

# MUNICIPALITY OF WALVIS BAY

## ENCROACHMENTS ON PUBLIC PLACES POLICY



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## 1. DEFINITIONS

**“Building”** means a structure or construction of any kind, whether permanent or temporary, movable or immovable and whether completed or not.

**“Consent”** means the Municipal Council’s written approval for the land uses laid down in the Zoning Scheme as ‘consent uses’ for which the Council has the power to approve or refuse in accordance with its local policies, the need and desirability of the use and the extent to which the proposed use would add or detract from the existing amenity in the area concerned.

**“Council”** means the Municipal Council of Walvis Bay and the staff of the Municipality of Walvis Bay.

**“Commercial encroachments”** means the encroachments of food or retail establishments on public places. Commercial encroachments are only allowed for erven zoned as General Business or Local Business in terms of the Walvis Bay Town Planning Scheme.

**"Encroachments"** means temporary or easily removable structures, objects or landscaping owned by a private property owner and located on or over selected adjoining public place (as defined in this Policy) for the property owner’s private use and enjoyment. Encroachments include landscaping, fencing, movable personal property (such as furniture and planters), patios, decks, landscape irrigation and lighting systems and similar structures and objects, in accordance with the standards, conditions and requirements of this Policy. Encroachments do not include permanent buildings or structural elements of a building (such as permanent walls, roofs, structural supports, balconies, stairwells, etc).

**“Food establishments”** means restaurants, snack shops, food and beverage markets, supermarkets, bakeries, delicatessens, or similar establishments that offer food or beverages. Food establishment does not include temporary, mobile or freestanding food service providers or vendors as defined in Informal Trading Regulations.

**“Land”** means a portion of land registered in a deeds registry as an erf, portion or farm.

**"Pedestrian Path"** means a continuous obstruction-free sidewalk area between the outside boundary of the encroachment area and any obstructions, such as street trees or planters, utility poles, street furniture, newsstands, bus benches, or curbs.

**"Policy"** means the Walvis Bay Encroachments on Public Places Policy.

**"Public Open Space"** means any land used or designated for use by the public as an open space, park, garden, playground, recreation ground or square and as reserved for such purposes in the Walvis Bay Town Planning Scheme.

**"Public Place"** means selected properties zoned as Undetermined or selected land reserved as Public Open Space or Street in terms of the Walvis Bay Town Planning Scheme.

**"Private Property"** means property owned by private parties (individual or a group or firm), essentially anyone or anything other than the Local Authority (Council). Private property may consist of real estate, buildings or objects.

**"Retail Establishment"** means a commercial establishment that sells or offers a product available on site in the adjacent retail establishment.

**"Services"** means sewerage, water or storm drainage, purified effluent, electrical, telephone lines, fibre optic cables, telecommunication towers, etc.

**"Street"** means any street, road, bridge, subway, tunnel, avenue, lane, driveway, sanitary lane or thoroughfare shown on a general plan of the township or approved subdivision of an erf and includes any subdivision of any land which, in the opinion of the Council, was intended to be used as a street at time of approval.

**"Undetermined"** means any land earmarked for urban development or expansion, of which appropriate land use can only be allocated in the future with the Consent of the Council.

**"Zoning Scheme"** means the Walvis Bay Zoning Scheme or the Walvis Bay Town Planning Scheme adopted by the Council and approved by the Minister of Urban and Rural Development in terms of the Urban and Regional Planning Act (Act No. 5 of 2018) as amended from time to time.

## 2. PURPOSE

The purpose of this Policy is to allow adjoining property owners to obtain Council's approval for an encroachment to enable them construct on public places, make improvements within public places for private purposes, subject to certain standards and conditions.

## 3. OBJECTIVES

- 3.1 To ensure that private construction on public property meets the goals of the community.
- 3.2 To encourage low profile construction or improvements on land reserved for local authority for streets, public open places, parking or municipal purposes; or properties zoned as Undetermined in terms of the Town Planning Scheme.
- 3.3 To maintain vistas of the ocean and a sense of openness along these pedestrian corridors.
- 3.4 To promote economic development within the Central Business District and local business centres.
- 3.5 To regularise existing encroachments.

## 4. APPLICATION PROCEDURE FOR ALL ENCROACHMENTS

- 4.1 An application for a residential encroachment onto a public place shall be made by the registered owner of the property for which the encroachment is sought or by an authorised representative of the owner. Only the registered owner of a property is eligible to apply for and receive a residential encroachment approval. However, commercial encroachment approvals may be issued to a lessee, who shall not sublet the encroachment.
- 4.2 The applicant shall complete and submit an **Encroachment Lease Agreement Application form**.
- 4.3 Once the lease agreement is approved in terms of the Local Authorities Act (Act No. 23 of 1992), the applicant shall appoint a registered professional land surveyor to **survey** the area being encroached upon. Such survey plan/s shall be certified (signed) by a professional land surveyor and shall be submitted to the General Manager: Roads and Building and Control together with the **encroachment plan**.

- 4.4 The **encroachment plan** shall show the proposed structures, objects furnishings, lights, planting or other similar work and the nature thereof, and shall also depict location, height, and extent of the proposed encroachments. If any services transgress the site to be encroached, the encroachment plan shall also show the applicable services (such as water, sewerage, electrical and/or telecommunication lines).
- 4.5 An **encroachment plan** shall be included in the building plans submitted for development on private property if the encroachment application is proposed in conjunction with a Building Permit application. If no other building construction is being proposed, other than the construction in the encroachment area, the encroachment plan shall be submitted independently.
- 4.6 The owner shall not start with any construction works or erect any furnishings or objects on a public place until the Encroachment Lease Agreement, Building Permit and Encroachment Plan have been approved.
- 4.7 A **non-refundable fee** as determined in the Government Gazette shall be paid to the Council for the processing of an application for the encroachment. No such application shall be accepted unless the fee therefor is paid at the time the application is filed.
- 4.8 Encroachments into, over, under or upon any public open space, public place, street, undetermined erf, municipal purposes erf or other public property, shall be unlawful unless expressly approved by Council through this Policy, lease or other legal instrument approved by the Municipal Council.

## 5. RESIDENTIAL ENCROACHMENTS

- ~~5.1~~ Encroachments will only be allowed up to a maximum of 10 metres from the private property boundary; however, the encroachment area must not exceed 100 square metres.
- 5.2 Fences shall not exceed a maximum height of 1 metre, measured from the natural grade.
- 5.3 Decks may be permitted to a maximum height of 1m height above the existing natural grade. Deck railings are permitted, provided that they are of open construction and that deck and railing do not exceed a maximum height of 1 metre.

## 6. COMMERCIAL ENCROACHMENTS

- 6.1 The commercial encroachment area shall be managed, operated, and maintained as an integral part of the adjacent **food or retail** establishment. All furnishings within each individual encroachment area shall be of uniform design and materials.
- 6.2 The encroachment area shall be located adjacent to the commercial/retail building and shall not be separated from the establishment by landscaping, street furniture, parking spaces, drive aisles, alleys or streets, or other elements.
- 6.3 Encroachment areas shall be available for and located adjacent to the ground floor of the retail businesses or food establishment. The encroachment area shall not exceed 3 metres in depth. The encroachment area shall not exceed the width of the tenant/lettable space frontage.
- 6.4 Outdoor dining in compliance with this section shall be exempted from compliance with on-site parking standards as required by the Walvis Bay Town Planning Scheme.
- 6.5 Use of the commercial encroachment area shall be limited to the hours of operation of the adjacent food or retail establishment.
- 6.6 The encroachment area is limited to sit-down food and beverage consumption for seated customers only.
- 6.7 A clear, continuous pedestrian path not less than 1.5 metres in width or more as deemed appropriate by the General Manager: Roads and Building Control and Chief Traffic Officer for pedestrian circulation outside of the encroachment area shall be maintained at all times.
- 6.8 The layout of the encroachment area shall not impede ingress or egress and shall be fully accessible to the physically challenged people.
- 6.9 Barriers around the encroachment area shall not be provided unless for the reasons associated with public safety, such as protection from vehicles or in cases of surface or grade changes. Unless otherwise specified, required barriers (including all furnishings and objects) shall be removed from the encroachment area daily prior to close of business, unless such furnishings are required to be bolted to the pavement or are approved to remain by the Municipal Council. Required barriers shall also conform to requirements for the sight-impaired and shall be properly maintained. The height of any barrier shall not exceed 1 metre. All barriers must be able to withstand inclement outdoor weather.
- 6.10 Food establishments shall be limited to sturdy chairs, benches and tables, umbrellas sheltering

tables. No other objects, including but not limited to host/hostess podiums, bars or bar-height tables, light stands, signs, menu boards, service items or grills, ATM machines and similar furnishings are allowed. All furnishings shall be maintained in good condition at all times.

6.11 Furnishings for retail establishment shall be in the form of tables or racks to display goods offered for sale. Other furnishings such as umbrellas, shade canopies, light stands or planters or signs are not allowed.

6.12 Awnings may extend up to 1.5m from the building front or cover up to fifty (50) percent of the sidewalk width, whichever is less. A building permit shall be obtained prior to installation of an awning.

6.13 No entertainment, music, audio speakers, televisions or visual media of any type, whether amplified or unamplified, shall be located within the encroachment area.

6.14 The encroachment area, including surfacing, shall be maintained in a neat and clean manner, free of litter, food scraps, soiled dishes, and graffiti, at all times.

## 7. GENERAL CONDITIONS FOR ALL ENCROACHMENTS

7.1 the Council may deny or grant permission to encroach subject to such terms and conditions as it may, in its discretion, deem proper.

7.2 No encroachment that is determined to be detrimental to the public health, safety, welfare, pedestrian traffic or interest shall be approved.

7.3 The encroachment shall not be unsightly. The property owner shall at its sole expense maintain the encroachment area in good condition and appearance, in accordance with all ordinances, and shall not allow a nuisance condition to exist on the encroachment area.

7.4 No construction within or affecting any existing public street, road, alley, or other right-of-way shall be allowed without an approved traffic control plan as well as without prior approval of the Chief Traffic Officer.

7.5 All construction shall conform to Standards Building Regulations.

- 7.6 Landscaping on encroachments shall be in accordance with a landscape plan to be approved by the General Manager: Community and Economic Development (Park Section Head) with the encroachment approval application.
- 7.7 An encroachment shall not provide structural support for any structure located on private property.
- 7.8 Use of the encroachment area shall not adversely affect the welfare of the nearby residents or commercial establishments. Obstructions to neighbouring scenic views must be avoided.

## **8. PAYMENT FOR ENCROACHMENTS**

- 8.1 The applicant for the encroachment will be required to pay either monthly or yearly fee for the encroachment at the fee based on the rate as determined by Council.

## **9. NEIGHBOURS' CONSENTS**

- 9.1 The consent(s) for adjacent land owners will be required prior to Council granting the approval for the encroachment.

## **10. TEMPORARY CLOSURE OF STREETS OR PUBLIC OPEN SPACES**

- 10.1 If the portion of land that is proposed for encroachment is located on the land that is reserved for Local Authority for Streets or Public Open Space purposes, the landowner or applicant will need to apply for the temporary closure of that portion of Street or Public Open Space in accordance with Section 50 of the Local Authorities Act of 1992 (Act 23 of 1992).

## **11. SERVICES WITHIN ENCROACHMENTS**

- 11.1 If the encroachment consists of any services (such as water, sewer or electrical lines), the owner shall obtain approval from the services departments and organisations (such as Department of Water, Waste and Environmental Management, Erongo RED, Telecom, etc).
- 11.2 If there are any services on the site to be encroached, such services (e.g. water, sewerage, electrical and/or telecommunication lines) shall be indicated on the encroachment plan.
- 11.3 Encroachments shall not obstruct access to services.

11.4 No open cut of a public roadway shall be made unless specifically allowed in the conditions of approval.

## 12. UNAUTHORISED ENCROACHMENTS, VIOLATIONS AND ENFORCEMENTS

12.1 In the event the Council determines that there is unauthorised encroachment, or that any encroachment is in violation of any applicable provision of this Policy or condition of approval therefor, a notice thereof will be issued to the owner or occupant of such encroachment.

Landowners of existing developments that encroach on public spaces prior to the commencement of this Policy will also be issued with a notice to bring the unauthorised encroachments into conformance with this Policy.

12.2 Any notice as per Section 12.1 of this Policy shall state the nature of the violation and ordering the removal of the encroachment or correction of the violation within (30) thirty days of notification.

12.3 The notice shall also inform the owner or occupant to respond to the notice within thirty (30) days of the date of the notice, in writing, by electing to:

- (a) remove the encroachment,
- (b) correct the violation within the time period specified in the notice or
- (c) apply for approval of the encroachment within thirty (30) days of the date of the notice.

12.4 If the owner or occupant fails to respond to such notice within the aforesaid thirty (30) days, the Municipal Council shall proceed in accordance with the termination of the encroachment as well as the Local Authorities Act (Act No. 23 of 1992) as amended.

12.5 In the event the owner or occupant elects to seek approval of the encroachment, the Council shall not take enforcement action unless the applicant fails to file an application within the required time.

12.6 Failure to comply with the terms of such notice within the time specified therein shall be remediable in the following manner. The election by the Council of any one or more or the

remedies set forth in this subsection shall not preclude the Council from seeking any other such remedy:

- (a) By a civil penalty in an amount not exceeding N\$100,000;
- (b) By legal action to enjoin the continuing violation of this section or by action in ejectment or other appropriate legal proceeding to recover possession of the street, road, alley or other public right-of-way or public property;
- (c) By removal of such encroachment by or on behalf of the Council, in which event the cost thereof shall be charged to the owner or occupant of the encroachment and collected as property taxes are collected;
- (d) By charging, the owner or occupant of the encroachment, pending the removal of any such encroachment, compensation for public place at the equivalent of the tax upon the land so occupied if it were property of the owner or occupant; or
- (e) Notwithstanding any other provision of this section, the Council may, without notice, remove or cause the removal of any unauthorised encroachment, without liability to the owner or occupant of such encroachment, if he determines that such encroachment:
  - (i) Interferes with the intended use of a public place;
  - (ii) Constitutes or causes a physical or visual obstruction to vehicles, pedestrians, cyclists or other general public;
  - (iii) May interfere with the response to an emergency on the property on which the encroachment is located; or
  - (iv) Otherwise constitutes an imminent hazard to the public health, safety or welfare.

### 13. TERMINATION OF ENCROACHMENTS

13.1 The encroachment approval issued to the residential property owner or commercial property owner or tenant does not create a vested right and is therefore revocable by the Council at any time, with or without cause, in Council's sole discretion and upon giving the property owner or tenant a thirty (30) days' advance notice of revocation. However, if the encroachment poses any danger to the public, the Council has the right to revoke the encroachment within less than 30 day notice.

13.2 Upon a finding of noncompliance with any condition of granting an encroachment permit, or upon revocation of an encroachment permit, the encroachment permit shall not be renewed and a new

encroachment permit shall not be granted for a period of one (1) year.

- 13.3 Upon termination of the encroachment permit, the permittee shall remove the barrier at his or her own costs, return the pavement to its original condition, and remove all personal property and furnishings from the public place.

## 14. VALIDITY

- 14.1 Any encroachment granted pursuant to the provisions of this Policy shall be developed and utilised within twelve (12) months from the date of the granting of such encroachment. If not so developed and utilised, such encroachment shall lapse at the expiration of the aforesaid twelve (12) month period.

- 14.2 The applicant may apply in writing for one extension of time (prior to the expiry of twelve (12) months stated in Condition 13.1) not to exceed six (6) months, within which to develop and use such encroachment.

- 14.3 The encroachment approval shall be valid for five years (5) year and shall be renewed every five (5) years.

## 15. TRANSFER OF ENCROACHMENTS

The encroachment approval shall not be transferred to any entity without the written consent of Council. Any such purported transfer shall be void and of no effect.

## 16. COUNCIL'S RIGHT OF ENTRY

The property owner accepts that Council has a right to enter upon the encroachment area for purposes of inspection or maintenance of its services within the encroachment area and the property owner expressly waives any and all claims for above damages to its encroachment resulting from such actions.

## 17. COMPLIANCE WITH OTHER LAWS

Property owner shall perform all work in full compliance with all applicable laws and obtain all necessary permits. Authorisation to any person to construct and maintain an encroachment shall

not relieve such person from complying with all other applicable laws, regulations and requirements.

## **18. DAMAGE TO PUBLIC PLACES**

The property owner assumes responsibility for all damage to Council's public places caused by construction or maintenance of the encroachment and shall reimburse Council for correction of any such damage. Upon failure of property owner to so reimburse Council, the cost incurred by Council in removing the encroachment shall be a debt of the property owner to the Council, and recoverable by Council in any manner provided by law. Moreover, property owner acknowledges that Council may record and enforce a lien upon the property in order to recover such costs.

## **19. RESTORATION OF ENCROACHMENT AREA**

- 19.1 Within thirty (30) days of termination of the encroachment permit, whether upon its expiration or earlier termination, the property owner shall at his or her own cost remove the encroachment and restore the public place to its condition prior to placement of the encroachment.
- 19.2 In the event the property owner fails to do so, the Council shall have the option of removing the encroachment at the property owner's expense and property owner waives all claims for damage to the encroachment or property owner's adjacent property or improvements resulting from such removal. The cost incurred by Council in removing the encroachment is a debt of the property owner to the Council, and recoverable by Council in any manner provided by law.

## **20. INDEMNIFICATION**

The property owner shall indemnify and hold harmless the Council, its officers, employees and agents from and against all claims, causes of action, liabilities and damages for injuries to persons and property, including reasonable costs of defense and legal fees, arising from property owner's encroachment on the public place as defined in this Policy, including but not limited to property owner's negligent or wrongful acts, errors or omissions in the construction, erection and continued maintenance of the encroachment in its location. Property owner shall promptly pay the amount of any judgment rendered against Council, its officers, employees and agents for any such indemnified claims, and reasonable costs and legal fees incurred by Council in the defense of such claims.