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| POLICY NO | CP/PMG-3781 | |
| POLICY | Leasing of Council Managed/Owned Land - Commercial | |
| RESPONSIBLE DIRECTORATE | Community Development | |
| RESPONSIBLE OFFICER | Senior Planning Officer | |
| COUNCIL ADOPTION | Date: 22/09/2015 | Resolution No: 11120 |
| REVIEWED/MODIFIED | Date: 26/04/2017 | Resolution No: 11659 |
| | Date: | Resolution No: |
| REVIEW DUE | Date: 26/04/2019 | |
| LEGISLATION | <i>Local Government Act 1995</i> <i>Local Government (Functions and General) Regulations 1996</i> <i>Land Administration Act 1997</i> <i>Commercial Tenancy (Retail Shops) Agreement Act 1985</i> | |
| RELATED POLICIES | CP/PMG-3780 – Leasing of Council Managed Land - Community | |
| RELATED ORGANISATIONAL DIRECTIVES | N/A | |

PURPOSE:

This policy applies to all leases between the Shire of Wyndham East Kimberley (Shire) and a private individual or enterprise where the property will be used for commercial activity.

A commercial lease is an agreement between the Shire and an external organisation, business or individual to manage a property or reserve where the property will be used for commercial gain.

The objectives of this policy are to:

- Ensure an open and transparent process when negotiating commercial leases.
- Ensure consistency across the Shire's commercial leases both in the negotiation process and terms of leases.
- Ensure commercial leases provide no commercial advantage, nor disadvantage to the lessee.
- Ensure the Shire does not incur any costs in the development and management of commercial leases.
- Minimise risk to the Shire, financial or litigious, resulting from commercial leases
- Ensure the environmental impact of commercial leases is considered.

DEFINITIONS:

Lease is a grant of interest in land.

Licence is a deed of agreement allowing for occupation of a parcel of land on a non-exclusive use basis. A licence is not an interest in land. As a matter of law, it simply authorises what would otherwise be a trespass. Licences do not provide the security of

tenure offered under a lease agreement and can be cancelled without notice on provision of suitable grounds to do so.

POLICY STATEMENTS:

This policy provides the opportunity for the lessee to provide service(s) to the community and visitors to the Shire of Wyndham East Kimberley. In some cases these services may not otherwise be provided or viable without proximity or access to Shire managed or owned assets, such as portions of the Lake Kununurra Foreshore and East Kimberley Regional Airport.

As minimising financial and litigious risk to the Shire is a key objective of this policy, Commercial leases should include mechanisms and terms to:

- Ensure that Lessees operate as per their permitted use and in accordance with relevant legislation
- Adequately indemnify the Shire, and the Minister for Lands when required.
- Clearly outline maintenance requirements for different types of commercial leases; and
- Ensure that Lessees hold minimum insurance cover for their commercial enterprise.

Standard terms of Shire of Wyndham East Kimberley Commercial Leases are:

1. Permitted Use

Permitted use of a lease should be consistent with the purpose of (and management order for) the reserve land and the zoning of the land.

2. Lease Term

Terms for commercial enterprises are to be negotiated in accordance with current market conditions with a minimum 5 year term in accordance with the Commercial Tenancy (Retail Shops) Agreements Act 1985.

The maximum lease term will be 21 years.

3. Lease Rent

Initial Lease Rent for all leases will be based on a valuation of fair market rent with a CPI rent review conducted annually.

Market reviews may be agreed to be undertaken every five years or when activating an option, at the cost of the Lessee, with a CPI rent review to be conducted every other year for the term of the lease.

Car hire booths and retail spaces at the East Kimberley Regional Airport (EKRA) will be the greater of either:

- a base annual rent as determined by a market valuation, or
- a rent based on a percentage of turnover as determined by a market valuation.

CPI rent review of the base annual rent will be conducted each year for the term of the lease.

The Lessee will be invoiced for the lease rental from 1 July annually; where leases are commenced other than 1 July the lease will be invoiced for the proportion of the year to 1 July, to align future lease payments to 1 July.

4. Development

Authorisation for any proposed development on leased land should be sought from the Shire prior to the submission of formal planning and building permit applications. The prior approval of the Minister for Lands will also be required for development on Crown land.

At the conclusion of a lease, any buildings or infrastructure not removed from the lease site will be forfeited and become the property of the Shire, for the disposal or retention at the Shire's discretion and associated costs may be recovered from the Lessee.

5. Maintenance Requirements

The Lessee will be responsible for all maintenance of all buildings, infrastructure or fixtures on the lease site unless otherwise negotiated according to the existing condition of the property and the term of the lease.

The Shire will not be responsible for any maintenance of buildings belonging to the Lessee on land only leases. Responsibility for maintenance of buildings owned by the Lessee rests with that owner.

The Shire will be responsible for major structural maintenance or replacement of buildings belonging to the Shire on the proviso that the repairs, maintenance or replacements are not required as a result of any inappropriate actions, or inactions, of the Lessee.

The Shire reserves the right to instruct the Lessee to carry out improvements to any aspect of their leased premises, either with or without buildings, should an issue arise which may impact negatively upon members of the public, the Lessee or the Shire's management of the leased premises.

6. Risk Management and Insurance

The Shire will ensure that all leases and licences contain appropriate risk management measures including an obligation on the Lessee to:

- Release and indemnify the Shire of Wyndham East Kimberley from all claims resulting from any damage, loss, death or injury in connection with the Shire's property, unless such claims arise out of the Shire's negligence;
- Effect and maintain adequate public liability insurance, noting the interest of the Shire and the Policy must contain a cross liability clause. A minimum cover of \$20 million must be provided, with regular increases in line with normal industry practice.

The Shire will insure all buildings and infrastructure that are the property of the Shire. Costs of insurance premiums may be recovered from the Lessee.

The Shire will not insure buildings or infrastructure built or belonging to the Lessee. Buildings belonging to the Lessee must be covered by comprehensive building insurance with a reputable insurance company.

The Lessee is required to ensure all insurances are in place and will be required to provide to the Shire on request, copies of all insurance policies required under the lease.

7. Kununurra Foreshore

All leases located on the Lake Kununurra Foreshore will consider the recommendations of the Lake Kununurra Foreshore and Aquatic Use Plan (Updated 2011) or subsequent document.

This includes the requirement for all foreshore leases to have a 10-metre buffer. In such cases, it may be appropriate for the Shire to issue a licence allowing use of this buffer, without excluding access to others.

8. General

- 8.1. The Lessee will be responsible for all rates, utility charges, taxes and charges against the land.
- 8.2. Cost of the lease preparation (including advertising costs, valuations, legal fees), stamping and registration are to be met by the Lessee, regardless of whether a final lease is agreed to or not.
- 8.3. Lessees are required to comply with all laws and statutory requirements, which are imposed throughout the term of the lease.
- 8.4. Leases will only be granted over areas required for exclusive use.
- 8.5. The Lessee will take out and maintain contents insurance for all fixtures, fittings and chattels contained within the leased premises
- 8.6. The Lessee will hold public liability insurance to a minimum of \$20 million indemnifying the Shire of Wyndham East Kimberley from any loss resulting from the Lessees activities conducted within the leased premises.
- 8.7. Sub-leasing in principal is not supported, however will require the prior permission of the Shire, as well as the Minister for Lands in relation to Crown land.
- 8.8. Final Ministerial Approval will be required for all Crown land leases.
- 8.9. Lessees must have business insurance, public liability and workers compensation insurances as a minimum.
- 8.10. All commercial leases are required to be registered.
- 8.11. The Lessee is to advise the Shire in writing no less than six months prior to the expiry of the lease whether a new Lease is requested.
- 8.12. At the expiry of the lease, the Lessee may be approved by the Shire to remain in possession of the leased premises. The Lessee will be deemed to be a tenant at will on a month to month basis, up to a maximum of 12 months. Any tenancy at will arrangement in excess of 12 months is subject to Council approval.

- 8.13. Where there is a period between the expiry of a lease and the signing of a new lease, the commencement date of the subsequent lease will be backdated to the date of the expiry of the previous lease.
- 8.14. The commencement date for all new commercial leases will be the date that Council has agreed to enter into lease negotiations, or specifically determined at that time, and must be prior to, or as of, the date of access to or occupation of the premises.

EXPLANATORY NOTES:

This policy outlines standard lease provisions for commercial leases on Shire managed and owned land.

This Policy should be read in conjunction with:

- Local Government Act 1995 and Local Government (Functions and General) Regulations 1996
- Land Administration Act 1997
- Lake Kununurra Foreshore and Aquatic Use Plan
- Shire of Wyndham East Kimberley Property and Public Places Local Law
- Local Planning Scheme No. 6 – Wyndham Townsite
- Local Planning Scheme No. 7 – Kununurra and Environs
- Commercial Tenancy (Retail Shops) Agreement Act 1985

All commercial leasing arrangements will be required to comply with the Local Government Act 1995, Section 3.58 Disposing of property.

Commercial leases on Crown Land require Preliminary Approval from the Minister for Lands prior to agreement to lease.

Under the Land Administration Act 1997, the Shire has been granted the care, control and management of numerous parcels of Reserve land which is set aside for various recreational and community purposes, along with the power to lease. The Shire also owns property in freehold and has the power to lease this property.

In some cases properties provide benefits to the wider community when leased to a commercial enterprise, as an example, where the business activity supports tourism. It is also the case that some businesses rely on property that is not available in freehold, for example requiring access to the Lake Kununurra Foreshore.

In addition to the community benefit of such businesses operating within the Shire, the income received from the leases provides a funding base for maintenance of services. The commercial value of the leases provides the Shire with revenue that offsets the cost of provision of services to the property as well as nearby public areas. For example all revenue collected from foreshore leases is used to maintain the public foreshore and its associated facilities.

RISK:

Risk: Failure to comply with legislative requirements leading to damage of reputation and/or financial loss.

Control: Review policies and procedures in accordance with review schedule.