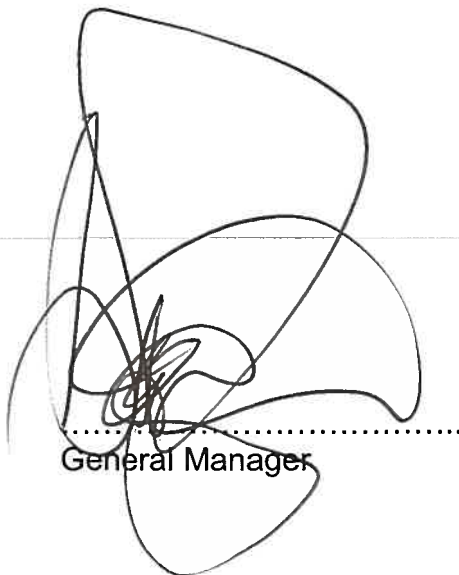




# Enforcement Policy

## DOCUMENT AUTHORISATION

<b>RESPONSIBLE OFFICER:</b>		DIRECTOR OF DEVELOPMENT, PLANNING AND REGULATORY SERVICES			
<b>REVIEWED BY:</b>		Manager of Planning and Regulatory Services (MPRS)			
<b>REVIEW DUE DATE:</b>		March 2024			
<b>VERSION NUMBER:</b>		5			
<b>DOCUMENT NUMBER:</b>		ENFORCE:POL:1			
<b>VERSIONS:</b>	<b>DATE:</b>	<b>RESOLUTION NO:</b>	<b>DESCRIPTION OF AMENDMENTS:</b>	<b>AUTHOR / EDITOR:</b>	<b>REVIEW / SIGN OFF:</b>
5	26/05/2022	21.05/22	This Policy was put into the new Policy Template, some spelling mistakes corrected and relevant legislation and Council Policies updated. There have been no significant or mentionable changes to the Policy that in any way change the meaning of the Policy.	B&EHO	Council
4	22/09/2016	30.09/16	Review	DDPRS	Council
3	22/8/2013	25.08/13	Review	DDPRS	Council
2	28/10/2010	13.10/10	Review	DDPRS	Council
1	25/9/2008	24.09/08	Review	DDPRS	Council



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General Manager

2/6/22.  
.....  
Date

## ACKNOWLEDGEMENT OF COUNTRY

Glen Innes Severn Council acknowledges and pays respect to the Ngoorabul people as the traditional custodians of this land, their elders past, present and emerging and to Torres Strait Islander people and all First Nations people.

## PURPOSE

Glen Innes Severn Council is committed to:

- Preventing or minimizing harm to health, welfare, safety, property or the environment;
- Improving the safety and amenity of residents and visitors to the area;
- The collective good, the welfare of the community or the public interest;
- Promoting social policies (e.g. to preserve or protect the environment);
- Managing risk;
- Upholding social order;
- Meeting the expectations of the community;
- Encouraging the reporting of possible unlawful activity from the community; and
- Making the regulated community aware of their legal obligations and how to comply.

Therefore, purpose of this policy is to establish clear guidelines and protocols for Council staff in the management of Council's regulatory activities. It provides workable guidelines on:

- Responding to reports alleged unlawful activity;
- Assessing whether reports alleging unlawful activity require investigation;
- Deciding on whether enforcement action is warranted;
- Options for dealing with the confirmed cases of unlawful activity;
- Taking legal action; and
- Implementing shared enforcement responsibilities.

The policy also provides advice and guidance on;

- The role of the Principal Certifying Authority with regard to building certification; and
- The role of Councillors in enforcement.

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

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

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

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

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

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

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

## APPLICABILITY

This policy applies to regulatory issues within Council's Local Government Area of responsibility including, but not limited to:

- Development and building control;
  - Pollution control;
  - Environmental health;
  - Public health and safety;
  - Noxious weeds;
  - Water and sewer;
  - Septic systems;
  - Control over animals;
  - Food safety; and
  - Fire safety.
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## OUTCOMES

Glen Innes Severn Council is committed to: Preventing or minimizing harm to health, welfare, safety, property or the environment;

- Improving the safety and amenity of residents and visitors to the area;
- The collective good, the welfare of the community or the public interest;
- Promoting social policies (e.g. to preserve or protect the environment);
- Managing risk;
- Upholding social order;
- Meeting the expectations of the community;
- Encouraging the reporting of possible unlawful activity from the community; and
- Making the regulated community aware of their legal obligations and how to comply.

## ROLES AND RESPONSIBILITIES

### DELEGATIONS

Delegations conferred on staff to initiate various levels of enforcement action are set out in the relevant Council Officers delegations. All officers having appropriate delegations are authorised to undertake appropriate enforcement action.

**It should be noted that for all offences requiring the instigation of legal proceedings at the level of or above that of a district court jurisdiction, the matter shall be reported to Council, for action.**

**All Land and Environment Court legal proceedings are required to be presented to Council for action.**

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## DEFINITIONS

The following are the definitions of key terms in this policy:-

Term	Meaning
Complaint	<p>A complaint is an expression of dissatisfaction made about Council services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</p> <p>For the purposes of this policy, a complaint does not include;</p> <ul style="list-style-type: none"> <li>• a report alleging unlawful activity (see definition below);</li> <li>• a request for information about a Council policy or procedure;</li> <li>• a request for an explanation of actions taken by Council; or</li> <li>• a request for internal review of a Council decision.</li> </ul>
Enforcement	Actions taken in response to serious or deliberate contraventions of laws.
Regulation	Using a variety of tools and strategies to influence and change behaviour to achieve the objectives of an Act, Regulation or other statutory instrument administered by Council.
Report alleging unlawful activity	An expression of concern or a request for service in relation to alleged unlawful activity, where a response or resolution is explicitly or implicitly expected or legally required.
Term	Meaning
Unlawful activity	<p>Any activity or work that has been or is being carried out contrary to the below and/or failure to take required action in order to be compliant with:</p> <ul style="list-style-type: none"> <li>• terms or conditions of a development consent, approval, permit or licence;</li> <li>• an environmental planning instrument that regulates the activities or work that can be carried out on particular land;</li> <li>• a legislative provision regulating a particular activity or work; or</li> <li>• a required development consent, approval, permission or licence.</li> </ul>

## POLICY STATEMENT

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, and
- Provide information to all relevant parties about any avenues to seek an internal or external review of such a decision.

All reports alleging unlawful activity are to be entered into Council's Practical of ECM system and actioned in a timely manner by the appropriate person.

Every effort will be made to ensure that all Customer Service Requests or complaints about alleged unlawful activity are actioned within the 'service standard' time allowed for resolving the complaints as dictated under the terms and conditions of the Glen Innes Severn Council Complaints Policy.

Action will be instigated within the following timeframes:

1. Urgent and life-threatening matters will 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. As a guide, these matters will be dealt with on the day of the receipt of the complaint, if possible.
  2. General compliance matters will be dealt with 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, and noise and food complaints.
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3. Nuisance matters will be actioned within seven (7) 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.

**Response times may vary depending on staff and other resources. However, the Council will acknowledge the complaint and keep the complainant informed in accordance with the service standards of the Council.**

Only Council staff with appropriate delegations from the General Manager can undertake investigations or compliance and enforcement action in relation to this policy.

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## COMPLIANCE AND ENFORCEMENT PRINCIPLES

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

PRINCIPLE	ACTION
Accountable and Transparent	<ul style="list-style-type: none"> <li>• Acting in the best interests of public health and safety and in the best interests of the environment;</li> <li>• Ensuring accountability for decisions to take or not take action;</li> <li>• Acting fairly and impartially and without bias or unlawful discrimination;</li> <li>• Providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community;</li> <li>• Ensuring meaningful reasons for decisions are given to all relevant parties;</li> <li>• Acting on any complaints or concerns about the conduct of compliance officers in accordance with Council's Complaints Management Policy and Procedures;</li> <li>• Advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.</li> </ul>
Consistent	<ul style="list-style-type: none"> <li>• Ensuring all compliance and enforcement action is implemented consistently;</li> <li>• Encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.</li> </ul>
Proportional	<ul style="list-style-type: none"> <li>• Ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach;</li> <li>• Making cost-effective decisions about enforcement action;</li> <li>• Taking action to address harm and deter future unlawful activity.</li> </ul>
Timely	<ul style="list-style-type: none"> <li>• Ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.</li> </ul>

## **RESPONDING TO CONCERNS ABOUT UNLAWFUL ACTIVITY**

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

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

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

- Maintain the collective welfare of the community;
- Prevent or minimise harm to health, welfare, safety, property or the environment;
- Consider the broader public interest having regard to Council's priorities and any resource limitations; and
- Consider the report fairly and impartially.

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

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

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

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

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

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

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

- The disclosure is necessary to investigate the matter;
- Their identity has already been disclosed to the subject of the 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; or
- The matter proceeds to court.

Council will take seriously any concern 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.

### **What Council expects from people who report allegations of unlawful activity**

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

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

If these expectations of the individual are not met, Council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual. Any unreasonable conduct will be dealt with in accordance with the principles of the NSW Ombudsman's *Managing Unreasonable Complainant Conduct Manual 2021* and any applicable Council Policy.

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## **What parties can expect from Council**

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

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

## **Complaints about Council's enforcement actions**

Any complaints about Council's handling of reports alleging unlawful activity will be recorded separately and handled in accordance with Council's Complaint's Policy.

Where a person or organization subject to enforcement action merely disputes Council's decision to take enforcement against them, they will be directed to make representations in accordance with any relevant internal and external appeal processes. Council staff will act on any complaints about the conduct of authorised officers in accordance with Council's Complaints and Code of Conduct Policy's.

## **Anonymous reports**

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

## **Unlawful activity outside business hours**

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

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

## **Neighbour disputes**

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

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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 Law Access NSW and Community Justice Centres.

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

### **INVESTIGATING ALLEGED UNLAWFUL ACTIVITY**

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

If there is insufficient information in the report to undertake a preliminary assessment, further information may need to be sought from the person who made the report, or an inspection undertaken. Staff may also need to consult Council.

#### Circumstances where no action will be taken:

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

- council does not have jurisdiction to investigate or is not the appropriate authority to take action on the issues raised. Where there is another appropriate authority or course of action, Council may bring the matter to the attention of the authority or provide information and contact details to the individual. For example, WorkCover NSW for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres for personal disputes;
  - the report relates substantially to a matter previously determined by Council and no new or compelling information is presented which would cause Council to change its earlier decision. In this case, staff will acknowledge the report and advise that no further action will be taken as no new information had been provided;
  - 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; or
  - the relevant manager, director or the general manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.
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Relevant factors guiding decisions as to whether to take action:

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

- the activity is having a significant detrimental effect on the environment, or it constitutes a risk to public safety,
- the report is premature as it relates to some unfinished aspect of work that is still in progress,
- the activity or work is permissible with or without permission,
- all conditions of consent are being complied with,
- much time has elapsed since the events the subject of the report took place,
- another body is a more appropriate agency to investigate and deal with the matter,
- it appears there is a pattern of conduct or evidence of a possible widespread problem,
- the person or organisation reported has been the subject of previous reports,
- the report raises matters of special significance in terms of the Council's existing priorities,
- there are significant resource implications in relation to an investigation and any subsequent enforcement action, and/or
- it is in the public interest to investigate the report.

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

The objective of the 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, and
- determine any necessary action to mitigate the possibility of reoccurrence of similar incidents.

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

## **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:

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### 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, and
- The time period that has lapsed since the date of the unlawful activity.

### Considerations about the alleged offender

- Any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them,
- Whether the offence was committed with intent,
- Whether the person or organisation reported has been proactive in the resolution of the matter and assisted with any Council requirements and instructions,
- Any mitigating or aggravating circumstances demonstrated by the alleged offender, and/or
- 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; or
- 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; or
- Whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.

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

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## **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.

## **REQUIREMENTS OF COUNCIL STAFF CONSIDERING ENFORCEMENT ACTION**

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

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

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

## **OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY**

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

Any enforcement action taken by Council will depend on the full circumstances and facts of each case, with any decision being made on the merits. At all times, Council's key concerns are:

- to prevent or minimise harm to health, welfare, safety, property or the environment, and
  - to influence a change in behaviour for the common good and on behalf of the community.
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The following enforcement options to be considered by Council are ordered to reflect an escalation in response that is proportionate to the level of risk, the seriousness of the confirmed breach or the need for a deterrent. Appendix 2 outlines examples of key options and possible courses of action that Council may take in specific circumstances:

LEVEL OF RISK	ENFORCEMENT OPTIONS
Very Low	<ul style="list-style-type: none"> <li>• Take no action on the basis of a lack of evidence or some other appropriate reason.</li> <li>• Provision of information/advice on how to be compliant.</li> </ul>
Low	<ul style="list-style-type: none"> <li>• Negotiating with the person to obtain voluntary undertakings or an agreement to address the issues of concern.</li> <li>• Issuing a warning or a formal caution.</li> </ul>
Medium	<ul style="list-style-type: none"> <li>• Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.</li> <li>• Issuing a notice of intention to serve an order or notice under relevant legislation, and then serving an order or notice if appropriate.</li> </ul>
High	<ul style="list-style-type: none"> <li>• Issuing a penalty notice.</li> <li>• Carrying out the works specified in an order at the cost of the person served with the order.</li> </ul>
Very High	<ul style="list-style-type: none"> <li>• Seeking an injunction through the courts to prevent future or continuing unlawful activity.</li> <li>• Commence legal proceedings for an offence against the relevant Act or Regulation.</li> </ul>

### **FOLLOWING UP ENFORCEMENT ACTION**

All enforcement action will be reviewed and monitored to ensure compliance with any undertakings given by the subject of enforcement action or advice, directions or orders issued by Council. Reports alleging continuing unlawful activity will be assessed and further action taken if necessary. If the unlawful activity has ceased or the work has been rectified, the matter will be resubmitted for follow up action to ensure compliance outcomes are met. Should initial enforcement action be found to have been ineffective, Council staff will consider other enforcement options.

### **TAKING LEGAL ACTION**

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

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

## **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.

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

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

## **WHETHER THERE IS A REASONABLE PROSPECT OF SUCCESS BEFORE A COURT**

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

## **WHETHER THE PUBLIC INTEREST REQUIRES LEGAL ACTION BE PURSUED**

The principal consideration in deciding whether to commence legal proceedings is whether doing 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; or
- whether the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive.

## **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.

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## **SHARED ENFORCEMENT RESPONSIBILITIES**

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

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

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

## **ROLE OF COUNCIL WHERE THERE IS A PRIVATE CERTIFIER**

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

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

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

## **ROLE OF COUNCILLORS IN ENFORCEMENT**

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

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

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

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**APPENDIX 1**

**Taking enforcement action**

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

CONSIDERATIONS ABOUT THE ALLEGED OFFENCE AND IMPACT	
<ul style="list-style-type: none"> <li>• the nature, extent and severity of the unlawful activity including whether the activity continued;</li> <li>• the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity;</li> <li>• the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature;</li> <li>• the costs and benefits of taking formal enforcement action as opposed to taking informal or no action; and</li> <li>• the time period that has lapsed since the date of the unlawful activity.</li> </ul>	<p>Consideration should be given to the nature, extent and severity of any actual or potential impact of the unlawful activity. If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach. It is also important to consider whether the unlawful activity is ongoing or has ceased.</p> <p>Consideration should be given to whether the likely costs and benefits of any enforcement action is justifiable where breaches result in no material impacts upon any other party or the health, safety and amenity of the environment and community. A breach of a technical, inconsequential or minor nature, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.</p> <p>Legislation may provide time limits in which to commence proceedings and take enforcement action, and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.</p> <p>In addition, consideration should be given to the time which the offence or breach occurred and the 'reasonableness' of taking enforcement action if a significant time has lapsed since the time of the offence or breach.</p>

**CONSIDERATIONS ABOUT THE ALLEGED OFFENDER**

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

Consideration should be given to the previous history of the offender. If prior warnings, instructions or advice has been issued to the person or organisation reported which was not followed, a more formal and coercive enforcement approach would appear more appropriate.

Consideration should be given to whether the offence was committed deliberately, recklessly or with gross negligence. It may be appropriate that cases of this nature are more likely to result in prosecution. Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning may be more suitable in achieving desired outcomes.

Where the offender has been proactive in the resolution of the matter and has assisted Council in the resolution of the matter, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been rectified. If the offender has demonstrated a lack of contrition and is uncooperative with the investigation or remediation, a prosecution or monetary penalty would appear more appropriate.

Consideration should be given to any genuine mitigating circumstances of the offender such as age, physical or mental health, disability and any financial hardship of the offender resulting in an inability to pay.

## CONSIDERATIONS ABOUT THE IMPACT OF THE ENFORCEMENT ACTION

- the need to deter any future unlawful activity;
- whether an educative approach 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; and
- whether Council has created an estoppel situation.

Consideration should be given to the deterrent effect, both on the offender and others. Prosecutions, because of their great stigma if a conviction is secured, may be appropriate even for minor unlawful activity where they might contribute to a greater level of overall deterrence.

When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters:

- the reasonable likelihood that the person may have known or should have known the relevant requirements or rules;
- the level of contrition shown by the responsible person;
- whether the parties have previously been advised of the regulatory requirements or provisions;
- whether or not any previous warnings or instructions have been provided; and
- the apparent level of intent shown by the responsible person.

It may not be appropriate to take enforcement action if the chances of success, in the event of an appeal or hearing, are unlikely. In such situations, you would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

Consideration should be given to what is reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.

Consideration is to be given to what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

**CONSIDERATIONS ABOUT THE IMPACT OF THE ENFORCEMENT ACTION**

	<p>Legal proceedings are expensive. When doing a cost-benefit analysis, costs and benefits should be assessed broadly and indirect costs and benefits should also be considered.</p> <p>Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied on and acted upon by another person.</p> <p>Consideration should be given to whether the actions of Council have created a reasonable expectation that no enforcement action would be taken.</p>
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**CONSIDERATIONS ABOUT THE POTENTIAL FOR REMEDY**

<ul style="list-style-type: none"> <li>• whether the breach can be easily remedied;</li> <li>• whether it is likely consent would have been given for the activity if it had been sought;</li> <li>• whether there is a draft planning instrument on exhibition that would make the unauthorised use legal.</li> </ul>	<p>If there is evidence of a significant issue of unlawful activity and that matter can be easily remedied by some action on the part of the person the subject of the report, there is a less compelling case for enforcement action, depending on the other circumstances of the case such as the conduct of the offender.</p> <p>If retrospective approval is possible, it may be reasonable to allow an opportunity to obtain this prior to taking other enforcement action. In some cases, compliance by informal means may be the most efficient way to resolve the matter and other enforcement action may not be necessary.</p> <p>This needs to be balanced with other considerations such as the public interest in enforcing the law.</p>
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## APPENDIX 2

Offence Scenario	Act/Reg.	Details of the case	Warning/ education	Penalty Infringement Notice	Notice and/or Order	Legal Action	LEC Class 4
Nuisance Dog Order	Companion Animals Act	Failure to comply with a Nuisance Dog Order (i.e., Possible danger to other people, unrestrained or barking dog)		X			
Traffic/ Parking	Aust. Road Rules or LGA	Parking of vehicle in No Stopping area		X			
Traffic/ Parking	Aust. Road Rules or LGA	Parking of vehicle on footpath or nature strip		X			
Pollution of stormwater drain	POEO Act	Soil, sand and other building waste entered stormwater system	X	X	X		
Potential for pollution	POEO Act	Location of stockpile of sand may cause pollution incident (i.e., in rain)	X				
Minor building works - Owner	EP&A Act	Construction of pergola awning by owner - Where there is no material impact on other parties and locality - No BCA issues	X				
Site management	Local Govt. Act or EP&A Act	Articles located on footpath without approval - Possible safety hazard		X	X		
Building work outside of hours	EP&A Act	Carrying out building works outside of hours permitted in DA - Licensed Builder		X	X		
Minor building works - Licensed Builder	EP&A Act	Construction of alterations or additions to rear of existing dwelling - BCA issues to be resolved		X	X		
Major building works	EP&A Act	Substantial alterations to the existing building - Planning & BCA compliance issues			X	X	X



Offence Scenario	Act/Reg.	Details of the case	Warning/ education	Penalty Infringement Notice	Notice and/or Order	Legal Action	LEC Class 4
Variation to DA - Major	EP&A Act	Major variation to DA (i.e. substantial changes to approved development or use)			X	X	X
Variation to DA - Minor	EP&A Act	Minor variation to DA (i.e. relocation of door/window) - Section 96 obtained	X				
Unauthorised Use - Major	EP&A Act	Unauthorised use of premises as backpacker accommodation, additional dwelling(s) or brothel			X	X	X
Fire safety - Minor	EP&A Act	Failure to submit an annual fire safety statement after due date		X	X		
Fire safety - Major	EP&A Act	Fire safety upgrading			X	X	X
Tree Preservation Order - Minor	EP&A Act	Tree covered by TPO lopped without approval - minor impact on tree/amenity of locality	X				
Tree Preservation Order - Major	EP&A Act	Tree covered by TPO removed without approval - significant impact on amenity of site/locality				X	
Food Premises	NSW Food Act & Regulations	Unclean food premises	X	X	X	X	
Vegetable Overgrowth and/or Noxious Weeds	Local Govt. Act or Noxious Weeds Act	Vegetation causes, or is likely to cause, unsafe or unhealthy conditions	X	X	X	X	
Accumulation of Rubbish	Local Govt. Act	Accumulation results in, or is likely to result in, unsafe or unhealthy conditions	X	X	X	X	

Examples of key options and possible courses of action\*

\* Notes:

- In some cases, the particular breach may be remedied or resolved prior to proceeding to the service of Notices, Orders or legal proceedings (i.e., Negotiation or by promptly obtaining relevant approvals).
- Prior to determining an appropriate course of action, consideration is required to be given to the circumstances of the case and the courses of action contained in the above table may not be suitable or sufficient in all cases.

## LEGISLATION AND SUPPORTING DOCUMENTS

### Relevant Legislation, Regulations and Industry Standards include:

- Local Government Act 1993 and Local Government (General) Regulation 2021;
- Environmental Planning and Assessment Act 1979 and Environmental Planning and Assessment Regulation 2021;
- Companion Animals Act 1998 and Companion Animals Regulation 2018;
- Road Rules 2014;
- Protection for the Environment Operations Act 1997 and Protection for the Environment Operations (General) Regulation 2021;
- Impounding Act 1993 and Impounding Regulation 2013; and
- Enforcement Guidelines for Council's December 2015 NSW Ombudsman.

### Relevant Council Policies and Procedures include:

- Local Orders Policy 1 – Guidelines of Keeping of Animals for Domestic Purposes;
- Local Approvals Policy;
- Complaints Management Policy; and
- On-Site Sewage Management Policy.

## VARIATION AND REVIEW

This Policy shall be reviewed every three (3) years, or earlier if deemed necessary, to ensure that it meets the requirements of legislation and the needs of Council. The term of the Policy does not expire on the review date, but shall continue in force until superseded, rescinded or varied either by legislation or a new resolution of Council.

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