6.22.2 Management of Leases and Licences

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Introduction

This procedure outlines the key elements of Council’s management of leases and licences to provide Council with a framework to support the equitable, efficient and effective management of Council owned and managed properties. This procedure should be read in conjunction with Council's Use of Public Land (Local Approvals Policy).

Aims of the procedure

- To encourage optimal use of Council owned and managed land and facilities to cater for a wide range of community and sporting groups,
- To obtain a contribution from user groups for the costs of providing facilities,
- Determine the most appropriate occupancy arrangements for each facility,
- Fulfil the requirements of State Government and Council regulation and policies in relation to provision of facilities on Operational land, Community land, Crown Public Recreation Reserves and Open Space,
- Protect and enhance Council’s assets for the benefit of the Bega Valley Shire community and future generations,
- To assist in determining an adequate level of rental for Council owned and managed land and facilities,
- To ensure that Council maintains the highest level of transparency in the management of its properties, and

Council will use a range of management models for land and facilities under its ownership and care and/or control including direct Council management, community management, lease, non-exclusive licences and permits.

Principles

1. Where a group or organisation has regular use of a facility as supported by a legal agreement, it should contribute to the management and maintenance costs of the property.
2. Financial contributions from users of Council facilities should be used to assist with the costs involved in the management, maintenance and minor improvement of the facility or reserve.
3. The process by which a property is managed will be open, accountable and transparent, and will be undertaken in consultation with the community.
4. Council’s properties will be managed to maintain and enhance their flexibility and accessibility in order to meet the current and future needs of the community as identified in Council’s Community Strategic Plan.
5. All financial arrangements will be documented, transparent and in accordance with legislative requirements.

Overview

Council recognises that many groups have a strong historical affiliation with the facilities which they use, and have contributed in cash and kind to their development. Council supports the continued occupation of those facilities by those groups, but on a shared multi-use basis where it does not currently occur. When occupation has been established by informal arrangements, Council will require formal agreements be entered into which identify the responsibilities and rights of all interested parties.
Where a current lease, licence or other formal agreement exists, this will be honoured until its expiry. A review of future management options for the facility will be undertaken within the last 12 months of the agreement period. It will take into account existing usage rates and the potential for the facility to be used on a multi-user basis, in line with changing community needs and in consultation with the community.

The availability of exclusive use space in Council owned buildings is limited. However when space becomes available, Council may advertise any vacancies and these will be considered in accordance with the specified criteria that might include identified community needs.

Contributions of cash or in kind by user groups to a facility do not convey ownership or preferential access to that facility. It simply means that this group benefits from having a more suitable facility in a shorter timeframe than might otherwise have been provided by Council.

Council may enter into leases or licences which provide for exclusive access to a facility by a private individual or group based on its merits e.g. residential properties. Council will generally not consider leases providing for exclusive access to a facility by one particular group to the exclusion of the general public, particularly when a facility is located on Council managed Crown land reserved for Public Recreation purposes.

**Rental Fees**

For all Council owned and managed properties, a market rental shall be applicable. The market rental value is the amount of annual rent achieved if the accommodation had been let in a competitive market.

With regard to specific buildings (e.g. childcare or community centres), the market rental value should reflect the level of demand for that type of accommodation and the community’s needs.

Subject to a resolution of the Council and the consideration of factors such as identified community benefit, the applicable lease or licence rental may be rebated by an amount calculated using the method outlined in Schedule 1 of Council’s Rental Assessment and Rebate Procedure. Any difference between the current market rent and the rebated rent will be shown as a donation from the Council’s Property Rebate Fund.

For all leases and licences of Council owned and managed assets, Council seeks to recover either all or a proportion of the total costs of operating that facility including depreciation, maintenance, administration and improvements.

For agistment agreements, biosecurity precautions will need to be considered before agisting stock on Council owned and managed land. Rental will be determined by the amount of stock to be placed upon the land as per Council’s Fees and Charges Schedule at that time.

If Council rates and charges are applicable to the leased property, these charges will be the liability of the Lessee/Licensee.

All leases and licenses shall be subject to either an annual rental review or CPI increase (as released by the Australian Bureau of Statistics) applied to the rental amount, details of which will be detailed in the agreement.

All commercial or retail leases are to be reviewed at market value upon expiration of the agreement or at any other time during the term of the agreement as determined by both parties. GST is applicable to all leases and licences.

**Rental Rebate Considerations**

While the criteria that will be used to determine the level of subsidy may vary according to the type of facility or Council’s long term directions, they will generally include:-
• Assessment against the broad criteria detailed in Schedule 1 of the Rental Assessment and Rebates Procedure.

• Ability of the community organisation to generate income from their activities, including fees for services, hiring out of the facility, private sector sponsorship and other government grants and subsidies (financial statements will be requested).

• Can the lessee/licensee demonstrate that a reduced rent for an agreed period would have significant social, community and economic benefit?

• Would a rental rebate encourage a particular cultural/community activity to establish itself?

• The extent of the benefit of the rebate to members of the community – how many community members gain a benefit from the application of the rental rebate?

• Will application of the rebate address identified community needs?

• Competitive neutrality. Competitive neutrality issues may arise, for example where a private operator believes that a childcare facility that receives significant rebates from Council has an unfair advantage.

• Level of financial commitment by user to undertake maintenance and major upgrades.

• Depending on use, there may also be some specific criteria. For example, in determining the level of subsidy for childcare facilities, other factors that could be considered include the number of places, where the children live, level of government subsidies, fees charged, number of children with special needs catered for, qualifications of staff etc.

Payment of Outgoings

All lessees/licensees shall be responsible for the payment of all outgoings on the property; including (but not limited to) Council rates and charges (if applicable), land tax, water, electricity, gas, telephone, and any other operating costs associated with their respective activities.

Maintenance, Improvements and Presentation

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

• Unless otherwise determined, Council is responsible for the external structural integrity of facilities, except where a user group has a detrimental impact upon the external condition of the building. A user group however is responsible for maintaining the external building in its existing condition and may include painting, graffiti removal etc. The responsibilities will be detailed in the agreement.

• 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 and must obtain written consent from Council prior to improvements being carried out.

• In some instances, when a high level of rental rebate is provided, an organisation or group may take responsibility for the long term maintenance of the facility required to ensure sustainability. This may happen where a facility is used solely by one organisation and this will be documented in the agreement. Where applicable, Council will work with these groups to develop a long term Facility Management Plan in conjunction with its Infrastructure section.

• Council will seek to ensure that facilities are progressively updated to become physically accessible to all segments of the community and in accordance with the current Building Code of Australia.
• Unless otherwise determined, users of the facility should be responsible for the internal maintenance of the facility. Where more than one group uses a facility, contributions and responsibility for maintenance should be shared based on the floor space usage ratio.

• 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.

• Ownership of any such improvements will devolve to Council upon expiration of the lease/licence unless the lessee/licensee elects to remove the improvements and reinstates the property to its original condition.

**Indemnity & Insurance**

**Release**

The lessee/licensee unconditionally releases all claims, suits, demands, actions or proceedings (whether at law, in equity or arising under any statute) which the lessee/licensee has or may have against BVSC, its councillors, officers, employees or Agents (other than the lessee/licensee) arising out of or in connection with an act, default or omission of the lessee/licensee or any of its officers, employees or agents. The lessee/licensee agrees not to sue or make any claim or demand against the BVSC, its councillors, officers, employees or agents in respect of matters covered by this release.

**Indemnity**

The lessee/licensee indemnifies, holds harmless and defends BVSC, its Councillors, officers, employees or agents (other than the lessee/licensee) against loss (including legal costs and expenses) or liability reasonably incurred or sustained by any of the indemnified persons arising from a claim, suit, demand, action or proceeding by any person against any of the indemnified persons where the loss or liability arises out of or in connection with an act, default or omission of the lessee/licensee or any of its officers, employees or agents.

**Negligence of BVSC**

The release indemnity clauses above do not extend to a claim, suit, demand, action or proceeding where the claim, suit, demand, action or proceeding is based upon errors, negligent omissions negligence or work performed or advice given in a negligent manner by BVSC or any of its councillors, officers, employees or agents (not including the lessee/licensee).

The indemnity provided by the indemnity clause above is reduced proportionally to the extent that the negligence of BVSC, its councillors, officers, employees or agents (other than the lessee/licensee) as contemplated in this clause contributed to the loss or liability.

**Insurance**

The lessee/licensee must hold public liability insurance for the entire duration of the lease/licence to the value of $20,000,000 minimum.

Any claims excess or deductible payable under the terms and conditions of the insurance policy are entirely the responsibility of the lessee/licensee. The policy must be with approved insurers.

To be acceptable for the purposes of this agreement, an insurance policy must be underwritten by:

• an Australian registered insurance company, approved by the Australian Prudential Regulation Authority (APRA) to conduct general insurance business in Australia; or

• a Lloyds of London Underwriter.
General Requirements for Insurance Policies

The insurance policies must:

- include BVSC as an additional named insured, and;
- include a satisfactory "Principal's Indemnity" clause, and;
- include satisfactory "Cross Liability" and "Subrogation Waiver" clauses.

Evidence of Insurance

The Lessee/licensee must provide to Bega Valley Shire Council evidence of the insurances nominated whenever requested to do so. The evidence must be in a form acceptable to Council and should be as issued by the insurer (not an Insurance Broker or other intermediary).

Costs for preparation of documents

All new agreements and those requiring renewal will attract a document preparation fee (as per Council’s fees and charges schedule). Community organisations who can demonstrate identified community benefit will be exempt from this fee as the minimum annual rental fee payable will cover the cost of document preparation. The minimum annual rental amount (as prescribed by Crown Lands) will not attract any rebate and will be payable by the lessee/licensee.

Excluding commercial retail leases, the lessee/licensee shall be responsible for payment of the costs of Council or its Solicitors in relation to the preparation of the lease/licence and any costs relating to the renewal of such agreement under any option clause contained therein. Such costs shall include all work completed in addition to the initial preparation of the document should amendments be required or further negotiations necessitated.

Approval and Execution of Leases/Licences

All community organisations who wish to lease or licence Council owned or managed land or buildings will be required to provide a Certificate of Incorporation issued by the NSW Department of Fair Trading. All lease/licence documentation is only to be executed by authorised officers of the incorporation/organisation.

All new lease/licence agreements and those which relate to Council managed Crown Land will require formal Council resolution.

Any renewal or extension of an existing lease/licence can be executed under delegated authority by the Mayor and General Manager and will not require further Council resolution, unless the proposed lease term exceeds five years and is the subject of Council managed Crown Land.

Any new lease or licence must be executed by the lessee or licensee within 6 months of the Council resolution approving the lease or licence, or the matter is to be reported back to Council for further consideration.

Council managed Crown Land

Leases/licences for Crown Land managed by Council are to be prepared in accordance with the Crown Land Management Act 2016 (CLM Act) and Local Government Act 1993 (LG Act). The CLM Act enables Council as Crown land manager to enter into leases and licences under the LG Act once a compliant plan of management is in place or the land is classified as operational, whichever occurs first. Council cannot enter into agreements for use, as lessor or licensor, on devolved Crown reserves.

The leasing and licensing of Crown land ensures there is legal and suitable occupation of Crown land. Council as Crown land manager is required to ensure all monies received from the use of community land is directed...
to maintaining and sustaining long-term use and enjoyment of the reserve/s. The income generated from leasing and licencing is a primary form of funding for a Crown land manager. It allows a Crown land manager to cover long-term running costs (at a minimum) and invest over the long term for future generations to use and enjoy the Crown land in the community. Crown land managers must have lease and licence agreements in place with all users of Crown reserves held under management.

Prior to the adoption of a compliant plan of management over Crown land, Council is able to issue short-term licences up to one year for prescribed purposes under the CLM Act. Councils can also renew existing leases as long as the permitted use has not changed. Councils can grant new leases if the uses they permit are the same as those of leases over the land in force immediately prior to the commencement of the CLM Act.

Until Council adopts a compliant plan of management for Council managed Crown land, Council can:

- issue short-term licences for a range of prescribed purposes, such as holding sports and recreational activities, camping and events;
- renew existing leases over Crown land for a term not exceeding 21 years, including any option for the grant of a further term, if the renewal does not authorise any additional uses for the land;
- grant new leases over the Crown land for a term not exceeding 21 years (including any option for the grant of a further term) if:
  - there was a pre-existing lease in force over the land immediately before the repeal of the Crown Lands Act 1989 (NSW);
  - the new lease does not authorise any uses for the land that are additional to uses that were permitted under the previous lease.

A new lease or licence can be issued to any user to conduct activities on reserves managed by Council as Crown Land manager for extended periods of time. They can only be granted for a purpose consistent with the reserve purpose. If a user wishes to undertake an activity on Crown land that is considered incompatible with the reserve purpose, Council as Crown land manager cannot pursue the lease or licence.

Leases and short-term licences can be issued under two sections of the CLM Act during the initial period. Council is not required to obtain minister’s consent prior to granting these tenures.

Council’s ability to lease or licence Crown reserves managed as community land is authorised by section 3.22 of the CLM Act, which requires the preparation of a community land plan of management, adopted by Council, to authorise the occupancy and use agreement. Council as Crown land manager is exempt from the operation of section 3.22 of the CLM Act during the initial transitional period of three years and prior to the preparation of a plan of management (pre-PoM), to enable transitional security and the operation, management and use of tenures. This exemption applies to the:

- granting of short-term licences over the pre-PoM Crown land of a kind that can be granted by a Crown land manager under section 2.20 of the CLM Act;
- renewal of existing leases over pre-POM Crown land for a term not exceeding 21 years (including any option for the grant of a further term) if there are no additional permitted uses for the land;
- granting of new leases over pre-POM Crown land for a term not exceeding 21 years (including any option for the grant of a further term) if:
  - there was a lease in force over the land immediately before the repeal of the Crown Lands Act 1989 (the ‘previous lease’);
  - there are no permitted uses for the land under the new lease that are additional to those that were permitted under the previous lease.

Native title
Native title is the name given to the traditional ownership of land and waters that have always belonged to Aboriginal people according to their traditions, laws and customs. The *Native Title Act 1993* sets out how native title rights are recognised and protected.

A proposed lease or licence may affect native title interests in the reserve. When exercising powers provided by these transitional arrangements, Council Crown land managers must obtain written advice from a qualified native title manager that any leases or licences complies or otherwise with native title legislation.

**Aboriginal land claims**

The *Aboriginal Land Rights Act 1983* recognises that land in NSW was traditionally owned and occupied by Aboriginal people, and is of spiritual, social, cultural and economic importance to Aboriginal people. Under the *Aboriginal Land Rights Act 1983*, Aboriginal Land Councils may lodge a claim over Crown land.

A lease or short-term licence must not be granted over land that is the subject of an undetermined Aboriginal land claim, if the proposed lease could:

- prevent the land being transferred to an Aboriginal Land Council in the event the claim is granted;
- impact or change the physical condition of the land.

Where the proposed lease or short-term licence will impact or change the physical condition of the land, the grant of the tenure must only be considered if the Council as Crown land manager or proposed lessee/licensee has obtained a letter of consent from the claimant Aboriginal Land Council or the claimant Aboriginal Land Council has withdrawn or amended the claim to exclude the proposed tenure area. While a request to a claimant Aboriginal Land Council can be made, the claimant Aboriginal Land Council is under no obligation to grant such a request and may prefer to have the claim fully investigated.

**Council owned land & buildings**

Leases and licences of Council owned land and buildings are usually negotiated for one of the following purposes:

- Commercial
- Community
- Residential
- Agistment
- Food Vans
- Sporting Clubs
- Preschools
- Surf Clubs
- Caravan Parks
- Jetty Licences
- Moorings
- Access Licences
- Unused Road Reserves (as defined in Section 153 of the Roads Act)
Agistment Land

When a parcel of land is introduced or relinquished by a previous occupier for use as an agistment paddock, the following steps should be taken to locate the most suitable tenant.

- Advertise the parcel of land in the local paper for expressions of interest,
- Review all applications that meet the selection criteria,
- Grant the lease or licence to the highest offer for a period of 12 months, alternatively should the highest offer not be suitable to Council, then a report will be submitted outlining the details and various reasons.

When a licence or lease agreement expires, the agistment paddock may be offered to the current licensee/lessee for a further term of 12 months, subject to a CPI price increase. Such extension being restricted to a twelve (12) month period, after which time the lease would be re-advertised.

Leases

A lease enables exclusive use over a particular piece of land or building for a specified term and purpose. 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 uses are proposed and major financial outlay is required.

Leases may be granted by:

- Public auction
- Public tender
- Invitations for expressions of interest
- Private treaty

The purpose of the lease must be compatible with:

- The purpose/s of the Crown Land reservation/dedication; or
- The land classification under Section 26 of the Local Government Act 1993;
- The Plan of Management adopted for the site; and
- The permitted use under Council’s Local Environmental Plan.

It must also be established as to whether the lease will benefit or provide a service or facility to reserve users. These issues must be addressed by the Council Crown Land manager, where the lease is for the occupation of Crown Land and details provided that clearly demonstrate the proposal is not inconsistent with and does not interfere with the reserve purpose/s.

The lease must contain the stated insurance and indemnity provisions.

A preferred maximum lease term is 20 years (including any extension of term options). A longer term can only be justified if MAJOR capital investment is involved or if the lessor (Council Crown Land manager) is directly associated with the existence of the reserve (e.g. racing clubs and racecourses, show societies and showgrounds).

Options for renewal are not favoured. However, if an option is given, the agreement must specify that there will be no such option clause in the renewed agreement (to avoid creating a Perpetual Lease situation). Clauses conferring a right to compensation for improvements are not acceptable. In appropriate cases the lessee/licensee should be required to clear and/or restore the land to the satisfaction of the Council.
circumstances the lease should clearly reflect Council’s intentions with respect to improvements within the leased land at the determination of the lease (removed or remain and become property of the Council).

Where applicable, the agreement should include clauses providing for use/access by the general public.

A clause requiring the lessee/licensee to bear Council’s expenses involved with the lease (e.g. Solicitor, advertising, stamp duty) should be considered.

The agreement should fix an economic rental, having regard to the terms and conditions, especially those requiring construction and maintenance of improvements which will become Council or Crown property on termination of the agreement.

Where a rebated rental amount is imposed because the lessee/licensee is a charitable or non-profit organisation, such rental should still be realistic and should not be less than the statutory minimum rental as advertised in Council’s annual Fees & Charges Schedule at that time.

Where only part of a reserve is to be leased and the term exceeds three years (including options), "subdivision" of the title may be required. Any lease exceeding three years should be registered on the Torrens Register.

In the case of a proposed lease with a term exceeding 5 years (including options), the proposal must be advertised in the local press inviting submissions and/or objections to the proposal.

**Licences**

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.

As with a lease, the purpose of the licence must also be compatible with the reservation/dedication, land classification, plan of management and permitted use under the Local Environmental Plan. It must also be established as to whether the licence will benefit or provide a service or facility to reserve users. For Crown Land, these issues must be addressed by the Council Crown Land manager and details provided that clearly demonstrate the proposal is not inconsistent with and does not interfere with the reserve purpose/s.

The licence must contain insurance and indemnity provisions as above.

The licence should be for a maximum term of 10 years (including options). A term greater than 10 years may be justified in cases where major capital investment is involved and the licensor (Council Crown Land manager) is directly associated with the existence of the reserve (e.g. racing clubs and racecourses, show societies and showgrounds).

Option clauses are not favoured. The procedures set out regarding “Leases” must be followed. Any option clause which extends the term of the licence beyond 10 years is not permitted except in exceptional circumstances. Holding over clauses are to be limited to a maximum term of 12 months.

There must be no clauses conferring a right to compensation for improvements. In all circumstances, the licence should clearly reflect Council’s or the Council Crown Land managers intentions in respect of the improvements within the licensed land at the determination date of the licence (i.e. is the licensed area to be cleared and/or restored or are the improvements to remain but become the property of Council or the Crown). Where conditions of the licence agreement require the licensee to undertake development works it must be specified that no work is to be undertaken until the development plans have been approved by the Council Crown Land manager, Crown Lands Department and all necessary consents obtained from Council.
Where appropriate, the licence agreement should include clauses providing for use/access of the reserve by the general public.

A clause requiring the licensee to bear the Council’s or Council Crown Land managers expenses involved with the licence (e.g. Solicitor, stamp duty) should be included in the licence.

The licence Agreement should fix an economic market rent having regard to the licences terms and conditions, especially those requiring construction and maintenance of improvements which will become Council or Crown property on termination of the agreement. Licence agreements for other than a short term, should provide for regular periodic redetermination of the economic market rent at intervals of not more than five years and at shorter periods in respect of business undertakings and for reference to an independent arbitrator (not from the Council or Crown Lands) if the parties cannot agree to the redetermination. Where a rebated rental amount is imposed because the lessee/licensee is a charitable or non-profit organisation, such rental should still be realistic and should not be less than the statutory minimum rental as advertised in Council’s annual Fees & Charges Schedule at that time.

The licence fees payable by the licensee will be retained specifically for the purpose of the betterment of that reserve.