



## **REJECT THE REQUEST TO DELAY LEASE COMMENCEMENT DATE:**

### **SUNSET LEASE, UNIT 1, J SHED ARTHUR HEAD.**

**Fremantle Inner-City Residents Association (FICRA) submits that the City of Fremantle should reject the request by Sunset to delay the commencement date of the lease.**

**The request to delay the lease commencement date should be *rejected* in accord with the recommendation of the Council officers, because:**

**1– there will almost certainly be a continuing failure by the lessee to meet fundamental obligations as to the use of the premises under the lease**

**2– the revised development application is inconsistent with and fails to satisfy the obligations as to the primary uses and investment required under the lease**

**3– Sunset is in fundamental breach of the lease by failing to “use its best endeavours” to secure the approvals by the required time**

**4– the unwillingness or incapacity of the lessee to pay the already reduced rent (25%) does not suggest a likely willingness or capacity in the future to provide substantial investment as the lease contemplates**

**5– there is nothing in the conduct of the lessee in relation to its “activation” of Unit # 1 J shed to suggest that special privileges waivers or exemptions should be extended to the lessee**

**6– the lease will in any event will become of no force or effect by July 1, 2017 or shortly thereafter because**

- the fundamental and essential nature of the object of the lease will not be possible of fulfilment by the lessee and the lessee will be in breach of fundamental terms.

-- the lease is expressed to be “subject to and conditional” on obtaining planning consent, and accordingly fundamental conditions of the lease will have failed or not been performed.

- the lease has been frustrated. The refusal by the WAPC to grant planning consent for the change of use and development frustrates the fundamental objects of the lease. The lease must be considered to be frustrated and at an end.

***FICRA SUBMITS THAT IN DUE COURSE UNIT # 1 J SHED SHOULD BE READVERTISED FOR LEASE, BY MEANS OF A GENERAL EXPRESSION OF INTEREST OPEN TO ALL, IN LINE WITH THE USES INDICATED BY THE WESTERN AUSTRALIAN PLANNING COMMISSION.***

## **BACKGROUND**

### **1 Terms of lease**

#### **1. Lease Conditional on Planning Consent.**

The lease expressly states that the lease is “subject to and is conditional” on the granting of planning consent by the Western Australian Planning Commission. (Clause 13.18).

#### **2. Commencement date.**

Item 6, first schedule, provides that the commencement date is the earlier of

– 1 July 2017,

– or when all of the conditions precedent and the conditions have been met.

The conditions include obtaining necessary approvals including planning consent and an appropriate liquor licence.

#### **3. Obligations of lessee**

##### **– rent**

— \$83,950 per annum plus GST plus outgoings (clause 3.1, item 8, clause 4)

– subject to rent reduction of 75% in first year and 50% in second year (item 14.6).

##### **-- use**

– “Lessee must use the premises for the permitted use and for no other use or purpose” (clause 8.5).

##### **Permitted Use (Item 11):**

Tavern, restaurant, micro-brewery, performance venue and artists’ studios.

– Lessee must comply with its obligations set out in the memorandum of understanding (clause 8.3). The Operating Strategy under the Memorandum of Understanding requires that Sunset operate the premises:

- (a) so that the **primary character of Sunset’s business is that of a micro brewer (on and/or off site) and artisan food provider;**
- (b) in a manner that supports the Premises as an iconic and high quality music location;
- (c) with a commitment to maintaining a well-balanced focus on food, craft, beverages, creative industries and music as is appropriate to service the Arthur’s Head Arts and Heritage Precinct (schedule 1).

### **--Works and investment**

The lessee is obliged under the lease to commit substantial investment to J shed including a full upgrade to the services, install a catering kitchen, construct toilets, install a microbrewery and bar, construct an extension including a large undercover area, and construct a stage.

The works must be carried out before the premises can be used under the lease.

### **Lessee’s Works (item 14.3).**

- (a) *The Lessee must, at the Lessee’s cost carry out and complete the Lessee’s Works.*
- (b) *In carrying out the Lessee’s Works the lessee must comply with the Works Conditions.*

*“Lessee’s” Works means the works the Lessee must carry out at the premises before being permitted to use the Premises for the Permitted Use, which include:*

- (a) *full **upgrades to the Services** including water, sewerage and electrical;*
- (b) *installing a **catering kitchen** in the Premises;*
- (c) ***constructing public and staff toilet facilities** internal and external to Unit 1, J Shed;*
- (d) ***installing a bar** in the Premises;*
- (e) ***installing a micro brewery;***
- (f) *constructing an extension to Unit 1, J Shed, which will include a **large undercover area;***
- (g) *constructing new limestone walls;*
- (h) *locating reconditioned containers on the Land (which will be suitable for pop up shops);*
- (i) *portable bars and seat options;*
- (j) ***installing a stage area;** and*

(k) carrying out landscaping.

## **--Best endeavours to obtain liquor licence and planning consent-**

(Item 14.2)

Paragraph (c) provides that:

The Lessee must use its best endeavours to satisfy the Conditions before July 1, 2017, in particular the obtaining of an appropriate liquor licence and planning consent.

## **-- Keep premises activated consistent with the Lessor's activation**

(Item 14.2)

Paragraph (d) provides that:

If the Commencement Date occurs before the Conditions have been met, the Lessee agrees to continue to keep the Premises activated in a manner consistent with the Lessor's activation of the Premises prior to the Commencement Date, until such time as the Approvals have been obtained and the Lessee is in a position to commence the Lessee's Works.

## **2 Refusal of planning consent by WAPC and No prospect of future consent**

### **Refusal of planning consent**

The Western Australian Planning Commission(WAPC) refused the application of Sunset Venues for development approval and for a change of use on the grounds *inter-alia* that:

1. The proposed use was *inconsistent with the purpose* for which the land was reserved, was inconsistent with orderly planning, and did not allow the preservation of the amenities in the locality.
2. The use was not of a *nature and scale* as was compatible with the nature and purpose of the reserve and the environment of the location.
3. There was *no identified community need* for the proposal and was not consistent with existing land use and management plans.
4. The proposal was inconsistent with City of Fremantle's local planning policies as being:
  - not a low-key use, and *incompatible with the ethos* of the area,
  - *incompatible with the primary and ancillary uses* desired for the locality,
  - *not a low profile commercial use* nor compatible with the history and maritime themes of Arthur head,
  - *an overloading* of the vicinity.

## **Revised development application.**

FICRA have not been supplied with details of the development application which was lodged on June 7. The City has not undertaken a formal assessment of the proposal though it is understood that informally an application has been before City officers for some time.

The officers' report indicates that the revised development application is for a Tavern with a maximum of 400. *400 is the Tavern patron limit that was always set as the maximum at the commencement of the lease. (Item 14.7(c)).* At a meeting on March 27, 2017 David Chitty explicitly refused to commit to lowering the patron limit, but wished to reserve the right to raise it. At the same meeting the Sunset counsel declared that the operation would not be a "dedicated restaurant". There is no reference to a brewery or restaurant, and ticketed live music events will not be held. There is no indication of the proposed works in the officers' report, but at the meeting the proposed works were indicated to be much less than that required by the lease.

Insofar as it is possible to perceive the detail of the revised development application, including from Sunset's public statements, the proposal continues to contemplate a substantial operation with a large patronage, but stripped of most of the investment in works. The focus remains upon the sale of alcohol.

## **No prospect of future consent.**

The reasons for the decision of the WAPC make clear that there is almost no prospect of future planning consent from the Commission for the revised proposal being granted, because it is inconsistent with the purpose for which the land was reserved, is still too large, not low-key, meets no community need, is inappropriate in its nature, incompatible with the ethos of the area and planned uses, and represents an overloading of the area. The focus would seem to be the sale of alcohol, but with much less investment.

## **3 Conduct of Sunset precludes special waivers and exemptions privileges or amendments**

The conduct of the activation for the period in 2015-16 disentitles Sunset from any special waivers privileges or amendments of the lease in its favour, including a deferment of commencement.

Following is the complaint made on behalf of the FICRA on March 25, 2016 to the Mayor and all councillors. Councillors Sullivan and Pemberton responded acknowledging the failings of the lessee and explicitly stating how far below expectations Sunset had fallen. (26 April, 2016, 5 May 2016).

### **"Noise/Disorderly Conduct/Encroachment/Destruction of Aesthetics/Safety/No Arts/Liquor Violations/**

**1. Excessive noise levels** during concerts and sound checks, particularly in the context of the concert by 'San Cisco' on Saturday, March 19. The noise levels far exceeded any permissible level resulting in not only

discomfort to local residents but also the roundhouse guides abandoning attempts to provide information to tourists visiting the Roundhouse.

**2. Disorderly conduct** by those attending the concert. Security leave immediately at the end of the concert and so there was no-one left to deal with the problems. Sunset events and the police have been advised. The police have been in contact with those who witnessed the incidents.

**3.** There is **significant encroachment** on the path along Bathers Beach during the concerts period because of the installation of opaque fencing so as to make passage difficult and unpleasant, and on the roadway to South Molle by the parking of food trucks.

**4. Industrial site appearance** has taken over at J Shed. Permanently parked trailers, portaloos, fencing, and significant amounts of other equipment on the grass in front of J shed and in the thoroughfare next to J shed, such that the area looks more like an industrial site than a beautiful reserve on the edge of the Indian Ocean. This also obscures and makes quite difficult access to the steps up to the Round House.

Security at the concerts place their tables in a way so as to block off the access to the steps up to the round house – one has to brush by the security to get to those steps.

**5. Safety issues** have arisen with respect to those climbing over the Arthur Head Roundhouse walls and fences to watch concerts from the edge of the cliffs above.

**6. Proposed ‘Artistic nature of the activation’ has not materialised.** The Sunset events declaration that the events were designed to promote local painters sculptors or other artists has been proven wholly empty. Aside from the opening event no artistic works have been or are on display at the concerts or the weekly “barbecues”.

**7. Conduct of Sunday (non) “barbecues”** events consist in outside food trucks being brought in selling sausages, kebabs and satay sticks! There has been very little custom for the “barbecues”.

**8. There has been virtually no expenditure by Sunset events** on the “activation”. The events, especially the “barbecues”, present as very tawdry appearing offerings.

**9. In terms of compliance with liquor legislative** requirements by Sunset events:

-The requisite notices regarding proof of age and service to intoxicated patrons were not displayed in a way which would be easily seen by patrons,

-Nor were the details of the occasional license displayed in a way which allowed examination.

**10. The beer brand "Corona" has enjoyed privileged prominence** both on the entry arch and within the grounds itself, entailing highly visible advertising of alcohol to all, young and old, at Bathers Beach.

**In Summary SUNSET EVENTS** have taken permanent occupancy of the southern end of J shed and parts of the lawn in front of that area in such a way as to destroy much of its aesthetic appeal. There have been problems relating to noise, disorderly conduct, unauthorised encroachment on public space and thoroughfares, and safety. The benefits are non-existent unless you consider the tawdry nature of the barbecues a benefit. There is almost a complete absence of anything in the way of public art displayed, and the activities of Sunset Events seriously hinder the activities of the true artists at J shed.

The benefit to the public from the use of the public space seems trifling compared to the damage done and the loss of the public space”.

## **4 Conclusions**

### **1. Failure of fundamental obligations for use of the premises under the lease**

The lessee appears almost certain to fail to achieve the fundamental objects of the lease and satisfy the required use of the premises under the lease. The fundamental object of the lease and the required use of the premises by the lessee is as a “Tavern, restaurant, micro-brewery, performance venue and artists’ studios”, and the “primary character of Sunset’s business is that of a micro brewer (on and/or off site) and artisan food provider”. The lessee is required to use its best endeavours to get all necessary approvals (including planning consent) and an appropriate liquor licence by July 1, 2017.

The lessee has been refused planning consent for the change of use and development and has not applied for an appropriate liquor licence. There is almost no prospect of future planning consent for the proposed development, as required by the lease, being granted by the Western Australian Planning Commission.

### **2. The revised development application is inconsistent with the lease.**

The revised development application appears, from the officer’s report, to make no reference to a microbrewery and contemplates significantly less investment in “lessee’s works”. Nor is there any reference to utilisation as a “high quality and iconic music location” and performance venue.

The lease provides for an initial 11 year term with an option for a further 10 years.

Such a substantial duration was granted in recognition of substantial investment. There is no indication of any substantial investment in the revised development application.

*The revised development application does not satisfy the obligations of Sunset under the lease.*

### **3. Fundamental breach by Sunset by failing to use best endeavours**

The Lessee was obliged under the lease to “use its best endeavours” to obtain an appropriate liquor licence and planning consent before July 1, 2017 (item 14.2 (c)). Sunset entered into the memorandum of understanding and the lease in June 2015. Sunset was refused planning consent in September 2016, but did not lodge a revised development application until nine months later on June 7, 2017. Sunset has never applied for an appropriate liquor licence.

Accordingly, Sunset is considered to be in fundamental breach of the lease in failing to use its best endeavours to obtain the necessary approvals to undertake the uses required by the lease before July 1, 2017. It had over two years to obtain the necessary approvals from the date of the memorandum of understanding and has failed completely.

Item 14.2 (d) contemplates activation under the lease where planning consent and an appropriate liquor licence are not obtained before July 1, 2017. The clause follows immediately after the requirement by the lessee to use its best endeavours to obtain those approvals. The

provision for activation does not shelter the lessee from being in fundamental breach of the lease where best endeavours are not used.

#### **4. Financial circumstances and avoidance of payment of rent.**

The explanation for seeking a deferment of commencement of the lease is that it will be “*difficult* in current circumstances for them to pay rent from July 2017 without the approvals they require to trade effectively”. Sunset are “hopeful that once approvals are gained, it would trigger investment and the *ability* to cover the rent and finalise the “lessee works” ”.

It would appear that the reason for the deferment of the commencement of the lease is to avoid the payment of rent, even though the rent is only one quarter of that which will be generally charged under the lease. There is also a suggestion that the required substantial investment in “lessee works” is not available at present.

Failure to pay rent when due is, of course, a breach of an essential term giving rise to a right to terminate the lease: 12.1, 12.3.

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June 12, 2017