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**Draft Policy:**

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**Road Airspace**

**2017**

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## INFORMATION ABOUT THIS DOCUMENT

Date Adopted by Council		Resolution No.	
Document Owner	Director – Sustainable Environment and Economy		
Document Development Officer	Insert there the position title of the person responsible for developing and/or reviewing this document		
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### Document History

Doc No.	Date Amended	Details/Comments eg Resolution No.
DM1202133	23/02/2012	12-79

### Further Document Information and Relationships

List here the related strategies, procedures, references, policy or other documents that have a bearing on this Policy and that may be useful reference material for users of this Policy.

Related Legislation*	Roads Act 1993 Environmental Planning and Assessment Act 1979
Related Policies	
Related Procedures/ Protocols, Statements, documents	

Note: Any reference to Legislation will be updated in the Policy as required. See website <http://www.legislation.nsw.gov.au/> for current Acts, Regulations and Environmental Planning Instruments.

## 1. OBJECTIVES

- To recognise that airspace structures enable private interests to profit from the use of public space and that it is appropriate for Council to charge for that usage and to recognise that airspace structures can also provide a public benefit.
- To provide for approval arrangements for road airspace structures (eg. Balconies) that provide for commercial floor space.

## 2. SCOPE

This policy applies to property owners who want, in the future, wish to use adjacent road airspace for commercial benefit. This policy does not apply to existing encroachments in road reserve air space.

## 3. DEFINITIONS

~~Road Airspace~~ ~~Is the encroachment that occurs where any part of the building projects beyond the lot boundaries on the Council road reserve. It can include the features such as balconies, awnings, etc.~~

## 4. STATEMENT

- 4.1. Airspace that is controlled by Council is a public amenity that must be managed effectively.
- 4.2. In assessing applications for approval for the use of road airspace Council must ensure the proposed use is consistent with the amenity of the area and that the appropriate approval process is formulated that protects the interests of the Council and the community.

## 5. LEGISLATIVE AND STRATEGIC CONTEXT

- 5.1. Section 138 of the Roads Act 1993 (Roads Act) permits a roads authority to approve the erection of a structure over a public road owned by the authority
- 5.2. Section 139 of the Roads Act permits a roads authority to impose such conditions as it thinks fit on an approval issued under Section 138
- 5.3. Development consent granted under the Environmental Planning and Assessment Act for a structure over a public road does not, of itself, entitle the applicant to occupy the subject airspace. Such entitlement derives from the application of the Roads Act. Development consent may be issued with conditions that require the applicant to obtain an approval under Section 138 of the Roads Act. In this event the applicant would need to make separate application to Council under the Roads Act. The absence of any such condition would not relieve the applicant from the requirement for a the relevant approval under the Roads Act
- 5.4. Unless an approval under Section 138 of the Roads Act has been granted, the occupant of airspace and/or the owner of the occupying structure has no lawful right to so occupy the airspace
- 5.5. A development consent may be also be issued with conditions that require the applicant to obtain approval under Section 138 of the Roads Act and that approval itself conditioned to levy and collect rent, require the applicant to maintain the structure, or remove the structure in certain circumstances (and on expiry of the Roads Act Approval).

- 5.6. In the event that no Section 138 approval has been granted, ~~Council may issue an order under Section 107 of the Roads Act to remove the structure. Such an order is not appealable~~ and the structure is not otherwise lawfully encroaching on road air space, Council may seek the structure's removal from the road reserve.
- 5.7. Subject to the Roads Act 1993, an approval of road airspace use will generally incorporate conditions to give effect to the following principles:
- The owner of the property adjacent to the subject airspace structure is responsible for the maintenance of the structure in a safe and secure condition. Council may require of the landowner at any time that a structural engineer's certification be provided that the subject airspace structure is safe.
  - The owner of the property adjacent to the airspace structure shall maintain the subject airspace structure in an attractive and well maintained condition.
  - Council reserves the right to require maintenance is carried out if, in Council's opinion, maintenance is necessary for aesthetic or safety purposes.
  - The owner of the property adjacent to the subject airspace structure is to indemnify Council through public risk insurance to a minimum value that is consistent with council's insurance practices.
  - Where the proposed structure comprises commercial floor space, rather than awning only. Council will levy and collect fees in accordance with Council's Fees and Charges adopted annually.

## **6. PLANNING AND URBAN CONSIDERATIONS**

- 6.1. The use of airspace should not compromise those qualities that contribute to the attractiveness of an area and should enhance the existing built environment
- 6.2. The use of airspace should not compromise existing and/or traditional ground level street front activities.
- 6.3. The use of airspace should provide demonstrated benefits to the broader community as well as to the potential users of the airspace structure.
- 6.4. Applications for the erection for airspace structures are commonly within the scope of development applications made under the NSW Environmental Planning and Assessment Act. Approval for the erection of the structures can only be granted under the NSW Roads Act. The assessment of the environmental impacts of a proposed structure are most appropriately undertaken in the context of the assessment of the entire development of which the airspace is an element and a view formed as to the acceptability, or otherwise, of the proposed structure.
- 6.5. In the event that a proposed airspace structure comprises an element to a development application made under the NSW Environmental Planning and Assessment Act, it should be established during the assessment process that a proposed structure will obtain approval under Section 138 of the relevant Roads Act and any conditions that will apply to that Roads Act approval ascertained.
- 6.6. Where the proposed structure incorporates floor area but is proposed in order to benefit streetscape, heritage or some other public interest, Council may elect to not levy a rental fee. A rental fee will be charged for such uses as restaurant, commercial or similar and the fee will be based on a market valuation.

## **7. RETROSPECTIVE APPROVALS**

- ~~7.1. This Policy does not provide prescriptive measure for the circumstances when an existing structure does not have approval under Section 138 of the Roads Act or when an existing structure that provides commercial floor area does not have an approval under Section 138.~~
- ~~7.2. It is not appropriate to issue a retrospective Section 138 approval. Such approval may be issued for an existing structure but will only operate from the time of its issue and may be conditioned to require that a rental arrangement be entered into.~~
- ~~7.3. If the owner of a property adjacent to an existing airspace structure is not prepared to seek Section 138 approval it is open to Council to issue an order under Section 107 of the Roads Act for the removal of the structure. This option should only be taken up in regard to awnings that do not provide floor space when there is an evident safety risk and/or when the owner is not prepared to provide certification from a suitably qualified and practising structural engineer that this is not the case.~~

## **8. SUSTAINABILITY**

- 8.1.     **Economic**  
Provides a methodology for Council to approve and collect revenue for the use of Council's road airspace for commercial benefit.
- 8.2.     **Governance**  
Provides guidelines for the approval and use of structures where properties derive a commercial benefit using the adjoining road airspace and the opportunity to review insurance, safety and maintenance requirements.