

**City of Moreton Bay**

# **Alteration of Public Land Local Law 2023**

**Explanatory Notes**

2023 | Version 1.0



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# Short title

This Local Law may be cited as the *Alteration of Public Land Local Law 2023*.

## What is this Local Law trying to achieve and why?

Public land, ranging from parks to local government offices, is spread throughout the Moreton Bay City. Public land plays a key role in ensuring the City is not only functional, but also desirable. Naturally, the City of Moreton Bay ('**Council**') wants to preserve the fitness for use and amenity of public land for generations to come. Without careful regulation, alterations to public land have the potential to diminish that fitness for use and amenity.

The following examples highlight some potential negative impacts if this issue is not carefully regulated:

- construction material stored on a narrow footpath near a busy road, intended to be used in a construction site on nearby land, blocks that footpath and forces pedestrians to pick a different route or otherwise risk moving too close to the road;
- once vibrant and healthy park plants are cut away, dug up or otherwise removed by passers-by leaving parks looking drab and devoid of natural beauty; and
- important public forest reserve access points are blocked with structures, or fenced off, by adjacent private landowners, depriving Council staff, researchers and members of the public from easily accessing and enjoying those reserves.

Council aims to create a modern Local Law that protects public land for the proper community use and enjoyment while at the same time allowing for and managing those alteration that are necessary.

## How will the Local Law achieve those aims?

Council aims to create a modern Local Law that is easy to read and navigate. As such, all matters relating to the alteration of public land and road are contained in this Local Law. It will also provide Council with sufficient discretion to tailor each approval to the needs of the community and applicants.

This Local Law achieves its purposes by:

- making it unlawful for a person to undertake an alteration of public land outside of certain circumstances;
- setting out clear enforcement mechanisms for Council to deal with people who breach this Local Law; and
- providing a framework for approving alterations of public land (an '**alteration approval**').

### (1) *Prohibition on undertaking an alteration of public land*

Outside of certain circumstances, it is unlawful for a person to undertake an alteration of public land. This is to allow Council to appropriately manage the risk to the fitness for use and amenity of public land posed by unregulated alterations.

The circumstances in which a person may lawfully undertake an alteration of public land are outlined in the commentary on section 9 below.

### (2) *Enforcement mechanisms*

This Local Law creates several offences in relation to unlawful alterations of public land and so, where one such offence is committed, Council may make use of the enforcement mechanisms of fining and prosecution generally available it.

This Local Law also allows Council to issue several different kinds of notices, in different circumstances, to address the risks posed by unlawful alterations of public land without going so far as to either issue a fine to or commence a prosecution against the offending person. This is to enable Council to seek compliance first by education, then by notice, then, as last resorts, by fine or prosecution. These types of notices are discussed in the commentary on sections 18, 19 and 20.

### (3) *Alteration approvals*

Under this Local Law a person may undertake an alteration of public land if the person has an approval granted under this Local Law. A straightforward application, information request and decision-making process is established in part 3 of this Local Law and discussed in commentary on that part below.



## Who did Council seek feedback from in forming this law?

In March 2021, Council sought feedback from the community to identify key issues with the Local Law regulating alterations to public land and invited recommendations on how those issues could be addressed. This consultation took the form of a public survey, as well as invitations to relevant peak body organisations and state departments.<sup>1</sup> The feedback received by Council was considered in developing this Local Law.

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<sup>1</sup> Australian Pipeline Limited, Dial before you dig, Board of Professional Engineers Queensland, Bribie Island Chamber of Commerce, BWP Caboolture, BWP North Lakes, Chamber of Commerce and Industry, Redcliffe Peninsula Council of Mayors (SEQ), Department of Energy and Public Works, Department of Local Government, Racing and Multicultural Affairs, Energex, Food and Agribusiness Network, Local Government Association of Queensland Ltd, Master Builders Queensland, Master Plumbers' Association of Queensland, Moreton Bay Business Association, Moreton Bay Region Industry & Tourism, Moreton Maritime Alliance, NBN Co, Office of Liquor and Gaming Regulation, Optus, Pine Rivers Chamber of Commerce, Property Council of Australia, Queensland Building and Construction Commission, Queensland Department of Education, Queensland Small Business Commissioner, Queensland Tourism Industry Council, Redcliffe Peninsula Chamber of Commerce, Regional Development Australia, Residential Tenancies Authority, Safe Work Australia, Samford and Districts Chamber of Commerce, Telstra, The Hills & Districts Chamber of Commerce Inc, TPG, Traffic Management Association of Australia, Unitywater, University of Sunshine Coast, Urban Development Institute of Australia, Urban Development Institute of Australia - Queensland - Moreton Bay Branch.

# Plain English explanations of each section of the Local Law

Note: The relevant sections of *Local Law No. 1 (Administration) 2011* and the *Subordinate Local Law No.1 (Administration) 2011* will be referred to throughout this section as 'the **2011 Local Law**' and 'the **2011 Subordinate Local Law**', respectively.

## Part 1 - Preliminary

### Division 1 - Introductory provisions

#### Section 1 - Short title

This section establishes the short title of this Local Law.

### Division 2 - Object and achievement of Local Law

#### Section 2 - Object

This section sets the broad context and scope for each provision within the Local Law. The content of these provisions must be consistent with the object of this Local Law, which seeks to balance the desire to protect the fitness for use and amenity of public land, environment, public health and safety, properties near public land and the infrastructure of the Council and the State government with the need to ensure the public land can be altered in an orderly way in line with community expectations.

The concepts of fitness for use and amenity in the context of this section are explained below.

**Fitness for use**, as a concept in this Local Law, relates to the ability for public land to be used in the ordinary way the community expects it to be.

*For example, a public park is fit for use as a place for children to play.*

So, the fitness for use of public land is diminished where it becomes dangerous or inconvenient for the community to use land in the ways they ordinarily expect to be able to.

*For example, a park becomes less fit for use if it is used as storage for large volumes of construction material for weeks at a time. In this example, the fitness for use of the park is diminished because it becomes dangerous and inconvenient for the community to use the park as, among other things, a place where children can play for fear of their injury on some construction material stored there.*

**Amenity**, as a concept in this Local Law, relates to the aesthetic desirability of public land in relation to its purpose.

*For example, a public nature walk has high amenity if it is in a state of relatively undisturbed natural beauty.*

So, the amenity of public land is diminished where it becomes less aesthetically desirable in relation to its purpose.

*For example, if flowering vegetation is taken from a public nature walk then it becomes less aesthetically desirable because its natural beauty is disturbed.*

The remaining concepts in this section take on their ordinary meaning.



### Section 3 - How object of Local Law is to be achieved

This section sets out how the object of the Local Law will be achieved. This is by:

- establishing the concept of undertaking an alteration of public land;
- prohibiting the alteration of public land, except in certain circumstances;
- providing mechanisms for enforcement where there is non-compliance with conditions of an approval or provisions of this Local Law; and
- establishing a framework to grant approvals for the alteration of public land and for general approvals.

### Division 3 - Interpretation

#### Section 4 - Definitions

This section provides that all relevant words are defined in the dictionary Schedule.

#### Section 5 - Alteration

This section defines the key concept of '**alteration**'. Alteration is defined, non-exhaustively, to include two broad categories of matters.

The first category, which is captured in subsections (a) to (d), relates to alterations of the direct physical characteristics of public land. This category covers the taking of material from, leaving of material on and lighting of fires on public land.

*For example, this category includes leaving construction material on, digging a hole in, cutting down, damaging or poisoning a tree or plant on or lighting a fire in a park.*

The second category, which is captured in subsection (e), relates to alterations of the indirect physical characteristics public land. This is intended to capture circumstances where an activity is carried out over public land, does not directly alter the physical characteristics of the land yet nonetheless is of such a nature that it indirectly interferes with its ordinary use and enjoyment.

Alteration is defined broadly in this Local Law and is intended to cover the field of the types of matters which may, if not properly regulated, diminish the fitness for use and amenity of public land.

This key concept is intended to capture and regulate:

- the prescribed activities of 'alteration or improvement to local government-controlled areas and roads' and 'carrying out works on a road or interfering with a road or its operation' once regulated under the 2011 Local Law; and
- various prohibited and restricted activities once regulated under *Moreton Bay Regional Council Local Law No. 4 (Local Government Controlled Areas and Roads) 2011* to the extent that those activities are alterations to public land.

#### Section 6 - Public land

This section defines the key concept of '**public land**'. Public land is defined broadly to include any land, water or fixture controlled by Council. This is necessary to capture any Council controlled area within the City of Moreton Bay where there is an intended use and level of amenity which ought to be protected against certain types of alteration. Public land includes all roads, as that term is defined.

### Division 4 - Operation of this Local Law

#### Section 7 - Relationship with other Acts

This section clarifies that this Local Law is intended to be consistent with and in addition to those laws regulating the use or development of land (e.g., the *Planning Act 2016*) and ongoing management of alterations of public land (e.g., *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*).

Nothing in this Local Law is intended to establish an alternative development process and any obligation or requirement imposed by or under this Local Law does not involve an assessment of development. To the extent that any alteration of public land constitutes development as that term is defined in the *Planning Act 2016*, that alteration ought to be assessed pursuant to the development process in that Act. This Local Law should not be relied on to regulate any activity dealt with, or that could have been dealt with, under a development approval or an existing land use right. However, this Local Law can regulate matters relating to alterations of public land to the extent that it is not a matter that can be regulated under the *Planning Act 2016*.

*For example, reinstatement of public land and road following the end of an alteration of public land that is development.*

Nothing in this Local Law is intended to impact on the water infrastructure work undertaken by a distributor-retailer (i.e., Unitywater) under the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*.

## Part 2 - Offences and enforcement

### Division 1 - What this part is about

#### Section 8 - Overview

This part outlines:

- offences relating to this Local Law;
- the enforcement mechanisms that can be utilised by the local government;
- offence proceedings in the Magistrates Court; and
- defences for offences against this Local Law.

### Division 2 - Offences

#### ***Subdivision 1 - Offence in relation to the undertaking of an alteration of public land***

#### **Section 9 - Offence to undertake an alteration of public land**

This section provides for the central offence under this Local Law, namely the offence of undertaking an alteration of public land outside of the allowed circumstances. The allowed circumstances for undertaking an alteration of public land are outlined in subsections (1)(a) to (1)(h), as follows:

- (a) a person does not commit this offence if they mow or otherwise maintain the grass on the road verge at the front of their property. The grass verge forms part of the road and is captured by the definition of **'road'** in this Local Law;
- (b) a person does not commit this offence where they undertake an alteration of public land which is necessary to lessen or prevent an urgent and serious risk to personal or public health and safety. This subsection is an acknowledgement of the clear public benefit in allowing people to undertake alterations necessary to lessen or prevent such risks;
- (c) a person does not commit this offence where they undertake an alteration of public land which is necessary to lessen or prevent an urgent and serious risk to environmental harm or property damage. *For example, an alteration captured by these subsections would include stacking sandbags on the road verge during a flood to reduce the risk of flood damage to nearby properties.* Like paragraph (b)



above, this subsection also acknowledges the clear public benefit in allowing people to undertake alterations necessary to lessen or prevent certain risks;

- (d) a person does not commit an offence where they undertake an alteration of public land which they are allowed to do so by some other law (including another Local Law). This is to avoid inconsistency and duplication between regulatory schemes;

*For example, an alteration undertaken by:*

- a utilities provider, where they are entitled to do so under an enabling law;
- a person under a development approval or in accordance with an existing historic land use right; and
- a person under an approval granted under another Local Law.

- (e) a person does not commit this offence where they undertake an alteration of public land as an employee, agent, contractor or volunteer of Council and are acting within the course of their duties in one of those capacities. For example, a Council worker mowing a park. This allows Council to carry out alterations of public land to maintain or increase their fitness for use and amenity;

- (f) a person does not commit this offence where they undertake an alteration of public land in accordance with a contract with Council. *For example, a local artist displaying, for several weeks, a large sculpture at the entrance of Council library in accordance with the terms of a contract between them and Council which allows them to do so.* This allows people to undertake an alteration of public land under a contract where Council has, through that contract, said they may do so;

- (g) a person does not commit this offence where they undertake an alteration of public land in accordance with an alteration approval under this Local Law. *For example, a researcher taking plants from a creek for study where they have been granted an alteration approval allowing them to do so.* This subsection enables the application and approval process in part 3 of this Local Law; and

- (h) a person does not commit this offence where they undertake an alteration of public land that is an “accepted alteration”. The term ‘**accepted alteration**’ is defined in the dictionary Schedule, and includes two categories of alterations. Firstly, it includes alterations listed as accepted alterations on a prescribed form under this Local Law. This provides Council with a flexible way of allowing a broad variety of variations to respond to emergent circumstances. Secondly, it includes an alteration undertaken for a matter regulated under another Local Law but for which an approval is not required. This avoids a situation where some matter ostensibly allowed under another Local Law is potentially, in effect, made unlawful by this Local Law.

*For example, if, under the Signs Local Law 2023, a person may lawfully display a certain type of sign on public land without needing to hold an approval, to the extent the display of that sign is the undertaking of an alteration of public land, it will also be lawful under this Local Law because it would be an accepted alteration.*

The maximum penalty for this offence is 50 penalty units. However, in certain circumstances a court may make an order for restitution or compensation in addition to any other amount for which an offender is liable.

The effect of subsections (2) and (3) is that, despite subsection (1), where an alteration is an offence under a Local Government Act (as defined), then the relevant Act will regulate the alteration instead of this Local Law. The example provided in subsection (3) is section 75 of the *Local Government Act 2009*. Under that section it is an offence for a person to carry out works on a road or interfere with a road or its operation without written approval from Council. Although carrying out works on or interfering with a road constitutes an ‘alteration’ under the Local Law and the process for obtaining an approval is set out in this Local Law (as a general approval - see section 29), the offence of undertaking the work without approval is an offence against section 75 of the *Local Government Act 2009*, not section 9 of this Local Law. Subsections (2) and (3) reflect section 6(1)(b) of the 2011 Local Law.

## **Subdivision 2 - Other offences**

## **Section 10 - Providing false or misleading information**

This section makes it an offence for a person to give information that they reasonably know or ought to have known is false or misleading in relation to this Local Law. This aims to ensure the community is aware of their obligations to provide correct and truthful information to Council and to deter the community from providing false or misleading information, through penalties. False or misleading information could result in Council making a decision that is not consistent with the object of this Local Law, or community expectations.

## **Section 11 - Threatening an authorised person**

This section retains the offence in section 21 of the 2011 Local Law, which makes it an offence to threaten, insult or use abusive language to an authorised person. The intention of this provision is to protect the safety of authorised persons and enable them to perform their roles and responsibilities under the Local Law in a safe and effective manner. If a person commits an offence under this section, an authorised person can issue them with a penalty infringement notice. Given the seriousness of this offence, the maximum penalty has been increased from 20 penalty units to 50 penalty units.

## **Section 12 - Failure to comply with conditions of approval**

Section 12(1) makes it an offence if a person fails to comply with their approval, including the conditions provided for in their approval. The power to impose conditions (see sections 34 and 37) enables Council to ensure the alteration or other activity approved is undertaken in a manner that aligns with the object of this Local Law (or for a general approval, the requirements and criteria specified in the relevant Local Government Act). This section aims to ensure that any risks posed by an alteration are minimised and deter those undertaking the alteration from ignoring the conditions imposed on their alteration approvals by imposing penalties for non-compliance.

However, under subsection (2), there is no offence against section 12 if the approval is a general approval (see section 29) and the Local Government Act which allows Council to grant the approval under this Local Law has an offence of failing to comply with the conditions of the approval. In that case, if a person does not comply with the approval, the offence is against the relevant section of the Local Government Act. The example provided in section 12 (2) is section 75(5) of the *Local Government Act 2009*. Under section 75(2) of that Act, it is an offence for a person to carry out works on a road or interfere with a road or its operation without written approval from Council. The process for obtaining that approval is set out in this Local Law (see section 29). Section 75(5) of that Act provides that a person must not contravene a condition that applies to a person under an approval granted by Council. As such the offence of not complying with the approval is an offence against section 75(5) of that Act, not section 12 of this Local Law. Subsection (2) reflects section 11(2) of the 2011 Local Law.

## **Section 13 - Attempts to commit offences**

This section provides that a person who attempts to commit an offence under this Local Law commits an offence. This means that even if a person unsuccessfully attempts to commit an offence, the person has committed the offence of attempting to commit an offence. The 'attempt' offence is not intended to operate, or be capable of operating, in respect of all offences. The offence of 'attempt' will only apply to those offences where it is possible to attempt the offence. In other words, an 'attempt' cannot reasonably and sensibly apply to that which is not capable of being attempted. To illustrate, to avoid doing something is not attempting not to do the thing; it simply is not doing the thing.

An attempt to commit an offence will most likely be capable of occurring, and being identified, where the offence involves:

- the doing of a positive act;
- the person taking steps with the intention to perform or otherwise carry out the positive act (and whether or not they are all the steps necessary to carry out the offending act); or
- an intervening event (not being an act necessary to perform the positive act) such that the person does not do the offending positive act.

The maximum penalties which apply to the offence of attempt under this section depend on and will be half the penalty that applies to the offence attempted.

## **Section 14 - Joint and several liability**

This section retains section 32 of the 2011 Local Law. This section provides that where this Local Law imposes responsibility on multiple people that are either engaged in the activity or joint owners/occupiers of a place, each person can be held liable, with or separate from the other.

*For example, if two neighbours built a shared chicken coop on public land adjoining their properties in contravention of section 9 of this Local Law, both would be liable for doing so.*

The aim of this section is to ensure any and all responsible parties can be held accountable via compliance and enforcement mechanisms under this Local Law.

## **Section 15 - Liability of third parties**

This section provides that a person involved in a contravention of the Local Law (for example, by aiding a contravention) also commits an offence.

## **Section 16 - Liability of encroaching alterations**

This section provides that where an alteration of public land is undertaken in contravention of this Local Law and that alteration, when viewed as a whole, is present on several parcels of land, the person who undertook the alteration, any owner and any occupier of land over which the alteration is present are each liable the contravention.

*For example, where a shed is constructed over the boundary of private land and public land in contravention of this Local Law, even if the owner of the private land did not build the shed then they will be liable for the contravention.*

The aim of this section is to reflect that owners and occupiers of land are, generally, liable for what occurs on their land (subject to the defences in this Local Law). Council is excluded from liability under this section. The defence in section 27 is relevant to section 16.

## **Division 3 – Powers of the local government**

### **Section 17 - Appointment of authorised persons**

This section establishes an additional requirement for how certain qualified persons are to be appointed as authorised persons under this Local Law. Under section 202 of the *Local Government Act 2009*, Council's CEO may appoint certain qualified persons to be authorised persons for specific Local Laws.

*For example, a Council employee who is a qualified person may be appointed as an authorised person for this Local Law.*

Section 17 provides that the document that appointed an authorised person must state this Local Law, or the provisions of this Local Law, for which the person is appointed as an authorised person. This ensures that appropriately qualified persons are authorised to take certain actions under the Local Law and that the extent and limitations of an authorised person's powers are documented, transparent and well defined.

### **Section 18 - Directions generally**

This section provides that an authorised person may give an oral compliance direction to a person contravening this Local Law. The direction may require a person to cease any conduct or activity which contravenes this Local Law or take other such action so the person does not contravene this Local Law. It is an offence for a person to not comply with such a direction.

### **Section 19 - Compliance notice for contravention of this Local Law**

This section retains in part section 26 of the 2011 Local Law and applies if a person contravenes this Local Law. An authorised person may give the person who contravenes this Local Law or who is involved in the contravention, a compliance notice. A contravention of this Local Law includes a contravention of any approval condition. A compliance notice must contain those matters stated in subsection (4), including the timeframe to

remedy the breach and the consequences of failing to do so. It is an offence not to comply with a compliance notice.

An authorised person may 'give' a compliance notice by delivering it to the person personally, or by leaving it at, or sending it to the person's place of residence or business. See section 39 of the *Acts Interpretation Act 1954*.

The purpose of this section is to enable an authorised person to give a person responsible an opportunity to stop or remedy a breach of this Local Law (including an approval condition), if appropriate to do so.

*For example, where a person has unlawfully fenced off a part of a public park adjoining their land, an authorised person may give that person a compliance notice to afford them an opportunity to remove the part of the fencing on public land to remedy the contravention and avoid the need for any further enforcement action.*

Compliance notices allow Council to work with the person to ensure activities within our community are being undertaken in a lawful manner. This aligns with Council's general enforcement approach, emphasising educating the community first, and escalating to stricter methods of enforcement as required. Non-compliance with a notice may result in Council amending, suspending or cancelling an approval, or issuing fines or commencing legal proceedings.

When an authorised person makes a decision to issue a compliance notice under this section, they must provide a notice of the decision to the applicant. This means the person given the compliance notice may apply to review the giving of the notice under section 44. The requirements for a decision notice are set out in the definition of '**decision notice**' in the dictionary Schedule of this Local Law.

## **Section 20 - Stop notice**

This section allows an authorised person to issue a stop notice to a person, requiring that person to immediately stop an activity that the authorised person reasonably believes to be a breach of this Local Law, where the authorised person reasonably believes the breach poses a certain kind of risk, obstruction or threat.

The intention of this provision is to act as an interim measure to immediately stop a person from carrying out an activity in breach of this Local Law, giving Council the opportunity to attend to the matter giving rise to the issuing of the stop notice.

If an authorised person wishes to put an immediate stop to a person's activity that is in a breach of the Local Law, it may be more appropriate for them to give the person an oral direction under section 18 or issue a compliance notice requiring the person to cease the offending activity immediately.

It is an offence not to comply with a stop notice issued under this section, which may trigger other enforcement measures.

This section does not apply to a distributor-retailer (i.e., Unitywater). Water infrastructure work undertaken by a distributor-retailer on public land is regulated by the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*.

## **Section 21 - Remediation notice for certain alterations**

This section allows Council to issue a notice requiring remediation work, even in circumstances where the alteration of public land is allowed under this Local Law. This power is intended to allow Council to require a person to bring public land back up to the standard it was before the alteration was undertaken (see subsection (1)) or to require a person to make sure the public land is safe after the alteration is made.

*For example:*

- *A remediation notice may be issued to a utilities provider who has lawfully undertaken an alteration of public land, but where the alteration leaves public land in a poorer state than it was before the alteration took place.*
- *A remediation notice may be issued to a person who has lawfully undertaken an alteration of public land under an alteration approval, but where the alteration has become unsafe*

*due to poor weather.*

Without this section, in those circumstances, Council would be left to use public funds to remediate the effects of the alteration.

This section does not apply to a distributor-retailer (i.e. Unitywater). Water infrastructure work undertaken by a distributor-retailer on public land is regulated by the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009*.

## **Section 22 - Local government power to take action required under a notice to act**

This section provides that, where a person has been given a notice under this Local Law which requires them to take some action by a certain time (a **'notice to act'**), and they have not done so by that time, Council may take whatever action was required to be done. Council may recover the cost for this from the person who was required to take the action under the notice after providing them with a notice of the amount of the debt.

This section makes it so that, if the process of education and voluntary compliance for a contravention made possible by the various notice provisions of this Local Law fails, Council is able to step in to remedy the contravention. In such a case, Council will ordinarily incur some expense. This provision empowers Council to recover the expenses it properly and reasonably incurs in remedying a contravention from the person responsible for the contravention rather than that cost being borne by the community.

## **Section 23 – Local government power to seize and cost recover**

This section expands on section 28 of the 2011 Local Law and provides for circumstances in which an authorised person may seize and impound an item brought onto or erected or installed in, on, across, under or over public land in a manner that contravenes the Local Law. This section gives an authorised person the power to seize the item in two circumstances:

- where immediate removal of the item is necessary in the interest of public health or safety, or to prevent environmental harm, property damage or loss of amenity; or
- where a compliance notice has been issued to the owner to remove the item and the owner has failed to do so. In this circumstance, Council will need to wait for the review period for the compliance notice to expire, before seizing the item.

Council has the power to recoup the cost of seizing and impounding an item under this section, as a debt from the person responsible for it being on public land.

The term **'item'** is defined in the dictionary Schedule of this Local Law.

## **Section 24 - Dealing with impounded items**

This section retains in part section 37 of the 2011 Local Law, which sets out:

- how a person can reclaim an impounded item;
- Council's powers to dispose of impounded items in certain circumstances; and
- how any proceeds from the sale or disposal of an impounded item must be dealt with.

A person can reclaim an impounded item by applying, providing proof of ownership of the item and paying the prescribed fee to Council. However, Council has powers to immediately dispose of items that are perishable or where the item is of negligible commercial value. This allows Council to immediately dispose of items where they will not reasonably keep (e.g., food), or where the commercial value is insignificant. Whether an item is perishable or of negligible commercial value will be determined by the reasonable opinion of the authorised officer. Items that are of negligible commercial value may include, for example, items that are dilapidated or damaged (e.g., fire or water damage) and cannot reasonably be reused or are not fit for re-use for public health reasons.

If an impounded item (other than an item that is perishable or of negligible commercial value) has not been reclaimed within 20 business days of the item being impounded, Council may:



- if in the reasonable opinion of the authorised person, the commercial value of the impounded item is so slight that it would not cover the reasonable cost of seizing, impounding and selling the impounded item, the item can be disposed of as the chief executive officer directs. The reasonable costs can be determined having regard to the costs associated with seizing, impounding and selling an item by auction, including an officer's time in facilitating this; or
- sell the item through a public auction. If the item does not sell at auction within a reasonable time, the item can be disposed of as the CEO directs (for example, by private sale, giving away the item or destroying the item).

In relation to the disposal of impounded items, Council's liability is limited. Council will only be liable under this section, where it is proved that Council has not acted in good faith or has been negligent.

This section aims to strike a balance between:

- Council's need to manage and responsibly maintain land and roads within the local government area (by seizing and impounding items);
- Council's desire to have transparent processes for managing seized and impounded items; and
- ensuring the owners of the items are not unreasonably deprived of their property and are given a reasonable opportunity to reclaim it before it is forfeited.

The term '*item*' is defined in the dictionary Schedule of this Local Law.

## **Division 4 - Offence proceedings in Magistrates Court**

### **Section 25 - Enforcement orders**

This section gives the Magistrates Court discretion to make an enforcement order requiring a person to take certain action within a specified period. The purpose of this section is to give the presiding Magistrate power to order a person to comply with a direction to secure compliance with this Local Law. This is particularly useful where a person has previously been given opportunities to comply by Council officers but has refused to do so.

*For example, where a person has not complied with a compliance notice requiring them to remove a pile of construction material they placed on public land in contravention of this Local Law by a certain time and they have not done so by the required time.*

This section also provides for further potential consequences that can be imposed by the court on the person if they fail to comply with the enforcement order.

## **Division 5 - Defences**

### **Section 26 - Defence of reasonable excuse**

This section retains section 30 of the 2011 Local Law. It provides a defence for a person charged with an offence against this Local Law, where they can prove they had a reasonable excuse for the contravention. This defence is typically used where extenuating circumstances or circumstances outside a person's control have caused the contravention of the Local Law.

*For example, it is a defence to any breach or non-compliance of any provision contained in this Local Law if a person was not criminally responsible in accordance with the Criminal Code Act 1899, Chapter 5.*

### **Section 27 - General defence to owners or occupiers of land**

This section retains a variation of the defence in section 31 of the 2011 Local Law by providing a defence for an owner or occupier of private land to prove that they did not have knowledge of an encroaching alteration on their land, and that they could not have reasonably prevented it.



Council recognises that in the circumstances contemplated by this section it is not reasonable or fair to hold the owner or occupier of a place responsible for an offence that occurs there.

The words '**land**', '**owner**', '**occupier**' and '**encroaching alteration**' are defined in the dictionary Schedule of this Local Law.

## **Part 3 - Alteration of public land approvals and general approvals**

### **Division 1 - What this part is about**

#### **Section 28 - Overview**

This section sets out the matters dealt with in part 3.

### **Division 2 – General approvals**

#### **Section 29 - General approvals**

This section retains the intention behind section 5(b) of the 2011 Local Law. It is designed to apply in circumstances where a Local Government Act authorises Council to grant an approval but does not make any provision about the process for Council to grant the approval (other than a provision that ties into this section of the Local Law). In those circumstances, the approval can be applied for by using the approval mechanism under part 3 of this Local Law. Part 4 (Review Process) will also apply. This section is intended to capture any other approvals that Council is authorised to make under a law but for which no approval process is provided.

*For example, section 75(2) of the Local Government Act 2009 allows for a local government to grant written approval to carry out works on a road or to interfere with a road or its operation. The provision does not provide a process for approving an application for this activity. Therefore, the approval process under this Local Law would be relied on as the process for approving the activity.*

The offence of undertaking an activity provided in State legislation without a current approval is covered by the relevant Act that provides for the approval. Similarly, any associated offences and any enforcement mechanisms are also covered by the relevant Act. The offences and enforcement provisions in this Local Law do not apply. See also the commentary for section 9(2) and (3) and section 12(2). Section 29 reflects section 5(b) of the 2011 Local Law.

### **Division 3 - Approvals**

#### **Subdivision 1 - Application process**

##### **Section 30 - Making an application**

This section partly retains section 8 of the 2011 Local Law with respect to the making of an application for an alteration approval (an '**alteration application**'), which sets out the way in which an application for approval needs to be made to Council and what it must be accompanied by. Under the 2011 Subordinate Local Law, Council imposed several application requirements, including mandating extensive documents and materials to accompany an application. In this Local Law, Council has aimed to achieve more flexibility, removing excessive application requirements so that only essential documents are required. The intention of this amendment is to ensure the community has a simple, straightforward application process to navigate. Section 30 also applies to applications for a general approval (refer to section 29).

#### **Subdivision 2 - Timeframes for deciding applications**

##### **Section 31 - Timeframe for deciding applications when no further information is needed**

This section sets out the timeframe within which Council must decide a properly made alteration application where no further information is required from the applicant. This timeframe may be extended where both parties agree.

Previously, Council did not have a set time within which it had to decide an alteration application. However, Council recognises that timeframes provide accountability and keep the decision-making process progressing for both parties.

### **Section 32 - Timeframe for deciding applications when further information is needed**

This section sets out the timeframe within which Council must decide a properly made alteration application where Council requires further information from the applicant to make a decision. Under this section, Council can make an information request to the applicant and the applicant must respond within the timeframe stated in the section.

Council then has further time to consider this information and make a decision. If the further information is not provided by the applicant within the timeframe, Council can still decide the alteration application. The purpose of this section is to allow the parties to request and provide further information necessary for Council to properly assess and decide the application.

### **Section 33 - Timeframe for dealing with applications that are not properly made**

This section applies where Council receives an alteration application that is not properly made. It requires Council to advise the applicant in writing that the application is not properly made. Following this, Council is not required to take any further action. The consequence of this section is that the applicant will, should they still seek an alteration approval, need to make a fresh alteration application under section 30. This provision is intended to ensure applications are being properly made and that Council is not required to assess and decide an application if there is insufficient information to do so.

## ***Subdivision 3 - Deciding an application***

### **Section 34 - Deciding an application**

This section requires Council to decide an application by either approving it, approving it subject to conditions or refusing it. If the application is for an alteration approval, Council can refuse the application if approving it would be inconsistent with the object of the Local Law. If the application is for a general approval, Council may refuse the application if approving it would be inconsistent with any requirements or criteria specified in the relevant Local Government Act which allows Council to give the approval, or approving the application would unreasonably impact any of those matters listed in subsection (3)(b)(i)-(vi). Subsection (3) reflects section 9(1)(f) of the 2011 Local Law. See section 37 regarding the conditions that may be imposed on an approval.

When Council makes a decision under this section, it must provide a notice of the decision to the applicant. This means the applicant may apply to review the decision under section 44. The requirements for a decision notice are set out in the definition of **'decision notice'** in the dictionary Schedule of this Local Law.

### **Section 35 - Effect of failure to decide application on time**

This section provides that if an application is not decided by Council in the timeframe specified in section 31 and section 32 of this Local Law, or such further period as agreed to by the applicant, the application is taken to be refused. This means that an applicant cannot undertake the proposed alteration or activity in the absence of Council's approval, even if the time in which the decision should have been made has passed. This ensures that alterations and other activities requiring an approval cannot go ahead unless Council has properly assessed an application. If a decision is taken to be refused because Council did not make a decision in time, the applicant will need to re-apply. Where an applicant reapplies for approval, the timeframes for deciding an application will re-commence.

### **Section 36 - Third-party certification**

This section retains section 12 of the 2011 Local Law, which gives Council the power to accept evidence from a qualified third-party that a particular application requirement is met. It also enables Council to specify (by Subordinate Local Law):

- individuals or organisations that are considered to be third-party certifiers; or
- particular qualifications that individuals or organisations must have to be considered third-party certifiers for application requirements under the Local Law.

The purpose of this section is to enable Council to rely on external expertise in assessing certain application requirements. This may assist Council's consideration of the application.

### **Section 37 - Permitted conditions**

Under section 34, Council may approve an application subject to conditions. Council may condition an approval to mitigate risks and to ensure an approval is undertaken in a manner consistent with the object of the Local Law. Section 37(1) provides that any condition imposed on an approval must relate to the object of this Local Law. This differs from the approach in the 2011 Subordinate Local Law No.1, which imposed onerous mandatory conditions for the various types of approvals it provided for. This approach was in-flexible, which made it difficult to achieve the best outcome for both the community and Council. This new section gives Council greater flexibility to impose tailored, purpose-based conditions.

*For example, Council may impose a condition on an approval that limits the time within which an alteration must be remediated after it is undertaken.*

However, if the approval is a general approval (see section 29), then subsection (2) applies. Under that subsection, the conditions must be consistent with the requirements or criteria specified in the relevant Local Government Act in relation to the approval or be reasonably necessary to ensure the activity does not unreasonably impact those matters listed in section 37(2)(ii).

*For example, an approval to carry out works on a road is a general approval, because Council is authorised to grant the approval under section 75 of the Local Government Act and does so through the approval process in part 3, division 3 of this Local Law.*

In that case, the conditions imposed must be consistent with any requirements of criteria specified in the Local Government Act in relation to the approval, not the object of this Local Law. Subsection (2) reflects section 10(2)(c) of the 2011 Local Law.

### **Section 38 - Term of approval**

This section specifies that an approval is valid for the term specified by Council in the approval. This section gives Council more flexibility to determine an appropriate length for an approval having regard to the object of the Local Law (for an alteration approval) and the nature of the activity approved.

*For example, if an alteration approval allows for construction material to be stored in a public park then that approval may be for a short term to avoid a noticeable loss of the fitness for use or amenity of that park.*

## **Subdivision 4 - Administering approvals**

### **Section 39 - Key definition for this subdivision**

This section defines a '**show cause notice**'.

### **Section 40 - Renewal and transfer of approval**

This section provides approval holders with the flexibility to renew or transfer their approval for the continuation of an alteration of, or activity on, public land. It also gives Council the ability to reconsider an approval to ensure it continues to be appropriate.

An application to renew or transfer must be submitted before the expiry of the existing approval (subsection (1)). If the approval holder is seeking to transfer the approval to another person, this person must be part of

the application process (subsection (3)). This is to ensure an approval is not transferred to another person without their knowledge or consent.

However, an approval holder cannot apply to renew or transfer their approval if Council has given the approval holder written notice that the approval is not renewable or transferable (subsections (4) and (5)). Written conditions of an approval or a decision notice will constitute written notice, such that if the conditions of an approval or a decision notice says that the approval is not renewable or transferable, then an approval holder cannot apply to renew or transfer the approval under this section.

Council must decide a renewal or transfer application by either approving it, approving it with amended conditions or refusing the application. Factors which Council may consider in deciding an application include the approval holder's history of compliance with approval conditions (where the application is a renewal application), the object of this Local Law (where the application relates to an alteration approval) and those matters mentioned in section 37(2) (where the application relates to a general approval). For renewal applications, Council has complete discretion to determine the term of renewal (if it decides to renew) (subsection (6)).

For renewal applications, existing approvals will remain in effect for different periods of time depending on the outcome of the renewal application. These timeframes preserve the applicant's right to seek review if Council refuses the renewal application.

When Council makes a decision under this section, it must provide a notice of the decision to the applicant. This means the applicant may apply to review the decision under section 44. The requirements for a decision notice are set out in the definition of '**decision notice**' in the dictionary Schedule of this Local Law.

### **Section 41 - Approval holder may apply to amend conditions**

This section retains section 16 of the 2011 Local Law. It allows an alteration approval holder to apply to Council to amend the conditions of an approval. This section recognises that circumstances may change and allows Council the flexibility to amend approval conditions to respond to those changes and enable the holder of an approval to continue with an alteration or activity.

Council must decide an amendment application by either granting or refusing the application, having regard to the object of this Local Law (where the application relates to an alteration approval), those matters mentioned in section 37(2) (where the application relates to a general approval) and the approval holder's history of compliance with approval conditions. When Council makes a decision under this section, it must provide a notice of the decision to the applicant. This means the applicant may apply to review the decision under section 44. The requirements for a decision notice are set out in the definition of '**decision notice**' in the dictionary Schedule of this Local Law. Where an amendment is made at the request of the approval holder, Council can amend the approval without having to follow the process in section 42.

### **Section 42 - Local Government may amend, suspend or cancel approval**

This section allows Council to amend, suspend or cancel an approval in certain limited circumstances. This includes, for example, for the protection of public health and safety, or where the approval holder has failed to comply with the approval.

Before making a decision, Council must provide the approval holder with a show cause notice. This gives the approval holder an opportunity to explain in writing why Council should not amend, suspend or cancel the approval, as proposed.

*For example, the approval holder may have a reasonable excuse for not complying with a condition of an approval.*

An approval holder does not have to make a submission in response to the show cause notice and may waive their right to do so. An approval holder may choose to do this in circumstances where they consent or agree to the proposed action (for example, Council's proposal to amend conditions to mitigate risk of environmental harm) (see subsection (4)). In that case, Council does not need to wait for the time stated in the show cause notice to pass before it makes a decision under subsection (6).

Where a submission is made by the approval holder, Council must consider the submission and then decide whether a reason to amend, suspend or cancel the approval still exists. If a reason no longer exists, Council will not take further action, meaning the existing approval remains in effect. If a reason still exists, Council can take the action proposed in the show cause notice. However, if Council proposed to cancel the approval, it is open to Council to either amend, suspend or cancel the approval. This allows Council to consider the submissions made and determine whether amendment or temporary suspension of the approval would be more appropriate than a cancellation.

When Council makes a decision under this section, it must provide a notice of the decision to the approval holder. This means the approval holder may apply to review the decision under section 44. The requirements for a decision notice are set out in the definition of '**decision notice**' in the dictionary Schedule of this Local Law.

This section is not intended to restrict Council's power to amend, suspend or cancel an approval under other sections of the Local Law, such as through an immediate suspension under section 42 or a stop notice under section 19 (for approvals other than a general approval).

### **Section 43 - Procedure for immediate suspension of approval**

This section retains section 19 of the 2011 Local Law, which gives Council the power to immediately suspend an approval. Council recognises there are certain urgent circumstances which make it necessary for an approved alteration or activity to immediately cease.

*For example, where the continuation of the approved alteration poses an urgent and serious threat to public health and safety.*

While this may impact the approval holder, it is intended to be used only where there is an urgent and/or serious need. The suspension can only operate for a limited period of time, until the risk is minimised, or Council decides to either amend, suspend or cancel the alteration. As such, this provision is intended as a temporary measure while Council decides how to proceed with an approval.

Under this section Council is required to give the approval holder both a suspension notice and a show cause notice. The show cause notice invites the approval holder to make written submissions to Council, as to why Council should not proceed to permanently amend, suspend or cancel the approval. This gives the approval holder an opportunity to demonstrate why permanently amending, suspending or cancelling the approval would be unjust. Council may then decide to either amend, suspend or cancel the approval, or alternatively lift the suspension. If Council lifts the suspension, the existing alteration approval continues.

## **Part 4 - Reviewing decisions**

### **Section 44 - Application for review**

This section retains section 22 of the 2011 Local Law, which provides that a person who is given, or entitled to be given a decision notice may apply to Council for a review of a decision. This gives the person a right to have the following types of decisions reviewed internally by Council:

- decisions in relation to approvals (i.e., conditions imposed, refusals, etc);
- decisions in relation to changing approvals (refusal to renew, refusal to amend conditions upon request, Council decisions to amend, suspend or cancel an approval); and
- decisions to issue compliance notices or remediation notices.

A review application must be made within the period stated in subsection (2) and be accompanied by a statement of grounds on which the applicant seeks the review of the decision. It is important to state the grounds so that Council can properly assess the application and review the relevant decision.

This section allows Council to take a fresh look at its original decision to determine whether it was correct. Internal reviews also help Council ensure consistency in decision-making. If a person wishes to complain about any other issues that do not attract a formal review right under this Local Law, they may be do so through the



administrative actions complaints process, which Council must administer under the *Local Government Act 2009*.

### **Section 45 - Review decision**

This section retains section 23 of the 2011 Local Law, which sets out requirements for Council's review of a decision. Council is required to either confirm or amend the original decision or substitute another decision. It is a requirement that the review application cannot be handled by the same person who made the original decision or a less senior person, unless the original decision was made by the CEO. This is to ensure the objectivity, impartiality and fairness of the review decision.

### **Section 46 - Stay of operation of original decision**

This section retains in part, section 24 of the 2011 Local Law, providing that a review application does not stay the original decision. This means a person remains bound by the original decision unless and until the original decision is amended or substituted by another decision.

*For example, if Council refuses an application for an alteration approval and the applicant applies for a review of that decision, Council's refusal is still valid while the review process is underway, and the person is not allowed to undertake the alteration if it cannot otherwise be lawfully undertaken.*

## **Part 5 - Administrative provisions**

### **Section 47 - Fees**

This section retains section 35 of the 2011 Local Law. Chapter 4, part 2 of the *Local Government Act 2009* allows Council to set cost-recovery fees under a Local Law or by resolution of Council. A cost recovery fee can be, for example, a fee for an alteration application or a fee for seizing property under a Local Government Act (which includes a Local Law). Where the Local Law provides for payment of a fee but does not specify the amount payable, this amount will need to be decided by resolution of Council.

The purpose of this section and the provisions of the *Local Government Act 2009* are to ensure that Council is transparent and accountable to the community in charging fees under this Local Law. Cost recovery fees cannot be more than the cost to Council of taking the action for which the fee is charged.

Subsection (2) gives Council the flexibility to determine, by resolution, appropriate circumstances for the reimbursement of a fee. For example, where an approval is surrendered before the end of its duration, Council can resolve to give a partial reimbursement of the approval fee if considered appropriate. Under subsection (3) the local government may, where appropriate, waive or partially remit a fee, unless specific provision to the contrary is made in a Local Law or resolution.

### **Section 48 - Rewards**

This section retains section 33 of the 2011 Local Law and allows Council to offer a reward for information leading to conviction of a person for offences against this Local Law. This enables Council to, in appropriate circumstances, provide an incentive to the public, to provide information which can assist Council's enforcement of this Local Law.

*For example, if a large ditch is unlawfully dug in the footpath, and no public safety cameras recorded who was responsible for digging it, information about that matter may be sought and incentivised by reward.*

### **Section 49 - Subordinate Local Laws**

This section allows Council to make Subordinate Local Laws in relation to alteration of public land. The purpose of this section is to define the scope of what Council can regulate by Subordinate Local Law.

### **Section 50 - Extrinsic material**



This section enables Council to make an explanatory note (which includes this document), which can be used to assist in the interpretation of this Local Law. The explanatory note must be passed by a resolution of Council and published on Council's website. The effect of this provision is that, where the meaning of a section of the Local Law is unclear or debated, Council can refer to the explanation of that section in this Explanatory Note (or another Explanatory Note passed by Council resolution) to try and determine the meaning of the section. The information provided in the Explanatory Note should not be treated as an exhaustive statement on the subject, but rather a tool to inform of the operation and intent behind each provision.

### **Section 51 - Transitional provisions**

The transitional provisions for decisions made under the 2011 Local Law are all contained in the *Commercial Use of Public Land and Roads Local Law 2023 (CUPLR LL)*. The CUPLR LL repeals the 2011 Local Law and for this reason, the transitional provisions for decisions made under the 2011 Local Law, including decisions about carrying out works on a road or interfering with a road or its operation and altering or improving public land or road, are contained in the CUPLR LL, part 7. This section 51 simply directs to reader to the CUPLR LL for the transitional arrangements.

# Is this law consistent with fundamental legislative principles?

The Local Law is generally consistent with fundamental legislative principles.

# Is this law consistent with Human Rights?

The Local Law is generally compatible with the *Human Rights Act 2019*.

