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LEASING AND LICENCING OF COUNCIL PROPERTY

Strategic Outcome:	CL. Our Civic Leadership
Policy type	Statutory
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Responsible Officer:	Deputy Chief Executive Officer
Document Control:	New policy
Delivery Program Link:	CL.5 Manage people, assets, resources, and risks responsibly to support the Council's ongoing viability and maximise value for money for ratepayers.

1. POLICY STATEMENT

Council from time-to-time leases and licences Council Land. In doing so, Council has obligations under legislation that are underpinned by probity, due diligence, analysis of risk, value for money and other key issues.

This Policy is a general guide to the principles and criteria that is to be followed when Council leases or licences Council land.

This Policy describes, generally, the manner in which Council will undertake the leasing and licensing of Council Land and acts to provide Council with:

- a reference that will survive successive Councils;
- an endorsed framework to enable and pursue Council Land leasing and licensing opportunities of merit and pro-actively present such opportunities to Council.

2. PURPOSE

The purpose of this Policy is:

- to set out the general principles, criteria and responsibilities for Council and Council Officers to consider in the management of the leasing and licensing of Council Land;
- to ensure impartiality, transparency, accountability and the delivery of best value leasing and licensing Council Land.



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3. SCOPE

This Policy applies to the leasing or licensing of all Council Land.

This Policy applies to all Councillors, Council Officers and agents of Council and to any other person involved in the leasing or licensing of Council Land.

4. OBJECTIVE

This policy is developed to assist the Council with the Delivery Program Objective:

CL.5 Manage people, assets, resources, and risks responsibly to support the Council's ongoing viability and maximise value for money for ratepayers.

5. DEFINITIONS

Lease: A **lease** provides the lessee with exclusive possession over the relevant Council Land (or part of the relevant Council Land) usually for a fixed period.

A lease creates an interest in the land (proprietary right) and confers greater protection than a licence.

A lessee can enforce its rights against third parties (i.e., subsequent owners of the property, if the land is sold).

A lease can be transferred (assigned) to another party but usually subject to the consent of Council.

Licence: A **licence** provides the licensee with non-exclusive rights over the relevant Council Land (or part of the relevant Council Land).

A licence does not create an interest in the land (as the rights are based in contract only).

A licensee cannot enforce its rights against third parties.

A licence is non transferrable (as the rights are based on contract only and are personal to the licensee).

6. POLICY IMPLEMENTATION

6.1 General requirements

6.1.1 Land type



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The classification of Council Land will impact on the agreement type, method of offer to the public and term of agreement.

Under the LG Act, Public Land must be classified as either “Operational Land” or “Community Land”.

Accordingly, land leased or licensed by Council will fall into one of the following groups:

- Public Land – classified as either:
 - Community Land; or
 - Operational Land;
- Crown Land; or
- a Public Road.

6.2 Land types

6.2.1 Community land

Community Land is land which:

- is reserved for community use;
- is of importance to the community because of its use or special features and must be managed according to special guidelines in accordance with the LG Act;
- Council has no power to sell, exchange or otherwise dispose of it;
- there are restrictions on Council’s ability to grant a lease, licence or other estate over the land; and
- must have a Plan of Management prepared for it by Council (in accordance to the *Local Government Act 1993*) or applying to it.

Council may only issue a lease or licence where it is consistent with the relevant Plan of Management and where the purpose for which the lease or licence is sought is consistent with the core objectives for the area of Community Land in question.

6.2.2 Operational Land

Operational Land is land which:

- is held as a temporary asset or as an investment;
- facilitates the carrying out by Council of its functions or operational activities, such as the provision of public car parks;
- may not be open to the general public (such as a works depot or Council garage); or
- is not required to be managed on behalf of present and future communities or kept for general public use.



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Operational Land has no special restrictions other than those that may apply to any piece of land.

6.2.3 Crown Land

Crown Land is owned by the State Government of NSW and is reserved or dedicated for public recreation or similar purpose and governed by the CL Act.

A lease or licence of Crown Land can only permit the lessee or licensee (as the case may be) to use the land in a way that is consistent with the reserve purpose (as stated when the reserve was dedicated or reserved). However, temporary licences (licences up to one (1) year) can be granted for certain purposes.

6.2.4 Road

Leasing or licensing of a Public Road (or part of a Public Road) is governed by the *Roads Act 1993*

Council is the Roads Authority for all Public Roads within the Council local government area, except for any freeway, Crown public road or any Public Road declared to be under the control of some other authority (i.e. Transport for NSW).

Council may only lease a Public Road to the owner or lessee of land adjoining the Public Road if, in the opinion of Council, the Public Road is not being used by the public.

Note: pursuant to section 153(3) of the Roads Act a lease may be terminated by Council at any time (and the lease should include a clause to this effect).

Any agreement in relation to street vending is to be pursuant to Council's Outdoor Dining and Street Trading Policy

A lease or licence may be granted in respect of the air space above, or land below the surface of, any Public Road (section 149 of the Roads Act). A lease pursuant to section 149 of the Roads Act may not be granted by Council without the approval of the Chief Executive Officer.

6.3 Retail leases

Leases of some property will be governed by the *Retail Leases Act 1994*, depending on the permitted use under the lease.

Schedule 1 of the Retail Leases Act sets out the leases to which the Act applies.

The requirements under the Retail Leases Act are in addition to the restrictions and requirements under the LG Act (for Community Land) or under the CL Act (for Crown Land).



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There are certain procedural and disclosure requirements for retail leases including for Lessor's and Lessee's Disclosure Statements which must be given to the proposed lessee prior to the lease being entered into by Council and the proposed lessee.

6.4 Determining rent

6.4.1 Retail and commercial leases

Commercial leases are leases where the lessee operates a business in, undertakes commercial activities on, obtains income from and/or there is a private gain from the use of, the premises.

Examples of commercial leases are:

- leases of kiosks, restaurants, shops, offices and other premises used for the operation of a business;
- leases of childcare centres to a person or company which operates a for-profit service; and
- a lease to a lessee which sub-licences or hires the premises for profit.

Retail leases are usually commercial leases.

Current market rent will be charged by Council on all commercial leases.

If there is a direct negotiation with one potential lessee only, the current market rent will be determined by an external Valuer or otherwise by a practising real estate agent.

If Council selects the lessee by a competitive process (i.e., auction, tender or expression of interest), the current market rent may be, but is not restricted to, the highest rent offered in a complying proposal.

6.4.2 Non-profit and commercial leases

Leases may be granted to non-profit, sporting and community organisations for non-commercial purposes for below market rent.

A minimum rent may be applied to all leases, at the same minimum rate applicable to Leases of Crown Land (as determined by Crown Lands NSW).

The following are relevant factors in Council's assessment of the community benefit from a proposed lease and its decision to grant a lease to a non-profit organisation and accept less than current market rent:

- the identity of the organisation, its Constitution and its aims and objectives;
- its history and experience;



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- the length of time it has been based in the Council local government area and/or its connection with the Council local government area;
- its funding sources and financial position;
- the services it offers;
- whether there are other organisations in the Council local government area offering the same or similar services and whether there is a shortage of such services;
- whether such services are most efficiently delivered by Council providing subsidised premises to the organisation or another organisation or by Council providing the services itself or by making monetary grants to another organisation;
- the clients and/or members of the organisation (the rent discount may be higher if the organisation is local and if it is delivering services mostly to the residents of the Council area);
- whether the lessee generates income from the premises and, if so, whether the income generated from the premises is used for the leased premises only or the services of the local community. If the lessee is remitting income earned from the premises to its other services outside the Council local government area, higher rent may be charged (but not exceeding current market rent);
- the costs and expenses incurred by Council in owning and leasing the premises, including staff administration time (the minimum rent should, where possible, cover Council's costs);
- the costs and expenses Council would incur for the maintenance and other expenses if it did not lease the premises (that is, the savings by Council if a lessee undertakes the maintenance and repairs instead of Council providing the service and maintaining the premises itself);
- any capital works to be done by the lessee (see clause 5.3 of this Policy); and
- whether the lessee is competing with other services or businesses and, if so, whether the lease at less than current market rent provides an unfair advantage to the lessee over its competitors.

Council recognises that many existing lessees of Community Land and Crown Land, notably sporting bodies and community groups, have strong historical and/or social and/or recreational ties to the facilities they use. In some cases, they have contributed cash or in kind to the development of these facilities.

In considering new or continued leases or licences for such facilities, Council will take these factors into account and may, in its absolute discretion, not require expressions of interests or tenders (except where required by the LG Act) and will negotiate the lease directly with the relevant lessee.

It cannot be assumed that a new lease will be granted to the same non-profit lessee at the end of a lease.

Council will consider the issues of the community benefit on each occasion a new lease is to be granted by Council. In deciding whether to grant a new lease to the same lessee, Council will (in addition to the above) consider:

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- the extent of compliance by the lessee with the lease throughout the term, including whether the lessee has properly maintained the premises as required and/or if the lessee has completed any work it has to do in a satisfactory manner;
- whether demand for the service has increased or decreased;
- whether demand by other groups for access to these or similar premises has increased or decreased, and whether it is equitable for one organisation to have on-going exclusive use;
- whether the membership/clientele of the lessee has increased or decreased; and
- whether renewals of leases to the same lessee for less than current market rent result over time in effective or perceived privatisation of Council Land without proper return to the public.

A non-profit organisation requesting a new lease or a renewal of a lease of Council Land at less than current market rent is expected to provide Council with all information requested by Council to enable Council to assess the community benefit.

A lease to a non-profit, sporting or community organisation for less than current market rent will contain provisions in the lease to ensure that it is (and continues to be) in the interests of the public.

6.4.3 Capital works

If the lease requires the lessee to undertake capital works or improvements to the premises, the lease will state that the works (or improvements resulting from such works) are or will become the property of Council or the Crown (as the case may be).

Capital works undertaken by the lessee do not give the lessee any interest or claim in the works or improvements or the premises (beyond what is in the lease) nor does it give the lessee any claim to the premises or improvements after the termination of the lease.

Undertaking capital works during the term of a lease does not entitle the lessee to demand a new lease following the termination of the lease.

Care is to be taken if the rent payable is reduced as a result of capital works to be done by the lessee. Capital works by the lessee may only be a return to the public if, following termination of the lease, Council is able to rent the premises for a higher/market value having regard to the improvements which have been made by the lessee (which become the property of Council or the Crown (as the case may be)).

If the lease term is very long and/or if renewals of leases of premises are continuously granted to the same lessee, capital works may benefit only that lessee (or are part of its use of the premises as lessee) and do not provide compensation to the public for the use of the Council Land.

6.5 **Selecting lessees/licences**

Council officers are to consider the processes for a lease or licence:



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- approximately 6-12 months prior to the expiry date of a current lease or licence; or
- as early as possible before the anticipated commencement of a new lease or licence.

A lease or licence of Council Land may be offered by one of the following means (unless Council is required by legislation to offer the lease or licence in a specific way):

- Advertised as an “Expression of Interest”
- Advertised “For Lease/Licence”
- Offered direct to Potential Lessee/Licencee

Council Officers are to give direct notice of the advertisements (or invitation to lodge tenders or expressions of interest) to any existing lessee/licensee of the premises.

6.5.1 Advertised as an ‘Expression of Interest’.

This option is appropriate in the following circumstances:

- the use of the Council Land is unclear;
- the rental value is unknown;
- there is potential for interest from multiple parties;
- the works to be carried out prior to leasing or licensing are unknown; or
- Council has identified that the relevant Council Land has lease/licence potential.

Invitations to lodge tenders or expressions of interest are to be made public in a manner likely to bring it to the attention of interested parties and on the Council website.

Expressions of Interest will be assessed by a panel of at least two Council Officers.

6.5.2 Advertised ‘For Lease’/’For Licence’

This option is appropriate when the value and potential use of the land is clearly known by Council and it is likely that more than one potential lessee/licensee may have an interest in the relevant Council Land.

Potential lessees/licensees or groups are to respond by completing an application form. Council may elect to engage the services of a real estate agent.

Applications will be assessed by a panel of at least two Council Officers.

6.5.3 Offered Direct to Potential Lessee / Licensee

This option is appropriate when the potential lessee or licensee already has a relationship with Council regarding a property and it is advantageous to both parties for the relationship to continue.



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Potential lessees/licensees may be asked to respond to a prepared proposal.

6.6 Other considerations

6.6.1 Agistment

Council may enter into an agreement with another party for that party to agist cattle, horses or other animals on Council Land. Such an agistment agreement will be by way of a licence.

The term of an agistment agreement must not exceed five (5) years.

(At the expiry of an agistment agreement the land may be offered to the current licensee (agistee) for a further term subject to a market fee review.

When Council wishes to offer Council Land for agistment; or at the expiry of an agistment agreement:

- Council does not offer the current licensee (agistee) a further term; or
- Council offers the current licensee (agistee) a further term and the licensee (agistee) does not wish to renew the agistment agreement,

the land is to be advertised in the local paper and Council website calling for expressions of interest to determine the most suitable agistee.

6.6.2 Instructions

Once the lessee or licensee has been determined and the terms of the lease or licence have been negotiated, Council's Property Officer will be responsible for:

- providing instructions to Council's legal services provider for the preparation of the lease or licence;
- arranging for the execution of the documents by all parties;
- where applicable, the inclusion in the Council Meeting Agenda (under Documents for Sealing);
- registration and/or completion of the lease (if applicable);
- arranging access to the property on the commencement date;
- preparation of the debtors advice to Finance;
- updating the Lease Register; and
- monitoring the review of the fees and terms of the lease or licence

6.6.3 Insurance

All lessees and licenses must effect and maintain the appropriate insurance policies for their permitted use throughout the term of the lease or licence



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These policies will include:

- public liability insurance not less than \$20 million;
- workers or accident compensation (if required);
- contents insurance (if required); and
- any other insurance required by Council.

The lessee/licensee must provide Council with a copy of the relevant Certificate of Currency during each year of the term.

6.6.4 Current market value

For leases or licences of Public Land, Council must obtain a current market review of the rent or licence fee every 5 years.

The current market review can be by way of:

- full market valuation by a Valuer; or
- appraisal by a suitably qualified practising real estate agent (experienced in leasing/licensing of similar properties).

Where a current market review is required under the terms of the lease or licence, then the current market review must be undertaken in accordance with the requirements of the lease or licence.

Council is not bound by any current market review (unless such current market review is required under the terms of the lease or licence). However, Council should consider the current market review in determining the rent or licence fee payable.

6.6.5 Execution of lease or licence

Leases should be executed by Council under the Council Seal (in accordance with Council's Use of Council Seal Policy) pursuant to regulation 400 of the Local Government (General) Regulation 2021.

Licences do not have to be executed by Council under the Council Seal. Licences may be executed by Council by being signed by an authorised delegate of Council pursuant to section 377 of the LG Act.

6.7 **Departure from the policy**

Any provision of this Policy may be varied to meet the needs of a particular matter, by resolution of Council. The reasons for change will be clearly articulated within the report submitted for consideration by Council in adopting such resolution and will only apply to such matter.

7. **RELATED LEGISLATION, POLICIES AND STRATEGIES**



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7.1 Legislation

- *Local Government Act 1993*
- *Crown Land Management Act 2016*
- *Roads Act 1993*
- *Retail Leases Act 1994*
- Local Government (General) Regulation 2021

7.2 Council policies and guidelines

- Governance Policy
- Code of Conduct
- Use of Council Seal Policy
- Capital Works on Community Facilities Policy
- Outdoor Dining and Footpath Trading Policy
- Acquisition and Disposal of Land Policy
- Commercial Activities Policy

8. RECORDS MANAGEMENT

All Records must be kept in accordance with Council's Records Management Policy (currently under development) and destroyed as per the General Retention and Disposal Authority: Local Government Records (GA39).

9. REVIEW AND EVALUATION

This policy (procedure) will be evaluated and reviewed at least once every four (4) years as per Council's Governance Policy (currently under development) or as required.

10. DOCUMENT AVAILABILITY

A number of legislative instruments require Councils to have the policy available for inspection at Council's principal office (i.e. Policies made under Part 3, of the Local Government Act 1993). Each document should therefore state the ways in which the policy is available including any relevant fees and charges for access to such policy. An example of the required statement is provided below:

This policy will be available for inspection at Council's principal office during ordinary business hours as per the requirements of section 18 (c) of the *Government Information (Public Access) Act 2009* and section 167 of the *Local Government Act 1993*.

Access to the policy in digital format is free and is available on Council's website <https://www.berriganshire.nsw.gov.au/>



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Printed copies of the document are available at Council's principal office (address noted below) and are subject to Council's Fees and Charges.

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11. VERSION CONTROL

Version Number	Date	Summary	Responsible Officer
1.0	15 May 2024	New Policy document	Deputy Chief Executive Officer

APPENDICES

- Appendix A – Kell Moore Lease/Licence Flowchart