Northern Beaches Council
Compliance and Enforcement Policy

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1. Introduction

Northern Beaches Council is an enforcement authority and its officers are required to make decisions and use discretion about appropriate enforcement action when non-compliant issues are identified.

Council also has a responsibility under section 8 of the Local Government Act 1993 to ensure its regulatory activities are carried out in a consistent manner and without bias.

Compliance and enforcement actions should be exercised to ensure the continued health and safety of the community whilst providing protection to the natural environment.

Council supports the positive assistance of the community in reporting issues of concern and undertakes to work collaboratively with the community to promote the benefits of compliance as a way of sustaining a safer quality of life for all.

The *'Enforcement Guidelines for Councils, December 2015'* and the *'Model Compliance and Enforcement Policy, December 2015'* both issued by the NSW Ombudsman have been used in the development of this Policy.

2. Purpose and scope

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.

Unlawful activity – this expression includes any activity or work that has been or is being carried out contrary to the law, as well as any state of affairs where there has been or is a failure or unpreparedness to take action so as to be compliant with the law, as more fully described below:

- a contravention, breach or non-compliance with conditions of a development consent, approval, permit or licence
- a contravention, breach or non-compliance with an Act, regulation, environmental planning instrument or other instrument that controls and regulates the activity, work or state of affairs
- a failure to obtain any required development consent, approval, permit or licence in respect of the activity, work or state of affairs
- any other actionable contravention, breach or non-compliance with the law pertaining to one or more of the matters falling within the scope and operation of this Policy.

This Policy aims to provide guidance on:

- responding to reports alleging unlawful activity
- assessing whether reports alleging unlawful activity require investigation
- deciding on whether enforcement action is warranted
- options for dealing with confirmed cases of unlawful activity
- taking legal action
- implementing shared enforcement responsibilities
- involvement with Private Accredited Certifiers, and
- the role of the elected Councillors in enforcement.

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 any 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 involved, and the role of the elected 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 merit.

3. Organisational approach

Council will generally use a graduated approach to enforcement action. For example, Council may decide to issue a warning letter at first instance. In the event a warning letter fails to resolve the issue, Council may then decide to issue a Penalty Infringement Notice or a statutory Notice followed by an Order. Finally, Council may be left with no other option but to initiate some form of enforcement proceedings (such as a Court action) if compliance cannot be achieved by any other method.

In some situations the gravity of the incident or other circumstances necessitates that an escalated approach is inappropriate and immediate regulatory action is required e.g. where an activity is or is likely to result in a significant public health or public safety risk, or is or likely to cause significant environmental harm, or is a serious breach or disregard for the law. Circumstances may also exist where multiple actions are taken in conjunction with each other.

Enforcement guidelines and procedures may be developed to further assist officers when determining the most appropriate enforcement actions. All guidelines will facilitate a consistent approach in applying the provisions of this Policy, subject to the exercise of administrative discretion and the need to tailor the approach to the circumstances of the particular case, the public interest, and the allocation of Council's finite financial and human resources.

Compliance and enforcement action is important for any one or more of the following reasons:

- 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 encourage reports about possible unlawful activity from the community
- to educate the community of their legal obligations and how to comply
- to ensure the attainment of the aims, objectives and content of Council's strategic planning

Council undertakes both proactive and reactive compliance and enforcement activities. Proactive compliance includes various scheduled and programmed inspections of land, premises and works and structures in, on or over land (e.g. swimming pools, food premises, hoardings over footpaths) where the protection and maintenance of public safety is of the utmost paramount importance. Reactive compliance may occur in response to a report in which there is alleged or documented carrying out of an unlawful or otherwise irregular activity.

4. Application

This Policy applies to regulatory issues within Council's area of responsibility including, but not limited to:

- development and building control
- pollution control and environmental degradation or damage
- environmental health
- public health and safety
- waste water systems
- control over companion animals
- food safety
- fire safety
- tree preservation
- residential swimming pool safety
- Council reserves, assets and infrastructure
- noxious weeds.

This Policy does not formally apply to parking control as Penalty Infringement Notices are generally issued on the spot and Council has a contractual arrangement with the State Debt Recovery Office to deal with applications for internal review under the *Fines Act 1996.* In addition, certain other activities, such as noise, including, but not limited to offensive noise, are regulated wholly or partly by specific legislation which often sets out a code-like procedure to be followed as respects the regulation of the matter in question. Nevertheless, this Policy can be expected to provide guidance to Council officers in the course of the exercise of their administrative decision-making, irrespective of whether this Policy formally applies to the particular subject-matter.

5. Compliance and enforcement principles

The following principles underpin Council actions relating to compliance and enforcement:

Principle - Accountable and Transparent
Action:

- acting in the best interests of public health and safety and in the best interests of the environment
- ensuring accountability for decisions to take or not take action
- acting fairly and impartially and without bias or unlawful discrimination
- providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community
- ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this Policy
- acting on any complaints or concerns about the conduct of compliance officers in accordance with Council's complaints management Policy and procedures
- advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.

Principle - Consistent
Action:

- ensuring all compliance and enforcement action is implemented consistently
- encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.

Principle - Proportional
Action:

- ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach
- making cost-effective decisions about enforcement action

- taking action to address harm and deter future unlawful activity.

Principle - Timely
Action:

- ensuring responses to reports alleging unlawful activity and decision making in relation to those are undertaken according to risk.

6. 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
- upon request 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 the appropriate Council system and actioned in a timely manner by the appropriate business unit. Only Officers with appropriate delegations can undertake investigations or compliance and enforcement action in relation to this Policy.

7. Responding to concerns about unlawful activity

7.1 How reports alleging unlawful activity will be dealt with by Council

Council will record and assess every report alleging unlawful activity.

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

- prevent or minimise harm to health, welfare, safety, property or the environment
- consider the broader public interest having regard to Council's priorities and its resources
- consider the report fairly and impartially.

Not all reports will warrant an investigation. A preliminary assessment of all matters will be made to determine the priority for a response, and whether investigation or other action is required. A priority matrix maybe developed to determine what matters are investigated.

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 it 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, or is restricted under data provisions or other restrictions.

Decisions about what action should be taken are made at the Council's discretion. This means the objective is that reports alleging unlawful activity will be resolved in accordance with the objectives of this Policy and not necessarily the person raising the matter.

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. It is acknowledged 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, the reasons will be explained to the person raising the matter.

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

7.2 Confidentiality of people who report allegations of unlawful activity

Generally people who report allegations of unlawful activity should expect their identities will remain confidential from the subject of their report. However, Council may have to disclose information that identifies them in the following cases:

- the disclosure is necessary to investigate the matter
- 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.

7.3 What Council expects from people who report allegations of unlawful activity

Council expects 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
- the customer may be required to provide a statutory declaration indicating their willingness to attend court, witness statements and record observations such as a noise diary.

If these expectations are not met, Council may need to set limits or conditions on the continuation of the investigation.

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

7.4 What people 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 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
- upon request, provide information about any relevant internal and external appeal processes that may be available
- carefully assess any new information provided by any person after a decision has been made and advise whether further action will be taken.

7.5 Complaints about Council's enforcement actions

Any complaints about Council's handling of reports alleging unlawful activity will be recorded separately and handled under Council's complaints management policies and procedures.

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 under any relevant internal and external appeal processes.

Council staff will act on any complaints about the conduct of compliance officers under Council's complaints management policies and procedures and the Code of Conduct.

7.6 Anonymous reports

Anonymous reports will be recorded and assessed under 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 may not be suitable for investigation.

7.7 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.

An afterhours service is provided for those matters deemed to be a significant risk, otherwise matters are actioned the next business day.

7.8 Neighbour disputes

Council will at times receive reports from people 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 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.

8. Investigating alleged unlawful activity

Whilst there is no proactive obligation on Council under most legislation, 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 the environment.

A triage or rating system for common non-compliance incidents maybe used to help with prioritising action.

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. Council may not take action where there are sufficient private remedies available to the customer to resolve a matter. Such other remedies will be advised to the customer.

8.1 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 regulatory 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 that authority or provide information and contact details to the individual. For example Worksafe NSW for workplace safety matters, NSW Environment Protection Authority for possible environmental offences, Community Justice Centres NSW for personal disputes, and NSW Building Professionals Board for concerns about the conduct of a private accredited certifier
- 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 Executive Manager Environmental Compliance, General Counsel, General Manager Planning, Place and Community or the Chief Executive Officer 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.

8.2 Relevant factors guiding decisions as to whether to investigate:

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

- does the activity have or is likely to have a significant detrimental effect on the environment or constitute a risk to public safety
- is the report premature as it relates to some unfinished aspect of work that is still in progress
- is the activity or work permissible with or without prior permission
- are all conditions of development consent being complied with

- the time elapsed since the reported events took place
- is there a more appropriate agency to investigate and deal with the matter
- has a pattern of conduct or evidence of a possible wide spread problem occurred
- the nature of previous reports recorded against the person or organisation currently reported
- does the report raise matters of special significance in terms of Council's existing priorities
- the extent of resource implications in relation to an investigation and any subsequent enforcement action
- is it 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 processes 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 in Council's document management system and the reasons for that decision clearly stated.

9. 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 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 unlawful use legal.

Considerations about the effect on public land:
- Where the unlawful activity has taken place or is taking place on the road reserve, a public reserve or bushland or Crown Land managed by Council, comments may be sought from the relevant Business Unit (land manager) with a view to assisting Council officers in determining the most appropriate response in the public interest.

9.1 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 any enforcement action is taken against the correct person or organisation. Where there are multiple possible parties to an alleged unlawful activity, it may not be appropriate to take enforcement action against every person who may be liable for the alleged unlawful activity.

9.2 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.

9.3 Council operations

The provisions of this Policy will apply where an unlawful activity has been carried out by Council (either by permanent staff or contractors). Notwithstanding this, any such matters deemed to present a serious threat to life safety or cause serious environmental harm will be reported in writing without delay to the Chief Executive Officer and the relevant General Manager.

10. Options for dealing with confirmed cases of unlawful activity

Council will adopt a graduated approach 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 Council will depend on the full circumstances and facts of each case, with any decision being made on the merits of the matter.

10.1 The nature and seriousness of the unlawful activity

In assessing the level of risk, Council staff will have regard to the matters for consideration specified in this Policy including but not limited to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the unlawful activity.

10.2 Relevant factors

Where unlawful activity is identified, the seriousness of the unlawful activity will guide the appropriate enforcement response. The following factors are relevant to determining the significance of the unlawful activity.

Severity or **seriousness** of the unlawful activity, which includes:

- the degree of harm or potential harm resulting from the unlawful activity, including whether it seriously endangers human health or safety, the environment, or the economic or social fabric of the community
- whether any environmental harm caused by the unlawful activity is temporary or long lasting
- the magnitude or degree of non-compliance and whether the non-compliance is trivial or not
- whether the offence 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.

Note. Certain legislation for example, the Protection of the Environment (Operations) Act and the Environmental Planning and Assessment Act, contain provisions setting out a hierarchy of seriousness within the framework of the statute. In such a case, the factors set out above are used to determine the significance of the unlawful activity in the context of the relevantly applicable statutory hierarchy and framework.

Public interest, including:

- the cost to the general community of the unlawful activity (e.g. whether the offence caused harm to public lands) and the cost of taking further action in response to the unlawful activity
- the need to deter an offender and the broader community from committing further offences of a similar nature in the future (particularly if the offence is prevalent)
- whether pursuing the unlawful activity would be of little or no utility (for example, where a change in the law is imminent which would make the activity lawful).

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 or by mistake
- whether the alleged offender has shown a willingness to co-operate with Council and to comply in the future

- whether the alleged offender has a history of prior unlawful activity and, if so whether Council has taken action, whether the unlawful activity is continuing (the alleged offender has not ceased or abated the offence) and the length of time which has elapsed since the unlawful activity occurred.

The applicability of, and weight to be given to, each of the above factors will depend on the circumstances of each case. Investigating officers will make determinations on the level of significance with reference to manager support and review and legal advice where appropriate. Council officers will operate only within their delegated authority.

After the above factors have been considered, suspected unlawful activity will be classified as being of low, medium or high significance. This classification will guide the appropriate action to be taken. In all cases professional judgment will need to be exercised when making the classification.

Table 1 provides an example of a matrix which could be used in determining the significance of an unlawful activity in consideration of the factors listed above.

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Table 1: Matrix in determining significance of unlawful activity

Severity/ seriousness	*Public interest*	*Aggravating or mitigating factors*	*Significance of unlawful activity*
Low to moderate 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 co-operated with investigation.	LOW
Moderate, short-term loss of amenity; Low harm	Public interest likely to be moderate due to the need to deter the offender from further unlawful activity of this nature but little public perception of the unlawful activity.	No significant aggravating factors; Offender rectified unlawful activity quickly when notified by Council.	LOW
Moderate or high degree of 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.	Significant aggravating circumstances due to offender knowingly committing the unlawful activity despite likely impacts.	HIGH
Large magnitude of unlawful activity; High level of unjust benefit; Low to moderate risk of harm	Public interest moderate due to the need to deter the offender against further unlawful activity of this nature.	Aggravating circumstances due to offender knowingly committing the unlawful activity for significant financial gain.	HIGH
High level of compliance with approval / consent	Public interest moderate due the need to deter the offender against further unlawful activity of this nature.	Minor aggravating circumstances due to offender submitting false and misleading information about the unlawful activity.	MEDIUM
Low level of compliance with approval / consent	Public interest high due to the high public perception of the unlawful activity and likelihood of the offender committing further unlawful activity.	No mitigating circumstances due to offender failure to acknowledge the unlawful activity and instigating measures to prevent further unlawful activity.	HIGH

EXAMPLE

11. Enforcement options

When unlawful activity has been identified, it is then necessary to determine the appropriate enforcement response for the particular unlawful activity. Enforcement options include actions to restrain or remedy unlawful activity, and actions to punish an offender. The range of enforcement options available to Council in ascending order of significance include:

- **Record of breach** – Council may decide to take no further action. This would occur in the case of very minor breaches only
- **Warning or advisory letter** – The purpose of such a letter is to encourage future compliance and caution that further action may be taken if considered necessary
- **Negotiation** – Council may negotiate with the alleged offender and provide written confirmation of commitments made
- **Letter requesting undertaking** – Council may issue a letter requesting an undertaking that corrective action will be taken within a certain timeframe
- **Penalty Infringement Notice (PIN)** – Council may issue PINs for offences listed in the Fixed Penalties Handbook
- **Order** – Council is empowered to issue Orders in appropriate circumstances (in most instances, proceeded by a notice of intention to give the Order) requiring certain things to be done to achieve compliance with the law
- **Court Order** – Council can initiate proceedings seeking an Order from the Court requiring certain things to be done to achieve compliance with the law
- **Criminal prosecution** – Council can initiate criminal proceedings in the Land and Environment Court or the Local Court.

The above enforcement options are not necessarily mutually exclusive. For example in some circumstances it may be appropriate to contemporaneously issue an Order as well as issue a PIN. Further, a graduated enforcement response may not be justified in circumstances where action is sort to resolve a critical safety concern or to avoid a decline in environmental quality.

11.1 Choosing the appropriate enforcement response

In all cases, Council will choose an enforcement response which is proportionate to the seriousness of the offence and which:

- sets a proper precedent for future cases
- is consistent with the intent and objectives of the relevant legislation
- is an appropriate use of Council resources
- does not adopt an unreasonable or extreme interpretation of a condition of approval or consent. Council will cast itself as the "reasonable person"
- is consistent with responses previously adopted for similar incidents.

Enforcement options which may be appropriate for unlawful activities determined to be of low, medium or high significance are set out below. It is important to remember that the following is a guide only and each case must be assessed on the particular facts.

Enforcement options for unlawful activities of *low significance* include the following:

- take no action but record the unlawful activity (only where the degree of harm and severity of the unlawful activity are low to very low, some mitigating circumstances exist, there are no aggravating circumstances, and the public interest does not compel further action)
- send an electronic caution notice or advisory letter to the alleged offender to encourage them to comply in the future
- negotiate a corrective action with the alleged offender and confirm commitments made in writing

- send a letter identifying the unlawful activity and requesting an undertaking that corrective action will be taken within a specific timeframe
- issue a PIN.

Enforcement options for unlawful activity of *medium significance* include the following:

- send an electronic caution notice or advisory letter to the alleged offender to encourage them to comply in the future
- negotiate a corrective action with the alleged offender and confirm commitments made in writing
- send a letter identifying the unlawful activity and requesting an undertaking that corrective action will be taken within a specific timeframe
- issue a PIN
- issue an Order, for example to cease specified activities, comply with a development consent or project approval, and/or effect a remedy or restraint of the alleged unlawful activity.

Enforcement options for unlawful activity of *high significance* include the following:

- issue a PIN
- issue an Order
- commence civil proceedings in the Land and Environment Court seeking Court Orders requiring certain things to be done to achieve compliance or to remedy or restrain an alleged unlawful activity
- commence criminal prosecution proceedings in the Land and Environment Court or in a Local Court.

It may be appropriate to use more than one enforcement option in some cases. If initial enforcement action does not achieve a satisfactory outcome, it may be necessary to proceed to a higher level of enforcement response. For example, if a warning letter does not achieve the desired response, it may be appropriate to give an Order or to seek an Order from the Court, or if an Order is not complied with it may be appropriate to bring enforcement or prosecution proceedings.

11.2 Penalty Infringement Notices (PIN)

PINs are a way of imposing a fine on a person who an authorised officer believes is guilty of an offence without Council commencing court proceedings against the individual.

Officers who issue PINs under the *Fines Act* 1996 must have regard to the guidelines issued by the Attorney General under section 19A(3) of the *Fines Act* 1996 entitled *Caution Guidelines* under the *Fines Act* 1996 in deciding whether to give a person a caution for an offence.

All representations by persons to whom a PIN has been issued, should be made to the State Debt Recovery Office (SDRO). Where the SDRO does not have the authority to determine the matter, the representations will be referred to Council's internal Adjudication Panel for review and recommendation back to the SDRO. Any representations directly received by Council will be forwarded to the SDRO and the person who made the representation informed of this action.

An internal Adjudication Panel will be convened in order to ensure :

- openness and transparency in the decision making process with regard to appeals and representations to a PIN
- a balanced assessment is made against each representation to a PIN and the State Guidelines and Council Policies are consistently and fairly considered and applied
- consistent outcomes on PIN matters.

11.3 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. Council may continue to monitor a matter to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

12. 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.

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

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.

12.2 Whether there is a reasonable prospect of success before a court

Council will consider if 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.

12.3 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. 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
- the seriousness of the matter
- the need to provide a deterrent

12.4 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.

13. 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, Crown Lands, NSW Planning and the Building Professionals Board.

Council recognises that collaboration and cooperation between authorities to address issues of shared regulatory responsibility is the best approach. 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
- 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.

14. Role of Council where there is a private accredited certifier

A private accredited certifier may be appointed by a property owner to act as the Principal Certifying Authority (PCA) for a development or to undertake an inspection of a swimming pool barrier under the provisions of the Swimming Pools Act.

Council retains its regulatory role and enforcement powers where a private accredited certifier has been appointed, however, it is primarily the responsibility of the private accredited certifier to ensure building and construction compliance for a development.

Private accredited certifiers have limited enforcement powers under relevant legislation. They have the power to issue a notice to the owner to comply with the conditions of consent or rectify any non-compliance with a swimming pool barrier as the case maybe. A copy of any notice issued by a private accredited certifier must be provided to Council for assessment as to whether Council will enforce the notice by subsequently issuing an Order or direction.

Council will work together with private accredited certifiers to resolve any issues when they arise to achieve compliance. Private accredited certifiers are regulated by NSW Building Professionals Board who is also responsible for the investigation of complaints concerning their conduct.

15. 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 elected 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 Council's policies are being carried out correctly, however they cannot ignore or alter a Policy in order to satisfy the demands of individuals or special groups.

The Chief Executive Officer 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.

16. Delegations

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

17. Approval

This Policy was adopted at the Council Meeting on [enter date of Council meeting when the Policy was approved].

18. Review

This Policy will be reviewed every three years.

19. Other resources

The NSW Ombudsman website has the following helpful resources at www.ombo.nsw.gov.au:

- Managing unreasonable complainant conduct – a model Policy and procedure
- *Managing Unreasonable Complainant Conduct Manual* 2012
- *The Rights Stuff – Tips for making complaints and solving problems*
- *Effective complaint handling guidelines* – 2nd edition
- Managing information arising out of an investigation – Balancing openness and confidentiality
- *Reporting of progress and results of investigations*
- *Good Conduct and Administrative Practice*
- Options for Redress
- *Investigating Complaints – A manual for investigators*
- *Enforcement guidelines for Councils*
- *Better Service and Communication for Council.*

See also:

- Commonwealth Director of Public Prosecutions (2014), *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*
- NSW Planning (2010), *Prosecution Guidelines.*

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