

THE BAROSSA COUNCIL

ORDER MAKING POLICY



Corporate and Community Plan Link:	Community and Cultural Wellbeing: 1.1 Health and Family 1.4 Safety and Security	First Approval Date:	TBC
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1. Purpose

- 1.1 The Local Government Act 1999 ("the Act") provides councils with the power to make Orders in a variety of circumstances 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 policy defines The Barossa Council's ("Council's") approach in the exercise of its Order making powers ("powers") under Chapter 12 – Part 2 of the Act.

2. Scope

- 2.1 The Act requires Council to prepare and adopt a policy concerning the operation of Part 2 of Chapter 12 of the Act, which relates to the making of Orders.
- 2.2 The circumstances in which Council can make an Order are listed within the Act and have been included as **Appendix 1**.
- 2.3 Council delegates powers to the Chief Executive Officer who then sub-delegates to appropriate officers.
- 2.4 This policy applies to Council in the exercise of its powers and all delegated officers acting on behalf of Council, under Section 254 of the Act.
- 2.5 In addition to Council's legislative requirements, this policy also applies to Orders issued by Council pursuant to Sections 216, 217 and 218 of the Act.

3. Definitions

Authorised Person	Authorised person means a person appointed by a council as an authorised person under Chapter 12 Part 3 of the Act.
Amenity	Amenity of a Locality means any quality, condition or factor that makes, or contributes to making, the Locality harmonious, pleasant or enjoyable;
Locality	An area or location; which may include adjacent Land and

	surrounding properties (not necessarily on the same street or road).
Land	As per the Act; means, according to the context— (a) Land as a physical entity, including— (i) any building or structure on, or improvement to, Land; or (ii) Land covered by water and, in such a case, the overlying water; or (iii) a strata lot under the Community Titles Act 1996 or a unit under the Strata Titles Act 1988; or (b) a legal estate or interest in, or right in respect of, Land.
Order	A formal and authoritative direction requiring action
Owner Of Land	As per the Act; means— (a) if the Land is unalienated Crown Land—the Crown; or (b) if the Land has been granted in fee simple (and is not unalienated Crown Land)— (i) the holder of an estate in fee simple, or a life estate, in the Land; or (ii) the holder of a leasehold estate in the Land who is not in occupation of the Land; or (iii) a mortgagee in possession of the Land (or a receiver appointed by such a mortgagee); or (c) if the Land is held from the Crown under a lease, licence or agreement to purchase—the lessee, licensee or purchaser; or (d) a person who holds native title in the Land; or (e) a person who has arrogated (claimed) to himself or herself (lawfully or unlawfully) the rights of an owner of the Land, and includes the executor of the will, or administrator of the estate, of any such person;
Procedural Fairness	Is concerned with the procedures used by a decision-maker to reach the decision, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. The rules of procedural fairness require: <ul style="list-style-type: none"> • a hearing appropriate to the circumstances; • lack of bias; • evidence to support a decision; and • inquiry into matters in dispute
Public Place	As per the Act; means a place (including a place on private Land) to which the public has access, but does not include any part of a community title under the Community Titles Act 1996
Public Road	As per the Act, means— (a) any road or Land that was, immediately before the commencement of the Act, a public street or road under the repealed Act; or (b) any road— (i) that is vested in a council under the Act or another Act or (ii) that is placed under a Council's care, control and management as a Public Road after the commencement of this Act, but not including an alley, laneway, walkway or other similar thoroughfare vested in a council; or (c) any road or land owned by a council, or transferred or surrendered to a council, and which, subject to this Act, is declared by the Council to be a Public Road; or (d) any land shown as a street or road on a plan of division deposited in the Lands Titles Registration Office or the General Registry Office and which is declared by the council to be a Public Road; or

	(e) any land transferred or surrendered to the Crown for use as a public road that was, immediately before the transfer, held by a person in fee simple or under a lease granted by the Crown, (and includes any such road that is within the boundaries of a public square);
Private Road	Means a Road in private ownership;

Any reference contained within this policy that has a corresponding definition contained within the Act, that definition shall apply.

4. Policy Statement

4.1 Council is committed to using its legislative powers and resources in a fair and reasonable manner and will consider Procedural Fairness and the nature of the matter when considering making an Order.

4.2 Considerations

To assist Council effectively resolve local nuisances and hazards, and before it makes an Order under this policy, the following will be taken into account:

- 4.2.1 The severity of the incident and nature of the hazard or danger posed to the community
- 4.2.2 The risk to health or safety of the community
- 4.2.3 The defraction or reduction in the Amenity of the Locality
- 4.2.4 Any previous or repeated occurrence of the activity or incident
- 4.2.6 Impact of any previous actions to overcome the matter
- 4.2.7 The extent of the breach
- 4.2.8 The likelihood of negotiation or informal action achieving the desired outcome
- 4.2.9 Public interest
- 4.2.10 The availability of sufficient evidence upon which Council may rely to exercise its powers
- 4.2.11 The alleged offender's willingness to resolve the matter
- 4.2.12 The number of complaints received in respect of the matter (if any).
- 4.2.13 The availability of other legislative or non-legislative mechanisms to effectively resolve the matter.

4.3 Except in the case of an emergency described in 4.4 below:

4.3.1 Council will take reasonable steps, within available resources, to resolve cases of local nuisance or hazards by education, negotiation and agreement before considering issuing an Order.

4.3.2 Prior to an Order being made, Council will provide a notice to whom it is proposed that the Order be directed, outlining the intent to issue an Order.

Such notice will:

- (a) State the proposed action, including the terms of the proposed Order and the period within which compliance with the Order will be required;
- (b) State the reasons for the proposed action;
- (c) Invite the person to address or respond to the matters outlined, or to dispute the matter and provide reasons as to why the proposed action should not be taken, by making a submission to the Council (or a person nominated to act on behalf of Council) within 21 days.

4.4 Urgent Threat or Emergency

Council, via its appropriately Authorised Officers, will proceed to make an Order without negotiation or notice, in accordance with section 255(12) of the Act where it is considered that the circumstance or activity constitutes, or is likely to constitute:

- 4.4.1 A threat to life; or
- 4.4.2 An immediate threat to public health or public safety; or
- 4.4.3 An emergency situation.

4.5 Reviews and Appeals

Council will ensure that any Order will include a statement which sets out the available rights of a person to seek a review of an Order under The Act. The following options for review are available:

4.5.1 Review under Section 256 of the Act

A person whom an Order is directed may, within 14 days after service of the Order, appeal against the Order to the District Court.

4.5.2 Request for an Internal Review under Section 270 of the Act

A person may, at any time and for any matter, seek a formal an independent review of a decision of a Council or Council Officer. A request for an internal review will be undertaken in accordance with Council's Internal Review of Council Decisions Policy and Process.

4.5.3 Ombudsman/Minister/Other Body

A person may, at any time and for any matter, make a complaint to the South Australian Ombudsman, the Minister for Local Government or any other appropriate body in relation to a decision of Council or a failure of a Council to act.

4.5 Non-Compliance with an Order

If an Order has not been complied with within the time provided for compliance, subject to any review under 4.5.1; Council, via it's appropriately Authorised Persons will take the necessary action to address the matter as required by the Order, as defined within the Act.

All reasonable costs and expenses incurred by Council in taking action following non-compliance with an Order will be recovered as a debt from the person who failed to comply with the Order, in accordance with the Act; unless exceptional circumstances exist.

The decision to recover costs and expenses will be at the discretion of the relevant Director and in accordance with relevant delegations. The relevant Director must consider the cost and benefit to the community in recovering costs incurred under this part.

5. Supporting Processes

Order Making Process (TBD)
Complaints Handling Process
Internal Review of Council Decision Process

6. Related Policies and Codes

Request for Service Policy
Complaints Handling Policy

Internal Review of Council Decision Policy
Public Consultation Policy
The Barossa Council Community Plan
The Barossa Council Corporate Plan

7. Legislation and References

Local Government Act 1999
Local Government (General) Regulations 2013
Development Act 1993
Local Government Association's 'Model Order Making Policy' (June 2014)

8. Review

This policy will be reviewed in consultation with the relevant stakeholders, within four years or more frequently if legislation or Council's need changes.

9. Further Information

This policy is available on Council's website at www.barossa.sa.gov.au. It can also be viewed electronically at Council's principal office at 43-51 Tanunda Road, Nuriootpa and all Council branches, during ordinary business hours. A copy of this policy can be obtained at those venues upon payment of a fixed fee.

Any complaint in relation to this policy or its application should be forwarded in writing addressed to the Chief Executive Officer, PO Box 867, Nuriootpa SA 5355 or barossa@barossa.sa.gov.au.

Signed:
Mayor Bob Sloane

Dated: 29/8/16

Appendix 1

Local Government Act 1999

Section 254—Power to make orders

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

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

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

- (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—		
<ul style="list-style-type: none"> · 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?
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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?
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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—

- (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.

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

(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).