**

Corporate & Strategy Reports

Committee Consideration – 13 August 2019

Council Resolution – 27 August 2019

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| CPS12.19 List of Accounts Paid – June 2019 |

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| **Committee** | 13 August 2019 |
| **Council** | 27 August 2019 |
| **Applicant** | City of Nedlands  |
| **Employee Disclosure under *section 5.70 Local Government Act 1995*** | Nil. |
| **Director** | Lorraine Driscoll – Director Corporate & Strategy |
| **Attachments** | 1. Creditor Payment Listing June 2019
2. Purchasing Card Payments June 2019 (29 May 2019 – 28 June 2019)
3. CEO Corporate Card (28 March 2019 – 27 June 2019)
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**Executive Summary**

In accordance with Regulation 13 of the *Local Government (Financial Management) Regulations 1996* Administration is required to present the List of Accounts Paid for the month to Council.

**Recommendation to Committee**

**Council receives the List of Accounts Paid for the month of June 2019** **(refer to attachments).**

**Discussion/Overview**

**Background**

Regulation 13 of the *Local Government (Financial Management) Regulations 1996* requires a list of accounts paid to be prepared each month, showing each account paid since the last list was prepared. This list is to include the following information:

1. the payee’s name;
2. the amount of the payment;
3. the date of the payment; and
4. sufficient information to identify the transaction.

The list is to be presented to the Council at the next ordinary meeting of the Council after the list is prepared and recorded in the minutes of that meeting.

**Risk Management**

The accounts payable procedures ensure that no fraudulent payments are made by the City, and these procedures are strictly adhered to by the officers. These include the final vetting of approved invoices by the Manager Finance and the Director Corporate and Strategy (or designated alternative officers).

**Conclusion**

The List of Accounts Paid for the month of June 2019 complies with the relevant legislation and can be received by Council (see attachments)

**Consultation**

Required by legislation: Yes [x]  No [ ]

Required by City of Nedlands policy: Yes [ ]  No [x]

**Budget/Financial Implications**

Nil.

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| CPS13.19 Tawarri Redevelopment Heads of Agreement |

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| **Committee** | 13 August 2019 |
| **Council** | 27 August 2019 |
| **Applicant** | City of Nedlands |
| **Employee Disclosure under *section 5.70 Local Government Act 1995*** | Nil.  |
| **Director** | Lorraine Driscoll – Director Corporate and Strategy |
| **Attachments** | 1. CONFIDENTIAL Heads of Agreement
2. CONFIDENTIAL Financial Due Diligence Report
3. Tourism Attractions Case Management
4. CONFIDENTIAL Advice – Commercial Tenancy Act
5. Tawarri Development - IndicativeTimeline
6. CONFIDENTIAL John Adcock Adroit Credentials
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**Executive Summary**

This report updates Council on the progress of securing the future of the Tawarri Site and presents a Heads of Agreement for Council approval to form the basis of the future SubLease.

**Recommendation to Committee**

**Council**

1. **approves the conditions contained within the Heads of Agreement;**
2. **instructs the CEO to engage Moore Stephens to update their advice where relevant re the structure of the entity (previous advice is now dated given the elapse of time since the commencement of negotiations)**
3. **instructs the CEO to engage Moore Stephens to update the Financial Due Diligence findings (previous advice is now dated given the elapse of time since the commencement of negotiations)**
4. **authorises the CEO to instruct McLeods Solicitors to commence drafting of the Agreement for SubLease and SubLease documents for the Tawarri Hot Springs Development;**
5. **authorises the CEO to provide concept design information to Councils endorsed selection panel once available; and**
6. **instructs the CEO to bring back to Council the draft Agreement for SubLease, the updated Financial Due Diligence Report, updated advice re Entity Structure and concept design for its approval.**

**Discussion/Overview**

The City’s Strategic Community Plan identified a need to plan for the future of Tawarri pending the upcoming end of an existing lease. A public Expression of Interest was released generating several submissions from parties interested in developing the site. Three of these parties were invited to submit a full proposal as part of a Request for Proposal (RFP) process. A Council appointed selection panel selected a Preferred Proponent from this process which was recommended to Council for endorsement at the Ordinary Meeting of Council on 26 June 2018.

At this meeting, Council instructed the CEO to commence negotiations and preparation of draft terms and conditions of a conditional lease/sublease with the endorsed Preferred Proponent, being Tawarri Hot Springs (THS). This work was commenced by former CEO, Greg Trevaskis, and has been completed by the current CEO, Mark Goodlet. The negotiations have been undertaken over the last thirteen months with Councillors receiving regular updates at briefings and through CEO updates. Administration is now in a position to present a proposed Heads of Agreement which has had input from;

* CEO
* Director Corporate and Strategy
* Councils endorsed Preferred Proponents; Tawarri Hot Springs Pty Ltd
* John Adcock of Adroit Consulting Pty Ltd
* Tourism Attraction Case Management Team – Cabinet Approved Sub Committee
* Department of Lands, Planning and Heritage (DLPH)
* McLeods Solicitors for the City
* Moore Stephens, Chartered Accountants
* Guy Douglas, Solicitor for the City
* City’s internal planning team

**The Process and Form of Key Documents**

**Heads of Agreement** – A Heads of Agreement (HOA) is **non binding** and sets out the key commercial terms and conditions prior to formalising the final contract, being a full SubLease document. It is important to take the time to correctly review the HOA before entering into a SubLease as it sets out the key terms of the relationship.

**Agreement for SubLease -** An Agreement for SubLease is a **binding agreement** between the landlord (City of Nedlands as authorised by the DLPH) and the prospective tenant ie Tawarri Hot Springs Pty Ltd. It sets out the rights and obligations of all parties and limits the potential of disputes arising. An Agreement for SubLease is most commonly used when premises are not yet ready to be leased. The document provides certainty for the landlord and prospective tenant and protects the interests of both parties.

An Agreement for SubLease creates a **binding obligation** on the landlord and tenant. This means there is an expectation they will each fulfil their requirements under the agreement. An Agreement for SubLease is, therefore, beneficial for both parties. For the landlord, it guarantees a tenant and future rental income. For the tenant, it provides certainty of future possession of the premises.

Both the landlord and tenant could be vulnerable to suffering loss if they have not drafted the Agreement for SubLease correctly. The following should be included in the agreement:

**The SubLease** - the actual SubLease to the agreement. It should be complete, except for the terms that need to be drafted after the premises are built.

**Sunset Clause** - A ‘sunset’ date allows a party to terminate the agreement if the other party has not met conditions by a specific date. Consideration should also be given which will allow the agreement to be extended beyond the sunset date due should the date not be able to be met due to external factors, such as delays in consent and adverse weather conditions. Such an extension, however, should not be indefinite.

**Consents as to Permitted Use** - It is essential the SubLease is subject to the parties obtaining the necessary consent. This is so the tenant can use the premises for its intended purpose. The SubLease should specify who is responsible for acquiring the consent.

**Lease / Sub-Lease** –effectively the same document, the State Government leases the land to the City, the City sub leases to THS. The binding Agreement for SubLease has the SubLease attached. The SubLease cannot be specific on dates hence the attachment of the Agreement for SubLease to the Lease/SubLease.



This is the process Council followed when it reached agreement on the Swanbourne Café lease and is the process advised the by the City’s solicitors.

**The Draft Heads of Agreement and its conditions**

The proposed HOA is **non binding** and provides structure to the relationship between the City and the preferred proponent. It also allows Council to take the time to understand the more complex details that the final SubLease will include. In this way, a HOA is a part of the negotiating process and specifies the key commercial terms and conditions.

In order for Council to make a decision on whether it is appropriate to approve the draft HOA, the additional information is provided by way of background;

The recent receipt (24 July 2019) of the HOA signed by Kathryn Gunn on behalf of THS and Barry Jones (yet to sign the Shareholders agreement) is the result of several months of negotiation after the City endorsed THS as the preferred proponent with whom to progress a SubLease agreement, as a result of the RFP process undertaken by the City in March 2018. The City engaged John Adcock of Adroit Consulting Pty Ltd, a professional lease negotiator to act on its behalf.

Before the RFP was issued the City engaged the Valuer Generals office at Landgate to provide a market rent valuation for the entire Tawarri site on a ground rent basis. Landgate’s assessment in July 2017 recommended a rate based on $46p/m2 to $100p/m2 per annum plus Outgoings and GST. When applied to the whole Tawarri site, having an area of 5,553m2, this equated to rental range of $255,438 to $555,300 per annum plus Outgoings and GST. A subsequent valuation from an independent commercial valuer, McGees in August 2018, suggested a market rent valuation of $260,000 per annum for the whole site, plus Outgoings and GST.

One of the challenges in determining a market rent valuation has been identifying sites which are directly comparable to Tawarri in terms of purpose, size, location, zoning and existing infrastructure including carparking.

The complexity of this project has meant that there have been detailed discussions of the key financial terms which are now before Council and subject to the City’s and the DLPH approval. With the HOA approved this will allow further consideration of other aspects and enable the parties to move to agree an Agreement for SubLease with SubLease attached to bind the parties into a formal agreement.

The HOA is provided in Confidential Attachment 1.

The draft financial due diligience report is provided in Confidential Attachment 2.

**Heads of Agreement Context**

Before discussing specific aspects of the HOA it is worthwhile considering the current economic conditions which provides a context in which to consider the negotiated terms.

The WA economy has virtually been in recession over the past five years and, while things are starting to improve, we are experiencing some very unusual economic conditions. The Reserve Bank is clearly concerned about the overall economic environment and this is reflected in the recent reductions of the Cash Rate with more cuts likely. This provides an economic climate that we have not seen before.

The housing market in WA has experienced a significant contraction with median house values dropping significantly.

The current rate of population growth in WA at less than 1% per annum (0.9% December 18) is the lowest it has been for many years and while this is now slowly building is it well off the peak of the 3.5% per annum growth seen during the ‘boom’. Net overseas migration, while still positive (+ 14,863 Dec 18), has dropped significantly from the boom and interstate net migration is negative (9,503 Dec 18) which is very unusual for WA.

The flow on effects of these factors to the Retail Sector have been well documented and it’s unlikely that there will be significant recovery in Retail spending until population and job growth return to more typical levels and until the restoration of confidence in the housing sector.

Weighing against these factors are some recent positive signs as a result of the Federal Coalition’s re-election and the implementation of personal tax cuts which combined with the lowering of interest rates means that the prospects for growth are improving.

The State Government has been busy promoting Tourism and capitalising on the new Optus Stadium facility with a resultant increase in tourism spending by 24% in the twelve months prior to March 2019. There appears to be strong interest from Tourism in this particular project proceeding, manifesting itself in a newly formed sub Committee of Cabinet tasked with the role of ‘Making Tawarri Happen’. Further information about Tourisms Attractions Case Management is provided in Attachment 3.

A significant number of resource projects are now in the pipeline but as yet the benefits have not flowed through to the broader economy, however this is expected to change in the next few years.

It is in the context of this scenario that the proposed Tawarri HOA needs to be considered as well as the overriding priority to minimise the costs and risks to the City.

**Terms of the Heads of Agreement**

The HOA sets up the core elements of the future SubLease, details of which can be found in Confidential Attachment 1. Matters covered include base and turnover rents, annual rental increments, market review period, rental commencement date, outgoings, assignment of the SubLease, reinstatement, works, insurance and bank guarantees.

Advice relating to this proposal from a commercial solicitor, Guy Douglas, is provided in Confidential Attachment 4.

**Summary**

On balance the response to the RFP was limited reflecting the complexity of the project and the economic times which WA is currently facing.

The extended negotiation has resulted in an agreement which has encouraged the proponent to accept reasonable commercial terms while limiting the risk to the City.

The ability to apply a Market Value Review at the end of three years (provided the terms of reference for the Market Review are adequate) is considered to be the most equitable means to resolve the Market Value of the premises.

Because of the current economic situation, it could be argued that it may be better to not accept this proposal and wait until economic conditions are possibly more favorable and allow other parties to show greater interest.

However, the position currently is that there is genuine interest from a seemingly credible party who want to develop a unique facility which could generate significant interest from the Interstate and Overseas Tourist Market as well as providing a service to the local community. The State Government have indicated a high level of interest in this project through the Minister of Tourism, and have provided an official statement as follows:

*“The Tawarri Hot Springs development is supported by the Western Australian Government as a Strategic Tourism Attraction to be case managed by Tourism Western Australia under the Tourism Attractions Case Management Framework”*

The success of the project however will depend upon the City and State Government being satisfied with the design and concepts submitted by THS, the proposed business plan and the City/State Government being satisfied that the parties involved have the financial capacity to deliver the project and operate it successfully, and the proponent achieving the required approvals.

**Concept Development**

Concepts were provided to Council last year and are currently being further developed and refined, including to consider the feedback that was given by the Council’s endorsed selection panel during the process of selecting the Preferred Proponent. Updated concept drawings are expected in the coming weeks and will be provided to the endorsed selection Panel and then Council once available. In addition to this, the City’s Planning team intends to assist in reviewing and informing design during the detailed design phase stage to ensure the final outcome best meets the expectations of Council.

Upon approval of the Heads of Agreement and conditions within, the CEO will instruct McLeods to commence lease preparation. Lease preparations take the form of;

* Agreement for SubLease; and
* Lease / SubLease.

**What happens if the Heads of Agreement is not approved?**

Should Council not approve the conditions within the HOA, the options are then to;

* Specify the objections and preferred conditions and re-negotiate with the proponents; or
* Determine that the project should not proceed. Clause 1.30 of the RFP states that “*No contractual relationship or other obligation arises between the City and a Proponent until the City and the successful Proponent formally exchange signed counterparts of the conditional a conditional Agreement to Lease/Sublease or Lease/Sublease. This clause applies despite any oral or written advice to the Proponent that a Proposal is successful or has been, or will be, accepted.”;* or
* Not proceed – return site to parkland, or seek a fresh Expression of Interest.

It should be noted that, should the project not proceed, the City will continue to remain in possession of a derelict building that cannot be used or leased in its current state, with an estimated cost of $75,000 incl. GST to demolish.

**Risks**

A full risk assessment has been undertaken on the project. Some of the key risks that are present at this stage relate to financial, reputation and site risk. These are summarised on the next three pages:

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| **Risk** | **Mitigation** |
| **Financial Risk**Proceeding with the HOA presents a positive financial opportunity to the City, in that it allows for the generation of a new rent revenue stream for the City to replace the previously ended lease for the site.There is a financial risk however that the business is not as successful and attract as much interest as initially anticipated, particularly given the current economy. This would impact the turnover of the business received by THS.There is also the financial risk that, in proceeding with the HOA, that the City may be missing out on opportunities with other developers that have the opportunity to generate a higher rental income. In not proceeding with the HOA, the City misses out on this opportunity to replace the recently ceased rent revenue stream for Tawarri, and will continue incurring expenses for management of the existing infrastructure and land | **Financial Risk**The proposal by THS has been determined as the most suitable offering as a result of the RFP process.The base rent negotiated in the HOA ensures the City receives a rent 22 months after the commencement of the SubLease, regardless of any delays or factors that impact the success or start-up of the business.THS have spent some time evaluating other businesses of this nature around the world and have built these learnings into their assumptions.The City will share in the success of THS with the supplementary turnover rent clause, yet still be protected by the assured base rent if for any reason the turnover is not as high as initially forecast.The financial risk is further mitigated by the rent review clause incorporated into the HOA. The HOA stipulates the rent will be reviewed to market levels after three years and provides the opportunity for the applicable market rate to be determined at that time, either through negotiation or a rent determination process. The HOA therefore secures that the City will ultimately receive market rent value in the future. It is unlikely the City would identify an alternative SubLease holder for the site who would pay above the market value, so the provision for rent reviews somewhat mitigates the risk of there being alternative options available with the potential to generate a higher income to the City than THS. By proceeding with the HOA, the City eliminates the ongoing financial impact of being responsible for Tawarri as well as replacing the recently ceased revenue stream. |
| **Reputational Risk**There is the potential for reputational risk should the preferred proponent business plans not be achieved and the business fails. The City may be viewed as not doing appropriate due diligence.There is a reputational risk should the City fail to progress a positive outcome for the site or progress the right outcome for the site. To come this far and not be able to secure a positive outcome could reflect badly on the City’s capabilities and lower Community faith in the competence of the Council to secure new facilities and in the District. The proposal is for unique facilities that connect strongly with the history and heritage of the site. The development has the potential to offer unique high-quality facilities not offered anywhere else in WA, right on the doorstep of the City’s residents and at no cost to rate payers. This itself presents a positive opportunity to benefit the City’s reputation.  | **Reputational Risk**The City has minimised this risk through engaging Moore Stephens to complete due diligence checks on the financial capacity of THS to undertake the development as proposed, this work needs to be updated prior to signing of the Agreement for SubLease due to the time that has lapsed. Insurance and Bank Guarantee clauses have been included in the HOA. THS have presented a clear understanding throughout the process of date of the complexities of constructing and operating the business proposed. The owner of the successful Peninsula Hot Springs in Melbourne was closely involved in development of the conception of the proposal, and THS have engaged experts such as Rock Water to assist in developing the use of the natural spring water at the site. It is essential that suitable and adequate community engagement be completed throughout the project at the right key stages to ensure community expectations for the development of new facilities in the area are met.  |
| **Site Risk**The site currently accommodates the old Tawarri Reception Centre. The building is a dilapidated eyesore and cannot be used or leased in its current form and with the current land status. The building presents hazards to the public having been used for illegal dumping and being subject to vandalism. Internally parts of the building including the ceiling in some areas are falling down. Should the HOA not proceed, and the future of the site not be determined, the site itself continues to present a risk for the foreseeable future. The estimated costs for demolition are $75,000 incl. GST.  | **Site Risk**Proceeding with the project will ensure the building on the site is demolished and redeveloped at no cost to the City. In the unlikely event that the proposed development does not prove to be successful, the HOA provides provision for the site to be returned to its natural state with no or minimal cost or disruption to the City and this would be included in the subsequent Agreement for SubLease and SubLease documents.The City is currently managing site risks by having the building fenced off and being closely monitored. The City currently maintains full security systems, alarms and fire alarms across the whole site. These solutions will only be suitable for a temporary period of time. |

**Key Relevant Previous Council Decisions:**

At the Ordinary Meeting of Council of 26 June 2018, in consideration of item 11.1 Future Use of Tawarri Site, Council resolved as follows:

*Council:*

1. *approves Tawarri Hot Springs (THS) as the Preferred Proponent subject to future Council agreement on the terms and conditions of a conditional lease/sublease being prepared based on submitted concept plans dated 29th March 2018 for the development of spa facilities, restaurant, café and function centre; as recommended by the Council appointed assessment panel;*
2. *requests the Preferred Proponent to confirm within 90 days all details with respect of: approved access to groundwater supply; ground rental to be paid under the lease/sublease and proposed contribution to be paid to the City in lieu of parking requirements for the proposed development;*
3. *instructs the CEO to prepare a Business Case for submission to the Department of Planning Lands and Heritage seeking an amendment to the reserve for the excision of Lot 253 from A-Class Reserve, for a suitable status that enables a land lease arrangement for the site’s redevelopment by Councils Preferred Proponent;*
4. *instructs the CEO to commence negotiations and preparation of draft terms and conditions of a conditional lease/sublease with Councils Preferred Proponent utilising the City’s legal representatives in liaison with the Department of Planning Lands and Heritage;*
5. *supports the Preferred Proponents application for a lease term of 50 years;*
6. *instructs the CEO to prepare a Business Plan for Council’s approval prior to public advertisement; and*
7. *instructs the CEO to provide a report back to Council following the advertisement of the Business Plan seeking Council approval prior to entering into a conditional lease/sublease arrangement with the Preferred Proponent.*

At the Ordinary Meeting of Council of 27 February 2018, in consideration of item 13.8 Future Use of Tawarri Site – Assessment Panel, Council resolved as follows:

*Council:*

1. *Appoints a panel for the purpose of assessing formal proposals for the future development and lease of the Tawarri Site consisting of:*
	* *The Mayor;*
	* *Two Elected Members (Councillor Argyle & Councillor Smyth as nominated by Council at this meeting;*
	* *The Chief Executive Officer;*
	* *John Adcock of Adroit Consulting; and*
	* *State President of the Australian Institute of Architects or their professional nominee;*
2. *Instructs the assessment panel to provide a report back to Council detailing the recommended development, that best addresses the assessment criteria seeking a resolution to proceed to the next stage for redevelopment of the site; and*
3. *Notes the government approvals required prior to development proceeding.*

**Consultation**

The City published information about Tawarri on its community engagement page, ‘Your Voice Nedlands’ for over a year and released a public media release including information in the Nedlands full page POST advert. These detailed the steps being undertaken to identify a suitable outcome for Tawarri’s future and included detail about the proposals received during the expression of interest process that were being considered. Councillors have been kept up to date on the progression of the project through CEO updates and briefings, with determining the future of Tawarri having been identified as a priority in the City Strategic Community Plans since the first Plan was developed and published in 2013.

With the exception of one public letter to the ‘Post’ (Page 2, 14 July 2018) in response to a front-page publication about Councils endorsement of the THS proposal, the City has received no negative feedback about the proposal in any form. This letter supported the idea of hot springs, but suggested the plans published were *perhaps a little “exclusive”* and suggested the hot springs be re-established *and made available for the public enjoyment of all*. The THS model proposes the facility be open to the public for an entry fee, which is consistent with Council provided aquatic facilities in other LG areas. THS therefore effectively will, ‘bring back’ the hot springs and make them available for the enjoyment of the public, the costs and management of such being beyond the remit or resources of the City to deliver itself.

There will be at further key sets of community engagement activities needing to be carried out. These are noted on the timeline provided as Attachment 5.

These key sets of activities include:

* Community engagement by City policy – the City’s Community Engagement Policy promises to keep the public informed. Inform community engagement is planned to be implemented at key stages throughout the whole process until the Lease documents are signed and there is a handover of the Tawarri site.

* DLPH statutory consultation for tenure transfer.
* Business Plan statutory requirements. The City is required to produce and advertise a Business Plan inviting public submission under s3.59 of the *Local Government Act 1995.*
* Part 5 application. The Department for Biodiversity, Conservation and Attractions (DBCA) are an approval body for construction on the Tawarri site and will require a Part 5 application to be submitted. DBCA advertise Part 5 applications prior to the Minister making a determination for the development and any conditions imposed on an approval issued.

**Budget/Financial Implications**

Should Council resolve not to proceed with the recommendation in this report, a budget for demolition of the existing building and return to parkland will be sought in future budgets.

Should Council proceed with resolving to approve the HOA as recommended in this report, the City only requires to budget for minimal operating costs associated with the management of the existing building until such a time that the site is handed to THS, to allow for continuing the security monitoring and fencing of the building on the site.

Advice fees and other administrative costs are within the existing budget provisions.

The credentials for the Citys appointed lease negotiator, John Adcock, are provided in Confidential Attachment 6.