

Enforcement Policy

As at September 2020



ENFORCEMENT POLICY

RESPONSIBILITY	Environmental Services		
DATE ADOPTED	5 July 2011	MINUTE	118/11
REVISED	September 2020	REVIEW	2021
ECM No			
ASSOCIATED POLICIES	<ul style="list-style-type: none"> • Code of Conduct • Business Ethics Policy • Complaints Handling Policy 		
ASSOCIATED LEGISLATION	<ul style="list-style-type: none"> • <i>Local Government Act 1993</i> • <i>Impounding Act 1993</i> • <i>Protection of the Environment Operations (POEO) Act 1997</i> • <i>Environmental Planning & Assessment Act 1979</i> • <i>Fines Act 1996</i> • <i>Public Health Act 2010</i> • <i>Swimming Pools Act 1992</i> • <i>Food Act 2003</i> • <i>Biosecurity Act 2015</i> • <i>Road Transport Act 2013</i> • <i>Australian Road Rules 2014</i> • <i>Companion Animals Act 1998</i> 		
ASSOCIATED GUIDELINES	<ul style="list-style-type: none"> • NSW Ombudsman (2002), '<i>Enforcement Guidelines for Councils</i>' 		

1.0 Introduction

1.1 Title and Commencement

This policy is titled *Enforcement Policy*. This policy was adopted on 5 July 2011 by Council resolution (minute 118/11). This policy replaces the *Procedure for Unauthorised Building Works and Activities* adopted on 5 February 2002. The following amendments have been made:

Date	Description	Council Meeting/Minute
5 July 2011	Adoption	Council Meeting Minute 118/11
September 2020	Administrative amendment	CEO

1.2 Background and Purpose of Policy

Council is involved in a broad range of regulatory activity and takes a minimal tolerance to unlawful activity. Council is required under Section 8 of the Local Government Act to act consistently and without bias in the exercise of its regulatory functions.

These policy guidelines have been developed to set out how the processes for investigating and taking enforcement action to ensure that Council's processes are consistent, transparent, fair and efficient. This policy is guided by the NSW Ombudsman publication '*Enforcement Guidelines for Councils*'.

The purpose of this policy is to:

- enable the Council to meet its obligations under relevant legislation including but not limited to the *Local Government Act, Environmental Planning and Assessment Act, Protection of the Environment Operations Act, Food Act* etc.
- provide guidelines for the efficient, consistent and effective management of requests and complaints concerning enforcement activity whilst ensuring that the principles of natural justice and procedural fairness are respected
- set out the roles and responsibilities of council officials in Council's investigative and enforcement processes

1.3 Objectives of the policy

The aim of this policy is to establish clear guidelines for the exercise of discretion in dealing with requests or complaints about unlawful activity. It provides workable guidelines on:

- how to assess whether complaints of unlawful activity require investigation
- options for dealing with unlawful activity
- how to decide whether enforcement action is warranted

1.4 Coverage of the Policy

This policy applies to all functions, services, regulatory activities of Strathfield Council and includes Council officials (including employees and contractors) and those persons or companies engaged in activities or works in the Strathfield Local Government Area.

1.5 Definitions

"Unlawful activity" is any activity or work under Council's jurisdiction in the Strathfield Local Government Area that has been or is being carried out:

- contrary to the terms or conditions of a development consent, approval, permission, licence or other written authorisation from the Council
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land
- contrary to a legislative provision regulating a particular activity or work
- without a required development consent, approval, permission or licence.

"Council official" includes councillors, employees, contractors and consultants of Strathfield Municipal Council.

“Frivolous and Vexatious Complaint” means a complaint submitted to Council which is without substance, not made in good faith and/or concerns a trivial matter.

‘Minimal Tolerance’ means the least amount of tolerance allowable to matters such as food safety, public health, environmental and development non-compliances, whilst taking into consideration Council’s core values of fairness and equity as well as responsive and responsible regulations. It is a method of ensuring consistency in the approach taken by all Council officers. Enforcement action taken will be dependent upon the circumstances in each case and consideration will be given to the various questions as specified in part 4 of this policy.

2.0 Policy Statement

2.1 Enforcement Principles

Strathfield Council takes a minimal tolerance approach to enforcement action, while applying the following principles:

- acting in the interest of protecting community health/safety and or the environment
- acting consistently, fairly and impartially
- preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason(s)
- ensuring the proposed enforcement action is in keeping with the relative severity of the offence(s)
- ensuring enforcement action is taken against the right person for the correct offence
- ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner
- disclosing evidence relevant to the alleged offence/s in accordance with relevant legislation
- assisting the Court by providing all necessary information whether or not that information is in favour of Council’s case
- issuing cautions to the alleged offender(s), where necessary
- making cost effective decisions concerning enforcement action
- ensuring action is instigated within the specified time limits.

2.2 Procedural fairness and natural justice

Council has an obligation to act fairly and ensure the principles of procedural fairness and natural justice are adhered to prior to a decision being made. Council will:

- provide information to the subject(s) of investigation(s) regarding the complaint or alleged offence involving them. This may not occur until an appropriate stage in the investigation
- provide opportunities for parties to the complaint to put forward their case unless there is a serious risk to personal or public safety or risk of serious environmental harm.
- consider any relevant submissions and evidence put forward by the parties
- make reasonable inquiries or investigations prior to making a decision

- not consider issues of no relevance to the matter under consideration
- ensure that the person who decides a matter does not have a personal interest in the outcome
- act fairly and without bias

2.3 Council officials

All Council officials, including employees, councillors and contractors, are obliged to comply with Council's Code of Conduct, legislation, policies and agreements relating to performance of their official duties in order that Council's processes and decisions are perceived as fair, lawful, unbiased and equitable.

Attempts by members of the public to offer money (bribe), coerce, offer gifts or benefits in order to influence or alter a decision or action of Council will be reported to the relevant authority, which may include oversight agencies such as the Independent Commission Against Corruption (ICAC).

Complaints regarding Council services should be made in accordance with Council's *Complaints Handling Policy*.

3.0 Reporting non-compliances and complaint handling

3.1 Limitations on investigation of complaints or non-compliances

Council will investigate all complaints and matters regarding unlawful activity unless:

- the matter has already been actioned and resolved
- Council has no jurisdiction (eg civil matters between neighbours, WorkCover issues on a building site, Strata Management internal issues etc)

Where a Principal Certifying Authority (PCA) is responsible for monitoring compliance with the conditions of development consent, the PCA must investigate breaches of development consent. Council may request the PCA to investigate non-compliances and receive advice from the PCA. However, Council will investigate matters where:

- the PCA fails or is unable to appropriately action a matter where it is in the public interest
- the PCA has taken all the action available under the legislation, but the offence continues or reoccurs despite that action
- where the complaint relates to Council property
- the complaint relates to an environmental pollution incident

3.2 Making a complaint or request about unlawful activity

Requests or complaints alleging unlawful activity can be submitted to Council in writing (eg letter, fax or customer service e-request form on Council's website) or verbally. The allegation will be

registered in Council's record management system and allocated to a Council officer to commence any necessary investigation.

Council records the name, address and contact details of the person submitting the complaint. This information is critical in fully investigating the complaint as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action. Council will advise complainants of the results of enquiries or investigations undertaken.

Council will take all reasonable measures to protect the privacy of the person submitting the complaint, however in certain circumstances, Council may be required to disclose this information including:

- should a determination be made to release information under legislation such as the *Government Information (Public Access) Act 2009*
- where legal proceedings are commenced and the information is disclosed in evidence served
- if the nature of the allegation otherwise makes it a necessity.

3.3 Anonymous complaints

Council cannot guarantee that an anonymous complaint will be investigated as the name of the complainant may be necessary to the investigation or to clarify details of the complaint.

3.4 Frivolous, vexatious or trivial complaints

Council may not investigate complaints which are regarded as being without substance and not made in good faith.

3.5 Out of Hours Requests

Complaints received outside of business hours are dealt with by Council's Rangers in the first instance. If further action is required, the matter is referred to the relevant Council officer for investigation. Timeframes for investigation are set out in Part 3.6 of the policy.

3.6 Responding to Complaints

Every effort will be made to ensure that all Customer Service Requests or complaints about alleged unlawful activity are actioned within Council's Customer Services Standards. Additional time may be needed if the matter is complex and requires extensive investigation.

After receipt of the complaint, Council will issue an acknowledgement to the complainant, generally in the form in which it was received (eg phone, email or letter).

Action will be instigated within the following time frames:

- Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint. Examples include unsafe building works, dangerous awnings, collapsed building/wall, serious pollution, food safety issues and public health and safety matters, etc. Where possible, these matters will be dealt with on the day that Council is notified of the complaint or within two (2) working days.
- General compliance matters will be dealt within ten (10) working days of receipt of a complaint. Matters will be actioned on a priority basis having regard to the relative seriousness of the matter. These examples include works not in accordance with consent or construction without consent, illegal use, noise and food complaints.
- Nuisance matters are actioned within fifteen (15) working days examples include domestic noise matters, minor non-compliance such as overgrown land or other matters in which there are no likely immediate health or safety implications

4.0 Investigative processes

All complaints and matters regarding unlawful activities will be reviewed to determine whether the matter requires enquiry or investigation. If a decision is made not to investigate a complaint, this decision must be recorded with the reasons for that decision and the complainant so advised.

Council takes a minimal tolerance approach but considers the following:

4.1 Initial assessment

- (a) Has the matter been previously investigated and finalised?
- (b) Is the complaint trivial, frivolous or vexatious?
- (c) Is the alleged offence a breach of a technical nature or inconsequential nature?
- (d) Is the activity lawful and therefore, does not require further investigation?
- (e) Is the matter within the jurisdiction of Strathfield Council?
- (f) Is there another body that is a more appropriate agency to investigate and deal with the matter?
- (g) Is the complaint premature eg does it relate to some unfinished aspect of work that is still in progress?
- (h) Is it possible to determine from the information available to the Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
- (i) Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
- (j) Has too much time elapsed since the events the subject of the complaint took place? Are there time limits which prevent Council from taking legal action? Are there difficulties in investigating and determining responsibility for the unlawful activity due time lapses?
- (k) Would development consent or other approval been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken?
- (l) Is there sufficient evidence able to be obtained which would enable regulatory action to proceed?

4.2 Offender behaviour

The behaviour including prior history of an offender or alleged offender is relevant to consideration of proposed enforcement activity. The following apply:

- (a) Is there a history of related complaints against this person or organisation?
- (b) Has the person(s) who committed the breach provided information to 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. In certain circumstances, Council may be less inclined to proceed with legal action especially if the owner actively and positively attempts to address the situation and was genuinely unaware of their obligations.
- (c) Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
- (d) Has the person(s) who committed the breach shown deliberate or wilful conduct in their actions eg ignored advice or instructions? Received a previous warning or other non-coercive approach or has formal legal action been taken?
- (e) Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?
- (f) Has the alleged offender been advised, if appropriate, that no response to a show cause letter will result in the commencement of enforcement action?
- (g) Has the person(s) who committed the breach shown contrition and, where possible, has remedied the unlawful activity?
- (h) Is the person(s) who committed the breach knowledgeable and 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?

4.3 Public interest and use of resources

Council should assess whether proposed enforcement action is in the public interest and a reasonable use of Council resources. The following issues should be considered:

- (a) Is the activity having a significant detrimental effect on the environment, or does it constitute a risk to public safety? Note that the nature and degree of impact(s) caused by the unlawful activity on the natural or built environment and on health, safety and amenity and the seriousness of the impacts should be assessed. Council's actions will be based on assessment of the degree of detriment and risk to the environment, health, safety and amenity.
- (b) Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- (c) Is it in the public interest to investigate the complaint? Is there a reasonable prospect for a satisfactory outcome?
- (d) Does the complaint indicate the existence of a systemic problem eg if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?

- (e) What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
- (f) Is there sufficient evidence to establish a prima facie case? Is there some doubt over the evidence or offence/s?
- (g) What are the chances of success if the proposed enforcement action was challenged in court?
- (h) What is the likely length and net expense of the legal action?

4.4 Building Certificates

Building Certificates are issued under section 10.7 of the *Environmental Planning and Assessment Act 1979*.

Council requires the submission of Building Certificate Applications to justify or rectify unlawful works. Council supports lawful processes intended to ensure that consent is obtained from Council or a consent Authority where development consent is required and that such consent is obtained before works are carried out. However, it is recognised that persons who may have carried out unlawful works are required to apply for a Building Certificate to regularise and formalise those unlawful works.

Council will consider in determining an application for a building certificate whether development consent would have been granted had it been applied for initially. On some occasions, however, it may be prudent and appropriate for Council to encourage the submission of a building certificate application to regularise a breach of the *Environmental Planning and Assessment Act 1979*.

Regardless of whether a building certificate application has been made, Council reserves the right to take appropriate enforcement action for unlawful works.

4.5 Factors considered in commencing enforcement action

Should Council decide to commence enforcement action, the following principles will apply:

4.5.1 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 and public safety of other residents, businesses or visitors to Strathfield Local Government Area.

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.

4.5.2 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:

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

If legal proceedings are considered to be the best option, the decision on which Court to bring 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
- Circumstances of each case.

5.0 Options for dealing with confirmed cases of unlawful activities

Council will use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options.

Options to be considered will include the following. Note that these are not listed in any order of preference or application:

- Refer the complaint to an external agency for further investigation or prosecution.
- Take no action on the basis of lack of evidence or for some other appropriate reason.
- Counsel the subject of the investigation to educate them on the relevant Council requirements.
- Negotiate with the subject of the investigation and obtain some undertakings to address the issues of concern arising from the investigation e.g. an application for modification of development consent.
- Refer the parties for mediation with the Community Justice Centre or alternatively for private mediation.
- Issue a letter requiring work to be done or activity to cease in lieu of more formal action.
- Issue a notice of intention to serve an order or notice under relevant legislation, followed by service of an appropriate order or notice (such as but not limited to ss 124-128 *Local Government Act* (LG Act), s.9.34 *Environmental Planning & Assessment Act* (EP&A Act) and Pts 4.2-4.4 and 8.6 *Protection of the Environment Operations Act* (POEO Act)).
 - Issue a notice requiring work to be done under various legislation
 - Start proceedings in the Land & Environment Court for an order to remedy or restrain a breach of the relevant Act or

- Regulation (such as s.673 LG Act, s.9.45 EP&A Act)
- Seek injunctions from the Land & Environment Court or the Supreme Court
- Issue a Court Attendance Notice in the local court
- Issue a penalty infringement notice
- Take proceedings for an offence against the relevant Act or Regulation (such as s. 691 LG Act, s.9.37 & 9.50 EP&A Act, Chapter 5 POEO Act)
- Carry out the works specified in an order under the Local Government Act at the cost of the person served with the order (s.678 LG Act)

6.0 Fines review

Requests for review of penalty notices will be considered under the Internal Review Guidelines under the Fines Act 1996 issued by the NSW Attorney General.