

7.5.1 PLANNING AUTHORISATIONS AND BUILDING INFRINGEMENTS

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RECOMMENDATION

That Council

- 1. Note that there was an administrative error with Planning Authorisations that affects infringements issued between December 2008 and June 2018, as well a different administrative error affecting Building Infringements relating to swimming pool compliance issued between February 2022 until November 2024.**
- 2. Note that the administrative error in both instances does not negate the fact that the original offences occurred and that a fine was warranted.**
- 3. Note that the issues with both matters has been rectified with appropriate Authorisations having been made under the Planning and Environment Act and the process with the Building Infringements having been amended.**
- 4. Note that all affected people have been directly notified so that the money paid toward their infringement can be refunded to them.**

INTRODUCTION

The purpose of this report is to provide an update on an administrative error with Planning Authorisations that affects infringements issued between December 2008 and June 2018, as well a different administrative error affecting Building Infringements relating to swimming pool compliance issued between February 2022 and November 2024.

The report details the administrative error that occurred with each of these matters, (including conflicting advice and interpretation on the Planning Authorisations matter) how they have been corrected as well as confirming that all affected people have been contacted directly so that money paid toward their infringement can be refunded to them.

The administrative error in both instances does not negate the fact that the original offences occurred, and a fine was warranted given the non-compliance that occurred, but rather the error(s) identified mean that Council, for administrative reasons, is unable to keep the infringement amount paid.

COUNCIL PLAN STRATEGIC OBJECTIVES

Good Governance

Ensure a financially, socially and environmentally sustainable organisation.
Maintain the highest standards of good governance.

BACKGROUND

Planning Infringements

There are several ways in which powers under legislation can be exercised. In 2008 there was a change to the way delegations and authorisations were done. The unintended consequence of this change ultimately meant that Planning Enforcement Officers were not appropriately authorised for the issuing of fines between 2008 and 2018. There are no broader issues with Council's planning enforcement or planning processes with the issue being limited to the issuing of Planning Infringements during this period.

Building Infringements

On 1 December 2019, the requirement for pools and spas to be registered with Council came into effect. The *Building Regulations 2018* also introduced a mandatory inspection and certification process, requiring property owners to submit a Form 23 – Certificate of Pool and Spa Barrier Compliance every four years to ensure their safety barrier meets the required standards.

From February 2022 until November 2024, Council issued 523 infringements to owners who failed to submit their Form 23 within the required timeframe. Whilst the basis of the fines were correct, it was identified that the timeframe provided for payment of these infringements did not account for postage which should allow a further 7 days above the minimum statutory period for a fine to be paid. This meant that the notices did not comply with the requirements of the *Infringements Act 2006* (Infringements Act) and *Interpretation of Legislation Act 1984*.

DISCUSSION

Planning Infringements

There are a number of ways in which powers under legislation can be exercised.

1. Powers that are only exercised by Council via a resolution.
2. Powers that are exercisable by Council, but delegated to the CEO or other staff.
3. Powers that are only exercisable by the CEO.
4. Powers that are exercisable by the CEO but delegated to other staff.
5. Powers that are only exercisable by specific officers.
6. Powers that are only exercisable by persons that are authorised to do so.

There are several powers that are granted under the *Planning and Environment Act 1987* (P&E Act). Some powers are granted to Council as the responsible authority and they can be delegated to officers. Some powers are exercisable by 'authorised officers' only. For the purposes of this report, it is relevant to note that the power to issue an infringement under the P&E Act is an authorised officer power (section 130).

Infringements have historically (and currently) been issued exclusively by Council's planning enforcement officers. Officers are generally authorised under section 224 of the Local Government Act 1989 (LG Act). This section provides that:

- (1) *A Council may appoint any person other than a Councillor to be an authorised officer for the purposes of the administration and enforcement of any Act, regulations or local laws which relate to the functions and powers of the Council.*

As this power is delegated from the Council to the CEO, the CEO can execute Instruments of Appointment for relevant officers, which allow them to exercise 'authorised officer' powers under the LG Act and any other Act for which the Council has functions or powers.

This had typically been Council's practice. Officers were appointed under section 224 (including for functions under the P&E Act) and exercised powers (CEO Appointment).

However, in about 2018, it came to Council's attention that there had been some disagreement about whether Council can rely on a CEO Appointment in the case of the P&E Act, as it was presented that the P&E Act has its own authorising provision and required an appointment from Council (Council Appointment).

Section 147(4) of the P&E Act states:

- (4) Any reference in this Act to an authorised officer of a responsible authority or of the Department is a reference to an officer or employee of the authority or employee of the Department whom the authority or the Secretary to Department (as the case requires) authorising in writing generally or in a particular case to carry out the duty or function or to exercise the power in connection with which the expression is used.*

This provision coupled with section 188:

- (1) A planning authority or responsible authority other than the Minister of the Victorian Planning Authority may by instrument delegate any of its powers, discretions or functions under this Act to*
...(b) an officer of the authority...
- (2) Subsection (1) does not apply to -*
...(c) the power of a responsible authority to authorise any officer to carry out a duty or function or to exercise a power.

As a result of the uncertainty, Council took advice in 2018. That advice confirmed that a CEO Appointment was appropriate, and no issue existed. Notwithstanding, Council determined to amend its practice to a Council Appointment being the most conservative approach.

In 2024, instigated by a general review, Council reconsidered the matter of its historical CEO Appointment practice and the advice received in 2018. After the consideration of further advice, Council determined that the only appropriate way to authorise planning enforcement officers was via a Council Appointment, and as such those infringements issued between 2008 and 2018 were invalid.

As a result Council has determined to refund the 69 planning infringements issued between December 2008 and June 2018.

Council has written to affected people inviting them to apply for a refund of these fines.

Building Infringements

With the requirement for pools and spas to be registered with Council, Council's Building unit prepared a number of new processes to deal with this new activity, including the issuing of fines where necessary. When the process relating to fines was created and advice sought, there was

unfortunately a lack of clarity provided with regard to the specific requirements of the Infringements Act when mailing an infringement.

Section 12 of the Infringements Act provides:

- (1) *An infringement notice for an infringement offence may be served on a person—
...
(b) by sending it by post addressed to the person at the person's last known place of residence or business; or ...*
- (2) *Subject to any evidence to the contrary and despite anything to the contrary in section 49 of the Interpretation of Legislation Act 1984, an infringement notice served by post in accordance with subsection (1)(b) is deemed to be served 7 days after the date of the infringement notice.*
- (3) *An infringement notice served on a person less than 21 days before the date specified in the infringement notice as the due date for payment of the infringement penalty is invalid.*

Accordingly, where Council issues an infringement notice via post, it must provide 28 days for payment, as opposed to 21 days for an 'on the spot' fine.

From February 2022 until November 2024 Council issued, by mail, 523 infringements to owners who failed to submit their Form 23 within the required timeframe. While the offence had been committed, the infringements did not provide 28 days for payment. This meant that the notices did not comply with the requirements of the *Infringements Act 2006* and were therefore invalid. Council has written to affected people inviting them to apply for a refund of these fines.

It is important to note, that following the issuance of the building infringements, most owners submitted the required certificate, providing Council with confidence that the pool barriers met the required safety standards within the Regs.

Council's compliance efforts are essential in maintaining a safe and liveable city. Whilst these refunds are necessary to maintain legal integrity, they do not negate the fact that the original offences occurred, and that the basis of the fine was warranted.

FINANCIAL IMPLICATIONS

The financial implication of refunding all planning infringement notices issued between December 2008 and June 2018 amounts to a total value of \$67,970.42.

The financial implication of refunding all swimming pool and spa infringement notices issued between February 2022 and November 2024 amounts to a total value of \$205,424.35.

Following the refund processes, further decisions will be made in accordance with relevant legislation for any money that is unable to be reunited with the relevant person (whether it is that

they cannot be found, or do not claim the money owed) which ultimately could include handing the money over the State Revenue Office for them to administer as unclaimed monies.

POLICY IMPLICATIONS

There are no policy implications to this report.

CONSULTATION

Community consultation was not required.

SOCIAL IMPLICATIONS

There are no social implications to this report.

HUMAN RIGHTS CONSIDERATIONS

There are no human rights implications to this report.

GENDER IMPACT ASSESSMENT

A GIA was not completed because this agenda item is not a 'policy', 'program' or 'service'.

CONCLUSION

A recent internal review of infringement notices issued under the *Planning and Environment Act 1987* and the *Building Act 1993* identified procedural errors resulting in the infringements being invalid. Officers have taken steps to rectify the issue, including offering refunds and ensuring safeguards are in place to avoid these issues from reoccurring.

ATTACHMENT LIST

Nil