

Leasing and Licensing of Council Owned Facilities and Managed Land

Policy Owner: Executive Manager Technology and Corporate Services	
Date Last Adopted: 28 May 2024	Review Date: 28 May 2027

1. Policy Statement/Objective(s)

Shellharbour City Council is committed to providing a clear, consistent and equitable approach to the leasing, licensing and management of Council owned facilities and land. Council provides a wide range of community facilities which help meet the diverse needs of its residents. It also owns, manages and leases land and facilities to provide these community facilities, and serve a commercial return.

The objectives of this policy are to:

- a) Set out the way community facilities, commercial facilities, land and other properties may be leased and licenced by individuals, organisations and businesses.
- b) Ensure equity and fairness into the decision-making process including maximising the use, value and utilisation of facilities.

Council recognises that some existing leases and licences of community land and Crown Land, notably community groups, have strong historical and/or social ties to the facilities they utilise. In some cases, they have contributed cash or in kind to the development of these facilities. In considering new or continued tenure of such facilities Council will take these factors into account, however the final decision will be at Council's discretion.

2. Scope

This policy applies to:

- a) Leases and Licences of community facilities and/or land
- b) Leases and Licences of commercial facilities and/or land
- c) Leases under the *Roads Act 1993* (NSW);

This Policy does not apply to:

- a) Telecommunication Facilities – (refer to Telecommunications on Council Land Policy).
- b) Outdoor dining (See Council's Schedule of fees and charges for this type of agreement).
- c) Licences for occasional or short-term use or non-exclusive use such as events over Council Land, Access over Council Land, Fitness Permits and Filming.
- d) Council Public Pools

e) Shellharbour City Stadium

3. References

Local Government Act 1993 (NSW)
Local Government (General) Regulation 2021 (NSW)
Crown Lands Management Act 2016 (NSW)
Retail Lease Act 1994 (NSW)
Conveyancing Act 1919 (NSW)
Practice Note No 1 (May 2020 – Public Land Management ISSN 1320-6788 – Department of Local Government)
Native Title Act 1993 (Cth)
Roads Act 1993 (NSW)
Open Space and Recreation Strategy
Property Strategy 2020 – 2030
Community Strategic Plan – 2023 – 2033
Valuation Policy

4. External/Internal Consultations

Legal Advisors

5. Definitions

Community Land	Land classified under the <i>Local Government Act 1993</i> (NSW) and Land under the <i>Crown Land Management Act 2016</i> (Cth). It reflects the importance of the land to the community because of its use or special features.
Crown Land	Land that is vested in the Crown.
Lease	A legal document that grants an occupant the exclusive right to use land/property and/or buildings for specified purpose and term.
Agreement to Lease	A legally binding agreement where a lessor and lessee agree to enter into a lease at a future point in time, subject to certain conditions being met. These conditions are typically works being done and/or approvals being obtained. The lessor is required to grant, and the lessee is required to accept, the lease subject to those conditions being met. There may also be rights for a party to discontinue with the agreement in certain circumstances (e.g. if an approval is not obtained). Lease details (e.g. term, commencing date, rent) are specified and a copy of the proposed lease is attached. Being a formal document, this gives the parties more certainty than a Heads of Agreement.
Assignment of Lease	Transferring the lease to another entity including all the rights and obligations.
Heads of Agreement	A document that is used pre-contractual negotiations that provides a framework of the proposed terms of an agreement between the parties.

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Leases of land	The <i>Roads Act 1993</i> (NSW) empowers a road authority (Council) to lease the airspace above or the subsoil below a public road. It also empowers a road authority in certain circumstances to lease the land comprising a public road (other than a Crown Road).
Licence	A legally binding document that grants non-exclusive right to use land and/or buildings for specified purpose and term.
Operational Land	Operational Land as classified under the <i>Local Government Act NSW 1993</i> (NSW). Operational land has no special restrictions other than those that may apply to any piece of land. Operational land is used for Council's administrative and works functions.
Plan of Management	Legislative requirements for Community Land under Section 36 of <i>Local Government Act 1993</i> (NSW) which identifies the purpose and permitted use of the land.
Not-funded, not for profit	A defined body with a legal entity that is incorporated under the <i>Corporations (New South Wales) Act 1990</i> and/or registered under the <i>Charitable Fundraising Act 1991</i> (NSW). The Charity is Not Funded, Not for Profit and charitable purposes are for public benefit.

6. Variation and Review

Council reserves the right to review, vary or revoke this policy at any time.

Review History

Date Policy first adopted – version 1 – Title – Community Centres and Halls Management Policy	July 2011
Date amendment adopted – version 2	17 November 2015
Date amendment adopted – version 3	23 October 2020
Date amended	July 2023
Date adopted – version 5	28 May 2024

7. Policy

7.1 Operational Land

Operational Land has no special restrictions and is owned in freehold pursuant to sections 25 and 26 of the *Local Government Act 1993* (NSW).

Council may grant a Lease or Licence over Operational Land pursuant to the requirements of the *Local Government Act 1993* (NSW).

7.2 Community Land

Leasing or licensing of Community Land is restricted by the *Local Government Act 1993* (NSW) (the Act). 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 not-for-profit organisation.

Where a Lease or Licence proposed exceeds 21 years, Council will require an application to the Minister be made.

7.3 Crown Land

Leases and Licences for Crown Land which are managed by Council are to be prepared in accordance with the *Crown Land Management Act 2016* (NSW) and its Regulations.

All leases or licence are to be issued by Council as Trust Manager of the Reserve Trust.

7.4 Public Exhibition, Submissions/Objections

Council may deal with Operational Land in its discretion and no public exhibition is required to be undertaken except where required by legislation or another Council Policy.

If Council proposes to grant a Lease, Licence or other estate in respect of Community Land exceeding 5 years the proposal must be notified and exhibited in the manner prescribed by section 47 of the *Local Government Act 1993* (NSW).

8. General lease and licence provisions

8.1 Lease and Licence Terms

- a) Each Lease will include Council’s Standard Conditions, varied as required depending upon the commercial terms. If the nature of the transaction requires a different base document, this will be notified to the prospective lessee.
- b) Leases will generally be considered up to a maximum term of 20 years, however Council at its discretion can grant Leases for a longer term. Generally, Leases of part of land will not be granted for more than 5 years.
- c) When determining the required legal documentation for a Lease, Council will take into consideration the existing and proposed use of the land or building. **Table 1** provides an overview of usual leasing arrangements.

Table 1.

	Heads of Agreement	Agreement to Lease	Lease
Vacant Land / New construction	✓	✓	✓
Existing Building	✓		✓

8.2 Licence Agreements

- a) Non-exclusive Licence agreements may be considered by Council, provided that the proposal aligns with the objectives of this Policy.

- b) Council will typically consider a Licence agreement for a term not exceeding 5 years, however Council at its discretion, can grant a Licence for a longer term.

8.3 Rent, Fees and GST

Ordinarily, rental amounts will be adjusted annually at least in line with the Consumer Price Index (CPI) and reviewed to market every 5 years of the Lease including any option.

The lessee or licensee must reimburse Council for all legal costs associated with the preparation, negotiation, execution and registration of the legal documents except where prohibited by legislation.

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.

8.4 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 for by Not-funded, Not for Profit registered groups only.

Market rental valuations may be obtained for all Council's Public land and buildings, by an independent qualified valuer who is an endorsed member of Council's valuers panel appointed by Council officers. The market rental value report acts as a guide is for the amount of annual rent negotiated.

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 Council officers guided by the rental valuation report.

8.5 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, an application for subsidy of the rental is to be applied for. In such cases, these groups must be registered with the Australian Charities and Not-For-Profits Commission and encouraged to apply for a rental subsidy, which will be assessed in accordance with Council's Fees and Charges.

8.3 Security Guarantee

The agreement will specify the type of guarantee required to protect Council's interests and ensure contractual compliance. This may take form as follows:

- a) Bank Guarantee or security deposit to a sum determined by Council; and/or
- b) Personal Guarantees.

8.4 Outgoings

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

Type of Agreement	Lessee/Licensee
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	Contribution of Outgoings
Lease	100%
Licence	To be determined case by case or by way of comparable footprint of the facility

All statutory outgoings such as rates and charges for water access and usage, sewerage and drainage (where appropriate), waste management, electricity, and telephone shall be the responsibility of the lessee.

8.5 Maintenance

The Lease or Licence will outline the maintenance responsibilities of the parties. The Lease or Licence will specify the obligations, scope and standards for maintenance activities to be undertaken by each party.

8.6 Subletting

Subletting will not be permitted without prior written consent from Council and will be subject to all requirements stated in the Lease or Licence being satisfactorily met.

Subletting arrangements may result in an ongoing sublease fee payable to Council.

Subletting for a commercial or government entity purpose for Category C will trigger a market rent review. Council will not consent to subletting for Category A or B.

8.7 Assignment or Transfer of Lease

Assignment or transfer of a Lease or Licence will not be permitted without prior written consent from Council and will be subject to all requirements stated in the Lease or Licence, and legislation where applicable, being satisfactorily met.

Council may conduct due diligence checks on the proposed assignee or transferee to assess their suitability. This may include financial viability checks, ASIC search and other relevant factors to ensure the prospective lessee or licensee meets the requirements to fulfill the obligations under the Lease or Licence.

8.8 Renewal and Expired Agreements including timeframes

The lessee or licensee must provide written notification to Council by no later than six months prior to the Lease or Licence expiry date, outlining their intent to enter to take up an option to renew (if applicable) or whether the lessee or licensee would like to hold over or renew the Lease or Licence.

Council may, during the period of 6-12 months prior to the expiration of the Lease or Licence, engage in discussions with the lessee or licensee regarding any potential considerations with new agreements.

Council reserves the right, at its discretion, subject to any option to renew contained in a Lease or Licence, to decide whether or not to extend or renew a Lease or Licence.

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

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.

8.9 Approval and Execution of Leases and Licences

The Chief Executive Officer (CEO) has the delegation of negotiating, signing and executing:

- a) Residential Leases for a term not exceeding 12 months;
- b) Leases and Licences with a maximum rental not exceeding \$200,000 (ex GST) and a term not exceeding 5 years over Community Land;
- c) Leases and Licences with a maximum rental not exceeding \$200,000 (ex GST) and a term not exceeding 10 years over Operational Land;
- d) Leases and Licences of Airspace above or below land the surface of any Council Public Road for a term not exceeding 5 years;
- e) Leases under Part 10, Division 2 of the *Roads Act 1993* (NSW); and
- f) Short term licences under section 2.20 of the *Crown Land Management Act 2016* (NSW).

All new Leases and Licences will be reported to Council as an item for information.

Any agreement outside the CEO delegations will be reported to Council for formal resolution.

9. Related Forms/Documents

There are a range of legislative requirements relating to the management and use of council-owned facilities in NSW. These include requirements under the *Local Government Act 1993* (NSW) about the leasing and licensing of facilities.

Under the *Local Government Act 1993* (NSW), Council's land is categorised as either Operational or Community Land. Community Land needs to be managed according to special requirements in the *Local Government Act 1993* (NSW) and *Crown Land Management Act 2016* (NSW).

- Application to Lease or Licence a Council Facility
- Application to Lease or Licence Council Land

Note: Related forms can be located Online under "Forms"

10. Attachments

Nil

Policy Authorised by:

Name: Council Resolution 75

Date: 28 May 2024

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