

# Build Over Easement Guidelines

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## **1 What is a build over easement?**

A build over easement is when a property owner plans to build or place a private structure on, near or above an easement or drain. A build over easement of any Council drainage easement cannot occur without the Report and Consent of Council. If consent is granted the property will be required to enter into a Build Over Easement Agreement.

A Build Over Easement Agreement, is a legally binding document entered into between Mitchell Shire Council and the property owner that protects Mitchell Shire Council's continuous rights of access to the easement if the build over is approved. This agreement is considered to be in effect for the life of the structure or works conducted over the easement.

Residents must get consent from Council to build over an easement that is vested in Council. But other Agencies or Authorities such as Power, Gas and Water Corporations, may also have an interest in the easement. If so the property owner must also get consent from each of the interested Agencies or Authorities.

### **1.1 What is an easement?**

An easement is a section of land registered on your Property Title that gives Council, or other nominated agencies or authorities, access rights through your property. Council will typically use these access rights for the installation and maintenance of essential drainage infrastructure.

An easement will most commonly be situated along a property boundary, but it can be anywhere on your property. Many easements will already contain essential services providing:

- Storm water drainage;
- Sewerage;
- Water supply, power, gas or telecommunications infrastructure;
- Overland flow paths for storm flows;
- Right of way for vehicles or pedestrians; and
- Reserves for overhead power lines.

Easements vary in width depending on their intended function and the type of assets that are contained within them. A typical width for a drainage easement is between 1.8 - 3.0m. However wider and narrow widths are not uncommon and a flood way easements can be much wider as required to meet flood requirements.

Mitchell Shire Council requires continual access to easements in order to ensure that its existing drainage network continues to provide reliable service and to connect new and existing developments to constructed drains.

Easements should appear on a copy of your properties certificate of title, although in some instances where an asset exists in the ground and no easement exists on title, an implied easement will exist.

## 1.2 What is an implied easement?

If a Council Drain has been constructed either underground or via surface flow through a swale or table drain within your property and there are no easements on your title, an Implied Easement still exists around the drain. Implied Easements are described in Section 148 of the *Water Act 1989*. This State Government Legislation states:

*“No structure can be built, or any filling in excess of 250mm in depth can be placed, within one meter laterally of any works of the Relevant Authority without permission from the Relevant Authority. An implied easement is enforced where there is no easement reserved on the property title and provides the same level of protection and rights of access for maintenance purposes as an easement on title.”*

Thus regardless of whether the drain has been constructed within an easement, Council has the same rights of access to its assets for maintenance and operations, and Council must approve of any proposed works near or over its drain.

## 2 Criteria for assessment

The following principles and criteria outline Council’s objectives for these guidelines:

1. Can building over the easement or Council drainage asset be avoided? Is there a viable alternative location for the proposed works, which is clear of the easement and drainage assets?
2. Building works near or over a drainage asset must not:
  - a. Interfere with or adversely affect the function of the drainage asset; or
  - b. Place any additional load to the drainage asset. **See Appendix A for footing clearance envelope.**
3. The proposed structure will not prejudice or unduly obstruct or limit the ongoing maintenance of any existing Council stormwater drain or asset located within the easement.
4. Adequate access must be provided along the alignment of the asset for future maintenance. **See Appendix A for overhead clearance access envelope.**
5. Adequate access must be provided to access covers and pits associated with a drainage asset.
6. Access must be maintained to a storm water connection point at all times.
7. Building works must not obstruct overland flow or adversely impact on flood levels. (Guidelines for development in flood prone areas can be found at [melbournewater.com.au](http://melbournewater.com.au))
8. Approval to build over the easement has been obtained from all relevant Statutory Authorities and parties that have rights over the easement.

9. Proposed structures must comply with the *Building Code of Australia*

Permanent structures will not be granted build over easement approval if they cover or obstruct access to:

- An existing Council drainage system;
- An easement required for the construction of future drainage systems; and
- Easements which provide overland flow paths for storm water.

These restrictions ensure that Council can maintain and construct drains without incurring the additional expense associated with the use of specialized equipment or construction techniques.

### 3 What can be placed over an easement or Council asset?

The type of structures that can be placed on an easement often depends on the requirements of the easement itself. The following diagrams are provided as a guide to what may or may not be constructed over an easement:

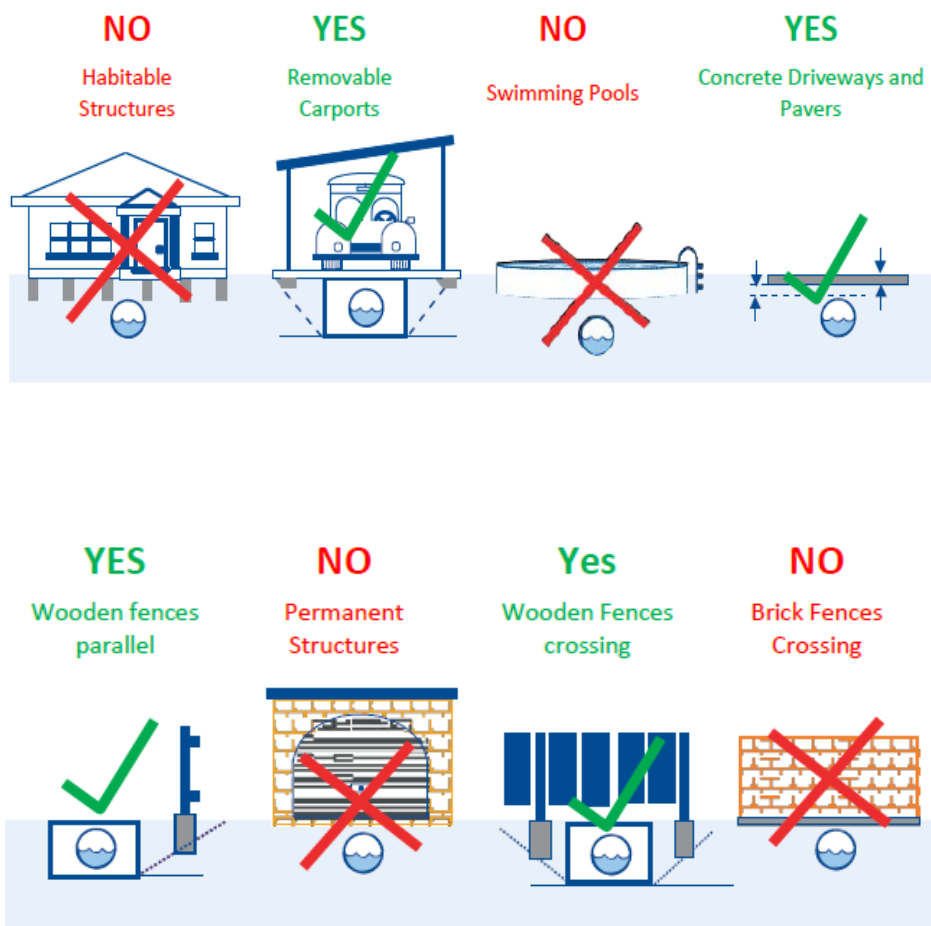


Image courtesy of Melbourne Water

Council will not give approval to place a permanent structure over an existing Council drainage system or over an easement that is likely to be required for future drainage works. Permanent structures are also not permitted in easements that provide overland flow paths for storm water.

Applications involving proposed works of a temporary nature will be considered on their individual merits. Temporary works are works that can be easily removed from the easement should access be required. There are a number of factors that may affect each proposal. These include:

- Ground conditions;
- Clearance from foundations;
- Drainage pipe type, size, condition and age;
- The location of stormwater overland flow paths;
- Clearance to the proposed structure; and
- The potential loads impacting on Council's assets.

### **Types of Structures or Works that May be Considered for Build Over Approval.**

Council has categorised potential structures into 3 types:

- Type 1 – Minor Structures (Things that can be easily removed);
- Type 2 – Minor Structures (Things that be removed with a bit of effort); and
- Type 3 – Permanent Structures (Things which cannot be removed without substantial effort or may need to be demolished in order to access the asset or easement).

**PLEASE NOTE:**

Irrespective of the category, No structure or works will be permitted on, over or within 1.0m of an Access Pit or Manhole.

Examples of the types of structures or works that fall into these individual categories are outlined below:

#### **TYPE 1 STRUCTURES OR WORKS (Generally Permitted)**

- Rainwater tanks with a maximum storage volume of 2000 litres and with a maximum footprint of 2m<sup>2</sup> (Excludes in ground tanks);
- Garden or storage sheds with a maximum footprint of 3m<sup>2</sup>; and
- Reinforced concrete paving with a maximum thickness of 100mm in quantities smaller than 5m<sup>2</sup>.
- Applicants will also need to consider if the proposed structure will impede overland storm water flows or adversely impact on flood levels. Approval will be subject to a flood assessment of the property.

## **TYPE 2 STRUCTURES OR WORKS (May be Permitted)**

- Rainwater tanks with a maximum storage volume greater than 2000 litres (Excludes in-ground tanks.);
- Garden or storage sheds with a maximum footprint of 15m<sup>2</sup> with or without a reinforced concrete base slab of maximum thickness of 100mm;
- Reinforced (non-structural) concrete paving with a maximum thickness of 100mm in quantities greater than 5m<sup>2</sup>.
  - *If approved, a minimum cover of 600mm over the drainage asset is to be maintained with pit covers to match new surface levels. Works are to be undertaken under Council supervision and at the owners' expense;*
- Stand alone or detachable structures with a maximum roof area of 50m<sup>2</sup> including carports, pergolas, verandas, gazebos and decking.
  - *If approved, the footing plan must comply with **Appendix A** of these guidelines;*
  - *Carports must have structurally independent roof if adjacent to or attached to a dwelling and must be open on a minimum of two sides;*
  - *The vertical height from the surface level to the underside of the overlying structure of the Carport must be a minimum 2.7 meters.*
- Above ground swimming pools and spas.
  - *Although many above ground swimming pool are demountable, they can exert tremendous loadings on the soils below them. Approval of these structures will therefore be at the discretion of Council.*
- Eaves.
  - *If the proposed eave is 600mm or less from the edge of the drainage asset or over the easement, a minimum height clearance of 2.7 meters is required.*
- Earthworks (Fill) to a maximum of 500mm.
  - *Where fill is placed over an easement, existing pits/manholes must be modified to match new surface levels. These works must be undertaken under Council supervision and at the owners' expense.*
- Applicants will also need to consider if the proposed structure will impede overland storm water flows or adversely impact on flood levels. Approval will be subject to a flood assessment of the property, conducted at the applicants expense.
- In all proposals, footing plans must comply with **Appendix A** of these guidelines.

## **TYPE 3 STRUCTURES OR WORKS (Generally NOT Permitted)**

- Garages (attached or standalone);
  - *Garages are to be provided with a structurally independent roof when attached to a dwelling.*
- Brick or masonry walls;
- Structural footings and ground slabs;
- In-ground swimming pools;
- Structural or landscaping retaining walls;
- Eaves;
  - *Other than those noted in type 2 Structures.*

- In all proposals, footing plans must comply with **Appendix A** of these guidelines.

Type 3 structures and works will not be approved over existing assets, or over easements which are likely to be required for the construction of future drainage assets. Where required approval will also be subject to a flood assessment of the property, conducted at the applicants expense.

#### **4 What cannot be placed over an easement or Council asset?**

The following structures or works will not be approved;

1. Type 3 Structures and works over existing drainage assets or over easements which are likely to be required for the construction of future drainage assets.
2. In-ground storage tanks;
3. Habitable Rooms;
4. Warehouse or Industrial/Commercial Buildings;
5. Excavation in excess of 250mm within an easement; and
6. Earthworks in excess of 500mm(Fill).

#### **5 Vegetation and tree planting over an easement or Council asset**

Council does not encourage the placing of vegetation over or near easements and Council assets.

Some tree species have very intrusive root systems that penetrate underground storm water pipes in search of water. These root masses cause damage to drains and cause blockages of the drainage system.

Under Section 149 of the *Water Act 1989*, where vegetation is found to be damaging, or is likely to damage a drainage asset, Council can require its mandatory removal. This may be at the property owners cost.

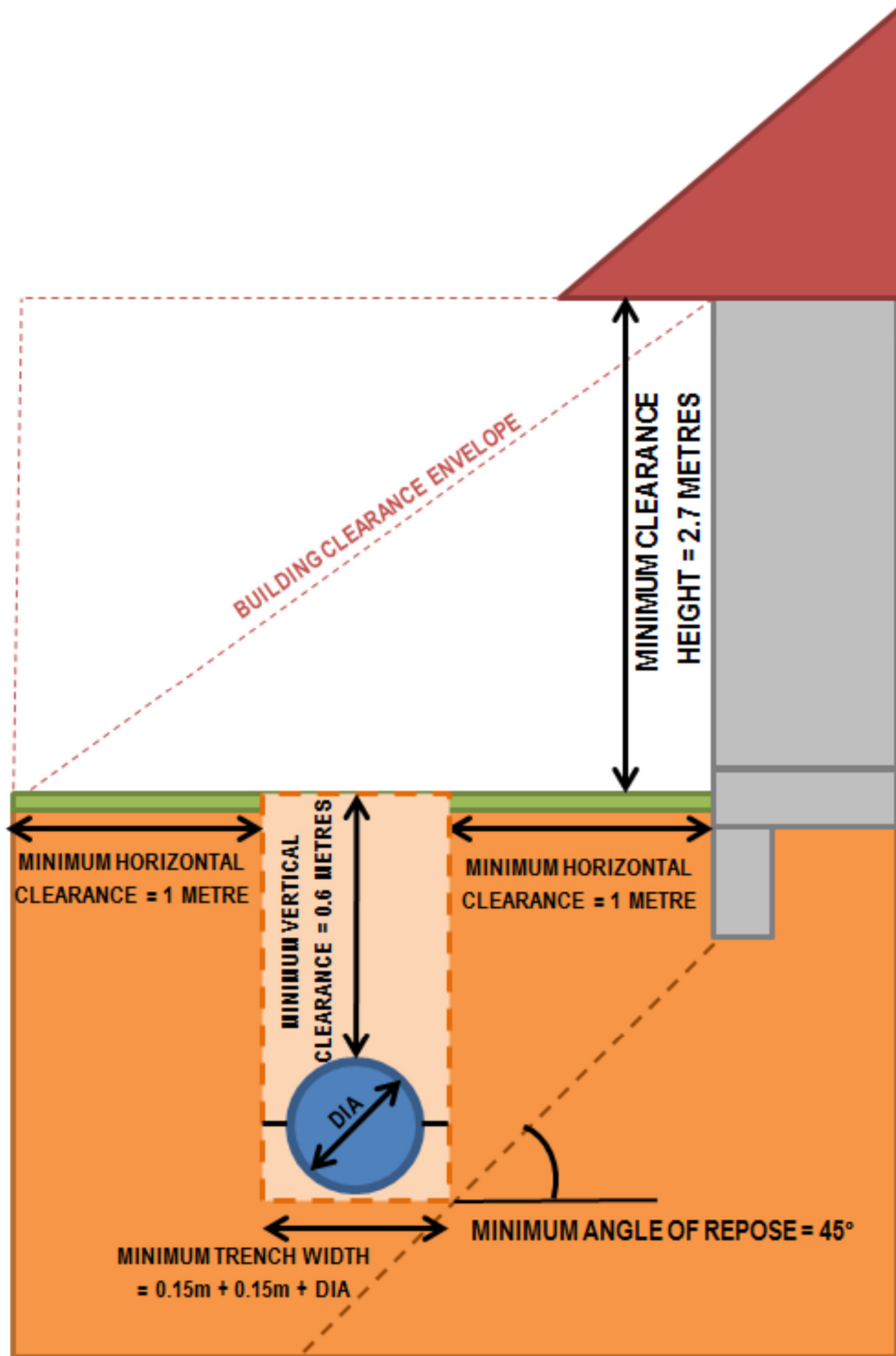
## 6 Application Process

<b>Pre Application</b>	<ol style="list-style-type: none"> <li>1. Prior to designing any structure or carrying out works, establish whether the proposed structure or works will be located over an easement or within 1.0 metre of a drainage asset.</li> <li>2. Request a drainage asset location plan (Size, Depth &amp; Offset) from Mitchell Shire Council (a standard fee may be applicable). Note: It is the applicant's responsibility to confirm the actual location of drainage assets prior to lodging an application.</li> <li>3. Refer to the requirements under item 3, 4 &amp; 5 contained within this document to confirm if the proposed works comply.</li> <li>4. Lodge an application form to Mitchell Shire Council along with:             <ol style="list-style-type: none"> <li>a. The applicable application fee;</li> <li>b. The current certificate of title including the plan of subdivision; and</li> <li>c. A set of building plans indicating:                 <ol style="list-style-type: none"> <li>i. The location of the proposed works on the site;</li> <li>ii. Details of the structure or works to be built;</li> <li>iii. Footing details (if applicable); and cross sections through and along the easement or asset being built over.</li> </ol> </li> </ol> </li> </ol>
<b>Council Assessment (2 weeks)</b>	<p style="text-align: center;"><b>Submission of an application does not constitute approval. Each application is subject to assessment on its own merits.</b></p> <ol style="list-style-type: none"> <li>5. Council will assess the documents provided. If these are not sufficient to make an assessment you may be asked to provide additional information.</li> <li>6. If the proposal meets the requirements set out in these guidelines, a pre-approval letter will set sent to you along with Councils standard indemnity agreement for works within an easement. If the proposal does not meet the requirements of these guidelines, the application will be refused.</li> <li>7. A sample copy of the indemnity agreement is enclosed within the guideline documentation for your reference, see Appendix B. You are advised to read this sample indemnity and seek legal advice if further clarification of the terms of this agreement are required before lodging an application.</li> </ol>
<b>Final Approval (1 week)</b>	<ol style="list-style-type: none"> <li>8. Upon receiving the completed indemnity, Council will issue final approval for your proposed works over the easement or asset.</li> <li>9. Council will keep a record of the indemnity agreement and the agreement will be recorded against your property. Clauses 9.1 &amp; 9.2 of the agreement require that upon sale of your property that you must notify any prospective purchaser of this indemnity agreement and that the agreement will be incumbent upon such future owners.</li> </ol>

A standard fee applies for the processing of applications and this is reviewed annually as part of Council's budget process. However, in the event that additional information is required to assess the condition or location of existing assets, the cost of obtaining this information is to be borne by the applicant. Such costs may include a survey and/or Closed Circuit Television (CCTV) investigations.



# APPENDIX A



## APPENDIX B

**THIS AGREEMENT** made on the .....day of.....  
**BETWEEN:**

.....

of.....  
("Owner(s)")

and

**MITCHELL SHIRE COUNCIL**  
**of 113 High Street, Broadford**  
("Council")

### BACKGROUND:

- A. The Owner is registered or entitled to be registered as the proprietor of the land known as **[## insert address of land]** being the whole/part **[delete as applicable]** of the land described in certificate of title volume **[## insert folio [## insert lot no. [## insert (Land)]**.
- B. The Land is encumbered by a drainage easement in favour of the Council (Easement).
- C. "Building" in this document refers to **[Description of proposed building or works]**.
- D. The Owner wishes to construct a building over the Easement.
- E. The Council has agreed to the Owner constructing a building over the Easement subject to the terms and conditions set out in this Agreement.

### THE PARTIES AGREE AS FOLLOWS:

#### 1. Construction of building

- 1.1. The Owner agrees that the building to be placed on the Land will be constructed in such a manner so as to be capable of being removed if access to the Easement is required by Council.
- 1.2. The Owner warrants that in constructing the Building the owner will not do anything which will or may cause damage or injury to any drain or other assets located within the Easement.

#### 2. Compliance with laws

The Owner agrees to comply with all laws and obtain all necessary licences, permits and approvals relating to the construction and existence of the Building.

#### 3. No warranty

Council makes no warranty as to the suitability of the location of the Building on the Land.

#### **4. Council's works**

- 4.1. Council and its authorised employees, agents and contractors may enter the Land at any reasonable time after giving the Owner reasonable notice for the purpose of inspecting, maintaining, constructing or repairing the drain or assets located within the Easement (Works).
- 4.2. If Council incurs additional costs in carrying out the Works because of the Building, the Owner will be responsible to pay those additional costs to Council on demand.
- 4.3. Council will not be responsible for any damage whatsoever caused to the Building as a result of the Works.
- 4.4. The Owner agrees that the Owner will be responsible for any damage caused to assets owned by a third party as a result of Council carrying out Works where that damage arises due to the existence of the Building on the Land.

#### **5. Removal of Building**

- 5.1. Council may serve a notice on the Owner requiring the Owner, at its own cost, to remove the Building from the Land.
- 5.2. The notice must specify the date by which the Building must be removed and this date is to be determined by Council in its absolute discretion having regard to the nature of the Building.
- 5.3. The Owner agrees that it is responsible for remedying any damage caused to the Easement or assets located within the Easement in removing the Building from the Land.

#### **6. Indemnity and Release**

- 6.1. The Owner releases Council from all claims resulting from any damage, loss, death or injury in connection with the construction or existence of the Building on the Land.
- 6.2. The Owner must indemnify and hold harmless Council against all claims resulting from any damage, loss, death or injury in connection with the construction or existence of the Building on the Land.

#### **7. Assignment**

The rights and obligations of each party under this Agreement are personal and cannot be assigned, encumbered or otherwise dealt with and no party may attempt, or purport to do so, without the prior written consent of all parties.

#### **8. Notice to purchaser's/mortgagee**

The Owner must draw this Agreement to the attention of any prospective purchaser or mortgagee.

**9. Successor's bound**

9.1. The Owner acknowledges that all of the conditions set out in this Agreement shall bind the Owner, the occupier (if any) of the Land, and any successor in title to the Land and any subsequent occupier of the Land.

9.2. The Owner must ensure that any successor in title or subsequent occupier of the Land executes and delivers to Council, an agreement in substantially the same form as this Agreement.

**10. Breach of Agreement**

If the Owner fails to comply with the Owner's obligations set out in this Agreement, Council may carry out those obligations on behalf of the Owner and claim any reasonable costs incurred by Council in carrying out those obligations from the Owner.

**11. Costs and stamp duty**

Each party must bear its own costs arising out of the negotiation, preparation and execution of this Agreement. All stamp duty (including fines, penalties and interest) that may be payable on or in connection with this Agreement and any instrument executed under this Agreement must be borne by the Owner and the Owner must indemnify Council on demand against any liability for costs or stamp duty.

The Owner will be responsible for any costs incurred by Council in enforcing this Agreement.

**12. Governing Law and Jurisdiction**

This Agreement is governed by the laws of Victoria. Each party submits to the non-exclusive jurisdiction of the courts exercising the jurisdiction in connection with matters concerning this Agreement.

SIGNED by the Owner(s).....

Before me (witness).....

(Witness print name).....

(Witness Address).....

SIGNED for and on behalf of  
**MITCHELL SHIRE COUNCIL**  
By the Municipal Building Surveyor  
Under an Instrument of Delegation  
dated 22 April 2013 .....

Before me (witness).....

(Witness print name).....

(Witness Address).....