

This is a response to the [City's Director Planning, UP23/28 Neighbour Dispute Mediation](#) Policy in response to a [motion put to Council by Cr Barber and carried at the August 2023 meeting](#). Cr Barber's motion may have been influenced by Dr Jeffrey Stevens longstanding dispute with his neighbours that built a retaining wall encroaching onto his land without his consent.

Elected Members, would you be happy if the Police told you to enter mediation for the return of your property proven to have been stolen from your home by a burglar because they weren't going to take enforcement action? Would any right-minded person be satisfied with the Police's non-feasance?

Council needs to be careful in formulating this Policy to ensure the City's Administration does not weaponize it to justify their non-feasance. That is, to use it as an excuse for them to avoid taking enforcement action for matters that fall within Council or the CEO's State conferred powers and duties.

**We urge Council to append Director Planning's recommendation to the effect that this proposed Policy is:**

- 1. Developed in conjunction with Council's review of its Compliance and Enforcement Policy ( CP-114 ) as outlined in [our written submission to Council of last month](#), and**
- 2. Not applicable where the City has compliance and enforcement obligations under State legislation, unless otherwise agreed between the affected parties. Meaning the proposed Policy cannot be used as an excuse to not fulfill Council's compliance and enforcement obligations under State legislation.**

We have seen many examples where the City has characterized and dismissed statutory non-compliance issues as a 'dispute between neighbours' to justify their non-feasance, or slow, inadequate, or biased enforcement actions. Examples of the City's inappropriate approach to enforcement have been recorded in many places, [including the September 2021 Weir Report](#) for example on page 23 and 24 with statements such as: "the City acted unreasonably in response to complainants about the unfenced spa", "It appears to have taken 3 years for this issue to be resolved which is not reasonable", Whilst the "City's actions to issue and infringement and 23 noise abatement notices in response to noise complaints was reasonable, and so was its decision to prosecute given the egregious nature of the allegations ... I am also critical of the fact that the charges were not laid sooner to deter XX from continuing with the alleged behaviours".

Council must recognize mediation will only work if all parties are motivated to resolve the dispute. A party's motivation to mediate often stems from one party alleging a loss or harm caused to them (the Victim) or the other party want to avert the threat of fines, orders, prosecution from the statutory authority (the Offending party) or other expensive legal action.

Director Planning has stated the Neighbour Dispute Mediation Policy could deal with such issues including:

- Dividing fences (noting Council has some jurisdiction by virtue of its [Local law Relating to Fences](#) and planning and building legislation),
- Amenity issues from noise and odour,
- Non-compliant developments,
- Cars and parking issues,
- Construction issues, and
- Building encroachments.

All issues that City has jurisdiction, duties, and powers to take appropriate enforcement action. Mediation is unlikely to succeed unless the City makes it clear to the disputing parties what the relevant laws are, and what the City CAN and WILL do if the dispute is not resolve between the parties within a set timeframe. An offending party is unlikely to be motivated to participate in mediation once the City makes it clear that it does not intend to take appropriate enforcement action.

Council must consider, in conjunction with its Compliance and Enforcement Policy review [as outlined in our submission](#), mechanisms for Council review of City decision in the event complainants are dissatisfied with the City's lack of appropriate enforcement action prolongs or inflames disputes between residents.

Council should review Dr Stevens' longstanding dispute to test the construction of any future policies.

## Dr Stevens' dispute summary

**September 2021** - Dr Stevens complained to the City about the neighbours' unauthorised retaining wall that encroaches into his property and caused consequential damage.

**March 2022** - Dr Stevens, with the assistance of Citizens for Building Reform, obtained legal advice confirming the City's powers to prosecute the neighbour and issues building orders to have the encroachment removed (Attachment 1).

**March 2022** - the City issued Dr Stevens neighbour a retrospective building approval certificate (BAC) for the unauthorised retaining wall (BA-2022-111). The City BAC plans do not reflect what was actually built. The City's issuance of the BAC does not to comply with [Bronwyn Weir's September 2021 recommendation 14](#): *"Where a person applies to the City for a BAC for retrospective approval of building work, and where it has been alleged or it is suspected that the subject work may be non-compliant, the City should undertake a substantive review of the application material and conduct its own inspection of the work to confirm the documentation is consistent with as built conditions and the work appears to be compliant with applicable building standards."*

**June 2022** - Dr Stevens spent \$1,100 on a boundary survey that proved? the encroachment, on the understanding that if he provided it to the City, they would take enforcement action.

**April 2023** - [Council refused to take enforcement action](#) on the basis of City officer advice that the *"best course of action is that these matters be resolved amicably between both property owners."*

**August 2023** - Dr Stevens wrote to the City's Director Planning proposing an approach to resolve the matter that involved the City issuing building orders and in the event the neighbours objected to the orders, mediation could happen at the **State Administrative Tribunal (SAT)**. The City rejected Dr Stevens proposed approach because of, amongst other things, the City's incorrect assumption that the Magistrates Court can deal with retaining wall issues under the Dividing Fences Act, and the City's policy that it will only take enforcement action for the benefit of the greater community; not individual residents or groups.

**October 2023** - In response to Dr Stevens letter seeking to resolve the dispute, the neighbour stated *"As there cannot be a resolution between both parties I propose mediation via the State Administration Tribunal (SAT) as put forward by the City of Melville. Previous efforts to discuss and explain the situations below by myself and the Melville City Council during the last two years has not been seen in your eyes to be adequate."*

This suggests Dr Stevens' neighbour is working closely with City officers and that he is confident the City will not take appropriate enforcement action. To our knowledge the City has not initiated the processes that could result in SAT mediation in relation to Dr Stevens' issues.

Mediation is unlikely to work in this dispute in the absence of the neighbours' understanding the laws and the City's enforcement powers (Attachment 1), building orders issued by the City and the neighbours being concerned about potential adverse consequences for non-compliance.

More than 2 years on the City's non-feasance still appears to favour Dr Stevens' neighbour and is continuing to cause Dr Stevens psychosocial harm. The matter remains unresolved, and Dr Stevens should not be forced to spend more money, time, and stress to resolve non-compliances the City can and should resolve.

**Attachment 1: Legal opinion on Council's powers to deal with illegal encroachments.**

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Our ref: JH:220211 (final)  
Your ref:

8 March 2022

To: [REDACTED]  
Citizens for Building Reform (WA) by email: [CitizensBR.WA@bigpond.com](mailto:CitizensBR.WA@bigpond.com)

Dear [REDACTED]

### **Local government enforcement powers for unauthorised encroachment of buildings and incidental structures**

I confirm I am instructed to provide a very brief summary of the main enforcement powers available to a local government under the *Building Act 2011* ("the Act") in respect of unauthorised encroachment of buildings and incidental structures.

Subject to various exceptions, s 76 of the Act requires the builder named in the building permit (or the landowner if no building permit is in effect) to ensure under that no part of a building or incidental structure is placed beyond the works land without the consent of the adjoining owner or court order. Failure to comply is an offence.

Conduct which breaches s 76 may also give rise to additional offences such as non-compliance with the building permit in breach of s 29 or doing building work without a building permit in breach of s 9.

The local government as permit authority is authorised to prosecute the above offences within 6 years of the alleged offence.

The local government may be able to issue a building order under s 110 requiring the unauthorised encroachment to be removed (reviewable by SAT under s 122). Non-compliance may allow the local government to give effect to the building order and recover the costs under s 118 and/or prosecute under s 112 within 3 years (if non-compliance was without reasonable excuse).

The builder named on the building permit can potentially be required to remove the unauthorised encroachment under a building order. But a building order can only be issued to the named builder while the building permit is still in effect.

Further or alternatively, a building order can be issued to a landowner at any time. But it appears a building order cannot require a landowner to do work beyond the boundaries of its own land. This would present practical difficulties in the case of unauthorised encroachment as a corresponding building order would also need to be issued to the owner of the adjoining land.

Yours faithfully

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