



Regulatory Services Enforcement Policy

Policy Number 306

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1. BACKGROUND

The purpose is to provide an overarching policy for a suite of enforcement policies to assist Council staff to act promptly, consistently and effectively in response to enforcement matters. Council staff respond to numerous complaints and allegations of unlawful activity associated with relevant legislative controls administered by Council. Council also undertakes proactive measures identifying illegal and unlawful activities through routine and programmed inspections.

Council has a clear obligation to investigate and properly record all complaints and the policy provides clear guidelines for an effective complaint handling systems that allows staff to deal with complaints consistently and effectively, providing a clear and transparent decision making process.

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council will initiate the appropriate enforcement action in accordance with this policy document. The types of enforcement activity may be; taking no formal action, issuing warnings, providing an educational role or instigating criminal or civil legal action.

2. Objective

The aim of this policy is to establish fair, impartial and equitable guidelines for the exercise of discretion that Council must use in dealing with unlawful activities, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case, public policy and precedent considerations.

The policy provides a legal and administrative framework to assist Council in making decisions in its enforcement functions and ensures that the enforcement process is conducted in a timely and efficient manner.

The aim is to provide specific criteria which the Council will take into consideration when deciding options for dealing with unlawful activity:

- (a) if enforcement action is necessary; and
- (b) the most appropriate type of action.

The policy also provides information to the public about the Council's role and policy on enforcement.

3. Scope

This policy applies to the investigation and enforcement of identified unlawful activity or failure to comply with terms or conditions of approvals, licences and orders. While it is primarily directed at the regulation of development activity, the policy may also be applied to other matters such as pollution control, regulation of parking and animal control, where applicable.

4. Relationship to Legislation

The following acts and regulations are the guiding legislation for regulatory matters they include and are not limited to;

The Local Government Act 1993& Regulations
The Environmental Planning & Assessment Act 1979 & Regulations
The Public Health Act 1991& Regulations
The Food Act 2003 & Regulations
The Swimming Pool Act 1992
Roads Transport Act 1993& Regulations
Impounding Act 1993& Regulations
Companion Animals Act 1997& Regulations
POEO Act 1997 and regulations
Noxious weeds Act 1993
Recreational Vehicles Act 1983
Rural Fires Act 1997
Waste Avoidance and Resources Recovery Act 2001

5. Related Strategies, Plans or Policies

1. Staff Delegations - Determinations regarding enforcement action will be made in accordance with this policy and relevant delegation criteria including all relevant acts and regulations as defined under delegation.
2. Parking policy
3. Standard Operating Procedures

6. Definitions

The following defined terms are used in the policy:

Authorised Officer:

A Parramatta City Council staff member with delegated authority to authorise certain Council officers under relevant legislation in order for them to carry out their duties and take necessary action.

All Council officers that carry out inspections on private land for regulatory purposes will:

- Have delegation to enter premises and carry out investigations as specified in Council's Instrument of Delegations and sub delegations;
- Be authorised by Council where this is required under specific legislation to permit inspections on private property;
- Carry photographic identification demonstrating authorisation to enter premises and private lands under each specific Act; and
- Carry documentation or certificates of authority where required by the legislation being implemented.

Court Attendance Notice (CAN):

Means a court attendance notice issued and filed in accordance with the *Criminal Procedure Act 1986*. A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard. If a person does not attend court on the day specified in a CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with in the absence of the person.

Defendant:

means the accused person against whom criminal proceedings are brought.

EPAA:

means the *Environmental Planning and Assessment Act 1979*.

GIPA

means Government Information Public Access Act.

LGA:

means the *Local Government Act 1993*.

Penalty Infringement Notice (PIN):

means penalty infringement notice. Sometimes referred to as an 'on-the-spot' fine. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.

POEO:

means the *Protection of the Environment Operations Act 1997*.

Respondent:

means the party against whom civil proceedings are brought in Land & Environment Court proceedings.

Unlawful activity:

means any activity or work that has been or is being carried out;

- contrary to a legislative provision regulating a particular activity or work;
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land;
- without a required development consent, approval, permission, direction, permit or licence; and/or
- contrary to the terms or conditions of a development consent, approval, permit or licence.

Criminal Proceedings:

Criminal proceedings include

- Issuing a PIN;
- Prosecuting the offence in the Local Court by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary jurisdiction (Class 5)

Civil Proceedings;

Civil Proceeds include

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or strain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and
- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

7. Dealing with unlawful activities

Council becomes aware of unlawful activities in a variety of ways, they include requests from members of the public, customers or dealing with matters as part of Council's general regulatory roles. These roles include proactive measures, acting as the Principal Certifying Authority for development and building works, development enforcement, environmental protection, public health, Community Law Enforcement roles and during regular enforcement programs to enforce relevant legislation.

Council officers who are not involved directly in enforcement matters may also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy. Nevertheless, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our community. As a result of identifying breaches Council officers may initiate education, enforcement or legal action in accordance with this policy and their delegations

7.1 Submitting complaints or service requests

Complaints or service requests alleging unlawful activity can be submitted to Council in writing, verbally or electronically. In all cases the allegation will be recorded in Council's computerised customer service request management system and will be allocated a unique reference number.

The request will be referred to the relevant Council officer to commence any necessary investigation.

The name, address and contact details of the person submitting the complaint will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action. Council will advise any complainants of the action, if any, taken or the reasons why no action was taken in the circumstances.

Council will take all reasonable measures to protect the privacy of the person submitting the complaint and generally information on this person will not be released. However, Council may be required to disclose this information in a variety of circumstances including the following;

- Access to the information is permitted under legislation, including GIPA or the LGA;
- Access to the information is permitted under another Council policy;
- Legal proceedings are commenced and the information is disclosed in evidence served; and
- The nature of the allegation otherwise makes it a necessity.

Also, in some circumstances it may be possible to ascertain the identity of the person submitting the complaint by the nature of the allegation.

Council officers may not investigate complaints where determined by Management that:

- Council has no jurisdiction to investigate the complaint, ie. dividing fences, private strata matters.
- The activity alleged to be unlawful is in fact determined to be lawful.
- The complaint is frivolous, vexatious or trivial in nature.
- Another agency is responsible for the investigation.

All anonymous complaints will be accepted and considered as to the nature of the complaint, as many residents may wish to remain anonymous due to mitigating circumstances or fear of retribution. Management will determine if the complaint is to be investigated using the following criteria;

- There is sufficient relevant information received to investigate the complaint
- The complaint relates to serious environmental harm, public safety or a life threatening matter.
- The potential risk to the complainant
- Is the complaint frivolous or vexatious?
- Is it in the public interest?

If a decision is made not to investigate a complaint, this decision must be recorded along with the reasons for that decision.

Council officers will notify the complainant of the outcome of Council's investigation.

7.2 Procedural fairness and natural justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to. In this regard Council will;

- Provide information on the substance of the complaint to the alleged offender. This may not occur until an appropriate stage in the investigation;
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety, risk of serious environmental harm or for parking and road related matters;
- Consider any submission put forward by the parties to the matter;
- Make reasonable inquiries or investigations before making a decision;
- Ensure no person decides a case in which they have an interest;
- Otherwise act fairly and without bias and
- Act within statutory time frames

7.3 Options for dealing with unlawful activity

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council will recommend the most appropriate course of action that may be one or more of the following options;

- a) Take no action;
- b) Counsel the alleged offender;
- c) Issue a formal letter of warning;
- d) Negotiate an undertaking to remedy the situation;
- e) Issue a formal Notice and Order
- f) Commence criminal proceedings or issue of a PIN; and
- g) Commence civil proceedings to remedy or restrain unlawful activity.

Unless urgent action is required a staged approach to obtain compliance will be applied to matters other than parking related offences. That is, in the first instance, offenders will be given the opportunity to discuss and remedy the breach before enforcement action is taken.

Options (a) through to (d) may be all that is required for minor breaches where no serious impacts have occurred. However where they are ineffective, inappropriate and/or unsuccessful, alternate enforcement action may be warranted and include options (e) to (g).

Whilst these options recognise that Council officers may use discretion in the process, officers are obliged to act fairly and ensure the principles of procedural fairness and natural justice are adhered to.

8. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?

Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

8.1 The nature and seriousness of the breach

Council will have regard 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 breach.

8.2 Balancing of public interest and cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity;

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but often occurs;
- has attracted sustained public attention and no alternative resolution is proposed or likely; and
- flouts Council's authority.

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- • Reporting a breach to a professional association; and
- • Use of statutory powers such as;
 - granting consent to a relevant application;
 - making an order under the EP & AA, LGA or POEO; or
 - issuing a building certificate under the EP & AA.

8.3 The available methods of enforcement

If formal proceedings are considered to be the best option, the decision on which to bring court proceedings in will be informed by considerations such as the following:

- Likely cost of proceedings;
- Prospects of recovery of those costs from the respondent or defendant;
- Remedies available;
- Available methods of enforcement; and
- Circumstances of each case.

8.4 The circumstances of each case

The Council will in all prosecution and enforcement matters consider the following;

- Whether the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;
- Whether the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- Whether the impact of the unlawful activity effects the natural or built environment, health, safety and amenity;

- Whether development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- Whether the person(s) who committed the breach has shown contrition and, where possible, has remedied the unlawful activity;
- Whether the person(s) who committed the breach has made submissions to the Council that provide reasonable grounds for the Council to conclude that the person was under a genuine mistaken belief as to a relevant factual or legal matter;
- Whether the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- Whether the person(s) who committed the breach should have been aware of their obligations because they have:
 - particular knowledge eg: a builder or company that regularly carries out work and is generally aware of the relevant Council or other requirements;
 - received a previous warning; or
 - been subject to previous formal legal action.
- Whether the unlawful activity was unavoidable; and
- Such other matters that may appear to be relevant to the individual case.

When deciding whether to take enforcement action, Council officers will consider the circumstances of the case.

The specific matters for consideration are contained in Council's internal assessment forms and include:

- Has council created an estoppel situation?
- Is the breach a technical breach only?
- When was the unlawful works carried out?
- How has the unlawful activity affected the natural and built environment and health, safety and amenity of the area?
- Would consent have been given if it had been sought?
- Can the breach be easily remedied?
- Does the person in breach show contrition?
- Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
- Has the person the subject of the complaint received a previous warning or other non-coercive approach or has formal legal action been taken?
- Would an educative approach be more appropriate than a coercive approach?
- What are the costs and benefits of taking enforcement action as opposed to taking informal or no action?
- What are the chances of success if the proposed enforcement action was challenged in court?
- Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
- What action would be reasonable and proportionate in this case?
- What would be in the public interest?

9. DECIDING ON THE METHOD OF ENFORCEMENT

When deciding on the method of enforcement, it is necessary to consider the principles explained above in Section 7.3 – ‘Options for Dealing with Unlawful Activity’ and the outcome being sought.

There are two main types of enforcement action Criminal and Civil;

Criminal Proceedings;

- Issuing a PIN;
- Prosecuting the offence in the Local Court by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary jurisdiction (Class 5)

Civil Proceedings

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or strain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and
- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

9.1 PINs

PINs will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. The issuing of a PIN will only occur where a decision has been made not to commence other criminal proceedings and if the Council has obtained, or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings. A PIN can only be issued where it appears to the issuer that the defendant has committed the relevant offence.

PINs should be issued as soon as possible after the conclusion of an investigation and may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

9.2 Consents, Orders And Building Certificates

Council recognises that a person who may have carried out unlawful works may apply for a Building Certificate under S149D of the EP&A Act to formalise the unlawful work. However such applications should not be encouraged to justify unlawful works.

Consideration will be given to whether a breach can be rectified by a consent or building certificate or whether enforcement can occur by way of an order under the EPAA, LGA, POEO or some similar means.

The Orders provisions of the EPAA, LGA and POEO are described as “*self-help*” provisions that provide Council with a formal cost effective mechanism to direct land owners and occupiers to do or refrain from doing something. They generally operate on the ‘principles of natural justice’ and, where appropriate, should be used prior to the commencement of civil proceedings in the Land & Environment Court.

Irrespective of whether or not a Building Certificate is applied for, Council may take action against a person who carried out unlawful work. Such action may include the issue of a Penalty Notice or in conjunction with criminal proceedings, where it is considered appropriate and necessary for punitive action to also be taken, having regard to the restrictions provided under Section 127(7) of the EPAA.

9.3 Land & Environment Court Proceedings

Council will give preference to civil proceedings in the Land & Environment Court over criminal prosecution in either the Local Court or the Land & Environment Court where Council requires the offender to do or refrain from doing something, such as comply with a development consent or demolish unauthorised works.

Generally civil proceedings will be preceded by formal notices and/or orders, unless the circumstances warrant the immediate commencement of court proceedings.

The following matters will be considered in determining whether to commence civil or criminal proceedings in the Land and Environment Court:

- Is there a liable Respondent?
- Does Council have sufficient evidence to prove its case either on the "balance of probabilities" (civil) or "beyond reasonable doubt" (criminal)?
- Does Council require an Order from the Court restraining the respondent from doing something or ordering the respondent to remedy the breach?
- Is an injunction required because the unlawful activity is causing serious, or has the potential to cause, serious environmental harm;
- Is the matter urgent?
- The severity of the offence;
- Is the respondent a repeat offender?;
- The cost of proceedings and
- Does the development breach non-standard conditions of consent.

9.4 Local Court Proceedings

The following matters will be considered in determining whether to commence criminal proceedings in the Local Court:

- Is there a liable defendant?
- Is a monetary penalty all that is required?
- Does Council have sufficient evidence to prove its case "beyond reasonable doubt"?
- Are works proceeding - (is a Court Attendance Notice needed)?;
- The severity of the offence;
- Is the defendant a repeat offender?; and
- The cost of proceedings.

10. RECOVERY OF LEGAL COSTS

Recovery of investigation cost

Council will recover cost where available through legislation requirements such as under the POEO for clean up notice including administrative charges and the EP&A Act for investigation of complaints.

The Council's policy for recovery of its costs in the Land and Environment Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court;
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed; and
- The Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

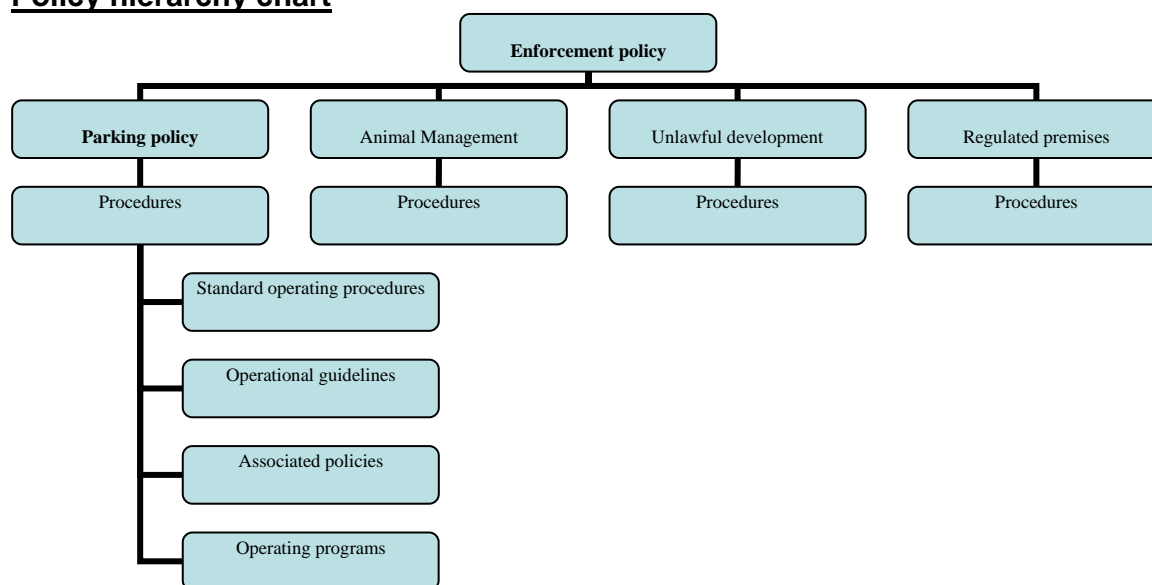
The Council's policy for recovery of costs in the Local Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court; and
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed.

11. Administration

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and shall be read in conjunction with all relevant Council policies. The Regulatory Enforcement Policy has been created as an overall guiding document for all enforcement matters within the Regulatory Service Unit. The policies and procedure will form a suite of documents for all regulatory matters. As legislation changes and issues arise policies and procedures will be developed to assist Council in managing the roles and responsibilities within the Regulatory Service Unit

Policy hierarchy chart



Authorisation

Adopted by Council 27 April 2010 Minute Number 11420

Review

This policy will be reviewed every 3 years

Version	Date Adopted	Date Superseded
1	27 April 2010	

Owner

Manager Regulatory Services