



COMMERCIAL LEASE POLICY

POLICY TYPE	DOCUMENT CONTROLLER	RESPONSIBLE MANAGER	POLICY ADOPTED	REVIEW DUE
Council	Executive Manager City Growth	General Manager	23 August 2021	July 2023
PURPOSE	The purpose of this policy is to outline a consistent approach to Council's commercial lease development and/or renewals, including determining suitability of tenants, negotiation of lease terms and lease management.			
SCOPE	This policy applies to all commercial lease and licence agreements entered into and/or renewed by Council.			
POLICY	<p>1. Commercial Leases</p> <p>Commercial leases refer to agreements entered into with tenants where the primary intention is to provide an economic return to Council.</p> <p>Sound lease and property management principles include:</p> <ul style="list-style-type: none"> • Ensuring Council-owned facilities meet demonstrated community needs consistent with Council's policies and Strategic Plan; • Ensuring transparent and equitable processes apply in granting new leases and/or renewals by having clear assessment criteria; • Ensuring tenants pay fair and reasonable rentals based on market forces and clear calculation methodologies; • Facilitating a shared approach between Council and tenant as to cost of management and maintenance of facilities; • Ensuring Council-owned facilities are appropriately maintained; • Ensuring Council assets are developed and occupied responsibly, having regard to community interests (including financial, cultural, economic); • Ensuring sound financial management and effective administration of leases; • Ensuring the obligations and responsibilities of lessor and lessee are clearly apportioned and agreed. <p>Whilst this policy provides parameters for lease negotiation and administration, terms and conditions may still vary on a lease by lease basis.</p> <p>Principles of transparency and consistency must apply to all agreements, with the primary objective being economic and social return to ratepayers and the community.</p> <p>For legislative compliance, Council is bound by the provisions of sections 177 and 178 of the <i>Local Government Act 1993</i> ("the Act") in regard to leases, including commercial leases.</p>			

In accordance with section 177 of the Act, Council may lease land (other than public land) owned by it. A decision made under this section must be made by absolute majority.

Under section 178 of the Act, Council may lease public land owned by it. A resolution of Council to lease public land is to be passed by an absolute majority and be in accordance with the provisions of section 178 of the Act.

1.1 Approaches in seeking tenant

a) Engagement of Commercial Agent

Council may engage a commercial agent to assist in the process of advertising, recommending and securing a suitable tenant against eligibility criteria (see clause 3) determined by Council. A decision on the recommended candidate must be determined by Council.

b) Public Process (Expression of Interest/Open Tender)

Significant lease opportunities should be open to all interested market participants.

An Expression of Interest or other open market process is required in the following circumstances:

- Where a facility is proposed or is suitable for commercial purposes;
- Where a current lessee fails to provide notice to renew or to exercise their options within the given terms of the agreement;
- Where a facility or property is vacant or a newly constructed property;
- Where it is considered appropriate to undertake market testing.

Council will publicly advertise the property through this process, including any desired use/s.

c) Unsolicited Approaches

Unsolicited proposals may be received by Council. The requirement for public advertising may be set aside where a unique or innovative proposal is initiated by a prospective tenant, on a commercial in confidence basis, and it can be demonstrated that the proposal has the potential to deliver outcomes that are desirable and in the best interests of the community.

d) Alternative Approaches

Council may undertake an alternative process for leases where, in its opinion, an alternative lease approach will achieve greater benefits to ratepayers than could be

achieved through a public process and will entertain direct negotiations to the exclusion of a public process.

Circumstances where an alternative approach may be undertaken include:

- Where the cost of a public process will exceed expected economic or community benefit.
- Where there is only one identifiable lessee.
- Where Council is bound by a contractual obligation, e.g. a tenant with a first right of refusal.
- Where a long-term lease is nearing the end of its term and implementing an open market process would impose either:
 - A significant and commercially undesirable reversionary cost (or risk of such cost) to Council; or
 - An unsatisfactory capital investment scenario which will impact (or is at risk of impacting) achievement of the stated Goals and Objectives of Council. The term of extension of lease should be commensurate with a period required to satisfactorily reduce such risks or costs to Council.
- The sitting lessee has a special interest in the land and no other similar party can be identified (i.e. a unique education use).
- Where a sitting lessee or adjoining occupant propose a commercial arrangement, which is of demonstrable benefit to Council and the community.
- A long term lease of land to Government to facilitate a strategic project.
- A long term lease to government or utility authority for purpose of infrastructure provision.
- Where a public marketing process which has been undertaken in accordance with this Policy has failed to achieve its desired outcome.
- In response to a proposal which achieves specific policy goals of Council and the community.

These exclusions aim to allow Council the ability to respond to an approach for the development of a unique project. Any such proposal must provide demonstrable support for the achievement of specific policy and strategic goals and objectives of Council.

Council may take into consideration current market conditions, future investment commitments, pre-existing relationship with lessee and other associated risks and benefits.

1.2 Market Valuations (prior to lease commencement)

Independent market valuation must be undertaken by Registered Valuer (under the *Land Valuers Act 2001*). Valuations are required in accordance with the *Local Government Act 1993*, where Council land is to be sold, leased, donated or exchanged.

The cost of valuation is to be met by Council in the first instance, but where the tenant has initiated the valuation, they are to meet the cost.

1.3 Application of relevant legislation

Leases should be prepared and managed in accordance with all relevant legislative requirements and Council policy.

All property being used as a retail shop premises, and that meet the qualifying criteria, must be compliant with the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas)*.

1.4 Public land

Land that is determined as public land in accordance with Section 178 of the *Local Government Act 1993* and listed on Council's Public Land Register, is subject to a separate process if earmarked for leasing. The land is subject to a public consultation process, which involves advertising twice in a local newspaper, signposting by public notice on the property boundary and a 21-day public submission period.

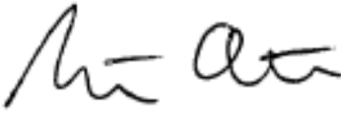
1.5 Conflict of interest

The provisions of both the Employee Declaration of Conflict of Interest Policy (employees, contractors and consultants) and Model Code of Conduct Policy (elected members) apply to all staff and Councillors involved in any process relating to the leasing of a commercial property. All conflicts must be declared immediately and assessed and managed in accordance with these policies. Declarations must be made in relation to any pecuniary or non-pecuniary interest.

1.6 Confidential information and disclosure

Negotiations will seek to minimise the use of confidentiality clauses which limit Council's disclosure rights, other than where information is required to be treated confidentially in accordance provisions of other regulatory and legislative requirements.

	<p>2. Legal Advice</p> <p>Property matters can be both complex and detailed and it is important to obtain appropriate legal advice in advance of making decisions that could have financial or contractual implications.</p> <p>For all commercial lease agreements, Council will utilise either a template lease agreement that has been developed with the assistance of external Legal Advice, or a specific lease agreement will be developed by external Legal Advisor where necessary. The engagement of a specific Legal Advice will be determined after an assessment of the risk, scale or complexity of any specific lease proposal.</p> <p>Mandatory clauses for inclusion in a lease are attached to this Policy. Other relevant considerations include:</p> <ul style="list-style-type: none"> • Use of the Retail Tenancy lease template developed by legal advisors; • Length of the lease; • Annual and total value of the lease; • Previous legal advice obtained in relation to the lease; • Condition of the property to be leased; and • Intended use of the property. <p>The process of engaging legal services must meet the tests of achieving value for money and transparency and accountability.</p> <p>3. Assessment Process</p> <p>The criteria and weighting are to be determined on a case by case basis. Criteria to consider include:</p> <ul style="list-style-type: none"> • Rental yield • Market forces • Experience and capability of the prospective tenant • Employment outcomes for local community • Support of Strategic Plan/strategic objectives of Council • Support of and linkages with other Council Strategies and Plans
LEGISLATION AND RELATED DOCUMENTS	<p><i>Local Government Act 1993</i> <i>Land Valuers Act 2001</i> <i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas)</i> Employee Declaration of Interest Policy Model Code of Conduct Policy Devonport City Council Strategic Plan 2009-2030</p>
ATTACHMENTS (IF APPLICABLE)	<p>Appendix A - Commercial Lease Checklist (mandatory clauses) <i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas)</i></p> <p>Appendix B – Disclosure Statement Details</p>
STRATEGIC REFERENCE	<p>5.3 Review and amend structures, policies and procedures to adapt to changing circumstances.</p>

MINUTE REFERENCE	21/173			
OFFICE USE ONLY	Update Register	Y	Training/Communication	Y
	Advise Document Controller	Y	Advise HR / MCO	Y
	Management Sign Off:  Date: 23 August 2021			

Appendix A – Commercial Lease Checklist – Mandatory Clauses

Clause	Terms and Conditions
Market re-valuations	Market re-valuations must be undertaken, at a minimum, at least every five years or on the exercising of an option by the tenant
Rental reviews	Rental shall increase by CPI Hobart % (annual) or agreed fixed percentage
Lease renewals	Leases may be renewed with existing tenants, subject to the tenant complying with requirements of lease agreement. A Deed of Variation may sit adjunct to the original lease if only minor variations are made to the original agreement
Terms of Lease	Commercial leases will be subject to full commercial terms and relevant guidelines and legislation. Any deviation from standard commercial leasing arrangement will be subject to specific consideration in lease reports to Council
Directors Guarantees or Security	All commercial lease entered into with a company or corporation must include a clause pertaining to a Director's Guarantee. The Director must sign the lease agreement in his/her own right as Guarantor, in addition to signing in their capacity as Director of the Company/Corporation. Bank Guarantees, or other equivalent forms of Security may be provided as an alternate to Directors Guarantees.
Length of Lease	Maximum term for a commercial lease shall be ten years, but must be of a sufficient period of tenure to allow tenant reasonable opportunity to establish the business
Outgoings	Tenant will be responsible for all outgoings, unless otherwise agreed, including all utilities (electricity, gas, water and sewerage, telephone) and statutory outgoings (municipal rates and land tax). Any deviation from standard commercial leasing arrangement will be subject to specific consideration in lease reports to Council
Costs	Each party will be responsible for their own legal fees in relation to the preparation, negotiation and finalisation of the agreement
Maintenance	Standardised maintenance responsibilities apply. Tenant will be responsible for any costs of repair and/or replacement of items or infrastructure damaged as a result of misuse, negligence, wilful damage or vandalism by the tenant, the tenant's guests, invitees and contractors. Council is responsible for ensuring the structural integrity of the premises and that the premises remain watertight.
Assignment and sub-leasing	The tenant must not sub-let or assign the property without the written consent of Council. A request seeking consent must include the relevant standing of the prospective assignee including their finance; information on the relevant business skills of the prospective assignee; information on the financial standing of any prospective guarantors; information as to the proposed use of the premises by the proposed assignor
Default and/or breach	Clauses relating to default or breach of lease must be included. This clause will generally relate to non-payment of rent; failure to comply with clauses deemed to be essential terms (including, but not limited to failure to pay outgoings; failure to maintain premises; failure to comply with notices); the tenant becoming bankrupt or entering into liquidation (company only)
Permitted Use	All commercial leases must include a permitted use which the Tenant's business operations are limited to

Refurbishment or works during the term of the lease	Written consent for refurbishment or works must be sought and received by the tenant from the Council prior to undertaking. Correct permits and licences must also be obtained by the tenant, and must be undertaken and finalised to an acceptable standard
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Appendix B - Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas) – Disclosure Statement Details

The following statements are to be displayed at the top of a disclosure statement:

- (a) the information provided is confidential;
- (b) tenants should ensure that they understand the statement before signing, and should seek independent advice if in doubt;
- (c) on entering a lease, the disclosure statement forms part of the lease agreement.

2. The following information is to be included in each statement:

- (a) the rent and the method of calculation;
- (b) the items to be included in turnover calculations;
- (c) the commencement date for rental payments;
- (d) rental reviews and options, how they are conducted, and their frequency;
- (e) the term of the lease and any option period;
- (f) any rental premium charged;
- (g) a list of general outgoings, with an estimate of the costs and the basis on which the costs are apportioned to the tenant;
- (h) a list of all other costs with an estimate of their amounts and, where appropriate, the basis on which they are calculated and how they are to be paid;
- (i) the identity of the property owner, the name and address of the agent and an emergency contact point;
- (j) a description of the premises, including the total lettable area and what is included in the area and fit out;
- (k) trading hours;
- (l) access to the premises;
- (m) the permitted or required use of the premises;
- (n) the date of availability for occupation;
- (o) the tenancy mix in a shopping centre complex.