



RIGHTS OF WAY OVER DRAINAGE RESERVES AND COMMUNITY LAND POLICY

D2-09

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Policy Owner: Director Open Space & Infrastructure

Category: Operational

Direction: 2. Our Built Infrastructure

1. STATEMENT OF INTENT

- 1.1 The intent of this Policy is to establish guidelines which cover requests from adjoining landowners for the granting of drainage easements over Community Land, with particular reference to Leases, Licences and Estates in respect of private vehicular access ways and drainage reserves, and to outline the core elements with regard to Community Land.
- 1.2 Each request for a grant of a drainage easement over Community Land, pursuant to the *Local Government Act 1993*, is unique and must be assessed as to whether it is the most appropriate course of action that may be considered.
- 1.3 Land that Council owns must be classified under the *Local Government Act 1993*, as either 'community' or 'operational' land.

2. ELIGIBILITY

- 2.1 This Policy applies to all Statutory Authorities, property owners and residents of North Sydney local government area, as well as to external entities having any involvement in Council owned Community Land.
- 2.2 This Policy applies to all of the above attempting to secure an easement or lease/licence over a drainage reserve on Council owned Community Land.

3. DEFINITIONS

- 3.1 Operational Land - would ordinarily comprise the following:
 - a) land held as a temporary asset or an investment;
 - b) land which facilitates the carrying out by a Council of its functions or operational activities, such as the provisions of public car parks;
 - c) land which may not be open to the general public, such as a Works depot or a Council garage;
 - d) land which is not required to be managed on behalf of present and future communities, or kept for general public use.

Operational land has no special management restrictions other than those that may apply to any piece of land. The restrictions applying to 'community land' do not apply to 'operational land'.

3.2 Community Land - is one type of Council Public Land which:

- a) is reserved for Community use;
- b) is of importance to the community because of its use or special features and must be managed according to special guidelines in terms of the *Local Government Act of 1993*;
- c) a council has no power to sell, exchange or otherwise dispose of unless it is re-classified as operational land;
- d) Council can grant a lease or licence over, but only for the purposes, pursuant to Section 46 of the *Local Government Act of 1993*, some of which may be expressly authorised by a Plan of Management for the land, and not for more than 21 years;
- e) must have a Plan of Management prepared for it, or applying to it.

3.3 Estate - is defined under Section 21(1) of the *Interpretation Act 1987* to include interest, charge, right, title, claim demand, lien and encumbrance, whether at law or in equity.

4. PROVISIONS

4.1 Community Land may be categorised as:

- a) Natural Area - a natural area is further categorised as Bushland, Wetland, Watercourse, Escarpment or Foreshore
- b) Park
- c) Sportsground
- d) General Community use
- e) An area of Cultural Significance

4.2 Lease/Licences and Other Estates - Section 46 of the *Local Government Act 1993* requires that any lease or licence of community land should be authorised by a Plan of Management.

The Act provides that a lease, licence or other estate in respect of community land may be granted:

- a) for the provision of public utilities and associated works;
- b) for the purpose of providing pipes, conduits or other connections under the surface of the ground, for the connection of premises adjoining the community land to a facility of the council or other public utility

- provider;
- c) for a filming project;
- d) in accordance with an express authorization in the plan of management for the purposes set out in Section 46(1)(b) of the Act.

but may not otherwise be granted.

- 4.3 Residential - the only allowable residential purpose is contained in Section 46(1)(b)(iv), which allows for a lease or licence to be entered into concerning residential housing owned by Council.
- 4.4 Landscaping - the *Local Government Act 1993* does not make provisions for land to be leased or licensed for Landscaping purposes, to private individuals, however, Council may approve such Lease or Licence if it conforms to the Plan of Management. Consent from the Minister must be granted if this does not conform to the Plan of Management. (Refer to Section 47A of the Act).
- 4.5 Dedication of Community Land as Public Road - in terms of Section 47F(1)(c) of the *Local Government Act 1993*, Community Land may not be dedicated as a public road under Section 10 of the *Roads Act 2008*, unless: "there is a Plan of Management applying only to the land concerned and the provision of the public road is expressly authorised in the plan of management."
- 4.6 Conditions
 - 4.6.1 Section 47 of the *Local Government Act 1993* - terms greater than five years (to be read in conjunction with Section 46 of the Act). If the status of the land is "Community" and the lease/licence will exceed five years (including any period for which the lease, licence or other estate could be renewed by the exercise of an option) but not more than 21 years, the following must be actioned:
 - a) give Public Notice of the proposal by advertising in the local press;
 - b) exhibit notice of the proposal on the land to which the proposal relates;
 - c) give notice of the proposal to such persons as appear to own or occupy the land adjoining the community land;
 - d) prepare a report including the submissions and comments received and submit to Council for consideration and approval;
 - e) where objections have been received, submit a proposal, including the Plan of Management, to the Minister for Local Government for approval and in accordance with the provisions of Section 47 (5) and (6) of the *Local Government Act 1993*.

- 4.6.2 Section 47A of the *Local Government Act 1993* - terms of five years or less (to be read in conjunction with Section 46 of the Act). If the status of the land is “Community” and the lease/licence does not exceed five years, Council may approve any lease or licence of such land subject to the following:
- a) the request must conform to the Plan of Management for the Land;
 - b) if the lease/licence conforms to the Plan of Management prepare a report for Council approval;
 - c) leases for five years or less do not require advertising or the grant of the consent of the Minister for Local Government, if they conform to the provisions of Section 46 of the *Local Government Act 1993*;
 - d) if no Plan of Management has been adopted by Council, submit a proposal to the Minister for Consent.
- 4.7 Right of Way over Community Land for Private Residential Vehicular Access ways with particular reference to Drainage Reserves:
- 4.7.1 Section 47D prohibits the “exclusive use” of community land by any person without a lease or licence obtained in accordance with Sections 47 or 47A of the *Local Government Act 1993*. Council is to determine whether the applicant’s use for access purposes will be “exclusive’ or not.
- 4.7.2 Use for access purposes is not a permissible use for purposes under Section 46(1) of the *Local Government Act 1993*. Use for access purposes must be a permissible use having regard to both the ‘use’ provision relating to drainage reserves and community land.
- 4.7.3 A lease, licence or estate over community land for residential vehicular access to a non-council owned property is contrary to the uses identified in Section 46(1) of the *Local Government Act 1993*.
- 4.7.4 The purposes set out in Section 46(1)(b), (which refers to the Plan of Management), do not make provision for private vehicular access ways by adjoining owners.
- 4.7.5 The right to use the land for access purposes may be an ‘estate’ for the purposes of the *Local Government Act 1993*. If the right to use the land for access purposes is an ‘estate’ under the Act, pursuant to Section 45(3), Council may grant an ‘estate’ in community land but only to the extent permitted in accordance with Chapter 6 Part 2 Division 2 of the Act (that is, “the Use and Management of Community Land).

4.7.6 In view of the above:

- a) assuming that the right to use the subject property for access purposes is an 'estate' but is inconsistent with the applicable Plan of Management, such use is not a permissible use under the *Local Government Act 1993* by reason of its classification as community land;
- b) a reclassification of the subject property from community land to operational land, made by the local environmental plan, is required; and
- c) if the right to use the subject property for access purposes is not an 'estate' and is authorized by the Plan of Management, then such use is permissible, subject to Council being satisfied that the subject property is capable of supporting the increased traffic.

4.7.7 Under the *Local Government Act 1993*, Council does not have the power to grant a lease over community land for the purpose of private vehicular access ways.

4.7.8 Section 51 of the *Local Government Act 1993* relates to the use of drainage reserves. Land that is a drainage reserve may be used for any other purpose that is not inconsistent with its use for drainage purposes:

- a) use for access purposes may be permissible if it is consistent with the use of the drainage reserve;
- b) if the use is inconsistent with its use as a drainage reserve, Council may conclude that certain applications are not supported due to reasons such as increased traffic and heavy vehicle loads on the reserve; and
- c) if inconsistent with its use for drainage purposes, use for access purposes is not permitted, regardless of the land's classification as community or operational land.

4.8 Situations which may deem Section 46 of the *Local Government Act 1993* to be Ineffective:

- a) a reclassification from community land to operational land may be made via the *Local Environmental Plan* or by Council Resolution. However, a Council may only resolve that the land be classified as operational land within three months after Council acquires the land, thereafter it must be classified under a *Local Environmental Plan*;
- b) if the subject property is not an 'estate', but is authorized by the Plan of Management, then such use is permissible, subject to Council being satisfied that the subject property is capable of supporting the increased traffic;

- c) the Supreme Court could impose an easement over community land, in terms of Section 88K of the *Conveyancing Act 1919*, however, it is unlikely if the community land is actively used by the public;
- d) compensation would be payable to Council for the creation of the easement. The compensation is based upon the loss to Council, as well as the increase in land value afforded to the land owner benefiting from the vehicular access. The services of a valuer will be required to assess the compensation payable to Council;
- e) even if Council is unable to grant consent because use for access purposes is not a permissible use under the *Local Government Act 1993*, the Court may exercise its discretion to grant an easement under Section 40 of the *Land and Environment Court Act 1979* on application by the applicant. Under Section 40 the Court may grant any easement where the Court has determined to grant the development consent on a Class 1 appeal and is of the opinion that the easement is reasonably necessary for the development to have effect in accordance with the consent; and
- f) the court has jurisdiction notwithstanding the provisions of Community Land under the *Local Government Act 1993*.

4.9 Responsibility for the Maintenance of Infrastructure over Drainage Reserves - the benefited owners are the only persons with the entitlement to the use of the Right of Way. They have an obligation to repair and maintain the infrastructure delivering the service to Council's standard.

5. RESPONSIBILITY/ACCOUNTABILITY

5.1 Council's Open Space & Infrastructure Division is responsible for administration of this Policy.

6. RELATED POLICIES/DOCUMENTS/LEGISLATION

The Policy should be read in conjunction with the following Council policies and documents:

- Encroachments Management Policy
- Plans of Management - various

The Policy should be read in conjunction with the following documents/legislation:

- Conveyancing Act 1919
- Interpretation Act 1987
- Land and Environment Court Act 1979
- Local Government Act 1993
- Roads Act 1993

- Roads Regulation 2008

Version	Date Approved	Approved by	Resolution No.	Review Date
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