POLICY TITLE: Building Over or Adjacent to an Easements (BOE) Policy

POLICY TYPE: Management

DIRECTORATE: Planning and Development

1. Background

Easements on private property can accommodate Council stormwater drains which service surrounding properties. Easements may also contain services not managed by Council such as gas, sewer and water. A Council easement may not contain a drain but may be required for later use or as an overland flow path (see Figure 1 as an example).

Easements are registered on a property’s Certificate of Title and provides a right of access to the relevant authority. Proposed private works over or adjacent to an easement must be approved by each authority with an interest in the easement.

2. Purpose

The objective of this policy and accompanying procedure manual is to provide clear guidelines where works involve building over or adjacent to a Council easement and is intended for use by Council officers, utilities, private developers and residents.

This policy provides clear and consistent instructions on maintaining the best interests of Council and statutory authorities when a property owner requests to build over or adjacent to an easement (BOE). Best interests may include protecting a Council drain or other asset within an easement, maintaining future access or use of an easement, and, maintaining an unobstructed overland flow paths.
3. **Scope**

This policy covers the installation of any item that: imposes a load over or adjacent to an easement; limits access to or over an easement; or, limits the future use of an easement.

4. **Definitions**

**Easement:** a section of land that may be registered on the Certificate of Title that provides Council or a statutory authority the right to enter a property for the purpose of maintaining, repairing, upgrading or installing services within the easement.

**Private drain:** a drain designed to directly service a private property. A private drain is the responsibility of the property owner and may be located within a private property, easement or Council reserve so as to be able to connect to the Council stormwater system.

**Section 173 agreement:** an agreement entered into by Council and a property owner under section 173 of the *Planning and Environment Act 1987* (Vic) that is recorded on the Certificate of Title. The conditions of the agreement are to be maintained on the Title indefinitely regardless of change in property ownership.

**Statutory authority:** a public or privately operated entity which provides water, sewerage, drainage, gas, electricity, telecommunication or other like services under the authority of an act of the Victoria or the Commonwealth governments.

5. **Responsibility**

**Technical Services**
- assess BOE application and record on Council database
- ensure the local stormwater system functions adequately and meets Council requirements for the wider system
- draft and register Section 173 Agreement on Certificate of Title
- provide guidance on construction methods and materials required to meet Council requirements

**Infrastructure Services**
- maintain drainage assets located within easements
- provide advice on methods of maintaining drainage assets within an easement

**Statutory Planning**
- assess any proposed structures and seek advice from Technical Services regarding BOE approval
- ensure advice provided regarding BOE is consistent with the policy
- ensure conditions of the planning permit or BOE approval have been satisfied

**Building, Health and Property Services**
- respond to breaches of the *Building Regulations 2006* (Vic)
- provide details of Council requirements to private building surveyor
6. Legislation

This policy has been developed with consideration to the following legislation:

- Building Act 1993 (Vic)
- Building Regulations 2006 (Vic)
- Local Government Act 1989 (Vic)
- Planning and Environment Act 1987 (Vic)
- Road Management Act 2004 (Vic)
- Subdivisions Act 1988 (Vic)
- Water Act 1989 (Vic)

7. Policy

It is Council policy to only allow building over or adjacent to an easement where: the Council stormwater system will not be damaged or adversely impacted; access to and within the easement is maintained; and, the overland flow paths is not obstructed.

8. Consultation

In developing this policy the following departments were consulted:

- Building, Health and Property Services
- City Planning
- Infrastructure Services
- Legislative Services and Support
- Operations Delivery
- Statutory Planning
- Technical Services

9. Related Documents

- Melbourne Water, 2009, Build Over Guide
- Moonee Valley City Council, 2015, Asset Protection Policy
- Moonee Valley City Council, 2012, Drainage Design Checklist
- Moonee Valley City Council, 2005, Drainage Improvement Study
- Moonee Valley City Council, 2015, Legal Point of Discharge Policy
- Moonee Valley City Council, 2015, Planning Scheme
- Moonee Valley City Council, 2013, Road Management Plan
- Moonee Valley City Council, 2006, Stormwater Drainage Requirements for Development Works

For further information including the Building Over Easement application refer to the following Council website:
An easement serves the purpose of providing access to an existing or proposed service, or, protect an overland flow path so as to prevent flooding. Details of an easement are placed on the Certificate of Title and allow the property owner to make an informed decision before purchasing a property. It is the obligation of the property owner that development or use within or adjacent to the easement is appropriate and does not prevent its intended use.

Before a BOE application is assessed the following items must be provided:

- Completed application form and payment
- Current copy of the Certificate of Title
- Copy of written approval from City West Water, or other service authority with vested interest over the easements (where applicable)
- Confirmation of the absence of a Council drain within the easement, or, confirmation the drains location, depth and size
- Structural engineering plans and calculations must be submitted for structures which also require a building permit
- Two copies of a scaled plan indicating the easement location and the proposed building or structure to be built over the easement or drain
Consideration of BOE application

The following tables provide a summary of BOE applications outcomes based on condition of the proposed development.

<table>
<thead>
<tr>
<th>Schedule One</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposed works are either non-permanent, or, adjacent but outside of an easement.</td>
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<tr>
<td>The following structures will generally be considered when assessing a BOE application, provided they meet other criteria detailed in this policy:</td>
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<tr>
<td>• Carports and patios: independently supported sidewalls, open at either end, have a non-structural floor section and provide a minimum clearance of 2500 mm at either opening</td>
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<tr>
<td>• Eaves: minimum vertical clearance of 2500 mm where they overhang an easement</td>
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<tr>
<td>• Sheds: lightweight demountable sheds less than 10m$^2$ in area</td>
</tr>
<tr>
<td>• Balconies: cantilevered from the dominant structure and provide a minimum clearance of 2500 mm over the easement</td>
</tr>
<tr>
<td>• Decking: no higher than 1200 mm from the finished ground level, constructed of lightweight materials, unroofed and demountable</td>
</tr>
<tr>
<td>• Retaining walls and fill (&lt; 1m height): Footings must not interfere with the Council drain as specified or access to the drain, clean fill material less than 1m in depth (no large rocks or waste), and, plants must be shallow rooted.</td>
</tr>
<tr>
<td>• Fencing: Paling, sheet metal, glass, pool and picket fencing</td>
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<tr>
<td>• Concrete paving: concrete paving with a maximum depth of 125 mm (residential specification)</td>
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<tr>
<td>• Other paving: paving on a sand base</td>
</tr>
<tr>
<td>• Standard vehicle crossing: intended for standard cars with construction joints corresponding to the easement extent. (note: this does not cover heavy vehicle crossings)</td>
</tr>
</tbody>
</table>
Schedule Two
Where a permanent building is proposed that will impose a significant load on an existing or future drain, reduce the soil cover of a drain, prevent access within the easement, or, obstruct overland flow. The following structures **will not** be considered for approval without significant sufficient reason:

| Any structure within the easement that includes habitable room/s |
| Any structure within the easement that is integral to the overall building by sharing a roof, trusses, foundations, guttering, drainage, electrical or plumbing services |
| Any structure that is self-supporting and transfers loads in such a way as to adversely impact underground drains including Council drains located in neighbouring properties |
| Any structure with a minimum clearance less than 600mm from a Council drain, including a drain that may be located within a neighbouring property |
| Any structure that will cause the Council drain to have less than 600mm cover |
| Any structure or footing where a Council drain is within the 45 degree angle of repose |
| Any structure with a slab foundation where more than 50% of the foundation is to be built on the easement |
| Any structure that will restrict or prevent a future Council drain from being constructed within the easement |
| Any structure that will restrict or prevent access to an existing Council drain |
| Any structure that will restrict or prevent an existing overland flow path from being maintained |
| Any wall constructed of brick, stone or concrete requiring engineered footings |
| Any building constructed of brick, stone or concrete requiring engineered foundations (e.g. carports, garages or sheds) |
| Driveways providing access for heavy vehicles or storage |
| Landscaping contain large trees (>3m) or trees and shrubs with invasive roots |
| Above and below ground swimming pools |
Schedule Three
Where there is a drain present within the easement but the proposed works are minor and pose little risk to Council drainage, and, do not hinder access to or through the easement.
Those exempt from consideration are:

- **Landscaping**: Where shallow rooted shrubs and ground cover are used, no approval is necessary
- **Minor Paving**: Brick formed over a sand base for pedestrian traffic
- **Garden Edging**: Minor garden edging using sleepers, bricks or other lightweight edging materials

**Note**: Should an application not meet the conditions under Schedule 2, or, not covered under the schedules a property owner may still submit an application with supporting information showing the proposed use of the easement does not:

- adversely impacts Council assets
- limit access to the Council easement or assets
- obstruct an overland flow path

Approval or rejection of the application will be at the discretion of Council, and approval may depend on amending the proposed design.

**Unrecorded Council assets**
Although Council continues to improve and overcome deficiencies in its recording of underground drains there remains gaps in Council’s understand of drainage in older areas where plans are no longer available. For this reason occasionally an unrecorded or inaccurately recorded drain is discovered during development of a site. To overcome this problem and prevent damaging an unrecorded Council drain it is a condition of the BOE application that absence or location of a Council drain is confirmed.

If during development, despite earlier investigation, a drain is discovered within or in the vicinity of the easement the developer must stop works and notify Council immediately. A Council Engineer will assess the site and may require the property owner enter a Section 173 Agreement, or, modify the proposed development.

**Redundant easements**
At the time of sub-division a property may have an easement placed on the Certificate of Title for the provision of future drainage. Occasionally, where an area is later serviced by alternative drainage and there is unlikely to be a need for the easement Council may consider an application to remove or amend the easement from the Certificate of Title.

**Approvals requiring a Section 173 Agreement**
Where BOE approval has been granted for an easement containing an existing or future drain, it will be on the condition the property owner enter a Section 173 Agreement with Council. A Section 173 Agreement serves as notice on the Certificate of Title to future owners of the property any structures within the easement must be removed should Council need access in the future.
Including an additional professional fee for registering with the Titles Office the Section 173 Agreement process involves the following steps:

1) BOE application assessed and letter issued by Council indicating approval will be granted on the provision a Section 173 Agreement is entered into
2) Council drafts a Section 173 Agreement outlining all conditions agreed to by Council and the property owner
3) Council sends the Agreement to the property owner
4) Property owner reads and signs the Agreement and returns to Council with lodgement fee
5) An authorised Council Director signs the Agreement
6) Council lodges the Agreement with the Titles Office
7) Titles Office adds the conditions of the Agreement to the Certificate of Title for the property

Private drains within Council easements
On occasion, a private drain may be located within the easement and connect to the Council stormwater system via a neighbouring property. Such a connection may be informal or by way of a drainage rights agreement with the neighbouring property owner. Private drains remain the responsibility of the property owner and are not recorded or maintained by Council including private drains located with the easement.

Where a private drain has been discovered within the easement Council must be notified immediately. If there is no practical alternative to drain the property other than via the easement an easement drain will need to be formalised and transferred to Council. If the existing private drain is not constructed to Council standards it will need to be replaced at the expense of the property owner. A Council easement drain must meet the following requirements:

- minimum service life
- accessibility for inspection and maintenance
- minimum capacity for a 1 in 5 year storm event
- able to withstand anticipated surface loads / sufficient cover
- Council provided with ‘as constructed’ drawings

For further details refer to the Council Stormwater Drainage Requirements for Development Works.

Unauthorised structures built over an easement
Where a structure has been built over an easement without approval the property owner may be required to remove the structure.\textsuperscript{12}

\textsuperscript{1} Section 310 of the Building Regulation Section 2006 (Vic)
\textsuperscript{2} Section 148 of the Water Act 1989 (Vic)
Where an unapproved structure has been identified but may otherwise have been approved the property owner will be given the option of submitting an application instead of having the structure removed. Approval is still required which may be conditional on additional works and/or entering a Section 173 Agreement with Council.

**BOE application checklist**

A summary of BOE assessment criteria is as follows:

**Application requirements**

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the development require a planning permit and has this been issued by Statutory Planning?</td>
<td>Requirement – Planning permit must be included with application</td>
</tr>
<tr>
<td>Does the proposal have the written approval of all affected service authorities?</td>
<td>Requirement – Approval from affected authority must be provided with application</td>
</tr>
<tr>
<td>Has the absence or location of the drain been confirmed?</td>
<td>Requirement – Property owner to confirm the absence, or, location of drain and the impact of structure on drain, i.e. loads.</td>
</tr>
</tbody>
</table>

**Easement considerations**

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Easement contains a Council drain</td>
<td>Approval declined – unless acceptable engineered design</td>
</tr>
<tr>
<td>Easement does not contain a Council drain but a drain may be required in the future and/or the easement may be required for access and/or an overland flow path runs through the easement</td>
<td>Conditional approval - dependant on intended use and may be declined</td>
</tr>
<tr>
<td>Easement does not contain a Council drain, a Council drain is not required in the future, access via the easement is not required and no overland flow path through the easement</td>
<td>Conditional approval – easement to be removed from Certificate of Title prior to commencement of works</td>
</tr>
<tr>
<td>Are there private drains within an existing easement?</td>
<td>Conditional approval – acceptable engineered design and existing drain to Council standards or re-built to Council standards</td>
</tr>
</tbody>
</table>
### Structural considerations

<table>
<thead>
<tr>
<th>Consideration</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are there habitable rooms proposed over the easement?</td>
<td>Approval declined</td>
</tr>
<tr>
<td>Is there any integral part of the dominant structure over the easement?</td>
<td>Approval declined</td>
</tr>
<tr>
<td>Are the footings or cover likely to interfere with the easement or Council asset?</td>
<td>Conditional approval – structure must be lightweight, independent structure with angle of repose clearing underground drain</td>
</tr>
<tr>
<td>Are footings or proposed structure located within the easement self-supporting?</td>
<td>Conditional approval – structure must be self-supporting to ensure access to Council drains within easement</td>
</tr>
<tr>
<td>Does the structure allow for overland flow?</td>
<td>Conditional approval - Evidence overland flow is not affected, e.g. footings should be pier or stumps, providing adequate clearance from underground services</td>
</tr>
</tbody>
</table>