

Program: Property Services
Date of Adoption: 14 September 2022
Resolution Number: ORD-2022-278
Review Date: 14 September 2025

Scope

This Policy applies to any/all encroachments identified on Mackay Regional Council (MRC) freehold or reserve land under MRC's trusteeship and control (Public Land).

The Policy does not apply to:

- a) Matters covered under existing legislation, Local Law or policy including outdoor eating areas or advertising structures;
- b) Structures of a temporary nature approved or required as part of a development application process;
- c) Authorities, corporations or other parties that have a statutory right to create such encroachments.
- d) Roads as defined under the Land Act 1993.

Objective

To provide an open and accountable objective whereby MRC can determine the impact of an encroachment on the community and either formalise the existence or order the removal of the encroaching structure or unauthorised occupation.

Policy Statement

This policy aims to provide a consistent framework for managing or removing unauthorised Encroachments on MRC Public Land and in due regard to the appropriate legislation.

All encroachments will be assessed, investigated and managed in accordance with the Encroachment on Public Land Corporate Standard which must be read in conjunction with this policy.

Council considers that to the extent this policy engages and limits, or potentially limits, any human rights, that limitation is reasonable in that it is proportionate and justified.

This process to remain in force until otherwise determined
by Mackay Regional Council

Contents

Scope 1

Objective..... 1

Policy Statement 1

1.0 Principles 3

 1.1 Encroachment Categories 3

 1.1.1 *Minor* 3

 1.1.2 *Moderate* 4

 1.1.3 *Major* 4

 1.2 Risk 4

 1.3 Options to Remedy Encroachments 4

 1.4 Exclusions to the Policy 5

 1.5 Approval for Encroachment Actions..... 5

2.0 Complaints..... 5

3.0 Definitions..... 6

4.0 Review of Policy 7

5.0 Reference..... 7

6.0 Attachments..... 7

1.0 Principles

Encroachments can be regarded as illegal extensions of private property boundaries and/or structures onto adjacent land. Although at an individual level, Encroachments may appear minor in impact, cumulatively Encroachments are responsible for retaining and degrading hectares of MRC Public Land.

Some Encroachments occur in a slow, progressive fashion and usually from the well-intentioned activities of residents. Seemingly harmless activities such as lawn mowing, fire-break maintenance and informal gardening or activities such as placement of structures, gradual removal of native vegetation and extension of fencing create the deceptive appearance of private ownership on MRC Public Land which can pass unknowingly from one owner to another. Other Encroachments occur rapidly as illegal land modification events.

Unauthorised Encroachments on MRC Public Land have the ability to:

- Compromise the integrity of natural and cultural values
- Alienate land from public use/access
- Impede fire management
- Detract from aesthetic appearances
- Divert and encumber MRC resources and assets
- Jeopardise public safety
- Cause social inequity
- Incite issues of legal liability
- Create risk that MRC is allowing MRC Public Land to be used inconsistently to its permitted purpose
- Create financial burdens on parties to resolve such encroachments
- Perceive ownership of the MRC Public Land by the Encroaching Owner and any future owner once ownership is transferred.

1.1 Encroachment Categories

MRC recognises that Encroachments on MRC Public Land do not always impose a constraint on the community use or effective operation of MRC Public Land.

In assessing the impact or constraint of the various instances of Encroachments on the community or MRC, the following categories have been adopted:

1.1.1 *Minor*

Encroachments of a minor nature considered unlikely to result in significant risk (financially or public liability) for the community or MRC. Minor Encroachments should not interfere with community access to MRC Public Land.

For example: landscaped gardens, mowing strips, letter boxes, access stairs, handrails and small retaining walls.

1.1.2 *Moderate*

Encroachments of this nature are considered quite significant and can restrict community access to MRC Public Land, this may generate a significant benefit to the Encroaching Owner. There may also be public liability issues for MRC.

For example: medium to large retaining walls, large hardstands, decks and structures.

1.1.3 *Major*

Major Encroachments include items of a physical nature that cannot be easily removed and can prevent access to MRC Public Land by the community, this gives the Encroaching Owner exclusive benefit. There may also be increased public liability and safety issues for MRC.

For example: fenced areas, shed/garage structures, pools and dwellings.

1.2 Risk

1.2.1 This Policy applies to all MRC Public Land and focuses on the management of all Encroachments upon such land.

1.2.2 Encroachments onto MRC Public Land may present a potential risk of safety to the public as well as a potential risk of legal claims to MRC if left unmanaged.

1.2.3 MRC has a duty to manage the risk and this is done by ensuring that the Encroaching Owner who encroaches onto MRC Public Land undertakes all measures necessary to mitigate the risk to an acceptable level while the Encroachment is being resolved.

1.3 Options to Remedy Encroachments

Options to remedy Encroachments on MRC Public Land may include:

- Permit to use land subject to compliance with tenure conditions.
- Removal of Encroachment and restoration of MRC Public Land.
- Consideration for Encroaching Owner to purchase encroached land, subject to community consultation and necessary sale conditions.

Council may consider formal approval of an Encroachment on MRC Public Land with due consideration of a range of criteria including, but not limited to, safety, commercial gain, personal gain, community impact, Queensland Department of Resources views and any legislative constraints.

If the Encroachment is inconsistent with the purpose of the MRC Public Land, the only appropriate remedy may be removal of the Encroachment.

Refer to the MRC Encroachment on MRC Land - Procedure for more details on the process on dealing with Encroachments.

1.4 Exclusions to the Policy

This policy and associated procedure do not apply to:

- Structures of a temporary nature approved or required as part of a development application process
- Authorities, corporations or other parties that have a statutory right to create such Encroachments (e.g. power poles/boxes, post boxes, telephone lines etc.)
- Matters covered under legislation, Local Law or policy, including outdoor eating areas, shopfront displays and advertising structures.
- Encroachments within road reserve.

1.5 Approval for Encroachment Actions

Council approval is required prior to action being taken to remedy the Encroachment. The CEO has delegated authority to sign any agreement for use of encroached land.

2.0 Complaints

Any complaints in relation to this service will be assessed and managed in accordance with MRC's Administrative Action Complaints Policy, a copy of which can be found on MRC's website.

When an individual feels that they are the subject of MRC's failure to act compatibly with human rights, they can make a complaint directly to MRC. These complaints will be assessed against the Human Rights Act 2019.

Complaints may be made as following:

In writing to
Chief Executive Officer
Mackay Regional Council

PO Box 41
MACKAY QLD 4740

Via Email - complaints@mackay.qld.gov.au

In person at the following Council Client Services Centres:

- MRC Mackay Office – 73 Gordon Street, Mackay
- MRC Sarina Office – 65 Broad Street, Sarina
- MRC Mirani Council Office – 20 Victoria Street, Mirani

3.0 Definitions

To assist in interpretation the following definitions shall apply:

CEO means the Chief Executive Officer of Mackay Regional Council. A Person who holds an appointment under section 194 of the *Local Government Act 2009*. This includes a person acting in this position.

Council means the Mayor and Councillors of Mackay Regional Council.

DOR means the Department of Resources.

Encroachment for the purpose of this Policy means a situation in real estate where a property owner or permitted occupant(s) violates the property rights of a neighbour (MRC) by making improvements or erecting structures on or over the neighbours' land.

Encroaching Owner means the owner or permitted occupant(s) of the land responsible for the encroachment on MRC Public Land.

Freehold Land means freehold land owned by MRC.

MRC means Mackay Regional Council.

MRC Public Land means Reserve Land/Trust Land and Freehold Land.

Reserve Land/Trust Land means government owned land where MRC is the Trustee for community purpose, includes but not limited to parks, drains, roads and easements.

Land that has been set aside under the *Land Act 1994* for public or community purposes. These are either reserves or deeds of grant in trust and are collectively referred to as 'Trust Land'.

Road as per Section 93 of the *Land Act 1994*:

(1) means an area of land, whether surveyed or unsurveyed-

- (a) dedicated, notified or declared to be a road for public use; or
- (b) taken under an Act, for the purpose of a road for public use.

(2) the term includes-

- (a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route;
- (b) a bridge, causeway, culvert or other works in, on, over or under a road; and
- (c) any part of a road.

4.0 Review of Policy

This policy will be reviewed when any of the following occur:

- The related documents are amended or replaced.
- Other circumstances as determined from time to time by a resolution of Council

Notwithstanding the above, this policy is to be reviewed at intervals of no more than three (3) years.

5.0 Reference

- *Local Government Act 2009*
- *Land Act 1994*
- *Local Government Regulation 2012*
- *Property Law Act 1974*
- *Building Act 1975*
- Local Law No. 1 (Administration) 2011
- Local Law No. 4 (Local Government Controlled Areas, Facilities and Roads) 2011
- MRC Corporate Standard 109.1 - Encroachment on Public Land

6.0 Attachments

- CS109.1 Encroachment on Public Land.

Version Control:

Version	Reason / Trigger	Change	Endorsed / Reviewed	Date
1	New Policy		ORD-2022-278	14/9/2022

Program	Property Services
Date of Adoption / Endorsement	14 September 2022
Resolution Number:	ORD-2022-278
Review Date	14 September 2025

1.0 Scope

This Standard applies to Encroachments on Mackay Regional Council (MRC) Public Land and applies to all MRC Employees.

This Standard does not apply to:

- a) Matters covered under existing legislation, Local Law or policy including outdoor eating areas or advertising structures;
- b) Structures of a temporary nature approved or required as part of a development application process;
- c) Authorities, corporations or other parties that have a statutory right to create such encroachments; and
- d) Roads as defined under the Land Act 1993.

2.0 Objective

This Standard outlines the objective to determine and rectify any/all Encroachments on Public Land.

3.0 Reference

- *Local Government Act 2009*
- *Land Act 1994*
- *Local Government Regulation 2012*
- *Property Law Act 1974*
- *Building Act 1975*
- Local Law No. 1 (Administration) 2011
- Local Law No. 4 (Local Government Controlled Areas, Facilities and Roads) 2011
- MRC COU109 - Encroachment on Public Land

4.0 Definitions

To assist in interpretation the following definitions shall apply:

CEO means the Chief Executive Officer of Mackay Regional Council. A Person who holds an appointment under section 194 of the *Local Government Act 2009*. This includes a person acting in this position.

Council means the Mayor and Councillors of Mackay Regional Council.

DOR means the Department of Resources.

Employee shall mean all persons directly employed by Mackay Regional Council on a permanent, temporary or casual basis.

Encroachment for the purpose of this Corporate Standard and its associated Policy means a situation in real estate where a property owner or permitted occupant(s) violates the property rights of a neighbour (MRC) by making improvements or erecting structures on or over the neighbours' land.

Encroaching Owner means the owner or permitted occupant(s) of the land responsible for the encroachment on MRC Public Land.

Freehold Land means freehold land owned by MRC.

MRC means Mackay Regional Council.

MRC Public Land means Reserve Land/Trust Land and Freehold Land.

Reserve Land/Trust Land means government owned land where MRC is the Trustee for community purpose, includes but not limited to parks, drains, roads and easements.

Land that has been set aside under the *Land Act 1994* for public or community purposes. These are either reserves or deeds of grant in trust and are collectively referred to as 'Trust Land'.

Road as per Section 93 of the *Land Act 1994*:

(1) means an area of land, whether surveyed or unsurveyed-

- (a) dedicated, notified or declared to be a road for public use; or
- (b) taken under an Act, for the purpose of a road for public use.

(2) the term includes-

- (a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route;
- (b) a bridge, causeway, culvert or other works in, on, over or under a road; and
- (c) any part of a road.

5.0 Standard Statement

This standard aims to clearly define the process for managing and rectifying Encroachments on MRC Public Land.

MRC's approach will include:

- Identification and verification of the Encroachment;
- Assessment of the impact of the Encroachment on MRC and the community needs; and
- Determine if the Encroachment is required to be removed or if the Encroachment is able to be formalised either by a Permit to Occupy, Licence or sale of encroached land to the Encroaching Owner.

MRC requires indemnity from liability for an Encroachment from the Encroaching Owner until the matter is formalised or the Encroachment is removed. The deed of indemnity is attached.

5.1 Encroachment Actions

The following actions have been developed as a guide to remedy an Encroachment:

- a) For all Encroachments on MRC Public Land, the Encroaching Owner will first be given a notice to remove and restore the MRC Public Land within a reasonable time frame. A reasonable time frame depends on the nature of the Encroachment and other circumstances but should be no less than thirty (30) days from the letter of notification to remove ("Notice to Remove").
- b) An Encroaching Owner may seek an extension of time to remove the Encroachment to a maximum of six (6) months from the date of the Notice to Remove. An extension of time may be appropriate where the removal of the Encroachment results in:
 - i) financial hardship; and/or
 - ii) other circumstance where a legitimate requirement for extension is demonstrated.
- c) In most circumstances, removal of the Encroachment and land restoration with full cost recovery from the Encroaching Owner to MRC is the most appropriate action. This action is often costly and time consuming, however, this may be an appropriate option when the Encroachment is categorised as moderate or major.
- d) Possible consideration of issuing a Permit to Occupy / Licence to the Encroaching Owner (with conditions) under special circumstances, including where the Encroachment is not inconsistent with the purpose of the MRC

Public Land and the Encroaching Owner does not require exclusive access rights. Appropriate fees and insurances will be applicable.

- e) Where the Encroachment is inconsistent with the purpose of the MRC Public Land and the Encroaching Owner requires exclusive access rights and the Encroachment is not removed, the Encroaching Owner may apply to purchase the encroached land. This option can only apply where:
- Council approval/consent is granted.
 - The area is of negligible open space and or community value.
 - Consultation with the community confirms this view (consultation with the community is only required if the scale of the encroachment impacts on the use of the land for its designated purpose). The Encroaching Owner purchases the encroached land by way of boundary realignment, at market value, and pays all associated costs, including survey plan, registration fees and any rezoning costs.
 - If Reserve Land, the Encroaching Owner must make formal application with DOR and obtain approval from DOR to purchase the encroached land.
 - Note: MRC and DOR where applicable, may consider formal approval of an Encroachment on MRC Public Land with due consideration to a range of criteria including, but not limited to, safety, commercial gain, personal gain, community impact, impact on future use of the subject areas by MRC and/or other public bodies and any legislative constraints.
 - Note: Zonings, purposes and classifications of some MRC Public Land may prevent MRC from formalising any agreement with the Encroaching Owner. The Encroaching Owner would be responsible for the cost of the reclassification process, if possible, and approval to formalise the Encroachment is granted by MRC. Reclassification is at the discretion of MRC and may be refused.

5.2 Notes

- Entering an arrangement with MRC may be subject to bond, annual rent, insurance and rates charges.
- MRC will note the Encroachment on the relevant rates file(s).
- Notice to remove the Encroachment at the Encroaching Owner's expense may be issued by MRC at any time in the future should it be deemed appropriate to do so.

6.0 Program Responsibility

Property Services will upon receiving an encroachment issue, facilitate initial investigations and research required into the matter. Property Services will liaise directly with the Encroaching Owner to discuss the most appropriate way forward to achieve a successful outcome.

Assistance from MRC Health & Regulatory and Legal Services Programs may be required to provide support in dealing with certain matters.

This standard does not apply to Encroachments within road reserves, these matters are managed by the MRC Transport & Drainage Infrastructure Planning Program.

7.0 Review

This Corporate Standard will be reviewed when any of the following occur:

1. The related Policy documents are amended or replaced.
2. Other circumstances as determined from time to time by a resolution of Council.

Notwithstanding the above, this standard is to be reviewed at intervals of no more than three (3) years.

8.0 Attachments

1. Deed of Indemnity

Version Control:

Version	Reason / Trigger	Change	Endorsed / Adopted	Date
1	New Policy/Standard		ORD-2022-278	14/9/2022

INDEMNITY DEED POLL

Given by

_____ (insert name/s) (“**Encroaching Owner**”)
 _____ (insert address) (“**Property**”)
 _____ (insert email)
 _____ (insert contact number)

In favour of **Mackay Regional Council ABN 56 24 721 069** of 73 Gordon Street, Mackay in the State of Queensland (“**Council**”)

Council land encroachment upon (“Land”):	Lot on
Land Tenure:	Title reference: MRC Freehold / Reserve
Encroachment:	Insert detailed description of encroachment. Attach aerial and or identification survey if available.

1. Recitals

- A. Council owns the Land.
- B. The Encroaching Owner has an Encroachment on the Land.
- C. Formalisation of the Encroachment has not been approved by Council, however, the Encroachment may remain in place until Council provides reasonable notice for its removal.
- D. The Encroaching Owner is required to obtain Council’s consent to the Encroachment.
- E. The Encroaching Owner agrees to indemnify and cause future owners of the Property to indemnify Council on the terms of this Deed.

2. Indemnity

- 2.1 The Encroaching Owner is liable for and indemnifies Council from and against all actions, claims, demands, losses, damages, costs and expenses including legal fees and costs and disbursements (“Claim”) arising out of or in any way connected to the Encroachment on the Land (“the indemnified acts or omissions”).
- 2.2 The Encroaching Owner acknowledges that Council will hold the Encroaching Owner liable for any public liability claims made against Council relating to the Encroachment on the Land.
- 2.3 The Encroaching Owner hereby releases and discharges Council from any Claim relating to the indemnified acts or omissions which may be made against Council, save to the extent that the Claim arises as a result of any negligent act or omission of Council.

3. Covenant

- 3.1 The Encroaching Owner is responsible for any maintenance required for the Encroachment.
- 3.2 The Encroaching Owner must provide a Certificate of Currency for Public Liability Insurance for the Encroachment of at least \$20 Million.
- 3.3 This deed is not transferable with change of ownership by the Encroaching Owner. The Encroaching Owner must obtain and provide to Council a signed indemnity from the purchaser/transferee to Council prior to the sale or transfer of the Encroaching Owner's interest in the Property.

EXECUTED as a deed poll by **the**)
Encroaching Owner in the presence of:)

)

Signature of Encroaching Owner

.....

Witness Signature

.....

Signature of Encroaching Owner/s

.....

Date: ____/____/20__

Witness Name