

CITY OF SUBIACO

LOCAL PLANNING POLICY 7.5

PLANNING COMPLIANCE

ADMINISTRATIVE

Version	Date	Comment
1.0	17 December 2013	Adoption
2.0	28 February 2017	Review
3.0	20 July 2021	Review

AUTHORITY

- Planning and Development Act 2005 (**PD Act**);
- Planning and Development (Local Planning Schemes) Regulations 2015 (**LPS Regulations**);
- Planning and Development Regulations 2009 (**PD Regulations**); and
- City of Subiaco Local Planning Scheme No. 5 (**Scheme**).

STATUTORY BACKGROUND

The **PD Act** is the head of power requiring development approval under a planning scheme.

The **Scheme** sets out when development approval is required and the requirements for assessing applications.

The City of Subiaco is the **responsible authority** for enforcement and observance of the **Scheme**.

Part 13 of the **PD Act** and Schedule 2, Part 10 of the **LPS Regulations** include enforcement and legal proceedings provisions for the City as a responsible authority.

This local planning policy is made pursuant to Schedule 2, Part 2, Division 2 of the **LPS Regulations** relating to local planning policies.

This policy does not consider building compliance matters under the *Building Act 2011*. Nothing in this policy should be taken to prevent the Council from commencing legal action at any time with regard to matters dealt with under the *Building Act 2011*.

This policy does not prevent compliance action from being undertaken by the City concurrently with any action undertaken by the Heritage Council under Part 4 of the *Heritage Act 2018* in relation to places on the State Register of Heritage Places.

PURPOSE

The purpose of this policy is to provide guidance for the development compliance process within the City.

APPLICATION

This policy applies to all **development** in the **Scheme** area.

POLICY

1.0 Objectives

The objectives of this policy are:

- (a) To ensure that development complies with the **Scheme, PD Act** and conditions of development approval as applicable to specific **compliance matters**;
- (b) To ensure that **compliance matters** are investigated in a transparent manner;
- (c) To ensure a consistent and efficient approach in the undertaking of **compliance action**.

2.0 Definitions

2.1 The following terms are defined for the purpose of this policy:

Compliance action means action undertaken by the City in relation to a **compliance matter**, and may include issue of a **written notice, Direction Notice** and/or **PIN**, and commencement of prosecution.

Compliance matter means an alleged non-compliance with a condition of development approval or alleged unauthorised development.

Development as defined by the *Planning and Development Act 2005*.

Direction Notice means a Direction Notice issued under section 214 of the *Planning and Development Act 2005*.

LPS Regulations means the *Planning and Development (Local Planning Schemes) Regulations 2015*.

Offender means a person(s) who is the subject of a **compliance matter**, and has not complied with a condition of development approval or has undertaken alleged unauthorised development.

PIN means Planning Infringement Notice issued under section 228 of the *Planning and Development Act 2005*.

PD Act means the *Planning and Development Act 2005*.

PD Regulations means the *Planning and Development Regulations 2009*.

Responsible as defined by the *Planning and Development Act 2005*.

authority

Scheme means City of Subiaco Local Planning Scheme No. 5.

Written notice means the issue of correspondence by the City to an **offender** in relation to a **compliance matter**.

2.2 All other terms, words and expression used in this policy have the same meaning as they have in the **Scheme**.

3.0 Jurisdiction

3.1 On receipt or notification of any **compliance matter**, the jurisdiction of the City will first be determined.

3.2 For any **compliance matter** falling outside the jurisdiction of the City, whether geographically or statutorily, the City will refer the complainant to the responsible authority with jurisdiction. No further action will be taken by the City, aside from notifying the complainant of the relevant authority to assist them in progressing their complaint for further investigation.

3.3 Where a **compliance matter** falls partly within the jurisdiction of the City and partly within the jurisdiction of another authority, that part falling within the City's jurisdiction will be dealt with in accordance with this policy, that part falling outside will be referred by the City to the relevant authority as soon as possible.

3.4 Where a **compliance matter** relates to a place on the State Register of Heritage Places the City will refer the complaint to the Department of Planning, Lands and Heritage, or whomever is responsible for enforcement of the *Heritage Act 2018* at the time of the complaint.

3.5 In relation to section 3.2 and 3.3 above, jurisdiction for **compliance matters** is as follows:

3.5.1 The Western Australian Planning Commission is responsible for compliance matters on land reserved under the Metropolitan Region Scheme.

3.5.2 Depending on the nature of the compliance matter, the Western Australian Planning Commission and/or the City may be responsible for compliance matters related to applications determined under Part 17 of the **PD Act**.

3.5.3 The Metropolitan Redevelopment Authority is responsible for compliance matters on land in redevelopment areas declared under the *Metropolitan Redevelopment Authority Act 2011*.

4.0 Manner and form of complaint

4.1 Submission of complaints to the City

4.1.1 All complaints are required to be submitted in writing in hardcopy or via electronic mail and shall include specific details of the **compliance matter** to be investigated, including:

- (1) The complainant's name, property address and preferred contact details;
- (2) The property address where the alleged compliance matter has occurred;
- (3) How the compliance matter is affecting the complainant;
- (4) All relevant details of the compliance matter, including the following where applicable –

- (a) The dates and times the compliance matter has occurred;
 - (b) Photographs of the compliance matter; and
 - (c) Where the complaint relates to an activity or use, information such as time and frequency of the use.
- 4.1.2 The City may not respond to anonymous complaints as the validity of the complaint may not be verifiable.
- 4.1.3 Complainant particulars will be kept confidential and will not be released to alleged **offenders** without the consent of the complainant.
- 4.1.4 Complainants will be notified of the progress of **compliance matters** at the following stages:
 - (1) Upon receipt of a complaint to advise that the City is investigating the matter; and
 - (2) At the conclusion of the investigation to advise that the matter has been resolved.The City may provide additional notice where it is considered appropriate. However, the City is not obliged to provide further notice than that specified in 4.1.4(1) and (2).

4.2 Investigation without receipt of complaint

The City may investigate **compliance matters** and undertake **compliance action** in accordance with this policy without receipt of a complaint.

5.0 Priority of compliance matters

- 5.1 Where the Manager Planning Services has reasonable grounds to believe that a **compliance matter** may be occurring on land within the **Scheme** area, matters will be progressed in accordance with the following priorities (in order), irrespective of the number or frequency of any complaints that are received:
 - 5.1.1 Any matter involving irreversible and permanent damage to a building or place on the State Register of Heritage Places or the Heritage List or Heritage Area established under the **Scheme**, or to the natural environment;
 - 5.1.2 Investigation of all other **compliance matters** will be progressed in the order in which they arise.
- 5.2 All **compliance matters** will be investigated where the City has reasonable grounds to suspect that the matter is occurring.
- 5.3 The City will not act in relation to any complaint which it determines is frivolous or vexatious in nature. Examples of frivolous or vexatious complaints are those that may be unfounded or baseless, relates to development **compliance matter** previously investigated and closed by the City, or is intended to cause annoyance or other distress.

6.0 Compliance investigation procedure

Upon becoming aware that a **compliance matter** may be occurring on land within the City and having ascertained that the matter falls within the jurisdiction of the City (refer section 3.0 of this policy), the City will undertake any investigation considered necessary to determine the extent of the non-compliance. This investigation may include contacting the landowner to ascertain the veracity of the allegations.

Where, in the opinion of the Manager Planning Services, the **compliance matter** is considered likely to fall under section 6.1 of this policy in that the matter may be considered uncertain; trivial or insignificant; or has been in existence for a substantial period of time, the City may determine that no further action be taken.

Where, in the opinion of the Manager Planning Services, the **compliance matter** is not considered to fall under section 6.1 of this policy, the procedures under section 6.2 will apply.

6.1 Circumstances where the City may not undertake compliance action

The City may determine not to undertake **compliance action** in the following circumstances:

6.1.1 Uncertainty of compliance matter

Where, after reasonable investigation, it is uncertain that a **compliance matter** is compliant with planning requirements, or it is uncertain whether it is capable of enforcement owing to:

- (1) a lack of precision in the plans/documents of any relevant approval; or
- (2) a lack of certainty at the time of development as to the legal status of the development or the requirement to obtain approval; or
- (3) any other legal consideration.

6.1.2 Matter considered trivial or insignificant

Where there is a breach of planning requirements, the **compliance matter** may reasonably be considered trivial or insignificant in certain circumstances.

A **compliance matter** will be considered to be trivial or insignificant where the extent of the non-compliance is minor to the point where the distinction between complying and not complying with the relevant legislation would not be noticeable other than to a person well versed in the relevant law and/or of no reasonable planning consequence.

6.1.3 Other circumstances

- (1) Where it has been established that a breach of planning requirements has occurred and that the breach is neither trivial nor insignificant, the City may determine not to take action where a **compliance matter** meets all of the following criteria:
 - (a) It can be established that the development that is the subject of the breach has been in existence for a substantial time period, nominally more than five (5) years; and
 - (b) The development or construction has no apparent impact on the amenity of adjoining properties, the streetscape, or the locality; and
 - (c) It can be established that the development or construction is structurally sound and certification of this is provided by a person who is qualified to provide that

evidence.

- (2) Where a **compliance matter** that falls within the scope of section 6.1.3 does not meet all of the criteria in section 6.1.3(1), the City may undertake **compliance action** in accordance with section 6.2 of this policy.

6.2 Circumstances where the City may undertake compliance action

6.2.1 Non-compliance with a condition of development approval

- (1) Condition of development approval requiring action within a specified timeframe

- (a) If the **compliance matter** relates to non-compliance with a condition of development approval which requires an action to be undertaken within a specified timeframe, a **written notice** will be issued requiring that the matter be rectified within 28 days or a longer period as determined by the Manager Planning Services having regard to the nature of the condition.
- (b) If after the specified timeframe in section 6.2.1(1)(a) the matter is not rectified:
 - (i) A **PIN** may be issued immediately by the City; and,
 - (ii) A **direction notice** may be issued requiring the **compliance matter** to be resolved within four (4) months. This may include:
 - a. obtaining retrospective development approval;
 - b. stopping an unapproved use;
 - c. removing an unapproved building and/or structure; or
 - d. undertaking the prescribed work to bring the development into compliance.
- (c) If after four (4) months the matter remains unresolved, then the matter may proceed to legal action (refer to sections 7.4 and 7.5 of this policy).
- (d) The City may proceed to issuing a **Direction Notice** and/or a **PIN** without issuing a **written notice** as detailed in section 6.2.1(1)(a) where considered necessary by the Manager Planning Services.
- (e) Where an application for retrospective development approval is lodged with the City under section 6.2.1(1)(b), the City may consider temporarily deferring the continuation of **compliance action** for a period as determined by, and agreed in writing with the City.

- (2) Condition of development approval which does not specify a timeframe

If the **compliance matter** relates to non-compliance with a condition of development approval which does not specify a timeframe, a **written notice** will be issued requiring that the matter be rectified within 42 days. If after 42 days the matter is not rectified, the provisions of section 6.2.1(1) will apply.

6.2.2 Other circumstances

- (1) In all other cases, as soon as is practicable after first determining the matter does not fall under section 6.1 of this policy, a **written notice** will be issued to the alleged **offender** specifying the **compliance matter** and requiring the matter to be resolved within four (4) months. The Manager Planning Services may consider issuing a **PIN** with the **written notice** in appropriate circumstances.
- (2) If after the specified timeframe in 6.2.2(1) the matter is not rectified, further **compliance action** will be taken. This may include one or more of the following:
 - (a) A **PIN** may be issued immediately by the City;
 - (b) A **direction notice** may be issued requiring the **compliance matter** to be resolved within a timeframe specified by the City with regard to the requirements of the **PD Act**. This may include:
 - (i) obtaining retrospective development approval;
 - (ii) stopping an unapproved use;
 - (iii) removing an unapproved building and/or structure;
or
 - (iv) undertaking the prescribed work to bring the development into compliance; and
- (3) Referral of the matter to Council for consideration of the commencement of legal action as per sections 7.4 and 7.5 of this policy.
- (4) Notwithstanding section 6.2.2(1), for **compliance matters** that fall within the scope of section 6.2.2, the City may consider taking no further action where an alleged **offender** can provide evidence to confirm that the development that is the subject of **compliance action** did not require development approval under the applicable planning framework at the time it was undertaken or constructed. Suitable evidence may include written correspondence from the City's Planning Services branch, confirming that the alleged unauthorised **development** did not require development approval.

6.3 Extension to rectify compliance matter

- 6.3.1 The City may consider extending the period of time for rectification of **compliance matters** under section 6.0 of this policy by written request. The City may have consideration to the following matters when determining whether an extension can be granted:
- (1) The nature of the **compliance matter**;
 - (2) The steps proposed to be, or already, undertaken to comply with the **Scheme**;
 - (3) The period of time that has lapsed since the **compliance matter** was initially identified by the City;
 - (4) Whether an extension would have implications for the timeframe for commencement of legal action (as set out in sections 7.4 and 7.5 of this policy);
 - (5) Whether the alleged **offender** has acted in good faith with the City in relation to the compliance matter. This may include evidence of demonstrated action to progress the matter to

- resolution; and
- (6) Any other matter considered to be relevant by the City.
- 6.3.2 Notwithstanding section 6.3.1, the City is not obliged to extend the timeframe for rectification of compliance matters.

7.0 Compliance action

7.1 Written notices

- 7.1.1 The City may issue a **written notice** at any time in relation to any **compliance matter**.
- 7.1.2 A **written notice** does not comprise a **Direction Notice** under the **PD Act**. Refer to section 7.3 for detail regarding **Direction Notices**.

7.2 Planning Infringement Notices

- 7.2.1 Where a **compliance matter** is occurring, the City may issue a **PIN** as prescribed the **PD Regulations**.
- 7.2.2 A **PIN** must be issued within six (6) months of the City determining that an offence has occurred, as required by the **PD Act**.
- 7.2.3 Separate **PINs** may be issued on multiple occasions, the frequency of which is at the discretion of the Chief Executive Officer or delegated officer.

7.3 Direction Notices

- 7.3.1 Where an unauthorised development has occurred, or has occurred contrary to a development approval, the City may issue a **Direction Notice** under section 214 of the **PD Act**.
- 7.3.2 Where the **compliance matter** relates to an unauthorised use, a **Direction Notice** may be given to the landowner or alleged **offender**, seeking cessation of the use within a specified time period under section 214(2) of the **PD Act**. The specified time period will depend on the nature of the offence and the public interest.
- 7.3.3 Where the compliance matter relates to unauthorised built development, a **Direction Notice** may be given to the landowner or alleged **offender** seeking them to undertake works as required to rectify the matter with regard to section 214(3) of the **PD Act**. A minimum of 60 days from the date of issue of the **Direction Notice** will be allowed for the landowner or alleged **offender** to comply.

7.4 Commencement of prosecution

- 7.4.1 If a **Direction Notice** issued under section 214 of the **PD Act** is not met within the timeframe specified in the notice, the City may commence legal action.
- 7.4.2 Notwithstanding the provisions of section 6.2 of this policy, the City may commence legal action at any time in relation to a **compliance matter**.
- 7.4.3 A planning prosecution must commence within 12 months of the City issuing initial compliance correspondence (comprising a **written notice** or **Direction Notice**) to an alleged **offender**, as required by the *Criminal Procedures Act 2004*.

7.5 Consideration of compliance matters by Council

A compliance matter will be formally referred to Council where the City

recommends commencement of legal action as per section 7.4 of this policy.

8.0 Discretionary criteria

Where there are extenuating circumstances warranting consideration of the departure from the terms of this policy, the Manager Planning Services may have regard to any of the following criteria that may be applicable to the **compliance matter**:

- 8.1 Whether it is in the public interest of the proper and orderly development and use of land that the applicable law(s) should generally be complied with;
- 8.2 The impact of the contravention of the law on the affected locality and environment. This includes a consideration of whether the breach complained of is purely technical in nature which is unnoticeable other than to a person well versed in the relevant law;
- 8.3 Those factual circumstances in which the contravention of the law took place;
- 8.4 The time which has elapsed since **development** was undertaken in contravention of the law;
- 8.5 The expense and inconvenience which would be involved in remedying the contravention of the law;
- 8.6 The extent of amenity impact the contravention may have on adjoining properties and the locality. This may include consideration of whether the unauthorised **development** is of lesser impact to the streetscape and/or adjoining properties than a development that would otherwise be compliant with the planning framework;
- 8.7 Whether the planning framework at the time that the **development** was undertaken was more onerous or prescriptive in its requirements than the planning framework that exists at the time of investigation of the **compliance matter**; and
- 8.8 Any other matter considered to be relevant by the City.