

10.2 Confidential - Almond Train and Carriage Café, McLaren Vale

A report to provide Council with an update on the current litigation taken by the Almond Train against the City of Onkaparinga in the District Court and an update on the ancillary lease negotiations.

This is an update on a previously reported project, concept or issue.

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1 Executive summary

1.1 Topic

A report to provide Council with an update on the current litigation taken by the Almond Train against the City of Onkaparinga in the District Court and an update on the ancillary lease negotiations.

1.2 Context

A report seeking approval for two new leases was presented to the 7 October 2008 Council meeting. In considering this matter Council resolved to grant 5 year leases to both Sharyn Lesley Hamence for the Carriage Café and Lawrence Hand Jnr for the Almond Train.

The Almond Train business and carriage was purchased by the Egan's from Lawrence Hand Jnr in January 2008.

The Egans commenced proceedings against the Carriage Café in December 2008 following actions by the Carriage Café in severing a water line servicing the Almond Train. The City of Onkaparinga was joined as a defendant to the proceedings due to being the landlord to the premises.

The orders granted an injunction against the proprietors of the Carriage Café to refrain them from further interference to the internal water line and ordered them to reinstate the service. Costs associated with this order were not determined at that stage.

Subsequently, at its meeting on 21 July 2009 Council considered an application by Mr Jon and Margaret Egan lodged as proprietors of the Almond Train to grant a lease to them in place of Lawrence Hand Jnr and resolved to:

'approve the grant of a ground lease for 5 years with a commencement date of 7 October 2008 with a current market lease fee to Mr Jonathan Francis Egan and Mrs Margaret Hand Egan over Allotment 2 in Deposited Plan 18856, Certificate of Title Volume 5658 Folio 156 and a portion of Allotment 1 in Deposited Plan 62040,

Certificate of Title Volume 5899 Folio 210 for the conduct of The Almond Train upon suitable terms and conditions'.

1.3 Suggested outcome

It is suggested that Council consider this item in Confidence. Section 90(3)(h) and 90(3)(i) of the Local Government Act 1999 are suggested as the most appropriate to use for this purpose.

This item is presented as a confidential item because it includes provision of advice on current court proceedings brought against Council by the proprietors of the Almond Train, it seeks direction from Council on parameters of any negotiated court outcome.

The possible implications of not considering this item in confidence is that it may jeopardise council's position in relation to external knowledge of our position with regard to both the court proceedings and lease negotiations.

2 Recommendation(s).

1. That:

- a. **under the provisions of Section 90(2) of the Local Government Act 1999 an order be made that the public be excluded from attendance at the meeting in order to consider in confidence this item.**
- b. **Council is satisfied that it is necessary that the public be excluded to enable the Council to receive the information at the meeting on the following grounds:**
 - **Section 90(3)(h) legal advice**
 - **Section 90(3)(i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council.**
- c. **accordingly, on this basis the principle that meetings of the Council should be conducted in a place open to the public has been outweighed by the need to keep the information or discussion confidential.**

2. **That Council note the current position of the court in relation to the proceedings brought against the Carriage Café (as first defendant) and the City of Onkaparinga (as second defendant) in the District Court.**

3. **That Council endorse an amendment to the Permitted Use for the Almond Train to read:**

'the sale of giftware, souvenirs, packaged provedore goods such as fruit, nuts, jams, sauces, chutneys, olives, olive oils, spices, honey and biscuits; the sale of chocolates and lollies produced in the Adelaide and Fleurieu region and the sale of bottled water'.

4. **That Council endorse an amendment to the Permitted Use for the Carriage Cafe to read:**

'the operation of a buffet carriage for the sale of refreshments together with the hiring of bicycles but not the sale of giftware, souvenirs, packaged

provedore goods such as fruit, nuts, jams, sauces, chutneys, olives, olive oils, spices, honey and in addition the sale of chocolates and lollies produced in the Adelaide and Fleurieu region is not permitted.

5. **That Council:**
 - (a) **endorse provisions within the leases that outline that infrastructure owned privately by the parties (train carriages and toilet infrastructure) be removed from the land at the lessee's cost at the end of any lease agreement.**
 - (b) **endorse the inclusion of a sub-leasing right in the lease subject to the lessee gaining council's prior written consent, upon our standard terms and conditions surrounding due diligence reporting, the provision of evidence of prior business experience and on the basis that the Permitted Use contained within the head lease is not altered.**
 - (c) **endorse the requirement of the lessees to formally accept (via execution) or reject the lease documents for the operation of the Almond Train and Carriage Café by the expiry of one month from the date that the final leases are put to the lessees.**
6. **That Council delegate authority to the Chief Executive Officer to determine the matter of costs in the best interests of council noting that recovery of costs is preferred within the parameters advised by council's legal representative.**
7. **That an order be made under the provisions of Section 91(7) and (9) of the Local Government Act 1999 that the abovementioned document (or part of such document) including the minutes and the report of the Council relating to discussion of the subject matter of that document, having been dealt with on a confidential basis under Section 90 of the Act, should be kept confidential on the grounds of information contained in 90(3)(h), 90(3)(i) until court proceedings and lease agreements have been finalised.**

Key Factors

3 Discussion

3.1 General

The land supports two train carriages upon land owned by Council on Main Road, McLaren Vale. The former District Council of Willunga first leased the site which was then known as the Almond Train to two separate lessees on 17 July 1992.

The two train carriages are two separate businesses which are leased independently to two different operators under a ground lease arrangement. The ground lease operates in recognition that the lessee's own the above ground infrastructure and have purchased these as part of a private business transaction.

Council had previously granted a 5 year lease for each of the respective carriages which expired in January 2008. These leases are currently managed under their holding over provisions.

The carriage adjacent to Main Road operates as a shop known as the Almond Train and sells provedore items such as locally produced fruits, nuts and confectionary

and hand made gifts. The rear carriage contains the business of the Carriage Café which operates as a buffet carriage and sells general refreshments and light meals.

3.2 Lease documents

The leases held with both parties expired on 31 January 2008 and are currently in a holding over provision.

The historical lease and the proposed new lease are 'ground leases'. Both leases continue to identify that each respective business has an exclusive lease area to the extent of the built infrastructure (individual train carriage) with the balance of the land being common property. The leases contain provisions outlining the management of the common property under a licence agreement.

Discussions have been held with the proprietors throughout February 2009 until the present time in relation to the terms and conditions of the lease.

3.2.1 Lease discussions

The parties were both given a copy of the draft lease in September 2008 containing terms and conditions which are closely aligned to those that previously operated.

The main factors that have under negotiation between the parties relate to day to day operations and management of the site, namely:

- the permitted use of the respective businesses
- the maintenance and management of the common area
- the business impacts on the individual businesses by the other business proprietor (refer Permitted Use discussion)
- sub-leasing
- the ownership of toilet infrastructure (the Carriage Café only).

The parties have used these day to day operational issues as a barrier to signing the lease documents, when in fact if the leases had been signed it would provide a better level of clarity to the parties with respect to the response to the above issues.

We have responded to the issues raised (both verbally and via email) as and when they have been raised by either lessee regarding the conditions of their respective leases. Unfortunately, the relationship breakdown between the two lessees' to each other is now to the extent of deliberate and demonstrated aggressive retailing behaviour against each other. Both lessees continue to expect that we will act as mediator between them on a weekly and to some extent daily basis.

A second set of leases providing further clarity were provided to both lessees on 14 August 2009.

These leases contain a dispute resolution clause which outlines a strict process should the two parties continue to experience the same relationship difficulties.

The dispute resolution clause requires that the parties are to enter into independent mediation with a recognised mediator to resolve ongoing issues which do not relate to a landlord/tenant issue in relation to the ground lease.

To date the leases remain unsigned. The Almond Train continues to utilise the court proceedings to attempt to negotiate lease terms to its benefit. The Carriage Café whilst continuing to verbally advise on points of an operational nature, have provided in writing their position on 1 October 2009.

The points raised by the lessees of both the Carriage Café and the Almond Train are the points of difference discussed within this report.

3.3 The Carriage Café

Trent Gregson is currently acting as the mediator for and on behalf of the lessee Sharyn Hamence.

The issues that have been raised by the Carriage Café relate to the leases being clarified so as to ensure that there is no conflict of trade between the two business operations. The mechanism to manage this is the clarification of the Permitted Use clause within the respective lease documents.

3.3.1 The Permitted Use

Historically, the leases have stated that the trade undertaken by each party should be specific and separate to that of the other party, to ensure that neither business competes directly against the other.

The former lease (expiry January 2008) stated that the Permitted Use be:

- for the Almond Train – *'sale of fruit and nuts and associated items'*. This was in support of the Almond Train operating a trade of provedore items and packaged produce sourced locally from the region. Sometime throughout the former lease, it is now apparent that the proprietors commenced the sale of refreshments (such as drinks and ice creams) which is deemed outside of the permitted use.
- for the Carriage Café – *'operation of a buffet carriage for the sale of refreshments'*. This is in reflection of the Carriage Café operating a trade more attuned to a café and light meal business. Over the past few months, the Carriage Café has commenced the sale of nuts in direct competition to the Almond Train in protest at the Almond Train's sale of refreshments.

The proposed leases of August 2009 stated the following Permitted Uses to continue to maintain a separation of trade between the two businesses:

- for the Almond Train – *'sale of fruits and nuts and associated items but not the sale of drinks and ice creams'*
- for the Carriage Café – *'operation of a buffet carriage for the sale of refreshments together with the hiring of bicycles but not the sale of fruit and nuts and associated items'*.

The words 'associated items' were identified as potentially unclear which prompted further clarification of the Permitted Use clause.

Clarification of the Permitted Use for the Carriage Café was put to the proprietors in an email of 1 October 2009 and received acceptance verbally on 2 October and via an email on 8 October 2009. The Permitted Use for the Carriage Café is proposed as *'Operation of a buffet carriage for the sale of refreshments together with the hiring of bicycles but the sale of giftware, souvenirs, packaged provided goods such as fruit, nuts, jams, sauces, chutneys, olives, olive oils, spices, honey and in addition the sale of chocolates and lollies produced in the Adelaide and Fleurieu region is not permitted'*.

The above proposed Permitted Use should assist to maintain clarity as to the business operations of the respective parties and supports discussions between the three parties over the past 12 months.

3.3.2 Management of common area

Mr Gregson also continues to raise concerns relating to the relationship between the two lessees for the operation of the common area.

The leases identify that the extent of the exclusive lease area is the boundaries of the respective train carriages (and the toilet in the case of the Carriage Café). The balance of the land is held as common area and is to be maintained and managed jointly by the lessees at their cost (as per the previous lease).

Over the past year, the lessees have continuously engaged council with regard to the operations of the decking area that resides aside the train carriages. The matters raised by the Carriage Café specifically relate to the following:

- gates to the two sets of stairs to the approaches of the decking (the gate at the Carriage Café stair approach has subsequently been removed)
- the location and use of a barrel upon the decking.

The infrastructure associated with these matters is not directly covered by the previous or proposed lease as it is a ground lease. The role of council as landlord does not usually extend to the management of infrastructure upon the land except to the extent of ensuring statutory compliance.

Notwithstanding that we do not have a role in the above we have made suggestions to the parties as to how they may administer these pieces of infrastructure to ensure harmony in the operation of the premises. The two businesses previously agreed that they would share keys to the gates on the approaches to the decking and that the last proprietor to leave would lock both gates. We have suggested to both parties that this arrangement be reinstated.

The leases do require the lessees to gain our prior written consent for any improvements, additions or alterations to the land. The infrastructure stated above has been in existence for some time (preceding the current lease discussions) and no further requests have been made for alterations or additions to the existing infrastructure.

3.3.3 Sub-leasing

The historical lease provided for subletting subject to strict due diligence and reporting obligations to the council by the applicant lessee.

The proposed lease states that *'the lessee must not sublet or licence any part of the leased area'*. Section 45 of the *Retail and Commercial Leases Act 1995* allows a landlord to contain provisions by the lessor to refuse consent to assign, sublease or concession the whole or part of the land in its absolute discretion. The provision to remove the ability to sublease was made in reflection of the intense negotiations between the parties as to the specific Permitted Use to ensure that the intent of the business operations trading agreement was preserved.

Both lessees have asked for our consideration as to the reinstatement of the ability to sublease.

Sub-leasing can be contained within the agreement to be allowed with the lessors prior written consent, upon our standard terms and conditions surrounding due diligence, reporting, the provision of evidence of prior business experience and on the basis that the Permitted Use contained within the head lease is not altered.

3.3.4 Toilet infrastructure

The proprietors of the Carriage Café received Development Approval in 2002 and in 2003 constructed a toilet to service their business operations.

The proposed lease of August 2009 outlined that upon the end of the lease to the Carriage Café that the toilet will vest to council for nil consideration in accordance with legal principles.

The lessee has disputed this clause as they deem that the council gains some benefit of the infrastructure for no financial consideration.

Upon further discussion and inspection, the toilet would not meet the required standard for a public toilet facility. Therefore, it is only appropriate to service the business operations for which it was constructed. It is envisaged that the toilet infrastructure will continue to vest with the proprietors of the Carriage Café (through ongoing lease arrangements as the case may be). It is only upon any such lease arrangement coming to an end that the infrastructure's ownership will need to be decided. As the toilet infrastructure will not be able to be utilised by the council as a public toilet, then it would be expected that (in the absence of the use of the facility by the Carriage Café) that it be removed from the land.

Provisions should therefore be contained within the lease that the toilet infrastructure be removed at the end of the lease at the cost of the lessee.

3.4 The Almond Train

3.4.1 Permitted Use

The Almond Train has persistently requested that the Permitted Use be amended to allow them to sell ice creams and drinks. The historical leases did not allow for this, yet we are advised that sometime through the lease period the sale of ice creams and drinks commenced.

We have continued to outline to the Egans that the sale of ice creams and drinks is not within their Permitted Use and therefore not allowed.

In a letter from the Egans lawyers they further questioned the use of the term 'associated items' in the lease of August 2009 and sought clarity on the meaning of these words. This prompted a further clarification on the Permitted Use put to the Egans on 2 October 2009 stating that the Permitted Use be – *'the sale of giftware, souvenirs, packaged provedore goods such as fruit, nuts, jams, sauces, chutneys, olives, olive oils, spices, honey and biscuits; the sale of chocolates and lollies produced in the Adelaide and Fleurieu region and the sale of bottled water'*.

We have received conditional acceptance of the Permitted Use from the legal representative of the Egans on 6 October 2009 on the basis that the wording proposed is agreed but included a further request to also include ice creams.

3.4.2 Management of common area

There is some conflict between the lessee's regarding the provision of a gate to the entrance of the stairs leading to the Almond Train. The Egans have provided us with a letter from their insurer stating that the gate is a requirement of their insurance policy.

The Egans have also verbally requested that council determine the use and enjoyment of a barrel which is located in the central area of the decking. It is understood that the barrel was placed on the decking by the Carriage Café who want it solely utilised by their customers. The Egans would like this barrel to be shared for all customers and have asked council to request that the Carriage Café no longer places notices upon the barrel restricting its use.

3.5 Court proceedings

The Egans commenced proceedings against the Carriage Café in December 2008 to which council was joined as landlord. We were not given an opportunity to present at this hearing.

The initial hearing dealt with the interference by the Carriage Café to the internal water pipe connection line utilised by the Almond Train. Since this time, the Egan's have not provided the court with a document which formally outlines any other matters for the court to determine. The Egans have however utilised their time in the court to raise subsequent issues relating to the operation of the site and referring to these matters as 'lease issues'. The court has allowed the matter to continue to be delayed as it was advised that the finalisation of the lease would deal with the issues raised.

The court hearings and ongoing discussions with the two lessees has demonstrated the extent of the relationship breakdown between the two parties, and that they are eager to continue to have some arbitrary body between them to resolve their issues.

3.5.1 Chronology of court hearings

In the initial application to the District Court in December 2008 by the Egans, the matter of the costs was unresolved.

An application was lodged at the court on 16 March 2009 by us to bring about finalisation of these proceedings.

The application was heard on 24 March 2009. The court directed a timetable in relation to answering issues raised in the affidavits filed by the Egans and the matter was listed then for argument on 28 May 2009.

On 28 May 2009 the matter was again heard by the court. The court expressed a concern that the Egans had failed to file any document that would assist in identifying their claim. Following discussion it was agreed that the Egans claim against council would be deferred and the court gave time for the parties to engage in settlement discussions with a focus on trying to resolve the ground lease. The matter was then adjourned for further directions on 20 July 2009.

The directions hearing on 20 July 2009 was then adjourned with consent of the parties to 20 August 2009. The adjournment was required in order to obtain the necessary approval from Council at its meeting of 21 July 2009 to grant consent for the lease to the Egans to lease land for the operation of the Almond Train.

A second set of draft leases was provided to the parties on 14 August 2009 in support of the court's expectation for settlement discussions.

At the hearing on 20 August 2009 the matter was adjourned to enable further discussions between the Egans and council in relation to the terms of the lease. The critical issue identified by the Egans at this stage was the ability to sell drinks and ice creams.

At the directions hearing on 20 August 2009 the court adjourned the matter to 1 October 2009 and ordered that the plaintiffs file a statement of claim outlining their claim against the Carriage Café and the City of Onkaparinga in this matter on or before 25 September 2009.

No such Statement of Claim was filed by the date of the court hearing on 1 October 2009.

At the further hearing on 1 October 2009 the court granted the plaintiffs a further 7 days within which to file a statement of claim. We were advised by our legal counsel that the court will not lightly dismiss an action brought by a plaintiff.

It is relevant to note that the Egans relinquished their former legal counsel and appointed Neville Morcombe QC in the week prior to this court hearing. Mr Morcombe, on behalf of the Egans advised the court in his opening that the parties had been in discussions on the lease terms for some time and that he felt that these discussions were fruitful and were close to some resolution. Further, Mr Morcombe outlined that it had been more prudent for him to attempt to negotiate a settlement rather than file the statement of claim as per the court's orders.

Due to the Egans failure to file the statement of claim within the required time, we sought the ability to file an application to dismiss the court proceedings. Our

application is pending awaiting adherence by the Egans to the orders of the court of 1 October 2009 to file a statement of claim by 9 October 2009.

4 Next steps

Given the nature of the relationship of the two lessees it is likely that the types of behaviour that have been demonstrated to date will continue even if the leases are signed. Ultimately, it is difficult to remove ourselves from an ongoing conflict situation due to the structure of two separate lessees sharing the same parcel of land and operating two separate businesses in such close proximity.

Additionally, there is a risk that both parties may attract community or media scrutiny whereby we are accused of a lack of support to the tourism and business sector by these two business operators.

The following points outline the likely path forward to resolving this dispute, including options for Council's further consideration.

4.1 Lease negotiations

The lease negotiations have now been ongoing for over 12 months. We have provided the lessees with leases that substantially contain the same terms and conditions of the previous lease with some clarifications (as outlined above).

It is felt that we have reached a point that the leases need to be put (with the above inclusions/amendments at the direction of Council) and the parties be given a timeframe in which to accept or reject those leases.

The lessees are currently on a holding over tenancy on a month by month basis. Therefore, it would be prudent that we finalise the leases based on the directions of Council and give one month's notice that we require the leases to be executed or formally rejected.

If rejected, the provisions of the holding over lease would be enacted. These provisions allow for the lessee to offer for sale the train carriage to council at a price to be agreed, or if this offer is not accepted to remove the train carriage and all infrastructure brought onto the land by the lessee within 21 days.

If the leases are not signed by the lessees, Council would need to determine what steps it wishes to take with regard to the land. Options that could be considered range from the purchase of the carriages from the lessees, requiring the removal of the carriages and the determination of the future use of the land.

4.2 Court process

At the hearing of 1 October 2009 we asked the court to consider dismissing the proceedings due to the fact that we had not been provided with the basis for the Egans claim against the City of Onkaparinga. The court did not allow our application in this instance and allowed further time for the lodgement of the Statement of Claim.

On 9 October 2009 the Egans lodged their statement of claim with the district court which details the following:

- a claim against the Carriage Café for the severing of the water supply
- a claim against the City of Onkaparinga for not rectifying the above water supply
- a claim against the City of Onkaparinga for not providing a lease document
- a claim against the City of Onkaparinga for disturbance to their business.

4.3 Costs

The Egans have on occasions stated that they require payment of all or some of their costs by us before they will consider concluding the court process.

In response we have advised that we are seeking full reimbursement of our costs in the matter to date and that we will not enter into negotiations regarding the payment of the other parties costs.

Our costs to the date of writing this report (both billed and unbilled) are \$24,354.60 for both our solicitor and barrister in this matter.

As outlined in 4.2 above, a Statement of Claim was lodged with the court on 9 October 2009. At the time of writing this report, our legal representative is determining the nature and validity of the claims made within the document and how these relate to the position for recovery of costs.

If the statement of Claim lodged outlines a valid claim against the City of Onkaparinga then the matter of costs is requested to be delegated to the Chief Executive Officer negotiate a compromise position to protect against further uncontrolled escalation of costs. This will be on the basis of advice from our legal representatives in this matter whereby the financial interests of Council are better protected by negotiating with the other parties in relation to costs. If this delegation is enacted, Council will be advised via a further council report.

4.4 Alternative options

An elected member has raised the notion of removing one or both lessees from the site. While this would be a pragmatic way of alleviating the current situation, we are aware that there are legal imperatives to consider. Both lessees have an expectation that they will be offered leases to continue their respective business operations. It could be argued by either or both of the lessees that they have acted on this expectation and incurred costs associated with this reliance.

Legally we must ensure that we have allowed a reasonable opportunity for the lessee to discuss and negotiate the terms of the lease prior to applying a termination date. This is the approach outlined in 4.1 above.

The leases (both previous and proposed) include the provision for the lessee to offer to the council the purchase of their private infrastructure (train carriages and toilet infrastructure). If such an approach was made by either or both lessees, the

council would have the opportunity to remove one or both parties from the current lease structure. This in turn would either leave the site with only one tenant or in the case of both lessees selling, the council as landlord and owner of the infrastructure. Then, the council would need to determine its next steps with options ranging from further business use to removing the infrastructure from the land and return the parcel to open space (perhaps with the construction of public toilet facilities) to service the community and tourist public.

We understand that both businesses have been purchased for less than \$100,000. It is assumed that this value was for both the train carriage and associated business (including goodwill). No further valuations have been undertaken and the removal costs associated with the train carriages are currently not known. Alternative options could be further explored at the direction of council.

5 Communication

The previous report on this matter highlighted that an update would be provided to members upon key milestones. While there have not been any significant developments in this dispute it is acknowledged that more information needs to be provided to elected members.

Therefore, we have put in place a revised communication process to ensure that members are kept up to date with developments.

The following will be implemented:

- a email update after each court hearing outlining key outcomes to all Elected Members
- weekly emails to Mayor and Ward Councillors outlining key developments of negotiations between the parties outside of the court process.

NB: confidential information will however be restricted to council reports.

Staff will continue to remain available to elected members to answer any questions or matters arising from specific contacts being made by the party's involved. Telephone contact may be made directly by Members to either the General Manager – Projects and Services or the Manager – Property and Recreation Services to answer specific concerns or questions.