



DEVELOPMENT CONTROL ENFORCEMENT POLICY

POLICY NUMBER 316

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1. INTRODUCTION

This policy set out the approach that the Parramatta City Council (*Council*) will take in relation to unauthorised building work in the local government area governed by Council. This includes:

- Non compliance with conditions of consent.
- Commencing building work without approval

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

This policy should be followed in all but extenuating circumstances, and applies to all Council staff (regulatory and development) and contractors involved where Council has a regulatory responsibility under the relevant NSW legislation. All Council staff are expected

to be familiar with relevant legislation that pertains to the carrying out of their operational duties.

2. PURPOSE OF THE POLICY

The purpose of this policy is:

- To confirm that the Council does not condone unlawful activity.
- To provide consistency in enforcement matters of development non-compliance, and to ensure transparency, procedural fairness and natural justice.
- To provide a documentary support to the Council's Enforcement Policy.

3. PRINCIPLES

3.1 Parramatta City Council Guiding Principles

Council's guiding principles will apply to all actions taken under this policy.

Council's guiding principles are:

- Cooperative teamwork
- Customer service
- Sustainability and Community focus
- Leadership
- Accountability
- Integrity
- Communication
- Excellence
- Innovation
- Respect

3.2 Responding to complaints of unlawful activity and building works

Complaints will be investigated and actioned in order of priority. Action should be instigated within the principles nominated the Risk Response Model of the Enforcement Policy. Generally, response will be:

- **Urgent and life threatening matters** – For matters of this kind priority is paramount and reasonable endeavours will be taken for action to occur on the day on which the complaint is received. The severity of such incidents may be such that they may result in death, or ill health, or cause severe damage to property or the environment. Examples include unsafe buildings, collapsed buildings, buildings recently damaged by fire, etc.
- **Significant Nuisance Matters** – For matters of this kind an immediate response is desirable and steps will be taken for action to occur on the day on which the complaint is received. In some cases these matters will be outside of normal working hours and Regulatory CSO staff are available on call. Examples include working out of hours in residential areas, environmental harm or excessive noise from building sites.
- **General compliance issues** – For matters of this kind reasonable endeavours will be made for action to be taken within 5 business days of the day on which the

complaint is received. The severity of such incidents is such that there is no immediate potential for physical harm to persons, property or the environment, however there is potential for adverse amenity impacts. Examples include alleged unlawful works and uses or work carried out not in accordance with a development consent.

- **General Nuisance matters** - For matter of this kind, action is to be taken within 10 business days of the day on which the complaint is received. Examples include minor alleged non-compliance that does not have an immediate adverse impact.

Council's regulatory staff will respond to all complaints or notifications relating to alleged unlawful activities and building work within 5 business days of the date on which the complaint or notification is received. Complainants will be advised of the progress and outcome of all investigations.

3.3 Investigating unlawful activity and building work

All complaints and matters regarding alleged unlawful activity and building work will be investigated unless:

- The matter has already been resolved.
- A private Principal Certifying Authority (*PCA*) is responsible for monitoring compliance with the development consent and the matter relates to compliance with approved drawings. To assist customers, Council will always refer them to the PCA in the first instance to remedy a complaint. (Council will liaise with the PCA and investigate matters outside the scope of the property boundaries, matters that are life threatening or may cause property damage or where there is likely to be significant local nuisance impacts).
- Council has no jurisdiction (for example, dividing fences).
- The unlawful activity is in fact determined to be lawful (for example, Exempt Development).
- The complaint is frivolous, vexatious or trivial in nature.

All decisions regarding the investigation and actions shall be carried out in accordance with Council's Enforcement Policy. If a decision is made not to further investigate the complaint, the decision will be recorded along with clear reasons why it was not investigated and the complainant will be advised in writing of the reason for the decision.

3.4 Authorised Officer Field Inspection Procedure

Pursuant to relevant legislation, Council will delegate authority to (and thereby authorise) certain staff to carry out inspections and take necessary action as part of their duties. Council views the power to enter private property in order to carry out investigations very seriously and will ensure that these powers are exercised in accordance with all relevant legal requirements.

All Council staff who carry out inspections on private land for regulatory purposes must:

- Have a delegation from Council to enter the premises in order to carry out investigations in the performance of their duties.
- Be authorised by Council where this is required by specific legislation to permit inspections on private property.

- Carry photographic identification demonstrating authorisation to enter private property under the relevant legislation.
- Be conscious of any requirements relating to occupational health and safety.
- Be courteous and helpful.

It is at the discretion of the authorised officer on how to investigate and resolve any complaint in accordance with Council's Enforcement Policy. In general the relevant procedure is set out below:

- The authorised officer must prioritise the complaint in accordance with the Risk Response Model of the Enforcement Policy.
- The complainant is contacted to substantiate the complaint, and to make a preliminary assessment. If it is determined that no further action is required, the officer immediately advises the complainant and records the reasons why no further action is required.
- If it is determined that further action is required, the authorised officer must inspect the subject premises to fully assess the situation and to advise the owner/occupier of the complaint. Before entering, the authorised officer must introduce themselves by giving their name, title and the reasons why they are visiting the premises. Details of the persons interviewed, notes relating to the inspection as well as any photographic evidence should be taken at this stage.
- Upon the completion of the inspection, the results of the inspection are to be recorded amongst Council's records. Depending on the results of the inspection, appropriate correspondence shall be prepared and sent. The complainant shall also be advised of Council's actions along with likely time frames for finalising the matter.

Note: All conversations and observations will be documented and recorded.

3.5 Options for action in confirmed cases of unlawful activity

Regulatory action is any formal and informal action taken to prevent or rectify infringements of any relevant laws or requirements. The regulatory options may differ with each case, but the principles of application should remain constant.

3.5.1 Non-Enforcement action where there is evidence of unlawful activity

In accordance with Council's values and the Enforcement Policy, a number of options may be considered instead of enforcement.

The following may be appropriate:

- Referring the matter to the relevant agency for further action if the breach does not fall under the jurisdiction of Council.
- Educating the person investigated on the relevant requirements.
- Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address issues of concern found during the investigation (No negotiating – as this may be seen as influencing an outcome).
- Issuing a warning or caution to the offender, requiring work to be done or activity to cease in lieu of more formal action. Verbal warning shall be documented on Council records and may be confirmed in writing.
- Taking no action on the basis of no reliable evidence or other reasons such as frivolous or vexatious complaints or where Council has no jurisdiction.

- Referring parties for mediation with Community Justice Centre

The approach followed by an authorised officer in any situation is to be determined by the authorised officer exercising the discretion vested in them by the relevant laws. This includes ensuring compliance with relevant administrative law principles such as acting fairly and equitably, and to act in the public interest.

These approaches also do not preclude the Council from taking enforcement action.

3.5.2 Enforcement action

Enforcement action will be taken with a minimal tolerance approach. It is recognised that this approach is consistent with other local authorities with the same regulatory authority.

Enforcement action includes:

- Issuing of notices or orders or both depending on the circumstances requiring compliance with legislative requirements or those of an environmental planning instrument.
- Issuing a penalty infringement notice (*PIN*)
- Commencement of legal proceedings of a criminal nature in the Courts.
- Commencement of legal proceedings of a civil nature in the Courts (to either remedy or restrain the unlawful activity. Examples include Class 4 proceedings in the Land and Environmental to enforce compliance with s121B of the Environmental Planning and Assessment Act 1979 or seeking of interlocutory or injunctive proceedings to prevent unlawful activity from occurring).

Before any enforcement action is taken, the Council must consider the Enforcement Policy with regard to the following:

- Could the unlawful activity be carried out lawfully if development consent or an exemption from development was sought?
- Are the breaches technical or inconsequential in nature with no aggravating circumstances?
- Could the non-compliance be easily remedied by some action of the person responsible?
- Are the unlawful activities or works carried out on a heritage item and did they adversely impact on the heritage significance?
- Is the condition of the Development Consent not being complied with unreasonable, ambiguous or plainly unenforceable?
- Would action be in the public interest?
- Is there any doubt over the evidence or the offence?
- Has the person responsible been educated about Council's policy? (ie, did the person know that their actions were unlawful?)
- Are the costs of enforcing likely to be prohibitive for the nature of the offence?
- What are the chances of success if challenged?
- Has the person or company that carried out the offence had an opportunity to provide representation or submission on the matters?

If it is considered that enforcement action is required, it will be taken in accordance with the relevant laws and Council's internal procedures (including reporting through General Counsel).

In taking enforcement action, Council recognises that there are statutory processes which provide for representations and appeals and thereby natural justice principles will still be observed.

Where a person is afforded the right to make representations to a notice, Council requires those representations to be made in writing. This ensures representation documents can be recorded and filed in Council's record system. Representations in person may be made if the Council considers this to be appropriate of individual circumstances.

Council will reply to all written representations received during the notice period advising of the determination of the representation and whether Council will proceed with the order.

3.6 Special Provisions – Position on Principal Certifying Authority (PCA) and Private Certifiers.

Council recognises that when a private certifier is acting as the PCA, they are responsible for ensuring that the development is carried in accordance with the Environmental Planning and Assessment Act 1979, and the development consent. Persons making complaints regarding a development under the responsibility of a private certifier should be advised to contact the private certifier. Where a complaint is received Council will advise the PCA requesting them to investigate and respond.

While Council does not have legal control over the PCA it will liaise with them, and will make every effort to ensure that requirements of all relevant laws are met, and that the health and safety of the public is not compromised.

Council will investigate environmental issues, amenity issues and matters outside the scope of the property boundaries (such as hours of operation, building materials stored on nature strips, inadequate sedimentation control and the like), matters that are life threatening or where there is likely to be significant local nuisance impacts or may cause property damage.

Council may make complaints to the Building Professional Board if Council considers that a PCA has not acted in accordance with their obligations under legislation or has not acted in the public interest.

Annexure 1; Complaints regarding PCA

4.0 ENFORCEMENT RESPONSE FOR UNAUTHORISED ACTIVITY

4.1 Unauthorised Building Works – No approval

A development consent or construction certificate cannot be issued retrospectively for building works already constructed. Building work carried out without a development consent or a complying development certificate or a construction certificate, which do not fulfil the criteria of Council's Exempt and Complying Development Code are deemed to be unauthorised.

Action to be taken by Council will depend on whether the building work complies or does not comply with Council's policies and other relevant legislation, and the extent of the work undertaken.

Note: All conversations and observations will be documented and recorded.

No approval and building work does not comply with Council policies, BCA or other legislation.

The authorised officer will carry out an assessment of the unauthorised work to determine whether it would generally comply with Council's policies (including those relating to heritage, the Building Code of Australia and any other relevant legislation or requirements. The owner may be requested to supply additional information, such as works as executed drawings or reports to assist the officer carry out their assessment. Such details may also be referred to but not limited to, Council's Development Assessment Team or other departments for comments regarding Planning, Engineering or Heritage or infrastructure comments.

If the structure does not comply with any of the legislative requirements, a Notice of Proposed Order requiring the removal of the unauthorised work under the provisions of the Environmental Planning and Assessment Act 1979 may be served on the owner of the subject property.

The Council may commence legal proceedings in accordance with the Enforcement Policy and these proceedings may be in the form of a criminal prosecution in the Land and Environment Court in cases where significant unauthorised work has been carried out.

In determining whether to pursue legal proceedings Council will have regard to those matters in the Enforcement Policy and those listed in 3.5.2 of this policy. An example of when prosecution action is likely is when building work has been undertaken and any damage to the environment can not be corrected, such as the demolition of a heritage building.

If there is failure to comply with the requirement of any order then the Council may pursue legal proceedings of a civil nature to enforce the order. In these circumstances, Council may also commence criminal prosecution action.

If the structure does not comply with any of the legislative requirements, there are two actions the Council may;

- Issue a Notice of Proposed Order requiring the removal of the unauthorised work under the provisions of the Environmental Planning and Assessment Act 1979 on the owner of the subject property.
- Issue a Court attendance Notice.

Unauthorised building work (no approval) that complies with Council Policy, BCA and other Legislation

If sufficient evidence is provided to verify that the unauthorised work complies with the requirements of Council's policies, the BCA and other legislation, the authorised officer will prepare a report for the Unit Manager of Regulatory Services with a recommendation of proposed actions. The matters in the Enforcement Policy and listed in 3.5.2 of this Policy will be taken into consideration when determining the appropriate action to be taken. In

addition to the matters for consideration in Section 3.5.2, the following requirements will need to be satisfied:

- Evidence that the building is structurally adequate (Structural Engineer's report).
- Building Code of Australia compliance such as evidence of termite control, waterproofing, smoke detectors etc.
- Basix requirements and any other energy efficient requirements.
- Compliance with Councils planning controls.
- Survey report indicating that the position of the structure complies.
- Works As Executed (WAE) plans.
- The structure is aesthetically acceptable and does not cause an unreasonable impact on streetscape compliments the surrounding area.
- The building work does not have an unreasonable impact on the adjoining properties (eg, privacy, overshadowing and the like)

Except in exceptional circumstances a Penalty Notice for the unauthorised work will be issued.

Where a significant amount of unauthorised work has been undertaken the Council may elect to commence criminal prosecution proceedings.

4.2 Unauthorised Building Work Where Approval Has Been Granted - Work Not Being Undertaken with Conditions of Consent

Where the building work is not being undertaken in accordance with conditions of development consent that control the way in which the building works shall be undertaken, Council may issue, either a written warning or a PIN.

Warnings are appropriate for matters that do not cause a nuisance or disturbance to others (e.g. not having the PCA sign on the site). PINs are the appropriate response for matters that cause a disturbance to others and these include:

- Storage of builder's materials on the road or nature strip.
- Working out of approved hours.
- Construction noise exceeds approved levels.
- Failure to provide safety fence or erosion and sediment control measures.

If there is ongoing non-compliance after the issue of a written warning then a PIN will be issued. If there is continued non-compliance Council may decide to commence legal proceedings in the nature of a criminal prosecution.

Building Work Does Not Comply with the Approved Plans and Details (but complies with Council policies and legislation)

If an inspection reveals that building work was, or is not being, carried out in accordance with the detail approved under development consent, Council may give a stop work order. The applicant may then choose to seek advice from Council's Development Assessment team.

NOTE: A Section 96 application may be requested, but only if the building work is considered to comply with Council policies and other legislation. It should be noted however that such application will be assessed on its merits, and could be refused regardless whether the building work has been completed.

The Development Assessment Team only can provide assistance to Regulatory staff in determining if works comply with Council policies.

The matters in the Enforcement Policy and listed in 3.5.2 of this Policy will be taken into consideration when determining the appropriate action to be taken.

Except in exceptional circumstances a PIN for the unauthorised work will be issued.

Where a significant amount of unauthorised building work has been undertaken the Council may elect to commence legal proceedings of criminal nature as an alternative to issuing a PIN.

Building Work Does Not Comply With the Approved Plans and Details and Does Not Comply With Council Policies and Legislation

If an unauthorised structure does not comply with any of the legislative requirements, a Notice of Proposed Order requiring the removal of the unauthorised work under the provisions of the Environmental Planning and Assessment Act 1979 may be served on the owner of the subject property.

Council may commence legal proceedings of a criminal or civil nature in the Land and Environment Court in cases where significant unauthorised work has been carried out.

In determining whether to pursue legal proceedings of a criminal nature Council will have regard to the matters in the Enforcement Policy and listed in 3.5.2 of this policy. An example of when prosecution action is likely is when building work has been undertaken and any damage to the environment can not be corrected, such as the demolition of a heritage building.

If there is failure to comply with the requirement of any order then Council may pursue legal proceedings of a civil nature to enforce the order in addition legal proceedings of a criminal nature.

4.3 Building Certificates

Council does not support or encourage the submission of a Building Certificate Applications under the provisions of section 149D of the Environmental Planning & Assessment Act 1979 to justify unlawful works. However, it is recognised that persons who may have carried out unlawful works may apply for a Building Certificate to formalise those unlawful works.

Council may still take enforcement action against a person who carried out unlawful works, irrespective of whether they have applied for a Building Certificate.

5.0 REVIEW OF THESE GUIDELINES

This Policy will be reviewed every three years or when legislative changes affect the policy.

Review

Version	Date Adopted	Date superseded
1	22 November 2010	

Owner

Manager Regulatory Services

6.0 ANNEXURE

6.1 Annexure 1: Complaint Process Involving Private Certifiers

This procedure is to identify a process to effectively deal with a complaint that involves a private certifier to ensure the complaint is dealt with at the appropriate level and to ensure effective management of Council resources to achieve a desirable outcome for the community.

Asking the right Questions

When deciding whether a complaint requires investigation, a range of matters should be considered including the following questions from The NSW Ombudsman Public Sector Fact Sheet 5 – Enforcement, which details the obligations of Council and how to assess and determine the appropriate action for investigating and dealing with a complaint.

Complaints relating to private certifiers

When dealing with a complaint regarding a project in which a Private Certifier has been appointed Council should consider;

- What action is necessary and should be taken?
- Who is the appropriate agency or person with the jurisdiction over the matter?

The EP&A Act and regulations clearly states that the certifier is responsible for the issuing of the construction certificate and the PCA is responsible to ensure the development is constructed in accordance with the Consent and building regulations.

The protection of the environment and public domain is seen as the responsibility of the Council.

The NSW Ombudsman Public Sector Fact Sheet 5 questions;

Q1. Is the matter within the jurisdiction of the agency?

The PCA is responsible for the construction of the development
The Building Professional Board is responsible for private certifiers
Council is responsible for the public domain, public safety and environmental protection.
Issues which require Council action include:

- Issues affecting public areas such as footpaths, roadways and open space areas
- Issues of public safety from within the site such as hazardous substances, dangerous structures and land forming (excavations/filling), and site access (fencing)
- Issues affecting environmental protection such as erosion and sediment control, hours of operation/construction, dust control and general noise issues.

Q2. Is the matter premature, eg, does the complaint relate to some unfinished aspect of work still in progress?

If the Occupation Certificate has not been issued see question 1 for actions.

Q3. Does the activity or work require permission (ie Road Opening Permits), and if so is an approval in place?

If there is an approval in place see question 1 for actions, if there is no approval in place generate complaint for unauthorised building work.

Q4. Is the complaint trivial, frivolous or vexatious?

These matters would be determined by Council or the certifier after receiving a complaint after determining responsibility (see question 1) when investigating the complaint.

Q5. Has too much time elapsed since the events the subject of the complaint took place?

Any complaint received after the issue of the occupation certifies should consider the merits of the complaint and action required. The complaint should also be directed to the BPB to investigate the actions and conduct of the accredited person.

Q6. Is another agency more appropriate to investigate or otherwise deal with the matter?

See Question 1 for Actions

Q7. Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?

Any matter in this category must be investigated by Council with and the certifier should also be advised of the complaint.

Q8. Does the complaint suggest a systemic problem, eg, if a complaint is one of a series, could there be a pattern of conduct or a more widespread problem?

The nature of the complaint regarding a systematic problem would be determined in most cases by the BPB and would result in action against the certifier by the board. However if there is a continual complaint that the certifier may not have acted upon and the complaint can demonstrate this Council will investigate all matters to determine if a complaint is justified or mediate a solution. Any inaction of the certifier should be directed to the BPB by the complaint for investigation.

Summary

There are a number of competing issues for Council to consider regarding complaints that involve privately certified projects. It is recommended that the following guidelines be used. However at any time should it be identified that the certifier has not acted on a complaint or numerous complaints have been received that Council may also investigate any matter at its discretion.

1. When a complaint is received the Council is to determine if a private certifier is involved, Check the Pathway System and log a service request advising they should also contact the private certifier.
2. If Council has been nominated as the certifier send request to Construction Services team all other request regarding private certifiers to be referred to Regulatory Services.

3. If a complaint relates to an activity having a significant detrimental effect on the environment or a risk to public safety allocate to an officer for determination of the level of action required, following normal procedures for handling complaints. Complaints to be dealt with by Council include:
 - a. Issues affecting public areas such as footpaths, roadways and open space areas
 - b. Issues of public safety from within the site such as hazardous substances, dangerous structures and land forming (excavations/filling), and site access (fencing)
 - c. Issues affecting environmental protection such as erosion and sediment control, hours of operation/construction, dust control and general noise issues.
4. If the work is in progress involving compliance with the approval send a standard letter to the certifier requesting investigation and advise the complainant of the certifiers details for any further contact.
5. If the development has been finalised and an occupation certificate issued then the complaint should also be referred to the Building Professionals Board to investigate the conduct of the certifier.
6. Where the complainant can provide written evidence that the certifier has not acted on a complaint, Council will investigate the matter on behalf of the complainant.
7. Council must investigate and act on any notice issued by a private certifier as required by the EP&A Act and Regulations.

Notes

- A certifier/PCA is required under the EP&A Act to ensure the development consent is being complied with and the work is undertaken in accordance with the relevant building standards.
- A certifier PCA undertakes the roles and responsibilities of a public official when acting as the PCA under the EP&A Act.
- The certifier has the power to issue a notice for non-compliance and Council must ensure they act on any notice to remedy any breaches under the EP&A Act.
- A certifier/PCA is required to investigate all complaints and keep records for the BPB under the EP&A Act.
- Any Notices or orders issued by Council must be forwarded to the certifier as required under the EP&A Act

Reference

Building Professionals Board www.bpb.nsw.gov.au/public/complaint.shtml
The NSW Ombudsman Public Sector Fact Sheet 5 – Enforcement