

10. PROPERTY MANAGEMENT

Policy 10.20

LEASING AND LICENSING POLICY

Version 1

LEASING AND LICENSING POLICY

Purpose of policy

This policy provides Council with a framework for granting leases or licences in a fair and consistent manner that complies with legislation and Council's Compliance Policy 9.16.

While this policy attempts to provide a straightforward framework, the many aspects involved in leasing or licensing property within the control of Council, make it difficult to provide a succinct explanation and flowcharts are provided at Annexures A, B and C for clarity.

Application of policy

This policy applies to Public Land and Crown Land that Council deems suitable and available for lease or licence. All references to 'land' in this policy include the buildings or structures on the land, if any.

Commencement of policy

This policy commences on the date it is adopted by resolution of the Council.

Current leases and licences will continue under the terms of existing arrangements, until they expire. Where there is no lease or licence in place, and as existing arrangements expire, this policy will underpin the future occupancy arrangement.

Exclusions

This policy does not apply to facilities that are booked or hired in accordance with Council's Fees and Charges and applicable legislation or residential premises.

KEY TERMINOLOGY USED IN THIS POLICY

- Public Land
- Crown Land
- Community Land
- Operational Land
- Lease
- Licence
- Property

Public Land

"Public Land" is defined in the *Local Government Act 1993* (hereinafter referred to as 'the **Act**') as any land (including a public reserve) vested in or under the control of the council, but does not include:

- (a) a public road, or
- (b) land to which the Crown Land Management Act 2016 applies, or
- (c) a common, or
- (d) a regional park under the National Parks and Wildlife Act 1974.

Crown Land

"Crown Land" is defined in the Crown Land Management Act as:

- (a) land that was Crown land as defined in the *Crown Lands Act 1989* immediately before the Act's repeal,
- (b) land that becomes Crown land because of the operation of a provision of this Act or a declaration made under section 4.4,
- (c) land vested, on and from the repeal of the *Crown Lands Act 1989*, in the Crown (including when it is vested in the name of the State).

Lithgow City Council is the Crown Land Manager for many parcels of Crown Land within the Lithgow Local Government Area. From 1 July 2018 the *Crown Land Management Act 2016* authorises Council Crown Land Managers to classify and manage dedicated or reserved Crown Land as if it were Public Land, subject to certain requirements (section 3.21 *Crown Land Management Act 2016*).

One of the requirements of leasing/licensing Crown Land is that the use must accord with an express authorisation in the Plan of Management. Plans of Management for Crown Land are required to be in place by 30 June 2021. In the interim, transitional arrangements allow Council Crown Land Managers to grant short-term licences for certain use (section 2.20 of Crown Land Management Act 2016 and clause 31 of the Crown Land Management Regulation 2018).

Community Land and Operational Land

All Public Land held or controlled by Council is classified as either Community Land or Operational Land (sections 25 and 26 of the Act). This classification and any subsequent reclassification of Public Land is adopted by either a local environmental plan or a resolution of Council under sections 31, 32 or 33 of the Act (section 27 of the Act).

The purpose of classification is to identify land which is held for use by the general public (Community Land) and land held for other purposes (Operational Land). From a leasing and licensing perspective, the main difference between the two is that Councils may grant a lease or licence over Operational Land in their discretion, whereas the capacity for

Councils to grant a lease or licence in respect of Community Land is somewhat restricted (Division 2, Part 2, Chapter 6 of the Act).

Lease or Licence

A lease is a right to exclusive possession of land granted by one person (lessor or landlord) to another person (lessee or tenant), usually in return for a rent. Exclusive possession is a fundamental element of a lease; it means the lessee or tenant has the right to possession of the premises to the exclusion of all others. A registered lease grants a legal interest in land; if the owner sells the land, the lease will be binding on successive owners.

A licence is an agreement between two parties (licensor and licensee) allowing a party to do something on land, or to occupy land, on particular conditions, usually in return for a licence fee. Unlike a lease, a licence does not grant exclusive possession of the land (not to be confused with exclusive use or occupation) and does not run with the land. A licence is a contract granting personal rights, and is not binding on successive owners of the land.

Property

For the purpose of this policy 'Property' means Public Land and/or Crown Land, within the control of Lithgow City Council.

PROCESS FOR LEASING OR LICENSING PROPERTY

Councils are exempt from inviting tenders in respect of a contract for the lease or licence of land, other than the lease or licence of Community Land for a term exceeding 5 years to a body that is not a non-profit organisation (sections 46A and 55(3)(e) of the Act).

In the event that Property becomes available for lease or licence, Council will adopt the following process:

- If the Property is Operational Land suitable for commercial use, the Property will be listed with Council's appointed real estate agent for marketing, unless the particular nature of the Property warrants listing with a specialist agency (for example, a childcare centre).
- If the Property is Community Land suitable for a commercial use, the Property will be submitted to tender for lease or licence (sections 46A and 55(3)(e) of the Act).
- If the Property is Operational Land or Community Land suitable for community use, the Property will be advertised in a local newspaper and on Council's website, calling for expressions of interest.

- Notwithstanding anything set out in this policy, if a lease or licence of Property is required for the purpose of emergency services, telecommunication facilities or public utilities, Council will deal directly with the entity seeking the lease or licence.

Thereafter, the steps set out in Annexure A will be followed.

ELEMENTS OF LEASING OR LICENSING PROPERTY FROM COUNCIL

Entering a lease or licence with Council

A lease/licence is a contract, creating legal rights and obligations. Therefore, parties entering a lease/licence must be capable of enforcing or defending their rights at law. Individuals over the age of 18 with mental capacity, companies, incorporated associations and government bodies have legal capacity and may enter a lease/licence.

Council does not provide legal or other advice to parties that enter a contract with Council, and Council encourages all parties to obtain legal advice (and/or any other professional advice) before entering a contract.

Rent/licence fee

The rent/licence fee payable under a lease/licence from Council will be determined by the following categories:

- Category A (commercial)
- Category B (community use, core function)
- Category C (community use, non-core function)
- Category D (telecommunications)

See Schedule A for more information pertaining to these categories and the applicable rent/licence fee.

If a particular use, legal structure or business model of a proposed lessee/licensee does not fit neatly within Category A, B, C or D, the rent/licence fee will be as agreed between the parties, subject to a resolution of Council.

Maintenance and repairs

Usually, lessees/licensees are not responsible for structural repairs to the premises or repairs needed because of fair wear and tear. However, lessees/licensees are responsible for:

- day to day maintenance, (for example, replacing light globes and smoke alarm batteries, replacing washers in leaking taps or toilets, tightening internal door handles, painting, general maintenance of yard/gardens etc.);
- repairs required because of damage caused to the Property by the lessee/licensee;

 maintenance or improvements required because of the lessee's/licensee's particular use of the premises.

In no circumstances should the lessee/licensee undertake any structural works or improvements to the Property without the prior approval in writing of Council.

Insurance

Throughout the term of the lease/licence, the lessee/licensee is required to hold public liability insurance cover for at least \$20m for each occurrence, plate glass cover, and any other insurance required by law for the particular use of the Property.

The certificate of currency must record 'Lithgow City Council' as an interested party and the lessee/licensee must provide Council with a copy of the certificate of currency at least once in each year of the term.

Legal costs

In accordance with Council's policy 1.1, legal costs incurred by Council in respect of the investigation, preparation and finalisation of a lease/licence are payable by the lessee/licensee.

Keys

At the commencement of each new occupancy arrangement Council will arrange to change the locks to the entrance and exit doors. Council will retain one set of keys and provide one set of keys to the lessee/licensee.

The lessee/licensee may arrange to have additional sets of keys cut at its own cost and own risk.

Legislation governing leases or licences

In addition to the common law and the provisions of the lease/licence between Council and the other party, the following legislation may apply to the lease/licence:

Local Government Act 1993 (NSW)
Crown Land Management Act 2016 (NSW)
Real Property Act 1900 (NSW)
Conveyancing Act 1919 (NSW)
Retail Leases Act 1994 (NSW)
Land Tax Management Act 1956 (NSW)
Competition and Consumer Act 2010 and the Australian Consumer Law (Cth)
A New Tax System (Goods and Services Tax) Act 1999 (Cth),
and associated regulations

SCHEDULE A

હ	CATEGORY A	ਹ	CATEGORY B	CATEGORY C	9	CATEGORY D	
8 <u>\$</u>	commercial use Market rent/licence fee	8.5	community use - core function	community u	community use - non-core function	telecommunications Rent/licence fee will accord	aecord
		ď	Peppercorn rent/licence fee	Rent/licence fee is the prescribed minimum by	Rent/licence fee is the prescribed minimum base	with 'Communication Licence Rent Eact Sheet	n Licence
				rent under <i>Crown Land</i> Management Regulatio	rent under <i>Crown Land</i> Management Regulation		
				2018			
8	Property will be used for a	9	Property will be used for a	 Property 	Property will be used for a	 Property will be used for 	used for
	commercial/retail purpose		core community purpose	non-core	non-core community	the delivery of	
				purpose		communication services	services
•	Examples include: hair		Examples include: RFS,				
	dressing salon, café, for		public health services,	Example;	Examples include: sport	 Examples include: mobile 	e: mobile
	profit childcare centre,	~~~~	libraries, historical	centres, (centres, sporting clubs,	and internet providers,	/iders,
	Department of Human	******	societies etc	men's sh	men's sheds, girl guides,	television and radio	dio
	Services			charitable groups	e groups	broadcasters, monitoring	onitoring
	į		The objective of the			equipment for mining,	ining,
9	The objective of the		lessee/licensee is to	The object	The objective of the	emergency services	ces
	lessee/licensee is to		provide a function that is	lessee/lic	lessee/licensee is to	communication equipment	equipment
	generate a profit or		consistent with the	deliver a	deliver a recreation or		
	lessee/licensee is a		functions of local	communi	community service that	 The business objective of 	jective of
	commonwealth or state	·····	government and provides	provides	provides a benefit to the	the lessee/licensee is to	ee is to
	government service		a direct benefit to the	communi	community, independent	generate a profit, or the	, or the
			broader community,	of Counci	of Council involvement	lessee/licensee is a	Sa
0	The commencing rent or		independent of Council			commonwealth or state	or state
	licence fee will be		involvement	Lessee/lic	Lessee/licensee has	government entity	<u></u>
	equivalent to market rent		:	ability to (ability to generate income		
	plus GST or may consist	•	Lessee/licensee has	from men	from members' fees,	 The annual rent/licence 	licence
	of a base rent plus		limited to no ability to	service cl	service charges, entry	fee will be equal to the	to the

CATEGORY A	CATEGORY B	CATEGORY C	CATEGORY D
commercial use	community use - core	community use - non-core	telecommunications
Market rent/licence fee	tunction	tunction	Rent/licence fee will accord
	Peppercorn rent/licence fee	Rent/licence fee is the	with 'Communication Licence
		prescribed minimum base rent inder Crown I and	Rent Fact Sheet"
		Management Regulation 2018	
revenue rent, and annual	generate income from the	fees, hire fees, donations,	amount stipulated in the
rent reviews will apply	undertaking	competitions or	Communication Licence
		fundraising etc. The	Rent Fact Sheet' issued
 The lessee/licensee will 	 Due to its core function 	income is used to sustain	by the NSW Department
be required to pay a	and limited ability to	and improve the service to	of Industry in June 2019,
security deposit equal to 3	generate income, a	the community	plus GST. Annual
months rent inclusive of	peppercorn rent/licence		rent/licence fee reviews
GST	fee applies	 The commencing 	will apply
		rent/licence fee will be the	
 The lessee/licensee will 	 The lessee/licensee will 	amount equivalent to the	 If applicable, the
be responsible for	be responsible for	prescribed minimum base	lessee/licensee will be
arranging a direct account	arranging a direct account	rent under clause 38 of	responsible for arranging
with retail utility providers	with retail utility providers	the Crown Land	a direct account with retail
and is responsible for	and is responsible for	Management Regulation	utility providers and is
payment of all utilities	payment of all utilities	2018 plus GST. Annual	responsible for payment
(such as telephone,	(such as telephone,	CPI reviews will apply.	of all utilities (such as
internet, electricity, gas,	internet, electricity, gas,	The rent/licence fee is	telephone, internet,
water, trade waste). The	water, trade waste). The	contingent upon the	electricity, gas, water,
lessee/licensee may also	lessee/licensee may also	lessee/licensee remaining	trade waste). The
be liable for payment of	be liable for payment of	a registered not-for-profit	lessee/licensee may also
outgoings (such as	outgoings (such as	or charitable organisation	be liable for payment of
council rates, water and	council rates, water and	and using the Property for	outgoings (such as
sewerage service	sewerage service	this purpose	council rates, water and
charges, building	charges, building		sewerage service

CATEGORY A	CATEGORY B	CATEGORY C	CATEGORY D
commercial use	community use - core	community use - non-core	telecommunications
Market rent/licence fee	function	function	Rent/licence fee will accord
	Peppercorn rent/licence fee	Rent/licence fee is the prescribed minimum base	with 'Communication Licence Rent Fact Sheet'
		rent under Crown Land	
		Management Regulation 2018	
insurance), depending on	insurance), depending on	• The lessee/licensee will	charges, building
and lease/licence	ine nature of the Property	be responsible for	insurance)
negotiations	and rease/licerice negotiations	arranging a direct account with retail utility providers	
)	and is responsible for	
	 In each year of the term 	payment of all utilities	
	the lessee/licensee is	(such as telephone,	
	reduired to provide	Internet, electricity, gas,	
	francial of the most to	water, trade waste). The	
	demonstrate income and	lessee/licensee may also	
	demonstrate income and	be liable for payment of	
	expenditure consistent	outgoings (such as	
	with the use	council rates, water and	
		sewerage service	
		charges, building	
		insurance), depending on	
		the nature of the Property	
		and lease/licence	
		negotiations	
		 In each year of the term 	
		the lessee/licensee is	
		required to provide	
		Council With a copy of its	

CATEGORY A	CATEGORY B	CATEGORY C	CATEGORY D
commercial use Market rent/licence fee	community use - core function	community use - non-core function	telecommunications Rent/licence fee will accord
	Peppercorn rent/licence fee	Rent/licence fee is the prescribed minimum base rent under Crown Land Management Regulation 2018	with 'Communication Licence Rent Fact Sheet'
		financial statement to	
		demonstrate income and expenditure consistent	
		with the use	

Maintained by Department:	Economic Development & Environment	Approved by:		
Reference:	Dataworks: Policy Register	Council Policy No:	Effective Date:	
Min No:		Version No:	Reviewed Date:	
Attachments:	Annexure A, Annexure B, Annexure C	e B, Annexure C		

ANNEXURE A

PROCESS WHEN PROPERTY BECOMES AVAILABLE FOR LEASE OR LICENCE

OPERATIONAL

LAND CLASSIFICATION

(listed in land register)

COMMUNITY

1. GOVERNANCE REQUIREMENTS

Operational Land may be leased/licensed at Council's discretion (there are no legislative restrictions for Operational Land).

Council's Property Leases Policy 10.14 authorises the General Manager to negotiate and enter leases or licences for market value.

2. ADVERTISE PROPERTY

List property with Council's appointed property agent, who will show the property and vet potential lessees/licensees. The property agent will also provide a market rent appraisal.

3. OFFER TO LEASE OR LICENCE

Once a proposed lessee/licensee is found, Council will negotiate the terms of the lease/licence with the proposed lessee/licensee, and submit a written offer to lease/licence to be signed before proceeding further.

4. SUBMIT LEASE OR LICENCE FOR EXECUTION

Once the offer to lease/licence is signed, Council will either instruct external solicitors to prepare the lease/licence, or prepare the lease/licence in-house. The document will be submitted to the lessee/licensee for approval and execution.

5. EXECUTION BY COUNCIL

Once the lease/licence signed by the lessee/licensee is returned to Council with all other requirements, the lease/licence will be submitted to the General Manager, with appropriate checklist and memo, for signing under section 377 of the Local Government Act 1993. The lease/licence should be dated with the date it was signed by the General Manager.

6. REGISTER THE LEASE

To convey a 'legal' interest, leases for a term of 3 years or more must be registered (sections 42 and 53 *Real Property Act 1900*). This requirement is mandated for retail leases (section 16 of the *Retail Leases Act 1994*). Leases for less than 3 years will generally be recognised at law, whether they are registered or not.

It is the aim of Council to register all leases that are capable of being registered.

Licences do not need to be registered as they are not capable of conveying an interest in land.

1. GOVERNANCE REQUIREMENTS

Consider governance requirements at the outset. See Annexure B for governance requirements in respect of Public Land and Annexure C for Crown Land.

2. ADVERTISE PROPERTY

Community use – if a community use of the property is recommended, advertise the property for expressions of interest in a local newspaper and on Council website.

Commercial use – if a commercial use of the property is recommended, invite tenders, to ensure compliance with sections 46A and 55(3)(e) of the Local Government Act 1993.

3. COUNCIL RESOLUTION - PRELIMINARY

Following assessment of tenders or expressions of interest, submit a report to Council seeking a resolution that Council offer a lease/licence to the successful applicant, subject to completion of governance requirements.

4. DRAFT LEASE OR LICENCE

Instruct external solicitors to prepare a lease/licence, or prepare the lease/licence in-house. Send the draft document to the lessee/licensee for preliminary review and approval, but not signature.

5. GOVERNANCE REQUIREMENTS

Complete relevant requirements set out in division 2 of part 2 of chapter 6 of the *Local Government Act 1993*. (See Annexure C flowchart for a list of requirements.)

7. COUNCIL RESOLUTION - FINAL

Following public exhibition, submit a report to Council summarising any submissions received during the exhibition period and requesting a resolution to:

- enter the lease/licence
- authorise the General Manager to execute the lease/licence; or send the lease to the Minister for Local Government for approval (if applicable).

6. FINALISE LEASE/LICENCE

Once Minister's approval is received, follow steps 4 to 6 of Operational Land process.

ANNEXURE B

LEASES OR LICENCES - PUBLIC LAND

(Local Government Act 1993 definition)

'Public land' means any land (including public reserve) vested in or under the control of the council, but does not include:

- (a) a public road, or
- (b) land to which the Crown Land Management Act 2016 applies, or
- (c) a common, or
- (d) a regional park under the National Parks and Wildlife Act 1974.



RESTRICTION ON OCCUPATION/USE

(Local Government Act 1993, s 47D)

Exclusive occupation or exclusive use of community land is prohibited except in accordance with a lease, licence or other estate (or sublease). The regulations contain very limited exceptions to this rule.

RESTRICTION ON LEASING/LICENSING

(Local Government Act 1993, s 46(3))

A lease or licence must not exceed 30 years (including any period for which the lease or licence could be renewed by the exercise of an option)

PURPOSES FOR WHICH LEASES AND LICENCES MAY BE GRANTED

(Local Government Act, 1993, s 46)

- public utilities and works associated with or ancillary to public utilities
- pipes, conduits or other connections under the surface of the ground for the connection of adjoining premises to a facility of council or other public utility provider
- where express authorisation is provided in the plan of management and provided the purpose is consistent with its core objectives
- filming projects (subject to section 46(5)

Term (including option terms) = 5 years or less (Local Government Act 1993, s 47A and s 47)

Requirements

- public notice
- exhibit notice
- notice to adjoining owners
- notice to other potentially affected parties within the vicinity of the premises
- Minister's consent is required if Council receives a request from the Minister

Exceptions to the above requirements (Reg 117)

- residential purpose, where community land has been developed for housing
- events listed in Reg 117(1)(c) provided they are for no more than 3 consecutive days (not including Saturday and Sunday) and the period from the first occurrence until the last occurrence is not more than 12 months.

Term (including option terms) = more than 5 years (Local Government Act 1993, s 47)

Requirements

- may be granted only by tender, unless it is to a non-profit organisation (Sections 46A(3) and 55(3)(e))
- public notice
- exhibit notice
- notice to adjoining owners
- notice to other potentially affected parties within the vicinity of the premises
- Minister's consent is required if Council receives an objection or the term exceeds 21 years

Sub-lease or sub-licence (Local Government Act, 1993, s 47C)

Community land that is the subject of a lease cannot be sublet for a purpose other than the purpose for which the land was to be used under the lease or a purpose prescribed by clause 119 of the Local Government (General) Regulation 2005.

ANNEXURE C

LEASES OR LICENCES - CROWN LAND

(Crown Land Management Act 2016, s 1.7 and 1.3)

"Crown land" for the purposes of this Act:

- (a) land that was Crown land as defined in the Crown Lands Act 1989 immediately before the Act's repeal,
- (b) land that becomes Crown land because of the operation of a provision of this Act or a declaration made under section 4.4,
- (c) land vested, on and from the repeal of the Crown Lands Act 1989, in the Crown (including when it is vested in the name of the State).

The objects of this Act are:

- (a) to provide for the ownership, use and management of the Crown land of New South Wales, and
- (b) to provide clarity concerning the law applicable to Crown land, and
- (c) to require environmental, social, cultural heritage and economic considerations to be taken into account in decision-making about Crown land, and
- (d) to provide for the consistent, efficient, fair and transparent management of Crown land for the benefit of the people of New South Wales, and
- (e) to facilitate the use of Crown land by the Aboriginal people of New South Wales because of the spiritual, social, cultural and economic importance of land to Aboriginal people and, where appropriate, to enable the co-management of dedicated or reserved Crown land, and
- (f) to provide for the management of Crown land having regard to the principles of Crown land management.

OPERATIONAL (Crown Land Management Act 2016, s 4.8) Crown land is classified as community land, unless the Minister declares the land to be LAND CLASSIFICATION operational following an application by (Crown Land Management Act 2016, Part 3, Division 3.4) COMMUNITY Council as Crown Land Manager. **GOVERNANCE REQUIREMENTS** Crown Land Management Act 2016 **GOVERNANCE REQUIREMENTS** Local Government Act 1993 Plan of management - LCC Policy 10.14 Native Title Act 1993 - LCC Policy 1.1 Council resolution

BRIEF OVERVIEW OF GOVERNANCE REQUIREMENTS

A lease or licence in respect of Crown Land classified as 'Community' is subject to the same requirements as Public Land classified as 'Community' under the Local Government Act 1993 (s 3.21 Crown Land Management Act 2016). In addition:

- If a proposed use is different to the categorisation in the Plan of Management, the approval of the Minister administering the Crown Land Management Act 2016 is required to change or add a new category to the Plan of Management (section 3.23); and
- Crown Land is subject to native title considerations and Native Title Manager advice is required in relation to a licence or lease (section 8.7).