



Policy Owner: Director City Strategy

Category: Operational

Direction: 3. Our Innovative City

1. STATEMENT OF INTENT

- 1.1 This Policy aims to provide consistency in enforcement action in matters of food safety, public health, environmental and development non-compliance and ensures natural justice principles are respected. The enforcement action taken will be dependent upon the circumstances in each case and consideration will be given to the various questions, as specified within Section 4.5 of this Policy.
- 1.2 Council's core values relating to responsive and responsible regulation, and fairness and equity also apply to any action taken in accordance with this Policy.
- 1.3 Council acknowledges that it has an obligation under s.8 of the *Local Government Act 1993* to ensure that the exercise of its regulatory powers is carried out consistently and without bias.

2. ELIGIBILITY

- 2.1 Implementation of this Policy applies to all City Strategy Division Staff, including the Rangers and Parking Services Department where authorized, to enforce local government, planning and environmental and other legislation in accordance with Council's *Delegations Manual* and implementation of Delegated Authority documentation.
- 2.2 Council Officers and contractors carrying out works must do so in accordance with the law and this Policy. It is recognised Council has limited authority to take certain legislative enforcement action against its own employees or contractors. In such instances those issues may be best handled under contractual terms and performance agreements or by the appropriate regulatory authority.
- 2.3 This Policy applies to all persons and companies who are carrying out, or may have carried out, unlawful activities or works within the North Sydney local government area.

3. DEFINITIONS

- 3.1 Unreasonable complainant conduct (UCC) - is any behaviour by a current or former complainant which, because of its nature or frequency raises substantial health, safety, resource or equity issues for Council staff, other service users and complainants or the complainant himself/herself. In accordance with Council's *Managing Unreasonable Complainant Conduct Policy* is grouped into five categories of conduct:
- a) Unreasonable persistence - is continued, incessant and unrelenting conduct by a complainant that has a disproportionate and unreasonable impact on Council staff, services, time and/or resources;
 - b) Unreasonable demands - are any demands (express or implied) that are made by a complainant that have a disproportionate and unreasonable impact on Council staff, services, time and/or resources;
 - c) Unreasonable lack of cooperation - is an unwillingness and/or inability by a complainant to cooperate with our organisation, staff, or complaints system and processes that result in a disproportionate and unreasonable use of Council services, time and/or resources;
 - d) Unreasonable arguments - include any arguments that are not based in reason or logic, that are incomprehensible, false or inflammatory, trivial or delirious and that disproportionately and unreasonably impact upon Council staff, services, time, and/or resources; and
 - e) Unreasonable behaviours - is conduct that is unreasonable in all circumstances, regardless of how stressed, angry or frustrated that a complainant is, because it unreasonably compromises the health, safety and security of Council staff, other service users or the complainant.
- 3.2 Unlawful activity - is any activity or work that has been or is being carried out:
- a) contrary to the terms or conditions of a development consent, approval, permission or license;
 - b) contrary to the *North Sydney Local Environmental Plan*, as amended, that regulates the activities or work that can be carried out on particular land;
 - c) contrary to a legislative provision regulating a particular activity or work;
 - d) without a development consent, approval, permission or license; and includes unauthorised works and uses; and
 - e) contrary to the laws of New South Wales in which Council is the regulatory authority.
- 3.3 Delegations Manual and/or Implementation of Delegated Authority - means the Delegations Manual adopted by Council from time to time and any Implementation of Delegations adopted by Council from time to time.

4. PROVISIONS

4.1 General Principles

- a) Proportionality - taking action that is reasonable and relates directly to the actual breach.
- b) Consistency - ensuring that similar issues are dealt with in the same way.
- c) Transparency - ensuring that Council's intentions and actions are easily understood.
- d) Customer Service - working with the business or individual to achieve compliance with the law by being approachable, courteous and efficient.
- e) Prioritising - making sure that resources are targeted primarily on those whose activities give rise to the most serious risk.

4.2 Responding to complaints of alleged unlawful activity - all complaints or notifications to Council relating to alleged unlawful activity should be acknowledged to the complainant within five working days and in accordance with Council's *Complaints Handling Policy*. Action should be instigated within the following time frames:

- a) Urgent and life-threatening matters should be actioned as soon as possible following receipt of the complaint. This means either on the day received or the day immediately following e.g. unsafe building works, collapsed buildings, surcharging drains, serious incidents where public health or the environment is at risk and unauthorised demolition of heritage items or contributory items;
- b) General compliance matters within five working days e.g. include, works not in accordance with consent or constructed without consent, illegal uses, noise affecting several persons, food complaints;
- c) Nuisance matters actioned within 10 working days e.g. domestic noise, minor non-compliances such as overgrown land or matters where there are no immediate adverse health or safety impacts; and
- d) Out of hours action requests are dealt with by the Rangers and Parking Services Department in the first instance, followed by a more formal investigation by the Environment and Building Compliance Department, if required e.g. out of hours works and noise matters.

All complainants should receive communication from the Council Officer handling the complaint within 21 days detailing the action taken by Council or the action that Council plans to take.

Timeframes may vary depending on staff and other resources. In such instances, complainant acknowledgement communications may include temporarily revised investigation times.

4.3 Investigating unlawful activity

4.3.1 All complaints and matters regarding unlawful activity will be investigated, unless:

- a) the matter has already been actioned and resolved;
- b) a private principal certifying authority (PCA) is responsible for monitoring compliance with the conditions of development consent;
- c) Council has no jurisdiction (e.g. NSW WorkCover issues on building sites or some internal matters within strata buildings etc);
- d) the activity is determined to be lawful without an investigation; or
- e) the complaint is vexatious in nature.

4.3.2 Council will investigate matters where:

- a) The PCA fails or is unable to appropriately action a matter or where it is in the public interest;
- b) The PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite that action;
- c) Where the complaint relates to Council property; and/or
- d) Where the complaint relates to an environmental pollution incident.

4.3.3 If a decision is made not to investigate a complaint, the decision must be recorded with clear reasons why it was not investigated. The complainant must then be notified.

4.4 Options for action in confirmed cases of unlawful activity - Council will consider a range of matters before taking regulatory action.

Regulatory action is any formal and informal action taken to prevent or rectify infringements of the legislation. The regulatory options will differ where different pieces of legislation are used, but the principles of application should remain constant.

Approaches to be considered without taking formal regulatory action include:

- a) Taking no action on the basis of no reliable evidence or other appropriate reason.
- b) Counselling the person who carried out an unlawful activity to educate them on the relevant requirements. Council acknowledges the role of educational initiatives to achieve compliance in some situations.
- c) Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address the issues of concern

arising from an investigation. For example, cease current unauthorised works and submit appropriate application for the remaining works to be completed.

- d) Referring parties for mediation with the Community Justice Centre or alternatively for mediation in accordance with Council's *Mediation Policy*.
- e) A letter requiring works to be carried out or works to cease in lieu of more formal action i.e. a Warning Notice and letter.

Such action may be all that is required in minor breaches where no serious impacts have occurred.

Whilst these approaches recognise that Council may use discretion in the process, Council is also obliged to uphold the law, including compliance with relevant administrative law principles e.g. acting fairly and equitably, and to act in the public interest.

Where appropriate, a staged approach may be taken. This is to ensure compliance will be adopted by giving businesses and individuals the opportunity to discuss and remedy the breach before action is taken, unless immediate action is required.

4.5 Enforcement Action - will be taken with a minimal tolerance approach. Enforcement action includes:

- a) Issuing of Directions, Notices and Orders requiring compliance with legislative requirements or those of an environmental planning instrument;
- b) Commencement of criminal proceedings for an offence under legislation or alternatively issuing Penalty Infringement Notice (PIN);
- c) Commencement of civil proceedings in a Court to either remedy or restrain unlawful activity.

However, before any enforcement action is taken, the action officer, management or the Council must acknowledge the circumstances in each case and consider the following questions:

- a) Could the unlawful activity be carried out lawfully if development consent or an exemption from development consent was sought? In these circumstances, Council will be less inclined to proceed with legal action especially if an owner actively and positively attempts to regularise the situation.
- b) Are the breaches technical or inconsequential in nature with no aggravating circumstances? Consideration will be given to the material implications that the breach might have on the interests of any party, as well as any detrimental affect on the amenity of the area or environment in general.

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- c) Could the non-compliance be easily remedied by some action on the part of the person responsible? In general Council will attempt to ensure compliance by informal means however there is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and at what cost.
 - d) Has the unlawful activity created a health, safety or environmental hazard? Consideration should be given to the degree of detriment or risk to the environment.
 - e) Are the unlawful activities or works carried out on a heritage item and did they adversely affect the heritage significance? In most cases, Council's Conservation Planner will be consulted in assessing the detriment to the natural or built environment and whether formal action is warranted.
 - f) Would it be in the public interest? Some of the issues that should be considered are: Has the unlawful activity affected a significant number of people; would enforcement action impact unreasonably on certain population groups, particularly disadvantaged or marginalised groups; are there any circumstances of hardship affecting both the complainant and the person or corporation subject to the complaint?
 - g) How long has the unlawful activity been occurring and is enforcement action statute barred? A time limit or existing use rights might apply that prevents Council from taking legal action.
 - h) Have previous warnings been issued? If the investigation reveals that a previous warning has been issued and the unlawful activity is not resolved, a more formal approach would be appropriate.
 - i) Has the person responsible been educated about Council policy and unlawful activity? (That is, did the person know their actions were unlawful?) When deciding whether to take an educative approach, consideration will be given to issues such as the level of contrition shown by the wrongdoer, whether they have previously been warned as a result of this or similar behaviour, and the level of intent shown.
 - j) Are the costs of enforcing likely to be prohibitive for the nature of the offence? Consideration should be given to the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action. Council's action should commensurate with the seriousness of the 'breach'.
 - k) Is the condition of development consent not being complied with, unreasonable, or ambiguous? A condition of consent that is unreasonable or ambiguous can be unenforceable.
 - l) Would a draft local environmental plan or amendment make the unlawful activity or work legal in future? If there is a draft LEP that would make the unauthorised use legal, consideration should be given to deferring any enforcement action.
 - m) Is there any doubt over the evidence or the offence? Consideration should be given to whether the collected evidence clearly identifies an actual breach. Council should not take untimely or unwarranted action.

- n) What are the chances of a success if challenged? Council should take into consideration what the likelihood is of a successful appeal or court challenge against the proposed enforcement action.
- o) Does the person or corporation exhibit contrition for an offence? In some cases it will be appropriate to have regard to the attitude of the offender and their willingness to prevent a recurrence of the problem.
- p) Has the person or company who carried out the unlawful activity had an opportunity to provide representations or submissions on the matters? Council should consider all elements pertaining to the circumstances of the case leading to the non-compliance.

If the process is being used as a delaying action or there has been a blatant attempt to flout the law, appropriate enforcement action will be instigated without delay.

If it is considered that enforcement action is required, it will be taken in accordance with existing procedures and legislative processes.

In taking enforcement action, Council must recognise that the statutory process also provides avenues for representation and appeal and thereby natural justice principles will still be observed.

- 4.6 Importance of Follow-up Action - Council staff will follow up matters reasonably required to be followed up to determine compliance. This includes conducting follow up inspections or re-inspections and resubmitting documents in Council's electronic document management system on expiry of compliance periods for warnings, Directions, Notices and Orders issued.
- 4.7 Building Certificate Applications under section 149D of the *Environmental Planning and Assessment Act 1979* - Council recognises that persons who may have carried out unlawful works may apply for a Building Certificate under section 149D of the Act to regularise or formalise such unlawful works. However, it is Council's policy that such applications should not be encouraged to justify unlawful works.
- 4.8 Community Education - Council will ensure adequate information is available to raise awareness and educate the community about compliance and enforcement. This may involve awareness programs and publication of information on Council's website.

5. RESPONSIBILITY/ACCOUNTABILITY

- 5.1 Council's Development Compliance Officers, Building Surveyors, Environmental Health and Protection Officers and Development Assessment Officers will ensure this Policy is implemented and associated procedures are followed and maintained.

- 5.2 Council's Rangers must ensure activities where they investigate and take enforcement action are in accordance with this Policy in areas of development compliance and environmental pollution matters.
- 5.3 Council's Manager People and Culture and Manager Environment and Building Compliance will ensure staff are provided with access to training to ensure this Policy is implemented.
- 5.4 Council's Manager Environment and Building Compliance will review this Policy every two years or as required by Council or senior management.
- 5.5 Council's Environment and Building Compliance Department will prepare educational information regarding this policy, in hard copy and electronic format for residents, developers and the like.

6. RELATED POLICIES/DOCUMENTS/LEGISLATION

The Policy should be read in conjunction with the following Council policies and documents:

- Complaints Handling Policy
- Customer Service Policy
- Delegations Manual
- Managing Unreasonable Complainant Conduct Policy
- Mediation Policy
- Planning and Development Services Division Procedures (Internal)

The Policy should be read in conjunction with the following documents/legislation:

- Local Government Act 1993
- Enforcement Guidelines for Councils, NSW Ombudsman (June 2002)
- Environmental Planning and Assessment Act 1979

Version	Date Approved	Approved by	Resolution No.	Review Date
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