

POLICY NO EP02 PLANNING ENFORCEMENT POLICY

DEPARTMENT:	Development Services
RESPONSIBLE OFFICER:	Development Services Coordinator
LINK TO STRATEGIC PLAN:	Ensure sustainable management of natural and built resources is respectful to our unique location
STATUTORY AUTHORITY:	Break O'Day Interim Planning Scheme 2013 Land Use Planning & Approvals Act 1993
OBJECTIVE:	In recognition of Council's obligations established by State legislation this policy aims to establish a framework for how planning and development matters are to be enforced in accordance with the <i>Land Use Planning and Approvals Act 1993</i> and minimise Council's legal liability and risk to the community.
POLICY INFORMATION:	Adopted 19 March 2012 – Minute No 03/12.15.4.069 Amended 16 April 2018 – Minute No 04/18.15.5.98 Amended 18 October 2021 – Minute No 10/21.16.2.229

POLICY

1. INTRODUCTION

Council has a mandatory obligation to observe and enforce its own planning scheme under the provision of section 48 of the *Land Use Planning and Approvals Act 1993*. That section is shown below for clarity.

“Where a planning scheme or special planning order is in force, the planning authority must, within the ambit of its power, observe, and enforce the observance of, that planning scheme or special planning order in respect of all use or development undertaken within the area to which the planning scheme or special planning order relates, whether by the authority or by any other person.

If Council does not properly enforce its own planning scheme the Council can be held accountable and liable through the provisions of section 63A of the *Land Use Planning and Approvals Act 1993*.”

Correct enforcement also involves procedures for correct administration of development applications.

If Council does not properly administer the processing of development applications in accordance with either section 57 or 58 of the *Land Use Planning and Approvals Act 1993*, the Council can be held accountable and liable through the provisions of section 59 of the *Land Use Planning and Approvals Act 1993*.

2. IDENTIFICATION

Under the provisions of the *Break O' Day Interim Planning Scheme 2013* Council has the power to assess development proposals as being exempt from planning approval or a permitted use application or a discretionary use application.

To observe this policy Council must ensure that all planning decisions are made in accordance with the *Break O' Day Interim Planning Scheme 2013* within the time limits set by the *Land Use Planning and Approvals Act 1993* in section 57 or 58. Under the *Land Use Planning and Approvals Act 1993* all planning decisions have a right of appeal, from time to time this may involve Council having to appear before the Resource Management and Planning Appeals Tribunal.

When development of land occurs without the required approvals Council is obliged under section 48 of the *Land Use Planning and Approvals Act 1993* to enforce its planning scheme. If Council ignores development occurring without approvals then the Council is liable under section 63A of the *Land Use Planning and Approvals Act 1993*.

To observe this policy Council must first identify all development within the Municipality and then seek to legalise any development that occurs without the necessary approvals or seek restoration orders from the Resource Management and Planning Appeals Tribunal. This is likely to involve Council having to appear before the Resource Management and Planning Appeals Tribunal to seek the desired outcome.

Therefore, policy principles need to be established to ensure that Council procedures for dealing with enforcement issues are fair, consistent, in the public interest and minimise risk to Council. Where possible Council should seek to resolve as many issues as possible at the local level and only use the Resource Management and Planning Appeals Tribunal as a last resort option. In all matters relating to development of land Council should seek to maintain a thorough transparent record keeping system.

3. POLICY STATEMENT

To observe this policy development of land can be considered as three (3) distinctly different types. These are: development of land that is exempt from planning approval; development of land through the development application process; and development of land without any of the required approvals.

a) Exemptions

For development of land that is listed as exempt from planning approval by the *Break O' Day Interim Planning Scheme 2013*, Council will reply to all requests for exemptions in writing. A copy of the reply is to be placed on the property file record.

b) No Permit Required Development or Use

For Development or Use of land meeting the acceptable solutions of the *Break O' Day Interim Planning Scheme 2013*, Council will issue a "No Permit Required Certificate" confirming that the development meets the acceptable solutions of the *Break O' Day Interim Planning Scheme 2013*.

c) Development Applications

Council will seek to ensure that all development applications are considered in accordance with the provisions of the *Break O' Day Interim Planning Scheme 2013* within the time limits set by the *Land Use Planning and Approvals Act 1993*.

- Keep a record of the date of fee payment for commencement of processing clock;
- Keep a visible record of expiry date of processing clock;
- Seek additional information from the applicants if the planning scheme requires in order to complete the assessment;
- Seek community opinion on applications where the planning scheme requires;
- Prepare a report and recommendation in accordance with the planning scheme;
- Council to make a decision upon receiving the recommendation from the professional officer before the expiry date is reached;
- Records of all correspondence, reports and decisions to be kept on records system.

d) Illegal Use or Development

Where development on land occurs without the relevant approvals Council will work with the landowner to ensure that the use or development is made consistent with the requirements of the *Break O'Day Interim Planning Scheme 2013*.

If that is not possible then penalties may be imposed depending on the severity of the offence and owner history, including but not limited to the illegal works site being rehabilitated and/or the ceasing of the use and/or removal of the illegal structures.

Action on Illegal use or development must be commenced within three months of Council being made aware of the activity. Councillors will be provided with regular updates on progress of such action.

Any enforcement procedures instituted by Council under Section 64 of the *Land Use Planning and Approvals Act 1993* will require Council endorsement. A decision to take such enforcement action will only be made on the following basis:

- a) all reasonable attempts have been made to achieve compliance by discussion and negotiation;
- b) the non-compliance is sufficiently serious to justify enforcement proceedings and it is in the public interest to do so;
- c) enforcement action is equitable and consistent with principles of fairness and natural justice;
- d) there is sufficient evidence available to provide a reasonable chance of success in enforcement proceedings;
- e) the cost of enforcement will not, of itself, deter Council from taking enforcement action;
- f) the potential for liability under Section 63A of the *Land Use Planning and Approvals Act 1993* has been considered.

4. APPEARING BEFORE THE RESOURCE MANAGEMENT AND PLANNING APPEALS TRIBUNAL

When appearing before the Resource Management and Planning Appeal Tribunal, Council will always seek the desired outcome as prescribed by the *Break O'Day Interim Planning Scheme 2013*. Where possible, mediation should be attempted but the provisions of the *Break O'Day Interim Planning Scheme 2013* are not to be compromised.

5. ETHICAL CONSIDERATIONS

Council will not require representation by a Planner at a planning appeal where Council's position is contrary to the professional opinion of the Planner. Council accepts and supports the ethical responsibility of its officers to state professional opinions without fear or favour.

Despite its policy on freedom of information, in the interests of natural justice, Council will accede to any lawful request by the Resource Management and Planning Appeals Tribunal to provide information to the Tribunal or other parties to an appeal.

Elected members of the Council must not attempt to influence the actions of a Planner observing this policy.

6. COST RECOVERY

The standard presumption before the Tribunal is that each party pay its own costs of an appeal unless certain matters can be found by the Tribunal that go to show that it is fair and reasonable that the other party pay the costs of the appeal. These include:

- (a) whether the proceedings appear to the Appeal Tribunal to have been instituted merely to delay or obstruct;
- (b) whether in the Appeal Tribunal's opinion a party has raised frivolous or vexatious issues;
- (c) the relative merits of the claims made by each of the parties;
- (d) whether in the Appeal Tribunal's opinion a party has unnecessarily or unreasonably prolonged the proceedings or increased the costs of them;
- (e) whether a party has failed to comply with a direction or order of the Appeal Tribunal without reasonable excuse;
- (f) whether a party has failed to comply with any relevant law or planning scheme;
- (g) the nature, complexity and outcome of the proceedings;
- (h) the capacity of the parties to meet an order for costs;
- (i) any other matter the Appeal Tribunal considers relevant.

Council will seek appeal costs against another party where, in its opinion, the above inclusions apply.

7. MONITORING AND REVIEW

This Policy will be reviewed every three (3) years in line with the Council's Policy Framework or earlier in the event of major changes to legislation or related policies, procedures of if deemed necessary by the Mayor and the General Manager