

POLICY NAME	Encroachment on Council Land Policy
DIRECTORATE	Engineering

1. PURPOSE

The purpose of this Policy is:

- (a) to provide a transparent framework and consistent approach as to how Council regulates and manages Encroachments on Council Land;
- (b) to ensure that all Encroachments on Council Land are effectively managed so as to safeguard Council's legal obligations and liability;
- (c) to ensure Encroachments on Council Land are appropriately designed and constructed to ensure pedestrian/vehicular safety, whilst conserving the desirable characteristics of an area;
- (d) to outline the minimum management requirements for the maintenance of structures that encroach onto Council Land;
- (e) to formulate a consistent method of calculating fees or compensation payable to Council for approved Encroachments onto Council Land;
- (f) to identify circumstances where separate approval is required under other Council policies for the use of Encroachments on Council Land; and
- (g) to develop a consistent approach for the removal of established but unauthorised and unapproved Encroachments on Council Land.

2. SCOPE

2.1 This Policy applies to:

- (a) all land contained within the Albury Local Government Area; and
- (b) all Councillors and employees of Council, as well as external consultants employed as representatives of Council; and
- (c) all private property owners who are proposing or who have existing Encroachments on Council Land.

2.2 This Policy does not apply to:

- (a) the use of Council Land for activities (such as outdoor dining, street advertising, street vending or the like) which are covered by Council's *Street & Outdoor Activities Policy*;
- (b) existing approved Encroachments established prior to the introduction of this Policy;
- (c) structures of a temporary nature approved or required as part of a Development Consent (if necessary) under other legislation, (e.g. the *Roads Act 1993* and for example, temporary hoardings and/or protective fencing); or
- (d) authorities, corporations or other persons that are entitled or authorised to create Encroachments or fixtures on a Road (such as power poles, post boxes, telephone lines, infrastructure, essential services and the like).

3. DEFINITIONS

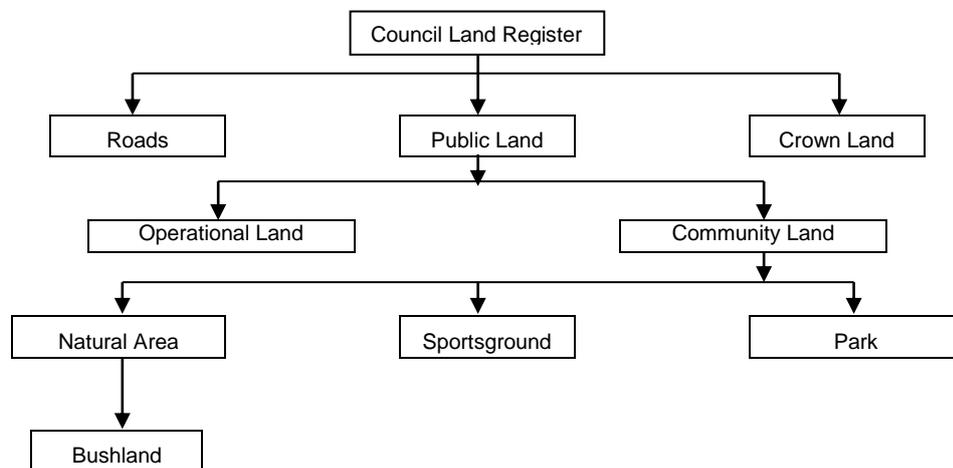
In this Policy:

- (a) **Boundary** means *the boundary line between contiguous* parcels of land.
- (b) **Community Land** means Public Land that is classified as community land under Division 1 of Part 2 of Chapter 6 of the LG Act.

Community Land is land which:

- (i) is reserved for community use;
 - (ii) is of importance to the community because of its use or special features and must be managed according to special guidelines in accordance with the LG Act;
 - (iii) Council has no power to sell, exchange or otherwise dispose of (unless it is re-classified as Operational Land);
 - (iv) Council may grant a lease, licence or other estate over, but only for the purposes set out in section 46 of the LG Act, some of which may be expressly authorised by a Plan of Management, and not for a period more than 21 years (except with the consent of the Minister); and
 - (v) must have a Plan of Management prepared for it or applying to it.
- (c) **Construction Certificate** means a certificate to the effect that work completed in accordance with specified plans and specifications will comply with the requirements of the regulations referred to in section 81A (5) of the EPA Act.
 - (d) **Council** means Albury City Council and its successors.
 - (e) **Council Land** means all land owned or controlled by Council which is listed in Council's Land Register.
 - (f) **Crown Land** means land that is vested in the Crown or was acquired under the *Closer Settlement Acts* as in force before their repeal, not in either case being:
 - (i) land dedicated for a public purpose, or
 - (ii) land that has been sold or lawfully contracted to be sold and in respect of which the purchase price or other consideration for the sale has been received by the Crown.
 - (g) **Crown Lease** means a lease of Crown Land which grants exclusive use over a particular piece of land for a specified term and purpose, governed by the *Crown Lands Act 1989*.
 - (h) **Crown Licence** means a Licence of Crown land which is a contractual agreement that grants the licensee a personal right to occupy and use Crown Land for a particular purpose in accordance with the *Crown Lands Act 1989*. It does not grant exclusive possession of the land as is the case of a lease, and may permit the land to be used by other persons.
 - (i) **Development Application** means an application for consent under Part 4 of the EPA Act to carry out development but does not include an application for a complying development certificate.

- (j) **Development Consent** means consent under Part 4 of the EPA Act to carry out development and includes, unless expressly excluded, a complying development certificate.
- (k) **Encroaching Owner** means the owner of the Encroaching Land.
- (l) **Encroaching Land** means the land from which an Encroachment extends.
- (m) **Encroachment** means a building, structure or other object which encroaches (or will, upon construction, encroach) onto Council Land.
- (n) **EPA Act** means the *Environmental Planning & Assessment Act 1979*.
- (o) **Footway** means that part of a Road as is set aside or formed as a path or way for pedestrian traffic (whether or not it may also be used by bicycle traffic).
- (p) **Land Register** means the land register comprising all land that is owned or controlled by Council which is categorised as follows:



- (q) **LG Act** means the *Local Government Act 1993*.
- (r) **Operational Land** means Public Land that is classified as operational land under Division 1 of Part 2 of Chapter 6 of the LG Act.

Operational Land is land which:

- (i) is held as a temporary asset or as an investment;
- (ii) facilitates the carrying out by Council of its functions or operational activities, such as the provision of public car parks;
- (iii) may not be open to the general public, such as a works depot or Council garage;
or
- (iv) is not required to be managed on behalf of present and future communities, or kept for general public use.

Note:

The range of controls which apply to Community Land do not apply to the use and management of Operational Land.

- (s) **Other Estates** has the same meaning as “estate” in section 21 of the *Interpretation Act 1987*, which includes interest, charge, right, title, claim, demand, lien and encumbrance

whether at law or in equity. A common example in local government is the granting of easements.

- (t) **Plan of Management** means a plan of management adopted by Council under Division 2 of Part 2, Chapter 6 of the LG Act, to manage Community Land.
- (u) **Public Land** means any land on Council's Land Register (including a public reserve) vested in or under the control of Council, but does not include:
- (i) a public road, or
 - (ii) land to which the *Crown Lands Act 1989* applies; or
 - (iii) a common; or
 - (iv) land subject to the *Trustees of Schools of Arts Enabling Act 1902*; or
 - (v) a regional park under the *National Parks and Wildlife Act 1974*.
- (v) **Reserve Trust** is a corporation established under the *Crown Lands Act 1989* to manage a Crown reserve on behalf of the people of NSW. It is not a branch of a department of Government. However, it is responsible (under the oversight of the Minister of Crown Lands) for the care, control and management of a specific reserve and is not for private profit.
- (w) **Road** means:
- (i) any highway, street, lane, pathway, footpath, cycleway, thoroughfare, bridge, culvert, causeway, road-ferry, ford, crossing, by-pass and trackway, whether temporary or permanent; and
 - (ii) any thing forming part of a road referred to in subclause (i),
- and in accordance with the *Roads Act 1993*, a road includes:
- (iii) the airspace above the surface of the road;
 - (iv) the soil beneath the surface of the road; and
 - (v) any bridge, tunnel, causeway, road-ferry, ford or other work or structure forming part of the road.
- Note:**
- For the purposes of this Policy a 'Road';
- does not include roads under the control or management of the Roads and Maritime Services; and
 - includes a "footway" as that term is defined in the *Roads Act 1993*.
- (x) **Subject Land** means that part of Council Land over which an Encroachment extends.
- (y) **Valuer** means a person who:
- (i) is a full member of the Australian Property Institute Inc (NSW Division) and has been for the last 5 years;
 - (ii) holds a licence to practise as a valuer;
 - (iii) is active in the relevant market at the time of their appointment; and
 - (iv) has at least 5 years experience in undertaking valuations of the nature of the requirements of this Policy.

4. CONTENT

4.1 Introduction

- (a) Buildings and other structures that extend over Council Land and into Council's airspace can provide a public benefit for pedestrians and other user groups by increasing activity in the roadside areas, providing protection from the weather as well as enhancing the appearance of buildings to create a vibrant urban environment.
- (b) The encroachment of buildings or other structures over Council Land can also provide a commercial benefit or return for individual business owners by increasing the useable floor area of a building.
- (c) Whilst Encroachments onto Council Land can provide both a public and private benefit, they may also present a potential risk of safety to the public and also a potential risk of legal claims to Council if left unmanaged.
- (d) Council has a duty to manage this risk by ensuring that the applicant proposing the Encroachment remains responsible for identifying the risks, assessing the extent of the risks and undertaking all measures necessary to mitigate the risk to an acceptable level of Council.
- (e) If the impact of an Encroachment is not in the public interest or is otherwise unacceptable, Council may direct the Encroaching Owner to remove the Encroachment. Alternatively, Council may remove the Encroachment at the Encroaching Owner's expense.
- (f) If the Encroachment is deemed acceptable, Council will direct the Encroaching Owner to formalise the Encroachment via:
 - (i) a Development Application or Building Certificate;
 - (ii) a licence; or
 - (iii) a sale and/or transfer.

Note:

- If the land occupied by the Encroachment is classified as Community Land, it can only be licenced if the purpose for which the licence is issued is consistent with the core objectives for the area of Community Land in question. Alternatively the Community Land may be reclassified as Operational Land.
- If the land occupied by the Encroachment is Crown Land, Council will only permit the Encroachment to remain (by entering into a lease and/or licence) if the use is consistent with the purpose of the reserve (i.e. public recreation), and is in the public interest.
- If the land occupied by the Encroachment is a Road, the lease or licence must comply with the *Roads Act 1993*.

4.2 Guiding Principles

- (a) This Policy applies to the erection of buildings or other structures that encroach into or upon Council Land.
- (b) Permitted Encroachments refer to buildings or other structures that may be permitted to encroach from private property onto Council Land including (but not limited to):

- (i) awnings and verandahs;
 - (ii) balconies;
 - (iii) sunblinds;
 - (iv) signage and advertising;
 - (v) decorative structures and landscaping;
 - (vi) driveways, vehicle crossovers and car parking areas;
 - (vii) private security lighting and CCTV cameras; and
 - (viii) special drainage structures.
- (c) No building or other structure shall be (or shall be permitted to remain) erected on Council Land unless a Development Application has been lodged and a Development Consent has been issued. See Section 4.3 for further details.
- (d) The Encroaching Owner is responsible for engaging a land surveyor to prepare a plan of survey defining the extent of the Encroachment.
- (e) The use of any Encroachment on Council Land for the purposes of outdoor dining, street vending or the like will be subject to separate approval under Council's *Street & Outdoor Activities Policy*.
- (f) Any building or other structure (with the exception of driveway crossovers) that encroaches onto Council Land will be subject to a separate Licence Agreement substantially in accordance with Council's *Licence Agreement – Encroaching Structures* which will, inter alia, make the Encroaching Owner responsible for the ongoing management, repair and maintenance of the encroaching building or other structure. The Licence Agreement executed by the Encroaching Owner must be submitted to Council prior to the issue of a Construction Certificate.

Note:

The Licence Agreement – Encroaching Structures only applies to Roads. Where an encroachment is proposed to extend onto other Council Land (such as Community or Operational Land), a separate Licence Agreement will need to be entered into with Council having regard to the specific conditions of the site.

- (g) Any building or other structure that encroaches onto Crown Land will be subject to a separate Licence Agreement in accordance with Section 45 of the *Crown Lands Act 1989* which will, inter alia, make the Encroaching Owner responsible for the ongoing management, repair and maintenance of the encroaching building or other structure. The Licence Agreement executed by the Encroaching Owner must be submitted to Council prior to the issue of a Construction Certificate.
- (h) Fees and/or compensation will be payable to Council for the encroachment and/or use of Council Land. The method used to calculate these fees or compensation is outlined in Section 4.7.
- (i) All costs associated with the requirements set out in this Policy will be borne by the applicant or the Encroaching Owner, including, without limitation, the preparation of the Licence Agreement, Council's legal costs and any costs associated with the ongoing management, repair and maintenance of the Encroachment.

4.3 Development Application (DA) Process

- (a) For any Encroachment that has already been constructed an application for a Building Certificate must be lodged.
- (b) Where an Encroachment is proposed to be constructed a Development Application must be lodged with Council (fees apply) and must be compliant with the requirements of this Policy.
- (c) Where a Development Application is required and the proposal is generally considered to be acceptable, owners consent must be provided by Council and/or Crown Lands for the erection of the building or other structure.
- (d) An Encroachment must comply with Section 11.7.20, as well as Figure 11.6 of the *Albury Development Control Plan 2010*.
- (e) Work must not be carried out on a Road (including a Footway) unless consent has been granted by Council under section 138 of the *Roads Act 1993* and section 68 of the LG Act. These approvals are separate to Development Consent.
- (f) A condition of the Development Consent will require the completion of a Licence Agreement between the Encroaching Owner and Council and/or Crown Lands in accordance with Council's *Licence Agreement – Encroaching Structures*. A copy of the executed Licence Agreement must be submitted to Council prior to the issue of a Construction Certificate. An initial licence fee will also be payable for the creation of the licence in accordance with Section 4.7 of this Policy.
- (g) Where an Encroachment is proposed to be used for the purposes of outdoor dining, street vending or the like, an advisory condition will be included within the Development Consent requiring separate approval under Council's *Street & Outdoor Activities Policy* and an annual rent/fee will be payable in accordance with Section 4.7 of this Policy.

4.4 Management of Encroachments on Public Land

4.4.1 Encroachments onto Roads (*Roads Act 1993*)

- (a) Licences
 - (i) Licences on Roads may be considered by Council for Encroachments listed under Section 4.2 of this Policy.
 - (ii) Council may grant a licence to the Encroaching Owner if, in its opinion, the Road (or part of it) is not being used by the public.
 - (iii) No structure may be erected on Council Land unless Development Consent has been obtained.
 - (iv) The term of the licence, including any option to renew must not exceed thirty (30) years.

- (v) The licence may be terminated by Council at any time by three (3) months' notice in writing to the Encroaching Owner and no compensation will be payable by Council in the event of any termination.
- (vi) The licence fee payable to Council will be determined in accordance with Section 4.7 of this Policy.

(b) Sale/Transfer

- (i) If Council is of the opinion that the Subject Land is no longer required for the original purpose that it was set aside for, Council may consider selling the Subject Land to the Encroaching Owner and in those circumstances the provisions of *Council's Acquisition and Disposal of Land Policy* will apply.
- (ii) If Council decides to sell the Subject Land, the Road will require closure* (at the applicants cost).

***Note:**

No guarantee is made by Council that approval will be given by Crown Lands or Roads and Maritime Service (or any other required authority) to close all or part of any Road.

4.4.2 Encroachments onto Operational Land (Local Government Act 1993)

(a) Licences

- (i) Operational Land has no special restrictions other than those that may apply to any piece of land and can be licensed for any period of time as determined by Council.

Note:

Council's Licence Agreement only applies to Roads. Where an Encroachment is proposed to extend onto other Council Land (including Operational Land), a separate Licence Agreement will need to be entered in to with Council having regard to the specific conditions of the site.

(b) Sale/Transfer

- (i) If the Encroaching Owner wishes to purchase the Subject Land, Council will determine whether the Subject Land is required for its original (or any other) purpose and must have regard to Council's *Acquisition and Disposal of Land Policy*.
- (ii) If the Subject Land is no longer required, Council may sell the Subject Land in accordance with Council's *Acquisition and Disposal of Land Policy*.

4.4.3 Encroachments onto Community Land (Local Government Act 1993)

(a) Licences

- (i) Encroachments on Community Land are not permitted unless authorised by a licence issued in accordance with the LG Act.
- (ii) Council may only issue a licence where it is consistent with the relevant Plan of Management and where the purpose for which the licence is sought is consistent with the core objectives for the area of Community Land in question.
- (iii) Where a proposed licence is not consistent with the core objectives of the relevant Plan of Management for Community Land then the licence will be rendered invalid.
- (iv) The term of the Licence Agreement, including any option to renew, must not exceed twenty one (21) years.
- (v) If the term of the Licence Agreement, including any option to renew, exceeds five (5) years it can only be granted by way of a tender, must be publicly exhibited and may require the approval for the Minister for Planning (should any objections be received).

Note:

Council's Licence Agreement only applies to Roads. Where an Encroachment is proposed to extend onto other Council Land (including Community Land), a separate Licence Agreement will need to be entered in to with Council having regard to the specific conditions of the site.

(b) Sale/Transfer

- (i) Council has no power to sell, exchange or otherwise dispose of Community Land (unless it is reclassified as Operational Land).
- (ii) Council, pursuant to the LG Act, must first determine whether the Subject Land be considered for sale.

Note:

Community Land may be reclassified as Operational Land via an amendment to the Local Environmental Plan in accordance with the provisions of the EPA Act.

4.5 Management of Encroachments on Crown Land

(a) Leases and Licences

- (i) Any dealing with Crown Land must be consistent with the *Crown Lands Act 1989* and the Department of Primary Industries *Lands Trust Handbook*.
- (ii) Encroachments onto Crown Land are not permitted unless authorised by a Crown Lease or Crown Licence.
- (iii) Where Council is the Reserve Trust Manager of Crown Land, upon notification of an existing Encroachment, Council will inspect the Crown

Land to determine the public impact and to determine whether the Encroachment is consistent with the purpose of the Crown Land reserve.

- (iv) If the Encroachment meets these conditions, a Crown Lease or Crown Licence may be granted.
- (v) Where an Encroachment is not supported, is not consistent with the purpose of the Crown Land reserve or creates a public risk, the Encroaching Owner will be directed to remove the Encroachment in accordance with Section 4.8 of this Policy.
- (vi) Generally, a Crown Lease or Crown Licence over a Crown Land reserve (or part of a reserve) can only be granted to permit the lessee/licensee to use the Crown Land in a way that is consistent with the purposes for which the Crown Land was dedicated or reserved and is in the public interest.
- (vii) If the Encroachment meets these conditions, a Crown Lease or Crown Licence may be granted at market value (or in accordance with the minimum rent payable for a Crown Lease or Crown Licence), subject to the consent of the Minister for Crown Lands.

(b) Sale/Transfer

- (i) Section 34(1)(a) of the *Crown Lands Act 1989* empowers the Minister for Crown Lands to sell Crown Land on behalf of the Crown.
- (ii) Council cannot sell or otherwise dispose of Crown Land without the authorisation of the Minister for Crown Lands.

4.6 Maintenance and Insurance

- (a) The Encroaching Owner is responsible for ensuring that the Encroachment remains structurally sound and is appropriately repaired and maintained at all times. Any costs associated with the ongoing repair and maintenance of the Encroachment will be at the cost of the Encroaching Owner.
- (b) Following construction of the Encroachment, the Encroaching Owner must submit a Structural Engineers Certificate to Council, certifying that the Encroachment is structurally sound and complies with the Building Code of Australia.
- (c) The Encroaching Owner must provide a new Structural Engineers Certificate (certifying that the Encroachment is structurally sound and complies with the Building Code of Australia) to Council every five (5) years (in accordance with the conditions of the Licence Agreement).
- (d) The Encroaching Owner must hold and maintain professional indemnity and public liability insurance to the value of \$20,000,000 in relation to the Subject Land noting Council as an interested party. A copy of the Certificate of Currency must be provided to Council.

- (e) If the Encroaching Owner neglects to fulfil their obligations, Council may terminate the agreement at any time and the Encroachment may be required to be removed as per the requirements of Section 4.8 of this Policy.

4.7 Method of Calculating Rent or Compensation Payable

4.7.1 Licence Fee for Encroaching Structures

- (a) A one-off application fee will be payable for the erection of any building or other structures (with the exception of driveway crossovers) that encroach onto Council Land. This fee will be payable in accordance with the requirements of Council's *Licence Agreement – Encroaching Structures* and Council's *Annual Fees and Charges Schedule*.
- (b) All costs associated with the preparation of the Licence Agreement (including Council's legal costs) are payable by the Encroaching Owner.

4.7.2 Fee for the Use of Council Land

- (a) An annual fee will be indexed for the use of Council Land in accordance with Council's *Street and Outdoor Activities Policy* and the Council's *Annual Fees and Charges Schedule*.
- (b) In accordance with Council's *Street and Outdoor Activities Policy*, this rate will be calculated based on:
 - (i) street vending – based on a square metre basis; or
 - (ii) footpath dining – based on a per chair basis, or
 - (iii) a combination of the above.

4.7.3 Sale/Transfer

- (a) Where Council decides to sell the Subject Land (or the whole of the Council Land) to an Encroaching Owner, Council will engage the services of a nominated Valuer to determine the compensation payable for the sale of the Subject Land or Council Land being a valuation based on the relevant provisions of Council's *Acquisition and Disposal of Land Policy*.
- (b) The Minister for Crown Lands will appoint a Valuer to assess the value of the compensation payable for the sale of Crown Land.

4.8 Unauthorised or Unapproved Encroachments

- (a) When Council becomes aware of an unapproved Encroachment, which following review is supported, the landowner must obtain a Building Certificate from Council and provide Council with a Structural Engineers Certificate certifying that the Encroachment is structurally sound and complies with the Building Code of Australia.

- (b) A formal Licence Agreement will also need to be entered into with Council to address issues regarding ongoing management, repair and maintenance.
- (c) When Council becomes aware of an unapproved Encroachment, which following review is not supported or creates a public safety risk, Council (or another authority) may direct the Encroaching Owner to remove the Encroachment in accordance with Appendix B and make good any damage caused by the removal of such Encroachment.
- (d) The Encroaching Owner will be responsible for the costs incurred in removing the Encroachment and the making good of any damage caused by the removal of such Encroachment. Where the Encroaching Owner refuses to remove the Encroachment, Council will remove the Encroachment and make good any damage caused by the the removal of the Encroachment. Any costs incurred by Council to remove the Encroachment and make good any damage caused by the the removal of the Encroachment will be recoverable from the Encroaching Owner as a debt due to Council.

4.9 Existing Approved Encroachments

- (a) For existing Encroachments that have already been constructed and approved, the provisions of this Policy do not apply.
- (b) Where an Encroaching Owner seeks to undertake additional works to an existing approved Encroachment, then the provisions of this Policy shall apply.

5. DOCUMENTATION

This Policy should be read in conjunction with the following policy documents and legislation:

- *Albury Local Environmental Plan 2010;*
- *Albury Development Control Plan 2010;*
- *Conveyancing Act 1919;*
- *Crown Lands Act 1989;*
- *Encroachment of Buildings Act 1922;*
- *Environmental Planning and Assessment Act 1979;*
- *Local Government Act 1993;*
- *Local Government Amendment (Community Land Management) Act 1998;*
- *Real Property Act 1900;*
- *Roads Act 1993;*
- *Regulations under each of the above Acts;*
- *Department of Primary Industries, Lands – Trust Handbook 2007 (updated 2012);*

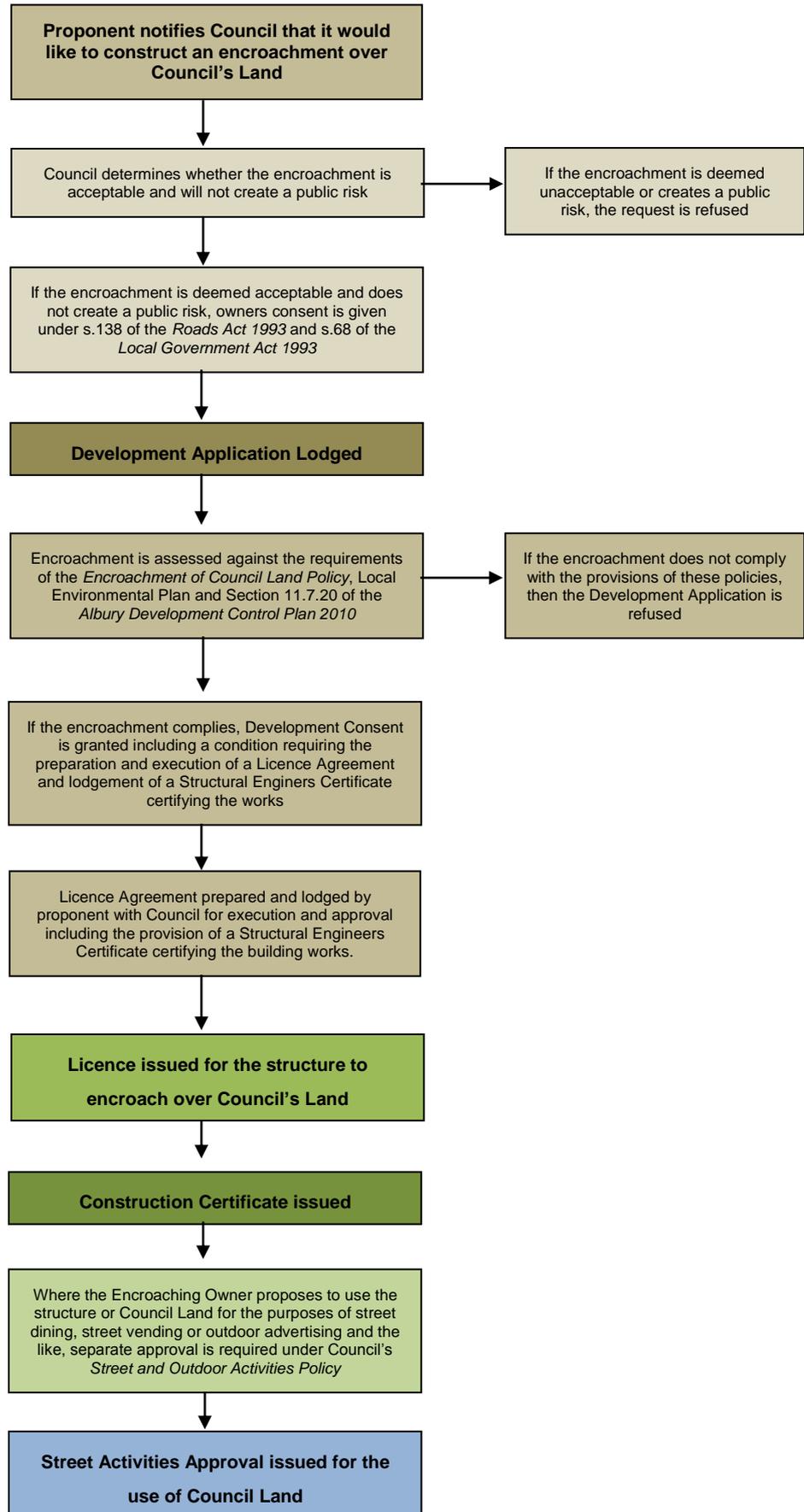
This Policy is to be implemented with other relevant Council policies including the following:

- (a) Use of Council Seal Policy (DOC12/111623);
- (b) Acquisition and Disposal of Land Policy (DOC13/106229);
- (c) Acquisition and Disposal of Land Procedure (DOC13/106230);
- (d) Asset Disposal Policy (DOC13/51122);
- (e) Licence Agreement – Encroaching Structures;
- (f) Street & Outdoor Activities Policy 2012 (DOC12/99281);
- (g) Plan of Management for Community Land (DOC16/47836)

AUTHORISATION

Status	Committee	AlburyCity Property Group (Internal)
	Manex	9/8/2016
	Council	24/10/2016
Owner	Property Working Group	
Compliance		
History	Policy developed to control and regulate the construction of structures that encroach on Council land.	
Register	This policy is to be included in the Public Policy Register.	
Last issued	October 2016	Review September 2020
TRIM REFERENCE	DOC16/248445	

APPENDIX A: APPROVAL OF ENCROACHMENTS FLOWCHART



APPENDIX B: REMOVAL OR RELEASE OF ENCROACHMENTS FLOWCHART

