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ORDER MAKING POLICY

1. PREAMBLE

1.1 Background

Under section 259 of the *Local Government Act 1999* ('the Act') each council is required to develop an Order Making Policy. This Order Making Policy is prepared and adopted pursuant to section 259 of the Act and sets out the steps council will take in the making of orders.

With the inception of the *Local Government Act 1999* ('the Act'), Councils can no longer make by-laws that apply to activities undertaken on private land.

To address issues covered by the former by-laws, an order making provision has been included in the Act. This allows Council to instruct owners or occupiers of private land to take action required to resolve an issue with the service of an order.

Orders are intended to apply and be considered on a case by case basis.

1.2 Purpose

Section 259 of the Act requires each council to take reasonable steps to prepare and adopt policies concerning the operation of Part 2 of Chapter 12 of the Act. Part 2 deals with the making of orders.

1.3 Scope

This policy applies to those circumstances listed in Section 254 of the Act, which states that Council may order a person to do or refrain from doing a thing under certain circumstances as specified in the Schedule identified in the Act.

Sections of the Act to which this Policy also applies are:

- a. Section 216 (Power to order an owner of a private road to carry out specified roadwork)
- b. Section 217 (Power to order owner of infrastructure on a road to carry out specified maintenance or repair work)
- c. Section 218 (Power to require an owner of adjoining land to carry out specified work)

Orders may be applied to activities as described in section 254 of the Act. Refer Attachment 1.

1.4 Definitions

There are no specific definitions associated with this policy.

1.5 Strategic Reference

Community: Building a healthy, active and resilient community

Culture: Supporting excellent, efficient operations

2. PRINCIPLES

2.1 Council is committed to using the order making powers available to it under the Local Government Act 1999 to meet its obligations to the community, namely:

- a. Ensuring a safe and healthy environment
- b. Enhancing the quality of life for residents and visitors to the area
- c. Improving the amenity of the City
- d. Ensuring all enforcement activities are conducted using natural justice principles and
- e. Ensuring that complaints requiring the service of an order under the Local Government Act are dealt with in a timely and effective manner

2.2 Council will apply the principles of social justice, ecological sustainability, accountability, transparent process and good customer service when undertaking to resolve an issue on private land using this Policy.

2.3 Council will consider the following factors when determining the merit of serving an order:

- a. Severity of the incident
- b. Hazard / Danger posed to the Community
- c. Risk to health and safety of the Community
- d. Impact on Local Amenity
- e. Repeated occurrence, previous offences
- f. Previous attempts to reconcile the situation
- g. Potential to use other options such as negotiation, mediation, warnings or other more collaborative approaches
- h. Public interest
- i. Offender Attitude / Recidivism
- j. Evidentiary support where potential for the order to be challenged
- k. Number of complaints received in respect of the matter (if any)

i. Opportunities to take action under alternative legislation

2.4 Expiation fees are set in accordance with the Act.

Penalties under this part do not derogate from the ability to undertake required works and charge accordingly under Section 257 of the Act.

3. PROCESS AND PROCEDURE

3.1 Except in the case of an emergency described below, council will take reasonable steps, within available resources, to resolve cases of local nuisance by negotiation and agreement before issuing an order.

3.2 Except in the case of an emergency described below, before making an order council will give notice of its intention to make an order in accordance with section 255 of the Act by:

- Giving the person to whom an order is intended to be directed a notice in writing stating the:
 - proposed action
 - terms of the proposed order (i.e. what it requires the person to do or refrain from doing)
 - period within which compliance with the order will be required
 - penalties for non-compliance; and
 - reasons for the proposed action; and
- Inviting the person notified of the opportunity to give reason/s, within a specified time, why the proposed action should not be taken.

3.3 Council will proceed to make an order without negotiation or notice, in accordance with section 255(12) where council considers the circumstance or activity constitutes, or is likely to constitute:-

- a threat to life; or
- an immediate threat to public health or public safety; or
- an emergency situation.

4. REVIEW RIGHTS

Pursuant to section 256 any person to whom an order is issued (including an order issued under sections 254, 216 or 218 of the Act) has a right to appeal against the order. Any such appeal must be lodged within 14 days of that person's receipt of the order. The council will ensure that reference to this right of review is included in any order issued.

5. NON-COMPLIANCE WITH AN ORDER

If an order is not complied with within the time fixed for compliance (or if there is an application for review, within 14 days after the determination of the review) the council may (subject to the outcome of any review) take the action required by the order.

The reasonable costs and expenses incurred by council in taking action under this section

may be recovered by council as a debt from the person who failed to comply with the requirements of the order.

Where an amount is recoverable by council, council may, by notice in writing to the person, fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid and, if the amount is not paid by the person within that period, the person is liable to pay interest and council may impose a charge over the land for the unpaid amount, together with interest, in accordance with section 257(5) of the Act.

Non-compliance with an order of council is an offence for which a person may incur a statutory penalty provided for in the Act.

6. RESPONSIBILITIES & DELEGATIONS

This policy will be enforced by Authorised Persons who have been appointed (in writing) by the council under section 260 of the Act.¹

Council may also choose to delegate the power to issue orders under sections 254, 216 and 218 of the Act to council staff, in which case, council will ensure appropriate delegations are in place.

7. REFERENCES

7.1 Legislation

- *Local Government Act 1999*
- *Local Government (General) Regulations 2013*

7.2 Other References – N/a

¹ Authorised Persons have powers under section 261 of the Act to enforce breach of orders by way of expiation.

Attachment 1

Local Government Act 1999

254—Power to make orders

- (1) A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following table if in the opinion of the council the circumstances specified opposite it in Column 2 of the table exist and the person comes within the description opposite it in Column 3 of the table.

| Column 1 To do or to refrain from doing what? | Column 2 In what circumstances? | Column 3 To whom? |
|---|---|--|
| 2. Hazards on lands adjoining a public place | | |
| (1) To fence, empty, drain, fill or cover land (including land on which there is a building or other structure). | (1) A hazard exists that is, or is likely to become, a danger to the public. | (1) The owner or occupier of the land. |
| (2) To remove overgrown vegetation, cut back overhanging branches, or to remove a tree. | (2) The vegetation, branches or tree create, or are likely to create, danger or difficulty to persons using a public place. | (2) The owner or occupier of the land. |
| (3) To remove or modify a flag or banner, a flagpole or sign, or similar object or structure that intrudes into a public place. | (3) The relevant object or structure creates, or is likely to create, danger or difficulty to persons using a public place. | (3) The owner or occupier of the land. |
| (4) Where the public place is a road—to take action necessary to protect the road or to remove a hazard to road users. | (4) A situation exists that is causing, or is likely to cause, damage to the road or a hazard to road users. | (4) The owner or occupier of the land. |

Examples—

- To fill an excavation, or to prevent drainage of water across the road.
- To construct a retaining wall or to remove or modify a fence.
- To fence land to prevent the escape of animals.
- To remove a structure or vegetation near an intersection.

4. Inappropriate use of vehicle

To refrain from using a caravan or vehicle as a place of habitation.

A person is using a caravan or vehicle as a place of habitation in circumstances that—

The owner or occupier of the land or a person apparently occupying the caravan or vehicle.

- (a) present a risk to the health or safety of an occupant; or*
- (b) cause a threat of damage to the environment; or*
- (c) detract significantly from the amenity of the locality.*

(2) A reference in the table to an animal or animals includes birds and insects.

216—Power to order owner of private road to carry out specified roadwork

- (1) A council may, by order in writing to the owner of a private road, require the owner to carry out specified roadwork to repair or improve the road.*
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—*
 - (a) any proposal to make an order; and*
 - (b) if an order is made, any order, under subsection (1).*

217—Power to order owner of infrastructure on road to carry out specified maintenance or repair work

- (1) A council may, by order in writing to the owner of a structure or equipment (including pipes, wires, cables, fittings and other objects) installed in, on, across, under or over a road, require the owner—*
 - (a) to carry out specified work by way of maintenance or repair; or*
 - (b) to move the structure or equipment in order to allow the council to carry out roadwork.*

- (2) If the order is not complied with within a reasonable time fixed in the order—*
 - (a) the council may itself take the action required by the order and recover the cost of doing so as a debt from the owner; and*
 - (b) the owner is guilty of an offence and liable to a penalty not exceeding \$5 000.*

- (3) Subsection (1) and (2) do not apply to the owner of electricity infrastructure, public lighting infrastructure or gas infrastructure if the Commission has determined, on application by the owner, that there are reasonable grounds for not requiring the owner to take the action specified in the order.*

(4) In this section—

Commission means the Essential Services Commission established under the Essential Services Commission Act 2002;

electricity infrastructure has the same meaning as in the Electricity Act 1996;

gas infrastructure has the same meaning as in the Gas Act 1997, but does not include a transmission pipeline within the meaning of the Petroleum Act 2000;

owner of a structure or equipment includes a lessee or licensee;

public lighting infrastructure has the same meaning as in the Electricity Corporations (Restructuring and Disposal) Act 1999.

218—Power to require owner of adjoining land to carry out specified work

- (1) A council may, by order in writing to the owner of land adjoining a road, require the owner to carry out specified work to construct, remove or repair a crossing place from the road to the land.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order,under subsection (1).