

APPROVAL PROCESS FOR BUILDING OVER OR NEAR A COUNCIL DRAIN

Introduction

In most situations, the DCC does not allow structures to be located over or near public drains because the structure can apply loading to the drain and result in damage. It also severely limits the DCC's ability to check, maintain and replace the drain quickly and efficiently in the future.

When all options for alternative siting of the structure or diversion of the drain have been exhausted, the DCC may permit the erection of certain light structures over drains (e.g. carports, detached garages, decks and elevated extensions to houses), subject to specific conditions and after registration of an encumbrance against the certificate of title to the property. This information sheet details what you need to know about the process to build near to, or over a DCC drain.

What is an encumbrance?

An encumbrance is a registered interest on the title to the land that secures the landowner's legal promise to meet the conditions set by the DCC, in return for the DCC agreeing that the structure can be erected over the drain. The encumbrance instrument records the terms and conditions of the agreement between the landowner and the DCC. In the event the landowner breaches the agreement, they will need to rectify the breach at their own cost. The landowner is also required to pay the DCC an annual sum of money (a "rentcharge") until the breach is rectified. As the encumbrance is registered on the certificate of title any subsequent owners of the property are bound by its terms and conditions.

What is in the encumbrance instrument?

- The encumbrance instrument is a document that identifies:
 - who the agreement is between - the landowner (encumbrancer) and the DCC (encumbrancee)
 - the land affected
 - the rentcharge and others costs payable for any breach of the terms and conditions
- The encumbrance describes:
 - the approved building work
 - the terms and conditions (covenants) the landowner must meet (see below)

What are the landowner's obligations, and the rights of the DCC under an encumbrance?

Obligations

The obligations of the landowner and the rights of the DCC are generally as follows:

- The building work must be constructed in accordance with that agreed to by the DCC and approved under any building consent.
- The DCC may require access to the drain at any time for the purposes of assessing the condition of the drain and building work, working on the drain, assessing compliance with the encumbrance, and remedying any breach of its terms and conditions.
- Except in the case of an emergency, the DCC will give the landowner reasonable notice of access required. What is "reasonable" will depend on the nature, scale and duration of any proposed works – e.g. 24 hours may be reasonable for an inspection, while 2 weeks may be reasonable for works involving heavy machinery.
- The landowner will provide that access. For work required on the drain, this may involve the landowner removing the building work at the landowner's expense.
- The DCC will not be liable for any damage to the building work arising directly or indirectly from the presence of the drain.

Breaches

- In the event of a breach of the terms and conditions, the DCC will write to the landowner requiring the breach to be fixed.
- If the landowner has not fixed the breach after 20 working days (or less in the event of emergency), the DCC will undertake the work required at the landowner's expense. To deter the landowner from breaching the encumbrance obligations, a rentcharge of \$20,000 per annum will be paid by the landowner until the breach is fixed, if demanded by the DCC. If the rentcharge is not paid, the DCC can sell the property to recover the monies owing.
- If the landowner is compliant with the encumbrance obligations, no money is required to be paid.

Term

- The term of the encumbrance is for as long as the building work obstructs the DCC drain.
- In the event the building work is permanently removed, or the drain is removed or realigned, the encumbrance may be removed from the landowner's title by mutual agreement.

Costs

- **All** costs related to the application to build near to, or over a DCC drain are to be met by the landowner. This includes preparation and registration of the encumbrance on the certificate of title to the property and any DCC legal costs.
- The landowner is responsible for any costs of dismantling and removal, repair, or reinstatement of the building works.
- The landowner does not incur any DCC staff costs in the preparation of these documents.

Procedure for applying for permission to build over or near a drain

In general, the procedure is as follows:

1. The landowner must provide a written proposal for permission to build over or near a DCC drain, submitting it to the 3 Waters Subdivision Engineer.
2. If the proposal is accepted, the DCC will advise the landowner in writing of the conditions of approval including the registration of an encumbrance. When the landowner confirms to DCC they accept the conditions, DCC will instruct its solicitor to prepare the encumbrance instrument including an authority and instruction form to register the instrument against the landowner's title.
3. If applicable, Building Services are advised not to issue the building consent until the encumbrance is registered.
4. The encumbrance instrument and authority and instruction form is sent to the landowner or their solicitor for signature to enable registration on the landowner's title.
5. The DCC shall complete the encumbrance instrument and authority and instruction form, and their solicitor will liaise with the landowner's solicitor regarding registration of the encumbrance. Registration will not be completed until such time as all DCC costs, including legal costs, are paid.
6. A copy of the certificate of title showing the registration of the encumbrance is provided to the DCC. The building consent is only issued once the certificate of title with the encumbrance instrument registered on it has been sighted by the 3 Waters Subdivision Engineer.

Involvement of your solicitor

- The DCC advises landowners to consult with their solicitor to obtain independent advice.
- If the landowner's mortgagee's consent is required, the landowner should instruct their solicitor to liaise with the mortgagee to obtain consent and secure the first priority status of the encumbrance on the title.

For further information please contact the 3 Waters Subdivision Engineer on 477 4000