



Late Item: FPOL2101-15

Finance, Policy, Operations and Legislation Committee

Wednesday, 20 January 2021, 6.00pm

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13. Late items

In cases where information is received after the finalisation of an agenda, matters may be raised and decided by the meeting. A written report will be provided for late items.

FPOL2101-15 CONSIDERATION OF REQUEST TO EXTEND THE SPICER SITE SUBSTANTIAL COMMENCEMENT DATE (8-10 HENDERSON STREET, FREMANTLE)

Meeting date: 20 January 2021
Responsible officer: Director City Business
Decision making authority: Council
Attachments: 1. Paddy Troy Easement
Additional information: Nil

SUMMARY

The property development arm of Spicer Street Pty Ltd (Forrest Entity/Minderoo), Fiveight (Spicer Purchaser), have formally requested the City to consider an extension of the substantial commencement date provided in the Spicer Development Deed (SDD) between the City and Spicer Street Pty Ltd for the property at 8-10 Henderson Street Fremantle, known as the Spicer Site.

The request proposes to extend this date for a period of two years to 19 December 2022. The current date is 19 December 2020.

This report recommends that Council agree to extend the substantial commencement date in the PDD, subject to a number of conditions.

BACKGROUND

The City entered into a contractual agreement with Sirona Capital in May 2013 for the sale of the former Spicer property as part of the Kings Square Project. This contractual agreement was in the form of the Project Development Deed (PDD).

Since the PDD was first entered into, settlement dates for the other properties involved have been amended twice, each time the consequence has had a flow on effect to move the Spicer settlement as well.

In late 2018 the property settled to Sirona and was then immediately sold on to the Spicer Purchaser. The condition of approval of the sale was that the Spicer Purchaser was required to enter into a development deed on substantially the same terms as that between the City and Sirona Capital Pty Ltd. At the Ordinary meeting of Council held on 12 December 2018, the following was adopted;

“Council consent to:

1. *the transfer of 8-10 Henderson Street, Fremantle, (known as the former Spicer Site) by Sirona Capital Management Pty Ltd (Sirona) to Spicer Street Pty Ltd (Forrest Entity);*
2. *the assignment of the Project Development Deed (PDD) as amended and originally dated 10 May 2013, as it relates to the development of the Spicer Site to the Forrest Entity; and*
3. *the modifications to the PDD recommended by the City’s lawyers needed to give effect to the above,*

Subject to the following conditions:

- a. *the transfer of the Spicer Site by the City to Sirona takes place within a time acceptable to the Chief Executive Officer;*
- b. *Sirona observes and performs all of its obligations in the PDD in relation to the development of the Spicer Site until the transfer to the Forrest Entity occurs;*
- c. *the Forrest Entity agrees to assume all of Sirona’s post settlement obligations in relation to the development of the Spicer Site;*
- d. *the parties to the PDD and the Forrest Entity enter into documents to effect the above that are acceptable to the Chief Executive Officer upon advice from the City’s lawyers and that the Mayor and Chief Executive Officer are authorised to execute such documents; and*
- e. *the City is not required to pay the costs of any other party to the PDD or the Forrest Entity in relation to this matter.”*

One of the conditions provided in the now Spicer Development Deed (SDD) is for the development of the property to reach substantial commencement within two years of the settlement of the property. The SDD defines the “Spicer Substantial Commencement Date” as;

- “(a) the date being 24 months from the date that Sirona Capital Management Pty Ltd as trustee for the Kings Square No. 2 Unit Trust becomes the registered proprietor of the Spicer Property; or*
- (b) such later date agreed to by the Spicer Purchaser and the City pursuant to clause 8.2.*

Substantial Commencement means in relation to the Spicer Development;

- (a) demolition of existing Buildings and Improvements;*
- (b) (if the development is to include a basement) completion of the site works, including excavation to basement level and completion of construction works to a ground floor slab level (including the pouring of a ground floor slab); and*
- (c) (if the development is not to include a basement) completion of the site works and completion of the structural works to a first floor level (including the pouring of a first floor slab), and Substantially Commence shall have a corresponding meaning.”*

Since purchasing the site, various Minderoo entities have met with the City to discuss various development options which meet the SDD and Urban Design Guidelines. No

formal development application has been received from Spicer Street Pty Ltd and a related entity, Fiveight, have formally requested consideration of an extension for substantial commencement.

FINANCIAL IMPLICATIONS

There is limited direct financial implication from considering this request. The immediate financial implication is any associated legal costs associated with negotiating the extension.

The SDD also contemplates options to buy the property back if substantial commencement is not achieved. The SDD requires particular steps to take place that are considered further in the legal implications of this report. The financial implication to this is the cost of re-purchasing the property.

In the event that:

- (i) the Spicer Purchaser fails to Substantially Commence the Spicer Development by the Spicer Substantial Commencement Date; and*
- (ii) this document is terminated prior to the date on which the Spicer Purchaser has Substantially Commenced the Spicer Development by:*
 - (A) either party pursuant to clause 17.6;*
 - (B) the City as a result of a Project Default pursuant to clause 18.3; or*
 - (C) the City pursuant to clause 20(c)(i)(B), then the City shall have the option to re-purchase the Spicer Property, from the Spicer Purchaser for the Re-Purchase Price, in accordance with the provisions of this clause.*

A further, albeit indirect, cost for considering such a request is the loss of rate income from the development not being commenced on time and therefore not being completed within the original considered timeframe. This issue is considered further within the body of this report.

LEGAL IMPLICATIONS

As noted above, the SDD has provision for the Spicer Purchaser to substantially commence development of the property within a determined timeframe (19 December, 2020), with one of the remedies being that the City has the right to re-purchase the property if this is not achieved.

The SDD describes the process for a re-purchase below;

- (a) The parties must use reasonable endeavours to complete the process contained in this clause 9.3 in a timely manner.*
- (b) The City must undertake a Business Plan Process.*
- (c) If the outcome of the Business Plan Process is that the City decides to proceed with the repurchase of the Spicer Property then the City must, within 28 days of making its decision to proceed, give an Exercise Notice to the Spicer Purchaser.*
- (d) If the Exercise Notice is not received by the Spicer Purchaser within 8 months of the date on which it received the Initiation Notice, then the City's option to repurchase the Spicer Property automatically and irrevocably lapses.*

- (e) *The Spicer Purchaser may not dispute or object to the validity of the Exercise Notice on grounds that the City has not complied with any requirements contained in the LGA relating to the Business Plan or the Business Plan Process.*
- (f) *Within 30 days of the City giving the Exercise Notice to the Spicer Purchaser;*
 - (i) *each party must obtain a valuation of the Market Value as at the date of the Exercise Notice;*
 - (ii) *the “parties must exchange copies of the valuations obtained under clause 9.3(f)(i); and*
 - (iii) *the Spicer Purchaser must notify the City of what the Spicer Purchaser considers to be the value of any works undertaken on the Spicer Property by the Spicer Purchaser since the Spicer Settlement Date.*
- (g) *The parties must then, acting through the Strategic Liaison Group, meet in good faith and endeavour to agree on the Re-purchase Price.*
- (h) *If the parties have not reached agreement on the Re-purchase Price within 40 days of the City giving the Exercise Notice, then;*
 - (i) *either party may request that the President of the Australian Property Institute (Inc) (Western Australia Division) appoint an independent Valuer;*
 - (ii) *the Valuer appointed under clause 9.3(h)(i) must use its best endeavours to determine:*
 - (A) *the Market Value; and*
 - (B) *the value of any works undertaken on the Spicer Property by the Spicer Purchaser since the Spicer Settlement Date, within 20 Business Days after being appointed and give the Valuer's determination (which will be a valuation in writing outlining the reasons for it) to the parties;*
 - (iii) *the Valuer must act as an expert and not as an arbitrator;*
 - (iv) *the fees of the Valuer will be payable by the Spicer Purchaser and the City in equal shares;*
 - (v) *clause 21.5 will apply as if the Valuer is the Expert described in that clause;*
 - (vi) *the Valuer's decision on the Market Value and the value of any works undertaken on the Spicer Property by the Spicer Purchaser since the Spicer Settlement Date will be final and binding on the parties for the purpose of determining the Repurchase Price; and*
 - (vii) *the Re-purchase Price shall be taken to be determined on the date of the Valuer's decision.*

The City is also required to commence this process by way of notice to the Spicer Purchaser within 90 days of the event failure. The City would need to undertake this step by 18 March 2021, if it were to proceed with this remedy rather than consider a request to extend the date.

CONSULTATION

Nil for this consideration.

OFFICER COMMENT

Officers have met with the officers of Fiveight to discuss the options that may be considered by Council when considering this request.

The City has proposed the following conditions as part of any consideration, subject to council approval and other options available to Council under the SDD. These being;

- Consideration of a one only extension for two years to 19 December 2022.
- An amendment to the SDD to allow for;
 - Milestone dates for each step in the development approval process up to substantial commencement.
 - The right for the City to commence re-purchase action for failure to achieve any milestone date.
 - A rate equivalent payment to be paid by the Spicer Purchaser in the event that a milestone date is not achieved.
 - An easement, 8 meters in width, be registered to ensure suitable access to Paddy Troy Mall from William Street between the Spicer property and the Fremantle Malls property.
 - A two stage development would be accepted as long as the first stage is:
 - at least 2,600m² of gross floor area fronting Henderson Street; and
 - not less than 50% of the works the subject of the approved development.

Rate Equivalent Payment Option

The City is seeking to be financially compensated for the rates revenue that the City would have received from the Spicer Purchaser had the Spicer Purchaser achieved the milestones in the Spicer Development Deed. The City is seeking the right to attain a rate equivalent payment from the Spicer Purchaser if any of the revised milestone dates are not met. The rates equivalent payment would be payable from the date that the first of the milestone dates is not achieved until Practical Completion of the Spicer Development.

Milestone Dates

Milestone dates have been suggested by the City to ensure that the Spicer Development progresses in a clear timeline and to give the City additional rights to repurchase the Spicer Property if one or any milestones are missed. This will allow Council to consider an option to repurchase the Spicer Property prior to the varied Substantial Commencement Date rather than waiting for this date before having any right to repurchase the Spicer Property under the SDD. The following milestone dates have been proposed;

Preparation of Spicer Development Plans and Specifications	19 June 2021
Development Application to be lodged	19 September 2021
Building Permit to be obtained	19 June 2022
Spicer Substantial Commencement Date	19 December 2022

Paddy Troy Easement

Registering an Easement against the Certificate of Title for the Spicer Property will ensure that the connection between William Street and Paddy Troy Mall is agreed now and will not be re-aligned or challenged through the development application process. This is a significant improvement in the SDD and allows Council to have greater say in

how the connection is provided and has been agreed in principle by the Spicer Purchaser subject to the Easement being drafted for review.

Two Stage Development

The Spicer Purchaser have advised a scenario where a two stage accommodation development may be more advantageous (for them) in the current tourism market and have requested that the City permit the Spicer Purchaser to stage the Spicer Development. This will allow them to develop the site without over-committing to tourism accommodation if the market cannot support it. The City has some support for this position, albeit that the development is to be significant enough to satisfy the City that the Spicer Purchaser has substantially commenced the Spicer Development. Therefore, the City suggests that the first stage needs to be:

- at least 2,600m² of gross floor area fronting Henderson Street; and
- not less than 50% of any approved development of the site.

Summary of Conditions

The above options will place council in a stronger position through the SDD if the request for extension is supported. Officers are of the view that a one time only support for extension could be considered based on the conditions being agreed by the Spicer Purchaser.

Re-Purchase

If council were to choose to apply the re-purchase option in place of an extension of the date, the City will need to notify SSPL of its intention and then run through the legal process of doing so. This may mean Council will need to grant SSPL an opportunity to rectify the situation, a valuation for the property will need to be obtained and further legal advice will need to be obtained. the SDD requires Council to notify SSPL of its intent to re-purchase prior to 18 March 2021. The conditions of the re-purchase under the current SDD are provided in the legal implications above.

VOTING AND OTHER SPECIAL REQUIREMENTS

Simple majority required

OFFICER'S RECOMMENDATION

Council approve a request from Spicer Street Pty Ltd for a one-off extension to the Spicer Substantial Commencement Date as defined under the Spicer Development Deed dated 19 December 2018, subject to the following conditions;

- 1. Consideration of a one only extension for two years to 19 December 2022.**
- 2. An amendment to the Spicer Development Deed dated 19 December 2018, to allow for;**
 - a. Milestone dates for each step in the development approval process up to substantial commencement as;**

Preparation Development Plans and Specifications	19 June 2021
Development Application to be lodged	19 September 2021

Building Permit to be obtained

19 June 2022

Spicer Substantial Commencement Date

19 December 2022

- a. The right for the City to commence re-purchase action for failure to achieve any milestone date.
 - b. A rate equivalent payment to be paid by Spicer Street Pty Ltd, if any milestone date is missed on and from the date that the milestone date should have been achieved until Practical Completion.
 - c. an easement, 8 metres in width, be registered to ensure suitable access to Paddy Troy Mall from William Street between the Spicer property and the Fremantle Malls property.
3. A two stage development would be accepted as long as the first stage is not less than 50% of the approved development from the development application to be lodged by 19 September 2021.

**FPOL2101-15 CONSIDERATION OF REQUEST TO EXTEND THE SPICER SITE
SUBSTANTIAL COMMENT DATE (8-10 HENDERSON
STREET, FREMANTLE)**

ATTACHMENT 1 - Paddy Troy Easement

BLANK INSTRUMENT FORM

EASEMENT IN GROSS (PUBLIC ACCESS EASEMENT)

(Note 1)

THIS DEED is made on the _____ day of _____ 20____

BETWEEN

SPICER STREET PTY LTD (ACN 623 254 553) of 80 Birdwood Parade DALKEITH WA 6009 (**Grantor**)

AND

CITY OF FREMANTLE of 70 Parry Street FREMANTLE WA 6160 (**Grantee**)

BACKGROUND

- A. The Grantor is the registered proprietor of the Servient Land which is situated within the district of the Grantee.
- B. Pursuant to section 195 of the *Land Administration Act 1997* (WA) (**LAA**) an easement may be created in favour of a local government without the need for a dominant tenement. In accordance with section 196 of the LAA an easement granted pursuant to section 195 may be a public access easement for the use and benefit of the public at large.
- C. The Grantor has agreed to provide to the Grantee an easement in gross under sections 195 and 196 of the *Land Administration Act 1997* (WA) for the rights of access of the public at large over the Easement Area, subject to the Encumbrances and upon the terms contained in this Deed.

OPERATIVE PROVISIONS

1. Definitions and Interpretation

1.1 Definitions

In this Deed unless the contrary intention appears:

Authority means any government, semi government, local government, statutory, public, ministerial, administrative, fiscal or judicial, body, department, commission, authority, tribunal, agency or entity.

Deed means the deed between the parties constituted by this document and includes the recitals and any amendments made from time to time in accordance with this deed and any schedules hereto, and "this Deed" has a corresponding meaning.

Deposited Plan means [xxx].

Easement means the easement described in clause 2 of this Deed.

Easement Area means those parts of the Servient Land marked [x] on the Deposited Plan.

Encumbrances means:

- (a) O058327 Restrictive Covenant to City of Fremantle;

(b) O058699 Caveat by City of Fremantle.

Grantee includes the successors in title to the Grantee.

Grantor includes the successors in title to the Grantor.

Land means Lots 374 and 375 on Deposited Plan 222424 and being the whole of the land comprised in Certificate of Title Volume 416, Folio 31A.

Landgate means the Western Australian Land Information Authority.

Owner means the registered proprietor from time to time of all or any part of the Easement Area.

Schedule means the schedule to this Deed.

Spicer Development means the Grantor's construction on the Land in a manner that is consistent with Restrictive Covenant O058327.

1.2 Interpretation

In this Deed unless a contrary intention appears:

- (c) the reference to any Act includes all statutory amendments and re-enactments thereof for the time being in force;
- (d) the singular number includes the plural number and the masculine gender includes the feminine gender and the neuter gender and vice versa;
- (e) any covenant entered into by more than one person will be deemed to be entered into by those persons jointly and each of them severally;
- (f) the covenants and obligations of both parties to this Deed will be binding upon and enforceable against not only each of them in the manner set out in this Deed but also against any assignee, transferee and successor in title; and
- (g) the covenants on the part of the Grantor bind the Grantor its assignees, transferees and successors in title only for so long as such party remains registered as the proprietor of the whole or any part of the Easement Area.

2. Grant of Public Access Easement

The Grantor, being the registered proprietor of an estate in fee simple of the Land subject to the Encumbrances, for itself and its successors in title HEREBY TRANSFERS AND GRANTS to the Grantee a public access easement for the use and benefit of the public at large under and by virtue of the provisions of sections 195 and 196 of the LAA with the full and free right, liberty, power and authority from time to time and at all times to go, pass and repass for all purposes and either with or without vehicles over, along and across the Easement Area on the terms set out in this Deed.

3. Grantor's Covenants

The Grantor covenants and agrees with the Grantee as follows:

- (a) that the Grantor will be liable to construct, maintain, repair and replace the road, driveway, drainage, landscaping (if any), retaining walls (if any) and pavements on the Easement Area in good safe repair, order and condition at its or their (as the case may be) own cost and expense to the satisfaction of the Grantee; and
- (b) that the Grantor will not make or erect or cause, permit or suffer to be made or erected any buildings or improvements (including any structure, fence, wall or other thing) on or over the Easement Area nor to plant or cause, permit or suffer to be planted any trees or shrubs on or over the Easement Area (unless located within landscaping or drainage areas designated by the Grantee), nor to place or permit to be placed anything on or over the Easement Area or any part of the Easement Area which does or may be likely to restrict, obstruct, interfere, prevent or hinder the Grantee in the exercise of its rights and privileges under this Deed without the

prior written consent of the Grantee (acting reasonably) being obtained.

4. Repairs and Maintenance and Insurance Obligations

- (a) If any damage to the Easement Area occurs, the Grantor will promptly rectify that damage at its sole cost, in a good and workmanlike manner as soon as possible or within a time period specified by the Grantee (acting reasonably and taking into account the works required to rectify the damage).
- (b) In the event that the Grantor fails to rectify any damage it causes to the Easement Area within the period specified in clause 4(a), the Grantee may at its absolute discretion rectify such damage, the costs of which will be payable by the Grantor.
- (c) The Grantor will at its cost effect all insurance in respect of public liability for any loss or damage caused to any person in or about the Easement Area in an amount of not less than TWENTY MILLION DOLLARS (\$20,000,000.00) in respect of any one claim, or such other amount in respect of any one claim as may be reasonably determined from time to time by the Grantee.

5. Grantee's Covenants and Acknowledgements

- (a) The Grantee covenants and agrees with the Grantor (to the intent that such covenants will be for the benefit of the Grantor) that the Easement in favour of the Grantee will not exclude the Grantor from using the Easement Area for any purpose consistent with clause 2 including without limitation permitting any recognised authority from having access to the Easement Area for the purpose of providing services to any part of the Easement Area and the Land and installing all necessary pipes, conduits and services in the Easement Area PROVIDED THAT the Grantor will be responsible for ensuring the particular authority makes good any damages to the surface of the Easement Area resulting from such works.
- (b) The Grantor must not barricade, gate, bollard, fence or close off the Easement Area without the prior written consent of the Grantee.

6. Mutual Agreements

6.1 Modification of rights

The rights granted to the Grantee under this Deed will not be modified, surrendered, released or abandoned either wholly or partially except with the prior written consent of the Grantor and the Grantee and neither of those parties shall make application to any Court, the Commissioner of Titles, the Registrar of Titles or Landgate for the partial or whole modification, removal or extinguishment of any right granted to the Grantee under this Deed except with such prior written consent of all parties.

6.2 Notices

Any notice required to be given under this Deed:

- (a) will be given in writing and may be signed by the party giving the notice or that party's solicitors;
- (b) will be served on each party personally or by being forwarded by prepaid security post to such party at its address mentioned in his Deed, or as the case may be to such other address as it may from time to time notify to the other party pursuant to this Deed;
- (c) each party may from time to time change its address by giving notice pursuant to this clause to the other party; and
- (d) will be deemed to be served TWO (2) business days after the date of posting from any post office within Western Australia.

6.3 Mutual Covenants

The Grantee shall not be liable for and shall not be required to pay any compensation to the Grantor or to any other party who has a right to use, occupy or possess the Easement Area or any part of it, for any losses, including but not limited to, loss of profits, or any economic loss sustained in any way

arising out of the Grantee exercising any of its rights under this Deed.

6.4 Further Assurances

The Grantor and the Grantee agree to sign and deliver such further document and notices and do and perform such further acts and things as may be necessary to give full and proper effect to the provisions of this Deed.

6.5 Registration

This Deed will be registered at Landgate as soon as practicable after execution and the Grantor and Grantee will execute all applications and documents, produce or arrange production of duplicate Certificates of Title at Landgate, and do all things necessary to ensure registration at Landgate of the easement created by this Deed.

6.6 Costs

The Grantee will bear the preparation and negotiation costs in relation to this Deed, any duty assessed on this Deed and the registration fees payable in respect of this Deed.

EXECUTED AS A DEED

Executed by
SPICER STREET PTY LTD
(ACN 623 254 553)
pursuant to section 127 of the *Corporations Act 2001* (Cth)

Director Signature

Director / Secretary Signature

Director Name (Please Print)

Director / Secretary Name (Please Print)

The Common Seal of the
CITY OF FREMANTLE
was hereunto affixed by the authority of the
Chief Executive Officer and Mayor
in the presence of:

Mayor Signature

Chief Executive Officer Signature

Mayor Name (Please Print)

Chief Executive Officer Name (Please Print)

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INSTRUCTIONS

1. This form may only be used when a "Box Type" form is not provided or is unsuitable. It may be completed in narrative style.
2. If insufficient space hereon Additional Sheet Form B1 should be used.
3. Additional Sheets shall be numbered consecutively and bound to this document by staples along the left margin prior to execution by the parties.
4. No alteration should be made by erasure. The words rejected should be scored through and those substituted typed or written above them, the alteration being initialled by the persons signing this document and their witnesses.

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2. A separate attestation is required for every person signing this document. Each signature should be separately witnessed by an Adult Person. The full name, address and occupation of the witness must be stated. Execution by a corporation or body corporate must be in accordance with the Corporation Act.



EXAMINED

OFFICE USE ONLY

LODGED BY

ADDRESS

PHONE No.

FAX No.

REFERENCE No.

ISSUING BOX No.

PREPARED BY JACKSON McDONALD

ADDRESS 225 St Georges Terrace
PERTH WA 6000

REFERENCE No: CES:SQM:7169997

PHONE: +61 8 9426 6611

FAX: +61 8 9321 2002

INSTRUCT IF ANY DOCUMENTS ARE TO ISSUE TO OTHER THAN LODGING PARTY

TITLES, LEASES, DECLARATIONS ETC LODGED HEREWITH

1. _____ Received Items
2. _____ Nos.
3. _____
4. _____
5. _____
6. _____ Receiving Clerk

Registered pursuant to the provisions of the TRANSFER OF LAND ACT 1893 as amended on the day and time shown above and particulars entered in the Register.