



Balconies

Government Land Bulletin No. 5 was issued in June 2003, and superseded Government Land Bulletin No. 2 of July 2001. Both Bulletins provided advice in relation to the policy of the State Land Services Business Unit of the Department for Planning and Infrastructure on construction of building encroachments into airspace over roads and other Crown land. Bulletin No. 5 can be accessed at http://www.dpi.wa.gov.au/mediaFiles/crown_bulletin5.pdf.

Given the time that has passed since then, and the likelihood of staff turnover within Local Government, it is appropriate that the matter be again drawn to attention.

In essence, the situation is as follows:

1. Land comprising streets is Crown land, and intrusion into Crown airspace over streets without 'reasonable excuse' or as permitted by the Minister for Lands, is a trespass under section 267 of the *Land Administration Act 1997* (LAA).
2. Section 400(1)(a) of the *Local Government (Miscellaneous Provisions) Act 1960* empowers local governments to regulate to allow buildings to encroach over streets or public places to a maximum depth of 750 mm, but such regulations, by-laws or local laws under the *Local Government Act 1995* cannot deal with issues of ownership and compensation in relation to Crown land.
3. The July 2001 Bulletin advised local governments that approvals should not be given without the developer being required to also seek the consent of the Minister for Lands, and appropriate tenure being given under the LAA. This notification removed any grounds of 'reasonable excuse', for the purposes of s.267 of the LAA.
4. State Land Services excludes 'minor encroachments', as defined in an Annexure to Government Land Bulletin No. 5 from this rigorous approvals and tenure process.
5. State Land Services will not approve intrusions into Crown airspace where freehold is the appropriate tenure for the relevant structure, because such freehold needs to be tied to the life of the building. Until 'determinable freeholds' have been legislated, freehold tenure can not be given.
6. Where the building which is to intrude into Crown airspace is (to be) registered under the *Strata Titles Act 1985*, the appropriate tenure for the airspace is freehold. For the reason set out in para 6, approval for proposals for construction into Crown airspace for Strata Title buildings must await legislation for 'determinable freeholds'.
7. State Land Services may consider leasing Crown airspace for commercial, non-Strata Title buildings.
8. Certain proposals which had already received approvals prior to the July 2001 notification were permitted to proceed under interim arrangements. However, no further 'interim approvals' are being given.

Planning Bulletin No. 52 of February 2002 restates the same message, but in even more categorical terms, as follows:

"Until legislation is amended to address liability and tenure issues, or alternative ways of addressing the issues in the interim are devised, balconies encroaching over public land will not be approved in new developments. Where balconies are to be included in developments they should be located within the building setback to ensure that the land below the balcony remains in private ownership."

State Land Services regrets the delay in getting the appropriate legislation drafted and presented to Parliament for 'determinable freeholds'. The details of these proposed amendments have been agreed between stakeholders, but the legislation will form part of a much larger Bill giving effect to the recommendations of the report into the review into the LAA, tabled in Parliament in August 2005. There will therefore be some further delay.

In the meantime, it would be appreciated if local governments would comply with Planning Bulletin No. 52 and Government Land Bulletin No. 5, and not approve new proposals for building encroachments in to Crown airspace except where -

1. the encroachment meets the definition of 'minor encroachment' in the Annexure to Government Land Bulletin No. 5.
2. The developer is required, as a condition of the local government's approval, to seek consent and tenure from State Land Services.

It is recommended that a developer approaches State Land Services prior to seeking Local Government approval.

Further enquiries can be made to the Manager State Lands for the relevant region within which the proposed development occurs (details at <http://www.dpi.wa.gov.au/stateland/15555.asp>), or to Dan Collins, Manager Policy and Practice, on Phone 9347 5104 (email dan.collins@dpi.wa.gov.au).