

Policy - Leasing and Licensing of Commercial Properties

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Responsible Officer:	Manager Governance		
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1. Purpose

This policy provides an equitable and consistent approach for the leasing and licensing of Council owned commercial property which is consistent with Council's Corporate Plan.

It aims to ensure the maximum commercial return and financial benefit to Council for its commercial assets and to ensure consistent, responsible and transparent property management practices.

2. Background

Council owns a number of properties, many of which are required for community or municipal purposes. There are also a number of properties that have been purchased for strategic or other purposes and are not, at the time, required for a municipal purpose. As such, they are available for lease or licence under commercial terms (commercial properties).

This policy outlines the principles when granting lease or licence agreements for Council owned commercial properties. These principles include:

- maximising the use and financial return of Council's commercial properties assuming they are not required for any other Council use or community use;
- standardisation of commercial property agreements where possible;
- ensuring best-practice and transparent commercial property management practices for all commercial property assets; and
- ensuring highest and best use of Council's commercial properties without compromising revenue return.

3. Scope

This policy applies to the lease or licence of any Council owned commercial property to another party. This policy excludes all Council community property assets. This policy also excludes the Dandenong Market which is managed by Dandenong Market Pty Ltd.

4. Human Rights and Responsibilities Charter – Compatibility Statement

The Victorian Charter of Human Rights and Responsibilities has been considered in the preparation of this policy but is not relevant to its content.

5. References and Related Documents

The following legislation and documents relate to this policy:

- *Local Government Act 1989*
- *Retail Leases Act 2003*
- *Occupational Health and Safety Act 2004*
- *Residential Tenancies Act 1997*
- *Planning and Environment Act 1987*
- *Health Act 1958*
- Fact Sheet – Leasing of Retail Spaces at Council’s Civic Centre
- Procedures – Leasing and Licensing of Commercial Properties

6. Definitions

In this policy the following definitions apply:

- **Lease** - A lease is a right granted by the owner of land to an occupant to have the exclusive use of that land in consideration for a payment, known as rent. A commercial property lease may be either a commercial or business lease or a retail lease under the *Retail Leases Act 2003* for which a landlord and tenant have particular responsibilities.

A lease creates an interest in land. An interest in land is binding on third parties and capable of being assigned.

A lease is also a contractual agreement between the landlord and the tenant under which each party has certain contractual obligations.

Council is prohibited under section 190 of the *Local Government Act 1989* (LGA) from entering into a lease exceeding 50 years. The LGA requires that Council gives public notice of its intention to enter into a lease where:

- the lease is one year or more and the rent exceeds \$50,000 per annum for any year of the lease;
- the lease is one year or more and the current market rental value of the land is \$50,000 or more a year;
- the lease term is 10 years or more; or
- the lease is a building or improving lease (which is a lease that includes the construction of a premises by either party).

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A lease agreement will generally be used where the site is fully occupied for a specific purpose or where a tenant has made substantial financial contributions to the development.

- **Licence** - a licence gives the licensee a right to occupy land (not exclusively).

A licence does not create any interest in the land. The rights created by a licence are personal and do not run with the land.

A licence cannot be assigned and will terminate where the owner of the land ceases to own the land.

A licence agreement will be used when an occupier shares a facility or the premises. This creates the potential for the facility to be shared promoting greater use of Council assets.

7. Council Policy

7.1 Tenants/Licensees

Council will consider all genuine and realistic offers made to it for rental of its commercial properties.

The following factors are to be considered when accepting a tenant/licensees:

- All commercial property tenants/licensees will be fully reference checked to ensure the performance of the agreement and that the premises/land will be properly maintained and rentals paid on time.
- Appropriate insurance coverage will be procured by the tenant/licensees at the commencement of any commercial property agreement and is continually made current during the term of the occupation as specified in the agreement. Specifically, these are:
 - public liability insurance, noting Council as an interested party, or in joint names of the tenant/licensees and Council. A minimum cover of \$10 million must be provided for areas leased up to and including 100sqm. A minimum cover of \$20 million must be provided for areas leased over 100sqm and within the Dandenong Civic Centre unless otherwise agreed by Council;
 - plate glass insurance, if plate glass forms part of the premises; and
 - contents insurance.

Tenants/licensees will be required to annually provide current certificates of currency to Council for all insurances taken out in relation to any Council premises.

- In the instance where Council has a number of properties in one area, such as within an arcade or civic centre, Council will not guarantee exclusivity in respect to proposed use, to any prospective tenants/licensees in any of its commercial properties., i.e Council will not guarantee any tenant that another premises in the same centre or arcade will not be leased to a similar type of operator.
- Subletting or assigning a lease will only be permitted with the prior written consent of the Council and such a decision must ensure the new tenant is capable of meeting the

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requirements of the policy. Assignment of a licence is not permitted as a licence is a right provided to the Licensee and doesn't run with the land.

7.2 Agreement and Terms

An agreement will be used in all commercial leases and licenses.

Standard leasing agreements have been developed by Council's solicitors for Council's major commercial properties, in particular for property leases that fall within section 190 of the LGA. For commercial properties of a smaller nature, standard commercial REIV (Real Estate Institute of Victoria) leases are used by Council's managing agents. All leases that are considered to be "retail lease" agreements will be made according to the legal requirements of the *Retail Leases Act 2003*.

The terms of any agreement will depend upon many factors including the following:

- the tenant's proposed use of the property to determine if it is captured by the *Retail Leases Act 2003*;
- the ongoing need for provided use;
- any strategic need for the premises;
- the stability of the tenant/licensee and the suitability of the business or proposed use to the area;
- the suitability of the premises to the tenant/licensee;
- the proposed length of the lease/licence. Council will endeavour to maximise the security of tenure for most leases/licences to provide for an acceptable level of return for any investment outlay in commencing the occupancy; and
- whether the tenant/licensee expects Council to contribute to any fit-out costs or consider a rent-free period in lieu of fit-out costs. Council will always endeavour to minimise any financial impacts to Council in regard to these negotiations.

Lease/licence agreements undertaken by Council do not release a tenant/licencee from seeking any other approvals or permits that may be required by Council as a planning, building, health or regulatory authority. It is the tenant's/licencee's responsibility to ensure they have any permits and approvals required by Council or any other statutory authority, prior to using the premises for its specified purpose.

The tenants/licensees may install a security system, at their own cost (prior written consent is required from Council). Security codes and subsequent changes to codes must be given immediately after installation to Council. This also applies to any new key system introduced by the tenant/licencee and Council must be supplied with a copy of any new keys to premises within seven days of locks being changed (banks are excluded).

Maintenance requirements for commercial property tenants/licensees will be specified in the agreement and will be agreed to between the parties prior to signing the documentation. Regular condition audits of Council's commercial properties will be undertaken by both Council and the tenant/licensee as outlined in the agreement.

Generally, any improvements made by a tenant/licencee will revert to Council upon termination of a lease/licence. However, if required by the Council, the tenant/licensee must remove any

improvements made to the premises by or for the tenant/licensee and make good any damage caused by their removal. This process will be carried out by mutual agreement.

Council, or its managing agents, will inspect premises prior to the termination of a lease/licence. The tenant/licensee must provide vacant possession of the premises in a condition agreed to by Council. Overholding clauses will generally be included in agreements to allow continued use of the premises by tenant/licensee, in the situation where new agreements have not been prepared, negotiations for a new lease/licence are underway or when Council is unable to guarantee another set term of lease/licence for strategic reasons. Where a clear termination of an agreement is to occur and the tenant/licensee is to vacate premises no overholding clauses will be included in agreements.

7.3 Rental and Outgoings

Commercial property leases/licences will pay a commercial market rental or licence fee derived from a market tested process or valuations in the current market. Any reduction in rental/licence fees shall only be considered in special cases dependant on the commercial property condition and/or tenants/licensees contribution to capital improvements during the term of the agreement which are of a benefit to Council.

All tenants/licensees must pay GST on rental at a level determined by the Federal Government. GST is payable in addition to the rental evaluated.

Council will review the rental for any lease/licence every year of the agreement and in accordance with the specific condition in the agreement. This can be via CPI adjustment or a set percentage. The most likely method of review is by commercial CPI reviews. A market review will be performed at the commencement of each agreement and at specified periods throughout the term of the agreement i.e. at the end of the first term and prior to a further term.

All tenants/licencees must pay a security bond of at least two months rental +GST to Council or its agent or provide a bank guarantee to the value of at least two months rental + GST in the name of Council. A bond (plus any interest accrued) or bank guarantee, or parts thereof, will be returned to the tenant/licencee on termination of any agreement but will be subject to the property being vacated on the agreed terms.

All user service charges including Council rates and levies, State levies and taxes, water, sewerage, telephone, commercial garbage, electricity and other service charges are to be paid directly to the charging authority by the tenant/licensee. If a premises is shared and separate meters are not in place then the costs will be shared equitably between the tenants/licencees based on usage at the premises. The tenants/licencees may arrange to have separate meters installed at their own cost.

Council will not charge any tenant/licensee legal fees if Council's is preparing the agreement using a standard lease/licence document. Legal costs generated as a result of a new lease/licence or major variations to a standard agreement will be split equally between Council and the tenant/licencee, if the relevant legislation allows. Council's costs that may arise as a result of a breach of this agreement by the tenant/licensee are to be paid on a solicitor-own client basis by the tenant/licensee unless otherwise specified in the agreement. Any lease or licence variation as a result of a tenant's/licensee's request will be charged to the tenant/licensee at full cost.

7.4 Use of Council's Commercial Properties

Council has a Smoke Free Environment in Council Owned and Managed Buildings Policy and adherence to this policy is strictly required.

Liquor sales within Council commercial premises will only be permitted if the necessary permits and liquor licenses have been obtained through Council and any other statutory authorities, and permission is first sought from Council as the landlord of the premises.

Gaming will only be permitted in specific Council premises if the necessary permits and licences have been obtained from Council and any other statutory authorities, and permission is first sought from Council as the landlord of the premises. Council must approve any additional or changed use of a leased/licensed premises. Council reserves the right to review the rent or any other lease/licence provisions when providing this consent or the termination of the agreement.

Tenants/licensees will be required to have emergency/evacuation plans in place.

Council recognises its rights and obligations, and the rights and obligations of its tenants, under the *Retail Leases Act 2003*.