

5.12 DEVELOPMENT COMPLIANCE ENFORCEMENT POLICY

Attachments: 1. **Development Compliance Enforcement Policy**

RECOMMENDATION:

That Council APPROVES the proposed Development Compliance Enforcement Policy at Attachment 1, for the purpose of community consultation, which is proposed to replace Policy No. 4.1.22 – Prosecution and Enforcement.

PURPOSE OF REPORT:

To consider approving the Development Compliance Enforcement Policy (the Policy) for the purpose of advertising.

BACKGROUND:

At the Ordinary Meeting of Council (OMC) on 22 February 2005 [Policy No. 4.1.22 – Prosecution and Enforcement](#) was adopted. This policy has guided the City's development compliance enforcement and prosecution activities and was due for review in February 2015, after amendments in 2010 and 2013.

A review of the Policy was presented to Council at the Ordinary Meeting on 15 December 2020 when it was determined for the policy review to be deferred to enable for Administration to further consult with the community and Council.

The policy review which was presented to the December 2020 OMC involved:

1. Stronger recognition of the Director of Public Prosecutions – Statement of Prosecution Policy and Guidelines (2018). While this is a State Government Guideline the City can adopt this approach and reference the DPP Guidelines through the Policy;
2. Consideration of whether certain clauses in the Policy should instead be in an internal procedure. Administration supports some clauses being contained within the Policy which could be perceived as procedural. This is to ensure there is accountability and endorsement by Council of certain approaches which involve the best use of resources. For example, to retain procedural discretion for Administration to make decisions not to investigate complaints that are unsubstantiated or vexatious in nature;
3. Placing greater emphasis on the concepts of 'graduated response' and 'proportionate response' (see clause 2.2(a) and (b));
4. Provision of guidance relating to seeking approval for unauthorised development (see clause 2.2(c) and (d));
5. Assessing where duplication of language can be reduced and merging sub-clauses to package common themes together, reducing the size of the Policy from 12 pages to four pages; and
6. Consideration of other policies, particularly for risk management.

Further feedback was obtained from Council in July-August 2021 and March 2022, when it was recommended for further changes to be made to the Policy prior to seeking Council approval for advertising.

DETAILS:

The updated Development Compliance Enforcement Policy can be viewed at **Attachment 1**. This Policy contains the following changes which were made in response to feedback from Council:

1. The scope of the policy has been amended so that it relates to planning and building compliance only;
2. The objective now includes the principles of fairness, impartiality, consistency, transparency and accountability;
3. The objectives includes a policy position on encouraging self-resolution of compliance matters between affected parties;
4. Guidance has been included on what could be a civil matter (Clause 1.2(d));
5. Further information on risk management and risk prioritisation has been included to reflect that high-risk matters are prioritised (Clause 1.4); and

6. Factors have been included to demonstrate when discretion to allow continuation of unauthorised development could be considered (Clause 2.2(d)).

The policy scope has been narrowed to ensure a targeted approach to planning and building compliance matters. These matters often involve ensuring Council and delegated planning decisions are implemented by applicants. The City administers other legislation which has existing State-based guidelines or policies in place to ensure a statewide compliance and enforcement approach. Such guidelines do not exist for planning matters, requiring policies to be developed at the local government level.

The City already adopts a risk-based approach and subscribes to the principles of fairness, impartiality, consistency, transparency and accountability. These principles are enshrined in processes and procedures. It was determined such principles should also be included in the Policy. A general framework for risk prioritisation has also been included which ensure safety and heritage based issues would continue to be prioritised.

Administration was also requested to consider factors for applying discretion to permit continuation of existing unauthorised development. Discretion has been used in the past when the owner of an unauthorised development has commenced applying for a planning approval in a timely fashion, with there being a reasonable prospect of the approval being given. Other factors to be considered include impact on neighbouring properties, public property and consideration of public health.

There is no clear stakeholder group to engage with on this policy, so it is suggested comments are sought from the general community as the next stage.

CONSULTATION/ADVERTISING:

In accordance with the City's [Community and Stakeholder Engagement Policy](#), public notice of all new and significantly amended policies must be provided for a period exceeding 21 days in the following ways:

- notice published on the City's website;
- notice posted to the City's social media;
- notice published in the local newspapers;
- notice exhibited on the notice board at the City's Administration and Library and Local History Centre; and
- letters distributed to relevant local businesses and community groups.

If approved, advertising of the draft Policy will commence in August 2022. Following consultation, the revised Policy will be presented to Council for adoption.

LEGAL/POLICY:

Section 2.7(2)(b) of the Local Government Act 1995 provides Council with the power to determine policies.

The City's [Policy Development and Review Policy](#) sets out the process for repealing and adopting policies.

RISK MANAGEMENT IMPLICATIONS

Low: It is low risk for Council to consider this Policy.

STRATEGIC IMPLICATIONS:

This is in keeping with the City's *Strategic Community Plan 2018-2028*:

Sensitive Design

Our built form character and heritage is protected and enhanced.

Innovative and Accountable

Our community is aware of what we are doing and how we are meeting our goals.

SUSTAINABILITY IMPLICATIONS:

This does not contribute to any environmental sustainability outcomes.

PUBLIC HEALTH IMPLICATIONS:

This is in keeping with the following public health outcomes in the *City's Public Health Plan 2020-2025*:

Reduced smoking

FINANCIAL/BUDGET IMPLICATIONS:

Nil.

COMMENTS:

The proposed Development Compliance Enforcement Policy would ensure a consistent approach to ensuring planning and building decisions made by Council and Administration are implemented. Council have provided insights to support this Policy review and the next stage is to seek community feedback.

Development Compliance Enforcement Policy



Legislation / local law requirements	Any ll legislation, regulations and local laws referred to in the City's Register of Delegations, Authorisations and Appointments relevant to Planning and Building compliance matters
Relevant delegations	Appointment of authorised and designated officers in accordance with the City's Register of Delegations, Authorisations and Appointments
Related policy procedures and documents	Director of Public Prosecutions Act 1991 – Statement of Prosecution and Policy Guidelines (DPP Guidelines) Other State Government Guidelines Register of Delegations, Authorisations and Appointments Administration Enforcement Procedure Service Area Practice Notes

PURPOSE

To establish the process for administering compliance with the acts, regulations and local laws [relevant to Planning and Building compliance matters](#) under the City of Vincent's (City's) control ~~in an impartial, fair and consistent manner.~~

OBJECTIVES

In undertaking any enforcement action the City will consider the rights of the offender, the interests of the community, the circumstances of each individual case and the risk associated with enforcement decisions.

The City will conduct its compliance and enforcement investigations and actions in a manner that is ~~impartial, fair and consistent~~ [transparent, and will apply legislative and local law requirements consistently.](#) The City endeavours to emulate the approach outlined in the DPP Guidelines, Court decisions and State Government guidelines. [To ensure transparency and accountability,](#) ~~D~~decision making processes will be documented in accordance with the Administration Enforcement Procedure and process mapping.

[The City strongly supports affected parties genuinely attempting to resolve compliance matters directly with one another. In most scenarios this will lead to a more timely, amicable and efficient resolution.](#)

SCOPE

This Policy applies to the investigation and resolution of offences for breaches of acts, regulations and local laws ~~that the City is responsible for administering~~ [relevant to Planning and Building compliance matters.](#) ~~Whilst the Policy can be applied by any service area in the City, it is predominantly applied to development related breaches.~~

POLICY

1. Investigation of alleged breaches



- 1.1 The City will investigate an alleged breach where:
- (a) A customer has contacted the City in respect to it; or
 - (b) It relates to an activity that poses an unacceptable risk to the City or community; and/or
 - (c) A monitoring observation has been made by an Authorised Officer which is considered to pose an unacceptable risk or outcome to the community.
- 1.2 The City may utilise its discretion to not investigate an alleged breach, or may discontinue an investigation if the alleged breach:
- (a) Is assessed as 'low' in accordance with the City's Risk Management Policy and does not directly affect the health, safety or amenity of the Customer;
 - (b) Arises from the negotiation of a contract of sale of Property, where resolution of the breach should be negotiated by the buying and selling parties;
 - (c) Is unsubstantiated, vexatious or involves an ongoing neighbourhood dispute which the parties could reasonably resolve;
 - (d) Is a civil matter [\(no prescribed legislation administered by local government\)](#) ;
 - (e) Is being managed by the offender submitting an application for existing unauthorised development; or
 - (e) When enforcement proceedings are unlikely to be successful due to:
 - (i) The time elapsing since the development was undertaken or statute of limitations expiring; and/or
 - (ii) A lack of documentary evidence (such as plans/documents, reliable witnesses), including if it is unclear who the offender is.
- 1.3 Where an alleged breach is raised by a Customer, for evidentiary and contact purposes the City would normally request the complaint be made in writing, including:
- (a) Name, address and phone number or email address of the complainant;
 - (b) Address of the Property to which the complaint relates;
 - (c) Details of the alleged breach; and
 - (d) Details of how the matter is affecting the Customer.

The City will advise the customer if they may be required to appear as a witness if prosecution is determined to be the appropriate course of action.

1.4 [Complaints will be prioritised for investigation in the order set out below, based on an assessment of the 'Risk Classification Matrix' as contained within the Risk Management Policy \(Attachment\)](#)

- (a) [Any matter relating to a property that is considered to be a high risk;](#)
- (b) [Any matter involving irreversible and permanent damage to a Heritage Building;](#)



(c) The seriousness/impact of the alleged breach or offence, consistent with legal requirements; and

(d) All other alleged breaches will be processed in the order in which they arise.

2. Enforcement

2.1 Enforcement action often involves a range of options depending on the legislation which is being applied, including:

- Taking no further action;
- Verbal direction;
- Written correspondence;
- Issue of infringement notice/s;
- Issue of notices/orders/directives;
- Seeking an injunction; or
- Prosecution action.

2.2 The City would determine the most appropriate method of enforcement action through consideration of the following principles:

- (a) Graduated response – this principle recognises that less severe enforcement options could be utilised and tried first, before progressing to more severe enforcement options;
- (b) Proportionate response – this is an assessment of the severity of the alleged breach which should lead to more serious enforcement action being utilised to manage more severe breaches or deliberate and/or repeated non-compliance;
- (c) Applications for existing unauthorised development may be invited if it is established there is a reasonable prospect of Development and/or Building Approval being obtained;
- (d) Discretion to allow the continuation of an existing unauthorised development while approval is being obtained is to be assessed on a case by case basis. Factors for consideration are to include:
 - (i) -depending on the degree of non-compliance and the impact to neighbouring properties, public property or the community;
 - (ii) Consideration of the objectives of the City's Public Health Plan; and
 - (iii) Reasonable prospect of Development and/or Building Approval being obtained;
- (e) Public interest assessment if there is a significant monetary penalty;
- (f) Consideration of mitigating or aggravating circumstances;
- (g) Provision of legal advice received from the City's legal representatives or precedence of similar cases;



- (h) The prospects of conviction including *prima facie* evidence to prove the case beyond reasonable doubt including but not limited to written or verbal admissions and witness statements; and
 - (i) An assessment against the City's Risk Management Policy.
- 2.3 Prosecution proceedings may be discontinued where:
- (a) There is an error at law or in the charges;
 - (b) There is a mistake of fact;
 - (c) The alleged offender is deceased, cannot be located or is declared bankrupt;
 - (d) The City's legal advisors recommend this;
 - (e) The age, state of physical health and/or mental health of the alleged offender is a determining factor;
 - (f) The Court has made comments which would support discontinuing the case;
 - (g) There has been consultation with the defendant or their legal representatives to achieve a suitable resolution, noting the City still has the discretion to continue the prosecution even if steps towards compliance are made following commencement; or
 - (h) It is not in the Public Interest to continue to pursue the charges.
- 3. Recovery of legal costs and penalties**
- 3.1 The City will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the Court.
- 3.2 The City is unable to assist third parties in the recovery of legal costs.
- 4. Injunctions/Prosecution Appeals**
- 4.1 The City may seek an injunction by a court for a breach of statute. The decision will be made at the discretion of the Chief Executive Officer.
- 4.2 The decision to appeal a decision/penalty made by a court will be made at the discretion of the Chief Executive Officer, based on the following factors:
- (a) The approach documented in the DPP Guidelines; and
 - (b) At the recommendation of the City's legal advisors.

DEFINITIONS

Authorised Officer means an employee of the City who has been appointed by Council, the CEO or the CEO's delegate, pursuant to the *Local Government Act 1995* or other legislation, to fulfil certain powers and duties assigned under that legislation or local law to an "authorised officer" or "authorised person".

Public Interest means:



- Action and/or conduct which is for the good of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals (Reference: *DPP v Smith* [1991] 1 VR 63). In the local government context, it specifically relates to the general function of the City to provide for the good governance of persons in its district (see section 3.3(1) of the *Local Government Act 1995*); and
- This definition of public interest was developed following consideration of the principles of 'Evaluation of the Public Interest' as stated in the *Director of Public Prosecutions Act 1991* – Statement of Prosecution and Policy Guidelines.

OFFICE USE ONLY	
Responsible Officer	Manager Built Environment and Wellbeing
Initial Council adoption	Date: <Approval Date>, Ref#
Reviewed / Amended	Date: Ref#:
Next Review Date	Date: <review Date>