

| COUNCIL POLICY  |  |
|---|--|
| Reference Number  | 750806   |
| Responsible Business Unit                               | Development & Regulation   |
| Responsible Officer                                     | General Manager Sustainable Communities  |
| Legislation   | Development Act 1993 & Regulations   |
| Relevant Delegations                                    | Development Act 1993 & Regulations   |
| Related Policies<br>Management Guidelines<br>Frameworks | Formal Action – Unlawful Development Enforcement Management Guideline (May 2017) |
| Link to Strategic Plan                                  | 2.1 Land use<br>3.1 Identity<br>5.1 Effective<br>5.3 Responsive                  |
| Council resolution                                      | 233.6  |
| Date Adopted  | 12 December 2016   |
| Review Date   | 11 September 2020  |
| Previous Revisions                                      | 14 September 2015 – 219.1<br>12 September 2016 – 178.3                           |

## POLICY STATEMENT

Local Government is charged with legislative responsibilities which protect individuals and the community as a whole. This includes responsibilities for the safety and amenity of the community's environment under the *Development Act 1993* ('the Act'). Potential unlawful activity may come to the attention of the Council through public enquiries or complaints, or through Council officer patrols and inspections. The Council has discretion on taking action with respect to any unlawful activity and will do so in accordance with the principles of good governance and administrative practice.

In adopting this Policy, the Council has recognised that when laws are made by the Parliament it may be difficult to determine all the circumstances that should give rise to enforcement. Consideration needs to be given to each individual situation having regard to its impact on economic, social, environmental and public safety issues. It is therefore recognised that it is appropriate for the Council to apply discretion or common sense in determining when and when not to take enforcement action.

## OBJECTIVES

To assist Council officers to act promptly, consistently and effectively in response to allegations of unlawful development activity. It provides workable guidelines on:

- how to assess whether allegations of unlawful activity require investigation;
- options for dealing with unlawful activity; and
- how to decide whether enforcement action is warranted.

## SCOPE

The Council adopts a broad definition of “enforcement”, which combines the provision of advice and assisting compliance with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals, businesses and other bodies. Notwithstanding the above, the Council will take immediate action when required (for example to ensure public health and safety or to protect the environment) against those who act unlawfully when circumstances warrant.

Only officers who are competent by training, qualification and/or experience will be authorised under section 18 of the Act to take enforcement action. Officers will also act in accordance with this, any delegated authority and other relevant Council policies and procedures to ensure a consistent approach to their duties. Any decision to act other than in accordance with Council policies must have approval from the relevant Manager and the reasons for action recorded in accordance with the Council’s Records Management protocols.

Officers are required to show their authorisations on demand.

## PRINCIPLES

Enforcement actions are taken within the context of both a legal and policy framework. Council officers will carry out their enforcement related work with due regard to the following principles:

- Proportionality: a proportionate response means that the Council’s actions will be scaled to the seriousness of the breach;
- Consistency: the Council will take a similar approach in similar cases to achieve similar outcomes; and
- Transparency: the Council will be open and transparent about the manner in which it undertakes enforcement activities under the Act.

## IMPLEMENTATION

### UNLAWFUL DEVELOPMENT ENFORCEMENT DECISION MAKING

#### IS AN INVESTIGATION REQUIRED?

Not all allegations of non-compliance with the Act will warrant investigation. The Council will consider a range of factors when deciding whether to investigate. These include:

- Is the matter within the jurisdiction of the Council and the Development Act?
- 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 the 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? (i.e. is there a history of non-compliance).

- 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? (i.e. is it trifling?)

Where a decision is made not to investigate a complaint, the decision and reasons will be recorded in accordance with the Council's Records Management protocols and the complainant will be advised in writing.

## FACTORS IN CHOOSING AN ENFORCEMENT STRATEGY

In coming to a decision on the most appropriate means of enforcement (and whether any enforcement is required at all), the officer shall apply discretion having regard to the following factors:

- whether the breach or situation ("the Development") has drawn complaint, and if so, to what extent;
- whether the Development has been implicated in any accident;
- whether the Development is highly visible due to its size, colour, location, illumination etc.;
- the size and scope of the Development, particularly as compared with what might be established "as of right" (i.e. without need for approval);
- the duration (hours) of operation of the Development, if relevant;
- whether the Development is something commonly employed by other like businesses, residences, premises, etc.
- whether other nearby businesses, residences, premises, etc. and/or competitors employ similar developments;
- how long the Development has been in place before coming to the Council's attention and whether the Council is within time to take enforcement action;
- whether the Development is being used for a purpose that is not envisaged by the Development Plan for the relevant area;
- whether the Council has given incorrect information or advice or in some other way encouraged the erection of the development;
- whether the Development would likely gain approval if approval was sought; and
- the "seriousness" of this Development relative to other breaches or situations of which the Council is aware (presumably it must prioritise its enforcement resources, targeting the most serious matters first).

The following factors are to be ignored when choosing an enforcement strategy:

- any element of discrimination or bias against the person such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
- possible political advantage or disadvantage to a government, person holding (or a candidate for) public office, or any political group or party.

Where a personal association or relationship with the alleged offender or any other person involved exists:

- an alternative person will make decisions where possible; and
- the facts about any conflict/relationship will be recorded in accordance with the Council's Records Management protocols.

Written documentation will:

- include all the information necessary to make clear what needs to be done to comply with legal requirements, the required time frame and if necessary, the reasons for these actions and potential penalties for failing to comply with the request;
- detail the section/s of the Act contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
- clearly differentiate between legal requirements and recommendations of good practice.

*The electronic version accessible on Council's website and Council's electronic record system is the controlled version. Printed copies are considered uncontrolled – before using a printed copy verify that is the current version.*

Where a decision is made not to pursue compliance, having exercised discretion in doing so, the decision and reasons, will be recorded in accordance with the Council's Records Management protocols and the complainant will be advised in writing.

## OPTIONS FOR COMPLIANCE

Where, after having undertaken investigation and exercising an appropriate level of discretion in accordance with this policy, it is determined that on prima facie evidence non-compliance has occurred, the Council has various options available to it to seek or promote compliance including:

- explaining legal requirements and, where appropriate, the means to achieve compliance;
- providing an opportunity to discuss points of issue where appropriate;
- allowing reasonable timeframes to achieve compliance and/or waiving or reducing fees;
- facilitating communication between affected parties to achieve a resolution;
- issuing a verbal or written warning; or
- enforcement actions such as issuing an expiation, issuing an order/direction or prosecution (see discussion below).

Enforcement decisions must be fair, consistent, balanced and relate to common standards that ensure the public is adequately protected.

## ENFORCEMENT ACTIONS

Officers have a range of enforcement actions available as outlined below. In considering each option, regard should be had to the factors outlined later in this Policy.

## NO ACTION

No action will be taken when, after investigation and exercising an appropriate level of discretion, no breaches of the Act are discovered.

It may also be appropriate to take no action when:

- the complaint is frivolous, vexatious or trivial in nature;
- the alleged offence is outside the Council's area of authority;
- taking action may prejudice other major investigations;
- the factors described later in this Policy do not warrant action being taken.

## INFORMAL ACTION

Informal action to achieve compliance with legislation may include:

- offering verbal or written advice;
- verbal warnings and requests for action; or
- written warnings.

Advice from officers will be put clearly and simply and will be confirmed in writing.

The circumstances in which informal action may be appropriate include:

- the act or omission is not serious enough to warrant formal action;
- the duty holder's past history reasonably suggests that informal action will secure compliance;
- confidence in the individual/other body is high;
- the consequences of non-compliance will not pose a significant risk to health and/or safety; or
- where informal action may prove more effective than a formal approach.

Where statutory action is not possible, but it would be beneficial in a wider public safety context to urge a particular outcome, such action will be taken by a senior officer of the Council and the reasons recorded in accordance with the Council's Records Management protocols. The recipient will be made aware that the requested actions are not legally enforceable.

## FORMAL ACTION

Service of Orders and Directions and Court action

The Act provides for a number of enforcement actions:

- Legally binding directions or orders (for example, section 69 Emergency Order or section 84 Enforcement Notice);
- Civil enforcement proceedings under section 85 of the Act;
- Criminal prosecution proceedings under section 49 of the Summary Procedure Act 1921.

Proceedings under S.84 of the *Development Act 1993* may only be instigated within 12 months of the date of the alleged breach. Proceedings under S.85 of the *Development Act 1993* must be commenced within three years after the date of the alleged breach or, with the authorisation of the Attorney-General, at any later time.

Council officers will use professional judgement and discretion to assess the variables relating to each matter under consideration, including the reasonableness of the actions required by an Order/direction and the timeframe to comply.

Where officers are of the opinion that there is a need for formal action, a case management meeting will be convened including the case officer and at least two of the following:

- Team Leader – Development;
- Manager – Development and Regulation;
- General Manager – Sustainable Communities; and
- Chief Executive Officer.

The outcomes of the meeting will include:

- The agreed formal action;
- A timescale for its undertaking
- An allocation of this responsibility;
- A statement of reason(s) as to the action(s) agreed; and
- A file note placed on the enforcement file detailing the above.

This will ensure that the approach to formal action is consistent, proportionate and in the public interest.

Only in circumstances such as a threat to life or immediate threat to public health or safety will an Order be made without giving notice of intention. In these circumstances immediate compliance to resolve a situation can be required.

In most cases the person receiving the Order or Direction has a right of appeal to the Environment, Resources and Development Court if the Order or Direction is considered unreasonable. If an Order or Direction is served for which an appeal is possible, the Council will advise the recipient in writing of the right to appeal and the relevant legal provisions at the time of serving the Order or Direction.

Where there is evidence that an offence has been committed, the Council may issue an Expiation Notice or launch a prosecution in addition to serving an Order or Direction. This will only be done where it is determined that the conduct of the recipient justifies taking both steps.

## ACTION IN REGARD TO A DEFAULT

Failure to comply with Orders or Directions will incur further enforcement action such as launch of a prosecution.

Where action in regard to a default is provided for by the Act and the necessary work has not been carried out in the time allowed without good reason (for example, section 56 of the Act), the Council may undertake the required work. Before doing the work the Council will consider whether there is a realistic prospect that the person responsible will complete the work within a reasonable time. Where work in default is undertaken the Council will seek to recover all costs over a fair period, using all statutory means available.

The decision to carry out action in default will be made by the Chief Executive Officer or delegate.

Where an offence has been committed the Council may issue an Expiation Notice or launch a prosecution in addition to taking action to fulfil an Order or Direction. This will only be done where the conduct of the recipient justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.'

## SERVICE OF AN EXPIATION NOTICE

A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence. Hence there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words, there must be sufficient evidence to prove an offence beyond reasonable doubt.

The following circumstances are likely to warrant an Expiation Notice:

- certain breaches of the Act administered by the Council;
- failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer (informal enforcement action);
- failure to comply with the requirements of an Order or Direction;
- confidence in the individual/other body's likelihood to not re-offend is low; or
- a written warning has been given for a similar offence.

## PROSECUTION

A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.

The following circumstances are likely to warrant a prosecution:

- a flagrant breach of the law such that public health, safety and welfare have been put at risk;
- the alleged breach is too serious or the risks too great to be dealt with by means of an expiation;
- a failure to correct an identified serious problem after having been given reasonable opportunity to do so;
- it is not possible to rectify a breach (for example, demolition or tree-damaging activity);
- a failure to comply with the requirements of an Order or Direction;
- an established and recorded history of similar offences;
- an unwillingness, on the part of the individual or other body, to prevent a recurrence of the problem; or
- the recovery of the costs of the investigation or remedial work or financial compensation that are required by the Council or an aggrieved party.

Where circumstances warrant a prosecution all relevant evidence and information will be considered to enable a consistent, fair and objective decision to be made.

Before a prosecution is recommended there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the offence.

A decision to prosecute must be in the public interest. In considering whether prosecution is in the public interest, the following additional factors will be considered:

- whether the offence was premeditated;
- the need to influence the offender's future behaviour;
- the effect on the offender's or witness's physical or mental health, balanced against the seriousness of the offence (i.e. would a prosecution be perceived as a disproportionate response given the offender's circumstances);
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence, both personal and general; and
- the likely length, expense and outcome of a trial.

The final decision to prosecute will be made by the Chief Executive Officer.

## DEFINITIONS

Nil.