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Minutes of the Special Meeting of Council
 held in the Council Chambers
 on Wednesday 17 October 2007, commencing at 10:03 am.

1. DECLARATION OF OPENING/ANNOUNCEMENT OF VISITORS

The President declared the Special Meeting of Council open at 10:03am.

2. RECORD OF ATTENDANCE/APOLOGIES/LEAVE OF ABSENCE

MEMBERS	Cr DE Anderson Cr LJ O'Connor Cr DJ Grey Cr L Hodder Cr EF Taylor Cr EC Rowe (10:06am)
STAFF	Mr N Mitchell, Chief Executive Officer Mr R Adams, Deputy Chief Executive Officer Mr J Phillips, Workplace Solutions, WA Local Government Assoc.
APOLOGIES	None
LEAVE OF ABSENCE	None

3. PURPOSE OF MEETING

- a) CEO Performance Review
- b) Railway Station Complex – Leases

4. PUBLIC QUESTION TIME

None

5. NOTICE OF ITEMS TO BE DISCUSSED BEHIND CLOSED DOORS

Item 7.1 CEO Review

6. DISCLOSURE OF INTERESTS

Item 7.1 CEO Review
Mr N Mitchell made a disclosure of financial interest as he is the employee being reviewed.

Item 7.2 Railway Station Complex – Leases
Cr DJ Grey made a disclosure of financial interest as he is an applicant for the lease.

7. BUSINESS AS NOTIFIED

7.1. CEO PERFORMANCE REVIEW

File: S10-2
Author: Niel Mitchell, CEO
Interest Declared: Employee being reviewed
Date: 9 October 2007
Attachments: None

MATTER FOR CONSIDERATION

Performance review of CEO.

BACKGROUND

As resolved at the September 2007 Meeting of Council, WALGA Workplace Relations have been contracted to carry out the review of the CEO position.

STATUTORY ENVIRONMENT

Local Government Act 1995 –

- s.5.23 – Meeting may be closed to the public for specific purposes
- s.5.36 – Council to employ a CEO
- s.5.38 – At minimum, an annual review
- s.5.39 – Contract requirements for CEO and senior staff

CEO Contract of Employment –

- review of performance after 3 months

STRATEGIC IMPLICATIONS

None

POLICY IMPLICATIONS

None

FINANCIAL IMPLICATIONS

None

CONSULTATION

Mr John Phillips, Executive Manager Services, WA Local Government Association

COMMENT

As required by the Contract, and at the direction of Council. WALGA Workplace Relations were engaged to carry out the review of the CEO position.

Mr Phillips has circulated a worksheet to Councillors for their responses and will be presenting the collated information at the meeting, and will facilitate the discussion, and outcomes.

VOTING REQUIREMENTS

Simple majority

OFFICER RECOMMENDATION/COUNCIL DECISION

S2007-1001 Meeting closed to the public – Performance Review of CEO

Moved Cr EF Taylor, Seconded Cr LJ O'Connor

That the meeting be closed to the public, the time being 10:05am

Motion put and carried 5/0*

Reason for Confidentiality – Local Government Act s.5.23 (2) – (b) personal affairs of any person

Cr EC Rowe joined the meeting at 10:06am

Mr N Mitchell declared a financial interest in Item 7.1 and left the meeting at 10:10am, the nature of the interest being he is the employee being reviewed.

Mr Mitchell rejoined the meeting at 10:26am

OFFICER RECOMMENDATION/COUNCIL DECISION

S2007-1002 Meeting opened to the public

Moved Cr EC Rowe, Seconded Cr LJ O'Connor

That the meeting be re-opened to the public, the time being 10:42am

Motion put and carried 6/0

RECOMMENDATION

To be determined by Council.

COUNCIL DECISION

S2007-1003 Review outcomes

Moved Cr L Hodder, Seconded Cr LJ O'Connor

- (1) The Council receive this Performance Review report and endorses the overall rating of '4' – "meets performance expectations".**
- (2) Council notes the successful completion of the period of probation by Mr Mitchell, and affirms the balance of the contract of employment**
- (3) The next review of the Chief Executive Officer's performance to be conducted in June 2008**

Motion put and carried 6/0

ADJOURNMENT

The meeting adjourned at 10:45am and resumed at 11:05am with those present before the adjournment present once again, with the exception of Cr DJ Grey and Mr J Phillips.

Mr R Adams joined the meeting at 11.06am.

Cr DJ Grey had declared a financial interest in item 7.2, the nature of the interest being he is an applicant for the lease, and was not present at the resumption of the meeting.

7.2 RAILWAY STATION COMPLEX – DRAFT LEASES

File: C6
Author: Niel Mitchell, CEO
Interest Declared: No interest to disclose
Date: 19 September 2007
9 October 2007
Attachments: Civic Legal cover letter of 18 September 2007
Instructions and amendments to Civic Legal of 3 October 2007

MATTER FOR CONSIDERATION

Matters relating to the preparation of the draft leases for the 24 hour fuel station, tearooms and office area at the Railway Station Complex.

BACKGROUND

Civic Legal were requested to prepare draft lease for the three areas, prior to advertising for tenders to lease. The draft leases have now been received and reviewed by me, and the Deputy CEO briefly, prior to the 20 September Council meeting, and in more detail since.

Referred from the Council Meeting of 20 September 2007.

STATUTORY ENVIRONMENT

Local Government Act 1995 –

- s.3.58 (1) – disposition of property includes leasing
- s.3.58 (2)(3) – disposition to be by auction, tender or after notice of proposal etc

Functions and General Regulations –

- r.11 and following – requirements for calling for inviting tenders

STRATEGIC IMPLICATIONS

Lease of the Railway Station areas.

POLICY IMPLICATIONS

None

FINANCIAL IMPLICATIONS

Cost of preparation of the lease documents, and income to be generated by the leases.

CONSULTATION

Philip Mavor, Solicitor Civic Legal
Ron Adams, Deputy CEO

COMMENT – 19 September 2007

As the draft leases were only received late Tuesday, they have not been able to be extensively reviewed, however, they appear to be closely aligned to Councils intentions. A full copy of the draft leases is available for review, should Council wish.

There are important matters that need to be clarified, and for which Council's instructions are sought, in order to finalise the drafts, and have them available for those interested in tendering for a lease.

The documents will not be able to be completely finalised until after the successful tender is known, as the lease amount, anticipated commencement date and other matters are to be confirmed.

The matters that need to be considered are as detailed in the cover letter from Civic Legal, a copy of which is attached. These matters are –

Matters noted from Civic Legal cover letter –

A) Fuel station –

- 1.1 Term of lease – must be for a possible 5 years. I suggest an initial two year term followed by 3 x one year options.
- 1.1 Opening / operating times –
 - needs to be clarified that the fuel station is set up to be unmanned, and does not have any buildings associated with it. Various consequential amendments are likely to be needed, eg no retail shop space available with this lease
 - party to retail sale – the Shire is not party to agreement relating to retail sale of fuel, and is making premises and equipment available, only.
 - Other commercial options –
 - o an understanding which is not binding, may be valuable, even if unenforceable
 - o a management agreement is not recommended, as a business plan etc will be required, as Council would be involved in the operation of a commercial business
 - Civic Legal to be advised that it is not the hours of operation that Council wishes to ensure, but that fuel is readily available, and the tanks not empty for days, as in Tom Price recently
- 1.6 refer comments relating to the draft lease

B) Tearooms –

Opening Hours – recommend that Council does not stipulate opening hours for the Tearooms

- 2.1 Lists of fixtures and fittings to be confirmed for inclusion. Note comment that small items be transferred to Lessee responsibility.
- 2.5 Closure for Jockey Races, Gymkhana and Emu Cup – as noted Civic Legal advise that the lessee cannot be required to close for these events, however, it can be a condition of the lease that the Lessee be required to enter into a licence with the relevant group, granting exclusive use for a nominal fee. Recommend that this option be pursued

C) Office –

Opening Hours – recommend that Council does not stipulate opening hours for the Office area, as hours of operation will depend on the viability of any business or activity that takes up the lease

- 3.3 Lists of fixtures and fittings to be confirmed for inclusion
- 3.4 Food preparation for sale – may need to clarify that this does not exclude the Jockey Races Gymkhana and Emu Cup, as these are once a year events rather than daily usage

D) Other matters to clarify –

- a. Lists of Lessor's Fixtures - to be done
- b. Lists of Lessee's Fixtures – to be done once new lessee known
- c. Caltex involvement re fuel software licence etc – enquiries made with Geraldton Fuel Company, and awaiting reply
- d. Shire a Party to the sale of fuel – No
- e. Terms of leases – recommend 2 years fixed, 3 x one year options by negotiation
- f. Rent amount – to be determined by tender
 - Type of rent review – to be based on WA Local Government Cost Index, as are general property rates increases, as per Council Policy
 - Time of review – prior to end of each year anniversary date, to take effect as of that date
- g. GST – rent / tender amount to be exclusive of GST
- h. Will Shire require a guarantor -

Matters noted from the Draft Leases –

A) Fuel Station lease, clause –

1. Definitions – Current CPI – delete
 - WA Local Government Cost Index – insert, and any consequential amendments
 - Premises – area to be defined, and square metres inserted
 - Previous CPI – replace with appropriate Previous WALG Cost Index
4. Rent – reviews to be based on WA Local Government Cost Index and effective as of anniversary date each year
11. Heritage Issues – permanent entry on the Register of Heritage Places to be verified
 - 11 (c)(d)(e) – relate to the Lessee entering into covenant agreements with the Heritage Council. This may not be required, unless there is work that the Lessee proposes to

- undertake, and should then become a requirement, as part of the process of seeking approval from the Heritage Council
14. Assignment – At the August Meeting, Council resolved that assignment or subletting will generally not be approved.
 - 14.1 in the draft lease stipulates no assignment, although permitted in 14.3. The effect is that assignment cannot happen without Council's consent.
 - 14.3 permits assignment in limited circumstances, notwithstanding 14.1. Note that assignment can only be withheld by Shire, and for good reason. The choice of assignee is at the Lessee's discretion, and there is no discretion for Shire to advertise for other interested parties.
 - 14.5 Lessor may consent to sublease – as the area is indivisible, it is suggested that no sub-leasing be permitted
 - 14.6 Charge or mortgage may be entered – in effect permits the Lessee to raise a loan against the business being run
 20. Termination – should provision for mutual termination on 3 months notice to be included?
 21. Options – these are at the choice of the Lessee not the Shire, for at least the first five years. Only after 5 years can Council decline the exercise of an option. Refer minimum time for a lease noted in Civic Legal's cover letter.
 - 24.11 Giving of notice – needs to have provision for faxed notice, or alternatively, more than the second day after posting before delivery is deemed effective
 - 25.1 Guarantee and Indemnity – wording to be clarified, as it appears that the Guarantor can request a guarantee

Council also needs to decide if a guarantor is to be part of the lease agreement, or if it will be a condition prior to entering a lease agreement. There may be instances in which a guarantee is not required, or is obviously unnecessary.
 - 26.1 Security bond – amount to be determined, and reference to Managing Agent to be clarified
 - 27.1 Licence for Ablution block – amount of one dollar per year

Sch 1

1. Commencement date – to be determined by the tender process
2. Term of 2 yrs
3. Options of 3 x 1 year, giving a total of 5 years as required
4. Rent – subject to the tender process
- 5.1 Rent review dates – annual anniversary date
- 5.2 Market rent review date – delete
- 5.3 Method of rent reviews – to be based on WA Local Government Cost Index, other methods can be deleted
6. Rate of Interest – 15%
7. Public Liability Insurance amount - \$10 million
8. Permitted use – 24 hour fuel station
9. Managing Agent – to be clarified / deleted
10. Landlord's details
11. Lessee's details – inserted once tender decided
12. Guarantor – to be decided
13. Lessor's fixtures – to be updated, delete EFTPOS machine (privately owned/responsibility)
14. Lessee's fixtures – inserted once tender decided
15. Plant and equipment
- 16.1 Special Conditions Lessor may prohibit sale of items –
 - (a) lists items that the Lessee of the Fuel Station is permitted to sell, which includes tissues, soft drinks ice creams, CD's insect repellent and fast food. Although most of these items could be dispensed through a vending machine, fast food could not. In any case, the Fuel Station lease does not have any building associated with it. Recommended therefore that fast food be deleted from the list.
 - (b) states –

The Lessee acknowledges that the Lessor may prohibit the sale by the Lessee of any item or product the Lessor in its sole discretion considers will not be in the interest of the Yalgoo General Store.

While local businesses do need to be supported and their viability encouraged, such a clause I believe is fraught with danger, as its exercise could be very easily be considered anti-competitive, or to be giving preferential treatment. I have no issue with designing a lease for a specific purpose and to ensure that activities do not exceed expectations, but to block future development that may compete with other businesses is a commercial decision that Council should not become involved with. If the clause is to remain in, it is

not only the Yalgoo General Store that should be stipulated, but also the Yalgoo Hotel. To be fair to all, provision should then be made that any future businesses starting up, are also protected.

Sch2 – to be clarified

Sch3 – to be clarified

B) Tearooms draft lease –

The numbering and provisions of clauses is consistent with those of the Fuel Station Lease. Consequently the general comments relating to the Fuel Station are also applicable to the draft lease for the Tearooms. Specific matters for the Fuel Station do not apply, but the following matters specifically for the Tearooms do apply –

Sch 1

8. Permitted use – replace “café” with the description “Tearooms”

13. Lessor’s fixtures – list to be thoroughly checked and updated. Perhaps consideration should be given to removing from the premises items that are more than that required for Tearooms, and deleting them from the Schedule (eg deep fryer)

14 Lessee’s fixtures

15. Lessee to comply with all statutory obligations, including any upgrade works required, which are to be carried out at their cost.

Sch2 – to be clarified

Sch3 – to be clarified

C) Offices –

The numbering and provisions of clauses is consistent with those of the Fuel Station Lease. Consequently the general comments relating to the Fuel Station are also applicable to the draft lease for the Office. Specific matters for the Fuel Station do not apply, but the following matters specifically for the Offices do apply –

General – terminology throughout to be consistent with “Tearooms”, not Café.

General – although not necessarily retail premises, the option of leasing for these purposes should be included. Therefore, additional documentation may be required, to comply with legislation, as noted by Civic Legal.

Sch 1

8. Permitted use – replace “Office” with the description “Office/Shop”

13. Lessor’s fixtures – list to be thoroughly checked and updated. Perhaps consideration should be given to removing from the premises items that are more than that required for Tearooms, and deleting them from the Schedule (eg deep fryer)

14 Lessee’s fixtures

15.1 Lessee not to operate on days prior and the event of Jockey Club Races, Gymkhana or Emu Cup, and agreement to permit the premises to be used by the organisations. This will change if the lease is amended to permit retail trade. If amended, a licence similar to that suggested for the Tearooms is recommended.

15.2 Kitchen not to be used for preparation of food for sale

15.3 all upgrade and alterations at lessee’s cost

Sch2 – to be clarified

Sch3 – to be clarified

COMMENT – 9 October 2007

At the Council meeting of 20 September 2007, it was resolved that this matter be deferred until the next available Special or Ordinary Council Meeting, for consideration of various aspects.

Instructions have been given to Civic Legal to amend a range of administrative matters, and to correct some errors, as per the letter to them and Schedule attached.

Gymkhana and Jockey Club – I contacted both Tania Brown for the Jockey Club, and Trish Grinham for the Gymkhana. Both have confirmed that a major reason for utilising the kitchen on the days of these events, is to raise funds. As commented at the September Meeting, running a business is hard enough without the

interruption of having to close on what is likely to be the two busiest days of the year. At the same time, the clubs need to have some assurance that their annual income is not detrimentally affected.

Over several discussions with Tania Brown, she advised that after having spoken with others on the Jockey Club Committee, their suggestion is that an arrangement be made for the profit on the day to be shared between the Club and the Lessee, and that the Club would assist by providing volunteer staff for the Tearooms as it would be quite busy in the lead up, and on the day. She also noted that she would confirm this in writing with me, but this has not been received as yet. She also provided me with approximate figures of income for the Club for the day from previous years, and a percentage of profit share that they would seek.

She also expressed concern that the other rooms may be included in lease agreements, and may not be available to the Jockey Club on race day. I advised that the areas proposed for lease did not include the Jockey Club rooms, nor the proposed teleconferencing rooms at either end of the building.

I also outlined the general principles of Council's position and of discussions with the Jockey Club to Trish Grinham. She confirmed that the Gymkhana also used the kitchen to raise funds for the Club. She advised that she had only recently taken on the role with the Gymkhana, and would seek information about the net income raised from the kitchen, and also speak to others about the possibility of options for kitchen use during the day.

Given that Council cannot require the lessee to close their business and allow free access to the kitchens for the clubs, a number of options are possible for Council –

- require the lessee/s to provide a licence for the groups to use the facilities on these days, as per the suggestion of Civic Legal. In effect the business would still have to close, causing them significant disruption, as well as inconvenience to the Clubs in trying to arrange alternative or additional refrigeration, cooking, and space for their materials and equipment.
- exclude the clubs from the lease, and provide a direct subsidy from Council in compensation. This would leave the operation of the kitchen solely to the lessee, with no involvement of the Clubs, which would then be free to concentrate on other fundraising opportunities. This would be the simplest and most clear cut of the options.
- request that the lessee make mutually agreed arrangements with the two Clubs as a private agreement, and the Shire to underwrite the kitchen income arrangement of each Club from their respective event to an agreed figure, and indexed as per rates each year. Retains involvement of the Clubs, but at the discretion of the lessee, who retains full management responsibility for their lease area.

Any arrangement between the Shire and the Clubs should not be in the lease agreement, but can be established by exchange of letters.

Council direction is required for the following matters –

- a) 24 Hour Fuel Station –
 - i) Guarantee and Indemnity – direction as to whether a bank or fuel company guarantee and indemnity is to be written into the lease, and therefore remain current during the term of the lease, or if it is to be a condition prior to awarding the lease
 - ii) Term of lease – minimum of 5 years combination of fixed and options. This will not be able to be determined until the tenders are considered.
 - iii) Security bond – amount to be determined
- b) Tearooms –
 - i) Guarantee and Indemnity – direction as to whether a bank or fuel company guarantee and indemnity is to be written into the lease, and therefore remain current during the term of the lease, or if it is to be a condition prior to awarding the lease
 - ii) Term of lease – minimum of 5 years combination of fixed and options. This will not be able to be determined until the tenders are considered.
 - iii) Security bond – amount to be determined
 - iv) Gymkhana, Jockey Club and Emu Cup – operation of the kitchen on these days, refer comment above.

- c) Office / Shop –
- i) Guarantee and Indemnity – direction as to whether a bank or fuel company guarantee and indemnity is to be written into the lease, and therefore remain current during the term of the lease, or if it is to be a condition prior to awarding the lease
 - ii) Term of lease – minimum of 5 years combination of fixed and options. This will not be able to be determined until the tenders are considered.
 - iii) Security bond – amount to be determined
 - iv) Gymkhana, Jockey Club and Emu Cup – operation of the kitchen on these days, refer comment above.

Cr LJ O'Connor left the meeting at 11:50am and returned at 11:53am.

ADJOURNMENT

The meeting adjourned for lunch at 11:58am and resumed at 12:56pm, with those present before the adjournment present once again.

Cr DJ Grey was not present at the resumption of the meeting.

VOTING REQUIREMENTS

Simple majority

OFFICER RECOMMENDATIONS

- (1) That the instructions of the CEO amending the draft leases issued to Civic Legal on 3 October 2007, as attached, be endorsed.
- (2) That Civic Legal be requested to amend the draft lease for the 24 Hr Fuel Station, noting the following comments and amendments –
 - Clause 25.1 – Guarantee and Indemnity – to be deleted, as will be a condition of awarding the tender
 - Clause 26.2 – Security bond – amount of \$1,000
- (3) That Civic Legal be requested to amend the draft lease for the Tearooms, noting the following comments and amendments –
 - Clause 25.1 – Guarantee and Indemnity – to be deleted
 - Clause 26.2 – Security bond – amount of \$4,000
 - Closure for Jockey Races and Gymkhana – that the lessee be requested to make mutually agreed arrangements with the two Clubs as a private agreement for raising of funds for the Clubs
 - Closure for Emu Cup – not be included
- (4) That Civic Legal be requested to amend the draft lease for the Office/Shop, noting the following comments and amendments –
 - Clause 25.1 – Guarantee and Indemnity – to be deleted
 - Clause 26.2 – Security bond – amount of \$2,000
 - Closure for Jockey Races and Gymkhana – that the lessee be requested to make mutually agreed arrangements with the two Clubs as a private agreement for raising of funds for the Clubs
 - Closure for Emu Cup – not be included
- (5) That the Jockey Club and Gymkhana be advised that –
 - Council's legal advice is to the effect that a lessee cannot be required to close their business to permit their exclusive use for their respective events,
 - the lessee will be requested to make a private arrangement with each Club to ensure continuity of their income from the kitchen on the day; such arrangements may include profit sharing, volunteer staff etc, and
 - the Shire will guarantee an equivalent income, up to an amount to be agreed with the Club, based on the past five years "kitchen" income for the Club, and this amount to be indexed each year in line with the rates increase for GRV occupied property.

COUNCIL DECISIONS

S2007-1004 Instructions endorsed

Moved Cr EC Rowe, Seconded Cr LJ O'Connor

That the instructions of the CEO amending the draft leases issued to Civic Legal on 3 October 2007, as attached, be endorsed.

Motion put and carried 5/0

S2007-1005 Draft Lease – 24 hr Fuel Station

Moved Cr EC Rowe, Seconded Cr L Hodder

That Civic Legal be requested to amend the draft lease for the 24 Hr Fuel Station, noting the following comments and amendments –

- **Clause 26.2 – Security bond – amount of \$2,000**

Motion put and carried 5/0

REASON FOR VARIATION

To remove requirement to delete reference to Guarantee and Indemnity, as these are standard components of a lease, and to increase the amount for the Security Bond.

S2007-1006 Draft Lease – Tearooms

Moved Cr EC Rowe, Seconded Cr DE Anderson

That Civic Legal be requested to amend the draft lease for the Tearooms, noting the following comments and amendments –

- **Clause 26.2 – Security bond – amount of \$4,000**
- **Closure for Jockey Races and Gymkhana – that the lessee be requested to make mutually agreed arrangements with the two Clubs as a private agreement for raising of funds for the Clubs**
- **Closure for Emu Cup – not be included**

Motion put and carried 4/1

Cr Taylor requested that her vote against the motion be recorded.

REASON FOR VARIATION

To remove requirement to delete reference to Guarantee and Indemnity, as these are standard components of a lease.

S2007-1007 Draft Lease – Office & Retail

Moved Cr EC Rowe, Seconded Cr L Hodder

That Civic Legal be requested to amend the draft lease for the Office/Shop, noting the following comments and amendments –

- **Clause 26.2 – Security bond – amount of \$2,000**
- **Closure for Jockey Races and Gymkhana – that the lessee be requested to make mutually agreed arrangements with the two Clubs as a private agreement for raising of funds for the Clubs**
- **Closure for Emu Cup – not be included**

Motion put and carried 5/0

REASON FOR VARIATION

To remove requirement to delete reference to Guarantee and Indemnity, as these are standard components of a lease.

S2007-1008 Draft Leases – Jockey Club and Gymkhana to be advised

Moved Cr L Hodder, Seconded Cr EC Rowe

That the Jockey Club and Gymkhana be advised that –

- **Council’s legal advice is to the effect that a lessee cannot be required to close their business to permit their exclusive use for their respective events,**
- **the lessee will be requested to make a private arrangement with each Club to ensure continuity of their income from the kitchen on the day; such arrangements may include profit sharing, volunteer staff etc.**

Motion put and carried 5/0

Cr LJ O’Connor left the meeting at 1:52pm and returned at 1:54pm.

S2007-1009 Support – Jockey Club and Gymkhana

Moved Cr L Hodder, Seconded Cr EF Taylor

That the Shire make a donation of \$500 to each of the Jockey Club and Gymkhana, in recognition of loss of access to the kitchen facilities under the Tearooms and Office & Retail leases.

Motion put and carried 5/0

REASON FOR VARIATION

To specify an amount of support in compensation for reduction in access to facilities as the lease Agreement cannot require the lessee to cease operation in their favour.

8. MEETING CLOSURE

There being no further business, the President declared the meeting closed at 2:15pm

DECLARATION

These minutes were confirmed by Council at the Ordinary meeting held on _____

Signed _____

Person presiding at the meeting at which these minutes were confirmed