

Enforcement Policy

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Responsible Officer:	General Manager Corporate and Development General Manager Urban and Community
Relevant Legislation:	<i>Development Act 1993</i> <i>Local Government Act 1999</i> <i>Planning, Development and Infrastructure Act 2016</i> <i>Local Nuisance and Litter Control Act 2016</i>
Related Policies:	Nil

1. Introduction

- 1.1. The City of Burnside is charged with legislative responsibilities which protect individuals and the community as a whole. This includes responsibilities for the safety and amenity of the community's environment under the *Development Act 1993* ('the Dev Act'), (to be repealed by the new *Planning, Development and Infrastructure Act 2016*) - *Local Government Act 1999* ('the LG Act'), *Australian Road Rules, Dog and Cat Management Act 1995, Expiation of Offences Act 1996, Road Traffic Act 1961, Fire and Emergency Services Act 2005, Local Nuisance and Litter Control Act 2016 and the City of Burnside ByLaws 1-7*
- 1.2. Potential unlawful activity and/or breaches of the above listed legislation may come to the attention of Council through public enquiries or complaints, or through Council officer patrols and inspections. Council has discretion on taking action with respect to any unlawful activity and will do so in accordance with the principles of good governance and administrative practice.
- 1.3. In adopting this Policy, Council has recognised that when laws are made by the Parliament it may be difficult to determine all the circumstances that should give rise to enforcement. Consideration needs to be given to each individual situation having regard to its impact on economic, social, environmental and public safety issues. It is therefore recognised that it is appropriate for Council to apply discretion or common sense in determining when and when not to take enforcement action.
- 1.4. In addition to enforcement, Council carries out a range of activities to ensure compliance such as community education programs to encourage conformance. Detailed policies and procedures about these specific activities may also apply.

2. Purpose of the Policy

- 2.1. This policy is an “umbrella” policy which outlines Council’s approach to enforcement matters and provides staff with direction about the manner in which enforcement activities are to be undertaken. The policy assists Council officers to act promptly, consistently and effectively in response to matters of non-compliance or unlawful activity. It provides workable guidelines on:
 - 2.2.1. How to assess whether allegations of unlawful activity or matters of non-compliance require investigation;
 - 2.2.2. Options for dealing with unlawful activity or matters of non-compliance; and
 - 2.2.3. How to decide whether enforcement action is warranted.
- 2.3. The policy ensures transparency, procedural fairness and natural justice principles are applied and that enforcement action is proportionate to the alleged offence in each case.

3. Defining Enforcement

- 3.1. Council adopts a broad definition of “enforcement”, which combines the provision of advice and assisting compliance with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals, businesses and other bodies.
- 3.2. Notwithstanding the above, Council will take immediate action when required (for example to ensure public health and safety or to protect the environment) against those who act unlawfully when circumstances warrant.

4. Principles of Good Enforcement

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

4.1. Proportionality

- 4.1.1. A proportionate response means that Council’s actions will be scaled to the seriousness of the breach.
- 4.1.2. Council recognises that most individuals want to comply with the law and will assist compliance by being open and helpful, offering informal advice and providing the chance to discuss compliance problems.
- 4.1.3. Attention will be focussed on those whose activities give rise to the most serious risks, where potential hazards are least well controlled or where offending is continued or in flagrant disregard for the legislation. Depending on the seriousness and persistence of the infringement, Council will enforce the minimum action necessary to secure future compliance.
- 4.1.4. Prosecution will generally be used for serious offences, those that pose a severe risk hazard to the community or where a person has elected to be prosecuted.

4.2. Consistency

- 4.2.1. Council will take a similar approach in similar cases to achieve similar outcomes.
- 4.2.2. While decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:
 - 4.2.2.1. Follow Standard Operating Procedures ('SOPs') wherever applicable;
 - 4.2.2.2. Ensure fair, equitable and non-discriminatory treatment; and
 - 4.2.2.3. Record any deviation from the SOPs along with reasons for the deviation.

4.3. Transparency

- 4.3.1. Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. It will consult on and provide ready access to published standards and levels of service and performance that can be expected and be clear and open about what is expected from those on whom the law places a duty (duty holders).
- 4.3.2. In educating the community at large and dealing with duty holders, Council will make a clear distinction between what is legally required and what is desirable but not compulsory.
- 4.3.3. Staff will be open to discussing potential and actual compliance failures, before, during and after formal action has been taken.
- 4.3.4. Complainants may be advised in general terms what action has been taken and why that action has been taken subject to respecting the privacy of the parties involved and not compromising the integrity of any ongoing investigations.
- 4.3.5. Generally the details of a complaint or the identity of a complainant will not be disclosed by the investigating officers during the course of an investigation. (Subject to Freedom of Information considerations).
- 4.3.6. When remedial action is needed Council will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against that decision.
- 4.3.7. Where it is not practical to give notice, where legislation requires immediate action, or where there is high risk or hazard from the offence, the reasons why will be recorded in accordance with Council's Records Management protocols.

- 4.3.8. Complainants will be advised of what action has been taken and why that action has been taken.

5. Authorisation of Officers

- 5.1. Only officers who are competent by training, qualification and/or experience will be authorised to take enforcement action.
- 5.2. Officers will also act in accordance with any delegated authority and other relevant Council policies and procedures to ensure a consistent approach to their duties. Any decision to act other than in accordance with Council policies must have approval from the relevant Manager and the reasons for action recorded in accordance with Council's Records Management protocols unless urgent or emergency action is required to be taken by the officer(s). In these circumstances the relevant manager is to be informed immediately after the action and records made as to the reasons for the urgent action.
- 5.3. Officers are required to identify themselves and show their authorisations on demand (or as required by the specific Act they are administering).

6. Decision Making

6.1. Is an investigation required?

- 6.1.1. Not all allegations of non-compliance with the Act will warrant investigation. Council will consider a range of factors when deciding whether to investigate. These include:
 - 6.1.1.1. Is the matter within the jurisdiction of Council and the various Acts it enforces?
 - 6.1.1.2. Is the complaint premature e.g. does it relate to some unfinished aspect of work that is still in progress?
 - 6.1.1.3. Is the activity or work permissible with or without consent?
 - 6.1.1.4. If the activity is permissible with consent, is there a consent in place?
 - 6.1.1.5. Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
 - 6.1.1.6. Is the complaint trivial, frivolous or vexatious?
 - 6.1.1.7. Has too much time elapsed since the events the subject of the complaint took place? (Limitation of time expired within the relevant legislation).
 - 6.1.1.8. Is there another body that is a more appropriate agency to investigate and deal with the matter under an Act not administered by Council?
 - 6.1.1.9. Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
 - 6.1.1.10. Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
 - 6.1.1.11. Has the person or organisation complained of been the subject of previous complaints? (i.e. is there a history of non-compliance)

- 6.1.1.12. Has the person or organisation making the complaint made complaints or multiple complaints about the same or similar issues in the past? (i.e. is there a history of vexatious, frivolous or trivial past complaints)
 - 6.1.1.13. Does the complaint have special significance in terms of the Council's existing priorities?
 - 6.1.1.14. Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
 - 6.1.1.15. Is it in the public interest to investigate the complaint? (i.e. is it trifling?)
- 6.1.2. Where a decision is made not to investigate a complaint in observance to this policy or relevant SOP, the decision and reasons will be recorded in accordance with Council's Records Management protocols and the complainant will be advised in writing.

6.2. Factors in choosing an enforcement strategy

- 6.2.1. In coming to a decision on the most appropriate means of enforcement (and whether any enforcement is required at all), the officer shall apply discretion having regard to the following factors:
- 6.2.1.1. Whether the breach or situation has drawn complaint, and if so, to what extent;
 - 6.2.1.2. Whether the breach or situation has been implicated in any accident;
 - 6.2.1.3. Whether the breach or situation is highly visible due to its size, colour, location, illumination or other factors etc;
 - 6.2.1.4. The size and scope of the breach or situation, particularly as compared with what might be established "as of right" (i.e. without need for approval);
 - 6.2.1.5. The duration (hours) that the breach or situation has occurred, if relevant;
 - 6.2.1.6. Whether the breach or situation is something commonly employed by other like businesses, residences, premises, etc;
 - 6.2.1.7. Whether other nearby businesses, residences, premises, etc and/or competitors employ similar circumstances;
 - 6.2.1.8. How long the breach or situation has occurred before coming to the council's attention and whether the council is within time to take enforcement action;
 - 6.2.1.9. Whether the breach or situation is being used for a purpose that is not envisaged by the Development Plan (to be replaced by the Planning and Design Code) or other Council policies for the relevant area or circumstance;
 - 6.2.1.10. Whether the Council has given incorrect information or advice or in some other way encouraged (tacit consent) the breach or situation;
 - 6.2.1.11. Whether the breach or situation would likely gain approval if approval was sought; and
 - 6.2.1.12. The "seriousness" of the breach or situation relative to other breaches or situations of which the Council is aware (Council must prioritise its enforcement resources, targeting the most serious matters first).

- 6.2.2. The following factors are to be ignored when choosing an enforcement strategy:
 - 6.2.2.1. Any element of discrimination or bias against the person such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
 - 6.2.2.2. Possible political advantage or disadvantage to a government, person holding (or a candidate for) public office, or any political group or party.
- 6.2.3. Where a personal association or relationship with the alleged offender or any other person involved exists:
 - 6.2.3.1. An alternative Authorised Officer or Group Manager will make decisions where possible; and
 - 6.2.3.2. The facts about any conflict/relationship will be recorded in accordance with Council's Records Management protocols.
- 6.2.4. Written documentation will:
 - 6.2.4.1. Include all the information necessary to make clear what needs to be done to comply with legal requirements, the required time frame and if necessary, the reasons for these actions and potential penalties for failing to comply with the request;
 - 6.2.4.2. Detail the section/s of the Act contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
 - 6.2.4.3. Clearly differentiate between legal requirements and recommendations of good practice.
- 6.2.5. Where a decision is made not to pursue compliance, having exercised discretion in accordance with this policy and/or the relevant SOP, the decision and reasons, will be recorded in accordance with Council's Records Management protocols and the complainant will be advised in writing.

6.3. Options for compliance

- 6.3.1. Where, after having undertaken investigation and exercising an appropriate level of discretion in accordance with this policy and the relevant SOP, it is determined that on prima facie evidence non-compliance has occurred, Council has various options available to it to seek or promote compliance including:
 - 6.3.1.1. Explaining legal requirements and, where appropriate, the means to achieve compliance;
 - 6.3.1.2. Providing an opportunity to discuss points of issue where appropriate;
 - 6.3.1.3. Allowing reasonable timeframes to achieve compliance and/or waiving or reducing fees;
 - 6.3.1.4. Facilitating communication between affected parties to achieve a resolution;
 - 6.3.1.5. Issuing a verbal or written warning; or

6.3.1.6. Enforcement actions such as issuing expiation, issuing an order/direction or civil enforcement proceedings and/or prosecution (see discussion under part 7 below).

6.3.2. Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected.

7. Enforcement Actions

Officers have a range of enforcement actions available as outlined below. In considering each option, regard should be had to the factors in part 6.2 of this Policy and the relevant SOP.

7.1. No Action

7.1.1. No action will be taken when, after investigation and exercising an appropriate level of discretion, no breaches of the Act are discovered.

7.1.2. It may also be appropriate to take no action when:

- 7.1.2.1. The complaint is frivolous, vexatious or trivial in nature;
- 7.1.2.2. The alleged offence is outside Council's area of authority;
- 7.1.2.3. Taking action may prejudice other major investigations;
- 7.1.2.4. The factors described in part 6.2 of this Policy and the protocols outlined in the relevant SOP do not warrant action being taken.

7.2. Informal Action

7.2.1. Informal action to achieve compliance with legislation may include:

- 7.2.1.1. Offering verbal or written advice;
- 7.2.1.2. Verbal warnings and requests for action; or
- 7.2.1.3. Written warnings.

7.2.2. Advice from officers will be put clearly and simply and will be confirmed in writing.

7.2.3. The circumstances in which informal action may be appropriate include:

- 7.2.3.1. The act or omission is not serious enough to warrant formal action;
- 7.2.3.2. The duty holder's past history reasonably suggests that informal action will secure compliance;
- 7.2.3.3. Confidence in the individual/other body is high;
- 7.2.3.4. The consequences of non-compliance will not pose a significant risk to health and/or safety; or
- 7.2.3.5. Where informal action may prove more effective than a formal approach.
- 7.2.3.6. Where the limitation of time has expired to undertake formal action but where a warning is served and recorded with Council so as to have a future record if non compliance continues.

7.2.4. Where statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, such action will

be taken by a senior officer of Council and the reasons recorded in accordance with Council's Records Management protocols. The recipient will be made aware that the requested actions are not legally enforceable.

7.3. Mediation

Where practical, Council will make mediation available. Mediation is a possible alternative where, after investigation, an officer determines that the problems being complained of are incapable of resolution through other 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.

7.4. Formal Action

7.4.1. Service of Orders and Directions and Court action

7.4.1.1. The various Acts provide for a number of enforcement actions, for example:

- Expiation of some offences under the *Expiation of Offences Act 1996*;
- Legally binding directions or orders (for example, section 69 emergency order or section 84 enforcement direction) under the *Development Act 1993* (*these section numbers will change in 2010 with the new Planning, Development and Infrastructure Act 2016*), and 105F notice under the *Fire and Emergency Services Act*;
- Civil enforcement proceedings under section 85 of the *Development Act 1993*; (refer above to PDI Act)
- Criminal prosecution proceedings under section 49 of the *Summary Procedure Act 1921*.

7.4.1.2. Council officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order/direction and the timeframe to comply.

7.4.1.3. Only in circumstances such as a threat to life or immediate threat to public health or safety will an Order be made without giving notice of intention. In these circumstances immediate compliance to resolve a situation can be required.

7.4.1.4. In most cases the person receiving the Order or Direction has a right of appeal if they consider the Order or Direction is unreasonable. Depending on the Act under which the offence is alleged, this may be to the Environment, Resources and Development Court, the District Court of South Australia, the Magistrates Court of South Australia, the Chief of the CFS or MFS, or another body as determined by the relevant piece of legislation. If an Order or Direction 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 or Direction.

- 7.4.1.5. Where there is evidence that an offence has been committed Council may issue an Expiation Notice, commence civil proceedings or launch a prosecution in addition to serving an Order or Direction. This will only be done where it is determined that the conduct of the recipient justifies taking both steps.

7.4.2. Action in Regard to a Default

- 7.4.2.1. Failure to comply with Orders or Directions may incur further enforcement action such as launch of a prosecution or civil enforcement.
- 7.4.2.2. Where action in regard to a default is provided for by the Act and the necessary work or action has not been carried out in the time allowed without good reason (for example, section 56 of the *Development Act 1993*), Council may undertake the required work or action. Before doing the work or action Council will consider whether there is a realistic prospect that the person responsible will complete the work or action within a reasonable time. Where work or action in default is undertaken Council will seek to recover all costs over a fair period, using all statutory means available.
- 7.4.2.3. The decision to carry out action in default will be made by the Chief Executive Officer or delegate.
- 7.4.2.4. Where an offence has been committed Council may issue an Expiation Notice, commence civil enforcement or launch a prosecution in addition to taking action to fulfil an Order or Direction. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.

7.4.3. Service of an Expiation Notice

- 7.4.3.1. 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 to prove an offence beyond reasonable doubt.
- 7.4.3.2. The following circumstances are likely to warrant an Expiation Notice:
- Expiable breaches of the Acts administered by Council;
 - Failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer (informal enforcement action);

- Failure to comply with the requirements of an Order or Direction;
- Confidence in the individual/other body's likelihood to not re-offend is low; or
- A written warning has been given for a similar offence.

7.4.4. Prosecution

- 7.4.4.1. A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.
- 7.4.4.2. 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;
 - It is not possible to rectify a breach (for example, demolition or tree-damaging activity);
 - A failure to comply with the requirements of an Order or Direction;
 - 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 Council or an aggrieved party.
- 7.4.4.3. Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.
- 7.4.4.4. Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence.
- 7.4.4.5. Prior to undertaking a prosecution the Authorised Officer of Manager should seek written legal advice from one of Council's legal panel members, this advice should be forwarded through senior management for their information and recording on Council records management systems.
- 7.4.4.6. 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 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 (i.e. would a prosecution be perceived as a disproportionate response given the offender's circumstances);
- 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.

7.4.4.7. The final decision to prosecute will be made by the Chief Executive Officer [or delegate].

8 Review and Authority

8.1 This Policy will be reviewed bi-annually in accordance with Council's Policy and Procedure Framework.

8.2 For the purposes of operational requirements, whilst still supporting the intent of the policy, the General Manager, Community and Development Services may approve, waiver or vary requirements of this Policy as needed.

9 Availability

9.1 The Policy is available to be downloaded, free of charge, from Council's website www.burnside.sa.gov.au

9.2 The Policy will be available for inspection without charge at the Civic Centre during ordinary business hours and a copy may be purchased at a fee as set annually by Council.

City of Burnside Civic Centre
401 Greenhill Road, Tasmore SA 5065

Telephone 8366 4200
Fax 8366 4299
Email; burnside@burnside.sa.gov.au

Office hours: Monday to Friday, 8.30am to 5.00pm (except public holidays)

10 Further information

For further information about this policy please contact:

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