

5.5.3 LATE ITEM: nib Stadium – Proposed Changes to Lease and Terms of Reference

Ward:	South	Date:	18 August 2015
Precinct:		File Ref:	
Attachments:	¹ – Current Perth Oval Lease ² – Proposed Changes to Current Lease (shown tracked) ³ – Proposed Changes to Stadium Advisory Committee Terms of Reference (shown tracked)		
Tabled Items:	Nil		
Reporting Officer:	Len Kosova, Chief Executive Officer		
Responsible Officer:	Len Kosova, Chief Executive Officer		

OFFICER RECOMMENDATION:

That Council:

1. **ACCEPTS** the proposed changes to the Lease for Perth Oval (nib Stadium) made on 13 March 2012 between the City and the State, as shown tracked in Attachment 2, **REQUIRES** those changes to be effected through a Deed of Variation to the current Lease and **AUTHORISES** the Mayor and Chief Executive Officer to execute that Deed of Variation subject to the following amendments being made to the satisfaction of the Chief Executive Officer:

- 1.1 The term of the Lease shall not change;
- 1.2 Clause 6.4 in Part – B (Reference Table) of the Lease shall remain in the Lease unaltered and shall be subject to a separate negotiation with the City should the State wish to pursue the matter further;
- 1.3 Clause 6.6 in Part – B (Reference Table) of the Lease shall remain in the Lease unaltered;
- 1.4 In Part – C (Terms & Conditions), the definition of “Manager” shall read as follows:

“Manager means any company or individual appointed by the State from time to time in accordance with Clause 6.7 of this Part to be responsible for the day to day operation of the stadium and/or execution of any commercial rights or arrangements in relation to the Stadium. It also means VenuesWest if VenuesWest is responsible for the day to day operation of the stadium.”

- 1.5 Clause 1.4 in Part – C (Terms & Conditions) shall remain in the Lease unaltered;
- 1.6 In Part – C (Terms & Conditions), the new Clause 6.7 shall read as follows:

“6.7 Lessee May Appoint Manager

(a) Notwithstanding the preceding provisions of this clause 6 clauses 6.1(a) and 6.2, the Lessee may from time to time appoint a Manager without having to obtain the consent of the Lessor, providing that the appointment of any Manager does not relieve the Lessee from its obligations to comply with the terms of this Lease. The Lessee must include provisions in any agreement with a Manager which similarly require the Manager to comply with the terms of this Lease.

(b) For the avoidance of doubt the authority for the Lessee to appoint a Manager without having to obtain the Lessor's consent, shall not otherwise affect the preceding provisions of this clause 6 in respect of the assignment, subletting, mortgaging or transfer of any whole or part of the Premises.

(c) The Lessee must provide the Lessor with not less than thirty (30) days' notice in writing of any such decision to appoint a Manager in accordance with sub-clause (a) of this clause."

1.7 Sub-clause 11.5(b) in Part – C (Terms & Conditions) shall remain in the Lease unaltered, and the words "during the term" added to the end of the two remaining sub-clauses (a) and (c);

1.8 In Part – C (Terms & Conditions) Clause 11.6 shall remain numbered 11.6, not 11.5.

1.9 In Part – C (Terms & Conditions) Clause 21.1 shall retain reference to the Mayor and CEO as the City's two representatives on the Advisory Committee. Additionally, the quorum for Advisory Committee meetings under this clause shall remain as four members (comprising two State representatives, one City representative and one representative of the Stadium users) and the Committee membership shall comprise not more than two representatives of the Stadium users.

2. ENDORSES the changes to the nib Stadium Advisory Committee Terms of Reference shown tracked in Attachment 3.

PURPOSE OF REPORT:

To consider changes proposed by VenuesWest (on behalf of the Minister for Sport and Recreation, representing the State Government) to the Perth Oval (nib Stadium) Lease and the Stadium Advisory Committee Terms of Reference.

BACKGROUND:

Perth Oval (nib Stadium) is situated on land owned by the City of Vincent and is the subject of a lease to the State Government, entered into on 13 March 2012, for an initial term of 25 years plus a further 25 year term at the lessee's option (the Lease).

Prior to the lease with the State Government, Perth Oval was the subject of a Heads of Agreement stamped 22 December 2003 between the City of Vincent (then the Town of Vincent), Allia Holdings Pty Ltd and Guarantors Nicola Tana and David George Rodwell. The Heads of Agreement set out the general terms and conditions under which Allia was to provide operational management services, catering services and naming rights services for the stadium at Perth Oval.

Over subsequent years, the Heads of Agreement between the Town, Allia and the Guarantors was varied by several Deeds of Covenant and was eventually terminated and replaced altogether with a new Agreement (the Agreement) between the State of Western Australia (through the Minister for Sport and Recreation) and Allia Venue Management Pty Ltd (Allia). That Agreement came into effect simultaneously with the execution of the lease between the City and the State on 13 March 2012.

In 2014, Allia and the State mutually agreed to terminate their Agreement and on 22 September 2014 management of the Stadium officially transferred to VenuesWest. Despite this, the Lease between the City and the State has remained unchanged and still references the previous Agreement(s) and Allia's involvement in the facility. Consequently, VenuesWest is seeking for the Lease to be amended to reflect the current management arrangement.

Under clause 21 of the Lease and clause 4 of the (now redundant) Agreement between the State and Allia, the State is required to establish a Stadium Advisory Committee to advise the State on the ongoing use of the Stadium. The functions of the Committee include (among other things) overseeing the performance of the Stadium Manager, assessing any proposed Licensing Agreements and advising the State on Capital Improvements required for the Stadium. The membership of the Committee (as determined by the current Lease) includes the Mayor and CEO of the City of Vincent, as well as representatives of Allia, VenuesWest, Department of Sport and Recreation and other persons appointed by the Minister for Sport and Recreation from time to time.

DETAILS:

VenuesWest, on behalf of the State as Lessee of nib Stadium, has proposed changes to the Lease with the City and the Terms of Reference for the Stadium Advisory Committee.

A copy of the existing Lease document is included as **Attachment 1**, while the revisions proposed by VenuesWest are shown as tracked changes in the version of that document contained in **Attachment 2**. A copy of the Committee's Terms of Reference showing (as tracked changes) VenuesWest's proposed revisions is included as **Attachment 3**.

The table below summarises the primary changes being proposed to the lease by VenuesWest, together with Administration's comment on each.

	Proposed Change	Administration Comment
1.	Part – A (Lease), Year of execution has been changed from 2012 to 2014.	The date of the Lease would only need to change if Council chose to enter into a new Lease to supersede the current Lease, rather than by simply giving effect to the proposed changes through a Deed of Variation. The Deed of Variation is Administration's preferred approach as it will keep the existing Lease intact and will only alter those provisions of the Lease that are being updated. This will be administratively simpler than entering into a new Lease altogether which is substantially identical to the current Lease.
2.	Part – A (Lease), Paragraph 3, reference to the capacity of the stadium has changed to 20,300.	Supported.
3.	Part – B (Reference Table), Clause 6.4 has been changed to allow use of the adjoining Loton Park Area as an "overflow area for other events", in addition to the current allowance for use of that area as a temporary car park during match days and events. Match day parking fees paid to the City of Vincent have also been reduced by \$7 per vehicle and new fees introduced for functions and other events using the Loton Park Area.	Not Supported. In principle, Administration has no objection to the occasional use of the Loton Park Area for functions and events (at the City's absolute discretion and in accordance with the City's usual conditions for the hire and use of Reserves), but does not support the guarantee of entitlement to use that area, as proposed by VenuesWest. At present, the adjoining Loton Park Area is referenced within the Lease document but is specifically excluded from the Lease Area. Administration does not support any reduction in the parking fees currently prescribed in the lease, as that will likely result in reduced income for the City.

		If directed by Council, Administration would be willing to negotiate an outcome with VenuesWest on the abovementioned elements that is financially advantageous to the City and which might be best served by a separate licence for use of the area.
4.	Part – B (Reference Table), Clause 6.6 has been deleted as it relates to a lump sum payment of \$5 million paid to the City by the State within 14 days of the Lease being executed in 2012.	Not Supported. This provision would only need to be deleted if the City intended to enter into a new Lease instead of simply executing a Deed of Variation. If a new Lease was entered into then retaining this clause 6.6 would require the State to (again) make a \$5 million payment to the City. This clause can be retained and will have no further effect if a Deed of Variation is executed and relates only to those parts of the current Lease that need to change.
5.	Part – C (Terms & Conditions), the definition of: <ul style="list-style-type: none"> • “Event” has been expanded to include use of rooms or areas for functions; • “Heads of Agreement” has been deleted; and • “Manager” has been revised and updated to reflect that a Manager would be appointed by the State and the current Manager is VenuesWest. 	Supported, providing that the definition of Manager is amended to read as follows (showing tracked changes proposed by Administration): <p><i>“Manager means any company or individual appointed by the State from time to time <u>in accordance with Clause 6.7 of this Part</u> to be responsible for the day to day operation of the stadium and/or execution of any commercial rights or arrangements in relation to the Stadium. It also means VenuesWest if VenuesWest is responsible for the day to day operation of the stadium.”</i></p> <p>The reason for this further change is discussed at Item 7 below, in relation to Clause 6.7.</p>
6.	Part – C (Terms & Conditions), Clause 1.4 (Conditions Precedent) has been deleted. This clause stipulates the conditions precedent that needed to be fulfilled by 31 March 2012 prior to the coming into effect of the Lease. Those conditions were previously fulfilled and the clause has therefore been deleted	Deletion of this clause is not supported for the reasons outlined in Administration’s Comments on Item 4 above. <p>This provision would only need to be deleted if the City intended to enter into a new Lease instead of simply executing a Deed of Variation. This clause can be retained and will have no further effect if a Deed of Variation is executed and relates only to those parts of the current Lease that need to change.</p>
7.	Part – C (Terms & Conditions), a new Clause 6.7 has been added, which would entitle the State to appoint a Lessee for the Stadium without having to obtain the consent of the City as the Lessor.	At present, clause 6.1 requires the Lessee to obtain the City’s approval for any sublease, transfer or assignment of any part of the Stadium, interest in the Stadium or benefit of the Lease – this can reasonably be interpreted to include operational management of the Stadium. <p>Clause 6.2 of the Lease currently protects the Lessee’s rights and states that the Lessor (the City) will not unreasonably withhold its consent under clause 6.1 subject to certain qualifications being met.</p> <p>It could be argued that the current arrangement is satisfactory and need not change, as the City would not unreasonably withhold its consent for management of the Stadium to transfer from VenuesWest to another person or company. Obtaining the City’s approval in that regard need not be a difficult decision for the Lessee to secure.</p>

		<p>Conversely, it could be argued that the City's only or primary interest in respect of the Lease should be to ensure all of the State's obligations under the Lease are fulfilled, regardless of the facility manager. This is a reasonable position to hold when considering that the City would still be represented on the Stadium Advisory Committee, which is responsible for overseeing the performance of the Stadium Manager; through that role the City could address any concerns or issues that might arise if management of the Stadium transfers from VenuesWest to another person or company.</p> <p>On balance, having regard to the above, Administration has no objection to inclusion of the new clause 6.7, subject to it being amended to read as follows (showing tracked changes proposed by Administration):</p> <p>“6.7 Lessee May Appoint Manager</p> <p>(a) <i>Notwithstanding the preceding provisions of this clause 6 clauses 6.1(a) and 6.2, the Lessee may from time to time appoint a Manager without having to obtain the consent of the Lessor, providing that the appointment of any Manager does not relieve the Lessee from its obligations to comply with the terms of this Lease. The Lessee must include provisions in any agreement with a Manager which similarly require the Manager to comply with the terms of this Lease.</i></p> <p>(b) <i>For the avoidance of doubt the authority for the Lessee to appoint a Manager without having to obtain the Lessor's consent, shall not otherwise affect the preceding provisions of this clause 6 in respect of the assignment, subletting, mortgaging or transfer of any whole or part of the Premises.</i></p> <p>(c) <i>The Lessee must provide the Lessor with not less than thirty (30) days' notice in writing of any such decision to appoint a Manager in accordance with sub-clause (a) of this clause.”</i></p> <p>The above changes will ensure the new entitlement for the State to appoint and change Stadium Managers – firstly, cannot be misapplied to avoid the need for City approval of other changes to the Lease arrangement and secondly, oblige the State to notify the City of any decision to appoint a new Manager.</p>
8.	<p>Part – C (Terms & Conditions), Sub-clause 11.5(b) has been deleted and the words “during the term” added to the end of the two remaining sub-clauses (a) and (c), the latter of which is now sub-clause (b).</p> <p>Sub-clause (b) of the current Lease refers to ownership of any capital improvements</p>	<p>Deletion of this clause is not supported for the reasons outlined in Administration's Comments on Item 4 above.</p> <p>This provision would only need to be deleted if the City intended to enter into a new Lease instead of simply executing a Deed of Variation. This clause can be retained and will have no further effect if a</p>

	<p>(i.e. plant and equipment) that were not used in the previous redevelopment of the Stadium. Under that sub-clause, the State was required to remove and relocate that plant and equipment to Loton Park and the City was then responsible for its use and disposal thereafter.</p> <p>This sub-clause has served its purpose and is therefore proposed to be deleted.</p>	<p>Deed of Variation is executed and relates only to those parts of the current Lease that need to change.</p>
9.	<p>Part – C (Terms & Conditions), existing clause 11.6 has been erroneously renumbered as clause 11.5.</p>	<p>Not supported. Existing clauses 11.1 – 11.5 (inclusive) are not proposed to be deleted and as such the numbering of clause 11.6 needs to remain.</p>
10.	<p>Part – C (Terms & Conditions), Clause 21 (Committee) has been amended, as outlined below:</p> <p><u>Clause 21.1</u></p> <p>VenuesWest's tracked change version of the proposed (revised) Lease (Attachment 2) suggests that the entirety of 21.1 has been amended and rewritten, but this is not the case. The <i>only</i> changes proposed to Clause 21.1 of the current Lease are as follows:</p> <ul style="list-style-type: none"> In sub-clause (b) the Committee membership has been changed to – refer to the CEO and further representative of VenuesWest (as opposed to the CEO and Chairman of VenuesWest); include “2-3 representatives of the regular users of the stadium to be appointed by the committee” (as opposed to a single non-voting Stadium user representative that is rotated annually among Stadium users); and refer to the CEO and “a further representative” of the City (as opposed to the CEO and Mayor). In sub-clause (c) the quorum for any meeting is to be at least 3 members, at least 2 of which must be State representatives and the third a Council representative (as opposed to a quorum of 4 at present, with two needing to be State representatives, the third Allia's representative and the fourth the Council's representative). <p><u>Clause 21.2</u></p> <p>Minor changes are proposed to sub-clauses (i), (ii) and (iii) to refer to the “Manager” instead of Allia and to correctly reference the Lease instead of the Agreement, as presently written.</p>	<p>Administration has no objection to the changes proposed to clause 21.1, although Council may wish to consider officially retaining (in the Lease) the Mayor's appointment to the Stadium Advisory Committee, rather than the City's second member being (generically) “a further representative of the City”.</p> <p>Administration does not support the reduced quorum of 3, given that the Committee Membership is actually increasing. This reduced quorum is also inconsistent with the proposed (revised) Committee Terms of Reference (see Attachment 3) which requires a quorum of 4 members – 2 State representatives, 1 City representative and 1 representative of the nib Stadium users.</p> <p>Administration supports the appointment of up to 2 (<i>not</i> up to 3) regular users of the Stadium as voting members, given their direct interest and investment in use of the Stadium. In Administration's view, the Stadium users representation on the committee should not exceed the City's membership of 2 persons. This number of Stadium users is also consistent with the proposed (revised) Terms of Reference for the Committee, which nominates the two main users of the Stadium as voting Committee Members – Western Force and Perth Glory.</p> <p>Administration supports the minor changes proposed to clause 21.2.</p>
11.	<p>Part – C (Terms & Conditions), Sub-clauses 22(a) and (b) have been changed to recognise that the Lessee <i>may</i> intend to carry out further redevelopment of the</p>	<p>Supported.</p> <p>These changes are minor, do not alter the purpose or intent of clause 22 and do not obviate the need</p>

	Stadium, and to delete the reference to <i>major</i> development. Sub-clause 22(b)(ix)(F) has also been changed to more appropriately refer to the Lessee rather than the Department.	for the State to still apply for and obtain the City's permission (as Lessor) for any further redevelopment of the Premises and for the State to obtain and comply with all other statutory approvals.
12.	Part – C (Terms & Conditions), Signing Page has been updated to refer to Mayor John Carey.	Supported, although the title "Hon." Would need to be removed prior to the Mayor's name if a new Lease is entered into.

In addition to the changes proposed to clause 21 of the Lease (as outlined in Item 10 of the table above), VenuesWest has also proposed changes to the Terms of Reference. A copy of the current Terms of Reference showing tracked changes is included as **Attachment 3**.

Administration has no objection to the proposed changes to the Terms of Reference.

CONSULTATION/ADVERTISING:

Nil

LEGAL/POLICY:

The proposed changes to the Lease are considered sufficiently minor to be dealt with through a Deed of Variation to the 2012 Lease, rather than by replacement of that Lease altogether with a new Lease.

If a new Lease is entered into in 2015 then the term of the original Lease would be increased by three years because the commencement date of the Lease has changed. This approach is not favoured and would likely, but unnecessarily, require the Lease to be treated as a major land transaction and an exempt land disposition to the State. There is little point in this occurring as the proposed changes to the Lease do not alter the purpose, intent or consideration (financial return) to the City and thus do not justify a complete replacement of the current Lease.

RISK MANAGEMENT IMPLICATIONS:

LOW: The changes proposed to the Lease and Terms of Reference do not alter the application, purpose or intent of those documents, nor do they materially diminish the City's rights as Lessor or the State's obligations as Lessee.

STRATEGIC IMPLICATIONS:

Consideration of this proposal is in keeping with the following strategy from the City's Strategic Community Plan 2013-2023:

"2.1.1 Develop and promote partnerships and alliances with key stakeholders"

SUSTAINABILITY IMPLICATIONS:

Perth Oval (nib Stadium) is a significant City of Vincent asset and has the potential to generate substantial asset management responsibilities and costs for the City beyond the current Lease term (ending in 2052) if not carefully managed by the State in the meantime. These issues will be closely reviewed in the current financial year as part of the City's preparation of a comprehensive asset management strategy.

FINANCIAL/BUDGET IMPLICATIONS:

There are no more or different financial or budget implications arising for the City as a result of the changes proposed to the Lease and Advisory Committee Terms of Reference.

COMMENTS:

Administration supports the proposed changes to the Lease for Perth Oval (nib Stadium), subject to the various amendments recommended by Administration earlier in this report and subject also to the changes being effected through a Deed of Variation to the current Lease. On this basis, it is recommended that Council accepts those changes (as amended by Administration) and authorises the Mayor and CEO to execute a Deed of Variation relating to the same.

Administration also supports VenuesWest's proposed changes to the Terms of Reference and it is therefore recommended that Council endorse those changes.