

## **MEMORANDUM OF ENCUMBRANCE**

It is a requirement that a Memorandum of Encumbrance (as per the sample attached) be registered on the titles of the affected properties. The Memorandum of Encumbrance is to include the following information:

- Legal description of the properties
- Type of stock underpass (pipe, precast box etc.)
- Construction material (concrete, steel etc.)
- Dimensions of structure
- Depth of cover over the structure
- Design loading data
- Location (ward, road, rapid no.)

***All costs relating to the registration of the Memorandum of Encumbrance is the responsibility of the Applicant.***

DATED

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**CLUTHA DISTRICT COUNCIL**

Council

and

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Encumbrancer

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**MEMORANDUM OF ENCUMBRANCE**

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# MEMORANDUM OF ENCUMBRANCE

Encumbrancer: \_\_\_\_\_  
(in this Memorandum called "the Encumbrancer")

Council: \_\_\_\_\_  
(in this Memorandum called "the Council")

## WHEREAS

1. The encumbrancer is registered as proprietor of an estate in fee simple in the land described in the First Schedule.
2. The land is situated in the district administered by the Council.
3. As a result of the circumstances disclosed in the Second Schedule the Encumbrancer has agreed:-
  - (a) to grant and make the rent charge with the Council as set out, and subject to the conditions expressed, in the Third Schedule and
  - (b) to enter into the covenants in the Council's favour as set out in the Fourth Schedule.
4. In this Memorandum and its Schedules:-
  - (a) "the Land" refers to that described in the First Schedule and any part of it.
  - (b) "the Licence" is that for a stock underpass referred to in the Second Schedule.
  - (c) "Schedule" refers to the several Schedules attached to this Memorandum.
  - (d) "the Works" refers to those described in the Sixth Schedule and any part of it.

Words importing the singular number or plural number shall include the plural number and singular number respectively and words importing the masculine gender shall include the feminine or neuter gender.

AND WHEREAS the Encumbrancer being registered of the estate as described and desiring to render the land available for the purpose of securing to and for the benefit of the Council the rent charge mentioned in the Third Schedule the Encumbrancer DOTH HEREBY ENCUMBER the said land for the benefit of the Council with the said rent charge to be raised and paid at the times and manner as set out in the Third Schedule and subject to the performance and observance of all other conditions contained in the Third, Fourth, Fifth and Sixth Schedules the Council shall be entitled to all powers and remedies given to an Encumbrance by the Land Transfer Act 1952 as are not expressly negated by this Memorandum

## FIRST SCHEDULE (The Land)

An estate in fee simple in all those parcels of land containing:

\_\_\_\_\_  
\_\_\_\_\_

**SECOND SCHEDULE**  
(the Circumstances)

1. The Encumbrancer has applied to the Council for a Licence to have constructed on and under the road between the separate parcels of the Land a stock underpass.
2. That application has been approved by the Council on the condition, amongst others, that the Encumbrancer enters into this charge and the covenants of the Fourth Schedule in the Council's favour.

**THIRD SCHEDULE**  
(Terms and Conditions of Encumbrance)

1. The term of the Encumbrance is 999 years commencing from the date hereof subject to earlier determination in the events provided in the Fifth Schedule.
2. The annual rent charge is \$1.00 and such further sum as may be owing by the Encumbrancer to the Council under the covenants of this Encumbrance to be paid to the Council on the 1<sup>st</sup> day of \_\_\_\_\_ and on the like day of \_\_\_\_\_ in every year thereafter.
3. The covenants of the Fourth Schedule shall be enforceable only against the owners and occupiers for the time being of the land and not otherwise against the Encumbrancer and his successors in Title.
4. Section 104 of the Property Law Act 1952 applies to this Memorandum of Encumbrance but otherwise (and without prejudice to the Council's rights of action at common law as a rent-chargee);
  - (a) The Council shall be entitled to none of the powers and remedies given to Encumbrancees by the Land Transfer Act 1952 and the Property Law Act 1952; and
  - (b) No covenants on the part of the Encumbrancer and his successors in Title are implied in this Memorandum other than the covenants for further assurance implied by Section 154 of the Land Transfer Act 1952.
5. In the event of the Encumbrancer wishing to enter into a mortgage or mortgages of the land to have priority to this Memorandum the Encumbrancer shall be entitled at his own cost in all things to a Memorandum of Priority granted by the Council in favour of any such mortgage or mortgages PROVIDED HOWEVER that the Mortgagee thereunder consents to and acknowledges that it is bound by the covenants of this Memorandum for the purposes of section 105 of the Land Transfer Act 1952.
6. The Encumbrancer shall further pay to the Council forthwith upon demand an amount equal to any output tax payable by the council under the Goods and Services Tax Act 1985 or any Act in amendment or substitution therefore in respect of taxable supplied made to the Encumbrancer directly or indirectly attributable to matters referred to in, or arising from, this Memorandum of Encumbrance.

**FOURTH SCHEDULE**  
(the Covenants)

1. That the Encumbrancer shall duly and punctually, to the Council's reasonable satisfaction, comply with all these Covenants.
2. Nothing expressed or implied in this Encumbrance shall constitute either party as the partner, agent, employee or officer of, or as a joint venturer with, the other party, and neither party shall make any contrary representation to any other person.
3. The Encumbrancer shall have the Works carried out and completed in strict accordance with plans and specifications and any timetable or programme of performance first approved by the Council and to the reasonable satisfaction of the Council.
4. The Encumbrancer shall not do, nor permit anything with regard to the underpass or Works which might directly or indirectly prejudice the structural integrity of the works, the Council's road or the underpass.
5. During the period of this Encumbrance the Encumbrancer shall maintain the Works to the reasonable satisfaction of the Council, including the provision of satisfactory as built plans and records of such of the Works as may be required from time to time by the Council, together with Certificate of Due Performance of the Works acceptable to the Council given by adequately qualified persons as requested from time to time by the Council, including upon completion of the works.
6. The Encumbrancer permits the Council without hindrance at any time and from time to time, and without the need for notice, by its servants, agents, contractors or workmen:
  - (a) To undertake the Works or any of them should the Council consider it necessary to do so on account of the Encumbrancer failing, or failing to make such progress as the Council reasonably requires as being necessary, to complete or fulfil any of the Covenants strictly in accordance with this schedule.
  - (b) To issue instructions to the Encumbrancer, or any servant, contractor, or workman of the Encumbrance for any remedial works as the Council reasonably thinks necessary for the due maintenance or better performance of the Works.
  - (c) As reasonably required to audit the performance of the Works by examination of all relative records of the Encumbrancer, or any servant, contractor or workman of the Encumbrancer.
  - (d) To undertake remediation work of the Works as the council reasonably thinks fit.
7. The Encumbrancer shall not take any proceedings, make any claim, join any proceedings or claim, or charge, account for, seek payment, or set-off of any kind, against the Council, whether in respect of any costs, charges or expense incurred, or losses or damages suffered, for compensation or other relief whatsoever, directly or indirectly arising from:
  - (a) The exercise by the Council or any rights, remedies or powers under this Encumbrance, or as territorial local authority for the district within which the Land is situated; or
  - (b) The Encumbrancer or any servant, contractor or workman of the Encumbrancer complying with orders or instructions given by, or for the council in accordance with this Schedule.
8. Without limiting the Encumbrancer's obligations and liabilities under this Encumbrance, the Encumbrancer shall effect and maintain in respect of the Works policies of public liability, professional and contract works insurance and personal injury and loss of life insurance, or any of them, as the Council may reasonably direct, with the Council named as principal, fully insuring the Council and the Encumbrancer against all claims and liabilities whether under statute or at common law in respect of damage to or loss of any real or personal property of any description, and loss of life or personal injury, if reasonably required by the Council, arising from or caused by the execution of the Works whether by or for the council, the Encumbrancer

or others. The total amount payable under each such insurance in respect of any one claim shall be as directed by the Council.

9. In undertaking the Works the Encumbrancer shall,
  - (a) Comply with all relative legislation including, but not in limitation, the Health and Safety in Employment Act 1992 (the HSE Act) and,
  - (b) When called upon by the Council to do so, satisfy the Council as to the Encumbrancer's due performance of the obligation in the preceding paragraph and,
  - (c) Indemnify the Council to the full extent permitted by the laws against liability or loss arising directly or indirectly to the Owner under or by virtue of the HSE Act as a consequence of the works or any thing undertaken by any person pursuant, or relative to this Encumbrance.
10. The Encumbrancer shall at all times indemnify the Council in respect of any loss, damage or cost (including consequential loss or damage and legal costs on a solicitor and own client basis) suffered or incurred by it as a direct or indirect result of the Council granting the Licence, or imposing conditions or requirements on the issue of the Licence.
11. The Encumbrancer authorises the Council to recover the cost of Council undertaking any Works, exercising any of the Council's powers, or satisfying any of the Covenants of the Encumbrancer under this Memorandum from the Encumbrancer as a debt owing by the Encumbrancer to the Council payable forthwith upon demand and, if not so paid, such sum or sums, together with interest thereon from the date of expenditure by the Council until refunded by the Encumbrancer at the rate of \$15 per centum per annum, shall constitute and be recoverable by the council as additional rent charge.
12. The Encumbrancer's liability under these Covenants shall not be release, varied or affected in any way by any delay, extension of time or other indulgence to the Encumbrancer of suffered or permitted by the Council or by any failure or neglect of the Council to enforce the Council's rights or powers or any obligation of the Encumbrancer under these Covenants.
13. The Encumbrancer shall forthwith upon demand pay the Council's legal and engineering costs of a professional and own client basis in respect of settling the terms and conditions, and the preparation, execution, operation, enforcement any variation and the ultimate release of this Encumbrance and of any action of proceedings relating to it.

#### **FIFTH SCHEDULE** (Events for Termination)

Upon the Council in its absolute discretion being satisfied (a) that the Covenants of the Fourth Schedule have been duly performed or (b) that the continuation of the Encumbrance is neither warranted nor justified or (c) the sale or other disposal by the owner of a part of the land immediately adjacent to and served by the underpass.



Correct for the purposes of the Land Transfer Act 1952

Solicitor for the Council