



## Report to General Manager

Attachments:  
1. Encroachment Management Policy

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**SUBJECT:** Response to Notice of Motion - 11 Woolcott Avenue, Waverton

**AUTHOR:** Robert Emerson Director Open Space and Environmental Services

**ENDORSED BY:** Adrian Panuccio, Acting General Manager

### EXECUTIVE SUMMARY:

At the Council meeting of 20 February 2017 Council resolved:

- 1. THAT the signing of lease over public land in relation to 11 Woolcott Avenue, Waverton, be deferred but not cancelled at this point in time.*
- 2. THAT Council call for an urgent report to the next Council meeting into alternative access route(s) to the property at 11 Woolcott Avenue, including the access from John Street which is currently used by the owners to access and park at their property.*
- 3. THAT the report advise whether the lease of public land for private use is consistent with Council's commitment to the preservation of public open space.*
- 4. THAT further community consultation be undertaken in relation to the leasing of public land for private use.*
- 5. THAT the legal advice dated 24 February 2016 which was discussed at the briefing on 7 March 2016 be made public and posted on Council's website.*

This report attempts to respond to the issues raised within the Council resolution.

### FINANCIAL IMPLICATIONS:

Nil

### Local Government Act 1993: Section 23A Guidelines - Council Decision Making During Merger Proposal Period

The Guidelines have been considered in the preparation of this report and are not applicable.

### RECOMMENDATION:

- 1. THAT** the report be received.
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## **LINK TO DELIVERY PROGRAM**

The relationship with the Delivery Program is as follows:

- Direction: 1. Our Living Environment
- Outcome: 1.2 Quality urban greenspaces

## **BACKGROUND**

At the Council meeting of 20 February 2017 Council resolved:

- 1. THAT the signing of lease over public land in relation to 11 Woolcott Avenue, Waverton, be deferred but not cancelled at this point in time.*
- 2. THAT Council call for an urgent report to the next Council meeting into alternative access route(s) to the property at 11 Woolcott Avenue, including the access from John Street which is currently used by the owners to access and park at their property.*
- 3. THAT the report advise whether the lease of public land for private use is consistent with Council's commitment to the preservation of public open space.*
- 4. THAT further community consultation be undertaken in relation to the leasing of public land for private use.*
- 5. THAT the legal advice dated 24 February 2016 which was discussed at the briefing on 7 March 2016 be made public and posted on Council's website.*

## **CONSULTATION REQUIREMENTS**

Community engagement is not required.

## **SUSTAINABILITY STATEMENT**

The sustainability implications are of a minor nature and did not warrant a detailed assessment.

## **DETAIL**

This report attempts to respond to the issues raised within the Council resolution

**THAT the signing of lease over public land in relation to 11 Woolcott Avenue, Waverton, be deferred but not cancelled at this point in time.**

The signing of the lease has been deferred as per the Council resolution.

**That Council call for an urgent report to the next Council meeting into alternative access route(s) to the property of 11 Woolcott Avenue including the access from John Street which is currently used by the owners to access and park at their property.**

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There are possibly five alternatives for access to the property of 11 Woolcott Avenue and these include:

1. Vehicular access from John Street across Waverton Park to the residential property.
2. Vehicular access from Commodore Crescent.
3. Provision of a parking slab in the unmade section of Woolcott Avenue that is currently open space and utilising a stairway for pedestrian access to the private residence.
4. Provision of an access driveway on the unmade section of Woolcott Avenue.
5. Retain pedestrian only access to the private residence provided down the Woolcott Street Steps, Commodore Street steps, across the park from John Street.

### **Option 1 Vehicular access from John Street across the park to the residential property**

The reinstatement of access across Waverton Park from John Street under a lease arrangement with the owner of the property is an alternative that may be considered. It should be noted however that the original paved surface used by previous owners has been removed, and that a new paved drive across public open space will be required. The distance between the access gate and 11 Woolcott Avenue (through Waverton Park) is approximately 150metres. Such a lease arrangement will establish a clear precedent for private vehicle access across community open space that will make it difficult to refuse similar requests in the future. This would represent a significant shift in Council's long established policy of restricting access across reserves.

A formal lease would be necessary and a rezoning would be required to change the specific part of the park affected from Community Land to Operational land to allow the access as a permissible use.

This would need to be done through a proposal in a draft Local Environmental Plan and then undertake the required public hearing under section 68 of the Environmental Planning and Assessment Act 1979 before Council making any resolution.

It is noted that this option would also be considered a use of public open space for a private purpose and would be in contradiction to the current Council's Foreshore Parks and Reserves Plan of Management that applies to this area of Waverton Park.

The current plan of management has the following objectives that pertain to the alienation of community land and/or the use of public open space for a private purpose

*“Prohibit and prevent general vehicular access into foreshore parks and reserves*

*To remove existing private encroachments which impede use and enjoyment of the foreshore parks and reserves.*

*To prevent future private encroachments on foreshore parks and reserves.”*

It is not recommended that Council support this option.

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## **Option 2 Vehicular access from Commodore Crescent**

Access for Commodore Crescent. The access from Commodore Crescent would involve a lease or purchase of the land that is owned by State Rail. It would also require a rezoning. The major obstacle is the change in levels as there is a difference in level of 15m from Commodore Crescent to the ground level at the rear of the dwelling. Some form of car lift is likely to be required to gain access should the applicant be able to resolve the issue of tenure and zoning with State Rail. This is likely to be far more visually intrusive than other options that facilitate vehicular access.

## **Option 3 Provision of a parking slab in the unmade section of Woolcott Avenue**

Option three is the proposal most recently under consideration of Council and includes the Construction of a driveway, vehicle hardstand for two (2) vehicles and a pedestrian pathway within part of the unformed road known as Woolcott Avenue.

On 15 December 2014, the Notice of Rescission Motion (NoRM03) 10/14 was considered, whereupon Council resolved the matter as follows:

- 1. THAT the Lease be granted with the appropriate conditions.*
- 2. THAT the future DA for the leased area be delegated to the General Manager for approval.*

At the Council meeting of 20 July 2015 Council resolved:

- 1. THAT Council notes the assessment and recommendations of the external consultant town planner, Ingham Planning Pty Ltd, which has had regard for the relevant considerations under S.79C of the Environmental Planning and Assessment Act 1979.*
- 2. THAT Council grants land owner's consent such that it can consider determining the Development Application (DA79/15).*
- 3. THAT subject to land owner's consent being granted as per Recommendation 2, Council determines the development application.*
- 4. THAT the lease incorporate the following Conditions: 1. Stipulate to owners that the parking position known as the "parking slab" is to be used for vehicular motorised parking only. 2. There be no roof structure over the parking slab. 3. The parking slab not be used for any building materials or storage.*

Development Consent No.79/15 was granted in September 2015 under delegation in accordance with the above resolution.

The subject of the lease of last considered by Council on 15 August 2016, which enabled the Council to implement Item 1 of the 15 December 2014 resolution, ie, THAT the Lease be granted with appropriate conditions.

Council forwarded the draft lease to the owners of 11 Woolcott Avenue on 29 August 2016 and have been in discussions since.

## **Option 4 Provision of an access driveway on the unmade section of Woolcott Avenue to the private residence**

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This option has been investigated in previous Council reports. The proposed driveway is a form of a public road within a currently unformed public road from Woolcott Street to the private residence. It is understood that there is no legal impediment to Council allowing the proposal. This proposal for a driveway along the unformed Woolcott Avenue from Woolcott Street as detailed in a previous report to Council did not proceed because *Council should not be supporting the change of use of land from public open space to private use.*

An earlier proposal did form part of a development application, which became the subject of Land and Environment Court proceedings against the Council's refusal to grant development consent. Those proceedings were withdrawn during the Court process.

### **Option 5 Retain pedestrian only access to the private residence**

There is no automatic right for vehicle access to any property and pedestrian access is available via a public road to the site. There are many properties within the Council's area that do not have vehicle access due to topographical constraints.

The current Foreshore Parks and Reserves Management Plan adopted by Council that applies to the open space component of Waverton Park clearly articulates that alienation of community land and/or the use of public open space for a private purpose ie private vehicular access is not supported.

### **That the report advise whether the lease of public land for private use is consistent with Council's commitment to the preservation of open space**

The leasing of public land that is zoned public open space and deemed community land for a private use contradicts Council's Encroachment Management Policy that was readopted by Council on 18 May 2015:

*"Encroachments onto Community land are not permitted unless authorised by a lease or licence in accordance with the Act, which provides that Council may only lease or licence community land where it is expressly authorised to do so under a Plan of Management, and where the purpose for which the lease or licence is issued is consistent with the core objectives for the area of community land in question. Note: if the purpose of the lease or licence is not consistent with the core objectives for the area of community land in question a Plan of Management authorising it will be rendered invalid."*

The leasing of public land that is zoned public open space for a private use contradicts Council's current commitment to the preservation of open space as identified within the Council's Foreshore Parks and Reserves Plan of Management. This plan identifies the following objectives for public open space that pertain to the alienation of community land and/or the use of public open space for a private purpose

*Prohibit and prevent general vehicular access into foreshore parks and reserves*

*To remove existing private encroachments which impede use and enjoyment of the foreshore parks and reserves.*

*To prevent future private encroachments on foreshore parks and reserves.*

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If the Council determines that they wish to propose a lease of public open space for a private purpose, Council would need to reclassify the land from Community land to Operational land through a proposal in a draft Local Environmental Plan and undertake the required public hearing under section 68 of the EPA Act 1979 before Council making any resolution.

**That further community consultation be undertaken in relation to the leasing of public land for a private use.**

Council's Encroachment Management Policy is attached for the Council's information. This policy was readopted by Council on 18 May 2015, after community consultation.

**That the legal advice dated the 24 February 2016 which was discussed at the briefing on 7 March 2016 be made public and posted on Council website**

Completed.

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# ENCROACHMENT MANAGEMENT POLICY

**Policy Owner:** Director Engineering and Property Services

**Category:** 2. Our Built Environment

## 1. STATEMENT OF INTENT

1.1 The purpose of this Policy is:

- a) To ensure that all encroachments on land owned or controlled by North Sydney Council are effectively managed under a consistent set of guidelines which safeguards Council's legal obligations and liability;
- b) To ensure encroachments from private property onto public property are safe for pedestrians and vehicular traffic, are designed and constructed to Council's expectations and conserves the desirable characteristics of an area;
- c) Subject to the *Environmental Planning and Assessment Act 1979*, to grant leases or licences to private landowners for encroachments approved by a development consent.
- d) To ensure that Council does not grant the right to encroach Council's land unless development consent is granted to the encroachment as part of a development consent, or otherwise only in exceptional circumstances.
- e) To ensure that any encroachments which are approved in exceptional circumstances onto land owned or controlled by Council are authorised by an appropriate instrument; and
- f) To formulate a consistent method of calculating rental or compensation payable to Council for approved encroachments and to develop a consistent approach for the removal of unauthorised encroachments.

## 2. ELIGIBILITY

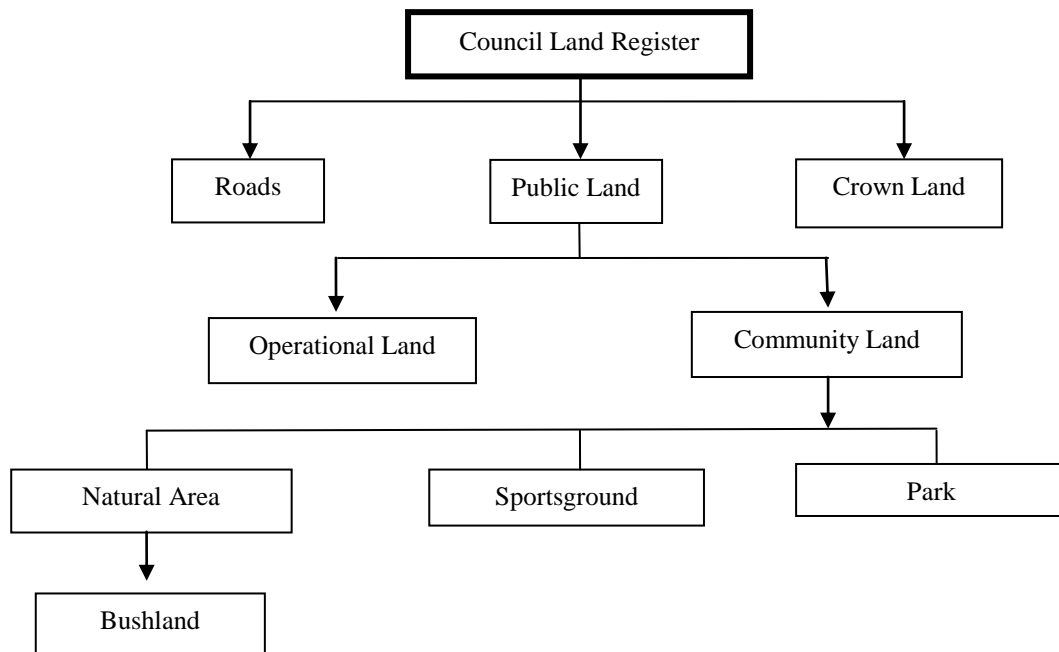
- 2.1 This Policy applies to all Councillors and employees of Council as well as external consultants employed as representatives of Council.
- 2.2 This Policy applies to all private landowners and residents, with specific reference to adjoining landowners who create encroachments onto or over land owned or controlled by Council.

## 3. DEFINITIONS

- 3.1 The Act - refers to the *Local Government Act 1993*.

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- 3.2 Adjacent owner - means the owner of land over which an encroachment extends.
- 3.3 Boundary - the boundary line between contiguous parcels of land.
- 3.4 Community Land - one type of Council's Public Land which:
- a) Is reserved for community use;
  - b) Is of importance to the community because of its use or special features and must be managed according to special guidelines in accordance with the Act;
  - c) Council has no power to sell, exchange or otherwise dispose of, unless it is re-classified as Operational Land;
  - d) Council can grant a lease, licence or other estate over, but only for the purposes pursuant to Section 46 of the Act, some of which may be expressly authorised by a Plan of Management, and not for more than 21 years;
  - e) Must have a Plan of Management prepared for it, or applying to it.
- 3.5 Council Land - all land owned or controlled by Council which is provided for in Council's Land Register.
- 3.6 Crown Reserve - a parcel of Crown land retained or acquired by the State and set aside for specific public purposes. The *Crown Lands Act 1989* is the principal legislation protecting and governing how these lands may be used and managed for the public benefit. Crown land can be reserved (or dedicated) for a multitude of purposes, including public recreation, showgrounds, cemeteries, environmental protection, public halls, racecourses and preservation of scenery.
- Uses and activities on land reserved for public purposes are broadly defined by the public purpose of the reservation, in conjunction with any conditions and provisions within the specific zoning in the relevant local Council's Local Environmental Plan. The land uses are then more specifically defined either by a Plan of Management, leases and licences or a combination of both.
- Crown land in North Sydney that has been reserved for public recreation is either zoned 'Public Open Space' or 'Bushland' under Council's *Local Environmental Plan 2001*.
- 3.7 Crown Lease - a lease on Crown land which enables exclusive use over a particular piece of land for a specified term and purpose, governed by the *Crown Lands Act 1989*.
- 3.8 Crown Licence - a Licence on Crown land which is a contractual agreement that grants the licensee a personal right to occupy and use Crown land for a particular purpose in accordance with the *Crown Lands Act 1989*. It does not grant exclusive possession of the land as is the case of a lease, and may permit the land to be used by other persons.
- 3.9 Easement - a right, attached to land (the dominant tenement), to use other land (the servient tenement) for a specified purpose known to the law.

- 3.10 Encroaching owner - means the owner of land contiguous to the boundary beyond which an encroachment extends.
- 3.11 Encroachment - the intrusion of a structure or other object onto or over land owned or controlled by Council.
- 3.12 “Exceptional circumstances” are those circumstances wholly within the discretion of the Council and may include a consideration of the public benefit or superior planning outcome which may benefit the public as a whole.
- 3.13 Interest/Instrument - lease, licence or easement.
- 3.14 Land Register - comprises all land that is owned or controlled by Council which is categorised as follows:



- 3.15 Operational Land - comprises land which:
- is held as a temporary asset or as an investment;
  - facilitates the carrying out by Council its functions or operational activities, such as the provisions of public car parks;
  - may not be open to the general public, such as a Works Depot or Council garage; and
  - is not required to be managed on behalf of present and future communities, or kept for general public use.

The range of controls which apply to Community Land do not apply to the use and management of Operational Land.

- 3.16 Other Estates - as defined in accordance with Section 21 of the *Interpretation Act 1987*, which includes interest, charge, right, title, claim, demand, lien and encumbrance whether at law or in equity. A common example in local government is the granting of easements.
- 3.17 Plan of Management - a plan adopted by Council under Division 2 of Part 2, Chapter 6 of the Act, to manage an area of public land.
- 3.18 Public Land - any land on Council's *Land Register* (including a public reserve) vested in or under the control of Council, but does not include:
- a) a public road, or
  - b) land to which the *Crown Lands Act 1989* applies.
- 3.19 Public Road Reserve - a public road reserve is a strip of public land that abuts property boundaries and which forms part of the public road accessible to the public.
- 3.20 Reserve Trust - a reserve trust is a corporation established under the *Crown Lands Act 1989* to manage a Crown reserve on behalf of the people of NSW. It is not a branch of a department of Government, however, it responsible under the oversight of the Minister - for care, control and management of a specific reserve and is not for private profit.
- 3.21 Road - in accordance with the *Roads Act 1993*, a road includes:
- a) the airspace above the surface of the road;
  - b) the soil beneath the surface of the road; and
  - c) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.
- For the purposes of this Policy roads include footpaths. It does not include roads under the control of the Roads and Maritime Services.
- 3.22 Subject land - that part of the land over which an encroachment extends.

## 4. PROVISIONS

### 4.1 Introduction

- 4.1.1 Encroachments onto Council's public land may present a potential risk of safety to the public and also a potential risk of legal claims to Council if left unmanaged.
- 4.1.2 Council has a duty to manage the risk and this is done by ensuring that the applicant proposing the encroachments remains responsible for identifying

the risks, assessing the extent of the risks and undertakes to carry out all measures necessary to mitigate the risk to an acceptable level.

- 4.1.3 Council shall only grant permission for an encroachment as part of a development consent or otherwise only in exceptional circumstances.
- 4.1.4 This policy therefore focuses on the management of encroachments which are deemed significant and which may also impact on Council's use of the land.
- 4.1.5 If the impact of an encroachment is significant, not in the public interest or otherwise unacceptable, Council may direct the encroaching owner to remove the encroachment. Alternatively, Council may remove the encroachment at the owner's expense or apply Council's standard Positive Covenant for Encroachments which would form part of the conditions of the Development Consent in exceptional circumstances.
- 4.1.6 If the impact of an existing encroachment is significant, but is deemed acceptable in exceptional circumstances, Council may direct the encroaching owner to formalise the encroachment by entering into a Deed of Agreement for:
- a) A lease or licence;
  - b) An easement or Positive Covenant, or both; or
  - c) A sale/transfer.

Note:

- i. If the land occupied by the encroachment is classified as Community land, it can only be leased/licenced if the purpose for which the lease/licence is issued is consistent with the core objectives for the area of Community land in question. Alternatively the Community land may be reclassified as Operational land (a classification which imposes fewer controls on development and use).
- ii. If the land occupied by the encroachment is Crown land, Council will only permit the encroachment to remain (by entering into a lease or licence) if the use is consistent with the purpose of the reserve (i.e. public recreation), and is in the public interest.

## 4.2 Guiding Principles

- 4.2.1 This Policy applies to all land owned or controlled by Council which is provided for in Council's *Land Register*.
- 4.2.2 No building or structure shall be erected on or over Council land unless approved by a development consent.
- 4.2.3 Council shall only grant permission for an encroachment as part of a development consent or otherwise only in exceptional circumstances.

- 4.2.4 The applicant will be charged Council's standard fees and charges for the assessment of the Development Application lodged.
- 4.2.5 The encroaching landowner is responsible for lodging a proposal to Council which is to be accompanied by a plan of survey, compiled by a Registered Surveyor, defining the extent of the encroachment. No reimbursement will be provided if Council does not approve the proposal.
- 4.2.6 It may be required that any land that forms part of a road reserve be converted to Torrens Title prior to the registration of an interest.
- 4.2.7 All costs associated with any of the transactions as per Section 4.1.6 will be borne by the applicant or the encroaching owner.
- 4.2.8 The encroaching owner will be advised whether a valuation is required, in which case the initial cost will be borne by Council and will later be recovered from the encroaching owner.
- 4.2.9 In the scenario that the encroachment is considered to be a case of exceptional circumstances, the encroaching owner will be required to lodge a bond of \$10,000 to cover all associated costs. This includes legal, advertising, surveying or any other likely costs arising from a transaction approved as per Clause 4.1.6. This bond is in addition to the Development application fees and charges payable as per Clause 4.2.4.
- 4.2.10 The encroaching owner will also be required to provide Council with written authorization to draw on the bond to recover expenditure being incurred. A further amount may be requested if the amount of bond lodged is insufficient.
- 4.2.11 The bond is payable once the public consultation process is complete and final approval obtained from Council. All monies expended will be deducted from the bond.
- 4.2.12 A security deposit may be required to ensure compliance with the condition of any lease or licence.
- 4.2.13 The method used for determining the rental or compensation payable to Council is outlined in Item 4.7.
- 4.2.14 This policy does not apply to Outdoor Dining Licences where Retailers are encroaching onto Council's footpath.
- 4.3 Development Application (DA) Process
- 4.3.1 Landowners should be aware that Council may impose further restrictions on the use of the land in accordance with the DA process.

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- 4.3.2 Approval to install encroachments on public land will generally require development consent; however circumstances regarding encroachments from private property onto public property are site specific.
- 4.3.3 Zonings of some areas may prevent the land from being leased, as such a use would comprise prohibited development under Council's Planning Controls.
- 4.3.4 Work must not be carried out on a public road or footpath unless consent has been granted by Council under the provisions of Section 138 of the *Roads Act 1993* and Section 68 of the Act. These are separate approvals to development consent or a complying development certificate under the *Environmental Planning and Assessment Act 1979*.
- 4.3.5 If development consent is required and the proposal is generally considered to be acceptable, owner's consent will need to be provided by Council and a development application submitted for consideration (fees will apply). Council's City Strategy is responsible for considering any development application submitted to the Council.
- 4.3.6 This process applies to all categories in Section 4.1.6; therefore it is essential that the encroaching landowner obtain the appropriate planning advice to determine the specific requirements.
- 4.4 Current Permitted Encroachments - The requirements for Permitted Encroachments can be found in Section 20.6 of the North Sydney Development Control Plan 2013 (DCP).
- 4.4.1 Encroachment Checklist
- Any application for Development Consent that proposes an encroachment shall be required to complete the "Checklist and Guide for Development Applications" prior to lodgement.
- This form is located at the rear of the Encroachment Management Policy.
- Note: Permitted encroachments do not apply to Community land or Crown reserves.
- 4.5 General principles in relation to each category for the management of encroachments on Council Land.
- Council shall only grant permission for an encroachment as part of a development consent or otherwise only in exceptional circumstances
- 4.5.1 Management of Encroachments on **Roads** (regulated by the *Roads Act 1993*) - to enable an encroachment which is approved by Council in

exceptional circumstances to be formalised on Council's Public Road, the following principles are to be considered in relation to each category:

#### 4.5.1.1 Leases and Licences

- a) Leases and Licences granted on roads are regulated by Sections 149 to 157 of the *Roads Act 1993*.
- b) Council may lease or issue a licence over the land to the adjoining owner if, in its opinion, the road is not being used by the public and only if Council has approved/authorised the encroachment due to exceptional circumstances.
- c) The land must comprise a temporary structure that can be easily demolished or removed and no structure may be erected on Council land unless approval is obtained.
- d) Leases and Licences as per Item 4.5.1.1 (b) may be categorised as follows:
  - i. Use of small areas of land for driveways, garages or parking areas;
  - ii. Use of small areas of adjoining land for incorporation or beautification of a resident's holding; and
  - iii. Commercial use.
- e) The term of the lease or licence, including any Option to Renew must not exceed five years.
- f) The lease is to be advertised in accordance with Section 154 of the *Roads Act 1993*, inviting submissions to the proposal.
- g) The granting of the lease is subject to Council approval once all submissions received are reviewed. The lease may be terminated by Council at any time and no compensation will be payable by Council in the event of any termination.

#### 4.5.1.2 Easements/Positive Covenants

- a) Despite Section 138 of the *Roads Act 1993* prohibiting any works to be undertaken, this Section constitutes the creation of an easement and all applications are to be made in accordance with this Section.
- b) Council may agree to register a Positive Covenant over the encroached area.

#### 4.5.1.3 Sale/Transfer

- a) If Council is of the opinion that the subject property is no longer required for its original purpose that it was set aside for, only then will Council consider selling the property to the encroaching owner, but only in exceptional circumstances.

- b) The encroaching owner should be aware that the road will require closure and this imposes additional costs. No guarantee is made by Council that approval will be given by Crown Lands to close all or part of any public road.

4.5.2 Management of Encroachments on **Operational Land** (governed by the *Local Government Act 1993*) - to enable an encroachment which is approved by Council in exceptional circumstances to be formalised on Council's Operational Land, the following principles are to be considered in relation to each category:

#### 4.5.2.1 Leases and Licences

- a) Operational land has no special restrictions other than those that may apply to any piece of land.
- b) It can be alienated from the public and can be leased for any period as determined by Council.

#### 4.5.2.2 Easements/Positive Covenants

- a) Although no specific restrictions apply, the easement/positive covenant will only be considered in exceptional circumstances.
- b) Council could apply its standard Positive Covenant clause which would form part of the conditions of the Development Consent.

#### 4.5.2.3 Sale

- a) If the encroaching landowner wishes to transfer the subject property, Council will make a determination on whether the property is required for the original or any other Council purpose, and if not, may begin statutory procedures to sell the land, but only in exceptional circumstances.
- b) Any encroachment supported by Council is to be consistent with the guiding principles.

4.5.3 Management of Encroachments on **Community Land** (Governed by the *Local Government Act 1993*)

#### 4.5.3.1 Lease, Licences and Other Estates

Management of Encroachments on Council-owned Community land shall be in accordance with the following principles:

- a) Development and use of Community land is subject to strict controls, in accordance with the *Local Government Act 1993*.
- b) Community land cannot be sold, is subject to strict restrictions to ensure its long term retention for public use, and is required to be used and managed in accordance with an adopted Plan of Management.

- c) Encroachments onto Community land are not permitted unless authorised by a lease or licence in accordance with the Act, which provides that Council may only lease or licence community land where it is expressly authorised to do so under a Plan of Management, and where the purpose for which the lease or licence is issued is consistent with the core objectives for the area of community land in question. Note: if the purpose of the lease or licence is not consistent with the core objectives for the area of community land in question a Plan of Management authorising it will be rendered invalid.
- d) Under the *Environmental Planning and Assessment Act 1979*, Community land may be reclassified as Operational land. Reclassification can occur by amending the Local Environmental Plan, however a public hearing into the proposed reclassification must be held prior to Council making any resolution.

#### 4.5.3.2 Sale/Transfer

- a) Council has no power to sell, exchange or otherwise dispose of Community land unless it is re-classified as Operational land.
- b) Council, pursuant to the Act, must first determine whether the subject land be considered for sale.
- c) If Council resolves that the land be considered for sale, and the use is not consistent with the core objectives of the land, the land must be:
  - i. re-zoned in accordance with the intended use;
  - ii. sold subject to an environmental study being undertaken;
  - iii. re-classified to operational land through a change in the LEP; and
  - iv. sold subject to a public hearing being undertaken.

#### 4.5.4 Management of Encroachments on **Crown Reserves** (Governed by the *Crown Lands Act 1989*)

##### 4.5.4.1 Leases and Licences

Management of Encroachments on Crown Reserves shall be in accordance with the following principles:

- a) Any dealing in Crown land must be consistent with the *Crown Lands Act 1989* and the Department of Primary Industries Catchments and Lands Trust Handbook, and in accordance with the Principles of Crown Land Management, Section 11 of the Act.
- b) Encroachments onto Crown land are not permitted unless authorised by a lease.

- c) Where Council is the Reserve Trust Manager of Crown land, upon notification of an existing encroachment Council will inspect the reserve to determine the public impact and to determine whether the encroachment is consistent with the purpose of the reserve.
- d) If the encroachment meets these conditions, a lease may be granted but only in exceptional circumstances, otherwise the encroachment must be removed.
- e) Generally, a lease or licence over a reserve (or part of a reserve) can only be granted to permit the lessee/licensee to use the reserve in a way that is consistent with the purposes for which the reserve was dedicated or reserved, and is in the public interest.
- f) If the encroachment meets these conditions, a lease may be granted at fair market value, subject to the consent of the Minister where necessary.

#### 4.5.4.2 Easements

- a) Section 34(1)(b) of the *Crown Lands Act 1989* permits the Minister to grant easements over Crown Land.
- b) Section 52 of the *Crown Lands Act 1989* governs the creation of easements.
- c) Council may not grant easements to encroaching owners unless Ministerial consent is obtained and will only be considered in exceptional circumstances.

#### 4.5.4.3 Sale/Transfer

- a) Section 34(1)(a) empowers the Minister to sell Crown Land on behalf of the Crown.
- b) Council cannot sell or otherwise dispose of Crown Land without the authorisation of the Minister.

### 4.6 Maintenance and Insurance

- 4.6.1 The encroaching owner is the only person with the entitlement benefiting from the interest and has the obligation to repair and maintain the infrastructure to Council's standard and requirements, unless otherwise determined by Council.
- 4.6.2 Council may occasionally monitor the encroached area to ensure that the public interest is maintained.
- 4.6.3 The encroaching owner may be required to hold and maintain professional indemnity and public liability insurance noting Council's interest for an amount determined by Council, for the service-life of objects encroaching on public property.

4.6.4 Council may impose a Positive Covenant for the maintenance, repair and upkeep, as well as for indemnity purposes on the title of the land in accordance with Sections 88BA (1) and (3) of the *Conveyancing Act 1919* to monitor the encroachment e.g. Council may require that public liability insurance be held over the encroached area and will not release a Section 88G Certificate if the insurance is not current.

4.6.5 If the encroaching owner neglects to fulfil their obligations, Council may terminate the agreement at any time and no compensation will be paid.

#### 4.7 Method for Calculating Rental or Compensation payable to Council

##### 4.7.1 Leases and Licences that apply to Roads and Operational Land

The rental payable to Council for the granting of Leases and Licences over an approved Encroachment will be calculated as follows:

4.7.1.1 Use of small areas of land for driveways, garages or parking areas, the annual cost of the rent will be 10% of the Value of Council Land (VCL).

4.7.1.2 Use of small areas of adjoining land for incorporation or beautification of a residents' holding, the annual cost of the rental will be 1% of the VCL.

Leases and Licences as per Items 4.7.1.1 and 4.7.1.2		
Acronyms	Description	Illustration
ACL	Area of Council land	5 sqm
AARL	Area of Adjoining Resident's land	500 sqm
VARL	Valuation of Adjoining Resident's land	\$1,000,000
VCL	Value of Council's Land (Rental Payable by lessee): (As per 4.7.1.1) Use of small areas of land for driveways, garages or parking areas (10%)	\$1,000 per annum plus GST
	(As per 4.7.1.2) Use of small areas of adjoining land for incorporation or beautification of a residents holding (1%)	\$100 per annum plus GST
VARL/AARL	Equates to \$ rate per sqm of ACL	\$2,000 per sqm

Illustration as per 4.7.1.1:

$$\begin{aligned} (\text{VARL/AARL}) \times (\text{ACL}) &= \text{VCL} \times 10\% \Rightarrow \text{Rental payable} \\ (\$1,000,000/500 \text{ sqm}) \times (5 \text{ sqm}) &= \$10,000 \times 10\% \Rightarrow \$1,000 \text{ per annum plus GST} \end{aligned}$$

Illustration as per 4.7.1.2:

$$\begin{aligned} (\text{VARL/AARL}) \times (\text{ACL}) &= \text{VCL} \times 1\% \Rightarrow \text{Rental payable} \\ (\$1,000,000/500 \text{ sqm}) \times (5 \text{ sqm}) &= \$10,000 \times 1\% \Rightarrow \$100 \text{ per annum plus GST} \end{aligned}$$

4.7.1.3 Commercial use - Council will engage the services of its nominated Valuer to determine an appropriate market rent.

4.7.1.4 Rental increases - an annual increase will apply to all leases until date of renewal. Upon renewal, the rent will be reviewed against the current land value of the adjoining landowner's property. The increased rent will be based either on the land value or the CPI at the time of renewal, whichever is the higher amount.

4.7.2 Easements in relation to Roads and Operational Land - the Compensation payable to Council for the granting of an Easement for an approved Encroachment will be calculated as follows:

Easements		
Acronyms	Description	Illustration
ACL	Area of Council land	5 sqm
ARL	Area of Resident's land	500 sqm
VRL	Valuation of Resident's land	\$1,000,000
VCL	Value of Council's Land (Compensation payable by encroaching owner)	\$10,000 (One-off payment)
VRL/ARL	Equates to \$ rate per sqm of ACL	\$2,000 per sqm

Illustration:

$$\begin{aligned} (\text{VRL/ARL}) \quad \times \quad (\text{ACL}) &= \text{VCL} \Rightarrow \text{Compensation payable} \\ (\$1,000,000/500 \text{ sqm}) \times (5 \text{ sqm}) &= \$10,000 \text{ plus GST (One-off payment)} \end{aligned}$$

Note: The method for calculating rental and compensation illustrated in Items 4.7.1 and 4.7.2 above, serves only as a guide. Council reserves the right to apply other methods of calculating rental and compensation as it may so determine. This includes market-related valuations commissioned by Council.

4.7.3 Lease, Licences and Easements in relation to Crown Land

The leasing and licensing of Crown Land will generally be carried out under the same conditions as Council's Community Land. Section 41-59 of the *Crown Lands Act 1989* stipulates the clauses in relation to leasing, licensing and the granting of an easement over Crown Land.

4.7.4 Sale/Transfer

- a) Council will engage the services of its nominated Valuer to determine the compensation based on an appropriate market value in relation to a:
  - i. sale of a Public Road Reserve; and
  - ii. sale of all other Council's Public Land, excluding Crown Land.
- b) The Minister will appoint a Valuer to assess the value of the compensation payable in relation to Crown Land

4.8 Removal or Release of Encroachments (as per Appendix A):

4.8.1 Appendix A (flowchart) outlines the process followed by Council after Council has been made aware of an unauthorised encroachment.

4.8.2 It focuses on the legal obligations delegated to Council in accordance with the appropriate Acts applicable to land either owned or controlled by Council as comprised in the Land Register.

4.8.3 The process outlined in Appendix A applies to the following categories of land:

- a) Roads;
- b) Operational land;
- c) Community land;
- d) Crown reserve.

## **5. RESPONSIBILITY/ACCOUNTABILITY**

5.1 Council's Director Engineering and Property Services, Director City Strategy and Director Open Space and Environmental Services are accountable for the implementation of this Policy.

5.2 Council's Property Assets Department is responsible for actioning tasks associated with the implementation of this Policy.

5.3 Council's Property Officer will review this Policy every four years or as required by Council or senior management.

## **6. RELATED POLICIES/DOCUMENTS/LEGISLATION**

The Policy should be read in conjunction with the following Council policies and documents:

- Local Environmental Plan
- Development Control Plan

The Policy should be read in conjunction with the following documents/legislation:

- Conveyancing Act 1919
- Crown Lands Act 1989
- Department of Lands Fact Sheets
- Department of Primary Industries Catchments and Lands Trust Handbook 2007 (updated 2012)
- Encroachment Act 1922
- Environmental Planning and Assessment Act 1979

**ENCROACHMENT MANAGEMENT POLICY**

- Local Government Act 1993
- Local Government Amendment (Community Land Management) 1998
- Local Government Manual 1993
- Local Government Practice Note May 2000 - Division of Local Government
- Real Property Act 1900
- Registrar General Directions
- Roads Act 1993

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**APPENDIX A: REMOVAL OR RELEASE OF ENCROACHMENTS FLOWCHART**

