

## PURPOSE

The purpose of this Policy is to provide guidance for Council staff and other persons dealing with Council as to the manner in which:

- Council will consider and decide applications to build over Easements vested in Council (whether the Easements are express or implied and whether or not physical drainage assets are located in the Easement land and pursuant to section 198 of the Local Government Act 1989 are vested in and under the care, management and control of Council); and
- Council will perform any relevant role as the Drainage Authority for the land.

## SCOPE

Under legislation, Council is the relevant service authority responsible for certain stormwater drains, the conveyance of surface and stormwater (subject to catchment size) and Easements vested in or appropriated and set apart in favour of Council.

In accordance with Regulation 130 (1) of the Building Regulations 2018, a property owner (or their representative) must obtain the report and consent of Council for any Works proposed to be built over, or partially over, any Easement vested in Council.

To deal with these matters, Council (through the Chief Executive Officer) has formally delegated to the Manager Engineering and Building Services the function and power of Council to act on Council’s behalf when considering and deciding any request to build over an Easement vested in Council.

The scope of this Policy impacts:

- Upon Easements vested in or appropriated and set apart in favour of Council;
- On the municipal Drainage Network generally; and
- On any development, building or construction works to be undertaken within the City of Maroondah.

### Policy Control Schedule

<b>Policy Title:</b> Building Over Easement Policy		<b>Policy No:</b> EBS002	<b>Policy type:</b> Council
<b>Policy creation date:</b> 10/05/2016	<b>Current version approved:</b> 10/05/2016	<b>Current version number:</b> 1.0	<b>Policy review date:</b> May 2019
<b>Parent policy:</b> N/A	<b>Child policy/policies:</b> N/A	<b>Policy responsibility:</b> Manager Engineering and Building Services	<b>TRIM record number:</b> 16/84075

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## OBJECTIVES

The objectives of this Policy are to:

- Ensure that Council fulfils its statutory obligations with regard to the report and consent process for building works over Easements vested in Council;
- Provide guidance to Council staff and the public generally with regard to Council’s assessment approach in terms of building works over Easements vested in Council;
- Protect Council’s interests with regard to Easements, assets within Easements, future possible easement assets, ongoing operational maintenance requirements for the Drainage Network (including access), works associated with Asset Renewal and flooding considerations, including overland flows during storm events;
- Provide high level advice to applicants, including clear and concise conditions when consents are granted, and robust and defensible justification(s) if an Application for consent is refused by Council; and
- Allow for building works over an Easement in an appropriate, fair and consistent manner.

## POLICY PRINCIPLES

Council must ensure that proper consideration is given to the intended purpose and function of an Easement vested in or appropriated and set apart in favour of Council, including whether the Easement (which may or may not have drainage assets located in the Easement land) serves a purpose with respect to Council’s current and future Drainage Network.

Council acknowledges a person’s right to apply for consent to build over an Easement, and in the interests of good governance Council will strive to ensure that applications are considered within the required timeframes.

Council also recognises the benefits to the community of maximising the potential for developable land. When implementing this Policy, Council officers will strive to be proactive in making assessments and dealing with applicants (or their representatives), whilst always ensuring that Council’s position under this Policy is upheld when making any determination.

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## RELATIONSHIP TO THE MAROONDAH 2040 COMMUNITY VISION

The relevant key outcome area from the ‘Maroondah 2040 Community Vision’ that relates to this policy is: ‘An attractive, thriving and well built community’.

The key directions from the objective of ‘An attractive, thriving and well built community’ as they relate to this Policy are to:

- 6.7 Plan and facilitate the development of a community where everyone can live, work and play locally
- 6.8 Encourage and support the provision of a diverse range of housing across Maroondah that meets the needs of current and future residents
- 6.9 Encourage high density development in activity centres where there is access to high quality facilities, services and amenities
- 6.11 Ensure the management of infrastructure and prioritisation of capital works considers demographic change, the impacts of climate change and accessibility for all ages and abilities
- 6.14 Work in partnership with other catchment authorities to ensure effective stormwater management across Maroondah, including the identification and implementation of appropriate strategies that increase the storage, re-use and re-direction of stormwater and provide flood mitigation for the community

## BACKGROUND / CONTEXT

An Easement may be vested in or appropriated and set apart in favour of Council for the purpose of providing a municipal service, such as a public drainage function or to allow a public right-of-way to be available for carriageway purposes. Simply put for Council, an Easement creates property rights over someone else’s land in favour of Council, without any need for Council to presently use or occupy the land.

Certain building works which may be proposed by a person in, over, on or within an easement vested in or appropriated and set apart in favour of Council will trigger a requirement for the report and consent process under Regulation 130 (1) of the Building Regulations 2018. Conflicting approaches and assessment methods by different Councils have resulted in inconsistencies across the sector with regard to the report and consent process. This has meant that a consent given in one municipality may not be given in another municipality.

Since 2000, Maroondah City Council has intentionally taken a ‘cautious’ approach when considering and deciding applications to Build Over Easements vested in Council. This approach, largely practically driven (but still in full recognition of Council’s statutory responsibilities), has arisen over time because of a number of ‘negative’ Council

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experiences, including ‘difficult’ complications with the potential for ‘significant’ costs to be incurred by both Council and applicants in relation to the position taken by Council.

The issues have generally arisen in the following circumstances:

- During (and as a result of) significant storm events;
- Where drains have required upgrade or renewal;
- Where the construction of new or upgraded drains has been required to pass through established properties;
- Where there has been potential for damage to be caused to Council’s assets by the approval of building works; and
- Where difficulties have been experienced in gaining access to properties in order to undertake operational maintenance for Council’s Drainage Network.

More recently, Council has undertaken extensive flood modelling with the result that Council now has a far more detailed and specific understanding of the Drainage Network within Maroondah, and those assets which are under the care, management and control of Council, including the ability to identify locations that will or are likely to flood or be subject to inundation in certain storm events. Typically, these locations (subject to further policy and budgetary direction from Council) are areas where drainage upgrades may potentially be required. This important information has enabled Council officers to make what are now more informed assessments in relation to requests for Building Over Easements in the context of future drainage upgrade requirements and Overland Flow Path issues.

In seeking to protect Council’s interests when approving building works over an Easement vested in Council, Council’s consent conditions have over time become more thorough, robust and vigorous. They now include detailed processes around on-site proving of assets, drainage asset condition checking and requirements for elements of any approval to be protected by agreements under section 173 of the Planning and Environment Act 1987 (which tie the conditions of approval to ongoing ownership of the land in question).

With development opportunities being continually sought by property owners, builders and developers (and with developable land becoming harder to secure), Council has recently seen some of its report and consent decisions the subject of challenge through Appeal at the Building Appeals Board.

In these circumstances, a formally endorsed Council policy is considered necessary in order to:

- Justify and ensure consistency of Council decision-making; and
- Back-up Council’s position during official deliberations throughout the adjudication process in circumstances where this may lead to an Appeal against Council’s decision.

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## POLICY POSITION

- Council reserves and otherwise maintains all of its right, title, interest, power and authority in, over, on or within an Easement vested in or appropriated and set apart in favour of Council, including for all purposes associated with the proper drainage of land and the safe and proper flows of surface and stormwater water during the course of a significant storm event (or other related purposes, such as rights of carriageway);
- Council will ensure that all Easements vested in or appropriated and set apart in favour of Council are protected from building works that may have the effect of jeopardising the purpose for which the Easement was created or damaging any asset(s) within the Easement, and that any requirement for future asset(s) to be constructed within the Easement (including Asset Renewal or upgrade works and ongoing drainage maintenance) is protected;
- Proper consideration will be given to the Easement rights of other persons where an Easement is vested in persons other than Council, or if there are services or assets (other than Council’s services or assets) located in, over, on or within the Easement;
- Council may require an applicant to provide further information in order to physically prove on site the exact size and location (depth and offset etc.) of any existing drainage asset and to ensure that the proposed works meet Council’s requirements in order for the applicant to undertake any works in, over, on or within an Easement vested in or appropriated and set apart in favour of Council;
- Where consent is given by Council for an applicant to construct a building or works over an Easement, the consent will be conditional upon such specific angle of repose and/or clearance requirements or other conditions which Council reasonably imposes. Without limitation, Council may require on site verification by the relevant Council officer (with the relevant building surveyor) before an occupancy permit (or final inspection) is given (in order to ensure that the Council-specified conditions have been complied with);
- Subject to the nature and extent of the works proposed in relation to the location of the Easement or the Council asset, Council may require a pre- and post-works assets condition assessment to be undertaken at the cost of the applicant. If any damage is caused to any Council asset by the Works, Council will require the applicant to undertake required repairs at the cost of the applicant (by relying on its local laws or other powers under the Local Government Act 1989);
- Council may require an applicant to enter into an agreement with Council under section 173 of the Planning and Environment Act 1987 (with such agreement to bind the owner of the property for the time being and to impose such conditions as Council reasonably considers are necessary in order to minimise any future risk or cost to Council in the event that Council is required to perform works in, over, on or within the Easement);
- If an Easement is deemed to be permanently redundant or to have been abandoned through non-use or if the land over which the Easement has been created is no longer required for its original purpose, consideration should be given for the Easement to be removed from all relevant property records;

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- If an applicant disagrees with Council’s decision under the report and consent process (including any conditions which Council, acting reasonably, may seek to impose) the applicant may Appeal the decision under the Building Act 1993 and the Building Regulations 2018 to the Building Appeals Board;
- By way of general guidance (but without limiting the proper exercise of Council’s discretions), building works are *unlikely* to be approved in, over, on or within an Easement vested in or appropriated and set apart in favour of Council where:
  - **The Easement:**
    - is required for future drainage or upgrade works;
    - conveys overland flows or holds water during a storm;
    - contains a Hydraulically Critical Drain; or
    - has a requirement for access for regular ongoing maintenance; or
  - **The proposed works:**
    - are permanent in nature and not easily demountable;
    - contain any part of a habitable dwelling (excluding eaves);
    - are likely to damage Council assets;
    - do not meet Council’s minimum clearance requirements;
    - will preclude or limit Council from undertaking any required drainage investigation, maintenance or renewal works;
    - will preclude or limit Council’s ability to construct a future drain or reconstruct an existing drain in terms of cost and construction requirements;
    - could be relocated elsewhere within the property rather than over the Easement; or
    - for any other reason (whether Major Structures or Works or Minor Structures or Works) are considered by Council as being works which should not be performed in, over, on or within the Easement; and
- By way of general guidance (but without limiting the proper exercise of Council’s discretions), the following minimum clearance requirements *must* be achieved:
  - Angle of Repose – The base of any footings in or adjacent to the Easement are founded 200mm below a line drawn at an angle of 45 degrees from the invert of any stormwater pipe;
  - Horizontal Clearance – Any footings in or adjacent to the Easement have a minimum 600mm horizontal clearance from any stormwater pipe;
  - Minimum Cover – For any works within an Easement, a minimum cover of 500mm to the top of Council’s drain must be maintained; and
  - Vertical Clearance – Where eaves are proposed over an Easement, a minimum of 2700mm vertical clearance must be maintained from the finished surface level.

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Applicants seeking a report and consent from Council under Regulation 130 (1) of the Building Regulations 2018 should also refer to the Maroondah City Council’s ‘Building Over Easement Technical Guidelines’ (see Supporting Documents).

## POLICY IMPLEMENTATION

Generally, there are three scenarios in which this Policy will be applied:

1. Following a formal Application seeking a report and consent from Council under Regulation 130 (1) of the Building Regulations 2018 to build over an Easement;
2. Where Council officers consider that the engineering requirements for any application for a Planning Permit are indicated; and
3. Where outside of points 1 and 2 above, any other request is made for Council to provide advice with regard to possible building or construction works in, over, on or within an Easement vested in or appropriated and set apart in favour of Council.

Notwithstanding points 2 & 3 above, Council’s report and consent is only valid in response to a formal applications received under and pursuant to the requirements of Regulation 130 (1) of the Building Regulations 2018.

## ROLES AND RESPONSIBILITIES

As at March 2015, by instrument of sub-delegation under section 98(2) of the Local Government Act 1989, the **Chief Executive Officer** of the Maroondah City Council has delegated the function, power and duty of Council to provide a report and consent for Building Over Easements under Regulation 130 (1) of the Building Regulations 2018 (being the function of Council, in its capacity as a ‘service authority’, to give its report and consent to an application for a building permit to construct a building over an Easement vested in Council”) to the **Manager Engineering and Building Services**.

Formal applications will be assessed, based on the principles set out in this Policy, by Council’s **Development Engineering Team**, with assistance and input as required from Council’s **Integrated Water Engineer**. The process will be overseen by the **Team Leader Engineering Services**. Once an Application has been considered, a report will be issued, and if it has been determined to give consent to Build Over Easement, the consent will be signed by Council’s **Manager Engineering and Building Services** under delegation.

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With respect to Planning Permit considerations that indicate possible building or construction works within an Easement, an assessment will be undertaken by Council’s **Development Engineering Team** with assistance and input as required from Council’s **Integrated Water Engineer**, in conjunction with Council’s **Statutory Planners**.

For general advice with regard to possible building or construction works within an Easement, Council’s **Development Engineering Team** will provide a response with assistance and input as required from Council’s **Integrated Water Engineer**.

## RELATED LEGISLATION

- Maroondah City Council Local Laws 2016
- Building Regulations 2018
- Building Act 1993
- Local Government Act 1989
- Water Act 1989
- Planning and Environment Act 1987
- Subdivision Act 1988

## RELATED POLICIES, STRATEGIES, PROCEDURES AND GUIDELINES

- Maroondah City Council Building Over Easement Technical Guidelines (see Supporting Documents)
- Maroondah City Council Development Engineering Guidelines (see Supporting Documents)
- Maroondah City Council Water Sensitive City Strategy
- Maroondah 2040 Community Vision
- Flood Management Strategy – Port Phillip and Westernport, Melbourne Water

## DEFINITIONS AND TERMINOLOGY

- **Appeal** – means an appeal to the Building Appeals Board for a review of a report and consent decision of Council in accordance with Part 19 ‘Appeals and Reviews’ of the Building Regulations 2018.
- **Application** – means a formal request to Council for a report and consent response under Regulation 130 (1) of the Building Regulations 2018.
- **Asset Renewal** – means the repair or reconstruction of an existing Council asset such as a stormwater drain or drainage pit.

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- **Building Appeals Board** – is the an independent statutory body established under the Building Act 1993 to determine any matter relating to the Building Act 1993, the Building Regulations 2018 or the Building Code of Australia 2006.
- **Building Over Easement(s)** – means the act of building or constructing works in, over, on or within an easement vested in or appropriated and set apart in favour of Council.
- **Drainage Maintenance** – means Council’s general operational activities with regard to the ongoing management of easements and the Drainage Network.
- **Drainage Network** – means Council’s stormwater drainage assets (and any other ancillary infrastructure), including drainage easements vested in or appropriated and set apart in favour of Council, any provision or proposal made by Council for any future drainage infrastructure, any Overland Flow Path, any areas subject to flooding (however described), any access point or location for the Drainage Network and Council’s electronic GIS register of drainage information (including Council’s flood model).
- **Easement** – means any land (whether or not registered on a property title) which gives to another person a right, title, interest, power and authority to use the land for another specific purpose.
- **Hydraulically Critical Drain** – means a drain that is running at capacity in a 1 in 5 year ARI storm event and has multiple connecting drainage branches and where the risk of failure through damage resulting from works over an Easement would be significant (in terms of both impact on residents served by the drain and the cost to repair the damage).
- **Implied Easement** – means any easement under section 12 of the Subdivision Act 1988 (including an existing drain that serves multiple properties or carries water from one property through another property and is recognised by Council as being a part of the Drainage Network, and where the context requires, an implied easement in favour of Council with the same protections and restrictions afforded for an easement registered on title. (The extent of the easement will generally be limited to the precise location and width of the asset only.)
- **Instrument of Sub-delegation** – is a written instrument by which (under section 98(2) of the Local Government Act 1989) the Chief Executive Officer of the Council expressly delegates a specific statutory function or power to an officer appropriately qualified to receive the delegation.
- **Major Structures or Works** – considering the definition for **Works**, means anything that is not easily dismantled that would not allow for simple access to a Council drain or easement (such as a brick garage or major retaining wall, etc.).
- **Minor Structure or Works** – considering the definition for **Works**, means anything that is easily dismantled that would allow for simple access to a Council drain or easement (such as an open carport or external low level decking, etc.).
- **Overland Flow Path** – means any above ground pathway for the conveyance of stormwater when the underground drainage system has reached its maximum capacity or if there are no stormwater drains to convey flows. The pathway may be designated under section 188 of the Water Act 1989 and may require a report and consent from the relevant authority under section 154 (1) of the Building Regulations 2018.

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- **Planning Permit** – means a planning permit that gives permission for any use or development of land in accordance with the Planning and Environment Act 1987.
- **Relevant Drainage Authority** – means, in accordance with Division 3, Part 10 of the Water Act 1989, an authority that has a waterway management district.
- **Report and Consent** – for the purposes of this Policy, means the formal consideration and response by Council to a request to build over an easement in accordance with Regulation 130 (1) of the Building Regulations 2018. The report and consent is to be provided within the timeframes set out in the Building Regulations 2018.

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- **Section 173 Agreement** – means a legal agreement made between Council as a responsible authority and another person under section 173 of the Planning and Environment Act 1987. A Section 173 agreement can be recorded on title so that the land owner’s obligations binds future owners and occupiers of the land and it is enforceable in the same way as a Planning Permit condition.
- **Works** – for the purposes of this Policy, means any works within an easement, including but not limited to general building or construction works, paving, earthworks, swimming pools, spas, services infrastructure, retaining walls, etc. that would trigger a requirement for a report and consent under Regulation 130 (1) of the Building Regulations 2018.

## SUPPORTING DOCUMENTS

- Maroondah City Council Building Over Easement Technical Guidelines
- Maroondah City Council Development Engineering Guidelines

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