

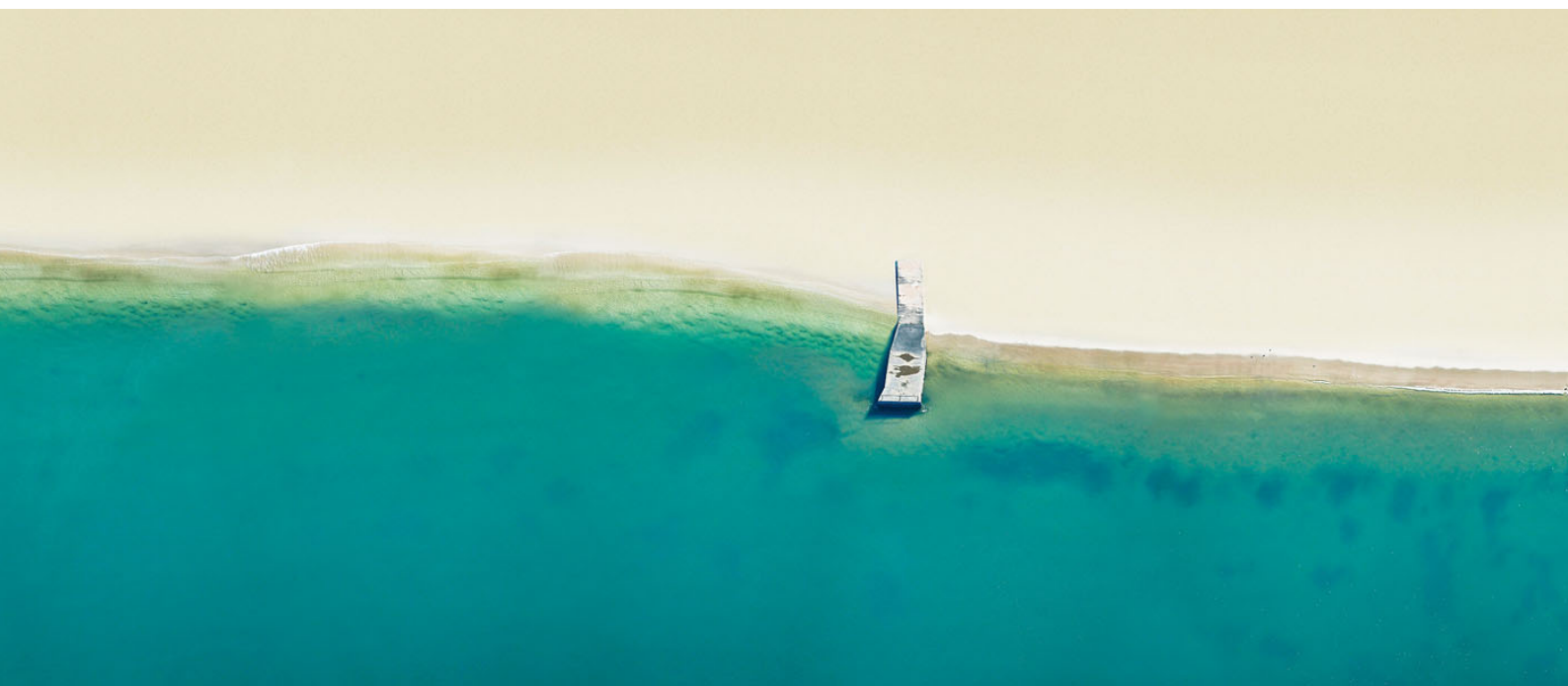


Bayside Council

Serving Our Community

Enforcement Policy

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Enforcement Policy

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Enforcement Policy

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1 Purpose of the Policy

The purpose of this policy is to assist Council staff to act promptly, consistently and effectively in response to allegations of unlawful activity. To ensure that:

- Council exercises its regulatory functions consistently and without bias, in accordance with its charter under section 8 of the *Local Government Act 1993*
- Council regulatory functions are exercised proactively
- Council responds promptly and effectively to allegations of unlawful activity
- The rules of procedural fairness are applied when making decisions that concern regulatory matters
- Enforcement action is proportionate to the offence in each case
- There is widespread understanding of the Council's approach to enforcement, including the circumstances which will be taken into account when assessing different enforcement options; and
- Council allocates its limited resources in the most appropriate manner consistent with the public interest, its policy objectives and current regulatory issues.

2 Policy Objectives

The aim of this Policy is to establish clear guidelines for the exercise of Council's powers in dealing with requests or complaints regarding unlawful activity. It provides practical guidance on:

- Council's responsibility with respect to actioning unlawful activities
- How Council staff are to assess complaints of unlawful activity to determine if they require further investigation
- Courses of action available to Council for dealing with unlawful activity
- How to decide whether enforcement action is warranted; and
- The process to be used in deciding which type of enforcement action is appropriate in the circumstances.

This policy is supported by a Procedures Manual to assist Council officers in implementing the Policy.

3 Introduction

Local Government is responsible for enforcing a variety of laws that are designed to protect public infrastructure, public health and safety and the environment.

This is an umbrella policy that outlines Council's broad approach to enforcement and provides a framework that promotes understanding of the manner in which enforcement activities are undertaken. The Policy is supported by detailed procedures that provide further guidance to staff.

Enforcement activities include:

- Patrolling streets and public places
- Inspecting premises either on a routine programmed basis or on a random basis; and
- Responding to enquiries and complaints.

However, as a statutory body, the Council cannot act in a particular situation unless it has been given the power to do so by an Act or a Regulation. In the exercise of Council's regulatory functions it is required to act in the public interest rather than the private interest of individual owners of land.

The policy applies to the investigation of suspected unlawful activity and the enforcement of confirmed cases of unlawful activity. While primarily directed at the regulation of development activity, this Policy is also applicable to the investigation and enforcement of other activities where Council has regulatory responsibility under NSW legislation, including but not limited to:

- Pollution control
- Inspection of premises
- Regulation of roads, footpaths and parking
- Control over keeping animals
- Regulation of public health and safety
- Regulation of food safety
- Regulation of fire safety; and
- Tree preservation.

4 Background

This Policy has been prepared in response to the *Promoting Better Practice Review* conducted by the Department of Local Government in 2007 and the need to codify Council's enforcement process and procedures.

5 Implementation

5.1 Staff and Contractors

All Council staff who deal with written and verbal complaints or action requests with respect to unlawful activity are responsible for implementing this Policy. Council consultants and contractors authorised to carry out functions on behalf of Council must also comply with this policy.

5.2 General Manager

The General Manager is responsible for ensuring compliance with this policy.

5.3 Councillors

Councillors have two distinct roles under the *Local Government Act 1993*:

- 1 As a member of the governing body of the Council and
- 2 As an elected person.

The councillors, as members of the governing body of the Council, have the responsibility to adopt and review this policy and monitor its compliance. In the role of an elected person, a Councillor is required to represent the interests of the community and provide leadership with respect to the implementation of this Policy. Council's Code of conduct sets the standard of conduct that is required of Councillors in the exercise of these roles. In particular with respect to any suspected unlawful activity, Councillors must not:

- Direct Council staff other than by giving appropriate direction to the General Manager in the performance of council's functions by way of Council or

committee resolution or by the Mayor or administrator exercising their power under section 226 of the *Local Government Act 1993*

- Direct or influence or attempt to direct or influence Council staff at any public or private forums
- Contact a member of Council staff on Council related business unless in accordance with the policy and procedures governing the interaction of councillors and Council staff that have been authorised by the Council and the General Manager; and
- Contact or issue instructions to any of council's contactors or tenderers, including council's legal advisers, unless by the Mayor or administrator exercising their power under section 226 of the *Local Government Act 1993*.

6 Key principles of Council's approach to Enforcement

Enforcement actions are taken within the context of both a legal and policy framework. Council staff will carry out their enforcement related work with regard to the following principles.

6.1 Proportionality

Council's enforcement action is in the overall public interest. This requires a proportional response. A proportionate response means that council's actions will be scaled to the seriousness of the breach. Council recognises that most individuals want to comply with the law and will assist compliance by being open and helpful, offering information advice and providing the chance to discuss compliance problems.

Attention will be focussed on those whose activities give rise to the most serious risks, or where potential hazards are least well controlled. Depending on the seriousness and persistence of the infringement, Council will minimise the costs to the person or body infringing the law by enforcing the minimum action necessary to secure future compliance. Prosecution will generally be used as a last resort, or for continuous serious offences.

6.2 Consistency

Council will take a similar approach in similar cases to achieve similar outcomes. While decisions on enforcement require the use of professional judgement and discretion to assess varying circumstances, officers will:

- Follow standard operating procedures wherever possible
- Ensure fair, equitable and non-discriminatory treatment; and
- Record any deviation from standard operating procedures and the reasons.

6.3 Transparency

Council will be open and transparent about the manner in which it undertakes enforcement activities and the laws it enforces. It will consult on and provide ready access to published standards and levels of service and performance that can be expected and be clear and open about what is expected from those on whom the law places a duty (duty holders).

In educating the community at large and dealing with duty holders, Council will make a clear distinction between what is legally required and what is desirable but not

compulsory. Staff will be open to discussing potential and actual compliance failures, before, during and after formal action has been taken.

When remedial action is needed Council will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on the process for seeking a review of, or how to appeal against that decision.

Where it is not practical to give notice, the reasons why will be recorded in accordance with Council's Records Management protocols.

Complainants will be advised of what action has been taken and why that action has been taken.

6.4 Fairness

Council officers are to act in good faith at all times and ensure that the principles of procedural fairness and natural justice are adhered to. This may include, but is not limited to:

- Providing information on the substance of the complaint to the alleged offender
- Providing an opportunity for a person whose interests may be affected by a decision to present their case to the Council officer. This may not be appropriate in all circumstances, such as cases where urgent/emergency action is required
- Considering any submission put forward by the affected persons.
- Making reasonable inquiries or investigations before making a decision.

6.5 Impartiality

Council officers are to make decisions based on credible evidence and in accordance with statutory obligations. Decisions must be free of bias or conflicts of interests in accordance with the Council's Code of Conduct.

6.6 Respect

Council officers are to treat other staff and the public with respect at all times.

6.7 Record Keeping

All notifications of unlawful activity, whether by telephone, email, letter or attendance at Council's offices, will be logged as a 'Service Request' in Council's electronic records system as soon as practical upon receipt.

Details of all instances of unlawful activity identified by officers in the course of their duties will also be logged as a Service Request.

Council officers responsible for the investigation of a matter will keep full and complete records of their actions within the relevant Service Request.

All decisions, including the reasons for all decisions made in relation to an investigation, will also be captured in, or linked to the relevant Service Request.

7 Definitions

Term	Meaning
Unlawful Activity	<p>Any activity or work that has been or is being carried out:</p> <ul style="list-style-type: none"> • Contrary to the terms and conditions of a development consent, approval, permit or licence; • Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land; • Contrary to a legislative provision regulating a particular activity or work; • Without a required development consent, approval, permit or licence; • Contrary to legislation in relation to which Council is the appropriate regulatory authority; • It includes any activity, place or structure which is a risk to public health and safety but excludes any parking or traffic offences, which are dealt with in accordance with the New South Wales Road Rules.
Procedural Fairness	<p>The procedures used by a decision-maker, rather than the actual outcome reached. It requires that a fair and proper procedure be used when making a decision. Specifically, the rules of procedural fairness require:</p> <ul style="list-style-type: none"> • A hearing appropriate to the circumstances; • Lack of bias; • Evidence to support a decision; and • Inquiry into matters in dispute.
Appropriate Regulatory Authority (ARA)	<p>Refers to the agency or body responsible for enforcing particular a regulation. In addition to councils, other regulatory authorities include:</p> <ul style="list-style-type: none"> • NSW and Commonwealth Courts and Tribunals • NSW Police Force • NSW Environment Protection Authority • NSW Department of Planning and Infrastructure • NSW Local Lands Board • NSW Fair Trading • NSW Food Authority • NSW Health • NSW Workcover Authority • NSW Transport • NSW Department of Primary Industries <p>Council is not the appropriate regulatory authority for all enforcement matters.</p>
Caution Guidelines	Means the latest version of the Caution Guidelines issued by the Attorney General under section 19A(3) of the <i>Fines Act 1996</i> .
Code of Conduct	Means the Code of Conduct adopted by Council and as amended from time to time
EPA Act	Means the <i>Environmental Planning & Assessment Act 1979</i>
Fines Act	Means the <i>Fines Act 1996</i>
LEC	Means the Land and Environment Court of New South Wales

LG Act	Means the <i>Local Government Act 1993</i>
Policy	Means the <i>Bayside Enforcement Policy</i>
Penalty Notice	Means penalty infringement notice and is sometimes referred to as an “on the spot fine.” Penalty notices may only be issued for offences prescribed by Regulation and the value of the fine is also set by the same Regulation.
POEO Act	Means the <i>Protection of the Environment Operations Act 1997</i>

8 Detection of Unlawful Activities

8.1 Means of Notification to Council

Council may become aware of suspected Unlawful Activity in a number of different ways, ranging from regular compliance monitoring activities by Council staff to the receipt of complaints from the general public.

Council acknowledges that information provided by the public is essential in the detection of unlawful activities in the local government area and welcomes any details regarding Unlawful Activities in the area.

Unlawful activities are also detected by Council officers in compliance roles undertaking such activities as patrols, environmental audits and site visits. However, Council officers who are not involved directly in compliance roles may also detect potential Unlawful Activities and report them to Council’s compliance section for investigation and action pursuant to this Policy.

When Council is appointed the Principal Certifying Authority for building works, Council staff are responsible for the identification of breaches of consent and unauthorised building works. Unauthorised building works can be actioned irrespective of whether Council performs a certifying role with respect to the particular development.

Regardless of the source of the complaint or the request for action, any information received in relation to a suspected Unlawful Activity will be referred to the Council’s compliance section to be investigated in accordance with this Policy to determine the most appropriate enforcement response.

8.2 Complaints

Complaints or customer service requests with respect to suspected Unlawful Activities may be submitted to Council either in writing or verbally to Council’s Customer Service Centre. In both cases, the allegation will be recorded in Council’s Service Request system and allocated a unique reference number before being referred to an officer to investigate.

Council staff may also lodge a Service Request as a result of detecting a suspected Unlawful Activity made in the course of carrying out their duties.

Recording each report of a suspected Unlawful Activity allows all decisions and the reasons for them to be tracked and reported on. It also enables repeat offenders to be identified and saves time on making unnecessary inquiries.

The name, address and contact details of the person submitting the complaint will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove any alleged offence and commence

enforcement action. Council will keep any complainants advised of the status of the investigation including any enforcement action taken or the reasons why no action was taken in the circumstances.

Council takes all reasonable measures to protect the privacy of the person making the complaint and, generally, information that identifies, or could be used to identify this person will not be released. However, Council may be required to disclose this information under the following circumstances, such as:

- Access to the information is permitted under legislation, including the *Government Information (Public Access) Act 2009* or the LG Act
- Access to the information is permitted under another Council policy
- Legal proceedings are commenced and the information is disclosed in evidence; and
- The nature of the allegation otherwise makes it a necessity.

It should be noted, that in some circumstances it may be possible to ascertain the identity of the complainant by the nature or type of allegation made by the complaint.

Council will not investigate anonymous complaints unless they relate to a serious and present risk to the public and there is sufficient information in the complaint to enable Council to conduct an investigation.

8.3 Response to Complaints

All complaints recorded on Council's Service Request system regarding suspected Unlawful Activities will be acknowledged within 5 business days by letter or email and a report, verbal or written, provided within 3 weeks on what action Council has taken or plans to take.

However, information on specific compliance and enforcement activities may not be released to members of the community or general public due to confidentiality and privacy restrictions under the relevant law, including the *Privacy and Personal Information Protection Act 1998*. Further, information that may jeopardise the investigation may be withheld until the investigation is complete.

9 Investigations relating to Unlawful Activities

9.1 Initial Evaluation

Not all complaints warrant further investigation by Council. However, all complaints will be subject to an Initial Evaluation to determine whether further investigation is warranted. Initial Evaluations require consideration of a range of factors, which include, but are not limited to:

- Is it a matter that falls under Council's jurisdiction or is it a matter that falls under private law (eg, trespass, nuisance etc) or is it the responsibility of another government organisation?
- Is the complaint premature? For example, does it relate to some unfinished aspect of works that are currently in progress?
- Does the activity or work require Council approval?
- Has approval been granted to carry out the work or activity complained of?
- Is Council able to determine if the activity or work is permissible without consent and or whether the conditions of consent are being complied based on the available information?

- Is there a history of trivial, frivolous or vexatious complaints made in relation to the matter?
- Has too much time elapsed since the event took place?
- Is Council the appropriate regulatory authority to deal with the matter?
- Is the activity having a significant detrimental effect on the environment or constitute a risk to public safety?
- Has the person or company complained of been the subject of previous complaints?
- Does the complaint relate to a matter that has special significance in terms of the Council's existing priorities?
- Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- Is it in the public interest to investigate the complaint?

The investigating officer will conduct a review of the available information, including reference to Council records. This may be followed by a site visit and/or discussions with the complainant and the person(s) the subject of the complaint before a determination is made as to whether the matter requires further action.

The Initial Evaluation may provide sufficient information to determine if an Unlawful Activity has taken place. Based on that the Initial Evaluation, the investigating officer will determine the appropriate level, if any, of further investigation or enforcement response required. These responses may include:

- That no further investigation or enforcement response is required; or
- That further investigation is required; or
- That an enforcement response is required without further investigation.

If a decision is made not to investigate a complaint or action a request, this decision must be recorded with the reasons for that decision and the complainant advised that no further action will be taken and the reasons why.

9.2 Investigation

The primary objective of an investigation is to obtain sufficient evidence to establish whether or not a contravention of law has occurred and to have this evidence available for potential enforcement action.

In doing so the investigator seeks to gather evidence:

- a Within a reasonable time and at a reasonable cost, according to legislative requirements and proportionate to the nature of the alleged Unlawful Activity;
- b That is admissible in civil proceedings or a criminal prosecution or other form of enforcement action; and
- c Which improves public confidence in the integrity of Council's regulatory system.

All investigations conducted by Council will be conducted in accordance with the Principles set out in this Policy. Evidence collected during the course of an investigation may take a number of forms:

- Field Notebook entries
- Photographs
- Videos
- Recorded observations
- Samples and physical evidence
- Witness statements

- Records of interview
- Documents (eg, contracts, receipts etc)

Evidence obtained during the course of an investigation is used to assist the investigating officer to determine the level of enforcement action, if any.

10 Responses to Unlawful Activity

10.1 Relevant Considerations

When an Unlawful Activity has been identified, the significance of the breach of the particular legislation resulting in the Unlawful Activity provides a guide as to the appropriate enforcement response. The following factors are relevant considerations in determining the significance of the Unlawful Activity:

- a the severity or seriousness of the Unlawful Activity, this includes:
- ***The degree of harm or potential harm resulting from the Unlawful Activity*** – the nature and extent of harm to human health or safety, the environment, or the economic or social fabric of the community.
 - ***The type of environmental harm resulting from the Unlawful Activity*** - whether temporary or long lasting.
 - ***The magnitude or degree of non-compliance*** – whether the non-compliance is trivial or a technical breach only.
 - ***Whether the Unlawful Activity occurred on public lands and has harmed the value of those lands to the community.***
 - ***The level of any unjust benefit to the alleged offender arising from the Unlawful Activity and whether the Unlawful Activity was motivated by financial gain.***

In cases where legislation stipulates a hierarchy of seriousness, the legislative hierarchy prevails over the above factors.

- b the public interest, including:
- ***The standard of the evidence collected during the investigation.***
 - ***The time that has elapsed since the alleged Unlawful Activity occurred.***
 - ***The cost to the general community of the Unlawful Activity and the cost of taking further action in response to the Unlawful Activity.***
 - ***The need to deter the offender and the broader community from committing further breaches of a similar nature in the future*** – whether the type of breach is prevalent.
 - ***Whether pursuing the Unlawful Activity would be of little or no utility*** - Is there an imminent change in the law or an environmental planning instrument which would make the Unlawful Activity lawful?
 - Would consent likely have been given if it was sought?
 - Can the breach be easily remedied?
- c **aggravating or mitigating factors** – this refers to the negative and positive circumstances surrounding the offender's commission of the offence, including:
- ***Whether the alleged offender committed the Unlawful Activity deliberately, recklessly or by mistake***
 - ***Whether there are any particular circumstances of hardship affecting the complainant or the alleged offender.***
 - ***The age, physical or mental health or special infirmity of the complainant or the alleged offender.***

- ***Whether the alleged offender has co-operated with Council during the investigation of the Unlawful Activity***
- ***Whether the alleged offender has shown contrition and a willingness to comply in the future.***
- ***Whether the alleged offender has a history of prior Unlawful Activity***, - if so, whether the Council has taken action or the alleged offender has received a previous warning or caution.
- ***Whether the Unlawful Activity is continuing*** – if the alleged offender has not ceased or abated the breach.

10.2 Irrelevant Considerations

Council's decision as to the appropriate enforcement response for an Unlawful Activity will not be influenced by the following:

- Race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or other person whose interests may be affected by a decision.
- The personal feelings of the investigating officers or individual Councillors concerning the alleged Unlawful Activity or the offender.
- The possible political advantage or disadvantage to the Council, government or any political party, group or individual.
- The possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or otherwise involved in its conduct.
- Possible media or community reaction to the decision.

10.3 Classification of the breach – low, medium, high

After the above factors have been considered, an alleged Unlawful Activity will be classified by the investigating officer as being of **low, medium or high significance**. This classification will guide the Council's choice of the appropriate enforcement action to be taken in the circumstances. In all cases, professional judgment will need to be exercised when making the classification.

The applicability of, and the weight to be given to, each of the factors outlined above to determine the significance of the Unlawful Activity will depend on the circumstances of each case. In the exercise of discretion, the investigating officer will make determinations on the level of significance with reference to:

- Published guidelines (For example, Planning NSW Practice Note on Exercising Discretion (August 2001))
- Internal Council policies;
- Peer review;
- Supervisor support; and
- Legal advice where appropriate.

The following table provides examples of the classification of particular Unlawful Activity having regard to the relevant considerations listed in this Policy. These are examples only and are not intended to be prescriptive.

10.4 Examples used to illustrate process of determining significance of unlawful activity

Significance of Unlawful Activity	Example of Unlawful Activity	Severity/Seriousness	Public Interest	Aggravating or Mitigating Factors
Low	Home owner erects colour-bond boundary fence 100mm higher than allowed without requiring approval.	Low to moderate environmental harm.	Public interest low due to minimal cost to the community and the "one off" nature of the unlawful activity with minimal need for deterrence against further unlawful activity.	No significant aggravating factors; offender cooperated with investigation.
Low	Person observed walking dog off-lead in on-lead area. Dog is well behaved and the owner immediately places dog on lead when spoken to by Council officer.	Moderate, short-term loss of amenity; low to moderate environmental harm.	Public interest likely to be moderate due to the need to deter the offender from further unlawful activity of the nature but little public perception of the unauthorised activity.	No significant aggravating factors; offender rectified unlawful activity quickly when notified by Council.
Medium	Waste truck observed to have deposited building rubble on vacant site in local area. Efforts had been made to cover the company signage on the truck and registration number.	Low to Moderate environmental harm.	Public interest moderate due to the need to deter the offender against further unlawful activity of this nature.	Significant aggravating circumstances due to offender submitting false and misleading information about the unlawful activity.
Medium	Builder observed discharging water laden with sediment into gutter at the front of the building site but takes immediate corrective action when spoken to by Council officer.	Moderate environmental harm.	Public interest moderate due to the low public perception of the breach and unlikelihood of the offender committing further unlawful activity.	Significant mitigating circumstances due to offender immediately rectifying the breach and instigating measures to prevent reoccurrence.
High	Unauthorised work is continuing on an unapproved extension to a residential dwelling despite Council having served a Stop Work Order to cease carrying out the works	Moderate or high degree of environmental harm.	Public interest moderate due to the need to deter the offender against further unlawful activity of this nature.	Significant aggravating circumstances due to offender knowingly committing the unlawful activity despite likely impacts.
High	Demolition of heritage building without approval. The owner of the building previously submitted an application to demolish the building but it was refused by Council	Large magnitude of unlawful activity; high level of unjust benefit; moderate to high risk of environmental harm	Public interest high due to the unlawful activity impacting on the amenity of several residential neighbours and the need to deter against further unlawful activity of this nature.	Aggravating circumstances due to offender knowingly committing the unlawful activity for significant financial gain.

11 Enforcement Options

11.1 Selection of appropriate enforcement Response

Should an initial evaluation or investigation determine that an Unlawful Activity has taken place Council has discretion as to whether to take enforcement action or not.

In making this determination Council seeks to use the most appropriate compliance and enforcement option in response to an Unlawful Activity, having regard to all of the relevant considerations and is guided by the Key Principles described in this policy.

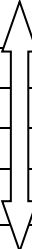
As a general rule, Council will choose the enforcement option which is the **quickest, most cost effective and which has the lowest level of intervention** to respond to an Unlawful Activity wherever possible. This will be the case unless there is a reasonable basis to form the opinion that there is little likelihood of there being a successful outcome using any of these options.

However, in all cases, Council will choose an enforcement response which is proportionate to the significance of the breach resulting in the Unlawful Activity and which:

- Sets a suitable precedent for future cases
- Is consistent with the intent and objectives of the applicable legislation
- Is an appropriate use of Council's resources
- Does not adopt an extreme or unreasonable interpretation of an approval or legislation; and
- Is consistent with responses previously adopted by the Council for similar incidents.

11.2 Enforcement options available to Council

Council has a number of available enforcement options to respond to the Unlawful Activity once confirmed that it has taken place. These options range from warning letters at the lighter end of the scale through to Court proceedings in the Land and Environment Court at the more serious end of the scale. The range of enforcement options are illustrated in the table below accompanied by the level of intervention on the part of Council for each option.

Enforcement Option	Level of intervention
LEC Prosecution	Highest – strict enforcement
LEC Civil Enforcement Proceedings	
Local Court Prosecution	
Penalty Notice	
Order	
Letter requesting undertakings	
Negotiated outcome	
Warning letter or caution	
Record the breach	Lowest - persuasion

In practice a combination of enforcement options may be more effective than the use of a single enforcement option in some circumstances. Further, the use of a combination of options allows Council to escalate the matter to a more interventionist enforcement response (including Court based legal remedies) if an offender continues to carry out the Unlawful Activity following the issuing of a warning letter or Penalty Infringement notice. This allows the more interventionist measures to be held in reserve thus making the more persuasive measures more effective.

Enforcement options which do not require court action are often referred to as “administrative measures”. These include recording of the breach, warning letters, a negotiated outcome, or a letter requesting undertakings. Administrative measures are generally less expensive to apply than court type measures and often result in an earlier resolution of the matter.

12 Details of Enforcement Options

12.1 Prosecution in the Land and Environment Court (Class 5)

A Land and Environment Court Prosecution relates to criminal proceedings brought in the NSW Land and Environment Court in Class 5 of the court’s jurisdiction to punish offenders for significant breaches of legislation relating to environmental planning and environmental protection.

If a person is found guilty of committing a criminal offence in a LEC Prosecution they may receive a penalty including:

- A criminal record
- A fine; and/or
- Imprisonment.

The maximum fine is considerably higher for the conviction of an offence in the LEC as compared to the Local Court. Costs for prosecuting a matter in the LEC are also likely to be significantly higher than in the Local Court and generally take longer to be determined and involve more Council resources than Local Court Prosecutions. For example, in the Land and Environment Court proceedings are more formal, evidence is required in the form of affidavits and there is often more than one Court mention of the matter before a plea is entered by the Defendant.

If the prosecution results in a conviction, Council will usually be entitled to an order for its “court costs” and “professional costs”. Only in limited circumstances may costs be awarded against the Council if the proceedings are withdrawn or dismissed.

12.2 Civil Proceedings in the land and Environment Court (Class 4)

Land and Environment Court Civil Enforcement Proceedings are civil proceedings brought in the Land and Environment Court under Class 4 of the court’s jurisdiction to remedy or restrain a breach of civil penalty provisions of legislation relating to environmental planning and environmental protection.

Unlike the Local Court, the Land and Environment Court has the power to make declarations and to grant injunctions and has broad powers to make orders to enforce planning or environmental law. Enforcement Proceedings brought under Class 4 provide for a more flexible enforcement option in that a wide range, or combination of, orders may be sought from the LEC. Examples include:

- **A declaration** – as to failure to comply with an obligation under a development consent
- **Orders requiring remedial action to be taken** – to remediate a contaminated site
- **An injunction to restrain behaviour** – to be restrained from carrying out development in breach of a condition of consent

In urgent matters, the Council may seek an interlocutory injunction to restrain a civil contravention where there is a risk that the breach is causing or is likely to cause serious harm to the environment. However, the Court must be satisfied that the matter is urgent, that the Council has evidence of a “prima facie case”, that damages would be an inadequate remedy and that the ‘balance of convenience’ favours the granting of an injunction prior to the full hearing of the substantive dispute. As a type of guarantee the Court may require Council to provide an undertaking as to damages in the event that the Council is unsuccessful at the final hearing.

The costs for bringing Land and Environment Civil Enforcement Proceedings are likely to be substantial and may require significant resources of the Council. As with land and Environment Prosecutions there is often more than one Court mention of the matter before the matter is listed for hearing and the hearing may take several days.

However, unlike prosecution proceedings in the Land and Environment Court (Class 5) the Court will make an order that the unsuccessful party pay the successful parties costs in Class 4 proceedings. Therefore, the Council is likely to be subject to a costs order if it is unsuccessful in the proceedings.

Generally, the Court will make an order that the unsuccessful party pay the successful parties costs in Class 4 proceedings. Therefore, unlike LEC or Local Court Prosecutions, the Council is likely to be subject to a costs order if it is unsuccessful in the proceedings. Further, a costs order in the Council’s favour is of little value if the person or company responsible for the breach is poor or bankrupt.

12.3 Local Court Prosecution

A Local Court Prosecution relates to criminal proceedings brought in the Local Court to punish offenders for usually less significant breaches of relevant legislation, than those that are brought before the Land and Environment Court.

If a person is found guilty of committing a criminal offence in a Local Court Prosecution they may receive a penalty including:

- A criminal record
- A fine; and/or
- Imprisonment.

The maximum penalty for a conviction for an offence in the Local Court is usually lower than that in the Land and Environment Court but is generally higher than under a Penalty Infringement Notice. However, the Local Court does not have the power to make declarations or to grant injunctions.

The costs for prosecuting a matter in the Local Court are usually significantly lower than in the Land and Environment Court. Further, Local Court proceedings are likely to be finalised more quickly than matters brought before the Land and Environment Court, particularly if a plea of guilty is entered.

If the prosecution results in a conviction, the Council will usually be entitled to an order for its court costs and professional costs. It is only in limited circumstances that costs may be awarded against the Council. These include circumstances where the proceedings are withdrawn or dismissed.

12.4 Penalty Infringement Notices

Penalty Infringement Notices are fines issued directly by the Council for moderately significant breaches of legislation. If a Penalty Infringement Notice is not paid on time, and no payment extension arrangements have been made, the penalty will be enforced and an additional cost will be added to the original fine.

Penalty Notices may only be issued for prescribed offences and the value of the fine is also prescribed by relevant legislation. For example, under the EPA Act a fine under a Penalty Notice varies from under \$200 up to \$6,000, depending on whether the offender is an individual or a corporation and the nature of the Unlawful Activity (as at December 2017). Whereas, under the POEO Act, a fine under a Penalty Notice for a corporation may be up to \$8,000.

There are two ways a person may challenge a Penalty Notice: by applying for a review of Council's decision to issue the Penalty Notice by the State Debt Recovery Office or electing to have the alleged offence heard in Court.

Under the Fines Act, an application for review of a Penalty Notice may be made at any time up to the due date for payment specified in the penalty reminder notice. Applications for review should be made to the State Debt Recovery Office, which will either conduct the review or refer the application for review to the Council. Reviews undertaken by the Council must be exercised in accordance with Division 2A of the Fines Act and the Internal Review Guidelines under the Fines Act 1996 (Appendix 2).

12.5 Caution Guidelines under the Fines Act 1996

The Caution Guidelines under the Fines Act 1996 are issued by the Attorney General under section 19A(3) of the Fines Act 1996. Council Officers who issue penalty notices under the Fines Act 1996 must have regard to these Guidelines in deciding whether to give a person a caution for a penalty notice offence.

The Guidelines are to assist officers in exercising their discretion. They do not create any right or obligation to give a caution. These Guidelines do not apply if the officer is a police officer, or the officer is employed or engaged by an agency that has issued its own guidelines for the use of cautions.

In the event of any inconsistency between these guidelines and the Fines Act 1996, the Fines Act 1996 prevails.

In certain circumstances Officers who issue penalty notices may give cautions instead. The Fines Act 1996 states that a caution may be given if the officer believes:

- on reasonable grounds that a person has committed an offence under a statutory provision for which a penalty notice may be issued; and
- it is appropriate to give a caution in the circumstances.

The matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:

- a The offending behaviour did not involve risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public
- b The person is homeless
- c The person has a mental illness or intellectual disability
- d The person is a child (under 18)
- e the person has a special infirmity or is in very poor physical health
- f The offending behaviour is at the lower end of the seriousness scale for that offence
- g The person did not knowingly or deliberately commit the offence
- h The person is cooperative and/or complies with a request to stop the offending conduct.

It is otherwise reasonable, in all the circumstances of the case, to give the person a caution.

Matters that Council considers do not involve significant risks to public safety, damage to property or financial loss, or have a significant impact on other members of the public that may attract a Caution, in the first instance only, include:

Offence	Example
Engage in trade / business / direct / procure entertainment/construct enclosure without approval	An unapproved street stall
Play instrument / sing for fee / reward / set up / operate / use loudspeaker / amplifier without approval	Playing amplified music on the street without approval
Expose article in / on / over road / let article be exposed at road without approval	Unapproved street furniture
Use vehicle / article for selling not as approved	Licensed ice cream van breaching licensed condition
Fail to comply with notice in public place	Riding of trail bikes, playing of golf, etc
Owner fails to take reasonable precautions to prevent dog from escaping property	Inadequate fencing surrounding property
Animal not permanently identified	Animal not lawfully micro chipped

Animal not registered	Animal found not to be on state register
Animal in public place not registered	Animal in park found not to be on state register
Owner of dog uncontrolled in a public place - not dangerous dog.	Dog not on leash (subject to the owner or a responsible person being with the dog)
Abandon article in a public place (not motor vehicle)	Shopping trolleys
Leave animal unattended in a public place	Animal left in park unattended
Erect / maintain / use door / gate opening outwards into road	Resident's gate opening outwards
Deposit advertising material in place	Shop brochures left on fences at unit blocks
Deposit advertising material on vehicle	Flyers placed under vehicle windscreen wipers

12.6 Notices and Orders

Council is empowered by statute to issue notices and orders to rectify breaches of various pieces of legislation. Failing to comply with statutory enforcement notices or orders is enforceable both civilly (ie LEC Civil Enforcement Proceedings) or criminally (LEC Prosecution or Local Court Prosecution).

This Policy is supported by operational guidelines issued from time to time under the relevant legislation to assist Council officers in understanding the preconditions which must exist before notices may be issued. For example, the Noise Guide for Local Government issued by the NSW Environment Protection Authority .

Prior to the issue of an order or notice the investigating officer will ensure that the prescribed procedural requirements in the relevant legislation have been strictly complied with. A failure to comply with the procedural requirements prescribed for the issue of an order or notice may render the order or notice unenforceable or liable to be declared invalid by the Court.

The validity of an order may be challenged by a Defendant in a LEC Prosecution or a Local Court Prosecution or on an appeal on the merits of the order if available under the legislation. If the order is declared invalid, the Council may be subject to an order for costs.

13 Accredited Certifiers and Unlawful Building Works

Individuals with particular qualifications and experience can be accredited by the NSW Fair Trading to issue Construction Certificates, Complying Development Certificates and to undertake the role of Principal Certifying Authority on building sites. They are referred to as Accredited Certifiers. Accredited Certifiers may be employed by the Council (Council Accredited Certifiers), or they may practice privately (Private Accredited Certifiers).

The Principal Certifying Authority is responsible for inspecting building and subdivision work during the construction phase of development to ensure the work is consistent with the Development Consent and Construction Certificate (or the Complying Development Certificate). The PCA is also responsible for issuing an Occupation Certificate at the completion of the development.

A PCA has some limited enforcement powers in circumstances where the conditions of the development consent are not being observed, or the building work is not consistent with the development consent and construction certificate.

The PCA can seek an undertaking from their client to rectify the unlawful activity. The PCA can also issue a Notice of Intention to Give an Order in the same manner that Council's Compliance Unit would issue a Notice. If a Notice is issued by a PCA a copy must be forwarded to the Council by the PCA within 2 working days. Responsibility for pursuing the Notice then rests with the Council's Compliance Unit.

Where an allegation of unlawful activity is received that relates to a matter that is under the supervision of a PCA, in most cases the matter will be referred to the PCA in the first instance. This is because the PCA is likely to be the person with the most association and familiarity with events occurring at the site. Complainants may also contact the PCA in the first instance. The contact details of PCA's are required to be displayed on building sites.

Possible exceptions include allegations which cause Council to form the view that immediate action is required. For example, Council will take action where:

- Work threatens life; safety or damage to property or the environment at the time of the allegation
- The alleged departure from development consent is substantial and there is likely environmental impact.
- The allegation concerns environmental conditions of consent or breaches that are generally enforced by Council's officers including hours of work; footpath and roadway obstructions; odours and fumes, noise, dust, sediment control and discharges; and/or
- It is otherwise in the public interest.

If the PCA does not deal with the allegation in a manner that is consistent with this Policy, Council will step-in and take appropriate enforcement action.

The NSW Fair Trading is responsible for regulating Private Accredited Certifiers and dealing with the complaints regarding the conduct of Private Accredited Certifiers.

14 Building Information Certificates

Section 6.6 of the *Environmental Planning & Assessment Act 1979* permits a landowner or any other person with the permission of the land owner to make an application for a Building Information Certificate.

A Building Information Certificate prevents a Council from taking enforcement action in relation to unlawful building works for a period of 7 years.

A Council must issue a Building Information Certificate “if it appears that there is no matter discernible by the exercise of reasonable care and skill that would entitle the Council to order the building to be demolished, altered, added to or rebuilt” under either the *Environmental Planning & Assessment Act 1979* or the *Local Government Act 1993*. In other words, if the building work complies with the relevant building standards and Council would have granted development approval for the work if an application had been made, a Building Certificate must be issued.

Council does not encourage the use of Building Information Certificate Applications to legitimise unlawful building works.

15 Related Legislation

This Policy should be read in conjunction with the following legislation:

- *Local Government Act 1993* and Regulations
- *Environmental Planning and Assessment Act 1979* and Regulations
- *Food Act 2003*, Regulations and NSW Food Safety Standards
- *Protection of the Environment Operations Act 1997* and Regulations
- *Waste Avoidance & Resource Recovery Act 2001* and Regulations
- *Noxious Weeds Act 1993*
- *Public Health Act 2010* and Regulations
- *Companion Animals Act 1998* and Regulations
- *Roads Act 1993* and Regulations
- *Road Transport (Safety & Traffic Management) Act 1999*, Regulations and Australian Roads Rules
- *Public Spaces (Unattended Property) Act 2021* and Regulations
- *Recreation Vehicles Act 1983*
- *Swimming Pools Act 1992*
- *Liquor Act 1982* and Regulations
- *Fisheries Management Act 1994* and Regulations
- *Tree (Disputes Between Neighbours) Act 2006* and Regulations
- *Fines Act 1996* and Regulations.
- *Building and Development Certifier Act 2018*
- *Design and Building Practitioners Act 2020*
- *Land and Environmental Court Rules 2007*

16 Acknowledgements

This Policy is adapted for Council from the “Model Policy” published by the NSW Ombudsman in “*An Enforcement Guideline for Council June 2002*” and the “*Compliance Policy*” (September 2002) published by the NSW Department of Planning.

This Policy sits within the broader NSW law enforcement policy context and is informed by relevant legislative obligations relating to privacy and access to information and emerging case law and other legal developments.

Further reference material informing this Policy includes:

- *Compliance & Enforcement Policy* (1 December 2009), Department of Sustainability, Environment, Water, Population and Communities, Cth.
- *EPA Prosecution Guidelines* (Revised 2004), Department of Environmental and Conservation (NSW) for the Environment Protection Authority.
- *Model Litigant Policy for Civil Litigation* (2008), Attorney General's Department, NSW.
- *Risk-Based Compliance*, (2008), Better Regulation Office, NSW.
- *Exercising of Discretion* (April 2002), NSW Department of Planning Practice Note.
- *A fact sheet discussing the meaning of "Public Interest"* published by the NSW Ombudsman.
- *Enforcement Guidelines for NSW Councils* (June 2002), NSW Ombudsman.

17 Review

This policy is to be reviewed at least every four years or as circumstances warrant (for example, when changes to legislation are enacted or where a particular judicial decision may have an impact on the procedures outlined in this policy).

The General Manager may approve of minor editing changes, amendments to this policy are to be submitted to Council for approval.

18 Related Documents

This document should be read in conjunction with:

- *Local Government Act 1993, particularly s.s124-128*
- *Environmental Planning & Assessment Act 1979 s.121B*
- *Protection of the Environment Operations Act 1997 Pts 4.2-4.2 and 8.6*
- *NSW Ombudsman Enforcement Guidelines 2002*
- *Council's Code of Conduct*

19 Version History

Version	Release Date	Author	Reason for Change
1.0	22/02/2018	Paul Vogt	Harmonised document with minor administrative updates only; policy content unchanged; approved for publication by the Manager Governance & Risk.
2.0	25/09/2023 (GM approval)	Manager Compliance & Community Safety	Minor editing and legislation updates.

Appendix I – Flowchart Enforcement Process

