

COBB COUNTY LEASE POLICY

Effective Date:
BOC Amended:

Owner	Board of Commissioners
Reviewers	Support Services; County Attorney's Office
Related Policies	Support Services - Steps Taken for Purchase/Sale of County Owned Property; DOT Land Acquisition Policy, Procedure and Rule Manual § III Q
Related Standards	
Storage Location	Clerk's Office via Agenda Item
Last Review Date	N/A
Next Review Date	N/A
Review Cycle	Document is updated as needed; no regular cycle established
Employee Acknowledgment	N/A

1. PURPOSE

The purpose of the Cobb County Lease Policy is to provide direction, guidelines and uniform procedures for the lease of County Owned Property or sublease of County leased properties to third parties, and for the lease of property owned by third parties for use by the County.

2. GOVERNING LAWS, REGULATIONS AND STANDARDS

Georgia Constitution and Official Code of Georgia Annotated	Art. IX, § III, Para. I, Art. IX, § II, Para. III, Ga. Constitution O.C.G.A. § 36-9-2 and 3; O.C.G.A. § 36-30-3; O.C.G.A. § 36-60-13
Official Code of Cobb County	§ 2-3
Case Law	Screws v. City of Atlanta, 189 Ga. 839, 843 (1940); Malcolm v. Webb, 211 Ga. 449, 86 S.E. 2d 489 (1955); Madden v. Ballew, 260 Ga. 530, 531 (1990); Stein v. Maddox , 234 Ga. 164, 215 S.E.2d 231 (1975); City of Atlanta V. Black, 265 Ga. 425, 457 S.E.2d 551 (1995); Dyer v. Martin, 132 Ga. 445, 64 S.E. 475 (1909).

4. DEFINITIONS

- a. **Board of Commissioners ("BOC")**-The duly elected officials of the Cobb County Board of Commissioners.
- b. **County Owned Property** – Real property owned by the County which is surplus or otherwise available for lease to third parties.
- c. **County Leased Property** – Real property leased by the County which is surplus or otherwise available for sublease to third parties.

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- d. **Property Advisory Commission ("PAC")** – A commission duly established in accordance with state law and resolution of the BOC, on January 28, 2003, for the sale and disposal of County Owned Property and leased property.

5. POLICY

The County enters into leases of real property both as a landlord and as a tenant. The policy respecting leases differs depending upon the capacity of the County in each lease. When acting in the capacity of a landlord and leasing County Owned Property, the County is acting in a proprietary, rather than a governmental, manner and has greater flexibility regarding the terms of those leases.

The Georgia courts have held that it is the duty of County commissioners to exercise their best judgment and skill and to do everything reasonable in their power to obtain the best price of land being sold. *Malcolm v. Webb*, 211 Ga. 449, 86 S.E. 2d 489 (1955); *Stein v. Maddox*, 234 Ga. 164, 215 S.E. 2d 231 (1975); *City of Atlanta v. Black*, 265 Ga. 425, 457 S.E. 2d 551 (1995). The courts have further held that County commissioners and all dealing with them were required to exercise the utmost good faith, fidelity and integrity. *Id.* The same principles apply regarding lease rents and other terms when leasing County Owned Property.

A. Lease of County Owned Property

- i. The County is authorized by the Georgia Constitution, statutes and case law to lease, as a landlord, County Owned Property that is surplus and/or not currently required for County purposes.
- ii. Pursuant to the Georgia Constitution the County may lease properties to other governmental entities for a period not to exceed 50 years.
- iii. A primary objective in leasing County Owned Property to private entities is to maximize the benefits to the County through fair market rental amounts and upon other lease terms most favorable to the County.
 - a. The fair market rental of a property can be determined by an independent appraisal or by real estate market analysis by the real estate broker retained by the County.
 - b. County Owned Property should not be leased for no or nominal rental amounts.
 - c. Existing leases at no or nominal rents (i.e. \$1.00 annually) should be renegotiated upon expiration of those leases to conform to this policy.
 - (1) When the County has available space and a service listed in Georgia Constitution Article IX, § II, ¶ III, Supplementary Powers, is being provided, the BOC, in its discretion, may consider the following when leasing to a non-profit or charitable entity: (i) the ability of the entity to pay fair market rental, and (ii) in recognition of the substantial community benefits that such entities provide to the County, the fair market rent may be paid through a cash component and an in-kind contribution component as follows: the value of the agreed upon in-kind contributions will reduce the fair market rent detailed in (a) of this Section. The required in-kind contributions shall be mandatory and agreed to between the Tenant and the County on an annual basis and shall run concurrently with each year of the

rental term. In-kind contributions are at the sole discretion of the County. In the event the required in-kind contributions are not made as anticipated throughout the year, the Tenant shall pay the difference between the deduction granted that year to fair market rent and the actual value of the contributions provided. This reconciliation shall occur at the same time the annual in-kind contributions are determined for each year of the rental term. To be considered for such lease rent reductions:

- i. The tenant must be a 501(c)(3) organization listed as active with the Secretary of State and current in filing federal tax returns with the Internal Revenue Service;
 - ii. Non-profits leasing from the County must have current IRS status and sufficient resources to fully maintain the County Owned Property, including ability to pay all utility costs;
 - iii. Non-profit organizations leasing County Owned Property may not sublease any portion of the space to any other entity and may not collect rent for any portion of the property, without written agreement of the County. The County will, at a minimum, equally share in any rental revenue resulting from approved subleases.
- (2) Rent reduction consideration must have the support of the District Commissioner in whose district the County Owned Property is situated.
 - (3) Capital investments to make the facility/spaces usable by the non-profit tenant will be considered when determining duration of the lease agreement.
 - (4) The BOC must, to the extent possible, treat all nonprofit or charitable entity tenants fairly and equitably, without preferences.
 - (5) The BOC will, by majority vote, make the final determination regarding any rental reductions on a lease by lease basis.
- v. Secondary objectives for these leases should be to reduce and allocate as much cost and risk, as feasible, to the tenant under the leases, including tenant's responsibility for:
- a. *Use*- limited to specific purpose of tenant only, no illegal use or purpose inimical to health safety and welfare of the public;
 - b. *Term* – generally limited to three years, with possible one or two one-year renewal periods (Note: exceptions may be made depending upon cost of tenant improvements and other factors.)
 - c. *Termination* - provide for right of County to terminate lease for convenience.
 - d. *Condition* – property leased “as-is, where is” with all faults and no warranties.
 - e. *Repair and maintenance of the property* – tenant responsibility at its cost (Note: the County may in some circumstances wish to remain responsible for roof, foundation, structural, electrical, plumbing, HVAC and exterior maintenance-tenant responsible for all other repairs);
 - f. *Tenant improvements* –only with prior written consent of County, in its sole discretion, with all improvements becoming property of County upon lease termination and at tenant's sole expense, or County retains the right to require removal/restoration of property; tenant to perform work in first class manner in compliance with all laws and keep property lien free.

- g. *Insurance requirements*: tenant responsible for commercial general liability, property casualty and commercial automobile coverage. (Note: County insures buildings/property, but coverage should be secondary to tenant's insurance);
 - h. *Taxes*: tenant pays applicable taxes (excluding real estate taxes as County Owned Property is tax exempt);
 - i. *Utilities* – tenant responsible for all utilities consumed on the property or prorate utilities as appropriate.
 - j. *Risk of loss from casualty and condemnation* – on tenant, with County right, but not obligation, to repair and restore property; rent abates during restoration; provide right of either party to terminate lease upon casualty or condemnation.
 - k. *Default and remedies* - maximize events constituting default by tenant with shorter cure periods for such defaults; ensure broad remedies of County for tenant's default, including County cure of default and termination of lease.
 - l. *Assignment of Lease/Subletting or Property* - not permitted without prior written consent of County in its sole discretion.
- vi. Lease Procedures
- a. A County Owned Property must be declared either surplus and not necessary for County purposes or otherwise determined to be currently available for leasing to a third party. (e.g. not surplus but reserved for future use).
 - Such property would include remnant parcels from DOT projects, closed facilities (i.e. libraries, fire stations, other former uses), property donated to the County, and excess land not currently needed for County purposes.
 - A County-Owned Property can be declared surplus when it becomes "unserviceable" and cannot be beneficially or advantageously used under all circumstances for County purposes
 - b. The Support Services Department is responsible for overseeing the process of determining that a property is surplus and/or otherwise currently available for lease, with the recommendation from the various departments formerly utilizing or responsible for the property.
 - c. Once suitable property is identified, the Support Services Department should discuss it with the District Commissioner and obtain support from the District Commissioner for the lease, then either (i) present it to the PAC for a recommendation to the BOC that the property be declared surplus, or (ii) if the property is currently not in use but the County would like to reserve it for future use, then present it to the County Manager for recommendation that it be leased.
 - d. The PAC or County Manager, as applicable, can then direct that the property be marketed for lease through the services of the real estate broker retained by the County.
 - e. The real estate broker will advertise and solicit offers to lease properties upon the most favorable terms.
 - f. Once an offer to lease is received, the lease terms and documents are drafted and negotiated with the assistance of the County Attorney's Office.
 - g. When fully negotiated, the lease is presented to the BOC to declare the property surplus or otherwise available for lease and authorize entering the lease.

- h. The BOC has the sole authority to approve leases of County Owned Property pursuant to the Georgia Constitution, Georgia Code and case law, as it does with other interests in real property.
- i. In order for any County Owned Property to be leased, the BOC must by majority vote authorize entering into the lease and authorize the Chairperson to execute the necessary documents.

B. County Sublease of County Leased Property

To the fullest extent practicable, County sublease of County Leased Property should follow the same procedures as County lease of County Owned Properties.

C. County Lease of Third-Party Owned Property

- i. If the County is to be a tenant under a lease of property owned by a third party, it must comply with further requirements.
 - a. The lease must comply with O.C.G.A. § 36-60-13.
 - b. If the lease requires rent payments by the County beyond the current calendar year, it must comply with O.C.G.A. § 36-60-13. Multi-year leases by counties are prohibited unless they comply with that statute. Multi-year leases where the County is the landlord (and therefore do not create a debt obligation to the County) do not have to comply with O.C.G.A. § 36-60-13.
- ii. A primary objective in leasing property owned by a third party is to maximize the benefits to the County through the lowest rental amounts negotiable and upon other lease terms most favorable to the County.
- iii. Secondary objectives for these leases should be to reduce and allocate as much cost and risk, as feasible, to the landlord under the leases, including:
 - a. Repair and maintenance of the property - landlord's responsibility;
 - b. Insurance requirements - Landlord insures for commercial liability, building and property casualty; County insures contents and its personal property.
 - c. Taxes/Assessments – paid by landlord;
 - d. Risk of loss from casualty and condemnation - on landlord (including obligation to repair and restore, and abatement of rent during restoration period). County should have right to terminate lease at its discretion.
 - e. Default and remedies - minimize events constituting default by County and maximize cure periods for such defaults, ensure adequate remedies for landlord's default, including right to cure at landlord's cost and right to terminate lease.
- iv. Lease Procedures
 - a. The County will lease property owned by a third party when there is no suitable County Owned Property available for its proposed use.
 - b. A County department, court or elected official in need of additional space must first determine through the Support Services Department that there is no County Owned Property available for their purposes.
 - c. Upon such determination, the Support Services Department will solicit the assistance of the real estate broker retained by the County to identify suitable property of third parties for the required use.

- d. Once suitable property is identified, a letter of intent (“LOI”) is solicited from the third party or prepared with the assistance of the County Attorney’s Office to lease it.
- e. When the basic terms of the LOI have been agreed upon with the landlord, the County Attorney’s Office will prepare and negotiate the necessary lease documents.
- f. Once the final lease terms have been fully negotiated and lease drafted, the lease is presented to the BOC for approval.
- g. The BOC has the sole authority to approve leases of Third Party Owned Property pursuant to the Georgia Constitution, Georgia Code and case law.
- h. The BOC must by majority vote authorize entering into the lease and authorize the Chairperson to execute the necessary documents.

D. Specific Lease Provisions/Considerations

- i. **Payment Obligations.** Is the specific amount due monthly under the lease sufficiently specific (i.e. rent, common areas charges, other)? Commercial landlords like to structure leases with rent plus a percentage of operating expenses (i.e., building maintenance, landscaping, janitorial, utilities, etc.) based on square footage of leased space versus square footage of overall space. This presents a problem in that 1) the monthly rent can vary, and 2) departments might not be aware of and/or budget for additional operating expenses. The better practice is a lease where the County pays a specified dollar amount every month.
- ii. **Property Description.** Is the legal description of the leased space specific? Can the property be adequately identified from the lease language or exhibits? Are the proper exhibits attached?
- iii. **Term:** Is the term of the lease defined? The initial term, and any renewal terms, if applicable, should follow the calendar year. Initial term should be 1 - 3 years’ maximum, with possibility of one or two one-year renewals with the consent of the County (this will vary depending upon type of property being leased, such as airport, ATMs and others). NO MULTIPLE YEAR TERMS when the County is a tenant, absent compliance with O.C.G.A. § 36-60-13.
- iv. **Lease Approval.** Who is approving lease as to substance? The County Attorney approves as to form, but another agency, typically the Support Services Department or the user department, has negotiated the terms of the lease and would therefore sign “as to substance”.
- v. **Contracting Party:** Who is the County entity listed as a party to the lease? Sometimes the user agency tries to make the lease in their name (e.g. Cobb County Water Department), but as the BOC approves the lease, “Cobb County” is the party to the lease. (Often there’s descriptive language along the lines of “Cobb County, for use by the Tax Commissioner’s Office”, but sometimes we want to preserve the ability of another agency to step into the space without having to amend the lease).
- vi. **Other Party to Lease:** ensure that name of other party is a legal entity (e.g. Acme, Inc. versus Acme, LLC; check the Georgia Secretary of State’s website to ensure they are a legal entity authorized to do business in this state.)
- vii. **Use of Property:** Should be as broad as possible where County is tenant; limited narrowly to specific use of tenant where County is landlord.

- viii. **Maintenance and Repairs.** Landlord is responsible for all repairs where County is tenant. Where County is landlord, all repairs are to be performed by tenant, except for foundation, structural, exterior of building (excluding windows and doors), roof, exterior electrical and plumbing, parking lot and common areas, the maintenance of which to be performed by County. All tenant repairs to County property would require prior County approval.
- ix. **Taxes:** Generally, not applicable where County owns property (tax exempt). Landlord pays taxes where County is tenant of other property
- x. **Remedies for Breach:** Does lease define the County's remedies for breach? The other party's remedies against the County for breach? Would the County be liable for liquidated damages? Would the County be liable for attorneys' fees and legal expenses of landlord to enforce the lease? The latter provision is unconstitutional and cannot be agreed to.
- xi. **Waiver due to Breach:** Lease should contain provision that there shall no waiver of breach due to the failure of a party to enforce their rights; failure to enforce previous breach does not waive right to enforce subsequent breach.
- xii. **Termination.** Does lease contain a termination for convenience provision for the County? This should be included if at all possible.
- xiii. **Termination/Renewal Notice.** If the lease is for multiple terms, when and in what form must the County provide notice of termination or notice to renew? A typical provision requires the County to provide notice of intent to terminate on or before October 1st for terms ending at the end of the year. Obviously, the less amount of advance notice the County must provide, the better.
- xiv. **Exhibits.** Are all correct exhibits attached? The lease cannot go to the BOC without all exhibits attached.
- xv. **Waiver of Suit:** Lease must not waive the County's rights to sue (i.e. no mandatory arbitration).
- xvi. **Choice of Forum:** Lease cannot have a choice of forums clause requiring suits to be brought outside of Cobb Superior Court. This is a non-negotiable deal point (except where other party is the U.S. Government, the State of Georgia or an agency of either entity).
- xvii. **Lease Construction.** Who drafted the lease? If the County did, then consider provision to the effect of "Both parties participated equally in the drafting of this Agreement and such Agreement shall not be construed against either party". This is intended as a defense against construing contracts against the party that drafted it. See O.C.G.A. § 13-2-2(5). (Obviously if it's their contract, leave this out).
- xviii. **Severability:** Include a severability section: "if any one provision of lease is declared void by a court of competent jurisdiction, such provision shall be stricken and the remaining provisions shall remain in force and effect".
- xix. **Insurance Provisions:** If County is requiring the other party to maintain insurance, or they are requiring us (the County is self-insured) to do so, confirm accuracy/appropriateness of insurance language with the County Attorney's office and requirements. If County is landlord, tenant is to maintain general liability, property/casualty, automobile, umbrella, workers' compensation and other types and amounts of coverages determined by County.

- xx. **Tenant Improvements:** Can be made by tenant only with prior written approval of County and at tenant's sole expense. Improvements must be removed at lease expiration or retained and owned by County in its sole discretion. Improvements must be constructed in first class workmanlike manner in accordance with all laws and permits. Liens may not attach to the property or must be bonded off and removed by tenant.
- xxi. **Indemnification:** The County cannot, by law, indemnify third parties (other than the state, other counties or municipalities). Other governments know this, private parties almost never do. Delete any language that purports to have the County hold harmless or indemnify another party. This is non-negotiable.
- xxii. **Amendments and/or Renewals:** Leases can only be amended or renewed before they expire. Once they expire there is no renewal possible, rather a new lease is required. If amending a previous lease, review the previous leases and prior amendments, if applicable, to understand what is, is not being amended. The preferred method to amend previous contract is to delete Paragraph "X" of lease and insert in lieu thereof new Paragraph "X". Don't just amend by adding language if that creates a conflict or confusion over existing language. The County Attorney's Office must be consulted in drafting amendments and renewals.
- xxiii. **Subleases or Assignments:** where County is landlord, not permitted or at minimum impermissible without prior consent of County in its sole discretion. Where County is tenant, permitted without consent of landlord.
- xxiv. **Overall Review.** Does the lease make sense? Are there glaring ambiguities in the terms of the Lease? Typographical errors? Internal inconsistencies between various paragraphs? Illegible provisions? Review/draft the lease with the thought, "would this provision make sense to a judge or jury?"