

# Land Management Agreements and Encumbrances Policy



---

Record number	D19/82166
Responsible Manager	Manager City Development
Other key internal stakeholders	Director Community and Cultural Development Manager City Strategy
Last reviewed	17 June 2020
Adoption reference	Policy and Strategic Development Committee
Resolution number	70
Previous review dates	29/08/17
Legal requirement	
Due date next review	2023

The electronic version of this document is the controlled version. Printed copies are considered uncontrolled. Before using a printed copy, verify that it is the current version.

## PURPOSE

The purpose of this policy is to provide a framework for matters relating to the administration of Land Management Agreements (LMAs) and encumbrances, where Council is a party to the agreements. This policy provides guidance to Council employees in relation to the creation of both LMAs and encumbrances and how Council expects its LMAs or encumbrances to be administered.

## POLICY

### Creating Land Management Agreements and Encumbrances

Council does not generally support or encourage the creation of Land Management Agreements or Encumbrances and will only enter into an agreement in exceptional circumstances. Council may choose to be a party to an:

- Encumbrance formed pursuant to the *Real Property Act 1886*
- LMA formed pursuant to, and for the purposes outlined, in sections 57(2) and 57A of the Development Act, or section 192 of the PDI Act.

LMAs and encumbrances may also be appropriately used for other matters unrelated to a development application, including instances relating to the development, management, preservation and conservation of land, including Council land.

Council will not consider entering into an encumbrance (either individual or common building scheme), unless there are valid reasons supported by an applicant's legal advice.

Section 33 of the Development Act and Section 102 of the PDI Act require the designated authority to assess development applications for planning consent against the relevant provisions of Council's Development Plan or the Planning Rules. Section 30 of the Development Act requires Council to regularly review the contents of its Development Plan or Planning and Design Code to ensure it is consistent with the strategic direction contained in the Planning Strategy for South Australia and State Planning Policies, and section 64 of the PDI Act requires the Commission to prepare and maintain the Planning and Design Code for the purpose of assessing against the Planning Rules. The Development Plan is therefore a living document and LMAs must not be created where their provisions are or may (in the future) be inconsistent with the provisions of the Development Plan Planning and Design Code. Such instances include:

- To justify the approval of a development application which would otherwise not comply with the provisions of Council's Development Plan or the Planning and Design Code
- To circumvent changes to Council's Development Plan or the Planning and Design Code
- Where the LMA is contrary to the intent of Council's Development Plan or the Planning and Design Code, or any policies contained therein
- To control the future development of land, which may otherwise be controlled by Council's Development Plan or the Planning and Design Code, or conditions attached to consents.

LMAs also must not reiterate planning provisions already contained in Council's Development Plan or the Planning and Design Code.

LMA's may only be entered into when all persons with a legal interest in the land consent to the creation of an LMA of their own free will. The use of an LMA may be proposed by any party with an interest in the

land. However, although the use of an LMA may be recommended by Council, its use as a tool for the effective management of land cannot insisted upon by Council (e.g. a development authorisation cannot be conditional upon the creation of an LMA).

Unless there are valid reasons supported by the applicant's legal advice, Council will not consider entering into an encumbrance (either individual or common building scheme). Although an encumbrance may achieve the same outcomes as an LMA, unlike an LMA an encumbrance must be registered against the Certificate of Title each time the subject land is sold. This creates an administrative burden which can be avoided through the use of an LMA in lieu of an encumbrance.

## Administration of Existing Land Management Agreements and Encumbrances

Where there is an inconsistency between the provisions of Council's Development Plan or the Planning and Design Code and the requirements of an LMA or an encumbrance, the provisions of Council's Development Plan or the Planning and Design Code (whichever is in place at the time) will prevail and the inconsistent terms within the LMA or encumbrance will have no legal effect.

## Discharging Existing Land Management Agreements and Encumbrances

Where an individual or single encumbrance contains a Lift and Replace clause, and the encumbrance is still considered to be relevant as determined by Council or the Council Officer acting under delegated authority; the encumbrance will be encouraged (at the discharge stage) to enter into a similarly worded LMA in lieu of a fresh encumbrance.

Where a land owner initiates the discharge of an LMA or an encumbrance, and the LMA or encumbrance is no longer required, any Council support for the discharge will be subject to all costs being borne by the land owner.

## LMA and Encumbrance Decisions to be made by the Council

Council employees have delegated authority to agree to enter into or discharge an LMA or encumbrance and such documents can be executed by a delegate of Council rather than under common seal.

Delegations will not be used for matters that in the opinion of the CEO, are politically sensitive, high risk or controversial. These matters will instead be referred for a resolution of the Council and may include situations where:

- The contents of an LMA or encumbrance relates to minimising environmental harm or any threat to public or private safety. Such LMA examples include but may not be limited to: control design and location of buildings to prevent environmental harm caused by factors such as land fill, potential gas migration or soil contamination, but excludes matters relating to Regulated Trees which are specifically covered by separate controls within Council's Development Plan
- The LMA or encumbrance relates to a recycled water scheme (e.g. those LMAs registered against properties located within The Settlement or the Parkwood Estate)
- An LMA or encumbrance is related to granny flats and conditions of consent do not exist to control the use of the building

- Any other instance in which the delegate considers it more appropriate for Council to consider the matter.

## LMA Register

As required by sections 57 and 57A of the Development Act and Section 192 of the PDI Act, Council will maintain a register of its LMAs and provide a public summary version of the register on Council's website ([www.cttg.sa.gov.au](http://www.cttg.sa.gov.au)).

## LEGISLATIVE FRAMEWORK

There is no legislative requirement for Council to have a policy relating to this area.

The following legislation applies to this policy:

### *Development Act 1993 and Development Regulations 2008*

Pursuant to section 33 of this Development Act, a development must (among other things) be assessed against the relevant provisions of Council's Development Plan as well as the provisions of the Building Rules. In addition, Council must have regard to the relevant provisions of any LMAs registered against the Certificate of Title.

Section 57(2) of this Development Act states that: "a Council may enter into an agreement relating to the development, management, preservation or conservation of land within the area of the Council with the owner of the land".

Section 57A of the Development Act goes further to state that Council may enter into an agreement (LMA) with an owner of a land which relates to a matter relevant to development, forming part of a development application. The LMA must have regard to:

- The provisions of Council's Development Plan
- The principle that the LMA should not be used as a substitute for proceeding with an amendment to Council's Development Plan.

Section 57 of this Act and regulations 99 and 100 of this Regulation requires Council to have a public register for all of its LMAs.

### *Planning, Development and Infrastructure Act 2016 and Planning, Development and Infrastructure (General) Regulations 2017*

Pursuant to section 102 of this Act, a development must (among other things) be assessed against the relevant provisions of the Planning Rules as well as the provisions of the Building Rules. In addition, the relevant authority must have regard to the relevant provisions of any LMAs registered against the Certificate of Title.

Section 192(1) of this Act states that: "a designated authority may enter into an agreement relating to the development, management, preservation or conservation of land with the owner of the land".

Section 193 of this Act goes further to state that a designated authority may enter into an agreement (LMA) with an owner of a land which relates to a matter relevant to development, forming part of a development application. The LMA must have regard to:

- The provisions of the Planning and Design Code, and
- The principle that the LMA should not be used as a substitute for proceeding with an amendment to the Planning and Design Code.

Section 192 of this Act and regulations 110 and 111 of this Regulation requires Council to have a public register for all of its LMAs.

[Real Property Act 1886](#)

Section 128 of this Act provides the legislative framework for the creation of encumbrances. This Act provides a great deal of flexibility concerning the content of encumbrances. Traditionally, encumbrances relating to development sites have contained design guidelines to control the future development of an allotment.

## Other references

Council’s document including:

- Fees and Charges Register

## STRATEGIC PLAN/POLICY

### Strategic Plan

The following strategic objectives in Council’s Strategic Plan 2025 are the most relevant to this report:

Objective	Comments
<b>Environment</b>	
<i>Environmentally valuable places and sites that are flourishing and well cared for</i>	<i>Our city is a desirable and sustainable place to live</i>
<i>Housing is well designed and affordable and responds to the changing needs of existing and future residents</i>	<i>Our city is a desirable and sustainable place to live</i>

## Organisation Plan

Our Strategic Plan is supported by an Organisation Plan which focuses on four key values. These values are customer care, learning and growth, future capability, and sustainable operations.

## DEFINITIONS

For the purposes of this policy the following definitions apply:

For the purposes of this policy the following definitions apply:

**Act**

Development Act 1993.

**Encumbrance**

The term as it relates to this policy relates to covenants which restrict or guide the future development of land, or guidelines which seek to preserve existing features on the land.

### Lift and Replace

This term refers to a covenant that requires an encumbrance to be discharged and an identical encumbrance to be entered into and registered in priority on the Certificate of Title whenever the registered proprietor is changed.

### LMA

Land Management Agreement. An LMA is an agreement between two or more parties, registered against the land and noted on the Certificate of Title. An LMA is still applicable to the new owner upon transfer of a title into another owner's name.

### PDI Act

*Planning, Development and Infrastructure Act 2016*

### Planning Strategy

This outlines the State Government's direction for land use change and development within South Australia.

### Regulated Trees

According to the Development Act 1993 this means trees within a designated area as prescribed within regulation 6A(3) of the Development Regulations 2008 and that have a trunk with a circumference of 2 metres or more or, in the case of trees with multiple trunks, that have trunks with a total circumference of 2 metres or more and an average circumference of 625 millimetres or more, measured at a point one (1) metre above natural ground level, but does not apply to those trees listed within Regulation 6A(5) or the exemptions listed within Schedule 3 of the Development Regulations.

### State Planning Policies

State Planning Policies are the highest order policy document in South Australia's planning system. They outline matters of importance to the state in land use planning and development and provide a policy environment aimed at enhancing our liveability, sustainability and prosperity..

## POLICY IMPLEMENTATION

This Policy will be implemented by the Chief Executive Officer or relevant portfolio director and managed in accordance with Council's scheme of delegations.

## ACCESSIBILITY

This Policy and Council's Fees and Charges Register are available to be downloaded free of charge from Council's website: [www.cttg.sa.gov.au](http://www.cttg.sa.gov.au)

Hard copies, for a fee, can be provided in accordance with Council's Fees and Charges Register at Council's Civic Centre at 571 Montague Road Modbury.