



10. PROPERTY MANAGEMENT

Policy 10.20

LEASING AND LICENSING POLICY

Version 3

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 TERMS 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 as soon as possible. In the interim, transitional arrangements allow Council Crown Land Managers to grant short-term licences for a prescribed 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).

The General Manager has delegated power to negotiate and enter leases/licences in relation to land classified Operational, having regard to the Categories in Schedule A of this policy. Any deviation from this policy in relation to a lease/licence of Operational Land requires a resolution of Council.

All proposed leases/licences in relation to land classified Community (other than a short-term licence issued under the *Crown Land Management Act 2016*) require a Council resolution before being placed on public exhibition.

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, or the 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.

Administrative/Legal costs

Administrative/Legal costs incurred by Council in respect of the investigation, preparation and finalisation of a lease/licence are payable by the lessee/licensee, unless prohibited by legislation (for example, section 14 of the *Retail Leases Act 1994*).

If the lease/licence is outsourced to external solicitors, the lessee/licensee will pay the total of the tax invoice issued by external solicitors to Council.

If the matter is dealt with in-house, the lessee/licence will pay the administration/legal fee listed in Council's fees and charges for the relevant year plus fees and charges incurred for registration of a lease with NSW Land Registry Services, if applicable.

Lessee/licensee to obtain and maintain all consents, approvals etc for use

Council enters a lease/licence in its capacity as owner of the Property and not in its capacity as a regulator or consent authority. Therefore, the lease/licence does not, and is not to be construed as, conferring on the lessee/licensee any right, approval, authorisation, permit or consent required to be obtained from a consent authority in relation to the proposed use of the Property (for example, a development consent may be needed to use the Property as a café).

The lessee/licensee must obtain and maintain throughout the term of the lease/licence any right, approval, authorisation, permit or consent required for the lessee/licensee's use or activities on the Property.

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

CATEGORY A commercial use Market rent/licence fee	CATEGORY B community use - core function Peppercorn rent/licence fee	CATEGORY C community use - non-core function Rent/licence fee is the minimum base rent under the <i>Crown Land Management Act 2016</i>	CATEGORY D telecommunications Rent/licence fee will accord with 'Communication Licence Rent Fact Sheet'
<ul style="list-style-type: none"> Property will be used for a commercial/retail purpose. The objective of the lessee/licensee is to generate a profit or lessee/licensee is a commonwealth or state government service. Examples include: hair dressing salon, café, for profit childcare centre, Department of Human Services. The commencing rent or licence fee will be equivalent to market rent plus GST or may consist of a base rent plus 	<ul style="list-style-type: none"> Property will be used for a core community purpose. <p>In this policy "core community purpose" means a service or activity that provides a direct benefit to the community and would otherwise be a function of Council.</p> <ul style="list-style-type: none"> The objective of the lessee/licensee is to provide a direct benefit to the broader community, independent of Council involvement. The lessee/licensee has limited to no ability to 	<ul style="list-style-type: none"> Property will be used for a non-core community purpose. <p>In this policy "non-core community purpose" means a service or activity that provides a direct benefit to the community but is not a function of Council.</p> <ul style="list-style-type: none"> The objective of the lessee/licensee is to deliver a recreation or community service that provides a benefit to the community, independent of Council involvement. The lessee/licensee has the ability to generate 	<ul style="list-style-type: none"> Property will be used for the delivery of communication services. The business objective of the lessee/licensee is to generate a profit, or the lessee/licensee is a commonwealth or state government entity. Examples include: mobile and internet providers, television and radio broadcasters, monitoring equipment for mining, emergency services communication equipment.

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<p>.revenue rent, and annual rent reviews will apply.</p> <ul style="list-style-type: none"> • The lessee/licensee will be required to pay a security deposit equal to 3 months rent inclusive of GST. • The lessee/licensee will be responsible for arranging a direct account with retail utility providers and is responsible for payment of all utilities (such as telephone, internet, electricity, gas, water, trade waste). • The lessee/licensee may also be liable for payment of outgoings (such as council rates, water and sewerage service charges, building 	<p>generate income from the undertaking.</p> <ul style="list-style-type: none"> • Examples include: maintenance and conservation of public reserves, beautification of public spaces etc. • Due to its core function and limited ability to generate income, a peppercorn rent/licence fee applies. • The lessee/licensee will be responsible for arranging a direct account with retail utility providers and is responsible for payment of all utilities (such as telephone, internet, electricity, gas, water, trade waste). The lessee/licensee may also 	<p>income partly due to its use of the premises, including members' fees, service charges, entry fees, hire fees, donations, competitions or fundraising etc. The income is used to sustain and improve the service to the community.</p> <ul style="list-style-type: none"> • Examples include: sporting clubs, community groups such as men's sheds, girl guides, kids clubs, charitable groups etc. • The commencing rent/licence fee will be the amount equivalent to the minimum rent under section 6.4(5) of the <i>Crown Land Management Act 2016</i> . Annual CPI 	<ul style="list-style-type: none"> • The annual rent/licence fee will be equal to the amount stipulated in the 'Communication Licence Rent Fact Sheet' issued by the NSW Department of Industry in June 2019, plus GST. Annual rent/licence fee reviews will apply. • If applicable, the lessee/licensee will be responsible for arranging a direct account with retail utility providers and is responsible for payment of all utilities (such as telephone, internet, electricity, gas, water, trade waste). The lessee/licensee may also be liable for payment of outgoings (such as council rates, water and

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insurance), depending on the nature of the Property and lease/licence negotiations.	<p>be liable for payment of outgoings (such as council rates, water and sewerage service charges, building insurance), depending on the nature of the Property and lease/licence negotiations.</p> <ul style="list-style-type: none"> In each year of the term the lessee/licensee is required to provide Council with a copy of its financial statement to demonstrate income and expenditure consistent with the use. 	<p>reviews will apply. The rent/licence fee is contingent upon the lessee/licensee remaining a registered not-for-profit or charitable organisation and using the Property for this purpose.</p> <ul style="list-style-type: none"> The lessee/licensee will be responsible for arranging a direct account with retail utility providers and is responsible for payment of all utilities (such as telephone, internet, electricity, gas, water, trade waste). The lessee/licensee may also be liable for payment of outgoings (such as council rates, water and sewerage service charges, building insurance), depending on 	sewerage service charges, building insurance).

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		<p>the nature of the Property and lease/licence negotiations.</p> <ul style="list-style-type: none"> In each year of the term the lessee/licensee is required to provide Council with a copy of its financial statement to demonstrate income and expenditure consistent with the use. 	

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ANNEXURE A

ANNEXURE B

ANNEXURE C