



LEETON SHIRE COUNCIL

Preserving the Past, Enhancing the Future

LEETON SHIRE COUNCIL POLICY

MANAGING ENCROACHMENTS ON COUNCIL ROAD RESERVES POLICY

Council disclaimer

This policy was formulated to be consistent with council's legislative obligations and within the scope of council's powers. This policy should be read in conjunction with relevant legislation, guidelines and codes of practice. In the case of any discrepancies, the most recent legislation should prevail.

This policy does not constitute legal advice. Legal advice should be sought in relation to particular circumstances and liability will not be accepted for losses incurred as a result of reliance on this policy.

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1. Policy Statement

Council, as the owner and asset manager of the road reserves in the local government area, has a duty to ensure that the community's interest is not compromised by unauthorised enclosure or occupation of public roads by plantings, private buildings or other structures.

Where Council becomes aware of such occupation it will take steps to either have the encroachment removed, or to require the encroaching owner to enter into a suitable formal agreement for continued occupation.

Where appropriate, Council may consider an approach from the encroaching owner to purchase part of the road for an agreed price based on market valuation.

2. Introduction

There are locations throughout Leeton Shire Council where private properties encroach on road reservations. Under the NSW Roads Act, Council owns and controls those Road Reserves not under the control of the RMS. As the owner and asset manager of the road reserves in the local government area, Council has a duty to ensure that the community's interest is not compromised by unauthorised occupation of public roads or alienation by private buildings or other structures.

3. Objectives

The objectives of the policy are to ensure that an encroachment is either

- Removal of unauthorised plantings, private buildings or other structures.
- Approval for plantings, private buildings and other structures on the road/road reserve subject to the adjoining owner entering into an appropriate agreement with the Council to ensure public liability and public amenity issues are identified and managed, and that a community benefit results.

4. Principles

The policy requires that encroachments will be managed to ensure that there is no loss of public amenity or safety, that future plans for road realignment or footpaths are not compromised and stormwater drainage is not impeded, that the encroachment is the subject of a legal agreement and where appropriate, is registered on the property title, and that the adjoining owner indemnifies Council against any claim made in relation to the encroachment,

Encroachments will be evaluated for removal or possible retention according to their impact on the community interest.

4.1 Removal

Encroachments which reduce public safety or public amenity, or obstruct public access routes, or compromise future road or footpath works which may be contemplated, or which compromise stormwater drainage, will not be considered for continuation.

4.1.1 The Roads Act prohibits unauthorised encroachments and provides for Council (as Roads Authority) to order restoration. If no agreement can be reached with the adjoining owner to remedy an encroachment, Council may issue an order for the unauthorised encroachment to be removed.

4.1.2 The Roads Act provides that a Road Authority may direct any person who causes an obstruction or encroachment on a public road to remove the obstruction or encroachment. A direction under this section may specify the period for compliance.

4.1.3 Where the direction is not complied with, Council may exercise its right to remove the encroachment and restore the site to the property boundary. The work will be carried out by Council at the adjoining owner's expense as provided for in the Act.

4.1.4 Council may also use powers under the Local Government Act to remove objects from a public place and to repair damage to a public place.

4.2 Retention with Conditions

Conversely, where it is considered that removal of the encroachment would reduce public safety or amenity, or detract from the character of an historic area or streetscape, or remove a positive contribution to local area built form or landscape character, recommendations will be made to Council for consideration of suitable arrangements to formalise continued occupation.

The initial recommendation to Council will be for an inspection of the site so that Councillors can determine whether continued occupation should be permitted.

Measures to allow encroachments to remain will be suited to the circumstances. The options will be:

1. A *Positive Covenant* registered on the adjoining property's Title, or
2. An *Easement to Permit Encroaching Structures to Remain* granted by the Council, under Section 181 of the Conveyancing Act 1919, and registered on the adjoining property's Title.
3. A *Lease*, with conditions, under Section 153 of the Roads Act 1993, to the adjoining property owner.

Subdivision of the road to excise the area encroached upon, *closure of the road parcel* and *sale* of the parcel to the adjoining owner

The adjoining owner responsible for an encroachment will be required in all cases to indemnify Council in regard to any claim arising from the encroaching item, and to maintain all improvements in good condition.

4.2.1 Positive Covenant

Will apply to:

- landscaping of road verges which contribute to the streetscape, incorporating unenclosed trees, garden planting
- minor garden elements such as rockeries, terraces, retaining walls under 600mm
- unenclosed stairs, pathways or driveways giving access to the adjoining property. The encroachment must not enclose any area for exclusive use by the adjoining owner.

The adjoining owner will be required to maintain the improvements on the area of the encroachment in good condition.

Council may direct maintenance works to be carried out, may carry out works at the adjoining owner's expense, or may direct removal of the encroachment.

The Positive Covenant will not be subject to a market value payment. The adjoining owner will be required to meet all costs in preparing the agreement. A report will be prepared for the General Manager's determination under delegation.

4.2.2 Easement to Permit Encroaching Structures to Remain

Will apply to:

- Buildings and parts of buildings, (including garages and other outbuildings), gazebos, water features, walls, fences, retaining walls over 600mm,

Removal of the encroachment and extinguishment of the Easement will be required upon redevelopment of the property.

The area occupied will be valued for a payment to be made in compensation for the alienation of public land for private use.

The adjoining owner will be required to meet all costs in preparing the agreement.

A report will be prepared for Council consideration and resolution. Where the scale of the building encroachment is significant, the report may recommend a preliminary inspection to enable Councillors to assess the situation.

4.2.3 Lease

Will apply to:

- An area of the road reserve walled, fenced or hedged in such a way as to give the adjoining owner exclusive use of the land
- An area of the road reserve formed as a car parking space

A Lease will only be considered where the Council resolves to agree to allow such an enclosure or car parking space to remain.

Under the Roads Act 1993, a lease can be for only five years at a time and must not contain structures which cannot be removed. Therefore, a lease cannot be employed in the case of a building or retaining wall or similar structure.

Every five years Council will need to review whether the lease should be renewed. The rent will be market value determined by an independent valuer.

The adjoining owner will be required to meet all costs in preparing the agreement, including valuation.

4.2.4 Subdivision, Road Closure and Sale

The adjoining owner may propose to Council to purchase the land which is occupied. This will be subject to:

- Assessment that the land will not be required in the future for road purposes,
- Public exhibition of the proposal to close part of the road and dispose of it,
- Council resolving to agree to sale of the land, and
- Minister's consent to close the road.

The purchase price will be determined by independent valuation.

The adjoining owner will be required to meet all costs in preparing the agreement, including valuation.

Procedures will be in accordance with Council's *Policy for Sale of Council Land*, adopted 29 November 2004.

4.3 Commercial uses of the Road Reserve

Areas occupied for customer parking or commercial activities such as out-door dining are not the subject of this Policy. Such matters are to be formalised by commercial licences or leases.

5. Costs

The adjoining owner will be required to agree to meet all relevant costs associated with survey, valuation, legal documentation and registration based on DPI Registration fees and administrative expenses, before any process to formalise an encroachment will be commenced.

6. Area to which the Policy Applies

This encroachment policy covers all encroachments by adjoining owners on Council roads, road reserves and footways.

If the encroachment was deemed to be of a high risk to either public safety or infrastructure, the action would be to enforce the removal of the encroaching object.

If the encroachment was deemed to be of a medium risk to either public safety or infrastructure, the action would be to enter into a formal lease or closure of the road reserve area. Failure to any agreement the alternative would be the removal of the encroaching object.

If the encroachment was deemed to be of a low risk to either public safety or infrastructure, the action would be to allow the encroachment to remain, but have the adjoining owner register a Positive Covenant on their property's Title.

If the encroachment is identified only as a planted tree and:

- Is deemed low risk
- A tree species native to the area and listed on the approved tree planting list
- There are no current programmed construction work for that area.

The tree could remain, without the adjoining owner having to register a Positive Covenant on their property's Title. However if future works were scheduled for that area and conflicted with the location of the planted tree, the tree may have to be removed at a later date.

7. Unauthorised Works

Where works have been carried out in association with development, which encroach on a road reserve and which are not authorised by a Development Consent or by a Roads Act Approval, Council will not issue an Occupation Certificate or a Building Certificate until the encroachment has been removed or an agreement has been entered into by the owner of the encroaching property to formalise the encroachment in accordance with this Policy.

Policy History:

Date of Adoption/Amendment	Resolution Number
26 February 2015	15/041
22 February 2017	17/018