



Leasing and Licensing of Council Land and Buildings Policy



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Document Control

Policy	Leasing and Licensing of Council Land and Buildings Policy	Policy Number	TBA
Author/Reviewer	Executive Director Corporate & Community	Review Period and Date	Reviewed within 12 months of election/4 yearly - September

This policy shall be reviewed: -

- This document will be reviewed within 12 months of an election, and thereafter at four yearly intervals, or as otherwise determined by Council.
- Subject to the provisions of the Local Government Act and/or Regulation, this policy may be amended or cancelled by council at any time without prior notice or obligation to any person.
- This policy commences as from the last date of adoption by Council as listed in the document history and replaces all previous versions.

Document History

Date	Status	Version	Resolution	Description
20 December 2017	Draft	0.1		Presented to Council for endorsement, public exhibition at least 60 days
20 December 2017	Draft	0.2	17/366	Endorse policy to be on public exhibition for at least 60 days
19 February 2018	Final	1.0	17/366	No submissions received – policy adopted



1. INTRODUCTION

Hilltops Council has a large portfolio of land and properties. Council owns and leases a number of buildings and land to community groups and businesses, Council requires a consistent approach to how this is undertaken and to what end special arrangements are entered into with regard to setting of rents and charges.

Council is also an agent for the management of crown land in some instances. Council will comply with its obligations in the management of crown land under its care and control.

2. OBJECTIVE

This policy outlines the key elements of Council's management of leases and licences, and provides Council with a framework to support the equitable, efficient and effective management of Council owned and managed land and properties.

This policy will come into effect as tenancies expire or are developed following adoption by Council. Existing arrangements including current leases and licences will continue until expiration. Where leases have expired or occupation of Council public land has been established in a way which does not demonstrate the principles of this policy then Council will proceed to ensure that the policy is implemented.

3. SCOPE

This policy applies to Council land and deals with:

- Leases of land (excluding residential leases and leases under the Roads Act, 1993)
- Licences of land which gives the licensee occupation of the premises for a specified period of time (even if the lessor reserves the rights to access and use)
- Licences to operate ventures on Council land for a specified period either on a full time or part time basis.

This policy does not cover:

- Leases or licences under the Roads Act 1993.
- Licences for occasional or short-term use or non-exclusive use that have separate charges set out in the Schedule of Fees and charges.

4. LEGISLATION AND OTHER REFERENCES

- Local Government Act 1993
- Local Government (General) Regulation 2005
- Crown Lands Act, 1989
- Crown Land Legislation Amendment Act 2017 No.17
- Retail Leases Act, 1994
- Conveyancing Act, 1919
- PRACTICE NOTE No.1 (May 2000) Public Land Management ISSN 1320-6788, Department of Local Government



5. DEFINITIONS

'Not-funded, not for profit' refers to a defined body with a legal entity that is incorporated under the *NSW Incorporations Act 1997* and/or registered under the *Charitable Fundraising Act No 69, 1991*. The Charity is Not Funded, Not for Profit and charitable purposes are for public benefit.

Market Rent means the annual rent that can be reasonably expected to be paid in the open market for a property or space within a property. The market rent is determined by comparing premises of comparable use in which advice will be sought by a licensed real estate agent.

6. POLICY

6.1 Leases and Licences

The Leases and Licences of Council's Public Land and Buildings Policy enables Council to:

- Encourage optimal use of public land and buildings to cater for a range of user groups.
- Obtain a contribution from users for the costs of providing facilities.
- Recognise the social value and benefits of services and activities organised and provided by groups and to subsidise these groups where Council agrees it is appropriate.
- Determine the most appropriate occupancy arrangement.
- Fulfil the requirements of State Government and Council policies in relation to provisions of land and facilities on Community, Operational and Crown land.
- Ensure all user groups support Council's non-discriminatory practices and policies.
- Clearly communicate Council's intentions in relation to management of Council's land and facilities.

6.2 Legislation

Public land is defined to mean any land (including a public reserve) vested in or under the control of the Council. However, public land does not include:

- a. a road; or
- b. land to which the Crown Lands Act 1989 applies (includes land that Council controls but which is owned by the Crown)
- c. a common; or
- d. land subject to the Trustees of Schools of Arts Enabling Act 1902
- e. a regional park under the National Parks and Wildlife Act 1974.

Under the *Local Government Act, 1993* all public land must be classified as either "Operational land" or "Community land". The main effect of classification is to restrict the alienation and use of the land. Land is classified by either:

- a Local Environment Plan (prepared under the EP&A Act 1979); or
- by Resolution of Council (prior to or when the land is acquired); or
- by operation of the Local Government Act –
 - a. applies to certain land controlled by council at 1 July 1993, or
 - b. where Council has since acquired land and there is no resolution to classify the land.



6.2.1 Operational Land

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

6.2.2 Community Land

Classification as community land reflects the importance of the land to the community because of its use or special features. Generally, it is land intended for public access and use, or where other restrictions applying to the land create some obligation to maintain public access. Community land:

- cannot be sold unless reclassified to Operational Land.
- cannot be leased, licenced or any other estate granted over the land for more than 21 years
- must have a plan of management prepared for it.

Land classified as community land must be further categorised as one or more of the following:

- a natural area;
- a sportsground;
- a park;
- an area of cultural significance;
- or general community use.

Leasing or licensing of community land is restricted by the *Local Government Act, 1993*. Leases and Licenses must be consistent with the core objectives of the category of land, for a use prescribed by the Act or Regulations and expressly authorised in a Plan of Management.

Purposes prescribed by the Act for leases or licences of community land are for the provision of goods, services and facilities, and the carrying out of activities, appropriate for the needs within the local community and of the wider public in relation to public recreation or the physical, cultural, social and intellectual welfare or development of persons.

Leases and licences for more than 5 years (or for a first term and option period/s which total more than 5 years) must be determined by tender, except if the lessee/licensee is a non-profit organisation.

Leases and licences of community land cannot be longer than 21 years (including the period of any options to renew) as per *S47 of the Local Government Act, 1993*). Where a proposed lease and/or licence exceeds 21 years application by Council to the Minister must be made.

6.2.2.1 Public Exhibition

If a Council proposes to grant a lease/licence on community land the proposal must be notified and exhibited in the manner prescribed by section 47 of the Local Government Act, 1993. This includes:

- a. give public notice of the proposal, and
- b. exhibit notice of the proposal on the land to which the proposal relates, and
- c. give notice of the proposal to such persons as appear to it to own or occupy the land adjoining the community land, and
- d. give notice of the proposal to any other person, appearing to the Council to be the owner or occupier of land in the vicinity of the community land, if in the opinion of the Council the land the subject of the proposal is likely to form the primary focus of the person's enjoyment of community land.



A notice of the proposal must include:

- information sufficient to identify the community land concerned
- the purpose for which the land will be used under the proposed lease, licence or other estate
- the term of the proposed lease, licence or other estate (including particulars of any options for renewal)
- the name of the person to whom it is proposed to grant the lease, licence or other estate (if known)
- a statement that submissions in writing may be made to the Council concerning the proposal within a period, not less than 28 days, specified in the notice.

6.2.2.1 Submissions/Objections

For a term of 5 years or less, details of all submissions must be included in a report to the Council to enable the proposal to be reconsidered, having regard to the content of each submission. On receipt by the Council of a written request from the Minister, the proposal is to be referred to the Minister for consideration.

For a term greater than 5 years, if a person makes a submission by way of objection to the proposal, details of all submissions must be included in a report to the Council to enable the proposal to be reconsidered and the proposal must be referred to the Minister for consent to the proposal.

6.2.3 Crown Land

Leases and licences for Crown Land which is managed by Council are to be prepared in accordance with the Crown Land Act and Regulations. All leases, licences and temporary licences are to be issued by Council as Trust Manager of the Reserve Trust.

All lease and licences other than temporary licenses (as detailed in the Crown Lands Act and Regulations) requires the consent of the Minister administering the Crown Lands Act.

6.3 Types of Agreements

6.3.1 Agreement to Lease

An Agreement to Lease is a legally binding contract used to commit to the terms of a lease to be granted at some future time, subject to certain conditions occurring.

6.3.2 Lease

A lease enables exclusive use over a particular piece of land or building for a specified term, use and controls the rights and obligations of both parties to the occupancy. A lease is considered the best form of agreement if longer-term security of tenure is an important factor to the user of the land – such as where commercial arrangements are proposed and major financial outlay is required.

6.3.3 Licence

A licence is a contractual agreement that grants the licensee a personal right to occupy and use land for a particular purpose. It does not grant exclusive possession of the land, as is the case with a lease, and may permit the land to be used by other persons.



6.4 Leasing and Licensing

Leasing and Licensing of land and facilities in control and management of Council will be undertaken in full consultation with major stakeholders including community representatives and in accordance with the relevant legislation.

The purpose of the lease or licence must be compatible with the purpose/s of the reservation/dedication, plan of management and permitted use noted within the zoning under the Local Environmental Plan.

Council may enter into leases or licences which provide for the exclusive access to a facility by a private individual or group on its merits. Council officers will encourage users of the facility to provide access to other community user groups and the general public.

Leases will only be considered in exceptional circumstances that could include the following situations:

- The proposed use of the facility has the potential to provide the best value to the community.
- The lease will return a market rental to Council.
- The lessee will significantly upgrade the facility at their expense where it would otherwise have remained in the same condition, and
- It is in keeping with the policies of the State Government, where the land is publicly owned.
- Community consultation has been undertaken, and
- The lease is awarded through a contestable process.

6.5 Rental Value

For a leased or licensed property, Council seeks to recover rent at market value although in some cases a rental subsidy may be applied.

Market rental assessments will be obtained for all Council's Public land and buildings, by suitably qualified real estate agent and will be updated on an annual basis. In certain circumstances a rental assessment may be required from an independent suitably qualified valuer. The market rental value is the amount of annual rent achieved if the accommodation had been let in a competitive market.

If the assessed market value is not agreed upon, the applicant is entitled to obtain their own independent valuation by a suitably qualified valuer. If a significant difference in value applies, the valuer will be required to meet with Council staff to determine a resolution on the market value.

Where it is clear a proposed lessee/licensee has an ability to pay a market rental or fee, the rental/fee payable shall be the market rate as determined by the assessment.

6.5.1 Not funded, Not for Profit Registered Groups

Council recognises that some Not- funded, Not for Profit registered groups do not have the ability to pay market-level fees for occupation of premises and in such circumstances, that an application for subsidy of the rental is to be applied for. Evidence of registration as Not- funded, not -for Profit and annual financial statements are to be submitted to Council.

6.5.1.1 Provision of Rental Subsidies – Community Land

The extent of the rental subsidy will be determined according to Council's objectives and using the established criteria which forms part of this policy and is shown in attachment 1. The level of subsidisation will vary.



To limit the impact on the Not- funded, Not for Profit registered groups, the rental will be phased in over three years with a rental increase of not more than 20% of the subsidised rent in the first year and not more than 40% of the subsidised rent in the second year. In the third year the full new rental will apply.

Subsidised rentals will be subject to a review in the event that the recipient financial capacity has improved or not defined as Not funded, Not for Profit. Accordingly, the recipient will be required to annually submit copies of audited financial statements.

In extraordinary circumstances if the Not- funded, Not for Profit registered groups have provided evidence of financial or special hardship, a minimum fee may be recommended by Council Officers on a case by case basis.

Council seeks to ensure that the cost to Council for the provision of rental subsidies is transparent. As Council is offering an annual subsidy this should be noted as an "in-kind donation" in Council's aggregate record of donations to the community. An "in-kind donation" is a donation that is made for goods or services rather than cash, accordingly this subsidy amount will not be paid out of Council's Financial Assistance - Donations Policy budget. All subsidies made under the policy, are made as "in-kind donations" in the form of the use of the facility for a lesser amount in return for the services that they offer to the community as well as the maintenance responsibilities that they may undertake on the property, rather than cash from Council's Financial Assistance and Donations Policy budget.

In the event that the proposed lessee/licensee is not satisfied with the level of rental subsidy determined, the process will be reviewed by a panel which will consist of Manager Community Services, Manager Business and Governance and Executive Director – Corporate and Community. If considered appropriate, an independent member, internal or external to Council will be invited to participate in the review process.

Council Staff will outline how the process was applied and the Community lessee/licensee will have the opportunity to state their situation. The basic purpose of the Review Panel is to ensure that the procedure is applied fairly and accurately. It is important that the integrity of the system be maintained.

Such matters relating to application of subsidy will be subject to a report to the Council giving all relevant facts and information provided by the applicant and a recommendation for resolution.

6.5.1.2 Provision of Rental Subsidies – Operational Land

From time to time, Council may wish to negotiate reduced rentals for operational land in situations whereby:

- Significant capital contribution is made by the lessee to upgrade the building
- The lessee is providing a service which in the opinion of Council is of benefit to the community
- The building is in a prominent position and leaving it empty would undermine the economic vibrancy of an area
- To leave the building empty would invite anti-social behaviour and may result in the building being vandalised

In these cases, the arrangement will be reported to Council in a manner which preserves the commercial interests of both parties.

In some cases, Council may wish to lease operational land/or buildings to a not for profit. Council reserves the right to either use the Matrix in Appendix A to determine the level of rental subsidy or to charge a commercial rental. Any dispute about the level of subsidy will be handled as per 6.5.1.1 above.



6.5.2 Rental Review

Annual lease and licence fees will be subject to an annual review in all cases, either by the Consumer Price Index rate at the time of the review or a fixed percentage, or as specified in the individual agreement.

Leases or licences extending beyond a five-year term will have a market rental assessment review applied 6 months prior to the anniversary of the commencement date of the fifth year. The new rental will be negotiated in accordance with the terms of the agreement and this policy.

6.5.3 GST

All lessees and licensee must pay GST at a level determined by the Federal Government on rent. GST is payable in addition to the rent calculated, unless otherwise stated.

6.6 Maintenance, Improvements and Presentation

Responsibilities in relation to maintenance, improvements and facility presentation will be fully detailed in formal agreements. The following general rules will apply:

- Unless otherwise determined, Council is responsible for the external structural integrity of community facilities. A user group however, is responsible for maintaining the external building in its existing condition and this may include painting, graffiti removal, etc. The responsibilities will be detailed in the agreement.
- Unless otherwise determined, users of the facility will be responsible for the internal maintenance of the facility. Where more than one group is licensed to use a facility, contributions and responsibility for maintenance will be shared based on the floor space usage ratio taking into account the different activities carried out by the different users.
- Where a group voluntarily undertakes extensions or improvements to the exterior of a facility (e.g. pergola, sun shade), they are responsible for the maintenance and presentation of those improvements. No alterations or modifications or beautifications are to be undertaken without prior discussions with Council's Business and Governance Manager, other users of the facility or without statutory planning approval, if applicable.

Preparation of the Development Applications is the responsibility of the user group, but Council will be required to sign the Development Application as the land owner.

Council granting owners consent to the application does not imply or guarantee development consent, as an assessment of the proposal will need to be made under the *Environmental Planning and Assessment Act 1979*.

Facility fit out improvements undertaken by user groups will remain the property of the groups. Structural modifications, additions and improvements undertaken with the consent of Council will remain the property of Council as owner of the facility.

6.7 Outgoings

Responsibilities in relation to outgoings will be fully documented within the lease/licence and in general the following process will apply.

A user group will be responsible for all outgoings as they apply to the facility.



The outgoing include, but are not limited to the following:

- Telephone and internet
- Commercial waste, sanitary, sewerage and cleaning charges,
- Insurance premiums (not building insurance),
- Fire protection,
- Charges for gas, electricity, oil and water separately metered and consumed in or on the premises, and
- All other charges and impositions by any public utility or authority for the supply of any service separately metered or supplied to the premises.

This is not an exclusive list and there may be other outgoing that relate to specific buildings and/or uses. The full list of responsibilities will be documented in the agreement.

Where there is more than one group sharing the facility, the users will assume proportionate responsibility for some of the outgoing. If any user does not agree to this then they will be responsible for the cost of installing a separate meter for recording or measuring the services or substances.

Council officers acknowledge the need for community groups to raise funds for the ongoing costs of running the organisation.

6.8 Renewal of Agreements

Where a current lease or licence or other formal agreement exists, it will be honoured until its expiry. This will apply to cases only where the legislation and conditions within the existing agreement permits.

Council recognises that many user groups and organisations have a strong historical affiliation with the facilities which they use, and have contributed in cash and kind to their development. However, past contributions of cash or in kind by user groups and organisations to a facility do not convey permanent or preferential access to that facility. While Council supports the continued occupation of those facilities and land by those groups and organisations, it will encourage shared multi-use basis where it does not currently occur.

A review of usage and management options for the facility and Council land in control and management will be undertaken within the last 6 months of the agreement period. It will take into account existing usage, the potential for the facility and land to be used on a multi-user basis and any changing community needs.

The level of rent paid will also be reviewed and determined in accordance with the process noted within this policy.

6.9 Expired Agreements

Within the six months prior to the expiry date of the agreement, the lessee/licensor will be required to provide written notification to Council outlining their position and interest to enter into a new agreement.

If notification is not received within the nominated timeframe, Council will deem that the agreement will be terminated.

Council officers will notify the licensor/lessor of the notification requirement, seven (7) months prior to the expiry date.



6.10 Approval and Execution of Leases and Licences

All new leases and licences will require formal Council resolution.

Any new lease or licence must be executed by the lessee or licensee within 120 days (unless agreed by Council) from the date of the Council resolution approving the lease or licence.

Any lease and licences for use of Crown Reserves may require in principle consent of the Minister administering the Crown Lands Act prior to any agreement being executed.

6.11 Provision of Information

Lessees and licensees of Council public land and facilities public land and buildings will be required to provide Council with their annual report including financials. Information provision requirements will be detailed in the agreement. Council will provide guidance and advice on the collection of this information.

6.12 Compliance

Lessees and licensees of Council Public land and facilities are expected to comply with the terms of the lease/licence. If a lessee/licensee breaches an agreement, Council officers may serve a Notice of Breach of Agreement requiring rectification of the breach or payment of compensation of the breach.

If a lessee/licensee does not comply with a Notice to remedy a breach or to pay compensation of if the lessee/licensee continues to commit breaches of the agreement, the agreement can be terminated. Council officers are to make a report to the General Manager to obtain approval before a lease/licence is terminated due to the lessee's default.

6.13 Costs for preparation of documents

The cost of complying with statutory requirements for advertising of the lease or licence is to be met by the applicant as per Council's annual fees and charges.

All new agreements and those requiring renewal will attract a document preparation fee as per Council's fees and charges.

Council has the discretion to engage a legal representative to prepare the required documentation. Accordingly, the lessee/licensee shall be responsible for the payment of the 'reasonable' costs of Council or its legal representative in relation to the preparation of the lease/licence. Prior to engaging legal representation, a quote shall be obtained and provided to the proposed lessee/licensee.



Attachment 1 – Matrix, Criteria for Determining Level of Rental Subsidy for Leases and Licenses for Not for Profit Organisations

	Criteria	Each answer worth 4 points	Each answer worth 3 points	Each answer worth 2 points	Each answer worth 1 point
1	Organisational Status & Structure	The organisation is locally based, stand alone and not-for-profit. It has a voluntary management committee, comprised mainly of local area representatives	The organisation is locally based, has a regional focus, is stand alone and not-for-profit. It has a voluntary management committee, comprised partly of local area representative	The organisation is a locally based service, outlet or project that is part of a larger not-for-profit organisation, it has a voluntary advisory committee, comprised partly of local area representatives	The organisation is a locally based service, outlet or project that is part of a larger not-for-profit organisation. There is limited or no local area representation on the advisory committee or similar
2	Capacity to undertake range of Administrative and Management responsibilities	Dependant on assistance from volunteers for all administrative and management functions	Paid staff undertakes some of the administrative and management functions and volunteers assist with the other tasks	Staff undertake majority of administrative and management functions with additional assistance provided by umbrella organisation.	Umbrella organisation carries out majority of administrative and management functions
3	Extent of Service provided by Organisation	The broader community is a beneficiary of services established by the organisation	Service is significantly used by number of specific sections of the local community	While the organisation provides a direct service to only a small number in the local community, it forms a part of a larger service provision	Service is only used by a small number of the local community
4	Extent of Accessibility of facility to Community	Facilities are accessible to many in the local community (managed by Council)	Facilities are generally accessible to the local community (managed by Council)	Facilities have limited accessibility to others in the local community (any fees charged for use comes to Council)	Facilities not accessible to others in the local community or limited access with funds (if charged) going to lessee/licensee



	Criteria	Each answer worth 4 points	Each answer worth 3 points	Each answer worth 2 points	Each answer worth 1 point
5	Number / type of Service Providers	A unique service (only one of a kind)	One of a number of providers of a community service	One of a number of providers meeting a less critical community need (in terms of Council identified targets) or meeting an identified recreational need	Provider meets social or recreational needs only
6	Social and Community benefit	Service is unique and specific and meets high level of need, or service meets identified social / community needs, with most-service users from low socio-economic or disadvantaged backgrounds	Service meets identified social / community needs, with service users from range of socio-economic backgrounds	Service meets a broad social / community need	Service is valued by community but it is not focused on meeting an identified social / community need
7	Ability to Charge Fees and Raise Income	Limited or no ability to raise revenue	Some ability to raise revenue and charge fees which may be varied to reflect ability of clients to pay	Has ability to charge fees and raise revenue	Operate on profit basis
8	Access to other sources of funding	No access to other sources of funding	Limited access to other sources of funding (no more than 5% total)	Access to other sources of funding – Federal, State and/or Local funding which provides between 5-30% of total funding	Access to other sources of funding – Federal, State and /or Local funding which provides more than 30% funding



	Criteria	Each answer worth 4 points	Each answer worth 3 points	Each answer worth 2 points	Each answer worth 1 point
9	Do they provide direct competition to commercial ventures?	No. Main activity is not a commercial activity.	While main business is not a commercial activity, some aspects of the business are in direct competition with other organisations or businesses.	While they are in direct competition with commercial providers they provide added or differentiated service to users	In direct competition with commercial providers
10	Does their service impact on Council's need to provide similar service as per the current Delivery Program/ Operation Plan?	Without this service provision Council would be required to provide additional service	Lack of service would have some impact on Council's provision	Service is not core responsibility of local government but could be provided	Service is not responsibility of local government
11	Structural	Assumes full responsibility for long term maintenance (structural integrity) of building	Makes some contribution to long term maintenance (structural integrity) of building	Makes minimal contribution to long term maintenance (structural integrity) of building	Council responsible for long term maintenance (structural integrity) of building
12	Reactive & ongoing maintenance	Takes responsibility for internal & external reactive maintenance as detailed in the agreement including full cleaning of the facility	Takes responsibility for almost all the internal & external reactive maintenance as detailed in the agreement including majority of the cleaning of the facility	Takes responsibility for some of the internal & external reactive maintenance as detailed in the agreement including minor cleaning of the facility	Does not take responsibility for internal & external reactive maintenance including no cleaning of the facility



Calculating the Subsidy

Category	Category A	Category B	Category C	Category D
Points of Range	37-48 Points	25-36 Points	13-24 Points	12 Points
Range of Subsidy	77-100% Subsidy	52-76% Subsidy	27-51% Subsidy	No subsidy

The level of subsidy is based on the number of points. Subsidy will be based on the following equation:

Market Rental = assessed per square metre value x actual square metres of the building

$$\frac{\text{Score}}{48} \times 100\% = \% \text{ Subsidy}$$

Assessed rental = Market Rental X % Subsidy