



Easement Management Policy

Adopted 27 August 2013

Ku-ring-gai Council

Easement Management Policy

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 but 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.

1. Purpose

This Policy provides information 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:

- Creation / modification of easements over Council owned land (public land) required as a result of development.
- Extinguishment/modification of easements that benefit Council over privately owned land if no longer required by Council.
- Creation of easements that benefit Council over private land.

Doc distribution	Internal/external	Doc status	Adopted	File No CY00066/5	
Document owner	Director Strategy & Environment	Contact officer/s	Manager Integrated Planning, Property & Assets		
Approval date	27/8/2013	Approved by	Council		
Effective date	27/8/2013	Review period	3 years	Review date	27/5/2016
History of approved versions					
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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 was initiated and the particular circumstances involved.

2. Objectives

To ensure that all parties, including developers, experts, 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.

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.

To make certain that new development incorporates appropriate stormwater management techniques including, appropriate provision of stormwater drainage, Water Sensitive Urban Design (WSUD) and re-use strategies.

To protect valuable property rights vested in Council, and to ensure that obligations and responsibilities to pay compensation for creation of an easement over Council land or for the extinguishment of an easement benefiting Council, are acknowledged and agreed to.

3. Definitions

For the purpose of this Policy:

Applicant is 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 is 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; or alternatively any loss or disadvantage experienced from the extinguishment or modification of an easement.

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.

Extinguishment also refers to the Release of an easement.

Owner is:

- (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 is 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

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rights to real property. It comprises of estates and interests in land and generally is in two (2) categories:

- tangible things (such as land and buildings) and
- intangible rights attaching to land (including easements).

Valuer is a person who is registered / licensed / approved to carry out property or plant and machinery valuations under any State, Territory or Commonwealth legislation; and/or a member of the Australian Property Institute who is accredited as a Certified Practising Valuer.

Watercourse is 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.

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4. Legislation and Other Instruments

The following legislation and other instruments are relevant to the creation, modification or extinguishment of easements under this Policy. Other legislation or instruments may also be relevant depending on the particular circumstances.

Real Property Act 1900

Conveyancing Act 1919

Community Land Development Act 1989

Strata Schemes (Freehold Development) Act 1973

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

Draft Development Control Plan (Local Centres)

Draft Ku-ring-gai Local Environment Plan 2013

Ku-ring-gai Planning Scheme Ordinance

Draft Local Environment Plan 218 to amend the Ku-ring-gai Planning Scheme Ordinance

Ku-ring-gai Development Control Plan 47-Water Management

Ku-ring-gai Council Riparian Policy 2004

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5. Procedure

If an Applicant approaches Council and requests the creation, modification or extinguishment of an easement the following procedures apply.

5.1 Creation/Modification of an Easement on Council Land

Creation or modification of an easement on Council 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.

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 Council land will be necessary.

The procedures and requirements for creating or modifying an easement over Council Land are set out below.

- 5.1.1 The Applicant is required to submit to Council, an application (**Attachment 1- Easement Application Form**) form and pay the application fee¹. 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 request². 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 the Council's reasonable legal costs.
- 5.1.2 Advice will be sought from the relevant staff in Council's Operations Department to determine the infrastructure requirements of Council.
- 5.1.3 Advice will be sought from the relevant staff in Council's Strategy & Environment Department – Property, to assess the statutory and Real Property impacts on Council owned 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*.
- 5.1.4 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 Policy and the NSW Water Management Act 2000. The Council will need to confirm that it is the Owner of the bed and banks of the particular Watercourse and that this land is not Crown Land.

¹ As determined annually by Council and identified in its Fees & Charges.

² The application fee does not guarantee an approval. This can only be determined by Council and requires the applicant to agree and complete all steps to progress the matter.

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- 5.1.5 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 purposes of proposed development, a condition requiring the easement to be registered may be imposed in the development consent as a deferred commencement condition.
- 5.1.6 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:
- 5.1.6(a) 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, stamp duty, registration and other costs, including compensation payable.
- 5.1.6(b) 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.
- 5.1.7 The Applicant will be required to compensate Council for the creation / modification of any easement over Council land. A valuation prepared by a Valuer will be obtained to determine the appropriate 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*.
- 5.1.8 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.
- 5.1.9 Valuation for the modification of an easement may include an assessment of any quantifiable loss or injury suffered as a result of the modification.
- 5.1.10 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.
- 5.1.11 Subject to Council resolution, the appropriate legal documentation for creation / modification of the easement will be prepared by Council's solicitors (usually, a Section 88B Instrument or a deed for old system land).

The legal documentation will be executed under delegation by the General Manager and the Mayor and, if required the Council Seal will be affixed³.

³ There is a fee for the affixing of the Seal identified in Council's Fees & Charges.

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- 5.1.12 When all fees and compensation are received by Council the easement will be registered on the title of the encumbered property.
- 5.1.14 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.

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.

5.2 Extinguishment/Modification of an easement on private property

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.

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.

Note: Where an easement exists over a Watercourse, extinguishment / 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 Policy, adopted planning instruments, related policies and NSW Water Management Act 2000 (as amended from time to time).

The procedures and requirements for extinguishing or modifying an easement that benefits Council over private land are set out below.

- 5.2.1 The Applicant requesting the extinguishment/modification of an easement, whether initiated by a development application or otherwise is required to submit an application (**Attachment 1** - Easement Application Form) form to Council, and pay an application fee⁴ 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 request⁵. At the time of submitting the application the

⁴ As determined annually by Council and identified in its Fees & Charges.

⁵ The application fee does not guarantee an approval. This can only be determined by Council and requires the applicant to agree and complete all steps to progress the matter.

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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.

- 5.2.2 Advice will be sought from the relevant staff in Council's Operations Department to determine the infrastructure requirements of Council.
- 5.2.3 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.
- 5.2.4 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 Policy and the NSW Water Management Act 2000.
- 5.2.5 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:
- 5.2.5(a) 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 final compensation.
- 5.2.6 Compensation will be payable for the extinguishment or modification of an easement that benefits Council over private land. The compensation will be subject to negotiation with Council and a valuation report will inform the compensation negotiations. 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.

Where:

- (a) Council no longer requires an existing easement on private property or
- (b) it is established to the Council's satisfaction that such an easement is obsolete or abandoned; and
- (c) the Council would suffer no loss or injury if the easement is extinguished,
- (d) the Council may agree to the extinguishment of that easement without payment of Compensation. Any costs associated with the actual extinguishment of the easement from the title to the relevant land will still be borne by the Applicant.

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- 5.2.7 The Applicant is to provide a Plan of Survey identifying the location of the existing easement to be extinguished / modified.
- 5.2.8 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).
- 5.2.9 The legal documentation is to be executed by the General Manager and the Mayor and, if required the Council Seal will be affixed⁶.
- 5.2.10 When all fees and compensation are received by Council the easement will be extinguished from or modified on the title of the encumbered property.
- 5.2.11 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.

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.

5.3 Creation of a Council easement on private property

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.

Note: Council will not create an easement over a Watercourse.

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

- 5.3.1 If the creation of an easement is initiated by Council, Council will be responsible for all costs and fees associated with the creation/modification of the easement, including but not limited to relocation of infrastructure, valuation, legal, stamp duty, registration and compensation payable to the Owner of the servient land if applicable.
- 5.3.2 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 over Council's infrastructure.

⁶ There is a fee for the affixing of the Seal identified in Council's Fees & Charges.

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- 5.3.3 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.
- 5.3.4 Council will be not be required to compensate the Owner in order to create an easement over existing infrastructure.
- 5.3.5 Council will be required to compensate the Owner in order to create an easement for installation of new infrastructure.
- 5.3.6 A valuation prepared by a Valuer will be obtained for the purposes of reaching an agreement about compensation. The valuation must determine an appropriate amount of compensation 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. Any Compensation payable may also include costs incurred as a result of the imposition of the easement.
- 5.3.7 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.
- 5.3.8 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.
- 5.3.9 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).
- 5.3.10 Once the easement is registered on the title of the encumbered property, compensation will be paid to the Owner.

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.

6.0 Departure from this Policy

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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.

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Attachment 1 - Application Form - Creation, Modification and/or
Extinguishment of easements



Application Form

Creation, Modification and/or Extinguishment of easements

All applicants are required to understand the requirements and follow the procedures detailed in Council's *Easement Management Policy 2013*, prior to lodging an easement application request.

Council will give consideration to the creation of a new easement over Council land, modification and/or extinguishment of an existing easement benefitting Council over privately owned land.

Consideration of any easement request will include the assessment of the compensation payable to Council, and the purpose and requirements of the proposed easement. Council will only process an applicant's request once the following information has been submitted;

- Receipt of a completed easement application – attached;
- Applicant agrees to pay all costs associated with the creation/modification of the easement; and
- Payment of the application fee (\$1,500 incl. GST) which is non-refundable and established annually in Council's Fees & Charges¹.

NOTE: The payment of the application fee does **not** guarantee an approval. This can only be determined by Council and requires the applicant to agree and complete all steps necessary to progress the application request.

If you are requesting to create a new easement, modify and/or extinguish an existing easement please complete the application form attached and forward it with the \$1,500.00, payment to;

Ku-ring-gai Council
Locked Bag1056
Pymble NSW 2073

Alternatively you can pay with credit card by completing Credit Card Payments form and with the application email to kmc@kmc.nsw.gov.au. or lodge in person at;

Customer Service
Council Chambers
818 Pacific Highway
Gordon NSW 2076

If you require assistance please contact Deborah Silva - Manager Integrated Property Planning & Assets 9424 0858.

¹ Ku-ring-gai Council's Fees & Charges are revised annually effective 1 July



Easement Application Form

Applicant details

Name:

Contact Name *(if different)*:

Postal address:

Suburb:

Post Code:

Contact phone:

Email address:

Agreement

I agree to and understand that I shall be liable for all costs including compensation associated with this application including, but not limited to those detailed in the Easement Management Policy.

Payment of **\$1,500.00** (including GST) non-refundable application fee is enclosed.
(Form and payment can be made at Council's Chambers Customer Service)

I am aware that Council does not guarantee the success of the application at any stage.

.....
Signature of Applicant

OFFICE USE ONLY

FILE NO:

FEE:

RECEIPT NO:

DATE:

Reason for application	<input type="checkbox"/> Creation of easement over Council owned land. <input type="checkbox"/> Modification of existing easement. <input type="checkbox"/> Extinguishment of easement.
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Purpose of easement	<input type="checkbox"/> Drainage (stormwater). <input type="checkbox"/> Right of way. <input type="checkbox"/> Other (please describe).
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Details of land affected by easement

Street Address:

Suburb/Location:

Parcel identification: *(if known)*
Title reference or parcel identification:

Reason for Easement Creation/Modification/Extinguishment:

Details: *(if applicable):*
Development Application or consent number:
Dimensions of easement:
Please attach a plan.
(Note: this plan is to show approximate location only, as you will need to supply an easement plan from a registered surveyor at a later date).

If easement is to be created on Council land, what is the current land use?