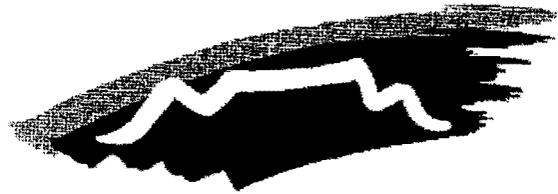


LAND USE ENFORCEMENT POLICY  
FOR THE PLANNING AND  
BUILDING DEVELOPMENT  
MANAGEMENT DEPARTMENT,  
CITY OF CAPE TOWN

APPROVED BY PLANNING AND ENVIRONMENT  
PORTFOLIO COMMITTEE : 4 NOVEMBER 2008

PLAN 17/11/08

**LAND USE ENFORCEMENT POLICY FOR THE  
PLANNING AND BUILDING DEVELOPMENT MANAGEMENT DEPARTMENT,  
CITY OF CAPE TOWN**



CITY OF CAPE TOWN | ISIXEKO SASEKAPA | STAD KAAPSTAD

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## **1. POLICY ISSUES**

This policy is called the Land Use Enforcement Policy for the Planning and Building Development Management Department of the City of Cape Town (the City).

There are different approaches to land use enforcement in the City. A uniform approach must be adopted. In many areas, the approach to land use enforcement has meant that people are permitted to continue with the unlawful land use until such time as the land use application has been finalised. Thus people are often able to utilise land for a purpose not contemplated by the zoning scheme for an unacceptable period of time.

There has been an increase in unlawful land use activities. This, in turn, has led to a flood of complaints from surrounding land owners, as well as from the Councillors who represent the ratepayers. The approach adopted must discourage the commencement of an activity prior to the land use rights being in place.

The approach must also give guidelines to officials on how to deal with land use enforcement issues and to exercise the discretion conferred upon Council in terms of section 40 of LUPO.

A working group of officials and Councillors was set up to examine the different methods of enforcing the legislation and this policy reflects the inputs received during these sessions.

## **2. LEGAL MANDATE**

Section 39, as read with section 46 of the Land Use Planning Ordinance no 15 of 1985 (LUPO) places an obligation on Council to enforce compliance with this law and zoning scheme regulations promulgated in terms of it and a reciprocal obligation on all people to comply with the provisions of the law. The Town Planning Schemes promulgated in terms of the Black Communities Development Act no 4 of 1984 (BCDA) contains similar provisions.

Section 11(3) (a) of the Municipal Systems Act no 32 of 2000, entitles a municipality to exercise its executive authority by

inter alia creating, developing and adopting policies.

In addition, section 4(2) (i) of the Municipal Systems Act no 32 of 2000 places a duty on Council to provide a safe and healthy environment for its citizens. This policy contributes to the fulfilment of this duty.

### **3. POLICY OBJECTIVES**

To guide the City's enforcement of LUPO and the various zoning scheme regulations by creating a framework to ensure that:

- officials in the Planning and Building Development Management Branch adopt a consistent and effective approach to land use enforcement throughout the City's area of jurisdiction.
- complaints are resolved within a reasonable time period.
- people are discouraged from commencing with unlawful land uses prior obtaining the relevant permission to conduct such operations.

### **4. SCOPE OF APPLICATION**

This policy applies to enforcement carried out in terms of LUPO, the Scheme Regulations deemed to be such in terms of LUPO or promulgated in terms of LUPO and the Town Planning schemes promulgated in terms of the Black Community Development Act no 4 of 1984.

The policy guides officials in the Planning and Building Development Management department throughout the City who are required to enforce the abovementioned laws.

This policy does not deal with contraventions of the National Building Regulations and Building Standards Act No 103 of 1977.

## **5. POLICY**

### **5.1 Complaints**

#### **5.1.1 A complaint may be lodged in the following ways:**

A written request to investigate from a complainant or a ratepayers/residents association;

A written report on a potentially unlawful activity from an official employed by the City or from a department within the City;

A request in writing from the Executive Director, Director, Councillor, or political structure;

An area sweep instituted by the Director, Regional Manager, District Manager or Enforcement Co-ordinator within the Planning and Building Development Management branch;

A notification from the tracking system that a land use approval has lapsed.

#### **5.1.2 A complaint must:**

##### **5.1.2.1 - be in writing.**

A complaint must be made in writing and submitted by hand, mail, fax or email to the relevant district office. Complainants may fill out a standard complaints form. *No telephonic or verbal requests will be dealt with. No anonymous complaints will be investigated, unless the Enforcement Co-ordinator considers that there is good reason to do so. The reason for not accepting anonymous complaints is that there must be a record of the information on which the investigation is based. In the event of a matter going to court, the complainant's details must be available in case they need to give evidence.*

If the complainant cannot read or write, they can make arrangements with the relevant enforcement Co-ordinator responsible for the area to have someone record their complaint.

If a Councillor complains on behalf of a ratepayer, or a ratepayers association complains, the information listed in the paragraphs below must be furnished. The person who lodges the complaint with the Councillor must be advised that he or she may be required to give evidence if criminal proceedings arise.

If the person, who is being investigated, requests a copy of the complaint, the nature of the complaint may be furnished but the identity of the complainant will be withheld unless or until the complainant is required to give evidence in court proceedings in which case, their identity will become known when they give evidence.

#### **5.1.2.2 - contain sufficient information in order to investigate**

This includes:

The name and address of the complainant and a telephone number/email address.

The name of the alleged offender, if known.

The address of the property and erf number, if known, where the offence is allegedly being committed. (The second yellow house on the left is not a sufficient description)

A detailed description of the alleged contravention of the zoning scheme. It is helpful to provide dates, times, frequency, intensity / extent of the activity and to this end it is useful to keep a log of when such activities take place and to record car registration numbers, if relevant.

Photographs, if available.

The impact that the alleged unlawful activity is having on the complainant and/or the neighbourhood.

The complainant must be advised to respect the alleged offender's privacy, not to trespass on their property and not to make defamatory statements.

**5.1.3 Be lodged with the secretary for the Enforcement Co-ordinator for the district.**

## **5.2 Investigation**

5.2.1 Once a complaint is lodged it is:

**5.2.1.1 Checked to see if it is one which can be investigated by the Department.**

If the contravention falls under the jurisdiction of a different department, the complainant will be advised accordingly and a copy of the inspector's response should be forwarded to the relevant department. The file will then be closed.

If the complaint could be investigated by more than one department, the enforcement co-ordinator for the area must liaise with the relevant people in the other departments in order to determine how to co-ordinate investigations.

**5.2.1.2 Entered on the tracker system**

**5.2.1.3 Acknowledged in writing within 2 working days (using the standard letter format) by the secretary of the Enforcement Co-ordinator or person designated to carry out this function.**

**5.2.1.4 Referred to the relevant property inspector for investigation. The property inspector must make a preliminary determination of the category which the complaint falls into. Such determination may change after carrying out a full investigation.**

**5.2.1.5 Investigation of complaints must commence within the periods set out below.**

Category A: within 24 hours after receipt of complaint

Category B: within 5 working days after receipt of complaint.

Category C: within 10 working days after receipt of complaint.

Category D: within 10 working days after receipt of complaint

### **5.2.2 Initial assessment**

The inspector will carry out a “desktop” investigation to ascertain the erf number, ownership details, zoning applicable to the erf.

If this assessment reveals that the property is being utilised in accordance with the zoning and or conditions of approval as the case may be, he or she will write to the complainant and advise that the property is being used in accordance with the zoning. The file will be closed.

### **5.2.3 On site inspection**

If the inspector cannot determine from a desktop investigation that the property is being used in accordance with its zoning, or it appears that there is a contravention, then the inspector will carry out a site inspection.

The inspector will request access to the site. If access is denied, he or she must issue a notice in terms of section 41 of the Ordinance and diarise for the relevant date. Once on site, he or she will complete the standard inspection form and take note of inter alia who is carrying out the unlawful activity, the time of the inspection, the nature of the unlawful use, the scale of the use, how many people are on the property and how many involved in the unlawful activity. If necessary, he or she will take photographs. The inspector must carry official identification when on inspection. The inspector will check if the complainant is available to depose to an affidavit.

### **5.2.4 Notice**

If, after inspecting the premises, the inspector forms the opinion that a land use contravention is occurring, after noting the relevant information, the inspector must issue and serve a notice based on the categories set out in Annexure A. The owner and, if applicable, the operator must be advised of the contact details of the relevant planning official in order to discuss whether a land use application can be made, but it must also be made clear that they remain liable to be prosecuted while

any application is being decided upon. The requirement to cease operation until the appropriate rights are in place is entirely separate from the process of making application for such rights.

The complainant will be advised by letter that a notice has been issued.

### **5.2.5 Additional evidence**

If, from the inspection, the inspector forms the opinion that there is no evidence of a land use contravention, the inspector must notify the complainant and invite them to furnish further evidence on affidavit and inform them that they must be prepared to give evidence in court. If a Councillor or ratepayers/residents association has submitted the complaint, the response will be directed to them and they will need to advise the individual complainant of the requirement to furnish further evidence.

If the complaint arises from issues such as noise, and there is a subjective element to the complaint (i.e the degree of disturbance can vary from person to person), the complainant will have to depose to an affidavit (the police station can commission an affidavit) and will have to give evidence in court, if the affidavit provides sufficient evidence of a contravention. The reason for this is that a criminal court will only accept the evidence of the person who actually saw or experienced the offence being committed. If an inspector did not see the offence being committed, he or she cannot give direct evidence in a court.

It is for this reason that if the complainant refuses to sign an affidavit or refuses to give evidence in court, after discussions with the prosecutor, the file will be handed to the enforcement co-ordinator, who will review the case. If there is not sufficient evidence to prosecute, this will be recorded on the file and the complainant advised accordingly. The file will then be closed.

### **5.3 Land Use Contraventions**

*"Section 39 of LUPO provides as follows:*

*(1) Every local authority shall comply and enforce compliance with-*

- (a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Townships Ordinance, 1934 ( Ordinance 33 of 1934);*
- (b) the provisions incorporated in a zoning scheme in terms of this Ordinance, or*
- (c) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,*

*and shall not do anything, the effect of which is in conflict with the intentions of this subsection.*

*(2) No person shall-*

*(a) contravene or fail to comply with-*

- (i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or*
- (ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance no 33 of 19234,*  
*except in accordance with the intention of a plan for the building as approved and to the extent that such plan has been implemented.*

*(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented."*

The generic town planning scheme promulgated in terms of the BCDA contains a similar provision with changes required by the context.

The approach of the City to land use planning contraventions is to ensure that the unlawful activity ceases until such time as the appropriate land use rights are in place. A person will be given a certain time period to cease such operation. The time given will be guided by the criteria set out in Annexure A. The failure to cease operation within the time periods will result in the matter being handed over for criminal prosecution. The fact that a certain time period is given to close the activity does not imply condonation of the unlawful land use.

### **5.3.1 Determination of categories**

In determining whether an unlawful activity falls into category A, B, C or D, one of the factors officials must have regard to is the nature of the complaint and the alleged impact of the unauthorised activity on the complainant and neighbourhood.

In the case of uncertainty as to which category a land use contravention falls into, the land use inspector shall refer the matter to the Enforcement Co-ordinator who shall make such determination.

### **5.3.2 Failure to comply with notice**

In the event that the person does not cease the unlawful use within the time periods set out in the notice, a summons must be issued.

Should a person require more time, they will have to request the Magistrate to postpone the matter. The Municipal prosecutors have been requested to oppose all such applications.

In the event that the Magistrate postpones the matter, Council may still elect to launch Civil court proceedings to interdict the person from carrying on the unlawful activity.

The person who is contravening the law must be informed that he or she is entitled to make an application for the land use rights required in order to conduct the activity however, the submission of such application does not impact on the obligation to cease operations until such time as the requisite authority has been granted. Inspectors may give the offender a pro forma information sheet which sets out the zoning of the property and the permissible use rights, the process for applying for the appropriate land use rights and the contact details of the planner for the area.

## **5.4 Buildings erected in contravention of LUPO**

Section 40 of LUPO provides as follows:

- "(1)(a) If a **building** or any part thereof was erected in contravention of section 39(2)(a), the local authority shall serve an instruction (hereinafter referred to as the instruction) on the owner concerned-*
- (i) to rectify such contravention before a date specified in the instruction, being not more than six months after the date of the instruction or at the option of the said Council,*

- (ii) *to apply for the determination of a contravention levy, or in terms of section 15 for a departure, before a date specified in the instruction, being not more than 30 days after the date of instruction.”*

It is the City’s discretion to determine which of the three options to implement. The owner may dispute the option chosen by Council by following the process set out in LUPO.

### **5.5 Criteria for determining which option to use**

See annexure B.

### **5.6 Procedure**

The unlawful building work will usually be discovered by a Building Inspector on a routine visit or after having received a complaint about unauthorised building work. Such work may also be discovered by Property Inspectors whilst carrying out an inspection for a different purpose. In this instance, they will liaise with the Section Head or official with delegated power to deal with this issue and Inspectors in the Building Development section.

If unauthorised building work is discovered, the Building Inspector will issue a notice in terms of the National Building Regulations to cease work and/or to submit a building plan as the person will have built without an approved building plan or will be deviating from an approved building plan.

Should the person fail to submit building plans as required by the notice on or before the specified date, and/or fail to cease work, this is an offence in terms of the National Building Regulations and Building Standards Act and prosecution will take place in terms of that Act.

If the building plan is submitted after construction has commenced, the person who assesses the plan in order to determine compliance with land use issues must flag that there may be a zoning scheme contravention and refer the plan to the section head and must not automatically tell the person to apply for departures.

Once the building plan is sent to the Land use management section, the official with sub-delegated power must confirm that there is a contravention of the zoning scheme regulations. He or she must determine which option in terms of section 40 is applicable.

A notice must be served on the **owner** of the land setting out:

- The details of the property and the development rights set out in the zoning scheme applicable to the property.
- The nature and extent of the contravention
- The proposed option which officials wish to adopt in terms of section 40.
- The time period within which the action must be taken.
- The time period (usually 7 days) within which the owner may direct written representations to Council as (i) the existence, nature and extent of the contravention; (ii) why such option should not be implemented; (iii) whether there are any circumstances which warrant a different time period from that contemplated.
- In the event that the unauthorised building work is not completed, the owner must be instructed to cease the unauthorised building work.
- Once the period for representations has expired, after considering any representations made, a decision must be made as to which option to adopt and the period within which the action must be taken.

A second notice (being the instruction contemplated in section 40) must be served on the owner instructing him/her to implement the option decided upon within the time periods set out in the notice.

A requirement to demolish/ remove unauthorised work must be carried out within a maximum of 90 days of the date of the notice. An application for a departure must be received within 30 days of the date of instruction. An application for a

contravention levy must be made within 30 days of the date of the instruction.

The instruction must notify the owner of the right of appeal in terms of section 62 of the Municipal Systems Act, 2000 and must also point out the right of appeal contained in section 40(1)(c) and (d) to the Provincial sphere of government. Details of the appeal authority must be provided.

The instruction must inform the owner that if he or she fails to comply with the instruction and in the event that no appeal to the Provincial sphere of government is received, Council shall take all steps as may be necessary to rectify the situation and that, in terms of section 40(2), any amount spent by the local authority in terms of subsection (1) shall be recoverable by that local authority from the owner.

If the owner fails to comply with the instruction and fails to launch an appeal, Council will launch an application to demolish such work.

## **5.7 Rates flag**

In both cases of *unauthorised use and unauthorised building work*, a "rates flag" will be placed on the system, if possible. If the property is sold, a letter will be addressed to the conveyancer pointing out the unauthorised work, the consequences of the unauthorised work and the fact that the new owner will be prosecuted.

## **Exclusions**

*Complaints dealing with land use matters related to shebeens* will not be subject to this policy but will be dealt with in conjunction with Law Enforcement. *Complaints dealing with land use issues related to drug dealing* will not be dealt with in terms of this policy.

## **6. IMPLEMENTATION PLAN**

### **6.1. Outcomes**

It is envisaged that this policy will reduce the number of land use contraventions which take place within the City of Cape Town and thus contribute to the improving the living environment and amenity of the neighbourhood of the citizens of Cape Town.

Furthermore, it will assist in a uniform and effective approach to land use enforcement issues within the area of the City of Cape Town.

## **6.2. Critical success factors**

*It must be emphasised that the failure to appoint enforcement staff and enforcement co-ordinators will have a material impact on the success of this policy.*

Training of current staff.

## **7. PROCEDURE AND SANCTION FOR NON COMPLIANCE**

All staff are obliged to comply with this policy. Should they not comply the processes set in the disciplinary procedures will be followed. Offenders who fail to comply with the requirements of the policy will face civil or criminal litigation.

## **8. DATE OF DECISION (APPROVED)**

November 2008

## **9. DATE OF IMPLEMENTATION (ENFORCEMENT)**

9.1 This policy comes into effect on the date specified by the PEPCO.

9.2 This policy repeals the following enforcement policies from date of implementation of this policy:

9.2.1 Land Use contraventions: operational policy for South Peninsula Municipality.

9.2.2 Prosedurehandleiding vir die hantering van Grondgebruikoortredings: Oostenberg.

9.2.3 Operational Practice relating to land use enforcement: City of Cape Town

## **10 EVALUATION OF POLICY**

This policy will be reviewed within a maximum period of one year after the date of implementation.

## ANNEXURE A

### Land Use Contraventions

Category	Description	Time Frame	Remedy
A	<p>Where a contravention of the zoning scheme in the opinion of the Property Inspector or Enforcement Co-ordinator results in a danger to life on the property or danger to individual and/or adjoining neighbours or the public, has a materially adverse impact on the safety and welfare of the community concerned or results in an irreversible change to land, or has a substantial detrimental effect on the natural or built environment.</p> <p>A person has been warned not to commence operation of an unlawful land use activity and notwithstanding the warning, commences operation, thus showing a total disregard for the rule of law.</p>	Immediate cessation	<p>Notice to cease unlawful activity immediately.</p> <p>Urgent Court application to interdict the activity. Officials must immediately hand the matter over to the legal department with a detailed history of the matter.</p> <p>Urgent court interdict.</p> <p>Officials must approach the legal department on the day that the warning letter is sent.</p>
B	<p>Where a contravention of the zoning scheme in the opinion of the Property Inspector or Enforcement Co-ordinator causes an adverse impact to an individual neighbour and/or adjoining neighbours or the public or has an adverse impact on the amenity of an area or has an adverse impact on the natural and built environment or has an</p>	Maximum of 30 days	<p>Notice must be issued giving a person 30 days to cease operation.</p> <p>If person fails to cease within the time period set out in the notice, hand over to Legal Department for criminal prosecution.</p> <p>Council may approach the Court for an</p>

	adverse impact on the safety and welfare of the community. Examples would include but not be limited to noise, pollution, traffic, parking, access and other planning criteria			interdict to prohibit activity.
C	In cases of a school, crèche or old age institution, where the children, residents are unable to be relocated at 30 days notice and in cases where the activity is discovered after it has commenced.		Maximum of 60 days but can be extended for a further 30 days if owner agrees in writing to move on or before the date of expiry of the notice and the Enforcement Co-ordinator agrees. .i.e there is a maximum of 90 days to cease operation. The length of the period should coincide where possible, with the end of a term.	Issue notice giving time period to cease. Criminal prosecution on non compliance with notice. City retains the option of launching civil proceedings.
D	Land use contraventions which in the opinion of the Property Inspector or Enforcement Co-ordinator, do not fall into any of the categories set out above		Notice to cease within a maximum period of 30 days, can be extended to 60 days if owner agrees in writing to move on or before the date of expiry of the notice and the Enforcement Co-ordinator agrees i.e the total period given to cease operation may never exceed 60 days.	Issue notice giving time period to cease. Criminal prosecution on non compliance with notice City retains the option of launching civil proceedings.

**ANNEXURE B**

**Criteria for determining which option to use when implementing section 40 of LUPO**

Option	Description	Criteria for using this option
Rectify within a certain time period	The owner must remove or demolish the unauthorised work within the time period set by Council.	<p>The official with sub – delegated power conferred by the Director of Planning and Building Development is of the opinion that the unauthorised work constitutes a danger to life, has major adverse impacts on existing rights, has a materially adverse impact on a neighbour or neighbours, has a materially adverse impact on the streetscape or a materially adverse impact on the natural and built environment.</p> <p>Building occurs over Council infrastructure, on public open space, or in environmentally sensitive areas such as flood plains or is carried out to buildings which are older than 60 years without the permission of Heritage Western Cape.</p> <p>In cases where building work in contravention of the zoning scheme regulations is not complete, the owner continues building after being notified in writing to cease building operations. This provision will also apply in cases where the owner continues to building whilst Council is considering the options to impose as this conduct thus showing a complete disregard for the rule of law and for the rights of adjoining neighbours.</p>
Apply for a departure	The owner is required to apply for a building regulation departure which enables them to obtain approval for the unauthorised building work.	<p>This option should be used in cases which do not meet the criteria set out in the other options.</p> <p>Building operations must cease until such time as the departure is decided upon.</p> <p>Notice to indicate that the mere fact that the owner is instructed to apply for a departure does not mean that the decision making body of Council or Province will approve it.</p>

<p>Apply for a contravention levy</p>	<p>Council may instruct the owner to apply for the determination of a contravention levy. This means that the owner must pay a sum of money to Council. The amount is based on the nature and extent of the contravention. At present, such contraventions are assessed using the market value of the extent of the contravention and Council has delegated authority in terms of the circular from Province dated September 1993, to impose a contravention levy of up to R5 000.00 provided agreement is reached with the owner.</p> <p>Should Council wish to impose a higher amount, it must make a recommendation to Province. An owner is entitled to dispute the nature of the contravention and the amount required to be paid. The result of paying the contravention levy is that in terms of section 40(4)(c) the land is deemed to be zoned in accordance with its utilisation.</p> <p>Officials at Province have indicated that they are in the process of amending the delegation to permit municipalities to impose a higher amount.</p>	<p>There is always the danger that an owner who is building a commercial development will consider the contravention levy to be part of the cost of construction and this may have the effect of encouraging developers to contravene the zoning scheme and pay the levy rather than wait for the process of approval of departures.</p> <p>In order to prevent this, it is suggested that the imposition of the contravention levy be limited to cases where the unauthorised work does not exceed 50m<sup>2</sup>. At present, and in most cases, Province will impose the contravention levy.</p> <p>The official with sub-delegated power should consider using this option in cases, where the amount of unauthorised building work does not exceed 50m<sup>2</sup> and where there is no major impact on the surrounding property owners.</p> <p>The calculation should be based on the methodology used by Province.</p> <p>Contravention levy would be a minimum of R 5000.00.</p> <p>If the unauthorised building work exceeds 50m<sup>2</sup>, this option should not be used.</p> <p>All unauthorised building work must stop until such time as the contravention levy is paid.</p>
<p>Note: Council may approach the court for an interdict at any stage of the above proceedings.</p>		