

1. POLICY STATEMENT

Obligations or restrictions have been placed on the owners of privately owned land regarding construction on or development, management or conservation of their land, to ensure a particular outcome for the locality, by the registration of Encumbrances in favour of the City of Marion on the Certificates of Title. For example, the height of fences, materials used for fencing, sheds, windows (noise reduction), prevention of further land divisions. These types of restrictions are now dealt with by way of Land Management Agreement, subject to the provisions of the Development Act 1993.

Encumbrances have traditionally been used to establish and maintain a standard of development in a group of properties.

At this stage, 171 Encumbrances to the City of Marion have been identified that effect 35,000 residential properties in the Council area.

2. OBJECTIVES

The objectives of this policy are to ensure that the City of Marion has clear guidelines and principles that relate to dealings with privately owned land that is subject to Encumbrances in favour of the City of Marion.

This policy does not apply to statutory encumbrances as defined by the Real Property Act 1886.

3. POLICY SCOPE AND IMPLEMENTATION

Consent

An owner of land that is subject to an Encumbrance must seek the Encumbrancee's Consent to certain dealings with the land, ie: a land division or surrender of lease. In the case of a boundary re-alignment where only one allotment is subject to the Encumbrance, the Encumbrance needs to be either partially released from or extended, so that the whole of the new allotments are either subject to or discharged from the Encumbrance.

Sale of Land

In the event of the sale of land, which is subject to an Encumbrance, depending on the terms and conditions contained in the Encumbrance, the existing Encumbrance may need to be discharged and a new Encumbrance on the same terms and conditions lodged for registration in the name of the new owner (lift or replace). The Discharge of Encumbrances and the new Encumbrance are lodged for registration at the Lands Titles office at the same time as the Transfer to the new owner. The new owner pays all costs. Some properties are transferred "subject to" the existing Encumbrance and no action is required from the Council.

Upon the sale of land where Council is requested to "lift and replace", Council's position is strengthened as opposed to when land is transferred "subject to" an existing Encumbrance.

Discharge of Encumbrance

Where it is identified that the Encumbrance is no longer relevant, ie; where the Encumbrance was entered into as an interim planning measure and the Local Government Planning provisions have since been updated, the Encumbrancee may discharge the Encumbrance. In this case, the Encumbrancee would need to be satisfied that the benefit derived from the Encumbrance has been satisfied or is no longer relevant.

Encumbrances have been registered traditionally to establish and maintain uniformity of development and maintaining a certain standard within the area or sub-division. Where one property is released from the Encumbrance without the consent of all other owners, Council may be at risk of legal action.

It would be a substantial exercise for Council to obtain the permission of every land owner in the development to discharge the Encumbrance.

When Council is requested (by an owner) to discharge an Encumbrance over one Certificate of Title, where the Encumbrance is (or encumbrances on the same terms and conditions are) over several Certificates of Title in the same locality, Council should seek legal advice and assess the request on a case by case basis.

Surrender of Lease

Upon consenting to a Surrender of Lease or a Land Division, there is little or no risk to Council, provided that the Encumbrance will remain registered on the Certificate/s of Title.

Conclusion

All documents that relate to the dealing with land come under the provisions of the Real Property Act 1886, the Strata Titles Act 1988 and the Community Titles Act 1996. The Registration of these documents are administered by the Registrar General.

Most land sales and land divisions are critical in terms of timing and to expedite the settlement process and avoid delays, it would be beneficial for documents to be signed under delegation by authorized delegates.

All Real Property Act documents signed on behalf of Local Councils by authorized delegates will be accepted for registration by the Registrar General.

Council's Schedule of Delegations and Sub-delegations (as amended from time to time) details the documents that may be signed by an authorized delegate or sub-delegate.

4. DEFINITIONS

A **Certificate of Title** is a document or certificate issued pursuant to any of the Real Property Acts which certifies that the person named therein as the registered proprietor is the owner of the land and sets out all Mortgages, Encumbrances, Easements, Caveats, Liens and other interests in the land. For the purpose of this Policy, "a Certificate of Title" shall include a Certificate of Title for a community lot, community strata lot, development lot or common property in a Community Plan (Community Title), a strata unit (Strata Title), a lease of Crown land (Crown Lease) and a computerised record of unalienated Crown Land (Crown Record).

An **Encumbrance** is a claim, restriction or liability against real property (land) which is usually registered on the Certificate of Title. An Encumbrance can restrict the owner's ability to transfer the land and may affect its value.

The **Encumbrancee**, for the purposes of this Policy, is the City of Marion, being the "owner" of the Encumbrance.

The **Encumbrancer**, for the purposes of this Policy, is the land owner.

Lift and replace is the term used when an Encumbrance is discharged and a new Encumbrance on the same terms and conditions is lodged for registration in the name of a new owner.

The **Registrar General** is the Government representative who is responsible for the administration of the Real Property Act 1886.

5. REFERENCES

- Land Services Group
- Local Government Act 1999
- Real Property Act 1886
- Strata Titles Act 1988
- Community Titles Act 1996
- Local Government Association (www.lga.sa.gov.au)

6. REVIEW AND EVALUATION

Policy to be reviewed in 2018