

Location	Lathlain
Reporting officer	Kevin Cunningham
Responsible officer	Ben Killigrew
Voting requirement	Simple majority
Attachments	Nil

Recommendation

That Council endorse:

1. That the Town of Victoria Park (Town) work collaboratively with Indian Pacific Limited (West Coast Eagles Football Club), the Perth Football Club Inc, the West Australian Football Commission and the AFL, as match day stakeholders, in respect to the playing of competitive football matches from time to time, within the Indian Pacific Limited leased area at Lathlain Park (Mineral Resources Park).
2. The Chief Executive Officer to give formal notice to Indian Pacific Limited as Tenant,
 - a. that under the Lease the playing of competitive football matches is not included as a Permitted Purpose,
 - b. invite a request from the Tenant in accordance with Lease Clause 8.4 (a), and Lease Clause 1.1 Definitions – “Permitted Purpose (i) any other purpose from time to time agreed by the Parties,” for the purpose of playing of competitive football matches for a specified schedule of fixtures for a specified time period.
 - c. the need for WAPC approval to be obtained for the purpose of playing competitive football matches as a precursor to any agreement from Council for such purposes under the lease.
 - d. that as part of any WAPC approval process the Tenant follows, the Town will require community consultation to be undertaken.
3. The Elected Members and Town Executive to consider at a Concept Forum,
 - a. the Tenant request for a Permitted Purpose agreement,
 - b. the period for which the Permitted Purpose agreement might apply,
 - c. any conditions the Town would require to safeguard the community, to satisfy a Permitted Purpose agreement.
4. The Chief Executive Officer to convene a meeting with the Tenant (with the inclusion of Elected Member representation) to review with them the notice and if provided, their request and any conditions required by the Town (Owner) to reach an agreement.
5. That following that meeting with the Tenant,
 - a. any outcomes be documented,
 - b. that outcomes be reported to Council for endorsement of any proposed Permitted Purpose agreement,
 - c. where a Council endorsed Permitted Purpose agreement is resolved, that the agreement be made in writing and signed by the delegated Officers of both organisations (the Lease Parties), in accordance with the lease.
6. That this procedure be repeated annually or other period as appropriate while an agreement for this Permitted Purpose reoccurs.

Purpose

- As a consequence of community feedback to the 2020 Marsh Community Series preseason competition AFL game fixture at Mineral Resources Park on Thursday 27th February 2020, Elected Members raised with the CEO lease provision queries related to the playing of competitive AFL football

matches by the West Coast Eagles within their lease area at Lathlain Park (Mineral Resources Park, MRP).

- The queries were in relation to community advice of public undertakings made verbally, prior to lease commencement, by the West Coast Eagles in community forums, that no AFL matches would be played at Lathlain Park.
- Legal advice was subsequently sought by the Town in respect to the (Indian Pacific Limited) lease permitted use provisions.
- The purpose of this report is to endorse action in respect to the advice received.

In brief

1. The legal advice relates to football games that the West Coast Eagles host upon the ground/s within their lease area.
2. The advice included that the Lease Definition "Permitted Purpose (i)" provides for situations that were not originally contemplated or that may change (such as in this case) and in their consideration of a new or changed purpose, provides the Town some flexibility.
3. The recommendation for endorsement addresses the establishment of a procedure to
 - a. consider a temporary change or expansion of the Ground Lease Permitted Purpose for an event or fixture of events,
 - b. apply conditions, as appropriate, and
 - c. apply time limits, as appropriate.

Background - Ground Lease Related

4. Indian Pacific Limited, (the West Coast Eagles Football Club, West Coast Eagles, WCE), are the Lessee (Tenant) of a land within Lathlain Park.
5. The Town of Victoria Park are the Lessor (Owner) of that land.
6. In 2020, AFLW football games, and an AFL Marsh Community Series pre-season AFL football game (between West Coast Eagles and Essendon Football Club) were scheduled and played at Mineral Resources Park.
7. The football ovals at Mineral Resources Park (MRP) are within the Indian Pacific Ltd (West Coast Eagles, WCE) Lathlain Park Ground Lease.
8. Any competitive game played on the ovals would come under the provisions of the WCE lease.
9. AFLW, WCE WAFL representation team and AFL Marsh Community Series football scheduled fixtures were not known or contemplated when the WCE lease agreement was being negotiated.
10. The lease provides for remedies (including litigation) for dealing with breaches of the lease.
11. The legal advice is that the playing of competitive football matches on those MRP football oval/s is not specified as a Permitted Purpose under the Lease.
12. The Town and the WCE, under the lease definition of Permitted Purpose item (i), would need to reach a separate agreement (in writing, under the lease) for this use.
13. A request for a Permitted Purpose agreement for this use has not been made nor agreed.
14. A Permitted Purpose agreement reached between the Town and the WCE may be for a stipulated time (eg as a schedule of specified days in one season, or year, made annually).
15. The Town may stipulate conditions for each "agreement" year such as
 - a. requirements for or promotion of public transport in relation to the permitted purpose (use),
 - b. maximum spectator attendance limits,
 - c. responsibility for parking management, or
 - d. for enhanced traffic management by the responsible event/s organiser.
16. The playing of competitive football matches by Perth Football Club (PFC) and others on the WCE lease area football oval is similarly not a specified Permitted Purpose in the lease.

17. While it could be argued or construed that the playing of PFC WAFL games is implied in the lease agreement, this a grey area. The construction of the lease makes provisions in the event of there being a PFC WAFL football competition and for other organised competitive football games on the WCE lease area MRP oval/s, rather than an unambiguous permission for that purpose.
18. Permission for the playing of those games will be made clear by including this "other clubs" competitive football use in an annual Permitted Purpose agreement.
19. As stakeholders, the Western Australian Football Commission, Perth Football Club, and other responsible football authorities may be required to be involved in the preparation of the Permitted Purpose agreement.

Background – Planning Related

20. Further consideration for compliance which need to be included in respect to a Permitted Purpose agreement raised in the legal advice were that
 - a. Lathlain Park is reserved under the Metropolitan Region Scheme as 'Parks and Recreation - Restricted Public Access'; and
 - b. the WAPC approved Lathlain Park Management Plan.
21. Western Australian Planning Commission advice was sought for a Permitted Purpose agreement, in respect to a request for a changed Permitted Purpose so as to permit the playing of competitive matches.
22. The Lathlain Park land is reserved under the MRS as a 'Parks and Recreation Reserve – Restricted Public Access'.
23. Given the reservation of the land, the WAPC have planning responsibility for the land, including their prior involvement in the following planning matters:
 - a. WAPC approval of 15 August 2016 for forward works being modifications to existing oval, new oval and removal of vegetation.
 - b. JDAP approval of 16 December 2016 for construction of new administration, community and training facility for the West Coast Eagles (copy attached); and
 - c. WAPC approval of July 2017 for the Lathlain Park Management Plan (copy attached)
24. In relation to the abovementioned planning related approvals,
 - a. neither of the above development approvals include conditions expressly prohibiting the playing of games.
 - b. the Lathlain Park Management Plan did not contemplate the playing of matches by WCE at Lathlain Park.
25. The WAPC planning advice was sought having regard to the following matters:
 - a. The reservation of the land and the need for the WAPC to be satisfied that the land is being used for the purpose for which it is reserved under the Scheme;
 - b. WAPC Development Control Policy DC5.3 'Use of Land Reserved for Parks and Recreation Regional Open Space';
 - c. The Lathlain Park Management Plan, having regard to Part 6 and the need for the WAPC's approval for uses/purposes not described in section 6.1 – 6.3 of the Management Plan.
26. The Town sought to ascertain the WAPC's position in relation to the playing of matches, including the following specific matters:
 - a. whether they consider there to be any distinction between ticketed or un-ticketed matches (note AFLW matches are un-ticketed);
 - b. the playing of matches by WCE (inclusive of the AFLW team, the WAFL team, and pre-season matches by the AFL team);
 - c. the playing of matches by Perth Football Club and other clubs or organisations;
 - d. the approval process for the playing of matches – approval in writing, amended development approval or other?
27. A teleconference meeting with WAPC occurred on 19 March 2020 in relation to the playing of football games at Lathlain Park and a WAPC email was received on 26 March 2020 which confirmed:

- a. that the Parks and Recreation reservation is consistent with other WAFL grounds around Perth where certain matches are ticketed.
 - b. the current Management Plan is very specific that football matches will only be played by Perth Football Club with an expected crowd of 1500-2000 people.
 - c. the playing of matches by WCE does not itself pose an issue, except for the crowd numbers these would attract.
 - d. that currently the Management Plan does not provide for the playing of football matches by any club (such as the WCE) that would attract a crowd that would significantly exceed 2000 people.
 - e. whether matches are ticketed or not would not impact on the permissibility of the land use of playing football matches.
 - f. The MRS reservation and the classification "Restricted Public Access" lends itself to the interpretation that the site will be restricted to the public, be it through tickets to enter or other means.
28. WAPC noted that:
- a. if expected crowd numbers, for games by clubs/organisations other than the Perth Football Club, were the same or less, then this could potentially be considered an incidental land use under Section 6 of the Management Plan.
 - b. an amendment to the Management Plan to allow for the playing of football matches generally would alleviate any potential concerns.
29. A proposal that would increase the crowd capacity substantially, such as many WCE games, would warrant either
- a. a new Development Application, or
 - b. an amendment to the Management Plan as per clause 9.1 of the Management Plan.
30. Changes to the aspirations of stakeholders also triggers the need to review the Management Plan and proposed amendments.
31. Any proposed amendment to the Management Plan, or a development application, to allow the playing of football matches by the WCE or other entity may warrant community consultation.
32. The principal concern to be addressed is the impact of the level of intensity of proposed crowds on the amenity of the locality (eg traffic and parking impacts). In this respect, the Town understands that WCE seek to accommodate up to 6500 patrons for a competitive match.
33. The Planning actions required should be addressed and initiated by the user (WCE as Tenant) simultaneously with the procedure for a Permitted Purpose agreement and be approved by WAPC prior to any Permitted Purpose agreement being finalised by the Town for the playing of competitive football matches.

Strategic alignment

Economic	
Strategic outcome	Intended public value outcome or impact
EC01 - A desirable place for commerce and tourism that supports equity, diverse local employment and entrepreneurship.	A procedure to address Permitted Purpose compliance of tenant operations upon their lease premises for annual appropriate operational use of the ovals. This is to balance the evolving operational needs and viability requirements of the Tenant, associated commercial benefits to commerce within the Town and the impacts on amenity for immediately surrounding community members.

	Should this not be progressed, commercial benefits associated with related events held in the Town would be in jeopardy.
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Engagement

The effected internal teams have been engaged in this matter.

Internal engagement

C-Suite Executive	In respect to the provisions of the lease, and in reviewing the legal opinion.
Operations Property	In respect to the provisions of the lease, and in reviewing the legal opinion.
Planning	In respect to the provisions of the MRS and in seeking advice from WAPC.

Legal compliance

34. The report recommendation is to endorse a course of action, and an ongoing procedure, to address and to ensure legal compliance by the Tenant of their uses upon their lease premises are permitted and in accordance with their Lease.

Risk management consideration

Risk and consequence	Consequence rating	Likelihood rating	Overall risk analysis	Mitigation and actions
Reputational Negative public perception towards the Town for not ensuring their Tenant is compliant with its lease.	Moderate	Likely	High	Ensure the Tenant is made aware when not compliant and what measures to take in accordance with the lease to deal with noncompliance or breach.
Reputational Negative perception from the community and the Tenant if the Town were to take other legal avenues to remedy the matter.	Moderate	Likely	High	For the Town to work collaboratively with the Tenant to put in place a procedure to deal with the situation and reach mutual agreement.

Financial implications

Current budget impact	Legal Fees for specific advice provided to date based upon the legal practitioner time amounted to \$13,056.30 including disbursements (excluding GST). This was negotiated to \$9,058.80 including disbursements (excluding GST). Funds were available for that procurement.
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	Operational Expenditure Funding may be required for further advice in respect to the preparation of the "Permitted Purpose Agreement".
Future budget impact	Property and Leasing will need to ensure their Legal Fees budget has adequate allocation for an annual legal advice in respect to the annual "Permitted Purpose Agreement".

Analysis

Not applicable.

Relevant documents

- Formal Ground Lease dated 16 August 2016 between the Town of Victoria Park, as Lessor (Owner) and Indian Pacific Limited (T/A West Coast Eagles Football Club) as Lessee (Tenant), for land contained within Lathlain Park, (Lease)
- Heads of Agreement dated 24 February 2014 between Indian Pacific Limited (T/A West Coast Eagles Football Club) and Perth Football Club Inc, referenced in the Lease
- WAPC Approved Lathlain Park Management Plan 2017