

**ITEM 14 POLICY REVIEW - ENCROACHMENT ON COUNCIL LAND COUNCIL POLICY**

The Encroachment Council Policy has been reviewed as part of Council’s rolling review schedule of its policies. This report seeks endorsement of the recent review and amendments to the Encroachment Council Policy.

**RECOMMENDATION**

Council adopt the revised Encroachment Council Policy

**REPORT AUTHORISATIONS**

Report of: Lani Richardson, Manager Commercial Operations + Property  
 Authorised by: Kerry Hunt, Director Community Services - Creative and Innovative City

**ATTACHMENTS**

- 1 Encroachment Council Policy - Draft

**BACKGROUND**

Encroachments can be regarded as illegal extensions of private property boundaries and/or structures onto public land or road reserve (Council owned managed or controlled land). Some encroachments occur in a slow, progressive fashion and usually from well-intentioned activities of residents. Activities such as the placement of structures, gradual removal of native vegetation and extension of fencing can create the deceptive appearance of private property on Council owned, managed, or controlled land. Other encroachments can occur rapidly such as illegal land modification events or the construction of structures that overhang public land or public road (whether by accident or intentionally).

Unauthorised encroachments on Council land can –

- Compromise the integrity of natural and cultural values.
- Alienate land from public use/access.
- Impede fire management.
- Detract from aesthetic appearances, divert, and encumber Council resources and assets.
- Jeopardise public safety.
- Cause social inequity.
- Create otherwise unavoidable legal liability exposure or uncertainty for Council.

The Encroachment Policy (the Policy) aims to provide a consistent framework for managing or removing unauthorised encroachments on Council owned, managed, or controlled land. The Policy was initially adopted in 2009, with further revisions in 2014 and 2019.

The original intent of the Policy and the position portrayed by the Policy remains the same with only minor changes to align with Council’s new Policy framework.

Key Changes proposed as part of the Policy review are outlined below:

Encroachment Council Policy	<ul style="list-style-type: none"> <li>• 2032 Goal and Strategy included to reflect current Community Strategic Plan.</li> <li>• Updated paragraph under the Policy heading and the inclusion of point 4, to include the wording <i>“This Policy will not apply to encroachments that have been approved by Council through Development Consents or the granting of easements, positive covenants and/ or Road Act Consents. These matters are specifically dealt with under related Council Policies and Procedures, Wollongong Local Environmental Plan 2009 and Wollongong Development Control Plan 2009, or State Environmental Planning Policies”</i>.</li> </ul>
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	<ul style="list-style-type: none"> <li>• Updated the definitions to include Crown Land and updated wording to reflect “<i>Crown Land for which Council has the care, control and management or is appointed Crown Land Manager under the Crown Land Management Act 2016</i>”.</li> <li>• Updated amendments to encroachment paragraph following internal consultation to provide guidance of when certain minor encroachments could be allowed to remain where it is a safer outcome to the community and how those encroachments may be managed via positive covenants.</li> <li>• Added new definition to include Easements/Positive Covenants.</li> <li>• Updated paragraph under approach to investigation to include the following wording “<i>The Compliance and Enforcement Council Policy is also integral and applies to this Policy. The review of any Penalty Notice issued as a result of this Policy will be consistent with council’s Regulatory Fine Review Policy</i>”.</li> <li>• Updated the paragraph under ‘<i>Communication and Prevention</i>’ to be concise and clear.</li> <li>• Updated the paragraph under ‘<i>Data Management</i>’ and reporting to include reporting Encroachments on Planning Certificates – Part 5 additional information, to ensure that private property owners and or prospective purchasers are aware of any encroachments that Council identified in relation to their land.</li> <li>• Legislative updates to include <i>Encroachment of Buildings Act 1922, Real Property Act 1900 &amp; Conveyancing Act 1919</i>.</li> <li>• Update of roles and responsibilities to clearly articulate Divisional actions and responsibilities.</li> <li>• Policy updated to new Council Policy template and adapted to suit new headings.</li> <li>• Changes to reflect other Council policies, ensuring consistency and best practice.</li> </ul>
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## PROPOSAL

It is proposed that Council adopt the revised Encroachment Policy.

## CONSULTATION AND COMMUNICATION

Consultation was undertaken with the following internal stakeholders:

- Regulation and Enforcement
- Customer and Business Integrity – Governance
- Commercial Operations and Property
- Development Assessment and Certification
- Land Use Planning – City Strategy

## PLANNING AND POLICY IMPACT

This report contributes to the delivery of Our Wollongong 2032 Goal 4 – ‘*We are a connected and engaged community*’.

It specifically delivers on the core business of Property Services, in particular ‘*provide high quality of service on all Council property matters.*’

## CONCLUSION

The revised Encroachment Council Policy provides Council with a clear framework for managing and acting in respect of encroachments and should be adopted.



## ENCROACHMENT COUNCIL POLICY

ADOPTED BY COUNCIL: [TO BE COMPLETED BY GOVERNANCE]

### PURPOSE

This policy aims to provide a consistent framework for managing or removing unauthorised encroachments on Wollongong City Council (Council) owned, managed or controlled land.

### POLICY INTENT

The main objectives of this policy are to:

1. Provide Council with a strategic, consistent and comprehensive approach to managing and removing encroachments from Council owned, managed or controlled land.
2. Assist with ensuring that all encroachments on land owned, managed or controlled by Council are managed under a consistent set of guidelines which safeguards Council's obligations and liability.
3. Raise community appreciation and respect for Council owned, managed or controlled land.
4. To assist Council in determining the impact of an encroachment and either formalise the existence of, or order the removal of, the encroachment or unauthorised occupation.
5. Ensuring that encroachments will be dealt with in a practical and equitable manner, considering the appropriate legislation and ensuring Council satisfies its obligations under the Local Government Act 1993, the Crown Land Management Act 2016 and the Roads Act 1993.
6. Ensure that where encroachments are permitted to remain by Council, they are safe for the community as well as Council employees, volunteers and contractors.
7. To provide clear and precise information to members of the public who are either responsible for encroachments within Council owned, managed or controlled land or are impacted by an encroachment.

### WOLLONGONG 2032 OBJECTIVES

This policy supports our Community Goals outlined in Wollongong 2032, with interconnected objectives being:

1. We value and protect our environment.
2. We have an innovative and sustainable economy.
3. We have a creative, vibrant city.
4. We are a connected and engaged community.
5. We have a healthy community in a liveable city.
6. We have affordable and accessible transport.

This Policy contributes to Goal 4 – “we are a connected and engaged community” specifically, the Core Business of Property Services, in particular “provide high quality of service on all Council property matters”.

### POLICY

This policy will apply to the following circumstances:

- 1 Any encroachment affecting public road as defined under the *Roads Act 1993* that are not classified or under the control of Transport for NSW;
- 2 Any encroachment affecting Council Land classified as Community or Operational land pursuant to the *Local Government Act 1993*; and

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- 3 Any encroachment affecting Crown Land for which Council has the care, control and management under the *Crown Land Management Act 2016*.

This Policy will not apply to:

- 4 Encroachments that have been approved by Council through Development Consents or the granting of easements, positive covenants and/ or Road Act Consents. These matters are specifically dealt with under related Council Policies and Procedures, Wollongong Local Environmental Plan 2009 and Wollongong Development Control Plan 2009, or State Environmental Planning Policies.

### Definitions

#### **Council owned, managed, or controlled land includes**

##### **Community Land**

Land that is classified as Community land under Division 1 of Part 2 of Chapter 6 of the *Local Government Act 1993*.

##### **Operational Land**

Land classified as Operational land within the meaning of the *Local Government Act 1993*.

##### **Crown Land**

Crown Land for which Council has the care, control and management or is appointed Crown Land Manager under the *Crown Land Management Act 2016*.

##### **Road Reserve**

Land dedicated as public road in accordance with the *Roads Act 1993* for which Council is the Roads Authority.

#### **Encroachment means**

- a. Privately owned buildings, steps, retaining walls, pools, fencing or physical barriers, signs, drains, roads, paths or any other structures over Council owned, managed or controlled land.
- b. Vehicle access to private property in whole or in part over Council owned, managed, or controlled land, unless approved by Council, for instance a driveway crossing permit.
- c. Trees and shrubs, garden beds or landscaping, in whole or in part over Council owned, managed, or controlled land which could create a public perception that it is privately owned. Excluding Community and Verge Gardens approved by Council.
- d. Clearing of trees and vegetation on Council owned, managed or controlled land, unless approved by Council.
- e. Privately owned building materials and other items such as soil, mulch, compost, vehicles, plant, and equipment temporarily or permanently stored in whole or in part on Council owned, managed or controlled land, unless it is approved by Council.
- f. Stormwater pipes discharging in whole or in part over Council owned, managed, or controlled land, unless approved by Council.

#### **Enforced Compliance**

##### Local Government Act 1993

An official order issued by Council under section 124 of the *Local Government Act 1993*, requiring the protection or repair of public places by specifically using either:

- Order No 27 to remove an object or matter from a public place or prevent any object or matter being deposited there in the circumstance where the object or matter: (a) is causing or is likely to cause an obstruction or encroachment of or on the public place and the obstruction or encroachment is not

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authorised by or under any Act, or (b) is causing or is likely to cause danger, annoyance or inconvenience to the public.

- Order No 28 to take whatever steps are necessary to prevent damage to a public place and to repair damage to a public place where there is actual or likely damage.

### Roads Act 1993 and Roads Regulation 2008

- Section 239 of the Act provides for the issuing of written directions by Council requiring specific works be undertaken to address breaches of the Roads Act 1993.
- In certain circumstances (clause 11) of the Regulation provides for the direct issuing of a penalty notice.

### ***Procedural Fairness/Natural Justice***

Legal terms (often used interchangeably) to imply that a decision maker should not only act in good faith and without bias but also should grant a hearing to any person whose interests will be affected by the exercise of that decision before the decision is made.

### ***Voluntary Compliance***

Cooperation with and fulfilment of a Council request to remove structures and/or desist inappropriate behaviours in the absence of enforced compliance.

### ***Easements/Positive Covenants***

Council deals with interests in land such as easements, restrictive covenants and positive covenants. The granting or release of interests will be subject to the requirements of the *Local Government Act 1993* including requiring a Council resolution where applicable.

- a. The nature of the encroachment will determine whether an easement/positive covenant can be considered.
- b. Council shall only grant an easement/positive covenant as part of a Development Application and/or Building Information Certificates.
- c. If the encroachment is supported through the development assessment process, then a positive covenant will be required to be imposed on the private property in accordance with the appropriate provisions of the Conveyancing Act 1919.

### **Background**

Encroachments can be regarded as illegal extensions of private property boundaries and/or structures onto public land that is owned, managed or controlled by Council. Although at an individual level, encroachments may appear minor in impact, cumulatively encroachments are responsible for detaining and degrading hectares of Council owned, managed, or controlled land.

Some encroachments occur in a slow, progressive fashion and usually from the well-intentioned activities of residents. Seemingly harmless activities such as lawn mowing, fire-break maintenance and informal gardening can stimulate notions of ownership, pride and a process of successive appropriation passed with land title from one proprietor to another. Further activities on Council owned, managed or controlled land such as placement of structures, gradual removal of native vegetation and extension of fencing create the deceptive appearance of private property. Other encroachments occur rapidly as illegal land modification events.

Unauthorised encroachments on Council owned, managed or controlled land have the ability to:

- Compromise the integrity of natural and cultural values
- Alienate land from public use/access
- Impede fire management

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- Detract from aesthetic appearances
- Divert and encumber Council resources and assets
- Jeopardise public safety
- Cause social inequity
- Create otherwise avoidable legal liability exposure or uncertainty for Council.

The Local Government Act 1993 and the Roads Act 1993 and Roads Regulation 2008 are the primary pieces of legislation relevant to encroachments on Council lands.

The Local Government Act 1993:

- Assists councils in the categorisation of community land and the management of that land
- Promotes the best management of environmentally sensitive land
- Curbs the inappropriate alienation of community land for essentially private purposes, and
- Reinforces the public's right to participate in public land management.

The Roads Act 1993 and Roads Regulation 2008:

- Regulates the carrying out of various activities on public roads
- Sets out the rights of members of the public to pass along public roads, and
- Sets out the rights of persons who own land adjoining a public road to have access to the public road.

Council also manages land on behalf of the State of NSW (Crown Land) in accordance with the Crown Land Management Act 2016, where Council is appointed Crown Land Manager or where Crown Land is held under Council's care, control and management. In instances where encroachments occur on land under the care, control and management of Council or where Council is appointed Crown Land Manager, the provisions of the Local Government Act 1993 apply.

### Approach to Investigation

Council's approach will undertake the following main steps (where relevant):

- Receipt of complaint or advice concerning encroachment
- Identification and verification of the encroachments
- Resident engagement concerning background to encroachment
- Referral to the appropriate Divisions for comment
- Determine most appropriate course of action based on an assessment of the impact of the encroachment
- Implement appropriate process pursuant to most appropriate course of action, and if enforcement is most appropriate, provide advice and direction to Regulation and Enforcement Division
- Advice received from Commercial Operations and Property Division pursued by Regulation and Enforcement Division
- Seek Voluntary Compliance
- Issue Local Government Act/Roads Act/Roads Regulation Notice
- Consider any representations to Council's Notice
- Issue Local Government Act Order and/or take further enforcement action with regards to the Roads Act/Regulation Notice
- Take legal action/issue fine for failure to comply with Order/Notice

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It is important to note that procedural fairness is offered as part of this process through Council's initial engagement with the offender, the offer of voluntary compliance and the consideration of any representation made to Council's Notice prior to the issue of any order.

The Compliance and Enforcement Council Policy is also integral and applies to this policy. The review of any Penalty Notice issued as a result of this policy will be consistent with council's Regulatory Fine Review Policy.

### Communication and prevention

Communicating the negative impacts associated with encroachments provides an important mechanism to raise appreciation and respect for Council owned, managed, or controlled land, and this policy will provide offenders with contextual knowledge of the ramifications and enforcement approach to prevent the establishment of new encroachments.

Encroachments over Council owned, managed, or controlled land are generally not permitted and the reclassification and disposal of public land is not generally supported due to the adverse impacts on the community.

### Data management

Notification of an encroachment on the adjoining privately owned property that applies to the adjacent Council owned, managed or controlled land, including extent and nature of encroachment will be noted within Council's Property Information System. Encroachments will be noted on Planning Certificates – Part 5 additional information. This ensures that private property owners and or prospective purchasers are aware of any encroachment that Council has identified in relation to their land.

## LEGISLATIVE REQUIREMENTS

The following instruments of legislation must be considered and are applicable to this policy (as amended from time to time):

- *Local Government Act 1993*
- *Roads Act 1993*
- *Roads Regulation 2008*
- *Crown Land Management Act 2016*
- *Encroachment of Buildings Act 1922*
- *Environmental Planning and Assessment Act 1979*
- *Real Property Act 1900*
- *Conveyancing Act 1919*

If there are any amendments to legislation that are contrary or inconsistent with this policy, then the amended legislation will prevail to the extent of the inconsistency.

## REVIEW

This Policy will be reviewed a minimum of once every term of Council, or more frequently as required.

## ROLES AND RESPONSIBILITIES

### ***Commercial Operations and Property***

Council's Commercial Operations and Property Division are responsible for implementing this Policy.



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The Commercial Operations and Property Division will take action in respect of encroachments in accordance with this Policy once they become aware of a potential encroachment, either by notification from a member of the public or by notification from another Division in Council. The Commercial Operations and Property Division may provide instructions to the Regulation and Enforcement Division to commence enforcement action as appropriate, which will then enforce removal if required.

The Commercial Operations and Property Division has the role of providing advice to the Regulation and Enforcement Division in relation to the desired outcome, for example, to formalise the encroachment, to take no action, to remove the obstruction or to repair the Council owned, managed, or controlled land. The Commercial Operations and Property Division will determine the desired outcome based on public risk and the overall impact of the encroachment.

**Regulation and Enforcement**

Council's Regulation and Enforcement team are responsible for enforcement actions in relation to this Policy.

**Development Assessment and Certification**

The assessment and removal of any encroachment under this policy will involve the Commercial Operations and Property Division as the manager of Council owned, managed or controlled land, Regulation and Enforcement Division, as the enforcement provider, and Development Assessment and Certification as the approval authority to any relevant Development Application and/or Building Information Certificate.

The Development Assessment and Certification Division's role is to provide Regulation and Enforcement Division with advice regarding unauthorised structures with respect to if the encroachment would likely be given approval should an application be submitted. Such advice will have bearing on any enforcement action.

This process will ensure the most effective use of resources for Council in relation to pursuing enforcement and that minor matters are considered in a reasonable and consistent fashion prior to any enforced compliance.

**RELATED STRATEGIES, POLICIES AND PROCEDURES**

- Wollongong City Council Plans of Management
- Crown Reserves Plans of Management
- Wollongong Local Environmental Plan 2009
- Wollongong Development Control Plan 2009
- Wollongong City Council Tree Management Order
- Compliance and Enforcement Council Policy
- Regulatory Fine Review Policy
- Land and Easement Acquisition and Disposal Policy
- Leasing and Licencing Council Policy
- Wollongong City Council Outdoor Dining Policy
- Urban Greening Strategy and Verge Garden Guidelines
- Community Gardens Management Policy
- Tree Management Council Policy

## APPROVAL AND REVIEW

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Responsible Division	Commercial Operations and Property
Date adopted by Council	[To be inserted by Corporate Governance]
Date/s of previous adoptions	2 September 2019, 8 September 2014, 24 November 2009, 8 September 2014
Date of next review	[Not more than three years from last adoption]