



# *Muswellbrook Shire Council*

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## Enforcement Policy

Policy No. E2/1



Assembled by  
C Gidney/P Jeuken

Adopted by Council  
8 September, 2008  
Minute No. 115

## **ENFORCEMENT POLICY**

### **1. STATEMENT OF INTENT**

- 1.1 Muswellbrook Shire Council has a considered approach to responding to unlawful activity.
- 1.2 This policy aims to provide consistency in enforcement action in matters of environmental and development non-compliance and ensures natural justice principles are respected.
- 1.3 Muswellbrook Shire Council's core values relating to *responsive and responsible regulation*, and *fairness and equity* also apply to any action taken in accordance with this policy.
- 1.4 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.

### **2. ELIGIBILITY**

- 2.1 Implementation of this policy applies to all Environmental Services Staff and Rangers where authorised to enforce local government, planning & environmental legislation in accordance with Council's Delegation Manual documentation.
- 2.2 Council's own employees and contractors carrying out works must do so in accordance with the law and this policy. It is recognised Council has limited authority to take certain legislative enforcement action against its own employees or contractors. In such instances those issues may be best handled under contractual terms and performance agreements.
- 2.3 This policy applies to all persons and companies who are carrying out, or may have carried out, unlawful activities or works within the Muswellbrook Shire Local Government Area, where those issues have been brought to the attention of Council and require investigation and possible enforcement action.

### **3. DEFINITIONS**

- 3.1 **"Unlawful activity"** is any activity or work that has been or is being carried out:
  - a) contrary to the terms or conditions of a development consent, approval, permission or licence;
  - b) contrary to the Muswellbrook Shire Local Environmental Plan or DCP, as amended, that regulates the activities or work that can be carried out on particular land;
  - c) contrary to a legislative provision regulating a particular activity or work;
  - d) without a development consent, approval, permission or licence, and includes unauthorised works and uses; and

e) contrary to the laws of New South Wales in which Council is the regulatory authority.

**3.2** “**Delegations Manual**” and “Implementation of Delegated Authority” means the Delegations adopted by Muswellbrook Shire Council from time to time and any implementation of Delegations adopted by Council from time to time.

## **4. PROVISIONS**

### **4.1 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.
- *Helpfulness* – working with the business or individual to achieve compliance with the law by being approachable, courteous and efficient.
- *Openness* – by being open about the way we go about doing things.
- *Prioritising* – making sure that resources are targeted primarily on those whose activities give rise to the most serious risk.

### **4.2 Responding to complaints of alleged unlawful activity**

All complaints or notifications to Council relating to alleged unlawful activity are to be acknowledged to the complainant in accordance with Council’s Complaints Management Policy. Action should be instigated within the following time frames:

- Urgent and life threatening matters are to be actioned as soon as possible following receipt of the complaint. This means either on the day received or the day immediately following. Examples include: unsafe building works, collapsed buildings, food poisoning incidents and serious incidents where public health or the environment is at risk.
- General compliance matters within 5 working days. Examples include, works not in accordance with consent or constructed without consent, illegal uses, noise affecting several persons, food complaints.
- Nuisance matters actioned within 10 working days. Examples include: domestic noise, minor non-compliances such as overgrown land or matters where there are no immediate adverse health or safety impacts.
- Out of hours action requests are discussed with the Director Environmental Services to determine whether the matter should be dealt with by the Rangers in the first instance, followed by a more formal investigation by the other staff, if required. Examples include: out of hours works and noise matters.

- All complainants should receive communication from the Council Officer handling the complaint within fifteen (15) working days detailing the action taken by Council or the action that Council plans to take.
- Timeframes may vary depending on staff and other resources. In such instances, complainant acknowledgement letters may include temporarily revised investigation times.

### 4.3 Investigating unlawful activity

All complaints and matters regarding unlawful activity will be investigated, unless:

- the matter has already been actioned and resolved; or
- a private principal certifying authority (PCA) is responsible for monitoring compliance with the conditions of development consent; or

Note: *Council will investigate matters where:*

- (a) *the PCA fails or is unable to appropriately action a matter or where it is in the public interest;*
  - (b) *the PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite that action;*
  - (c) *where the complaint relates to Council property; and/or*
  - (d) *complaint relates to an environmental pollution incident.*
- the Council has no jurisdiction (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 frivolous, vexatious or trivial in nature.

Council will consider a range of factors when deciding whether to investigate. These include:

**a) Is the complaint premature eg does it relate to some unfinished aspect of work that is still in progress?**

If the complaint is premature it may be appropriate to bring the matter to the attention of the person responsible for the non-compliance in writing at an early stage to ensure it is dealt with later.

**b) Is the activity or work permissible with or without consent or is there a consent in place?**

If the work is permissible without consent (either in the land use tables in the LEP or as exempt development), it will need to be determined if there is any relevant criteria applying to that work or activity, and whether that criteria is being complied with. If there is a consent or approval in place in relation to the complaint, does the consent or approval sufficient to cover the matter, and is the consent or approval being complied with? Consider whether it is appropriate to consider a building certificate or section 96 application as a course of action.

- c) 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?**

Additional information may need to be sought from the complainant or person the subject of a complaint.

- d) Has too much time elapsed since the events the subject of the complaint took place?**

If the complaint relates to an activity, event or work completed more than one (1) year ago, there is a need to consider any statute of limitations, and whether there is an ongoing issue that still needs to be addressed.

- e) Is there another body that is a more appropriate agency to investigate and deal with the matter?**

If the matter is outside the jurisdiction of Council, or another agency is better equipped to deal with the matter, consider referring the matter to that agency.

- f) 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?**

If the complaint indicates a problem with a person or company, consider options such as a memorandum of understanding or seeking a written undertaking for future management of the issue. If there are inconsistencies within the regulatory system that applies to the circumstances, seek clarification of the issues from the complainant or Departmental Director before continuing investigation. If the complaint indicates systemic problems with Council processes and procedures, submit the matter for consideration in the Environmental Services Department Improvements Register via the Administration Manager – Environmental Services.

- g) Has the person or organisation complained of been the subject of previous complaints?**

If the complaint has not been resolved through previous education, advice or proactive measures, determine whether the non-compliance is a result of whether the person or company “can’t or “won’t” comply prior to determining course of action.

- h) Are there significant resource implications in relation to an investigation and any subsequent enforcement action?**

Consider whether the resources required (eg. staff time, financial allocation) are proportional to the final outcome sought. Will a precedent be set for investigation of future complaints?

- i) Is it in the public interest to investigate the complaint?**

Generally, the public interest relates to meeting general community expectations in relation to legislative or policy compliance. Consider whether the content of the complaint is reasonable and whether

investigation is likely to result in a determined course of action with a final objective that is compatible with reasonable community expectations.

If a decision is made not to investigate a complaint, the decision must be recorded in writing via Council's Records Management System by the officer dealing with the matter with clear reasons why it was not investigated. The Complainant must then be notified in writing.

The decision on whether or not to investigate a complaint, with consideration to the above criteria, is to be made by the Director of the Council department dealing with the complaint. The relevant Director may determine, at any time, whether it is appropriate to refer the matter to the General Manager or Council for a final decision.

#### **4.4 Options for action in confirmed cases of unlawful activity**

Council will consider a range of matters before taking regulatory action.

Regulatory action is any formal and informal action taken to prevent or rectify infringements of the legislation. The Regulatory Options will differ where different pieces of legislation are used, but the principles of application should remain constant.

Approaches to be considered without taking formal regulatory action include:

- Taking no action on the basis of no reliable evidence or other appropriate reason.
- Counselling the person who carried out an unlawful activity to educate them on the relevant requirements. Council acknowledges the role of educational initiatives to achieve compliance in some situations.
- Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address the issues of concern arising from an investigation. For example, the submission of a section 96 application to modify consent.
- Referring parties for mediation with the Community Justice Centre or alternatively for mediation or to advise them of the action they may take on their own behalf (ie. self help)
- A letter requiring works to be carried out or works to cease in lieu of more formal action i.e. a warning letter.
- Such action may be all that is required in 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 and 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. Timeframes are to be specified in correspondence to ensure compliance within a reasonable timeframe.

#### 4.5 Enforcement action

Enforcement action will be taken with a considered approach.

Enforcement action includes:

- Issuing of Notices and Orders requiring compliance with legislative requirements or those of an environmental planning instrument.
- Commencement of criminal proceedings for an offence under legislation or alternatively issuing a Penalty Infringement Notice (PIN).
- Commencement of civil proceedings in a Court to either remedy or restrain unlawful activity.

However, before any enforcement action is taken, the action officer, management or the Council must acknowledge the circumstances in each case and consider the following questions:

- a) **Could the unlawful activity be carried out lawfully if development consent or an exemption from development consent was sought?**

In these circumstances, Council will be less inclined to proceed with legal action especially if an owner actively and positively attempts to regularise the situation.

- b) **Are the breaches technical or inconsequential in nature with no aggravating circumstances?**

Consideration will be given to the material implications that the breach might have on the interests of any party, as well as any detrimental affect on the amenity of the area or environment in general.

- c) **Could the non-compliance be easily remedied by some action on the part of the person responsible?**

In general Council will attempt to ensure compliance by informal means however there is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and at what cost.

- d) **Has the unlawful activity created a health, safety or environmental hazard?**

Consideration should be given to the degree of detriment or risk to the environment and public health and safety.

- e) **Are the unlawful activities or works carried out on a heritage item and did they adversely affect the heritage significance?**

In most cases, Council's Conservation Planner will be consulted in assessing the detriment to the natural or build environment and whether formal action is warranted.

**f) Would it be in the public interest?**

Some of the issues that should be considered are: Has the unlawful activity affected a significant number of people, would enforcement action impact unreasonably on certain population groups, particularly disadvantaged or marginalised groups, are there any circumstances of hardship affecting both the complainant and the person or corporation subject to the complaint?

**g) How long has the unlawful activity been occurring and is enforcement action statute barred?**

A time limit might or existing use rights might apply, that prevents Council from taking legal action.

**h) Have previous warnings been issued?**

If the investigation reveals that a previous warning has been issued and the unlawful activity is not resolved, a more formal approach would be appropriate.

**i) Has the person responsible been educated about Council policy and unlawful activity? (That is: did the person know their actions were unlawful?)**

When deciding whether to take an educative approach, consideration will be given to issues such as the level of contrition shown by the wrongdoer, whether they have previously been warned as a result of this or similar behaviour, and the level of intent shown.

**j) Are the costs of enforcing likely to be prohibitive for the nature of the offence?**

Consideration should be given to the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action. Council's action should commensurate with the seriousness of the 'breach' occurred.

**l) Is the condition of development consent not being complied with, unreasonable, or ambiguous?**

A condition of consent that is unreasonable or ambiguous can be unenforceable.

**m) Would a draft local environmental plan or amendment make the unlawful activity or work legal in future?**

If there is a draft LEP that would make the unauthorised use legal, consideration should be given to deferring any enforcement action.

**n) Is there any doubt over the evidence or the offence?**

Consideration should be given to whether the collected evidence clearly identifies an actual breach. Council should not take untimely or unwarranted action.

**o) What are the chances of a success if challenged?**

Council should take into consideration what the likelihood is of a successful appeal or court challenge against the proposed enforcement action.

**p) Does the person or corporation exhibit contrition for an offence?**

In some cases it will be appropriate to have regard to the attitude of the offender and their willingness to prevent a recurrence of the problem.

**q) Has the person or company who carried out the unlawful activity had an opportunity to provide representations or submissions on the matters?**

Council should consider all elements pertaining to the circumstances of the case leading to the non-compliance.

If the process is being used as a delaying action or there has been a blatant attempt to flout the law, appropriate enforcement action will be instigated without delay.

If it is considered enforcement action is required, it will be taken in accordance with existing procedures and legislative processes. Legal advice from Council's solicitors is generally to be obtained (at the discretion of the Director Environmental Services) at the following stages:

- a) Upon receipt of an appeal against an order or direction issued by Council;
- b) Where the investigation results are inconclusive about the likelihood of Council being able to successfully pursue a course of enforcement action;
- c) Where representations are made by an individual or company that may affect Council's prospects of pursuing enforcement through the court process;
- d) Where the investigation process has resulted in a situation where Council is unable to resolve the matter to the satisfaction of the Director Environmental Services.

In taking enforcement action, Council must recognise that the statutory process also provides avenues for representation and appeal and thereby natural justice principles will still be observed.

#### **4.6 Importance of Follow Up Action**

Council staff will follow up matters 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. This is detailed further in Councils Environmental Services Procedures.

#### **4.7 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.

#### **4.8 Community Education**

The Council will ensure adequate information is available to raise awareness and educate the community about compliance and enforcement. This may involve awareness programs and publication of resources.

### **5. RESPONSIBILITY/ACCOUNTABILITY**

5.1 Council's Environmental Services staff will ensure this policy is implemented and associated procedures are followed and maintained. Council's Rangers must also ensure activities where they investigate and take enforcement action are in accordance with this policy in areas of development compliance and environmental pollution matters.

5.2 Council's Human Resources Department and Director Environmental Services will ensure staff are provided with access to training to ensure this policy is implemented.

5.3 The Director Environmental Services will review this policy annually or as required by Council or senior management.

5.4 Council's Environmental Services Department will prepare educational information regarding this policy, in hard copy and electronic format for residents, developers and the like.

### **6. RELATED POLICIES & PROCEDURES**

The Policy should be read in conjunction with the following Muswellbrook Shire Council

Policies:

- Complaints Management Policy
- Environmental Services Division Procedures

This policy is adapted for Muswellbrook Shire Council from the *Enforcement Guidelines for Councils*, published by the Office of the NSW Ombudsman, June 2002.

### **PROCEDURE**

As set in Environmental Services Division Procedures Manual.

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Revised Chris Gidney

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**REVIEW HISTORY:**

	<i>Current</i>	<i>Previous</i>	<i>Prior</i>	<i>Prior</i>
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<i>Meeting Date:</i>				
<i>Review Date:</i>	Annually in July			
<i>Rescind Date:</i>				