

Ku-ring-gai Council

Compliance Policy

Version Number 2

24 May 2016



Compliance Policy

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Controlled Document Information

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Related Legislation:	<p>Environmental Planning & Assessment Act, 1979 and regulations Local Government Act, 1993 and regulations Protection of the Environment Act, 1997 and regulations Companion Animals Act, 1998 and regulations Public Health Act, 1991 and regulations Road Transport Act, 2005 and regulations Roads Act, 1993 and regulations Swimming Pools Act, 1998 and regulations Impounding Act, 1993 Noxious Weeds Act, 1993 Road Rules, 2008 Roads Regulation, 2008 Fines Act, 1996 Food Act, 2003 Road Transport Act, 2013 Road Transport(mass Loading & Access) Regulation 2005 State Environmental Planning Policy (Exempt & Complying) (enter in this section any details of which parts of the legislation is directly reflected in the policy)</p>
Related Policies (Council & Internal)	<p>Code of Conduct Complaint management policy Providing a service to customer policy</p>

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Other References	Ombudsman NSW, Enforcement guidelines for Council, December 2015
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Version History

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2	24 May 2016	April 2020	Anne Seaton	Revised version in line with NSW Ombudsman model document

Policy

Introduction

Council's regulatory responsibilities are applicable to actual unlawful activity, as well as a failure to take action in order to be compliant with certain legal requirements.)For simplicity, this policy refers to both an act and /or an omission by an alleged offender as "unlawful activity."

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

For the purpose 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 service, 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 Management Policy and procedures.

Purpose and objectives

This policy provides information for all internal and external stakeholders and interested parties about Council's position on compliance and enforcement matters in the local government area.

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

The objectives of this policy are to:

- help achieve the objectives of relevant legislation and management plans
- maximise compliance with legislation
- enhance the community's capacity to protect the environment and enhance biodiversity

Scope

The 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 is 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 merits.

Responsibilities

All Council staff and Councillors, who have responsibilities for compliance as defined by this policy, are responsible for its implementation.

Only staff with appropriate delegations from the General Manager can undertake investigation and enforcement activities associated with particular legislation.

Council's consultants and contractors authorised to carry out functions on its behalf must also comply with this policy.

Policy Statement

Organisational Approach

One of the principle functions of Council is to act as a regulator and an enforcement agency in respect of a large range of legal duties applied by acts of parliament, regulations and orders made under them, including various local policies.

Compliance and enforcement is important:

- to prevent or minimise harm to health, welfare, safety, property or the environment
- to improve the safety and amenity of residents and visitors to the area
- for the collective good, the welfare of the community or the public interest
- to promote social policies (eg to preserve or protect the environment)
- to manage risks
- to uphold social order
- to meet the expectations of the community
- to encourage reports about possible unlawful activity from the community
- to make the regulated community aware of their legal obligations and how to comply

The legislation that Council is responsible for enforcing is extensive and cannot be fully listed here, but the following exemplify the range and diversity:

- Environmental Planning & Assessment Act 1979
- Local Government Act 2993
- Protection of the Environment Operations Act 1997
- Impounding Act 1993
- Companion Animals Act 1998
- Public Health Act 1991
- Roads Transport Act 2005
- Roads Act 1993
- Swimming Pools Act 1998
- Building Code of Australia
- Noxious Weeds Act 1993
- Food Act 2003
- Australian Road Rules

Copies of all relevant legislation may be found at www.legislation.nsw.gov.au

Definitions

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

Term / Abbreviation	Definition
Compliant	<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 purpose of this policy, a complaint does not include:</p> <ul style="list-style-type: none"> • a report alleging unlawful activity (see definition below) • a request for information about a council policy or procedure • a request for an explanation of actions taken by Council • a request for internal review of a Council decision
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 objective 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; or legally required.
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> <p>in terms or conditions of a development consent, approval, permit or license</p> <p>an environmental planning instrument that regulates the activities or work that can be carried out on particular land</p> <p>a legislative provision regulating a particular activity or work</p> <p>a required development consent, approval , permission or licence.</p>

Policy Intent

The intent 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 alleging unlawful activity
- assessing whether reports alleging unlawful activity require investigation
- deciding on whether enforcement action is warranted
- options for dealing with confirmed cases of unlawful activity
- taking legal action
- implementing shared enforcement responsibilities

The policy also provides advice and guidance on:

- the role of the Principal Certifying Authority and
- the role of Councillors in enforcement

Application

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

- development and building control
- environmental health
- public health and safety
- noxious weeds
- water and sewer

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- septic and other regulated systems
- control over animals
- food safety
- tree preservation
- land use
- traffic and parking matters

Compliance and enforcement principles

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

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> • acting in the best interests of public health and safety and in the best interests of the environment • ensuring accountability for decisions to take or not take action • acting fairly and impartially and without bias or unlawful discrimination • providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the community • ensuring meaningful reasons for decisions are given to all relevant parties. • acting on any complaints or concerns about the conduct of compliance officers in accordance with council's complaints management policy and procedures • advising people and organisations subject to enforcement action of any avenues available to seek an internal or external review of a decision.
Consistent	<ul style="list-style-type: none"> • ensuring all compliance and enforcement action is implemented consistently • encouraging reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter.
Proportional	<ul style="list-style-type: none"> • ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach • making cost effective decisions about enforcement action • taking action to address harm and deter future unlawful activity.
Timely	<ul style="list-style-type: none"> • ensuring responses to reports alleging unlawful activity and decision making are timely.

Responsibility

Council receives information about alleged unlawful activity from members of the public, contact from other government agencies and information gathered by its officers during proactive inspections and patrols.

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 department 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 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 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 an alleged unlawful activity
- provide information to all relevant parties about any avenues to seek an internal or external review of a decision

All reports alleging unlawful activity are to be entered into Council's Customer Request Management System and actioned in a timely manner by the appropriate staff member/s having appropriate delegations from the General Manager to undertake the investigation or compliance & enforcement action in relation to this policy.

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.

Council 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.

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

- maintain the collective good and 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
- 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 regular feedback on the progress of the investigation and any reasons for delay. This does not mean that the individual can expect to be given details about every aspect of the investigation or information that would compromise the integrity of the investigation.

Decisions about what actions should be taken by Council are made at 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 the matters as quickly as 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.

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 their report directly or in a publicly available document
- the individual was consulted following receipt of a Government Information (Public Access Act 2009) application and did not object to disclosure
- the individual consents in writing to their identity being disclosed
- the disclosure is required to comply with principles of procedural fairness
- the matter proceeds to court

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit Council's ability to investigate the matter.

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 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 enquiries and giving timely responses to questions and requests for information
- treating Council staff with courtesy and respect
- 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 Complaint Conduct Manual 2012 and providing a Service to Customer Policy 2010.

What parties can expect from Council staff

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

- treat them with courtesy and respect
- advise them of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances
- clearly explain the decisions in plain English
- provide information about any relevant internal and external appeal processes that may be available
- 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 Complaints Management Policy and procedures.

Where a person or organisation subject to enforcement action merely disputes Council's decision to take enforcement against them, they will be directed to make written representations in accordance with Council's adopted review process.

Senior Council staff will act on any complaints about the conduct of compliance officers in accordance with Council's Code of Conduct Policy.

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 a matter, it may be more difficult to evaluate the allegations and therefore these reports are less likely to warrant investigation.

Note: Complaints regarding nuisance cats and dogs will not be accepted on an anonymous basis as council needs to establish how the animal unreasonably interferes with the peace, comfort or convenience of any person in any other premises.

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 resources and operational capability restraints on Council, investigations into alleged unlawful activity outside business hours will be assessed on the basis of;

- risk or harm to health, welfare, safety, property or the environment, and
- whether it is in the public interest to take such action

All matters arising will be recorded by Council's After Hours Call Centre and forwarded to an appropriate first response officer for an initial assessment of urgency for response.

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 of which will be personal to the parties.

Council staff will thoroughly assess such reports to determine whether there is evidence of any possible unlawful activity requiring action by Council. Care will be taken to explain which aspects of a report council can deal with and which cannot be dealt with and why. Where possible, individuals will be provided with information about how to resolve neighbour disputes including referral information resources such as Law Access NSW and Community Justice Centres.

It is possible that one party will provide further information 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 the 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.

Appendix 1 of this policy provides a sample of compliance practices.

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.

RISK CATEGORY			
CRITICAL	HIGH	MEDIUM	LOW
Features of category			
Permanent, long term or reoccurring and serious damage to health, property or environment likely or very likely	Moderate, major or severe consequences likely or very likely	Moderate consequences are likely, serious impacts very unlikely	Consequences are minor or moderate and are unlikely or very unlikely to occur.
Large scale impacts	Medium-large scale impacts	Small –medium scale impacts	Small scale , isolated impacts.
Very serious offences	Serious offences	Moderate offence severity	Low level offence severity
Very high priority issue for Council and the community	Very high priority issue for Council and the community	Very high priority issue for Council and the community	Very high priority issue for Council and the community
INDICATIVE TIMEFRAME OF INITIAL RESPONSE			
Immediate and urgent response	Response within 24 hours	Response within 10 working days	Response within 15 working days
Example of issues			
Significant pollution incidents	Unsafe buildings and building works	Nuisance dogs	Noxious Weeds
Food poisoning incidents	Rubbish dumped in an unsafe location / hazardous pollution incidents	Abandoned vehicles	Minor consent breaches
Abandoned or unlawfully parked vehicles in an unsafe location	Breaches of tree preservation order	Stormwater or drainage issues	Unauthorised signage
Collapsed or unsafe building works in public areas	Dangerous / restricted dog complaints	Dumped rubbish (not hazardous)	Unauthorised land use
Dog attacks		Breach of consent conditions	Overgrown vegetation
		Poor sediment control on building sites	Aesthetic issues
		Noise complaints affecting several people	Neighbour disputes
			Nuisance complaints(eg domestic noise, barking dogs)

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's records and other internal business units to understand the relevant history and context of the matter.

Circumstances where no action will be taken

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

- I. 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 NSW WorkCover for workplace safety matters, the NSW Environment Protection Authority for possible environmental offences and Community Justice Centres NSW for personal disputes.
- II. 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 has been provided (other than where the person has previously been advised they would receive no further response).
- III. 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).
- IV. The report is not supported with evidence or appears to have no substance.
- V. 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 on resources.

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 wide spread 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
- 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 consideration and may decide to investigate based on these and other factors. The objective of the processes Council staff use when investigating incidents of alleged unlawful activity is to:

- determine the cause of the incident
- determine if there has been a contravention of law, policy or standards
- gather evidence to the required standard to support any required enforcement action
- determine any necessary action to mitigate the possibility of reoccurrence or 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:

The alleged offence and impact:

- the nature, extent and severity of the unlawful activity, including whether the activity is continuing
- the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity
- the seriousness of the breach, including whether the breach is merely technical, inconsequential or minor in nature
- the time period that has lapsed since the date of the unlawful activity

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 circumstances demonstrated by the alleged offender
- any particular circumstances or hardship affecting the person or organisation reported.

The impact of any enforcement action:

- the need to deter any future unlawful activity
- whether an educative approach would be more appropriate than a coercive approach in resolving the matter
- the prospect of success if the proposed enforcement action was challenged in court
- the costs and benefits of taking formal enforcement action as opposed to taking informal or no action
- what action would be proportionate and reasonable in response to the unlawful activity
- whether Council is prevented from taking action based on earlier advice given, i.e. whether an estoppel situation has been created

The potential remedy:

- whether the breach can be easily remedied
- whether it is likely consent would have been given for the activity if it had of been sought
- whether there is a draft planning instrument on exhibition that would make the unauthorised use legal

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 for 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 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.

Permission to engage legal services on behalf of Council for compliance matters must be sought from one of the following nominated staff as appropriate; the General Manager, the Director Development & Regulation, the Corporate Lawyer or the Manager Compliance and Regulation .

Enforcement options**Example scenario**

Warning

Issued for minor offences. For example , displaying a small sign, minor parking offence or where education is the preferred first option.

Penalty notice

Issued for parking offences, breaches of food premises standard, disregard of order, minor unauthorised works which have no impact on the amenity of the surrounding neighbours and there is no ongoing risk to public health or safety, where the breach is a one-off and where the breach is only of such significance to require deterrence from further unlawful activity. For example, an unauthorised pergola, which does not overshadow or cause loss of solar access/view, residency without an occupation certificate (where there are no safety risks).

Notice of intention to issue an order

Issued for unauthorised works, which may not be permitted to remain, where there is a threat to public health and safety, works being undertaken without permission. Examples include, renovations undertaken without consent, unauthorised works to a heritage item, environmental and public health matters, noxious weed infestations etc.

Emergency order (without notice)

Issued where a building structure is compromised and is likely to cause imminent threat to public health and safety or works are being undertaken without permission. For example, the failure of the façade of a building, unauthorised demolition works.

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 each decision being made on the individual merits of the case.

At all times, Council's key concerns are:

- to prevent or minimise harm to health , welfare , safety , property or the environment
- to influence behaviour change for the common good and on behalf of the community.

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:

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

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

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 or proof
- whether there is a reasonable prospect of success before a court
- whether the public interest warrants legal action

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.

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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 upholding the public interest warrants legal action

The principal consideration in deciding whether to commence legal proceedings is whether to do so is in the public interest. In making this determination, the same factors to be considered when taking enforcement action apply.

The following consideration will assist Council and delegated staff in making the 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
- the effective sentencing options available to the court in the event of a conviction
- whether the proceedings of the consequences of any resulting conviction would be unduly harsh or oppressive.

Time within which to commenced 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 as occurred.

Shared enforcement responsibilities

Some reports will raise matters involving shared regulatory responsibilities between Council and other authorities including the Environmental Protection Authority, the NSW Police Force, the Office of Liquor and, Gaming, and Racing, Workcover NSW, 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
- 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 as 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 the 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.

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 staff in their day to day activities. Councillors may 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.

Delegations

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

Appendix : Schedule of sample compliance practices

Non complying development/unauthorised works/illegal land use

In the assessment of the unauthorised / non complying works or illegal use, the Council officer shall have regard to the scale of the works and categorise as either “minor” or “major”.

If the site is one controlled by a Private Certifying Authority (PCA), the complaint should be referred to the PCA for management. Council should only act if the PCA is found to be negligent in their duties or the PCA issues a Notice of Intention to serve an Order and then refers the matter to Council for the issue of the Order.

What are minor non complying or unauthorised development works?

- a. These may include works that fall within the parameters of Complying Development but the owner failed to obtain a Complying Development Certificate.
- b. These may include works that fall just outside the parameters of Complying Development where the owner has failed to obtain development consent and the associated Construction Certificate.
- c. The non complying works do not substantially alter the development as initially approved and where an application to modify the development consent (Section 96) could be considered.

What are major non complying or unauthorised development works?

- a. These works generally include significant alterations and additions to a development where the owner has failed to obtain prior development consent and associated construction certificate, and where there are substantial structural concerns and changes in land use.
- b. These works include significant departures from a consent, where the works so substantially alter the development as approved, that an application to modify the development consent in terms of Section 96 of the EP&A Act is not available.

Regulatory action for minor works

- a. For works where owner failed to obtain a Complying Development Certificate:
 - Issue a Penalty Infringement Notice
 - Require an application for a Building Certificate so as to regularise the structure so that it may remain.
- b. For works that fall just outside the parameters of Complying Development where the owner has failed to obtain development consent and the associated construction certificate:
 - Issue a Penalty Infringement Notice
 - Serve a Notice of Intention to issue an Order, seeking to have the unauthorised works removed. This gives the recipient the opportunity to make representations as to why the Order should not be served or have the contents of the Order altered.
 - Prior to/ or upon receipt of the representations refer the case to a Development Assessment Officer with a request that they carry out an assessment of the works against the heads of consideration as detailed in Section 79C of the EP&A ACT. (The purpose of this being to determine if support for the works would have been given if appropriate application had been

made. This brings transparency to the regulatory process and provides a sound footing if the matter is to progress to court)

- If the response from the Development Assessment Officer is positive:
 - the owner may be required to undertake any other ancillary works that may be recommended, for example landscaping, installation of privacy screen, opaque glazing etc. (This may be done via the issue of a formal order detailing the required works.)
 - the owner will be requested to lodge an application for a Building Certificate so as to regularise the structure so that it may remain.
- If the response from the Development Assessment Officer is negative, orders shall be issued requiring the removal of the unauthorised works or cessation of the unauthorised activity.
- The order shall have due regard for any representations made against the notice of intention to issue an order.

The recipient of the order may either comply or appeal the terms of the order.

The order should be checked by the appropriate officer at the expiration of the period referred to in the order. If the terms of the order are not complied with the matter is to be referred to Council's solicitors for court action.

- c. The non complying works do not substantially alter the development as initially approved and where an application to modify the development consent (Section 96) could be considered:
- Issue a Penalty Infringement Notice.
 - Serve a Notice of Intention to issue an order, seeking to have the unauthorised works removed. This gives the recipient the opportunity to make representations as to why the order should not be served or have the contents of the order altered.
 - In this instance, the owner has the ability to lodge an application to modify the development consent in accordance with Section 96 of the EP&A Act to regularise the works.
 - The order is placed on hold until the application under Section 96 of the EP&A Act is determined.
 - If the Section 96 application is approved, the order is cancelled.
 - If the Section 96 application is refused, the order is pursued.
 - Orders shall be issued requiring the removal of unauthorised works or cessation of unauthorised activity. The order shall have due regard for any representations made against the Notice of Intention to issue an Order.

The recipient of the order may either comply or appeal the terms of the order.

The order should be checked by the appropriate officer at the expiration of the period referred to in the order. If the terms of the order are not complied with, the matter is to be referred to Council's solicitors for court action.

Regulatory action for major works

For works that include significant alterations and additions to a development where the owner has failed to obtain development consent and associated construction certificate, and/ or where there are substantial structural concerns, changes in land use, and / or where the works so substantially alter the development as approved, that an application to modify the development consent under Section 96 of the EP&A Act is not available:

- Serve a Notice of Intention to issue an order, seeking removal of the unauthorised works or cessation of an unauthorised/illegal activity. This gives the recipient the opportunity to make representations as to why the order should not be served or have the terms of the order altered.
- Prior to/ or upon receipt of the representations refer the case to a Development Assessment Officer with a request that they carry out an assessment of the works against the heads of consideration as detailed in Section 79C of the EP&A ACT. (The purpose of this being to determine the level of compliance, if any, with the relevant DCP, amenity issues and any other legislation applicable, that may affect the works, and a comment if support for the works would have been given if appropriate application had of been made. This brings transparency to the regulatory process and provides a sound footing if the matter is to progress with court action.)
- The owner should be requested to supply documentary evidence testifying to the structural adequacy of the works and compliance with Building Code of Australia.
- Should the response of the Development Assessment Officer be negative, the order should be issued giving consideration to any representations. The recipient has the ability to comply with the order or appeal the terms of the order in the Land & Environment Court. In the event there is no appeal and the order is not complied with, prosecution action to commence. Generally Class 4 Proceedings seeking orders to remove the unauthorised works and Class 5 proceedings for a monetary penalty are taken in the Land & Environment Court.

Unclean unhealthy or unsafe premises

The Council officer shall have regard for the scale of the non compliance and the public interest.

Actions may be pursued under the Local Government Act, Food Act, Public Health Act, Swimming Pool Act or Noxious Weeds Act, depending on the matter at hand.

Matters usually before officers include regulated premises such as food shops, hairdressing and barber shops, beauty salons, mobile vendors, boarding houses, air handling systems, overgrown, dilapidated and neglected premises. Residential premises considered to be occupied in squalor conditions, may require special assistance from external authorities that provide mental health support for occupants as well.

Regulatory action for minor breaches

Minor breaches may include defective fittings within food preparation areas e.g. broken tiles, keeping of *animals, defective guttering or downpipe not connected, untidy yard, cultivation of noxious plants, etc.*

Generally, the following steps should be taken:

- Conduct field assessment and issue verbal or written direction.
- Send letter of warning and seek co-operation in having the matter attended to.

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- Serve a Notice of Intention to issue an Order seeking to have the premises reinstated into safe, clean and healthy condition. This gives the recipient the opportunity to make representations as to why the order should not be served or have the terms of the order altered.
- Assess representations made by the recipient of the order terms.
- Issue order having due regard for any representations made against the Notice of Intention to Issue an Order.
- Non-compliance with order may result in the Issue of a Penalty Infringement Notice.

Regulatory action for significant breaches

Significant breaches may include dirty food preparation areas, inappropriate storage of food intended for sale and consumption, broken sewage or stormwater services, overgrown or dilapidated premises, etc.

The following steps should be taken:

- Conduct field assessment and issue verbal or written direction.
- Serve a Notice of Intention to issue an Order, seeking to have the premises reinstated into safe, clean and healthy condition. This gives the recipient the opportunity to make representations as to why the order should not be served or have the contents of the order altered.
- If the premises are a food shop or place used to prepare food for sale, issue an Improvement Notice or Prohibition Order in accordance with Section 58 of the Food Act 2003.
- Assess representations made by the recipient of the Order.
- Issue the order having due regard for any representations made against the Notice of Intention to issue an Order.

The recipient of the order may either comply or appeal the terms of the order.

The order should be checked by the appropriate officer at the expiration of the period referred to in the order. If non-compliance continues, the matter is to be referred to Council's legal team for court action. A Penalty Infringement Notice for noncompliance with the order may be issued if considered appropriate, alternatively, Council officers may seek to have the court impose a monetary penalty.

If a person fails to comply with an order, Council officers may wish to carry out the outstanding works. Section 678 of the Local Government Act makes provisions for this but generally this action is taken only with the consent of the court, in that way Council may recover all expenses incurred by charging as a debt against the property.

Breaches of the Swimming Pool Act

Breaches of this Act present a real threat to the safety of young children within the community, for this reason there is no leniency shown in the application of this legislation. All breaches should be dealt with in the following manner:

- Issue an order, clearly stating the reasons for the order and the defects to be corrected.
- Reinspect at expiration of the period referred to in the order.
- Issue a Penalty Notice if the order is not complied with.
- Require the order to be complied with within a further 30 days.
- If noncompliance continues, refer the matter to Council's solicitors.

Noise complaints

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The majority of noise complaints received by Council relate to noisy equipment such as air conditioning systems, swimming pool pumps, power tools and to barking dogs.

Noisy equipment

Generally, the following steps should be taken:

- Conduct a field assessment and attempt to take a noise reading of the offending article if appropriate.
- Send a letter of warning and seek the co-operation of the user to comply with legislation and guidelines as contained within the Protection of Environment Operation Act 1997 (POEO ACT) and POEO Noise Control Regulations 2008.
- Issue a POEO Act Prevention Notice and associated administration fee charge. A 21 day appeal period is mandatory.
- Issue a Noise Abatement Direction, Noise Control Notice or Noise Control Order (POEO Act)
- Issue a Penalty Infringement Notice.

Barking dogs

Under the Companion Animals Act, a dog may be declared a nuisance if it is found to be *“making a noise, by barking or otherwise, that persistently occurs to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any other premises.”*

A numerical standard has been adopted within internal operating procedures to assist Council officers with investigation of barking dog complaints. The standard being; *“A dog may be considered to be causing a nuisance if it barks, howls or otherwise makes persistent noise for greater than 8 minutes in any one daylight hour or greater than 4 minutes in any night time hour.”*

Complaints concerning barking dogs are often a sign of other significant neighbourhood disputes. Care must be taken by the Council officer to ensure an objective assessment is made. The following steps should be taken:

- Initial site inspection is to be undertaken to verify details of the complaint, registration status of the dog and a verbal warning is to be given to the owner that there is an alleged problem. Suggest to the owner that appropriate remedial behavioural training needs to be undertaken.
- A letter of warning is to be issued to the dog owner, along with a brochure setting out responsibilities and appropriate noise control regulations. At the same time, a letter is to be sent to the complainant, acknowledging receipt of their complaint and suggesting that they allow 3 weeks for behavioural training of the dog in question.
- If a second complaint is lodged after the initial 3 week period, Council's Animal Control Officer will contact the dog owner and advise that Council is actively monitoring the dog, at the same time a “barking dog diary” is to be sent to the complainant. The complainant is to be requested to complete the diary over a 2 week period, and return it to Council duly signed.
- If the diary is not returned by the due date, the matter is finalised and the complainant advised that no similar complaint will be investigated for a period of 6 months.
- If the diary is duly completed and returned, Council's Animal Control Officer may conduct more patrols to coincide with the recorded diary times to gather further evidence in respect of the degree of nuisance.
- If the Animal Control Officer finds no evidence of the dog causing a nuisance, the matter is to be finalised.

- If the Animal Control Officer finds that the dog is causing a nuisance, a Nuisance Order is issued and enforced, accordingly. Nuisance Orders are in force for 6 months and the dog owner must ensure that the dog does not bark so as to cause a nuisance within this time. If the Nuisance Order is not complied with, fines for the first offence and for any subsequent offences may be issued.

General complaints about buildings under construction or demolition

The most common complaints received by Council in respect of building sites relate to noise, dust, hours of work, local traffic problems and concerns with asbestos or unsafe work practices.

If the site is one controlled by a Private Certifying Authority (PCA), the complaint should be referred to the PCA for management. Council should only act if the PCA is found to be negligent in their duties, or if the PCA issues a Notice of Intention to serve an Order and then refers the matter to Council for the issue of the order.

If the matter concerns unsafe work practices or hazardous materials it should be referred to Work Cover NSW.

The following steps should be taken:

- Conduct a field assessment and establish the level of nuisance or non compliance.
- Issue a verbal direction to cease the offensive activity and make good.
- Issue a POEO Act Clean up Notice.
- Issue a POEO Act Prevention Notice, a statutory administration fee is imposed on this notice. (21 day appeal period is mandatory).
- Issue a Penalty Infringement Notice/s for offences.
- Serve a Notice of Intention to issue an Order, seeking to have the nuisance or non compliance made good. This gives the recipient the opportunity to make representations as to why the Order should not be served or have the terms of the order altered.
- Issue the order, having due regard for any representations made against the Notice of Intention to issue an Order.

The recipient of the order may either comply or appeal the terms of the order.

The order should be checked by the appropriate officer at the expiration of the period referred to in the order. If non-compliance continues, the matter is to be referred to Council's solicitors for legal action.

Parking surveillance and enforcement

The principle objective of this activity is to achieve an appropriate balance between public safety, traffic flow and equitable access in the management and regulation of vehicle parking facilities available to the general public, for the benefit of the community and local business and people who frequent the Ku-ring-gai local government area.

Council is responsible for both "on-street" and "off-street" parking surveillance. "On-street" is parking on public roads, whilst "off-street" relates to parking within Council managed public car parks or other off road areas.

Council's rangers carry out regular patrols of public parking areas and roads in the local government area, they also respond to complaints from the public in relation to illegally parked vehicles.

Priorities in this surveillance work include:

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- Patrolling on street parking around different school zones, randomly selecting different schools on a daily basis during the school term.
- Patrolling all on street parking restrictions on a daily basis.
- Random, daily surveillance of time limits and bay markings in off-street parking areas.
- Surveillance to ensure correct use of bus, taxi and loading zones, as well as no stopping zones, especially around Ku-ring-gai's major transport hubs and town centres.
- Public education of motorists in respect of their obligations under the Australian Road Rules.

Observed offences are generally photographed by Council's rangers. The photographs are taken for the purpose of 'supporting evidence'. The captured images are stored in Council's secure record data base TRIM and are not available for access by unauthorised persons. Individuals whom are infringed may apply to Council for a copy of any photo, if held, and will be supplied with a copy, subject to payment of the prescribed fee.

Penalty Notices are normally placed on the parked vehicles. If the Penalty Notice cannot be placed on the vehicle, the ranger will gather the evidence; obtain ownership details from the RMS DRIVES database and mail out the Penalty Notice, with an accompanying letter informing the last registered owner of the offence details and the process for payment and/or challenge of the Penalty Notice.

Typical offences subject to a penalty notice may include:

- Overstaying sign posted time limits.
- Breaches of on street restrictions applicable to "No Stopping", Bus, Taxi and Loading zones;
- Parking in accessible (disability) parking spaces without the authority to do so, or permit not being displayed as set out in the 'conditions of use'.
- Breaches of on street parking and restrictions around school zones.
- Failure to comply with conditions of off-street parking.

Penalties for parking offences and all other offences are set by legislation and are administered by the NSW State Government and not by Council.

Details of current NSW legislation can be found on the Internet at the following Web address, <http://www.legislation.nsw.gov.au>. Interested persons should check the NSW Road Rules 2008 for on street offences and Local Government Act, 1993 for off street offences.

The use of discretion

Council's rangers have very limited discretion in their enforcement of signposted or marked restrictions in relation to vehicle parking. Failing to take action in relation to an observed offence may create hazards or risks for the community. In addition, it may expose Council and the rangers concerned to accusations of partiality and, potentially, a claim for damages where an unsafe situation has arisen. Such inaction may also be in breach of Council's Code of Conduct.

Council's rangers should exercise limited discretion, including issuing warnings, where obvious exceptional and mitigating circumstances are apparent to the ranger when observing an offence. Critically, however, public safety must *not* be comprised.

Service agreement with State Debt Recovery Office (SDRO)

Council has a commercial agreement with the NSW State Debt Recovery Office (SDRO) for the administration and processing of all Penalty Notices issued, as well as the enforcement of outstanding fines and Penalty Notice amounts.

Under this arrangement, the SDRO provides an assessment and review service independent of Council, reducing local administration costs and reducing potential conflicts of interest. The SDRO also offers extensive advice to people who have received penalties on relevant issues and appeal options available to them. Guidelines are available at <http://www.sdرو.nsw.gov.au>. The guidelines include matters considered when reviewing an appeal.

All enquires relating to the appeal of a Penalty Infringement Notice should be directed to the SDRO in the first instance.

In the event that a person elects to have the matter determined through the Local Court process, Council's reporting officer will usually attend to give evidence. In the event of a written representation where the recipient of the Penalty Notice may have raised unusual circumstances, the SDRO may seek advice from Council's Compliance and Regulation Unit and request a review of its decision.

Handling complaints regarding penalty infringement notices

The administration of all offences and penalty notices is managed under an arrangement with Council and the SDRO.

Accordingly, a letter attached to all mailed Penalty Notices issued by Council advises the recipient of the fine to direct all enquiries regarding the Penalty Notice to that organisation. Council's Customer Service staff and rangers also give this advice to the public when they receive phone calls or other representations on penalties issued.

Where a member of the public lodges a complaint with Council about the conduct of a Council officer in connection with enforcement of public parking rules, the complaint will be processed in accordance with Council's Complaint Management Policy.