



8.1.5 REQUEST TO DEMOLISH EXISTING DEVELOPMENT AND BUILD NEW 'HOLIDAY COTTAGE' AND OUTBUILDING - SITE 72 THIRD AVENUE, PEACEFUL BAY

File Ref:	A1879
Applicant / Proponent:	Summit North West on behalf of G & G Clark (Lessees)
Subject Land / Locality:	Site 72 Third Avenue, Peaceful Bay
Disclosure of Officer Interest:	Nil
Date:	10 June 2011
Author:	Annette Harbron, Director of Planning and Sustainability
Authorising Officer:	Dale Stewart, Chief Executive Officer
Attachments:	8.1.5 a) – Plans of Existing and Proposed Development 8.1.5 b) – Photos of Existing Development on Site 72 8.1.5 c) – Photos of Redevelopment Works on Site 91

Summary:

The lessees of Site 72 Third Avenue, Peaceful Bay are seeking Council support to the demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' on-site. As per the provisions of the lease and Shire of Denmark's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Council Land*, owner approval of the proposed development is required to be obtained prior to formal assessment of a Planning Application.

Having regard to the lease provisions, the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines it is recommended that Council not support the proposal.

Background:

An application for Planning Approval was lodged with Planning Services in April 2011 for the demolition of the existing 'holiday cottage' (approx. 98m²) and existing shed (9m²) to facilitate building a new 'holiday cottage' (approx. 143m²) and outbuilding/shed (approx. 42m²) – refer Attachment 8.1.5 a).

Upon receipt of the Planning Application, Planning Services advised the applicant (Summit North West) and the lessees (G & G Clark) that the Planning Application was deemed incomplete as the landowner (being the Shire of Denmark) had not signed the application form, and that as per the provisions of the lease pertaining to the site and the Shire of Denmark's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Council Land*, owner approval of the proposed development is required to be obtained prior to formal assessment of a Planning Application. After discussions with the Chief Executive Officer and the Director of Finance and Administration it was determined that this proposal was to be referred to Council for their due consideration in its capacity/role as the landowner in the first instance.

Lessee's Request & Justification

The lessee's reasons and justification for the proposal to demolish the existing development on-site and rebuild a new 'holiday cottage' and outbuilding are as follows:

"In June 2009, a builder looked at the existing development on-site with the idea of removing and repairing the white ant damage, roof rust, re-stumping of the house and levelling of the floor area. After the inspection the advice received was that the costs would be too great and it would be less expensive to rebuild completely.

In October 2009 we met with the Shire to discuss the proposal and view what the Council requirements were. After the meeting we determined it would be better to wait until the new lease was signed before doing anything in relation to the building.

A range of options were investigated (i.e. transportable, site kit home etc) such that when the lease was signed we could progress the proposal further.

We have now reached a stage where our family have very young children and they wish to use the house more, but it's current conditions doesn't allow this with the roof leaking, floor, plumbing and electrical evens. Even with a new house we will be limited by the use of rain water.

It is not our intention ever to live there nor any of my immediate family. The new residence is purely designed to be a family holiday house. As for the proposed shed this is to house the boat and 4 wheel drive.

The existing house and the new house are of similar size and we hope to keep in with the surroundings and don't wish to lose the character of the area."

It should be noted that Planning Services have tried to ascertain from the lessees which staff they may have liaised with in October 2009 regarding the proposal as there is no file note of the meeting. To date the lessees have not been able to provide such details other than a passing conversation with the Shire's building staff when they were doing inspections of the area in relation to water supply connection compliance.

Comment:

As referenced above, this proposal is being referred to Council for due consideration in the capacity/role as the landowner in the first instance. Should Council consent to the application as the landowner, the formal planning assessment process can then commence (i.e. full assessment against the relevant Town Planning Scheme and policy provisions that pertain to the proposal, including advertising and internal/external referrals) such that a determination on the planning application can be made (which the applicant will then have appeal rights). Should Council not consent to the application as the landowner, the Planning Application received to date is deemed incomplete and would be returned to the applicant, along with any monies paid associated with the application to date. There are no appeal rights to this process from a planning perspective however there may be the potential for some civil action from a lease perspective.

Lease Considerations

Clause 6.01 of the Lease for the site states

"the Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing".

Given the lessee's justification reasons for seeking demolition of the existing building on-site, Planning & Building Services staff undertook an inspection of the premises - refer Attachment 8.1.5 b). From this inspection it was evident that there were some issues associated with the current development on-site – namely:

- roof leaking which is causing dampness in the building;
- roof is bowing/sagging at the rear of the cottage
- some roof and external timbers are rotting;

- uneven internal floor;
- unevenness with verandah floor including floorboards lifting/moving; and
- the cottage is lined with blue asbestos.

Although it is acknowledged there are some issues with respect to the current state of the dwelling, it is also important to note that it appears there has been very little maintenance work undertaken on the premises by the lessees despite Clause 5.02 of the lease stating:

“At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the lessor (damage by fire, storm, tempest, earthquake and explosion excepted).”

Heritage Values Considerations

The Peaceful Bay Heritage Precinct pertains to the original leasehold subdivision of the settlement in Peaceful Bay – comprised of 163 houses constructed along First, Second, Third and Fourth Avenues. The Peaceful Bay Heritage Precinct is classified in Town Planning Scheme No. 3 (TPS No. 3) as a “Place of Heritage Value”. Strategic and policy documents that relate to the Peaceful Bay Heritage Precinct are the:

- Peaceful Bay Heritage Precinct Conservation Plan (PBHPCP); and
- Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines (Policy 35).

Site 72 Third Avenue is located within the Peaceful Bay Heritage Precinct, thus the following provisions are relevant for consideration of this proposal:

- The PBHPCP states that within a state context the entire Peaceful Bay Heritage Precinct is considered to be a zone of considerable significance. This category warrants inclusion on any register of heritage places with conservation highly recommended. As a result, the Peaceful Bay Heritage Precinct has been the subject of the Heritage Council of Western Australia’s consideration for State listing since 2004.
- The Peaceful Bay Heritage Precinct is listed in the 1999 Municipal Heritage Inventory (MHI) as Category ‘C’ – that is:
 - Retain and conserve if possible.
 - Endeavour to conserve the significance of the place through the provisions of the Town Planning Scheme.
 - A more detailed Heritage Assessment/Impact Statement to be undertaken before approval given for any major redevelopment.
 - Incentives to promote conservation should be considered.
- In the draft 2011 MHI, the Peaceful Bay Heritage Precinct level of significance has been recommended as ‘Exceptional’ – that is:
 - Essential to the heritage of the locality.
 - Rare or outstanding example.
 - The place should be retained and conserved unless there is not feasible and prudent alternative to doing otherwise.
 - Any alterations or extensions should reinforce the significance of the place, and be in accordance with a Conservation Plan.
- Clause 4.5.1 of Policy 35 states “Most of the houses have been classified in the PBHPCP as having some cultural heritage significance, apart from No. 79, which is constructed of brick. There should be no demolition or removal of any of the original sections of buildings that are classified as having some cultural heritage significance”.

- Clause 4.5.2 of Policy 35 states “The buildings which are classified as having considerable or some heritage value should be conserved and maintained”.
- From a review of records, there have been numerous proposals supported for redevelopment of ‘holiday cottages’ ranging from small minor additions through to major renovations (refer Attachment 8.1.5 c)), however there is no record of the complete demolition of ‘holiday cottages’ in the Peaceful Bay Heritage Precinct area.

Conclusion

At this stage Council is being asked to consider the proposal in its capacity/role as the landowner in order to facilitate the formal lodgement of a Planning Application. In determining a position in relation to this proposal, the following issues all need to be put into context:

- Not undertaking maintenance could be deemed a breach of the lease provisions, thus Council needs to consider at what point it is prepared to accept complete demolition as being an appropriate option as opposed to maintenance, repair and redevelopment proposals;
- Are cost factors associated with maintenance and repair a justifiable reason to support demolition as opposed to maintenance, repair and redevelopment proposals?;
- The precedence that may result and the associated impacts on the heritage values of Peaceful Bay, noting however that there is the potential to address heritage values through good building design;
- Did the Shire have a role to play to ensure that conditions of leases were being met prior to entering into new leases, particularly in the case of leases being re-entered into with former lessees?;
- Should the Shire have had a role to play from a maintenance inspection regime perspective such that holiday cottages were not run-down to the extent that demolition was considered the only option from the lessee’s perspective; and
- The strategic value and importance of the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines.

Having regard to the above, it is recommended that Council not support the proposal to demolish the existing ‘holiday cottage’ to facilitate building a new ‘holiday cottage’.

Consultation:

External Consultation

Informal consultation on the subject request was held with the Peaceful Bay Progress Association (via the Director of Community & Regulatory Services discussing the request at the Association’s meeting held on 13 June 2011) and from this consultation the Association did not express any fundamental objection to the demolition component of the proposal.

Internal Consultation

- Chief Executive Officer
- Director of Finance and Administration
- Building Services

Statutory Obligations:

The lease between the Shire of Denmark and G & G Clark commenced on 1 July 2010 for a period of 21 years. The lease clearly sets out the requirements of the lessor (the Shire of Denmark) and the lessee (G & G Clark) with respects to issues such as:

- Use of demised premises;
- Inspection, maintenance and repair of demised premises;
- Rental and other lessee charges and
- Alterations to demised premises.

Council is considering this application in its capacity/role as the landowner initially as this will determine whether the Planning Application process can commence.

Should Council consent to the proposal as the landowner, it should be noted that Council as the decision making authority could still refuse the Planning Application, noting however that the applicant then has appeal rights as per the provisions of the *Planning and Development Act 2005*.

Policy Implications:

Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines applies to the development proposal for Site 72 Third Avenue. A Town Planning Scheme Policy does not bind the Council in respect of any application, but the Council shall take into account the provisions of the policy and the objectives which the policy was designed to achieve before making its decision.

Should Council resolve to consent to the lodgement of the Planning Application as the landowner, a formal assessment of the proposal having regard to the relevant provisions of TPS No. 3 and Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines will need to be undertaken, including public advertising as per Clause 7.3 of TPS No. 3.

To date Planning Services have only undertaken a preliminary assessment of the plans having regard to Policy No. 35 and have identified the following issues that need further consideration:

- The use of custom orb cladding and aluminium windowframes as opposed to the preference for weatherboard (jarrah or similar) and timber window frames
- The dwelling does not have a good streetscape aspect with no front verandah or front door elements facing the street;
- The alfresco area to the side of the dwelling is not consistent with roof forms or streetscape in the area
- The proposal for a paved driveway and grass crossover is generally not supported; and
- The proposal entails removal of some mature peppermints which is generally not supported.

Budget / Financial Implications:

There are no known financial implications upon the Council's current Budget or Plan for the Future.

Should Council not consent to the Planning Application as the landowner, reimbursement of the Planning Application and Building Licence fees paid (being \$1536.50, noting this includes the BCITF and BRB fees) will need to be organised.

Strategic Implications:

The Peaceful Bay Heritage Precinct Conservation Plan states the entire Peaceful Bay Heritage Precinct is considered to be a zone of considerable significance, with the intention being to protect and enhance the unique special character of the Peaceful Bay original leasehold settlement as a relaxed, informal low key holiday location.

Sustainability Implications:➤ **Environmental:**

There are no known significant economic considerations relating to the report or officer recommendation.

➤ **Economic:**

The applicant has indicated that the costs associated with maintenance and repair works on the existing 'holiday cottage' exceed the costs associated with demolishing and building a new 'holiday cottage'. This however should not be the sole reason for Council supporting the request to demolish the existing 'holiday cottage'.

➤ **Social:**

The heritage values of the Peaceful Bay Heritage Precinct are recognised by the community of the precinct and by the wider community.

Voting Requirements:

Simple majority.

OFFICER RECOMMENDATION

ITEM 8.1.5 a)

That Council with respect to the proposal for demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' on Site 72 Third Avenue, Peaceful Bay advise the applicant/lessees that:

1. Consent to the proposal, as required under Clause 6.01 of the lease between the Shire of Denmark and G & G Clark, is not granted on the basis that the demolition of 'holiday cottages' is not supported by the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme No. 35 – Peaceful Bay Conservation Plan Development Guidelines;
2. Consent to the proposal by Council as the landowner, as required for the Application for Planning Consent, is not granted; and
3. Redevelopment of the existing 'holiday cottage' is supported, along with major additions/renovations, subject to due regard being given to Town Planning Scheme No. 35 – Peaceful Bay Conservation Plan Development Guidelines, thus consultation should occur with Planning Services staff to progress a proposal that will be supported.

COUNCIL RESOLUTION & CR LAING'S RECOMMENDATION

ITEM 8.1.5 a)

MOVED: CR LAING

SECONDED: CR PHAIR

That Council advise the lessee of site 72 Third Avenue Peaceful Bay that it is prepared to consider providing approval as the lessor/landowner in accordance with Clause 6.01 of the lease such that an Application for Planning Approval for demolition of the existing 'holiday cottage' to facilitate building a new 'holiday cottage' subject to the following provisions;

1. That the applicant demonstrate to Council's satisfaction that the building is in such a state that it is beyond its useful life and generally unfit for habitation and/or economical repair and;
2. That the applicant demonstrate to Council's satisfaction concept building plans and elevations of the proposed replacement building that are sympathetic to and conform to the principles of the Peaceful Bay Heritage Precinct Conservation Plan and Town Planning Scheme Policy No. 35 - Peaceful Bay Conservation Plan Development Guidelines (noting that the current submitted plans in the opinion of Council do not).

CARRIED: 11/0

Res: 120611

REASONS FOR CHANGE

The building is possibly beyond repair and Council was prepared to allow the applicant to demonstrate it to Council.

COUNCIL RESOLUTION & OFFICER RECOMMENDATION ITEM 8.1.5 b)

MOVED: CR LAING

SECONDED: CR SAMPSON

That with respect to the Peaceful Bay Leasehold Cottages, Council request the Chief Executive Officer to have prepared a report on the potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance, criteria for supporting demolition, removal of improvements at the end of term (of the lease) and the Council's existing inspection regime, Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35.

CARRIED: 11/0

Res: 130611



953 South Coast Highway, Denmark Western Australia 6333

Tel (08) 9848 0300 Fax (08) 9848 1985

Our Ref: DS/CT File A3104

Enquiries: Dale Stewart

7 July 2011

Mr D Mcleod
McLeods Barristers & Solicitors
220-222 Stirling Hwy
CLAREMONT WA 6010
Emailed to: imcleod@mcleods.com.au

Dear Dennis

Re: Peaceful Bay Leaseholds

I write to seek legal advice on a matter relating to the leaseholds cottages at Peaceful Bay, comprising some 203 private holiday cottages situated on a Council Reserve No. 24510 which is managed by Council through a Management Order with the power to lease.

The cottages all have the same lease (blank example copy enclosed) and all have the same expiration date (30 June 2031) (renewed in 2010).

Recently Council was faced with the request of assessing an application for demolition of one of the cottages (refer attached report) which tested the first question of 'lessor' approval (pursuant to clause 6.01 of the lease) as well as that as the 'owner' (pursuant to clause c of the Council's Town Planning Scheme (TPS) No. 3) prior to either the Council (or its staff under delegation) considering the question of considering the development application for demolition as the planning authority.

The first question is to confirm that prior to assessing an application for development pursuant to our TPS is that the lease requires the lesser to seek approval of the Council (lessor) and that thereafter that the approval of the Council is not required as 'the owner' as would be normal, as our Scheme defers that right to the lessee (I think in error and contrary to the model scheme text) (refer clause 'c' of the definition of 'owner' under our scheme as it refers to the lessee (not lessor).

The second question that I seek clarity from McLeod's on is the legal ability of Council to deny approval as the 'owner' and or 'lessor / management authority' if a different answer to this (Scheme versus Lease), and what rights of appeal, compensation, breach of contract or other action is open to the applicant (lessee) which may exist if that was the case. The issue, in simple terms, is that the Conservation Plan and Town Planning Policy have a presumption that all of

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Celebrating 100 years of Local Government in 2011

All communications to:
Chief Executive Officer, PO Box 183, Denmark WA 6333
Email: enquiries@denmark.wa.gov.au
Website: www.denmark.wa.gov.au

Attachment 8.5.1 b)

the cottages covered by the Policy and Plan, have heritage value and there is a presumption against demolition. Council is grappling with the issue of whether it should have a more thorough maintenance / inspection regime either annually, on assignment or sale or so often as lessor (and or as the local building and health authority) so as to identify maintenance or public health issues when they might first become evident, or whether this liability solely / mostly rests with the lessee and or buyer (assignee). In other words, if Council does nothing as the local authority and or the lessor to inspect or enforce maintenance / health requirements and then some years later refuses permission to demolish on the basis that the lessee(s) over the years (either of themselves and or through assignment) should have 'maintained' it, what would be the expectations at law and or appeal...?

The following issue (question) is that of our obligations pursuant to the lease and or the laws of tort and precedents such as the 'Pyrenees' case etc, in relation to potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance. At present, Council's administrative practice is that the building is inspected prior to sale (assignment) by a qualified Health Inspector, typically with Building Surveyor qualifications (but not always) so as to identify any building maintenance, health, safety or other works required to be addressed prior to or as part of the assignment and a fee for this service is charged based on an average assessment. Smoke alarms, RCDs, general health issues, compliance with potable water signage, etc are examples of things that are brought to the attention of the vendor and purchaser and their agents. If however the property is not assigned for some extended period – let's say 21 years (and we didn't inspect them on re-signing them for another 21 years in 2010) then it is possible that we have not had cause to enter the property to inspect and or our current regime is such that we don't inspect the properties from time to time (say once a year) like a landlord would, notwithstanding that our lease gives us the right to.

Does this lessen our defense, in supporting the view that they should have 'maintained' it such that it didn't get to a state of disrepair thus necessitating the application for demolition, and or make us liable in any way in the event of personal injury or accident?

For information the Council's existing delegation that relates states "The Chief Executive Officer is delegated authority to approve the assignment and/or mortgage of Peaceful Bay Holiday Cottage Leases. The delegation is granted on the basis that if the Chief Executive Officer is not prepared to support an assignment the matter is referred to Council for determination. The application for lease assignment should include a site plan indicating all buildings and the type, size and location of all existing effluent disposal systems. An inspection will be carried out to confirm the above information and a fee will be charged. Officers will endeavour to combine inspections with other routine duties to reduce inspection fees whenever possible. Any substandard or failing effluent disposal systems must be upgraded to the satisfaction of Council's Environmental Health section and in compliance with State legislation before the lease will be assigned."

This delegation will be modified to correctly reflect the above inspection regime (beyond the limitations of the existing delegation) in coming months, together with any additional advice that you would provide about guiding officers and Council so as to ensure that its risks are managed whilst still complying with its obligations pursuant to the lease and at law.

The next issue for clarity from McLeod's is the issue of determination of the property on yielding up or end of term of the lease. Clauses that relate (perhaps amongst others) include;

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so

long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

14.02 Lessee's Obligation to Remove Fittings

The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee's fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal.

The question here is does the lease give the absolute right of the lessee to remove the buildings (the cottage - being the improvements) at the end of term as the 'owner' of the improvements? If the answer is yes – then does it call into question the intent of the Conservation Plan and Town Planning Policy that purports to ensure the continuity of the Peaceful Bay Conservation Heritage Precinct that has a presumption against demolition in favour of preservation and is there the potential for conflict between the intents of these two 'planning documents' and the rights of the lessee to remove the improvements? Or do they work together in that the planning authority might well refuse the applicants request to remove the property, which is open to appeal, and if upheld, does this then potentially give right to some form of compensation from the lessor or some obligation to purchase the improvements under or civil, contract or other law?

Last but not least, any guiding premises at law in relation to the above to guide Council in determining criteria to deny or support an application for demolition (valuing the heritage as contrasted to the costs of repairs) (how far gone is the building to be salvaged and repaired and whose fault was it – the Council as lessor (for allowing it) or the lessees?) that would generally stand up on appeal.

By way of additional background, Council resolved as follows; "That with respect to the Peaceful Bay Leasehold Cottages, Council request the Chief Executive Officer to have prepared a report on the potential for conflicts or policy direction relating to the lease obligations of the lessor and / or lessee with respect to maintenance, criteria for supporting demolition, removal of improvements at the end of term (of the lease) and the Council's existing inspection regime, Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35".

Should you require further information or advice on this matter please contact the undersigned on telephone (08) 9848 0300 or email enquiries@denmark.wa.gov.au.

Yours faithfully



*Dale Stewart
Chief Executive Officer*

Enc. Blank Leasehold Lease; Council Officer Report and Resolution of 28 June 2011; Town Planning Scheme Policy No. 35 – Peaceful Bay Conservation Plan Development Guidelines; and Purchase Order No. 1300

cc Directors of Community & Regulatory Services, Finance & Administration & Planning & Sustainability

Shire of Denmark

(“Lessor”)

and

«Owner_1»

«Owner_2»

«Owner_3»

«Owner_4»

«Owner_5»

«Owner_6»

«Owner_7»

(“Lessee”)

LEASE

Peaceful Bay Reserve 24510 Site No. «Lot_No»
on
Land Administration Statutory Services Plan 20017

Attachment 8.5.1 c)

WESTERN AUSTRALIA
LAND ADMINISTRATION ACT 1997
TRANSFER OF LAND ACT 1893 as amended

LEASE OF CROWN LAND (L)

DESCRIPTION OF LAND (NOTE 1)

DESCRIPTION OF LAND (NOTE 1)	EXTENT	VOLUME	FOLIO
Portion of Hay Locations 1423, 1424 and 2229 and being site «Lot_No» on Land Administration Statutory Services Plan 20017, subsidiary title volume «Volume» folio «Folio».	Whole	3122	555

ENCUMBRANCES (NOTE 2)

Nil

LESSOR/LESSORS (NOTE 3)

Shire of Denmark of PO Box 183 Denmark WA 6333
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LESSEE/LESSEES (NOTE 4)

«Owner_1»	«Owner_5»
«Owner_2»	«Owner_6»
«Owner_3»	«Owner_7»
«Owner_4»	

TERM OF LEASE (NOTE 5)

21 Years	Months	Days
Commencing from the	First day of	July in the year 2010

THE LESSOR HEREBY LEASES TO THE LESSEE the land above described subject to the encumbrances as shown hereon (Note 6)
For the above term for the clear yearly rental of (Note 7) One Thousand and One Hundred Dollars (\$1,100.00) payable (Note 8) annually in advance

SUBJECT TO THE COVENANTS AND POWERS IMPLIED UNDER THE LAND ADMINISTRATION ACT 1997 AND THE TRANSFER OF LAND ACT 1893 AS AMENDED (UNLESS HEREBY NEGATED OR MODIFIED) AND ALSO TO THE COVENANTS AND CONDITIONS CONTAINED HEREIN.

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THE SCHEDULE

THIS DEED is made on the first day of July 2010.

BETWEEN:

SHIRE OF DENMARK of PO Box 183, Denmark, Western Australia ("the Lessor") of the first part

AND

The party named and described in the Schedule as lessee ("the Lessee")

WHEREAS:

- A. The Land comprises a Class A Reserve No 24510 and is situated at Peaceful Bay Western Australia and is managed by the Lessor through a management order for the purpose of Recreation, Camping, Caravan Park and Holiday Cottages and empowers the Lessor to lease the whole or any portion of the part thereof as is comprised in Hay Locations 1423, 1424 and 2229 subject to the prior approval in writing of the Minister for Lands.
- B. Subject to the consent of the Minister for Lands being obtained hereto the Lessor has agreed to grant to the Lessee a lease of the Demised Premises upon the terms and conditions hereinafter contained.

NOW THIS DEED WITNESSES as follows:-

Subject to the provisions of clause 17 hereof the Lessor HEREBY LEASES to the Lessee and the Lessee HEREBY TAKES ON LEASE the premises ("Demised Premises") described in Item 1 of the Schedule TO BE HELD by the Lessee for the term commencing on the date specified in Item 2 of the Schedule ("Date of Commencement") and terminating on the date or at the time specified in Item 3 of the Schedule ("Termination Date") (that period described herein as "the Term" which expression when not repugnant to the context includes any term determined before the date specified in Item 3 of the Schedule) at the rental calculated and payable as hereinafter provided and subject to the following terms covenants and conditions AND the Lessor and the Lessee HEREBY COVENANT AGREE AND DECLARE that throughout the Term (regardless of the date of this Deed or the date of execution of it by any party hereto) and any renewal or extension thereof:-

1. DEFINITIONS AND INTERPRETATION

1.01 Joint and Several Liability

Where two or more persons are the Lessee the covenants and obligations on their part herein contained bind them jointly and each of them severally.

1.02 Land

The term "Land" means Class A Reserve No 24510 comprising Lot 1424 on Deposited Plan 202471 and Lots 1423 and 2229 on Deposited Plan 240012 being the whole of the land comprised in Qualified certificate of Crown land title Volume 3122 Folio 555.

- 1.03 Lessee
The term "Lessee" means the Lessee above described and where the context permits includes in the case of a body corporate its successors in title and permitted assigns and in the case of a natural person his executors administrators and permitted assigns.
- 1.04 Lessee's Covenants
The term "Lessee's Covenants" means the covenants and agreements contained or implied in this Lease to be observed and performed by the Lessee.
- 1.05 Rental Year
The term "Rental Year" means each period of TWELVE (12) months during the Term and includes the period commencing on the Date of Commencement to the following 30th June and also includes any period of less than twelve (12) months from the 1st July immediately prior to the Termination Date to that date.
- 1.06 Yearly Rental
The term "Yearly Rental" means the annual sum set forth in Item 4 of the Schedule as reviewed from time to time as hereinafter provided for.
- 1.07 Improvements
The term "Improvements" means any structure, building or other fixture or fitting in or upon the Demised Premises.
- 1.08 Captions and Headings
Captions and headings used herein are for convenience and reference only and shall not have any effect on the interpretation construction or effect hereof.
- 1.09 Holiday Cottage
The term "Holiday Cottage" means any building for short term accommodation of people approved by the Lessor from time to time.
- 1.10 Minister for Lands means a body corporate under section 7 of the Land Administration Act 1997.
2. RENTAL
- 2.01 Manner of Payment of Yearly Rental
The Lessee shall pay the Yearly Rental for each Rental Year during the Term in the manner described in Item 4 of the Schedule without any deduction or set off and without any demand therefor being made by the Lessor PROVIDED THAT the Lessor may from time to time with effect from the 1st July in any year during the Term ("Rent Review Date") review the Yearly Rental and the Lessee shall pay the Yearly Rental as reviewed from the relevant Rent Review Date.
- 2.02 Rent Review
(a) The Yearly Rental payable in the first year of the Lease Term will be the Yearly Rental as determined by the Valuer General who shall also provide Yearly Rentals effective for the years commencing 1 July 2015, 1 July 2020, 1 July 2025 and 1 July 2030. The rent payable from the Review Date other than those Rent Review Dates mentioned in this clause, will be the rent payable by the Lessee immediately preceding the relevant Review Date increased by the sum ascertained by multiplying the rental payable immediately prior to the Review Date by the most recently published Consumer Price Index number applicable at that Review date and dividing the resulting figure by the most recently published Consumer Price Index number applicable at the next preceding Review Date or in the case of the first review the

Commencement Date PROVIDED THAT the rental payable will not be less than the rental payable immediately prior to the relevant Review Date.

If the Consumer Price Index at any relevant date is no longer published by the Australian Bureau of Statistics the Lessor will substitute a figure which the Lessor will reasonably determine and in determining the Lessor will use an index which is as near to the Consumer Price Index as is reasonably possible.

“Consumer Price Index” means the Consumer Price Index (All Groups) for Perth as presently calculated by the Australian Bureau of Statistics.

(b) The Lessor shall not by reason of its failure to give the Lessor’s Notice within the time referred to in Clause 2.02(a) forfeit its right to have the annual rent reviewed and if the Lessor gives the Lessee notice in writing later than the time referred to in Clause 2.02(a) then the Lessor’s Notice whenever given shall be of the same force and effect as if it were given as specified in Clause 2.02(a) and the rate at which the annual rent is payable shall be payable from the date of the notice if the notice is sent after the period of three (3) months from the Rent Review Date.

2.03 G.S.T.

(a) Whenever any payment is required to be made by the Lessee in accordance with the terms of this Lease, whether to the Lessor or otherwise, the Lessee shall also pay to the Lessor or as directed by the Lessor, any and all taxes, levies, impositions or charges required to be paid in addition to or in respect or as a consequence of that payment including, but not limited to, the amount of all or any tax in the nature of a goods and/or services tax or consumption tax or value added tax or other like tax and a failure to pay the same shall be a breach by the Lessee of this Lease.

(b) The Lessee shall pay the tax, levy, imposition or charge referred to in paragraph (a) hereof at the same time and in the same manner as the payment to which it relates unless otherwise directed by the Lessor.

(c) A certificate given to the Lessee by the Lessor of the amount of the tax, levy, imposition or charge referred to in paragraph (a) hereof will be conclusive as between the Lessee and the Lessor except in the case of manifest error.

3. OTHER LESSEE CHARGES

3.01 Utility Charges

Unless otherwise expressly provided herein the Lessee shall pay all charges connection fees disconnection fees rental maintenance service and other like costs payable in respect of water, electricity, gas, telephone and all other services provided to, servicing or charged to the Demised Premises as well as all municipal rates from time to time levied or raised by the Lessor against the Demised Premises. The Lessee shall also pay to the Lessor upon demand or otherwise as specified from time to time by the Lessor such fees as the Lessor may from time to time charge or levy in respect of the Demised Premises toward the costs associated with the provision of future infrastructure and/or infrastructure services to Peaceful Bay. In the event of a dispute between the parties as to the amount of any such fee, charge or levy the certificate of the Lessor shall be conclusive proof.

3.02 Costs of Lease

Upon demand by the Lessor the Lessee shall pay the sum of \$100 for the cost of Lease preparation plus any legal costs charges fees necessary for the registration and stamping of the Lease as well as all expenses incurred by the Lessor in relation to a determination of the Term

or any attempt thereat a re-entry by the Lessor into the Demised Premises or any attempt thereat a surrender of this lease (including any stamp duties thereon) and the granting of any consent by the Lessor.

3.03 Interest On Overdue Money

Without affecting the rights, powers and remedies of the Lessor under this Lease the Lessee shall pay to the Lessor on demand interest on any money due by the Lessee to the Lessor pursuant to this Lease but unpaid for SEVEN (7) days computed from the due date for payment until payment in full which interest is recoverable in the like manner as Yearly Rental in arrears and which interest is to be computed at the rate per cent per annum determined in accordance with Section 6.51 of the Local Government Act 1995 (as amended). The certificate of the Lessor shall be conclusive proof of such rate.

4. USE OF DEMISED PREMISES

4.01 Permitted Use

The Lessee may use the Demised Premises for the purpose or purposes specified in Item 5 of the Schedule but not for any other use or purpose without the prior written consent of the Lessor.

4.02 Statutes, Regulations, Policies, and Local Laws

The Lessee shall at its own expense observe perform and fulfil the requirements of all statutes as well as all regulations, by-laws, ordinances, local laws and policies of the Lessor relating to the Land and the Demised Premises and or the use to which the same are being put and ensure that all of the Lessee's guests also observe those statutory regulations ordinances and local laws.

4.03 Annoying or Injurious Conduct

The Lessee shall not carry on or permit to be carried on in any part of the Demised Premises any business or any noxious offensive or illegal activity or practice nor do or permit to be done therein any act or thing or use or permit to be used any plant or machinery which through noise odour vibration or otherwise is or may grow to be an annoyance nuisance grievance or disturbance or be damaging to any person including but not limited to any other tenant of the Land or to the Lessor or to the occupiers of land adjoining the Land. The Lessee shall not nor shall it permit any of its invitees or licensees to obstruct any part of any areas set aside by the Lessor as thoroughfares for vehicles or persons.

4.04 Cleaning of Demised Premises

The Lessee shall keep the Demised Premises clean and not allow any accumulation of useless property or rubbish therein or thereon and at its own expense the Lessee shall clean and keep clean the Demised Premises to the reasonable satisfaction of the Lessor.

4.05 Location of Refuse

The Lessee shall not permit any garbage refuse rubbish container or other waste material to accumulate in or outside around or in the vicinity of the Demised Premises except where designated by the Lessor for that purpose.

4.06 Amplified Noise

The Lessee shall not without the prior written consent of the Lessor play broadcast or amplify any musical instrument radio broadcast or other music or announcement so as to be audible by or annoying or a nuisance to other persons lawfully on or about the Land or to occupiers of land adjoining the Demised Premises.

4.07 Weed and Pest Control

The Lessee shall use its best endeavours to keep the Demised Premises free from infestation by rodents weeds and other pests.

4.08 Excavation and Erosion

The Lessee shall not excavate, mine, dig up or remove any gravel, soil, sand, stone, mineral or other substance from the Demised Premises or the Land nor disturb the surface of the soil in a manner likely to cause erosion.

4.09 Trees and Shrubs

The Lessee shall not destroy fell cut down any trees or shrubs on the Land or on the Demised Premises except such as shall be absolutely necessary to provide for the erection construction and maintenance of such cottage and other improvements on the Demised Premises of which the Lessor has approved.

4.10 Lessee's Environmental Obligations

The Lessee:

- (a) must not cause or permit any contamination within the meaning of the Contaminated Sites Act 2003, to the Demised Premises or the surrounding area;
- (b) must notify the Lessor immediately on becoming aware of:
 - (i) the existence of any contamination affecting the Demised Premises or the surrounding area;
 - (ii) a notice under the Contaminated Site Act 2003 being served on the Lessee or any other person which relates to or arises from the Lessee's use of the Demised Premises;
- (c) must at the Lessee's costs comply with every notice issued under the Contaminated Sites Act 2003 in respect of or arising from or relating to the Lessee's use of the Demised Premises;
- (d) Without affecting:
 - (i) the obligations of the Lessee in this clause; or
 - (ii) limiting any right or, or indemnity in favour of, the Lessor or the Minister for Lands,if any contamination occurs in breach of subclause (a) the Lessee must do everything necessary to minimise the effect of the contamination as soon as reasonably practicable and must remediate any result in damage or harm, to the reasonable satisfaction of the Lessor and in compliance with the Contaminated Sites Act 2003.

5. INSPECTION, MAINTENANCE AND REPAIR OF DEMISED PREMISES

5.01 Inspection by Lessor

The Lessor or its duly authorised agents may with or without workmen and others at all reasonable times enter upon and view the state of repair of the Demised Premises.

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

5.03 Rainwater Tank

At its own expense the Lessee shall maintain a storage tank for the retention of at least 4,640 litres of rainwater and will not construct any replacement rainwater tank on the Demised Premises of a capacity less than 4,640 litres.

This clause will be waived and have no effect where the Demised Premises is connected to an approved reticulated potable water supply.

6. ALTERATIONS TO DEMISED PREMISES

6.01 No Alteration without Consent

The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing.

7. DAMAGE OR DESTRUCTION

7.01 Termination of Lease Term

If the Demised Premises are totally or partially destroyed or damaged by fire flood storm earthquake tempest explosion riot civil commotion war or otherwise by inevitable accident or act of God and without any neglect or default on the part of the Lessee and thereby rendered wholly or partly unfit for occupation or use by the Lessee the Lessor may elect to determine the Term (but without prejudice to any right which accrues prior to such determination).

In exercising its discretion under this clause the Lessor shall not determine the Term if, within 90 days of the event, the Lessee makes a written request for consent to repair or rebuild the improvements on the Demised Premises at the Lessee's cost and to the Lessor's usual requirements (**Request**) and it undertakes such works promptly, but if the Lessor notifies the Lessee within 90 days of receipt of the Request that it intends to put the Demised Premises to an alternative use then the Lessor may thereupon determine the Term.

8. RESERVATIONS

8.01 Right of Entry to Effect Works

The Lessor reserves the right with contractors' workmen and others and with all necessary materials machinery and appliances to enter upon the Demised Premises at all reasonable times for the following purposes:-

- (a) erecting laying or installing in under or over the Demised Premises any pole mast post drain conduit pipe main cable electric or other wire; or
- (b) inspecting removing installing maintaining altering or adding to services to the Land;

PROVIDED ALWAYS that in the exercise of these rights the Lessor shall use its reasonable endeavours not to cause any undue inconvenience to the Lessee.

9. INDEMNITIES

9.01 Indemnities for Lessor

The Lessee shall indemnify and shall hold indemnified the Minister for Lands and Lessor from and against all actions claims demands losses costs and expenses which the Minister for Lands or Lessor sustains or incurs or for which the Minister for Lands or Lessor becomes liable whether during or after the Term in respect of or arising from:-

- (a) Breach of Covenant
Loss damage or injury from any cause to property or person upon the Demised Premises occasioned or contributed to by the neglect or default of the Lessee or its servants agents sub-tenants or other persons claiming through or under the Lessee to observe or perform any covenant condition regulation or restriction on the part of the Lessee hereunder whether positive or negative expressed or implied.
- (b) Misuse
The negligent or wilful misuse waste or abuse by the Lessee or its servants agents or other persons claiming through or under the Lessee of any water gas electricity or other services to the Demised Premises.
- (c) Escape of Harmful Agent
The overflow leakage or escape of water fire gas electricity, any other harmful agent or contamination within the meaning of that term under the Contaminated Sites Act 2003 in or from the Demised Premises caused by or contributed to by any act or omission on the part of the Lessee or its servant's agents or any other person in the Demised Premises with the express or implied consent of the Lessee.
- (d) Failure to Notify
The failure of the Lessee to notify the Lessor of any known danger in or about the Demised Premises.
- (e) Use of Demised Premises
Loss (including loss of life) damage or injury from any cause to property or person caused or contributed to by the use of Demised Premises by the Lessee or its servant's agents or any other persons in the Demised Premises.
- (f) Personal Injuries
Loss damage or injury sustained by the Lessee or any servant workman employee client customer visitor invitee or licensee of the Lessee or any member of the public in upon or about the Demised Premises.

10. INSURANCE

10.1 Lessee's Insurance

At its own expense the Lessee shall effect and maintain the insurance specified in Item 6 of the Schedule with reputable insurers and shall produce to the Lessor upon demand such proof of the extent and currency of the policy of insurance as the Lessor requests.

11. ASSIGNMENT SUBLETTING AND MORTGAGES

11.01 Restriction on Assignment

Subject to clause 11.02 hereof the Lessee shall not assign, sublet, mortgage, charge, part with possession of, nor dispose of, the Demised Premises or any part thereof or the benefit of this Lease without the prior written consent of the Lessor and the Minister for Lands which consents may be given or withheld as the Lessor or the Minister thinks fit, and if given may be given conditionally PROVIDED THAT the lessor will not unreasonably withhold its consent to such assignment.

Where consent is given it shall be subject to the Assignee executing and delivering to the Lessor a Deed of Assignment which shall be at the cost of the Assignee or Lessee as they determine.

11.02 Property Law Act

It is agreed and declared that Sections 80 and 82 of the Property Law Act 1969 are hereby expressly excluded.

12. LESSOR'S WARRANTIES AND EXCLUSION OF IMPLIED WARRANTIES

12.01 Quiet Enjoyment

The Lessor covenants with the Lessee that if the Lessee pays the Yearly Rental in accordance with this Lease and observes and performs the terms covenants and conditions on its part herein contained the Lessor will allow the Lessee to peaceably hold and enjoy the Demised Premises during the Term without interruption by the Lessor.

12.02 Assumption of Risk by the Lessee

The Lessee agrees to occupy and use the Demised Premises at the risk of the Lessee and the Lessor will not in any circumstance be liable to the Lessee for, and hereby releases and forever discharges the Lessor from, all claims, demands, actions, proceedings and liability in respect of any damage to the improvements, chattels or property of the Lessee contained in or about the Demised Premises occasioned by erosion, storm, surge, damage, flooding, subsidence or other act of God, water, heat, fire, electricity, vermin, explosion, bursting pipes or by the entry of water from any source whatsoever.

12.03 Warranties Negatived

The Lessee acknowledges that this Lease has been entered into on the basis that it is of the vacant premises only and the Lessor makes no representation nor gives any warranty that all of the improvements on the Demised Premises are located within the boundaries of the Demised Premises. The Lessor hereby expressly negates and excludes all such representations and warranties.

13. DEFAULT OF LESSEE

13.01 Definition of Default

(a) If during the Term:-

- (1) the Yearly Rental is not paid within THREE (3) months after becoming due whether or not demand therefor has been made; or
- (2) the Lessee breaches any of the terms covenants conditions or obligations on the part of the Lessee contained herein other than in respect of the payment of Yearly Rental and the breach continues for TWENTY EIGHT (28) days after notice has been served on the Lessee by the Lessor; or
- (3) the Lessor has given notice to the Lessee more than 3 times in any 12 month period in respect of the same breach of this Lease;

THEN the Lessor may at any time thereafter either by notice in writing to the Lessee determine the Term and from the date of giving notice the Term will determine absolutely or without any notice or demand enter and repossess the Demised Premises and thereby the Term and the estate and interest of the Lessee in the Demised Premises will immediately determine but in both cases without affecting any rights of the Lessor under this Lease and without releasing the Lessee from liability in respect of the Lessee's Covenants. Upon re-entry or determination by notice the Lessor will have the right to pull down take away or otherwise sell or dispose of any buildings and improvements on the said Demised Premises and either retain the proceeds of sale for its own use absolutely or the Lessor may (in its absolute discretion) refund all or part of the net proceeds of sale thereof to the Lessee. The Lessee expressly and irrevocably authorises

the Lessor to deduct from the net proceeds of any such sale all moneys which may be owing by the Lessee to the Lessor on any account whatsoever and to pay to the Lessee the balance of the net proceeds after deduction thereof.

13.02 Damages after Re-entry

- (a) Each of the Lessee's Covenants specified in this paragraph are essential terms of the Lease created by this Deed;
 - (i) Clause 2.01 - Covenant to pay Yearly Rental;
 - (ii) Clause 4.01 - Covenant as to Use of Premises;
 - (iii) Clause 4.03 - Covenant as to Annoying or Injurious Conduct;
 - (iv) Clause 11.01 - Covenants relating to Assignments and Sub-letting;
 - (v) Clause 18.01 - Additional Terms and Conditions;
 - (vi) Clause 19.00 – Reticulated Water and Sewerage.
- (b) In respect of the Lessee's obligations to pay Yearly Rental the acceptance by the Lessor of arrears or of any late payment of Yearly Rental will not constitute a waiver of the essentiality of the Lessee's obligation to pay Yearly Rental in respect of those arrears or of the late payments or in respect of the Lessee's continuing obligation to pay Yearly Rental during the Term.
- (c) The Lessee covenants to compensate the Lessor in respect of any breach of an essential term of the Lease created by this Deed and the Lessor is entitled to recover damages from the Lessee in respect of any breach and the Lessor's entitlement under this clause is in addition to any other remedy or entitlement to which the Lessor is entitled including the right to terminate the Term and the Lease created by this Deed.
- (d) If the Lessee's conduct whether acts or omissions constitutes a repudiation of the Lease created by this Deed or of the Lessee's Covenants or constitutes a breach of any of the Lessee's Covenants the Lessee covenants to compensate the Lessor for the loss or damage suffered by reason of the repudiation or breach.
- (e) The Lessor will be entitled to recover damages against the Lessee in respect of repudiation or breach of any of the Lessee's Covenants for the damage suffered by the Lessor during the entire Term.
- (f) The Lessor's entitlement to recover damages will not be affected or limited by any of the following:-
 - (i) Abandonment or vacation of the Demised Premises by the Lessee;
 - (ii) Election to re-enter or to terminate the Term and the Lease created by this Deed by the Lessor;
 - (iii) Acceptance of the Lessee's repudiation by the Lessor; or
 - (iv) Conduct of the parties constituting a surrender of the Lease by operation of law.

- (g) The Lessor will be entitled to institute legal proceedings claiming damages against the Lessee in respect of the entire Term including the periods before and after the Lessee vacates the Demised Premises and before and after the abandonment termination repudiation acceptance of repudiation or surrender by operation of law referred to in paragraph (f) whether the proceedings are instituted either before or after that conduct.
- (h) If the Lessee vacates the Demised Premises whether with or without the Lessor's consent the Lessor will be obliged to take reasonable steps to mitigate his damages to endeavour to lease the Demised Premises at a reasonable rent and on reasonable terms and the Lessor's entitlement to damages is to be assessed on the basis that the Lessor should have observed the obligation to mitigate damages contained in this paragraph and the Lessor's conduct taken pursuant to the duty to mitigate damages will not by itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law.

13.03 Lessor may Rectify

If the Lessee fails to pay any money or charge as required hereunder to any person other than the Lessor or if the Lessee fails to perform any covenant on the part of the Lessee hereunder the Lessor may as the agent of the Lessee make that payment or do any act or thing and incur any expense necessary to perform that covenant and the full amount of the payment made and the cost and expense incurred will constitute a liquidated debt due and owing by the Lessee to the Lessor and shall be paid by the Lessee to the Lessor on demand.

13.04 Interest on Overdue Payments

If the Lessee fails to pay to the Lessor any money within SEVEN (7) days from the due date for payment then without prejudice to any of the Lessor's rights pursuant to clause 13.01 the Lessee shall pay to the Lessor on demand interest thereon or on so much thereof as remains unpaid from the due date or dates for payment until the same is actually paid and also upon any judgment which the Lessor obtains against the Lessee from the date of judgment until the judgment is satisfied at the rate which is at the time the payment becomes due or the judgment is obtained equal to the rate per cent per annum determined in accordance with Section 6.51 of the Local Government Act 1995 (as amended). The certificate of the Lessor shall be conclusive proof of such rate.

13.05 Non-waiver

The waiver by the Lessor of a default or breach by the Lessee of a term covenant or condition hereof will not in any circumstance entitle the Lessee to repeat or continue the default or breach nor is the waiver to be construed or operate as a waiver of any subsequent default or breach whether of a like nature or not.

14. DETERMINATION OF TERM

14.01 Lessee to Yield Up

At the expiration or sooner determination of the Term the Lessee shall yield up the Demised Premises in the order and condition described in clauses 4 and 5 hereof and consistent with the Lessee having observed and complied with those clauses and remediate any contamination of or to the Demised Premises or the surrounding area arising from or connected with the use and occupation of the Demised Premises by the Lessee or the Lessee's servants or agents

14.02 Lessee's Obligation to Remove Fittings

The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee's fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the

Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal.

14.03 Abandoned Fittings Belong to Lessor

Any fixture or fitting or improvement not removed by the Lessee either as of right or by requirement of the Lessor as aforesaid will at the Lessor's election become the property of the Lessor and the Lessor will not be liable to the Lessee or any person claiming through the Lessee to compensate for the acquisition by the Lessor of those buildings structures and other fixtures and fittings.

14.04 Holding Over

If the Lessee with the consent of the Lessor remains in occupation of the Demised Premises after the expiration of the Term then in absence of an express agreement in writing to the contrary and notwithstanding the payment by the Lessee (and acceptance by the Lessor) of Yearly Rental for a period greater than one month the Lessee will be deemed to hold the Demised Premises as tenant from month to month at a monthly rental equal to ONE TWELFTH (1/12) of the Yearly Rental payable hereunder at the date of expiration of the Term (the rental being payable monthly in advance) and otherwise on the terms and conditions of this Lease so far as they can be applied to a monthly tenancy.

15. GENERAL PROVISIONS

15.01 Notice to Lessee and Acts to be Done by the Lessee

An invoice notice or demand in writing required to be given by the Lessor to the Lessee may be given by the Lessor or its solicitors or agents and may be forwarded to the Lessee by prepaid registered mail service addressed to the Lessee at the Lessee's last known address or registered office (if any) in Western Australia and the notice or demand if sent by post will be deemed to have been given on the fourth business day next following the day on which it is posted.

15.02 Notice to Lessor

If a notice or demand in writing is required to be given by the Lessee to the Lessor the Lessee shall forward it to the Lessor by prepaid registered mail service addressed to the Lessor at its abovementioned address or the address which at the time of giving notice or demand is the then current address of the Lessor and a notice or demand if sent by post is deemed to be given on the fourth business day next following the day on which it is posted.

15.03 Easements

The Minister for Lands and / or the Lessor may for the purpose of providing public or private access to or egress from the Land support of structures hereafter erected on adjoining land or services including water sewerage drainage gas electricity and telephonic or electronic communications or services grant rights of support enter into any arrangement or agreement with any person and may dedicate transfer grant or create any land easement, right of carriageway or privilege in favour of any person who owns or occupies any adjoining or neighbouring land over or affecting the Demised Premises and this Lease will be deemed to be subject to each agreement arrangement right easement or privilege however and whensoever created PROVIDED THAT the Lessor shall use reasonable endeavours not to cause any undue inconvenience to the enjoyment of the Demised Premises by the Lessee.

15.04 Non-Merger

The terms and conditions of this Lease or any act matter or thing done under by virtue of or in connection with this Lease or any other agreement between the parties hereto will not operate as a merger of any of the rights and remedies of the parties in or under this Lease or in or under any other agreement all of which will continue in full force and effect.

- 15.05 Lessor Not Liable to Third Parties
The Lessor will not be responsible for loss damage or injury to any person or property or the effects of the Lessee or any other person in or about the Demised Premises or the Land however occurring whether arising from the operation of or failure to operate any of the appurtenances public utility services or other machinery therein or not.
- 15.06 Severance
If any part of this Lease is or becomes void or unenforceable then that part is or will be severed from this Lease so that all parts not void or unenforceable remain in full force and effect and unaffected by that severance.
- 15.07 Arbitration
Any disputes between the parties hereto arising out of or in connection with the Lease or as to the liability of any party hereunder may prior to the commencement of proceedings in any court of competent jurisdiction be referred by either party to the decision of a single arbitrator in accordance with the provisions of the Commercial Arbitration Act 1985 and for the purposes of Section 20 thereof it is agreed between the parties that each of them shall if they so wish be represented at any hearing under the said Act by qualified legal practitioners or by any parties they may wish to appoint.
- 15.08 Lessor May Act by Agent
All acts and things which the Lessor is required or empowered to do under this Lease may be done by the Lessor or the solicitor agent contractor or employee of the Lessor.
- 15.09 Exercise of Powers
The Lessor may exercise all rights conferred upon the Lessor by this Lease ("Lessor's Powers") without any proof of default by the Lessee the continuance of that default or any notice being required (other than as provided in this Lease) and notwithstanding any lapses neglect or previous waiver by the Lessor in respect of any of the Lessee's Covenants or the exercise of any of the Lessor's Powers.
- 15.10 Statutory Powers
The powers conferred by or under any statute (except to the extent inconsistent with the terms and provisions expressed in this Lease) are in augmentation of the powers conferred on the Lessor by this Lease.
- 15.11 Proper Law
This Lease is governed by the laws of Western Australia and each party irrevocably submits to the exclusive jurisdiction of the courts of Western Australia and agrees that proceedings arising in respect of this Lease (including appellate proceedings) may only be brought in those courts.
- 15.12 Effect of Execution
Upon execution by the Lessor this Lease is binding upon each person who has executed it notwithstanding:
- (a) the failure of any other person named as a party to execute it;
 - (b) the avoidance or unenforceability of any part of this Lease; or
 - (c) the avoidance or unenforceability of this Lease or any part of this Lease against any signatory or intended signatory.

16. FURTHER TERM

16.01 No Option of Renewal

The Lessee shall have no option of renewal to extend the Term however if at the expiration of the Term of the Lease the Lessee is not in default of this Lease, and if this Lease has not been terminated by the Lessor pursuant to clause 13, and if the Lessor intends to grant a further lease of the Demised Premises at that time, then the Lessor shall inform the Lessee of the terms and conditions upon which the Lessor intends so doing and the Lessee shall have the first right of refusal to take up a new lease upon those terms and conditions. The first right of refusal must be exercised by the Lessee in writing in the manner and within the time specified by the Lessor at that time for that purpose (as to which time is of the essence) and if the Lessee fails for any reason to exercise that right strictly in accordance with the Lessor's specifications then the Lessee shall be deemed to have waived the right of first refusal and in that case the Lessor may lease the Demised Premises to any other party on terms and conditions not more favourable (as to term, rent or otherwise) than were notified to the Lessee pursuant to this clause.

17. APPROVALS

17.01 Ministerial Approval

This Lease and all proposed assignments hereof and sub-leases as permitted in accordance with clause 11 hereof shall be subject to the approval and consent of the Minister for Lands or an officer authorised on that behalf by the Minister and endorsed accordingly whereafter the terms and conditions hereof will be operative.

18. ADDITIONAL TERMS AND CONDITIONS

18.01 Additional Terms and Conditions

The covenants conditions terms and conditions (if any) set out in Item 7 of the Schedule shall form part of and shall be deemed to be incorporated in the terms of this Lease and shall have full force and effect and be binding upon the Lessee and the Lessor as if the same had been herein repeated at length.

19. RETICULATED WATER SUPPLY AND SEWERAGE SERVICE

19.01 Water Supply Condition

- a. It is a material condition of this Lease that the Lessee will at its sole expense and risk connect the Demised Premises within the period specified by the Lessor in clause 19.01(b) to any reticulated potable water supply suitable for the Demised Premises that becomes available to the settlement of Peaceful Bay, such reticulated potable water supply having been provided by an Economic Regulation Authority (under the Water Services Licensing Act 1995) or by way of a private scheme which has been so approved in writing by the Lessor, the Department of Health and the Department of Environment and Conservation.
- b. The Lessor will in writing both advise the Lessee when a reticulated potable water supply has been installed to the settlement of Peaceful Bay and will also specify a date by which the connection by the Lessee required by clause 19.01(a) must be effected being a date to be decided by the Lessor in its sole discretion but being no less than one month and no more than two years after the date of such written notification to the Lessee by the Lessor of such installation.

19.02 Sewerage Condition

- a. It is a material condition of this Lease that the Lessee will at its sole expense and risk connect the Demised Premises within the period specified by the Lessor in clause 19.02(b) to any reticulated deep sewerage service suitable for the Demised Premises that becomes available to the settlement of Peaceful Bay, such reticulated deep sewerage service having

been provided by an Economic Regulation Authority (under the Water Services Licensing Act 1995) or by way of a private scheme so approved in writing by the Lessor, the Department of Health and the Department of Environment and Conservation.

- b. The Lessor will in writing both advise the Lessee when a reticulated deep sewerage service has been installed to the settlement of Peaceful Bay and will also specify a date by which the connection by the Lessee required by clause 19.02(a) must be effected being a date to be decided by the Lessor in its sole discretion but being no less than one month and no more than two years after the date of such written notification to the Lessee by the Lessor of such installation.

19.03

Assignment Condition

- a. The Lessee agrees that it is a material condition of this Lease that the Lessor will not consent to an assignment of this Lease unless the Demised Premises are both connected to a reticulated water supply in accordance with clause 19.01 and a deep reticulated sewerage service in accordance with clause 19.02.
- b. At the Lessor's sole option, the Lessor may waive the requirement specified in clause 19.03(a) and provide consent to the assignment of this Lease if the proposed assignee enters into an enforceable agreement with the Lessor to honour the requirements undertaken by the Lessee pursuant to clauses 19.01 and 19.02.

THE SCHEDULE

THE LESSEE:

Name(s): «Owner_1»
 «Owner_2»
 «Owner_3»
 «Owner_4»
 «Owner_5»
 «Owner_6»
 «Owner_7»

Address: «Postal_Address__1»
 «Postal_Address__2»
 «Postal_Address__3»

ITEM 1

(Operative Part)

Demised Premises:

That part of the Land means Class A Reserve No 24510 comprising Lot 1424 on Deposited Plan 202471 and Lots 1423 and 2229 on Deposited Plan 240012 being the whole of the land comprised in Qualified certificate of Crown land title Volume 3122 Folio 555.

AND BEING Site «Lot_No» the subject of Subsidiary Title Volume «Volume» Folio «Folio».

ITEM 2

(Operative Part)

Date of Commencement

First (1st) day of July 2010.

ITEM 3

(Operative Part)

Termination Date

Midnight on the Thirtieth (30th) day of June 2031.

ITEM 4

Yearly Rental

The sum of \$«VALUE» per annum paid annually in advance.

Address for payment of Yearly Rental

Until further notice to:
The Chief Executive Officer
Shire of Denmark
PO Box 183
Denmark WA 6333.

ITEM 5

Permitted Use

Holiday cottage which shall not be occupied for any single consecutive period of THREE (3) months or combined period or several short term periods which in total are greater than SIX (6) months in any one Rental Year, without the prior written consent of the Lessor.

ITEM 6

Lessee's Insurances :

In the name of the Lessee a policy to cover the Lessee's fixtures, fittings and improvements as the Lessee deems necessary or desirable.

In the name of the Lessee and (if so required by the Lessor) the Lessor for their respective interests a comprehensive public liability policy relating to the Demised Premises and the improvements thereon with cover of ten million dollars per claim or such other sum as the Lessor from time to time nominates.

ITEM 7

Additional Terms and Conditions

1. Notwithstanding anything hereinbefore contained to the contrary the Lease may at any time during the term hereof be terminated:
 - (a) by the Lessee on the giving to the Lessor of three (3) months' notice in writing of his intention so to do. On the date of the expiration of the Lessee's notice this Lease shall absolutely cease and determine noting that the Lessee is to deliver possession of the Demised Premises to the Lessor in such state of repair and condition which is consistent with the proper performance by the Lessee of the covenants contained in the lease;
 - (b) by agreement between the Lessor and the Lessee on any other date as may be agreed; or
 - (c) by the Lessor if for any reason the Lessor's right or title in and to the Land is withdrawn or in any other way affected such that the Lessor is unable to grant to the Lessee the rights and entitlements herein.
2. In the event of any dispute between the parties as to the date upon which a reticulated water supply and/or a sewerage service is connected to or available at Peaceful Bay, the certificate of the Lessor shall be conclusive proof.
3. The Lessee hereby indemnifies and agrees to fully and effectively keep indemnified the Lessor against all costs, expenses, liabilities and claims for moneys expended or incurred or paid by the Lessor or for which the Lessor may be or become liable to pay at any time and from time to time as the result of the failure or refusal by the Lessee to connect the Demised Premises to the reticulated water supply or sewerage service in accordance with the terms of this Deed.
4. Neither party will have any claim for compensation in respect of the termination of the lease under this provision provided that nothing in this provision prejudices or affects any rights, powers or actions of the Lessor in respect of any breach of the terms or covenants in this lease by the Lessee arising before termination of the lease under this provision.

ATTESTATION SHEET

Executed by the parties as a Deed on the _____ day of _____ in the year _____

LESSOR/LESSORS SIGN HERE (NOTE 9)

THE COMMON SEAL of the)
SHIRE OF DENMARK)
was hereunto affixed in)
the presence of :)

..... Shire President, Cr Ross Thornton

..... Chief Executive Officer, Mr Dale Stewart

LESSEE/LESSEES SIGN HERE (NOTE 9)

Signed

Signed

In the presence of

In the presence of

Signed

Signed

In the presence of

In the presence of

Signed

Signed

In the presence of

In the presence of

Signed

In the presence of

INSTRUCTIONS
<ol style="list-style-type: none"> 1. If insufficient space in any section, Additional Sheet Form B1 should be used with appropriate headings. The boxed sections should only contain the words "See Annexure". 2. Additional Sheets shall be numbered consecutively and bound to this document by staples along the left margin prior to execution by parties. 3. No alteration should be made by erasure. The words rejected should be scored through and those substituted typed or written above them, the alteration being initialed by the person signing this document and their witnesses. 4. Duplicates are not issued for Crown Land Titles.
NOTES
<ol style="list-style-type: none"> 1. DESCRIPTION OF LAND Lot and Diagram/Plan number or Location name and number to be stated. Extent – Whole, part or balance of the land comprised in the Certificate of Crown Land Title to be stated. The Certificate of Crown Land Title Volume and Folio number to be stated. 2. ENCUMBRANCES To be identified by nature and number, if none show "nil". 3. LESSOR State full name and address of Lessor/Lessors and the address/addresses to which future notices can be sent. 4. LESSEE State full name of Lessee/Lessees and the address/addresses to which future notices can be sent. If two or more state tenancy eg. Joint Tenants, Tenants in Common. If Tenants in Common specify shares. 5. TERM OF LEASE Term to be stated in years, months and days. Commencement date to be stated. Options to renew to be shown. 6. RECITE ANY EASEMENTS TO BE CREATED Here set forth Easements to be created as appurtenant to the lease commencing with the words "together with" and/or any Reservations hereby created encumbering the lease commencing with the words "reserving to". 7. RENTAL State amount in words. 8. PAYMENT TERMS State terms of payment. Eg, by instalments of \$..... payable on theday of each month/the months of in each year, commencing with a payment of \$..... on or before the day of...../execution of this lease by the Lessee. 9. EXECUTION A separate attestation is required for every person signing this document. Each signature should be separately witnessed by an Adult Person. The address and occupation of witnesses <u>must</u> be stated.
EXAMINED

Office Use Only

LEASE OF CROWN LAND (L)

LODGED BY	Shire of Denmark
ADDRESS	PO Box 183 DENMARK WA 6333
PHONE No.	9848 0300
FAX No.	9848 1985
REFERENCE No.	
ISSUING BOX No.	

PREPARED BY	Shire of Denmark
ADDRESS	PO Box 183 Denmark WA 6333
PHONE No.	9848 0300
FAX No.	9848 1985

INSTRUCT IF ANY DOCUMENTS ARE TO ISSUE TO
OTHER THAN LODGING PARTY

TITLES, LEASES, DECLARATIONS ETC LODGED HEREWITH

1.		Received Items
2.		Nos.
3.		
4.		Receiving Clerk
5.		
6.		

Registered pursuant to the provisions of the TRANSFER OF LAND ACT 1893 as amended on the day and time shown above and particulars entered in the Register.



Our Ref

KR:SM:DENM-29989

Your Ref

30 May 2012

Mr Dale Stewart
Chief Executive Officer
Shire of Denmark
PO Box 183
DENMARK WA 6333



Stirling Law Chambers
220-222 Stirling Highway
Claremont WA 6010
Tel (08) 9383 3133
Fax (08) 9383 4935
Email: mcleods@mcleods.com.au

Denis McLeod
Neil Douglas
Fiona Grgich
David Nadebaum
Geoff Owen
Andrew Roberts
Craig Slarke
Peter Wittkuhn
Elisabeth Stevenson (Special Counsel)
David Nicholson (Senior Associate)
Peter Gillett (Senior Associate)
Trudi Firth (Associate)

By email: ceo@denmark.wa.gov.au

Dear Dale

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

I refer to your letter dated 7 July 2011. I also refer to your email dated 24 May 2012.

You raised numerous issues for advice, most of which individually were difficult or complex or both. That accounted for the delay which, however, is regretted.

In relation to the costs for this advice, a substantial amount of work has gone into the advice. I accept however, that it may be more extensive than you anticipated. For that reason, we will provide a substantial reduction on our ordinary fees. I am looking at our records and will contact you about the fees shortly to ensure that you are happy on that count.

Request for advice

You have requested advice regarding the obligations of the Shire of Denmark in relation to the 203 private holiday cottages situated in Class A Reserve No. 24510 (**the Property**), which is managed by the Shire. In particular, you have posed the following questions:

- 1 Questions arising regarding the nature of approval required for an application for development or demolition on the Property
 - 1.1 Is the lessee considered to be the owner of the Property under cl.3 of the definition of 'owner' in the Shire of Denmark Town Planning Scheme No. 3 (the Scheme)?
 - 1.2 Is the Shire's consent required as the lessor under the Lease in addition to the Shire providing planning approval under the Scheme?
 - 1.3 Can the Shire deny approval as the 'owner' or 'lessor' (ie. prior to submission of a development application)?
 - 1.4 If so, what rights of appeal or of compensation etc exist for the applicant/lessee against the decision to deny approval?

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

- 1.5 Is the Shire's ability to refuse a request to demolish a cottage compromised if it has not inspected or enforced the requirements under the Lease for repair etc?
- 2 Questions regarding what legal responsibilities the Shire may have in relation to undertaking inspections and enforcing maintenance of the cottages
 - 2.1 Does the Shire have any duties of care or other legal responsibilities to require it to undertake regular inspections and enforce maintenance of cottages by the lessees?
 - 2.2 Should the Shire amend its policy in relation to property inspections?
 - 2.3 If a cottage is replaced with a new building, does the lessee have the right (or the obligation) to remove the new building (ie. is the new building considered an 'addition')?
- 3 Questions regarding planning and policy framework for decision making in relation to the cottages
 - 3.1 Is there any conflict between the Shire's legal obligations and the Conservation Plan and Town Planning Policy
 - 3.2 Can we give criteria to guide Shire in a decision to deny or support an application for demolition?

Background

- (a) The Shire leases the cottages and you have provided a sample copy of the Lease Agreement (**Lease**). I understand that the Leases for all the cottages commenced on 1 July 2010 for a period of 21 years and will expire on 30 June 2031. Relevant provisions of the Lease include -

5.01 Inspection by Lessor

The Lessor or its duly authorised agents may with or without workmen and others at all reasonable times enter upon and view the state of repair of the Demised Premises.

5.02 Maintenance of Demised Premises

At its own expense the Lessee shall at all times during the Term and otherwise for so long as the Lessee remains in occupation of the Demised Premises maintain the Demised Premises and all improvements placed thereon by the Lessee in good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted).

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

6.01 No alteration without Consent

The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing.'

- (b) The Original Peaceful Bay Settlement is listed as a Place of Heritage Value under the Scheme and is also subject to the Peaceful Bay Conservation Plan and Town Planning Scheme Policy No. 35 (**Conservation Policy**), which you have also provided. This is discussed further below.
- (c) In April 2011, a lessee of a cottage lodged an application to demolish a cottage and to construct a holiday cottage and outbuilding. The lessee had received advice in 2009 that the repairs required to the cottage were greater than the cost of rebuilding. In May 2011, Shire staff undertook an inspection of the premises and identified the following need for repairs:
- Roof leaking, causing dampness in the building;
 - Roof is bowing/sagging at the rear of the cottage;
 - Some roof and external timbers are rotting;
 - Uneven internal floor;
 - Unevenness with verandah floor including floorboards lifting/moving; and
 - The cottage is lined with blue asbestos.
- (d) The Shire, as lessor under the Lease, determined not to consent to the application at its Council Meeting of 28 June 2011, the Minutes of which you have also provided (**Minutes**).

Questions for advice

The questions that you have raised in your letter, together with my responses, are set out and numbered below. In order to avoid repetition, I have not repeated all of the questions which you have asked where I considered that the response has been covered under another question. Please let me know, however, if you have any outstanding queries.

Summary of advice

The Shire has a duty of care, under the common law principle of negligence to take reasonable care to avoid foreseeable risk of injury.

The lessee, however, has a particularly onerous obligation under the lease to maintain the premises in a "good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor". In my view, while the lease is in place, the responsibility to maintain the property in a safe state transfers to the lessee. The lessee will also have responsibilities to take reasonable care to ensure that a person entering the premises will not suffer injury by reason of any dangers which are due to the state of the premises, as the occupier under the *Occupier's Liability Act 1985 (OL Act)*.

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

The Shire must still ensure it takes reasonable care and, in order to effect that, we recommend conducting regular inspections and enforcing obligations of the lessees in relation to maintenance and repair.

Some uncertainty will arise as to the extent of repairs required by the tenant under the lease where the Shire has entered into new leases for cottages that are in a poor state of repair at the commencement of the lease. The obligations upon the lessee to maintain the cottages will normally be to the same state as at the commencement of the lease. The lessee's obligations under the OL Act, will also be relevant here.

I recommend that the Shire undertake the actions set out at 2.2, including inspections of the premises, and enforcement of the repair obligations under the lease.

Advice

1 Questions arising regarding the nature of approval required for an application for development or demolition on the Property

1.1 Is the lessee considered to be the owner of the Property under cl.3 of the definition of 'owner' in the Shire of Denmark Town Planning Scheme No. 3 (the Scheme)?

Under the Scheme, the Shire is considered to be the owner of the Property.

The Scheme provides the following definition of owner -

“owner” - in relation to any land includes the Crown and every person who jointly or severally whether at law or in equity:

- (a) is entitled to the land for an estate in fee simple in possession; or
- (b) is a person to whom the Crown has lawfully contracted to grant the fee simple of the land; or
- (c) is a lessee or licensee from the Crown; or
- (d) is entitled to receive or is in receipt of, or if the land were let to a tenant, would be entitled to receive the rents and profits thereof, whether as a beneficial owner, trustee, mortgagee in possession, or otherwise.’

Applying that definition, the lessee would not be considered the owner under the Scheme. Under para.(c) of the definition of ‘owner’ in the Scheme, an owner, in relation to Crown land, includes ‘a lessee or licensee from the Crown’. In the Peaceful Bay Reserve, the Shire of Denmark is the lessor. Even though the land is Crown land, it is leased from the Shire, which is not the Crown or an agency of the Crown.

The Shire is the owner of land under para.(d) of the Scheme’s definition, as it has the power to grant a lease over the land under the Management Order and is entitled to receive the rents and profits of any such lease.

1.2 Is the Shire's consent required as the lessor under the Lease in addition to the Shire providing planning approval under the Scheme?

The Shire's consent is required at two stages for a request for development of the cottages. These are separate requirements for Shire consent, granted under different provisions of the Scheme, and the Lease.

Firstly, the Shire's consent is required as the lessor of the cottages under cl.6.01 of the Lease, which provides -

'The Lessee shall not make or cause to be made any structural or other alteration or addition to the Demised Premises without first submitting to the Lessor full detailed drawings and specifications of the proposed works and first obtaining the Lessor's consent in writing'.

The Scheme also requires the owner to have signed the application for planning approval, as set out in the form in Appendix III and provided in cl.6.3.1 of the Scheme. We understand this is also required by the Shire's Procedure *OP040239: Construction of New or Significant Alterations to Building Structures on Shire Land* (as referred to in the Minutes).

Secondly, any alteration, demolition or construction on the property requires planning approval from the Shire under cl.6.1.1 of the Scheme. Additionally, as a result of the status of the settlement as a place of heritage value, cl.7.2 of the Scheme also applies. It provides -

'A person shall not without the approval of the Shire at or on a place of Heritage Value, carry out any development including, but without limiting the generality of the foregoing:

- (a) the erection, demolition or alteration of any building or structure (not including farm fencing, wells, bore or troughs and minor drainage works ancillary to the general rural pursuits in the locality);
- (b) the removal, felling, lopping, topping or damaging of trees associated with Places of Heritage Value;
- (c) the erection of advertising signs; and
- (d) clearing of land.'

1.3 Can the Shire deny approval as the 'owner' or 'lessor' (ie. prior to submission of a development application)?

The Shire may deny approval to a request for development or demolition in its role as the lessor under the Lease and owner under the Scheme, provided it has a reasonable basis for doing so.

I note that the decision by the Shire to refuse its consent to a request to demolish an existing cottage and build a new holiday cottage and outbuilding was based on the Lease provisions (notably those requiring the lessee to maintain the cottages in 'good ... substantial repair and condition'), the Conservation Policy and the Peaceful Bay

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

Heritage Precinct Conservation Plan (PBHPCP). These documents give the Shire a reasonable basis for forming its decision, however they must be considered in light of the Shire's legal obligations, particularly in negligence, as discussed further below.

1.4 If so, what rights of appeal or of compensation etc exist for the applicant/lessee against the decision to deny approval?

Manner of appeal or challenge

A lessee can bring any dispute it may have in relation to the Lease to arbitration in accordance with the *Commercial Arbitration Act 1985*, prior to commencement of proceedings in any Court of competent jurisdiction, in accordance with cl.15.07 of the Lease.

A lessee could also choose to commence proceedings in a Court, if it had a legal basis for doing so.

Additionally, if the Shire had made a planning decision on the matter, for example to refuse a request for planning approval, the lessee could apply to the State Administrative Tribunal for a review of the decision.

Potential grounds of appeal or challenge

Breach of contract

If a lessee sought to challenge a decision of the Shire to refuse its consent to a proposed development as the lessor and owner, it may seek to do so on the basis of breach of contract, and claim damages for any loss that it may have incurred as a result of the breach by the Shire.

Possible grounds upon which a challenge could be raised under breach of contract include breach of an implied duty to act reasonably. Contracts would generally be construed as incorporating an implied obligation on both parties to do what is normally and reasonably necessary to enable fulfilment of the contract. A lessee may attempt to mount a claim that the failure of the Shire to grant consent prevents the lessee from being able to fulfil its obligations in relation to maintenance and repair.

Rescission for misrepresentation

Alternatively, the lessee may seek to rescind the Lease on the grounds of misrepresentation and misleading conduct if it believed the Shire had made statements or conducted itself in a manner that encouraged the lessee to sign the Lease, which turned out to be false (whether innocent or otherwise). On the facts as we understand them, it is unlikely the lessee in question would attempt to rescind the Lease.

The Minutes refer to discussions between the lessee and the Shire prior to the Lease being entered into and prior to the development application being made, after which the lessee decided it should wait until the new Lease was in place before progressing

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

further. Depending upon what, if any, representations Shire employees made, of which we have no knowledge, this could provide a basis for action.

A failure by the Shire to provide approval could also be relevant if the lessee made a claim in negligence. The Shire's duties in this regard are discussed below.

It is, however, speculative to consider the grounds of a hypothetical challenge to a decision on the basis of the limited information that we have. Other than identifying these possible areas of challenge, I do not think it appropriate to spend further time at the present time on this issue.

1.5 Is the Shire's ability to refuse a request to demolish a cottage compromised if it has not inspected or enforced the requirements under the Lease for repair etc?

The Shire has the right to inspect under the Lease, not an obligation. The lessee can't transfer the obligation under the Lease to maintain and repair to the lessor. However if it could be shown on the facts that the Shire was aware the lessee was not monitoring and repairing in accordance with cl.5.02, the right to refuse approval to demolish may be affected. There may also be a consequence in negligence as discussed below.

2 Questions regarding what legal responsibilities the Shire may have in relation to undertaking inspections and enforcing maintenance of the cottages

2.1 Does the Shire have any duties of care or other legal responsibilities to require it to undertake regular inspections and enforce maintenance of cottages by the lessees?

The Shire may have legal responsibilities to inspect and enforce maintenance of the cottages under contract (ie. in the Lease), statute and the common law of negligence.

Contractual Obligations

Maintenance and Repair

Cl.5.02 of the Lease imposes an obligation upon the lessee to 'maintain' the premises in 'good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor (damage by fire storm tempest earthquake and explosion excepted)'.

This provision clearly places the responsibility for repair on the lessee (with the exception of damage by fire, storm, tempest, earthquake and explosion) and will overcome obligations that a landlord would otherwise have to undertake structural repairs of the property under the OL Act or the RT Act, which are discussed below.

It is less clear whether this provision is strong enough to overcome obligations a landlord may have in negligence to take reasonable care to avoid a foreseeable risk of injury, particularly at the commencement of the Lease. This is also discussed further below.

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

The NSW Supreme Court and Court of Appeal have considered similarly phrased term, “to keep in good and substantial repair the demised premises” in *Alcatal Australia Ltd v Scarcella* [2001] NSW CA 401. The Supreme Court described it as an “unusually onerous” obligation upon the lessee; like the Shire’s lease in this instance, there was no qualification that fair wear and tear is excepted and there was no obligation on the landlord to carry out any work; and the obligation to “keep” the premises was on a continuous basis. The same applies in this instance.

If the lessee has not undertaken these repairs throughout the life of the lease, the Shire may be able to claim damages for the cost of repairs. The standard to which a lessee is required to maintain the premises in “good and substantial repair” has been described as :

“Time must be taken into account. A 28-year building is not to be made new. But so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken. This means that if deterioration to the building is not evident after 28 years but would not have been evident, or evident to such a degree, if in earlier years maintenance or repairs which could have been undertaken had been undertaken, then the plaintiff is required to put the building in the condition in which it would have been if the maintenance had been undertaken in the earlier years. This may entail renewing subsidiary parts of the building (though not renewal of the whole building). The plaintiff is not allowed to neglect the building and then, by reason of the neglect, at a later date say that deterioration to the building which has occurred by reason of that neglect diminishes the extent of its obligation to put and keep the building in good and substantial repair. He is bound by seasonal application of labour to keep the premises as nearly as possible in the same condition as at the commencement of the lease” (*Alcatal Australia Ltd v Scarcella* [2001] NSW CA 401 at [57]).

In practical terms, the extent to which the lessee is required to upkeep the premises, factoring in the impacts of time, will depend upon the particular circumstances and what “a reasonably minded owner” would do.

Now that new leases have been entered into on the cottages, and the previous leases have terminated, it would be extremely difficult for the Shire to bring a claim for damages in relation to the repairs that need to be undertaken, as the obligation upon the lessee is to maintain the premises to the Shire’s “reasonable satisfaction”. The Shire’s actions, in making no complaint and commencing a new lease infer its “reasonable satisfaction” and it may be further that some of the premises are now in the possession of new tenants.

Further, the obligation for the lessee to maintain the premises will generally be to keep the premises in the same condition as at the commencement of the lease. Accordingly, where the new leases have been entered into in premises that are run down and in need of repair at the commencement of the lease, the lessees will not necessarily be obliged under the Lease to improve the condition of the properties.

Legal Issues in Relation to Demolition Request for Leasehold Cottages at Peaceful Bay

In my view, the lessee will still have to take responsibility for the care of the premises and keep them reasonably safe, as they bear the responsibility under the Lease and under the OL Act as the occupier (as discussed below).

Inspection

Cl.5.01 of the Lease authorises the Shire to undertake inspections of the property but does not, in itself, require the Shire to undertake such inspections. You have informed me that it has not been the Shire's practice to carry out inspections of the property.

Commercially, however, it is sensible to undertake inspections in order to enforce the obligations under the lease for the lessee to maintain the premises, in order to avoid the situation where the cost of repairs required outweigh the cost of replacing the entire building.

Inspections would also be a means to demonstrate the Shire is taking reasonable care to satisfy its obligations in negligence, as discussed below.

Statutory Obligations

Occupier's Liability Act 1985 (OL Act)

The OL Act sets a standard of care that occupiers and landlords of premises owe to persons and property on the premises.

Where a landlord is responsible for repair and maintenance of premises under a lease agreement, the OL Act imposes a duty of care upon the landlord towards any persons who may from time to time be on the premises, in respect of the repair and maintenance of the premises (s.9). In this instance, it is the lessee, not the landlord, who is responsible for repair and maintenance, therefore this obligation will not apply.

Where the premises are subject to a lease which grants exclusive possession, the tenant is ordinarily considered to be the occupier during the term of the lease and will therefore have an obligation to exercise reasonable care to ensure that a person entering on the premises will not suffer injury by reason of any dangers which are due to the state of the premises (s.5) (*Jones v Bartlett & Anor* (2000) 176 ALR 137 at 146). The landlord may, however, be considered to be the occupier prior to entering into the lease (*Jones v Bartlett & Anor* (2000) 176 ALR 137 at 146).

The Shire should not, therefore, be responsible under the OL Act in ordinary circumstances during the term of the lease. Prior to entering into a lease, however, it will most likely have a duty to exercise reasonable care to ensure that a person entering on the premises will not suffer injury by reason of any dangers which are due to the state of the premises, under the OL Act.

The standard of care that the Shire should exercise here is consistent with the standard of care under common law discussed below. In summary, it is described as "observing reasonable care to avoid a foreseeable risk of injury".

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If there was something to suggest that the property was defective, dangerous or, by reason of its age, hazardous, then the Shire would need to ensure that “reasonable care” was taken to avoid foreseeable injury.

In light of the age of the property and the need for repairs outlined in the Minutes, we think that as a minimum, the Shire should inspect the properties and enforce the requirements to repair the property under the lease.

In particular, it should take care prior to entering into leases, and ensure that it inspects and undertakes necessary repairs prior to the lease being entered into. In practical terms, it will assist if the Shire enforces the requirements for maintenance during the term of a lease.

Residential Tenancies Act 1987 (RT Act)

The RT Act imposes a responsibility on landlords of residential tenancies to ‘maintain the premises in a reasonable state of repair’ (eg. s.42).

On the basis of the information and the Lease that you have given me, I do not think that the RT Act applies to the Lease of the cottages because the tenancies do not meet the definition of residential tenancies under the Act. Significantly, the cottages may be used for holiday use only and lessees are not permitted to stay for more than three months consecutively, unless prior approval is given.

In any event, however, s.82(3) of the RT Act enables an owner and a tenant to contract out of the requirements of s.42 (for the owner’s responsibility for cleanliness and repairs) by excluding, modifying or restricting the requirements contained in the provisions, as long as the agreement is in writing and is signed by the owner and the tenant. In my view, the obligation upon the lessee to undertake maintenance and repairs in the existing Lease would be sufficient to contract out of those requirements, provided the Lease was in writing and signed by both parties.

Civil Liability Act 2002 (CL Act)

The CL Act operates along side the common law principles of negligence, discussed below, and formalises some exceptions to where a person will be liable to breaching a duty of care (*Department of Housing and Works v Smith (No 2)* [2010] WASCA 25). Section 5B clarifies that a person will not be held liable for harm caused by that person’s failing to take precautions against a risk, where –

- “(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
- (b) the risk was not insignificant; and
- (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.”

It also gives some guidance as to what consideration a 'reasonable person' would give to a decision to take precautions against a risk, namely –

- “(a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm;
- (d) the social utility of the activity that creates the risk of harm”

Section 5N and 5O also provide exceptions where the risk was an obvious risk, (unless the person proves on the balance of probabilities that he or she was not aware of the risk).

In effect, however, these provisions are consistent with the common law.

Common law obligations

Negligence

A landlord can be liable to a tenant in negligence for injury caused by the defective state of premises. Traditionally, this was not the case, and the law is still in a state of development in this area.

The Judges of the High Court, in *Jones v Bartlett* (2000) 205 CLR 166, described the duty in different ways, including “to take reasonable care to put and keep the premises in a safe state of repair” [93], “to take reasonable care to avoid foreseeable risks of harm to the tenant and members of the tenant’s household” [57], and “to take reasonable care to avoid foreseeable risk of injury from defects of which the landlord was on notice, or of which (by appropriate inspection) the landlord would reasonably become aware” [252].

This principle has since been interpreted as imposing on the landlord an obligation to “observe reasonable care to avoid foreseeable risk of injury”. What constitutes a ‘reasonable’ amount of care will depend upon the circumstances, however, it does not necessarily mean that all foreseeable risks should be eliminated, even if they may be significant, as it may well be a reasonable response not to respond to such a risk.

For example, in *Department of Housing and Works v Smith (No 2)* [2010] WASCA 25, HomeWest was not responsible for the injury that Ms Smith sustained due to a depression in the lawn of the senior’s accommodation unit that she leased from HomeWest. A depression in the lawn had been left by the previous tenant extending 1 inch deep, by up to 2 feet in diameter. Even though the Court of Appeal accepted that the depression posed some risk to an elderly person living there, it was not a hazard of a kind “requiring some protection or warning” and was no a hazard at all for most people “taking reasonable care for their own safety”. The Court concluded that a reasonable person in the appellant’s position would not, in the circumstances, had filled in the depression [111].

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Similarly, the duty does not go as far as detecting latent defects, undetectable to the ordinary eye, or requiring experts to determine whether the construction fell short of current building standard, for example, whether building standards had changed over time to require a thicker level of glass to be used in sliding door (*Jones v Bartlett & Anor*), particularly if there was “nothing to suggest ... that the house was defective or dangerous, or that, by reason of its age, or condition, it was hazardous to occupy” (*Jones v Bartlett & Anor* at 147).

Consequently, if there was something to suggest that the property was defective, dangerous or, by reason of its age, hazardous, then the Shire would need to ensure that “reasonable care” was taken to avoid foreseeable injury.

Examples of what landlords have been found to be liable to tenants for include injuries caused by reasonably-foreseeable factors such as faulty electrical work, defective plumbing, faulty hot water service, dangerously muddy area around a water pump, and missing or defective balcony struts.

The question of what is reasonably foreseeable is not always clear and will depend on the particular facts and circumstances of the case, including the ‘obviousness’ of the defect and its ‘inherent danger’ to users.

Obligation to inspect

The Shire, as landlord, should inspect the premises, particularly prior to commencement of a Lease.

The Courts have found that a landlord can be liable for injury where it was reasonably practical for a landlord to inspect the premises and the injury resulted from factors that would have been reasonably discoverable on such an inspection (*Gration v C Gillan Investments Pty Ltd* [2005] 2 Qd R 267). The landlord does not have to go the extent of requiring experts to inspect the premises to find latent defects, unless they have been brought to the landlord’s attention.

While it seems settled that this obligation exists at the beginning of the tenancy, it is not clear whether the duty of care owed by a landlord continues to require inspection during the Lease, and continual maintenance, as this is still a matter being considered by the Courts. In my view, it is best to act prudently, as set out below at 2.2.

Extent of the Shire’s duty of care in relation to the cottages

In summary, the Shire may be responsible for injury that occurs as a result of a foreseeable risk, including injury resulting from factors that would have been reasonably discoverable on such an inspection where it was reasonably practicable for the Shire to do so prior to the commencement of the Lease. This obligation is more pertinent at the commencement of a Lease because the Shire has had control of the premises, and as such has the additional responsibility of being the occupier under the OL Act.

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Once the lease is in place, however, in my view the responsibility to maintain the property in a safe state transfers to the lessee. The lessee has a particularly onerous obligation under the lease to maintain the premises in a “good, clean, habitable, substantial repair and condition to the reasonable satisfaction of the Lessor. The Shire must still ensure it takes reasonable care and, in order to effect that, we recommend conducting regular inspections and enforcing obligations of the lessees in relation to maintenance and repair.

Some uncertainty will arise as to the extent of repairs required by the tenant under the lease where the Shire has entered into new leases for cottages that are in a poor state of repair at the commencement of the lease. The obligations upon the lessee to maintain the cottages will normally be to the same state as at the commencement of the lease. The lessee’s obligations under the OL Act, will also be relevant here.

If the Shire was to act prudently, it would undertake the actions set out at 2.2 below.

2.2 Should the Shire amend its policy in relation to property inspections?

In our opinion, the Shire should undertake regular inspections and, if repairs are required, then the Shire should notify and require the lessee to undertake the necessary work. This would substantially reduce any burden of liability that the Shire may have in this regard, and shift that burden to the lessees.

In relation to existing Leases, I recommend inspecting the premises as soon as possible and requiring lessees to undertake necessary repairs.

I also recommend undertaking regular inspections for example on an annual basis, and requiring that lessees undertake necessary repair works.

Since a landlord has particular responsibilities under the OL Act and in negligence for ensuring the safety of the premises prior to a Lease being entered into, the Shire should pay particular attention to enforcing the maintenance obligations at the end of a Lease, and ensuring the cottages are reasonably safe and maintained prior to entering into a new Lease, or renewing an existing Lease.

I also recommend writing to lessees to inform them of the risk that they can be liable for any injury or damage caused by failure to maintain the premises, and requiring that they obtain necessary insurances. The Shire may not be able to enforce such a requirement, but it is a requirement that could be included in a new Lease.

For new Leases, a careful approach will need to be taken to the respective repair and maintenance obligations of the lessee and the lessee.

2.3 If a cottage is replaced with a new building, does the lessee have the right (or the obligation) to remove the new building (ie. is the new building considered an ‘addition’)?

The Lease places an obligation upon the lessee to remove all the lessee’s fixtures, fittings and improvements. Cl.14.02 of the Lease provides-

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‘The Lessee shall within FOURTEEN (14) days after the expiration of the Term or immediately prior thereto remove from the Demised Premises all the Lessee’s fixtures and fittings and improvements which are erected or installed on the Demised Premises unless consent for such fixture fittings or improvements to remain on the Demised Premises is obtained from the Lessor and the Lessee shall make good to the satisfaction of the Lessor all damage caused to the Demised Premises by the removal’.

This provision includes all fixtures, fittings and improvements, but only those of the lessee.

The Lease provision is consistent with the usual requirement for a tenant to remove ‘tenants’ fixtures’ from a premises. It should be noted however that items that are ‘so firmly affixed that removal would destroy their essential character or value or would substantially damage the realty’ are considered to be ‘landlord’s fixtures’ and are not to be removed by the tenant, even if the tenant brought them onto the property.

Historically, the Courts have treated a timber dwelling-house, resting by its own weight on brick foundations on land to be a fixture, because it had been brought onto the land with the intention of becoming part of the realty. If the house was considered to be a ‘fixture’, it would be classified as a ‘landlord’s fixture’ and would not be able to removed from the site by the lessee at the end of the Lease.

More recently, the Courts are considering a house not as a fixture, but as ‘part and parcel of the land’. This classification would remove the need to classify the house as a landlord’s or tenant’s fixture, since the house would be considered as part of the land and could not be removed by the lessee at the end of the Lease. This is a recent development of the law which has not, as yet, been confirmed by the High Court.

In any event, a lessee could not take from the land a house that it builds on the land, at the completion of the Lease, without authority of the lessee to do so.

A means of avoiding potential dispute over this issue would be to require, as a condition of the approval of undertaking significant improvements or construction of a new dwelling, confirmation that the improvements/new building remains the property of the Shire at the end of the Lease.

3 Questions regarding planning and policy framework for decision making in relation to the cottages

3.1 Is there any conflict between the Shire’s legal obligations and the Conservation Plan and Town Planning Policy

The Conservation Policy provides the following guidance to the Shire -

‘4.5.1 Retention

There should be no demolition or removal of any of the original sections of buildings that are classified as having some cultural heritage significance.

4.5.2 Conservation and Maintenance

The buildings which are classified as having considerable or some heritage value should be conserved and maintained.'

The Minutes also refer to the PBHPCP, though we have not been provided with a copy of that document. From the Minutes, I understand that the PBHPCP includes the property the subject of the request in the Peaceful Bay Heritage Precinct, which is considered to be a zone of 'considerable significance'. The Minutes also indicate that the Precinct is listed on the 1999 Municipal Heritage Inventory (MHI) as Category 'C' which provides to 'retain and conserve if possible'. Additionally, the draft 2011 MHI refers to the Precinct as having 'Exceptional' level of significance which 'should be retained and conserved unless there is no feasible and prudent alternative to doing otherwise'.

Together, the Conservation Policy, the PBHPCP and the MHIs (**the planning documents**) certainly provide some guidance to the Shire that there should be a strong inclination towards retention of the existing buildings and that there should be no demolition of the buildings, as far as is possible.

The planning documents stop short, however, of prohibiting demolition. They allow some scope for demolition if, for example, there was no feasible and prudent alternative to doing so.

In any event, the planning documents themselves are in the nature of policies, and should not be treated as binding (*Falc & Ors v State Planning Commission* (1991) 74 LGERA 68). They must be considered in light of the legal obligations of the Shire. In particular, it will be necessary for the Shire, if faced with a similar request in the future, to weigh up any duties in negligence that may be attributable to the Shire as lessor (discussed above).

If the Shire were to regularly inspect the cottages and require the maintenance of them, I do not see how there would be any conflict between the Shire's legal obligations and the requirements of the planning documents.

To provide guidance to the Shire staff and the Council in making decisions in relation to these properties, particularly in the interim period where lessees will be undertaking maintenance and may be making different applications for development, I recommend that the Shire prepares a policy to assist to weigh up the requirements of the planning documents, and the legal obligations of the Shire. To assist in this regard, I have suggested some criteria at 3.2 below.

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3.2 Can we give criteria to guide Shire in a decision to deny or support an application for demolition?

- (1) Is the existing cottage habitable? Can it be used without risk of damage or injury or risk to health?
- (2) Could the cottage be made habitable by reasonable repair or restoration work, at a cost less than replacement cost?
- (3) Does the cottage alone or as part of a group have cultural heritage or other special status which justifies a decision to retain at a cost exceeding replacement cost?
- (4) Is there any precedent for approval or refusal of demolition?
- (5) Is there any record of requests for permission to carry out maintenance or repair work on that cottage?

I hope the above satisfies your requirements. Please don't hesitate to contact me or Kristy Robinson if you require any further assistance with the above.

Yours sincerely



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