

From: [Kristy Rusher](#)
To: [lgoima](#)
Subject: FW: Information request
Date: Wednesday, 16 August 2017 12:04:42 p.m.
Attachments: [REDACTED]

From: Kristy Rusher
Sent: Tuesday, 15 August 2017 5:27 p.m.
To: [REDACTED]
Subject: Information request

Hi,

In relation to your request for “a copy of the Memorandum of Understanding (MOU) that exists between the Dunedin City Council and the company owned by Tekapo businessman Anthony Charles Onslow Tossell as relates to the council owned development site at 143-193 Moray Place, Dunedin” we advise that the MOU was released last year and was published by the Council on its LGOIMA requests page.

The MOU has now expired and been replaced with a Heads of Agreement which is attached. After taking the views of NZH into account, we have decided that the timeframes for the Feasibility Period and the Exclusivity Period referred to in the agreement will be withheld on the following grounds:

- S7(b)(ii) – The withholding of the information is necessary to protect information where the making available of the information would be likely to prejudice the commercial position of the person who supplied or who is the subject of the information. NZH have advised that they have invested a significant amount of money in design and resource consent costs and it would unreasonably prejudice NZH’s commercial position if these timeframes were released.
- S7(2)(i) –The withholding of the information is necessary to enable any local authority holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations). Here, the feasibility period and exclusivity period are subject to negotiation and possibly to extension.

Regards,

Kristy Rusher.



Memorandum of Understanding

Date:

19th September

2016

Parties

Dunedin City Council a Territorial Local Authority under the Local Government Act 2002 ("the Council")

NZ Horizon Hospitality Group Limited ("NZH")

Background

- A. DCC owns the property situated on the corner of Moray Place and Filleul Street contained in Certificates of Title OT187/241, 142952, OT185/28, OT185/29, OT3D/890, OT278/22, OT6C/1038, OT235/275, OT6C/1039 and OT6C/1040 ("the Property").
- B. The Parties are negotiating a proposal for NZH to purchase and develop the Property (or part thereof) into a five star hotel ("Proposed Development").
- C. Following discussions between representatives of the Parties it is agreed (along with various other matters):
 - (i) NZH undertakes the Due Diligence Exercise relating to the purchase of the Property for the purpose of undertaking the Proposed Development.
 - (ii) Council will not enter into any discussions or negotiations with any other party other than NZH relating to the sale and purchase of the Property during the Exclusive Period.

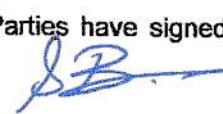

All on the terms of this Memorandum of Understanding.

It is Agreed

1. Definitions

1.1 In this Memorandum of Understanding unless the context otherwise requires the following words shall bear the following meaning, namely:

- (a) "**Alternative Site**" means the part of the Property as identified by NZH and agreed to by council under clause 2.7.
- (b) "**Due Diligence Exercise**" means an investigation in relation to the Property including the following matters:
 - (i) all legal and title issues relating to the Property and any encumbrances, easements and memorials registered on the titles.
 - (ii) the overall financial suitability of purchasing the Property and undertaking the Proposed Development.
 - (iii) the zoning of the Property.

- (iv) what the Proposed Development will comprise.
- (v) the ability of NZH to purchase adjoining properties to proceed with the Proposed Development.
- (c) "Exclusive Period" means the period from the date the Parties have signed this Memorandum of Understanding until *three* ~~six~~ months later. 
- (d) "Parties" means the Council and NZH. 
- (e) "Property" means the property situated on the corner of Moray Place and Filleul Street as defined in Background A.
- (f) "Proposed Development" means a five star hotel to be built on the Property and occupied by guests, employees and contractors of NZH and others as further defined in Background B.

2. Agreements

- 2.1 NZH agrees to undertake the Due Diligence Exercise on the Property during the Exclusive Period.
- 2.2 The Council will nominate one of its employees as Project Manager to assist NZH with identifying the regulatory processes to be undertaken by NZH in completing the Proposed Development during the Exclusive Period and appropriate Council staff to engage with. Such assistance shall continue in the event the Parties enter into an Agreement for Sale and Purchase of the Property (or part thereof).
- 2.3 During the Exclusive Period, the Council will commission at its own cost geo-technical advice on the Property and provide this to NZH at no cost.
- 2.4 Council agrees it will not enter into negotiations nor agree to sell the Property to any third party except NZH during the Exclusive Period.
- 2.5 During the Exclusive Period, the Parties may enter into negotiations relating to the sale and purchase of the Property (or part thereof) but acknowledge that this Memorandum of Understanding does not oblige either party to enter into an Agreement for Sale and Purchase of the Property during or after the Exclusive Period.
- 2.6 The Parties agree that if an Agreement for Sale and Purchase of the Property is entered into between NZH and the Council the following conditions will be included:
 - (a) NZH will be obliged to proceed with construction of the Proposed Development on the Property within a specified period;
 - (b) the Proposed Development will be eligible for Development Contributions Relief to a maximum of \$1,000,000 (excluding GST) from Council on the terms of the Agreement; *- noting that waiving the Development Contributions is at the discretion of Council*
 - (c) the Purchase Price for the Property will be set based on market value;
 - (d) the full Council of Dunedin City Council's approval must be obtained to the Sale and Purchase of Property. Such approval may or may not be given at the discretion of the full Council.



Heads of Agreement

Dunedin City Council

NZ Horizon Hospitality Group Limited

**MEREDITH
CONNELL**

—
THE LAW FIRM.

PO Box 90750, Victoria Street West,
Auckland 1142, New Zealand

DX CP24063

T: +64 9 336 7500

www.mc.co.nz



Agreement dated

4 July

2017

Parties

Dunedin City Council a local authority under the Local Government Act 2002 (**Council**).

NZ Horizon Hospitality Group Limited a company incorporated in New Zealand having its registered office c/o Kean & Walker Ltd, Level 3, 12 Kent Street, Newmarket, Auckland 1023 (**NZH**).

(Each a **Party** and together the **Parties**)

Introduction

- A Council owns the Property.
- B NZH wishes to develop a five-star hotel on the Property (**Hotel Development**) and proposes to purchase all or part of the Property for that purpose.
- C Council and NZH entered into a memorandum of understanding dated 19 September 2016 in respect of the Hotel Development (**MOU**). The MOU established an exclusive negotiation period between the parties and provided for NZH's due diligence in respect of the Property.
- D The Parties wish to continue negotiations and consultation with a view to entering into formal arrangements in respect of the Property and the Hotel Development. They also wish for those continued discussions to follow a structured process and programme.
- E As a pre-cursor to entering sale documentation the Parties wish to agree a further exclusivity period to discuss and confirm the viability and commercial structure for the Hotel Development and the acquisition of all or part of the Property.
- F The Parties have agreed to record the terms of, and a timetable for, their further consultation in this heads of agreement.

Agreements

1 Interpretation

- 1.1 In this heads of agreement, the following words have the following meanings, unless the context otherwise requires:

Agreement means this heads of agreement;

Exclusivity Period means a period of [REDACTED] from the date of this Agreement;

Feasibility Matters has the meaning given to that term in clause 2.1;

Feasibility Period means a period of [REDACTED] from the date of this Agreement;

Hotel Development has the meaning given to that term in paragraph B of the Introduction;

Key Representative means each Party's nominated representative as identified at clause 6.1;

LGOIMA means the Local Government Official Information and Meetings Act 1987;

MOU has the meaning given to that term in paragraph C of the Introduction; and

Property means the property located at the corner of Moray Place and Filleul Street, and contained in Certificates of Title OT185/28, OT185/29, OT187/241, OT235/275, OT278/22, OT3D/890, OT6C/1038, OT6C/1039, OT6C/1040 and 142952.

2 Feasibility Matters

- 2.1 The Parties wish to consult further on the following commercial and operational aspects of the Hotel Development:
- (a) The proposed development timetable;
 - (b) The intended standard of quality of the Hotel Development;
 - (c) The intended hotel operating arrangements;
 - (d) The proposed ownership structure for the Hotel Development;
 - (e) NZH's sales strategy in respect of the completed Hotel Development, and the Property (if any);
 - (f) NZH's existing and/or proposed financing arrangements in respect of the Hotel Development;
 - (g) The portion of the Property that will be the subject of the proposed land transfer, and access arrangements in respect of any land not included in that transfer; and
 - (h) Given the above criteria, the Parties' preferred commercial terms and timing in respect of the Property including protections for the Council that any land transferred is used solely for the Hotel Development,
- (together, the **Feasibility Matters**).
- 2.2 The Parties will discuss, and exchange information in respect of, the Feasibility Matters during the Feasibility Period, and will focus their interactions on the following:
- (a) **NZH Resources:** Consideration of resources available to NZH, or engaged (or proposed to be engaged) by NZH, in connection with the Hotel Development, including in relation to design, construction and project management;
 - (b) **Funding:** Details of NZH's existing and proposed funding arrangements in respect of the Hotel Development, including applicable security arrangements;
 - (c) **Programme:** Consideration of indicative timeframe in respect of Hotel Development, from the finalisation of sale or other documentation in respect

of the Property through to expected opening of the hotel and including provision for:

- (i) consenting and approval processes;
 - (ii) contractor and consultant procurement;
 - (iii) negotiations with hotel operators;
 - (iv) design; and
 - (v) construction;
- (d) **Construction:** Consideration of construction matters, including:
- (i) the contractor engaged (or likely to be engaged) for the Hotel Development;
 - (ii) the design (preliminary, detailed and/or other drawings) and specifications for the Hotel Development;
 - (iii) Construction methodology;
- (e) **Hotel operation:** Details of intended operational arrangements for the Hotel Development, including:
- (i) details of any formal or informal arrangements in place with a hotel operator or operators;
 - (ii) the requirements of any hotel operators in relation to the Hotel Development, to the extent made known to NZH; and
 - (iii) if negotiations with a hotel operator have not yet commenced, a summary of NZH's strategy for that;
- (f) **Ownership structure:** Details of the proposed ownership structure for the Hotel Development;
- (g) **Sales strategy:** Summary of NZH's commercial intentions on completion of the Hotel Development, including as to any intended sale arrangements already in place in that regard; and
- (h) **Other:** Protection of Council's desire that the portion of the Property to be transferred is solely used for the Hotel Development.

3 Timeline for documentation

- 3.1 Upon signing this Agreement the Key Representatives will discuss their requirements in terms of the form and contents of documentation to be exchanged during the Feasibility Period. The Parties agree that all documentation will be exchanged as soon as possible following execution of this Agreement to enable timely review and discussion.

- 3.2 During the Feasibility Period the Parties will review relevant documentation (internally and with their respective consultants) and the Parties will discuss any issues arising, which may include requests for further information and/or documentation.
- 3.3 At the end of the Feasibility Period, the Key Representatives will meet to discuss any outstanding issues and confirm the basis upon which they wish to proceed with negotiations in respect of the Hotel Development and the Property, and an agreed timetable.
- 3.4 If the Parties wish to proceed with negotiations following the Feasibility Period, Council will prepare the relevant documents in respect of the transfer of all or part of the Property and the Parties will negotiate and agree substantive contract terms and documents to further develop and record the basis on which the Hotel Development will proceed, with a view to agreeing documents within one month of the expiry of the Feasibility Period.

4 Relevant considerations and acknowledgements

- 4.1 NZH acknowledges that Council may consider any matters that it considers relevant (in its sole discretion), in respect of any decision it makes in relation to the Property or the Hotel Development.
- 4.2 NZH acknowledges and agrees that unless stated otherwise, Council makes no representations or warranties in respect of information and/or documents provided to NZH by Council in relation to the Property (including, without limitation, geotechnical reports prepared by GeoSolve Limited). NZH will make its own enquiries in relation to such information and/or documents as part of its due diligence process.

5 Exclusivity Period

- 5.1 Council grants the Exclusivity Period to NZH.
- 5.2 Within the Exclusivity Period, Council will in good faith exclusively deal with NZH in relation to discussions about the potential sale of all or part of the Property. Council will not negotiate directly with or solicit interest from any other party in relation to the Property during the Exclusivity Period. In particular, and without limitation, Council agrees that it will not enter into a feasibility arrangement with any other person, or invite any other person to consider development of the Property, nor will Council agree to sell or lease the Property (or any part of it) to any other person except NZH during the Exclusivity Period.
- 5.3 If a common basis to proceed to documentation cannot be agreed following the Feasibility Period then either Party may terminate this Agreement at any time on written notice after the Exclusivity Period.

6 Key Representatives

- 6.1 Each Party nominates the following person as their Key Representative in respect of any discussions or actions to be carried out under this Agreement:

(a) in respect of Council: General Manager of Infrastructure Networks (Ruth Stokes).

(b) in respect of NZH: Mr Anthony Tosswill, Managing Director

- 6.2 Any notice under this Agreement must be delivered by mail or email to a Party's Key Representative at the address notified in writing by that Party being:

Council: ruth.stokes@dcc.govt.nz

NZH: tony@nzhhg.co.nz

7 Confidentiality and publicity

- 7.1 The Parties acknowledge that they may have received and/or will receive or have access to information of the other that is confidential information. Subject to clauses 7.2 and 7.3, the Parties agree to keep all such information confidential and to only use such confidential information for the purpose of performing their obligations under this Agreement and any subsequent agreements entered into by the Parties in respect of the Property or the Hotel Development. For this purpose, each Party acknowledges that disclosure of its confidential information may be made to the other Party's third party advisors and consultants for the purposes of this Agreement and to the other Party's officers and key stakeholders. Any such disclosure to third party advisors and consultants must only be made subject to confidentiality obligations (and exceptions) that correspond to those set out in this clause 7.
- 7.2 The Parties may release confidential information as required by law. Where a Party is so required to release confidential information, it will liaise (to the extent reasonably possible) with the other Party prior to such release, including by way of consultation as to the legal basis for the release and/or whether any grounds for withholding information exist.
- 7.3 NZH acknowledges that Council is subject to the LGOIMA, and that pursuant to a request made under the LGOIMA, Council may disclose information relating to the Property, the Hotel Development or this Agreement to the requestor.
- 7.4 NZH will provide assistance and information to Council promptly upon request in order to enable Council to comply with any statutory obligations or internal governance obligations insofar as they relate to this Agreement (including, without limitation, Council's obligations under the LGOIMA).
- 7.5 The Parties agree that the undertakings given in relation to the confidential information shall continue notwithstanding the termination of this Agreement.
- 7.6 NZH may not make any statement or publication in respect of any aspect of the Hotel Development, this Agreement or discussions between the Parties prior to the date of this Agreement, without the approval of Council.

8 General


- 8.1 The Parties acknowledge that this Agreement sets forth the entire agreement and understanding of the Parties and supersedes all prior oral or written agreements understandings or arrangements relating to its subject matter, including, for the avoidance of doubt, the MOU.



- 8.2 NZH acknowledges that Council, in terms of its regulatory function as a local authority, is obliged to and shall act as an independent local authority and not as a party to this Agreement. NZH shall not have a right or claim against Council in Council's capacity as a party to this Agreement as a result of any lawful action or decision made by Council in the performance of its regulatory function, except in the case of bad faith in its capacity as a party to this Agreement. Any decision of Council acting in its regulatory capacity shall not be construed as an approval of Council as a party to this Agreement or as a change unless otherwise expressly agreed.
- 8.3 The Parties each agree to act in good faith and in the spirit of mutual cooperation in the discharge of their obligations under this Agreement.
- 8.4 Nothing in this Agreement shall be construed to constitute a partnership or joint venture between the Parties.
- 8.5 This Agreement does not oblige either Party to enter into any contract in respect of the Hotel Development or the sale or purchase of the Property, nor to provide any reasons to the other Party if it does not wish to enter a contract. For the avoidance of doubt, in the event that Council does wish to enter into a contract in respect of the Hotel Development or sale and purchase of the Property, such contract would be subject to (among other things) Council's internal approvals and authorisations.
- 8.6 Each Party shall bear its own costs in relation to this Agreement.
- 8.7 This Agreement may be executed in any number of counterparts (which may be facsimile or pdf copy) all of which when taken together shall constitute one and the same document.
- 8.8 This Agreement shall be read and construed in accordance with New Zealand law and shall be subject to the exclusive jurisdiction of New Zealand Courts.


Execution

Signed by and on behalf of Dunedin City
Council



Authorised signatory

Signed by and on behalf of NZ Horizon
Hospitality Group Limited



Director/authorised signatory

