Enforcement and Compliance Guidelines

Introduction

This Guideline applies to the investigation and enforcement of complaints about unlawful activity or failure to comply with the terms or conditions of approvals, consents, notices or orders.

This Guideline outlines how to assess whether complaints of unlawful activity require investigation, options for dealing with unlawful activities and regulatory breaches, matters for consideration and the use of discretion in dealing with regulatory action, and how to decide whether enforcement action is warranted. It meets the requirements of the NSW Division of Local Government in regard Council enforcement and compliance activities.

Application

This Guideline applies to all compliance and enforcement action where Council has regulatory responsibility under NSW legislation including:

- Environment protection and pollution control
- Unauthorised development
- Fire safety
- Public health and safety
- Weed Management
- Food safety
- Carparking, roads and footpaths
- Control of animals
- Tree preservation

Definitions

For the purpose of this Guideline unlawful activity is any activity or work that has been or is being carried out:

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

Council staff

All staff that deal with customer requests or complaints alleging unlawful activity or non-compliance are responsible for implementing these procedures. All notifications of alleged unlawful activity should be registered in TRIM and directed to the responsible workflow.

Private Principal Certifying Authority (PCA)

Council recognises that the PCA is responsible for ensuring compliance with conditions of development consent. Persons making complaints regarding a site where the PCA is privately engaged must be advised to contact the nominated PCA in the first instance. Where a complaint is received in writing regarding a site under the control of a private certifier Council will forward the complainant the contact details of the private certifier.

Responding to customer requests regarding alleged unlawful activity

All requests received relating to alleged unlawful activity will be registered in TRIM and actioned to the appropriate section via the established and approved TRIM Workflows. Action should be instigated in accordance with the following priorities and times frames.

Urgent & life threatening matters should be actioned as soon as possible by the relevant officer. This typically means on the day of receipt or immediately the following day. Examples include collapsed or unsafe buildings, dog attacks, pollution incidents where the public health or environment is at risk of harm.

General compliance issues should generally be actioned within 21 days. Examples would include alleged unlawful works or activities, abandoned vehicles, weed management, food premises complaints, noise complaints affecting several properties etc.

Nuisance matters should be actioned generally within 21 days. Examples include domestic noise, overgrown land, and minor non-compliance with Consents or Approvals issues.

It should be noted that the investigating officer would also prioritise the request based on an assessment of the customer request and competing demands and priorities.

Investigation of unlawful activities

All customer requests regarding alleged unlawful activity will be investigated unless:

- the request has already been resolved or actioned
- Council has no jurisdiction (e.g. the NSW EPA is the Appropriate Regulatory Authority)
- The request is determined to be lawful without the need for an investigation
- a private Principal Certifying Authority (PCA) is responsible for monitoring compliance with the conditions of development Consent

Note:

Council will investigate matters where:

- the PCA fails or is unable to appropriately action a matter or where it is in the public interest to do so;
- the PCA has taken all the action available to it under the legislation, but the offence continues despite that action;
- the complaint relates to an environmental pollution incident; or
- the request relates to Council property
• the complaint is frivolous, trivial in nature or vexatious, or
• the relevant Manager, Group Manager or General Manager has determined that investigation and / or regulatory action is not warranted.

In considering whether a customer request about alleged unlawful activity requires investigation staff will consider the following range of factors.

1. Is the matter within Council’s jurisdiction?
2. Is the complaint premature, e.g. does it relate to an unfinished aspect of work that is still in progress?
3. Is the activity or work permissible with or without consent or approval?
4. If the activity is permissible with consent, has one been issued?
5. Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
6. Is the request frivolous trivial or vexatious?
7. Has too much time elapsed since the events (the subject of the request) took place?
8. Is there another agency that is more appropriate to investigate and deal with the matter?
9. Is the activity or work having a significant detrimental effect on the environment, or does it constitute a risk to public health or safety?
10. Does the customer request indicate the existence of a systemic problem, e.g. if the complaint is one of a series about the same matter could there be a pattern or a more widespread problem?
11. Is there a history of customer requests concerning this person, organisation or activity?
12. Does the request have significance in terms of the priority of Council?
13. Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
14. Is it in the public interest to investigate the customer request?

If a decision is made not to investigate a customer request regarding alleged unlawful activity, that decision must be recorded on TRIM with clear reasons why it was not investigated. The customer must also be advised of the decision within 21 days.

Confidentiality

Council will respect the privacy and confidentiality of information received. Due however to other statutory requirements confidentiality cannot always be guaranteed. In cases where the release of information is considered necessary the customer will be consulted by the Public Officer before such a decision is made.

Habitual or vexatious complaints

Customer requests that have been thoroughly investigated on prior occasion(s) will not be revisited unless new evidence is presented that warrants further investigation. In cases where it is decided not to take further action then the customer will be advised in writing within 14 days.

Options after investigation

Following an investigation there are a range of options available to deal with a particular matter depending on the nature of the matter or offence, relevant legislative provisions, circumstances of the case and the outcome desired. The regulatory options will differ where different legislation is involved, but the principles of application will remain constant.
Approaches to be taken without taking formal regulatory action include:

- Taking no action on the basis of no reliable evidence or other appropriate reason and advising customer of same within 14 days.
- Educating the person who carried out the unlawful activity to inform them of the relevant requirements. Council acknowledges the role of such initiatives to achieve compliance in some situations.
- Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address the issues of concern arising from an investigation, e.g. obtaining a s96 application to modify a Development Consent.
- Referring parties involved for mediation.
- A letter requiring works to be carried out or ceased in lieu of more formal action, e.g. a warning letter.

These options may be all that is required in regard minor breaches where no serious impacts have occurred. Whilst these approaches recognise that Council may use discretion in the process, Council is obliged to uphold the law. Where appropriate a staged approach to ensure compliance will be adopted and in the first instance customers will be given the opportunity to discuss and remedy the breach before action is taken, unless immediate action is required.

Where regulatory action is to be taken options again vary dependent upon the legislation,

- The issue of Notices and Orders requiring compliance with legislative requirements or those of an environmental planning instrument
- Commencement of criminal proceedings for an offence under legislation (through the Court Attendance Notice (CAN) Process)
- Issuing Penalty Infringement Notice/s (PINs),
- Commencement of civil proceedings in a Court to either remedy or restrain unlawful activity
- Seek injunctions from the Land and Environment Court or the Supreme Court
- Carry out the works specified in any order or Notice at the expense of the person / entity served with the Notice or Order.
A summary of the main regulatory options available to Council staff is contained in the following table.

**Compliance options available under major LG Legislation**

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ARR = Australian Road Rules
RA = Roads Act 1993
IA = Impounding Act 1993
CAA = Companion Animals Act 1998
FA = Food Act 2003
PHA = Public Health Act 2010
SPA = Swimming Pools Act 1992
NWA = Noxious Weeds Act 1993
RFA = Rural Fires Act 1997
CLM = Contaminated Land Management Act 1997
EPA = Environmental Planning & Assessment Act 1979
LGA = Local Government Act 1993
POEO = Protection of the Environment Act 1997

**Using discretion**

The NSW Director of Public Prosecution advises in its “Prosecution Policy and Guidelines” that the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:

- whether or not the admissible evidence available is capable of establishing each element of the offence
- whether or not it can be said that there is no reasonable prospect of conviction and, if not,
- whether or not discretionary factors dictate that the matter should not proceed in the public interest.
The NSW Ombudsmen provides guidelines of requirements for discretionary decisions and the NSW Department of Planning also provides useful information on the proper use of discretionary powers available under the EP&A Act 1979.

Taking enforcement action

A range of matters are required to be taken into consideration when determining the appropriate course of enforcement action. The investigating officer and relevant Manager must acknowledge the individual circumstances of each case and consider the following.

1. The nature extent or severity of the unlawful activity.
2. Whether the unlawful activity created a health, safety or environmental hazard.
3. Whether or not the unlawful activity is of a technical, inconsequential or minor nature.
4. Whether the unlawful activity could be carried out lawfully if development consent or an exemption from development consent was sought.
5. Whether or not Council is legally stopped from taking action.
6. Whether the enforcement activity is in the public interest.
7. Whether previous warnings have been issued.
8. How long the unlawful activity has been occurring and whether the enforcement action is statute barred.
9. Whether there is any doubt over the evidence or the offence.
10. What are the chances of success in regard the enforcement action?
11. Would consent have been given if it had been sought?
12. Whether the condition of development consent not being complied with is clear and unambiguous.
13. Are the enforcement costs likely to be prohibitive with respect to the type of offence?
14. Whether the person or entity exhibits contrition for the offence.

Deciding on prosecution action

Regardless of any other enforcement action contemplated the following three matters will be considered before the Manager or Group Manager contemplates prosecuting an offender.

1. Is there admissible evidence that establishes each element of the offence beyond reasonable doubt? This is the prima-facie test! Evidence that should be collected and reviewed can include contemporaneous notes, diary notes, admissions or photos etc.
2. Is there a reasonable prospect of conviction? This should be based on the balance of probability or beyond reasonable doubt.
3. Are there discretionary factors to be considered?

For other than minor matters Council will typically seek legal advice to help determine whether or not to prosecute a matter. A record of this decision making process will be kept by the relevant Manager and recorded in TRIM.

Delegations for enforcement action

Council staff delegated to initiate various levels of enforcement action are nominated in Council’s Delegations Register. Before any enforcement action is considered delegations of staff involved should be reviewed to ensure that appropriate delegations are in place.