

9.6 NSW Telco Authority rental submission for Mount Misery

REPORT BY THE MANAGER PROPERTY AND REVENUE
TO 03 NOVEMBER 2021 ORDINARY MEETING
GOV400088, 20422

RECOMMENDATION

That Council:

1. **receive the report by the Manager Property and Revenue on the NSW Telco Authority rental submission for Mount Misery;**
2. **agree to enter into a suitable agreement with the NSW Telco Authority for a lease and licence within Lot 332 DP1141487 for the purpose of the *Permitted Use* as cited in Attachment 4 to this Report;**
3. **reject the NSW Telco Authority's offer of an annual rental fee for the amount as cited in Attachment 2 to this Report for the proposed lease and licence within Lot 332 DP1141487;**
4. **authorise the General Manager to negotiate an annual rental fee for the proposed lease and licence within Lot 332 DP1141487 to NSW Telco Authority for no more than 10% less than the amount returned in the rental Valuation dated 26/7/2021 (plus GST) as cited in Attachment 1 to this Report;**
5. **authorise the General Manger to negotiate the terms and conditions of the proposed lease and licence agreement with NSW Telco Authority;**
6. **authorise the General Manager and the Mayor, if additionally required to do so, to sign any documentation necessary to give effect to this resolution; and**
7. **authorise the affixing of the Common Seal of Council to all documents required to be sealed to give effect to this resolution.**

Executive summary

The NSW Telco Authority (NSWTA) has made a proposal to Council to lease and licence part of the Council owned Mount Misery telecommunications site (the Site) to expand the Public Safety Network (the Project).

The purposes of this Report are to provide Council with the opportunity to consider the grant of a new lease and licence to the NSWTA and subsequently seek Council resolutions to authorise delegated authority to the General Manager to negotiate both an appropriate annual rental fee for the Site and formal agreement.

Disclosure of Interest

Nil.

Detailed report

Allotment 332 DP1141487 having a total area of 1,075m² is located at 441 Mount Misery Road Mudgee and is known as the Mount Misery Communication Tower. The allotment is owned by

Council, is classified as *Operational* land in accordance the Local Government Act 1993 (LGAct) and is used for telecommunication purposes.

NSWTA first approached Council in December 2018 having identified Mount Misery as a suitable candidate for the Government Radio Network (GRN) to co-locate by way of a licence on the existing tower and to enter into a lease for 58m² of the land for the installation of related ground equipment.

The Project to expand the GRN and build a Public Safety Network for first responders is funded by the NSW Government.

A Heads of Terms document (HoTs) was endorsed by Council in 2019/2020 which indicated a rent for the NSWTA's occupation of \$3,200 pa (incl GST).

A HoTs is not a binding agreement. The HoTs was endorsed by Council so that Council's willingness to collaborate and negotiate with the NSWTA in relation to the Project was recognised and, to subsequently enable further negotiations and Council's obligations under its Leasing and Licencing Policy (the Policy) to progress.

The Policy directs that an independent valuation must be obtained to form the basis of negotiations in relation to a proposed rental amount. Obtaining a valuation ensures that fair and reasonable rent would be paid under an agreement and also facilitates Council's charter as custodian and trustee of public assets to effectively manage the holdings for which it is responsible in a transparent manner.

The commissioning of the valuation (the Valuation) occurred in June 2021 after the NSWTA had finalised investigations/decisions relating to access to the Site and other issues.

The Valuation obtained is appended as Attachment 1 to this Report.

The rental amount returned in this Valuation was subsequently rejected by the NSWTA.

In August 2021 the NSWTA informed Council it was prepared to undertake an independent valuation to facilitate valuation comparisons and further negotiations. This offer was accepted. However, the NSWTA withdrew the offer due to perceived time delays in procuring the valuation and instead provided examples of other sites within the Mudgee region which it considered comparable to the Site.

These examples were reviewed by the Valuer and Council's Manager of the Site.

It was deemed that the examples provided were of lesser value sites, and only one appeared to be a collocated site, with lower contention than Council's tower. As the information supplied showed little comparability to the Site, the market rental evidence was considered inferior.

The same examples have been provided to Council in the NSWTA's *Rental Submission* (the Submission) which is appended as Attachment 2 to this Report.

The Valuation has regard to the IPART *Final Report - Review of rental arrangements for communication towers on Crown land – July 2013*, commercial rents managed by other LGAs and private land holders. It is also contended that Mount Misery is a *High Value Site* (as opposed to the NSWTA's site status allocation of *Low Density* based upon its rural location) and commands a commensurable rental value. The market rents of telecommunication sites in regional NSW at a similar rent proposed by the Valuation have comparable characteristics to the Site, such as topography, line of sight, proximity to major townships and availability of alternative sites. These sites are outlined in the Valuation.

The term of the agreement is proposed to be 20 years via Consecutive 4 x 5 year leases.

As a result of the review, the NSWTA's assertion did not persuade the Valuer to a different point of view.

The issue of the rent is now referred to Council for consideration and determination.

The draft Agreement prepared by NSWTA lawyers (the Lawyers) has been reviewed by Council's legal representative. Suggestions and proposed amendments have been forwarded to the Lawyers. At the time of writing this Report, no response has been received.

The draft Agreement is appended as Attachment 4 to this Report.

It is recommended that Council agree to enter into a suitable agreement with NSWTA to occupy the Site and reject the NSWTA's offer of an annual rental fee for the proposed lease and licence for the amount as cited in Attachment 2 to this Report. Additionally, it is recommended to authorise delegated authority to the General Manager to negotiate both an appropriate annual rental fee for the Site in line with the Valuation and a formal agreement.

Community Plan implications

Theme	Good Governance
Goal	An effective and efficient organisation
Strategy	Prudently manage risks association with all Council activities

Strategic implications

Council Strategies

Nil.

Council Policies

Leases and Licences of Owned and Managed Land and Real Property.

Legislation

Local Government Act 1993.

The Site is classified as *Operational* land in accordance with Part 2 Division 1 LGAct, therefore Council is not required to publically advertise the proposed Agreement.

Financial implications

Costs have been incurred for the valuation of the Site and the first review of the draft agreement by Council's lawyer.

As a result of negotiation, the NSWTA increased its original payment offer to Council to defray legal expenses. If there are no further negotiations in relation to the finalisation of the Agreement it is expected that legal costs will exceed this amended offer and will be borne by Council.

All expenses payable by Council will be funded from an existing budget.

If the Agreement is executed, income for the Mount Misery telecommunications facility will be increased.

Associated Risks

The requirement of obtaining a rental valuation in accordance with the Policy mitigates risks relating to non-transparency and mismanagement of the community's assets.

The engagement of Council's lawyer ensures adequate advice and representation is available to deal with risks to Council associated with conditions in the proposed Agreement.

NSWTA may decide not to proceed with the Project on the Site. Such a decision would not impact Mount Misery's financial viability as it is considered that opportunities are strong to secure other tenants who are willing to pay the full rent as returned in the Valuation if Council so desired.

DIANE SAWYERS
MANAGER PROPERTY AND REVENUE

LEONIE JOHNSON
CHIEF FINANCIAL OFFICER

15 October 2021

- Attachments:*
1. Valuation 26/7/2021. (Confidential - separately attached)
 2. NSW Telco Authority Rental Submission 15/10/2021. (Confidential - separately attached)
 3. Policy - Leases and Licences of Owned and Managed Land and Real Property.
 4. Draft of Proposed Agreement 24/9/2021. (Confidential - separately attached)

APPROVED FOR SUBMISSION:

BRAD CAM
GENERAL MANAGER



POLICY

Leases and Licences of Council Owned and Managed Land and Real Property

*A prosperous
and progressive
community.*

ADOPTED		VERSION NO	V 2.0
COUNCIL MEETING MIN	286/20	REVIEW DATE	SEPTEMBER 2024
DATE:	16 SEPTEMBER 2020	FILE NUMBER	COU500044, GOV400047

Objective

Council owns and manages both *Community* and *Operational* land and real property, and unformed Council public roads. Council will manage the use of its holdings for the benefit of the community and/or to maximise the amount of revenue it derives from these holdings.

Some of these land assets are available for short term and long term use under an agreement.

The main objectives of this Policy are -

- in response to Chapter 3 Local Government Act 1993, to acknowledge Council's charter as the custodian and trustee of public assets and to effectively manage the holdings for which it is responsible;
- to outline the general requirements for the grant of occupation agreements for Council owned and managed land and buildings;
- to ensure the grant of occupation agreements meet legislative requirements;
- to ensure management and use of Council owned and managed land and real property is consistent with Council's economic, social and environmental objectives;
- to ensure the grant of occupation agreements are consistent, transparent, fair and impartial.

Scope

This Policy applies to Council owned and Council managed *Community* and *Operational* land and unformed Council public roads.

This Policy excludes the hire and usage arrangements of land or real property where charges are set within Council's annual *Schedule of Fees and Charges*.

Legislative requirements

Local Government Act 1993
 Local Government (General) Regulation 2005
 Crown Land Management Act 2016
 Crown Land Management Regulation 2018
 Crown Lands (General Reserves) By-Law 2006
 Conveyancing Act 1919
 Real Property Act 1900
 Retail Leases Act 1994
 Residential Tenancies Act 2010
 Roads Act 1993
 Aviation Transport Security Act 2004
 Aviation Transport Regulation 2005

Civil Aviation Safety Authority

ICAC Direct Negotiations: Guidelines for Managing Risks 2018.

Related policies and plans

- Long Term Financial Plan 2019/29.
- Towards 2030 Community Plan.
- Asset Management Policy.
- Asset Management Strategy.
- Building Maintenance Plan.
- Mid-Western Regional Council Plans of Management for *Community* land.
- Mudgee Regional Airport Master Plan 2015.
- Mudgee Showground Master Plan 2009.
- Mudgee Showground Four Year Business Plan 2016/2017-2020.
- Unmaintained & Unformed Roads Policy.
- Roads Asset Management Plan 2016-2026.

Definitions

CLMA means Crown Land Management Act 2016.

Community Land as defined in Chapter 6, Part 2 of the Local Government Act 1993.

Council means Mid-western Regional Council.

Crown means the NSW Government.

Land as defined in Section 3 of the Real Property Act 1900.

Lease is any agreement under which a person grants to another person for value a right of occupation of premises or land for a particular purpose for a specified term. It gives the tenant a proprietary interest in the real property.

Licence is an agreement that grants a personal right to occupy and use a premises or land for a particular purpose. It does not grant exclusive possession of the land and may permit the land to be used by other persons.

LG Act means the Local Government Act 1993.

Market Rental Value is the amount of annual rent achieved if the occupation had been let in a competitive market.

Minister means Minister for Local Government.

Occupation Agreement means the contract between the user and council to reflect the agreed terms and conditions for the use of the land or facility. A lease or licence is referred to as an agreement.

Operational Land as defined in Chapter 6, Part 2 of the Local Government Act 1993.

Plan of Management as defined Chapter, Part 2 of the Local Government Act 1993.

Real Property means land and all the things that are attached to it.

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Regulations means Local Government (General) Regulation 2005.

Roads Act means Roads Act 1993.

Tenant is a person or company or organisation who occupies land or real property rented from the Council. A tenant may be a lessee or licensee.

Policy

An occupation agreement may take the form of either a licence or lease.

Types of occupation may include, but are not limited to, major commercial developments; retail, airport and other commercial businesses; residential; community groups or clubs; agistment and occupation of surplus unformed Council public road reserves.

Types of agreement documentation to formalise an occupation include, licence agreements, retail leases where occupation is subject to the Retail Leases Act 1994; residential leases where occupation is subject to the residential Tenancy Act 2010; all other occupations are leases subject to the provisions and formal requirements under the Real Property Act 1900 and the conveyancing Act 1919.

The lease or licence will be administered in accordance with the LG Act, and CLMA when dealing with *Community* land, *Operational* land and; the Roads Act when dealing with unformed Council public roads.

A proposed lease or licence outcome will be assessed in accordance with, but not limited to, the following –

1. STATUTORY AND STRATEGIC CONSIDERATIONS:

- Land management provisions of the LG Act, CLM Act and Roads Act;
- Other Legislative requirements;
- Native Title interest and Aboriginal Land Claims;
- Planning controls;
- Strategic objectives;
- Asset management objectives;
- Land will be effectively utilised;
- Condition & ongoing maintenance requirements;
- Land classification and zoning;
- Length of tenure and if the duration of the agreement allows Council to respond to any changing operational and community demands and needs;
- Exclusivity or non-exclusivity of use;
- Social and community benefit – address identified community demand and Council's operational needs.

2. COMMERCIAL AND FINANCIAL CONSIDERATIONS:

The most appropriate return; having regard to the proposed use, tenant and the specific property being the subject of the agreement.

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General Principles

DELEGATION

Pursuant to section 377 of the LG Act, the General Manager has been provided with delegated authority to enter into all leases and licenses on behalf of Council.

COMMUNITY LAND

The lease or licence of *Community* land is restricted by the LG Act and must be consistent with the core objectives of the category of land, for a use prescribed by the LG Act or Regulations and expressly authorised in a Plan of Management.

Purposes prescribed by the LG Act for leases or licences of *Community* land are for the provision of goods, services and facilities, and the carrying out of activities, appropriate for the needs within the local community and of the wider public in relation to public recreation or the physical, cultural, social and intellectual welfare or development of persons.

The term of tenure for *Community* land is influenced by the legislative requirements of the LG Act.

OPERATIONAL LAND

The lease or licence of *Operational* land is not burdened with the same legislative restrictions as those of *Community* land.

APPOINTMENT PROCESS

A licensee or lessee will be assigned by a public competitive process, being either by tender, expression of interest or other competitive process, unless there are exceptional circumstances.

In exceptional circumstance situations, it may not be possible to use a competitive process or; while a competitive process may be possible, it may be so impractical or expensive that direct negotiations are the most acceptable way to seek assignment.

All direct negotiations must be undertaken having regard to the guidelines issued by the Independent Commission Against Corruption - *Direct Negotiations: Guidelines For Managing Risks 2018*.

In other circumstances, Council may contract a suitably qualified real estate agent to secure a tenant.

LEASE AND LICENCE TERMS AND CONDITIONS

In all instances, except where deemed a standard agreement template will be acceptable, lease and licence agreements will be prepared and reviewed by Council's solicitor having regard to the proposed use, tenant and the specific property being the subject of the agreement.

Any standard agreement template will be submitted to Council's solicitor for review at least every three years to reflect changes in legislative and administrative requirements.

APPLICATION FEES AND LEGAL COSTS

Unless exempt by legislation, the proposed lessee/licensee shall be responsible for the payment of all application fees (when applicable) and Council's legal costs in the preparation and review of leases and licences.

Prior to engaging legal representation, a quote shall be obtained and provided to the proposed lessee/licensee.

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RENTAL VALUE

Market rental valuations will be obtained from a suitably qualified valuer for all *Community* and *Operational* land and Council public roads. In certain circumstances a rental assessment may be obtained from a suitably qualified real estate agent.

A rental return of less than market value may be considered in specific circumstances.

A market rental review valuation will be obtained for all leases and licences at least every 3 - 5 years and if applicable a tenant will be secured via the Appointment process.

RENT REVIEW AND ADJUSTMENTS

All rents will be reviewed in line with the tenure agreement with the view to being increased annually for the term of the agreement by either a consumer price index adjustment, a fixed percentage, or as specified in the individual agreements.

MANAGEMENT OF LEASE AND LICENCE TERMS AND CONDITIONS

Council will manage the compliance of lease and licence terms and conditions, except in certain circumstances where the management may be contracted to a suitably qualified real estate agent.

MAINTENANCE, IMPROVEMENTS AND PRESENTATION

Responsibilities will be fully detailed in formal agreements.

In relation to buildings and structures, no alterations, modifications or beautifications are to be undertaken without Council's consent.

INDEMNITY

All tenants shall indemnify Council (and the Crown, if applicable), and hold Public Liability Insurance to the minimum value of \$20 million; or other amount as advised by Council.

Variation

Council reserves the right to vary the terms and conditions of this policy, subject to a report to Council.