



Ku-ring-gai Council

Draft Policy

Commercial Leasing Policy 2019

Version Number 2

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Related Document Information, Standards & References

Related Legislation:	<p>Council's property activities will be managed within the legislative parameters of the:</p> <p>Local Government Act 1993; Valuation of Land Act 1916; Conveyancing Act, 1919; Environmental Planning and Assessment Act 1979; Roads Act 1993; Crown Land Management Act 2016; Native Title Act 1993; Environment Protection and Biodiversity Conservation Act, 1999; Real Property Act 1919; Retail Leases Act 1994; Regulations under each of the above Acts; any other legislation applicable to the Policy.</p>
Related Documents - Procedures, Guidelines, Forms, WHS Modules/PCD's, Risk Assessments, Work Method Statements, etc	<p>Ku-ring-gai Local Environment Plan [Local Centres] 2012 Ku-ring-gai Local Environmental Plan 2015 Ku-ring-gai Community Strategic Plan – Our Ku-ring-gai 2038 Ku-ring-gai Development Control Plan Ku-ring-gai Local Centres Development Control Plan Generic and specific Plans of Management for Community Classified Land</p>

Version History

Version Number	Version Start Date	Version End Date	Author	Details and Comments
1	10/06/2014	20/08/2019	Deborah Silva	First version
2	20/08/2019		Claire Khalil	Changes include: <ul style="list-style-type: none">- Formatting updates- Inclusion of new Crown Land Management Act 2016 provisions and Native Title Act 1993 requirements- Capacity to impose sales based rent for retail leases and relevant commercial leases/licences

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Policy

1. Introduction

Council owns land across the local government area. It also manages certain Crown Land on behalf of the NSW Government. A significant portion of this land is used under formal arrangement by other people, groups or companies. Examples of these types of uses include:

- Commercial, retail, or residential use;
- Community or recreation groups that exclusively occupy a premises;
- Community or recreation groups that seasonally occupy a premises;
- Groups that have regular non-exclusive access to Council facilities;
- Groups or people that use a facility on an irregular or one off basis.

This Policy applies to agreements relating to exclusive occupation of a Council facility or land for commercial and retail uses only. Such occupation will typically be in the form of a lease agreement, but may also include a licence.

This Policy does not apply to leases and licences for residential or community use, seasonal tenancies or ground allocations for Council's sporting ovals.

2. Purpose

The purposes of this Policy are to:

- 2.1 Set out the framework, responsibilities and processes for Council and officers to account for, and manage the leasing and licensing of Council and Crown Land that is of a commercial based nature and is expected to return a market rent or fee for the commercial rights conferred.
- 2.2 Identify, manage and mitigate the risks associated with the leasing and licensing of Council and Crown Land.

3. Objectives

The objectives of this Policy are to provide Council with a framework for decision-making which adopts the following principles:

- a) probity;
- b) statutory compliance;
- c) commercial maximisation, flexibility and confidentiality;
- d) transparency of process; and
- e) achievement of specific strategic outcomes of Council and the community.

4. Legislative Requirements

Legislation and other instruments relevant to Council's commercial leasing of land under this Policy are listed under Related Legislation and Documents at the beginning of the policy. Other legislation or instruments may also be relevant depending on the particular circumstances.

- 4.1 The Local Government Act, 1993 and the Crown Land Management Act 2016 vests authority in Council to grant leases, licences and other interests over Council land and Crown Land managed by Council as a Crown Land Manager.
- 4.2 In accordance with Council's Purchasing Policy, Land activities are excluded from the provisions of the Purchasing Policy.
- 4.3 In respect of the granting of leases, licences, permits and authorities over Crown Land where Council is a Crown Land Manager, an assessment of potential native title rights and interests must be carried out in accordance with the requirements of the Native Title Act 1994. Leases, licences, and other interests can only be granted after advice is obtained from Council's appointed Native Title Manager.
- 4.4 Leases and licences over community land and Crown Land may only be granted if a plan of management expressly authorises the lease or licence, its purpose is consistent with the core objectives for the land and is for a purpose permitted under section 46 of the Local Government Act 1993.

5. Fundamental Principles

All decisions and actions in relation to the leasing and licensing of land will have due regard to the following fundamental principles:

- **Best Value for Money** – achieving “best value” may include financial, social and environmental benefits;
- **Transparency** – processes must be open to scrutiny and provide full information and record the reasons behind decisions;
- **Accountability** – demonstrate the best use of public resources and the highest level of performance through appropriate record keeping and audit trails;
- **Impartiality** – address perceived or actual conflicts of interests.

6. Methods of Leasing and Licensing

- 6.1 Council's standard leasing process requires that vacant tenancies are advertised through an Expression of Interest (EOI)/tender or through a Real Estate Agent and that a competitive process determines the successful lessee.
- 6.2 Direct negotiation with existing tenants or where a lease has been re-assigned following the sale of a business is a standard leasing practice and may be entertained in Council's absolute discretion and subject to legislative requirements.
- 6.3 Commercially confidential discussions with prospective and/or existing tenants are a standard practice as part of the lease negotiation process.

7. Leases and Licences to new tenants

7.1 Irrespective of whether land is offered through a competitive process or direct negotiation, applicants for a new lease must provide the following information to Council when requested:

- a) A Business Case, outlining their financial capacity to successfully undertake the ongoing lease commitments;
- b) Details of relevant skills and experience in the business or operation proposed to be carried out on the Land;
- c) Evidence of capacity to satisfy the financial obligations of the lease (including rent, make-good, proposed capital works and maintenance) as well as information regarding the prospective lessee's compliance with previous leases (if applicable); and
- d) Any other information reasonably required by Council for the purpose of deciding whether or not to lease the premises or land to the prospective lessee.

7.2 It is the intention that these provisions satisfy Council that the proposed business endeavours are viable and have a reasonable prospect of success before entering into a lease or licence.

8. Lease and Licence Renewals to existing tenants

8.1 As is standard practice, Council is able to renegotiate with existing tenants without going to Expression of Interest/tender provided the term of tenure does not exceed 5 years. This helps reduce property vacancies and encourages tenants to invest in upgrading the property. This includes where a property has been re-assigned following the sale of a business.

8.2 Lease renewals are negotiated against a clear set of criteria including value for money, meeting or exceeding independent market rental expectations and lessees overall fit with Council's strategy. Lease renewals guidelines are as follows:

8.2.1 Council will generally not consider a retail lease renewal more than 12 months before the existing lease expiry date, unless the tenant is proposing a major refit of the premises or has established other compelling reasons in writing;

8.2.2 Commercial leases will be considered for renewal at any time within their lease term at Council's discretion;

8.2.3 There is no automatic right for any existing tenant to have their lease renewed;

8.2.4 In determining whether an existing tenant is to be offered a new lease, Council may consider the following criteria:

- a. The proposed use is in line with Council's strategic direction;
- b. The tenant has demonstrated proven financial capacity and business viability;
- c. The tenant has a proven record of compliance with all existing lease condition; including but not limited to meeting the financial obligations under the lease;
- d. The renewed lease will meet or exceed financial benchmarks including the deemed market rent;
- e. The tenant's level of commitment to a new tenancy fitout including financial and timeframe; and
- f. The impacts of the current or proposed use to any heritage building.

9. Leasing and Licensing Procedure

9.1 The leasing and/or licensing of Council or Crown Land requires a formal resolution of Council.

9.2 Rental for the leasing and/or licencing of Land is to be benchmarked to an independent valuation of land and take consideration of:

9.2.1 In some cases there will be justified basis for Council to consider rents below the valuation benchmark as incentives to guarantee the successful securing of a tenant and/or where a tenant is investing a substantial capital contribution towards and upgrade of the leased premises.

9.2.2 Any incentives should be determined and quantified within the decision of Council and referenced to the achievement of specific goals and objectives of Council.

9.3 Leasing and/or Licensing Process

The General Manager and/or their delegate may undertake preliminary enquiries and negotiations regarding a possible lease/licence for commercial purposes. The General Manager shall:

- a) be responsible for the conduct of all negotiations;
- b) have regard to an independent valuation obtained from a registered valuer;
- c) seek such other professional advice as is considered necessary in the circumstances;
- d) have regard to the Independent Commission Against Corruption publication *Direct Negotiations* so far as is appropriate in the circumstances; and
- e) report the outcome of all negotiations to the Council for final determination.

9.4 Council's process must include the following steps to ensure transparency, fairness and equity:

9.4.1 Formal consideration by Council of dealing with the matter and if required in accordance with Section 10A of the Act be dealt with in a closed meeting;

9.4.2 Formal report to Council and documented reasons and if supported delegation to the Mayor and General Manager to implement all matters necessary for the preparation, signing and sealing of contract documentation required; and

9.4.3 Public notification of a proposed lease/licence over community classified land including tenures granted over Crown Land.

9.5 Valuation Processes

A formal market valuation undertaken by a registered Valuer to establish the current market rental is required. The valuation instructions must clearly state the following:

- a) the purpose of the valuation being "market value", unless an alternative basis is considered more appropriate in the circumstances;
- b) that the valuation is to be marked confidential; and

- c) the valuation includes market commentary, details of rental evidence and adjustments, valuation rationale and methodology, and valuation range for negotiations.

9.6 Rent

Rents for commercial activities will be based on or reflect market rates. In certain instances, such as retail leases, the rent may also be structured to include a sales based component of gross revenue. Rents will be subject to:

- a) an annual adjustment to reflect positive movements in CPI;
- b) a regular rent review at a specified period(s) during the lease term, to ensure the lease provisions remain consistent with market rates; and
- c) to the extent permitted by law, a 'ratchet' clause providing that despite the methodology for the rent review, a reviewed market rent may not be less than the rent payable prior to the review.

9.7 Documentation

9.7.1 Council's solicitors will prepare all lease and licence documentation including:

- a) A 'Heads of Agreement' or an 'Agreement to Lease' will be prepared and agreed between lessor and lessee prior to entering into a formal Lease of Licence;
- b) Retail Leases shall be prepared in accordance with the Retail Leases Act 1994 and include appropriate disclosure information and certificates;

9.7.2 Leases and licences will comprise of contemporary commercial terms and conditions including but not limited to:

- a) recovery of outgoings;
- b) bank guarantees, cash bonds and/or personal guarantees;
- c) indemnities and insurances;
- d) maintenance & repair obligations;
- e) assignment and holdover provisions; and
- f) default, remedy and termination clauses.

9.7.3 Where required, leases will be registered on the Certificate of Title of the land subject to the lease agreement.

10. Confidentiality

In the majority of leases and licences the information contained in reports to Council may confer an advantage upon a person with whom Council is, or proposes, to be conducting business. On balance, it would be contrary to the public interest for Council to deal with such matter in an open session because release of the information could prejudice Council's ability to obtain the maximum return on the property.

Therefore, it is acknowledged that reports to Council on commercial leasing matters will be generally deemed confidential under Section 10A(2)(c) of the Local Government Act, 1993. This confidentiality may be lifted by Council resolution upon settlement, if considered to be in the public interest.

11. Departure from this Policy

Any provision of this policy may be varied to meet the needs of a particular matter, by resolution of Council. The reasons for change will be clearly articulated within the report submitted for consideration by Council in adopting such resolution and will only apply to such matter.

12. Definitions

Terms and abbreviations used in this Policy have the meanings set out in the Definitions section below.

Term / Abbreviation	Definition
Act	means the Local Government Act 1993 and any replacement Act.
Community Land	means land that is classified as community land under the Local Government Act 1993.
Crown Land	As is defined in Section 1.7 of the Crown Land Management Act 2016 and managed by Council as a Crown Land Manager
Land	is as defined in Section 21 of the Interpretation Act 1987. As a more specific reference for the purpose of this Policy, Land is defined as; Land as a physical entity including: <ol style="list-style-type: none"> 1. any building or structure on or improvement to Land; or 2. any stratum of land whether below or above ground; or 3. a strata lot pursuant to relevant strata subdivision legislation.
Lease	means an agreement granting exclusive use or occupation of property during a specified period in exchange for a specified rent.
Licence	means an agreement granting non- exclusive use or occupation of property during a specified period in exchange for a specified fee.
Plan of Management	means a plan of management adopted by a council under Division 2 of Part 2 of Chapter 6 and in force in relation to an area of public land.
Regulation	means the Local Government (General) Regulation 2005 and any replacement Regulation.