

Road Surface, Airspace and Subsoil Encroachment Policy

1 Policy Statement

There are 3 types of encroachment on roads, they are:

- 1) Structures on the road
- 2) Structures into the subsoil below roads
- 3) Structures in the airspace above roads

Before placing any structure on, under or above a legal road or retaining or excavating any part of legal road the following are required:

- Landowner consent which can be obtained from AT via AT Property, and then
- Any necessary regulatory consents, for example, resource or building consents, which can be obtained from Auckland Council.
- A Corridor Access Request is required for any excavation within the road corridor (apply on the www.beforeudig.co.nz website).

Private use of legal road (solely for private benefit) may be permitted in exceptional circumstances. Any encroachment onto the road surface, subsoil or airspace of a legal road must be authorised by Auckland Transport (AT) and can only remain in place with AT's agreement.

The following items are specifically excluded from this policy. These items are subject to a specific Auckland Transport approval:

- Leases for underpasses,
- Leases for pedestrian walls,
- Leases for occupied space,
- Construction of cellars or excavation in the vicinity of a road.

2 Statutory Provisions

Auckland Transport under powers set down in the Local Government (Auckland Council) Act 2009 Section 46 has the Powers and functions of Council to authorise any encroachment on, above or below an area of road owned by Council and managed and controlled by Auckland Transport, under section 357 of the Local Government Act 1974 (LGA 74)

- Section 341 of the Local Government Act 1974:
 - requires that sufficient airspace remains above the surface of the road for the free and unobstructed passage of vehicles and pedestrians lawfully using the road.
 - provides that Council may grant a lease for any improvements erected or constructed in the airspace or subsoil of roads.
 - provides that Council may permit the temporary occupation of any part of the surface of legal road or airspace above the legal road.
 - provides for facilities under and over the road for the health, safety or convenience of the public.
- Section 338 (1) of the Local Government Act 1974 provides that Council may grant a lease for the laying of conduit pipes under or along any road.

Utility companies also have a statutory right to use legal road, which AT must protect as the supply of the underground utility services benefits everyone in the community. Any damage caused to utilities by surface, airspace or subsoil encroachments must be repaired by the encroacher at their own cost (whether the encroachment has received AT permission or not).

Under section 357(2) of the Local Government Act 1974, AT may not authorise an encroachment, which might obstruct or interfere with the statutory rights of utility operators in relation to roads, without their written consent.

3 Guidelines

Encroachments will be considered on a case by case basis. Auckland Transport will establish and maintain guidelines for consideration of encroachment applications (see associated guidelines).

4 Lease/ Licence Terms and Transfer

The term of the lease will not normally exceed Twenty (20) years however longer terms may be approved if the specific circumstances warrant a longer term. The lease shall include a condition allowing AT to terminate the lease and require removal of the foundations or structure if required for public purposes, upon 6 months' notice.

The term of the licence should not exceed Five (5) years and shall include a condition allowing AT terminating the licence and requiring removal of the foundations or structure if required for public purposes. AT must provide 6 months' notice of the termination and all costs are to be borne by the licence holder.

Licences and leases will not automatically transfer to a new adjoining landowner; they cannot be sold or traded. A replacement encroachment licence/lease in the new adjoining landowner's name may be granted when Transport is notified about the change of ownership, if there are no issues with the encroachment, where:

- any structures are in good repair,
- any outstanding fees have been paid in full,
- the selling adjoining owner is not in breach of the terms of the licence/lease, and
- the licence/lease does not have any special conditions e.g. special termination clauses.

5 Lease/Licence Fees and Charges

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

- A **non-refundable application fee** which is payable to AT for the purpose of assessing the encroachment and, where appropriate issuing a lease/licence that provides for the private occupation of the surface, airspace or subsoil of legal road, and preparing and registering an encumbrance (where required). The fee is also payable where AT undertakes an assessment of an existing encroachment that yet to be leased/licenced.
- An **encroachment administration fee** which is charged for any changes to existing leases/licences. This applies to any changes to a lease/licence holder, use of the road encroachment, or the size of the encroachment.
- An **annual lease fee** for the use of the airspace or subsoil For surface a per square metre rate is chargeable on the rural road encroachments. This is calculated on the adjoining lands rateable land value and divided by the land area to obtain a per square metre rate which is applied to the adjoining encroachment area. A *market rental will be charged for commercial and residential encroachments.

** The market rental will be determined by an independent valuer appointed by AT. The fee associated with the valuation will be paid by the lease applicant/holder. In the case of airspace and subsoil leases, land value per square metre of the road will be assumed to be the same as the land value per square metre (highest and best use) on each side or an average if two different uses or values.*

The annual lease fee will be:

- Either
 - 3% of the freehold land value as annual rental where the encroachment is related to any other purposes except for commercial trading. Provided that if a multi-level encroachment is proposed the rental rate will increase by 1% point for the third and each additional level to a maximum of a 6% rental rate. **Or**
 - 6% of the freehold land value as an annual rental where the encroached land is used for commercial trading
- *Plus* an Annual CPI adjustment

AT may waive the annual fee where an encroachment is created in order to address a public safety concern. Such waivers will be considered under the financial delegations policy.

6 Enforcement

Encroaching on the road surface, airspace or subsoil of a legal road without landowner consent or an encroachment lease/licence is in breach of section 357 of the Local Government Act 1974 and can lead to prosecution. Section 357 “states that every person commits an offence who, not being authorised encroaches on a road and is liable for a fee not exceeding \$1,000 and, where the offence is a continuing one to a further fine not exceeding \$50 for every day the offence continues and may be ordered to pay costs incurred by the council (AT) in removing any such encroachment”.

AT would firstly seek to either have the encroachment removed voluntarily or request the encroacher to apply for an encroachment licence, lease or road stopping if applicable before such action would be considered.

7 Monitoring and Review

This policy will be reviewed as part of the three year review cycle.

8 Definitions

In terms of this Policy, the following definitions apply.

Airspace: is the area, which commences at the height above the surface of a legal road that will allow the unobstructed passage of vehicles and pedestrians lawfully, using the road.

Access ways include driveways, paths, or steps that cross legal road and provide access from the formed legal road to private property. This can include a narrow area of formed or unformed legal road running between two properties to provide public access from one street to another.

Land owner approval is Auckland Transport's consent as the Road Controlling Authority of the Auckland roading network (which includes legal road), to allow legal road to be used for private or commercial purposes. “**N.B. Any consent granted by Council in its capacity as a regulatory authority does not constitute land owner consent**”

A **Lease** confers a legal or equitable estate in the land. The road surface cannot be leased.

Legal road has the same meaning as **road** in the Local Government Act 1974 (Section 315). In short, it covers the total area of land between road boundaries including:

- carriageway (formed road)
- footpath including kerb and channelling, bridges, gates, drains and other places within legal road intended for use by the public
- cycle ways, cycle paths

- land that is legally designated as road but is not currently formed as carriageway or footpath (road corridor, unformed or paper road)
- subsoil below the legal road
- airspace above the legal road

A **Licence** is a mere personal permission to enter the land and use it for some purposes which does not confer any estate in the land on the licensee.

A **subsoil or airspace lease** is a property right to authorise the exclusive occupation of an area such as airspace or subsoil but not the road surface. AT cannot issue a lease on road surface unless it carries out a road stopping and creates a fee simple area of land, it can however grant a surface licence.

Road Encroachment occurs where:

- public access along legal road is restricted by an object, temporary or permanent, which is placed on legal road by a resident/owner with or without prior approval of AT, or
- a deliberate or inadvertent action causes an area of legal road to be used or occupied for private benefit (exclusive or otherwise).

A **road encroachment licence** authorises a right to occupy an area of legal road. However, it does not give the licence holder exclusive possession in the way that a lease would. A licence can be revoked on **one month's** notice or such other terms determined by Transport. It does not provide an interest in the land. A licence can include a condition that public access must be maintained at all time.

A **structure** on, above or below a legal road includes any kind of physical construction or addition such as:

- Parking structures, for example garages, car pads, car decks, car ports
- Access structures, for example retaining walls to support a driveway, gates, covered access ways, steps, ramps.
- Houses/building, for example any part of a primary or secondary building or dwelling, eaves, porches, decks, balconies, conservatories.
- Boundary markings, for example, fences, walls, hedges.
- Verandas or any structures suspended or cantilevered from buildings generally built on boundaries and include canopies, sun blinds and awnings.
- Architectural features, foundation pads, wall beams or piles.

Subsoil means the area beneath the surface of a legal road.

Utility Service providers, these include any utility service providers that are legally entitled to use and occupy the subsoil or airspace for the installation of utility services such as gas, water, power, traffic control, telecommunications, wastewater, storm-water etc. The utility service providers can either be publicly or privately owned.