

**5.3.2 City of Vincent Aged Persons and Senior Citizens Reserve**

|                             |                                      |                  |                  |
|-----------------------------|--------------------------------------|------------------|------------------|
| <b>Ward:</b>                | North                                | <b>Date:</b>     | 27 November 2015 |
| <b>Precinct:</b>            | Leederville - 3                      | <b>File Ref:</b> | SC313/SC308      |
| <b>Attachments:</b>         | -                                    |                  |                  |
| <b>Tabled Items:</b>        | -                                    |                  |                  |
| <b>Reporting Officer:</b>   | J Paton, Director Corporate Services |                  |                  |
| <b>Responsible Officer:</b> | J Paton, Director Corporate Services |                  |                  |

**OFFICER RECOMMENDATION:**

**That Council:**

1. **NOTES** that the surplus funds transferred to the City by Leederville Gardens (Inc) in accordance with clause 39(3) of its Constitution is transferred in 'trust';
2. **APPROVES BY ABSOLUTE MAJORITY**, in accordance with section 6.8(1) of the *Local Government Act 1995* the unbudgeted transfer of \$889,803 from the City's Municipal fund into the Aged Persons and Senior Citizens Reserve, to reimburse \$745,352 transferred from the Reserve in 2014/15 together with accrued interest;
3. **NOTES** the Annual Financial Report for the year ended 30 June 2015 has been amended on the advice of the City's Auditor to reflect the movement of \$875,631 (\$745,352 plus interest to 30 June 2015) from Unrestricted Cash to Restricted Cash, effectively neutralising the transfer approved by the Council on 18 November 2014; and
4. **NOTES** that a further report will be provided to Council to advise on the broader requirements for the management of the funds held in trust in the Aged Persons and Senior Citizens Reserve.

**PURPOSE OF REPORT:**

To consider reimbursing the Aged Persons and Senior Citizens Reserve of the \$745,352 transferred during 2014/15, together with accrued interest.

**BACKGROUND:**

Leederville Gardens Retirement Village was constructed on land provided free of charge by the City of Perth. The freehold ownership of the land is registered in the name of Leederville Gardens (Inc) (the Association), which operates under a constitution, originally prepared by the City of Perth in 1991.

**DETAILS:**

The original Constitution (originally named Lake Monger Senior Citizens' Centre and Homes (Inc)) provided that the operating surplus of the Association would be transferred:

*"... to the City to be deposited by the City in a Particular Trust Account and disbursements therefrom shall only be made to public benevolent institutions which are located within the municipality of the City of Perth and which are covered by the provisions of sub-paragraph 78(1)(a)(ii) of the Income Tax Assessment Act ..."*

In 1998 the Constitution was amended to provide that the transfer of funds by way of Trust to the Town, is on the basis that the Town deposit the excess in a particular trust account and payments from that account shall be made to one or any of those organisations which;

- “(i) have similar aims and objectives to the Association;*
- (ii) exist for the acquisition, provision, maintenance, management or extension of the existing village operated by the Association, or the purchase or construction of a similar type of village for senior citizens within the Town’s boundaries; and*
- (iii) are covered by the provisions of section 78(4) and Item 4.1.1 of the Income Tax Assessment Act,*

*and the Deputy Commissioner of Taxation in Western Australia shall be provided with a copy of the financial records of the Trust in each financial year at the completion of the audit referred to in clause 25.*

*If no organisation exists which satisfies the requirements set out in clause 46(3) the Town may transfer the excess in the manner set out in clause 46(3) to one or any of those organisations which:*

- (a) are covered by the provisions of section 78(4) and Item 4.1.1 of the Income Tax assessment Act; and*
- (b) are approved in writing by the Association as appropriate recipients of the excess prior to the transfer taking place.*

*and the Deputy Commissioner of Taxation in Western Australia shall be provided with a copy of the financial records of the Trust in each financial year at the completion of the audit referred to in clause 25.”*

At the Ordinary Meeting of Council on 19 January 1998, report 11.3.12 noted that Leederville Gardens (Inc) “has now transferred the sum of \$925,405 to the Town of Vincent, in accordance with their constitution. While that constitution requires us to hold the funds in a trust, the proper accounting treatment of these monies is for them to be held in a specific cash reserve for the purpose as outlined in (ii) above”. Council approved the establishment of the Aged Persons and Senior Citizens Reserve (the Reserve) and the transfer of the \$925,405 into the Reserve.

It is of note that the defined purpose of the Reserve as detailed below is inconsistent with the relevant provisions in the constitution:

- *“For the acquisition, provision, maintenance, management or extension of the existing Leederville Gardens Village; or*
- *The purchase or construction of a similar type of village for Senior Citizens; or*
- *Provision of aged or senior citizens facilities, within the City’s boundaries.”*

In August 2006, Council approved amendments to the Constitution, previously endorsed by the members of the Association at their AGM. In respect to the transfer of the Surplus Funds as detailed in clause 39 (previously 46), the following key amendment occurred:

- This payment to the Town shall be on the basis of a trust to the Town requiring that the Town deposit the excess in a particular Trust reserve account.

At 30 June 2014, the balance of the Reserve was \$3,620,923 made up of ‘surplus’ funds from the Association together with accumulated interest on the balance.

At the Special Meeting of Council on 3 September 2014, as part of the City's strategy to deal with the potential significant Budget deficit, Council approved by absolute majority, pursuant to section 6.11(2)(b) of the *Local Government Act 1995* (the Act), to give one month local public notice of the proposed use of the past five years of accumulated interest earned from the Reserve, calculated at \$745,352. The transfer was subsequently approved by Council on 18 November 2014.

**CONSULTATION/ADVERTISING:**

Not applicable.

**LEGAL/POLICY:**

**Local Government Act 1996**

**6.9 Trust Fund**

- (1) A local government is to hold in the trust fund all money or the value of assets —
  - (a) that are required by this Act or any other written law to be credited to that fund; and
  - (b) held by the local government in trust.
- (2) Money or other property held in the trust fund is to be applied for the purposes of, and in accordance with, the trusts affecting it.
- (3) Where money or other property is held in the trust fund, the local government is to —
  - (a) in the case of money, pay it to the person entitled to it together with, if the money has been invested, any interest earned from that investment;
  - (b) in the case of property, deliver it to the person entitled to it.

**RISK MANAGEMENT IMPLICATIONS:**

**Low:** This is a compliance matter.

**STRATEGIC IMPLICATIONS:**

Strategic Plan 2013-2023:

*“4.1 Provide good strategic decision-making, governance, leadership and professional management:*

*4.1.2 Manage the organisation in a responsible, efficient and accountable manner;*

- (a) Continue to adopt best practice to ensure the financial resources and assets of the City are responsibly managed and the quality of services, performance procedures and processes is improved and enhanced.”*

**FINANCIAL/BUDGET IMPLICATIONS:**

The Reserve had a closing balance on 30 June 2015 of \$3,238,209. If the transfer from this Reserve had not occurred, and interest earnings had been credited to this Reserve, the balance of the Reserve at 30 June 2015 would have been increased by the following amount:

|                                 |                  |
|---------------------------------|------------------|
| Transfer to Municipal           | \$745,352        |
| Interest Earnings to 30/06/2015 | <u>\$130,279</u> |
| <b>Total</b>                    | <b>\$875,631</b> |

During the first four months of 2015/16 this Reserve averaged 3.237% earnings on investments. If the 2015/16 Opening Balance had been increased by \$875,631, this Reserve would have earned an additional \$9,448 during the period July to October 2015. If this rate of earnings is extrapolated to the end of December, the interest earned could be estimated at \$14,172, bringing the total amount due to be reimbursed to the end of December 2015 to \$889,803.

It is noted, that as part of the finalisation of the 2014/15 annual audit, the City's Auditor sought information on subsequent events to the Reporting date that may have a material impact on the 2014/15 Financial Report. Administration provided the auditors with specific information and advice in respect to the Reserve and as a result, they have recommend changes to the Annual Financial Report to reflect the likely restriction on the above funds.

The changes proposed by the City's Auditor will have the effect of recognising the movement of \$875,631 from 'Unrestricted' Cash to 'Restricted' Cash. In turn, this will reduce the closing balance from \$1,883,522 (as reported to the Audit Committee) to \$1,007,891. Effectively, this amendment will neutralise the original transfer, which was required as one of the strategies to deal with the deficit at the time. Given the City's improved financial performance during the year, that funding has proven to not be required.

It is noted that the Opening balance for 2015/16 was estimated at \$576,865, however the annual audit for 2014/15, including the amendment for 'subsequent events' has identified that the actual closing balance for 2014/15 is \$1,007,891, an improvement of \$431,026. Whilst this report is recommending formal approval for the reimbursement of the Reserve in 2015/16, as a result of the past year adjustment, the net effect for the Municipal fund in 2015/16 will be recognition of the interest to be credited on the increased balance of the Reserve from 1 July 2015, which is estimated at \$14,172.

#### **COMMENTS:**

It is unclear, on what basis the 1998 advice to Council was made, in respect to the "proper accounting treatment" of the transferred surplus being held in a Reserve account rather than in Trust.

The City obtained legal advice on this matter, which (among other things) concluded that:

- The City is bound by the terms of the trust created by the Constitution. When the City receives the surplus funds, it holds those funds on trust. This means that the City has the legal possession and title to the money, but that a trust has been created whereby the City holds the funds for the benefit of the Association and those purposes specified in clause 39(3) of the Constitution;
- As the City receives the surplus funds on trust, they should be held in a trust fund established by S.6.9 of the Act; and
- S.6.9(3) of the Act requires any interest earned by the trust fund to be paid to the person entitled to it.

Administration erred in its advice to Council that the Reserve funds (interest) could be used, subject to compliance with section 6.11(2)(b) of the Act (advertising the proposed alternative use of Reserve funds). That advice overlooked the original 'trust' intent of the transfer from the Association and relied on the presumption that the funds were subject to the usual legislative limitations of a Reserve Fund. This may have been due to the funds being held by the City in a Reserve account established for that purpose instead of in Trust.

The legal advice received raises broader issues in respect to the application of the surplus funds and appropriateness of the transfer of the surplus funds in the context of the *Code of Fair Practice for Retirement Villages 2009* (the Code). Further research is required to reconcile the relevant transfer and Reserve balance with the specific constitution wording and timing of the introduction of the Code. A further report will be provided to Council addressing the broader issues once it has been fully researched.

In the interim, the legal advice is clear, in that the transfer of the surplus funds by the Association to the City was in 'trust' and despite the funds being held in a Reserve, they should still have been subject to the requirements of section 6.9 of the Act. In view of that, the funds, including the interest accumulated should be reimbursed.