

## Land Encroachment Policy

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Policy Classification	- <b>City Services</b>
Policy N°	- <b>POL/559</b>
Policy Status	- <b>Current</b>
Responsible Service Unit	- <b>Property Services</b>
Authorised by	- <b>CEO/ Director</b>
Date Endorsed	- <b>25 May 2021</b>
Next Review Date	- <b>1 July 2024</b>

*This policy is part of a suite of policies adopted by Council or the Executive Management Team (EMT).*

*New or replacement policies can be created and developed within Service Units but can only be added to Council's Policy Register by Governance Services following the approval of the policy by Council or the EMT.*

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## **1. PURPOSE**

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This Policy is aimed to provide a clear and transparent process for the management and decisions related to land encroachment on Council land by abutting property owners and occupiers.

This Policy outlines the processes involved in the identification and actions to deal with land encroachments. With responsibilities clearly defined of the various internal Council departments involved in the consultation and the resolution of land encroachment issues. These guidelines apply to the whole of the municipality in regards to land encroachment on Council land.

## **2. BACKGROUND**

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A key component of Council's strong commitment to responsible and ethical management of its land assets is the need for a strong governance framework that supports the process of identifying and managing land encroachment issues.

Throughout the municipality, land encroachments have resulted over time by abutting property owners and occupiers who have encroached onto Council land (be it reserves, tree reserves, or road reserves) with fencing, driveways, landscaping and other structures.

Encroachments must be carefully assessed and controlled, to ensure appropriate and sustainable development that is in the best interests of the public.

This Policy provides direction to Council officers on the process for the reclaiming land from property owners and occupiers who have encroached onto Council land.

Observing this Policy will produce many beneficial outcomes to Council including the removal of many disputes and angst that naturally has arisen for everyone involved and provide a clear way forward for Council to manage land encroachment issues.

## **3. POLICY STATEMENT**

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The Policy provides a clear and transparent process for the management and resolution of land encroachment on Council land by abutting property owners and occupiers.

The Policy ensures that Council has an effective management solution to identify and action for the resolution of land encroachment issues and that they will be undertaken in a consistent, clear and transparent manner.

## 4. SCOPE

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This Policy applies to all Council land whereby there are encroachment issues by abutting property owners and occupiers.

Generally, the majority of land encroachments are on Council land (including belonging to, or in the care, custody or control of Council) that are reserves, tree reserves, or road reserves (including road encroachments, and footpath accessibility issues).

Where a land encroachment issue arises, Council is to assess all available advice from relevant officers in relation to the land encroachment on Council land in order to manage an acceptable outcome for Council and to allow Council to manage the issue according to the Policy guidelines.

Such an outcome may include the resolution for the abutting property owner or occupier to remove its occupation and improvements (if any) from Council land and for the property owner or occupier to be responsible for any rehabilitation and fencing costs.

Where agreement cannot be reached and the encroachment is inappropriate, the Council will issue a formal notice to the property owners requiring them to rectify the encroachment.

Specific legal advice can be sought by Council officers for more problematic and/or where there are specific legislative aspects to a land encroachment issue.

Alternatively, the Policy includes the potential to have a register whereby Council and the abutting property owner acknowledge the land encroachment on Council land. Council in this way could charge an annual licence fee to the abutting property owner charged at a rate to be determined by Council's Manager, Property Services.

Further, any decision by Council to enable a structure to remain on Council land must also include the land owner entering into a formal agreement with Council for the removal of the structure upon change in property ownership or any other time specified by Council.

Property Services would undertake the review including preparation of agreements and the policy is intended to apply to all properties.

Where a property is subject to an agreement and as such, the encroachment agreement has been identified on Council's Property Ci system, should a Land Information Certificate be applied for, when the subject property with the identified land encroachment is scheduled for sale, then this will alert Council officers of the

property owners obligation prior to selling the property and will hopefully avoid any potential conflict for the purchasers after they have purchased the land.

Officers will also place a note on the Land Information Certificate where relevant, which states that a notice has been delivered to the owner of the land advising them that the land abutting the proposed land is encroached by the land which is the subject of the Land Information Certificate request.

The agreement can include a number of requirements, including (but not limited to) specific time frames for the removal of any structure, the rehabilitation of Council land & a sunset clause in the agreement that will end the agreement once the requirements of the agreement have been undertaken to Council's satisfaction.

When the abutting property owner's property is sold, the agreement is terminated and rehabilitation costs are to be borne by the abutting property owner or new owner pursuant to the agreement.

A register would provide Council officers with a conclusion to the land encroachment when the abutting property is sold and the encroached land is returned to the possession of Council.

If the abutting property owner chooses not to occupy the Council land, then the area is reclaimed by Council and fenced on the correct boundary under the half share fencing provisions (where applicable).

## **5. DEFINITION**

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"Land" includes any Council owned land asset (or in the care, custody or control of Council).

For clarity this definition includes land where Council has a Committee of Management responsibility over Crown land, or other similar statutory authority.

## **6. GOVERNING LEGISLATION**

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In 2015 and 2016, the Victorian government introduced a new policy framework for managing government land, and made a number of changes including:

- establishing Land Use Victoria (LUV) to bring together key land administration functions and provide whole-of-government advice on determining the best use of government land.

Essentially, this provides a statutory framework at a broader higher level designed to protect public land.

The relevant governing legislation and statutory requirements applicable to the management of land encroachments are:

### **Local Government Act 2020**

Part 3 – Council decision making – Division 3 – Local Laws

Allows Council to make local laws and have delegated and discretionary authority to manage land encroachments.

Part 4 – Planning and financial management – Division 4 – Powers in relation to land.

## **7. OBJECTIVES**

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### **Overview**

In the interests of promoting probity, fair dealing and openness to all residents and ratepayers of the municipality, Council generally does not permit any encroachment onto Council land by abutting property owners and occupiers.

The best value outcome to Council and the method for the management of land encroachment issues must be the major considerations for Council under this Policy.

Given the number of land encroachment issues that arise, it is vital that the procedure be conducted in an efficient, effective and transparent manner in order to demonstrate the accountability and responsibility of Council to ratepayers and to protect the image, credibility and reputation of Council.

## **8. MANAGEMENT PROCEDURES**

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### **Responsibility for Identification of Land Encroachment**

In general, responsibility for identifying land encroachment issues rests with those Council officers who identify such an encroachment through on-site inspections during the normal course of business, either in the field or from such other activities related to Council business, or from software platforms used by Council (e.g. Weave, GIS), or from advice received from a resident or ratepayer.

Where possible and to avoid any disputes, a survey plan is the best way to determine land title boundaries, and to confirm who has constructed what on where. Property Services will take officer advice as to the merit of undertaking such survey.

If a Council officer visits a site and becomes aware that there is a reasonable belief or suspicion that an encroachment has occurred, the matter is referred to Property Services for action.

The details of the suspected encroachment are to be forwarded to the Property Services Unit to enable a proper evaluation to be made in order for an action plan to be prepared and in turn provided to all relevant Council Units for consideration of the appropriate management action to resolve the encroachment.

Prior to declaring an appropriate action for the resolution of the encroachment, every effort must be made to identify whether the land encroachment can be remedied, or whether other business unit Managers within Council have an alternate approach for an appropriate resolution of the encroachment.

### **The Land Encroachment Appeal and Resolution Process**

The process for identifying and actioning a course of action for the resolution of a land encroachment issue follows a series of defined steps to ensure that separation of the identification, decision making and approval processes occur. This provides the process with rigour and transparency, reducing the likelihood of inappropriate conflict or angst with property owners or occupiers, or suggestion of inappropriate treatment of the issue.

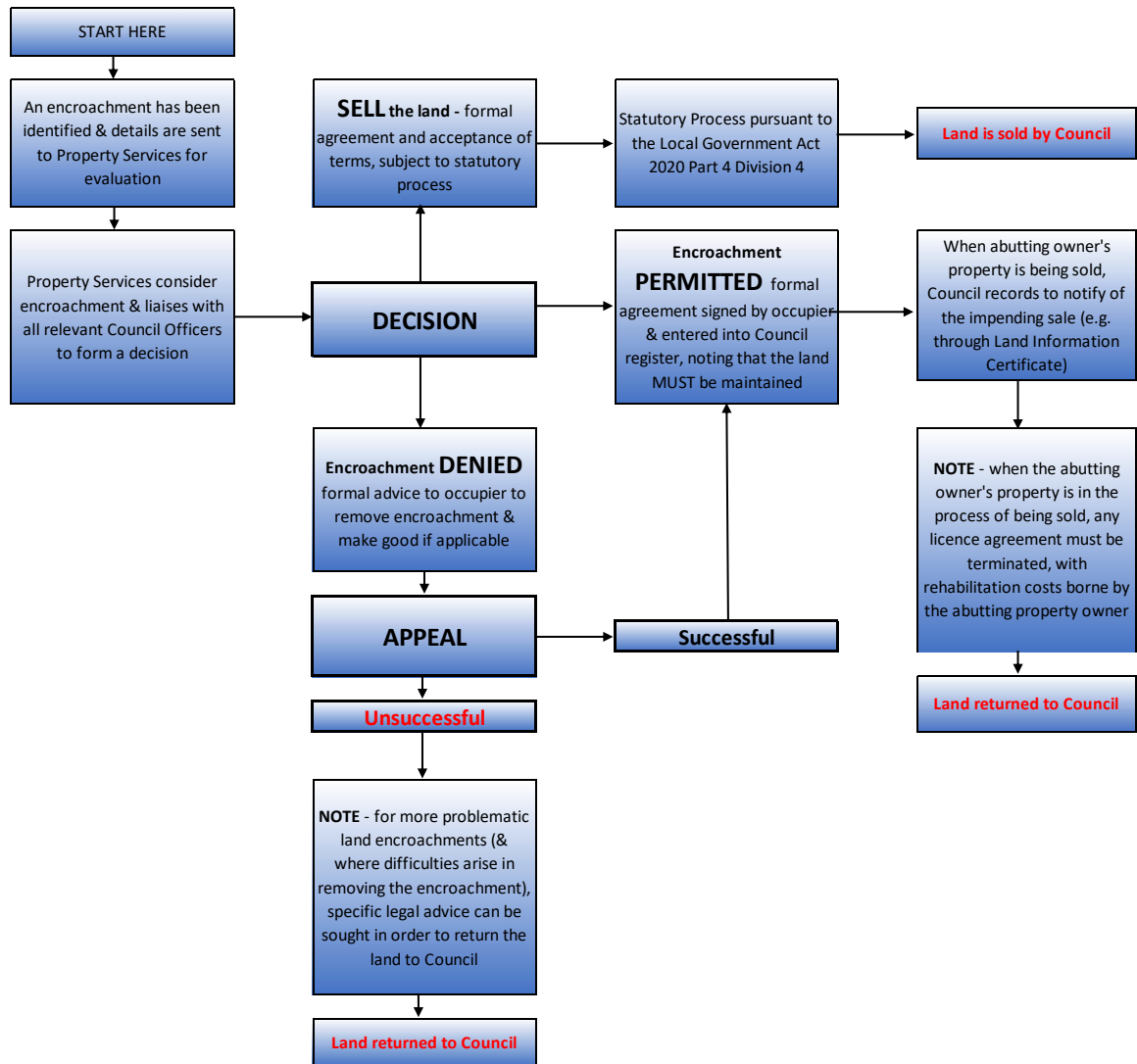
In the event that Council denies the land encroachment, and the applicant is not satisfied with the decision, the matter can be considered via an internal appeal process, where the relevant Group Manager/Director to review all matters related to the decision. If the decision is upheld, the applicant to be advised of their rights to an external review process by the Victorian Ombudsman.

Any person involved in the assessment, authorisation or management action of any land encroachment issue must advise their Director (or CEO if a Director or staff member reporting to the CEO) of any existing or known potential conflict of interest which may arise from the investigation and subsequent action of remediating the land encroachment issue, and withdraw from the process.

In this context, a conflict of interest would be defined as any situation where the person involved will personally receive as a result of the land encroachment action, a benefit or will be in a better position than they were previously.

This is referred to in the Local Government Act 2020 under conflict definitions.

The process is detailed in the following flow chart.



## Rectification of Land Encroachment Procedure

Where a Council officer believes the appropriate outcome is for the abutting property owner to remove its occupation and improvements (if any) from Council land and for the property owner or occupier to be responsible for any rehabilitation and fencing costs, the following are the key steps in the process to provide guidance on the acceptable method of rectifying the land encroachment issue:

A full, accurate and objective assessment of any identified land encroachment must be undertaken to:

- Evaluate existing or foreseeable use to Council;
- Determine the useability, condition of any improvements erected on the land, or other benefit to Council should remediation of the land encroachment be undertaken;
- Determine the consequences of a forced rectification of the encroachment;
- Establish the value to Council and municipality for the use of the land;



- Identify (if any) physical hazards rendering it unsafe or impractical to take this action; and
- Develop remedial actions where appropriate.

Specific legal advice can be sought by Council officers for more problematic and/or where there are specific legislative aspects to a land encroachment issue.

### **Register of Land Encroachments for Continued Occupation of Council Land**

Where not possible to rectify an encroachment, at the agreement of Council and the property owner the encroachment nature and make good arrangements to be included within a Section 173 agreement. If an agreement cannot be reached to enter into a Section 173 agreement then land affected to be included within the land certificate.

The Policy also includes the potential to have a register whereby Council and the abutting property owner formally acknowledge that they (the property owner or occupier) are occupying Council land.

Council must ensure that it has no immediate or longer term need or use for the land and initiates a proper record of the acknowledgement in TRIM (& Property Ci) to evidence the decision and to ensure any future action in respect of the abutting property (e.g. sale, or subdivision), is promptly notified to alert Council officers for immediate reclaiming of the land at that time.

A register of all land encroachments whereby Council accepts the ongoing encroachment and the abutting property owner or occupier acknowledge the encroachment on Council land MUST be maintained.

Council officer may charge an appropriate annual licence fee to the abutting property owner charged at a rate to be determined by Council's Manager Property Services.

When the abutting property owner's property is sold, any licence agreement must provide for immediate termination, with rehabilitation costs to be borne by the abutting property owner.

A register would provide Council officers with a conclusion to the land encroachment when notification that the abutting property is to be sold and the encroached land is returned to the possession of Council.

## DOCUMENT HISTORY

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<b>Policy Title:</b>	Land Encroachment Policy
<b>Responsible Officer:</b>	Graham Brewer
<b>Resp. Officer Position:</b>	Manager Property Services
<b>Next Review Date:</b>	July 2024
<b>To be included on website?</b>	Yes

<b>Last Updated</b>	<b>Meeting type? - Council or EMT</b>	<b>Meeting Date</b>	<b>Item N°</b>
6 May 2021	EMT (noted)	6 May 2021	6.1
7 May 2021	SBS	18 May 2021	1.0
19 May 2021	SBS	19 May 2021	2.0
25 May 2021	Council (noting only)	25 May 2021	11.3