



Public Property Encroachment Policy

Sutherland Shire Council

Document review and approval

This policy has been approved by

	Name	Minute No	Date approved
1	Director's Committee DMC160-12		23 April, 2012
2	Finance Committee FIN030-13	182	27 August, 2012

Revision history

Version	Author	Date	Revision
1	Senior Property Officer	March 2011	Original Version
2	Property Services Manager	21 March, 2014	Policy reviewed under annual process, policy to be maintained, position titles of staff updated
3	Governance Manager	19 May, 2014	Removed reference to Civil Assets Manager, due to changes in council structure
4	Property Services Manager	09 February, 2015	Policy reviewed under annual review process. No changes necessary.

Contents

1	Purpose	3
1.1	Introduction	3
1.2	Policy Intent, Statement & Purpose	3
2	Application	4
3	Definitions & Classification of Encroachments	4
3.1	Road Reserves	4
3.1.1	Class 1 - Minor	4
3.1.2	Class 2 - Restrictive	5
3.1.3	Class 3 - Exclusive	5
3.2	Public Land	5
4	Principles	6
5	Relevant Legislation	7
6	Responsible Officer	7
7	Monitoring, Process Management & Documents	7
7.1	Road Reserves	7
7.2	Public Land	8
8	Review Date	9
9	Breaches and Sanctions	10
9.1	Costs	10

1 Purpose

This policy shall be cited as the Sutherland Shire Council Public Property Encroachment Policy for Road Reserves and Land Owned and Managed by Council.

1.1 Introduction

The Sutherland Shire is located at the southern coastal border of the Sydney metropolitan region. It covers an area of 370 sq. kms and has a population of approximately 215,000, making it one of the largest council areas by population in Australia. Geography ranges from beaches, wetlands, bays and rivers, to tablelands dissected by deep river valleys and gorges.

The boundaries of the Sutherland Shire are the Georges River in the north, Deadman's Creek, and Woronora Dam in the west, the Royal National Park in the south and the Pacific Ocean in the east.

Sutherland Shire Council ("Council") as the owner and asset manager of land and road reserves has a duty to ensure that the community's interest is not compromised by unauthorised occupation or alienation of public lands and road reserves.

1.2 Policy Intent, Statement & Purpose

- (a) The intent of the policy is to create a process for recording, managing and dealing with encroachments within Council controlled roadways in accordance with the *Roads Act 1993* and Council owned or managed land.
- (b) The policy will be used as a guideline in determining how an encroachment will be dealt with in a practical and equitable manner having due regard to appropriate legislation.
- (c) This policy aims to provide an open and accountable framework whereby Council can determine the impact of an encroachment on the community and either formalise the existence or order the removal of the encroaching structure or unauthorised occupation.
- (d) This policy aims to ensure that footways, road reserves and Council owned and managed lands remain accessible to all members of the public.
- (e) This policy seeks to provide clear and precise information to members of the public who are responsible for existing encroachments within public footways and road reserves.
- (f) This policy will outline remedies to owners who have encroaching structures or unlawful occupation of adjoining public lands that are owned or managed by Council.
- (g) This policy seeks to improve visual amenity of the streetscape and also limit Council's liability against any future claim that may be the result of any encroachment that has been constructed within the road reserve.

2 Application

- (a) This policy will apply to all dedicated public road including “footway” as defined under the *Roads Act, 1993* that are not under the control of the NSW Roads & Traffic Authority (“RTA”).
- (b) This policy will also apply to all lands classified as Community or Operational land under the *Local Government Act, 1993*. This will include land owned by the Crown where Council is the reserve trust manager.
- (c) This policy does not apply to Outdoor Eating Areas, A-Frame Advertising and Shopfront Displays covered by existing Council policy.
- (d) This policy does not apply to Crown Roads or RTA Freeways.
- (e) This policy does not apply to structures defined and approved under Council’s policy for Vehicular Footpath Crossings or Council’s policy for Vehicle Crossings Across Public Roads.
- (f) This policy does not apply to structures of a temporary nature approved or required as part of the Development Application process and subsequently approved (if necessary) under other legislation such as the Roads Act. For example, temporary hoardings, protective fencing and the like.
- (g) This policy does not apply to authorities, corporations or other persons parties that have a statutory right to create such encroachments/fixtures on road reserves such as power poles, post boxes, telephone lines etc.

3 Definitions & Classification of Encroachments

3.1 Road Reserves

In relation to road reserves, there will be three classifications that will be used to identify the nature of an encroachment and the associated risks that it may have to Council and the public. The classes are listed below:

3.1.1 Class 1 - Minor

Encroachments or structures that fall into this category are considered to be of a minor nature and are unlikely to result in a significant risk (financially or public liability) for Council.

Examples include landscaped garden areas, existing retaining walls less than 600mm high and encroaching less than 600mm on to the road reserve, letter boxes, at grade access stairs and hardstand, hand rails and all other structures that are considered by an appropriate asset manager (Roads and Footpath Manager / Parks and Waterways Manager) to be of a minor nature.

3.1.2 Class 2 - Restrictive

Encroachments of this nature are considered to be quite significant in that they restrict public access and generate considerable benefit to the applicant. This type of encroachment or structure could create public liability issues for Council.

Examples include existing retaining walls greater than 600mm in height and encroaching not more than 600mm encroaching on to the road reserve. Hardstand areas not covered by Council's Road Lease Policy and above ground access stairs.

3.1.3 Class 3 - Exclusive

Class 3 encroachments and structures are those considered to provide exclusive benefit to an applicant and therefore remove public access. Encroachments of this nature may be permitted to be leased on a short term basis pursuant to Section 153 and 157 of the Roads Act, 1993.

Examples include fenced areas, existing garage and carport structures. Council's Road Lease Policy will need to be taken into consideration when dealing with encroachments/structures of an exclusive nature.

Alternatively, there may be certain situations where a Road Closure & Sale to an adjoining owner may be considered. For a road closure and sale to proceed, Council resolution to commence the process and make an application to the Department of Lands will first be required.

Note

Where any class of encroachment has been situated over a public utility service such as electricity, gas, water etc; Council or the service provider will not be responsible for any make good provisions associated with the encroaching structure regardless of whether or not there is approval for the structure to remain.

3.2 Public Land

Encroachments located on public land must take into consideration the legislative impacts of Chapter 6 Division 2 of the *Local Government Act, 1993*. In particular Council must comply with Section 46 of the Act and the categorisation of the land.

Where encroachments or the alienation of Community Land occurs, Council is not in a position to grant a lease, license or other estate or interest in the land whereby the party benefiting from the encroachment or alienation is set to reap a private gain over public lands.

When Council is made aware of an encroachment or the alienation of public land, the person responsible for the encroachment will be issued with a Notice pursuant to section 136 of the *Local Government Act 1993* which will provide the responsible party the opportunity to advise why the structure or encroachment should remain.

There may be circumstances where the impacts of certain encroachments are considered to have a negligible affect on public lands that have a community classification. In these situations there may be an extremely limited opportunity for an adjoining owner to apply to

have part of a community classified property reclassified to operational land. Applicants must consider the following two issues:

- a)** Permission to commence reclassification actions will be at the sole discretion of the Council. Reclassification will only be permitted if:
- there is no reasonable alternative available to the occupation of the public land.
 - the re-classification is not contrary to the public interest.
 - an improper precedent is not being set.
 - the land is not required for its original acquired purpose.
 - the land is to be used for an authorised project of council.
 - council obtains market value for the land.
- b)** The reclassification process is costly with no guarantees of success. All costs will need to be met by the applicant in advance.

Minor fencing variations or irregularities along a private boundary will not be considered or dealt with under this policy.

4 Principles

- (a) No structures or encroachments are permitted to be erected or placed on Community land without prior written approval.
- (b) An application under Section 139 of the Roads Act, 1993 must be made to allow encroachments on road reserves to remain. A consent may be granted on Council's initiative or upon application.
- (c) All applications to regularise encroachments on road reserves will be assessed pursuant to Section 138 of the Roads Act, 1993.
- (d) All encroachments on Community Land will be assessed and dealt with in accordance with the Community Land provisions Div 2, Ch 6 of the Local Government Act, 1993, including the impact on public amenity and the alienation of public land.
- (e) Any agreements/authorisations will seek to indemnify Council in relation to any public liability that may arise as a result of an encroachment.
- (f) Unauthorised encroachments for which there are no remedies and which are deemed unacceptable must be removed at the expense of person causing obstruction or encroachment or owner of the land from which the encroachment emanates.
- (g) Any approval granted for a structure or encroachment must contain a condition requiring that the encroaching structure complies with the Building Code of Australia and/or any other relevant standards.
- (h) Council at any time may revoke an approval under the *Roads Act 1993* and can request the removal of an encroachment in accordance with the *Roads Act, 1993*.

- (i) No structures shall be erected on the road reserve without prior written approval from Council.

5 Relevant Legislation

- a. *Local Government Act, 1993*
- b. *Roads Act, 1993*
- c. *Civil Liability Act, 2002*
- d. *Environmental Planning and Assessment Act, 1979*
- e. *Crown Lands Act, 1989*

6 Responsible Officer

Property Services Managers who acts as the authorised representative of the council to implement, amend or review this policy as and when required.

7 Monitoring, Process Management & Documents

7.1 Road Reserves

In all instances where encroachments are identified, Council will inspect the alleged encroachment and classify it as either a Class 1, 2 or 3 type encroachment. Criteria for each class is listed in the table below:

Class	Definition	Conditions	Response
1	Minor	<ul style="list-style-type: none"> • Encroaches less than 600mm on to road reserve and is less than 600mm in height. • Limited public liability. • Limited benefit to applicant. 	<ul style="list-style-type: none"> • Roads Act Approval or licence to be issued . • If public risk is evident complete removal of encroachment is required.
2	Restrictive	<ul style="list-style-type: none"> • Encroachment is greater than 600mm in height. • Encroachment extends more than 600mm into the road reserve • Could create public liability issues for Council 	<ul style="list-style-type: none"> • Lease to be entered into by applicant in accordance with Road Reserve Leasing Policy FIN095-09; or • Complete removal
3	Exclusive	<ul style="list-style-type: none"> • Exclusive benefit exists to applicant • No public access exists 	<ul style="list-style-type: none"> • Road Lease required in accordance

			<p>with Road Reserve Leasing Policy.</p> <ul style="list-style-type: none"> • Complete removal of structure • Road Closure & Sale
--	--	--	---

Table Notes:

1. In all cases Council's response will be to seek total indemnity from all encroachments that have been erected upon land and roads within Council's control.
2. Where an owner/occupier concedes to alleged encroachment and agrees to the removal of the said encroachment. Council will consider issuing an order under section 124 of the *Local Government Act, 1993* or a directive under the *Roads Act 1993*.
3. Where an owner/occupier concedes to alleged encroachment but refuses to remove the encroachment due to hardship, non accountability, general apathy or other rationale, enforcement action will be considered..
4. Where an owner/occupier denies responsibility in relation to an alleged encroachment, enforcement action will be considered.
5. In matters of enforcement, Council may seek to recover reasonable costs in accordance with the procedures in the *Local Government Act, 1993* and *Roads Act 1993*.. These costs may include the costs of removal of the encroachment and legal costs.

7.2 Public Land

• **Operational Land**

Council upon notification of an encroachment will:

- a) Inspect the land and determine the impact on the land in question and public amenity. At this stage Council may elect to do nothing.
- b) Issue a Notice or letter to the adjoining owner enjoying the benefit of the encroachment in relation to why the encroachment should be permitted to remain, or decide that it is not in the public interest for enforcement action to be taken. At this stage Council may elect to do nothing.
- c) Council may decide subject to resolution to sell or lease the affected portion of the land at market value as determined by a registered valuer.
- d) If agreement can't be reached the occupying party will be required to remove the encroachment or failing this advised that Council may remove the structure at the expense of the party in occupation.

- **Community Land**

As the administration of Community Land must comply with section 46 of the Local Government Act, 1993, Council upon notification of an encroachment will:

- a) Inspect the land.
- b) Determine the impact on the land in question and public amenity. At this stage Council may elect to do nothing.
- c) Issue a Notice or letter to the adjoining owner enjoying the benefit of the encroachment in relation to why the encroachment should be permitted to remain, or decide that it is not in the public interest for enforcement action to be taken. At this stage Council may elect to do nothing.
- d) If the reply received does not satisfy the criteria listed on Page 5 (Classification of Encroachments), an order under section 124 of the Local Government Act, 1993 is to be considered requiring that the encroachment be removed within a reasonable timeframe.
- e) If the encroachment is subsequently not removed the owner is to be advised that Council may remove the structure at the expense of the party in occupation.
- f) If the encroachment is in principle permitted to remain, the occupying party must agree (subject to Council resolution) to commence the reclassification process at the occupier's expense.
- g) Should the land be reclassified to "Operational Land", the owner is to then enter a lease agreement with Council for the subject occupation. The lease fee will reflect current market value.
- h) A sale of the land may be an option but will be at the sole discretion of the Council.

- **Crown Land**

Generally, a lease or licence of a reserve can only permit the lessee/licensee to use the reserve in a way that is consistent with the purposes stated when the reserve was dedicated or reserved. Any dealing in Crown land must be consistent with the Crown Lands Act, 1989 and the Department of Lands "Trust Handbook".

With this in mind, where Council is the Reserve Trust Manager of Crown Land, Council upon notification of an encroachment will:

- a) Inspect the reserve and determine the public impact.
- b) Determine whether an encroachment is consistent with the purpose of the reserve.
- c) If use is consistent, permit the encroachment to remain in accordance with the provisions of the Crown lands Act, 1989 whereby a lease or licence may be granted at fair market value subject to the Consent of the Minister where necessary.
- d) If the encroachment is not in the public interest, request the party responsible to remove the encroachment or Council will remove the structure at the expense of the party in occupation.

8 Review Date

This policy shall be reviewed in February 2015.

9 Breaches and Sanctions

That as a matter of policy, enforcement action for illegal work or unlawful occupation of Council land and public roads be pursued in the first instance and such enforcement matters be determined on their individual case merits.

9.1 Costs

All costs to remedy an encroachment or to document its continued existence will be at the expense of the owner of the property encroaching on the adjoining public property.

Any enforcement action that may be required will be at the expense of the party responsible for an encroachment.

Council will recover any costs in relation to:

- (a) remedying and/or regularising the encroachment; and
- (b) enforcement action.

(including but not limited to legal costs for preparation of any lease, removal and/or demolition costs, lodgement & registration costs and valuation and survey fees).

Application Fee to regularise an encroachment\$150.00*

**Prices subject to change in accordance with Council's Adopted Fees & Charges.*