

**CITY OF NEW ORLEANS
CHIEF ADMINISTRATIVE OFFICE**

POLICY MEMORANDUM NO. 138

October 30, 2017

TO: All Departments, Boards, Agencies and Commissions
FROM: Jeffrey P. Hebert, Deputy Mayor and Chief Administrative Officer
SUBJECT: Charges for Encroachments onto City

I. PURPOSE

The purpose of this memorandum is to provide guidance to the Department of Property Management as to the appropriate charges for the use of City property relative to private property improvements that encroach onto the City's public rights-of-way¹. This policy is limited to this express purpose.

II. LAW AND GOVERNING AUTHORITY

Chapter 3 Section 4-302(5) of the City Charter authorizes the Chief Administrative Officer to "prescribe accepted standards of administrative practice to be followed by all offices, departments, and boards."

Article VII, §14 of the Louisiana Constitution, further provides:

Section 14.(A) Prohibited Uses. Except as otherwise provided by this constitution, the funds, credit, *property*, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private.

The City can permit the use of its property and air space above the rights-of-way when it is not needed for public purposes, subject to specified statutory procedures². It is customary, however, that the City charges a fee equal to fair market value (FMV) for the use of City property³. Although the outright donation of public property is prohibited, reasonable reductions to the FMV

¹ This policy memorandum applies to encroachments, which are privately-owned structures or infrastructure (or a component part of the structure or infrastructure), that occupy space on/over/under/into the public right-of-way and are effectively permanently-attached to the structure on the adjacent legal lot of record. Examples of these encroachments include but are not limited to: balconies, galleries, roof overhang, and steps. Private structures in/on/under the public right-of-way that do not fall within the scope of this policy memorandum are: pipelines, cell phone towers, sidewalk cafes, bike racks, and other free-standing encroachments.

² La. Rev.Stat. § 33:4712 and 33:4712.1.

³ See Op. Atty. Gen. No. 10-0273 ([Feb. 10, 2011](#)), [2011 WL 996316](#) (City must receive FMV for the lease of City office space); [La. Atty. Gen. Op. No. 12-0134](#), [2012 WL 4865706](#) (Private company must pay FMV to use, rent, or lease a publicly owned building); Op. Atty. Gen. No. 09-0030 ([March 13, 2009](#)), [2009 WL 1065049](#) (A \$1.00 a year lease is a prohibited donation); Op. Atty. Gen. No. 14-0162 ([December 19, 2014](#)), [2014 WL 7642338](#) (Fair market value for the sale of immovable property is required); Op. Atty. Gen. No. 16-0119 ([August 29, 2016](#)), [2016 WL 4965402](#) (Fair market value for the sale of immovable property is required).

requirement may be considered if the City receives a proportional benefit in return⁴.

Certain structures and areas of the City are of such historic interest and importance that their preservation has been statutorily mandated for the people of the City and the State of Louisiana⁵. Such architectural character may include a building's porch, gallery, or balcony and other architectural elements that may encroach onto the City's rights-of-way.

These buildings, and their encroachments, conserve New Orleans' distinct historical attributes. These visible features must be preserved as their removal would significantly alter the appearance of the City's unique, historic streetscape. Ensuring their preservation serves a public purpose and grants the City a reciprocal benefit. Consequently, waiving the required FMV fee in exchange for continued maintenance of historically contributing encroachments is not a gratuitous donation.

III. PROCEDURE

Generally, encroachments onto the City's rights-of-way shall pay a FMV fee for the use of public space, subject to the below exemptions:

A. Existing encroachments within Vieux Carre Commission (VCC) and Historic District Landmarks Commission (HDLC) jurisdiction.

Given the significance of structures in VCC and HDLC districts, demolition of all or portions of these buildings, including their encroachments, are considered drastic actions that alter the character of the area. As a result, the VCC or HDLC rarely approve demolitions within their jurisdictions⁶. In fact, in many instances, VCC and HDLC guidelines require that these encroaching architectural elements be retained. Therefore, existing historic encroachments in HDLC and VCC jurisdictions c⁷annot be voluntarily removed because it has been statutorily determined that these historic elements contribute to the overall historic fabric of the City.

Accordingly, these buildings, and their encroachments, conserve New Orleans' distinct historical attributes. These visible features must be preserved as their removal would significantly alter the historic nature of the City. Ensuring their preservation serves a public purpose and grants the City a reciprocal benefit. Therefore, existing encroachments that contribute to the historic fabric of the City that encroach onto the City's rights-of-way within HDLC and VCC jurisdiction are not charged a FMV fee.

B. Existing encroachments outside HDLC and VCC jurisdiction.

Existing encroachments outside HDLC and VCC jurisdiction may similarly contribute.

⁴ *Bd. of Dir. of Indus. Dev. Bd. v. All Taxpayers*, 2005-2298 (La. 9/6/06); 938 So. 2d 11, 20.

⁵ See <http://www.crt.state.la.us/cultural-development/historic-preservation/national-register/database/index>; the Vieux Carre Commission was created by the 1936 La. Const. Art. XIV 22A Louisiana Constitution Article XIV, §22A; and the Historic Districts and Landmarks Commission was created by state law. La. Rev. Stat. § 25:731.

⁶ See [City of New Orleans HDLC Guidelines for New Construction, Additions and Demolition, 12-23, 14-20](#). Currently, the following districts must seek HDLC approval for demolitions: the Lower Garden District, Irish Channel, Marigny, Bywater, Holy Cross, Algiers Point, CBD, Warehouse District, the properties fronting St. Charles Avenue, Carrollton Avenue and Esplanade Avenue, Tremé, Uptown, Mid-City, Parkview, Garden District, and Esplanade Ridge.

⁷ See [Vieux Carré Commission Guidelines for Balconies, Galleries & Porches, 08-3](#); [City of New Orleans HDLC, Guidelines for Porches, Galleries and Balconies, 09-3](#).

Although these encroachments can voluntarily be removed by the owner, their removal may significantly alter the City's historic streetscape. Therefore, continuation of these unique elements serves a public purpose and grants the City a reciprocal benefit.

Prior to a waiver of the FMV fee, the Department of Property Management must ascertain if the encroachments contribute to the historic landscape. Therefore, for existing encroachments outside HDLC and VCC jurisdiction, the Executive Director of the HDLC must provide to the Department of Property Management if the encroachment historically contributes to the fabric of the City. Upon this determination, the Department of Property Management may waive the required FMV fee.

C. Reconstruction of historic encroachments that were previously removed.

Reconstruction of historic encroachments that were previously removed within HDLC and VCC districts - verified and approved by HDLC or VCC, will contribute by restoring the City's historical streetscape. Therefore, a waiver of the required FMV fee in this instance is permissible.

Reconstruction of historic encroachments that were previously removed outside of HDLC or VCC districts, upon verification by the Executive Director of the HDLC as to its previous historic existence and contributing nature, may receive a waiver of the required FMV fee after obtaining all other necessary permits and approvals.

Therefore, encroachments not categorized within the above enumerated exemptions must pay a FMV fee for the use of the City's rights-of-way. This includes new encroachments that never previously existed - regardless of location. Since these encroachments do not contribute to the historic landscape of the city, exist solely for personal benefit, and the utilization of the rights-of-way is wholly discretionary, the FMV fee for use of City property as required by the Louisiana Constitution cannot be waived.

VI. INQUIRIES

Questions regarding this memorandum should be addressed to the Department of Property Management.