



# Unauthorised Use of Public Land

# Policy

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<b>Unauthorised Use of Public Land Policy</b>		
Owner: Manager Asset Strategy and Property Management	Area: Property Development and Significant Assets	Policy No: 344
Commencement: 7/12/15	Approval Authority: Council	Date Approved: 7/12/15
Amendment 1	Date of NextReview:7/12/2017	Review: Every 2 years

## 1. Scope

This policy applies to Council owned land under the Local Government Act 1993 and Crown Land managed under a Council Reserve Trust or where Council has care, control and management of that land under the Crown Lands Act 1989 together with other land that Council has the care, control and management of. It also encompasses roads, whether formed or not, where Council is the Roads Authority under the Roads Act 1993.

The Policy is to be read in conjunction with:

- a) Unauthorised Use of Public Land Procedure; and
- b) Other Council Policies as outlined in Section 5(h).

## 2. Policy Objectives

Council will manage the Unauthorised Use of Public Land to:

1. Ensure Public Land remains accessible for the use of all members of the public;
2. Preserve ecological integrity;
3. Preserve recreational amenity;
4. Ensure Council can properly maintain Public Land; and
5. Ensure Council satisfies its legal obligations and administers the intent of the Local Government Act 1993 (LG Act), Crown Lands Act 1989 (CL Act) and Roads Act 1993.

## 3. Definitions

For the purpose of this policy, the following definitions will apply:

***Alleged Unauthorised Use*** means an unverified ***Unauthorised Use***.

***Bushland*** means land on which there is ***Vegetation*** which is either a remnant of the natural ***Vegetation*** of the land or, if altered, is still representative of the structure and floristics of the natural ***Vegetation*** and can also include remnant native canopy trees with a missing or modified understorey.

***Council*** means Parramatta City Council.

***Crown Land*** means land as defined under Section 3 of Part 1 of the Crown Lands Act 1989.

***Enforced Compliance*** means an order issued by Council under the Local Government Act 1993, requiring or prohibiting the doing of things to or on Public Land.

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**Procedural Fairness** means that a decision maker should not only act in good faith and without bias but will also grant a hearing to any person whose interests will be affected by the exercise of that decision before the decision is made.

**Public Land** means any land (including a public reserve) vested in or under the control of Council or a public road where Council is the Roads Authority, but does not include:

- (a) a common; or
- (b) land subject to the *Trustees of Schools of Arts Enabling Act 1902*; or
- (c) a regional park under the *National Parks and Wildlife Act 1974*.

**Roads Authority** means the council of a local government area in accordance with section 7 of the Roads Act 1993.

**Unauthorised Use** means an occupation and/or encroachment, whether fenced or unfenced, of part or the whole of any parcel of Public Land and includes (but is not limited to):

- a) the erection of fencing or other physical barrier, in whole or in part over Public Land, which restricts access to Public Land; and/or
- b) the storage of privately owned objects and materials and other items, such as soil, mulch, compost, vehicles, plant and equipment and/or construction material/s whether temporarily or permanently stored in whole or in part on Public Land; and/or
- c) any other Unauthorised Use as determined by Council.

**Vegetation** means trees (including any sapling or shrub, or any scrub), understory plants, groundcovers (being any type of herbaceous vegetation) and plants occurring in a wetland.

**Voluntary Remediation Agreement** means a formalised agreement which sets out the agreed terms and conditions for removing item/s and/or rehabilitating areas of **Public Land**, an example of which is contained in Annexure A.

## 4. Procedure

Council will follow the *Unauthorised Use of Public Land Procedure* when responding to an Alleged Unauthorised Use of Public Land and to action all verified Unauthorised Uses.

Unauthorised Use of Public Land will be managed with Procedural Fairness.

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## 5. Relationship to Legislation, Strategies, Plans and Policies

The Local Government Act, Crown Lands Act and Roads Act are the primary legislation relating to the Unauthorised Use of Public Land.

### (a) Local Government Act 1993

Council is responsible for managing both operational and community land.

In accordance with Chapter 6, Part 2 of the LG Act. The following provisions in the LG Act apply to community land:

1. Section 45 gives Council no power to sell, exchange or otherwise dispose of community land;
2. Section 47D (1) prohibits the exclusive occupation or exclusive use by any person of community land otherwise than in accordance with a lease, licence of other estate;
3. Section 47B precludes the granting of a lease or license for private residential purposes on land categorised as a natural area; and
4. Section 46 (2) specifies that the granting of a lease or license must be in accordance with the applicable core objectives for community land (Sections 36E to 36N) which are inconsistent with private residential purposes.

Section 124 (Orders 27 – 29) of the LG Act empower Council with the regulatory mechanisms to deal with the Unauthorised Use of Public Land.

### (b) Crown Lands Act 1989

Council also manages land on behalf of state authorities. In instances where the Unauthorised Use of Public Land occurs on land under the care, control and management of Council or on land managed under a reserve trust, provisions of the LG Act apply. Section 98 of the CL Act devolves to Council the ability to use provisions of the LG Act in relation to land where Council is the manager of a reserve trust.

### (c) Roads Act 1993

Council is the Roads Authority pursuant to Section 7 of the Roads Act 1993, as follows:

#### Section 7 - Roads authorities

- (1) RMS is the roads authority for all freeways.
- (2) The Minister is the roads authority for all Crown roads.
- (3) The regulations may declare that a specified public authority is the roads authority for a specified public road, or for all public roads within a specified area, other than any freeway or Crown road.
- (4) The council of a local government area is the roads authority for all

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- public roads within the area, other than:
- (a) any freeway or Crown road, and
  - (b) any public road for which some other public authority is declared by the regulations to be the roads authority.
- (5) A roads authority has such functions as are conferred on it by or under this or any other Act or law.

**(d) State Environmental Planning Policy 19 (Urban Bushland)**

This policy aims to protect and preserve bushland within urban areas and under Clause 6 (1) a person shall not disturb bushland zoned or reserved for public open space purposes without the consent of the council.

**(e) Real Property Act 1900**

Under Section 45D (3) of the Real Property Act 1900, a possessory application may not be made in respect of an estate or interest in any land, or in any part of any land of which the Crown or Council, within the meaning of the LG Act, is the registered proprietor. To reinforce that public land cannot be claimed by a private individual.

**(f) Encroachment of Buildings Act 1922**

This legislation deals with the encroachment by a building onto adjoining land and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil of adjoining land.

**(g) Surveying and Spatial Information Act 2002**

This legislation deals with the provision of authority for survey work to be undertaken.

**(h) Related Strategies, Plans and Policies**

This Policy must be implemented in conjunction with adopted or draft Council Plans of Management and other plans and policies, including, but not limited to, the following:

- 1) Parramatta City Centre Local Environmental Plan 2007;
- 2) Parramatta Local Environmental Plan 2011;
- 3) Community Land Plan of Management (2014);
- 4) Lake Parramatta Reserve Plan of Management (2012);
- 5) Baludarri Wetland Plan of Management (2010);
- 6) Biodiversity Plan (2003);
- 7) Open Space Plan (2003);
- 8) Development Control Enforcement Policy (Policy 136);
- 9) Volunteer Bushcare Program Charter And Policy (Policy 195);
- 10) Environmental Policy (Policy 282);
- 11) Local Orders Policy including The Keeping Of Birds And Animals (Policy 135);
- 12) Policy 236 - Outdoor Dining Policy; and
- 13) Policy 240 – Retail Trading in Public Spaces Policy.

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## 6. Administration

### Authorisation

This policy was adopted by Council on 7/12/15.

### Review

This policy will be reviewed every 24 months or when legislative changes affect the policy.

### Version

Version	Date Adopted	Date superseded
1	7/12/15	

### Owner

The owner of this policy is Asset Strategy and Property Management.

### Implementation

The Policy will be implemented by Managers with appropriate delegation.

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## Unauthorised Use of Public Land

# Procedure



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## Attachments:

- Attachment 1 – Voluntary Compliance Agreement
- Attachment 2 – Deed Permitting Lodgement of Caveat

<b>Unauthorised Use of Public Land - Procedure</b>		
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Commencement:7/12/15	Approval Authority: Council	Date Approved:
Amendment 1	Date of Next Review: 7/12/17	Review: Every 2 years

## 1. Scope

This procedure applies to land defined in the Scope of the Unauthorised Use of Public Land Policy.

## 2. Purpose

The purpose of this Procedure is to administer the *Unauthorised Use of Public Land Policy*.

## 3. Definitions

As defined by the Unauthorised Use of Public Land Policy.

## 4. Policy Objectives

Council will manage the Unauthorised Use of Public Land to:

1. Ensure Public Land remains accessible for the use of all members of the public;
2. Preserve ecological integrity;
3. Preserve recreational amenity;
4. Ensure Council can properly maintain Public Land; and
5. Ensure Council satisfies its legal obligations and administers the intent of the Local Government Act 1993 (LG Act), Crown Lands Act 1989 (CL Act) and Roads Act 1993.

## 5. Procedure

In summary, Council will:

### Step 1 – Verify, Assess and Prioritise

Verify if an Alleged Unauthorised Use exists.

Assess and prioritise a verified Unauthorised Use.

### Step 2 – Notify

Notify the affected owner and/or occupier and notifier.

### Step 3 – Action

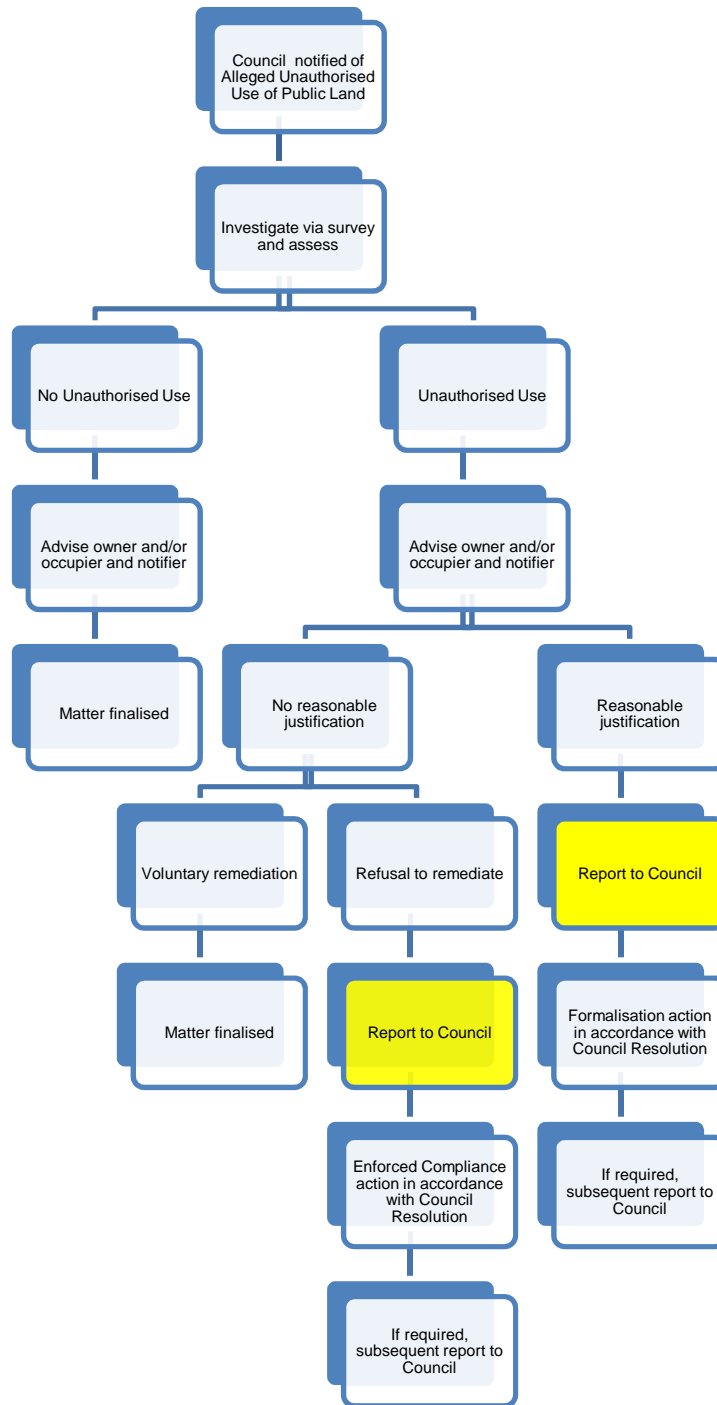
3.1 - Voluntary Remediation.

3.2 - Enforced Compliance.

3.3 - Reasonable Justification.

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This is illustrated in the Flowchart below.



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The detailed Procedure is:

## Step 1 – Verify, Assess and Prioritise

Following the detection or the reporting of an Alleged Unauthorised Use, Council will:

- i. Survey the boundary of the land on which the Alleged Unauthorised Use is situated;
- ii. Exercise any necessary power of entry or inspection function in accordance with provisions of the LG Act;
- iii. Investigate all reports of Alleged Unauthorised Uses in a consistent and impartial manner;
- iv. Refer any Unauthorised Use pertaining to land owned/managed by external (State) land management agencies or private property owners for management action;
- v. Review relevant property files to determine the incidence of past Unauthorised Uses and to obtain other relevant information.
- vi. Determine if either an:
  - a) Unauthorised use doesn't exist; or
  - b) Unauthorised use does exist.

If an Unauthorised Use does exist, the Policy objectives will be used to assess and prioritise any action by Council as either:

- a) Removal of the Unauthorised Use via Voluntary Agreement or Enforced Compliance, or
- b) Approve and acknowledge the use where it is deemed reasonable justification exists based on the circumstances of the case.

## Step 2 - Notification Process

When an Alleged Unauthorised Use has been determined not to exist, Council will:

- a) Ensure the owner and/or occupier of land from which the Alleged Unauthorised Use was thought to emanate from, is advised that no Unauthorised Use exists; and
- b) The person, who advised Council that an Alleged Unauthorised Use existed, is advised that no Unauthorised Use exists.

When an Alleged Unauthorised Use has been verified as an Unauthorised Use, Council will:

- i. Ensure the owner and/or occupier of land from which the Unauthorised Use emanates, receive a letter outlining the Unauthorised Use;
- ii. Provide the owner and/or occupier of land from which the Unauthorised Use emanates, a plan indicating unauthorised structures, measurements and any necessary property dimensions for the purpose of illustrating the existence and scope of the Unauthorised Use; and
- iii. Arrange a meeting with the owner and/or occupier to discuss the Unauthorised Use of Public Land.

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## Step 3 – Action

### 3.1 - Voluntary Remediation

Where the owner and/or occupier of land, from which an Unauthorised Use emanates, agree to voluntarily comply with remediation directives, Council will:

- i. Formalise arrangements in a Voluntary Remediation Agreement (VRA) (see **Attachment 1** for VRA template) to ensure equity and consistency in voluntary remediation;
- ii. Guide and support the owner and/or occupier of land in the removal of objects and structures from Public Land;
- iii. Not assume any responsibility for damages or mishaps to persons or property whilst engaged in the removal of private objects or structures from Public Land;
- iv. Accept as true and correct any current survey conducted and certified by a registered surveyor that confirms or refutes Council's assumptions regarding an Unauthorised Use;
- v. Provide an owner and/or occupier with an approximate indication of the boundary between private and Public Land, unless otherwise signified by a registered surveyor;
- vi. Upon written notification of a change of circumstances by an owner and/or occupier, generally review the fairness of the terms prescribed in the VRA.
- vii. Upon a written request, consider reasonable variations or extensions to the specific terms in a VRA issued by Council;
- viii. Exercise any right under the VRA should the terms and/or conditions stated in the VRA not be satisfied within the time specified, without reasonable excuse, including, but not limited to;
  - a. Remediation of an Unauthorised Use;
  - b. Recovery of a debt of remediation by Council;
  - c. Service of an order under the LG Act.

### 3.2 - Enforced Compliance

Where the owner and/or occupier of land, from which an Unauthorised Use emanates, denies the validity of the Unauthorised Use or generally refuses to comply with remediation directives staff will recommend Enforced Compliance to Council for consideration. In this case, Council will:

- i. Demonstrate procedural fairness when exercising regulatory functions;
- ii. Retain the right to issue an order in accordance with provisions of the LG Act and Regulation;
- iii. Commission a property boundary survey from a registered surveyor prior to the service of an order or at any other occasion deemed necessary;
- iv. Ensure all orders promote the option to enter a Voluntary Remediation Agreement with a period for compliance not being less than the period specified in the order;
- v. Retain final determination as to the standards or extent that an order must be satisfied taking into consideration any representations made against the terms of an order or against the order generally during the period allocated for representations to be made;

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- vi. Hear any representations received against a proposed order by Council's nominated delegate and provide a single consultative session to all residents wishing to debate the terms of an order;
- vii. Retain the right to undertake whatever measures are necessary to give effect to the terms of an order, including the carrying out of any work required by the order and recovering costs;
- viii. In relation to a significant and obvious Unauthorised Use, retain the right to undertake whatever measures are necessary to give effect to the terms of an order, including the carrying out of any work required by the order and the recovery of all costs;
- ix. Serve all orders in respect of land owned or occupied by more than one person to both persons (if aware of their existence or requested to do so);
- x. Revoke or modify any orders when proven inconsistent with a registered survey;
- xi. Ensure all orders are appropriately re-inspected within 7 days following the date for compliance;
- xii. Retain the option to serve penalty infringement notices for non-compliance with Council orders;
- xiii. Not undertake court proceedings for an Unauthorised Use without prior review and approval from the relevant Group Manager and Council delegate authorised to approve for matters to be held in Court.

### 3.3 - Reasonable Justification

In a circumstance where it is assessed there is reasonable justification for an Unauthorised Use to remain, when considered in the context of the Policy, staff will report the matter to Council.

If the reasonable justification is of a permanent nature, appropriate arrangements will be made to formalise the use of the Public Land, such as an easement, licence, lease or any other approved method, to protect Council's interests.

If the reasonable justification is of a temporary nature, appropriate arrangements will be made to formalise the use of the Public Land by a VRA. To ensure Council's interests are protected, a Deed that will permit Council to lodge a caveat over the adjoining subject property will also be required to be entered into.

A Deed Permitting Lodgement of Caveat template is at **Attachment 2**.

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## 6. Data Management

A database (register) will be established to record information on Unauthorised Uses being assessed and what actions have been taken on verified Unauthorised Uses.

This register of will act as a case history reference to help with the consistent implementation of the Policy and Procedure.

## 7. Dispute Resolution

The Director of the relevant Council Departmental Unit will consider mediation between Council and the property owner, and/or occupier, when necessary.

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# Attachment 1

## **VOLUNTARY COMPLIANCE AGREEMENT**

**BETWEEN**

**PARRAMATTA CITY COUNCIL**

**AND**

**[LAND OWNER]**

**Property: [ADDRESS OF ADJOINING LAND]**



**THIS AGREEMENT** made the                      day of                      20XX

**BETWEEN**            **PARRAMATTA CITY COUNCIL** of 30 Darcy Street, Parramatta (**the Council**) of the one part

**AND**                    **[LAND OWNER]** of [Address], [Suburb] (**the Adjoining Owner**) of the other part.

**WHEREAS**

- A.            The Adjoining Owner is the owner of the land described in the First Schedule (**the Adjoining Land**).
- B.            The Council is the owner/has the care, control and management of the land described in the Second Schedule which is also known as [**NAME OF PARK/RESERVE**] (**the Council Land**).
- C.            There [are/is an] unauthorised [structures/structure] erected on the Council Land by the Adjoining Owner which encroaches on the Council Land.
- D.            The Adjoining Owner has agreed to remedy the unauthorised use on the Council Land by taking all necessary steps to remove the unauthorised use and to restore the Council Land to its original condition.
- E.            The Adjoining Owner agrees to pay all costs in remedying the unauthorised use and restoring the land to its original condition.

**NOW THIS DEED WITNESSETH**

1. The Adjoining Owner agrees to take all necessary steps, including but not limited to the removal or demolition of all unauthorised structures, to remedy the unauthorised use on the Council Land and restore the Council Land to its original condition.
2. Any steps or works to be completed by the Adjoining Owner are to be completed as expeditiously as possible and within a reasonable time. For the purpose of this clause [XX weeks] is deemed to be a reasonable time.
3. Before the Adjoining Owner undertakes any of the necessary steps or works, it must notify the Council of the commencement of the necessary steps or works on the Council Land.

4. The Council agrees to guide and support the Adjoining Owner in the removal of unauthorised structures from the Council Land.
5. The Council agrees to provide the Adjoining Owner with an approximate indication of the boundary between the land of the Adjoining Owner and the Council Land.
6. In the event that the Adjoining Owner fails to undertake the necessary steps or works to remedy the unauthorised use and restore the land or fails to complete such steps or works within a reasonable time, the Council may issue the Adjoining Owner with a formal notice pursuant to the *Local Government Act 1993* or the *Crown Lands Act 1989* and if not complied with shall entitle the Council to remove the unauthorised use at the expense of the Adjoining Owner.
7. If the Council exercises its powers under Clause 6, the Adjoining Owner agrees:
  - (a) that the unauthorised structures forming the unauthorised use remains the property of the Adjoining Owner; and
  - (b) the Council in removing the unauthorised use shall deliver to the Adjoining Owner their property by placing it on the land of the Adjoining Owner; and
  - (c) If the Adjoining Owner disputes the delivery of their property onto their land, the Council shall retain such property for [XX] days before being entitled to sell, dispose or alienate the property by any means they are legally entitled to do.
8. In exercising its powers under Clause 6 the Council agrees to provide written notification to the Adjoining Owner to inform them of their intention to remove or otherwise dispose of the unauthorised structures and Adjoining Owner's property left on the Council Land within 14 days to the commencement of any steps or works.
9. The Council in exercising its powers under Clause 6 shall be entitled to recover from the Adjoining Owner costs in relation to:
  - (a) remedying the unauthorised use;
  - (b) restoring the Council Land to its original condition; and
  - (c) enforcement action for illegal work or unlawful and unauthorised occupation of Council Land.

For the purpose of Clause 9,

**“enforcement action”** means any steps or actions undertaken by the Council in remedying the unauthorised use and restoring the Council Land including but not limited to removing structures, delivering property to the Adjoining Owner and selling, disposing or alienating the Adjoining Owner’s property.

10. The Adjoining Owner agrees to pay all costs in undertaking the necessary steps or works in remedying the unauthorised use and restoring the Council Land to its original condition.
11. Upon written request to Council the Adjoining Owner may request Council to grant a single time extension of two weeks for compliance with the terms of this Agreement. The granting of such an extension will be at the discretion of the enforcing officer of the Council.
12. Upon written request to Council by the Adjoining Owner notifying the Council of a change of circumstance, the Council will review the fairness of the terms of this Agreement and should it be necessary amend this Agreement to ensure procedural fairness is maintained.
13. Within [XX] days following the Adjoining Owner notifying the Council of completion of the steps and works to remedy the unauthorised use and restore the Council Land to its original condition, the Council is to inspect the site to ensure the unauthorised use has been removed and the Council Land has been restored to its original condition.
14. The Council as the owner, carer and controller and manager of the Council Land will determine by an objective assessment whether the Council Land has been returned to its original condition on completion of the necessary steps and works in remedying the unauthorised use and restoring the land to its original condition.
15. The Adjoining Owner and their agents agree to indemnify and hold indemnified the Council from and against all claims, demands, remedies, suits, injuries, damages, losses, costs, liabilities, actions, and the like arising out of or as a result of the actions of the Adjoining Owner, its invitees, servants or agents in remedying the unauthorised use and restoring the Council Land to its original condition.
16. The Adjoining Owner will obtain and keep a current insurance policy covering public liability in an amount not less than [\$\$\$] and will provide the Council with a Certificate of Currency as evidence of such insurance.

17. Notwithstanding Clause 16 of this Agreement, should the Adjoining Owner begin to take the necessary steps for the removal of the unauthorised use and restoration of Council Land without public liability insurance, the Adjoining Owner does so at their own risk and cannot make a claim or demand, seek remedies, damages, costs, commence suits or take actions, and the like against Council.
18. Nothing in the Agreement shall prevent the Adjoining Owner or the Council from applying to the Land and Environment Court for relief under the *Encroachment of Buildings Act 1922*.

**IN WITNESS WHEREOF** the parties hereto have hereunto set their hands and affixed their seals on the day and year hereinbefore written.

**The Common Seal of PARRAMATTA CITY COUNCIL** )  
was hereunto affixed this )  
[XX] day of [MONTH] 20[XX] pursuant to a )  
resolution of Council passed at its meeting held on )  
the [XX] day of [MONTH] 20[XX]

.....

LORD MAYOR

.....

.....

CHIEF EXECUTIVE OFFICER

Signed by the said **[LAND OWNER]** in the presence )  
of: )

.....

.....

Witness

## SCHEDULES

<b>FIRST SCHEDULE</b>
[Details of Adjoining Land]

<b>SECOND SCHEDULE</b>
[Details of the Council Land]

# Attachment 2

## DEED PERMITTING LODGEMENT OF CAVEAT

**THIS DEED** made the                      day of .....2015

**BETWEEN**        **The Council of the City of Parramatta of 126 Church Street, Parramatta (“Council”)** of the one part,

**AND**                **[NAMES] of [ADDRESS] (“the Owner”)** of the other part

### IT IS AGREED AS FOLLOWS:

1.        The Council is the registered proprietor of the public reserve described in the First Schedule (the **“Council Land”**).
2.        The Owner is the registered proprietor of the land described in the Second Schedule (the **“Owner’s Land”**).
3.        The Owner acknowledges that the buildings **[SPECIFY BUILDING OR OTHER MATERIAL]** used in conjunction with the Owner’s land encroach and/or are located **[WHOLLY/PARTLY]** onto the Council land (**“the unauthorised use”**).
4.        The Owner agrees to remove the unauthorised use/s from the Council land at their own cost prior to any sale, transfer or assignment of the Owner’s land (**“the removal works”**). This work must be carried out pursuant to the following:
  - a.        Prior to carrying out the removal works, the Owner must obtain all necessary approvals and consent to carry out those works,
  - b.        The removal works must be carried out in a proper and workmanlike manner,
  - c.        Upon completion of the removal works, the area of the Council land affected by the unauthorised use must be restored to a condition which is satisfactory to the Council, and
  - d.        The Owner indemnifies the Council from all claims or actions arising from the removal works on Council land.
5.        Subject to the terms of this Deed, the Council has agreed not to take any action requiring the removal of the unauthorised use.
6.        The Council and the Owner agree that the cost of the removal of the unauthorised use is **[\$[AGREED FIGURE]]**.
7.        The Owner agrees to charge the Owner’s land with the amount of **[\$[AGREED FIGURE]]** in favour of the Council.

8. The Owner agrees that the terms of this Deed entitle the Council to a caveatable interest in the Owners land, and consents to the Council lodging a caveat over the Owner's land to protect its interests under the Deed.
9. The owner agrees to pay the Council's costs of the preparation of this Deed and lodgement of the caveat. The Owner further agrees that Council has recommended that they obtain legal advice in respect of this Deed.
10. Once the removal of the unauthorised use has been carried out to the reasonable satisfaction of Council, the Council will release the charge over the Owners land and remove the caveat.