were subleased.
11. As the new toilet facility was to be a shared facility between the City for public use, and the Lessee for the use of their customers, the new 1992 lease incorporated clauses outlining the City's responsibility to maintain, clean, meet water consumption costs and insure the toilet facility.
12. In January 1998 the head lease was assigned to Walker Paddon Real Estate Pty Ltd ATF the WP Superannuation Fund and Vally Pty Ltd ATF the Holman Superannuation Fund (Walker Paddon / Vally) for the remainder of the term. Current subleases at that time for cafe and restaurant areas remained in place.

13. In June 2006 the restaurant sublease expired, and as there was no option for a further term, the Tenant remained on a holding over basis, as a month to month Tenant.
14. In February 2008 the cafe sublease expired and the option for a further three year term was not formally exercised.
15. In 2008 the City sought legal advice to clarify the ownership of the buildings; and the rights and obligations of each party at the termination of the head lease on 14 December 2013.
16. The legal advice concluded that:
 - Ownership of the buildings is vested in the City of Albany.
 - Upon termination of the lease, tenant and sub tenants are required to remove all furniture, fittings and effects, plus signage within one month of lease expiry.
 - Head Lessee to remove any buildings or improvements placed on the site after 15 December 1992 (with City consent only) and leave premises in a clean condition.
17. It is noted that the building extensions including the public toilet facility were completed prior to 15 December 1992.
18. In 2009 the sublease for the cafe area was assigned to Jonathon Marwick and Kate Marwick.
19. City officers met with the Head Lessee, Walker Paddon Vally to discuss leasing arrangements including sub leases, assignment requests, rent, building ownership, proposed improvements and extension of the lease on commercial terms.
20. In November 2010 the lease was assigned to Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust for the remainder of the term till 14 December 2013.
21. At this time the Lessee was formally advised and agreed that any new lease past the expiry date in 2013 would be negotiated on a commercial basis with rent determined by current market valuation undertaken by a licensed Valuer in line with Councils Policy – Property Management – Leases and Licences.
22. The lease is due to expire on 14 December 2013 with no option for a further term and returns a current rental of \$1,236.20 plus GST per annum.
23. The City of Albany owns the building located within the lease area. The City is responsible for all structural maintenance including electrical wiring of the lease premises with the Lessee responsible for all other repairs and maintenance and ongoing operations of the leased premises.
24. The *Commercial Tenancy (Retail Shops) Agreement Act 1985* applies to the Emu Point 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.

25. In response to recent City correspondence advising that the current lease is due to expire on 14 December 2013, the Lessee has requested a new lease over the area currently occupied by Emu Point Cafe on portion of Reserve 22698.

DISCUSSION

26. In September 2013 the City engaged licensed Valuer Opteon (Albany & Great Southern WA) to undertake a current market valuation to determine rent. The valuation concluded rent to be \$44,365.00 per annum plus GST. The current Lessee, Jonathon Marwick and Kate Marwick have confirmed agreement to the annual rent.
27. The Lessee has made minor improvements to the building with the City recently undertaking electrical works to ensure the building standards are maintained.
28. It is proposed that the City continue to allow cafe customers to use the public toilets facility on a non-exclusive basis while the proposed lease agreement is operating.
29. The Lessee has operated the Emu Point Cafe since November 2010 and developed the businesses as a valuable service and attraction to both tourist and locals.
30. The Lessee has met the obligations of the lease agreement including payment of rent and outgoings.
31. The proposed new lease will be negotiated in line with Council Policy – Property Management – Leases and Licences within the category of Commercial Leases and governed by the *Commercial Tenancy (Retail shops) Agreements Act 1985*.

GOVERNMENT & PUBLIC CONSULTATION

32. Under Section 18 (1) of the *Land Administration Act 1997* the Department of Lands has been consulted. Minister for Land's consent will be sought for the proposed new lease on portion of Crown Reserve 22698.
33. Section 3.58 of the *Local Government Act 1995* defines the requirements for the disposal of property, including leased land and buildings. The Act requires the following:
- a. A local government must give local public notice of the proposed lease inviting submissions from the public, for a period of two weeks.
 - b. Any submissions are to be considered by Council and their decision with regard to those submissions, to be recorded in the minutes.
 - c. A local government can then proceed with the lease.
34. The proposed new lease will be advertised to comply with the requirements of Section 3.58 of the *Local Government Act 1995*.

STATUTORY IMPLICATIONS

- 35. 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.
- 36. As this is Crown land, under Management Order H224473 issued to the City of Albany with the power to lease, sub-lease or licence for the purpose of “Recreation and Associated Business Purposes”, Minister for Land’s consent will be required.
- 37. Section 3.58 of the *Local Government Act 1995* defines the requirements for the disposal of property, including leased land and buildings.
- 38. Under the City’s current Town Planning Scheme 1A, the subject land is zoned “Parks and Recreation, Tourist Residential”. The existing use of (the operations of) commercial restaurant and cafe is an approved use in accordance with the Scheme.

POLICY IMPLICATIONS

- 39. Council adopted a revised Property Management – Leases and Licences Policy in September 2012.
- 40. The Policy aims to ensure that all requests for leases and licences will be treated in a fair and equitable manner using open and accountable methodology and in line with statutory procedures.
- 41. The recommendation is consistent with Council Policy – Property Management – Leases and Licences.

RISK IDENTIFICATION & MITIGATION

- 42. The risk identification and categorisation relies on the City’s Risk Management Framework:

Risk	Likelihood	Consequence	Risk Rating	Mitigation
<i>Council does not approve a new lease – reputational loss to the City</i>	<i>Unlikely</i>	<i>Minor</i>	<i>Low</i>	<i>Seek to negotiate terms to Council satisfaction.</i>
<i>Council does not approve a new lease – loss of rental income in short term</i>	<i>Unlikely</i>	<i>Minor</i>	<i>Low</i>	<i>Seek to negotiate terms to Council satisfaction.</i>
<i>Council does not approve a new lease – restaurant / cafe services will be limited within this tourist area</i>	<i>Unlikely</i>	<i>Moderate</i>	<i>Medium</i>	<i>Seek to negotiate terms to Council satisfaction.</i>

FINANCIAL IMPLICATIONS

43. In accordance with section 14B of the *Commercial Tenancy (Retail shops) Agreements Act 1985* all costs associated with the preparation, execution and completion of the new lease documentation will be payable by the City of Albany as Landlord.
44. The new lease rental as determined by a current market valuation provided by a licensed Valuer being \$44,365.00 plus GST per annum.
45. The new lease rental will be directed to COA 14053 Income – Misc Commercial.

LEGAL IMPLICATIONS

46. The agreement with the Lessee will be a formal Deed of Lease which grants an interest in the land and building with enforceable conditions and will be prepared by the City's lawyers.

ENVIRONMENTAL IMPLICATIONS

47. Nil

ALTERNATE OPTIONS

48. Council may:
 - a. Approve the request for a new lease; or
 - b. Decline the request.
49. Should Council decline the request, the Lessee would be required to remove their fixtures and fittings and return the premises to the same condition as at the commencement of the lease.
50. Council could then invite expressions of interest to lease this premises with Council considering any new lease for the vacated area.

SUMMARY CONCLUSION

51. The current Lessee is seeking a new lease over the area currently occupied known as Emu Point Cafe on portion of Crown Reserve 22698 to continue providing cafe and restaurant services within the Emu Point tourist precinct.
52. The Lessee has occupied this site since November 2010 and has met the obligations of the previous lease including payment of rent and outgoings, at no cost to Council.
53. The lease request to allow Jonathon Sylvester Marwick and Kate Patricia Marwick as Trustee for the Marwick Family Trust to continue providing cafe and restaurant services is supported.

Consulted References	<ul style="list-style-type: none">• Council Policy – Property Management – Leases and Licences• <i>Local Government Act 1995</i>• <i>Land Administration Act 1997</i>• <i>Commercial Tenancy (Retail shops) Agreements Act 1985</i>
File Number (Name of Ward)	PRO319, A152433 (Breaksea Ward)
Previous Reference	OCM 1992