

3 September 2021

Ms Helen Dyer
Chair, State Planning Commission
GPO Box 1815
Adelaide SA 5001

By email saplanningcommission@sa.gov.au



Dear Ms Dyer

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 sections 225(18) and 230(15) of the *Planning, Development and Infrastructure Act 2016 (PDI Act)*, to enable the City of Mitcham (**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 we understand 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. Specifically, a civil penalty may be recovered in one of two ways, either 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)*

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

Request for authorisation

Council is in the process of updating its enforcement and compliance policy and is keen to add civil penalties and enforceable voluntary undertakings as pathways available to Council to resolve development compliance and enforcement matters in the community.

While existing compliance tools have served their purpose, Council is of the view that the new tools 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, the new tools are likely 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). The occupier was unaware of the existence of the condition, and 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 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 then continues to fail 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.

Case Study

I am advised by my compliance team that a matter currently under investigation may lend itself to resolution via the new civil penalties process rather than a prosecution. The circumstances involve a landowner who removed a regulated tree without approval.

The tree was knowingly identified as a regulated tree for retention on plans connected to a development authorisation. However, the owner later relied on advice from a consultant that the tree could be removed based on an exemption in reg 3F of the *Planning, Development and Infrastructure (General) Regulations 2017*. In this instance the consultant's advice was incorrect. As such, while the breach likely warrants a penalty, a prosecution may be too harsh a process, not to mention the likely added time and cost to Council.

Anecdotally in discussing these powers with other councils, the current experience is that the resources and financial cost involved in bringing criminal or civil enforcement actions through the courts is significant, and in some cases is disproportionate to the final outcome achieved through the Court process.

With the above hypothetical and case study situations in mind, as well as acknowledging the 'newness' of these provisions, I write as a delegate of the Council to request the Commission's authorisation under ss 225(18) and 230(15) to utilise the provisions for a period of 3 years.

Council considers this timeframe appropriate in order to adequately utilise the benefit of the provisions, evaluate their effectiveness, as well as recognising the time it often takes to successfully reach a resolution. Council would also be pleased to undertake to update the Commission on the effectiveness of the powers.

While Council's preference would be to obtain unconditional authorisation, if the Commission is minded to impose conditions or directions in relation to use of these new enforcement powers, Council would welcome the opportunity to have a discussion about the scope and nature of any such conditions and directions.

Should you, or PlanSA staff wish to discuss the above information further please don't hesitate to contact me.

Yours faithfully



Alex Mackenzie
A/General Manager
Development and Community Safety

Cc Ms Anita Allen, Director Planning and Development
anita.allen@sa.gov.au

11 October 2021

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Mr Alex Mackenzie
A/ General Manager
Development and Community Safety
City of Mitcham

By email: amackenzie@mitchamcouncil.sa.gov.au

Dear Mr Mackenzie

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 3 September 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 Mitcham to utilise the enforcement tools available in the relevant sections for the period 30 September 2021 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; 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.

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.

Kind regards

A handwritten signature in black ink that reads "Helen R. Dyer". The signature is written in a cursive style with a large initial 'H' and a long, sweeping tail on the 'y'.

Helen Dyer
Chair

17646912



11 October 2021

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Mr Clinton Jury
Chief Executive Officer
Local Government Association of South Australia

By email: lgasa@lga.sa.gov.au

Dear Mr Jury

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

The State Planning Commission (the Commission) recently received a request from a local council to be authorised to use the enforcement tools available under sections 225 and 230 of the *Planning, Development and Infrastructure Act 2016* (the Act).

The Commission granted authorisation to the council for a period of three years 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.

The Commission encourages the Local Government Association to explore whether other councils are interested in being authorised to utilise these enforcement tools, and if so, provide appropriate details to the Commission by **Friday, 29 October 2021**.

This will assist in streamlining the application process for both councils and the Commission, whilst also ensuring all councils have comparable enforcement tools available.

Details of councils interested in seeking an authorisation to utilise these enforcement tools should be provided to the Commission via email at: SAPlanningCommission@sa.gov.au.

Kind regards

A handwritten signature in black ink that reads "Helen R. Dyer". The signature is written in a cursive style with a large initial 'H' and 'D'.

Helen Dyer
Chair