

TITLE: ORDER MAKING POLICY

REFERENCE NUMBER:	14/037680
RESPONSIBLE DEPARTMENT:	Health & Public Safety
APPLICABLE LEGISLATION:	Local Government Act 1999 Local Government (General) Regulations 1999
STRATEGIC MANAGEMENT PLAN:	Outcome 14: Good Governance Structures, Supporting Council Focus on Strategic Areas
RELATED POLICIES:	<ul style="list-style-type: none">• Nil
SUPPORTING PROCEDURES:	<ul style="list-style-type: none">• SOP 14 For the Issue of Orders under the Local Government Act 1999 (DRAFT)
ENDORSED BY COUNCIL:	<<Insert Date>>
NEXT REVIEW DATE:	<Insert Date>>

1. POLICY STATEMENT

- 1.1 The District Council of Mount Barker is committed to using the order making powers available to it under the *Local Government Act 1999* in such a way as to facilitate a safe and healthy environment, to improve the amenity of a locality, and generally for the good governance of its area.
- 1.2 This Order Making Policy is prepared and adopted pursuant to Section 259 of the *Local Government Act 1999* ("the Act") and sets out the steps Council will take in the making of orders.

2. PURPOSE

- 2.1 This Policy sets out the steps Council will take in the making of Orders.
- 2.2 Orders can be issued by Council to instruct owners or occupiers of private land to take action required to resolve an issue as specified within the Act.
- 2.3 Unlike the blanket prohibition of certain activities that exists through by-laws, Orders are intended to apply, and be considered, on a case-by-case basis.

3. SCOPE

- 3.1 This policy applies to all owners or occupiers of lands within the District Council of Mount Barker.

3.2 This policy applies in respect of making Orders under the following sections of the Local Government Act, 1999 (“the Act”):

3.2.1 Section 254 - Power to make Orders

Section 254 empowers the Council to order a person to do, or refrain from doing, a thing under certain circumstances. This includes infringements specified for:

- Unsightly condition of property, hazards on lands adjoining a public place.
- Animals that may cause a nuisance or hazard (includes birds and insects).
- Inappropriate use of a vehicle.

3.2.2 Section 216 - Power to Order Private Road Owners to Carry out Roadworks

Section 216 empowers the Council to order an owner of a private road to undertake specified roadwork.

3.2.3 Section 217 - Power to Order Road Infrastructure Owners to Carry out Maintenance or Repair Work

Section 217 empowers the Council to order an owner of infrastructure installed on a road to carry out specified maintenance or repair work.

3.2.4 Section 218 Power to Order Adjoining Land Owner to Carry out Works

Section 218 empowers the Council to order an owner of adjoining land to carry out specified work.

3.2.5 Section 299 - Power to Order Vegetation Clearance

Section 299 empowers the Council to require the owner / occupier of adjoining land to remove or cut back vegetation encroaching on to that land

4. **ROLES & RESPONSIBILITIES**

Council:

- To adopt a policy and ensure appropriate budget provided to maintain resources within the Health and Public Safety section.

Chief Executive Officer:

- To ensure that sufficient Council resources are available for the Health and Public Safety section...

General Manager:

To ensure the relevant Manager is responsible for supervising enforcement activities under the Local Government Act 1999.

- Environmental Health Officers, Health & Public Safety Officers to undertake enforcement action under the Local Government Act 1999

and to inform Manager responsible of Health and Public Safety of factors which might have an impact on the delivery of services.

5. GUIDING PRINCIPLES

5.1 Wherever possible, reasonable steps will be taken to have works undertaken or to resolve cases of local nuisance or potential hazards by negotiation with or by educating the person involved before considering the issue of an Order.

5.2 In contemplating the exercise of its Order making powers, the Council will consider each case on its individual merits, in keeping with the following principles which are deemed central to effective assessment and resolution of matters requiring rectification:

5.2.1 The significance of the breach and any other public interest or well-being considerations.

5.2.2 The level of detraction from the amenity of the locality.

5.2.3 The nature of the occurrence; including the frequency, duration and prior history of incidents.

5.2.4 The potential to pursue other options such as negotiation, education, mediation, warnings or other more collaborative approaches.

5.2.5 The principles of natural justice (or procedural fairness) to ensure that decision making is fair and reasonable.

Depending on the circumstances which apply, this may require a decision-maker to:

- inform any person whose interests are or are likely to be adversely affected by a decision, about the decision that is to be made and any case they need to make, answer or address;
- provide such persons with a reasonable opportunity to put their case why the proposed action should not be taken or a particular decision should or should not be made
- consider those submissions;
- make reasonable enquiries and ensure that a decision is based upon findings of fact that are in turn based upon sound reasoning and relevant evidence;
- act fairly and without bias in making decisions, including ensuring that no person decides a case in which they have direct interest; and
- address an issue without undue delay.

5.2.6 The level of evidence to warrant and support any action.

- 5.2.7 Opportunities to take action under alternative legislation.
- 5.2.8 The availability of a more appropriate response by the Council.
- 5.3 The Council retains an absolute discretion to issue an Order at any stage depending upon the circumstances of each individual matter.

6. PROCESS

6.1 Circumstances Exempt from this Process

In the event that Council considers the circumstances or activity constitutes or is likely to constitute:

- a threat to life; or
- an immediate threat to public health or public safety; or
- an emergency situation,
- and that immediate action is required

It may, in accordance with Section 255(12) of the Act, make an Order and require compliance without undertaking the notification process outlined in this policy.

6.2 Prior to Making an Order

Council will take reasonable steps to serve a written notice of the proposed Order to the person. If the person is not the owner of relevant land, the Council will take reasonable steps to also serve a copy of any notices or Order on the owner of that land.

6.2.1 Acceptable means of service are defined within Section 279 of the Local Government Act 1999 as being given to the person:

- (a) personally; or
- (b) by leaving it at the last residential or business address of the person known to the Council (including, in the case of a corporation, the registered address of the corporation); or
- (c) by post addressed to the person at the last residential or business address of the person known to the Council; or
- (d) by leaving it in the letter box to which the document could be sent under paragraph (c); or
- (e) by a means indicated by the person as being an available means of service (such as by facsimile transmission or by delivering it, addressed to the person, to the facilities of a document exchange); or
- (f) if the document is to be served on a person as the owner of land, the land is unoccupied, and the identity or address of

the owner is unknown to the Council—by placing the document on a conspicuous part of the land; or

(g) by any means provided for service of the document by another Act or law.

6.2.2 If a document must be served on the owner or occupier of land and there is more than one owner or occupier, it is sufficient if the document is served on any owner or occupier (and not on all owners or occupiers).

6.2.3 If a person ("the agent") has actual or ostensible authority to accept service of a document on behalf of another, the document may be served on the agent as if the agent were that other person.

6.3 Notice of the proposed Order must include:

6.3.1 The proposed action, including the terms of the proposed Order, and the time period within which compliance with the Order will be required;

6.3.2 Reason(s) for the proposed action; and

6.3.3 Penalties for non-compliance with the proposed Order; and

6.3.4 An opportunity for the person to respond in writing to the proposed Order within a specified timeframe.

6.4 The time specified for compliance in the notice (or Order) may vary due to the nature of the defect, the potential for hazard or injury to others and the effect on the environment.

6.5 Notice of the proposed Order is intended to provide an opportunity for the person to:

6.5.1 Remedy the defect; or

6.5.2 Make representations to the appropriate person to take action; or

6.5.3 Make representations to the Council explaining any mitigating circumstances.

6.6 In the event that a defect is remedied within the specified time period, no further action will be taken.

6.7 Considering Representations

The Council may, after considering any representations about a proposed Order:

- 6.7.1 Make an Order in accordance with the terms of the original proposal; or
- 6.7.2 Make an Order with modifications from the terms of the original proposal (without a requirement to provide further notice before making the modified Order); or
- 6.7.3 Determine not to proceed to make an Order.

6.8 Making an Order

The Order must be made in writing and include:

- 6.8.1 The action required, including the reasons for the action;
 - 6.8.2 The terms of the Order;
 - 6.8.3 The time period within which compliance with the Order will be required;
 - 6.8.4 Penalties for non-compliance with the Order, including the ability of Council to take the action required by the Order and recover the debt from the person; and
 - 6.8.5 A detailed statement of the review rights available to the person, in accordance with Regulation 20 (1) of the Local Government (General) Regulations 1999.
 - 6.8.6 A statement about the ability of the Council to vary or revoke the Order if satisfied that it is appropriate to do so.
- 6.9 An Order, upon issue, may:
- 6.9.1 Include two or more Orders in the same instrument, or
 - 6.9.2 Direct two or more persons to do something specified in the Order jointly.
- 6.10 An Order must be served by the Council on the person to whom it is addressed. If the person to whom the Order is addressed is not the owner of the land, the Council must take reasonable steps to serve a copy of the Order on the owner of the land.
- 6.10.1 The acceptable means of service detailed at Clause 6.2.1 apply to this section.
- 6.11 If the land is owned or occupied by more than one person the Order is not invalidated if it is not directed to all the owners.
- 6.12 The Council may vary any Order or revoke any Order it sees fit.

7. Vegetation Clearance Orders

- 7.1 Any person seeking an Order under Section 299 (Vegetation Clearance) of the Act should provide evidence that there are grounds for making such an Order.
- 7.2 Council is not obliged to make Orders upon simply receiving an application.
- 7.3 The applicant will provide to Council information to allow Council to be satisfied that the encroaching vegetation comprises a threat of damage to persons or property, including:
- Details of the applicant's name and property
 - The species, size and position/s of the vegetation and the impact on the applicant and their property.
 - Reports from suitably qualified and experienced experts detailing:
 1. findings from a thorough inspection of the properties regarding the vegetation and any building allegedly being damaged; and
 2. a risk assessment outlining the potential consequences and likelihood of any risks to life or property posed by the vegetation; and
 3. a determination of the most appropriate course of action, in their professional opinion, made on the basis of the inspection and risk assessment.
 - Where the allegation is that the vegetation impacts the applicant and/or their family's health (eg. through allergies), the applicant must produce medical evidence to support the claim.
 - Details and evidence of all discussions, negotiations and attempts to resolve the matter with their neighbour.
 - An indication of whether they are prepared to meet (or contribute to) the cost of the vegetation's removal.
- 7.4 Each situation will be assessed on its merits. The criteria used in the consideration of each matter will be:
- The level of nuisance resulting from the encroaching vegetation;
 - The degree of any hazard or danger resulting from the encroaching vegetation;
 - The extent of the work required to remove the encroachment;
 - The difficulty and cost involved in undertaking the work;
 - The degree to which other avenues of resolution have been undertaken, for example negotiation with the neighbour, mediation, civil remedies at common law, etc.
 - The resources available to the complainant to undertake the work directly or through a third party.
- 7.5 If Council determines that there is insufficient evidence of a threat to life or property or little likelihood of it occurring, the Council will not make an Order for the owner or occupier to complete any work on the vegetation.

8. Action for Non-Compliance with an Order

8.1 The following actions will occur if:

- the requirements of an Order are not complied with in the expected time period or
- within 14 days of the determination of an application for a review of the order, (subject to the outcome of the review).

8.1.1 Council may impose penalties, by way of a fine or an expiation fee, in accordance with the relevant section of the Act.

8.1.2 Council may take the action required by the Order itself.

8.1.3 Council may recover the reasonable costs and expenses incurred in taking the action required in the Order as a debt from the person who failed to comply with the Order, in accordance with Section 257 of the Act. The person will be given Notice in writing of a fixed period within which to pay the debt; being no less than 28 days from the date of the notice.

8.1.4 Failure to pay the debt will result in interest being accrued and a charge may be imposed on the land for the unpaid amount including interest.

9. **RIGHTS OF REVIEW**

9.1 The person to whom the Order is directed has the right to appeal against the Order by applying for a review is to be made to the District Court within 14 days after service of the Order.

9.2 The operation of the Order continues pending the determination of an application for review unless the District Court, or the Council, makes an interim Order suspending the operation of the Order.

9.3 The District Court has the power, if satisfied that it is appropriate and just in the circumstances to do so, to vary or set aside the Order on an application for review.

10. **COUNCIL ENDORSEMENT OF THE POLICY**

10.1 This Policy was endorsed by Council on **<insert date>**. Council endorsed the policy following public consultation on its draft policy. Written submissions commenting on the draft policy were invited within 4 weeks of a notice appearing in the local newspaper – The Courier on **(date)**. Submissions received were considered and taken into account in preparing this policy.

11. REVIEW AND EVALUATION

- 11.1 This Policy will be reviewed every four (4) years or earlier in the event of changes to legislation or related Policies and Procedures or if deemed necessary by the Manager Health and Public Safety.

Any future amendment or alteration to the policy, or substitution of a new policy, will be subject to the public consultation provisions under section 259(2) of the Act unless the alteration has only minor significance and is likely to attract little or no community interest.

12. ACCESS TO THE POLICY

The Policy is available for public inspection at the Customer Service Centre, at the Local Government Centre, 6 Dutton Road, Mount Barker, South Australia on the Council's website www.dcmtbarker.sa.gov.au.

13. FURTHER INFORMATION

For further information on this Policy, please contact:

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Attachment 1 – Extract from the Local Government Act 1999

254—Power to make orders

- (1) A council may order a person to do or to refrain from doing a thing specified in Column 1 of the following table if in the opinion of the council the circumstances specified opposite it in Column 2 of the table exist and the person comes within the description opposite it in Column 3 of the table.

Column 1 To do or to refrain from doing what?	Column 2 In what circumstances?	Column 3 To whom?
1. Unsightly condition of land		
To take action considered by the council to be necessary to ameliorate an unsightly condition.	Land, or a structure or object on land, is unsightly and detracts significantly from the amenity of the locality in which the land is situated.	The owner or occupier of the land.
2. Hazards on lands adjoining a public place		
(1) To fence, empty, drain, fill or cover land (including land on which there is a building or other structure).	(1) A hazard exists that is, or is likely to become, a danger to the public.	(1) The owner or occupier of the land.
(2) To remove overgrown vegetation, cut back overhanging branches, or to remove a tree.	(2) The vegetation, branches or tree create, or are likely to create, danger or difficulty to persons using a public place.	(2) The owner or occupier of the land.
(3) To remove or modify a flag or banner, a flagpole or sign, or similar object or structure that intrudes into a public place.	(3) The relevant object or structure creates, or is likely to create, danger or difficulty to persons using a public place.	(3) The owner or occupier of the land.
(4) Where the public place is a road—to take action necessary to protect the road or to remove a hazard to road users.	(4) A situation exists that is causing, or is likely to cause, damage to the road or a hazard to road users.	(4) The owner or occupier of the land.

Examples—

- To fill an excavation, or to prevent drainage of water across the road.
- To construct a retaining wall or to remove or modify a fence.
- To fence land to prevent the escape of animals.

Column 1
To do or to refrain from doing what?

Column 2
In what circumstances?

Column 3
To whom?

- To remove a structure or vegetation near an intersection.

3. Animals that may cause a nuisance or hazard

To do or to refrain from doing the thing specified in the order in order to abate a nuisance or a hazard to health or safety associated with a live or dead animal or animals, or otherwise to deal with an animal or animals.

A person is keeping or dealing with (or failing to deal with) an animal or animals (whether the animal or animals are alive or dead) so as to cause, or to be likely to cause, a nuisance or a hazard to health or safety.

The owner or occupier of land or any person apparently engaged in promoting or conducting an activity.

A person is the owner or occupier of land where an animal or animals are located which may cause, or be likely to cause, a nuisance or a hazard to health or safety, or otherwise to become a pest.

Examples—

- (1) *The slaughtering of animals in a town or urban situation.*
- (2) *Keeping an excessive number of insects, birds or other animals.*
- (3) *Keeping bees in close proximity to other property.*
- (4) *Keeping animals so as to generate excessive noise, dust or odours, or to attract pests or vermin.*
- (5) *Keeping an aggressive animal, or keeping an animal in a situation where it cannot be adequately contained or may cause danger to the public.*
- (6) *Failing to deal with a wasp's nest*

Column 1
To do or to refrain from doing what?

Column 2
In what circumstances?

Column 3
To whom?

4. Inappropriate use of vehicle

To refrain from using a caravan or vehicle as a place of habitation.

A person is using a caravan or vehicle as a place of habitation in circumstances that—

The owner or occupier of the land or a person apparently occupying the caravan or vehicle.

- (a) present a risk to the health or safety of an occupant; or
- (b) cause a threat of damage to the environment; or
- (c) detract significantly from the amenity of the locality.

(2) A reference in the table to an animal or animals includes birds and insects.

216—Power to order owner of private road to carry out specified roadwork

- (1) A council may, by order in writing to the owner of a private road, require the owner to carry out specified roadwork to repair or improve the road.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order, under subsection (1).

217—Power to order owner of infrastructure on road to carry out specified maintenance or repair work

- (1) A council may, by order in writing to the owner of a structure or equipment (including pipes, wires, cables, fittings and other objects) installed in, on, across, under or over a road, require the owner—
 - (a) to carry out specified work by way of maintenance or repair; or
 - (b) to move the structure or equipment in order to allow the council to carry out roadwork.
- (2) If the order is not complied with within a reasonable time fixed in the order—
 - (a) the council may itself take the action required by the order and recover the cost of doing so as a debt from the owner; and
 - (b) the owner is guilty of an offence and liable to a penalty not exceeding \$5 000.
- (3) Subsection (1) and (2) do not apply to the owner of electricity infrastructure, public lighting infrastructure or gas infrastructure if the Commission has determined, on application by the owner, that there are reasonable grounds for not requiring the owner to take the action specified in the order.
- (4) In this section—

Commission means the Essential Services Commission established under the *Essential Services Commission Act 2002*;

electricity infrastructure has the same meaning as in the *Electricity Act 1996*;
gas infrastructure has the same meaning as in the *Gas Act 1997*, but does not include a transmission pipeline within the meaning of the *Petroleum Act 2000*;
owner of a structure or equipment includes a lessee or licensee;
public lighting infrastructure has the same meaning as in the *Electricity Corporations (Restructuring and Disposal) Act 1999*.

218—Power to require owner of adjoining land to carry out specified work

- (1) A council may, by order in writing to the owner of land adjoining a road, require the owner to carry out specified work to construct, remove or repair a crossing place from the road to the land.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order,under subsection (1).

299—Vegetation clearance

- (1) A council may, on the application of the owner or occupier of the land (the **relevant land**), by order under this section, require the owner or occupier of adjoining land to remove or cut back vegetation encroaching on to the relevant land.
- (2) Divisions 2 and 3 of Part 2 of Chapter 12 apply with respect to—
 - (a) any proposal to make an order; and
 - (b) if an order is made, any order,under subsection (1).