



KIAMA
MUNICIPAL
COUNCIL

ENFORCEMENT POLICY

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1. INTRODUCTION

1.1 The Policy

This policy is called “Kiama Municipal Council’s Enforcement Policy”.

1.2 Commencement

This Policy was adopted by Council on 17 May 2011 and commences on 25 May 2011.

1.3 Purpose

The purpose of this policy is to assist Council staff to act promptly, consistently and effectively in response to allegations of unlawful activity primarily associated with, but not limited to, development and building matters.

1.4 Policy Statement

Council is strongly opposed to unlawful activity at any time or under any circumstances. Council’s officers will initiate enforcement action in accordance with this policy document.

1.5 Policy Objective

The aim of this policy is to establish clear guidelines for the exercise of the discretion the Council and its officers must use in dealing with unlawful activity, taking into account all relevant information including the available evidence, cost to the community, the circumstances of the individual case and public policy and precedent considerations.

The policy:

- Provides a legal and administrative framework to assist Council and its officers in making decisions in its enforcement functions;
- Specifies the criteria which the Council and its officers will take into consideration when deciding:
 - (a) if enforcement action is necessary; and
 - (b) the most appropriate type of action.
- Provides information to the public about the Council’s role and policy on enforcement; and
- Ensures that the enforcement process is conducted with maximum speed and minimal delay.

1.6 Policy Principles

Council is committed to:

- Acting in the interest of protecting community health, safety and or the environment;
- Acting consistently, fairly, impartially and transparently;
- Preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s;
- Ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s;
- Ensuring enforcement action is taken against the right person for the correct offence;
- Ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner;
- Disclosing all evidence relevant to the alleged offence/s;
- Assisting the Court by providing all necessary information whether or not that information is in favour of the Council case, in accordance with a prosecutor's general duties.

1.7 Application

This policy applies to the investigation and enforcement of unlawful activity or failure to comply with terms or conditions of approvals, licences, orders, notices, directions, Council policies or breaches of legislation administered by Council. While it is primarily directed at the regulation of development activity, this policy also applies to all functions, policies and legislation administered by Council including but not limited to pollution control, food regulation, parking and animal control, tree preservation and prohibited activities applicable to property and land.

1.8 Definitions

The following defined terms are used in the policy:

CAN - means a court attendance notice issued and filed in accordance with the Criminal Procedure Act 1986. A CAN may be used to commence summary proceedings in the local court. A CAN specifies the offence and its essential particulars as well as the address of the court where the matter is to be heard. If a person does not attend court on the day specified in a CAN, a warrant may be issued for the arrest of the person or the matter may be dealt with in the absence of the person.

Council - means Kiama Municipal Council and staff holding relevant delegations.

Defendant - means the accused person against whom criminal proceedings are brought.

EPAA - means the Environmental Planning and Assessment Act

1979.LGA - means the Local Government Act 1993.

Legislation – any legislation as administered by Council and its delegated officers.

PIN - means penalty infringement notice. Sometimes referred to as an ‘on-the spot’ fine. PINs may only be issued for prescribed offences and the value of the fine is also prescribed by legislation.

POEO - means the Protection of the Environment Operations Act 1997.

Policy of Council – means this policy and any other policies as adopted by Council.

Respondent - means the party against whom civil proceedings are brought in Land & Environment Court proceedings.

unlawful activity - means any activity or work that has been or is being carried out:

- contrary to a legislative provision regulating a particular activity or work;
- contrary to legislation as administered by Council.
- 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, licence, notices, orders or directions as issued by Council.

2. BACKGROUND

Council becomes aware of unlawful activities in a variety of ways, from the proactive actions of Council staff to the receipt of complaints or requests from members of the public.

When Council is appointed the Principal Certifying Authority for development and building works, Council staff will identify breaches of consent and unauthorised building work and uses. In our environmental protection or public health roles, we may discover pollution incidents and unhealthy premises that require enforcement action. Furthermore, Rangers and Parking Enforcement Officers, Building Surveyors, Environmental Health Officers or other authorised officers of the Council issue PINs or take other legal action on Council’s behalf on matters including, but not limited to, parking, companion animals, pollution control, food regulation and building site offences.

Council officers who are not involved directly in enforcement matters will also commonly identify potential unlawful activities and report them for investigation and action pursuant to this policy.

Nevertheless, while Council is proactive in the detection of unlawful activities, not all offences are readily discernible and early detection can only be achieved with support and direct advice from our community.

2.1 Submitting Complaints or Requests

Complaints or requests alleging unlawful activity can be submitted to Council either in writing or verbally. In either case the allegation will be recorded in Council's Customer Action Request system and will be allocated a unique reference number. The request will be referred to the relevant officer to commence any necessary investigation.

The name, address and contact details of the person submitting the complaint will also be recorded. This information is critical as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action. Council will advise any complainants of the action, if any, taken or the reasons why no action was taken in the circumstances.

Council will take all reasonable measures to protect the privacy of the person submitting the complaint and generally information on this person will not be released. However, Council may be required to disclose this information in a variety of circumstances including the following;

- Access to the information is permitted under legislation, including the Government Information (Public Access) Act 2009;
- Access to the information is permitted under another Council policy; Legal proceedings are commenced and the information is disclosed in evidence served; and
- The nature of the allegation otherwise makes it a necessity.

Also, in some circumstances it may be possible to ascertain the identity of the person submitting the complaint by the nature of the allegation.

2.2 Procedural Fairness and Natural Justice

There is an overriding duty on the Council to act fairly and ensure the principles of procedural fairness and natural justice are adhered to. In this regard Council will:

- Provide information on the substance of the complaint to the alleged offender. This may not occur until an appropriate stage in the investigation;
- Comply with any statutory requirements including any specific timeframes as specified by legislation;
- Provide an opportunity for the alleged offender to put their case. This will not be necessary if there is a serious risk to personal or public safety or risk of serious environmental harm;
- Consider any submission put forward by the parties to the matter;
- Make reasonable inquiries or investigations before making a decision;

- Ensure no person decides a case in which they have an interest; and
- Otherwise act fairly and without bias.

2.3 Options for Dealing with Unlawful Activity

Council has discretion in deciding whether to take enforcement action on the basis of the available evidence and the circumstances of the individual case. At the conclusion of an investigation, Council may have one or more of the following options:

- Take no action;
- Counsel the alleged offender;
- Issue a formal letter notice or verbal warning;
- Commence criminal proceedings; and/or
- Commence civil proceedings.
- Issue PIN or PINs;
- Issue a Notice, Order or Direction

2.3.1 Criminal Proceedings

Criminal proceedings are punitive. The sentence which a court may impose if an offence is proven is usually a fine.

The amount of a fine imposed by a court will be based on the need for specific deterrence and the rehabilitation of the offender, the need for general deterrence of similar offences by other members of the community and any aggravating or mitigating circumstances.

The types of criminal proceedings available to Council include:

- Issuing a PIN subject to appeal;
- Prosecuting the offence in the Local Court by issuing a CAN; and
- Prosecuting the offence in the Land & Environment Court in its summary jurisdiction (Class 5)

In criminal proceedings an offence must be proved 'beyond a reasonable doubt'.

PINs for offences currently (as at April 2011) vary from \$100 up to \$3,000 under the EPAA and Environmental Planning and Assessment Regulation 2000 depending on whether the offender is an individual or a corporation and the nature of the unlawful activity. Under the POEO, a corporation could be fined up to \$5,000 by PIN. The offender can either pay the fine stated on a PIN or elect to have the matter heard before a court.

Where prosecution action is taken rather than remedying the offence by a PIN, the maximum penalty is usually considerably higher. For example, the maximum penalty for an offence under the EPAA is the amount specified or, if no penalty is specified for the particular offence, 10,000 penalty units and a further daily penalty not exceeding 1,000 penalty units. At present 1 penalty unit equals \$110. However, if the offence is prosecuted in the Local Court the maximum monetary penalty the court can impose is 1,000 penalty units, or the maximum penalty specified for the offence, whichever is the lesser.

In criminal proceedings for offences against the EPAA there is often no provision which enables the Court to order the offender to remedy the breach or restrain the unlawful activity. These powers are available to the court in some other kinds of cases, for example, offences against the EPAA involving the destruction of or damage to a tree or vegetation or in appropriate cases where an offence is committed against the POEO or the regulations under that Act.

A person cannot be convicted of an offence against the EPAA or the regulations where:

- the matter is the subject of civil proceedings under Section 123 of the EPAA and those proceedings have not been concluded; or
- an Order of the Court has been made to remedy or restrain the breach. (Section 127(7) of the EPPA)

These restrictions, and the practice of the court, usually favour civil proceedings being taken where it is necessary to remedy or restrain an unlawful activity.

Criminal proceedings for an offence against the EPAA must be commenced within two (2) years of the offence being committed or within two (2) years from the date when evidence of the offence first came to the attention of an authorised officer. (Section 127(5), (5A), (5B) & (5C) of the EPPA)

2.3.2 Civil Proceedings

The objective of civil proceedings is to rectify the consequences of, or restrain an unlawful activity, by requiring the offender to do or refrain from doing something. Civil proceedings include the following:

- Notices and orders issued by Council pursuant to various legislation;
- Class 4 proceedings before the Land & Environment Court, seeking an order of the Court to remedy or strain a breach of the EPAA (Section 123), the LGA (Section 673), the POEO (Sections 252 & 253), or any other Act, if the breach is causing or is likely to cause harm to the environment; and

- Interlocutory relief for matters causing, or with the reasonable potential to cause, serious environmental harm. In such proceedings it is likely the Council would be required to provide an undertaking as to damages.

For civil proceedings to be successful Council must prove the breach on the balance of probabilities. This is a less onerous burden of proof than is required in a criminal prosecution. However, even if the breach is established, the court has discretion not to make any order. Council must therefore be in a position to lead evidence that persuades the court that an order to remedy or restrain the breach should be made.

Civil proceedings can be held over to provide the person responsible for the unlawful activity with an opportunity to lodge any required application and have it determined or otherwise to cease or remedy the breach voluntarily.

2.3.3 Criminal or Civil?

Deciding whether to commence criminal or civil proceedings depends on the outcome that is being sought. If Council were willing, retrospectively, to accept the results of the unlawful activity or if the unlawful activity cannot be undone or is not ongoing and Council wishes to punish the offender, criminal proceedings may be preferred subject to the considerations detailed below.

Conversely, if Council is not willing to accept the unlawful activity (and particularly for alleged offences against the EPAA where the court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity), it is often more appropriate for Council to commence civil proceedings.

If Council decides not to commence proceedings under the EPAA, LGA or POEO, any person may commence their own proceedings for an order to remedy or restrain a relevant breach. (Section 123 of the EPAA; Section 674 of the LGA; Section 253 of the POEO)

3. WHEN WILL COUNCIL COMMENCE ENFORCEMENT ACTION?

Council will decide whether to take enforcement action after it has considered, among other things, the following matters:

3.1 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.

3.2 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 EPAA, LGA or POEO; or
 - issuing a building certificate under the EPAA.

3.3 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:

- Likely cost of proceedings;
- Prospects of recovery of those costs from the respondent or defendant;
- Remedies available;
- Available methods of enforcement; and
- Circumstances of each case.

3.4 The circumstances of each case

The 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;
- Whether there are impact(s) caused by the unlawful activity on the natural or built environment and on health, safety and amenity and the seriousness of the impacts;
- 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 eg: 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.

4. DECIDING ON THE METHOD OF ENFORCEMENT

When deciding on the method of enforcement, it is necessary to consider the principles explained above in Section 2.3 - 'Options for Dealing with Unlawful Activity' and the outcome being sought.

4.1 PINs

PINs will be issued for offences of a minor nature, where it is considered a small monetary penalty may prevent a recurrence of the unlawful activity or stop the unlawful activity from continuing. The issuing of a PIN will only occur where a decision has been made not to commence other criminal proceedings and if the Council has obtained, or could obtain sufficient evidence in admissible form to prove the offence beyond reasonable doubt in any subsequent criminal proceedings. A PIN can only be issued where it is beyond reasonable doubt to the issuer that the defendant has committed the relevant offence.

PINs should be issued as soon as possible after the conclusion of an investigation. PINs may be used in conjunction with other enforcement action, as permitted by the applicable legislation.

4.2 Consents, Orders, Notices, Directions and Building Certificates

Consideration will be given to whether a breach can be rectified by a consent or building certificate or whether enforcement can occur by way of an order, notice, direction under the EPAA, LGA, POEO, Food Act or some similar means.

The Orders provisions of the EPAA, LGA, POEO are described as “self-help” provisions that provide Council with a formal cost effective mechanism to direct land owners and occupiers to do or refrain from doing something. They generally operate on the ‘principles of natural justice’ and, where appropriate, should be used prior to the commencement of civil proceedings in the Land & Environment Court.

Enforcement action of this nature may occur in conjunction with criminal proceedings, where it is considered appropriate and necessary for punitive action to also be taken, having regard to the restrictions provided under Section 127(7) of the EPAA.

4.3 Land & Environment Court Proceedings

Council will give preference to civil proceedings in the Land & Environment Court over criminal prosecution in either the Local Court or the Land & Environment Court where Council requires the offender to do or refrain from doing something, such as comply with a development consent or demolish unauthorised works. Generally civil proceedings in the Land & Environment Court will be preceded by formal notices and/or orders, unless the circumstances warrant the immediate commencement of court proceedings.

The following matters will be considered in determining whether to commence civil or criminal proceedings in the Land & Environment Court:

- Is there a liable respondent;
- Does Council have sufficient evidence to prove its case either on the ‘balance of probabilities’ (civil) or ‘beyond a reasonable doubt’ (criminal);
- Does Council require an order from the court restraining the respondent from doing something or ordering the respondent to remedy the breach;
- Is an interlocutory injunction required because the unlawful activity is causing serious, or has the potential to cause, serious environmental harm;
- Is the matter urgent;
- The severity of the alleged offence;
- Is the respondent a repeat offender;
- The cost of proceedings;
- Does the development breach height limits; and
- Does the development breach non-standard conditions of consent.

4.4 Local Court Proceedings

The following matters will be considered in determining whether to commence criminal proceedings in the Local Court:

- *Is there a liable defendant;*
- *Is a monetary penalty all that is required;*
- *Does Council have sufficient evidence to prove its case ‘beyond a reasonable doubt’;*
- *Are works proceeding - consider CAN to commence proceedings quickly;*
- *The severity of the offence;*
- *Is the defendant a repeat offender; and*
- *The cost of proceedings*

5. RECOVERY OF LEGAL COSTS

The Council’s policy for recovery of its costs in the Land and Environment Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court;
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed; and
- The Council will adopt the recommendations of its solicitors to accept a lesser amount than the full legal costs incurred by the Council if, in the circumstances, the acceptance of such an offer will result in the Council not incurring further and unnecessary legal costs.

The Council’s policy for recovery of costs in the Local Court is:

- That the Council will seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or by order of the court; and
- The Council will seek to recover the penalty imposed by the court where such penalty is imposed.

6. COMMUNITY AWARENESS

The Council will carry out a community awareness campaign about enforcement by providing information on its website.

7. ACKNOWLEDGEMENTS

This policy is based on the 'Model Policy' developed by the NSW Ombudsman and the following documents were used in its preparation;

1. Enforcement Guidelines for Councils - 1st Edition, NSW Ombudsman (2002)
2. Enforcement Policy - Hurstville City Council (May 2008)
3. Enforcement Policy - Woollahra Municipal Council (January 2007)
4. *Compliance and Enforcement Policy* – Singleton Council (*December 2008*)
5. Enforcement Policy – Wollongong City Council (June 2009)