

Planning and Development Reports

Committee Consideration – 9 July 2013
Council Resolution – 23 July 2013

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PD29.13	No. 110 (Lot 153) Stirling Hwy, Nedlands – Proposed Office Additions (Ground and Upper Floors)
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Committee	09 July 2013
Council	23 July 2013
Applicant	JUO
Owner	Cherry Field Pty Ltd
Officer	Laura Sabitzer – Planning Officer
Director	Peter Mickleson – Director Planning & Development
Director Signature	
File Reference	DA12/463 : ST6/110
Previous Item	Nil

Executive Summary

This development application is for the proposed additions to an existing office at No.110 Stirling Highway, Nedlands. The proposed additions are to the rear and consist of an extension to the existing ground floor and the construction of an upper floor. The use of the property is to remain as Office – Professional.

It has been referred to Council for determination as officers do not have delegation to determine an application under instrument of delegation 6A, where valid objections have been received.

The application has been assessed against the provisions of the City of Nedlands Town Planning Scheme No.2 and Council Policies, where variations to the standards relating to car parking, setbacks and external appearance were identified. The application is recommended for refusal. This is because it is considered that there is insufficient provision of car bays on-site, the external appearance of the proposed additions detracts from the surrounding residential amenity and that approving such application would not result in orderly and proper planning.

Recommendation to Committee

Council:

1. refuses an application for proposed office additions (ground and upper floors) at No. 110 (Lots 153) Stirling Hwy, Nedlands in accordance with the application received 21 November 2012 and the plans received 21 May 2013 for the following reasons:
 - a. an insufficient number of car bays are provided for the office – professional use. The car bays in the proposed road reservation area cannot be included in the calculation of car parking requirements under schedule III of the City of Nedlands Town Planning Scheme No.2;
 - b. the external appearance of the proposed addition will negatively impact the amenity of the surrounding area and does not satisfy the clause 5.5.1 of the City of Nedlands Town Planning Scheme No.2; and
 - c. the proposal is not orderly and proper planning.

Strategic Plan

KFA: Natural and Built Environment

Background

Property Address:	No. 110 (Lot 153) Stirling Hwy, Nedlands
Lot Area	1044.6 m ²
Zoning:	
Metropolitan Region Scheme	Urban
Town Planning Scheme No. 2	Office/Showroom

This application proposes additions (ground and upper floor) to an existing office at No. 110 Stirling Highway, Nedlands. The subject site has frontage to Stirling Highway and is bounded by residential units to the west, office/showroom development to the east and residential dwellings to the south (refer to Figure 1 below).

The lot is currently zoned 'Office/Showroom'. The *Draft Special Control Area Provisions – Stirling Highway Redevelopment* identifies the site as having a future zoning of Commercial / Mixed Use. These draft provisions were endorsed by Council in 2009 and are proposed for inclusion in Town Planning Scheme No.3.

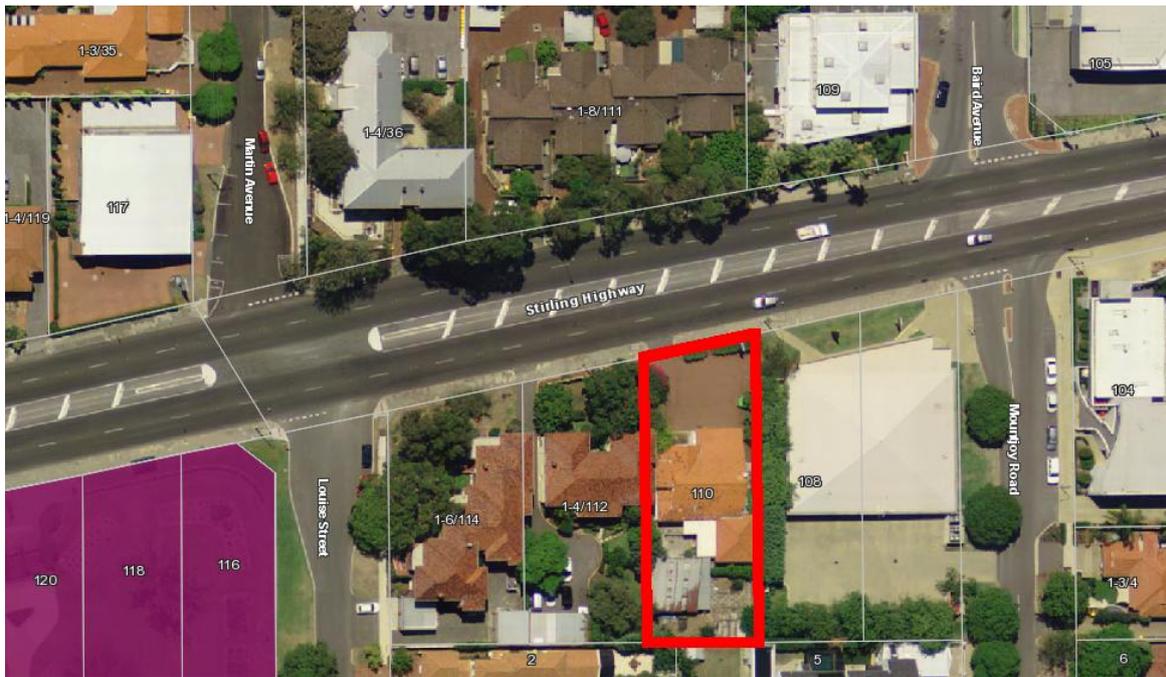


Figure 1 – Locality Plan

The existing development on-site is an office in a single storey building which has the external appearance of a residential dwelling. There is also a large outbuilding to the rear, which is earmarked for demolition.

The proposed development comprises of the following:

- Ground floor additions of mailing room and toilets to rear of existing office building
- Upper floor additions which comprise of offices and toilets
- Car parking at front and rear of building.

The proposed development plans can be viewed at Attachments 2 & 3.

Legislation / Policy

- City of Nedlands Town Planning Scheme No.2 (Scheme)
- Local Planning Policy 6.11 Road Widening - Stirling Highway (Stirling Hwy policy)
- Council Policy – Neighbour Consultation (Neighbour Consultation policy)

Discussion

Building setbacks

The application proposes variations to the minimum setback requirements listed in Table II of the Scheme. The table below outlines the assessment of the building setbacks.

	Required setback	Proposed setback	Complies?
Ground floor – Side (W)	Min. 5m abuts residential zone	3.97m	No
Ground floor – Rear (S)	Min. 5m abuts residential zone	17.1m	Yes
Ground floor – Side (E)	Min. Nil abuts commercial zone	3.95m	Yes
Upper floor – Side (W)	Min. 5m abuts residential zone	3.47m	No
Upper floor – Rear (S)	Min. 5m abuts residential zone	5.09m	Yes
Upper floor – Side (E)	Min. Nil abuts commercial zone	3.45m	Yes

The building setbacks from the south and east boundaries comply with the setbacks nominated in the Scheme. The proposed building setbacks to the west do not comply with the minimum setbacks listed at Table II of the Scheme. Clause 5.4.1.3 of the Scheme allows for the listed setback requirements to be varied by Council.

The applicant has noted that the width of the proposed additions relates to the width of the existing cottage and that there is an existing shed (to be demolished) which is 5.3m high and is located on the western boundary. The adjoining owner has objected to the proposed western setbacks due to the large size of the proposed building and because the structure would impose on their backyard area. A summary of the consultation can be viewed at Attachment 4.

The proposed setbacks of the upper and ground floor extensions will not adversely affect the adjoining lot in terms of overshadowing, privacy, access to direct sunlight and ventilation. As the setback variations are on the western side of the property, the adjoining property will be subject to minimal overshadowing impact from the development. Direct sunlight and ventilation would be maintained to the adjoining residential apartments as access to northern light and prevailing winds from the west will not be impacted. The proposed western facade does not contain any openings, therefore there are no opportunities for the adjoining property to be overlooked. Therefore privacy between the two properties is protected.

It is recommended that the applicant considers the redesign of the external form, in particular the western elevation of the upper floor (refer to external appearance of building section, below). The proposed external form of the western elevation is a blank continuous wall which extends for 18.5m (refer to Attachment 3). Ways to modify the proposed external form which include articulating the building and having varying setbacks.

On balance, the setback variations to the west are considered to be appropriate. This is because the proposed setbacks do not adversely impact the adjoining property; however it is recommended that further consideration is given to the treatment to the exterior of the proposed upper floor.

Building height and plot ratio

Both the building height and the plot ratio of the development complies with the Scheme requirements. The proposed building is two storeys and 7.1m high. The Scheme allows for a three storey building and a maximum wall height of 8.5m. The plot ratio of the development is 0.38 whilst the Scheme permits a maximum plot ratio of 0.75.

Car parking

The Scheme at Schedule III requires an office use to provide car parking at a minimum rate of 4.75 bays per every 100m² of gross leasable floor area. Based on the gross leasable floor area proposed, a minimum of 21 car bays are required.

This application proposes a total of 21 car bays located at the front and to the rear of the office building. However five (5) of the car bays provided cannot be included in the car parking calculations. Four (4) of the car bays are located in the Stirling Highway Road Reservation area and one (1) tandem bay is proposed. Refer to Attachment 2 for the car parking configuration.

The application was referred to Main Roads WA because the front portion of the lot falls within the 'Primary Regional Road' reserve. Main Roads WA commented that

“the area required for road purposes is not to be included in the specific car parking requirements for the development”.

Any car bays located in the first 5.4m of the lot cannot be included in the car parking calculations. Refer to Attachment 6 for the full copy of the comments from Main Roads.

The Stirling Highway policy states that the area reserved for road widening shall be excluded for the purpose of calculating car parking. The policy also requires that the road reservation area shall be landscaped and not for any other purpose unless approved by Council. A total of 4 bays are proposed in the road reservation area. It is not orderly or proper planning to include the car bays located in the road reservation into the car parking calculation because it is foreseeable that these car bays would not be available in the future.

The tandem car bay is not calculated in the car parking assessment under the Scheme, however it can be taken into consideration when a car parking shortfall is proposed. In this case, as the tandem car bays are designated for staff it is considered likely that both these bays would be used. Therefore Administration supports the proposed tandem bay.

This application proposes a 4 bay deficit and 1 tandem bay or 19% shortfall to the Scheme's car parking requirement. Clause 5.4.1.4 of the Scheme allows Council to vary the car parking requirements, taking into account the following:

- The number of bays to be roofed or covered
- The number of bays to be below natural ground level
- The access to each space and the adequacy of vehicle manoeuvring areas
- The effect on the amenity of the adjoining premises
- The provision of pick up and settling down bays

The application proposes that 3 bays are to be covered and no pick up or loading bays are proposed. No bays will be located below natural ground level, however it is noted that the rear addition has been raised to allow for car parking underneath the building. The City's Engineering section has reviewed the proposed car parking configuration and has advised that it meets the relevant Australian Standards and allows for adequate vehicle manoeuvring.

The subject lot is located in an area which has been identified by the City as having limited availability of car parking. Therefore it is essential that uses in this area have sufficient car parking on-site to meet the parking demand generated by the use. This application proposes a 4 bay shortfall to the minimum number of bays required by the Scheme for an office use. It is acknowledged that the applicant has stated that for their business in the financial industry, they predict 8 bays will be required for staff and up to 2 bays for visitors; however the site is approved for an Office use, which could contain other business models and not require further approval by Council. Therefore, it is orderly and proper planning for the City to consider the car parking standard in terms of the Office use rather than for the particular business proposed.

The car bays proposed in the road widening reservation area are temporary and therefore cannot be included in the car parking calculations for the proposal. With 15 bays, 1 tandem bay & 1 accessible bay proposed in lieu of the required 21 bays, it is deemed that there is inadequate supply of parking provided on-site to satisfy the parking demands of an Office use in the proposed building.

External appearance of building

The external form of the building consists of an existing single storey building at the front of the lot and proposed ground and upper floor additions to the rear. The existing building at the front of the lot, presents as a residential cottage. The proposed additions at the rear are modular in design and the external form presents as commercial development. The upper floor addition, especially on the western facade, is a blank, continuous wall which contributes to the building appearing to be 'bulky'. The elevation plans (refer to Attachment 3) show the external appearance of the existing and proposed buildings.

The upper floor addition is proposed to be constructed from Scyon cladding, which is a composite material which mainly consists of lightweight cement. This building material differs from the Scheme's specified building materials of brick, stone or concrete. However, Council may approve other building material not specified in the Scheme. This material is a relatively new building material and is considered appropriate for an office development. The proposed colour of the external cladding is black / dark grey (*Dulux Domino* shade).

During the consultation period for the proposal, the City received comments from neighbouring landowners concerned about the proposed external building materials and colour. The applicant has stated that the building material was selected due to its aesthetics and ease of installation. It has been noted that the material was chosen to contrast from the existing cottage as a means to clearly identify the new and old development, which is a strategy promoted by the Burra Charter (principles for the conservation of heritage places). In terms of the proposed dark exterior colour of the upper floor, the applicant states that the colour was chosen to provide contrast between the new and old development, and also to minimise visibility of, and glare to, the residents of the neighbouring apartments. Refer to Attachments 4 & 5 to review the summary of consultation and a copy of the applicant's justification for the proposal.

The City considers that the external appearance of the proposed upper floor addition would affect the amenity of the surrounding area. The adjoining lots to the west and south of the subject site are zoned Residential and contain residential dwellings. The proposed upper floor development is deemed to not complement the surrounding residential development and detracts from the residential amenity.

It is recommended that the applicant amends the proposed exterior of the upper floor addition and consider the following methods to ensure that the proposed development is complementary to the surrounding development and the existing development on-site. Such methods to modify the exterior facades include:

- The external building colour being a neutral or muted tone.
- The building length being articulated instead of being at the same setback.
- The addition of architectural features or projections to the exterior facade, rather than a blank wall.

Administration has discussed the above modifications with the landowner and applicant; however they wish to proceed with the current plans (refer to Attachments 2 & 3).

Preservation of amenity

TPS2 clause 5.5.1 (Preservation of amenity) states:

'Without limiting the generality of Clause 6.5 the Council may refuse to approve any development if in its opinion the development would adversely affect the amenity of the surrounding area having regard to the likely effect on the locality in terms of the external appearance of the development, traffic congestion and hazard, noise or any other factor inconsistent with the use for which the lot is zoned.'

The City considers that the external appearance of the proposed upper floor addition would adversely affect the amenity of the surrounding area and therefore would not comply with clause 5.5.1 of the Scheme. This is discussed further in the section above.

The use of the site remains as an Office, which is a use consistent for which the lot is zoned. The proposal is deemed to not adversely impact the locality in terms of noise or traffic.

The development is required to meet the *Environmental Protection (Noise) Regulations 1997* (Noise regulations) and must not exceed the assigned noise levels. An office use is typically not an excessive noise generating activity and as such is expected to meet the Noise regulations. In terms of traffic, the lot is located along Stirling Highway which is a major transport route. The property has single vehicle access to Stirling Highway and this is to remain. The proposal will not adversely affect the locality in terms of traffic congestion or hazard.

Consideration of applications

TPS2 clause 6.4.1 (Consideration of applications) states:

'In considering any application for planning approval the Council may have regard to the appropriateness of the proposed use and its effect on the Scheme area, and in particular the provisions of this Scheme or any By-laws in force in the district and the relationship of these to the proposed development or use.'

The land is zoned 'Office/Showroom', and the 'Office: Professional' use is a use consistent for which the land is zoned. The existing use of the site is 'Office – Professional', no changes to the use class are proposed.

Orderly and proper planning

TPS2 clause 6.5.1 (Determination by Council) states:

'The Council may determine an application by granting approval, refusing approval or granting approval subject to such conditions as it thinks fit, having regard to the orderly and proper planning of the area.'

As discussed above, it is considered that there are insufficient car bays provided to satisfy the parking demands of an Office use in the proposed building. It has been identified that there is limited availability of car parking in the area. It is not orderly and proper planning to approve temporary car bays (in the road reservation area) in an area which already experiences parking issues. Furthermore, the external appearance of the proposed additions is considered to be inconsistent with the surrounding development and will detract from the surrounding residential amenity. Accordingly, the proposal is recommended for refusal by Council.

Consultation

A total of three (3) submissions received during the community consultation period, one (1) in support and two (2) objecting to the proposal. A summary of the objections received and the City's response can be viewed at Attachment 4. Refer to the Consultation Process section for details as to how consultation was conducted.

As the front portion of the lot falls within the 'Primary Regional Road' reserve, the application was referred to Main Roads for comment. The application is acceptable to Main Roads subject to stated conditions and advice notes, which can be found at Attachment 6.

Conclusion

The application is for ground and upper floor additions to an office development. The application has been assessed against the provisions of the City of Nedlands Town Planning Scheme No.2 and Council Policies, where variations to the standards relating to car parking, setbacks and external appearance were identified.

Whilst the proposed setback variations to the western boundary are considered to be appropriate, the proposed variation to the Scheme's car parking standard is not supported. Additionally the external appearance of the proposed additions, in particular the proposed upper floor is deemed to detract from the surrounding residential amenity and is not harmonious with the existing development on-site. For the reasons outlined above, the application is recommended for refusal.

Consultation Process

What consultation process was undertaken?

Required by legislation (Scheme / R-Codes): Yes No
Required by City of Nedlands Policy: Yes No

As a portion of the site is within the 'Primary Regional Road' reserve, the application was also referred to Main Roads for comment.

How and when was the community consulted?

The application was advertised by letter to relevant landowners and occupiers surrounding the development site. The comment period was from 17 May 2013 – 31 May 2013.

In total three (3) submissions were received, one (1) in support and two (2) objecting to the proposal. A summary of the comments received during consultation can be viewed at Attachment 4.

Budget / Financial Implications

The application is for works to be constructed on a private lot, and therefore has no budget / financial implications for the City.

Risk management

Not applicable.

Attachments

1. Locality plan
2. Floor plans
3. Elevations
4. Summary of consultation
5. Applicant's justification
6. Main Roads comments

PD30.13	No.7 (Lot 76) Thomas St, Nedlands - Proposed Three Storey Additions & Pool
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Committee	9 July 2013
Council	23 July 2013
Applicant	Stephen Harper
Owner	Stephen Harper
Officer	Elle O'Connor – Planning Officer
Director	Peter Mickleson – Director Planning & Development
Director Signature	
File Reference	TH5/7: DA2013/134: M13/16432
Previous Item	Nil

Executive Summary

The application is referred to Council as it does not comply with the standards of the City's Town Planning Scheme No. 2 and the Residential Design Codes 2010.

In instances where discretion to the acceptable development criteria is sought, officers do not have discretion to refuse an application.

The application proposes extensive three-storey additions and renovations to a small dwelling located at No.7 Thomas St, Nedlands. The additions include a carport, cellar, rear extension, habitable loft space, storage and a swimming pool.

Variations to the Acceptable Development criteria include the following:

1. Proposed rear setback of 3m in lieu of 6m (West);
2. Ground floor side setback variations (South); and
3. 54.5% open space in lieu of 60%.

The recommendation is to refuse the application due to cumulative impacts of the proposed variations on the open character and amenity of the locality.

Recommendation to Committee

Council:

1. **refuses an application for three storey additions located at No.7 (76) Thomas Street, Nedlands in accordance with the application and plans dated 10 April 2013 for the following reasons:**
 - a. **the overall bulk and scale of the proposed development in relation to the adjoining boundaries and surrounding area is considered to cause an adverse affect on the amenity of the adjoining owners;**
 - b. **the external appearance of the development and cumulative effect of all the variations will have an adverse impact on the amenity of the surrounding area; and**
 - c. **the proposal will not be orderly and proper planning.**

Strategic Plan

KFA 3: Built Environment

KFA 5: Governance

Background

Property address	No.7 (76) Thomas Street, Nedlands (refer to Locality Plan below)
Lot area	1011.7m ²
Zoning:	
Metropolitan Region Scheme	Urban
Town Planning Scheme No. 2	Residential R10

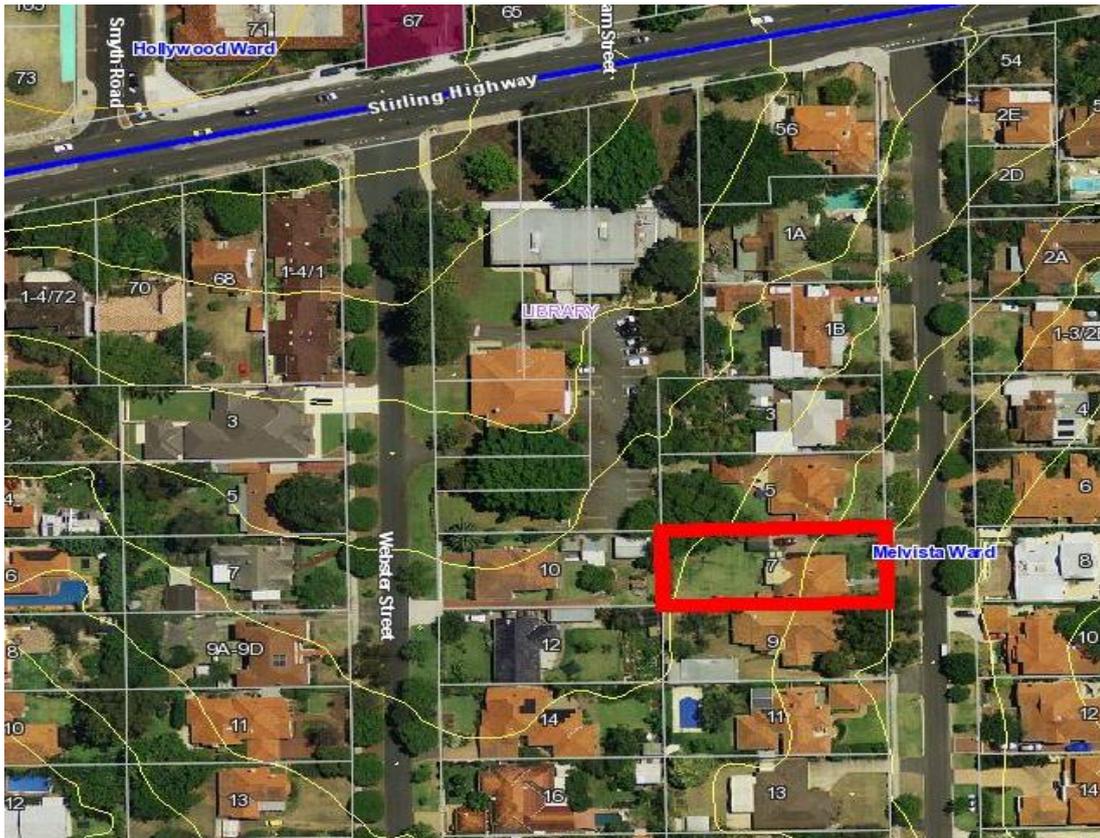


Figure 1 – Locality Plan

Legislation / Policy

- City of Nedlands Town Planning Scheme No. 2 (TPS2 or Scheme)
- Residential Design Codes of WA 2010 (R-Codes)
- Council Policy 6.4 – Neighbour Consultation

Discussion

Planning Assessment

The proposal involves extensive three-storey additions (carport, cellar, rear extension, habitable loft & swimming pool) to a Single House on the site, as depicted in the submitted plans (Attachment 1).

Variations to the Acceptable Development criteria include the following:

1. Proposed rear setback of 3m in lieu of 6m (West);
2. Ground floor side setback variations (South); and
3. 54.5% open space in lieu of 60%.

Rear setback (West)

Clause 6.3.1 of the RCodes requires a 6m minimum rear boundary setback for all lots with a density coding less than R17.5.

The proposed dwelling includes an upper floor loft with both habitable and non habitable areas. Both the ground floor and loft space are setback 3m in lieu of 6m from the rear boundary.

The R-Codes Performance Criteria allows for reduced setbacks, with the following considerations:

- Provide adequate direct sun and ventilation to the building;
- Ensure adequate direct sun and ventilation being available to adjoining properties;
- Provide adequate direct sun to the building and appurtenant open spaces;
- Assist with protection of access to direct sun for adjoining properties;
- Assist in ameliorating the impacts of building bulk on adjoining properties; and
- Assist in protecting privacy between adjoining properties.

The proposed rear setback will not provide adequate direct sun to the adjoining southern lot's appurtenant open spaces as it will over shadow an additional 18m² of the neighbours backyard.

It is also considered that the rear setback variation in conjunction with the side setback variations will cause the exterior of the dwelling to appear exceptionally bulky and overdeveloped to adjoining properties.

The applicant did not provide a justification to consider. As a consequence of the above, it is considered that the rear setback variation of 3m in lieu of 6m does not comply with planning requirements and is not supported.

Ground floor side setback variations (South)

The front portion of the dwelling (ground floor) is setback 1.1m in lieu of 1.8m to the south. The rear portion of the dwelling (ground floor) is setback 1000mm in lieu of 3400mm to the south. As discussed above, the R-Codes Performance Criteria allows for reduced setbacks subject to sufficient sun penetration and minimal bulk.

Sun and ventilation to the adjoining property is inadequate due to a bedroom window and a study window (Major Openings) being only 1.0m from the boundary. The impact of bulk on the neighbouring property is also undesirable, as the development is highly visible as it is adjacent Major Openings and a patio (an Outdoor Living Area).

The applicant did not provide a justification to consider on this particular variation. As a consequence of the above, it is considered that the setback variation of the western patio does not comply with planning requirements and is not supported.

Open Space

The R-Codes Performance Criteria allows for reduced open space, with the following considerations:

Sufficient open space around buildings

- To complement the building;
- To allow attractive streetscapes; and
- To suit the future needs of residents, having regard to the type and density of the dwelling.

The subject lot is rectangular in shape, very large in size (1011.7m²) and contains no easements or irregular obstructions on site. Due to this, there are no issues that would restrict the design to result in a site cover variation. The rear and south side setbacks are significantly reduced; this will create an overdeveloped, bulky exterior visible from all adjoining properties.

To complement the building:

It is considered that the reduced open space at the rear and along the southern boundary has not been designed to adequately complement the building and will furthermore affect the amenity of others.

To allow attractive streetscapes:

The justification provided by the applicant for the open space variation (Attachment 2) discusses how the open space provided fully compliments the streetscape due to

“adequate front setback space to provide for an attractive streetscape in keeping with the neighbouring properties and the street in general”.

It is agreed that the dwelling provides for adequate open space within the front setback, however, this is due to the 9m front setback requirement of the City's TPS2. The design does not provide open space behind the front setback which is not addressed by the open space provisions. A distinct character of this locality is the open nature and spaciousness around the envelope of dwellings, not just the front setback.

Notwithstanding this, it is also agreed that the reduced open space at the rear of the site will not impact negatively on the streetscape. However, the City is required to ensure a consistent approach that the minimum amount of open space should be provided on all residential developments to ensure protection of the existing residential amenity.

If the City was to approve this application it may then be expected that Council would approve other similar proposals to vary the minimum open space requirements. This would lead to an overall decrease in open space of the area and may reduce residential amenity and the attractiveness of the streetscape.

To suit the future needs of residents, having regard to the type and density of the dwelling:

Significantly reducing both the side and rear setbacks, and reducing the open space will limit the opportunity and potential for renovations or extensions in the future to cater for the residents changing lifestyle.

Preservation of Amenity

TPS2 clause 5.5.1 (Preservation of Amenity) states:

'Without limiting the generality of Clause 6.5 the Council may refuse to approve any development if in its opinion the development would adversely affect the amenity of the surrounding area having regard to the likely effect on the locality in terms of the external appearance of the development, traffic congestion and hazard, noise or any other factor inconsistent with the use for which the lot is zoned'.

In response to the above, it is considered that the cumulative impact of all the variations will negatively affect the external appearance of the development.

Accordingly, it is considered that variations do not comply with planning requirements, and are not supported.

Orderly & Proper Planning

TPS2 clause 6.5.1 (Determination by Council) states:

'The Council may determine an application by granting approval, refusing approval or granting approval subject to such conditions as it thinks fit, having regard to the orderly and proper planning of the area'.

In response, some components of the development do not comply with planning requirements, with some discretionary variations which are not supported (see Discussion section). Accordingly, it is considered that those components do not represent orderly and proper planning in accordance with clause 6.5.1, and are not supported.

Conclusion

The recommendation is to refuse the application due to the cumulative impacts of the proposed variations. The alternative option considered was a conditional approval subject to the rear setback variation being amended to comply. This amendment would also alleviate the open space variation as it would reduce the site cover by 40.5m². However, this is not recommended as to achieve this; a significant redesign of the proposed additions is required. The resulting house design has not been assessed for potential impacts on amenity and can therefore not be approved until future consultation and assessment.

Clause 5.5.1 of TPS2 states that:

“...Council may refuse to approve any development if in its opinion the development would adversely affect the amenity of the surrounding area having regard to the likely effect on the locality in terms of the external appearance of the development...”

The significant rear and side setback reductions in addition to the proposed reduction of open space will cause the property to appear overdeveloped. Due to this, it is considered that this external appearance is not in keeping with locality. The locality is open in nature, with surrounding properties being setback from lot boundaries, especially rear setbacks.

The large size and length of the lot provides ample space for the additions to be designed in accordance with the RCodes and TPS2. The external appearance of the development and cumulative effect of all the variations will have an adverse impact on the amenity of the surrounding area.

Consultation Process

What consultation process was undertaken?

Required by legislation (Scheme / R-Codes):

Yes No

Required by City of Nedlands Policy:

Yes No

How and when was the community consulted?

Community consultation period	27 November – 11 December 2012
No objections were received.	

Budget / Financial Implications

The application is for works to be constructed on a private lot, and therefore has no budget / financial implications for the City.

Risk management

Nil.

Attachments

1. Plans (Floor, Elevations & Sections)
2. Applicant Justification

PD31.13	Sand Volley Australia Pty Ltd – Sublease of “old bowling green” from Hollywood Subiaco Bowling Club, Smyth Road Nedlands and Variation of Lease with Hollywood Subiaco Bowling Club Inc.
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Committee	09 July 2013
Council	23 July 2013
Applicant	City of Nedlands
Owner	City of Nedlands – Head Lessor; Hollywood Subiaco Bowling Club Inc – Sublessor
Officer	Rebecca Boley – Property Management Officer
Director	Peter Mickleson – Director Planning & Development
Director Signature	
File Reference	M13/16436; IFM/426-07
Previous Items	Item PD 26.13 25 June 2013 Item PD 53.12 27 November 2012 Item C148.97 23 September 1997 Item F27.97 25 February 1997

Executive Summary

Council is now asked to consider the terms of Sublease with Sand Volley Australia Pty Ltd for an area within the Hollywood Subiaco Bowling Club Inc. lease premises at Smyth Road Nedlands. The terms of the Sublease have been agreed between Administration and the parties and as per Attachment 1. The report also asks Council to consider the matter of a proposed variation of the lease with the Bowling Club to ensure the City receives a portion of the sublease rental accrued from commercial activity on an A class reserve, recorded by the terms of the Deed of Variation of Lease as per Attachment 2. The Bowling Club’s current position on the proposed variation of lease is of disagreement.

Recommendation to Committee

Council:

- 1. approves the CEO and Mayor to execute the Deed of Sublease for a term with expiry on 30 April 2018 and on the terms as per Attachment 1 (the Sublease);**
- 2. approves the provision of the Sublease to allow for Sand Volley Australia Pty Ltd (Sand Volley) to apply for and have a liquor licence if granted by the Department of Racing Gaming and Liquor;**
- 3. approves the provision of the Sublease which requires that any conduct at the premises be in accordance with any Development Approval received for the premises;**
- 4. authorises the CEO to finalise the content of the provision in Annexure 2 of the Sublease relating to the list of works and associated time frame in accordance with the Development Approval resolved by Council on 25 June 2013;**
- 5. approves the CEO and Mayor to execute the Deed of Variation of Lease with the Hollywood Subiaco Bowling Club (the Bowling Club) to vary the rental from peppercorn to a portion equal to 47% of the Sublease rental from Sand Volley as per Attachment 2; and**
- 6. Requires a further provision in the Deed of Sublease to be executed by the Mayor and CEO as follows:**

The Sublessee and Sublessor agree that any functions held on the Premises may only occur:

 - a. in accordance with any conditions of a development approval in respect of the land; and**
 - b. only with the prior written consent of the City, which consent the City may withhold in its absolute discretion.**
- 7. Requires the definition for “functions” to be included in the Deed of Sublease to be executed by the Mayor and CEO as follows:**

“a gathering of people at which there is likely to be consumption of alcohol and for a purpose outside Sand Volley’s main operation of a Sand Volleyball and Netball competition”.

Strategic Plan

KFA: Natural and Built Environment
KFA: Community Development
KFA: Governance and Civic Leadership

Background

Highview Park, more formally noted as Reserve 22384 is an “A” class reserve vested in the City for the purpose of recreation pursuant to a management order. The management order confers on the City the power to lease for up to a maximum term of 21 years, subject to the Minister for Lands approval.

Hollywood Subiaco Bowling Club (‘the Bowling Club’) leases a portion of land at Reserve 22384, Highview Park on Smyth Road and Verdun Street pursuant to a lease dated 11 July 2003 (Head Lease).

The Bowling Club subleases a portion of the lease area at its southern most end to West Coast Futsal Association Inc. (Futsal) pursuant to a sublease agreement with commencement on the 8 July 2011 and expiring with the expiration of the term of the Head Lease on 30 May 2018. This sublease agreement is recorded by deed and specifies a peppercorn rental, although, it has recently been noted that a monthly rental is paid from Futsal to the Bowling Club which the City understands to be equivalent to that received from Sand Volley.

Pursuant to a deed of Sublease dated 24 September 1997 the Bowling Club subleased a portion of its leased premises to Wilson & Foley. This sublease expired on 11 August 2004 and has been held over on the same terms since and the sublessee now more recently known as Sand Volley Pty Ltd. This sublease agreement is for an area of land within the Bowling Club’s leased area at its Northern most boundary and for the purpose of providing a venue for the playing of volleyball. Pursuant to the sublease at its commencement the sublease rental was \$300 per month in rent to the Bowling Club. The Minister for Lands approved this sublease. The City did not receive any portion of this rental.

The City was previously reluctant to formally extend the arrangement in part due to the fact that there were plans to redevelop the reserve, specifically the Highview Park Master Plan.

Lease negotiations continued to be protracted due to the nature of Sand Volley’s operation being a commercial entity on a City reserve and also because there were issues of non-compliance with structures onsite.

The City sought and received by letter of 24 August 2011 from the Minister for Lands “in-principle” consent to a further sublease, despite the highlighted aspect of the entity’s operations being a “for profit” model.

Council at its meeting of 27 November 2012 considered the future of the sublease with Sand Volley and an associated recommendation from Administration to terminate the agreement, instead resolving to refer the matter back to Administration for further consideration.

On 14 February 2013 the City met with the Bowling Club to discuss terms of the Sublease. At this meeting there was discussion of the City's requirement to obtain a market valuation for the sublease premises and the likelihood of this figure being above the rate of rental received by the Club under the current sublease arrangement. At this meeting the City also proposed to receive a percentage of the sublease rental paid from Sand Volley to the Bowling Club. The Bowling Club appeared to accept this requirement. There was discussion about the amount that would be acceptable to the Bowling Club which was noted as an amount to ensure the Club's position remain the same, and more specifically, that they continue to receive the current rental. At the meeting the 'current rental' was noted by the Club as \$4,800 p.a.

The City then received a market valuation from Burgess Rawson (WA) Pty Ltd (Burgess Rawson) dated 2 April 2013 which advised a rental of \$9,000 per annum, as per Attachment 3.

On 26 April 2013 the City met with the Bowling Club and Sand Volley to further discuss the terms of the Sublease. At this meeting the parties were each given a copy of the draft Sublease for consideration. At this meeting the City was provided with the schedule of rental previously agreed between the Bowling Club and Sand Volley, as per Attachment 4.

At that point it was determined that the Bowling Club had actually been receiving \$550 per month (\$6,600 p.a) in rent instead of the \$400 per month (\$4,800 p.a) previously noted. The City had drafted a Deed of Variation of Lease to record this agreement. The deed was forwarded to the Club and its legal representative noting the proposed portion of rent to be received by the City as 47%. Following communication with the Club, it was found that the Club were not prepared to sign such an agreement to vary the Lease and pay to the City a portion of the Sublease rental as recently assessed at its market value. When asked what percentage might be acceptable to the Bowling Club they stated that they expect to receive the full amount more recently negotiated with Sand Volley and recorded in Attachment 5. The Club maintain that they require the sublease rental in its full amount to support its Club activities.

Council at its meeting of 25 June 2013 considered Sand Volley's development application for the refurbishment of existing and the construction of new facilities at the sublease premises. These works are necessary to rectify issues of non-compliance. Council also considered Sand Volley's activities of holding functions and the selling of alcohol at the venue. Council endorsed the Committee recommendation to approve the development application and allow for alcohol to be supplied and consumed within the subleased area in accordance with certain conditions relating to liquor licensing; hours of sale of alcohol and the purpose of functions. Council also made requirement for the sublease to contain provision

requiring that Sand Volley receive the City's approval before holding any functions onsite.

On 28 August 2012 the City met internally to discuss an arrangement in which the Bowling Club leased to the QEII Hospital (Hospital) the car parking bays at Highview Park for use by Hospital staff members. It is understood that the Hospital had a shortage of car parking due to developments around the Hospital's precinct. In July 2010 the City received e-mail communication from Hospital staff which included an e-mail dated 16 February 2010 noting that the lease arrangement was for the use of 50 car bays at \$1 each per day. It is unclear how long this arrangement continued for but the City took action to bring it to an end as the car parking area is a public car park for use by visitors to the reserve and outside the Bowling Club's lease area. The Bowling Club noted with the City that the arrangement had been given informal approval from previous City staff. There is no record on file regarding this approval.

Key Relevant Previous Council Decisions

25 February 1997, Item F27.97 - Council approved the Bowling Club's proposal to allow a "beach volley ball organisation" to use a part of their leased premises for the playing of volley ball. It was noted that alternative use for volleyball conflicted with intended use of premises in their lease which would require a Deed of Variation of Lease to be prepared.

23 September 1997, Item C148.9 – Council approved the signing and sealing of Hollywood Subiaco Bowling Club's Deed of Variation as noted in Item F27.97.

On 24 September 1997 the Mayor and Chief Executive Officer signed and the City's common seal was affixed to a Deed of Sublease (refer to Attachment 1) which included provision for the variation to the Bowling Club's lease.

27 November 2012, Item PD53.12 - Council considered a report recommending Council terminate the sublease arrangement with Andrew Jonathon Wilson and Larry Francis Foley for an area occupied by a commercial entity within the Hollywood Subiaco Bowling Club's leased premises at Smyth Road Nedlands. Basis for this recommendation was underpinned by issues of ongoing non-compliance and characteristic of the sublessee being a commercial entity. Council resolved to recommend the matter back to Administration.

25 June 2013 Item 26.13 – Council resolved to approve Sand Volley's development application for the refurbishment of existing and the construction of new facilities at the sublease premises. Council also considered Sand Volley's activities of holding functions and the selling of alcohol at the venue. Council endorsed the Committee recommendation to approve the development application and allow for alcohol to be supplied and consumed within the subleased area in accordance with certain conditions relating to liquor licensing; hours of sale of alcohol and the purpose of functions. Council at this meeting further required that the sublease include a provision requiring that the sublessee receive the consent of the Chief Executive Officer before conducting a 'function' at the premises. Council also required Administration to define "function" for the purpose of the Sublease.

Legislation / Policy

City of Nedlands policy requires that developments within the City must be undertaken in accordance with town planning legislation and the Building Code of Australia.

Section 3.58 of the Local Government Act requires that a disposition of land to a commercial entity must be at market value. Although the section does not apply in this instance as the disposition has already taken place in the form of the lease with the Bowling Club the essence is apparent that where commercial entity is in control and management of Local Government land there should be compensation at a rate of market value.

Discussion

Following the Council's recommendation to refer the matter of a further Sublease of premises by Sand Volley Pty Ltd the City has continued to negotiate with both the directors of Sand Volley Pty Ltd and the Bowling Club. The product of these negotiations is now presented to Council in the form of the draft Sublease. The lease is essentially drafted along the terms of the City's standard lease agreement with modification to note that the Sublessee is a commercial entity.

To this end the City has received a market valuation from Burgess Rawson dated 2 April 2013. The valuation report as presented in Attachment 3 notes that Sand Volley operates a similar venture in the City of Stirling in which the rent was agreed with the City of Stirling as Head Lessor and sublessor Bowling Club as follows:

- Year 1 – the greater of \$10,000.00 or profit earned from sale of beverages, to a maximum of \$20,000 p.a;
- Year 2 – the greater of \$15,000 or profit earned from sale of beverages, to a maximum of \$20,000 p.a;
- Year 3 onwards - \$20,000 p.a adjusted by annual CPI.

Despite noting the existence of this agreement the report advises on an appropriate market rental of \$9,000 per annum. The City has used this figure as the basis for negotiations as to rental in the City of Nedlands.

The Directors of Sand Volley Australia Pty Ltd are required to personally guarantee the sublease as per common commercial practice tenant is a company. This will ensure that directors are personally liable for any default occurring pursuant to the sublease.

Specific provisions of the sublease agreement worth special note are:

Clause 2 – Conditions – As well as it being a condition of the sublease that the Minister for Lands consent to the agreement, the sublease is also conditional on Sand Volley as sublessee completing the works in the manner and in the timeframe set out in Annexure 2. Although Council has considered and approved the development application for the site Sand Volley have yet to submit a building application for the works. Once this is completed the City will be better placed to

detail and itemise this list of works and a timeframe for this. Council are asked to delegate the authority to determine this list to the CEO. This will give flexibility to enable Council to consider this report in close succession to the report regarding the development approval but ensuring that an equally accurate and sufficiently strict timeframe is required.

Clause 43 - Alcohol – although this is a provision within the City's standard lease agreement it is worth noting that Council, at its meeting on the 25 June 2013 considered the sale and consumption of alcohol on the sublease premises and given initial approval to allow for this.

Clause 45 – Acknowledgement Possession of Premises – this provision acknowledges the past history of Sand Volley's tenure at the sublease premises and associated responsibility thereof.

Schedule – Item 1 – Premises is to specifically exclude the colourbond shed at the northern end of the sublease premises. After some debate between Sand Volley and the Bowling Club as to whether the shed would be included in the sublease area it was agreed by the parties that it was to be excluded.

Extra provision regarding "Functions" - Council at its meeting of 25 June 2013 resolved to include in the sublease agreement a provision regarding functions held at the sublease premises. Such a provision had not been included in the draft agreement (as per Attachment 1) prior to Council's request. The reason for this was to accord the approach of Council in its decision of 11 December 2012 in which Council considered the Sublease agreement for the Naked Fig Cafe. Council at this meeting considered a report which suggested a definition for "functions" in accordance with the Liquor Control Act, a definition previously agreed between the parties. At this meeting Council considered a decision of the Western Australia Planning Commission (WAPC) regarding the Cafe's application for extended hours. The WAPC's decision made no reference to "functions" although a prior approval for the site specifically mentioned "functions". At this meeting Council resolved to "delete any reference to "functions" in the sub-lease". The approach taken by the WAPC and subsequently Council highlighted a shift in focus to regulating the operating hours onsite and measures to ensure that such activities comply with Noise legislation (through the Noise Management Plan) to avoid issues of Nuisance.

However, if Council require such a provision it is suggested that this be drafted along the lines of a similar provision in the sublease agreement for the Naked Fig Cafe.

The Sublessee and Sublessor agree that any functions held on the Premises may only occur:

1. in accordance with any conditions of a development approval in respect of the land; and
2. only with the prior written consent of the City, which consent the City may withhold in its absolute discretion.

Please note also that administering such a provision requiring Sand Volley to receive the CEO's approval for each function would require a list of criteria in which approval would be given. This seems a duplication of the development approval process in which the recent approval allowing functions for a maximum number of people and with the sale of liquor and at set hours of operation. It would seem more appropriate to follow the approach taken with Naked Fig café and look to regulate the effects of functions which the Sublease does in Clause 13 – relating to use of the premises as well as the purpose of the Sublease; Clause 44 – Duty to Minimise Nuisance to neighbours and ability to impose conditions on the Sublessee to achieve this.

With regard to the definition of "functions" it is noted that at Council's meeting of 11 December 2012 regarding the Naked Fig cafe, the following definition was considered, a definition as previously noted derived from the Liquor Control Act:
Functions definition:

"a gathering, occasion or event (including a sporting contest, show, exhibition, trade or other fair, or reception) at which it is proposed that liquor be sold or supplied to those present".

The shortcoming of this definition is that on this basis Sand Volley's main activity of a sand volleyball and netball competition would be considered a "function" as Sand Volley have noted that participants in their "regular competition" would often have a drink after their game.

If Council requires that the City have this specific ability to further regulate the holding of functions at the premises, a more workable definition of "functions" for this purpose and to be included in the Sublease is suggested as follows:

"a gathering of people at which there is likely to be consumption of alcohol and for a purpose outside Sand Volley's main operation of a Sand Volleyball and Netball competitions".

In terms of the draft Deed of Variation of Lease with the Bowling Club, as noted above in the background to the matter, the City initially proposed to the Bowling Club the charging of a rental pursuant to a variation of the lease to enable the City to receive a portion of the sublease market rental. Despite an inaccuracy in figures initially discussed the City maintains that it should receive a portion of rental paid under a sublease agreement and in particular where the activity carried out is performed by a commercial entity, on the rationale that individuals are receiving pecuniary gain directly and personally from land designated for use by the public. This notion is further supported by the circumstance of the Lease from the State of Western Australia for land at the Swanbourne Beach precinct on which the Naked Fig café is located. Under this lease the City of Nedlands as lessee pays a rental which in its commencement was \$15,000.00 p.a. The City subsequently subleased a portion of this land to Naked Fig Pty Ltd, a commercial entity for a rental which at commencement was \$50,000.00. Therefore the lease rental was 30% of the sublease rental. The Bowling Club have stated that they need the revenue stream in its totality from Sand Volley to support the Club's activities, however the City has not received the Club's most recent financial statements to support this despite a request for such. It is apparent that the City may not make a unilateral change to

the Lease agreement however pursuant to Clause 24.2 of the Lease – Lessor's Consent to Assignment and Sub-letting, the City has the right to withhold its consent to the Sublease as the sublessee is a commercial entity and does not have the noted "non-profit making community purposes" as specified in this provision of the Lease thereby availing the City with the ability to withhold its consent. This clause of the Lease provides the City with the leverage to require that the Lessee pay a portion of the sublease rental to the City. It is also worth noting that the Lease agreement expires on 31 May 2018 at which point the terms of a future lease will be open to negotiation as will the specifics of the lease area. This will avail the City with an opportunity to lease Sand Volley's premises direct to them if it is decided in the interests of the community to do so.

The figure of 47% proposed as the portion of sublease rental to be received by the City is based on initial discussions with the Bowling Club about what would be acceptable to them. This is a slightly less than a 50:50 even split in favour of the Bowling Club.

The Administration suggest a possible alternative figure for the portion of sublease rental to be received by the City of 26% which is the figure to maintain the Bowling Club's rental of \$555 per month.

Administration suggest another alternative rent to be charged to the Bowling Club in a nominal amount of \$3000 (one third of the initial sublease rental) and this amount to be indexed and adjusted by CPI annually. Under this method the City's rental would be tied to CPI (approx. 2.5 - 3% currently) whereas the sublease rental in each of the first 3 years increases by more than current CPI rates.

It is noteworthy that the Minister for Lands will also be required to consider and endorse both the Sublease and Variation to Lease before the Deeds are fully executed and effective. It has been noted that at this point the Minister may require some portion of the rental and if so this will need to be further considered. However for reference, the lease for Tawarri Reception Centre is located on an A class reserve for which the City receives a rental from the lessee and does not pay any portion of this to the State.

Consultation

The City has consulted with both the Bowling Club and Sand Volley in terms of negotiating the terms of the Sublease and also the draft Deed of Variation of Lease with the Bowling Club. Although the parties agree to the terms of the Sublease it is noted that the Bowling Club are not in agreement with the terms of the Deed of Variation of Lease. The process followed is further detailed in the following section entitled 'Consultation Process'.

Conclusion

Following further consideration by Administration of a future sublease with Sand Volley Pty Ltd the City has worked with the Directors of Sand Volley and the representatives of the Bowling Club to produce the terms of the Sublease now presented to Council. The agreement for the most part accords the terms of the City's standard lease agreement with extra provision to acknowledge the issues the sublease has faced in terms of developments onsite, as well as to reflect the nature of the sublessee being a commercial entity with a profit making objective.

The draft Deed of Variation of Lease with the Bowling Club is proposed to ensure the greater community of the City of Nedlands also receives benefit from land reserved for public purposes given that a commercial entity has exclusive use of the site under the Sublease. Although the City to date has not received any portion of the sublease rental from Sand Volley there is now an opportunity for the City to do so through the Deed of Variation of Lease.

Consultation Process

What consultation process was undertaken?

- Initially Council was involved in the consultation process when it considered the future of the sublease and resolved for Administration to work with Sand Volley and the Bowling Club to further negotiation of a future sublease.
- The City has given much internal consideration to the matter.
- The City has received legal advice from McLeods on process for negotiation and agreement as to terms of sublease.
- The City has received a valuation from Burgess Rawson as to market value of the sublease.
- The City has met with the Bowling Club and Sand Volley on several occasions to negotiate the terms of the Sublease to arrive at the agreement now presented. In terms of the draft Deed of Variation of Lease the City had initial conversations with the Bowling Club with subsequent documentation forwarded to the Club and its legal representation for consideration upon which the Club's position of disagreement was proffered.

Required by legislation:

Yes

No

Required by City of Nedlands policy:

Yes

No

Budget / Financial Implications

Within current approved budget:

Yes

No

Requires further budget consideration:

Yes

No

Clause 6.4 of the Sublease requires that the sublessee pay all costs associated with the preparation, execution and stamping both legal and professional in regard to survey diagrams and valuations obtained.

In terms of the draft Deed of Variation of Lease with the Bowling Club there will be associated revenue for the City if the deed is executed and implemented. This extra income can be pooled in the City's reserves for use in municipal purposes.

Risk management

The main risk associated with this proposal is of ongoing non-compliance in development at the sublease premises. This will be mitigated by incorporating in the terms of the sublease a requirement for sublessee to comply with development approval received in the determined timeframe which will be a provision of the Sublease.

Attachments

1. Draft Deed of Sublease for premises by Sand Volley Australia Pty Ltd.
2. Draft Deed of Variation of Lease with Hollywood Subiaco Bowling Club Inc.
3. Market Valuation as provided by Burgess Rawson dated 2 April 2013.
4. Schedule of rental as agreed between Sand Volley and the Bowling Club 7 August 2012.
5. Schedule of rental as agreed between Sand Volley and the Bowling Club 9 May 2013.