

POLICY: DS-HC-005

COMPLIANCE

PURPOSE

The purpose of this policy is to establish clear guidelines for the exercise of discretion the City must use in dealing with unlawful activity, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case, and public policy and precedent considerations.

This policy:

1. Provides a legal and administrative framework to assist the City in making decisions in its enforcement functions
2. Specifies the criteria which the City will take into consideration when deciding if enforcement action is necessary and the most appropriate type of action for the City to instigate
3. Provides information to the public about the City's role and policy on enforcement; and
4. Ensures that the enforcement process is conducted with due speed and minimal delay.

DEFINITIONS

The following defined terms are used in the policy:

Applicant	In relation to legal proceedings, the person who is applying for the Court to commence proceedings. In relation to development or other approvals, the person lodging an application for the City to consider.
Authorised person	person authorised by the local government under section 9.10 of the Act to perform any of the functions of an authorised person in this Compliance Policy.
Chief Executive Officer	Is the Chief Executive Officer (CEO of the City of Kalgoorlie-Boulder.

City: The City of Kalgoorlie-Boulder or an employee of the City of Kalgoorlie-Boulder

Compliance Ensuring that the requirements of laws, regulations, industry codes and organisational standards are met.

Defendant: The person against whom the report has been lodged or the accused person against whom criminal proceedings are brought.

PA: Planning Act 2005 (WA)

LGA: The *Local Government Act 1995 (WA)*.

PIN: Infringement Notice. PINs are authorised by subordinate Regulations to the principal legislation (the Acts themselves) and are administered by the Infringement Notices Enforcement Act 1994 (WA) and the Fines Enforcement Registry Ministry of Justice (WA). PINs can only be issued for prescribed offences and the value of the fine is also prescribed by legislation.

SAT State Administrative Tribunal

Standard of Proof: The level of proof required proving a charge before a Court of Law.

There are two distinct standards of proof, namely:-

Criminal Standard of Proof. Also called “Beyond Reasonable Doubt”. The standard definition of beyond reasonable doubt is “*when any sane and prudent person has the same evidence placed before them, will reach the same conclusion*” [*Brown v R (1913) HCA 70*]. This is the standard of proof required for any criminal prosecution in any Court within Australia and the level of proof to be established by City should it seek a punitive penalty (monetary fine) through either the Local or Magistrates Court;

Civil Standard of Proof. Also called the “Balance of Probabilities”. The standard definition of balance of probabilities is “*if the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain*” [*Briginshaw v Briginshaw (1938) HCA 34*]. This is the standard of proof for any civil proceedings within any Court

within Australia and is the level of proof to be established by the City in any proceeding.

Unlawful activity:

Any activity or work that has been or is being carried out:

- contrary to a legislative provision (Act or Regulation of Parliament) regulating a particular activity or work; or
- contrary to a planning instrument that regulates the activities or work that can be carried out on particular land; or
- without a required development consent, approval, permit or license; or
- contrary to the terms or conditions of a development consent, approval, permit, license or registration; or
- contrary to the terms and conditions of consents, construction certificates, approvals, licenses, registrations, planning instruments or applicable legislation; or
- contrary to any signage erected by the City under the provisions of the *Local Government Act 1995* (WA); or
- Which is illegal, whether prohibited or merely unauthorised?

STATEMENT

The City is strongly opposed to unlawful activity at any time or under any circumstances. The City will initiate compliance action in response to unlawful activity in accordance with this policy document.

1 INTRODUCTION

1.1 Application

This policy applies to the investigation and enforcement of unlawful activity or failure to comply with terms or conditions of approvals, licenses, orders, notices, directions and public signage. While it is primarily directed at the regulation of development activity and environmental health issues, the policy may also be applied to other matters such as the regulation of parking and public places, streets and reserves as well as animal control, where applicable.

Whilst it is always preferred that co-operation is firstly sought from companies and individuals that may not be complying with their statutory obligations, there will be instances where some form of enforcement action is required to achieve compliance. In these instances, each case will be assessed on its merits and an appropriate level of action will be taken.

1.2 Related Documents

This policy should be read in conjunction with the City's Compliance Policy

1.3 Applicable Legislation

The statutes in respect of which this policy will operate are numerous and include the following Acts and all subsidiary legislation:

- Planning and Development Act 2005
- *Local Government (Miscellaneous Provisions) Act 1960*
- *Builders' Registration Act 1939*
- *Strata Titles Act 1985*
- *Local Government Act 1995*
- *Building Construction Industry Training Fund Levy and Collection Act 1990.*
- *Health Act 1911*
- *Environmental Protection Act 1986*
- *Home Building Contracts Act 1991*
- *Dividing Fences Act 1961*
- *Heritage Act*

2 BACKGROUND

Local governments are involved in a broad range of regulatory activities. These activities help to protect community health & safety, the environment and to improve amenity. The role includes investigating unlawful activity or failure to follow the terms or conditions of approvals and orders.

The City becomes aware of these unlawful and unapproved activities in a variety of ways, from the proactive actions of City staff to the receipt of customer requests from members of the public.

When the City is the approval authority for development and building works, City officers identify breaches of approval and unauthorised building work and uses. In our environmental protection or public health roles, the City may discover pollution incidents, unhealthy premises and general health matters that require enforcement action. The City's Rangers Department and other compliance officers regularly identify parking, dog, litter, fire hazards other compliance issues.

City officers who are not involved directly in compliance matters also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy. While the City is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advice from local community.

2.1 Submitting requests

Customer requests alleging unlawful activity can be submitted to the City either in writing or verbally. All requests received by the City will be actioned in accordance with the City's internal customer request management procedures.

2.2 Principles

There is an overriding duty on the City to act fairly, consistently, professionally and to ensure the principles of procedural fairness and natural justice are adhered to.

In this regard the City will:

- Provide information on the substance of the matter to the alleged offender. This may not occur until an appropriate stage in the investigation; and
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk of personal or public safety or risk of serious environmental harm; and
- Consider any submission put forward by any of the parties to the matter; and
- Make reasonable inquiries or investigations prior to making a decision; and
- Ensure no person decides a case in which they have an interest; and
- Act fairly and without bias.
- Be outcome focused. The objective compliance actions will be to achieve a defined and measurable outcome.

- Adopt the concept of staged escalation to deal appropriately with people or companies who fail or neglect to fulfil these obligations.

2.3 Options for dealing with unlawful activity

When dealing with any unlawful activity, there are two distinct areas for the City to consider. The first area for consideration is the actual activity itself whilst the second area for consideration is the remedy for that unlawful activity.

The City firstly needs to assess the actual unlawful activity itself and any resultant action that may be required due to the carrying out of that unlawful activity. This is also known as the criminality of the unlawful activity. The City has discretion in deciding the level of enforcement action taken in relation to the actual act itself based on the available evidence and the circumstances of the individual case.

At the conclusion of an investigation, the City may have a number of options available to deal with any unlawful activity. Some of these options are:-

1. Take no action (not appropriate unless the matter is trivial or is without merit)
2. Provide compliance advice / education to achieve voluntary compliance
3. Verbal direction or field notice
4. Issue a formal letter of warning or caution
5. Mediation
6. Issue an Infringement Notice
7. Suspension or revocation of approval or licence/permit
8. Retention of any guarantee or bond to fund repairs
9. Carrying out of required works and subsequent invoicing for cost of works to the landowner
10. Issue a statutory notice

11. Commence civil proceedings
12. Commence criminal proceedings
13. Other actions e.g. seizures

The City may take one or more of the above options.

While the City does have the legal authority to exercise discretion in any instance in which an unlawful activity has been detected, considerable care needs to be taken by all representatives of the City, to ensure that the use of discretion does not lead to corrupt conduct. These matters need to be considered in connection with the City's Code of Conduct.

The City also needs to ensure that where an unlawful activity has been detected and a decision has been made to remedy this unlawful activity, the decision reached will stand up to an independent investigation. The City will also need to assess the broader picture rather than just the individual instance of the unlawful activity.

2.3.1 The Act causing the Unlawful Activity

When considering the cost/benefit of taking enforcement action, the City must not only assess the individual costs and benefits, but should also consider indirect costs and benefits. For example, the direct cost in taking no action is minimal, but the indirect cost of that same act of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on the City to intervene.

Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

When any investigation provides sufficient evidence to substantiate that an unlawful activity has occurred, this Policy does not allow the City to elect not to take some form of action in relation to that unlawful activity.

This Policy requires, in respect to the act itself, that some form of action is taken, however, this Policy does not seek to specify the level of that action as each individual instance needs to be assessed fairly, consistently, professionally and to ensure the principles of procedural

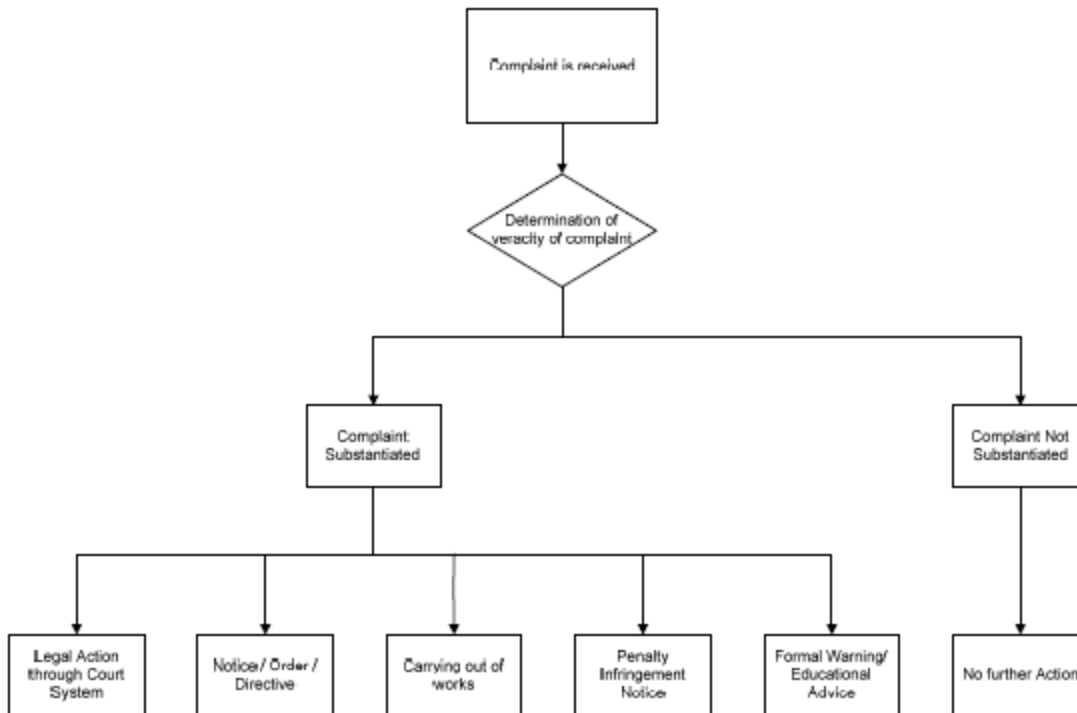
fairness and natural justice are adhered to.

2.3.2 Taking Enforcement Action

When taking enforcement action Council will consider the circumstances of the case, including these issues:

- Has the Council created an estoppel situation? *
- Consideration of the reasonableness and proportionality of actions and consideration of the issue in terms of the public interest;
- The effects of the unlawful activity will be considered with regard to the local area taking into consideration the impact on amenity, health, safety and environmental issues;
- Is the breach a technical one only? For example a minor or inconsequential change to the plans during construction;
- If considering prosecution action, there will be consideration of admissible evidence that establishes the offence beyond all reasonable doubt, is there a reasonable prospect of conviction and are there discretionary factors to consider?
- If consent had been sought, would it have been given? This will be a particular consideration if the owner has sought approval of their own volition;
- Are there particular circumstances of hardship which should be considered?
- Does the person who is the subject of the complaint show due contrition?

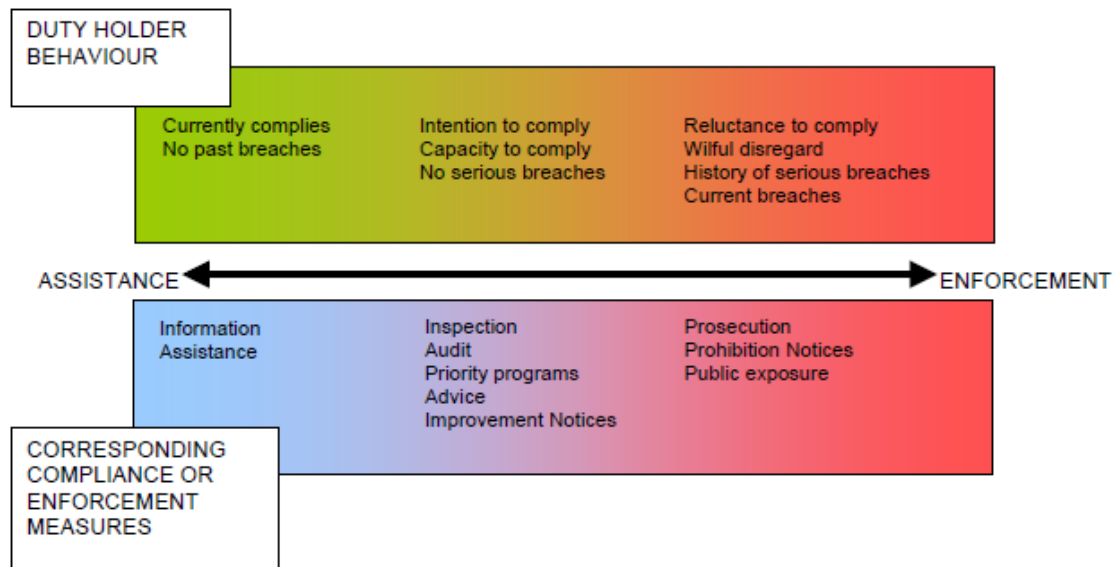
2.3.3 Flow Chart of the Act of Unlawful Activity



2.3.4 Compliance Action Continuum

The initial emphasis of compliance actions undertaken by the City is on communication and mediation. This includes giving advice and encouragement to companies and individuals to voluntarily comply with the required standards and therefore meet their statutory obligations. This cooperative approach incorporates the concept of staged proportionate escalation to deal appropriately with people or companies who fail or neglect to fulfil their obligations but does not preclude prosecution as an initial response. The compliance methodology followed by the City is illustrated below.

THE COMPLIANCE CONTINUUM



2.3.5 General Criteria for Compliance

The need and type of compliance action will be considered on the basis of considering the criteria outlined in Appendix One, and the Risk Matrix in Appendix Two as well as by applying the aforementioned principles in Section 2.2

2.3.6 Remedy of Unlawful Activity

The City also needs to determine the course of action required to remedy an unlawful activity, which is quite separate from any action for the carrying out of the unlawful activity. It may be appropriate for the City to commence some form of compliance action for the carrying out of the unlawful activity, but not take any enforcement action to remedy the resulting effects of the unlawful activity.

2.3.7 Take No Action

It is not appropriate that, on determining that an unlawful activity has occurred, a decision is made that no action will be taken.

The City can however, elect to take no action to seek a remedy for the results of that unlawful activity in line with this Policy. For example, the City may issue educational advice or a formal warning for the unlawful placement of sign on a property but not require the removal from the property of that same sign.

Any decision by the City not to seek remedy for an unlawful activity is subject to a number of criteria more fully described in Part 3 of this policy.

2.3.8 Carrying out of works and retention of deposits and bonds

The City may determine that, in the interests of public safety and/or expedience in remedying an unlawful activity, to exercise powers under the relevant legislation to enter onto premises and undertake works to bring about compliance with City requirements. Any works of this nature could be exercised on both public land and on private property.

Whilst the City is the owner and/or custodian of public land within Kalgoorlie-Boulder, the City does issue permits and approvals for the occupation and use of public lands for some commercial activities, including footpath displays, roadside stalls and use of City reserves for access for building projects. In most circumstances, the City requires the payment of a bond for potential damage to publicly owned land.

When an unlawful activity or a failure to comply with a permit or approval on public land has been detected, the City may elect to carry out the works required to remedy the situation utilising the bond as payment or may seek costs for reinstatement of the public land by way of a debt owed to the City.

Similarly, the City does have the legal authority under legislation to serve Notices, Orders and Directions to carry out works on private property and if the Order or Direction is not complied with, to enter onto private property and undertake the works and recover the costs as a debt owed to the City.

2.3.9 Requirements for discretionary decisions

Like any discretionary decision, there are several important requirements that City must observe for the decision to be lawful. These include:

- The power of discretion must be used for a proper purpose; and
- The decision-maker must give proper, genuine and realistic consideration to the merits of the particular case; and
- The decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision; and
- The decision-maker must give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance; and
- The decision-maker must not exercise discretion in a way that is so unreasonable that no reasonable person could have exercised the power; and
- The decision-maker must not make a decision that is arbitrary, vague or fanciful; and
- The decision-maker must exercise a discretion independently and not act under the dictation or at the behest of any third person or body; and
- The decision-maker must not fetter its discretion by, for example, adopting a policy that prescribes its decision-making in certain circumstances; and
- The decision-maker must observe the basic rules of procedural fairness or natural justice; and
- The decision-maker must not act in a way that is biased or conveys a reasonable perception of bias.

3.0 WHEN WILL THE CITY COMMENCE ENFORCEMENT ACTION?

3.1 Taking Compliance Action

The basic pre-requisite of any enforcement action is that the available evidence establishes an appropriate standard of proof to enable that prosecution to be commenced. The City will decide whether to take enforcement action after it has considered, among other things, the following matters:

3.2 Issues to Be Considered When Considering Compliance Action

When taking compliance action the City will consider the circumstances of the case, including these issues:

If considering prosecution action, the City will comply with the prosecution policy.

- Are there particular circumstances of hardship which should be considered?
- Does the person who is the subject of the complaint show due contrition?

3.2.1 Has the City created an estoppel situation?

Estoppel is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment. The issue is whether the conduct of the City could lead to an expectation that it will not take action in a particular circumstance or that it is not concerned about the conduct in question.

For example:

- Has the owner/occupier previously been notified that the City would not be taking action?
- Has the matter previously been brought to the attention of the City yet no action taken?
- Has the City contributed to the owner/occupier acting upon a reasonable expectation that no action would be taken?

3.2.2 Is the breach a technical breach only?

A breach of a technical condition, license or inconsequential changes to approved plans during construction, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach. The City needs to consider whether there are any material implications to the interests of any party or any detrimental effect on the amenity of the area or the environment generally. For

example, a minor or inconsequential change to the plans done during construction.

3.2.3 When was the unlawful activity carried out and for how long?

Time limits frequently apply and sometimes prosecution will be statute barred despite sound evidence that unlawful activity has taken place. Courts generally look unkindly on delays in taking action to prevent or prohibit unlawful activity, so evidence of the City's failure to take action in the required time may be an obstacle to successful prosecution. Whether the offending activity is ongoing or has ceased will also be a relevant consideration.

3.2.4 How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?

If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach.

Examples of situations where there is a significant risk of detriment include serious noise, air or water pollution, unsafe building work (especially in occupied buildings), dangerous dogs, seriously unhealthy food premises and detriment existing in or threatening any public place.

Other examples will be matters which are specifically negotiated by the City at development application stage (DA) stage to address neighbourhood amenity issues and community concerns. The issue the City will consider is the degree of detriment or risk to the environment. There may also be cases where the unlawful activity will have a positive or beneficial impact on the environment or amenity of the locality.

3.2.5 Would consent have been given if it had been sought?

In the absence of aggravating circumstances, the City should be less inclined to proceed with legal action if the unlawful activity could be carried out lawfully if consent had been sought. In these circumstances, the City might consider deferring action to allow the owner time to lodge an application for assessment. Similarly, if an unauthorised use comes to the City's attention only because the owner has sought approval, it is reasonable to defer action until the application is determined. If a person actively and positively attempts to legalise an unauthorised use by lodging an application, the City should take this conduct into account in determining whether to

take action against them.

However, if there has been a blatant attempt to flout the law or the person is using the application process as a delaying action, deferral would not be appropriate.

3.2.6 Can any unauthorised works or failure to comply with conditions be easily remedied?

If there is evidence of a significant issue of non-compliance and that matter can be easily remedied, by some action on the part of the person, there is a less compelling case for enforcement action. An example would be if, because of a measurement error, the parking spaces available in a development are insufficient to comply with the approval.

Strict compliance might involve further excavation or be impossible due to site constraints and subsequent works. In such a case, other options might be considered to remedy the breach such as a monetary contribution or the provision of off-site spaces to make up the shortfall. These options would achieve the City's objective in imposing the condition while still permitting the development to proceed without prejudicial expense and delay.

There is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and, if so, how expensive and inconvenient this would be. Discretion may be more readily used in the case of a static development (such as when a building has already been erected) rather than when there is a continuing, easily remedied breach. Importantly there are no hard and fast rules and it is important that discretion is exercised on a case by case basis.

3.2.7 Does the person subject to the report of unlawful activity show due regret?

In some cases, the person will have acted appropriately by acknowledging their wrongdoing and submitting to the rule of law. In such cases, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been remedied.

3.2.8 Are there any particular circumstances of hardship affecting the person

subject to the report of unlawful activity?

If the unlawful activity is minor and primarily offends a private interest rather than the general amenity of the area, the City should not take action where an appropriate alternative remedy, such as civil action, is available. However, if the matter falls within the City's jurisdiction and there are particular hardship factors that make it unreasonable to expect the person to pursue alternative redress, it may be appropriate for the City to intervene.

Similarly, if enforcement action would cause particular hardship to a person subject to the report and the impact of the unlawful activity is not otherwise severe, the City may consider taking informal action or taking no action. For example, if action in relation to a particular breach would impede progress of a major development and seriously prejudice the rights of the developer in terms of delays and costs, the City should consider whether there are acceptable alternatives to enforcement action.

3.2.9 Are there existing use rights?

Hardship may also be caused to the person subject to the report if the onus of proof is difficult or impossible to discharge. For example, the onus of law to prove existing use rights falls upon the person asserting that right. If an existing use is long established, say over 20 years, it may not be reasonable to require the owner to produce documentary evidence of the use at a particular date if, for example, the business has changed hands several times or fire/flood has destroyed documents.

A heavier responsibility may fall upon the person asserting an existing use right to prove the existence of that right in relation to larger scale developments and those with significant environmental impacts such as quarrying.

3.2.10 Has the person subject to the report of the unlawful activity received a previous warning?

It is essential that the City continues to monitor situations where it decides not to take formal enforcement action despite evidence of unlawful activity. If monitoring reveals that the unlawful activity is not resolved or the City subsequently receives fresh reports, then a more formal and coercive approach would appear more appropriate.

3.2.11 Would an educative approach be more appropriate than a coercive

approach?

When deciding to take an educative rather than a coercive approach, the City needs to consider issues such as the level of contrition shown by the person, whether they have previously been warned or dealt with as a result of this or a similar behaviour, and the level of intent shown.

3.2.12 What are the chances of success if challenged?

City can validly take into consideration the likelihood that a Court challenge to the contemplated action would be successful. In such situations, City would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

3.2.13 What are the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action?

When considering the cost/benefit of the options open to the City, it should assess costs and benefits broadly and remember to consider indirect costs and benefits.

For example, the indirect cost of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on the City to intervene. Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

3.2.14 What about reasonableness and proportionality?

The City should always act in ways that are reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them. Where decisions are based on technical advice (eg engineering or legal advice), the City should also make sure that non-technical issues, such as the reasonableness of the conduct and the effect of possible decisions, are not ignored.

The obligation to comply with the law does not relieve the City of the moral obligation to take lawful steps to mitigate the effects of rigid adherence to the letter of the law if that results in, or is likely to result in, manifestly inequitable or unreasonable treatment of an individual or organisation.

Considerations such as the impact of the breach on other people, whether there are other acceptable options available to address the breach, and the attitude of the

developer should be assessed. If the breach is not a structural breach likely to result in an unsafe development, the City might consider negotiating a settlement with the developer and resolving variations through, for example, the use of building certificates.

3.2.15 What is in the public interest?

While decisions to take enforcement action are discretionary and the City is generally under no legal obligation to act in any particular case, the City does have obligations to uphold the planning laws and to act in the public interest.

- While there is no concise definition of the 'public interest', some of the issues the City should consider are:
- Are the circumstances outlined in the report of unlawful activity likely to affect a significant number of people?
- Will the circumstances impact on certain population groups, particularly disadvantaged or
- marginalised groups e.g. elderly residents?
- Is the activity indicative of a systemic flaw — the result of a deficiency in policy or procedures?
- Does the activity raise an issue that is individual in nature but occurs unreasonably often?
- Has the activity attracted sustained public controversy and no alternative resolution has been proposed or is likely?

4.0 DECIDING ON THE METHOD OF COMPLIANCE

The decision whether to take compliance action and if so which enforcement measure is the most appropriate will be based on Section 2 in the matters explained above in Section 2.3 – 'Options for Dealing with Unlawful Activity', the outcome being sought and the Risk Matrix in Appendix Two.

The process of selecting the enforcement measure(s) should be clearly documented.

If an investigation finds that an offence may have occurred and either negotiation has failed or is deemed inappropriate, then action will be considered in the form of one or more of the following measures;

4.1 Advice

In situations where the breach is of a trivial or minor nature, does not constitute an immediate threat to health or safety and the person has not previously received a warning or caution, an Authorised Person may call or email requesting that the breach be rectified within a reasonable period of time. Such advice will quote the relevant Act, Regulation or Local Law and will indicate the actions open to the City if the breach is not rectified, including penalties that may apply.

4.2 Warnings

A warning is not a sanction in itself, but will convey to the recipient that they have done something wrong and put them on notice that a sanction may be applied in the future. A warning may be an appropriate response where:

- the breach, damage or risk is minimal;
- the breach of an administrative instrument or legislative provision is of a minor or technical nature;
- a warning is fair and appropriate having regard to the history of the offender and nature of the breach;
- a hazard, public risk or environmental incident may occur if action is not taken; and
- the matter is one which can quickly and easily be remedied.

In deciding whether a warning is an adequate response the general criteria for enforcement will be considered and, in particular the compliance history of the person, and the steps taken to ameliorate the damage and prevent any recurrence. While a warning may be issued orally, it will normally be followed up in writing to ensure that a person clearly understands what actions they are required to undertake to fulfil their obligations.

Written warnings reiterate and reinforce an oral warning while formally documenting the incident and the subsequent direction(s) for cessation of an activity and/or actions for remediation or repair. Where a warning is not complied within a specified period further enforcement measures may be pursued.

4.3 PINs (Infringement Notices)

PINs will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. A PIN will only be issued where a decision has been made not to commence other criminal proceedings and if the City has obtained, or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings.

The recipient of an infringement notice has the option of paying the fine or, by not paying the fine, electing to have the matter dealt with by a court. A prosecution can be initiated if an infringement notice is not paid. There is also the option to withdraw a PIN and proceed to a prosecution by way of a brief of evidence or to forward the infringement to fines enforcement.

After applying the general criteria outlined in Section 2.3, the following specific criteria will be considered when deciding whether a PIN is an appropriate form of enforcement:

- the offence is one that may be dealt with by imposition of an infringement notice;
- the facts are apparently indisputable;
- the evidence discloses a *prima facie* case against the person with reasonable prospects of success should the matter go to court;
- the breach is relatively easily remedied; and
- issuing of an infringement notice is likely to be a deterrent.

A PIN can only be issued where it appears to the issuer that the defendant has committed the relevant offence. PINs should be issued as soon as possible after the conclusion of an investigation and may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

Repetition of behaviour that attracts a PIN penalty may signify the need for tougher enforcement and prosecution may be pursued in these situations.

4.4 Notices / Orders / Directives;

Where the Authorised Person believes that the breach will not be rectified within the time frame stipulated in the letter, a notice/order/directive should be issued in accordance with the Act, Regulation and Local Law.

When an Authorised Person serves a Notice in person in accordance with the Act, Regulation and Local Law on any person an 'Endorsement of Service' is to be completed by the Authorised officer and the person being serviced a Notice.

When an Authorised Person serves a Notice on any person by mail this must be sent by registered post.

Where the breach has not been rectified after the City has issued the necessary notices/orders/directives, consideration will be given to instituting prosecution action. Such action will be in accordance with the City's Prosecution Policy.

4.5 Prosecution

Prosecutions will be initiated, consistent with the principles and criteria of the Prosecution Policy, where there is evidence of *prima facie* breaches of the Act and on a case-by-case basis. Prosecution will be pursued where in the opinion of the CEO it is the most appropriate response to achieve the best outcome.

The following matters will be considered in determining whether to recommend prosecution:

- The severity of the offence or alleged breach
- Whether the issue of court orders are necessary to prevent a recurrence of the offence;
- The availability and effectiveness of any alternatives to prosecution;
- Whether there are any counter-productive features to a prosecution;
- Whether the consequences of a conviction would be unduly harsh or oppressive considering the length and expense of a court hearing;
- Whether the offender had been dealt with previously by non-prosecutorial means;
- Whether the breach is a continuing or second offence;
- Whether proceedings are to be instituted against others arising out of the same incident;
- Whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so; and
- The likely outcome in the event of a finding of guilt

4.6 Decisions relating to Approvals, Orders, Directions and Building Certificates

Consideration will be given to whether a breach can be rectified by an approval or building certificate or whether enforcement can occur by way of an order, notice or direction under the relevant Act or Regulation.

5.0 ESCALATION OF COMPLIANCE PROCEEDINGS

The City will create and maintain a record of offences and offenders with a view to identifying repeat or recalcitrant offenders. Notwithstanding the above criteria for any decision on legal enforcement matters, should it become evident that a person or company continues to act unlawfully despite previous enforcement history, the City will consider escalating any proposed enforcement against that person or company. Any escalation of proceedings would not only apply to a particular parcel of land, but also to the person or company responsible for the unlawful activity.

For example, a decision is made that a certain course of action would result in a formal warning being issued, however the person subject to the proposed warning has previously received a formal warning for a similar offence. This formal warning was issued for a separate property within Kalgoorlie-Boulder. The City may wish to take the view that the previous warning was not a suitably effective enforcement deterrent and that it may be prudent to escalate enforcement proceedings against that person and a PIN may be issued for the offence instead of a formal warning.

As a general rule, any escalation of enforcement proceedings should be initiated as below:-

- Advice
- Mediation / co-operation
- Caution notice or written warning
- PIN
- Other Actions e.g. Seizure
- Suspension or revocation of approval or licence/permit (where applicable)
- Statutory notices and directions
- Prosecution

Nothing in the escalation of enforcement proceedings restricts or requires the City to follow

this escalation procedure. All enforcement matters should be assessed in line with this policy as a whole and the appropriate course of action taken. This may include a matter proceeding from a warning to a Court prosecution, should the circumstances of the case permit.

6.0 RECOVERY OF LEGAL COSTS

The City's policy for recovery of its costs are:

- The City will seek to recover fair and reasonable costs in all matters where costs are recoverable, either by a charge on the land, consent or by order of the Court; and
- The City will seek to recover the penalty imposed by the Court where such a penalty is imposed; and
- The City will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the City if, in the circumstances, the acceptance of such an offer will result in the City not incurring further and unnecessary legal costs.

7.0 RIGHT OF REVIEW AND APPEALS

Defendants must be notified in writing of their right to appeal direction or decision of the City. If a defendant lodges an appeal with SAT no further compliance action will be taken until a ruling has been made. Unless the matter is considered to represent a serious risk to public health or safety in which case the matter is to be referred to the CEO for a determination.

RELEVANT DOCUMENTS

Appendix One - General Criteria for Compliance

1. The seriousness of the incident or breach having regard to the damage to the environment, risk to public health or safety, impact on people and the implications for the City.
2. Whether there has been a clearly identified *prima facie* breach of the Act.
3. Whether there has been failure to comply with any formal request, lawful direction or notice given by an inspector or authorised officer.
4. The culpability of the person, whether it be a corporation or employee or individual person, including any mitigating or aggravating circumstances.
5. The previous history of the person, with particular regard to the environment, including the frequency of the offence.
6. The level and nature of public concern.
7. The frequency of the alleged offence and the need for deterrence of the offence.
8. The precedent which may be set by failure to take enforcement action.
9. Due diligence procedures already in place and used by the person.
10. Voluntary actions by the person to mitigate damage to the environment and put in place mechanisms to prevent recurrence.
11. The measures necessary to ensure compliance and those most likely to achieve the best environmental outcome.
12. Failure to notify or delayed notification of the unlawful activity by the person.
13. The co-operation given to the City by the person or company and willingness to commit to appropriate remedial action.
14. The length of time since the incident.
15. Where more than one party has been involved, whether enforcement measures have been taken or are intended against others in relation to the same incident.
16. The enforcement approach adopted to similar incidents in the past taking into account the specific circumstances;
17. The age, intelligence, antecedents, background, physical or mental health of the offenders and witnesses; and

18. Whether there were any aggravating or mitigating circumstances.

Appendix Two - Risk and Prioritisation Matrix

		CONSEQUENCE				
		CIYT'S RISK EXPOSURE	RISK TO PEOPLE / ENVIRONMENTAL IMPACT	LEGISLATIVE BREACH	COMMUNITY CONCERN / OUTRAGE	ORGANISATIONAL PRIORITY OR OBJECTIVE
Significance	TRIVIAL (0)	0	0	0	0	0
	MINOR (1)	1	1	1	1	1
	MODERATE (2)	2	2	2	2	2
	SERIOUS (3)	3	3	3	3	3
	Major (4)	4	4	4	4	4

Non compliance issue descriptors:

Trivial: (Score 0-3)

Descriptors

- Verbal direction or email can be given.
- Initial response focus including education / advice.
- Priority: very low - action only if staffing levels permit.
- Dealt with at officer level

If unresolved escalate to;

- Warning / Caution Letter
- Infringement Notice

Minor: (Score 4-8)

Descriptors

- Verbal direction or email can be given.
- Initial response focus including education / advice.
- Priority - low action when staffing levels permit.
- Dealt with at officer level
- Infringement appropriate for repeat offence

If unresolved escalate to;

- Infringement Notice
- Carrying out of required works and subsequent invoicing for cost of works against the land (if applicable)
- Issue a statutory notice

Moderate: (Score 9-13)

Descriptors

- Initial response focus including mediation / advice.
- Issuance of Caution / Warning Letter appropriate
- Priority – Medium action when within 1-5
- Dealt with at officer level, however advise supervisor or manager
- Infringement Notice appropriate for repeat offence

If unresolved escalate to;

- Infringement Notice
- **Issuance of a statutory notice**

Serious: (Score 14-17)

- Minimum compliance action: Caution / Warning Letter
- Consider
 1. Issuance of an Infringement Notice
 2. Suspension or revocation of approval or licence/permit
 3. Retention of any guarantee or bond to fund repairs
 4. Carrying out of required works and subsequent invoicing for cost of works to the landowner or attached costs to the land
 5. Issuance of a statutory notice
 6. Recommending prosecution for repeat offence(s)
- Priority – High action when within 1-2
- Investigated at Officer level, dealt with by supervisor or manager. Relevant Director to be informed

If unresolved escalate to;

1. One of the other non-utilised compliance options (above) e.g. Issuance of a statutory notice
2. Possible prosecution

Major: (Score 18-20)

- Minimum compliance action:
 1. Suspension or revocation of approval or licence/permit
 2. Carrying out of required works and subsequent invoicing for cost of works to the landowner or attached costs to the land
 3. Issuance of a statutory notice
 4. Other actions e.g. seizures
 5. Consider recommending prosecution
- Priority – Very High initial action is to be within 24hrs
- Investigated at officer level, dealt with by supervisor or manager. Relevant Director & CEO to be informed

If unresolved escalate to;

- Issuance of a statutory notice
- City may act in default to resolve issue
- Possible prosecution