



Consultation document

# Proposed changes to the Road Encroachment and Sale Policy

June 2010

# PART ONE

## Overview

## **INTRODUCTION**

Wellington City Council owns more than 660 kilometres of legal road. This is made up of unformed road, footpaths and actual formed road. For many years the Council has allowed unformed road, the airspace above and the subsoil below roads to be used for activities other than roading – provided this does not unreasonably interfere with existing or possible future uses of the legal road.

Because the land and the airspace above it is owned by the Council, people wishing to use it for private purposes may need to get permission (an encroachment licence or a lease) from the Council. Rental fees may also be charged. Wellingtonians already hold around 5800 road encroachment licences mainly for parking, access or outdoor living.

The Council has been reviewing its policy about:

- how it decides whether to grant encroachment licences and leases
- the terms and conditions that apply in certain circumstances
- when rental fees should be paid
- possible approaches for setting rental fees
- when any changes should be introduced.

The Council has agreed to consult the public on a number of proposed changes to the Road Encroachment and Sale Policy. These changes are outlined in this consultation document. The document is in three parts.

Part one summarises the proposed changes and other options the Council has considered.

Part two discusses possible changes to fees. It also includes suggestions about when any changes to fees should be introduced.

Part three is the draft new policy for road encroachments and sales. It addresses such things as: objectives of the policy; principles and criteria for deciding whether to approve an encroachment; terms and conditions that will apply; and in what circumstances fees will be payable.

## **BACKGROUND**

In February last year, the Council's Strategy and Policy Committee (the Mayor and Councillors) agreed that the objectives, principles and fees associated with the Road Encroachment and Sale Policy should be reviewed by Council officers and reported back to the committee by the end of 2010.

## **SUMMARY OF PROPOSED CHANGES**

Having reviewed the Road Encroachment and Sale Policy, Council considers that there are a number of areas where amendments would make it clearer and allow better alignment of the policy with other Council policies and plans.

Specifically, Councillors propose amendments to the objectives, principles and criteria sections of the policy to improve the logical sequence and help officers and property owners through the decision-making process.

Other proposed changes include:

- a new section on 'consultation with affected parties' outlining the Council's expectations that property owners proposing encroachments will consult other property owners in the vicinity
- amendments to the section dealing with encroachments onto Town Belt land to ensure that decisions about these encroachments are taken in accordance with the Town Belt Management Plan.

The proposed changes outlined above are incorporated into the draft Road Encroachment and Sale Policy, May 2010, which is contained in Part three of this consultation document.

On fees, the Council considered three approaches for setting annual rental fee rates:

- status quo (a flat rental rate per square metre – currently \$11.25 excluding GST)
- a differentiated fee structure where rental rates are set in proportion to land values in a given area
- individual valuations of encroachment land.

Councillors have agreed to consult on each of these approaches. The preferred approach is the differentiated fee structure, since this more fairly reflects the wide variations in land values across the city, but without imposing large costs by requiring individual land valuations..

Importantly, Councillors turned down any preferred new level of fees to apply in any given suburb. This would be a matter for further public consultation and consideration as part of the 2011–12 draft Annual Plan process. The purpose of

this consultation is to get feedback on the approach used for setting fees, rather than the level of fees themselves.

Other proposed changes involving fees clarify:

- that fences and hedges are 'structures' for the purpose of determining fees. This means proposed encroachments with fences or hedges would no longer be exempt from paying rental fees on the first 50 square metres of encroachment land
- how new airspace leases (for example, for balconies) would be valued and fees would be set and paid.

Finally, two options are discussed for when any changes would be introduced:

- from 1 July 2011 (preferred option); or
- when licences are issued or reissued (for example, when a property is sold or when changes are made to an existing encroachment licence).

More detail on the proposed changes to fees is provided in Part two of this document: Possible Approaches to Setting Rental Rates and Other Proposed Changes to Fees.

Sections 5.9, 5.9.1, 5.9.2, and 5.9.3 of the draft Road Encroachment and Sale Policy, in Part three of this consultation document, are also relevant to fees.

## **MAKING A SUBMISSION**

Submission forms can be obtained from [wellington.govt.nz](http://wellington.govt.nz) .

Submissions can be emailed to [encroachment.review@wcc.govt.nz](mailto:encroachment.review@wcc.govt.nz) or posted to PO Box 2199, Wellington

Submissions close at 5pm on Thursday 8 July 2010.

## **NEXT STEPS**

On 29 July the Council's Strategy and Policy Committee will hear oral submissions. Two further days – 30 July and 2 August – have also been set aside for hearings, if required.

A final report to the Strategy and Policy Committee is expected in August 2010.

## **MORE INFORMATION**

Bryan Smith  
Principal Advisor, Policy  
Phone: 499 4444  
Email: [bryan.smith@wcc.govt.nz](mailto:bryan.smith@wcc.govt.nz)



## PART TWO

### Possible Approaches to Setting Rental Rates and Other Proposed Changes to Fees

## INTRODUCTION

This part of the consultation document discusses possible approaches to setting rental rates and other proposed changes to the fee structure for road encroachments. It should be read in conjunction with sections 5.9, 5.9.1, 5.9.2 and 5.9.3 of the draft Road Encroachment and Sale Policy in Part three of this document.

When considering these issues, it's important to understand how the fees for a particular encroachment will be determined. This depends on three factors:

- the rental rate per square metre (currently a flat rate of \$11.25 excluding GST for all residential encroachments)
- the area of the encroachment
- the nature of the encroachment:
  - Encroachments that do not restrict public access pay no fees.
  - Encroachments that restrict public access (say due to planting), but have no structures, pay for the area in excess of 50 square metres.
  - Encroachments with structures for access only pay no fees.
  - Encroachments with structures (other than for access only) pay for each square metre of the encroachment. Examples of structures include decks, garages, parking platforms, and retaining walls.
  - Minimum charges also apply.

## POSSIBLE APPROACHES TO SETTING RENTAL RATES PER SQUARE METRE

The current rental rate for residential encroachments (\$11.25 per square metre) is generally low compared to what would be a market rental rate for land. In some suburbs it is just 10 to 20 percent of the estimated market rental rate. This, combined with other factors, means that in many cases the public is getting an extremely low rate of return for the private use of public assets.

Table 1 (at the end of Part two) provides average land values and estimated market rental rates<sup>1</sup> by suburb across Wellington City. The information is useful for demonstrating the relative land values across the city. However, it is important to note that the estimated market rental rates are not a proxy for the value of road reserve land or the rentals that might be set for road encroachments. The Council would need to consider discounting any market rental values to recognise the amenity benefits from property owners looking

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<sup>1</sup> Estimated market rental rates were calculated by multiplying the capital value of freehold land per square metre by 6 percent.

after the road reserve, and the encumbrances and lack of security on road reserve land that reduce its value well below average freehold land values.

Actual rental rates would not be agreed until after further consultation as part of the 2011–2012 draft Annual Plan process. The purpose of this consultation is to get feedback on the approach used for setting fees, rather than the fees themselves.

The information in table 1 shows that the current policy creates a number of inequities. For example, under the current flat rental rate of \$11.25 per square metre, a resident with an encroachment in Thorndon would pay, on average, just 12 percent of the market rental price for that land. A resident in Tawa, on the other hand, would be paying 86 percent of the market rental price for the encroached land.

This has financial implications beyond just annual rental fees. Expert advice is that the net value of encroachments is often capitalised and incorporated into the value of properties when they are sold. The degree to which this occurs depends partly on the rental fees payable. As encroachment rental rates tend towards market rental rates, buyers will discount property values accordingly.

The effect is that property owners in expensive suburbs around central Wellington and Seatoun can expect that the value of the encroachment land will be incorporated into the price they receive for their properties. On the other hand, property owners in areas like Tawa would see little if any value added to their properties as a result of having encroachments.

Addressing these issues is challenging. The Council considered three options for setting the residential encroachment rental rate per square metre:

- Status quo – a flat rate of \$11.25 per square metre across all suburbs. The rate was last set in mid-2009. It is adjusted annually in line with the Consumer Price Index. It is also reviewed every three years as part of the Long-Term Council Community Plan process.
- A differentiated fee structure where the rental rate per square metre is set in proportion to land values in a given area/suburb. The rate per square metre would be set at a discount to market rental rates, recognising that legal road is less valuable than normal freehold land due to the uncertainties and encumbrances on it.
- Individual valuations of encroachments, with rental rates set as a percentage of the value of the encroachment land.

Each option has strengths and weaknesses.

### ***Status quo – flat rate***

The status quo is transparent, simple and relatively low cost to administer. However, it also creates significant inequities between property owners in

different suburbs. This is because the rental rate is set somewhat arbitrary and does not necessarily relate to the value any given encroachment adds to a property. This approach also leads to some very poor returns on the public's assets, especially in higher-value areas.

### ***Differentiated fee structure***

A differentiated fee policy based on average rateable land value by suburb would be more complex to administer than the status quo. It may lead to a number of disputes over the validity of the differential fees and, in more expensive suburbs, it could put total fees up.

To set rental rates for road encroachments, the Council would first need to agree any discount factor to apply to estimated market rental rates. This is because road reserve land is not as valuable as average land<sup>2</sup>.

Theoretically, the discount factor should vary on a case-by-case basis since it depends on the marginal value an encroachment adds to a specific property. However, such an approach is impractical to apply across 5800 encroachment licences.

A pragmatic approach would be for the Council to set rental fees by multiplying the estimated market rental rate for a suburb by a set discount factor.

To reduce the administrative burden and complexities and to address issues of distortions at the extreme ends of the land values, suburbs with similar land values could be grouped together and a single rental rate applied across these.

In some areas this approach would likely mean rental rates would fall or stay the same. In more expensive suburbs rental rates would rise. The actual level of increase or decrease would depend on:

- the discount factor agreed by the Council to apply to estimated market rental rates; and
- the number of groupings of suburbs and the graduation of fees between them.

Rental rates would not be adjusted annually in line with CPI, but instead would be adjusted every three years as rateable land values change.

The differentiated fee approach would remove many of larger inequities inherent in the status quo. It would also result in returns on Council assets that are more appropriate and aligned to the value of those assets.

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<sup>2</sup> This is because road reserve land is encumbered, licences are short term, and dwellings cannot be built on it. All these factors significantly reduce the value of road reserve land compared to normal land, and therefore the rental fees that should be payable on it.

Balanced against these benefits are the administrative complexities, possible disputes and possible fee increases in some suburbs.

### ***Individual valuation***

Under the individual valuation approach valuers would be asked to assess the capital value an encroachment adds to a property. Rental rates would then be set at a percentage, say 6 percent, of the capital value of the encroachment.

While theoretically attractive, this approach has the major drawback of expense. Valuers would need to make individual and complex assessments perhaps costing many hundreds of dollars each. These would need to be updated regularly. It would also be administratively difficult, and valuers may have little transaction information upon which to base valuations, giving rise to possible disputes over valuations.

### ***Preferred approach***

The Council's preferred approach is the differentiated fee structure where residential encroachment rental rates are based on a discount of the estimated average market rental rates in a given area.

If a differentiated fee structure is ultimately agreed by Councillors, actual rental rates, including a set discount factor, would be set following further consultation as part of the 2011–2012 draft Annual Plan process.

## **FEES PAYABLE BASED ON THE NATURE OF ENCROACHMENTS**

As the benefits of an encroachment move from largely public to a mix of public and private and then to largely private benefits, fees should increase accordingly.

The current policy – that fees change depending on the nature of an encroachment – broadly follows this principle. This policy is described in Part three of this document under section 5.9.1.

While there will be exceptions, the current policy means that fees generally increase as the level of exclusive private benefit increases.

Consequently, changes are not proposed to most aspects of this part of the current policy.

One significant exception, however, is clarifying that fences and hedges are 'structures' for the purpose of setting fees (discussed below).

### ***Fences and hedges and the 50 square metres free policy***

Under the current policy, encroachments of up to 50 square metres with access restrictions but no structures on them are free. This is considered justified since, without structures, many property owners will accrue relatively little private value from an encroachment and the encroachment often provides public benefits.

There is an inconsistency in the current policy between the definition of 'structures' (in section 3 of the current policy), which includes fences and hedges, and the policy on '50 square metres free', which implies that fences and hedges are not structures.

The Council proposes that this be addressed by specifying that the '50 square metres free' does **not** apply where a fence or hedge is on an encroachment, because:

- fences and hedges are designed to exclude public access and create a high degree of exclusive private use
- the land is Council-owned and the Council is entitled to a reasonable rate of return in the public interest, especially where there is a high degree of public exclusion from the land
- expert valuation advice is that there is clear value to the property owner from fenced encroachments and (under existing rental fee arrangements) this is typically being reflected in the price the property owner receives when they sell their property even though the encroachment licence is not an interest in land.

Around 650 encroachments currently receive the first 50 square metres free. While there is no precise information on how many of these have fences or hedges, officers estimate it is around three quarters of this group.

### **AIRSPACE LEASES – BALCONIES**

Encroachments by balconies into the airspace above legal road are generally dealt with by providing encroachment leases. Unlike licences, leases create an ongoing interest in the airspace and remain in place for the life of the building (though they can be terminated in some circumstances).

Currently, airspace leases are charged for at the same flat fee as encroachment licences (\$11.25 per square metre) even though leases are more enduring than licences. In addition, balconies can add thousands of dollars a square metre to the value of apartments; a value that is not reflected in the current rental rate.

Finally, there have been issues with buyers of apartments only becoming aware of annual rental fees after they have purchased a property and then disputing their obligations to pay the fee.

This situation could be addressed in future by obtaining a registered valuation of any proposed airspace encroachment lease, then charging a one-off, up-front rental fee to cover the lifetime of the lease. This would allow the lease fee to be specific to the proposed development, rather than using an averaged rental rate per square metre (which is more applicable to land licences than airspace leases). It would also avoid future purchasers of apartments being surprised by the obligation to pay rental fees.

Owners of existing balconies could also be offered the option of a single fee to cover the remaining life of the lease. Property owners who do not wish to take up this option would be subject to the existing terms and conditions, but with an updated rental rate applicable to their particular area, should changes to rental rates be agreed by Councillors.

## **TIMING OF CHANGES**

The Council's preferred option is for any changes to fees to apply from 1 July 2011. This would be equitable for all property owners, since all occupiers of Council land (and airspace and subsoil) would be under the same fee structure.

An alternative is to gradually introduce changes by applying the new rules only as licences are issued or reissued. For those changes agreed to be introduced gradually this would mean that there would be no change for existing licence holders provided they did not change the use or size of their encroachment. However, when a new encroachment licence is required (for example, at a change of ownership or use of an existing encroachment) the new pricing policy would be applied from then on.

Roughly 10 percent of encroachment licences are reissued each year when properties are sold. This alternative approach would therefore take many years for a new pricing structure to be consistently applied across the city.

**Table 1: Market land values and estimates of market rental rates per square metre of land by suburb**

	Freehold land value <sup>1</sup> (per square metre)	Estimated market rental rate <sup>2</sup>
Ohariu*	\$89	\$5.32
Makara*	\$107	\$6.42
Glenside*	\$153	\$9.20
Grenada North*	\$178	\$10.69
Makara Beach	\$203	\$12.15
Tawa	\$219	\$13.14
Ngauranga	\$224	\$13.42
Grenada Village	\$234	\$14.03
Crofton Downs	\$265	\$15.90
Broadmeadows	\$268	\$16.07
Newlands	\$272	\$16.30
Mornington	\$288	\$17.27
Woodridge	\$317	\$19.02
Paparangi	\$317	\$19.05
Owhiro Bay	\$319	\$19.17
Churton Park	\$323	\$19.38
Johnsonville	\$324	\$19.47
Kingston	\$328	\$19.69
Ngaio	\$338	\$20.25
Wilton	\$338	\$20.26
Strathmore Park	\$350	\$21.01
Karori	\$375	\$22.53
Houghton Bay	\$387	\$23.23
Vogeltown	\$394	\$23.62
Southgate	\$394	\$23.62
Moa Point	\$395	\$23.69
Melrose	\$396	\$23.78
Rongotai	\$445	\$26.71
Island Bay	\$451	\$27.08
Miramar	\$464	\$27.87
Maupuia	\$480	\$28.82
Brooklyn	\$486	\$29.18
Highbury	\$520	\$31.18
Khandallah	\$520	\$31.22
Breaker Bay	\$525	\$31.51
Aro Valley	\$548	\$32.87
Northland	\$549	\$32.93
Wadestown	\$562	\$33.74
Kilbirnie	\$615	\$36.89
Lyall Bay	\$615	\$36.89
Kaiwharawhara	\$643	\$38.59
Hataitai	\$702	\$42.14
Berhampore	\$712	\$42.71
Karaka Bays	\$813	\$48.75
Newtown	\$862	\$51.72

Kelburn	\$918	\$55.09
Roseneath	\$1010	\$60.59
Seatoun	\$1024	\$61.42
Mt Cook	\$1030	\$61.81
Pipitea	\$1191	\$71.45
Te Aro	\$1250	\$75.00
Wellington Central	\$1271	\$76.25
Thorndon	\$1585	\$95.12
Mt Victoria	\$1672	\$100.29
Oriental Bay	\$2833	\$169.96

Notes: <sup>1</sup> Freehold land values are the average rateable land values in a suburb as at 2009. They include only freestanding homes.

<sup>2</sup> Estimated market rental rates are calculated as 6 percent of the rateable land value. They are based on the value of unencumbered land averaged across entire sections (that is they include the value of both 'yard' land and much more valuable 'dwelling building site' land). They are **not** a proxy for the value of road reserve land (or the rentals applicable to road reserve land), since road reserve is both encumbered and cannot be used for dwellings. These factors significantly reduce the value of road reserve land compared to the values in the table.



# PART THREE

Draft

## Road Encroachment and Sale Policy

May 2010

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## **1. INTRODUCTION**

Wellington's topography is unique with steep hills and little flat land. Its street layout was largely derived from English town planning processes. Often it did not take the steepness of the land into account. As a result, the formed roads are often much narrower than the width of the land legally designated as road and there are far fewer formally planted street trees and berms compared with cities such as Christchurch and Auckland. Some of the planned roads were never formed and are still bush or just small walkways. Other roads are only partially formed.

The Council owns more than 660 kilometres of legal road around the city. This is made up of unformed road, footpaths and actual formed road. The Council believes its unformed road, the airspace above roads, and the subsoil below roads can be used for activities other than roading provided this does not unreasonably interfere with existing or possible future uses of the legal road. Because the land and the airspace above it is owned by the Council, people wishing to use it for private purposes may need to get authorisation (an encroachment licence or a lease) from the Council. Wellingtonians already hold around 5800 road encroachment licences mainly for parking, access or outdoor living.

This policy describes when a licence or lease is required and the criteria the Council will use to decide whether to grant one. It also describes the terms and conditions and fees applicable to licences and leases for encroachments under, on or above legal roads.

Finally, there may be cases where it becomes clear that an area of legal road will never be needed for actual roading. This policy describes the process that must be gone through if the Council, usually at the request of a nearby landowner, considers that a legal road should be stopped and the land sold.

## **2. OBJECTIVES**

This policy aims to provide a framework for consistent decision-making in respect of encroachments under, on or above legal road in Wellington City. The objectives of the policy are to assist property owners making encroachments where, in the view of the Council, these are expected to have overall net benefits; to establish a fee structure that reasonably reflects the degree to which benefits accrue privately, publicly or some combination of the two; and to aid the Council in meeting its legal obligations.

### 3. DEFINITIONS

In terms of this policy, the following definitions apply:

**Access-ways** include driveways, bridges, cable cars or stairs that cross legal road and provide access to private property.

**Footpath** is that part of any legal road that is laid out or constructed primarily for the use of pedestrians and includes the edging, kerbing and channelling.

**Legal road** has the same meaning as in the Local Government Act 1974<sup>3</sup>. In summary it covers the:

- carriageway (formed road)
- footpath, including kerbs and channelling
- land that is legally road but is not currently formed as carriageway or footpath (sometimes referred to as 'unformed road' or a 'paper road')
- subsoil below the legal road
- airspace above the legal road.

**Private use** covers both individual and commercial use and refers to situations where those that directly benefit can be identified, for example, the owner of a garage or balcony. Residential and commercial categories are determined by the property's ratepayer status.

**Public benefit** occurs when those that directly benefit cannot be identified or cannot be excluded from using the service, for example pedestrian or vehicle access.

**Restricted public access** and enclosed areas are where a deliberate action causes a restriction that provides an associated private benefit. This includes circumstances where there is:

- exclusive private use of a portion of legal road, or
- a barrier, including a visual barrier, that can be reasonably interpreted as restricting access by the general public.

**Road encroachment** is where either public access to legal road is restricted or a deliberate action causes an area of legal road to be used for private use (exclusive or otherwise).

A **road encroachment lease** is a property right to authorise exclusive occupation of airspace or subsoil. It creates an interest in the airspace or subsoil for the lease term, subject to compliance with the lease terms (such as payment of rental).

A **road encroachment licence** authorises a right to occupy land. A licence does not provide an interest in the land and can be revoked on one month's notice.

**Road stopping** is where the status of legal road is changed into freehold land in situations where it is clear that the legal road is surplus to the Council's operational requirements. This change enables the Council to sell the land.

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<sup>3</sup> The relevant sections of the 1974 Act were not repealed when the 2002 Act was passed.

**Structure** in respect of legal road includes any kind of improvement such as:

- parking structures, for example garages, car pads, car decks, car ports, boatsheds
- access structures, for example driveways, stairs, retaining walls, cable cars, gates, covered access-ways
- house, for example any part of a primary or secondary building, eaves, porches, decks, balconies, conservatories
- boundary markings, for example walls, fences, hedges.

**Unformed road** is any land that forms part of the legal road but is not used as a carriageway or footpath. It is commonly called road reserve.

## 4. POLICY PRINCIPLES

The Council is empowered to authorise any property owner (the encroacher) to occupy an area of legal road owned and controlled by the Council through the Wellington Consolidated Bylaw 2008: Part 5 – Public Places. The Council (as landowner of legal roads) has the discretion to consent to an encroachment and, if approved, provide an encroachment licence or lease to the encroacher in accordance with this policy.

Decisions on encroachments are at the Council's discretion; nothing in this policy requires officers to grant an encroachment or to reject an encroachment application. The following principles are taken into account when assessing whether or not to allow an encroachment:

- Road reserve is Council-owned land; the Council will seek to make an economic return from this asset where appropriate.
- Encroachments with greater public and/or private benefits than detriments should generally be accepted; those with greater detriments than benefits generally should not.
- Encroachments with low public but high private benefit, especially those that exclude public use, should generally incur higher rental charges.
- Encroachments for commercial properties should incur higher rental charges than non-commercial encroachments.
- People who are materially affected by a proposed encroachment should be consulted and their views considered when decisions are made.
- Encroachments that provide access to properties are broadly in keeping with the original purpose of roading reserves.
- Encroachments should not interfere with any reasonably foreseeable future public uses of the particular road reserve or should be removable.
- The use to which the encroached land is put should be in line, and preferably support, the Council's other plans, policies and objectives.
- While not limiting the above principle, amenity values, cultural values, and significant ecological values should not be significantly degraded by the encroachment.
- Road reserve contributes positively to the overall look and feel of Wellington.

## 5. KEY ASPECTS OF THE POLICY

### 5.1 What this policy covers

This policy covers all occupation or exclusive private use of legal road within Wellington City with the following exceptions:

- activities on formed footpaths and formed roads. The Footpath Management Policy provides a framework for the use of footpath areas for retail activities. Activities on formed road are subject to other legislative, regulatory and policy requirements.
- legal road within areas zoned as **rural** in the Wellington City District Plan
- verandas that are specifically designed and used to provide cover for pedestrians. These are covered by District Plan requirements.
- activities and structures of utility companies where these relate to specific statutory rights that allow them to use legal road to provide various utility services.

This policy applies to existing and proposed buildings.

### 5.2 When is a licence or lease needed?

Any property owner seeking to occupy or use legal road for exclusive private purposes must apply to the Council as landowner of the road.

A **licence** is required if there are structures or any form of public access restriction associated with the road encroachment. This includes:

- the use of legal road for garages, car pads, decks, gardens and commercial purposes
- access structures such as stairs that do not follow the contour of the land, driveways, bridges, cable cars and retaining walls
- the use of airspace above legal road for eaves, balconies or similar structures (unless an airspace lease has been obtained)
- the use of subsoil for private purposes (unless a subsoil lease has been obtained).

The option of a **lease** is available for airspace and subsoil encroachments only. Where these types of encroachments are proposed for longer-term use, the lease option can provide property owners with greater certainty about the continuity of the encroachment for a specified period of time.

There is also the option of seeking to have a legal road stopped so that the landowner may purchase the land. This process is subject to specific legislative requirements and is relatively expensive. It is described in section 7 and Annex 2 of this policy.

If in doubt as to whether an encroachment licence or lease is needed, you should contact the Council (see Section 8: Further information).

### 5.3 When is a licence not needed?

A road encroachment licence is not required for:

- access-ways that follow the natural contours of the land provided there are no structures (with the exception of basic hand/safety rails) or public access restrictions. However, the prospective occupier of legal road is still required to apply to the Council (as landowner) for consent and any necessary regulatory consents<sup>4</sup>.
- maintaining unformed areas of legal road. Residents are encouraged to maintain and beautify these areas in their streets. However, residents should refer to the Council's Tree Maintenance and Road Reserves policies and may wish to take advantage of the Council's services such as selective vegetation removal and pruning, growth-cutting on banks, free plants, weed-spraying and noxious weed control. These areas cannot have structures, such as fences or hedges, put on them or features that may reasonably be interpreted as restricting public access.

### 5.4 Who can apply?

Any property owner who has legal road adjoining their property may apply for a road encroachment licence. In some cases a property owner may apply when the legal road is not adjoining but is in the vicinity of that owner's property.

### 5.5 Criteria for evaluating road-encroachment proposals

The Council will apply criteria to help evaluate whether a proposed encroachment should be approved and the fee structure appropriate to the encroachment (see section 5.9: Fees).

The criteria are divided into primary and secondary criteria. Primary criteria are legal factors that must be considered by the Council when considering an encroachment application in accordance with Part 5 clause 17.2 of the Wellington City Consolidated Bylaw (2008). They are:

- A proposed encroachment must not compromise the primary use of legal road to facilitate free pedestrian and traffic movement.
- A proposed encroachment must not **unreasonably** interfere with a property owner's right of access to any road across the frontage between the road and the private property.

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<sup>4</sup> Examples of other regulatory consents that might be required include resource consent and/or building consent.

Secondary criteria provide a framework for evaluating the overall benefits and detriments of a proposal and where those benefits and detriments are likely to fall. Secondary criteria are:

- What benefits would the proposed encroachment provide? For example, to what extent is it likely to:
  - provide vehicle or pedestrian access to a property
  - enhance outdoor living, recreation, private or public amenity values
  - improve public safety and street use – for example, provide off-street parking
  - improve security – for example, through lighting or ‘eyes on the street’
  - improve biodiversity
  - support any strategic, policy or plan objectives of the Council
  - improve sense of vibrancy
  - encourage development and/or economic activity
  - provide other benefits.
  
- What would be the detriments of the proposed encroachment? For example, to what extent is it likely to:
  - degrade significant vegetation
  - degrade streetscape amenity values
  - degrade significant public or private vistas
  - degrade any other amenity, cultural, environmental, or heritage values
  - reduce safety
  - exclude the public from using the relevant land
  - be difficult or necessary to reverse or remove in the future. This is assessed based on the likelihood that the encroachment would cause an impediment to any foreseeable use of the road reserve space
  - unreasonably impede the use of the land by those with rights to it, such as utility companies
  - create other detriments.

In addition the Council will consider other factors, including:

- Are there already similar encroachments in the vicinity?
- Can the proposal be reasonably accommodated on private land (particularly applicable where no rental income would be generated from the proposed encroachment)?
- Any other relevant factors.

**Significant vegetation** will be assessed by the Council on a case-by-case basis. A range of factors indicate that vegetation is significant, including:

- trees or vegetation over 2m in height or with a circumference greater than 200mm measured at 1.45m from ground level
- areas of vegetation with a site coverage of greater than 5sq m, excluding pest plants as defined by the Wellington City Council Pest Management Plan
- existing roadside gardens or street trees formally planted and maintained by the Parks and Gardens Business Unit and/or community groups, and plans to landscape the area or replace lost vegetation
- officers will also consider other values including maturity, ecological context, potential life span, whether the vegetation is indigenous to the region, its rarity, health and aesthetic quality
- certain trees that are noted in the District Plan as heritage trees and are protected under that plan.

The Council's decision to provide an encroachment, or not, depends on an overall assessment of a proposal's benefits and detriments as well as other factors it may choose to consider, such as those noted above. In many cases, judgements will need to be made not only on what the benefits and detriments of a proposal might be, but also the magnitude of those benefits and detriments and the balance between them.

Critically, the views of those people potentially affected by the proposal, especially those directly affected, will be used to inform the Council's decision-making (see section 5.6: Consultation with affected parties).

## **5.6 Consultation with affected parties**

The Council needs to be able to understand and assess the effects a proposed encroachment could have on other property owners. The Council, therefore, will want to know the views of property owners in the vicinity of the proposed encroachment who could be materially affected by it. This is especially so in cases:

- where an adjoining property owner believes their significant vistas and/or amenity values could be affected by a proposed encroachment
- where the proposed encroachment covers another property owner's legal road frontage.

The Council will also want to be assured that the views of third parties are based on accurate information about the proposal.

If an adjoining property owner who may be affected by a proposed encroachment provides written consent to the proposal, the application will be considered by the Council on the basis that that adjoining property owner is not affected. If no written consent is provided then the Council will consider any comments raised by that property owner before deciding whether to grant an encroachment. However, the Council retains the ultimate discretion as to whether to agree to any encroachment, guided by the principles in this policy.

## **5.7 Terms and conditions of encroachment licences and leases**

### **5.7.1 Licences**

An encroachment licence is issued only to a property owner and cannot be transferred. It may be revoked by the Council by giving one month's notice to the licence holder. This means applicants for road encroachment licences need to consider the risk and the associated implications if their licence ever needs to be revoked.

Where certainty over the continuation of an encroachment is required, other options may be more appropriate. These include purchasing the land (see section 7: Sale of legal road) or obtaining a lease – in the case of airspace and subsoil encroachments only.

When a property is sold, any encroachment structure is deemed to also be 'sold' and the new property owner becomes fully responsible for the maintenance of the encroachment. The Council must be notified about the change of ownership. A new encroachment licence will be issued to the new owner following notification, provided there are no outstanding issues with the encroachment. This means:

- any structure should be in good repair
- all fees should have been paid
- the selling owner must not be in breach of the terms of the licence
- the licence does not have any special conditions, for example, special termination clauses (also see section 5.8 below).

In addition, any encroachment licence that is issued to a property owner will be recorded on the land information memorandum (LIM) for that property. Please note, however, the encroachment structure is not recorded on the certificate of title for the property.

Should an encroachment licence holder want to change the use or the structure of their encroachment they must apply to the Council (as landowner) for written consent.

Other special conditions may be applied to a licence on a case-by-case basis.

### **5.7.2 Special conditions for airspace licences**

Airspace encroachments occur when a building has a structure, such as a balcony, facade, dwelling, conservatory or eaves, that encroaches into airspace above the legal road. These are usually for residential purposes but there are also a limited number of commercial airspace encroachments, for example, signage and café extensions. In addition to the above terms and conditions, the following requirements for airspace encroachment licences also apply:

- Proof of public liability insurance to the value of \$100,000 must be provided annually.
- The signature of the body corporate is required on the encroachment licence when a body corporate is part of the ownership structure of a building.
- Where there are several separate airspace encroachments above each other belonging to the same owner, for example, several balconies and eaves, the rental will be assessed on the cumulative encroachment area.

### **5.7.3 Airspace and subsoil leases**

The Council may allow more permanent – that is, difficult to remove – structures into airspace above or subsoil below a legal road by issuing a lease for that airspace or subsoil. The key differences between licences and leases are that leases:

- provide the lessee with a legal interest in the airspace or subsoil
- will be for the life of a building
- will be revocable with six months' notice from the Council if the Council requires the land for its own use or an alternative use
- will be reissued to a new property owner for the outstanding term of the lease at the date of any property transaction.

With respect to leases for **airspace** the following terms and conditions will apply:

- The airspace encroachment must not be:
  - for wet-room use such as a kitchen, bathroom or laundry
  - more than 25 percent of the room it is part of
  - instrumental to the functioning of the apartment or building it is attached to. If the encroachment was to be removed the room must still function for its intended purpose.
- Other terms and conditions for airspace leases are similar to those for an airspace encroachment licence (see 5.7.2 above).

Other special conditions may be applied to an airspace or subsoil lease on a case-by-case basis.

## **5.8 Encroachments onto or near Town Belt or other reserve land**

Historically, the Council granted licences for encroachments that were located partially on legal road and partially on land held under the Reserves Act or Town Belt Deed. The protection of these types of land is being more rigorously pursued. This has implications for both Town Belt and reserve land itself and any legal road adjacent to such land.

Where an encroachment onto legal road is proposed and the adjacent land is subject to the Town Belt Deed or is reserve land, then the provisions of the Town Belt Management Plan, relevant reserve management plan or Reserves Act will also apply to the legal road. This means that applications for any new encroachments onto legal road that is adjacent to Town Belt or Reserve land will not be permitted.

In cases where there are existing encroachment licences for legal road that is adjacent to Town Belt or reserve lands, these will be amended when the next licence is required to be issued (for example, a change of ownership or use of the encroachment) to include a special termination clause. It will, without limiting the Council's normal termination powers, state that no further licence will be issued after that one. At that point the owner of the structure must remove it from legal road adjacent to the Town Belt or reserve land. In cases where this would render the encroachment unusable, the whole encroachment would have to be removed.

Existing encroachments onto Town Belt or reserve land are subject to the relevant policies established under the Town Belt Management Plan, reserve management plan or Reserve Act. Property owners should contact the Council for more information (see section 8: Further information).

## **5.9 Fees**

This section outlines the fees and rental charges applicable to road encroachments.

Residential annual rental fees will be reviewed by the Council as part of its long-term planning process (LTCCP) every three years.

The following fees and charges are applicable for existing and proposed legal road encroachments.

- A *landowner consent application fee* is for the Council (as landowner) to assess an encroachment and, if approved, issue a licence or lease that provides for the private occupation of legal road. The fee is also payable where the Council undertakes an assessment of an existing illegal encroachment that is unlicensed and a licence is subsequently issued.
- An *administration fee* is for changes to existing licences or leases. This applies to changes in:
  - the ownership of the licence or lease holder
  - the use of the road encroachment
  - the size of an existing structure on the road encroachment.
- An *annual rental* is for the use of the legal road. The annual rental is determined according to the nature and size of the encroachment (see 5.9.1: Annual road encroachment rental). For residential encroachments, a cost per square metre is applied when determining the annual rental for a particular encroachment in a particular area.
- For commercial encroachments a market rental will be charged.

The market rental will be determined by an independent valuer, who may be appointed by the Council or be chosen by the licence applicant/holder, subject to the approval of the Council. The cost of obtaining the valuation will be paid by the licence applicant/holder.

### **5.9.1 Annual road encroachment rental for residential encroachments**

The *annual rental* applies in cases where:

- people cause restricted public access or establish enclosed areas and the total encroachment is greater than 50 square metres; or
- the encroachment has a structure other than a structure exclusively for access (see table 1).

In both cases minimum annual charges apply.

When the encroachment does not restrict public access and there are no structures on the encroachment, then no rental is required. Also, no rental is required when a structure is for access only.

Table 1 outlines when approval, licences, administration fees and annual rentals are applicable.

Further information on actual fees and charges can be obtained from the Council (see Section 8: Further information).

**Table 1: When is a fee or annual rental payable?**

TYPE OF ENCROACHMENT	
<b>Unrestricted public access and no structures</b>	No licence required No rental payable
<b>Restricted public access</b> but no structures are on the encroachment. See definition of <i>restricted public access</i> .	Council approval and licence required Application fee or administration fee payable Annual rental payable, but only for area in excess of 50sq m Minimum annual rental applies for areas in excess of 50sq m
<b>Encroachment with structures for access only</b> See definition of <i>structures</i> .	Council approval and licence required Application fee or administration fee payable No annual rental payable
<b>Encroachment with structures (other than structures for access only)</b> See definition of <i>structures</i> .	Council approval and licence or lease required Application fee or administration fee payable Annual rental payable Minimum annual rental applies

### 5.9.2 Balconies and airspace leases

For new airspaces leases the annual rental will be replaced by a one-off fee covering the duration of the proposed lease – generally the lifetime of the building to which the lease relates. The fee will be based on a market valuation of the proposed airspace encroachment lease. The valuation will need to reflect the particular conditions of a lease, including any rights retained by the Council to revoke the lease in certain circumstances.

Holders of existing airspace leases have the option of obtaining a valuation for their lease and, based on this valuation, paying a signal fee to cover the remaining life of the

lease. Property owners who do not wish to take up this option will be subject to the annual rental structure applicable to other encroachment licences.

### **5.9.3 Fee waivers**

The Council retains the discretion to waive the annual rental where a road encroachment is created by relocating a fence or wall onto legal road in order to address a public safety concern. This may occur on any or all of the following occasions:

- There is a significant hazard.
- There is an associated public safety issue.
- It is impracticable or undesirable to locate the fence or wall on the boundary of the adjoining private land.

When the Council is considering waiving the annual rental it will determine whether the alternatives to an encroachment will be ineffective. In addition, the encroachment must:

- assist with the Council's obligation to ensure public safety
- fully address the public safety concern
- primarily be for the purpose of promoting public safety.

In instances where an encroachment is created to address a public safety concern the:

- line of the fence or wall shall be determined by the Council
- fence or wall must comply with the Building Act and District Plan requirements
- design of the fence or wall shall be approved by the Council.

For land encroachments, the Council also retains the discretion to waive the annual rental in cases where the steepness of the road reserve is assessed as making it unusable for other purposes.

## **6. COMPLIANCE AND MONITORING**

The Council regularly discovers structures on legal road that were built without obtaining Council approval or an encroachment licence or lease. Some of these structures have been there for a number of years and may have been built by a previous owner of the adjoining private property, while others are recent or in the process of being built.

Erecting a structure on legal road without Council approval or an encroachment licence or lease is a breach of the Wellington Consolidated Bylaw 2008 and can lead to prosecution. It is the responsibility of the **current** owner of the property, who benefits from the encroachment, to apply for land-owner consent and to obtain an encroachment licence or lease from the Council's Property Unit.

## **7. SALE OF LEGAL ROAD**

The Council may sell legal road to a property owner when it considers that the land is not needed for utilities, roads or footpaths in the future and private occupation will not compromise the amenity or environmental values.

The sale of legal road for private use is a legal process which is outlined in Annex 2. It is subject to statutory and planning requirements and requires the section of road to be legally 'stopped'<sup>5</sup>. The process, under the Tenth Schedule of the Local Government Act 1974, can involve appeals to the Environment Court. The Public Works Act also provides a mechanism for stopping legal roads.

Eligibility to purchase any surplus legal road from the Council (unless it can be subdivided for use as a building site) is limited to the adjoining property owner. Most of the costs associated with road stopping and the amalgamation with the existing title have to be met by the purchaser.

The sale of any legal road will not generally be permitted where public utilities (such as pipes and cables) are located underneath, unless the prospective purchaser undertakes to relocate the services at their cost or an easement or other arrangement satisfactory to the utility operator(s) can be agreed. The Council will also need to be satisfied that the land is not likely to be required for the location of services at any point in the future.

The market value of legal road being sold by the Council will be determined by an independent registered valuer who is a member of the New Zealand Institute of Valuers. Valuations for establishing the price for purchase are based on the added value to the existing title – based on valuations before and after the addition of the land.

## **8. FURTHER INFORMATION**

To speak to someone directly about the Wellington City Council Road Encroachment and Sale Policy please call the Council on 499 4444 and ask for the Encroachments and Road Stopping Team.

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<sup>5</sup> Changing the status of land from legal road to freehold land.

## **ANNEX 1**

### **APPLICATION PROCESS FOR AN ENCROACHMENT LICENCE OR LEASE**

In most cases the application process has the following steps:

1. Application is made to the Council for approval of a new encroachment or changes to an existing encroachment (size or use).
2. Consultation is undertaken with neighbours and affected parties and, if possible, written consent is sought from any affected property owner(s).
3. Consultation is undertaken with utility companies.
4. The Council acknowledges the application and may request additional information.
5. The Council inspects the proposed encroachment site.
6. The Council sends a letter granting or declining consent. If granted, the letter includes a licence or lease and an aerial photograph showing the encroachment.
7. The applicant must, if they haven't already, obtain any required regulatory consents.
8. The licence or lease is signed, witnessed and returned to the Council. The Council signs the licence/lease and a copy is sent to the applicant for their records. Note, construction cannot start until the licence is executed.
9. The applicant has 18 months to complete the construction of the encroachment, unless a written extension is sought and granted.

In most cases the issuing of a new licence or lease for an existing encroachment has the following steps:

1. Change of ownership is identified by the Council (through notification from the old or new owner or the rates system).
2. Letter and licence/lease documents are sent to the new owner for signing.
3. Once the licence or lease is signed, witnessed and returned to the Council, the Council signs the licence/lease and a copy is sent to the applicant for their records.

## **ANNEX 2**

### **SUMMARY OF PROCESS FOR SALE OF LEGAL ROAD**

For detailed information on road stopping and the sale of legal road, please contact the Council's Property Business Unit on 499 4444. What follows is a summary of the process.

The applicant prepares a survey plan defining the area of legal road to be stopped. The Council publicly notifies the proposal and provides the opportunity for objections. The road-stopping proposal must be made available to the general public for inspection, together with the reasons why the road is to be stopped. The public has 40 days to object.

The Council must:

- issue at least two public notices calling for objections to the proposal to stop the road (any person may object)
- notify all owners and occupiers of land adjoining the proposed road stopping.

The Council may, at its discretion, consult with other affected parties.

If no objections are received within the time limit, the Council may, by public notice, declare the road stopped. The road ceases to be a road at that stage and may be sold.

If objections are received, the Council must decide if they are justified. This occurs at a Council hearing. Any person objecting will be given the opportunity to attend the hearing.

A Council meeting is held to make a decision on the objections. The Council can either:

- decide to allow the objections and decline the road stopping (meaning the subsequent sale of the land to the adjacent owner cannot go ahead), or
- decide to reject the objections and continue with the road stopping. If the objections are not withdrawn or otherwise resolved, the Council must send the objections, together with the survey plans, and a full description of the proposed alterations to the Environment Court.

The referral to the Environment Court may not necessarily result in a court hearing. The Environment Court is able to arrange mediation to resolve any objections before any hearing.

The valuation of the land will be assessed on the basis that the additional land will add value to the proponent's existing title. This valuation will take into consideration variations in the final survey area, any market movement in land values since the date of the initial valuation and any further conditions imposed by the Council.

The legal costs incurred by the Council will be recovered from the proponent.



## Road Encroachment and Sale Policy submission form

We are keen to get your thoughts on proposed changes to the Road Encroachment and Sale Policy.

You can have your say:

- by making a submission on this form or in writing and send it to us by:
  - Post – Freepost 2199, Road Encroachment Review, Wellington City Council 6140
  - Fax (04) 801 3124
- by making a submission online at [www.Wellington.govt.nz](http://www.Wellington.govt.nz)
- by sending an email to: [encroachment.review@wcc.govt.nz](mailto:encroachment.review@wcc.govt.nz)

Please contact Wellington City Council on 499 4444 for more information.

First fold here

### Your name and contact details

Mr / Mrs / Ms / Miss / Dr (circle which applies)

First name/last name\*

Street address\*

Phone/mobile

Email

\* Mandatory fields

I am making a submission

As an individual

On behalf of an organisation

Name of organisation

I would like to make an oral submission to the City Councillors

Yes

No

If yes, provide a phone number above so that a submission time can be arranged.

**Submissions close 5pm Thursday 8 July 2010**

#### Privacy statement

All submissions (including name and contact details) are published and made available to elected members of the Council and the public. Personal information supplied will be used for the administration and reporting back to elected members of the Council and the public as part of the consultation process. All information collected will be held by the Wellington City Council, 101 Wakefield Street, Wellington. Submitters have the right to access and correct personal information.

### Have your say

**Q1:** Some parts of the Road Encroachment and Sale Policy have been changed. What are your views on the following parts of the draft policy?

	STRONGLY SUPPORT	SUPPORT	NEUTRAL	OPPOSE	STRONGLY OPPOSE
Objectives	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Policy principles	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Criteria for evaluating road encroachment proposals	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Consultation with affected parties	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Q2:** Do you have any concerns or views about the draft Road Encroachment and Sale Policy?

**Q3:** The Council is consulting on three options for how to set rental rates: (1) a flat rate per square metre (existing policy); (2) differentiated fees where the rate per square metre is in proportion to land values in the area (the Council's preferred option); or (3) individual valuation of each encroachment licence.

What are your views on these options?

	STRONGLY SUPPORT	SUPPORT	NEUTRAL	OPPOSE	STRONGLY OPPOSE
Flat rate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Differentiated fees	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Individual valuations	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Q4:** The Council proposes changing the existing policy so that where an encroached area is fenced or hedged, property owners no longer have use of the first 50 square metres of public land free of charge.

What are your views on this proposal?  Strongly support  Support  Neutral  Oppose  Strongly oppose

**Q5:** The Council proposes that the value of new airspace leases (eg for private balconies above legal roads) be determined up front and a single fee be made that covers the life of the lease.

What are your views on this proposal?  Strongly support  Support  Neutral  Oppose  Strongly oppose

**Q6:** The Council is consulting on two options for when any changes to the Road Encroachment and Sale Policy, including any changes to fees, might come into force.

What are your views on these options?

	STRONGLY SUPPORT	SUPPORT	NEUTRAL	OPPOSE	STRONGLY OPPOSE
All changes from 1 July 2011	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Changes introduced as new licences are issued	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Q7:** Do you have any other concerns or views about how fees are set?

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FreePost Authority Number 2199



Road Encroachment and Sale Policy (COP001)  
 Wellington City Council  
 PO Box 2199  
 Wellington 6011