



Order Making Policy

Reference Number:	2.8
Type:	Council Policy
Category:	Corporate Governance & Finance
Relevant Community Plan Outcome:	<ul style="list-style-type: none"> Be bold and innovative in our practices, leadership and decision making. Practise transparent and accountable governance
Responsible Officer(s):	Manager Public Health & Safety
First Issued/Approved:	January 2001
Minutes Reference:	CoS 3/10/2017, Item 3.42
Last Reviewed:	October 2017
Next Review Due:	October 2019
Applicable Legislation:	Local Government Act 1999 Local Nuisance and Litter Control Act
Related Policies:	Expiation Notices Review Policy Internal Review of Council Decisions Policy
Related Procedures:	Not applicable

1. Purpose

The City of Charles Sturt 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, and to improve the amenity of the locality.

Scope

This policy sets out the principles and processes Council and any Council officers acting under delegated authority will consider in the making of orders.

Local Government Act 1999 (“the Act”)

Section 259 of the Act requires Council to take reasonable steps to prepare and adopt policies concerning the operation of Part 2 of Chapter 12 of the Act. Part 2 deals with the making of orders.

This policy will apply to those circumstances listed in Section 254 of the Act which states that Council may order a person to do or refrain from doing a thing under certain circumstances. A copy of Part 2 of Chapter 12 of the Act, which includes Section 254, is attached to this policy.

This policy will also apply to the making of any orders under Section 299 (Vegetation Clearance), 216 (Power to Order Owner of Private Road to Carry out Specified Roadworks) 217 (Power to Order Owner of Infrastructure Installed on Road to Carry out Specified Maintenance or Repair Work) and 218 (Power to require owner of adjoining land to carry out specific work) of the Act.

Local nuisances (other than those found in the Local Government Act) are also contained in the Local Nuisance and Litter Control Act 2016. Nuisance and littering actions that fall within the jurisdiction of the Local Nuisance and Litter Control Act will be dealt with in accordance with the procedures set out in that

Act.3. **Policy Statement**

Prior to making an order Council or its delegated officers will consider the following principles, which are seen as central to effective and timely resolution of local nuisances on private land.

Principles

- 3.1 Every reasonable effort will be made to resolve the matter by negotiation prior to instigating the order making process.
- 3.2 Each case for the possible use of the order making powers will be assessed on its individual merits. Factors that will be considered include:
 - Severity or seriousness of the incident
 - Extent of hazard/danger posed to the community
 - Nature and level of risk to health/safety of the community
 - Extent of detraction from the amenity of the locality
 - Impact on the environment
 - Occurrence of the activity/incident eg frequency, duration.
 - Impact of any previous actions to overcome the problem
 - Any public interest issues
 - The evidence available
 - Implications of not taking any action.

In the case of Section 299 (Vegetation Clearance) orders Council will only exercise its order making powers in the most extreme situations where threat of damage to persons or property exist and all other avenues for resolution of the dispute have been exhausted. (For further details refer below)

- 3.3 Procedural fairness and natural justice.

Process

The initial response to complaints of local nuisance will generally be a personal visit or telephone call by an authorised officer to attempt to resolve the matter with as little formality as possible.

If this approach is not effective, a letter detailing the complaint, the required action to resolve the matter and stipulating a reasonable timeframe, will be sent to the occupier of the land.

In situations where the matter is assessed by the appropriate Manager as having a level of urgency for action to be undertaken, the step of sending an initial letter detailing the complaint and requesting action may be forgone and Officers can immediately begin the formal order making process.

If a letter still does not result in a satisfactory outcome the formal order making process may be instigated. This will include a notice of intention to issue an order detailing the information required by Section 255 of the Act, including:

- The proposed action
- Reasons for the proposed action
- Terms of the proposed order
- Period within which compliance with the order is required.
- Penalties for non compliance
- Opportunity to give reasons in writing to Council within 14 days of notification, on why the proposed order should not be given.

Where protracted informal negotiations have failed to achieve the desired outcome, the first letter from Council may be the formal notice of intention to issue an order.

Where the order is intended to direct a person who is not the owner of the land to take certain action, reasonable steps will be taken to serve a copy of any notices or orders on the owner of the land.

Where representations are received about a proposed order, the delegated officer may:

- Make the order on the terms of the original proposed order
- Make an order with the modifications from the terms of the original proposed order (and not give further notice before making the modified order), or
- Determine not to proceed with making the order.

In cases where the delegated officer considers the circumstances or activity constitutes or is likely to constitute:

- a threat to life and
- immediate threat to public health or public safety, or
- an emergency situation

and that immediate action is required, the order and required compliance may be imposed without undertaking the above notification process.

Where the requirements of an order are not complied with Council will, where appropriate:

- Impose penalties in accordance with Section 258 of the Act, up to \$2,500 maximum fine or \$210 expiation fee for failure to comply with an order issued under Sections 254, 216, 218 or 299 and a penalty of up to \$5,000 for an order issued under Section 217 of the Act.
- Take the action required by the order itself and recover the reasonable costs and expenses in doing so as a debt from the person who failed to comply.

Responsibilities and Delegations

This policy will be implemented by relevant staff operating under Council's delegated authority and be enforced by authorised officers appointed by Council.

Vegetation Clearance Orders

Any person seeking to have Council make an order under Section 299 (Vegetation Clearance) must provide sufficient information to satisfy Council that the encroaching vegetation comprises a threat of damage to persons or property and that the applicant has exhausted all other means of resolving the dispute. This information must include:

- Details of the applicant's name and property
- The tree species, size and position/s and the impact on the applicant and their property
- Reports from suitably qualified experts regarding the tree and any building allegedly being damaged. Where the allegation is that the tree impacts on the applicant and/or their family's health through allergies and the like, 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, and
- An indication of whether they are prepared to meet the cost of the tree's removal, or at the very least, to contribute to these costs.

Each situation will be assessed on its merits. This assessment will include a thorough inspection of the properties by an appropriately qualified and experienced person who will make a determination of the likelihood of the threat to life or property. Where that person determines that there is no evidence of a threat to life or property and no likelihood of it occurring, then Council will not make an order for the owner or occupier to complete any work on the vegetation.

Persons may also apply to the Magistrates Court to have a dispute between neighbours determined. Section 3(1) of the Magistrates Court Act 1991 defines "neighbourhood dispute" as "*A dispute between neighbours, or the occupiers of properties in close proximity, based on allegations of trespass or nuisance.*"

4. Definitions

Nil

**PART 2
ORDERS**

DIVISION 1 - POWER TO MAKE ORDERS

Power to make orders

254. 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.¹

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

Column 1 To do or to refrain from doing what?	Column 2 In what circumstances?	Column 3 To whom?
<p>2. Hazards on lands adjoining a public place</p> <p>(1) To fence, empty, drain fill or cover land (including land on which there is a building or other structure).</p> <p>(2) To remove overgrown vegetation, cut back overhanging branches, or to remove a tree.</p> <p>(3) To remove or modify a flag or banner, a flagpole or sign, or similar object or structure that intrudes into a public place.</p> <p>(4) Where the public place is a road - to take action necessary to protect the road or to remove a hazard to road users.</p> <p><i>Examples</i></p> <ul style="list-style-type: none"> - To fill an excavation, or to prevent drainage of water across the road. 	<p>(1) A hazard exists that is, or is likely to become, a danger to the public.</p> <p>(2) The vegetation, branches or tree create, or are likely to create, danger or difficulty to persons using a public place.</p> <p>(3) The relevant object or structure creates, or is likely to create, danger or difficulty to persons using a public place.</p> <p>(4) A situation exists that is causing, or is likely to cause, damage to the road or a hazard to road users.</p>	<p>(1) The owner or occupier of the land.</p> <p>(2) The owner or occupier of the land.</p> <p>(3) The owner or occupier of the land.</p> <p>(4) The owner or occupier of the land.</p>

<ul style="list-style-type: none"> - To construct a retaining wall or to remove or modify a fence. - To fence land to prevent the escape of animals. - To remove a structure or vegetation near an intersection. 		
<p>4. Inappropriate use of vehicle</p> <p>To refrain from using a caravan or vehicle as a place of habitation.</p>	<p>A person is using a caravan or vehicle as a place of habitation in circumstances that:</p> <p>(a) present a risk to the health or safety of an occupant; or</p> <p>(b) cause a threat of damage to the environment; or</p> <p>(c) detract significantly from the amenity of the locality.</p>	<p>The owner or occupier of the land or a person apparently occupying the caravan or vehicle.</p>

DIVISION 2 - ASSOCIATED MATTERS

Procedures to be followed

- 255.** (1) A council must, before taking action to make an order under this Part (but subject to this section), give the person to whom it is proposed that the order be directed a notice in writing –
- (a) stating the proposed action, including the terms of the proposed order and the period within which compliance with the order will be required; and
 - (b) stating the reasons for the proposed action; and
 - (c) inviting the person to show, within a specified time (of a reasonable period), why the proposed action should not be taken (by making representations to the council or a person nominated to act on behalf of the council).
- (2) If a notice is directed to a person who is not the owner of the relevant land, the council must take reasonable steps to serve a copy of the notice on the owner.
- (3) The council may, after considering representations made within the time specified under subsection (1) –
- (a) make an order in accordance with the terms of the original proposal; or
 - (b) make an order with modifications from the terms of the original proposal; or
 - (c) determine not to proceed with an order.
- (4) The council is not required to give further notice before it makes an order with modifications under subsection (3)(b).
- (5) A council may:
- (a) include two or more orders in the same instrument;
 - (b) direct two or more persons to do something specified in the order jointly.
- (6) An order must:
- (a) subject to this section, specify a reasonable period within which compliance with the order is required; and
 - (b) state the reasons for the order.
- (7) An order must be served on the person to whom it is addressed¹.

¹ See Chapter 14 Part 2 about various forms of service.

- (8) If an order is directed to a person who is not the owner of the relevant land, the council must take reasonable steps to serve a copy of the order on the owner.

- (9) If land is owned or occupied by more than one person
- (a) an order in respect of the land is not invalid merely because it is not directed to all of those owners or occupiers; and
 - (b) an owner or occupier who complies with an order may recover a fair contribution from other owners or occupiers.
- (10) Nothing in this section affects the right of a person from recovering from another all or any of the expenses incurred by the person in complying with an order.
- (11) A council may, at the request, or with the agreement, of the person to whom an order is directed, vary an order or may, on its own initiative, revoke an order if satisfied that it is appropriate to do so.
- (12) If a council, in the circumstances of a particular case, considers:
- (a) that an activity constitutes, or is likely to constitute, a threat to life or an immediate threat to public health or public safety; or
 - (b) that an emergency situation otherwise exists,
- the council may:
- (c) proceed immediately to make an order under this section without giving notice under subsection (1); and
 - (d) require immediate compliance with an order despite subsection (6)(a).
- (13) A council is not required to comply with any other procedure, or to hear from any other person, except as provided by this section before it makes an order under this section.

Rights of review

- 256.** (1) An order must include a statement setting out the rights of a person to apply for a review of the order under this Act.
- (2) A statement is sufficient for the purposes of subsection (1) if it includes the information specified by the regulations.
- (3) A person to whom an order is directed may, within 14 days after service of the order, apply to the District Court .

Action on non-compliance

- 257.** (1) If the requirements of an order are not complied within the time fixed for compliance or, if there is an application for review, within 14 days after the determination of the review, the council may (subject to the outcome of any review) take the action required by the order.
- (2) Action to be taken by a council under subsection (1) may be taken on the council's behalf by an employee of the council or by another person authorised by the council for the purpose.

- (3) The reasonable costs and expenses incurred by a council in taking action under this section may be recovered by the council as a debt from the person who failed to comply with the requirements of the order.
- (4) The regulations may limit the amount of costs and expenses recoverable under subsection (3) in a case involving a European wasp's nest.
- (5) If an amount is recoverable from a person by a council under this section, the council may, by notice in writing to the person, fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid and, if the amount is not paid by the person within that period –
- (a) the person is liable to pay interest charged at the prescribed rate per annum on the amount unpaid; and
- (b) if the person is the owner of the land to which the order relates; the council may, in accordance with Schedule 6, impose a charge over the land for the unpaid amount, together with interest.
- (6) No civil liability attaches to a council, an employee of a council, or a person acting under the authority of a council, for anything done by the council, employee, or person under this section.
- (7) In this section –

"**European wasp's nest**" means the nest of an insect of the species *Vespula germanica*.

Non-compliance with an order an offence

258. A person who contravenes or fails to comply with an order under this Part is guilty of an offence.

Maximum penalty: \$2,500.

Expiation fee: \$210.

DIVISION 3 - POLICIES

Councils to develop policies

- 259.** (1) A council must take reasonable steps to prepare and adopt policies concerning the operation of this Part.
- (2) A council must:
- (a) prepare a draft of a policy; and
- (b) by notice in a newspaper circulating in the area of the council, give notice of the place or places at which copies of the draft are available for inspection (without charge) and purchase (on payment of a fee fixed by the council) and invite interested persons to make written representations on the draft within a period specified by the council.
- The period specified by the council must be at least four weeks.
- (3) A council must consider any submission made to the council on a proposed policy in response to an invitation under subsection (2).

- (4) A council may amend a policy at any time.
- (5) However, a council must, before adopting an amendment to a policy, take the steps specified by subsections (2) and (3) (as if the amendment were a new policy), unless the council determines that the amendment is of only minor significance.
- (6) A person is entitled to inspect (without charge) a policy at the principal office of the council during ordinary office hours.
- (7) A person is entitled, on payment of a fee fixed by the council, to a copy of the policy.
- (8) A council must, in considering whether to make an order under this Part, deal with the particular case on its merits but must also take into account any relevant policy under this Division.