



Ku-ring-gai Council

Policy

Easement Management Policy

Version Number 2

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Easement Management Policy

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Controlled Document Information

Authorisation Details

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Related Document Information, Standards & References

Related Legislation:	<ul style="list-style-type: none"> ▪ Real Property Act 1900 ▪ Conveyancing Act 1919 ▪ Community Land Development Act 1989 ▪ Strata Schemes Development Act 2015 ▪ Local Government Act 1993 ▪ Local Government (General) Regulations 2005 ▪ Land Acquisition (Just Terms Compensation) Act 1991 ▪ Environment Planning and Assessment Act 1979 ▪ Water Management Act 2000 ▪ State Environment Planning Policy (Infrastructure) 2007 ▪ Ku-ring-gai Local Environment Plan (Local Centres) 2012 ▪ Ku-ring-gai Local Centres Development Control Plan ▪ Ku-ring-gai Local Environment Plan 2015 ▪ Ku-ring-gai Planning Scheme Ordinance ▪ Ku-ring-gai Development Control Plan <p>Note: Other legislation or instruments may also be relevant depending on the particular circumstances.</p>
Related Documents - Procedures, Guidelines, Forms, WHS Modules/PCD's, Risk Assessments, Work Method Statements, etc	Easement Application Form

Version History

Version Number	Version Start Date	Version End Date	Author	Details and Comments
1	27/08/2013	19/11/2019	Deborah Silva	First version
2	20/11/2019	TBA	Claire Khalil	Changes include: <ul style="list-style-type: none">- removing references to outdated legislation- adding in new relevant legislation- clarification of the terms compensation and commercial consideration- minor changes to the referenced application form

Policy

1. Introduction

An easement is a right over land that is granted for the benefit of other land or a public body, generally authorising access to and / or use of the land for a particular purpose.

Easements can be created for a variety of purposes such as pedestrian or vehicular access, stormwater drainage, water and electricity supply and sewerage purposes. The majority of easements dealt with under this policy are likely to be those for stormwater drainage.

Many easements are acquired by Council through subdivision at no cost and become a Council owned right or asset. However, if Council acquires an easement other than by subdivision, compensation will be payable to the Owner for the potential detriment to the land.

Conversely, the extinguishment, modification and/or relocation of an easement can enhance the value of the property through removal of the encumbrance, resulting in the availability of more land for development. Therefore, an easement is an interest in property with a value that is assessable by a valuer.

For the purposes of this Policy, the modification of an easement means the variation of an easement. The relocation of an easement involves the extinguishment of an easement and the creation of another.

2. Purpose

This Policy provides information to internal and external stakeholders in relation to the creation, modification and extinguishment of an easement over property that is the subject of a Development Application or when requested by an Owner.

The policy ensures consistency of approach for the following:

- a) Creation/modification of easements over public land, that are required as a result of development and public works;
- b) Extinguishment or modification of easements that benefit Council over privately owned land if it is no longer required by Council;
- c) Creation of easements that benefit Council over private land.

This Policy sets out measures and procedures so that each party is aware of their responsibilities and likely costs. However, these can vary depending on how the process is initiated and the particular circumstances involved.

3. Objectives

The objectives of this Policy are:

- 3.1 To ensure that all parties, including developers, valuers, landowners and Council staff have a consistent approach to, and an awareness of, Council's requirements and procedures for creating, modifying and/or releasing an easement, whether on public land or private property.
- 3.2 To ensure that relevant Council staff, involved in the provision of technical and statutory information required for the creation, modification and extinguishment of easements are conversant with and can rely upon an approved policy and procedure.

- 3.3 To make certain that new development incorporates appropriate stormwater management techniques including appropriate provision of stormwater drainage and Water Sensitive Urban Design (WSUD) and re-use strategies.
- 3.4 To protect valuable property rights vested in Council, and to ensure that obligations and responsibilities to pay compensation or commercial consideration for creation of an easement over Council land or for the extinguishment of an easement benefiting Council, are acknowledged and agreed.

4. Legislation and Other Instruments

Legislation and other instruments relevant to the creation, modification or extinguishment of easements under this Policy are listed under Related Legislation and Documents at the beginning of the policy. Other legislation or instruments may also be relevant depending on the particular circumstances.

5. Easements on Council land and private land

Circumstances where the need for easements arise may include:

5.1 Creation of an easement on Council Land

- 5.1.1 Creation or modification of an easement on public land may occur as a result of a development application where the Applicant requires access to the land and / or the right to connect to Council's existing infrastructure on public land.
- 5.1.2 Where a development application is involved, all allotments that are the subject of the development application will be checked with Council's Development Assessment records to establish whether an encumbrance exists on that allotment either by way of easement or constructed drain. This check will determine whether the creation or the modification of an easement over public land will be necessary.
- 5.1.3 Creation of an easement for an essential public work by a government or statutory authority.

5.2 Creation of a council easement on private property

- 5.2.1 An easement benefiting the Council over private property may be required where Council has undertaken or proposes to undertake new works that require a right of access through private property (e.g. to alleviate flooding problems) or in the case where works were completed in the past and no easement was ever created.

It is to be noted that Council will not create an easement over a Watercourse.

6. Procedures

If an Applicant approaches Council and requests the creation, modification or extinguishment of an easement on public land the following procedures apply:

- 6.1 The Applicant is required to submit to Council, an application form and pay the application fee. The application fee is to investigate the request, assess impacts, coordinate and attend inspections and meetings, and submit a report to Council to consider the request. At the time of submitting the application, the Applicant is to provide in writing, an agreement that the Applicant will be responsible for all costs associated with the creation/modification of the easement, including Council's reasonable legal costs.
- 6.2 Advice will be sought from the relevant staff in Council's Operations Department to determine the infrastructure requirements of Council.
- 6.3 Advice will be sought from the relevant staff in Council's Strategy & Environment Department – Property, to assess the statutory and Real Property impacts on public land. In particular, Applicants should be aware that restrictions apply to the granting of easements over Council land that is classified as Community Land under the Local Government Act 1993.
- 6.4 Where the request relates to an easement over a Watercourse, advice is sought from the relevant staff in Council's Development and Regulation or Strategy & Environment Departments to ensure the proposal adequately addresses Council's riparian controls contained in local environmental plans and development control plans and the NSW Water Management Act 2000, as amended from time to time. Council will confirm that it is the Owner of the bed and banks of the particular Watercourse and that this land is not Crown Land.
- 6.5 Relevant input from Council's Operations and Strategy & Environment staff will be incorporated into any conditions of development consent and the terms of any easement granted. Where an easement is required for the purpose of a proposed development, a condition requiring the easement to be registered may be imposed in the development consent as a deferred commencement condition.
- 6.6 Applicants will be advised by letter of Council's requirements in line with the Easement Management Policy. These requirements will at least include the following:
 - 6.6.1 The Applicant will be responsible for all costs associated with the creation/modification of the easement, including but not limited to relocation of infrastructure, valuation, legal, native title advice, stamp duty, registration and other costs, including commercial consideration.
 - 6.6.2 The Applicant will be responsible for the cost of the construction of any new infrastructure or the de-commissioning or relocation of any infrastructure as required. This will be subject to a final inspection and approval by Council's Operations Department Engineer.
- 6.7 The Applicant will be required to pay compensation to the Council for the creation / modification of any easement over Council land. A valuation prepared by a valuer will be obtained to determine the appropriate quantum of compensation. The valuation may take into account similar factors to those that would be considered if the easement was acquired under the Land Acquisition (Just Terms Compensation) Act 1991.

- 6.8 Valuation for the creation of an easement may include, but is not limited to, an assessment of the diminution in value of the land based on the “before and after” value of the land - that is, the value of the land in its present condition compared with the value of the encumbered land. Any compensation payable may also include costs incurred as a result of the imposition of the easement.
- 6.9 Valuation for the modification of an easement may include an assessment of any quantifiable loss or injury suffered as a result of the modification.
- 6.10 The Applicant is to provide a Plan of Survey identifying the location of the easement to be created/modified. If another easement is required to be created the Plan should identify the location of the new easement.
- 6.11 Subject to Council resolution, the appropriate legal documentation for creation or modification of the easement will be prepared by Council's solicitors (usually, a Section 88B Instrument or a deed for old system land).
- 6.12 The legal documentation will be executed under delegation by the General Manager and the Mayor and, if required the Council Seal will be affixed.
- 6.13 When all fees and commercial consideration are received by Council the easement will be registered on the title of the encumbered property.
- 6.14 The matter will then be referred to Council's Development Assessment team to consider whether any relevant conditions of consent have been satisfied in accordance with the approval and technical requirements.
- 6.15 At any stage in the process, the proposal to create or modify the easement may be referred to the full Council for consideration. Whether or not this occurs will depend on the relevant Council delegations at the time and any particular circumstances for each case.

7. Extinguishment or Modification of an Easement on Private Property

The following requirements will apply to applications made to extinguish or modify Council easements over privately owned land.

- 7.1 A request for extinguishment or modification of an easement that benefits Council over private property may occur as a result of a development application. The Applicant may request the removal of the easement and associated infrastructure that hinders the development of their property.
- 7.2 The request to extinguish an easement can also occur if an Owner requests that an existing easement over their land which benefits Council be extinguished without development being contemplated at that time. For example, an easement may be redundant and an Owner may wish to remove the interest from their title. All allotments that are the subject of a development application and/or a private request will be investigated with Council's Development Assessment records to establish whether an encumbrance exists on that allotment either by way of easement or constructed drain.
- 7.3 Where an easement exists over a Watercourse, extinguishment or modification of the easement does not allow piping or removal of the Watercourse. Any change to the Watercourse must be undertaken in line with Council's riparian controls contained in local

environmental plans and development control plans, adopted planning instruments, related policies and NSW Water Management Act 2000, as amended from time to time.

- 7.4 The procedures and requirements for extinguishing or modifying an easement that benefits Council over private land are set out below.
- 7.4.1 The Applicant requesting the extinguishment or modification of an easement, whether initiated by a development application or otherwise is required to submit an application form to Council, and pay an application fee to cover administrative costs. The application fee is to investigate the request, assess impacts, coordinate and attend inspections and meetings, and submit a report to Council to consider the request. At the time of submitting the application, the Applicant is to provide in writing, an agreement that the Applicant will be responsible for all costs associated with the extinguishment or modification of the easement, including the Council's reasonable legal costs.
- 7.4.2 Advice will be sought from the relevant staff in Council's Operations Department to determine the infrastructure requirements of Council.
- 7.4.3 Advice will be sought from the relevant staff in Council's Strategy & Environment Department – Property, to assess the statutory and Real Property impacts for Council.
- 7.5 Where the request relates to an easement over a Watercourse, advice will be sought from the relevant staff from Council's Development and Regulation or Strategy & Environment Departments to ensure the proposal adequately addresses Council's riparian controls and the NSW Water Management Act 2000.
- 7.6 Relevant input from Council's Operations and Strategy & Environment staff will be incorporated into the conditions of any development consent or the terms of any easement. Alternatively, a letter will be provided to the Applicant outlining Council's requirements. These requirements will at least include the following:
- 7.7 The Applicant will be responsible for all costs associated with the extinguishment/modification of the easement, including but not limited to relocation or de-commissioning of infrastructure, valuation, legal, stamp duty, registration and other costs including commercial consideration.
- 7.8 Council's original acquisition of the easement would have entailed payment of compensation to the Owner for the potential detriment to the land and encumbrance on title. Commercial consideration will therefore be payable for the extinguishment or modification of an easement that benefits Council over private land. The creation of a new easement over the land in an alternate location at no cost to Council will not necessarily negate the requirement to pay commercial consideration for the extinguishment/modification of the original easement. The commercial consideration will be subject to negotiation with Council and a valuation report will inform the negotiations which will, among other valuation principles, take in account the "before and after" value of the land. In addition, an assessment of any quantifiable loss or injury which the Council will suffer as the result of the extinguishment or modification will also be considered.
- 7.9 Where Council no longer requires an existing easement on private property or it is established to the Council's satisfaction that such an easement is obsolete or abandoned; and the Council would suffer no loss or injury if the easement is extinguished, the Council may agree to the extinguishment of that easement subject to the payment of commercial

consideration assessed by independent valuation. Any costs associated with the actual extinguishment of the easement from the title to the relevant land will still be borne by the Applicant.

- 7.10 The Applicant is to provide a Plan of Survey identifying the location of the existing easement to be extinguished or modified.
- 7.11 Subject to Council resolution, the appropriate legal documentation for extinguishment / modification of the easement will be prepared by Council's solicitors (usually, a section 88B Instrument or any deed or other instrument for old system land).
- 7.12 The legal documentation is to be executed by the General Manager and the Mayor and, if required the Council Seal will be affixed.
- 7.13 When all fees and compensation/commercial consideration are received by Council the easement will be extinguished from or modified on the title of the encumbered property.
- 7.14 The matter will then be referred to Council's Development Assessment team to consider whether any relevant conditions of development consent have been satisfied in accordance with the approval and technical requirements.
- 7.15 At any stage in the process, the proposal to extinguish or modify the easement may be referred to the full Council for consideration. Whether or not this occurs will depend on the relevant Council delegations at the time and any particular circumstances for each case.

8. Creation of a Council easement on private property

The procedure and requirements for the acquisition of an easement over private property are set out below.

- 8.1 If the creation of an easement is initiated by Council, Council will be responsible for all costs and fees associated with the creation or modification of the easement, including but not limited to valuation, legal, stamp duty, registration and other disbursements.
- 8.2 Council's Operations Department and Strategy & Environment's Property section will carry out negotiations with the affected private property owners for the creation of an easement to formalise Council's infrastructure.
- 8.3 Council will be responsible for the cost of the construction of any new infrastructure or the de-commissioning or relocation of any infrastructure as required.
- 8.4 Council will be required to pay compensation to the Owner in order to create the easement.
- 8.5 A valuation prepared by a valuer will be obtained for the purposes of reaching an agreement on the compensation payable. The valuation must determine an appropriate amount in accordance with the provisions of the Land Acquisition (Just Terms Compensation) Act 1991. The valuation may include, but is not limited to, an assessment of the diminution in value of the land based on the "before and after" value of the land - that is, the value of the land in its present condition compared with the value of the encumbered land.

- 8.6 The Council will attempt to reach an agreement with the Owner as to the acquisition of the proposed easement and the amount of compensation to be paid. If an agreement cannot be reached, the Council may rely on its compulsory acquisition powers under relevant legislation. The acquisition will be undertaken in accordance with the requirements of the Land Acquisition (Just Terms Compensation) Act 1991. A resolution of the Council will be required if the Council intends to rely on its compulsory acquisition powers to acquire an easement.
- 8.7 Council will prepare a Plan of Survey identifying the location of the easement and the appropriate legal documentation for registration of the easement on the title of the encumbered property.
- 8.8 Subject to Council resolution, the appropriate legal documentation for creation and registration of the easement will be prepared by Council's solicitors (usually, a section 88B Instrument or a deed for old system land).
- 8.9 Once the easement is registered on the title of the encumbered property, compensation will be paid to the Owner.
- 8.10 At any stage in the process, the proposal to create or acquire the easement may be referred to the full Council for consideration. Whether or not this occurs will depend on the relevant Council delegations at the time and any particular circumstances for each case.

9. Departure from this Policy

Any provision of this policy may be varied to meet the needs of a particular matter by resolution of Council. Any deviation from Council's Easement Management Policy will be clearly articulated within the report submitted for consideration by Council in adopting such resolution and will only apply to such matter.

10. Definitions

Terms and abbreviations used in this Policy have the meanings set out in the Definitions section below.

Term / Abbreviation	Definition
Applicant	an interested party, either the Owner of the land or a party acting on behalf of the Owner of the land that requires the creation, modification or extinguishment of an easement.
Compensation	the amount of payment for the loss of the use of the land or other impacts caused by the creation or modification of an easement and any disadvantage experienced from the easement.
Commercial consideration	The amount of payment payable to Council assessed by independent valuation to compensate for releasing/modifying a Council easement over private land.
Easement	a right over land that is granted for the benefit of other land or a public body, generally authorising access to and / or use of the land for a particular purpose.
Extinguishment	also refers to the Release of an easement.
Owner	(a) with respect to Torrens Title land, the registered proprietor of the land; (b) with respect to Old System title, the holder of the title to the land; (c) with respect to community title, the relevant community association; and (d) with respect to common property in a strata scheme, the relevant body corporate.
Real Property	the rights, interests, and benefits related to ownership of real estate under the Real Property Act 1900 or Old System title. Real Property is a legal concept distinct from real estate, which is a physical asset. There may be potential limitations upon ownership rights to real property. It comprises of estates and interests in land and generally is in two (2) categories: <ul style="list-style-type: none"> • tangible things (such as land and buildings) and • intangible rights attaching to land (including easements).
Valuer	a person who is accredited as a Registered Practising Valuer and/or member of the Australian Property Institute.
Watercourse	any river, creek, stream or chain of ponds, whether artificially modified or not, in which water usually flows, either continuously or intermittently, in a defined bed or channel and does not include artificial waterbodies.