

**CITY OF MARION  
SPECIAL GENERAL COUNCIL MEETING  
10 May 2016**

**Confidential Report**

**Originating Officer:** John Valentine, Manager Strategic Projects  
**General Manager:** Abby Dickson, General Manager City Development  
**Subject:** Former Hallett Cove Library and Youth Services building  
**Reference No:** SGC100516F01  
**File No:** 13.60.1.1

If the Council so determines, this matter may be considered in confidence under Section 90(3)(b), (d) and (g) of the *Local Government Act 1999* on the grounds that the report contains information relating to a matter that could confer a commercial advantage to a third party, is of a commercial nature and Council has an obligation, to maintain the confidentiality of its agreement with Etiria (the Makris Group).



**Adrian Skull  
Chief Executive Officer**

**RECOMMENDATION:**

1. That pursuant to Section 90(2) and (3)(b), (d) and (g) of the *Local Government Act 1999*, the Council orders that all persons present, with the exception of the following persons: Adrian Skull, Vincent Mifsud, Abby Dickson, Tony Lines, Kate McKenzie, Jaimie Thwaites, John Valentine and Craig Clarke be excluded from the meeting as the Council receives and considers information relating to Expressions of Interest received for the purchase of the existing Hallett Cove Library and Youth Services building, upon the basis that the Council is satisfied that the requirement for the meeting to be conducted in a place open to the public has been outweighed by the need to keep consideration of the matter confidential given the information relates to a matter that could confer a commercial advantage to a third party, is of a commercial nature and Council has an obligation, to maintain the confidentiality of its agreement with Etiria (the Makris Group).

**REPORT OBJECTIVES:**

To consider the outcomes of the Expression of Interest (EOI) for the former Hallett Cove Library and Youth Services building.

To consider entering into a contract with the highest valued EOI for the property subject to offering the property on the same terms and conditions to Etiria No. 25 and Hallett Cove Holdings (the Makris Group) the highest valued EOI.

**RECOMMENDATIONS: (6)**

**DUE DATES**

**That Council:**

- |   |               |
|---|---------------|
| 1. Note that an Expression of Interest has been held for the purchase of the former Hallett Cove Library and Youth Services building.   | 10 May 2016   |
| 2. Note that three Expressions of Interest were received and two parties submitted their best and final offers of \$1,520,000 and \$1,605,000 subject to certain terms and conditions.  | 10 May 2016   |
| 3. Note the advice received from Mellor Olsson in relation to the terms and conditions of the Expressions of Interest and Council's agreement with the Makris Group.  | 10 May 2016   |
| 4. Resolves to enter into a conditional contract with Hamish Brown and / or nominees for the sale of the former Hallett Cove Library and Youth Services building for \$1,605,000 subject to the Makris Group matching the terms and conditions offered by Hamish Brown and / or nominees.   | 10 May 2016   |
| 5. Offer the former Hallett Cove Library and Youth Services building to the Makris Group for \$1,605,000 with a \$50,000 deposit and 60 day settlement period to secure a third party lease and the Makris Group to respond within 28 days of being notified.   | 10 May 2016   |
| 6. In accordance with Section 91(7) and (9) of the Local Government Act 1999 the Council orders that this report and the minutes arising from this report having been considered in confidence under Section 90(2) and (3)(b), (d) and (g) of the Act shall, except when required to effect or comply with Council's resolution(s) regarding this matter, be kept confidential and not available for public inspection for a period of 12 months from the date of this meeting. This confidentiality order will be reviewed at the General Council Meeting in December 2016 | December 2016 |

## **BACKGROUND:**

Council has previously resolved to dispose of the former Hallett Cove library and youth services building and appointed Jones Lang LaSalle (JLL) to conduct the sale process, (GC241115F01).

Council entered into an agreement with the Makris Group to achieve the development of Patpa Drive, to which the Makris Group contributed \$1,250,000, and they integrated the design of the shopping centre development with Patpa Drive. The agreement with the Makris Group also included that Council would offer the Hallett Cove Library building to Makris Group if Council resolved in the future to dispose of the property. In accordance with the confidential agreement between the City of Marion and Etiria No 25 and Hallett Cove Holdings (the Makris Group) the property was offered to the Makris Group at Council's adopted reserve price of \$1,500,000, a \$150,000 deposit and a 60 day settlement period.

The Makris Group subsequently advised that they were interested in the property but not at Council's reserve price of \$1,500,000.

After the Makris Group's response JLL prepared a variety of marketing materials and subsequently commenced an EOI process to the open market.

The EOI closed on 21 April 2016 and three EOI's were received with various terms and conditions and financial offers. The three offers were for:

- \$800,000, from a gymnasium entity;
- \$1,487,000, from Hamish Brown and / or nominee;
- \$1,520,000, from [REDACTED] and / or nominee.

After receipt of the 3 EOI's the parties that offered the higher amounts (Brown and [REDACTED]) were invited to submit their best and final offers by Friday 29 April, 2016. Both parties responded by 29 April with the following financial offers:

- EOI of \$1,520,000 confirmed as [REDACTED] best and final offer;
- EOI of \$1,487,000 increased by Brown to \$1,605,000.

## **DISCUSSION:**

In accordance with the agreement between the City of Marion and the Makris Group Council cannot dispose of the property to another party on more favourable terms to the purchaser than those offered to the Makris Group.

The financial offer of the two highest bidders is clearly less favourable to the purchaser compared to the \$1,500,000 reserve put to the Makris Group. The deposits offered by [REDACTED] and Brown are lower than the Makris Group terms (therefore more favourable to the other parties). Most importantly the [REDACTED] and Brown EOI's are subject to them gaining approval from another party to enter into a secure lease. The Brown and [REDACTED] EOI's being subject to achieving a secure lease is very clearly a significantly more favourable arrangement compared to the Makris Group terms as it effectively removes or reduces risk to Brown and [REDACTED]

Mellor Olsson have reviewed this matter and their advice is attached as Appendix 1.

Mellor Olsson advise that the three main elements of the EOI's are price, deposit and conditions, such as securing a lease to another party. Mellor Olsson conclude that the deposit and conditions of the [REDACTED] and Brown offers are more favourable to them and Mellor Olsson recommends that in accordance with the agreement with the Makris Group that Makris should be given the opportunity to purchase the property on the same terms.

Council can enter into a contract with Brown so as to secure that offer. If Council resolves to enter into a conditional contract with Brown there would need to be a condition that the contract can be terminated if the Makris Group offer to buy the property on the same terms and conditions, i.e. price, deposit and settlement time and subject to achieving a lease.

If the Makris Group matches the Brown EOI terms, Council would then have a contract with the Makris Group for \$1,605,000, a \$50,000 deposit and the same settlement conditions as Brown, as described in the attached correspondence from Mellor Olsson. The progression of the contract with the Makris Group would then be subject to Makris Group achieving a lease agreement for a third party to occupy the building and thereby removing or reducing the risk as per the Brown offer.

If the Makris Group does not match the price, deposit and settlement terms of the Brown offer the conditional contract with Brown will continue. Subject to Brown achieving a lease within their nominated timeframe (and the other terms and conditions) the property will be sold for \$1,605,000.

**CONCLUSION:**

Council has previously resolved to dispose of the former Hallett Cove Library and Youth Services building and set a reserve price of \$1,500,000.

The property has been offered to the Makris Group and subsequently an EOI process conducted with three EOI's received and a highest offer of \$1,605,000 subject to certain terms and conditions. To meet the requirements of the agreement between Council and the Makris Group the Makris Group will need to be given the opportunity to meet the terms and conditions of the Brown offer within 28 days of being notified.

Our Ref: PP:M150959

6 May 2016

Mr John Valentine  
 Manager Strategic Projects  
 City of Marion  
 PO Box 21  
 OAKLANDS PARK SA 5046

**CONFIDENTIAL**

Dear John

**RE: HALLETT COVE DISPOSAL**

I refer to previous correspondence in relation to the above matter and to the email from Jed Harley of JLL dated 3 May 2016 and the material attached to that email.

**The Offer to the Makris Group**

You have previously instructed me that, in accordance with Clause 13 of the Deed dated 16 March 2007 ("the Deed") between Council of the one part and Etiria (No 25) Pty Ltd and Hallett Cove Holdings Pty Ltd (together called "the Makris Group") of the other part, Council offered to sell the property at Unit 8, 1 Zwerner Drive, Hallett Cove ("the Property") to the Makris Group on the following terms:

- a price of \$1,500,000 (plus GST);
- a deposit of \$150,000, payable on signing the Contract; and
- settlement within 60 days.

The Makris Group responded, advising that, whilst it was interested in purchasing the Property, it was not prepared to pay the amount specified in Council's offer.

The Makris Group did not:

## LAWYERS

Philip Page  
 Greg Anderson  
 Con Traianos  
 Greg Arthur  
 Phil McGovern  
 Tim Mellor  
 Karen Olsson  
 Anthony Kelly  
 Joanna Andrew  
 Joseph Anderson  
 Phil Dorman  
 Jennifer Goodale  
 Matthew Dorman  
 John Dempster  
 Andrew Goode  
 Henry Ringwood  
 Leonie Millard  
 Elizabeth Olsson  
 Jenny Tummel  
 Carmel Homes  
 Catherine Lels  
 Vanessa Varga  
 Thea Blrss  
 Sarah Vinal  
 Matt Noonan  
 Zeena Anthony-Qureshi  
 Maria Demosthenous  
 Natasha Budimski  
 Callen Bubner  
 Melanie Meaney  
 Erin Moll  
 Emily Barrett  
 Peter Bosco  
 Victoria Gilliland  
 Kate McShane  
 Sorcha O'Neill

## CONVEYANCERS

Judith Phillips  
 Michelle Colmer  
 Kristy Tohl


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Adelaide  
 Level 5 80 King William Street  
 Adelaide SA 5000  
 GPO Box 74  
 Adelaide SA 5001 DX 543  
 Phone: +61 8 8414 3400  
 Fax: +61 8 8414 3444

Port Lincoln  
 11 Mortlock Terrace  
 Port Lincoln SA 5606  
 PO Box 411  
 Port Lincoln SA 5606 DX 51050  
 Phone: (08) 8682 3133  
 Fax: (08) 8682 6030

Clare  
 165 Main North Road  
 Clare SA 5453  
 PO Box 671  
 Clare SA 5453  
 Phone: (08) 8842 1833  
 Fax: (08) 8842 1811

## Regional Offices (By Appointment Only)

Bordertown  
 22 Binnie Street  
 Bordertown SA 5268  
 McLaren Vale  
 178 Main Road  
 McLaren Vale SA 5171

Kadina  
 26 Taylor Street  
 Kadina SA 5554  
 Nuriootpa  
 45 Murray Street  
 Nuriootpa SA 5355

Keith  
 Cnr Makin & Hender Street  
 Keith SA 5267  
 Phone: 1300 414 414  
 Fax: (08) 8414 3444

- (a) waive its first right of refusal to purchase the Property under Clause 13 of the Deed, or
- (b) specify an alternative price at which it would be prepared to purchase the Property.

### **The Expressions of Interest**

Council subsequently proceeded with an Expression of Interest process in relation to the sale of the Property and has received two non-binding expressions of interest for the purchase of the Property, which may be summarised as follows:

1. [REDACTED] and/or nominee [REDACTED] for:
  - a price of \$1,520,000 (plus GST);
  - a deposit of \$60,000;
  - settlement within 90 days, subject to “the Board of National Pharmacies approving a licence or lease of an area of approximately 240m<sup>2</sup> in the northern part of the unit”.
  
2. Hamish Brown and/or nominee (“the Brown Offer”) for:
  - a price of \$1,605,000 (plus GST);
  - a deposit of \$50,000;
  - settlement 60 days after satisfaction of special conditions:
    - i. the Purchaser undertaking and completing to its satisfaction a 30 day Due Diligence Period;
    - ii. the Purchaser obtaining Development Plan Consent for a development of the Property on terms acceptable to the Purchaser, acting reasonably (“the Planning Approval Condition”); and
    - iii. the Purchaser, as proposed Lessor, entering into an Agreement to Lease in relation to the proposed development on terms acceptable to the Purchaser, acting reasonably (“the Lease Agreement Condition”);

and on the basis that, if the Planning Approval Condition has not been satisfied or waived within 60 days from the date of the Contract and/or the Lease Agreement Condition has not been satisfied or waived within 30 days from the date the Planning Approval Condition has been satisfied or waived, either party may terminate the Contract on giving 2 business days notice.

### **The Deed – “more favourable terms”**

Under Clause 13.5 of the Deed, Council is **not** entitled to dispose of or transfer the Property “on more favourable terms than those first offered to [the Makris Group] without first giving [the Makris Group] the opportunity of purchasing the same on the more favourable terms”.

The question therefore arises whether the terms proposed by the [REDACTED] or by the Brown Offer are "more favourable" than those previously offered to the Makris Group.

In the context of the Deed, "more favourable terms" must, in my view, be interpreted to mean more favourable to the *Purchaser*.

#### The [REDACTED] Offer

A simple comparison of the essential terms is as follows:

Council Offer	[REDACTED] Offer	Comparison
Price of \$1,500,000 (plus GST)	Price of \$1,520,000 (plus GST)	Less favourable by \$20,000
Deposit of \$150,000	Deposit of \$60,000	More favourable by \$90,000
Settlement 60 days	Settlement 90 days, subject to leasing commitment by potential tenant	More favourable

In my view, as a matter of commercial favourability to the Purchaser, despite the additional \$20,000 being payable on the purchase price, the other conditions, particularly the opportunity to make the sale subject to obtaining a leasing commitment from a potential tenant, rather than being completely unconditional, probably make the terms of the [REDACTED] offer "more favourable" to the Purchaser than Council's earlier offer.

#### The Brown Offer

A simple comparison of the essential terms is as follows:

Council Offer	Brown Offer	Comparison
Price of \$1,500,000 (plus GST)	Price of \$1,605,000 (plus GST);	Less favourable by \$105,000.
Deposit of \$150,000	Deposit of \$50,000	More favourable by \$100,000
Settlement 60 days	Settlement 60 days after satisfaction of special conditions relating to: (a) 30 day DD period; (b) 60 days for Planning Approval; and (c) Formal Agreement to Lease with prospective tenant within 30 days after Planning Approval	More favourable

In this instance, the additional \$105,000 being payable on the purchase price is a significant factor making the terms *less* favourable to the Purchaser. The reduction of the deposit amount by \$100,000, is *more* favourable to the Purchaser, though this is less significant to Council as Vendor. The other requested special conditions are clearly substantially *more* favourable to the Purchaser than Council's offer of an unconditional sale. It may not be easy, or possible, to determine definitively whether the detriment to the Purchaser represented by the increase of \$105,000 in the purchase price outweighs the benefit to the Purchaser represented by the requested special conditions, however the special conditions give the Purchaser much greater flexibility than an unconditional contract.

In view of the uncertainty of Council's position under the Deed in this situation, I recommend that the safest course for Council would be to assume that the Brown offer is, in its totality, potentially "more favourable" to the Purchaser than Council's earlier offer.

### Next Steps

1. Council must decide whether it is prepared to sell the Property on the terms of either the [REDACTED] Offer or the Brown Offer. I understand from my discussions with Jed Harley of JLL that these are "best and final offers" from both of those parties and that, accordingly, there is no room for further negotiation as to their terms. Council must, therefore, make a commitment that it would be prepared to sell the Property on the terms of one of those offers.
2. It should, of course, be borne in mind that both of these "expressions of interest" are non-binding and could be withdrawn at any time.
3. Having decided which of the offers is acceptable to Council, Council will need to serve on the Makris Group another "Notice of Intention to Dispose of Property" in similar terms to the one used previously, but annexing a new Commercial Contract setting out the new sale price and deposit amount and the terms of the applicable special conditions. This procedure is required by Clause 13.5 of the Deed under which Council is required to give the Makris Group "the opportunity of purchasing [the Property] on the more favourable terms *upon the terms and in the manner set out above.*" This requires Council to give the Makris Group another period of 28 days from the date of service of the Notice within which to accept Council's offer to sell on those terms.
4. At the same time, if it wished, Council could enter into a conditional Contract with the preferred offering party, on the terms of the offer, but subject to an additional special condition allowing Council to terminate the Contract in the event that the Makris Group accepts the offer.
5. If the Makris Group accepts the new offer within the 28 day period, the sale to the Makris Group can proceed.
6. If the Makris Group does not accept the new offer within that period, Council can either enter into a Contract with the preferred party or, if that has already been done as contemplated by paragraph 4 above, Council can advise the Purchaser that the Contract is proceeding.

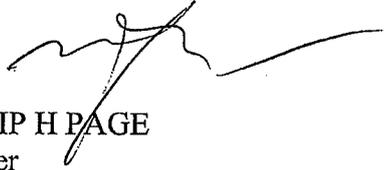
6 May 2016

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Please do not hesitate to contact me if you have any questions or if you wish me to review the proposed Notice or draft Contract which is to be provided to the Makris Group.

Yours faithfully  
MELLOR OLSSON

Per :



PHILIP H PAGE  
Partner

Direct e-mail: [ppage@mellorolsson.com.au](mailto:ppage@mellorolsson.com.au)

Direct Phone: 8414 3441 (Adelaide)