

Agenda Report for Decision

Meeting Date: 20 January 2022

Item Name	Civil Penalties and Enforceable Voluntary Undertakings (City of Burnside)
Presenters	Ben Sieben
Purpose of Report	Decision
Item Number	4.2
Confidentiality	Not Confidential (Release Immediately)
Related Decisions	Item 4.3 – 30 September 2021 Item 4.2 – 25 November 2021

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately).
2. Pursuant to sections 225(17)(b) and 230(14)(b) of the *Planning, Development and Infrastructure Act 2016* (the Act), authorise the City of Burnside (the Council) to utilise the enforcement tools available under sections 225 and 230 of that Act for the period 20 January 2022 to 30 September 2024 (as per **Attachment 1**).
3. Further to Resolution 2 and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, grant the authorisation to the Council subject to the following conditions:
 - (a) The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced.
 - (b) The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act.
 - (c) Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections.
 - (d) Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act.
 - (e) The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act.

- (f) In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections.
4. Request that Council report on the effectiveness of the enforcement tools prior to 31 August 2022 to assist the Commission with granting future authorisations.
5. Authorise and approve the Chair of the Commission to make any minor amendments as required and sign the draft letter to Council (**Attachment 4**).
6. Should any further councils request to be authorised to utilise the enforcement tools available under sections 225 and 230 of the Act, authorise the Chair to issue the authorisation (subject to the same requirements of resolutions 2, 3 and 4 above) on behalf of the Commission.

Background

On 3 September 2021, Mr Alex Mackenzie, Acting General Manager, Development and Community Safety, City of Mitcham, wrote to the Commission seeking authorisation to enable the City of Mitcham to use the enforcement tools available under sections 225 (civil penalties) and 230 (enforceable voluntary undertakings) of the Act.

On 30 September 2021, and in response to the City of Mitcham's correspondence, the Commission considered the attached Agenda Report (**Attachment 1**) and resolved the following:

- 2) Pursuant to sections 225(17)(b) and 230(14)(b) of the *Planning, Development and Infrastructure Act 2016* (the Act), authorise the City of Mitcham (the Council) to utilise the enforcement tools available under sections 225 and 230 of that Act for the period 30 September 2021 to 30 September 2024 (as per Attachment 1).
- 3) Further to resolution 2 and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, grant the authorisation to the Council subject to the following conditions:
 - a. The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced.
 - b. The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act.
 - c. Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections.
 - d. Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act.
 - e. The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act.
 - f. In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections.

- 4) Request that the Council report on the effectiveness of the enforcement tools prior to 31 August 2022 to assist the Commission with granting future authorisations.
- 5) Write to the Local Government Association (LGA) of South Australia requesting that it encourage Councils to use the enforcement tools available under sections 225 and 230 of the Act, on the basis of a framework for the authorisation which is consistent with the authorisation for the City of Mitcham.

On 8 November 2021, the LGA responded to the Commission's request for a list of councils seeking to utilise the enforcement tools, and on 25 November 2021, the Commission subsequently authorised the following councils to utilise those tools subject to the same conditions as the City of Mitcham's authorisation:

- | | |
|--|-----------------------------------|
| 1. Alexandrina Council | 10. City of Adelaide |
| 2. District Council of Robe | 11. City of Marion |
| 3. District Council of Loxton Waikerie | 12. City of Charles Sturt |
| 4. District Council of Yankalilla | 13. City of Port Adelaide Enfield |
| 5. District Council of Grant | 14. City of Unley |
| 6. Coorong District Council | 15. City of Onkaparinga |
| 7. Kingston District Council | 16. City of West Torrens |
| 8. Mount Barker District Council | 17. City of Mount Gambier |
| 9. Adelaide Hills Council | 18. City of Playford. |

On 20 December 2021, Mr Magnus Heinrich, Group Manager, City Development & Safety, City of Burnside (the Council), further requested that the Commission authorise Council to utilise the enforcement tools available under sections 225 and 230 of the Act (**Attachment 3**).

Discussion

As it would be beneficial for the period of all authorisations to align, it is recommended that the Commission authorise the Council to utilise the enforcement tools available under sections 225 and 230 of the Act for the period 20 January 2022 to 30 September 2024. Further to this, for consistency, it is recommended that the authorisations are made subject to the same conditions as all other authorisations issued.

As all other councils have been requested to report back to the Commission on the effectiveness of the tools by 31 August 2022, it is recommended the same request be made of the Council. This information can be used to inform the granting of authorisations going forward, as well as the development of a policy guiding their use if deemed required.

Finally, as other councils may also continue to request to be authorised to use the enforcement tools individually, it is recommended that the Commission authorise the Chair to issue any initial authorisations (subject to the same requirements and conditions as authorisations already issued) going forward.

A draft response to Council has been prepared at **Attachment 4** for the Commission's consideration.

Attachments:

1. State Planning Commission Agenda Report, 30 September 2021 (#17646913).
2. State Planning Commission Agenda Report, 25 November 2021 (#17979943).
3. Incoming correspondence from Mr Magnus Heinrich, City of Burnside – 20 December 2021 (#18200808).
4. Draft letter of response to the City of Burnside (#18200455).

Prepared by: Ben Sieben

Endorsed by: Chelsea Lucas

Date: 11 January 2022

Agenda Report for Decision

Meeting Date: 30 September 2021

Item Name	Civil Penalties and Enforceable Voluntary Undertakings
Presenters	Nick Buick and Ben Sieben
Purpose of Report	Decision
Item Number	4.3
Confidentiality	Not Confidential (Release Immediately)
Related Decisions	N/A

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately);
2. Pursuant to sections 225(17)(b) and 230(14)(b) of the *Planning, Development and Infrastructure Act 2016* (the Act), authorise the City of Mitcham (the Council) to utilise the enforcement tools available under sections 225 and 230 of that Act for the period 30 September 2021 to 30 September 2024 (as per **Attachment 1**);
3. Further to resolution 2 and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, grant the authorisation to the Council subject to the following conditions:
 - (a) The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced;
 - (b) The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act;
 - (c) Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections;
 - (d) Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act;
 - (e) The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act; and

- (f) In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections;
4. Request that the Council report on the effectiveness of the enforcement tools prior to 31 August 2024 to assist the Commission with granting future authorisations;
 5. Write to the Local Government Association (LGA) of South Australia requesting that it seek information on whether other councils are interested in utilising the enforcement tools available under sections 225 and 230 of the Act, on the basis of a framework for the authorisation which is consistent with the authorisation for the City of Mitcham; and
 6. Authorise the Chair of the Commission to make any minor amendments as required and sign the draft letter to the Council (**Attachment 2**) and the draft letter to the LGA (**Attachment 3**).

Background

On 3 September 2021, Mr Alex Mackenzie, Acting General Manager, Development and Community Safety, City of Mitcham, wrote to the Commission seeking authorisation to enable the Council to use the enforcement tools available under sections 225 (civil penalties) and 230 (enforceable voluntary undertakings) of the Act (**Attachment 1**).

Section 225 – Civil Penalties

Civil penalties are contemplated in section 225 of the Act. A civil penalty is a pecuniary penalty generally imposed by the court in civil proceedings (as distinct from a fine in criminal proceedings).

Under section 225, when a designated entity is satisfied that a person has committed an offence by contravening the Act, it may recover an amount as a civil penalty as an alternative to criminal proceedings. This may be done voluntarily by negotiation between the parties or by application to the Environment, Resources and Development Court (the Court).

The maximum amount which can be negotiated as a civil penalty is the amount specified in the Act for the offence, or \$120,000; whichever is the lesser. The maximum amount that the Court may impose as a civil penalty is the criminal penalty specified in the Act for the offence.

The Act does provide some restrictions as to when civil penalties may be utilised, including that a council must be satisfied that an offence has been committed and it cannot be used for offences which require proof of intention/state of mind (which would generally include more serious offences). Further to this, a person may elect to be prosecuted instead of having a civil penalty imposed and there is no criminal conviction of guilt where a civil penalty is imposed.

Section 230 – Enforceable Voluntary Undertakings

Pursuant to section 230 of the Act, a designated entity may accept (by written notice) a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention of the Act by the person. The giving of an undertaking does not constitute an admission of guilt by the person giving the undertaking, and an undertaking may be varied or withdrawn at any time through written agreement.

It is an offence to breach an undertaking once it has been entered into and a designated entity may apply to the Court for enforcement of the undertaking. When proceedings regarding a contravention of the Act have been commenced but are yet to be finalised, a designated entity may accept an undertaking regarding that same contravention. The designated entity must then discontinue the proceedings.

For the purposes of both sections 225 and 230 (the relevant sections), a designated authority is either of the following:

- the Commission;
- a council acting under an authorisation granted by the Commission; or
- the Commissioner for Consumer Affairs acting after consultation with the Commission.

In granting an authorisation to a council, the Commission may do so subject to certain conditions. The Commission may also vary or revoke an authorisation.

The Council is of the view that civil penalties and undertakings will enable it to better respond in a more targeted, pragmatic and efficient way, to the wide variety of compliance scenarios it is commonly faced with. In particular, this includes the ability to deal with matters that are serious enough to warrant some form of statutory compliance action (i.e. over and above a formal warning), but not serious enough to warrant the full force of a criminal prosecution or civil enforcement proceedings.

The Council has specifically sought that unconditional authorisation be provided for a period of three years, which will allow it to adequately utilise the benefit of the provisions, evaluate their effectiveness, whilst also recognising the time it often takes to successfully reach a resolution.

Discussion

It is important to note that there are obligations on the Commission to ensure that details regarding the commencement of proceedings under section 225 and any notice of the giving, varying or withdrawal of an undertaking under section 230 are published on the SA Planning Portal (the Portal).

There are three options that the Commission may wish to consider going forward regarding the authorisation sought by the Council:

- *Option 1* – do not allow the Council to utilise the tools at all;
- *Option 2* – require the Council to seek authorisation from the Commission on a case-by-case basis for individual enforcement matters; or
- *Option 3* – the Commission grants a standing authorisation (subject to conditions) to the Council allowing it to use the tools when it requires.

Option 1

The Commission may determine to not enliven the relevant sections for the Council at all, as it already has a variety of other enforcement tools available. This includes:

- Enforcement Notices – a council may direct a person to refrain from taking further action for a specified period or direct a person to make good a breach of the Act within a specified period;
- Civil Enforcement – a council may apply to the Court for an order to remedy or restrain a breach of the Act (and the Court may make various orders, including granting an injunction or requiring payment of compensation for losses incurred); and
- Prosecution – a council may also prosecute for an offence against the Act.

While the Council does have these tools available, civil penalties and undertakings may assist with filling a void where a matter requires more than an enforcement notice, but does not warrant costly court action. The tools may also assist with removing enforcement matters from the court system, as they would be significantly less costly.

It should also be noted that the burden of proof required in a civil matter is *on the balance of probabilities*; whereas, in a criminal matter it is *beyond reasonable doubt*. The Council may

therefore find it more attractive to commence proceedings in the Court for civil penalties, as it may be a far more effective and cost-beneficial enforcement tool.

Option 2

The Commission may require the Council to seek authorisation on a case-by-case basis (at least at the outset) each time it wishes to utilise the tools available under either of the relevant sections. The Council would be required to provide details regarding the matter it proposes to utilise the tools for, and the Commission would then consider whether to grant the Council authorisation.

This provides the Commission with significant control and oversight over the enforcement action taken under the relevant sections, and would also provide the Commission with the appropriate information to publish on the Portal at the outset.

It must be noted that the powers to authorise the Council under the relevant sections have already been delegated to the Executive Director and two Directors of Planning & Land Use Services. The Commission could therefore consider allowing them to authorise the Council (and future councils going forward) on a case-by-case basis. Should the Commission wish to explore this option further, guidance material could be developed to ensure the delegates use this power appropriately and in line with the Commission's intentions.

This option may be considered overly burdensome for the Council and it may discourage it from utilising the enforcement tools under the relevant sections. It may also cause unnecessary delays should the Council wish to take action relatively quickly under the Act. Case-by-case authorisation would also become quite burdensome for the Commission (and/or its delegates), as it would need to satisfy itself that the enforcement action proposed is appropriate in each instance.

Option 3

The Commission could grant a broad authorisation that is subject to certain conditions allowing the Council to utilise the enforcement tools under the relevant sections when it so requires. The Commission could grant the authorisation for a period of time and require the Council to report back on their effectiveness following this period. This information could then be utilised by the Commission when considering to grant future authorisations.

To ensure the Commission receives the information it needs to meet its obligations regarding information being published on the Portal and to ensure that the enforcement tools are not misused, the Council's authorisation should be subject to the following conditions:

- (a) The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced;
- (b) The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act;
- (c) Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections;
- (d) Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act;
- (e) The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act; and
- (f) In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections.

While the Act places a limit on the maximum civil penalty that can be negotiated, it is worth noting that should multiple councils be granted authorisation, negotiation and agreement on civil penalties may not be applied consistently across councils. This is something that should be monitored by the Commission and, if required, the Commission could place a further limitation on the amount that councils are authorised to negotiate through a condition.

If minded, the Commission could also restrict the Council's use of the enforcement tools available under the relevant sections to specific breaches of the Act or offences under the Act. This would also assist with ensuring the tools are not misused; however, it would involve significant further work in identifying all possible breaches and offences under the Act and then considering whether it would be appropriate for the Council to have the tools available to utilise.

It is recommended that should the Commission be minded to authorise the Council to utilise the enforcement tools available under the relevant sections of the Act, that it progress with option 3. Option 3 will allow the Commission to maintain oversight, while also providing the Council with the flexibility and scope to pursue enforcement mechanisms as appropriate.

The Council has requested that authorisation be granted for a period of three years, as this would provide adequate time to utilise the benefit of the provisions, evaluate their effectiveness, whilst also recognising the time it often takes to successfully reach a resolution.

It would also be appropriate for the Council to report back prior to the end of the three year period with information regarding the effectiveness of the enforcement tools. This information can then be used by the Commission in determining whether to grant future authorisations, as well as any conditions to place on an authorisation. A draft response back to the Council is attached reflecting this position (**Attachment 2**).

In addition to this, it is recommended that the Commission write to LGA requesting that it seek information on whether other councils are interested in utilising the enforcement tools available under the relevant sections of the Act. This would provide scope for the Commission to grant authorisations to multiple councils at once and align the expiry of the authorisations, where possible for administrative efficiency. A draft letter to the LGA is attached for the Commission's consideration (**Attachment 3**).

Attachments:

1. Correspondence from the City of Mitcham, 3 September 2021 (#17646909).
2. Draft response to the City of Mitcham (#17646911).
3. Draft letter to the Local Government Association (#17646912).

Prepared by: Ben Sieben

Endorsed by: Sally Smith

Date: 22 September 2021

Agenda Report for Decision

Meeting Date: 25 November 2021

Item Name	Civil Penalties and Enforceable Voluntary Undertakings
Presenters	Nick Buick and Ben Sieben
Purpose of Report	Decision
Item Number	4.2
Confidentiality	Not Confidential (Release Immediately)
Related Decisions	Item 4.3 – 30 September 2021

Recommendation

It is recommended that the State Planning Commission (the Commission) resolves to:

1. Approve the designation of this item as Not Confidential (Release Immediately).
2. Pursuant to sections 225(17)(b) and 230(14)(b) of the *Planning, Development and Infrastructure Act 2016* (the Act), authorise the following councils to utilise the enforcement tools available under sections 225 and 230 of that Act for the period 25 November 2021 to 30 September 2024 (as per **Attachment 1**):
 - Alexandrina Council
 - District Council of Robe
 - District Council of Loxton Waikerie
 - District Council of Yankalilla
 - District Council of Grant
 - Coorong District Council
 - Kingston District Council
 - Mount Barker District Council
 - Adelaide Hills Council
 - City of Adelaide
 - City of Marion
 - City of Charles Sturt
 - City of Port Adelaide Enfield
 - City of Unley
 - City of Onkaparinga
 - City of West Torrens
 - City of Mount Gambier
 - City of Playford.

3. Further to Resolution 2 and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, grant the authorisation to the councils subject to the following conditions:
 - (a) The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced.
 - (b) The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act.
 - (c) Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections.
 - (d) Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act.
 - (e) The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act.
 - (f) In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections.
4. Request that each council report on the effectiveness of the enforcement tools prior to 31 August 2022 to assist the Commission with granting future authorisations.
5. Authorise the Chair of the Commission to make any minor amendments as required and sign the draft letter to the councils (**Attachment 3**) and to the Local Government Association (LGA) of South Australia (**Attachment 4**).

Background

On 3 September 2021, Mr Alex Mackenzie, Acting General Manager, Development and Community Safety, City of Mitcham, wrote to the Commission seeking authorisation to enable the City of Mitcham to use the enforcement tools available under sections 225 (civil penalties) and 230 (enforceable voluntary undertakings) of the Act.

Section 225 – Civil Penalties

Civil penalties are contemplated in section 225 of the Act. A civil penalty is a pecuniary penalty generally imposed by the court in civil proceedings (as distinct from a fine in criminal proceedings).

Under section 225, when a designated entity is satisfied that a person has committed an offence by contravening the Act, it may recover an amount as a civil penalty as an alternative to criminal proceedings. This may be done voluntarily by negotiation between the parties or by application to the Environment, Resources and Development Court (the Court).

The maximum amount which can be negotiated as a civil penalty is the amount specified in the Act for the offence, or \$120,000; whichever is the lesser. The maximum amount that the Court may impose as a civil penalty is the criminal penalty specified in the Act for the offence.

The Act does provide some restrictions as to when civil penalties may be utilised, including that a council must be satisfied that an offence has been committed and it cannot be used for offences which require proof of intention/state of mind (which would generally include more serious

offences). Further to this, a person may elect to be prosecuted instead of having a civil penalty imposed and there is no criminal conviction of guilt where a civil penalty is imposed.

Section 230 – Enforceable Voluntary Undertakings

Pursuant to section 230 of the Act, a designated entity may accept (by written notice) a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention of the Act by the person. The giving of an undertaking does not constitute an admission of guilt by the person giving the undertaking, and an undertaking may be varied or withdrawn at any time through written agreement.

It is an offence to breach an undertaking once it has been entered into and a designated entity may apply to the Court for enforcement of the undertaking. When proceedings regarding a contravention of the Act have been commenced but are yet to be finalised, a designated entity may accept an undertaking regarding that same contravention. The designated entity must then discontinue the proceedings.

For the purposes of both sections 225 and 230, a designated authority is either of the following:

- the Commission
- a council acting under an authorisation granted by the Commission
- the Commissioner for Consumer Affairs acting after consultation with the Commission.

In granting an authorisation to a council, the Commission may do so subject to certain conditions. The Commission may also vary or revoke an authorisation. It is important to note that there are obligations on the Commission to ensure that details regarding the commencement of proceedings under section 225 and any notice of the giving, varying or withdrawal of an undertaking under section 230 are published on the SA Planning Portal (the Portal).

On 30 September 2021, and in response to the City of Mitcham's correspondence, the Commission considered the attached Agenda Report (**Attachment 1**) and resolved the following:

- 2) Pursuant to sections 225(17)(b) and 230(14)(b) of the *Planning, Development and Infrastructure Act 2016* (the Act), authorise the City of Mitcham (the Council) to utilise the enforcement tools available under sections 225 and 230 of that Act for the period 30 September 2021 to 30 September 2024 (as per Attachment 1);
- 3) Further to resolution 2 and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, grant the authorisation to the Council subject to the following conditions:
 - a. The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced;
 - b. The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act;
 - c. Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections;
 - d. Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act;

- e. The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act; and
 - f. In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections;
- 4) Request that the Council report on the effectiveness of the enforcement tools prior to 31 August 2022 to assist the Commission with granting future authorisations;
 - 5) Write to the Local Government Association (LGA) of South Australia requesting that it encourage Councils to use the enforcement tools available under sections 225 and 230 of the Act, on the basis of a framework for the authorisation which is consistent with the authorisation for the City of Mitcham.

LGA has now responded (**Attachment 2**) and advised that the following councils have indicated that they are interested in being authorised to utilise the enforcement tools available under sections 225 and 230 of the Act:

1. Alexandrina Council
2. District Council of Robe
3. District Council of Loxton Waikerie
4. District Council of Yankalilla
5. District Council of Grant
6. Coorong District Council
7. Kingston District Council
8. Mount Barker District Council
9. Adelaide Hills Council
10. City of Adelaide
11. City of Marion
12. City of Charles Sturt
13. City of Port Adelaide Enfield
14. City of Unley
15. City of Onkaparinga
16. City of West Torrens
17. City of Mount Gambier
18. City of Playford.

LGA has also recommended that the Commission develop a uniform policy or guidelines to assist councils in the use of the new enforcement tools.

Discussion

As it would be beneficial for the period of all authorisations to align, it is recommended that the Commission authorise each of the 18 councils identified by LGA to utilise the enforcement tools available under sections 225 and 230 of the Act for the period 25 November 2021 to 30 September 2024. Further to this, for consistency, it is recommended that the authorisations are made subject to the same conditions as the City of Mitcham's authorisation.

In relation to the development of a policy or guideline for use of the enforcement tools by councils (as requested by the LGA):

- It is considered that, in the majority of cases, the question of whether a particular enforcement mechanism is appropriate will be a question of fact and degree, which needs to be considered on a case-by-case basis by the party initiating the action.
- At the time of granting the authorisation to the City of Mitcham, it was also the Commission's preference to only have limited oversight of councils' use of the enforcement tools that is required by the Act to ensure councils remain responsible and accountable for the enforcement action they pursue.
- Concerns over the consistent implementation of the enforcement tools were raised with the Commission on 30 September 2021. Rather than restricting the use of the tools through additional conditions, the Commission instead resolved to request that the City of Mitcham report back on the effectiveness of the tools by 31 August 2022.

As such, it is recommended that the information reported by Councils is used to identify any concerns or issues with the application of the enforcement tools, which could then be used by the Commission to inform any additional conditions to place on an authorisation or a policy or guideline (if appropriate) on the use of the enforcement tools. It is therefore recommended each of the 18 councils identified by LGA also be requested to report back on the effectiveness of the tools by 31 August 2022.

A draft template response intended to be sent to each of the 18 councils is at **Attachment 3**, as well as a draft response to LGA reflecting the Commission's position on the development of a policy or guideline at **Attachment 4** for the Commission's consideration.

Attachments:

1. State Planning Commission Agenda Report, 30 September 2021 (#17646913).
2. Letter from the Local Government Association, 8 November 2021 (#17980176).
3. Draft template response to the councils (#17980178).
4. Draft response to the Local Government Association (#17980172).

Prepared by: Ben Sieben

Endorsed by: Chelsea Lucas

Date: 11 November 2021

20 December 2021

Mr Craig Holden, Chair
State Planning Commission
GPO Box 1815
Adelaide SA 5001

Dear Mr Holden

Planning, Development and Infrastructure Act, 2016 – Authorisation to use Civil penalties (s 225) and Enforceable voluntary undertakings (s 230)

I write to seek the Commission's authorisation under ss 225(18) and 230(15) of the *Planning, Development and Infrastructure Act 2016 (PDI Act)* to enable the City of Burnside (**Council**) to use new enforcement tools available under those sections.

New enforcement tools

As you would be aware, the PDI Act provides for various new enforcement tools designed to give compliance authorities greater flexibility in dealing with contraventions of the PDI Act and associated regulations.

For example, under s 225 of the PDI Act (which is modelled on similar provisions in the *Environment Protection Act, 1993*), a designated authority is able to recover a civil penalty in respect of a contravention, as an alternative to criminal proceedings. A civil penalty may be recovered in one of two ways, namely, by negotiation with the alleged offender or by application to the Environment, Resources and Development Court.

Section 230 of the PDI Act provides for acceptance by a designated entity of an enforceable voluntary undertaking given by a person in connection with a contravention or alleged contravention of the Act. An undertaking may be given without any admission of guilt and is itself enforceable via criminal or civil proceedings in the event of a failure to comply with its terms.

By way of context, when the PDI Act was passing through Parliament, the Minister's second reading speech said relevantly:

'We will also empower councils with better enforcement tools, including the ability for courts to capture profits from breaches, impose corporate multiplier penalties, and make adverse publicity orders.....'

Designated entity

The new enforcement tools in sections 225 and 230 are available for use by a 'designated entity'.

The term 'designated entity' is defined in s 225(17) to mean:

- (a) *the Commission; or*
- (b) ***a council acting under an authorisation granted by the Commission; or***
- (c) *the Commissioner for Consumer Affairs acting after consultation with the Commission. (Bold added)*

Section 225(18) provides:

An authorisation granted to a council under subsection (17)-

- (a) *may be granted on conditions determined by the Commission; and*
- (b) *may, if the Commission so determines, be varied or revoked by the Commission.'*

Equivalent (and relevantly identical) provisions are found in ss 230(14) and (15) of the PDI Act.

Request for authorisation

The Council is keen to add civil penalties and enforceable voluntary undertakings into its compliance toolbox.

While existing compliance tools have no doubt served their purpose, the Council is of the view that the new tools will enable it to better respond, in a more targeted and efficient way, to the wide variety of compliance scenarios it is commonly faced with.

In particular, the new tools are likely to be particularly apt to situations involving a breach of the Act which is serious enough to warrant some form of statutory compliance action (i.e. over and above a formal warning), but is not serious enough to warrant the full force of a criminal prosecution or civil enforcement proceedings.

By way of some common (hypothetical) scenarios:

- An owner of land wishes to remove a regulated tree. The owner engages a tree lopping contractor. The owner asks whether approval is required and is told 'no' by the contractor. The owner relies on that advice and the tree is removed without the necessary approval. Had the owner contacted the council, the owner would have been told that approval is required.

COMMENT: While a higher standard would be expected of the contractor (such that a criminal prosecution might be justified against that person), the landowner's culpability is diminished given that some attempt was made to do the right thing. Civil enforcement proceedings would be inapt (given there is no way of bringing the tree

back), and the cost of bringing criminal proceedings against the owner is likely to exceed the potential penalty.

- An occupier of commercial premises breaches a condition of development approval (imposing a limit on patron numbers say). As the occupier was unaware of the existence of the condition, a formal warning is given. Subsequently, a second breach of the condition occurs, this time as a consequence of a failure of the occupier's staff. The second breach was preventable if staff were given proper training and instruction following the first breach. The occupier is contrite and puts in place appropriate measures. The breach causes nuisance to neighbours, but no lasting impacts.

COMMENT: In this scenario, given the occupier has already received a warning, an escalated response is warranted. However, given the second breach was reckless rather than deliberate, and also given the occupier's contrition and remedial actions, a prosecution or civil enforcement proceedings would seem heavy-handed.

- A licensed builder fails to give notice of the intended commencement of building work, contrary to regulation 93(5) of the *PDI (General) Regulations 2017*. An expiation notice is issued and the expiation fee is paid (\$750). The builder again fails to give notice.

COMMENT: the repeated nature of the offending requires an escalated response. However, if the builder enters a guilty plea at the first opportunity, the likely penalty will be much less than the maximum (\$10,000), and probably less than the cost of bringing a prosecution. In this scenario, the Council may wish to enter into a voluntary enforceable undertaking with the builder that the builder will comply with notification requirements on all future projects. Should the builder fail to comply with the undertaking, the maximum penalty is \$20,000 and the Court may also make orders against the builder.

With these kinds of situations in mind, I write on behalf of the Council (in my capacity as a delegate of the Council) to request the Commission's authorisation under ss 225(18) and 230(15), respectively.

In making this request, I am acutely mindful of anecdotal reports from other councils that the cost and resources (primarily council staff time) involved in bringing and maintaining criminal or civil enforcement proceedings can be very significant and, in some cases, is totally disproportionate to the conduct involved and the final outcome achieved through the Court process.

Acknowledging that these are uncharted waters for the Council and the Commission, the Council seeks authorisation for a period of 3 years which I consider to be an adequate period for the new tools to be applied and evaluated.

I look forward to your favourable consideration.

Please direct further correspondence on this matter to myself at mheinrich@burnside.sa.gov.au.

Yours sincerely



Magnus Heinrich

Group Manager, City Development & Safety

Cc Ms Sally Smith
Attorney-General's Department
By email: sally.smith@sa.gov.au

18200455

22 January 2022

Mr Magnus Heinrich
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Dear Mr Heinrich

Planning, Development and Infrastructure Act 2016 – Authorisation to use Civil penalties (s 225) and Enforceable voluntary undertakings (s 230)

Thank you for your letter of 20 December 2021 seeking authorisation from the State Planning Commission (the Commission) to use the enforcement tools available under sections 225 and 230 (the relevant sections) of the *Planning, Development and Infrastructure Act 2016* (the Act).

I am pleased to advise that pursuant to sections 225(17)(b) and 230(14)(b) of the Act, the Commission has authorised the City of Burnside (the Council) to utilise the enforcement tools available in the relevant sections for the period 20 January 2022 to 30 September 2024. Further to this, and pursuant to sections 225(18)(a) and 230(15)(a) of the Act, the authorisation is subject to the following conditions:

- (a) The Council must provide details (date of commencement of proceedings, alleged offender, details of the breach and the outcome once known) to the Commission regarding the commencement of proceedings under section 225 of the Act as soon as practicable after the proceedings are commenced.
- (b) The Council must provide to the Commission a copy of any enforceable voluntary undertaking that is given, varied or withdrawn under section 230 of the Act.
- (c) Where the Council is proposing to take enforcement action under the relevant sections and the Council was not the relevant authority that granted development authorisation, it must notify the relevant authority that did grant development authorisation indicating that it proposes to take enforcement action under the relevant sections.
- (d) Enforcement action under the relevant sections may only be commenced or undertaken by an authorised officer appointed by the Council under the Act.
- (e) The Council must, to the best of their ability, make use of the enforcement tools available under the relevant sections in a consistent manner that is proportionate to the alleged offence or breach of the Act.

- (f) In granting authorisation to the Council, the Council acknowledges and agrees that the Commission will not be liable for any costs associated with entering into (or subsequently enforcing) proceedings initiated or undertakings given under the relevant sections.

The Commission also requests that the Council report back to the Commission prior to 31 August 2022 on the effectiveness of the enforcement tools. The Commission will then consider this information in determining whether to grant future authorisations, as well as the appropriateness of any conditions imposed on an authorisation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Craig Holden', with a long horizontal flourish extending to the right.

Craig Holden
Chair