

Leasing and Licensing of Community Facilities

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Responsible Officer:	General Manager Urban and Community
Relevant Legislation:	<i>Development Act 1993</i> <i>Disability Discrimination Act 1992</i> <i>Electronic Conveyancing National Law (South Australia) Act 2013</i> <i>Food Act 2001</i> <i>Independent Commissioner Against Corruption Act 2012</i> <i>Liquor Licensing Act 1997 and Codes of Practice</i> <i>Local Government (Accountability and Governance) Amendment Act 2015</i> <i>Local Government Act 1999</i> <i>Public Health Act 2011</i> <i>Real Property Act 1886</i> <i>Retail and Commercial Leases Act 1995</i> <i>Work Health and Safety Act 2012</i>
Related Policies:	Heritage Policy Community Access Inclusion and Participation Policy Community Engagement (Public Consultation) Policy Fees and Charges (Non Rates) Policy Fees and Charges (Non Rates) Waivers, Discounts and Subsidies Policy Hire of Community Open Space and Facilities Policy Open Space Policy Parking Policy Procurement Policy Sponsorship and Donation Policy Volunteers Policy Be the Future of Burnside – Our Strategic Community Plan 2016-2026 Eastern Health Authority Regional Public Health Plan Community Land Management Plans Delegations of the Chief Executive Officer

1. Introduction

- 1.1 This Policy's scope:
 - 1.1.1. provides guidance for consideration of applications to lease or licence Community Land, and the terms by which such leases and licences will be granted; and
 - 1.1.2. identifies the basic criteria used to assess and award a lease or licence, or renewal of a lease or licence.

2. Strategic Plan Desired Outcomes

- 2.1 High quality sport and recreational opportunities and facilities that foster healthy lifestyles.
- 2.2 Fit for purpose and cost effective infrastructure that meets community needs.
- 2.3 A vibrant and diverse community that has a strong sense of belonging and wellbeing.

3. Our Approach

- 3.1 Public spaces that meet the future needs of our community and provide for vibrant, current and inspirational opportunities, encouraging participation.
- 3.2 Create and facilitate access to diverse and appropriate leisure, recreation and sporting facilities and programs that are safe for people of all ages and abilities.
- 3.3 Social, economic and environmental infrastructure that meets the needs of the community.
- 3.4 Council infrastructure and assets provided to the required level of service and condition to meet the needs of the community now and into the future.
- 3.5 Library, swimming centre and community centres as a resource to meet local needs and enliven activity, supporting all age groups.
- 3.6 Share and celebrate cultural and social diversity through local events, programs and projects.
- 3.7 Encourage residents to participate in artistic, creative and lifelong learning pursuits.

4. Legislative Requirements and Corporate Policy Context

- 4.1 Councils have a role in improving the quality of life of the community, providing community and cultural services and facilities and ensuring equitable access to these.

- 4.2 The power to grant a lease or licence over Community Land is a power of Council. Council may delegate its power or functions under section 44 of the *Local Government Act 1999* (the LG Act) including to the Chief Executive Officer. Section 44(4) of the LG Act provides that a delegation to the CEO authorises sub-delegation unless Council directs otherwise.
- 4.3 Section 202 of the LG Act makes provision for the grant of lease or licence over Community Land including land that is, or forms part of, a park or reserve. In addition, section 202 places restrictions on Council's power to grant lease and licences over Community Land. These restrictions include that leases and licences may only be granted for a maximum term of 42 years (including renewals).
- 4.4 The LG Act requires that Council have Community Land Management Plans (CLMP) over any land that is defined as Community Land and includes sporting and recreational facilities and their surrounds. In particular, section 196 (1b) of the LG Act requires any Community Land that is or is to be occupied under a lease or licence to be the subject of a CLMP. Prior to the grant of a lease or licence Council should ensure that a CLMP has been adopted in respect of the land. The Community Land must be managed in accordance with the applicable management plan (section 199) and leases and licence must be consistent with the relevant management plan (section 202(6)).
- 4.5 There are a number of factors that dictate whether the *Retail and Commercial Leases Act 1995* (RCL Act) applies to a lease from Council. At its most basic, the RCL Act will apply if the lease is a retail shop lease as defined in the RCL Act. If this is established, then the exceptions to the application of the RCL Act may need to be considered.
- 4.6 The City of Burnside Procurement Policy provides for methods and processes which will be undertaken to advertise, assess and offer all commercial leases and outsourced services associated with leasing such as lease management, legal review, maintenance tasks and inspection of premises.

5. Interpretation

- 5.1 Differentiating between a lease and licence,
- 5.1.1 The right of exclusive possession is the prime consideration in determining whether an agreement is a lease or licence. An example of where a licence is appropriate is where two sporting clubs sharing a joint facility i.e. neither has exclusive possession and in those circumstances a licence is the appropriate agreement. A licence provides a contractual right and does not provide the licensee with proprietary interest in the land whereas a lease does.
- 5.2 For the purpose of this Policy, the following definitions apply.
- 5.2.1 "Authorised Officer" means any person to whom power has been delegated in relation to this Policy.

- 5.2.2 “Community Organisation” means any group, recreation group, club, sporting club, or any such organisation that is incorporated for the benefit of the community and the profits of which are retained within the organisation.
- 5.2.3 “Community Facility” means a building or asset, located on Community Land, primarily available to facilitate community activities in accordance with the Be the Future of Burnside – Our Strategic Community Plan 2016-2026 and any relevant Council strategies.
- 5.2.4 “Community Land” means land as defined in the LG Act.
- 5.2.5 “Community Open Space” means all Council owned or managed public open space i.e. parks, gardens, sporting fields and reserves.

6. Policy

- 6.1 This Policy addresses Council decision making and risk management in relation to the granting of leases and licences for Community Open Space and Community Facilities.
- 6.2 The City of Burnside will make land, venues and facilities available to groups, organisations or residents on a fair and equitable basis to meet community needs.
- 6.3 The City of Burnside will aim to assist and support Community Organisations to actively encourage and promote local participation in both senior and junior categories, where appropriate.
- 6.4 Community Organisations with a membership comprising of local residents will be prioritised by the City of Burnside over clubs from other Council areas.
- 6.5 High level utilisation of Community Facilities and Community Open Space is actively encouraged.
- 6.6 A consistent issue through Local Government is the increasing maintenance cost of its assets. Leases and licences provide an important tool for Council to manage this expense where appropriate.

7. Licences

- 7.1 Non-exclusive licences are granted over Community Open Space as well as Community Facilities with multiple users.
- 7.2 In general, Council will not grant a year-round licence to a Community Organisation over Community Open Space for seasonal access.
- 7.3 The fee structure for licensing attracts a higher initial fee than a lease. These fees are determined in accordance with anticipated use of the Community Facility and/or Community Open Space by each tenant.

- 7.4 If a licence is to be granted over dedicated Crown land, the licence should also be consistent with the dedication and the approval of the Minister may need to be sought for the grant. All proposed licences of dedicated Crown land are also to be forwarded to Council for approval.
- 7.5 Licences are provided where:
 - 7.5.1 Exclusive possession of a facility is not granted;
 - 7.5.2 The intended use is consistent with any relevant CLMPs and/or reserve Master Plans;
 - 7.5.3 The intended use is deemed appropriate by the Authorised Officer for the Community Facility or Community Open Space; and
- 7.6 Shared facilities may be made available at the discretion of the Authorised Officer. In these cases, a Community Organisation will be required to:
 - 7.6.1 Enter into a formal licence agreement for a standard period of five years except where Council has approved a longer term; and
 - 7.6.2 Meet all costs representing their share of maintenance and outgoings relating to the Community Facility and/or Community Open Space.

8. Leasing

- 8.1 The following criteria must be met to the satisfaction of the Authorised Officer:
 - 8.1.1 The Community Organisation is an incorporated body.
 - 8.1.2 The Community Organisation has a structured committee that holds regular meetings and represents the users and local community.
 - 8.1.3 The Community Organisation has prepared a business and viable financial plan for a period of three years from the present date.
 - 8.1.4 The intended use is in accordance with the CLMP, Council's Strategic Plan and any relevant Council strategies as well as suiting the Community Facility and the community.
 - 8.1.5 The Community Organisation can demonstrate capacity to manage the Community Facility in accordance with the lease agreement and in an environmentally sustainable manner.
 - 8.1.6 The Community Organisation will provide an annual report to Council.
- 8.2 The following conditions apply to leasing a Community Facility that is to be exclusively occupied by a Community Organisation: A standard lease period of five years applies for all agreements except where Council has approved a longer term.

- 8.2.2 In cases where Council has determined that a lease fee other than peppercorn rent is to apply, the lease fee is to be indexed by the Consumer Price Index on an annual basis.
 - 8.2.3 Where the tenant bears the full cost of maintenance and utilities, facilities may be leased at a peppercorn rent. Market value rent will apply where Council is responsible for maintenance and utilities under the lease.
 - 8.2.4 Council has no absolute responsibility to provide a Community Facility for a Community Organisation.
 - 8.2.5 The tenant has full responsibility to repair and maintain the Community Facility in accordance with the lease agreement.
 - 8.2.6 A tenant may apply to Council for financial assistance with presentation of a business case which will be considered by Council during the annual budget process.
 - 8.2.7 The tenant may initiate capital works at its cost provided approval is granted from Council including any necessary building and planning approvals.
 - 8.2.8 Where the RCL Act applies to a lease, Council is restricted from passing on responsibility for capital contributions to the tenant. In these circumstances, this is the responsibility of Council and will be clearly articulated in the lease agreement.
 - 8.2.9 Leases are to be offered in compliance with the Community Land provisions of the LG Act.
 - 8.2.10 If a lease is to be granted over dedicated Crown land, the lease or licence should also be consistent with the dedication and the approval of the Minister may need to be sought for the grant. All proposed leases of dedicated Crown land are also to be forwarded to Council for approval.
- 8.3 Where exclusive possession of a Community Facility has been granted to a Community Organisation, they will be required to:
- 8.3.1 Enter into a formal lease agreement with Council;
 - 8.3.2 Meet all costs associated with outgoings related to the building (eg water rates, water and electricity use, insurance costs, other taxes and charges, etc); Should the RCL Act apply to the lease, land tax payments cannot be passed onto the tenant;
 - 8.3.3 Undertake building maintenance as specified in the lease; and
 - 8.3.4 Pay to Council a lease fee as determined by this Policy and set out in the lease.
- 8.4 Community Facilities under lease are not able to be sub-let by the primary tenant; however the tenant may offer ad-hoc hire in accordance with their lease agreement.

- 8.5 National Police Checks will be required where the lessee may be considered to be perceived as an agent of Council and is in contact with vulnerable people.

9. Licensed Clubrooms

- 9.1 Licence applications under the *Liquor Licensing Act 1997* are made through Consumer and Business Services (CBS). As Landlord, the Authorised Officer of Council or their delegate provide support to the application in the first instance, and then the application may be assessed by the relevant delegate of Council in collaboration with the CBS.
- 9.2 Support will not necessarily be granted for alcohol service, however when support is granted, it is suggested that it be offered during the following times:
- | | |
|---------------------|----------------------------|
| Monday - Thursday | 12.00 noon to 11.00 pm |
| Friday and Saturday | 11.00 am to 12.00 midnight |
| Sunday | 12.00 noon to 9.00 pm |
| Public Holidays | 10.00 am to 11.00 pm |
- 9.3 Each application for a liquor licence or variation of hours is to be considered on its merits by the Authorised Officer, considering the proposed activity, locality, membership and total hours.

10. Delegated Authority for Authorising Lease and Licence Agreements

- 10.1 Council delegates approval for granting and signing lease and licence agreements to the Chief Executive Officer within the guidelines specified in Appendix A of this Policy.
- 10.2 Where an existing tenant wishes to maintain current conditions, terms and occupation area in accordance with the existing arrangements, Council Administration will:
- 10.2.1 Assess the application against the criteria set out in Appendix A; and
- 10.2.2 Where the application conforms, prepare a report for the Chief Executive Officer to consider recommending execution of the lease and/or licence; or
- 10.2.3 Where either the applicant or the lease does not conform with the criteria set out in Appendix A, bring a report to Council with recommendations for conditions under which a lease will be considered, before undertaking public consultation (if appropriate).
- 10.3 The criteria set out in Appendix A will be used to assess whether the renewal requires public consultation and/or Council endorsement.

11. Leases and Licences where Council Endorsement is required

- 11.1 Endorsement is in accordance with Appendix A within this Policy.
- 11.2 New tenants, new occupation areas, change of facility use and leases with new or altered special conditions attached will be referred to Council for consideration. This will involve a report to Council recommending terms of endorsement, suggested alternatives, issues for consideration and whether public consultation is required.
- 11.3 A tenant changing its name, constitution and/or purpose will be considered as a new tenant and Council endorsement is necessary.
- 11.4 For the purposes of this Policy, non-material changes to modernise a Community Organisation's constitution or purpose (ie for governance purposes) will generally be excluded from the operation of paragraph 11.3, provided the level of service to City of Burnside residents is to be maintained.
- 11.5 Licences cannot be registered because they confer contractual rights to use land only, they do not confer an interest or estate in land.
- 11.6 The requirement to undertake public consultation regarding the alienation of Community Land by leases and licences is contained in Section 202 of the LG Act. Public consultation prior to the grant of a lease or licence over Community Land is required in all cases except where the lease or licence is for a term of five years or less and the grant of the lease or licence is authorised in an approved CLMP.

12. Peppercorn Rent for Community Facilities

- 12.1 Where a Community Facility is to be used by a Community Organisation that will deliver a community service to City of Burnside residents, including sporting and social opportunities, a peppercorn rent of \$1 per annum will be applied.
- 12.2 Where a peppercorn rent is offered, the tenant is expected to maintain the facility as directed by the standard agreement and to contribute to a sinking fund for any major items of repair or maintenance and the capital upgrade of community facilities, where appropriate.
- 12.3 Where a sinking fund is established and maintained in accordance with the agreement, Council may consider a co-contribution where the funds are to be used to improve and/or upgrade the facility or amenities.

13. Commercial Leases and Licences

- 13.1 The City of Burnside has a Procurement Policy which affects the offer and negotiation of leases of a commercial nature, in addition to the parameters set by the RCL Act. This policy does not apply to the grant and renewal of commercial leases and licences.

14. Market Review

- 14.1 Where a market review is provided for within a lease, the current market rent will be determined by a licensed Valuer at the cost of Council.
- 14.2 All agreements, specifically relating to market review provisions, will be administered in accordance with the standard agreement.
- 14.3 If the market rate set is not accepted by the tenant and the process for fixing rate has been in accordance with the lease content, this matter will be brought to Council for further consideration.

15. Referral to Council

- 15.1 Leases and licences will be referred to Council for endorsement, resolution, clarification or review under the following circumstances:
 - 15.1.1 The tenant requires the lease to be registered, at their expense, and it is necessary for the common seal of Council to be affixed to the lease to enable the lease to be registered (note this option is not available for licenses);
 - 15.1.2 The tenant has been the subject of continued complaint or has incurred more than three breaches of lease notifications during their prior term;
 - 15.1.3 The tenant is a new tenant;
 - 15.1.4 The tenant is an existing tenant who seeks to change their service provision, purpose or constitution significantly away from service to City of Burnside residents;
 - 15.1.5 The tenant is in dispute with an Authorised Officer in relation to any aspect of the lease and/or licence and the dispute cannot be resolved in any other manner;
 - 15.1.6 Where a lease or licence is to be granted for a term of greater than five years;
 - 15.1.7 Where a lease or licence is for a portion of an allotment and has a term exceeding six years including any renewal terms. In these circumstances the lease or licence constitutes the division of an allotment and requires approval under the *Development Act 1999*; and/or
 - 15.1.8 Where Council's strategic goals have identified alternative opportunities for the potential increase of participation rates by residents, or the Community Facility and/or Community Open Space may be better utilised to meet the needs of the community.
- 15.2 Where leases and licences for a period of longer than five years are sought, the following points must be considered before presentation of a report to Council seeking endorsement of the granting of the lease occurs:

- 15.2.1 Development of a building management plan by the tenant and approved by the Authorised Officer, including a condition audit and schedule of improvements above and beyond those implied by a standard five year lease.
- 15.2.2 A statement reflecting the necessity for a longer term lease and/or licence. This may be desired to secure significant external funding for facility upgrades.
- 15.2.3 The initial term would remain at five years and each subsequent renewal of five years would only be exercised after the Authorised Officer have audited the expectations and outcomes associated with the condition audit, schedule of improvements and any other criteria placed on the community organisation.
- 15.2.4 Whether the tenant has abided by the conditions of any prior leases.
- 15.2.5 Residential impact should be reviewed and monitored including public consultation if required by Section 202 of the LG Act.

16. Review and Authority

- 16.1 This Policy will be reviewed every three to four years in line with Council's Policies and Protocols Framework.

17. Availability

- 17.1 The Policy is available to be downloaded, free of charge, from Council's website www.burnside.sa.gov.au
- 17.2 The Policy will be available for inspection without charge at the Civic Centre during ordinary business hours and a copy may be purchased at a fee as set annually by Council.

City of Burnside Civic Centre; 401 Greenhill Road, Tasmore SA 5065

Telephone; 8366 4200; Email; burnside@burnside.sa.gov.au

Office hours: Monday to Friday, 8.30am to 5.00pm (except public holidays)

18. Further Information

- 18.1 For further information about this policy please contact:
City of Burnside
401 Greenhill Road
Tasmore SA 5065
T. 08 8366 4200

Appendix A

Assessment of standardised lease and licence renewals

At a minimum, Council must consult on all proposed lease and licence grants with a term of greater than five years or are not included in an approved CLMP.

In addition to this minimum requirement, Council endorsement will be required on lease agreements that involve the following:

- The tenant is a new tenant; or
- The tenant has undertaken a change of constitution or directive purpose; or
- New or altered special conditions itemised in the second schedule of the lease/licence; or
- The term is greater than five years including renewal; or
- A change of land use is implicated; or
- A change of method of rent assignment / review is implicated; or
- The tenant has been issued with a notice of breach or been the subject of complaints during the previous lease period that were not satisfactorily resolved.

Assessment of new lessee or licensee

For every new lease or licence which is considered by Council and/or Council Administration, the following points must always be considered and investigated:

- Has Council adopted a CLMP for the relevant land?
- Is the proposed use consistent with the CLMP and with current Council Policy?
- Will there be a benefit to the local community by housing this Community Organisation in these premises?
- Does the applicant have the financial and logistical capacity to fulfil maintenance obligations as set out in the lease or licence?
- Does the applicant have a three year business plan which underscores their viability?
- Has the applicant provided sufficient details regarding their proposed use and future of the facility?
- Has the applicant provided a current National Police Certificate?
- If the lease or licence is to be granted over dedicated Crown land, the lease or licence should also be consistent with the dedication and the approval of the Minister will need to be sought for the grant. All proposed leases and licences of dedicated Crown land are also to be forwarded to Council for approval.

FLOWCHART FOR ASSESSMENT OF LEASE OR LICENCE

