

**Report to General Manager**

Attachments:

1. Encroachment Policy

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**SUBJECT:** Current Encroachment Management Policy - Response to Notice of Motion**AUTHOR:** Risha Joseph, Property Officer**ENDORSED BY:** Duncan Mitchell, Director Engineering and Property Services**EXECUTIVE SUMMARY:**

This report responds to Notice of Motion No. 32/18 by Councillors Barbour, Mutton and Keen dated 14 November 2018 regarding North Sydney Council's current Encroachment Management Policy. The resolution from Council's meeting held on 19 November 2018 in relation to Notice of Motion No. 32/18 states:

*1. THAT Council requests a report and briefing to consider a review of North Sydney's current policy relating to encroachments.*

The background to the Notice of Motion stated, *"It has been brought to Councillors' attention that the current policy may be imposing heavy costs on ratepayers that until recent times did not suffer such an impost, so an appraisal to make sure the Policy is fair and just is warranted"*.

Council's initial Encroachment Management Policy was adopted in 2013 and subsequently amended in 2015 and 2018. This policy was established to both discourage private property owners from encroaching on Council owned and/or controlled land (Public land) as well as to provide Council with a framework for managing encroachments that was consistent, transparent and fair.

Prior to the adoption of the Encroachment Management Policy in 2013, encroachments over Council owned and/or controlled land (Land classified as both *"Community"* and/or *"Operational Land"*) were not effectively managed and only irregular, ad-hoc mechanisms were in place to safeguard Council's legal obligations and public liability exposure should unregularised encroachments become a public safety hazard and/or cause loss/damage to other third parties.

The status of any encroachments that existed over or on Council owned and/or controlled land before the adoption of the Policy in 2013 remain unaffected by the policy (Unregulated). The policy is not applied retrospectively and only comes in effect for new encroachments or when property owners are making changes to their property and it is brought to Council's attention that part of the proposed changes (modifications) involve an encroachment.

Council's formula outlined in its policy for calculating what costs should be charged to property owners who wish to encroach on or over Council controlled/owned land is based on a common land valuation approach. Other Councils within NSW apply similar charges to property owners

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who wish to encroach on or over Council owned/controlled land.

This report is making recommendations on how the policy could be further amended in the future (at the end of this calendar year) to improve how costs associated with encroachments are communicated to property owners and also how the costs can be further validated if required.

#### **FINANCIAL IMPLICATIONS:**

The payment for market valuations to be prepared by Council for large encroachments or encroachments of a commercial nature will be paid for from the current Property budget allocation.

**Note:** As per the current Encroachment Management Policy as amended in 2018, Clause 4.2.8.3 states, “Council will bear the costs of any valuation if required. The valuation is for the purposes of Council only and it will not be released to any party.”

#### **RECOMMENDATION:**

- 1. THAT** Council assess the rental or compensation payable for any encroachment before Development Consent or a Lease, Licence, Easement or Deed of Agreement is granted and/or entered into so that the Property Owner can decide whether or not to proceed with the encroachment. Council’s assessment of the rental or compensation payable, including other terms and conditions such as the provision of insurances, bank guarantees, bonds and the creation of stratum subdivisions, is to be provided in writing to the Property Owner.
  - 2. THAT** for encroachments that are large or of a commercial nature, Council obtain two (2) independent valuations if necessary, using the “*before and after*” valuation approach, to ensure that the market rent that is proposed to be charged for the encroachment is supported by the two professional valuers, and
  - 3. THAT** if the rental/compensation is still being disputed by the Property Owner, the Owner be entitled to obtain at their own cost their own “*Market Valuation*”. Each party and their respective valuers are to be given the opportunity to review their valuation approaches and findings to reach a satisfactory agreement.
  - 4. THAT** these recommendations be incorporated into the Encroachment Management Policy when it is next amended at the end of this calendar year.
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## LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

Direction: 2. Our Built Infrastructure

Outcome: 2.1 Infrastructure and assets meet community needs

## BACKGROUND

This report responds to Notice of Motion No. 32/18 by Councillors Barbour, Mutton and Keen dated 19 November 2018 which states that, “*Councillors have requested a report and briefing to consider a review of North Sydney’s Council’s current policy relating to encroachments*”.

The background to the Notice of Motion stated, “*It has been brought to Councillors attention that the current policy may be imposing heavy costs on ratepayers that until recent times did not suffer such an impost, so an appraisal to make sure the Policy is fair and just is warranted*”.

Council’s initial Encroachment Management Policy was adopted in 2013 and subsequently amended in 2015 and 2018. The amendments made in August 2018 specifically addressed ‘*minor*’ encroachments.

This policy was established to both discourage private property owners from encroaching on Council owned and/or controlled land (Public land) as well as to provide Council with a framework for managing encroachments that was consistent and transparent.

**Table 1. Number of leases, licences, easements and deeds of agreements that relate to Encroachments that have been established after 2013 – adoption of the Policy**

Instrument	Number	Comments
Lease or Licence	11	11 x new leases / licences has been established directly as a result of Council’s Encroachment Management Policy a number of these are ongoing and yet to be finalised.
Easements	8	8 x new Easements have been finalised and are a direct result of Council’s Encroachment Management Policy
Minor Encroachments (Regularised through deeds or agreement)	3	3 x Minor Encroachments have been finalised through deeds of agreement since the adoption of Council’s Encroachment Management Policy.
Development Applications	5 x in March / April alone	5 x Development Applications have been lodged with Council since March / April 2019 which have identified encroachments in the survey plans that have been lodged with those DAs.

**Note:** That between 2008 and 2013 (prior to the adoption of Council’s Encroachment Management Policy in 2013), there were approximately 30 encroachments regularised through a formal instrument of agreement with Council, be that a lease, licence, easement or deed or agreement.

Prior to the adoption of the Encroachment Management Policy in 2013, encroachments over

Council owned and/or controlled land (Land classified as both Community and Operational Land) were not effectively managed and only irregular, ad-hoc mechanisms were in place to safeguard Council's legal obligations and public liability exposure should unregularised encroachments become a public safety hazard and/or cause loss or damage to other third parties.

The status of any encroachments that existed over or on Council owned/controlled land before the adoption of the Policy in 2013 remain unaffected by the policy (Unregulated). The policy is not applied retrospectively and only comes in effect for new encroachments or when property owners are making changes to their property and it is brought to Council's attention that part of the proposed changes (modifications) involve an encroachment.

The purpose of Council's Encroachment Policy is primarily:

- 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. To enter into Agreements with private property owners for encroachments where the encroachment/s are greater than 5m<sup>2</sup> or 1m<sup>3</sup>, and which has been approved as part of a development consent, or in exceptional circumstances;
- d. To formalise existing encroachments which are unable to be removed; and
- e. To formulate a consistent method of calculating rental or compensation payable to Council for approved encroachments.

## **CONSULTATION REQUIREMENTS**

Community engagement was undertaken in relation to all versions of the Policy, in accordance with Council's Community Engagement Protocol prior to its adoption.

## **SUSTAINABILITY STATEMENT**

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

## **DETAIL**

**Why does Council need to charge rental / compensation to residents who wish to encroach onto or over Council owned / controlled land (Public land)?**

Rental is charged by way of a lease, licence or deed of agreement between Council and landowners who encroach on or over land that is controlled (or owned) by Council. Also in some instances whereby an easement is being sort for an encroachment, upfront compensation

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is payable to Council if an easement is agreed to by both parties and the encroachment is in accordance with the provisions of the policy. In most instances where encroachments occur or are being sort by property owners, the land is classified as “Road” or “other Public Land” and rent or compensation is charged by Council to compensate for loss of public amenity or use of the land for private benefit, as well as to cover administrative costs for Council to formalise the encroachment.

Formalising or regulating the encroachment is required to cover Council’s public liability exposure in terms of public safety and loss or damage caused to other parties that may arise as a result of the encroachment.

### **Risk and Public Liability**

Council is aware that encroachments present a potential public safety risk and has received legal advice on how this risk is to be managed.

The following clause prepared by Council’s lawyers is incorporated into all Development Consents and Agreements to safeguard Council against the potential risks that encroachments pose.

#### ***Insurance***

*“In the event that part of the proposed development encroaches upon or over Council land, the land owner must defend and hold harmless, indemnify and keep indemnified, Council and its employees, officers, agents and contractors from and against all claims, expenses, losses including consequential losses, damages and costs (including costs on a solicitor and client basis and whether incurred by or awarded against Council) that Council may sustain or incur as a result, whether directly or indirectly, of the encroachment by the proposed development on Council land, including:*

- (a) any injury or death to any person including any injury or death to the general public, employees, officers, agents and contractors, or invitees, or other entity of the Council; or*
- (b) damage to or loss of any property; and*
- (c) arising out of performance by the land owner of its obligations under the Conditions of Consent including claims by a person who is not a party to this development, except to the extent caused or contributed to by Council, its contractors, employees and agents.*

*Without limiting the generality of condition “XXX “(insert DA Condition Clause No.), the land owner must ensure that:*

- (a) the processes and methods to be used for carrying out the development will be completely suitable for the purposes for which they are required;*
- (b) the development is carried out in accordance with the Conditions of Consent;*
- (c) it will obtain for the benefit of Council all available product and work warranties from any suppliers, contractors and subcontractors in respect of equipment and materials used in the development that encroaches on Council land and assign such benefit to Council where the warranty is not in favour of Council.*

*The land owner must provide Council with a copy of its Certificate of Insurance on an annual basis so that Council can satisfy itself that the land owner holds adequate public liability insurance in relation to the development that encroaches on Council land.”*

### **Costs and Compensation: Method for calculating Rental and Compensation Payable to Council for Encroachments**

As per Council’s Encroachment Management Policy the following mechanisms are used to calculate costs payable to Council for encroachments.

For leases, licences or deeds of agreement that apply to encroachments on or over Roads and Operational Land - the rental payable to Council will be calculated as follows:

- 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). Formula (a)
- 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. Formula (b)
- Commercial use - Council's registered valuer will determine the appropriate market rent or compensation payable to Council.
- In air spaces and other related encroachments, Council's registered valuer will determine the appropriate market rent or compensation payable to Council.
- Rental increases - An annual CPI increase will apply to all leases until the date of renewal.
- Upon renewal, a market valuation will be undertaken to determine the new rental.

Rental or other compensation (assessment of easements), for occupying Council's public space, legal costs arising from the preparation, negotiation and registration of the legal instrument, and ongoing insurances are some of the costs that arise when regularising the encroachment.

Extract from Council's Encroachment Management Policy – as amended August 2018.

**Table 2. How Lease / License Costs are Calculated for Encroachments**

Example of Calculation in relation to Leases and Licences as per Items 4.2.7.1 (a) and (b)		
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):	\$10,000
VCL Rent	(As per 4.2.7.1 (a)) Use of small areas of land for driveways, garages or parking areas (10%)	\$1,000 per annum plus GST
	(As per 4.2.7.1 (b)) 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 4.2.7.1(a): Use of small areas of land for driveways, garages or parking areas (10%)

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

Illustration as per 4.2.7.1(b): Use of small areas of adjoining land for incorporation or beautification of a residents holding (1%)

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

## **How is Rental / Compensation Calculated?**

Council's existing Encroachment Management Policy contains three (3) methods of calculating rental:

(a) **Ground Lease Rental Using Formula (a) from the Table 2**

The formula applies only for the use of small areas of land for the purposes of encroaching garages or parking areas.

The annual cost of the rent is 10% of the value of Council land measured against the value of the property owners land.

The figure 10% and the land value formula is based on a calculation of what an average 2.5m x 5m (12.5m<sup>2</sup>) car space would cost to lease or rent in North Sydney. Council is justified in charging private property owners for the privilege to exclusively use Public Land for the purposes of parking a private vehicle – garage or parking space. It is the opportunity cost that Council forgoes in leasing its Public land for Private benefit as opposed to the land being used for some other Public use or benefit.

(b) **Ground Lease Rental Using Formula (b) from the Table 2**

The formula applies only for small areas of adjoining land for incorporation or beautification of a residents holding.

The annual cost of the rent is 1% of the value of Council land measured against the value of the Property owners land.

The figure of 1% and the land value formula is based on a calculation of what Council considers fair and reasonable for private property owners to use small areas of adjoining Public land for incorporation or beautification of a residents holding. The low percentage (1%) recognises that residents look after, maintain and/or beautify the land so that it doesn't fall into disrepair or become dilapidated and that there are costs both monetary and in-kind associated with undertaking that work.

(c) **Market Valuation for a Lease, Licence, Easement or Deed of Agreement**

In instances where an encroachment is large or is for Commercial use - Council's registered valuer will determine the appropriate market rent or compensation payable to Council through the preparation of a "*Market Valuation*". *The Property Owner*

In addition, other encroachments that do not fall into the category of a garage, parking space or land beautification, such as air space encroachments and other related encroachments, Council's registered valuer will then also determine the appropriate market rent or compensation payable to Council through the preparation of a "*Market Valuation*".

**Note:** As per the current Encroachment Management Policy as amended in 2018 - clause 4.2.8.3 states - Council will bear the costs of any valuation if required. The valuation is for the purposes of Council only and it will not be released to any party.

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### **Consultation with other Councils**

To establish whether North Sydney Council's approach in managing and valuing encroachments is fair and reasonable, Council's Property Officer consulted with other Local NSW Council's Property Departments for comment. Hornsby, Tweed, Blue Mountains and Canada Bay all responded to staff questions of the valuation and general approach to managing encroachments. The responses were consistent with the methodology used by North Sydney Council for valuing and managing encroachments.

### **Conclusion**

It is recognised that property owners need more formal written advice from Council on how encroachments are valued before Development Consent or a lease, licence, deed of agreement or easement is granted or entered into so that the property owner can decide whether or not to proceed with the encroachment. It is recommended that Council's Encroachment Management Policy be amended to reflect this requirement by the end of this calendar year.

It is also recommended that in instances where encroachments are large or of a commercial nature that Council obtain two (2) independent valuations if necessary, using the "before and after" valuation approach, to ensure that the market rent/compensation that is proposed to be charged for the encroachment is supported by the two professional valuers, and if the rental or compensation is still being disputed by the property owner, the owner be entitled to obtain at their own cost their own "Market Valuation". Each party and their respective valuers are to be given the opportunity to review their valuation approaches and findings to reach a satisfactory agreement.

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# ENCROACHMENT MANAGEMENT POLICY

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

**Category:** 2. Our Built Infrastructure

## 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) To enter into Agreements with private property owners for encroachments where the encroachment/s are greater than 5m<sup>2</sup> or 1m<sup>3</sup>, and which has been approved as part of a development consent, or in exceptional circumstances;
- d) To formalise existing encroachments which are unable to be removed;
- e) To formulate a consistent method of calculating rental or compensation payable to Council for approved 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

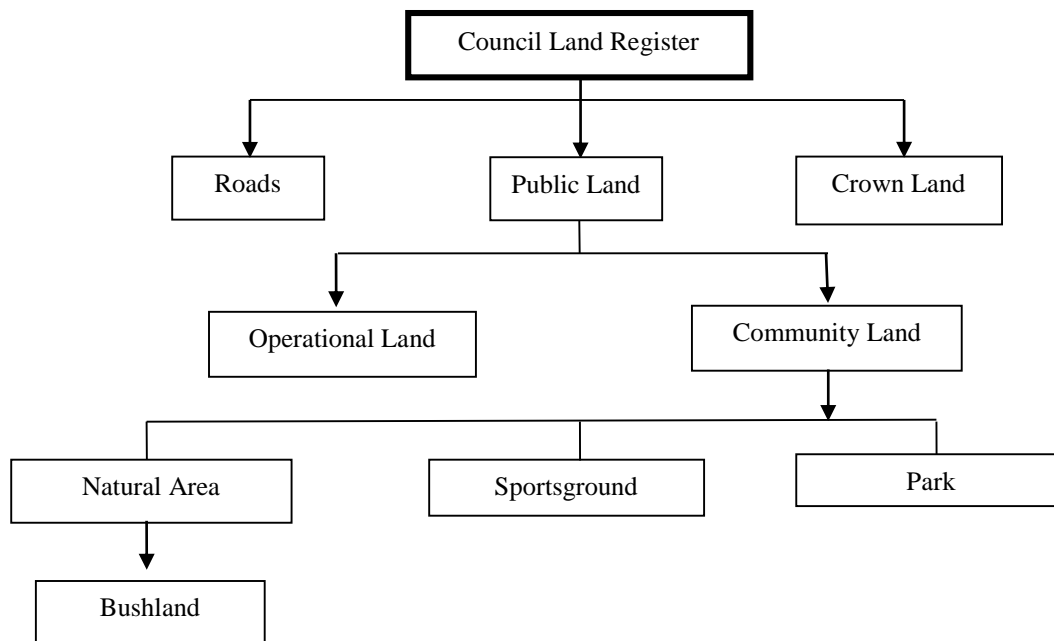
- 3.1 **The Act** - refers to the *Local Government Act 1993*.
- 3.2 **Adjacent owner** - means the owner of land over which an encroachment extends.
- 3.3 **Agreement** - means a legal contractual obligation to which two parties have entered into negotiations and have agreed to.

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- 3.4 **Bond** - a formal transaction wherein an applicant deposits an amount of money into the Council bond account to allow Council to draw on and pay costs associated with the transaction.
- 3.5 **Boundary** - the boundary line between contiguous parcels of land.
- 3.6 **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 it, 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.
- 3.7 **Council Land** - all land owned or controlled by Council which is provided for in Council's Land Register, including public road.
- 3.8 **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*.
- 3.9 **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.
- 3.10 **Crown Reserve** - a parcel of Crown land retained or acquired by the State and set aside for specific public purposes.
- 3.11 **Easement** - a right, attached to land (the dominant tenement), to use other land (the servient tenement) for a specified purpose known to the law.
- 3.12 **Encroaching owner** - means the owner of land contiguous to the boundary beyond which an encroachment extends.
- 3.13 **Encroachment** - the intrusion of a structure or other object onto or over land owned or controlled by Council.
- 3.14 **"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.

- 3.15 **Instrument** - A formal document which records and evidences proprietary rights.
- 3.16 **Land Register** - comprises all land that is owned or controlled by Council which is categorised as follows:



- 3.17 **Minor Encroachments** - an encroachment of a structure/s that are less than 5m<sup>2</sup> or 1m<sup>3</sup>, and are unlikely to result in a significant risk to Council.

Such encroachments may include structures such as hosecocks (taps); letterboxes; protrusion of parking garages, sheds; balconies, protruding into Council's airspace, structures, eaves and gutter overhangs, sewer and other drainage pipes, stairs; water meters; boundary line built elements such as fences, walls or other landscaping and architectural detail encroachments as determined solely at the discretion of Council, but does not include encroachments which currently benefit the encroaching property such as rock anchors, solar panels/structures and other structures which generate an income.

- 3.18 **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.

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- 3.19 **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.
- 3.20 **Parcel** - a parcel of land defined by measurement as a lot in a Deposited Plan or allotment lawfully registered pursuant to the provisions of the *Conveyancing Act 1919* and the *Conveyancing (Sale of Land) Regulation 2010*.
- 3.21 **Plan of Management** - a plan adopted by Council under Division 2 of Part 2, Chapter 6 of the *Local Government Act 1993*, to manage an area of public land.
- 3.22 **Positive Covenants or Restrictions for Maintenance and Repair** - a dealing created on title for the maintenance and upkeep of the burdened land in accordance with Section 88BA(1) of the *Conveyancing Act 1919*.
- 3.23 **Public Land** - has the same meaning as under the *Local Government Act 1993* and is defined as follows:  
public land means any land (including a public reserve) vested in or under the control of the Council, but does not include:  
(a) a public road, or  
(b) land to which the *Crown Lands Act 1989* applies, or  
(c) a common, or  
(d) land subject to the *Trustees of Schools of Arts Enabling Act 1902*, or  
(e) a regional park under the *National Parks and Wildlife Act 1974*.
- 3.24 **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.
- 3.25 **Regular Awnings** - the following table represents a “Regular Awning”. All other awning will be subject to Clause 4.2.3.5.

Awnings (in accordance with Council's DCP)			
Requirement		Zone	
		B3 - Commercial Core B4 - Mixed Use	B1 - Neighbourhood Centre
Minimum width		2m (min)	2m (min)
Setback from kerb	General	1.1m (or 600mm where walkway is not of sufficient width)	600mm
	To accommodate street trees	1.5m	2.0m
Height above footpath level		3.2m - 4.2m	3.0m - 3.6m

- 3.26 **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

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the oversight of the Minister - for care, control and management of a specific reserve and is not for private profit.

3.27 **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.

3.28 **Section 10.7 Planning Certificates** - outlines the relevant planning information that applies to a particular parcel of land on the date that the Certificate was signed. These Certificates are required to accompany the contract of sale of any registered parcel of land pursuant to the provisions of the *Conveyancing Act 1919* and the *Conveyancing (Sale of Land) Regulation 2010*.

There are two types of Planning Certificates which include:

- a) Section 10.7(2) Planning Certificate - basic information to satisfy the requirements identified under the *Environmental Planning & Assessment Regulation 2000*, such as applicable planning instruments, permissible uses and legislative constraints such as building height and heritage status).
- b) Section 10.7(5) Planning Certificate - all information contained within a Section 10.7(2) Planning Certificate and any other information of relevance that Council sees fit, such as encroachments, previous subdivisions, easements and other Council advice.

3.29 **Security Deposit** - a sum of money equivalent to six month's rental (or a negotiated amount, determined at the discretion of the Property Assets Department), and paid to the landlord to be used to recover any arrears or other lease related costs (e.g. paying for damage caused by the tenant). The money is refunded once the tenant has vacated the property and there are no outstanding matters.

3.30 **Subject land** - that part of the land over which an encroachment extends.

## **4. PROVISIONS**

### **4.1 Risk**

4.1.1 This Policy applies to all Council Land.

4.1.2 It focuses on the management of all encroachments which impact Council land.

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4.1.3 Encroachments onto Council's public land may present a potential risk of safety to the public as well as a potential risk of legal claims to Council if left unmanaged.

4.1.4 Council has a duty to manage the risk and this is done by ensuring that the private property owner who encroaches onto Council land remains responsible for identifying the risks, assessing the extent of the risks and for undertaking all measures necessary to mitigate the risk to an acceptable level.

## **4.2 Guiding Principles**

### **4.2.1 Classification**

#### **4.2.1.1 Road:**

- a) Management of encroachments on public roads shall be in accordance with the principles pursuant to the Roads Act 1993.
- b) Encroachments on public roads are not permitted unless in 'exceptional circumstances' and if approved by Council.

#### **4.2.1.2 Operational Land:**

- a) Management of encroachments on Operational Land shall be in accordance with the principles pursuant to the *Local Government Act 1993*.
- b) Encroachments on Operational Land are not permitted unless in 'exceptional circumstances' and if approved by Council.

#### **4.2.1.3 Community Land:**

- a) Management of encroachments on Community Land shall be in accordance with the principles pursuant to the *Local Government Act 1993*.
- b) Encroachments over Community Land are prohibited.

#### **4.2.1.4 Crown Land:**

- a) Management of encroachments on Crown Land shall be in accordance with the principles pursuant to 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) Where Council is the Reserve Trust Manager of Crown land, upon notification of an existing encroachment

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Council will inspect the reserve to determine the public impact and to determine whether the encroachment is consistent with the purpose of the reserve.

- c) If the encroachment meets these conditions, a lease may be granted but only in 'exceptional circumstances', otherwise the encroachment must be removed.
- d) Section 34(1)(b) of the *Crown Lands Act 1989* permits the Minister to grant easements over Crown Land.
- e) Section 34(1)(a) empowers the Minister to sell Crown Land on behalf of the Crown.
- f) Council cannot sell or otherwise dispose of Crown Land without the authorisation of the Minister.

**4.2.2 Minor Encroachments**

4.2.2.1 Minor encroachments over Council land are generally not permitted.

4.2.2.2 Where minor encroachments occur, they will be notated on a Section 10.7(5) Planning Certificate. This is to ensure that property owners are aware of any encroachment that Council has identified in relation to their land.

4.2.2.3 A minor encroachment is to be regularised by a Deed of Agreement between Council and the property owner. This is to ensure that Council is indemnified against any potential public liability claim which may arise as a result of the encroachment.

However, Council reserves the right to determine whether the minor encroachment warrants a lease or easement to be entered into.

4.2.2.4 The Deed is to be accompanied by a Plan of Survey, prepared by a Registered Surveyor. The Plan must reflect the dimensions and size of the encroachment in m<sup>2</sup> or m<sup>3</sup> occupied by the encroachment.

**4.2.3 New Encroachments**

4.2.3.1 New Encroachments over Council land is generally not permitted.

4.2.3.2 Council shall only grant permission for an encroachment as part of a development consent or otherwise only in 'exceptional circumstances'.

4.2.3.3 If owner's consent is required as part of a development application, the applicant is required to submit a plan of

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survey, prepared by a Registered Surveyor, with the encroachment/s calculated in m<sup>2</sup> (area) or m<sup>3</sup> (volume), depending on the nature of the encroachment.

4.2.3.4 If an encroachment appears over various levels, then the volume of the encroachment over each level must be taken into consideration to determine the total volume.

4.2.3.5 If the encroachment/s are greater than 5m<sup>2</sup> or 1m<sup>3</sup> the encroaching land owner will be requested to secure either one of the following:

- (a) Lease or Licence
- (b) Easement

**(i) Execution of the Lease Agreement**

- (a) If the determined option is a lease as per Item 4.2.3.5(a), then the encroaching owner is required to enter into a lease agreement which must be executed before a Construction Certificate can be issued.
- (b) The commencement date of the lease shall be the Date of Practical completion.
- (c) The agreed rental will be reviewed at the date of Practical Completion, using the same approach applied at the time the lease was initially executed, or CPI may be applied to compensate the time lapse.

**(ii) Easement**

- (a) If an easement is approved for the encroached area, a draft plan of easement, together with the terms and conditions must be provided to Council with the recommended bond before a Construction certificate can be issued.
- (b) All documentation relating to the easement must be executed by both parties and lodged for registration at the NSW Land Registry Services immediately after a Certificate of Practical Completion is issued and before an Occupation Certificate can be issued.

**4.2.4 Existing Encroachments**

4.2.4.1 If Council becomes aware of an existing encroachment on its land, and it is not in the public interest or is otherwise unacceptable, Council may:

- (a) direct the encroaching owner to remove the encroachment;
- (b) remove the encroachment at the owner's expense and recover such expense as a debt under the provisions of the *Local Government Act 1993* or as a liquidated claim in court; or



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(c) issue infringement notices or commence enforcement action until the matter is resolved.

- 4.2.4.2 If Council concludes that the encroachment cannot be removed, then Clause 4.2.3.5 will be applied if the encroachment/s are greater than 5m<sup>2</sup> in area or 1m<sup>3</sup> in volume. If the encroachment/s are less than 5m<sup>2</sup> in area or 1m<sup>3</sup> in volume, it will be regarded as a minor encroachment.
- 4.2.4.3 Zonings and classifications of some land may prevent Council from formalising Agreements with property owners, and the encroaching owner would be responsible for the cost of the reclassification process if approval to formalise the encroachment is granted by Council. Reclassification is at the discretion of Council and may be refused.
- 4.2.4.4 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.
- 4.2.4.5 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. The consent of the Minister is also required.
- 4.2.4.6 If an existing encroachment is identified by Council and it cannot be removed, (Refer to Clause 4.2.4.2, the encroachment will be notated on a Section 10.7(5) Planning Certificate. This is to ensure that property owners are aware of any encroachment that Council has identified in relation to their land.

**4.2.5 General Principles**

- 4.2.5.1 The following principles relate to the various categories for the management of encroachments on Council Land.
- 4.2.5.2 Only regular awnings that have public benefit over Council land will be permitted.
- 4.2.5.3 Council shall only grant permission for an awning as part of a development consent or otherwise only in 'exceptional circumstances'.
- 4.2.5.4 Encroachment/s must not hinder pedestrian/vehicle access safety.

#### 4.2.5.5 Category

- (a) **Leases and Licenses** as per Item 4.2.3.5 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 beautification of a resident's holding;
  - (iii) Airspace encroachments such as balcony encroachments, pedestrian footbridges, vehicular airbridges, building cladding, decorative awnings, protruding structures and any other related encroachments; and
  - (iv) Commercial use.
- (b) **Easements/Positive Covenants:**
  - (i) The nature of the encroachment will determine whether an easement is required.
  - (ii) Council shall only grant permission for an easement as part of a Development Application or in 'exceptional circumstances'.

Council reserves the right to determine whether a Lease or Easement is to be registered to secure its interests.

#### 4.2.5.6 No Sale/Transfer

- (i) The sale/transfer of Council land is not permitted under this policy.
- (ii) However, if Council believes the subject property is no longer required, only then will Council consider selling/transferring the property but only in circumstances where the encroachment is over Operational Land or land classified as a public road in accordance with the *Roads Act 1993*, and only if the encroaching owner is a government authority.
- (iii) Any sale or transfer of Council Land will be subject to Council approval by way of Council resolution.

### 4.2.6 Maintenance and Insurance

- 4.2.6.1 If an easement is approved, positive covenants or restrictions may be imposed onto the encroaching owner in accordance with Section 88BA(1) of the *Conveyancing Act 1919*.
- 4.2.6.2 All agreements will comprise Council's standard terms and conditions relating to insurance purposes.
- 4.2.6.3 The encroaching owner is the only person with the entitlement benefiting from the interest and has the obligation to repair and

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maintain the infrastructure, or any damages caused to Council property, which are consistent with Council's standards and requirements, unless otherwise determined by Council.

- 4.2.6.4 Council may occasionally monitor the encroached area to ensure that the public interest is maintained.
- 4.2.6.5 The encroaching owner is required to maintain public liability insurance of \$20 million, noting Council's interest on the Certificate of Currency.
- 4.2.6.6 If the encroaching owner neglects to fulfil their obligations, Council may terminate the agreement at any time and the landowner will not be compensated for any losses.
- 4.2.6.7 The landowner is also responsible for providing Council with a copy of the Certificate of Insurance on an annual basis. This is to ensure that the landowner holds adequate public liability insurance in relation to the development that encroaches onto Council land.

**4.2.7 Rent and Compensation: Method for calculating Rental and Compensation payable to Council**

- 4.2.7.1 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:
  - a) 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).
  - b) 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.
  - c) Commercial use - Council's registered valuer will determine the appropriate market rent or compensation payable to Council.
  - d) In air spaces and other related encroachments, Council's registered valuer will determine the appropriate market rent or compensation payable to Council.
  - e) Rental increases - An annual CPI increase will apply to all leases until the date of renewal.  
Upon renewal, a market valuation will be undertaken to determine the new rental.

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**4.2.7.2 Easements**

The compensation payable will be determined by a registered Valuer.

<b>Example of Calculation in relation to Leases and Licences as per Items 4.2.7.1 (a) and (b)</b>		
<b>Acronyms</b>	<b>Description</b>	<b>Illustration</b>
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):	\$10,000
VCL Rent	(As per 4.2.7.1 (a)) Use of small areas of land for driveways, garages or parking areas (10%)	\$1,000 per annum plus GST
	(As per 4.2.7.1 (b)) 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 4.2.7.1(a):

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

Illustration as per 4.2.7.1(b):

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

**4.2.8 Title Application and Costs**

4.2.8.1 It may be required that Title be created for any encroached parcel of land for which Council has granted approval.

4.2.8.2 All costs associated with any transaction as per Clause 4.2.3.5 will be borne by the applicant or the encroaching property owner.

4.2.8.3 Council will bear the costs of any valuation if required. The valuation is for the purposes of Council only and it will not be released to any party.

4.2.8.4 If an encroachment is approved by Council, the encroaching owner will be required to enter into a Heads of Agreement with Council. A Heads of Agreement is a pre-requisite to the Lease Agreement which comprises the key elements to the Lease. By executing the Heads of Agreement, the property owner confirms that he is willing to enter into a Lease Agreement with Council.

4.2.8.5 The executed Heads of Agreement is to be returned to Council

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with a bond of \$10,000, or a lower amount as determined at the discretion of the Property Assets Department.

4.2.8.6 If the application requires the permanent closure of the road, the applicant or the encroaching owner is required to lodge a bond of \$20,000, or a lower amount as determined at the discretion of the Property Assets Department.

4.2.8.7 This bond is required to cover legal, advertising, surveying or any other likely costs arising from a transaction approved as per Clause 4.2.3.5 and must be submitted with a written authorisation to draw on the bond to recover expenditure being incurred. A further amount may be requested if the amount of bond lodged is insufficient.

4.2.8.8 If a lease is approved as per Clause 4.2.3.5, the encroaching property owner is required to lodge a Security Deposit with Council.

4.2.8.9 The lease would be subject to all other Council's standard terms and conditions.

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

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

4.2.9.2 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 Council's Land Register.

## **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.

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**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
- Conveyancing (Sale of Land) Regulation 2010
- 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
- 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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## ENCROACHMENT MANAGEMENT POLICY

## APPENDIX A: REMOVAL OR RELEASE OF ENCROACHMENTS FLOWCHART

