

Occupation of Council Owned or Managed Land

Adoption Date:	21/12/2009
Amendment Date:	26/03/2013, 15/09/2015, 20/12/2016, 28/01/2020, 20/09/2022, 16/12/2025
Minute Number:	MIN09.1798, MIN13.301, MIN15.597, MIN16.1011, MIN20.65, MIN22.631, MIN25.649
Next Review Date:	29/07/2029
Related Legislation:	See section 5
Associated Policies/Documents:	See section 5
Directorate:	City Services
Responsible Owner:	Property Services Manager
Record Number:	POL25/49

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1. Policy Purpose

The purpose of this policy is to provide clear requirements to enable the equitable management for the use and occupation of Council owned or managed land. Council is required to observe the guiding principles contained within Section 8A (1) of the Local Government Act 1993 and for this policy include:

- carrying out functions in a way which provides the best possible value for residents and ratepayers; and
- manage lands and other assets so that current and future local community needs can be met in an affordable way.

2. Objectives

2.1. Policy Statement

The objectives of this policy are;

- ensure Council’s assets are utilised, meet community expectations and strategic asset management outcomes.
- ensure all statutory requirements are observed in respect of the management of Council’s property portfolio.
- ensure that the processes adopted in the management of Council’s property portfolio are transparent and equitable.

This policy does not apply to:

- the use and occupation of public places identified in Shoalhaven City Council Local Approvals Policy.
- licences for occasional or short-term non-exclusive use and the occupation of public places and generally as prescribed by clause 116 of the *Local Government Regulation 2021*, such as but not limited to events, access, and filming.
- facilities managed by s355 Committees.

3. Definitions

Term	Meaning
Agreement to Lease	A legally binding agreement where a lessor and lessee agree to enter into a lease, subject to pre-conditions being met such as completion of physical works or fit-out, and/or approvals being obtained.
Community Groups	Organisations that operate as a not-for-profit entity for community benefit and need, whether for sporting purposes, local service, interest groups and conservation groups, and may include activities for charitable purposes
Community Land	Land owned or managed by Council and classified “Community” under the <i>Local Government Act 1993</i>

Expression of Interest	The open process conducted to seek interest in the potential use or occupation of a public place under lease or license from Council
Gross Rent	The assessed or agreed rent plus other operating expenses and outgoings such as property taxes and building insurance
Lease	A legally binding document granting exclusive rights to use or occupy land or buildings for an agreed term and fee
Licence	A legally binding document granting non-exclusive rights to use or occupy land or buildings for an agreed term and fee
Market Rent	Means the rent paid for leasing or licensing a facility on the private market as determined by an independent valuer
Market Rent Appraisal	Means an estimate of Market Rent based on an assessment of comparable properties in the current market
Market Valuation	Means a valuation of Market Rent provided by an appropriately qualified and experienced professional independent to Council
Net Rent	The assessed or agreed rent as determined by market rent appraisal or valuation
Operational Land	Land owned or managed by Council and classified "Operational" under the <i>Local Government Act 1993</i>
Operating Cost Contribution	An estimated amount for utilities and services charges associated with occupation of a property
Plan of Management	An approved document by resolution of the Council made under the requirements of section 36 of the <i>Local Government Act 1993</i>
Public Place	Includes a public reserve, public road and crown reserve and as otherwise defined in the <i>Local Government Act 1993</i>
Public Road	A road dedicated by plan of subdivision, gazette notice or under the <i>Roads Act 1993</i> that the public are entitled to use.
Temporary Licence	A legally binding document granting non-exclusive rights to use or occupy land or buildings for a term that does not exceed 12 months, also known as short-term licence

Tender	The process described by section 55 of the <i>Local Government Act 1993</i> and Part 7 of the <i>Local Government Regulation 2021</i> for use or occupation of a public place under lease or licence from Council
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4. Roles and responsibilities

4.1. Provisions

4.1.1 Grant of Leases and Licences - Public Places

Council may grant a lease or licence on land that is classified as Operational land with no specific restrictions or requirements imposed under the *Local Government Act 1993*.

Leases and licences can be considered on land classified as Community land under section 46 the *Local Government Act 1993* and the *Local Government Regulation 2021*. Proposed use/occupation of Community land under lease or licence has to be consistent with the objectives of the category of the land, be a prescribed use under the Act/Regulation, and be expressly authorised by the corresponding plan of management.

Leases and licences on Crown land managed by Council are considered under the *Crown Land Management Act 2016* and *Crown Land Management Regulation 2018*. Council is responsible for the issue of a lease or licence as the Crown Land Manager. Leases on Crown land must be consistent with the reserve purpose as well as the objectives of the category of the land and be expressly authorised by the corresponding plan of management.

Temporary (short-term) licences can be considered on Council managed Crown land under section 2.20 of the *Crown Land Management Act 2016* and clause 31 of the *Crown Land Management Regulation 2021*. Until a new Crown land plan of management is adopted, only short-term licences can be considered by Council.

Council can issue leases and licences under the *Roads Act 1993* including lease of unused sections of public road reserve and lease of air space (above or below) the road surface. Market valuation advice is used to determine appropriate annual rental or lease consideration fee.

Application for renewal of Lease or Licence is the responsibility of the lessee/licensee through submission of a "Proposal to Occupy Council Property" and not later than six months from lease/licence expiration. Council may at its discretion decide whether or not to renew a lease or licence and instead consider the merits of undertaking an Expression of Interest process or Council's needs form an organisational perspective, or broader community needs and multi-use of the facility/property.

4.1.2 Agreement to Lease

Council will require an Agreement to Lease in situations where there are works to be carried out in preparation of lease commencement, or where other approvals are required to be obtained for the use of the property.

4.1.3 Lease & Licence Advertising

Prior to the grant of a lease, licence, or other estate in respect of Community land, advertising/notification is required under section 47 of the *Local Government Act 1993*. A lease or licence proposal exceeding five years and subject to an objection following statutory advertising can only be granted with the Minister's consent.

Proposed leases of unused public road reserve are required to be advertised under the *Roads Act 1993*.

To the extent of any inconsistency with a prevailing policy of Council requiring advertising of the proposed lease or licence, the legislation will prevail to the extent of any inconsistency.

Advertising exclusions:

- Lease or licence on Operational land (unless specific policy of Council is in place)
- Temporary (short-term) licences under the *Crown Land Management Act 2016*
- Short-term (casual use) licences on Council owned Community land by clause 117 *Local Government Regulation 2021*
- Leases and licences on Crown land managed by Council identified under clause 70 of the *Crown Land Management Regulation 2018* (until corresponding new Crown land plan of management adopted)

Lease or licence advertising is separate to a public Expression of Interest (EOI) or tender process. An EOI is undertaken for potential use or occupation of land to prospective parties under future lease or licence arrangement with advertising of a lease/licence taking place after the EOI/tender outcome.

4.1.4 Lease & Licence Terms

Maximum lease and licence terms are prescribed by the respective Acts. Leases on Community land exceeding 21 years (up to 30 years) require Minister's approval. Council will generally consider the grant of a lease or licence for a term of up to five years, to implement property/asset strategies. At its discretion, Council can consider longer-term agreements where exceptional circumstances are demonstrated (e.g., a substantial upgrade to the asset is proposed). Longer term agreements will include provision for additional asset maintenance responsibilities for the lessee.

Temporary (short-term) licences are issued for up to 12 months.

During the pre-plan of management period, lease terms on Crown land are prescribed under clause 70 of the *Crown Land Management Regulation 2018*.

4.1.5 Assignment/Transfer/Subletting

A lease or licence will only be considered for transfer to another party after Council has undertaken appropriate due diligence on the proposed assignee such as financial and Australian Securities and Investment Commission (ASIC) checks, and assessment of prospective lessee/licensee being able to meet prevailing lease requirements. Council must provide written consent for any sub-lease or transfer.

Subletting arrangements will be accompanied by appropriate market rent review and the submission of annual financial records to Council. Sub-lease fee payable to Council will be a minimum 10% of the sub-lease fee/rental up to 20% where the uses being conducted through sub-letting have no direct community benefit.

4.1.6 Rent & Fees

Market Rent Valuation

All new/renewed leases and licences will be subject to a market valuation by independent valuer. Exceptions include:

- prevailing leases and licences:
 - i. where annual rental was assessed by market valuation method as part of current five-year term and is currently less than \$1,500 p.a. – a market rent appraisal can be undertaken to establish new rent.
 - ii. peppercorn rent arrangements or where previously based on statutory minimum rent – a

market rent appraisal in the first instance, and if the appraisal indicates new rental upward of \$1,500 p.a. – a market valuation to be undertaken to determine new rental for lease negotiations.

- telecommunications licences - based on Council’s Fees & Charges in lieu of market valuation or market rent appraisal.

Rent advice is generally current for a 12-month period subject to valuation report disclaimer. The assessed market valuation rental acts as a guide for the rental negotiation outcome, notwithstanding that some lessees/licensees have capacity for assessed market value rent and Council’s expectation is reasonably a market value outcome.

Rental Assessment Framework & Rental Subsidy

Council uses a Rent Assessment Framework (RAF) to determine rental subsidy to eligible groups/organisations. Prospective lessees/licensees are required to complete a “Proposal to Occupy Council Property” for potential subsidy and the adjusted amount becomes the initial rent offer.

The assessed rental subsidy under the RAF may, in circumstances, be negotiated for the purpose of achieving rental outcome and the Chief Executive Officer or Delegate has delegation to approve negotiated rent variations under 4.1.14.

The Rent Assessment Framework (RAF) subsidies are shown on Table 1.

Table 1 – Rental Subsidies under Rental Assessment Framework (RAF)

Category	Rent Subsidy
Local Community Service Group	85%
Local Community Interest Group	75%
Local Community Sporting Club	70%
Local Community Conservation Group	90%
Small to Medium not-for-profit provider of community services	50%
Large not-for-profit provider of community services	10%
Government entity providing community services	5%
Commercial business	0%
Residential	0%
Surf Lifesaving Clubs & Emergency Services organisations	statutory minimum rent

Rent Review

Rent will be adjusted annually by CPI increase (All Groups Sydney). Council can prescribe a fixed percentage annual rent increase through individual negotiation in certain circumstances. Market rent reviews will be undertaken every five years of a lease/licence with options. Market rent review amount is not to be less than the prevailing rent.

Statutory Minimum Rent

Temporary (short-term) licences will be considered for statutory minimum rent where prescribed by legislation or Council's Fees & Charges. Statutory minimum rent is to be applied to those lease and licence types in Table 1.

The Chief Executive Officer has delegation to approve the application of statutory minimum rent otherwise where appropriate, including consideration for not-for-profit community organisations that exist solely to provide services and support for disadvantaged members of the community and appropriate evidence is provided to Council to substantiate this purpose.

In situations where statutory minimum rent is applied, any area /use of the property for commercial/revenue gain will be separately assessed for payment of appropriate rental in accordance with the method expressed in 4.1.5.

4.1.7 Outgoings (Operating Costs)

The lease or licence will document the responsibilities for outgoings associated with the use and occupation of the property. The lessee/licensee is responsible for all utilities/services usage charges while they occupy the property, such as electricity and gas. Outgoings (operating costs) separately charged to the lessee/licensee may include;

- land tax and rates (Operational land)
- water and sewer usage/charges
- trade waste charges
- garbage charges
- fire safety and compliance charges

Council and the lessee may negotiate an Operating Cost Contribution where only estimates for utility and services usage/charges are available (i.e.; not separately metered).

Where a licence is proposed, it is reasonable to assess outgoings payable in relation to the area occupied including proportionate costs for shared use parts of the property.

Outgoings can be included with a gross annual rental amount, as agreed by the parties. A gross rental will generally be used when multiple occupants exist in a building/property.

4.1.8 Cost Recovery

In the consideration of proposed lease and licence agreements, no unreasonable burden on Council's general revenue shall result. Council will seek to achieve at a minimum, cost neutrality from the use/occupation of its properties, i.e.; the tenancy is to be at no cost to Council. The following costs incurred by Council in the preparation of a lease or licence are to be met by the lessee/licensee;

- external legal fees in preparing lease/licence documentation
- statutory lease advertising costs
- market rent valuation costs (when required by legislation)
- lease registration costs including survey fees associated with LRS NSW registration requirements for the lease or licence
- native title assessment fee (Council managed Crown land)
- lease/licence application fee (Council Fees & Charges)

Council can require the payment of costs incurred by Council prior to finalisation of the lease or licence and may defer ongoing progress of an individual lease/licence until costs are recovered.

4.1.9 Restricted Asset Account

For hard court facilities/constructed playing surfaces under an agreement (e.g., tennis, hockey), 100% of the income received from an agreement will be set aside in a sinking fund and applied towards capital upgrades for that facility. Leases/licences will be required to pay rent for occupation of non-court areas (as per 4.1.6) plus the contribution to court sinking fund for capital upgrades. The restricted asset account contribution is assessed as total cost of resurface/total asset life (years) including Council project management fees.

4.1.10 Maintenance

A Maintenance Schedule is attached to all leases/licences specifying the maintenance responsibilities of the respective parties.

4.1.11 Insurance

The lessee/licensee is responsible for Public Liability Insurance and contents insurance including the annual renewal of respective insurances for the term of the licence.

4.1.12 Lease & Licence Registration

Commercial and retail leases will be registered in accordance with the respective legislation where lease term exceeds three years. Registration may be specifically requested by the applicant for reduced lease terms.

Where a lease or licence exceeds five years, it is a requirement of Land Registry Services NSW (LRSNSW) to include a lease plan suitable for registration. Successive lease terms of five years are exempt from this requirement

4.1.13 Tenders & Expression of Interest

Leases and licences on Community land exceeding a 5-year term must be determined by tender except for not-for-profit organisations, including where the cumulative contract amount exceeds the prevailing tender threshold. Otherwise, Council may decide to use a tender process for any lease or licence.

Council may use an Expression of Interest (EOI) for the use/occupation or property for interested parties, community groups, and organisations to be afforded equal opportunity for a lease or licence ensuring transparency, fairness, and compliance with local government procurement, and for Council to achieve best value for money. Council will obtain independent valuation advice to determine fair and reasonable market rent for leases/licences arising from an EOI process. The following framework will apply for consideration to the use of an EOI.

Existing Lease/Licence

On Community land (expired agreements):

- a) where a reasonable assumption exists that more than one operator may have interest undertaking the land use/activity currently occurring, and Council considers there is potential commercial benefit and public interest by inviting other interested parties to seek a lease or licence agreement, Council may elect to conduct EOI/tender and;
- b) where a lessee has not achieved lease compliance (rental payment default, breach of lease conditions), Council may elect to conduct EOI/tender.

When an EOI is not undertaken and renewed lease is negotiated, a Proposal to Occupy Council Property is to be submitted to Council.

On Operational land (expired agreements):

- a) where Council considers it may be commercially disadvantaged by not undertaking an EOI/tender.

When an EOI is not undertaken and renewed lease is pursued, a Proposal to Occupy Council Property is to be submitted to Council.

New Lease/Licence

EOI or tender process to be undertaken (Community and Operational land).

4.1.14 Lease & Licence Approval

Chief Executive Officer (and Delegate) has delegation to negotiate and execute the following leases/licences:

- properties managed for Council by appointed external property service agency, including residential tenancy agreements
- on Community land – total lease rental is less than \$250,000 for the lease term, and otherwise if lease term exceeds five years
- on Community land - an objection has been submitted to Council with statutory advertising when lease term is greater than five years
- on Operational land – total lease rental is less than \$500,000 for the lease term, and otherwise if lease term exceeds 10 years
- negotiated rent outcomes where agreed annual rent amount differs from the fixed rental subsidy amount
- application of statutory minimum rent under section 4.1.6
- temporary (short-term) licences under s2.20 *Crown Land Management Act 2016*
- Assignment, Transfer, Variation of agreements and Sub-leases
- following tender/EOI under Council's Tender Evaluation Policy POL22/163, but excluding lease/licence of community land exceeding five-year term where lessee does not have status as not-for profit organisation
- telecommunications licences
- lease and licence of air space and leases under *Roads Act 1993*

All other situations require the resolution of Council.

4.1.15 Lease & Licence Execution

All leases and licences are to be executed within six months of the Council resolution.

Council can pursue alternate negotiations and opportunities with other parties if document execution is not effected within this time.

4.2. Implementation

City Services Directorate

5. Related Legislation, Policies or Procedures

Conveyancing Act 1919
Crown Land Management Act 2016 and Regulation 2018
Real Property Act 1900
Retail Leases Act 1994

Native Title Act 1993 (Commonwealth)
Residential Tenancies Act 2010
Aboriginal Land Rights Act 1983
Local Government Act 1993 and Regulation 2021
Roads Act 1993
Shoalhaven Local Environmental Plan 2014
Shoalhaven City Council Community Strategic Plan
Shoalhaven City Council Local Approvals Policy
Shoalhaven Council Tender Evaluation Policy (POL22/163)
Temporary Storage (Shipping) Container on Public Land (POL22/65)
Community Gardens on Council Managed Land (POL22/52)
Council Plans of Management

If there are any amendments to legislation that are contrary or inconsistent with this policy, then the amended legislation will prevail to the extent of the inconsistency.

6. Risk Assessment

Leasing and licensing of land owned and managed by Council has potential risks including financial, legal and reputational. Financial risks can be mitigated through the engagement of valuers to provide market based rental evidence. Legal service providers can be engaged for preparation of lease and licence documentation for execution. Reputational risk can be addressed through observance of due diligence in the assessment of new and renewed lease proposals, having regard to prevailing legislation and established processes and procedures.

7. Monitoring and Review

This policy statement will be reviewed a minimum of once every term of Council, or more frequently as required.

8. Ownership and Approval

8.1. Public Policy

Responsibility	Responsible Owner
Directorate	City Services - Buildings & Property Services
Endorsement	Director City Services
Approval/Adoption	Council