

## PROPOSED NOTICE OF MOTION (Elected Members)

Please forward this form to [Governance@melville.wa.gov.au](mailto:Governance@melville.wa.gov.au)

Name: Cr Tomas Fitzgerald

Date of Meeting: 17 March 2020

Meeting of the: Ordinary Meeting of Council

Subject: Draft Prosecutorial Guidelines

*Disclaimer: Where administration has provided any assistance with the framing and/or wording of any motion/amendment to the Elected Member who has advised their intention to move it, the assistance has been provided on an impartial basis. The principle and intention expressed in any motion/amendment is solely that of the intended mover and not that of the officer/officers providing the assistance. Under no circumstance is it to be expressed to any party that administration or any officer holds a view on this motion other than that expressed in an official written or verbal report by administration to the Committee or Council meeting considering the motion.*

### PROPOSED NOTICE OF MOTION: CITY OF MELVILLE

#### **That the Council hereby resolves:**

- 1. To request the CEO to cause a proposed policy which sets out prosecutorial guidelines appropriate for the City of Melville and which take account of the issues noted in the attached reasons for this proposed notice of motion, to be drafted.**
- 2. To request that the CEO cause the proposed draft policy to be presented to Council at an EMIS at a date to be fixed.**

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## PROPOSED NOTICE OF MOTION

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### REASONS:

#### Background

Presently, the City does not have a Council policy which sets out prosecutorial guidelines. The issue of such guidelines arose when changes to the *Criminal Procedure Act 2004* necessitated amendments to some delegated authorities are exercised by certain City officers. Specifically, those changes introduced a new capacity to deal with certain breaches relating to asbestos by issuing an infringement notice, rather than commencing prosecution.

Discussion by councillors suggested that officers would benefit from clear and specific guidelines about when such matters are appropriately dealt with by issuing an infringement notice, and when the appropriate response is to commence prosecution. The discussion further suggested that publication of a more general prosecution policy (as undertaken by other LGAs) may be desirable.

#### Current Policy/Procedures

While there is no present Council policy, Mr Hitchcock provided two documents which set out the City's current procedures with respect to prosecutions. Those were entitled **Directorate Procedure -- Planning Compliance** and **Work Instruction -- Planning Compliance**. Those documents do outline - briefly - some considerations with respect to prosecutions. However, those documents are addressed to planning, rather than the full suite of the City's regulatory compliance functions. Further, those documents are in the style of procedure manuals. That is, they lay out the general process which is to be followed in administering the compliance functions. There is limited - and in some cases no - consideration of the broader principles to be applied when exercising prosecutorial discretion. The relevant sections of those documents are set out at **Appendix I** below.

It is also worth noting that the current procedures do not contain considerations one would ordinarily expect to see in prosecutorial guidelines. To take one example, there is no guidance on dealing with conflicts of interest. Hypothetically, an officer might comply with the framework set out in the procedures by responding to a complaint that they themselves had raised. That is, the reactive compliance procedure set out in the **Work Instruction -- Planning Compliance** document only excludes planning officers who have "recently been involved with the development (at the discretion of the Senior Planning Officers) (pg 4)" from undertaking the procedure, and hence exercising the relevant prosecutorial discretion. On the face of it, more robust procedural safeguards would assist by shielding officers from suggestions of the perception of bias.

To be clear, this is not to criticise the procedures set out in the documents. In general terms they are appropriately clear and reasonably adapted to the purpose of planning compliance actions. It may well be that the general workflow set out in those documents remains appropriate, though some reassessment may be necessary in specific areas. Nevertheless, there are opportunities to strengthen the overarching policy framework within which the City's officers operate.

## Specific Issues

The present guidelines

1. relate only to planning matters.
2. notionally outsource the exercise of the City's prosecutorial discretion (Directorate Procedure 4.2.5 dot point 3).
3. explicitly favour prosecution through the Magistrates Court to resolve non-compliances (Directorate Procedure 4.2.5 dot point 4).
4. contain limited guidance for the exercise of prosecutorial discretion generally, and offer specific guidance only to compliance actions relating to building and planning matters (Directorate Procedure 4.3.1).
5. do not contain reference to considerations relevant to the exercise of prosecutorial discretion, eg. the public interest in prosecution, the nature of the risk created by the alleged non-compliance, etc.
6. do not contain an explicit procedure for reference to alternative methods of dispute resolution (negotiation, education, formal warnings, etc.) where appropriate.
7. in some cases notionally compel proceeding "directly to legal action" in a manner inconsistent with the requirement to exercise prosecutorial discretion in the public interest (Work Instruction dot point 4).
8. are formatted in a manner which makes reference to the provisions of the guidelines cumbersome (see above...).

It should be noted that other LGAs have adopted explicit prosecutorial guidelines as a policy of the council. For example, City of Albany (<https://www.albany.wa.gov.au/documents/103/regulatory-compliance-policy-and-guideline>) and the City of Vincent (<https://www.vincent.wa.gov.au/documents/558/4122-prosecution-and-enforcement>).

## Appendix I

The **Directorate Procedure -- Planning Compliance** document notes, relevantly:

### 4.2.5 Legal Action

- Where no response has been received to the two letters requesting compliance, a further site visit is to be undertaken to check whether the offending structure has been removed (or use ceased).
- Where the breach still exists and no further correspondence has been received from the property owner / occupier, the Officer is to liaise with the Planning Services Coordinator and where necessary, the Manager Statutory Planning and Executive Manager Legal Services in relation to undertaking further compliance action.
- The City will proceed in accordance with the legal advice received. In general, the City generally favours prosecution through the Magistrates Court in order to resolve non-compliances.

### 4.2.6 Continued Non-Compliance following Prosecution

- Where formal compliance action (Directions Notice or Prosecution) has been undertaken and the breach has not been rectified (i.e. structure not removed or modified to comply, or the use continues) during the course of the proceedings, the City may, upon legal advice, commence further compliance action without further warning.

## 4.3 General

### 4.3.1 Circumstances where the City may decide not to undertake compliance action

The City may exercise its discretion not to undertake compliance action where:

- The alleged breach is within building tolerance.
- The alleged breach has a negligible impact on adjoining properties or the streetscape.
- The modifications undertaken to a building still maintain compliance with all statutory requirements.
- It is unlikely that compliance action would be successful due to:
  - The time period which has lapsed since the development was completed, or
  - Lack of clarity in the approved plans or documents, or
  - Lack of certainty at the time of development as to the legal status of the development or the requirement to obtain approval, or
  - Any other legal consideration.

The **Work Instruction -- Planning Compliance** document notes, relevantly:

### Written Correspondence

(dot points 3-6)

- Where the breach is not able to be rectified by the submission of a DA, only one written letter is to be sent to the owner/occupier giving them 28 calendar days to comply. Failure to comply within this timeframe proceeds directly to legal action. Where no correspondence is received (including an application for Retrospective Planning Approval) at the conclusion of the 28 calendar day period, a follow up site visit is to be undertaken by the Officer within 7 calendar days to check the offending development (or use)



has been removed. If the breach still exists, a follow up letter is to be sent requiring compliance within 14 days of the date of the letter.

- Where no correspondence is received within 14 calendar days, a follow up site visit is to be undertaken by the Officer within 7 calendar days to check the offending development (or use) has been removed. If the breach still exists, the Officer is to compile a file note detailing what has occurred to date.

- The Officer is to discuss the matter with the Planning Services Coordinator, and where relevant the Manager Statutory Planning and Executive Manager Legal Services, to determine how to proceed to achieve compliance.

#### Site Inspections

- Where it is suspected that unlawful activity is occurring (eg. brothel), the Officer should liaise with the local police station to undertake a combined site visit.

SIGNATURE: \_\_\_\_\_

**\*\* Please circulate to all Members of the Council, preferably a few days prior to the meeting, or on the night, and pass a copy of this form to the officer recording the minutes of the meeting. \*\***

***Copies of this form are available on the Elected Members Extranet under Forms.***