

Policy Name:	Planning Compliance
Objective:	To provide a standardised process for planning compliance within the Shire of Esperance and to provide clear criteria for officers making decisions relating to compliance.
Key Words	Planning Compliance, Compliance
Statutory Compliance	Local Planning Scheme

POLICY

Objectives

The objectives of this policy are to:

1. Define whether a particular compliance matter is under the jurisdiction of the Shire;
2. Identify the general criteria by which it is determined whether to take compliance action or not;
3. Identify specific circumstances where no further action will be taken;
4. Identify in what instances a Planning Infringement Notice is issued;
5. Identify in what instances a Directions Notice is issued; and
6. Outline the general compliance procedure including the issue of infringements and prosecution.

Operation of the Policy

Unless the relevant legislation provides otherwise or the Chief Executive Officer following legal advice determines otherwise, the owner(s) or occupier(s) of the property or other applicable person(s) that are in breach of the relevant legislation shall be the subject of compliance action in accordance with this policy.

The statutes in respect of which this policy will operate include the Planning and Development Act 2005 and Shire of Esperance Local Planning Scheme.

The policy assumes the precedence of planning over building compliance matters in most instances (except for dangerous buildings).

Separate action may be undertaken under the Building Act 2011 concurrently with any action undertaken under this Policy.

Policy Statement

Compliance matters will be investigated in the following order:

1.0 Jurisdiction

On receipt or notification of any compliance issue, the jurisdiction of the Shire of Esperance will first be determined.

Any compliance issue falling outside the jurisdiction of the Shire of Esperance will be referred to the authority with jurisdiction for action, and any complainant advised as such. No further action will be taken by the Shire of Esperance.

In the case of development that has occurred prior to 27 September 1991 no action will be taken by the Shire unless documentation relating to the development is on file. This is due to the accidental destruction of some development approvals prior 1990 and the date coincides with the gazettal of Town Planning Scheme No. 22.

2.0 Priority

Where a Shire Officer has reasonable grounds to believe that non-compliant activity may be occurring on land within the Shire, compliance issues will be progressed in accordance with the following priorities (in order), irrespective of the number or frequency of complaints received:

- a) Any matter that presents a danger or other circumstances that demand an immediate response.
- b) Any matter involving irreversible and permanent damage to a building or place on the State Register of Heritage Places or a Heritage List established under Local Planning Scheme, or to the natural environment.
- c) All other compliance issues not meeting these priorities will be progressed in the order in which they arise.

Complaints relating to compliance issues are:

1. Required to be in writing and include specific details of the compliance matter;
2. Complaints not in writing that are file noted or included in a running sheet; or
3. Identified during any compliance audit undertaken by the Shire.

Anonymous complaints cannot be investigated as it is not possible to undertake due process to ensure procedural fairness.

3.0 Circumstances Where the Shire May Take No Further Compliance Action

The Shire may, following the consideration of a report and having regard to any legal or technical advice, resolve to take no further compliance action in the following circumstances.

3.1 Uncertainty of Compliance

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

- a) A lack of precision in the plans / documents of any relevant approval; or
- b) A lack of certainty at the time of development as to the legal status of the development or the requirement to obtain approval; or
- c) Any other legal consideration.

3.2 Matter Considered Trivial or Insignificant

Where there is a breach of planning or building requirements and the matter may reasonably be considered trivial or insignificant.

For the purposes of this policy, a matter will be considered to be trivial or insignificant only where the extent of the non-compliance is minor to the point where the distinction between complying and not complying with the relevant legislation is unnoticeable other than to a person well versed in the relevant law;

3.3 Other Circumstances

Where it has been established that a breach of planning or building requirements has occurred and that the breach is neither trivial nor insignificant, The Shire may determine not to take action where a matter meets all of the following criteria:

- a) It can be established that the development the subject of the breach has been in existence for a substantial time period; and
- b) The development has no apparent impact on the amenity of adjoining properties, the streetscape, or the locality; and
- c) The development is, in the opinion of the Coordinator Building Services, or other appropriately qualified officer, structurally sound.

3.4 Historic Usage

In situations where a use has been in operation since before 1990 it is considered unreasonable to consider that documentary evidence of land use approval will still exist due to potential destructions and changes to business ownership. This will only apply when the Shire has no records in relation to the relevant approvals.

4.0 Compliance Procedure

If part 3.0 of the policy above is not satisfied, the following will apply in sequence:

4.1 Non Compliance with a Condition of a Development Approval

- a) A letter will be sent seeking clarification on the breach and provide an opportunity for the non compliance to be addressed voluntarily within 28 days or other appropriate time period given the nature of the non compliance. If the matter is not rectified in the specified timeframe:
- b) A letter is issued with a draft of an Infringement requiring that the matter be rectified within 28 days or a \$500 infringement will be issued;
- c) A \$500 Planning Infringement Notice will be issued;
- d) In the case of a major planning offence as outlined under 4.2.2 in lieu of 4.1(b and c) a letter is issued with a draft Directions Notice requiring that the matter be rectified within 28 days or a Directions Notice will be issued; or
- e) A Direction Notice will be issued requiring the compliance matter to be resolved in line with the requirements of Section 214 of the Planning and Development Act 2005 (this may include obtaining retrospective development approval, stopping an unapproved use, removing an unapproved structure or undertaking the prescribed work). If the matter is not resolved, then the matter may proceed to legal action.

4.2 Other Circumstances

In all other circumstances

4.2.1 For a minor planning offence (a minor planning offence is a breach of the Scheme which has minimal impact on the community, a community member, or the environment. The breach may be able to be resolved in a relatively short timeframe without any further impact on the community or the environment once compliance has been reached:

- a) The investigating officer is to negotiate with the alleged offender to reach compliance within a timeframe commensurate with the non-compliance;
- b) If Compliance is not achieved with the specified timeframe a \$500 Planning Infringement Notice will be issued;
- c) A Direction Notice will be issued requiring the compliance matter to be resolved within four (4) months (this may include obtaining retrospective development approval, stopping an unapproved use, removing an unapproved structure or undertaking the prescribed work). If after four (4) months the matter remains unresolved, then the matter will be referred to Council for consideration of the commencement of legal action.

4.2.2 For a major planning offence (a major planning offence is a breach of the Scheme that significantly impacts or risks the health and safety of the community, a community member, or the environment. It may also be the case whether the issue cannot be resolved in a relatively short time frame or where the alleged offender is not willing to cooperate or negotiate to achieve compliance:

- a) The investigating officer is to negotiate with the alleged offender to reach compliance within a timeframe commensurate with the non-compliance;
- b) A Direction Notice will be issued requiring the compliance matter to be resolved within four (4) months (this may include obtaining retrospective development approval, stopping an unapproved use, removing an unapproved structure or undertaking the prescribed work). If after four (4) months the matter remains unresolved, then the matter will be referred to Council for consideration of the commencement of legal action.

4.2.3 For a minor offence that occurs after advice stating that the use/development needs to be approved before commencing or if the offence is a repeat of an earlier offence:

- a) A \$500 Planning Infringement Notice will be issued.

4.3 All notices must comply with legislative requirements including notification of the right of appeal to the State Administrative Tribunal

4.4 Where legal action is being contemplated consideration must be given to admissible evidence that establishes the offence beyond all reasonable doubt. Consideration must also be given to whether or not there is a reasonable prospect of conviction.

5.0 Discretionary Criteria

Where there are extenuating circumstances to depart from the terms of this policy, the Development Compliance Officer will prepare a report which will be referred to the Executive Management Team, having regard to the following general criteria:

- a) 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;
- b) 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;
- c) Those factual circumstances in which the contravention of the law took place;
- d) The time which has elapsed since development was undertaken in contravention of the law;
- e) The expense and inconvenience which would be involved in remedying the contravention of the law;
- f) The extent of amenity impact the contravention may have on adjoining properties and the locality; and
- g) Any potential liability the Shire is subject to if compliance is not resolved.

If the Discretionary Criteria are acted on they will be reported to Council via the monthly Information Bulletin.

NOTE 1: An Planning Infringement Notice must be issued within 6 months of the Shire determining that an offence has occurred.

NOTE 2: A planning prosecution must commence within 12 months of the Shire determining that an offence has occurred.

NOTE 3: Failure to comply with a Direction Notice is an offence under Section 214(7) of the Planning and Development Act 2005. Under Section 223 of the Act, a person who commits an offence under this Act is liable to a fine of \$200,000 and in the case of a continuing offence, a further penalty of \$25,000 for each day on which the offence continues.

NOTE 4: A Direction Notice issued under Section 214 of the Planning and Development Act 2005 is generally issued with a term not less than 60 days.

NOTE 5: The person(s) to whom a Direction Notice has been issued, may within twenty eight (28) days of the date of service of the Direction Notice, apply to the State Administrative Tribunal for a review of the decision. The contact details for the State Administrative Tribunal will be set out at the end of a Direction Notice.