



Item No: 19.3

File No: 16.51.4.9

Date: 16 December 2019

Attachment: A

Meeting:	Council
Title:	Application for Assignment of Pre-Kindy Lease
Responsible Manager:	Group Manager Corporate Services, Katy Bone
Author:	Business Analyst (Property & Contracts), Scott Reardon
Key Focus Area:	Strategic Community Plan Focus area 3 - Transparent and accountable local tier of Government
Key Focus Area:	Financial Guiding Principle 1 - Finances managed responsibly
Type of Report:	Decision Required

Pursuant to Section 83(5) of the *Local Government Act 1999*, the Chief Executive Officer indicates that the matter contained in this report may, if the Council so determines, be considered in confidence pursuant to Section 90(2) of the *Local Government Act 1999* on the basis that the information contained in the attached report is information of the nature specified in subsections 90(3)(b) of the Act being commercial information of a confidential nature the disclosure of which could reasonably be expected to prejudice the commercial position of the person who supplied the information or that would confer a commercial advantage on a third party and that would, on balance, be contrary to the public interest.

Recommendation (Public)

Pursuant to s90(3)(b)

Pursuant to section 90(2) of the *Local Government Act 1999* the Council orders that all members of the public, except the Chief Executive Officer Kiki Magro, Group Manager Asset & Infrastructure Josh Bowen, Group Manager Planning, Environment & Regulatory Services Andreea Caddy, Group Manager Corporate Services Katy Bone, Group Manager Customer Experience Danielle Garvey, Manager Community Development & Engagement Fiona Deckert, Business Analyst (Property & Contracts) Scott Reardon and Council Secretariat Vanessa Davidson, be excluded from attendance at the meeting for Agenda Item Application for Assignment of Pre-Kindy Lease.

The Council is satisfied that, pursuant to section 90(3)(b) of the Act, the information to be received, discussed or considered in relation to this Agenda Item is information the disclosure of which could reasonably be expected to confer a commercial advantage on a person with whom the Council may propose to conduct business and would therefore prejudice the commercial position of the Council.

Recommendation (Confidential)

1. That Council endorses the application made by Angie and Corey Burford which seeks to Assign the Lease over the Walkerville Pre-Kindy, that being the portion of the land contained within Certificate of Title Volume 5255 Folio 827;
2. That all costs and legal fees associated with the preparation of the Deed of Assignment be borne by the Lessee / Assignee; and

3. That the Mayor and Chief Executive Officer be authorised to execute any/all relevant and ancillary documents that pertain to the proposed Lease Assignment between Walkerville Pre-Kindergarten Pty Ltd and Council including affixing of the common seal of Council.

Recommendation (Public)

Pursuant to s.91(7)

That having considered Agenda Item 19.3 Application for Assignment of Pre-Kindy Lease in confidence under section 90(2) and (3)(b) 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 6 months 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 *Local Government Act 1999* the Council delegates to the Chief Executive Officer the review and power to revoke this Order

and

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

Summary

Sally Anne Cudmore (**Lessee**) has held a lease over the Walkerville Pre-Kindy for 20 years; commencing her tenancy 16 July 1999. The most recent Lease Agreement (**Agreement**) (dated 13 November 2017) authorised tenancy of the site for an initial term of two (2) years commencing 1 January 2018 (expiring 31 December 2019), and included one (1) right of renewal for a subsequent three (2) year period commencing 1 January 2020 (expiring 31 December 2022). The Lessee exercised this right of renewal on 25 September 2019.

Simultaneously the Lessee has engaged in negotiation with a third party with the view of both selling the Pre-Kindy business and Assigning the Lease. On 4 November 2019 Administration received an application from Angie and Corey Burford (**Assignee / Applicant**) who now seek to have the Pre-Kindy Lease Assigned to them as part of the business purchase.

Administration has reviewed the submitted application documentation and on 29 November 2019 met with the Applicant. Administration considers the Applicant to be suitable for the purposes of Assignment as they are deemed to satisfy the criteria as outlined in s43 of the *Retail and Commercial Lease Act 1995*. On this basis it is suggested that Council endorse the recommendation outlined in this report.

Background

At their ordinary meeting 20 November 2017 Council resolved as follows:

CNC157/17-18

That Council:

1. *Authorises the Chief Executive Officer to finalise the negotiations and enter into a lease with Andrew and Sally Cudmore, in respect to the leasing of 13 Alfred Street, Walkerville*
2. *That the proposed lease:*
 - *Be a commercial lease based on the Retail and Commercial Leases Act 1995;*
 - *Be for an initial term effective from 1 January 2018 to 31 December 2019;*
 - *Include an option to renew for a further three years at the discretion of the lessee; and*
 - *Set an annual rental of \$19,175 subject to annual CPI increases*

Discussion/Issues for Consideration

Lease Agreement and Right of Renewal

Following a tender process, on 20 November 2017 Council resolved to enter in a new Lease Agreement (**Agreement**) with Sally Anne Cudmore (**Lessee**). The initial term of the Agreement commenced 1 January 2018 for a period of two (2) years. The Agreement included one (1) right of renewal for a subsequent term of three (3) years “at the discretion of the Lessee”.

In order to exercise their right of renewal, Clause 12 of the Agreement required to the Lessee to serve written notice on the Lessor no less than three (3) months from the expiration of the initial Term (viz 30 September 2019). Administration received said notice on 25 September 2019 and on the basis that the renewal was subject to the “*Lessee’s discretion*” the process of automatic renewal was triggered. It should be noted that this renewal does not require Council approval by way of Resolution.

Assignment & Assignee

Subject to Landowner consent, clause 9 of the Agreement allows for the Lease to be Assigned to a third party in the event that the business is sold. Section 43 of the *Retail and Commercial Leases Act 1995 (Act)* outlines the grounds in which consent to Assignment can be withheld by a landowner; those grounds being:

1. if the proposed assignee proposes to change the permitted use; or
2. if the proposed assignee is unlikely to be able to meet the financial obligations of the lessee under the lease; or
3. if the proposed assignee's retailing skills are inferior to those of the assignor; or
4. if the lessee has not complied with procedural requirements for obtaining the lessor's consent;

On 4 November 2019 Administration received an application from Angie and Corey Burford (**Assignee / Applicant**) who now seek to have the Pre-Kindy Lease Assigned to them as part of the business purchase. On review of the application, and in reference to the criteria set out in s43 of the Act, the Assignee:

- Proposes to continue the existing operation of the Pre-Kindy while also seeking to invest in and expand upon the business;
- Is self-funded and in a financial position to meet the obligations of the lease;
- Has extensive experience in running a successful business (Corey Burford), is qualified and has worked in the industry for since 2002 (Angie Burford).

It should be noted that Angie Burford has worked at the Walkerville Pre-Kindy since 2013.

Administration considers the Applicant to be suitable for the purposes of Assignment as they are deemed to satisfy the criteria of s43 of the *Retail and Commercial Lease Act 1995*.

Terms & Conditions of Lease Assignment

Licensee	Walkerville Pre-Kindergarten Pty Ltd ABN 75 637 030 267
The Land	The whole of the land contained within Certificate of Title Volume 5255 Folio 827.
Premises	The portion of the land comprised within Certificate of Title Volume 5255 Folio 827.
Permitted Use	Childcare Centre
Term	Three (3) years
Commencement Date	1 January 2020
Annual Commencing Rent	\$20,000
Renewal Term	Nil.

Rent Review	Annual CPI Increases on Licence Anniversary Date.
Public Liability Insurance	\$20,000,000

Options for Consideration

Option 1

1. That Council endorses the application made by Angie and Corey Burford which seeks to Assign the Lease over the Walkerville Pre-Kindy, that being the portion of the land contained within Certificate of Title Volume 5255 Folio 827;
2. That all costs and legal fees associated with the preparation of the Deed of Assignment be borne by the Lessee / Assignee; and
3. That the Mayor and Chief Executive Officer be authorised to execute any/all relevant and ancillary documents that pertain to the proposed Lease Assignment between Walkerville Pre-Kindergarten Pty Ltd and Council including affixing of the common seal of Council.

Option 2

That Council refuses the proposal to Assign of Lease on the following grounds:

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Analysis of Options

Option 1

Provides a recommendation that aligns with focus areas 3 of 2016 – 2020 *Living in the Town of Walkerville: a strategic community plan*, ensures the continual activation of a Council asset, and maintains a revenue stream in the form of rent for the following three (3) years.

Option 2

This recommendation does not support either the current Lessee or proposed Lessee in their business dealings.

Financial Implications

Once the Lease is Assigned to the Applicant, the applicant assumes all responsibilities and obligations under the Lease; including those related to rent and general maintenance. The annual commencing rent for the Lease (commencing 1 January 2020) totals \$20,000 (plus GST and is subject to annual CPI increases.

In the 2019/20 financial year Council has adopted an annual amount of \$10,000 for the maintenance of the facility. As a Council owned Asset, pursuant to the terms and conditions of the Lease, Council is responsible for ensuring the structural integrity and general functionality of the facility.

Community Implications

On the basis that the permitted use of this site has been a Childcare Centre / Pre-Kindy for a number of decades, and that there is no intended change to the permitted use, there are no associated Community Implications associated with the proposed Assignment and/or this report.

Governance Implications

The proposal is consistent with Council's *Lease and Licence for Community Land and Buildings Policy* in that it seeks to optimise the use of its community land holdings for the benefit of the community and maximises the amount of revenue it derives from its community land holdings.

Preferred Option & Reasoning

Option 1 is the preferred option as it supports the continuation of a long-term community facility, generates revenue for Council by way of reasonable rent and activates Council's assets.

Attachments

Attachment A	Application for Assignment Documentation
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Released