



**TWEED**  
SHIRE COUNCIL

## Policy

# Unauthorised Private Encroachments on Council Public Roads

Version 1.0

Adopted by Council at its meeting on Thursday 19 March 2015

Minute No: 158

Division:  
Section:  
File Reference:  
Historical Reference:

Engineering  
Design  
N/A  
Protocol Version 1.1  
Adopted 15/12/2004 Minute 866

**THIS PAGE IS BLANK**

# Unauthorised Private Encroachments on Public Roads

## Policy Objective

Council, as the owner and asset manager of the road reserves in the Shire, 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, eg, retaining walls.

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

- Removed, or
- Subject to Council resolution, is permitted to remain by 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.

## Definitions

**Council** means Tweed Shire Council.

**Encroachment** means any unauthorised structure, object or planting which has been placed within a Council public road reserve without prior consent of Council.

**Encroachment below the surface of a road reserve** is defined as being any work carried out in the subsurface area of the road reserve such as tunnels, car parks and the like.

**Footway** means that part of a road that is set aside or formed as a path or way for pedestrian traffic (whether or not it may also be used by bicycle traffic).

**Fence** means a structure, ditch or embankment, or a hedge or similar vegetative barrier enclosing or bounding land, whether or not continuous or extending along the whole of the boundary separating the land of adjoining owners and includes;

- Any gate, cattlegrid or apparatus necessary for the operation of the fence, and
- Any natural or artificial watercourse which separates the land of adjoining owners, and
- Any foundation or support necessary for the support and maintenance of the fence, but does not include a retaining wall (except as provided by this paragraph) or a wall which is part of a house, garage or other building).

**Landscaping/Vegetation** means an expanse of vegetated plantings or structures including but not limited to retaining walls, rock walls, flower beds, shrubs, trees and garden borders.

**LPI** means Land & Property Information, being the Registrar General's Office where all plans and dealings are lodged for registration.

**Roads Authority** means a person or body that is, by or under the *Roads Act 1993*,

declared to be a roads authority and, in relation to a particular public road, means the roads authority for that road.

All public roads within a local government area (other than freeways and Crown roads) are vested in fee simple in Tweed Shire Council.

**Road Reserve** means

- (a) any road that is opened or dedicated as a public road, whether under the *Roads Act* 1993 or any other Act or law, and
- (b) any road that is declared to be a public road for the purposes of the *Roads Act* 1993, and
- (c) the airspace above the surface of the road, and
- (d) the soil beneath the surface of the road, and
- (e) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.

**Road Work** includes any kind of work, building or structure (such as a roadway, footway, bridge, tunnel, road-ferry, rest area, transit way station or service centre or rail infrastructure) that is constructed, installed or relocated on or in the vicinity of a road for the purpose of facilitating the use of the road as a road, the regulation of traffic on the road or the carriage of utility services across the road, but does not include a traffic control facility.

**Usable floor space** includes any floor that has the potential to be used for any purpose, whether commercial or otherwise.

## Policy Background

This Policy is being developed for the community to outline Council's Policy on existing and new structures encroaching on or under Council public road reserves for which approval of Council as the relevant Roads Authority may be required.

A structure includes but is not limited to buildings, dwellings, sheds, carports, gates, car parks and tunnels.

**This policy does not generally apply to Crown public roads or commercial awnings/verandas over footpaths or road reserves.**

**This Policy does not remove Councils option for instigating legal action for any unauthorised works.**

This Policy has been written to provide a practical framework for the application of Council's role as the relevant Roads Authority under the *Roads Act* 1993. The relevant parts of the *Roads Act* are included below.

## **Roads Act 1993**

### **Division 3**

#### **Section 107 Obstructions and Encroachments**

(1) A roads authority may direct:

- (a) any person who causes an obstruction or encroachment on a public road, or
- (b) the owner of any land that is used, or is able to be used, in connection with an obstruction or encroachment on a public road,  
to remove the obstruction or encroachment.

(2) A direction under this section may specify the period within which the direction must be complied with.

(3) In the case of an obstruction or encroachment that was created before the alignment of the road, or that is situated on a road that has not been aligned, the period specified in the direction must be at least 60 days.

(4) This section does not apply to an obstruction or encroachment on a public road if its presence on the road is authorised by or under this or any other Act.

(5) However, this section does apply to an obstruction or encroachment on a public road if its presence ceases to be authorised by or under this or any other Act.

#### **Section 138 Works and Structures**

(1) A person must not:

- (a) erect a structure or carry out a work in, on or over a public road, or
- (b) dig up or disturb the surface of a public road, or
- (c) remove or interfere with a structure, work or tree on a public road, or
- (d) pump water into a public road from any land adjoining the road, or
- (e) connect a road (whether public or private) to a classified road

Otherwise than with the consent of the appropriate roads authority.

#### **Consent**

The following sections apply to the consent, revocation of consent and maintenance of works and structures within a road reserve.

#### **Section 139 Nature of Consent**

(1) A consent under this Division;

- (a) may be granted on the roads authority's initiative or on the application of any person, and
  - (b) may be granted generally or for a particular case, and
  - (c) may relate to a specific structure, work or tree or to structures, works or trees of a specified class, and
    - (c1) in relation to integrated development within the meaning of section 91 of the Environmental Planning and Assessment Act 1979, is subject to Division 5 of Part 4 of that Act, and
  - (d) may be granted on such conditions as the roads authority thinks fit.
- (2) In particular, a consent under this Division with respect to the construction of a utility service in, on or over a public road may require the service to be located:
- (a) in such position as may be indicated in that regard in a plan of subdivision or other plan registered in the office of the Registrar-General with respect to the road, or
  - (b) in such other position as the roads authority may direct.
- (3) In particular, a consent under this Division with respect to the erection of a structure may be granted subject to a condition that permits or prohibits the use of the structure for a specified purpose or purposes.

### **Section 140 Revocation of Consent**

A roads authority may at any time and for any reason revoke a consent under this Division (other than street vending consent) by notice in writing served on the holder of the consent.

### **Section 141 Effect of Consent**

While a consent under this Division is in force, the taking of action in accordance with the consent is taken not to constitute a public nuisance and does not give rise to an offence against this or any other Act.

### **Section 142 Maintenance of works and structures**

- (1) A person who has a right to the control, use or benefit of a structure or work in, on or over a public road;
- (a) must maintain the structure or work in a satisfactory state of repair, and
  - (b) in the case of a structure (such as a grating or inspection cover) located on the surface of the road, must ensure that the structure is kept flush with the surrounding road surface and that the structure and surrounding road surface are so maintained as to facilitate the smooth passage of traffic along the road,

And the person is, by this section empowered to do so accordingly.

## Policy

This 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.

Tweed Shire Council will consider applications for private structures on or under road reserves having regard to the merits of each proposal. Each application will take into consideration Division 3 Section 11 of the *Roads Regulation 2008* with regard to public safety and an evaluation made for the removal or possible retention according to the impact on the community interest.

With regard to all structures other than gates there are **five** options available to an applicant depending on the encroachment into the road reserve. The appropriate action for each application will be determined at the discretion of Tweed Shire Council.

### **OPTION ONE: Removal**

Encroachments which reduce public safety or public amenity, obstruct public access, are subject of dispute between adjoining land owners or compromise future Council works will not be considered for retention.

- The *Roads Act 1993* 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.
- The *Roads Act 1993* 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.
- 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.
- 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.

**Option one will apply to all unauthorised encroachments placed in the road reserve after the date of this policy.**

### **OPTION TWO: Road Closure and Private Purchase**

In some cases it will be necessary for an applicant to close and purchase a section of the road reserve immediately adjacent to their property in which the encroachment or structure exists.

Councils Road Closure and Private Purchase Policy sets out the conditions and relevant requirements for this option.

### **OPTION THREE: Registration of a Positive Covenant**

The selected mechanism to minimise Councils Public Liability exposure is by enforcing the registration of a Positive Covenant over the subject land.

In instances where this Policy is applied, Council will place a Condition of Consent on a Development Approval that requires the registration of a positive covenant upon the land which is executed by all parties including, but not limited to the Registered Proprietor, Council, the Mortgagee, the Lessee and any other party having an interest in the land using the words as specified by Council.

Council will provide the required wording for the positive covenant which is to be registered prior to the specific trigger (for example Construction Certificate, Subdivision Certificate, Works Commencing) as conditioned on the Development Approval. The Positive Covenant will specify a number of requirements such as the timeframe for the submission of civil engineer certification, public liability insurance and the registered proprietor's responsibility with regard to maintenance and repairs.

#### **Public Liability**

The Positive Covenant will require Council to be indemnified for any future claim for loss to any person or property by providing evidence of public liability insurance for no less than \$20,000,000.00 showing Council as an interested party.

### **OPTION FOUR: Creation of an Easement**

The creation of an easement under Section 88B of the *Conveyancing Act* 1919 will be considered in various cases.

This option may only be undertaken at the full cost of the applicant and will be subject to a Deed of Agreement.

Below are the relevant steps required to be undertaken by Council for the creation of an easement over a road reserve. The applicant will be required to meet all legal, survey and valuation costs as well as LPI registration fees as necessary.

1. If necessary the resolution of any doubts as to the status of certain roads will be need to be determined under Division 2, Section 16 of the *Roads Act* 1993.
2. A survey plan for first title creation from a registered surveyor will be required identifying the encroachment or new structure and the location within the road reserve.
3. Council will obtain at the cost of the applicant a valuation from a registered valuer for the amount of compensation payable upon registration of the easement.

4. An 11R request form will be submitted and registered at Land and Property Information, Sydney thus creating a title over the relevant section of road reserve.
5. Upon creation of the title issued in the name of Tweed Shire Council a plan of easement and S88B Instrument will be prepared. The plan and S88B instrument upon endorsement of Council will be registered at Land and Property Information, Sydney.

### **Deed of Agreement**

A Deed of Agreement will be entered into which shall include but is not limited to the following conditions;

- Determination of compensation payable to Council by the applicant
- Type of easement to be granted
- Specific terms of the easement
- Responsibilities of the applicant in relation to the ongoing maintenance of the structures including structural engineers certification
- Indemnification of Council by the applicant through Public Liability Insurance for an amount specified by Council showing Council as an interested party
- Agreement to the extinguishment and termination of the easement

### **OPTION FIVE: Lease or Licence of Council Road Reserve**

Only in exceptional circumstances will Council approve a lease or licence a section of road reserve. Under the *Roads Act* 1993 a lease can only run for five years at a time and must not contain structures that cannot be removed. Rental will be market value determined by an independent registered valuer.

The applicant will be required to meet all legal, survey and valuation costs as well as LPI registration fees as necessary.

Each lease agreement will be determined on the merits of the application and contain relevant terms in each instance.

Reference - Section 149 *Roads Act* 1993 Leasing of Land above or below public road.  
Section 153 *Roads Act* 1993 Short-term leases of unused public roads.

This option does not apply to Footpath Dining or Trading Licences. Please refer to Councils Footpath Trading Policy in this regard.

### **Gates on Road Reserves**

Division 2 Sections 128 to 132 of the *Roads Act* 1993 relates to public gates on public road reserves.

An application for a gate on a public road reserve will be considered by Council on its merits and if approved must comply with all requirements as set down under the *Roads Act 1993*.

## **Private Driveways**

Council as the Roads Authority may provide authorisation for the construction of a private driveway over a road reserve under S139 of the Roads Act 1993. Reference should be made to Councils "Access to Driveways" policies and protocol.

The provision and maintenance of a vehicular access driveway from the property boundary to the kerb and gutter or the edge of the road seal is the responsibility of the property owner. However, any work undertaken by private owners on Council roads requires written approval, in most circumstances a development application will be required concurrently.

Section 138 of the Roads Act 1993 requires council consent for works on road reserves (local roads), which includes driveways.

This process is necessary to ensure that such works comply with the many Australian Standard and Policies that enable works to be safe and practicable for all road users, including pedestrians and cyclists.

It should be noted that driveways and other works placed in the road reserve without Council approval may need to be removed if deemed to be a safety or public liability risk.

## **Roadside Fencing**

Roadside fencing refers to the fencing along the road reserve boundary, usually parallel to the constructed or non constructed roadway. Roadside fencing is the responsibility of the owner of the property adjoining the public road pursuant to the *Dividing Fences Act 1991*.

It is the property owner's responsibility to verify property and road reserve boundaries prior to fencing.

Section 25 (b) of the *Dividing Fences Act 1991* states that the Act does not impose any liability or confer any rights with respect to dividing fences on a roads authority (within the meaning of the *Roads Act 1993*) with respect to any road.

## **Related Legislation**

*Roads Act 1993*

*Roads Regulation 2008*

*Conveyancing Act 1919*

*Dividing Fences Act 1991*

## **Compliance**

## **Forms**

## **Review Period**

To be reviewed every five (5) years

## **Useful Links**

[\*\*Tweed Shire Council website\*\*](#)

[Division of Local Government](#)

