
C125. Compliance and Enforcement Policy

Title: Compliance and Enforcement Policy

Policy No: C125

Keywords: Compliance, Enforcement, Unlawful Activities, Breaches of EPAA, Unlawful Development

Responsible Officer: Deputy General Manager – Land Use and Sustainability

1. PURPOSE AND AUTHORITY

The objective of this policy is to assist Council staff and contractors to act promptly, consistently, effectively and without bias in response to allegations of unlawful activity within the Council area.

2. POLICY STATEMENT

In accordance with section 8 (charter) of the *Local Government Act 1993*, Manly Council has an obligation “to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected.” Council is committed to achieving this objective through the implementation of this Policy.

Council also acknowledges its obligations under the *Occupational Health and Safety Act 2000* to provide a safe work environment for its officers.

3. PRINCIPLES

Objectives

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

- how to assess whether complaints of unlawful activity require investigation;
- options for dealing with unlawful activity;
- how to decide whether enforcement action is warranted;
- the opportunity for public participation with respect to the impacts caused by such activities;
- providing any person responsible for carrying out any unlawful activity an opportunity to make representations to Council in accordance with administrative law principles of ‘procedural fairness’ and ‘natural justice’; and
- providing the community with information and guidance with respect to the Council’s role in the management of unlawful activities.

What is an unlawful activity?

An **unlawful activity** is the doing of any act, matter or thing, or the carrying out of any activity of any kind, that is:

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

and includes but is not limited to the carrying out of unlawful development within the meaning of the *Environmental Planning and Assessment Act 1979* (EPA Act) and the carrying out of any activity under s 68 of the *Local Government Act 1993* (LG Act) without the prior approval of Council having been obtained.

The **unlawfulness** of any activity will be determined objectively by reference to the relevantly applicable legislation. In the case of unlawful development, regard is to be had to the EPA Act, the EPA Regulation or

any environmental planning instrument (EPI) as to whether such development can only be implemented with or without 'development consent'. Unlawfulness is also determined against the criteria of 'Exempt Development' and 'Complying Development' as prescribed by or under the Manly Local Environmental Plan 2013.

Investigating Unlawful Activity

Not all complaints will warrant investigation. Council will consider a range of factors when deciding whether to investigate, including the following:

- Is the matter within the jurisdiction of Council?
- Is the complaint premature e.g. does it relate to some unfinished aspect of work that is still in progress?
- Is the activity or work permissible with or without consent?
- If the activity is permissible with consent; is there a consent in place?
- Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
- Is the complaint trivial, frivolous or vexatious?
- Has too much time elapsed since the events the subject of the complaint took place?
- Is there another body that is a more appropriate agency to investigate and deal with the matter?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
- Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- Has the person or organisation complained of been the subject of previous complaints?
- Does the complaint have special significance in terms of the Council's existing priorities?
- Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- Is it in the public interest to investigate the complaint?

If a decision is made not to investigate a complaint, the decision must be recorded with the reasons for that decision.

Responding to complainants

All action requests or complaints about alleged unlawful activity should be acknowledged within 2 working days of receipt and advice given to the complainant within 21 days on what action Council has taken or plans to take.

Anonymous Complaints

Council will accept and investigate anonymous complaints. However, Council's ability to thoroughly investigate an anonymous complaint may be limited by the inability to obtain further information from the complainant.

Provision of Information

The subject of a complaint or the person or persons alleged to be carrying out an unlawful activity will be given all reasonable opportunity to provide any relevant information or other particulars and make appropriate representations regarding the unlawful activity. All such representations must be made in writing. In addition, authorised Council officers have certain powers under relevant legislation to inspect premises and require certain information to be furnished.

A failure by the person(s) to reply to a request for information within the allowed timeframe will be taken into account when determining what enforcement action to take.

Authorised Officers, Delegated Authority and Lawful Powers of Entry

Only certain staff have been delegated authority by the General Manager to initiate various levels of enforcement action. Staff must ensure that any enforcement action is only initiated by a person with appropriate authority. All delegations of authority are contained in Council's Delegations Register which is available from Council's Administration Manager.

These delegations include powers for staff to enter private property. 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 applicable legislation.

All Council staff or contractors who carry out inspections on private land for regulatory purposes will:

- have delegation (as well as all other necessary authorities and authorisations) to enter premises and carry out investigations as specified in Council's delegations; and
- be Authorised by Council where this is required under specific legislation to permit inspections on private property; and
- carry photographic identification demonstrating authorisation to enter premises and private lands under each specific Act; and
- carry documentation or certificates of authority where required by the legislation being implemented.

Principal Certifying Authority (PCA) and Private Certifiers

Council will only investigate matters where a Private Certifier is nominated as PCA in relation to development where:

- the PCA fails, or is not able, to appropriately action a matter;
- the PCA has taken all the action available under the legislation but the offence continues or reoccurs despite that action; or
- it is otherwise in the public interest to do so.

Community Input

Where appropriate, community feedback on the impacts of unlawful activity will be obtained.

Manly Council will approach any investigation of unlawful activity on a 'case by case' basis. Inviting community input will assist Council to assess the impacts of unlawful activity against the public interest and the cost involved to the Council to implement enforcement strategies relative to the benefits to be derived from taking such action.

In inviting community input, care must be taken to respect the privacy and rights of persons alleged to be responsible for the unlawful activity.

Options for dealing with confirmed cases of unlawful activity

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

- referring the complaint to an external agency for further investigation or prosecution
- taking no action on the basis of a lack of evidence or for some other appropriate reason
- counselling the subject of the investigation to educate them on the relevant Council requirements
- negotiating with the subject of the investigation and obtaining some undertakings to address the issues of concern arising from the investigation e.g. an application for unauthorised works (in that regard, refer to the unauthorised works flowchart [Attachment 1 to this policy]) 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, followed by service of an appropriate order or notice (LG Act ss. 124-128, EPA Act s.121B, and the Protection of the Environment Operations Act (POEO Act) Pts 4.2-4.4 and 8.6)
- issuing a notice requiring work to be done under various legislation

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- starting proceedings in the Land & Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulation (s.673 LG Act; s.123 EPA Act)
 - seeking injunctions from the Land and Environment Court or the Supreme Court
 - issuing a summons in the local court
 - issuing a penalty infringement notice
 - taking proceedings for an offence against the relevant Act or Regulation (s.691 LG Act, s.125 EPA Act; Ch 5 POEO Act)
 - carrying out the works specified in an order under the LG Act at the cost of the person served with the order (s.678 LG Act).

All enforcement action will be monitored and a decision made in relation to non-compliance within 2 weeks of any deadline imposed.

Taking enforcement action

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These considerations include:

The nature and seriousness of the breach

Council will have regard to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach. This should also include consideration of whether action is time critical.

Balancing of public interest and cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the 'public interest' Council will have regard to whether the unlawful activity:

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

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- reporting a breach to a professional association; and
- use of statutory powers such as:
 - granting consent to a relevant application;
 - making an order under the EPA Act, the LG Act, or the POEO Act; or
 - issuing a building certificate under the EPA Act.

The available methods of enforcement

If formal proceedings are considered to be the best option, the decision on which court to bring proceedings in will be informed by considerations such as the following:

- the likely cost of proceedings;
- the prospects of recovery of those costs from the respondent or defendant;
- the remedies reasonably available;

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- the available methods of enforcement; and
 - the circumstances of each case.

The circumstances of each case

Council will in all prosecution and enforcement matters consider the following:

- whether the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;
- whether the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- the impact of the unlawful activity on the natural or built environment and on health, safety and amenity;
- whether development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- whether the person(s) who committed the breach has shown contrition and, where possible, has remedied the unlawful activity;
- whether the person(s) who committed the breach has made submissions to the Council that provide reasonable grounds for the Council to conclude that the person was under a genuine mistaken belief as to a relevant factual or legal matter;
- whether the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- whether the person(s) who committed the breach should have been aware of their obligations because they have:
 - particular knowledge, e.g., a builder or company that regularly carries out work and is generally aware of the relevant Council or other requirements;
 - received a previous warning; or
 - been subject to previous formal legal action.
- whether the unlawful activity was unavoidable; and
- such other matters that may appear to be relevant to the individual case.

Adjudication of Penalty Infringement Notice Appeals (All offences)

An adjudication panel consisting of the Manager Compliance and Enforcement and the Manager Ranger Services will examine client representation schedules received from the NSW State Debt Recovery Office and in some instances representations received directly by Council. The client representation schedules contain representations from persons who have received a penalty infringement notice for an offence.

The panel is to consider the representations made and the circumstances of the case and make a written recommendation to the Deputy General Manager, Land Use and Sustainability who will make a final decision in regards to the appeal.

Administrative Fees

Pursuant to Council's Fees and Charges and where illegal works have been completed within the past twenty-four (24) months a fee for the assessment of unlawful building works will be charged. This fee will be equivalent to the maximum fee that would have been imposed if the application was for a combined development application/construction certificate application, or a complying development application (whichever is relevant) for the building or part of the building the result of the unauthorised work.

Planning Certificates

Notwithstanding any decision taken under this document, the Council may, pursuant to s 149(5) of the EPAA and to the extent it sees fit, include advice on a planning certificate with respect to any land where an action or actions have been taken under the Policy.

Record-keeping

Council officers investigating or enforcing unlawful activity must ensure that full and accurate records of the matter are kept and stored in Council's official record keeping system. In addition to all incoming and

outgoing correspondence (letters, emails, faxes) relating to the matter, Council officers must keep notes of all interviews and inspections in their interview book as well as notes of phone conversations that go beyond a basic exchange of already documented information. Records must also be kept of the reasons why the method for dealing with the unlawful activity was chosen e.g. why Council decided not to issue a notice.

Work Health and Safety of Council staff

Council is required to provide for the health, safety and welfare of all staff including compliance and enforcement staff. In this regard, Council staff will observe safe work practices and comply with safe work method statements when carrying out their duties

Discretion

One of the main purposes of the Compliance and Enforcement Policy is to provide guidance to Council and the Community on how we will exercise our powers of discretion in matters of compliance and enforcement. In this regard, it is Council policy to support the administrative law principles which require public officials to:

- use discretionary power in good faith and for a proper purpose. That is, to use the powers honestly and only within the scope of the purpose for which the power was given;
- base decisions on logically probative material. This means decisions are based on logical reasons, relevant information that proves the issues in question, as well as reliable and relevant evidence;
- consider only relevant considerations and not consider irrelevant considerations;
- give weight to matters of greater importance and not give weight to matters of lesser importance;
- exercise discretion independently and not under the dictation or at the behest of any third party;
- give proper, genuine and realistic consideration to the merits of each particular case and not apply policy inflexibly; and
- observe the rules of procedural fairness (known also as the rules of natural justice).

The principles, positions and special provisions of this policy are in themselves a demonstration of the proper use of discretionary powers.

Procedures

The General Manager shall, from time to time, implement procedures for the investigation of complaints and the taking of enforcement action. Such procedures must be consistent with the principles espoused in this Policy.

Such procedures may include, but are not limited to, matters involving:

- unauthorised building works
- non-compliance with development consents
- fire safety compliance
- places of public entertainment
- food safety
- public health
- skin penetration
- brothels
- residential swimming pool fencing
- pollution incidents
- littering and dumped rubbish
- hours of operation
- noise.

4. SCOPE

This Policy applies to the investigation and enforcement of complaints about unlawful activity or failure to comply with the terms or conditions of approvals, licences and orders. While primarily directed at the regulation of development activity, the Policy is also applicable to pollution control, regulation of parking and control over keeping animals.

This document applies to all land within the Manly local government area.

5. DEFINITIONS

Building Certificate	A <u>building certificate</u> is issued pursuant to ss.149A-149E of the EPA Act and operates to prevent the Council - <ol style="list-style-type: none"> from making an order (or taking proceedings for the making of an order or injunction) under that Act or the LG Act requiring the <u>building</u> to be repaired, demolished, altered, added to or rebuilt, and from taking proceedings in relation to any encroachment by the <u>building</u> onto <u>land</u> vested in or under the <u>control</u> of the Council
Development	'development' means: <ol style="list-style-type: none"> the use of land, and the subdivision of land the erection of a building; the carrying out of a work; the demolition of a building or work; any other act, matter of thing referred to in s.26 of the EPA Act that is controlled by an EPI, but does not include any development of a class or description prescribed by the regulations made under that Act [see, relevantly, the <i>Environmental Planning and Assessment Regulation 2000 (NSW)</i>] (the 'EPAR') for the purposes of this definition].
EPAA	The Environmental Planning and Assessment Act, 1979, which sets out the framework for local planning in New South Wales
EPAR	The Environmental Planning and Assessment Regulation 2000, which supports the general aims of the EPA Act in the regulatory process.
EPI	Environmental Planning Instrument' ('EPI') is any state environmental planning policy, regional environmental plan or local environmental plan (relevantly, Manly Local Environmental Plan 2013 (the 'MLEP')).
Exempt Development	Development that is of minimal environmental impact and does not require development approval.
MLEP	Manly Local Environmental Plan 2013, comprising specific planning controls for the Manly local government area administered by Manly Council. This plan applies to all land within the local government area of Manly as shown on the MLEP map.
POEO	The <i>Protection of the Environment Operations Act 1997</i> (POEO Act) is the key piece of environment protection legislation administered by Council.
PCA	Principal Certifying Authority, being an accredited authority who issues certificates for development under the EPA Act.
Unlawful activity	The doing of any act, matter or thing, or the carrying out of any activity of any kind, that is: <ul style="list-style-type: none"> contrary to a legislative provision regulating a particular activity or work; contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land; without a required development consent, approval, permit or licence; and/or contrary to the terms or conditions of a development consent, approval, permit or licence, and includes but is not limited to the carrying out of unlawful development within the meaning of the <i>Environmental Planning and Assessment Act 1979 (NSW)</i> (the 'EPAA') and the carrying out of any activity under s 68 of the Local Government Act 1993 (LGA) without the prior approval of Council having been obtained.

6. IMPLEMENTATION

This Policy will be implemented on adoption by Council and will be available on Council's website and provided to Council staff.

Council and/or the General Manager, may during a civil emergency only, set aside any policy terms to ensure public safety.

7. MONITORING AND BREACHES

Regular monitoring of compliance with this Policy, related policies, procedures and guidelines, and relevant legislation will be undertaken and documented by the responsible officer for this Policy.

Breaches of this Policy by staff will be considered to be breaches of Manly Council's Code of Conduct and therefore invoke the relevant sanctions outlined in that Code. Persons in breach of any legislation may be subject to relevant criminal action.

8. REPORTING

There is no statutory reporting required for this policy.

9. POLICY REVIEW

This Policy is subject to regular review at a maximum interval of two years.

For the purposes of carrying out and giving effect to this policy, the General Manager may from time to time prepare, adopt or vary, and otherwise issue to Council staff, guidelines and directions relating to any aspect of this policy.

Any recognised change to relevant legislation; or directives or guidelines issued by agencies including the NSW Ombudsman and the Division of Local Government; or to Manly Council's related guidelines and procedures will activate an immediate review of this policy to ensure it remains current and aligned to best practice policies.

10. RELEVANT REFERENCES AND LEGISLATION

Environmental Planning and Assessment Act 1979 (NSW)

Environmental Planning and Assessment Regulation 2000 (NSW)

Local Government Act 1993 (NSW)

Manly Local Environmental Plan 2013

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008

Protection of the Environment Operations Act 1997

NSW Ombudsman's Enforcement Guidelines for Councils June 2002.

11. RELEVANT COUNCIL POLICIES

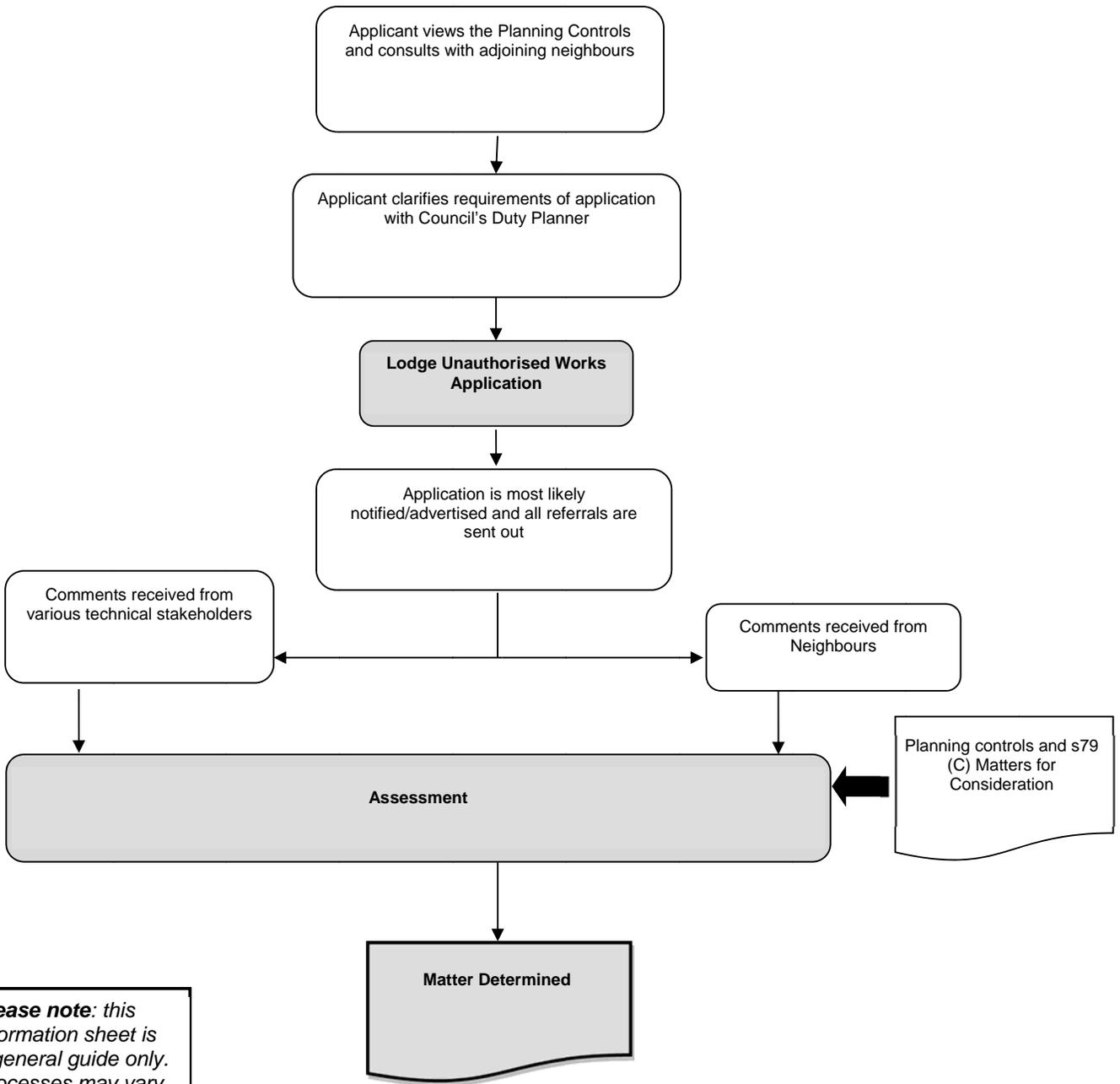
Nil.

12. REVISION SCHEDULE

Minute No	Date of Issue	Action	Author	Checked by
n/a	20 October 2008	First Draft prepared	Consultant Solicitor	Manager Compliance and Enforcement
	13 October 2009	Second Draft	Manager Corporate Governance	
146/09	19 October 2009	Adopted OM 191009.		
n/a	22 October 2009	Added to the Policy Register.	OM, Corporate Services.	Manager, Administration
	10 March 2011 to 8 April 2011	Policy on Public Exhibition 28 days	Manager Compliance &	

			Enforcement	
OM 92/11	9 May 2011	Policy Adopted and added to Policy Register	OM, Corporate Services	Manager Administration
	June 2013	Comprehensive Review	Manager Corporate Governance	General Counsel
PS16/14	3 March 2014	Periodic Review	OM CSS	Manager Governance

ATTACHMENT 1 Unauthorised Works Flowchart



Please note: this information sheet is a general guide only. Processes may vary slightly on a case by case basis.