

# ENFORCEMENT POLICY

## ENFORCEMENT POLICY FOR PLANNING, BUILDING, HEALTH AND ENVIRONMENT MATTERS

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## 1. Preamble

A Council is created under legislation (the Local Government Act 1993) and has powers of regulation defined by that Act. A Council does not have the status, privileges and immunities of the Crown but rather has powers prescribed by NSW legislation. Many of Council's regulatory functions are derived from the Local Government Act. Other Acts relevant to Council's regulatory powers are referenced in this Policy. As a body created by legislation, a Council cannot change the law and has a duty to uphold the law as created by the NSW Parliament. This Policy sets out the procedures and principles which are adopted by the Council in undertaking its duty.

## 2. Purpose and Statement of Intent

This policy aims to provide a consistent and transparent approach to enforcement action which follows the principles of natural justice and procedural fairness.

Canada Bay Council's core values reflecting responsive and responsible regulation, and fairness and equity will apply to any action taken in accordance with this policy.

The Council acknowledges that it has an obligation under Section 8 of the Local Government Act 1993 to ensure that the exercise of its regulatory powers is carried out consistently and without bias.

This document aims to outline enforcement options and resultant procedures available to Council in relation to environmental, health, building and development enforcement matters.

## 3. Policy Objectives

The objective of this policy is to establish clear guidelines for dealing with requests or complaints regarding allegations of unlawful activity primarily associated with, but not limited to, environmental, and building and development matters referred to in this Policy. It provides a framework for;

- assessing whether complaints require investigation; and
- options for dealing with complaints; and
- determining appropriate enforcement action; and
- This policy also provides information to the public and other government agencies about Council's role in enforcement matters and is designed to ensure that the enforcement process is conducted effectively and efficiently whilst being consistent with the principles of natural justice and procedural fairness.

## 4. Application

This policy applies to the investigation of complaints about unlawful activity or failure to comply with the terms or conditions of approvals, licences and orders, and appropriate enforcement actions. While primarily directed at the regulation of development and building activity, the policy is also applicable to pollution control and other regulatory matters under the Protection of the Environment Operations Act 1997.

Implementation of this policy applies to all Planning and Environment Staff who are authorised to enforce local government, planning & environmental legislation in accordance with Council's Delegations. The Policy does not apply to private certifiers (see Clause 5.3).

This policy applies to all persons and companies who are carrying out, or may have carried out, activities or works within the Canada Bay Local Government Area, and to those who may be breaching current legislation relating to environmental matters such as pollution control, particularly on construction sites but also with regard to existing industrial and commercial activities.

## 5. Responsibilities

### 5.1 Council Staff

All council staff members involved in the processing of written and verbal customer requests or complaints alleging unlawful activity are responsible for implementing these policy guidelines.

All notifications of alleged unlawful activity or related requests shall be logged in Council's customer request system or registered through the complaints system and directed to the responsible person.

All matters reported will be investigated by the relevant Council staff unless;

- The Council has no jurisdiction over the matter (eg NSW WorkCover issues on building sites or some internal matters within strata buildings etc); or
- The activity is determined to be lawful without an investigation; or
- The complaint is deemed to be frivolous or vexatious in nature.

If a decision is made not to investigate a complaint, the complainant will be notified and advised of the reasons why the complaint was not investigated or why the use/building etc was not deemed to be unlawful.

### 5.2 Principal Certifying Authority (PCA)

Principal Certifying Authorities are companies and/or individuals who are generally registered building surveyors responsible for undertaking mandatory building inspections as work progresses on a construction site. They are also the authority responsible for ensuring compliance with the conditions of development consent. Principal Certifying Authorities can be Council officers or private certifiers.

Persons making complaints regarding a site where the Principal Certifying Authority is a private certifier will be advised to contact the certifier. Where a complaint is received in writing regarding a site under the responsibility of a private certifier, Council will forward the complaint to the private certifier registered in Council's records and will advise the complainant of this action and the name and contact details of the Private Certifier for action.

Council will investigate matters where:

- The PCA fails to or is unable to appropriately action a matter or where it is in the immediate public interest for Council to investigate;
- The PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite the action;
- Where the complaint relates to Council property; and/or
- Where the complaint relates to an environmental pollution incident

### 5.3 Building Professionals Board (BPB)

The Building Professionals Board is an authority established by the NSW Government to accredit private certifiers to issue Construction, Occupation, Subdivision, Strata, Compliance and Complying Development Certificates under the Environmental Planning and Assessment Act 1979, and the Strata Schemes (Freehold Development) Act 1973 and Strata Schemes (Leasehold Development) Act 1986. The Board also investigates complaints against accredited certifiers and audits accredited certifiers and Councils in their certification roles.

Under Section 21 of the Building Professionals Act 2005, any person can make a complaint to the BPB in relation to the professional conduct of an accredited certifier. Before making a complaint against an accredited certifier, it is recommended that the complainant contact the certifier first to discuss the complaint and to allow the certifier to consider the matters raised in the complaint and take any appropriate action available to the certifier.

It should be noted that private certifiers are not bound by the terms of this Enforcement Policy.

## 6. Definitions

Unlawful activity is any activity or work that has been or is being carried out on any land:

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

'Register of Delegations' and 'Implementation of Delegated Authority' means the Delegations Register adopted by Canada Bay Council from time to time and any Implementation of Delegations adopted by Council from time to time.

### 6.1 General Principles

- Proportionality - taking action that is reasonable and relates directly to the actual breach.
- Consistency - ensuring that similar issues are dealt with in the same way.
- Transparency - ensuring that what we do and why we do it is easily understood and relevant information is made available where possible and reasonable through freedom of information.
- Helpfulness - working with the business or individual to achieve compliance with the law by being approachable, courteous and efficient.
- Prioritising - making sure that resources are targeted primarily on those whose activities give rise to the most serious risk.
- Mediation - work with both sides in a dispute in an attempt to reach an amicable and lawful agreement

## 7 Investigating Unlawful Activity

Council's response to complaints about unlawful activity or failure to comply with the terms or conditions of approvals, licences and orders shall be guided by the following matters before any appropriate enforcement action is undertaken:-

- Is the matter within the jurisdiction of Council?
- Is the complaint premature e.g. does it relate to some unfinished aspect of previously approved 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 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 that are 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?
- Does the activity constitute a risk to public safety?
- Does the complaint indicate the existence of a systemic problem eg if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- Has the matter already been investigated and resolved or found to have no basis?
- 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, this decision must be recorded with the reasons for that decision. The complainant shall be advised of any such decision.

## 8. Responding to Complaints

Every effort will be made to ensure that all Customer Requests or complaints in relation to alleged unlawful activity are actioned in a timely manner.

Council will make every effort to instigate preliminary investigation within the following timeframes:

- Urgent and life threatening matters will be actioned as a matter of priority following receipt of the complaint. Examples include unsafe building works, collapsed building/wall, food safety issues and public health and safety matters etc. As a guide these matters should be dealt with on the day of receipt of the complaint.
- General compliance matters will be dealt with on a priority basis having regard to the relative seriousness of the matter and resources available. Examples include works not in accordance with consent or construction without consent, illegal use, noise and food complaints.
- Nuisance matters should commence action within 3-5 working days; examples include domestic noise matters, minor non-compliance such as overgrown land or other matters in which there are no likely immediate health or safety implications.

## 9. Options for Dealing with Confirmed Cases of Unlawful Activity etc

As indicated in Clause 7 above, Council will consider a range of matters before taking regulatory action.

Regulatory action is any formal or informal action taken to investigate, and rectify as necessary, infringements of the relevant legislation.

The options for taking regulatory action will differ where different pieces of legislation are used, but the principles of application remain consistent, i.e., the legislative requirements and evidence of a breach are required in each case.

Approaches which may be considered include (see summarised table in Appendix 1 on page 11 of this Policy):

- Referring the complaint to an external agency for further investigation.
- Taking no action on the basis of a lack of evidence or other relevant reason.
- Counselling the subject of the investigation to educate them on the relevant council requirements if it appears that there is a genuine ignorance or lack of understanding of legislative requirements etc.
- Negotiating with the subject of the investigation to obtain undertakings addressing the issues of concern arising from the investigation e.g. an application for modification of development consent. (only in circumstances where it is likely that such an application would likely have been approved if it had been lodged prior to the work being carried out).
- Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.
- Issuing a Notice of Intention to issue an Order or Notice under relevant legislation, followed by service of an appropriate Order or Notice (Local Government Act (LG Act) ss. 124-128, Environmental Planning & Assessment Act (EP&A 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
- 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 EP&A Act)
- Seeking injunctions from the Land & Environment Court or the Supreme Court
- Issuing a summons in the Local Court
- Issuing a Penalty Infringement Notice (PIN)
- Taking proceedings for an offence against the relevant Act or Regulation (s.691 LG Act, s.125 EP&A Act, Chapter 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).

In many cases following investigation, no further action is required for minor breaches where no serious impacts have occurred.

Whilst these approaches recognise that Council may use discretion in the process, Council is also obliged to uphold the law, including compliance with relevant administrative law principles (for example: acting fairly and equitably), and to act in the public interest.

Where appropriate, a staged approach to ensure compliance will be adopted. In the first instance businesses and individuals will be given the opportunity to discuss and remedy the breach before action is taken, unless immediate action is required due to the seriousness of the breach. All enforcement action will be monitored and a decision made in relation to non-compliance as soon as practicable.

## 10. Taking Enforcement Action

From an operational perspective the Council has a range of enforcement options including, but not limited to the following:

- The issuing of a verbal warning;
- The issuing of a written warning;
- The issuing of a 'show cause' letter;
- The issuing of a Stop Work Order;
- The service of a Notice of Intention to issue an Order;
- The service of written or oral Notices/Orders/Directions;
- The issuing of a Penalty Infringement Notice(s) (PINs);
- The recommendation to instigate legal action;
- The waiving of certain fees and the granting of an extension of time for compliance;
- The revocation of an approval;
- The removal/impounding of goods or items;

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

- Has the Council created an Estoppel situation? Estoppel is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment.
- Is the breach a technical breach only?
- When was the unlawful activity carried out and for how long?
- How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?
- Would consent have been given if it had been sought?
- Can the breach be easily remedied?
- Does the person in breach show genuine contrition?
- Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
- Has the person the subject of the complaint received a previous warning or other non-coercive approach or has formal legal action been taken?
- Would an educative approach be more appropriate than a coercive (forced or forcible) approach?
- What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
- Is there sufficient evidence to establish a prima facie case which signifies that on first examination, a matter appears to be self-evident from the facts? Is there some doubt over the evidence or offences?
- What are the chances of success if the proposed enforcement action was challenged in court?
- What action would be reasonable and proportionate in the circumstances of the case?
- Is it in the public interest to pursue formal enforcement action including there being a reasonable prospect of success?
- Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?

- What is the likely length and net expense of the legal action?

The Council will ensure that the principles of natural justice are adhered to prior to a decision regarding action being reached. The following principles will be implemented by the Council:

- Whoever is the subject of concern must know all allegations in relation to their action;
- All parties to the complaint have the right to be heard;
- All relevant submissions and evidence will be considered;
- Matters which are not relevant will not be taken into account;
- The person who makes the complaint will not determine the matter;
- The decision will be fair and just.

## 11. Importance of Follow up Action

Council staff will follow up matters particularly where a serious risk of harm is present. Council endeavours to follow up on previous action in all cases reasonably required to be followed up to determine compliance.

This includes conducting follow up inspections or reinspections and resubmitting documents in the corporate information system on expiry of compliance periods for warnings, Notices and Orders issued.

## 12. Building Certificate Applications under section 149D of the Environmental Planning and Assessment Act 1979

Council recognises that persons who may have carried out unlawful works may apply for a Building Certificate under Section 149D of the Act to regularise or formalise such unlawful works. However, it is Council's policy that such applications should not be encouraged to justify unlawful works. Even where Section 149D is applied to illegal building works, a PIN or other regulatory action will usually be applied.

## 13. Process for Requests or Representations Seeking Reconsideration

To ensure that Council manages the penalty infringement process and enforcement action in a consistent, transparent, accountable and unbiased manner, any requests or representations seeking reconsideration or waiving of a Penalty Infringement Notice (PIN) are required to be made directly to the NSW Office of State Revenue. Requests to waive PINs are not to be made directly to Council.

The decision to waive a PIN must be made by the NSW Office of State Revenue. In some cases, the Office of State Revenue may consult with Council prior to making a determination.

To maintain the integrity of the Council's regulatory and enforcement functions, Council will not support the waiving of a PIN unless:

- it is evident that an error has been made in the issuing of the PIN, or
- the extent of evidence or circumstances may affect the successful defence of the infringement in the event of a Court hearing or appeal, or
- it is evident that Council has acted unreasonably in the issuing of the PIN, or
- legal advice has been obtained and it is considered appropriate to support the waiving of the PIN on the basis of such advice.

## 14. Delegations for Enforcement Action

Council staff delegated to initiate various levels of enforcement action are set out in Council's Register of Delegations and each relevant Council staff member is issued with a Certificate of Authority. Legislation applicable to delegations under this Policy is as follows:

- Food Act 2003;
- Public Health Act 1991;



- Swimming Pools Act 1992;
- Noxious Weeds Act 1993;
- Contaminated Land Management Act 1997;
- Environmental Planning and Assessment Act 1979;
- Local Government Act 1993;
- Protection of the Environment Operations Act 1997 and the various Regulations made thereunder.
- Local Planning and Approvals Policies

## 15. Related Policies and Procedures

This Policy should be read in conjunction with the following City of Canada Bay Council Policies:

- Complaints Handling Policy
- Customer Service Policy
- Planning & Environment Department Procedures Manual

This policy is adapted for City of Canada Bay Council from the Enforcement Guidelines for Councils, published by the Office of the NSW Ombudsman, June 2002.

## Appendix 1 - Options for Dealing with Confirmed Cases of Unlawful Activity

Council may consider the following range of actions available under the following Acts

Compliance Option	F	PH	SP	NW	CLM	EPA	LGA	POEO
Verbal Advice	✓	✓	✓	✓	✓	✓	✓	✓
Warning Notice	✓	✓	-	✓	✓	✓	✓	✓
Notices	✓	✓	-	✓	✓	✓	✓	✓
Orders	✓	✓	-	✓	✓	✓	✓	✓
Impound Articles	✓	-	-	-	-	-	-	-
Directions	✓	✓	✓	✓	✓	✓	✓	✓
Penalty Notice	✓	-	✓	✓	✓	✓	✓	✓
Prosecution	✓	✓	✓	✓	✓	✓	✓	✓

- F = Food Act 2003
- PH = Public Health Act 1991
- SP = Swimming Pools Act 1992
- NW = Noxious Weeds Act 1993
- CLM = Contaminated Land Management Act 1997
- EPA = Environmental Planning & Assessment Act 1979
- LG = Local Government Act 1993
- POEO = Protection of the Environment Operations Act 1997