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**NAME OF POLICY:** Enforcement Policy

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**POLICY MANUAL:** Governance

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## BACKGROUND

The City of Norwood Payneham & St Peters (the Council) is responsible for the operation, administration and enforcement of various legislation. This responsibility includes taking enforcement action, where necessary, to protect the community and/or preserve the amenity of the City.

This Policy outlines the Council's approach, methodology and priorities for ensuring compliance with legislation for which the Council is responsible, including the carrying out of enforcement functions where necessary.

The Policy provides a framework to promote consistency when undertaking enforcement action, so that any action that is taken is proportionate to the alleged offence. In addition, the Council is required to observe the principles of natural justice and procedural fairness when taking enforcement action on an alleged breach.

## DISCUSSION

Pursuant to the *Local Government Act 1999* ("the Act") and other relevant legislation, the Council has certain powers and functions that govern the operations of the Council and which serve to protect the community. Whilst it is ultimately the responsibility of individuals and other bodies to comply with the law, from time-to-time, the Council is required to carry out enforcement action to secure compliance with its legislative obligations.

This Policy is an "umbrella" policy which outlines the Council's approach to enforcement action that may be taken under the legislation that the Council administers and provides staff with direction about the way enforcement action is to be taken. It is important to recognise that the Council has the discretion on the approach which it takes in respect to enforcement.

Considering the above, the Council has adopted education, encouragement and enforcement approaches where appropriate (3E's philosophy) to secure legislative compliance. In line with the 3E's approach, it is recognised that prevention of behaviours to avoid a breach of legislation is preferred. Educating the community about their legislative obligations to achieve voluntary compliance is also recognised as a critical component in achieving this objective.

Whilst prevention and voluntary compliance are the preferred approaches, the Council recognises that voluntary compliance may not be achievable in all cases. Therefore, there are occasions where and when the Council may need to take enforcement action to achieve compliance.

Compliance responsibilities that are undertaken by the Council's Regulatory and Compliance staff are unique and require careful consideration to ensure the right balance between encouraging voluntary compliance and taking enforcement action. All compliance responsibilities are managed according to their merits, having regard to the circumstances and the evidence in the Council's possession.

## KEY PRINCIPLES

Enforcement actions are taken within the context of both a legal and policy framework. Council staff will carry out their work as it relates to enforcement with due regard to the following principles:

### Proportionality

A proportionate response means that the extent of Council's actions will be determined by having regard to the seriousness of the breach. The Council recognises that most individuals want to comply with the law and will assist in achieving compliance by being open and cooperative, offering information to the Council and being available to discuss concerns.

In respect of proportionality, the following criteria will be considered by Council staff in determining the best course of action:

- whether there are safety or health risks arising from the breach;
- where potential hazards arising from the breach are not able to be satisfactorily controlled;
- the seriousness and nature of the alleged breach;
- the relevant legislative framework;
- the willingness of the individual or entity to cooperate with any investigation and their contrition; and
- the cost to the Council in taking enforcement action on the alleged breach.

The above criteria are all relevant considerations in the exercise of the Council's discretion in respect to the enforcement action which may be taken for an alleged breach.

### Consistency

The Council will take '*a like-for-like approach*' to achieve similar outcomes. Achieving voluntary compliance is the preferred method, however, there may be occasions where taking enforcement action on an alleged breach is appropriate. Decisions in respect to enforcement and compliance require the use of professional judgment and discretion of the decision maker to assess varying circumstances relative to an alleged breach.

To assist this, the Council will:

- establish and follow standard operating procedures wherever relevant;
- ensure fair, equitable and non-discriminatory treatment;
- tailor its approach to the specific circumstances of the matter, with a view to achieving consistent outcomes.

### Transparency and Procedural Fairness

The Council will be open and transparent about the way in which it conducts enforcement activities, its decisions relating to enforcement action and the laws it enforces, to ensure that the principles of natural justice and procedural fairness are observed, while being mindful of any privacy or copyright related matters. In addition, transparency in any decision which is taken in respect to enforcement is in the public interest.

When enforcement action is required, the Council will explain clearly and in plain language to the alleged offender, why action is necessary. For example, the allegations and the intended action by the Council on an alleged breach, will be put to the alleged offender.

The Council will advise what action is required to achieve compliance and the timeframe for undertaking that action. Advice to an alleged offender will be provided on the process for seeking a review of, or how to appeal against, a decision.

Action and decisions relating to compliance and enforcement action, will be documented in accordance with the Council's Records Management protocols.

Complainants of an alleged breach that are reported to the Council, will be advised of what action has been taken by the Council, and why, at an appropriate point in the process, providing such disclosure does not breach any privacy requirement or jeopardise future proceedings.

The *Public Interest Disclosure Act 2018*, must also be taken into consideration to achieve transparency and accountability in public administration. Public Officers must make a disclosure of the following two types of public interest information:

- environmental and health information – where there is a substantial risk to the environment or to public health and safety;
- public administration information – where there is potential corruption, misconduct or maladministration in public administration.

## **POLICY**

In undertaking enforcement action, the Council will proceed through an appropriate decision-making process, before determining whether to take no action, informal action, mediation or formal action. The following parameters are applicable to this process and any subsequent action to be taken.

### **Decision Making**

Where non-compliance is discovered, options available to the Council to seek or promote compliance include:

- explaining legal requirements and where appropriate, the means to achieve voluntary compliance;
- providing an opportunity to discuss points of issue where appropriate;
- allowing reasonable timeframes to achieve compliance;
- facilitating mediation between affected parties (including, where necessary, via a third party);
- issuing a verbal or written warning; or
- enforcement action such as issuing an expiation notice, issuing an order or a direction under legislation or commencing a prosecution.

Enforcement decisions are dependent on different factors and must be fair, consistent, balanced and relate to common standards that ensure the public is appropriately considered.

In arriving at a decision on the most appropriate means of enforcement, the Authorised Officer shall consider, amongst other relevant factors:

- the seriousness of the offence;
- the objectives of the relevant legislation;
- the degree of wilfulness and / or recklessness involved;
- past history of the alleged offender;
- the consequences of non-compliance, including any hazards and / or safety threats;
- the likely effectiveness of the various enforcement options including the extent to which any action may achieve deterrence and minimise re-offending;
- the effect on the local community and other affected citizens;
- the Council's responsibility to implement legislation for which it is responsible and the reputational risks of decisions in this regard;
- consistency of approach to similar breaches/offences; and
- the requirements, resources and priorities of the Council.

An Authorised Officer must, in the course of their duties when considering or undertaking enforcement, adhere to relevant legislation, relevant Council Policies and any applicable Codes of Conduct.

Where a personal association or relationship with the alleged offender or any other person involved exists:

- an alternative suitably qualified and Authorised person will make enforcement related decisions; and
- the facts about any conflict/relationship will be documented and recorded in accordance with the Council's Records Management protocols.

Formal written documentation will:

- include all the information necessary to make clear what needs to be done to comply with legal requirements, the required timeframe and if necessary, the reasons for these actions and potential penalties for failing to comply with the request;
- include the legislation contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
- clearly differentiate between legal requirements and recommendations of good practice.

Written documentation and any other relevant evidence (such as photographs) will be documented and recorded in accordance with Council's Records Management protocols.

### **No Action**

No action will be taken when, following investigation, no breaches of legislation are discovered. In addition, it may also be appropriate to take no action when:

- the complaint is frivolous, vexatious or trivial in nature;
- the duty holder who may have breached a law has, or has committed to, making good the breach;
- the alleged breach is outside the Council's jurisdiction;
- the alleged breach is within the Council's jurisdiction, but the circumstances of the breach give rise to another authority having jurisdiction and that authority is considered the better authority for dealing with the offence;
- taking action may prejudice other major investigations; or
- having regard to the principles of proportionality and consistency, the Council has determined that the breach is of such minor nature that action would be an unreasonable use of Council resources.

The Council will however have flexibility to re-investigate a matter should more information become available.

### **Informal Action**

Informal action to achieve compliance with legislation may include:

- offering the duty holder who may have breached a law with a verbal or written warning;
- verbal or written warnings that may include requests for remedial action.

Advice from Council staff will be conveyed clearly and simply wherever possible and any verbal advice or requests for action will be confirmed in writing at all times.

The circumstances in which informal action may be appropriate include:

- the act or omission is not serious enough to warrant formal action;
- the duty holder's past history reasonably suggests that informal action will secure compliance;
- confidence in the individual/other body is high;
- the consequences of non-compliance will not pose a significant risk; or
- where informal action may prove more effective than a formal approach.

Where statutory action is not possible or advisable, but it would be beneficial in a wider public safety context to encourage a particular outcome, informal action may be taken and the reasons documented and recorded in accordance with Council's Records Management protocols. The recipient will be made aware that the actions that have been requested are not legally enforceable.

## **Mediation**

Where practical and circumstances warrant, the Council may pursue mediation through an external provider. Mediation is a possible alternative where, following investigation, the Council considers that the issues are unlikely or incapable of resolution through either formal or informal means. The use of mediation services may also be appropriate where an aggrieved individual has no wish to pursue action to resolve a complaint by legal means, but discretion to enter mediation remains with the Council. Matters raised through mediation may require further investigation and enforcement.

## **Formal Action**

### Service of Orders and Directions

Various pieces of legislation specify the procedures which Councils must follow, in order to:

- advise of the intention to issue an Order;
- invite submissions with respect to the matter;
- order a person to do or refrain from doing a thing under specified circumstances; and/or
- issue directions specifying how the Order may be complied with.

Authorised Officers will use professional judgment and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order, Notice or direction and the timeframe to comply.

Where appropriate and / or advisable, a notice of intention will be issued prior to proceeding to issue a Notice and / or Order.

In most cases, the person receiving the Order / Notice has a right of appeal to the appropriate court if the Order / Notice is considered unreasonable or if they wish to dispute the validity / directions in the Order / Notice. If an Order is served for which an appeal is possible, Council will advise the recipient in writing of the right to appeal and the relevant legal provisions at the time of serving the Order/Notice.

### Action in Regard to a Default

Failure to comply with Orders and/or a Notice may incur further enforcement action.

Where action in respect to a default is provided for in legislation and the necessary work has not been carried out in the time allowed without good reason and it is necessary to address a safety or risk related breach that poses an unreasonable risk to public safety, the Council may undertake the required work.

Before undertaking the work, the Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken, the Council will seek to recover all costs over a fair period, using all statutory means available.

The decision to carry out action in default will be made by the Authorised Officer, in conjunction and consultation with the relevant Manager. Where the estimated cost of the required action exceeds \$10,000, the relevant General Manager, must authorise the undertaking of the required works and actions to address the outstanding offence.

Where an offence has been committed, the Council may issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil an Order and / or Notice. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Authorised Officers and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

### Service of an Expiation Notice

A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence. Hence, there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence on face value to enable a conclusion to be reached that there is a reasonable prospect of being able to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an Expiation Notice:

- certain breaches of the legislation administered by the Council;
- failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer;
- failure to comply with the requirements of an Order and / or Notice;
- confidence in the individual / other body is low, including a past history of committing similar offences; or
- a written warning has been given for a similar offence.

### Prosecution

A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.

The following circumstances are likely to warrant a prosecution:

- a flagrant breach of the law such that public health, safety and welfare have been put at risk;
- the alleged breach is too serious or the risks too great to be dealt with by means of an expiation;
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so;
- a failure to comply with the requirements of an order and/or Notice;
- an established and recorded history of similar offences;
- an unwillingness, on the part of the individual or other body, to prevent a recurrence of the problem; or
- the recovery of the costs of the investigation or remedial work or financial compensation that are required by the council or an aggrieved party.

Where circumstances warrant a prosecution, all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

Prior to recommending that a prosecution be pursued, there must be reasonable and reliable evidence that an identifiable person or organisation has committed the offence.

A decision to prosecute must be in the public interest. In considering whether prosecution is in the public interest, the following additional factors will be considered:

- whether the offence was premeditated;
- the need to (or likelihood of) influence the offender's future behaviour;
- the effect on the offender's or witness's physical or mental health, balanced against the seriousness of the offence;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence, both personal and general; and
- the likely length, expense and outcome of a trial.

The final decision to prosecute will be made by the relevant General Manager or delegate.

## Appealing a Decision

In most cases where an Order, Notice, Expiation or direction has been served, the recipient will have the ability to appeal the decision. Appeals processes vary dependant on the legislation under which the Order, Notice, Expiation or direction has been served.

## **DEFINITIONS**

*Authorised Officer* - A person who is authorised to carry out statutory functions or powers as specified within a particular piece of legislation. The decision to appoint an Authorised Officer may only be made by Council or a delegate of Council.

*Chief Executive Officer* - Refers to the Chief Executive Officer (including their delegate) of the City of Norwood Payneham & St Peters.

*Compliance* - The act of adhering to and demonstrating adherence to an Act, By-Law, Regulation or similar. Compliance may or may not involve the process of enforcement.

*Enforcement* - Enforcement refers to the use of legislative provisions to direct a person or body to make good a breach of the Act and / or otherwise penalise a person for a breach. Enforcement is a tool to ensure compliance and accountability for illegal conduct or other wrongdoing.

*Order/Notice* - Formal direction(s) issued by the Council or Council delegate to a person or entity concerning a breach of a particular piece of legislation.

*Prosecution* - The process of instituting legal proceedings against a person or body in relation to an illegal activity, with the intent of penalising the person/body for illegal activity, or alternatively civil enforcement proceedings to compensate for the breach.

*Public Officer* - A member of a Local Government body or an officer or employee of a Local Government body. Broader definition contained within the *Independent Commissioner Against Corruption Act 2012*.

## **REVIEW PROCESS**

This Policy will be reviewed in five (5) years of the adoption date of the Policy.

## **INFORMATION**

The contact officer for further information at the City of Norwood Payneham & St Peters is the Council's Manager, Development & Regulatory Services.

## **ADOPTION OF THE POLICY**

This Policy was adopted by the Council on 5 February 2024.

## **TO BE REVIEWED**

February 2029.