



Item No: 19.1

Date: 19 June 2023

Attachment: A, B

Meeting:	Council
Title:	Strategic Property Leasing Review – Saints Gymnastics Club Inc.
Responsible Manager:	Acting Chief Executive Officer, Scott Reardon
Author:	Acting Chief Executive Officer, Scott Reardon
Key Pillar:	Financial Guiding Principle 4 – Robust and transparent allocation and prioritisation of resources
Key Focus Area:	Strategic Community Plan Focus area 3- Transparent and accountable local tier of Government
Type of Report:	Decision Required

Pursuant to Section 83(5) of the *Local Government Act 1999* (the **Act**), the Chief Executive Officer indicates that the matters contained in this report may, if the Council so determines, be considered in confidence pursuant to Section 90(2) of the Act on the basis that the information contained in the attached report is information of the nature specified in subsections 90(3)(h) of the Act being legal advice.

Recommendation (Public)

Pursuant to s90(3)(h)

Pursuant to section 90(2) of the Act the Council orders that all members of the public except, Acting Chief Executive Officer Scott Reardon, Group Manager Assets & Infrastructure James Kelly, Group Manager Public Relations & Community Services, Group Manager Corporate Service Vikki Purtle, and Group Leader Customer & Library Services Lisa Cuculowskyj, be excluded from attendance at the meeting for Agenda Item 19.1 Strategic Property Leasing Review – Saints Gymnastics Club Inc.

The Council is satisfied that, pursuant to section 90(3)(h) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is legal advice provided by Council's Lawyers in relation to Council's position relevant to a possible legal action.

The Council is satisfied that the principle that the meeting be conducted in a place open to the public has been outweighed in the circumstances because Council has not yet made a decision in relation to this advice which is subject to professional privilege.

Recommendation (Confidential)

Option 1

1. That Council receive and note the Strategic Property Leasing Review – Saints Gymnastics Club Inc report.
2. That Council receive and note the legal advice appearing as Attachment A to this report.
3. That Council rescinds resolution **CNC262/22-23** of 17 April 2023 which reads:

*That Council seek to hold an Information Briefing Session on 4 May 2023 relating to the future operations of the 39 Smith St Site and drafting the proposed Expressions of Interest for interested parties and in doing so defer the previous Council Resolution **CNC30/22-23** as determined in confidence on 19 July 2022.*

And in lieu thereof endorses the following resolutions:

4. That in accordance with resolution **CNC30/22-23**, Council authorises Administration to continue negotiations with the Saints Gymnastics Club Inc for its future tenancy at the 39 Smith Street building once the scheduled refurbishment has been completed, and a subsequent report be submitted to Council for consideration and determination on the final negotiated position;

AND

5. That Council continues to develop the proposed Expression of Interest to be released at a future date to invite interested parties to put forward submissions relating to the proposed occupancy by lease/licence, whether in part or in whole, of the remaining usable areas within the 39 Smith Street building (with the exception of the area identified as the area to be leased by the Saints Gymnastics Club Inc).

OR

Option 2

1. That Council receive and note the Strategic Property Leasing Review – Saints Gymnastics Club Inc report.
2. That Council receive and note the legal advice appearing as Attachment A to this report.
3. That Council's reaffirms its position with regard to resolution **CNC262/22-23** of 17 April 2023, and as such Council directs Administration to:
 - a. advise the President of the Saints Gymnastics Club Inc of the Council's decision to proceed with a further Information Briefing Session at a date to be notified by Administration, and to invite the Saints Gymnastics Club Inc to submit a proposal for the gymnastics area for the Council's consideration as part of the proposed Expression of Interest process;
 - b. to obtain legal advice, including an opinion from counsel as required, with respect to any action which may be threatened or commenced by the Saints Gymnastics Club Inc.

Recommendation (Public)

Pursuant to s.91(7)

That having considered Agenda Item 19.1 Strategic Property Leasing Review – Saints Gymnastics Club Inc. in confidence under section 90(2) and (3)(h) of the *Local Government Act 1999*, the Council, pursuant to section 91(7) of that Act orders that the report and attachments relevant to this Agenda Item be retained in confidence for a period of 12 months and that the minutes relevant to this Agenda Item be retained in confidence for a period of 12 months or until either a leasing contract has been signed or the matter has been finalised, excepting that Council authorises the release of the minutes to substantive party/parties to enable enactment of the resolution and that pursuant to Section 91(9)(c) of the Act the Council delegates to the Chief Executive Officer the power to review and revoke this Order.

and

That Council resolves to end its confidential deliberations pursuant to Section 90(2) of the Local Government Act 1999 Council and re-admit the public.

Summary

In January 2022 a representative from the Saints Gymnastics Club Inc. (the **Club**) made contact with Administration regarding the possibility of accessing and leasing a portion of the 39 Smith Street building (the **Site**). Elected Members were advised of the Club's initial interest in the Site at an Information & Briefing Session held on 17 February 2022, after which the general direction was for Administration to further liaise with the Club.

Discussions continued over the course of the next few months, and after a Site visit with the Club and subsequent Information & Briefing Session with Elected Members on 11 July 2022, at the Ordinary Meeting on 18 July 2022, Council resolved (**CNC30/22-23**) to continue with formal negotiations with the Club regarding their possible tenancy at the Site once the planned refurbishment had been completed.

Discussions and negotiations with the Club continued over the course of the following nine months, during which time the Club assisted with the design scoping for the Site refurbishment of the 'gymnastics area'.

At their Ordinary Meeting on 17 April 2023 Council resolved to defer any further discussions with the Club and instead conduct an open expressions of interest (**EOI**) to seek out interested parties to put forward a submission to occupy the entirety of the Site, whether in part or in whole (**CNC262/22-23**).

Following this decision on 22 May 2023 Administration received a correspondence from the Club, appearing as Attachment A to this report, which outlined the Club's view that since the commencement of negotiations they had made operational decisions for the Club's future based on the assertions and representations of both Council and in turn Administration, which as such the Club would be detrimentally impacted if a lease over a portion of the Site was now not honoured; the strong inference being that the Club may lodge a claim against the Council.

Administration has since obtained legal advice from Kelledy Jones Lawyers (**KJL**) (the **Advice**) in relation to the matter, appearing as Attachment B to this report, which in summary indicates that:

- whilst the Club was aware that there was a final approval process;
- Council expressed ongoing support to continue with formal negotiations;
- the Club held an understanding that no EOI process was in place at the time negotiations commenced and that Administration was only negotiating with the Club;
- public assertions that gymnastics would be returning to Walkerville were made prior to **CNC262/22-23** being determined; and
- as the Club maintained ongoing involvement in the refurbishment design process;

the Club may have reasonably obtained enough assurances that the Council would support a lease and may have legitimately held the belief that any final approval was procedural in nature given the broadly-held view that there was support within the Council and in the community for gymnastics to be offered at the Site.

As such, the Advice recommends that Council should approach any decision to proceed with **CNC262/22-23** with caution, having regard to the legal, commercial and reputational impacts of such a decision.

The Advice further suggests that as the recent decision of Council (**CNC262/22-23**) was made as part of a variation of recommendation and not as the result of researched and documented report, Council could be viewed to having acted without giving sufficient consideration to the matter and that the decision making process was not transparent and well-informed; thus exposing Council to a possible Ombudsman's claim of Maladministration.

This report, its recommendations and the legal advice are now provided to Council to assist with Council's deliberations.

Background

At their Ordinary Meeting of 18 July 2022, Council resolved in Confidence:

CNC30/22-23

Moved: Cr Wilkins

Seconded: Cr Bishop

1. *That Council receives and notes the Strategic Property & Leasing Review – Saints Gymnastics Club report.*
2. *That Council directs Administration to continue with formal negotiations with the Saints Gymnastics Club Inc. regarding their possible tenancy at facility located 39 Smith Street Walkerville once the planned refurbishment has been completed.*
3. *That Council directs Administration to undertake interim necessary works to the basketball stadium and the adjacent amenities to allow for the Saints Gymnastics Club to occupy and utilise the facility from 30 November 2022, while the refurbishment works are concurrently undertaken to the Gymnastics area of the facility;*
4. *That Council direct Administration to provide an update on the progress of negotiations to the Member for Adelaide, Lucy Hood.*
5. *That once the aforementioned recommendations 1 and 3 have been completed, a subsequent report, including timeline, be submitted to provide Council with an update.*

At their Ordinary Meeting of 17 April 2023, Council resolved in Confidence:

CNC262/22-23

Moved: Cr Trotter

Seconded: Cr Vanstone

*That Council seek to hold an Information Briefing Session on 4 May 2023 relating to the future operations of the 39 Smith St Site and drafting the proposed Expressions of Interest for interested parties and in doing so defer the previous Council Resolution **CNC30/22-23** as determined in confidence on 18 July 2022.*

Discussion/Issues for Consideration

This report and attachments are presented to assist Council in their decision-making process regarding this matter. Administration has provided extensive information to KJL to assist in forming their advice to Council.

Administration will therefore now be guided by Council.

Options for Consideration

Option 1

1. That Council receive and note the Strategic Property Leasing Review – Saints Gymnastics Club Inc report.
2. That Council receive and note the legal advice appearing as Attachment A to this report.
3. That Council rescinds resolution **CNC262/22-23** of 17 April 2023 which reads:

*That Council seek to hold an Information Briefing Session on 4 May 2023 relating to the future operations of the 39 Smith St Site and drafting the proposed Expressions of Interest for interested parties and in doing so defer the previous Council Resolution **CNC30/22-23** as determined in confidence on 19 July 2022.*

And in lieu thereof endorses the following resolutions:

4. That in accordance with resolution **CNC30/22-23**, Council authorises Administration to continue negotiations with the Saints Gymnastics Club Inc for its future tenancy at the 39 Smith Street building once the scheduled refurbishment has been completed, and a subsequent report be submitted to Council for consideration and determination on the final negotiated position;

AND

5. That Council continues to develop the proposed Expression of Interest to be released at a future date to invite interested parties to put forward submissions relating to the proposed occupancy by lease/licence, whether in part or in whole, of the remaining usable areas within the 39 Smith Street building (with the exception of the area identified as the area to be leased by the Saints Gymnastics Club Inc).

OR

Option 2

1. That Council receive and note the Strategic Property Leasing Review – Saints Gymnastics Club Inc report.
2. That Council receive and note the legal advice appearing as Attachment A to this report.
3. That Council's reaffirms its position with regard to resolution **CNC262/22-23** of 17 April 2023, and as such Council directs Administration to:
 - a. advise the President of the Saints Gymnastics Club Inc of the Council's decision to proceed with a further Information Briefing Session at a date to be notified by Administration, and to invite the Saints Gymnastics Club Inc to submit a proposal for the gymnastics area for the Council's consideration as part of the proposed Expression of Interest process;
 - b. to obtain legal advice, including an opinion from counsel as required, with respect to any action which may be threatened or commenced by the Saints Gymnastics Club Inc.

Option 3

That Council direct Administration to undertake the following alternate action(s)

- _____

Analysis of Options

Option 1 provides and outcome the promptly resolves the situation, ensures an anchor tenant at the Site, allows for the Club to operate on additional days and times to further activate the Site for the community, secures a notable annual rental amount, and allows Council to proceed with an EOI for the remainder of the Site for additional tenancy opportunities.

It should be noted that if Option 1 is selected, Recommendation 3 should be made public.

Option 2 provides an outcome that while allows Council to proceed to an EOI for the entirety of the Site, this option has reasonable potential to expose Council to legal, commercial and reputational damage, a possible claim by the Club and/or investigation of Maladministration by the Ombudsman, with the need to suspend and/or abandon any such commenced EOI should such action or investigation commence (or affect the EOI process in any way).

Financial Implications

Should Council determine to endorse **Option 1**, Council will receive an additional annual rental amount up to and possibly including \$40,000 per year for the Club's use of a portion of the Site. It should also be noted that additional rental amounts would be received for those other successful parties from the EOI process.

Should Council determine to proceed with **Option 2**, the financial implications are presently unknown on the basis that Council may be subject to legal costs as well as possible damages if a claim from the Club is successful, and that the EOI process has not yet been undertaken.

Community Implications

The sport of gymnastics, in one form or another, has been a much loved sport in Walkerville and the community (both local and greater) expressed disappointment when the service was no longer provided following the close of the facility. **Option 1** delivers upon the public assertions of the Mayor in 'bringing back gymnastics' to Walkerville, as well as reactivating the remainder of the Site for other user groups and future uses.

Due to the present uncertainty of the outcomes of the EOI contemplated by **Option 2**, this option cannot guarantee an outcome that will necessarily be superior to Option 1, or meet the community's expectations.

Governance Implications

Option 1 delivers an outcome that is consistent with resolution **CNC30/22-23** and does not put the Council at risk of any claim by the Club (including any claim in estoppel) and manages any complaint or scrutiny of the Council which may arise given the Council's change in position in accepting and passing **CNC262/22-23** as a motion without notice.

Option 2 delivers an outcome that while consistent with resolution **CNC262/22-23**, the Council faces a very real risk of the Club pursuing action against the Council, but may also expose the Council to the scrutiny of its decision-making process.

Preferred Option & Reasoning

Option 1 is the preferred option on the basis that it is aligned with the previous decisions of the Council and the ensuing assertions and representations of the Council and Administration, and avoids reasonable exposure to and potential of legal, commercial and reputational damage, and possible claims of Maladministration to the Ombudsman.

This being noted however, Administration will be guided by Council.

Attachment

Attachment A	Letter from Saints Gymnastics Club Inc. – 22 May 2023
Attachment B	Legal Advice – Kelledy Jones – 15 June 2023



22 May 2023

Mr Scott Reardon
Acting Chief Executive Officer
Town of Walkerville
PO Box 55
Walkerville SA 5081

By email: SReardon@walkerville.sa.gov.au

39 Smith Street Walkerville SA 5081 & Saints Gym Club Incorporated

Dear Scott

This letter is written on behalf of the Committee of Saints Gym Club Incorporated (**SGC**).

As you know, we, on behalf of the SGC, have been corresponding with you on behalf of the Town of Walkerville, in relation to the premises situated at 39 Smith Street Walkerville SA 5081 (**Smith Street**).

We now consider it appropriate to formalise the SGC's position in relation to Smith Street.

Saints Gym Club Inc.

The SGC is a community gymnastics club established in 1978. We have over 360 gymnasts from ages four and up. We currently operate from the gymnasium located at St Peter's Girls' School. The SGC is managed by a volunteer Committee.

As you are aware, in late 2019, we were advised the St Peter's Girls' gymnasium would be undergoing redevelopment and that once works commenced in or about November 2023 the gymnasium would not be available to the SGC.

If an alternate, and suitable, premises cannot be identified for occupation by the SGC by, at the latest, November 2023, the SGC will be forced to cease all operations. Such a decision would detrimentally impact hundreds of people.

Engagement with the Town of Walkerville

In December 2021, we approached the Town of Walkerville in respect of leasing the premises at 39 Smith Street.

Over the next few months, the SGC was invited, and indeed encouraged, to contribute to the design of Smith Street's redevelopment. Representatives of the SGC both met and corresponded with you and the Town's architects to discuss our specific requirements.



In July and October 2022, we met with you to discuss the SGC's lease and occupation of the site (**July and October 2022 meetings**).

At the July and October 2022 meetings, you showed us a copy of the lease which was understood to be solely for the SGC's lease of designated areas in Smith Street. Terms of the lease were discussed and settled on, including, but not limited to the initial term of 5 years, the rent amount (an amount in line with our current cost to set up and pack down), payment of utilities and outgoings (to be covered by the SGC), secure and sole access to the Smith Street designated areas by the SGC, insurance (building insurance was to be covered by the Town; equipment insurance was to be covered by the SGC), and that a security system could be installed.

Although the SGC was not provided a copy of the lease to execute, you assured us that the SGC's lease of Smith Street would be proceeding.

Throughout the remainder of 2022 and into February 2023, we continued to meet and correspond with you, and the Town's architects, about Smith Street and our specific requirements for the redevelopment.

We were told on numerous occasions the lease would be provided imminently.

Our final meeting with you was on 28 April 2023 advising the Town was reviewing the options for Smith Street.

We understand Smith Street will be discussed at a Council meeting on Monday, 22 May 2023.

Position of Saints Gym Club Inc.

At the July and October 2022 meetings, you, on behalf of the Town, made representations and assurances to us. These representations and assurances confirmed, either expressly or by implication, that the SGC would be the lessee of the Smith Street, in line with the terms settled upon at the July and August 2022 meetings (**representations and assurances**).

The discussions between you, the Town's architect, and us which continued thereafter only confirmed the veracity of the representations and assurances. You were aware that we were reliant upon your representations that the SGC were to lease the premises at Smith Street commencing December 2023, and that we ceased looking at any other premises on the basis of your representations and assurances.

In light of the discussion at our meeting on 18 April 2023 and the upcoming Council meeting, we have significant concerns as to the Town's commitment to honour its representations and assurances.

If the Town were to now resile from its representations and assurances, and the SGC was not allowed to take occupation of Smith Street, the SGC's viability and future will be in doubt. If the representations and assurances were to now be unfulfilled, the SGC would be significantly prejudiced and be placed in a position of material disadvantage. The SGC would undoubtedly suffer significant detriment and loss.

Request for advice from the Town of Walkerville

To allow us to assess the SGC's current and future position, we are seeking the Town's written response to the following matters:

1. When should the SGC expect receipt of the written lease in accordance with the terms settled upon at the July and August 2022 meetings.



2. What are the current architectural drawings relating to the gymnastics area redevelopment.
3. What is the date the SGC can anticipate occupancy will be provided (either to the initial basketball area or to the gymnastics area (once redevelopment is complete)).

In respect of item 1 above, you have repeatedly represented and assured us that you had been preparing the lease. As such, we request the lease be provided as a matter of priority.

The Town's response to this letter and the matters raised herein is requested by Monday 29 May 2023.

Absent your response within the requested time, or if we do not consider your response adequately addresses our concerns, we will be in the unfortunate position where we will be compelled to consider our position further. The Committee's strong preference is to resolve this matter in an amicable, pragmatic and commercial manner – without the need to raise public awareness.

We kindly ask you bring this letter to the attention of the Councillors at the upcoming Council meeting.

Regards

DocuSigned by:
Jessica Fraser
E1FDA692C7714FD...

Jessica Fraser

President

DocuSigned by:
Lucy Sach
FB6629F6BF69474...

Lucy Sach

Treasurer

For and on behalf of the Committee of Saints Gym Club Incorporated.

Copy to: Ms Melissa Jones, Mayor
By email: mjones@walkerville.sa.gov.au

Town of Walkerville
By email: walkerville@walkerville.sa.gov.au

15 June 2023

Mr Scott Reardon
Acting Chief Executive Officer
Town of Walkerville
66 Walkerville Terrace
GILBERTON SA 5081

VIA EMAIL: SReardon@walkerville.sa.gov.au

Dear Scott

SAINTS GYM CLUB – 39 SMITH STREET WALKERVILLE

We refer to our recent correspondence in relation to this matter and in particular, to our preliminary advices provided by email on 25 May 2023 and 29 May 2023.

Advice requested

In accordance with your email dated 24 May 2023, you have requested advice in relation to the impact of prior communications with the Saints Gym Club Incorporated (the **Club**) in connection with a lease of a portion of the premises located at 39 Smith Street Walkerville (the **Site**), to relocate its gymnastics club and operations.

Specifically, you have queried if the Club can rely on the parties' conduct and negotiations, to support a claim by the Club that negotiations were so advanced, the Club could rely on any 'implied contract' between the parties.

Background

1. We understand the background to this matter as follows:
 - 1.1 In 2021 Council undertook an EOI process for the Site.
 - 1.2 This EOI was abandoned by resolution of the Council in October 2021 (refer CNC116/21-22). Instead, the Council resolved to retain the building, and to implement a five (5) year repair and maintenance program, and to reactivate the facility for gymnastics, basketball and other associated sports and services. Whilst the report and discussions relating to the EOI process were considered in confidence, the Council resolution was made public.
 - 1.3 In December 2021 the Club approached Administration seeking advice about the future of the Site and indicating an interest in becoming a tenant of the Site, as their current tenure at St Peter's Girls' School was due to expire in November 2022.

Scott Reardon

15 June 2023

- 1.4 Elected members were advised of these discussions and the Club's interest in the Site at an Information & Briefing Session held on 17 February 2022. At this Information & Briefing Session guidance was given to Administration by Council to further liaise with the Club.
- 1.5 On 17 May 2022 the Club requested a tour the Site, subsequent to which the Club emailed Administration with details of its requirements (including to reference the national guidelines for gymnastics) for the gymnastics space.
- 1.6 On 5 June 2022, the Club proposed a MOU with the Council, on the Club's understanding that "*if it's too early for us to discuss lease terms*". Notwithstanding this request, the Club subsequently agreed that it would wait to receive a formal lease from the Council.
- 1.7 In June 2022 the Club provided an unsolicited bid for tenancy at the Site which was considered at the Council's ordinary meeting in July 2022 (see further below). A rental of between \$30,000 to \$40,000 per year was discussed, but the final amount has never been settled.
- 1.8 On 28 June 2022, the Council received notice of grant funding in the amount of \$5 million specifically to assist with the redevelopment of the Site. This grant followed an election commitment by then-candidate, Lucy Hood MP, prior to the State election, which was then confirmed following Ms Hood's (and Labor's) successful election.
- 1.9 Council was briefed about the Club's ongoing interest in the Site and its unsolicited bid at an Information & Briefing Session held on 11 July 2022.
- 1.10 A confidential report was submitted to the Council at its meeting on 18 July 2022 during which meeting, the Council resolved to commence formal negotiations with the Club and passed the following resolutions in confidence:
 2. *That Council directs Administration to continue with formal negotiations with the Saints Gymnastics Club Inc. regarding their possible tenancy at facility located 39 Smith Street Walkerville once the planned refurbishment has been completed.*
 3. *That Council directs Administration to undertake interim necessary works to the basketball stadium and the adjacent amenities to allow for the Saints Gymnastics Club to occupy and utilise the facility from 30 November 2022, while the refurbishment works are concurrently undertaken to the Gymnastics area of the facility;*
 - ...
 5. *That once the aforementioned recommendations 1 and 3 have been completed, a subsequent report, including timeline, be submitted to provide Council with an update.*

(the **July 2022 Resolutions**)

- 1.11 Following the July 2022 Resolutions, you met with the President of the Club, Jessica Fraser to verbally inform her of Council's decision. Ms Fraser was not provided with a written copy of the July 2022 Resolutions.
- 1.12 On 31 August 2022 you met again with Ms Fraser and other members of the Club's

committee to discuss a possible lease of the Site, including the general conditions of any such lease, and the proposed refurbishment of the Site; to which the Club provided input.

- 1.13 At or around this time, the Club informed Administration that their lease termination date was November 2023, not November 2022, as had been previously indicated to the Council. In this respect, we note that the change in date is not fatal to the July 2022 Resolutions, and that Resolution 2 was unaffected in giving authority to Administration to continue negotiations with the Club in relation to a possible tenancy *“once the planned refurbishment has been completed”*.
- 1.14 Between August 2022 and October 2022, the Club was involved in discussions with Administration and the Council’s architects and provided input in relation to the space within the Site to be refurbished for gymnastics. The Club’s input was sought over several revisions of the gymnastics space and the specific requirements of the Club, addressed and negotiated.
- 1.15 During these negotiations, the Club was shown a copy of the Council’s template lease which was discussed at one (or more) of those meetings, but no copy was provided to the Club. Indeed, no commercial terms were finalised to give rise to any certainty around the Club’s intended tenure.
- 1.16 Due to the Council having entered the Caretaker period in the lead up to the local government elections from early September until mid-November 2022, discussions with the Club were necessarily general in nature, but the design process with the Club’s input continued. The outgoing Council remained supportive of the Club becoming a tenant of the Site.
- 1.17 Over the early months of 2023, various general conversations between Administration and Ms Fraser continued in relation to the refurbishment of the Site and the possible tenancy by the Club.
- 1.18 In March 2023, Ms Hood MP featured an update in the Adelaide Electorate’s publication *“Your Local Community News”* in relation to the concept designs for the Site. Mayor Jones is quoted in this article to be looking forward to the Site reopening and *“[p]articularly, so that there is a facility to have gymnastics back in Walkerville”*.
- 1.19 At its Ordinary Meeting of 17 April 2023 (**April 2023 Meeting**) a report was put to the Council to select and endorse the final design and costing options for the refurbishment of the Site.
- 1.20 During the April 2023 Meeting, a variation to Administration’s proposed recommendation (**Motion without Notice**) was moved by the Deputy Mayor, which was accepted by Mayor, seconded and carried unanimously. The effect of which was to cease and defer negotiations with the Club, until such time that a new open expression of interest for the entire facility had been undertaken. This motion was carried unanimously (CNC262/22-23) by the Chamber (**April 2023 Resolution**).
- 1.21 The April 2023 Resolution had not formed part of the report which was presented to Council in the agenda for the April 2023 Meeting, nor had it been formally proposed or discussed with Administration prior to that meeting.

Scott Reardon

15 June 2023

- 1.22 In which case, there is also a 'live' question as to whether it could be said that the motion without notice, which subsequently became the April 2023 Resolution, could be said to be transparent and informed for the purposes of regulation 4 of the *Local Government (Procedures at Meetings) Regulations 2013*.
- 1.23 Whilst it does not act to 'invalidate' the Council's decision in this respect, **it is** a matter that could give rise to a finding the Council committed maladministration in public administration by the Ombudsman in the circumstances, if a complaint were to be made to that office regarding this matter.
- 1.24 To this end then, the intent to formally change the position of the Council was not known by Administration, prior to the April 2023 Meeting, in which case, you were unable to advise (i.e. fully inform) the Council of the proposed risks associated with such a position, nor had the Council instructed you to discontinue discussions with the Club which had been occurring in accordance with the July 2022 Resolutions.
- 1.25 On 28 April 2023 you met with Ms Fraser to notify her of the Council decisions from its Meeting of April 2023 and specifically, the April 2023 Resolution.
- 1.26 In response to that meeting, on 22 May 2023 the Club wrote to the Council making assertions that the Council and/or Administration has made various "*representations and assertions*" (as defined in that letter) giving the Club the assurance that it would be the lessee of the Site "*in line with the terms settled upon at the July and August 2022 meetings*" (the **Club's Assertions**).
- 1.27 Specifically, the Club's Assertions include:
- If the Town were to now resile from its representations and assurances, and the SGC [the Club] was not allowed to take possessions of Smith Street, the SGC's viability and future will be in doubt. Of the representations and assurances were to now be unfulfilled, the SGC would undoubtedly suffer significant detriment and loss.*
- 1.28 On 29 May 2023, you provided a 'holding response' to the Club, indicating a need for the Council to consider the Club's Assertions.
- 1.29 Finally, we understand that Administration conveyed to the Club that, even if the parties were able to reach a negotiated position in relation to any lease to the Club, any proposed lease would be subject to final Council approval, and public consultation should a lease term in excess of five (5) years be granted by Council, in accordance with section 202 of the *Local Government Act 1999*
2. Please let us know if any of this Background is incorrect, or if any material information has not been notified to us, as this may affect our advice.

Advice

3. As set out above, you have requested advice querying:
- 3.1 if an implied contract or lease has been formed with the Club; and
- 3.2 if there is any risk to the Council to proceed in accordance with its resolutions at the April 2023 Meeting.

Scott Reardon

15 June 2023

4. We will consider each of these in turn, however also note our previous advices that it is our view the language in Club's Assertions suggests the Club is putting the Council 'on notice' that it will pursue an estoppel claim against the Council.

Can the Club assert that an implied contract or lease been formed with the Club?

5. An implied contract may arise in circumstances where two or more parties act in a manner which indicates they intend to enter into a contract, however, the agreement is not formalised in writing by way of an executed contract.
6. The starting point is that a lease must generally be in writing (*Law of Property Act 1936* section 26). This is a general proposition throughout Australia. However, Courts have developed legal concepts in equity, including estoppel and part-performance, which have displaced this requirement and act to enforce oral agreements and/or reliance on conduct.
 - 6.1 in the case of part-performance, a contract may be evidenced by the conduct of the parties which suggests that a contract exists between them; and
 - 6.2 in the case of estoppel, a party is prevented from inducing another party to act in a certain way and then to resile from that position, to the detriment of the that other party.
7. In the present circumstances, the Club may seek to pursue a claim in proprietary estoppel, rather than to rely on part-performance (given there is no aspect of the lease, or any obligations, which have commenced).
8. Proprietary estoppel provides equitable relief to a party in circumstances where a party relies on a promise made by another party, and that they have or will suffer detriment if the promise is withdrawn. Further, proprietary estoppel seeks to give relief where the claimant can demonstrate that it would be unconscionable for the promise to be broken.
9. Ultimately, the success of any argument put by the Club in relation to its proposed tenure as lessee will depend on the facts as presented by the Club. Whilst the Club was aware that a final approval process was necessary, the support of the Council and Administration during negotiations, and the involvement of the Club in the design process, may have led the Club to legitimately believe that any approval was procedural in nature.
10. Indeed, whilst the Council's decision-making must not be fettered, the Club may have obtained enough assurances that the Council would support a lease which did not depart from the Council's standard template. This is particularly so, given the Council's support in progressing negotiations in accordance with the July 2022 Resolutions.
11. Similarly, the public support for a local gymnastics facility, including Ms Hood MP, and the Mayor, may have also given sufficient assurance to the Club that any public consultation would be uncontroversial and supported.
12. If a proprietary estoppel is established by the Club, the appropriate relief depends on the circumstances. If the Club has found an alternative location to relocate (but it is less favourable), the Club may seek damages. However, we expect that the relief the Club will seek in this matter is specific performance, that is, the parties enter into a lease of the Site in accordance with its prior negotiations.

Scott Reardon

15 June 2023

Is there a risk to the Council if it proceeds in accordance with the resolutions passed at the April 2023 Meeting?

13. Put simply, yes.
14. The language in the 22 May Letter suggests the Club will pursue a claim against the Council, and is likely to do so with haste, given its must vacate its current premises in November. That is not to say that the Council would not be successful in defending any claim by the Club, however, the Council is 'on notice' of this position.
15. A proprietary estoppel claim will be argued on the facts and to this end, without all relevant information (which includes any information and allegations which may be put by the Club) we can only provide preliminary advice to the Council on these issues.
16. Given we do not have a particularised claim from the Club, we can do little more than to speculate the basis upon which it may assert any claim against the Council.
17. However, having regard to the Background, it is likely the Club may rely on any one or more of the following 'representations and assertions':
 - 17.1 the Club's understanding that no EOI process was in place and that Administration was only negotiating with the Club in accordance with the July 2022 Resolutions;
 - 17.2 the Club's involvement with Administration and the Council's architects in developing the design for the gymnastics space within the Site;
 - 17.3 the review of the template lease agreement, irrespective that the Club was not given a copy, we understand the terms were discussed in some detail;
 - 17.4 the Club's reliance on its negotiations with the Council in relation to the Site, such that it is less than 6 months prior to the Club's current lease expiring, with no known alternatives being investigated by the Club;
 - 17.5 reliance upon Mayor Jones' statements regarding the return of gymnastics to Walkerville (given the Club was several months into negotiations with the Council); and
 - 17.6 finally, the Club may seize upon the change in the Council's position, and in contrast with the behaviour of the Administration, that a motion without notice was put at the April 2023 Meeting.
18. Irrespective any claims which may be brought by the Club, the July 2022 Resolutions were not conclusive and were always subject to the matter returning to the Council and public consultation under section 202 of the *Local Government Act 1999*.
19. The Council may also defend any claims made by the Club on the following bases:
 - 19.1 the Council's refusal to enter into a MOU (or other 'pre lease' type agreement), demonstrating that the Council had not wholly committed to leasing the Site to the Club;
 - 19.2 the template lease was never agreed, nor tailored for the Club's purposes – it was simply a presentation of the Council's template document, for the Club to have awareness of the terms of any lease (with the option for the Club to have withdrawn, had it not agreed with

Scott Reardon

15 June 2023

the template); and

- 19.3 in such circumstances it is the Club's own commercial risk not to have alternative plans in place if negotiations with the Council were to be abandoned (or deferred, in the present circumstances).
20. It is relevant to point out that the Council's *Procurement Policy* permits the acceptance and consideration of 'unsolicited proposals' of the type made by the Club ahead of the July 2022 Resolutions. Relevantly, the policy requires that "*principles of probity and fair and equitable procurement activities will be observed*". The Council should have regard to the requirements of this policy in any decision to defer (or even cease) negotiations.
21. At this juncture, the Council has two options:
- 21.1 to proceed in accordance with the April 2023 Resolution, and risk a claim from the Club. If the claim is successful (or the Council agrees to enter into a lease with the Club) the Council will need to abandon any EOI process commenced by it; or
- 21.2 to rescind the April 2023 Resolution and to progress negotiations with the Club.
22. The Council should approach this decision with caution, having regard to the legal, commercial and reputational impact of its decision. We understand the Council will consider this matter at its Ordinary Meeting on Monday 19 June 2023.
23. We also note, as 'flagged' above, if the Club were to make a complaint to the Ombudsman, its decision making is also exposed on the April 2023 Resolution to a finding that its decision making was not transparent and informed, and hence, the Council committed maladministration in public administration.

Recommendation & next steps

The Council should be prepared to defend a claim by the Club should it proceed in accordance with the April 2023 Resolution.

In these circumstances, we **recommend** we promptly brief counsel to prepare for the Club's claim.

Further, in accordance with your preliminary response to the Council on 29 May 2023, we understand the Club is expecting you to notify it of the Council's decision following the Ordinary Meeting.

Let us know if you would like us to progress either of these steps for the Council at this time.

Otherwise, do not hesitate to contact us if you have any queries.

Yours sincerely

KELLEDY JONES LAWYERS



ZINTA DOCHERTY

Direct Line: 08 8113 7112

Mobile: 0413 998 883

Email: zdocherty@kelledyjones.com.au