


# *Council Policy*

## Order Making



# COUNCIL POLICY

 Adelaide Hills COUNCIL	<b>ORDER MAKING</b>
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<b>Policy Number:</b>	GOV-05
<b>Responsible Department(s):</b>	Development & Regulatory Services
<b>Relevant Delegations:</b>	None
<b>Other Relevant Policies:</b>	None
<b>Relevant Procedure(s):</b>	None
<b>Relevant Legislation:</b>	<i>Local Government Act 1999</i>
<b>Policies and Procedures Superseded by this policy on its Adoption:</b>	December 2007, Item 10.2, B326 Order Making 26 August 2014, Item14.4,176
<b>Adoption Authority:</b>	Council
<b>Date of Adoption:</b>	25 May 2021, Item 12.4
<b>Effective From:</b>	8 June 2021
<b>Minute Reference for Adoption:</b>	94/21
<b>Next Review:</b>	No later than May 2024or as required by legislation or changed circumstances.

## ORDER MAKING

### 1. PURPOSE

The Adelaide Hills Council is responsible for managing its area at a local level in accordance with *Local Government Act, 1999*. In particular it is the function of the Council to provide for the welfare, well-being and interests of the members of its community and, where necessary, to take measures to protect its area from hazards.

To fulfil its functions, the Council has a range of statutory powers. These powers enable Council to exercise its regulatory functions by formulating policies and by-laws, and issuing orders. The Council has resolved to develop an Order-Making Policy in relation to exercising its powers pursuant to Part 2 of Chapter 12 of the *Local Government Act 1999 (the Act)*, to promote the health, safety and well-being of our community. This Policy sets out the matters for which orders may be issued. The relevant principles, procedures and penalties that will be applied are also reflected in the Policy.

This Order Making Policy is prepared and adopted pursuant to section 259 of the Act and sets out the steps Council will take in the making of orders.

### 2. SCOPE

Section 259 of the Act requires each 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 which states that Council may order a person to do or refrain from doing a thing under certain circumstances, as specified in the table included within that section of the Act (refer **Attachment 1** of this Policy).

In accordance with the requirements of the Act, this Policy also applies in respect of orders issued by Council pursuant to section 216 (power to order the owner of private road to carry out specified roadwork's), section 218 and section 217 (power to order owner of infrastructure on road to carry out specified maintenance or repair work).

### 3. GUIDING PRINCIPLES

When considering making an order within the scope of this policy, the Adelaide Hills Council will consider the following principles, which are considered central to the effective resolution of local nuisances on private land. Each case for the possible use of the order making powers will be considered on its individual merits. Factors that Council will consider include:

- Severity of the incident
- Hazard/danger posed to the community
- Risk to health/safety of the community
- Detraction from the amenity of the locality
- Repeated occurrence of the activity/incident (e.g. duration, previous offences)
- Impact of any previous actions to overcome the problem

- Is the breach significant/substantial?
- Would an informal warning letter be sufficient?
- Are there any public interest issues?
- Whether there is sufficient evidence upon which Council may rely to exercise its order making powers
- The offender's response and number of complaints received in respect of the matter (if any).

#### **4. MATTERS TO WHICH THE POLICY APPLIES**

The matters to which this Policy applies are set out in **Attachment 1**. The matters are stated in general terms with particular examples provided for illustration purposes. These examples are not intended to be an exhaustive list of the circumstances in which the Policy will apply. However, they are provided to assist the community in understanding the purpose and intent of this Policy and the way in which it will be applied.

#### **5. PROCESS AND PROCEDURE**

Except in the case of an emergency described below, Council will take reasonable steps, within available resources, to resolve cases of local nuisance and/or low risk hazards by negotiation and agreement before issuing an order.

Except in the case of an emergency, before making an order the Council will give notice of its intention to make an order in accordance with section 255 of the Act by:

- Giving the person to whom an order is intended to be directed a notice in writing stating the:
  - proposed action required to rectify the matter
  - terms of the proposed order (i.e. what it requires the person to do or refrain from doing)
  - period within which compliance with the order will be required
  - penalties for non-compliance; and
  - reasons for the proposed action; and
- Inviting the person notified of the opportunity to give reason/s, within a specified time, why the proposed action should not be taken.

Council will proceed to make an order without negotiation or notice, in accordance with section 255(12) where Council considers the circumstance 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 requiring immediate action.

#### **6. REVIEW RIGHTS**

Pursuant to section 256 of the Act, any person to whom an order is issued (including an order issued under sections 254, 216, 217 or 218 of the Act) has a right to appeal against the order. Any such appeal must be lodged within 14 days of that person's receipt of the order. The Council will ensure that reference to this right of review is included in any order issued.

## **7. NON-COMPLIANCE WITH AN ORDER**

If an order issued under section 254, 216 or 218 of the Act is not complied with 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.

The reasonable costs and expenses incurred by Council in taking action under this section may be recovered by Council as a debt from the person who failed to comply with the requirements of the order.

Where an amount is recoverable by Council, Council may, by notice in writing to the person:

1. fix a period, being not less than 28 days from the date of the notice, within which the amount must be paid, and
2. if the amount is not paid by the person within that period, the person is liable to pay interest and Council may impose a charge over the land for the unpaid amount, together with interest, in accordance with section 257(5) of the Act.

Non-compliance with an order of Council is an offence for which a person may incur a statutory penalty provided for in the Act. Section 258 of the Act provides for a maximum penalty of \$2,500 and an expiation fee of \$210 for failure to comply with an order issued under the Act.

Where an order is issued under section 217, if the order is not complied with within the time specified in the order:

- Council may carry out the action required by the order and recover the cost of doing so as a debt for the owner; and
- The owner is guilty of an offence and liable to a maximum penalty not exceeding \$5,000.

## **8. RESPONSIBILITIES & DELEGATIONS**

This policy will be enforced by Authorised Persons who have been appointed (in writing) by the Council under section 260 of the Act<sup>1</sup>.

Council may also choose to delegate the power to issue orders under sections 254, 216, 217 and 218 of the Act to Council staff, in which case, Council will ensure appropriate delegations are in place.

## **9. REVIEW AND EVALUATION**

The effectiveness of the policy will be reviewed on an as needs basis, including where necessary as a result of any legislative change.

The Chief Executive Officer will report to Council on the outcome of the evaluation, and make recommendations for amendment, alteration or substitution by way of a new Policy.

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<sup>1</sup> Authorised Persons have powers under section 261 of the Act to enforce breach of orders by way of expiation.

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**10. AVAILABILITY OF THE ORDER MAKING POLICY**

This policy will be available for inspection at Council's principal office during ordinary business hours and published on the Council's website [www.ahc.sa.gov.au](http://www.ahc.sa.gov.au) . Copies will be provided to interested parties upon request.

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# **Appendix 1**

*Extracts from the Local Government Act 1999*

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**Attachment 1 - 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.

<b>Column 1</b> <b>To do or to refrain from</b> <b>doing what?</b>		<b>Column 2</b> <b>In what circumstances?</b>	<b>Column 3</b> <b>To whom?</b>
<b>2. Hazards on lands adjoining a public place</b>			
(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.
<b>Examples—</b>			
·	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.		
·	To remove a structure or vegetation near an intersection.		
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<b>Column 1</b> <b>To do or to refrain from doing what?</b>	<b>Column 2</b> <b>In what circumstances?</b>	<b>Column 3</b> <b>To whom?</b>
<b>4. Inappropriate use of vehicle</b> <i>To refrain from using a caravan or vehicle as a place of habitation.</i>	<i>A person is using a caravan or vehicle as a place of habitation in circumstances that—</i> <ul style="list-style-type: none"> <li><i>(a) present a risk to the health or safety of an occupant; or</i></li> <li><i>(b) cause a threat of damage to the environment; or</i></li> <li><i>(c) detract significantly from the amenity of the locality.</i></li> </ul>	<i>The owner or occupier of the land or a person apparently occupying the caravan or vehicle.</i>

(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.

#### **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, or, across, under or over a road, require the owner –
- (a) to carry out any proposal to make an order; any specified work by way of maintenance or repair; or
  - (b) to cover 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) 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 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.