

Policy:	Planning Enforcement Policy
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Directorate:	Strategic Development
Department:	Planning Building and Health Services
Responsible officer:	Director Strategic Development

POLICY OBJECTIVE

This policy applies to the enforcement of the *Planning and Environment Act 1987* (the Act) and Hobsons Bay Planning Scheme (Planning Scheme) and will provide a guide to Council's planning enforcement decision making. It sets out the principles, criteria and measures that Council will use to enforce provisions of the Act and the Planning Scheme.

The Scheme and Act regulates land uses and developments across the Municipality. These activities are controlled by the provisions in the Planning Scheme, planning permits, Section 173 Agreements and Victorian Civil and Administrative Tribunal (VCAT) issued enforcement orders.

Section 14 (a) of the Act places an obligation on Council to enforce the Act and the Scheme. On occasion landowners, occupiers or people using the land fail to obtain appropriate planning approvals or fail to abide by the conditions of planning permits or provisions of the Planning Scheme. Where breaches occur compliance and enforcement actions must be taken.

1 Policy

Council strategic goals are detailed in the Council Plan, and the Health and Well Being Plan 2013-2017 which are updated annually. Council's relevant Strategic goals are reproduced here.

Goal 1: An Inclusive, Resilient and Healthy Community.

1.3 Protect and promote public health and community safety.

Goal 2: A Well Planned, Vibrant and Sustainable Place.

2.2 Enhance neighbourhood character, while respecting local heritage and open space.

2.4 Plan for a well designed urban environment and public spaces that contribute to the life of the city.

Goal 3: Quality Community Infrastructure and Public Open Spaces and Places.

3.1 Protect and enhance our coastal environment, public open space network and natural areas.

Goal 4: An Innovative, Proactive and Leading Organisation.

4.1 Undertake responsible and sustainable decision making and management.

4.3 Communicate and engage effectively with the community and provide excellent customer service.

2 Procedural guidelines

The aim of all enforcement actions is to achieve compliance. The method by which compliance is achieved will be by one or a combination of the following:

- verbal or written advice
- warnings
- penalty infringement notices (PIN's)
- prosecution heard in the Magistrates Court of Victoria
- enforcement orders obtained from VCAT
- Section 173 agreements
- injunctions granted in the Supreme Court of Victoria

3 Principles

When exercising enforcement functions Council will have regard to this policy. Council has discretion as to when enforcement or compliance is required and which measures are appropriate for particular situations.

Ethics

Council enforcement and compliance officers will conduct themselves in accordance with the Hobsons Bay Code of Conduct. Enforcement and compliance activities will be conducted, lawfully, respectfully, diligently, honestly, consistently, ethically and in line with natural justice principles.

Council will act as the model litigant and will pursue compliance and enforcement actions to their logical and proper conclusions. The Auditor General has published Guidelines that codify the expected behaviors of government bodies when taking enforcement action.

Court and VCAT

Where an incident warrants a PIN and an enforcement order at VCAT the PIN will be issued first.

Where an incident warrants prosecution in the Magistrates Court and a VCAT enforcement order, Council will usually commence the Magistrate Court action first.

Combined matters

Where a breach of more than one piece of legislation occurs Council will pursue all breaches and may, where fair to do so, combine those actions into one matter. ie. Where a prosecution is warranted for breaches to both the Act and Building Act, one informant will generally be appointed and one group of charges and summons will be issued. This will allow the accused person to answer all charges in a comprehensive manner.

Publicity

Council will publish the outcomes of enforcement and compliance activities either generally or as a report to specific professional associations and on its corporate website where such publication is deemed beneficial.

Costs

Council will seek the appropriate orders to recover its full costs in undertaking compliance or enforcement actions.

4 Enforcement Factors

In determining the course of action to be taken, Council will take into consideration the following factors:

- **Legislative Obligation**

The obligation to achieve compliance with the provisions of the Planning Scheme as reflected in the *Planning and Environment Act 1987*.

- **Cost effectiveness**

The community benefit generated by Council taking action when comparing costs of possible ongoing or increasing non compliances.

- **Choosing the most appropriate enforcement path**

Council will determine the most effective action applicable to the incident. The remedy may reside with other areas of Council such as, Local Laws, Building, Environmental Health or external bodies such as, Victoria Police, Environment Protection Authority ("EPA") or Vic Roads. Council will actively cooperate with those other investigation enforcement agencies.

- **Prima facie breach**

Council will determine if there is a prima facie breach before committing full investigational resources to gathering evidence and documenting a case.

- **Seriousness of the incident**

Will be considered in terms of damage to the environment, level of amenity impact, such as to, neighbours, locality, municipality, State-wide or National.

- **Prevalence**

Taking into account whether the breach can occur elsewhere in the Municipality. If the frequency of similar incidents is not decreasing, the level of compliance/enforcement actions may be increased.

- **Deterrence**

Consider whether the taking of action will likely decrease the frequency or severity of similar breaches by that person or others across the Municipality.

- **Intention**

Take into account whether the breach was accidental, negligent, deliberate, willful or unavoidable.

- **Foreseeability of the breach**

The contribution of any management system to the breach. The person's experience, qualifications or registrations in an allied area.

- **Previous history**

Previous conduct of the person in other non compliances with any other areas of Council or with other Councils.

- **History of previous actions for similar breaches**

The previous actions taken for similar incidents will be reviewed prior to determining the appropriate action for the current issue. If the frequency or severity of incidents is not decreasing, the level of compliance/enforcement actions may be increased.

- **Level of Council or Community concern.**

Consideration will be given to the detrimental or positive impact on Council's reputation by the taking or not taking of action.

- **Incorporated body or natural person**

Whether the breach was caused by an incorporated body or a natural person. Company Directors may have actions taken against them where it is likely they could have prevented the breach. Council will actively explore the availability of any statutory due diligence defences.

- **Deeming provisions**

The owner of a property is deemed to have committed all offences that have occurred on their property. Section 126 of the Act deems the owner responsible for all breaches that occur on the property. Council may choose not to rely on this deeming provision and

institute legal proceedings against another or alternative party if appropriate to do so. Council may take action against all parties that are found to have contributed to the breach occurring.

- **Level of cooperation**

The level of cooperation and rectification actions taken will be considered. If cooperation is not given the level of enforcement action may be increased to the next level. The making of a retrospective planning application seeking to remedy the breach is not considered as cooperation. ie Was cooperation provided at the first instance, was the breach self reported, were rectification works undertaken without direction or was a planning amendment sought.

- **Other aggravating or mitigating circumstances.**

Dependent on the prevailing circumstances these will be assessed on a case by case basis.

5 Types of Action

Council has a number of tools available to resolve breaches. Initially minor breaches will be resolved informally and more significant matters may result in prosecution in the Magistrates Court or an interim enforcement order through VCAT. In ascending order the available actions are as listed.

- **Negotiation of compliance**

In matters of minor or no amenity impact and no community concern it may be determined that verbal or emailed advice or agreements by letter will resolve the issue.

- **Official warnings**

May be issued at the officer's discretion in matters where there are minor amenity effects and no possibility of medium term or greater impacts.

- **Penalty Infringement Notices**

PIN's can be issued where previous requests have not been actioned or the issue causes amenity impacts on others, or is of a medium impact and effect but can be reversed or is temporary. PIN's may or may not contain additional measures to be undertaken to rectify the breach.

- **Prosecution in the Magistrates Court - Charges and Summons**

Charges and summons may be issued where:

- a PIN remains unpaid or remediation actions unresolved. The original offence is the subject of the charges and summons
- the breach causes significant environment, amenity or social impacts
- the effects cannot be easily reversed
- the breach occurred deliberately, willfully or negligently

- multiple breaches are present
- obstruction of Authorized officer(s) occurred
- failure to comply with an Enforcement Order (Section 133 VCAT Act.)

Charges will be heard in the Magistrates Court of Victoria.

- **Enforcement order VCAT**

An enforcement order will be sought from VCAT where a previous request to rectify the breach has not occurred, where PIN's have been paid but remediation actions have not resolved the issue, or a prosecution has been undertaken however the breach remains.

An enforcement order is not punitive and is seen as a compliance measure. Also see Section 3 **Costs**.

In matters where a risk of serious amenity or long term impacts may be realised an interim enforcement order will be sought from VCAT.

- **Breach of VCAT order**

Council may carry out work to rectify any non compliance and recover its costs of the action. The issue must be causing serious amenity detriment and all other actions must have been either explored and disregarded or taken and found to be ineffective.

- **Cancel or amend a planning permit**

Where there has been substantial and ongoing non compliance with conditions of a planning permit Council may apply to VCAT to request the permit be revoked or amended. Also see Section 3 **Costs**.

- **Supreme Court County Court Injunction**

The issue must be causing or is likely to cause serious amenity detriment and all other actions must have been either explored and disregarded or taken and found to be ineffective.

6 Action Matrix

	No impact	Slight amenity impact.	Moderate amenity temporary impact. Heritage issues	Major amenity, residual impact Heritage. Contributory	Catastrophic amenity Heritage impact. State significance
Deliberate or willful	Moderate PIN/VCAT	Moderate PIN/VCAT	High level Court/VCAT	Immediate Court/VCAT	Immediate Court/VCAT
Negligent	Very low	Low Advice	Moderate PIN/VCAT	High level Court/VCAT	Immediate Court/VCAT
Accidental	Very low	Low Advice	Moderate PIN/VCAT	Moderate PIN/VCAT	High level Court VCAT
Inadvertent	Very low	Very low	Low Advice	Moderate PIN/VCAT	Moderate PIN/VCAT

7 Outcomes

Action Rating	Response
Immediate action Court/VCAT	Officers attend immediately. Request works cease. If other powers exist in Council to stop works take relevant action. Immediately obtain evidence. Consider seeking interim enforcement order at VCAT. Injunction at Supreme Court. Charges and summons usually issued.
High level Court/VCAT	Attend within three days. Request works cease. If other powers exist in Council to stop works take relevant action. Collect evidence. Charges and summons usually issued. Consider enforcement order at VCAT.
Moderate level PIN/VCAT	Attend and follow up in writing. PIN usually issued. Charges and summons issued if PIN unpaid or works not completed.
Low level Advice	Attendance may not be required. Can issue verbal request, emails, letters. PIN may be issued if non compliance with initial request.
Very low level	Investigate if resources allow. Attendance may not be required.

8 Examples

	Risk Rating				
	Very low	Low	Moderate	High	Immediate
Heritage					
Works on State significant dwelling					Demolition or addition without permit
Demolition works without permit - contributory dwelling ie. chimney					Chimney or whole room or rear structure visible from street or lane way.
Demolition			Side or rear fabric	Significant fabric front	
Signage		Request removal			
Fence without permit.		No intrinsic heritage value	Intrinsic heritage value		
Solar panels	Request removal/ planning application				
Driveway construction			Built or not removed in breach of permit No permit in place		
Residential					
Non residential uses		Mechanical Wreckers			

	Risk Rating				
	Very low	Low	Moderate	High	Immediate
Extra bedrooms				Breach of permit	
Air conditioner		Built in breach of permit			
Meter box		Breach of permit too tall			
Windows balcony not screened					
Commercial					
Hours of use	In commercial area		Impacting residents		
Noise amenity			Impacting residents		
Dust			Impacting residents		
Parking		In industrial zone	Impacting residents		
Signage					
Landscaping					
Use without permit		Allowed by Scheme	Not allowed by Scheme		
Odour		Impacting industrial	Impacting residents		
Vegetation/ Fauna					
National State significance damage					Sun moth or rice orchid

	Risk Rating				
	Very low	Low	Moderate	High	Immediate
Tree protection zone impacted			Planning permit. Materials within area		
No tree protection zone		Planning permit			
Landscaping					
Industrial					
Hours of operation			Impacting residents		
Noise	Impacting other industrial uses		Impacting residents		
Emissions to air - dust		Impacting other industrial uses	Impacting residents		
Indigenous Heritage					
Culturally significant site					

9 Policy Review

The Council will review this policy on 1 July 2020 or if new legislation is introduced.