Shellharbour CITY COUNCIL

Policy

# Compliance & Enforcement

**Adapted from the NSW Ombudsman, Enforcement Guidelines for Councils**

| Policy Owner: Group Manager City Development | |
|---|---|
| **Date Last Adopted: 21 May 2019** | **Review Date: 13 June 2026** |

## 1. Policy Statement/Objective(s)

Shellharbour City Council is committed to promoting best practice by establishing clear guidelines and standards when responding to allegations of unlawful activity. Council takes a risk-based approach to its compliance and enforcement activities, prioritising where the risks are greatest and escalating regulatory intervention where non-compliance is wilful, persistent or more serious.

This Policy applies to the investigation and enforcement of unlawful activity or failure to comply with the terms or conditions of approvals, consents, notices or orders. It outlines how to assess whether complaints of unlawful activity require investigation, options for dealing with unlawful activities and regulatory breaches, matters for consideration and facilitates a proportional approach to compliance management. It is based on the NSW Ombudsman's model "Enforcement Guidelines for Council (2015)"

The objectives of the policy are to:

- To establish clear guidelines and procedures for Council staff in the management of Council's regulatory activities.
- To provide a framework to facilitate a responsive and risk-based approach to proactive and reactive compliance and enforcement matters.
- To improve compliance management and reduce the impact of unlawful activity on the community and environment.

The policy also provides advice and guidance on the role of the Principal Certifier and the role of Councillors in enforcement.

## 2. Scope

This Policy provides information for all internal and external stakeholders and interested parties about Council's position on compliance and enforcement matters in the Shellharbour City Council Local Government Area.

## 3. References

Model Compliance and Enforcement Policy – NSW Ombudsman
Council's Customer Service Charter
Council's Complaints Policy
Council's Managing Unreasonable Complainant Conduct Policy
Council's Code of Conduct
*Companion Animals Act* 1998
*Environmental Planning and Assessment Act* 1979
*Food Act* 2003
*Impounding Act* 1993
*Local Government Act* 1993
*Protection of the Environment Operations Act* 1997
*Public Health Act* 2010
*Road Rules* 2014
*Road Transport Act* 2013
*Roads Act* 1993
*Swimming Pools Act* 1992

***NB: Reference to Acts includes references to associated Regulations**

State Environmental Planning Policies
Shellharbour – Development Control Plan (DCP)
Shellharbour – Local Environmental Plan (LEP)

## 4. External/Internal Consultations

Governance Manager
Executive Manager / Public Officer
Risk and Audit Manager
Group Managers
Manager Environment
Manager Building

## 5. Definitions

See attached

## 6. Variation and Review

Council reserves the right to review, vary or revoke this policy.

### Review History

| | |
|---|---|
| Date Policy first adopted – version 1 | 14 April 2007 |
| Reviewed – No change | 28 April 2009 |
| Reviewed with minor changes – Version 2 | 13 June 2017 |
| Date amended – Version 3 | 4 July 2019 |
| Reviewed with minor changes | 13 June 2023 |



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## 7. Policy

See attached

## 8. Related Forms/Documents

Nil

**Note: Related forms can be located Online under "Forms"**

## 9. Attachments

Appendix 1: Taking Enforcement Action – Considerations
Appendix 2: Risk Assessment Table

**Policy Authorised by:**

Name: Council Resolution Number 83

Date: 21 May 2019



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# 1. INTRODUCTION

Council's regulatory responsibilities are applicable to *actual unlawful activity*, as well as any *failure to take action* (in order to be compliant with certain legal requirements). For simplicity, this policy refers to both an act and/or an omission by an alleged offender as 'unlawful activity'.

This policy distinguishes between a 'report alleging unlawful activity' and a 'complaint'.

For the purposes of this policy, a report alleging unlawful activity is where an individual expresses concern in relation to alleged unlawful activity, or they request service from council about such matters. Council considers that a response or resolution to a report alleging unlawful activity is explicitly or implicitly expected by the individual, or may be legally required.

A complaint is where an individual expresses dissatisfaction about council services, staff or the handling of a complaint. Therefore, a complaint may arise where an individual claims that council staff have failed to take action in relation to a report alleging unlawful activity. A complaint will be recorded separately and responded to in accordance with Council's complaints management policy and procedures.

# 2. OUR CORE VALUES

Our Core Values of Collaboration, Accountability, Integrity, Respect and Sustainability represent who we are and set the behavioural expectations for how people are treated when they interact with Council. Demonstrating our Core Values in what we do will build trust in Council and its ability to meet our community's expectations.

| | |
|---|---|
| Collaboration | We seek opportunities to develop our staff and our teams to represent our high ethical standards of behaviour.<br><br>We work together with our Community, Councillors, Customers and Council to inform, educate and achieve shared goals with the best outcomes possible.<br><br>We communicate and listen openly and honestly to ensure information is shared in an efficient, transparent and timely way and we consider the impacts of enforcement within the community. |
| Accountability | Enforcement staff take responsibility for their decisions and ensure that those decisions are evidence based and in accordance with this Policy.<br><br>Our staff will identify and undertake appropriate training to ensure that they are acting according to the law, the expectations of Council and the community. |
| Integrity | We behave professionally, ethically and reliably in everything we say and do, and ensure that we remain transparent in our processes and decision making.<br><br>We have the courage to do what is right even when it's not the easiest route.<br><br>We are evidence based and intelligence led when we decide to take any enforcement action and our decisions are beyond reproach. |

| | |
|---|---|
| Respect | Council will embrace diversity and welcome differences in backgrounds, experiences and viewpoints and not discriminate when making decisions that affect its community.<br><br>Staff will ensure that every person is treated with fairness and equity and will provide all available options for resolving enforcement issues to achieve compliance. |
| Sustainability | We make decisions that will protect the community and the environment from harm and will positively impact on Shellharbour City and its environment for generations to come<br><br>We adopt a long-term view in the decisions we make and the actions we take so we can deliver enduring benefits to our community well into the future<br><br>We encourage creativity, innovation and continuous improvement to achieve a lasting impact |

## 3. CUSTOMER SERVICE CHARTER

Shellharbour City Council strives to provide a positive experience to customers at every opportunity.

The Customer Service Charter outlines standards we will use to deliver professional, reliable and consistent customer service that meets your expectations. Customer service is everyone's responsibility and we will hold each other accountable in our service commitment.

We will work with you to achieve positive outcomes and commit to:

- act in a way that reflects and upholds our core values - Collaboration, Accountability, Integrity, Respect, Sustainability
- listen and respect your issues and concerns
- set clear expectations and deliver on those commitments
- be professional, respectful and courteous
- train our staff to deliver information and services
- provide clear and concise information in a timely manner
- recognise and respond to the diverse needs of our community and act with proper regard and sensitivity
- actively measure and monitor our performance against the Customer Service Standards

## 4. OUR VISION

In 2030, Shellharbour is a dynamic city that values and celebrates the unique diversity of our people, places and environment. We are a connected community working together to create a safe, sustainable future that provides opportunities for all to achieve their potential.

## 5. PURPOSE AND SCOPE

This policy provides information for all internal and external stakeholders and interested parties about council's position on compliance and enforcement matters in the local government area.

The purpose of this policy is to provide structure for consistency and transparency in decision making, and to facilitate a proportional approach to compliance and enforcement. It is also intended to assist council staff to act promptly, effectively and consistently in response to allegations of unlawful activity.

This policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unlawful activity, through to what enforcement option council will choose and whether to commence criminal or civil proceedings.

In certain circumstances council will have shared enforcement responsibilities with other regulatory authorities. This policy sets out a collaborative and cooperative approach to such matters. Advice and guidance is also provided on the role of council in building and construction compliance matters where there is a private certifier, and the role of councillors in enforcement.

Responsible council staff are not limited by this policy in their use of discretion and exercise of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits.

## 6. ORGANISATIONAL APPROACH

Council considers that compliance and enforcement strategies and programs are an integral part of being responsive to the needs of the community, particularly in matters that go against the standards expected by the community, and the requirements imposed by law.

Compliance and Enforcement is important and considers this necessity:

- to prevent or minimise harm to health, welfare, safety, property or the environment
- to improve the safety and amenity of residents and visitors to the area
- for the collective good, the welfare of the community or the public interest
- to promote social policies (e.g. to preserve or protect the environment)
- to manage risks
- to uphold social order
- to meet the expectations of the community
- to encourage reports about possible unlawful activity from the community
- to make the regulated community aware of their legal obligations and how to comply

## 7. DEFINITIONS

| Term | Meaning |
|---|---|
| **CAN** | Court Attendance Notice |
| **Caution** | An oral or written warning given by a Regulatory Officer and recorded officially on Council's systems. |
| **Complaint** | A complaint is an expression of dissatisfaction made about council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required. |



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| | For the purposes of this policy, a complaint does not include:<br>• a report alleging unlawful activity (see definition below)<br>• a request for information about a council policy or procedure<br>• a request for an explanation of actions taken by council<br>• a request for internal review of a council decision. |
| **Council** | Shellharbour City Council |
| **Delegations** | The legal instrument whereby powers are conferred on a Regulatory Officer by the General Manager to act for and on behalf of Council as its agent in matters where Council has been given those powers by legislation. |
| **Development** | The use of land, the subdivision of land, the erection of a building, the carrying out of a work, the demolition of a building or work or any other act, matter or thing that may be controlled by an environmental planning instrument. |
| **Enforcement** | Actions taken in response to serious or deliberate contraventions of laws |
| **Legislation** | Any Act, Regulation or other Statutory Instrument administered by Council |
| **LGA** | Local Government Area |
| **PIN** | Penalty Infringement Notice |
| **PCA** | Principal Certifier |
| **Regulation** | Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument which empowers Council to create, impose, enforce or administer rules that control the actions of others. |
| **Regulatory Activities** | Activities where Council attempts to control or influence behaviour, manage risk and/or protect the community in accordance with legislation. |
| **Regulatory Intervention** | A discretionary method of implementing proactive measures to achieving a legislative outcome without formal enforcement. |
| **Regulatory Officer** | An officer exercising regulatory functions under delegated authority |
| **Report alleging unlawful activity** | An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required. |
| **Unlawful activity** | Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:<br>• terms or conditions of a development consent, approval, permit or licence<br>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land<br>• a legislative provision regulating a particular activity or work<br>• a required development consent, approval, permission or licence. |

## 8. POLICY OBJECTIVES

The purpose of this Policy is to provide structure for consistency and transparency in decision making, and to facilitate an equitable approach to compliance and enforcement. It is also intended to assist council staff to act promptly, effectively and consistently in response to allegations of unlawful activity.



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This Policy outlines matters to be considered at the various stages of the enforcement process from the receipt and investigation of reports alleging unlawful activity, through to what enforcement options council will consider and whether to commence criminal or civil proceedings.

In certain circumstances Council will have shared enforcement responsibilities with other regulatory authorities. This Policy sets out a collaborative and cooperative approach to such matters. Advice and guidance is also provided on the role of Council in building and construction compliance matters where there is a Private Certifier, and the role of Councillors in enforcement.

Responsible council staff are not limited by this policy in their use of discretion and exercise of official functions. The full circumstances and facts of each case need to be considered and a decision made on the merits.

## 9. APPLICATION

Council is responsible for a number of regulatory functions including, but not limited to:

- **Planning** – development controls, development consents, certification of complying developments, and change of use approvals.
- **Building and construction** – certification and compliance with building standards, and fire safety requirements.
- **Environmental protection** – native vegetation, noxious weeds, waste management, noise control, coastal protection, underground petroleum storage systems, stormwater drainage, sewage and grey water systems, contaminated land, and solid fuel heaters.
- **Public health and safety** – food safety, mobile food vendors, skin penetration businesses, cooling towers, warm water system, and swimming pools.
- **Parking and transport** – road openings and closures, structures in or over roadways or footways, traffic management plans and controls and road access. Regulatory officers also enforce parking provisions on street, in designated school zones, carparks and public land.
- **Companion animal management** – registration of dogs and cats, dangerous dogs, and surrendered animals.
- **Public areas and issues** – graffiti, hoardings, signs, waste bins, protection of public places, busking, street theatre, parks and playgrounds, public events, trees, and filming.
- **Other activities** – hairdressers, beauty salons, mortuaries, backpacker accommodation, boarding houses, camping grounds, and caravan parks.

## 10. COMPLIANCE & ENFORCEMENT PRINCIPLES

Council is accountable in the way it conducts its regulatory activities and extends to include any unreasonable failures to take appropriate action. Council's decisions are open to scrutiny and Council is answerable for its decisions on why it took action or decided not to act. The following guiding principles underpin Council's regulatory activities.

| Principle | Action |
|---|---|
| **Accountable & transparent** | • acting in the best interests of public health and safety and in the best interests of the environment<br>• acting fairly and impartially and without bias or unlawful discrimination<br>• providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community.<br>• ensure meaningful reasons for decisions are given to all relevant parties, particularly when there has been a departure from adopted policy or standard practice<br>• acting on any complaints or concerns about the conduct of its regulatory officers in accordance with Council's complaints Management Policy.<br>• have clear procedures for internal and external review of decisions where applicable. |
| **Consistent** | • ensuring all compliance and enforcement action is implemented consistently<br>• encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter |
| **Proportional** | • ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach, with more serious breaches attracting a more severe response<br>• making cost effective decisions about enforcement action<br>• taking action to address harm and deter future unlawful activity |
| **Timely** | • ensuring responses to reports alleging unlawful activity and decision making in relation those reports is timely |

## 11. RESPONSIBILITY

Council receives information about alleged unlawful activity from members of the public, contact from other government agencies and information gathered by its officers during proactive inspections.

All council staff who deal with reports alleging unlawful activity are responsible for implementing this policy. Council staff are also responsible for ensuring that any other possible unlawful activity identified as a result of an inspection, proactive enforcement or other activity is brought to the attention of the appropriate business unit of council.

Council staff are required to:

- treat all relevant parties with courtesy and respect

- communicate with all relevant parties and provide feedback on the progress of an investigation and any reasons for delay without compromising the integrity of the investigation
- make full and proper records in relation to the assessment and investigation of reports alleging unlawful activity, including reasons for any decisions
- inform all relevant parties of reasons for decisions
- provide as much information as possible to all relevant parties about the outcomes of investigations to show that adequate and appropriate action was taken and/or is proposed to be taken in response to a report of alleged unlawful activity
- provide information to all relevant parties about any avenues to seek an internal or external review of a decision.

All reports alleging unlawful activity are to be entered into Council's customer request system and actioned within the appropriate risk-based timeframe by the appropriate business unit.

## 12. RISK-BASED REGULATION

Our community is a growing, healthy and liveable city where we value and protect our environment. As a direct connection to this, the number of laws and regulations have increased expanding the scope of necessary enforcement. From time-to-time reports made to Council alleging unlawful activity will exceed available resources.

Risk-based regulatory programs work on the basis that the type of compliance action chosen will be dependent on an evaluation of the degree of risk, and the impact of the non-compliance on Council's ability to achieve its objectives. A risk-based approach to regulation can:

- enhance consistency in decision-making because the regulator's response will be dictated by the relative level of risk
- maximise efficiency by allocating resources to areas of highest risk
- increase compliance by focusing on areas where the compliance risk is greatest
- reduce the compliance burden by minimising regulatory intervention where the risks are relatively low.

In essence, a risk-based approach to regulation focuses on risks associated with non-compliance with legal rules, rather than the legal rules themselves. More specifically, the Council identifies and assesses the risk associated with non-compliance by its community and/or with a particular obligation or group of obligations, such as those obligations required to be met by residents, developers, commercial and industrial premises and visitors.

Based on this risk assessment, Regulatory staff makes decisions regarding a range of regulatory matters, including:

- the nature and intensity of compliance and enforcement activity warranted for non-compliance with particular obligations within the regulatory framework
- what monitoring and information-gathering mechanisms are needed and when should they be employed for particular regulated entities and/or regulated activities
- the targets, focus and regularity of audit and inspection programs
- the targets and contents of public reporting on compliance and enforcement activity to encourage voluntary compliance.

Risk-based regulation is most effective where resources are abundant, processes and procedures are clear, well defined, and apparent and appropriate staffing levels are maintained. Staff need to be responsive, well trained and knowledgeable, disciplined and

innovative and committed to achieving both personal and organisational goals and are able to transition through roles and jobs to mitigate and manage risk.

# 13. RESPONDING TO CONCERNS ABOUT UNLAWFUL ACTIVITY

## 13.1 How reports alleging unlawful activity will be dealt with by Council

Council will record and assess every report alleging unlawful activity.

Council will respond to every such report unless the person raising the matter has indicated they do not wish to receive a response about council's handling of the matter, or the report is anonymous.

Generally speaking, council's objectives when dealing with reports alleging unlawful activity are to:

- maintain the collective good and welfare of the community
- prevent or minimise harm to health, welfare, safety, property or the environment
- consider the broader public interest having regard to council's priorities and any resource limitations
- consider the report fairly and impartially.

Not all reports will need to be investigated. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required.

An investigation of alleged unlawful activity may take a significant amount of time to complete, particularly where the issues are complex. If council decides to investigate, staff will give the person who reported the alleged unlawful activity regular feedback on the progress of the investigation, and any reasons for delay. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.

Decisions about what action should be taken by council are made at the council's discretion. This means the objective is that reports alleging unlawful activity will be resolved to the satisfaction of Council, not necessarily the person raising the matter. Council will generally try to resolve matters as quickly and informally as possible so as to avoid the need to take formal action.

Council staff will endeavour to manage the expectations of people who report alleged unlawful activity, and in particular explain that in the absence of sufficient evidence of unlawful activity, council may be unable to take further action. They will also explain that council does not have unlimited resources and powers to deal with reports alleging unlawful activity. If council is unable to fully investigate or take action on a matter because it is restricted by any legal or resource limitations this will be explained to the individual.

While there are certain statutory requirements that must be met in relation to notices and orders council staff will ensure that all explanatory communications are made in plain English and explain any technical language the law requires to be used.

## 13.2 Confidentiality of people who report allegations of unlawful activity

People who report allegations of unlawful activity should not expect that their identities will remain confidential from the subject of their report in all circumstances. Council may have to disclose information that identifies them in the following cases:

- the disclosure is necessary to investigate the matter



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- their identity has already been disclosed to the subject of their report directly or in a publicly available document
- the individual was consulted following receipt of a *Government Information (Public Access) Act 2009* application and did not object to the disclosure
- the individual consents in writing to their identity being disclosed
- the disclosure is required to comply with principles of procedural fairness
- the matter proceeds to court.

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit council's ability to investigate the matter.

## 13.3 What council expects from people who report allegations of unlawful activity

Council expects that people who report allegations of unlawful activity will cooperate and act in good faith in respect of any investigations conducted by council. This includes:

- providing a clear description of the problem (and the resolution sought, if relevant)
- giving all available and relevant information to council, including any new information about the alleged activity that may become known to the person following the making of their report
- not giving any information that is intentionally misleading or wrong
- cooperating with council's inquiries and giving timely responses to questions and requests for information treating council's staff with courtesy and respect
- allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to by council.

If these expectations of the individual are not met, council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual.

Any unreasonable conduct will be dealt with in accordance with Council's Managing Unreasonable Complainant Conduct Policy and the principles of the NSW Ombudsman's *Managing Unreasonable Complainant Conduct Manual* 2012.

## 13.4 What parties can expect from council staff

People who report alleged unlawful activity, as well as individuals or businesses that are subject to investigation and any enforcement action, can expect that council staff will:

- treat them with courtesy and respect
- advise them of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances
- clearly explain decisions in plain English
- provide information about any relevant internal and external appeal processes that may be available
- carefully assess any new information provided by any party after a decision has been made and advise whether further action will be taken.

## 13.5 Complaints about council's enforcement actions

Any complaints about council's handling of reports alleging unlawful activity will be recorded separately and handled in accordance with council's complaints management policy and procedures.



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Where a person or organisation subject to enforcement action merely disputes council's decision to take enforcement against them, they will be directed to make representations in accordance with any relevant internal and external appeal processes.

Council staff will act on any complaints about the conduct of compliance officers in accordance with council's complaints management policy and procedures and the code of conduct.

## 13.6 Anonymous reports

Anonymous reports will be recorded and assessed in accordance with the above requirements. However, because it is not possible to seek clarification or additional information about a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

## 13.7 Unlawful activity outside business hours

Unlawful activity can occur outside business hours. In particular, council may receive reports about matters such as offensive noise and failure to comply with limitations on hours of operation during nights and weekends.

Due to resource and operational capability restraints on council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of risk of *harm to health, welfare, safety, property or the environment* or it is otherwise in the public interest to take such action.

## 13.8 Neighbour disputes

Council will at times receive reports from parties involved in neighbour disputes seeking council's involvement. When a dispute between two neighbours is a civil matter, council will often have no authority to resolve the issue in dispute. Some reports will raise several matters, some of which will require council's involvement and some of which will be personal to the parties.

Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by council. Care will be taken to explain which aspects of a report council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as LawAccess NSW and Community Justice Centres.

It is possible that one party will provide further information about a matter which changes council's decision about whether it will become involved. In such circumstances, council staff will carefully consider the matter before taking action and document reasons for the new decision. Relevant parties will be advised about the reasons council has changed its position on a matter. Council staff will not change a decision about whether or not council should be involved purely as a response to the conduct of an individual such as persistent demands or threats.

Council's website contains information and advice on some of the most common types of neighbour issues including:

- *noise (from air conditioning units, after hours work, power tools, barking dogs, etc)*
- *dividing fences and retaining walls*
- *encroachments*
- *illegal development*
- *non-compliance with development consent*



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- *drainage and flooding issues*
- *damage from trees.*

# 14. INVESTIGATING ALLEGED UNLAWFUL ACTIVITY

Not all reports alleging unlawful activity will warrant investigation. A preliminary assessment of all matters will be made to determine whether investigation or other action is required. Council will prioritise matters on the basis of risk to public safety, human health and environment.

Council has developed a well-defined category system for common unlawful activity incidents, such as, critical, high, medium and low categories to prioritise action. This will assist Council with managing expectations and the allocation of their resources. An example of Council's Risk Category system is attached at Appendix 2.

If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report or an inspection undertaken. Staff may also need to consult council records and other internal business units to understand the relevant history and context of a matter.

## 14.1 Circumstances where no action will be taken:

Council will take no further action if, following a preliminary assessment, it is identified that:

- council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, council may bring the matter to the attention of the authority or provide information and contact details to the individual. For example, NSW WorkCover for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW for personal disputes
- the report relates substantially to a matter previously determined by council and no new or compelling information is presented which would cause council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided (other than where the person has previously been advised they would receive no further response)
- the allegations relate to a lawful activity (e.g. where there is an existing approval or the activity is permissible without council approval or consent being required)
- the report is not supported with evidence or appears to have no substance
- the relevant manager, director or the general manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

## 14.2 Relevant factors guiding decisions as to whether to take action:

When deciding whether to investigate, council will consider a range of factors including whether:

- the activity is having a significant detrimental effect on the environment or it constitutes a risk to public safety
- the report is premature as it relates to some unfinished aspect of work that is still in progress
- the activity or work is permissible with or without permission
- all conditions of consent are being complied with
- much time has elapsed since the events the subject of the report took place

- another body is a more appropriate agency to investigate and deal with the matter
- it appears there is a pattern of conduct or evidence of a possible wide spread problem
- the person or organisation reported has been the subject of previous reports
- the report raises matters of special significance in terms of the council's existing priorities
- there are significant resource implications in relation to an investigation and any subsequent enforcement action
- it is in the public interest to investigate the report.

The above are factors for council to consider and weigh in making a determination. Council staff are not limited in their use of discretion by these considerations and may decide to investigate based on these and other factors.

The objective of the process's council staff use when investigating incidents of alleged unlawful activity is to:

- determine the cause of the incident
- determine if there has been a contravention of law, policy or standards
- gather evidence to the required standard to support any required enforcement action
- determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

Any decision not to investigate an allegation of unlawful activity will be recorded and the reasons for that decision clearly stated.

## 15. TAKING ENFORCEMENT ACTION

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, council will consider the full circumstances and facts of the matter and the public interest. The following common considerations will assist council staff in determining the most appropriate response in the public interest:

### Considerations about the alleged offence and impact:

- the nature, extent and severity of the unlawful activity, including whether the activity is continuing
- the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity
- the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature
- the time period that has lapsed since the date of the unlawful activity.

### Considerations about the alleged offender:

- any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them
- whether the offence was committed with intent
- whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any council requirements and instructions
- any mitigating or aggravating circumstances demonstrated by the alleged offender
- any particular circumstances of hardship affecting the person or organisation reported.

### Considerations about the impact of any enforcement action:

- the need to deter any future unlawful activity

- whether an educative approach would be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether council is prevented from taking action based on earlier advice given, i.e. whether an estoppel situation has been created.

### Considerations about the potential for remedy:

- whether the breach can be easily remedied
- whether it is likely consent would have been given for the activity if it had been sought
- whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

A further explanation of the above considerations is provided in Appendix 1.

### 15.1 Legal or technical issues

Where legal and/or technical issues are in question, council staff will consider whether legal advice or professional advice from duly qualified staff or other experts should be obtained and considered. Council may also require a person subject to possible enforcement action to obtain professional advice in relation to issues of concern to council for assessment as to whether further action is required.

### 15.2 Requirements of council staff considering enforcement action

Prior to taking enforcement action, council staff will take into account the above considerations as well as the evidence gathered during their investigation. Council staff must act impartially, be mindful of their obligations under council's code of conduct and not act as a decision-maker in relation to any matter in which they have a personal interest. Enforcement action will not be taken purely as a response to the conduct of an individual such as persistent demands or threats.

Council staff are required to maintain records about critical thinking and decision-making processes in relation to reports alleging unlawful activity and any enforcement action, as well as records of interactions with relevant parties. Council staff will at all times adhere to council's internal approval processes prior to the commencement of any enforcement action.

Council staff will take steps to ensure that any enforcement action is taken against the correct person or organisation. Where there are multiple possible parties to an alleged unlawful activity, it will generally not be appropriate to take enforcement action against every person who may be liable for the alleged unlawful activity. In such circumstances, council staff will be guided by legal advice in determining the appropriate persons to pursue.

## 16. OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY

Council will try to use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options. Council staff will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach. Any enforcement action taken by



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council will depend on the full circumstances and facts of each case, with any decision being made on the merits.

At all times, council's key concerns are:

- to prevent or minimise harm to health, welfare, safety, property or the environment
- to influence behaviour change for the common good and on behalf of the community.

The following enforcement options to be considered by council are ordered to reflect an escalation in response that is proportionate to the level of risk, the seriousness of the confirmed breach or the need for a deterrent:

| Level of risk | Enforcement options |
|---|---|
| **Very low** | • take no action on the basis of a lack of evidence or some other appropriate reason<br>• provision of information/advice on how to be compliant |
| **Low** | • negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern<br>• issuing a warning or a formal caution |
| **Medium** | • issuing a letter requiring work to be done or activity to cease in lieu of more formal action<br>• issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate |
| **High** | • issuing a penalty notice<br>• carrying out the works specified in an order at the cost of the person served with the order |
| **Very High** | • seeking an injunction through the courts to prevent future or continuing unlawful activity<br>• commence legal proceedings for an offence against the relevant Act or Regulation. |

### 16.1 Following up enforcement action

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary.

If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, council staff may consider escalating any enforcement action.

## 17. TAKING LEGAL ACTION

The council and its delegated staff will be guided by legal advice in deciding whether to commence criminal or civil proceedings and will consider the following:

- whether there is sufficient evidence to establish a case to the required standard of proof
- whether there is a reasonable prospect of success before a court
- whether the public interest warrants legal action being pursued.

### 17.1 Whether there is sufficient evidence to establish a case to the required standard of proof



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Council considers the decision to take legal action a serious matter, and as such will only initiate and continue proceedings once it has been established that there is admissible, substantial and reliable evidence to the required standard of proof.

The basic requirement of any **criminal** prosecution is that the available evidence establishes a prima facie case. The prosecutor is required to prove the elements of the offence beyond reasonable doubt.

In **civil** enforcement proceedings, council will require sufficient evidence to satisfy the court that an actual or threatened breach has occurred on the balance of probabilities.

### 17.2 Whether there is a reasonable prospect of success before a court

Given the expense of legal action council will not take legal action unless there is a reasonable prospect of success before a court. In making this assessment, council staff will consider the availability, competence and credibility of witnesses, the admissibility of the evidence, all possible defences, and any other factors which could affect the likelihood of a successful outcome.

### 17.3 Whether the public interest requires legal action be pursued

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply. (See Section 12, Taking enforcement action).

The following considerations relate more specifically to the decision to commence legal proceedings and will assist council and its delegated staff in making this determination:

- the availability of any alternatives to legal action
- whether an urgent resolution is required (court proceedings may take some time)
- the possible length and expense of court proceedings
- any possible counter-productive outcomes of prosecution
- what the effective sentencing options are available to the court in the event of conviction
- whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

### 17.4 Time within which to commence proceedings

Council staff must be aware of legislative time limits in which enforcement proceedings must be commenced. Sometimes legal action will be statute barred despite good evidence that unlawful activity has occurred.

## 18. SHARED ENFORCEMENT RESPONSIBILITIES

Some reports will raise matters involving shared regulatory responsibilities between council and other authorities including the Environment Protection Authority, the NSW Police Force, the Office of Liquor, Gaming and Racing, NSW Fair Trading, NSW Food Authority and Crown Lands.

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. To this end, where there are shared legislative responsibilities, council staff will liaise with relevant authorities to establish:

- which authority will take the leading role on any joint investigation
- which activities each authority will carry out
- responsibilities for updating an individual where relevant



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- protocols for exchanging confidential information between the relevant authorities.

Council will reasonably endeavour to respond to requests for information or assistance on joint regulatory matters in a timely manner.

## 19. ROLE OF COUNCIL WHERE THERE IS A PRIVATE CERTIFIER

Council retains its regulatory role and enforcement powers where a private certifier has been appointed the Principal Certifier (PCA). However, if a private certifier is appointed the PCA, it is not council's responsibility to ensure building and construction compliance.

Private certifiers have limited enforcement powers as the PCA. They have the power to issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. A copy of any notice of intention issued by a private certifier must be provided to council for assessment as to whether council will enforce the notice by issuing an order.

Council and private certifiers will work together to resolve any issues when they arise to achieve compliance with the development consent or complying development certificate. Council staff will take steps to ensure individuals are clear about which agency performs which role.

## 20. ROLE OF COUNCILLORS IN ENFORCEMENT

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of appropriately authorised council staff or the Council itself.

Individual Councillors do not have the right to direct council staff in their day-to-day activities. Councillors can help individuals who raise concerns with them by satisfying themselves that their Council's policies are being carried out correctly, however they cannot ignore or alter a policy in order to satisfy the demands of special groups.

The General Manager may present certain decisions to be ratified by the elected Council if this is necessary or desirable, and the councillors may also have the right to call for a report about particular issues to a council meeting.

## 21. DELEGATIONS

Council staff delegations for taking action under this policy are included in Council's Delegation Register.



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# APPENDIX 1 - TAKING ENFORCEMENT ACTION

When deciding whether to take enforcement action in relation to a confirmed case of unlawful activity, council will consider all the circumstances of the matter. The section below is intended to assist staff by providing a further explanation of matters to be taken into consideration when deciding whether to take enforcement action.

| Considerations about the alleged offence and impact | |
|---|---|
| • the nature, extent and severity of the unlawful activity including whether the activity continued<br><br>• the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity | Consideration should be given to the nature, extent and severity of any actual or potential impact of the unlawful activity. If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach. It is also important to consider whether the unlawful activity is ongoing or has ceased. |
| • the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature<br><br>• the costs and benefits of taking formal enforcement action as opposed to taking informal or no action<br><br>• the time period that has elapsed since the date of the unlawful activity. | Consideration should be given to whether the likely costs and benefits of any enforcement action is justifiable where breaches result in no material impacts upon any other party or the health, safety and amenity of the environment and community. A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.<br><br>Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.<br><br>In addition, consideration should be given to the time which the offence or breach occurred and the 'reasonableness' of taking enforcement action if a significant time has lapsed since the time of the offence or breach. |



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| Considerations about the alleged offender | |
|---|---|
| • any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action<br>• taken against them | Consideration should be given to the previous history of the offender. If prior warnings, instructions or advice has been issued to the person or organisation reported which was not followed, a more formal and coercive enforcement approach would appear more appropriate. |
| • whether the offence was committed with intent | Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are more likely to result in prosecution. Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable in achieving desired outcomes. |
| • whether the person or organisation reported has been proactive in the resolution of the<br>• matter and assisted with any council requirements and instructions | Where the offender has been proactive in the resolution of the matter and has assisted council in the resolution of the matter, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. If the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate. |
| • any mitigating or aggravating circumstances demonstrated by the subject of the report<br>• any particular circumstances of hardship affecting the person or organisation reported. | Consideration should be given to any genuine mitigating circumstances of the offender such as age, physical or mental health, disability and any financial hardship of the offender resulting in an inability to pay. |

| Considerations about the potential for remedy | |
|---|---|
| • whether the breach can be easily remedied.<br>• whether it is likely consent would have been given for the activity if it had been sought.<br>• whether there is a draft planning<br>• instrument on exhibition that would make the unauthorised use legal. | If there is evidence of a significant issue of unlawful activity and that matter can be easily remedied by some action on the part of the person the subject of the report, there is a less compelling case for enforcement action, depending on the other circumstances of the case such as the conduct of the offender.<br><br>If retrospective approval is possible, it may be reasonable to allow an opportunity to obtain this prior to taking other enforcement action. In some cases, compliance by informal means may be the most efficient way to resolve the matter and other enforcement action may not be necessary. This needs to be balanced with other considerations such as the public interest in enforcing the law. |

| Considerations about the impact of enforcement action | |
|---|---|
| • the need to deter any future unlawful activity<br><br>• whether an educative approach be more appropriate than a coercive approach in resolving the matter<br><br>• the prospect of success if the proposed enforcement action was challenged in court<br><br>• the costs and benefits of taking formal enforcement action as opposed to taking informal or no action<br><br>• what action would be **proportionate** and reasonable in response to the unlawful activity<br><br>• whether the council has created an estoppel situation. | Consideration should be given to the deterrent effect, both on the offender and others. Prosecutions, because of their great stigma if a conviction is secured, may be appropriate even for minor unlawful activity where they might contribute to a greater level of overall deterrence.<br><br>When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:<br>• the reasonable likelihood that the person may have known or should have known the relevant requirements or rules<br>• the level of contrition shown by the responsible person<br>• whether the parties have previously been advised of the regulatory requirements or provisions<br>• whether or not any previous warnings or instructions have been provided<br>• the apparent level of intent shown by the responsible person.<br><br>It may not be appropriate to take enforcement action if the chances of success, in the event of an appeal or hearing, are unlikely. In such situations, you would need to identify the causes of that likelihood and address them in the particular case or as a general issue.<br><br>Consideration should be given to what is reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.<br><br>Consideration is to be given to what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.<br><br>Legal proceedings are expensive. When doing a cost-benefit analysis, costs and benefits should be assessed broadly and indirect costs and benefits should also be considered.<br><br>Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied on, and acted upon by another person.<br><br>Consideration should be given to whether the actions of council have created a reasonable expectation that no enforcement action would be taken. |



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# **APPENDIX 2 -** RISK ASSESSMENT TABLE

| LOW – MINOR | MEDIUM | HIGH – SEVERE |
|---|---|---|
| • Right of way and covenant complaints<br>• Boundary fence and retaining wall issues<br>• Minor unauthorised or non-complying building works<br>• Home business / home occupation<br>• Overgrown land<br>• Non-complying building works<br>• Over land stormwater flow<br>• Nuisance complaints (wood heaters, BBQ's, domestic noise)<br>• Barking dogs<br>• Unregistered, unidentified animals<br>• Animals other (roosters, goats, sheep, birds)<br>• Noise complaints (domestic, air-conditioners, pool pumps)<br>• Unsightly / untidy premises | • Significant unauthorised or non-complying building works<br>• Development not in accordance with consent<br>• Development without construction certificate<br>• Unauthorised use<br>• Building works (private certifier)<br>• Construction (hours of operation)<br>• Sediment control on building sites<br>• Dog roaming (general)<br>• Illegal parking<br>• Abandoned articles/motor vehicles<br>• Rubbish dumping (general waste)<br>• Littering<br>• Noise complaints (commercial / industrial)<br>• Backyard burning<br>• On-site sewer management<br>• Tree preservation orders<br>• Parks and reserves (camping, horses, kites, golf, fires, model planes)<br>• Unsecure loads | • Large scale, significant, hazardous pollution incidents<br>• Collapsed or unsafe building works adjacent to public land<br>• Significant environmental harm<br>• Issues causing immediate danger to the public<br>• Dog attacks (immediate or imminent threat, injuries, dangerous)<br>• Dog roaming (dangerous, menacing, restricted breed)<br>• Dog roaming (schools, traffic, shopping centres)<br>• Footpath obstruction (main road, danger to public)<br>• Landfill (alter environment, quantum)<br>• Swimming pool fencing<br>• Illegal parking (school zones, footpath obstructions, mobility parking, clearways, children and pedestrian crossings) |
| **INDICATIVE RESOLUTION TIME** | **INDICATIVE RESOLUTION TIME** | **INDICATIVE RESOLUTION TIME** |
| • 4-12 weeks | • 2-12 weeks | • 1-4 weeks |
| **POSSIBLE ACTION** | **POSSIBLE ACTION** | **POSSIBLE ACTION** |
| • Verbal warning<br>• Written warning<br>• Penalty notice | • Notice / Order<br>• Penalty Notice | • Notice / Order / Declaration<br>• Penalty Notice<br>• Prosecution |

Note: This table is provided as a general guide and each issue will be examined on its merits and will be assessed as appropriate.



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