

 City of Mount Gambier	ADMINISTRATIVE PRINCIPLE – UNSIGHTLY PREMISES	Version No:	1
		Issued:	October 2019
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1. INTRODUCTION

Local Government is charged with legislative responsibilities to prevent, and to protect the community from, local nuisance and litter. This includes responsibility for addressing unsightly premises under the Local Nuisance and Litter Control Act 2016 ('the Act'). Identification of unsightly premises may come to the attention of the Council through public enquiries or complaints, or through Council officer patrols and inspections. The Council has discretion on taking action with respect to any unsightly premises and will do so in accordance with the principles of good governance and administrative practice.

In adopting this Administrative Principle, the Council has recognised that when laws are made by 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 the Council to apply discretion and/or common sense in determining when and when not to take enforcement action in relation to unsightly premises.

2. SCOPE

The 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. Notwithstanding the above, the Council will take immediate action when required to address unsightly conditions on premises which may substantially affect the environment or amenity in a negative way or which may give rise to public health and safety concerns.

Only officers who are competent by training, qualification and/or experience will be authorised under Section 12 of the Act to take action in relation to unsightly premises. Officers will act in accordance with this Administrative Principle, any delegated authority and other relevant Council policies and procedures to ensure a reasonable and 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 the Council's Records Management Protocols.

Officers are required to show their authorisations on demand.

3. PURPOSE

To assist Council officers to act promptly, consistently and effectively in response to allegations of the unsightly condition of premises. It provides workable guidance on:

- How to assess whether allegations of unsightly premises require investigation;
- Options for dealing with unsightly premises; and
- How to determine whether enforcement action is warranted.

4. PRINCIPLES

Actions to address unsightly premises are taken within the context of both a legal and policy framework. Council officers will carry out work related to this role with due regard to the following principles:

- Education: the importance of educating the community regarding legislative obligations and the consequences of action and non-action;
- Opportunity: recognising and using opportunities to assist community members to comply with their legislative obligations;
- Equity: fairness and impartiality in the judgement and conduct of authorised officers;
- Prioritisation: focus on matters/issues of severity which pose danger and hazards to the community;

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- Proportionality: a proportionate response means that the Council’s actions will be scaled to the seriousness of the breach;
- Consistency: the Council will take a similar approach in similar cases to achieve similar outcomes; and
- Transparency: the Council will be open and transparent about the manner in which it undertakes enforcement activities under the Act.

5. IMPLEMENTATION

WHAT ARE UNSIGHTLY CONDITIONS?

Section 17 of the Act states that unsightly conditions fall within the meaning of local nuisance:

“17 – *Meaning of local nuisance (1) For the purposes of this Act, local nuisance is –*

.....

- (c) *Unsightly conditions, of a kind declared by Schedule 1, on premises caused by human activity or a failure to act; or*”

Schedule 1 of the Act provides further clarification regarding unsightly conditions:

“3 – *Unsightly conditions on premises (section 17(1)(c)) For the purposes of section 17(1)(c), the following unsightly conditions are declared:*

- (a) *Conditions on premises involving-*
- (i) *Excessive or unconstrained rubbish, waste or vegetation; or*
 - (ii) *Stockpiled, excessive or unconstrained disused or derelict items or material that a reasonable person would consider to be rubbish or waste in the circumstances; or*
 - (iii) *Graffiti (other than authorised graffiti) that has been left on the premises-*
 - (A) *In the case of offensive graffiti – for more than 7 days; or*
 - (B) *In any other case – for more than 28 days, where, in the opinion of an authorised officer, the conditions have had an adverse effect on the amenity value of the area or caused the premises to be significantly out of conformity with the general appearance of neighbouring premises; or*
- (b) *Conditions involving a building on the premises having been left partially demolished or in a state of disrepair, dilapidation or damage where, in the opinion of an authorised officer, the conditions have had an adverse effect on the amenity value of the area or caused the premises to be significantly out of conformity with the general appearance of neighbouring premises.”*

FACTORS IN CHOOSING AN ENFORCEMENT STRATEGY

When a premises is identified that may fall within the definition of unsightly conditions, and accordingly local nuisance, an officer must use discretion when determining an enforcement strategy (including whether any form of enforcement is necessary) having regard to the following factors:

- The extent of any alleged unsightly conditions;
- Whether the breach or situation has drawn compliant, and if so, to what extent;
- The visible nature of unsightly conditions;
- The factors which may have led to the unsightly conditions including (but not limited to) the mental health of any owners / occupiers, lack of financial resources, cultural reasons, lack of transport;
- The ownership and use of the land (some properties may be exempt from the requirements of the Act);
- The nature of the locality and the impact on the amenity of the locality;

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- Whether the unsightly conditions are causing risks to life, property or safety of either occupants and/or members of the community; or
- Whether the issue can be best dealt with using other legislative provisions (e.g. Public Health Act) and in conjunction with other teams within the Council or community.

The following factors are to be ignored when choosing an enforcement strategy:

- Any element of discrimination or bias against the person such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
- Possible political advantage or disadvantage for a government, person holding (or a candidate for) public office, or any political group or party.

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

- An alternative person will make decisions where possible; and
- The facts about any conflict / relationship will be recorded in accordance with the Council's Records Management protocols.

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;
- Detail the section/s of the Act contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
- Clearly differentiate between legal requirements and recommendations of good practice. Where a decision is made not to pursue compliance, having exercised discretion in doing so, the decision and reasons will be recorded in accordance with the Council's Records Management protocols and the complainant will be advised in writing.

Where potential unsightly conditions are identified (either via complaint, referral or observation) Council Officers will undertake an initial investigation which will involve the following:

- Where a complaint or referral is made, it must be received in writing by the person making the complaint or referral (help can be provided by Council officers in this regard);
- A case file will be established in conjunction with the Records Team and an acknowledgement of the complaint / referral sent back to the person who lodged it;
- A review of Council's Records System will be undertaken to discover any previous complaints, actions or activities in relation to the matter;
- A site visit will be undertaken to determine the extent of the unsightly conditions; and
- A record of the research and inspection undertaken regarding the unsightly conditions will be made on the case file and recorded in accordance with the Council's Records Management protocols.

OPTIONS FOR COMPLIANCE

Where, after having undertaken an investigation and exercising an appropriate level of discretion in accordance with this Administrative Principle, it is determined that on prima facie evidence of unsightly conditions is sufficient to take further action, the Council has various options available to it to seek or promote compliance including:

- Explaining legal requirements and where appropriate, the means to achieve compliance;
- Providing an opportunity to discuss points of issue where appropriate;
- Allowing reasonable timeframes to achieve compliance and / or (where relevant) waiving or reducing fees;
- Facilitating communication between affected parties to achieve a resolution;

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- Issuing a verbal or written warning; or
- Enforcement actions such as issuing an expiation, issuing an order / direction or prosecution (see discussion below).

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

ENFORCEMENT ACTIONS

Officers have a range of enforcement actions available as outlined below. In considering each option, regard should be had to the factors outlined in this Administrative Principle.

NO ACTION

No action will be taken when, after investigation and exercising an appropriate level of discretion, no breaches of the Act are discovered. It may also be appropriate to take no action when:

- The complaint is frivolous, vexatious or trivial in nature;
- The alleged offence is outside the Council's area of authority;
- Taking action may prejudice other major investigations;
- Other factors described in this Administrative Principle do not warrant action being taken.

INFORMAL ACTION

Informal action to achieve compliance with legislation may include:

- Offering verbal or written advice;
- Verbal warnings and requests for action; or
- Written warnings. Advice from officers will be put clearly and simply providing all relevant information, and will be confirmed in writing where relevant / necessary in the judgment of the officer.

The circumstances in which informal action may be appropriate include:

- The unsightly conditions are 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 to health and/or safety; or
- Where informal action may prove more effective than a formal approach.

Where statutory action is not possible under the *Local Nuisance and Litter Control Act*, but it would be beneficial in a wider public safety context to urge a particular outcome, such action will be taken by an officer of the Council and the reasons recorded in accordance with the Council's Records Management protocols. The recipient will be made aware that the requested actions are not legally enforceable.

FORMAL ACTION

The Act provides for a number of enforcement actions:

- Requesting that the unsightly conditions, and the substance, material or thing causing that, be removed (Section 20);
- The issuing of a Nuisance Abatement Notice (Section 30);
- The issuing of an Emergency Notice (verbal or written) where urgent action is required (Section 30);
- The issuing of an Expiation Notice;
- The undertaking of the work required by a Nuisance Abatement Notice by the Minister or Council, with the costs of undertaking that work being recovered by the Minister or Council;

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- Lodging proceedings with the Environment Resources and Development Court to secure a civil remedy;
- Lodging prosecution proceedings with the Environment Resources and Development Court.

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 a Notice/Order/Direction and the timeframe to comply.

Where officers are of the opinion that there is a need for formal action, a case management meeting will be convened including the case officer and at least two of the following:

- Team Leader – General Inspectorate;
- Manager – Development Services;
- General Manager – City Growth; and
- Chief Executive Officer.

The outcomes of the meeting will include:

- The agreed formal action;
- A timescale for its undertaking;
- An allocation of this responsibility;
- A statement of reason(s) as to the action(s) agreed; and
- A file note placed on the enforcement file detailing the above. This will ensure that the approach to formal action is consistent, proportionate and in the public interest.

Only in circumstances such as a threat to life or public health or safety will a Notice/Order/Direction be made with immediate effect. In these circumstances immediate compliance to resolve a situation can be required.

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

APPEALING A NOTICE

In most cases the person receiving the Notice, Order or Direction has a right of appeal to the Environment, Resources and Development Court if the Notice, Order or Direction is considered unreasonable. If a Notice, Order or Direction is served for which an appeal is possible, the Council will advise the recipient in writing of the right to appeal and the relevant legal provisions at the time of serving the Notice, Order or Direction.

Persons have the right to attend any appeal at Environment Resources and Development Court as do Council officers.

Any actions or discussions between the parties underway at the time of the appeal may be suspended or many continue depending on the nature of the appeal and the issue which leads to the appeal.

DEFAULT

Where action in regard to a default is provided for by the Act and the necessary work has not been carried out in the time allowed without good reason, the Council may undertake the required work (Section 31 of the Act). Before doing 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.

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The decision to carry out action in default will be made by the General Manager City Growth or a delegate.

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 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.'

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 to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an Expiation Notice:

- Certain breaches of the Act 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 a Notice, 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.

PROSECUTION

A prosecution will only proceed where a person/body corporate has elected to be prosecuted and/or where there is a reasonable prospect that an offence can be proved beyond reasonable doubt. The following circumstances may 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 condition after having been given reasonable opportunity to do so;
- A failure to comply with the requirements of a Notice, 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 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.

Before a prosecution is recommended there must be substantial, reliable and admissible 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 influence the offender's future behaviour;

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- 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. The final decision to prosecute will be made by the Chief Executive Officer, however a number of other bodies / persons have an ability to commence proceedings including:

- The Director of Public Prosecutions;
- The Minister;
- An authorised officer;
- A relevant council;
- The Chief Executive Officer of a relevant council;
- A police officer;
- A person acting on the written authority of the Minister.

PENALTIES

A number of penalties are applicable to persons or body corporates who contravene or fail to comply with the provisions of the Act. When determining the extent of any financial or other penalties regard will be had to the principles and factors outlined throughout this Administrative Principle.

6. REVIEW & EVALUATION

This Administrative Principle is scheduled for review by Council in October 2020. However, it will be reviewed as required by any legislative changes which may occur.

7. AVAILABILITY OF ADMINISTRATIVE PRINCIPLE

This Administrative Principle will be available for inspection at Council's principal office during ordinary business hours and on the Council's website www.mountgambier.sa.gov.au. Copies will also be provided to interested members of the community upon request, and upon payment of a fee in accordance with Council's Schedule of Fees and Charges.

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File Reference:	AF15/598
Applicable Legislation:	Local Nuisance and Litter Control Act 2016, Local Government Act 1999
Reference: Strategic Plan – Beyond 2015	Goal 4, Strategic Objective 7 & 8
Related Policies:	
Related Procedures:	
Related Documents:	

DOCUMENT DETAILS

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