

COUNCIL POLICY

**Policy Name**

Compliance and Enforcement Policy

Abstract

To establish clear guidelines in dealing with regulatory action by Council, customer service requests or complaints about unlawful activity.

Dates	Policy or amendment approved	21 Sep 2011
	Policy or amendment takes effect	21 Sep 2011
	Policy is due for review (up to 4 years)	21 Sep 2015
Endorsed by	Council	
Approved by	Gunnedah Shire Council at its Ordinary Meeting held on 21 Sep 2011 Resolution number: 74.7	
Policy Custodian	Director Planning and Environmental Services	
Relevant to	Council	
Superseded Policies		
Related documents		
Related legislation		

1. BACKGROUND

Gunnedah Shire Council is involved in a broad range of regulatory activities. In recognition of the increase in the regulatory role of all Councils, the NSW Ombudsman in June 2002 published "Enforcement Guidelines for Councils" including a Model Enforcement Policy. That Model Enforcement Policy forms the basis of this policy.

The Compliance and Enforcement Policy reflects the need for the decision making process of the Council authorised officers to be carried out in a transparent, efficient, fair and consistent manner having regard to all the circumstances.

The inclusion of Appendices A and B at the rear of the policy can be interpreted as a guide to indicate the relative level of seriousness of some offences and therefore, from a consistency viewpoint, to determine whether or not the Council may issue a warning prior to some level of formal action.

1.1 Purpose

The purpose of this Compliance and Enforcement policy is to assist Council staff to act promptly, consistently and efficiently in response to allegations of unlawful activities.

Gunnedah Shire Council aims to provide consistency in enforcement action in matters of non-compliance and to ensure transparency, procedural fairness and natural justice principals are followed.

This policy is to confirm that Gunnedah Shire Council has a minimal tolerance approach to unlawful activity.

2. OBJECTIVES

The objectives of this policy are to establish clear guidelines in dealing with regulatory responsibilities of Council, customer service requests or complaints about unlawful activity.

It provides workable guidelines on:

- How to assess whether complaints of unlawful activity require investigation;
- Options for dealing with unlawful activity; and
- How to decide whether enforcement activity is warranted.

Gunnedah Shire Council acknowledges that it has an obligation under Section 8 of the Local Government Act 1993 (NSW) to ensure that the exercise of its regulatory power is carried out with consistency and without bias.

3. APPLICATION

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

This policy applies to all compliance and enforcement action where Council has regulatory responsibility under NSW Federal legislation. This policy is directed at the regulation of:

- Development activity
- Pollution control
- Control of Animals
- Unauthorised development or activities (including non-compliance with consent conditions)
- Food safety and hygiene, and
- Public health and safety

This policy applies to Council staff and also contractors or delegates of Council who must carry out their duties lawfully and with integrity.

Elected members in making a decision on any reported matters must comply with this policy unless exceptional circumstances are evidenced.

4. RESPONSIBILITY

All Council staff who deal with the proactive enforcement of relevant legislation in addition to written and verbal action, requests or complaints alleging unlawful activity, are responsible for implementing these policy guidelines.

All notifications of alleged unlawful activity will be properly recorded by Council through the Customer Request System. All outcomes of requests are reported and filed on Council's electronic document management system.

The responsibility for implementing this policy rests with the Directors of the area into which the responsibility falls and Authorised Officers.

Consultants and contractors authorised to carry out functions on behalf of Council must also comply with this policy.

5. DEFINITIONS

5.1 Unlawful Activity

The NSW Ombudsman defines 'unlawful activity' as:

- Contrary to the terms or conditions of a development consent, approval, permission or licence, or other written authorisation from Council;
- Contrary to the Gunnedah Shire Council Local Environmental Plan 1998, or any newly made and adopted EPI, as amended, that regulates the activities or work that can be carried out on particular land;

- Contrary to legislative provisions regulating a particular activity or work;
- Without a required development consent, approval, permission or licence; and
- Contrary to NSW legislation for which Council is the appropriate regulatory authority.
- The matter has already been investigated and resolved;

6. INVESTIGATING UNLAWFUL ACTIVITY

It is Council policy to investigate all complaints and alleged unlawful activity unless:

- Council has no jurisdiction (e.g. where there is no lawful provision for Council to take action, such as NSW WorkCover issues on building sites or internal matters in private strata buildings) (Council will refer such matters to the appropriate authority);
- The activity is deemed to be lawful without an investigation; or
- Where the matter is the sole responsibility of another Government agency.
- The matter has no basis or is frivolous (See Draft Complaints Policy)

Council must consider a range of factors when determining whether it will warrant enquiry/investigation but if a decision is made not to investigate a complaint or matter, then the decision must be recorded with clear reasons why. The complainant must then be advised of the decision and the reasons for no action.

6.1 AUTHORISED OFFICERS, DELEGATED AUTHORITY AND LAWFUL POWERS OF ENTRY

The General Manager may delegate authority and authorise certain staff under relevant legislation to carry out investigation and take necessary action in relation to activities.

Council views the power to enter private property very seriously and will ensure that the exercise of these functions will be strictly in accordance with the legislation and delegations.

All Council staff or contractors who carry out inspections on private land for regulatory purposes must have delegation to enter premises and carry photographic identification or relevant documentation or certificates or authority, where required by the legislation being implemented.

6.2 RESPONDING TO COMPLAINTS

Staff will respond to all complaints or notification to Council relating to unlawful activities.

Complaints received by Council shall be recorded and an acknowledgement given within 48 hours. Action will be taken within ten (10) days (depending on the severity and nature of the complaint). It should be noted that the specific issue may not be resolved within that time and investigations may be on-going, in which case a response providing an update will be provided within 10 working days of receipt of the complaint.

Complaints are investigated and actioned in accordance with the serious nature of the complaint.

Priority 1: Urgent and life threatening matters are a priority and shall where possible be actioned immediately on the day the complaint is received or where immediate action is not possible the day immediately following. Complaints of this nature include those which pose an immediate risk to the environment or public health and safety.

Priority 2: General compliance matters. Examples include but are not limited to: alleged unlawful uses, unlawful works, works not carried out in accordance with development consent and standard complaints about food premises, etc. Response time: 1-5 days.

Priority 3: Nuisance matters. Examples include but are not limited to: domestic noise, overgrown land and matters that do not pose an immediate threat to the environment, health or safety impacts. Response time: 5-10 days.

Response times may vary depending on staff and other resources.

6.3 CONFIDENTIALITY OF COMPLAINTS

Council will respect the privacy and confidentiality of information received. However, due to its statutory obligations and other requirements, confidentiality cannot always be guaranteed. In cases where the release of information is considered to be necessary, the person who made the complaint will be consulted before such a decision is made. The complainant's identity may be disclosed where:

- The person consents in writing to the disclosure of that information subject to GIPA, PIPA and Protected Disclosure Legislation; or
- The principles of natural justice dictate that information be disclosed to the person who is the subject of the complaint, which may enable the complainant to be identified; or
- The Council is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively.

7. OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITY

Council will consider a range of matters before taking regulatory action. Approaches to be considered will include:

- Taking no action, on the basis of lack of evidence or some other appropriate reason;
- Counselling/cautioning the person who carried out the unlawful activity, with the purpose of educating them on the relevant requirements. Gunnedah Shire Council recognises that educational initiatives may lead to compliance being achieved without enforcement action in some circumstances;
- Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address the issues or concerns raised in the investigation;
- Referring parties to the Community Justice Centre (CJC) for mediation, in instances where it is determined that mediation would be more appropriate to resolve an issue than enforcement;
- Issuing formal written or verbal warnings or cautions, such as the issuing of Notice of Intention, a letter requiring the activity/work to cease, or modify in some way, in order to comply.
- Issue of an order where there is a matter of urgency.

Council aims to reach an amicable outcome for all parties involved, within Council's jurisdiction in the hope that formal enforcement action will not be required.

7.1 TAKING ENFORCEMENT ACTION

Where formal enforcement is considered necessary, Council will take action based on a minimal tolerance approach. Council may take the following enforcement action as it deems necessary based on the circumstances of each case:

- Issuing of Notices, Notices of Intent, Orders, Directions and Declarations requiring compliance with legislative requirements
- Issuing a Penalty Infringement Notice (PIN) or alternatively, commencement of proceedings for an offence under the relevant legislation. (For example, offences under the Food Act 2003 (NSW) or Protection of the Environment Operations Act 1997 (NSW);
- Commencement of civil proceedings in a Court to either remedy or restrain unlawful activity; or
- If unauthorised building work is observed by Council that is under the control of a Private Certifier he or she will be reported to the Building Professionals Board of the NSW Department of Planning.

Before enforcement action is taken, the Authorised Officer must acknowledge the circumstances in each case and consider the following questions before selecting an appropriate method of action:

Circumstances to consider	Reason/Examples
<input type="checkbox"/> Could the unlawful activity be carried out lawfully if development consent or exemption from development consent was sought?	In these circumstances, Council will be less inclined to proceed with legal action especially if an owner actively or positively attempts to regularise the situation.
<input type="checkbox"/> Are the breaches technical or inconsequential in nature with no aggravating circumstances?	Consideration will be given to the material implication that the breach might have on the interests of any party, as well as any detrimental affect on the amenity of the area or environment in general.
<input type="checkbox"/> Could the non-compliance be easily remedied by some action on the part of the person responsible?	In general, Council will attempt to ensure compliance by informal means, however there is a need to balance the public interest in enforcing the law by determining whether it is possible to remedy a breach and at which cost.
<input type="checkbox"/> Has the unlawful activity created a significant health, safety or environmental hazard?	Consideration should be given to the degree of detriment to health and safety or risk to the environment.
<input type="checkbox"/> Are the unlawful activities or works carried out on a heritage item and did they adversely affect the heritage significance?	In most cases, relevant Council Officers will be consulted in assessing the detriment to the natural or built environment and whether formal action is warranted.
<input type="checkbox"/> Would it be in the public interest? Note: Unlawful actions must be addressed.	Some of the issues that should be considered here are: <ul style="list-style-type: none"> ◦ Has the unlawful activity affected a significant number of people or significantly affected a small number of people? ◦ Would an enforcement action impact unreasonably on certain population groups, particularly disadvantaged or marginalised groups? ◦ Are there any circumstances of hardship affecting both the complainant and the person or corporation subject to the complaint.
<input type="checkbox"/> How long has the unlawful activity been occurring and is enforcement action statute barred?	A time limit or existing right may apply, that prevents Council from taking certain action.
<input type="checkbox"/> Has a previous warning or rectification notice been issued?	If the investigation reveals that a previous warning has been issued and the unlawful activity is not resolved, a more formal approach would be more appropriate.
<input type="checkbox"/> Has the person responsible been educated?	When deciding whether to take an educative approach, consideration will be given to issues such as the level of contrition shown by the wrongdoer, whether they have previously been warned as a result of this or similar behaviour and the level of intent shown.
<input type="checkbox"/> Is the cost of enforcement likely to be prohibitive given the nature of the offence?	Consideration should be given to the relative costs and benefits of taking formal enforcement action. Council's action should be commensurate with the seriousness of the breach that has allegedly occurred
<input type="checkbox"/> Is the condition of development consent not being complied with, unreasonable or ambiguous?	A condition that is unreasonable or ambiguous can be unenforceable.
<input type="checkbox"/> Is there any doubt over the evidence or the offence?	Consideration should be given to whether the collected evidence clearly identifies an actual breach. Council should not take untimely or unwarranted actions.
<input type="checkbox"/> What are the chances of success if challenged?	Council should take into consideration what the likelihood is of a successful appeal or court challenge against the proposed enforcement action.
<input type="checkbox"/> Does the person or corporation exhibit contrition for an offence?	In some cases it will be appropriate to have regard to the attitude of the offender and their willingness to prevent a recurrence of the problem.
<input type="checkbox"/> Has the person or company who carried out the unlawful activity had an opportunity to provide representations or submission in the matter?	Council should consider all elements pertaining to the circumstances of the case leading to the non-compliance including representation by the person purported to carrying out the unlawful activity?

7.2 IMPORTANCE OF FOLLOW-UP ACTION

Council's investigating officers will follow up matters reasonably required to be followed up to monitor compliance. It is considered critical to successful compliance or enforcement action that officers are accountable in following up matters. This also demonstrates Council's commitment to quality customer service.

Follow up action may include but is not limited to, inspections and re-inspections, resubmitting relevant documents, recording all notes or contacting all relevant parties to a complaint, to advise what action will be taken, subject to relevant Privacy considerations. Follow-up outcomes must be recorded on file and responded to.

7.3 FAILURE TO COMPLY WITH NOTICE AND/OR ORDERS

Most legislative provisions which permit Notices and Orders to be issued also have offence provisions for failure to comply.

Where Council has issued Notices and Orders and follow-up investigations reveal non-compliance, with no appeal against the Notice or Order, this may result in further penalty infringement notices being issued, and/or commencement of legal proceedings for the offence of failing to comply.

7.4 MAKING REPRESENTATIONS TO NOTICES OF INTENTION

Where a person is afforded the right to make representations to a Notice of Intent, Council requires those representations to be made in writing. This ensures representational documents can be recorded and filed in Council's electronic document management system.

After written representations are considered by Council, representation may be made in person where Council management consider it appropriate.

7.5 COMMUNITY EDUCATION AND AWARENESS

Council will ensure adequate information is available to raise awareness and educate the community about compliance and enforcement.

A proactive approach in preventing unauthorised uses and works will include providing information to the public about planning and building obligations, the restrictions which apply for the development of land and when consent is required.

8. LEGISLATION AND REFERENCES

This policy assists in the compliance and enforcement implementation of the following legislation, in force at the time this policy was adopted and any amendments gazetted from time to time:

- Local Government Act 1993 (NSW) & Regulations.
- Environmental Planning and Assessment Act 1979 (NSW) & Regulations.
- Food Act 2003 (NSW), Regulations & NSW Food Safety Standards.
- Protection of the Environment Operations Act 1997 (NSW) & Regulations.
- Waste Avoidance & Resource Recovery Act 2001 (NSW) & Regulations.
- Noxious Weeds Act 1993 (NSW).
- Public Health Act 1991 (NSW) & Regulations.
- Companion Animals Act 1998 (NSW) & Regulations.
- Impounding Act 1993 (NSW) & Regulations.
- Recreational Vehicles Act 1983 (NSW).
- Swimming Pools Act 1993 (NSW).
- Liquor Act 1982 & Regulations(NSW).
- Roads Act 1993.

This policy is adapted for Gunnedah Shire Council from the *"Enforcement Guidelines for Councils"* published by the Office of the NSW Ombudsman, June 2002.

9. REVIEW DATE

This Policy is to be reviewed by Council, two (2) years after the Adoption Date.

10. RECORDKEEPING, CONFIDENTIALITY AND PRIVACY

This Policy is to be made available for public viewing in accordance with the Government Information (Public Access) Act 2009.

11. BREACHES AND SANCTIONS

Any breaches of this Policy will be referred to the General Manager for appropriate action.

APPENDIX “A”

As a guide, the following first time offences may result in a prior written warning being given to the offenders(s) before any enforcement action in the form of the service of an order or notice of intention or penalty infringement notice or court action is undertaken.

- Advertising signs without approval or unsightly.
- Commercial swimming pool not properly maintained.
- Development/Activity without consent or not in accordance with condition(s) of consent.
 - Minor development or old unauthorised development.
 - Minor breach of consent condition(s).
- Noise pollution
 - Air conditioner*.
 - Intruder alarm*.
 - Musical instrument and sound equipment*.
 - Power tools*.
 - Motor vehicle on residential premises*.
 - Use of refrigeration equipment fitted to motor vehicle*.
- Non compliance with an Order/Notice/Direction – work partly done or other mitigating circumstances.
- Residential swimming pool issue not serious (eg. resuscitation chart not provided).
- Revocation of an approval (eg. footpath dining/place of public entertainment).
- Failure to microchip or register dog or cat.

*Mandatory warning required by legislation.

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.

APPENDIX “B”

As a guide, the following offences may result in **NO** prior warning being given to the offender(s) before any enforcement action in the form of the service of an order or notice or penalty infringement notice or court action is undertaken.

- Development not in accordance with consent / risk to health and safety / bush fire protection /notice of Intention issued by PCA.
- Development without consent – unsatisfactory explanation / no explanation / repeat offender /prohibited development / risk to health and safety or environment.
- Dilapidated building.
- Failure to comply with order / notice / cease use of premises / failure to comply with order regarding development consent / demolish remove unlawful building / threatening life / public safety / environment / amenity protection / contravene noise control notice / noise pollution.
- Land clearing of a significant nature.
- Noise abatement direction.
- Noise pollution generally after prescribed mandatory warning.
- Not comply with condition of development consent/approval to operate.
- Obstruction of road / public place involving safety.
- Obstruction / intimidation / assault of a Council Officer.
- Animal Control offences.
- Parking offences.
- Remove and / or damage tree(s).
- Swimming Pool fencing / gates open.
- Street trading without consent / approval.

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.

Version Control and change history

Date	Version	Approved by & Resolution No.	Amendment
21 Sep 2011	1	Council Meeting 21 Sep 2011 Resolution 74.7	