



<b>POLICY TITLE:</b>	<b>RESERVES POLICY</b>
<b>POLICY NUMBER:</b>	<b>LC38</b>
<b>CATEGORY:</b>	<b>COUNCIL</b>
<b>CLASSIFICATION:</b>	<b>GOVERNANCE</b>
<b>STRATEGIC PLAN REFERENCE:</b>	<b>1. Effective leadership and governance</b>
CORPORATE GOVERNANCE AND PERFORMANCE :Provide systems of council governance and service delivery that are financially sustainable, accountable, equitable and efficient	
<b>STATUS: Approved</b>	<b>Council Resolution PA13/CAM/063</b>

<b>Date Approved:</b>	<b>13/06/2013</b>	<b>Approved By:</b>	<b>Council</b>	<b>Date for review:</b>	<b>March 2016</b>
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## **PURPOSE:**

This Policy will provide the framework for:

1. the assessment of existing Not For Profit Organisations (“**NFPO**”) to Lease or Licence (“**Occupation Agreements**”) Council owned/managed land and buildings prior to the consideration of the matter by Council.
2. the assessment of future NFPO to enter Occupation Agreements for Council owned/managed land and buildings prior to the consideration of the matter by Council.
3. the reporting requirements to Council to ensure accountability and recognition of Council’s contribution.
4. Termination of Occupation Agreements granted under this Policy.

## **Background**

Litchfield Council’s land and building assets are managed by the Assets Management System. Their contact details are: Property Manager and Asset Manager

It is important to develop an open and transparent policy that relates to all Council owned/managed land and building assets currently used or proposed to be used by NFPO under Occupation Agreements.

Council enters Occupation Agreements in connection with a number of its land assets to community related groups, clubs and incorporated organisations for a variety of purposes.

## **ORGANISATIONAL SCOPE:**

### **2. Objective**

Council aims to achieve a number of outcomes from the Policy including:-

- Ensuring the community has the opportunity to benefit from an appropriate range of support services and activities which address identified community needs;

- Assisting NFPO to provide programs and services which address the social, cultural and/or recreation needs of the community;
- Providing Occupation Agreement guidelines which are clear and easily understood;
- Encouraging use by the community of Council facilities to cater for a range of NFPO and to minimise duplication of services by determining the most appropriate occupancy;
- Using contributions from NFPO towards the cost of providing use of Council facilities in the most efficient manner;
- Ensuring Council owned facilities are used to meet demonstrated community needs consistent with Council's Vision, Policies and Strategic Planning (available on the Council's web-site)
- Ensuring fair and consistent Occupation Agreement terms and conditions between NFPO and equitable access to community assets that are the subject of Occupation Agreements;
- Ensuring appropriate legal processes are in place to provide an appropriate level of legal and risk management protection to Council including that transactions and Occupation Agreements comply with all applicable laws;
- Providing accountability through Financial Statements and/or Annual Report for Council expenditure on subsidies provided in connection with Occupation Agreements, as they constitute donations;
- Ensuring that Council-owned facilities are appropriately maintained, developed and occupied responsibly having regard to the interests of local communities and the care of assets;
- Ensuring sound financial management and effective administration of Occupation Agreement arrangements;
- Recognising the value and benefits of services and activities organised and provided by community based groups and to subsidise these groups as appropriate.
- Recognise the income/funding arrangements of NFPO and their ability to pay, and provided alternative contribution structures or Occupation Agreement arrangements to meet the reasonable requirements of particular transactions. For example some groups receive grant fund from state/federal governments which is granted on relatively short terms, other groups have very limited ability to raise funds.

### **3. Application / Scope**

This policy will apply to all Occupation Agreements developed or renewed following adoption of the policy by Council.

### **4. Definitions**

For the purposes of this Policy the following definitions apply:

**Full Maintenance:** Maintain, repair and replace.

**Maintain/repair:** Keep in good condition in accordance with Australian Standards. Ensure useful life of the asset is met and does not deteriorate during the term of the Lease or Licence.

**Replace:** Replace at end of useful life. Replace if broken or damaged beyond repair.

## **5. Principles**

### **5.1 Management Philosophy**

Council facilities which are not required for delivering Council services and which the Council has determined are suitable to be offered for occupation by NFPO will be subject to this policy. The terms of occupation will be generally in accordance with the provisions contained in Council's standard Occupation Agreements (Leases or Licences) *Lease agreements under review and to be part of this policy*] for use of Council facilities by NFPO.

Facilities will generally be managed in a manner which preserves and maintains their flexibility and availability for current and future residents of the Litchfield Local Government Area. Wherever possible, Council will implement a strategy of multiple shared uses between groups.

#### **Existing Lease or Licences**

All NFPO with current Occupation Agreements will be asked to provide annual reports against the eligibility criteria during the term of the current Occupation Agreement, to assist Council in achieving its aim of accountability for expenditure on Occupation Agreement subsidies and sustainable economic management of these assets.

Where any existing Occupation Agreement is renewed, the requirements below in respect of New Occupation Agreements will apply. This policy will not be applied retrospectively.

#### **NEW LEASE OR LICENCES**

### **5.2 Eligibility**

Any new Occupation Agreements by the Council for whole or of a Council facility, to a NFPO will be assessed against the following eligibility criteria, which shall apply for the whole period of any Occupation Agreement subsequently granted by the Council:

The criteria indicated with an asterisk (\*) are mandatory and must be met to enable assessment of an application. A weighting of the remaining criteria will be applied to assist in the assessment process.

#### **NFPO Criteria**

- \* The NFPO is a legal entity registered under appropriate legislation (such as the Associations Incorporation Act 2009).
- \* The NFPO complies with relevant legislation governing its activities, and holds valid licenses or registration certificates required for it to operate and complies with all conditions which may be attached to such licences or registration certificates at all times.
- \* The NFPO adheres to all relevant Council policies and complies with the terms of any contracts (comprising but not limited to Occupation Agreements other agreements with Council) from the Council.
- \* The NFPO has a constitution or charter which confirms and is actively able to demonstrate the organisation's commitment to either the cultural, social and/or recreational well being of the community.

- The NFPO is one which is not solely operating for the profit or gain of its individual members, whether these gains would be direct or indirect.
- The NFPO is financially sustainable, with annual financial statements provided to Council, audited by a suitably qualified third party, where it is required as a prescribed association under the Associations Incorporation Act or in the case of companies or other entities, annual financial statements certified by its accountants. Such annual financial statements will be required to be provided to Council on a yearly basis, without request by the Council, throughout the term of the Occupation Agreement.
- The NFPO has a committee of management or other like governance structure and appropriate governance arrangements, with established accountability and reporting methods to members of the NFPO and/or to the community. Council will be entitled to examine the said governance structure and appropriate governance arrangements, with established accountability and reporting methods and any information that may flow from such structure and information.
- The NFPO will have a published complaints procedure, (which can be found on the website).
- If successful in negotiations, the NFPO carries out a full Health and Safety audit of the property proposed for the Occupation Agreement in relation to the proposed use and implements at the NFPO's sole cost any recommendations arising from such Health and Safety audit.

### **Community Benefit Criteria**

- \* A plan for the facility's use is provided including current and projected hours of operation and expected participant and/or membership numbers.
- \* The NFPO provides a written service or a program of activities which can be demonstrated to address an identified cultural, social, recreational or other need in the community.
- Use of the facility will increase social engagement and promote health and well-being of the Litchfield community residents.
- Facility use is consistent with Council's vision and the goals outlined in the Litchfield Strategic Plan.
- The support already being provided by Council to a NFPO both financial and non financial. by providing operational financial support through its annual budget to all reserves]
- The service or activity is non-discriminatory: it will be open to all residents (except where prohibited by law) who meet clearly stated criteria for participation that are directly related to the nature of the service or activity, or geographic catchment area.
- The service or activity can be reasonably accessed by disadvantaged groups, with strategies in place to review and remove any barriers to participation.
- The NFPO's promotion and support of volunteerism.

### **Facility Management Criteria**

- \* Proposed use of the facility is suitable (without modification to the property or zoning) for the nature of the site and the neighbourhood.
- Utilisation of, and community access to, the facility will be maximised, through shared use with other NFPO, (where Council deem it appropriate) consistent with any special requirements (which might entail a Licence rather than a Lease).

- The NFPO is willing to undertake significant/identified capital works (where appropriate) as necessary to develop the facility as an asset for the long term benefit of the community.

The eligibility requirements indicated above will be applied in the assessment of an initial request for a Council facility for occupation under an Occupation Agreement and an application to renew an Occupation Agreement.

### **5.3 Lease or Licence Provisions**

Council recognises that many organisations have strong historical affiliation with the facilities which they use, and have contributed in cash and kind to their development. Generally Council supports the continued occupation of those facilities by those organisations but with a preference for a shared multiuse basis where it does not currently occur.

Details of whether a Lease or a Licence should apply to an occupancy can be found detailed in the schedule to this Policy Document and is strictly subject to any updated legislation and cases which may arise during the course of this Policy being in force.

#### **5.3.1 Occupation Agreement Term**

The period of an Occupation Agreement will in part be determined according to the NFPO and Council's estimation of the contribution made by a NFPO to the relevant facility being or to be occupied:

1. Where the NFPO voluntarily undertakes (with prior written approval from Council) extensions or improvements to the exterior of a facility (eg. Pergola, sun shade) they are responsible for the maintenance and presentation of those improvements. NB: The NFPO must also comply with any relevant statutory approval processes (eg. Development Consent / Building Board), prior to commencing any works.

Unless mentioned above, NFPO's of the facility should be responsible for all maintenance of the facility. Where more than one organisation uses a facility, contributions and responsibility for maintenance should be shared according to use.

#### **5.3.2 Operating Costs**

NFPO will be responsible for the costs associated with services provided to a Leased or Licenced facility (eg. Electricity, water usage and gas) and any applicable taxes (including GST and stamp duty).

#### **5.3.3 General**

The information below will form the basis of accountability by the NFPO to Council and subsequently through Council to residents of Litchfield Council.

##### ***(i) Hours of Use***

The hour of use will be subject to any legal restrictions and to ensure that the use doesn't affect the amenity of the area where the occupation occurs

##### ***(ii) Insurance***

The NFPO must maintain its own public liability insurance and insurances for all plant and equipment and all fixtures and fittings (and in the case of those owned by Council such insurance will name Council as a joint policy holder). Council will cover building insurance.

***(iii) Legal fees***

Each party will meet their own legal fees and expenses. The Tenant will be responsible for any registration costs of the Occupation Agreement.

***(iv) Removal of Assets***

The NFPO may not remove any assets that have been constructed or installed by them during the term of the Occupation Agreement. All improvement at the end of the Occupation Agreement shall remain in Council ownership unless Council gives notice to the NFPO that it must remove them.

The Council recognises that any items subject to a hire purchase agreement may be removed, prior to the expiration of the Occupation Agreement, however any damage made to the property in their removal must be made good by the NFPO at its sole cost to the reasonable satisfaction of Council.

***(v) Capital improvements***

NFPO may only undertake capital improvements with the written permission of Council as the asset owner (which Council may refuse in its absolute discretion).

Council retains ownership of capital improvements that cannot be removed unless otherwise specified in the Occupation Agreement at the expiration of the Occupation Agreement.

***(vi) Acknowledgement of Council contribution***

The NFPO shall, acknowledge Council's contribution in their organisation's annual report and publications, any advertising and community event.

A copy of the NFPO's audited or certified report is required prior to receiving any annual funding from Council.

***(vii) Nuisance***

Council requires that NFPO undertake their permitted activities without adversely impacting on the amenity of nearby neighbours. Council reserves the right to terminate the tenancy or to restrict the use of facilities by the NFPO if this requirement is not adhered to.

***(viii) Reporting requirements***

NFPO using Council's facilities will be required to report annually on performance indicators in relation to the facility and the organisation's activities. Council will provide guidance and advice on the collection of this information.

***(viii) Options to Extend***

These will be considered by the Council on a case by case basis.

***(x) Costs, and Payments***

The NFPO will be responsible for all costs under the Occupation Agreement except where otherwise expressly agreed. Any payments due under the Occupation Agreement shall be by electronic transfer to such account as Council may nominate.

***(xi) Rent Reviews***

Where Rent is payable under a Occupation Agreement , and the Occupation Agreement is for a period of [longer than three years] Council shall be entitled to increase Rent in line with CPI, every [three years].

***(xii) Business Tenancies Fair Dealings Act (BTFD Act)***

Where the permitted use (incidental or otherwise) involves the provision of retail sales or services the BTFD Act may apply and the NFPO will be given a 'Landlords Disclosure Statement' (LDS) prior to being granted its Occupation Agreement and the NFPO must comply with its obligations under that legislation including providing a signed copy of the LDS in accordance with the BTFD Act.

***(xiii) Planning Act (PI Act)***

Where an Occupation Agreement is granted with respect to part of a parcel of land for a term of over 12 years (including any options to renew or for a new lease or licence), unless the Occupation Agreement is only with respect to part of a building then the PI Act deems it to be a subdivision and PI Act approval will be required. Council will not enter Occupation Agreements for greater than 12 years without giving consideration to the provisions of the PI Act.

***(xiv) Repairing Obligation***

The NFPO will keep the property in good repair and undertake upkeep in accordance with a maintenance schedule.

***(xv) Crown Lands Act***

Where land is Crown land the provisions of the Crown Lands Act will apply and the NFPO must comply with any Crown lease terms and leasing will be conditional upon Ministerial approval in most cases.

**Termination of Agreements under this Policy**

Council reserve the right to terminate any Occupation Agreement permitted under this Policy, where there is a breach of the Occupation Agreement in accordance with the provisions in Occupation Agreement.

Further the Council will be entitled to terminate any Occupation Agreement (or negotiations) where the NFPO does not meet the NFPO Criteria contained in this Policy at any time during the term of the Occupation Agreement or any extension, renewal or renegotiated Occupancy Agreement. Such rights to terminate shall include, but not be limited to:

- (a) Breach of any conditions under the Occupation Agreement,
- (b) Damage or destruction of the building or infrastructure the subject of the Occupation Agreement (subject to any specific arrangements between Council and the Tenant in respect of reinstatement, as may be contained within the Occupation Agreement),
- (c) Receipt of a valid notice to terminate the Occupation Agreement in accordance with any agreement between Council and the NFPO.

**6. LEGISLATIVE REQUIREMENTS**

Community facilities will be managed in a manner which ensures a close nexus with legislation including the Local Government Act, the Crown Lands Act and other legislation and regulations and Government guidance that may apply from time to time.

Council will reserve to itself a right to make 'Rules' in connection with Occupation Agreements that it may apply from time to time providing these are not inconsistent with the Occupation Agreement.

This Policy is not intended to vary any Occupation Agreement existing or future and such Occupation Agreements will prevail to the extent of any inconsistency.

## 7. REVISION DATE

This policy is to be reviewed within four months after the next Local Government elections in 2016.

### REFERENCES:

Policy Number:	<b>LC38</b>
Policy Owner:	<b>GOVERNANCE</b>
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Amendments:	
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Related Publications:	

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Schedule to Policy Document Number #####

### Differences between Leases and Licences

The fundamental difference between a Lease and Licence is that a Lease gives 'exclusive occupation' of the relevant premises or area to be occupied to the occupier whereas a License gives occupation subject to the right of other parties (including the Landlord) to also occupy the relevant premises or area. (see *Radaich -v- Smith* (1959) 101 CLR 209). A lease is for occupation of an area to the exclusivity of the world including the Landlord (in this case the Council if granting the Lease) itself. Accordingly, if when granting occupation to a party it is clear that other third parties will require permanent or temporary occupation rights to the same area Council will grant a License rather than a Lease. If the area needs to be given over exclusively to a particular party to the exclusion of all others then a Lease will be granted by Council. By way of example, a market stall arrangement in an area marked out for 'weekend markets' for use by a variety of NFPO's will be provided to them under Licence to recognise that they all have rights of access to the area and that the stalls might 'move around' from weekend to weekend. A Lease would better suit a sporting club for its club house premises which it will occupy 24/7.

**Disclaimer – This is a general note on some of the differences between a Lease and a Licence. Legal advice should always be sought in relation individual matters as the circumstances of the case may contain peculiarities which falls outside the general note above.**