



Randwick City  
Council  
a sense of community

# COMPLIANCE AND ENFORCEMENT POLICY

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# 1. Introduction

The purpose of the policy is to assist Council staff to undertake Council's regulatory and compliance functions in an appropriate, consistent and effective manner.

In the context of this policy *unlawful activity* means any regulatory requirement, activity or work that has been or is being carried out;

- contrary to a requirement of an Act, Regulation or associated provision regulating a particular activity, work or matter;
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out;
- without a required development consent, approval, permit, certificate or licence; and/or
- contrary to the conditions or requirements of a development consent, approval, permit, certificate or licence.

Council is strongly opposed to unlawful activities and regulatory breaches and Council will undertake regulatory action in accordance with this policy and relevant Acts, Regulations and associated requirements.

Randwick City Council also acknowledges that it has an obligation under section 8 of the *Local Government Act 1993* to ensure that the exercise of its regulatory power is carried out with consistency and without bias.

The policy provides clear guidelines, including the appropriate exercise of discretion that Council will use in investigating and assessing unlawful activities, taking into account all relevant information including the available evidence; environmental, amenity and safety impacts; cost to the community; circumstances of the case and the public interest.

The policy outlines the process and matters to be considered, from receipt or identification of an allegation about an unlawful activity through to enforcement action and any relevant appeals process.

## 2. Policy Objectives

This policy provides a legal and administrative framework to assist Council in its regulatory, compliance and enforcement functions, providing guidelines on:

- The investigation and response to customer action requests relating to regulatory matters
- Options for dealing with unlawful activities
- Matters for consideration in the investigation of alleged unlawful activities
- Facilitating a proportional approach to compliance and enforcement
- Determining the most appropriate regulatory and enforcement response.

The policy also provides information about Council's regulatory activities and processes.

## 3. Application of the Policy

The policy applies to the investigation and enforcement of regulatory matters and unlawful activities associated with;

- Consents, approvals, applications, certificates, permits and orders
- Air, noise and water pollution
- Fire safety
- Food safety
- Public health and safety
- Control over animals
- Roads, footpaths, parks and reserves
- Parking control
- Tree preservation

- Waste disposal and littering

## 4. Relevant Legislation

This policy applies to the enforcement of all Acts and their associated Regulations, Standards and Rules administered by Council, including, but not limited to:

- *Local Government Act 1993*
- *Environmental Planning and Assessment Act 1979*
- *Food Act 2003*
- *Protection of the Environment Operations Act 1997*
- *Public Health Act 2010*
- *Boarding Houses Act 2012*
- *Swimming Pools Act 1992*
- *Companion Animals Act 1998*
- *Roads Act 1993*
- *Road Transport Act 2013*
- *Impounding Act 1993*
- *Crown Land Management Act 2016*
- *Rock Fishing Act 2016*

## 5. Responsibility

All Council staff who receive and respond to reports about alleged unlawful activities and regulatory matters are responsible for implementing this policy and a range of staff are authorised by Council's General Manager to undertake these functions, including Council's Environmental Health Officers, Building Surveyors, Compliance Officers, Rangers, Parking Officers, Tree Preservation and Maintenance Officers and other Authorised Officers.

## 6. Investigation of Alleged Offences and Breaches

Council receives information about alleged unlawful activities from members of the public, business operators or government agencies. Reports about alleged unlawful activities may also be reported by Council officers when undertaking inspections or patrols of an area.

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

Reports alleging unlawful activities will be entered into Council's customer request system and will be allocated a reference number. The request will be referred to the relevant team or officer for investigation and action.

It is preferable that reports include accurate and complete information about the alleged unlawful activity, and an indication of the impacts or harm arising from the activity.

The name, address and contact details of the person submitting the report will also be recorded. This information is important as Council may need to rely on evidence from the person to prove any alleged offence and to commence enforcement action.

Except in the case of urgent matters, reports or concerns relating to privately-owned premises are encouraged to be provided in writing, to enable the investigating officer to better understand the issues and to determine whether or not the matter falls within Council's jurisdiction and warrants investigation. Also, to facilitate a full and proper investigation of the matter and gathering of evidence of any unlawful activity.

Council staff will:

- Investigate matters in accordance with relevant Acts, Regulations, Council policies and procedures
- Provide information about the alleged breach to any alleged offender
- Consider all submissions made about the matter
- Make reasonable enquiries or investigations before making a decision
- Make records of the investigations and reasons for decisions
- Provide information to the parties about the investigation, matters for consideration and relevant regulatory requirements
- Communicate with relevant parties and advise of the action to be taken or has been taken in the particular matter
- Make decisions and take enforcement action which is proportionate and appropriate for the severity of the offence or unlawful activity
- Advise parties of any rights of review or appeal
- Act fairly and without bias

### 6.1 Neighbour issues

To promote good neighbourly relations neighbours are encouraged to talk with each other to resolve their concerns prior to making any complaints to Council.

Reporting matters to Council without first talking with your neighbour may cause unnecessary friction and impact on long-term neighbourly relations.

Council is unable to take action or intervene in neighbour disputes relating to the activities or behaviour of a neighbour or other matters which are of a private or civil nature e.g. dividing fence or retaining wall disputes, trespass, encroachments, damage to private premises or actions resulting from the behaviour of a person.

NSW Community Justice Centres may be able to assist with neighbour complaints and for more information visit [www.cjc.justice.nsw.gov.au](http://www.cjc.justice.nsw.gov.au).

### 6.2 Council's jurisdiction

Whilst Councils have regulatory powers under a wide range of Acts and Regulations, Councils do not have jurisdiction in all matters or unlawful activities.

A number of NSW government departments and other authorised agencies or persons are responsible for the investigation, enforcement or resolution of disputes and alleged unlawful activities, including:

- NSW Police
- NSW Fair Trading
- Building Professionals Board (BPB)
- NSW Liquor & Gaming
- SafeWork NSW
- NSW Environment Protection Authority
- NSW Department of Planning and Environment
- BPB Accredited Certifiers

If Council is not the appropriate regulatory authority for a particular matter, Council will advise the customer accordingly and provide any necessary assistance to the regulatory authority.

### 6.3 Prioritisation of investigations

Not all reports and allegations made to Council will require an investigation. A preliminary assessment will be undertaken to determine if an investigation is required and/or the priority for the investigation.

Generally, reports relating to public and occupant safety and environmental harm will be given a higher priority, as detailed in the examples below:

#### Urgent

- Major pollution incident
- Immediate threat to public health or safety

- Multiple food poisoning incident
- Asbestos incident
- Sewer blockage/leak
- Unauthorised demolition of a heritage item or building in a heritage conservation area
- Dog attack

#### High

- Building safety
- Fire safety
- Swimming pool safety
- Public health and safety
- Unauthorised development (significant impact or in progress)
- Significant tree removal
- Food safety
- Single food poisoning incident
- Dangerous illegal parking

#### Medium

- Construction site management
- Unauthorised development (general)
- Noise complaints (major)
- Air or water quality
- Abandoned vehicles
- Roads, reserves & footpaths
- Stormwater drainage
- Animal control (general)
- Waste dumping
- Trees

#### Low

- Animal nuisances
- Food labelling
- Unauthorised development (minor nature or historical)
- Overgrown vegetation
- Noxious weeds
- Noise complaints (minor)
- Health and amenity (minor)
- Waste storage
- Aesthetic issues
- Neighbour nuisances
- Minor issues, technical or administrative breaches

Some investigations may take some time to complete, particularly where the investigation or issues are complex or where applications may be submitted to council for consideration (e.g. an application for development consent or modification of a consent).

It is also recognised that Council does not have unlimited resources to investigate and enforce all alleged unlawful activities.

In some cases, the extent of investigation and enforcement action may be limited, due to the absence of sufficient evidence or resources required for lengthy or detailed investigations or surveillance.

When prioritising and undertaking investigations, Council officers will take all relevant matters into consideration, including the extent and nature of the alleged breach or activity and the material impacts arising from the activity.

#### *6.4 Reports which may not be investigated*

All reports regarding alleged unlawful activities will be investigated, except where:

- Advice has been provided to relevant parties and no further investigation is necessary

- The activity is considered to be lawful without further investigation
- The matter has already been investigated and addressed to the satisfaction of the relevant Manager, Director or General Manager
- The report is not supported with sufficient details or evidence or it appears to have no substance
- Council is not the most appropriate authority and/or has no jurisdiction to take action in the matter (e.g. matters under the jurisdiction of a State authority such as WorkCover NSW, the NSW Environmental Protection Authority, NSW Office of Fair Trading or Building Professionals Board)
- The matter may be resolved via alternative dispute resolution processes i.e. strata by-law or tenancy matters which may be resolved between the parties or through the NSW Civil and Administrative Tribunal (NCAT)
- The matter principally relates to a private dispute or nuisance or serves to progress a private interest, or should be resolved between the parties or through mediation or civil proceedings
- The complaint is considered to be trivial, frivolous, vexatious or of a retaliatory nature
- The relevant Manager, Director or General Manager has determined that investigation and/or regulatory action is not warranted (i.e. the extent or nature of the investigation requested would have an unreasonable impact upon the effective allocation of Council's resources or the investigation or taking of regulatory action would be unreasonable or not in the public interest).

Council must consider a range of factors when determining whether the particular matter will warrant further investigation, but if a decision is made not to investigate or act upon a complaint or matter, the decision must be recorded with clear reasons why. The customer must be advised of the decision and the reasons for not taking further action.

#### 6.5 *Alleged unlawful activities outside standard operating hours*

Council may receive reports about alleged unlawful activities which occur outside of standard operating hours and on weekends (e.g. alleged failure to comply with conditions relating to operating hours or use of plant or equipment at night). Council officers aim to investigate all alleged unlawful activities, however due to operational and resource constraints investigations outside of standard operating hours will be limited and based on an assessment of the risk of harm to public health, safety and the environment and the public interest.

#### 6.6 *Anonymous reports*

Anonymous reports will be recorded and assessed in accordance with this policy. However, because it is not possible to contact the person making the report for clarification or additional information, it may be more difficult to evaluate the allegations or impacts, obtain evidence of a breach or take enforcement action.

#### 6.7 *Confidentiality*

Council officers will not disclose confidential or personal and private information. However, the identity of the person making the report to Council may be apparent, due to the nature and location of the matter being investigated. The identity of the person making the report may be disclosed in the following cases:

- The identity has already been disclosed to the subject of the report directly
- The identity has already been disclosed in a publicly available document or report
- The disclosure has been made after determination of an application made under the *Government Information (Public Access) Act 2009*
- The individual consents to their identity being disclosed
- The disclosure is required to comply with principles of procedural fairness
- The disclosure is necessary to properly investigate the matter
- The matter is the subject of a Subpoena or Court proceedings.

#### 6.8 *Complaints about Council staff or actions*

Any complaint about Council staff and the handling of reports or investigations of alleged unlawful activities will be recorded and processed separately, in accordance with Council's Complaints Handling Policy and Code of Conduct.

## 7. Options for Enforcement

During and following an investigation, there are a range of possible options available to Council, depending on the nature and extent of the alleged offence or breach, relevant legislative provisions, available evidence, circumstances of the case and the appropriate outcome.

Regulatory action and enforcement options may include:

- Take no action because the activity is not unlawful
- Take no further action due to the lack of evidence of an offence or breach
- Take no further action having regard to the minor nature of the offence or breach and/or the circumstances of the case
- Counsel the person investigated to educate them on the relevant Council or regulatory requirements
- Referring parties to the NSW Community Justice Centres (CJC) for mediation (i.e. in instances where it is considered that mediation would be more appropriate to resolve a particular matter rather than taking enforcement action)
- Issue a warning and advise the person that any further breaches may result in possible regulatory action or penalties
- Direct the person, or issue a letter requiring the person, to; cease specified activities; carry out specified works; provide specified information, documentation or certification; or obtain necessary approvals, within a specified timeframe
- Consult and negotiate with the parties and/or obtain undertakings, to achieve a reasonable outcome and resolution of a particular matter
- Issue a formal *Notice of Intention* to serve an *Order* under relevant legislation, which allows the person to make representations to Council, prior to determining any appropriate action
- Issue a formal Order or Notice under relevant legislation, requiring specified work to be undertaken or, to cease specified activities or, to provide specified documentation, certification or the like to Council
- Issue a formal 'caution' for the offence or breach
- Issue a Penalty Notice (on-the-spot fine) for the offence or breach
- Take legal proceedings for the offence or breach (i.e. Local Court or Land & Environment Court)
- Take civil enforcement proceedings to obtain a Court Order or Injunction (i.e. to remedy or restrain a breach of relevant legislative provisions)
- Council may carry out the works specified in a Council Order under relevant legislation, at the expense of the person served with the Order.

## 8. Discretion

The taking of enforcement action by Council and its officers is a discretionary power. This means that, whilst Council is provided with the authority to enforce a law, this does not mean that there is legal obligation to do so, not even at the insistence of a third party.

Council's decision whether or not to take regulatory action is determined, essentially, by the following criteria;

- there is sufficient evidence to prove that the offence has occurred and the person/s responsible for the offence;
- it must be evident from the facts and the circumstances of the case, that the taking of regulatory action would be appropriate (having regard to the matters for consideration as outlined in this policy);
- the taking of enforcement action would be appropriate and proportionate to the offence or unlawful activity; and
- the action is in the public interest.

When exercising discretion, Councils are obliged to:

- use discretionary powers in good faith, including for the intended and authorised purpose;

- base their decisions on facts and findings supported by evidence, only relevant considerations and not irrelevant ones;
- give proper, genuine and realistic consideration to the merits of the case, including weighing-up the importance of relevant factors;
- exercise discretion independently and not under the direction of a third party or body;
- make decisions in accordance with relevant rules or policies but not inflexibly; and
- observe the basic rules of natural justice and procedural fairness.

The decision to pursue regulatory action will also be made impartially and will not be influenced by any inappropriate reference to race, religion, sex, national origin or political association, nor will it be influenced by matters that are of a civil nature or a private dispute.

*Further details on the use of discretion by regulatory authorities can be found in the Enforcement Guidelines for Councils published by the NSW Ombudsman and the NSW Department of Planning Practice Note – Exercising Discretion.*

## 9. When will Council Commence Enforcement Action?

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

### 9.1 Nature and seriousness of the breach

Council will have regard to the impact the unlawful activity is causing on amenity or harm to the environment. If action is required, Council will consider what is reasonable in the circumstances and ensure the action is not disproportionate to the level of harm or damage arising from the breach.

### 9.2 Evidence of the offence or breach

To be able to take enforcement action Council must have sufficient evidence of the alleged offence (which can be substantiated in Court if necessary), including evidence of the person/s responsible for the offence.

### 9.3 Balancing of public interest and cost to Council

Council will weigh up the public interest or benefits that will be served against the cost to the Council, and the community, of taking enforcement action.

In considering the ‘public interest’ Council will have regard to whether the unlawful activity;

- will impact on a significant number of people;
- will impact on disadvantaged or marginalised groups;
- is indicative of a systemic flaw;
- is individual in nature but often occurs;
- has attracted sustained public attention and no alternative resolution is proposed or likely; and
- significantly undermines the integrity of the relevant regulatory provisions.

Council will also consider whether more effective means of rectifying an unlawful activity are available before formal legal proceedings are initiated. This may include one or a combination of the following:

- Reporting a breach to the relevant Federal or NSW government department or professional association; and
- Use of statutory powers such as;
  - granting consent to a relevant application;
  - making an order under relevant legislation; or
  - issuing a building certificate under the *Environmental Planning & Assessment Act 1979*.

In some cases, a person may submit an application to the Council, to seek approval or consent for the activity which commenced or was carried out without the required consent or approval. A person may also submit an application to the Council for a ‘building certificate’, which, if issued, ‘regularises’ the subject

unauthorised building work and prevents Council from issuing certain orders or taking further regulatory action in relation to the unauthorised work.

If an application is made to Council seeking approval or acceptance of a previous unauthorised activity or building work, it is generally appropriate to properly consider and determine the application, before taking further enforcement action which seeks to remedy the breach (i.e. except in the case of a serious breach, environmental harm/impact or safety issue).

#### 9.4 *The available methods of enforcement*

If formal proceedings are considered to be the best option, the decision on which court to bring proceedings in will be informed by considerations such as the following;

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

#### 9.5 *The circumstances of each case*

In prosecution and enforcement matters, Council will consider the following;

- Whether the unlawful activity has caused a breach which is technical in nature and does not cause harm to amenity or to the environment;
- Whether the unlawful activity is ongoing. If it has ceased, Council must consider the length of time that has expired;
- Whether the impact of the unlawful activity on the natural or built environment and on health, safety and amenity;
- Whether development consent or other approval would have been granted by Council if the appropriate application had been submitted prior to the unlawful activity being undertaken;
- Whether the person(s) who committed the breach has shown contrition and, where possible, has remedied the unlawful activity;
- Whether the person(s) who committed the breach has made submissions to the Council that provide reasonable grounds for the Council to conclude that the person was under a genuine mistaken belief as to a relevant factual or legal matter;
- Whether the person(s) who committed the breach has shown deliberate or wilful conduct in their actions;
- Whether the person(s) who committed the breach should have been aware of their obligations because they have:
  - particular knowledge e.g. a builder or company that regularly carries out work and is generally aware of the relevant Council or other requirements;
  - received a previous warning; or
  - been subject to previous formal legal action.
- Whether or not the person has cooperated with Council and assisted in the prompt and effective resolution of the matter;
- Whether the unlawful activity was unavoidable;
- Personal hardship, health or well-being considerations which may have contributed to the unlawful activity; and
- Such other matters that may appear to be relevant to the individual case.

## 10. Determining Appropriate Action and Enforcement

Council is not required to take enforcement action in every instance of unlawful activity. To be able to take enforcement action Council must have sufficient evidence of the offence and the person responsible for the offence or breach.

Council and its officers have discretion to determine whether or not enforcement action should be taken and what type of enforcement action should be taken. The type of enforcement action should be proportionate to the level of risk and seriousness of the breach, with more severe breaches attracting a more severe action.

Enforcement action should:

- Aim to change the behaviour of the offender
- Aim to eliminate any financial gain or benefit from the offence
- Be responsive and consider what is appropriate for the particular offence and issue
- Be proportionate to the nature of the offence and level of harm caused
- Aim to rectify or minimise the harm where appropriate
- Aim to deter future non-compliance
- Aim to achieve a balance between the public interest, the benefits of enforcement action and cost to Council.

A range of matters may be taken into consideration when determining the appropriate enforcement response to any unlawful activity including:

- a) The nature, extent and severity of the offence or breach
- b) The impact or potential impact of the offence or breach upon the natural or built environment
- c) The impact or potential impact of the offence or breach upon the health, safety and amenity of the locality and community
- d) Whether or not the breach is of a technical, inconsequential or minor nature
- e) Whether or not Council is legally prevented from taking action
- f) The time period that has lapsed since the date of the offence or breach
- g) Whether or not the breach has been or can be remedied or rectified
- h) Whether or not an informal warning, a formal caution or provision of education would be appropriate in the circumstances
- i) Whether or not the particular matter satisfies relevant regulations, standards and requirements (i.e. Building Code of Australia)
- j) Whether or not the person has demonstrated genuine mitigating circumstances, hardship or contrition
- k) Whether or not the person has been proactive in the resolution of the matter and assisted with any Council requirements and instructions
- l) Whether or not a relevant development consent has been or can be obtained or sought for the particular matter (i.e. a variation to a development consent)
- m) The extent, level and nature of the matter and comparison with other provisions and criteria (e.g. comparison of unauthorised development against relevant or similar provisions for exempt or complying development)
- n) Whether or not any previous warnings, instructions or advice was provided which has not been followed
- o) Whether or not it is likely that consent would have been issued for the particular matter if consent had been sought
- p) Whether or not any modifications or works have or may be carried out to reasonably address or minimise potential impacts of the particular matter (i.e. removal of part of unauthorised works having the greatest impacts)
- q) Whether or not it was likely that the person was aware or should have been aware of the relevant regulatory provisions and requirements
- r) Whether or not the proposed action would be reasonable and proportionate in the particular case
- s) Whether or not there are available alternative disputes resolution options, including the availability of options to resolve the matter that do not require the involvement of Council (e.g. resolution of disputes

relating to defective building work; damage to premises; tenancy or strata by-laws disputes, contracts or agreements and other matters which may be resolved via mediation between the parties, relevant Tribunals or Courts)

- t) Whether or not the Council has sufficient admissible evidence to prove each element of the offence or breach
- u) The likely chances of success if the enforcement action was challenged in Court and relevant 'case-law'
- v) The costs and benefits of further investigating a particular matter, taking enforcement action or implementing proceedings (i.e. resources and cost of lengthy investigations, enforcement action or legal action would be excessive and/or outweigh the likely benefits or outcomes)
- w) The circumstances of the particular case
- x) The public interest (i.e. having regard to the extent and degree of impact, upon the broader community).

Annexure A contains a summary of a number of unlawful activities and typical courses of action which may be appropriate for the offence.

## 11. Legislative Provisions and Requirements

Specific provisions are contained within each piece of legislation relating to the appointment of Authorised Officers, Powers of Entry, Inspections & Investigations, Search Warrants, Issuing of Notices & Orders, Issuing Penalty Infringement Notices, Legal Proceedings, Appeals, Court Orders, Penalties, Compensation and other associated activities.

Specific provisions are also contained in most legislation to restrict Authorised Officers' access to residential premises, unless permission has been obtained or the inspection relates to a current approval or Council has obtained a Search Warrant.

Although Councils are provided with a range of Acts and Regulations to regulate and enforce, the provisions are, in most cases, very specific and action may only be taken if certain matters or circumstances are evident and can be demonstrated by the Authorised Council Officer.

The Acts and Regulations do not provide Council with unfettered powers to take action in matters which are not specifically provided for in the legislation (e.g. actions or behaviour of parties and neighbour nuisances).

Council officers are required to be duly authorised and carry out their regulatory functions fully in accordance with these provisions. Failure to do so may affect any potential proceedings or appeal and could result in a determination against Council or possible compensation.

## 12. Legal Proceedings - General

Prior to taking enforcement action, Council must have sufficient evidence of the offence (under the relevant Act or Regulation) and the person responsible for the offence or breach.

### *12.1 Criminal Proceedings*

The commencement of legal proceedings or issue of penalty notices in relation to an offence or breach of an Act or Regulation are identified as 'criminal proceedings'.

In criminal proceedings, Council must be able to prove the particular offence 'beyond reasonable doubt'.

These types of proceedings are 'punitive' and may result in the issue of a fine by the Court, if the case is proven. In criminal proceedings, there is generally no provision which enables the Court to issue an order requiring the offender to remedy the breach or restrain the unlawful activity.

In some cases, it may be clearly evident that an unlawful activity has occurred. However, Council may not have sufficient evidence to prove, that a particular person has committed the offence, which would prevent Council from commencing proceedings or issuing a penalty notice for the offence.

### *12.2 Civil Proceedings*

In some cases (i.e. cases of a significant breach, environmental harm, life safety or ongoing offence), Council may commence 'civil proceedings' in the Land & Environment Court, seeking an order from the Court requiring the offender to do or refrain from doing something.

In civil proceedings (e.g. Land & Environment Court class 4 proceedings), the level of proof is based on the 'balance of probability', which is less onerous than that in the criminal jurisdiction. However, even if the breach is established, the Court has the discretion as to whether or not an order will be issued.

In civil proceedings, the costs of litigation may be substantial and the Court may order the parties to pay their own legal costs or may order one party to pay the other parties legal costs in addition to their own costs.

### *12.3 Criminal or Civil Proceedings?*

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

Conversely, if Council is not willing to accept the unlawful activity (e.g. for alleged major offences against the Environmental Planning & Assessment Act where the court may not have any jurisdiction to make an ancillary order requiring rectification of the unlawful activity), it is often more appropriate for Council to commence civil proceedings.

In general terms, the type of enforcement action and proceedings should be proportionate to the severity of the offence and harm. For example:

- General offence or breach – issue of a penalty notice
- Substantial breach or offence – Local Court (criminal proceedings)
- Major breach or ongoing offence or significant harm/impact (civil proceedings).

In determining appropriate type of proceedings, Council will have regards to the matters for consideration in this policy and any advice from Council's legal advisors.

If Council decides not to commence proceedings under the Environmental Planning & Assessment Act, Local Government Act or Protection of the Environment Operations Act, any person may commence their own proceedings for an order to remedy or restrain a relevant breach.

### *12.4 Recovery of Legal Costs*

In the event of any legal proceedings in the Local Court or Land & Environment Court, Council may seek to recover any penalty imposed by the Court.

Council may also seek to recover its fair and reasonable costs in all matters where costs are recoverable, either by consent or order of the Court.

Council may agree to settle or agree to legal costs (i.e. based on the advice of its Solicitors), having regard to the circumstances of the case and to prevent incurring further unnecessary costs.

## **13. Notices, Orders & Appeals**

Most legislation administered by Council has provisions which offer Council the option of the issuing of Orders. These provisions provide Council with a formal cost effective mechanism to direct land owners and occupiers to do or refrain from doing something that is unlawful or, contrary to particular provisions, requirements or standards.

Generally such provisions operate on the 'principles of natural justice' and require Council to issue a 'Notice of Intention to Give an Order', prior to an Order being issued. A 'Notice of Intention' is not required in cases of an emergency.

A person who receives a 'Notice of Intention' has a period of time in which they can make submissions on the proposed Order or the proposed timeframe in which the Order is to be complied with. Any representation made to Council will be considered prior to determining the appropriate course of action.

The relevant legislation contains provisions by which a person may lodge a formal appeal against an Order in the Land & Environment Court or Local Court within a specified timeframe (generally 28 days from the date the Order served). The appeal provisions will be outlined in Council's Orders.

## 14. Penalty Notices

A number of the Acts and Regulations which Council administer provide the ability for Council officers to issue Penalty Notices for certain offences. The Penalty Notice system was introduced to provide an effective and efficient means to deal with those offences which are generally not serious enough to warrant instituting Court proceedings.

The payment of a penalty notice does not result in the recording of a criminal conviction. Non-payment of a penalty notice is not dealt with by way of criminal sanctions, but is recoverable as a civil debt by Revenue NSW. However, a person may elect to have the matter heard in proceedings in the criminal jurisdiction of the Local Court.

Penalty notices may be issued by designated authorised officers under the relevant legislation. In many instances, authorised officers are not only Council officers, but include officers from other agencies such as the Police, Roads & Maritime Services, Environment Protection Authority, Department Planning & Environment and NSW Fair Trading.

Penalty notices are generally most appropriate where:

- the breach is relatively minor,
- the facts are apparently indisputable,
- the penalty is proportionate and appropriate for the particular offence or breach;
- the breach is a one-off situation that can be remedied easily, and
- the issue of a penalty notice is likely to be a practical and viable deterrent.

It may not be appropriate to issue penalty notices where:

- the breach is on-going,
- the penalty prescribed in the penalty notice would be clearly inadequate for the severity of the offence,
- the extent of impact or the harm to the environment or locality cannot be assessed immediately,
- the evidence may be insufficient or controversial and the matter may be unlikely to succeed in the event of a Court hearing,
- a significant period of time has elapsed since the alleged breach,
- negotiations to find a resolution to the problem which is the subject of the breach are being conducted,
- a direction has been issued to perform specified work (i.e. via a Notice of Intention to serve an Order) within a timeframe and the time limit for such performance has not expired,
- multiple breaches have occurred.

Penalty notices are generally most suitable for immediate and straight-forward offences or breaches, to uphold the objectives of the relevant regulatory requirements and to act as a deterrent against further similar breaches, including:

- Public place offences
- Roads, traffic and parking offences
- Waste and littering offences
- Failure to comply with public notices
- Certain animal control offences
- Low-impact pollution incidents
- Minor fire safety offences

- Low-impact development control offences
- Failure to submit fire safety certificates and statements to Council.

## 15. Penalty Notice Review

To ensure that Council manages the penalty notice process and enforcement action in a consistent, transparent, accountable and unbiased manner, any requests or representations seeking reconsideration or waiving of a penalty notice should be made directly to Revenue NSW.

Revenue NSW have in place specific guidelines (Revenue NSW Review Guidelines), to assist and guide them when considering requests for the review of a penalty notice, in a consistent and transparent manner, as recommended by the NSW Ombudsman.

When reviewing a penalty notice, Revenue NSW may seek further information or refer the representations regarding the issue of the penalty notice to the Council for comment and advice.

Where representations seeking reconsideration or waiving of a penalty notice, are made to Council via Revenue NSW, the General Manager's delegate will have due regard to upholding the integrity of the Council's regulatory and enforcement functions.

Council will generally not support the waiving of a penalty infringement notice unless:

- it is evident that an error has been made in the issuing of the penalty notice; or
- documentary evidence is provided from a registered Health Practitioner that the offence occurred due to the result of a medical emergency or incident; or
- the extent of evidence or circumstances may affect the successful prosecution of the offence the subject of the penalty notice in the event of a Court hearing or appeal; or
- it is evident that Council has acted unreasonably or inappropriately in the issuing of the penalty notice; or
- after consideration of legal advice or the exceptional circumstances of the case and it considered appropriate to do so.

Where representations are made to Revenue NSW seeking reconsideration or waiving of a penalty notice, the decision to waive a penalty notice is a matter for Revenue NSW alone.

### 15.1 Penalty Notice – Caution Guidelines

In certain circumstances it may be appropriate that Council instead of issuing a penalty notice gives an official *Caution* to an offender.

Council may give an official Caution for minor or inconsequential breaches or in other exceptional circumstances (e.g. in circumstances where there has been no environmental impact or harm and there are no safety concerns or material impact upon the community).

An official Caution should be given by Council's Authorised Officer in accordance with the Caution Guidelines approved by the NSW Attorney General.

## 16. Certification of Development

The 'certification' of development in NSW is carried out by building certifiers known as Accredited Certifiers and Principal Certifying Authorities. Accredited Certifiers and Principal Certifying Authorities can be private certifiers or Council certifiers. The NSW Building Professionals Board (BPB) is the statutory authority that regulates building certifiers under the *Building Professionals Act 2005*.

The BPB is the responsible authority to investigate complaints about all certifiers and the BPB also undertake pro-active audits of accredited certifiers.

Reports relating to development compliance (i.e. alleged non-compliance with a development consent or a complying development certificate) should be referred directly to the appointed certifier for investigation and appropriate action.

An accredited certifier may issue a Notice of Intention to Serve an Order, if the development or matter is not being carried out in accordance with the development consent (or a complying development certificate). A copy of which is forwarded to Council, to consider any representations which may be made by the person served with the notice and to determine any appropriate regulatory action (e.g. issue of an Order or Penalty Notice (fine) for a breach of consent).

Generally, matters relating to 'off-site' environmental or amenity impacts (i.e. pollution incident, breach of working hours, urgent or public safety matters) may be referred directly to Council for investigation and appropriate regulatory action by Council.

In the case of an emergency or urgent matter, the report may be provided to Council and certifier, to facilitate a prompt investigation of the matter.

Council does not carry out any assessment or review of construction certificates, complying development certificates or other certificates issued by an accredited certifier and any enquiries or concerns regarding the certificates and development encompassed in the certificates must be referred directly to the certifier for assessment and response.

All accredited certifiers are subject to the BPB Code of Conduct and a complaint may be lodged with the BPB if the certifier is in breach of the Code or other regulatory provision.

## 17. Exempt & Complying Development

*Exempt development* relates to specified minor development, building work and renovations which do not require any approval from Council or an accredited certifier, subject to compliance with specified limitations and requirements.

Exempt development does not require any notification to Council or any approval from Council. The owner or builder is responsible to ensure compliance with the relevant requirements specified in the applicable planning instrument for exempt development.

*Complying development* relates to a wide range of development types including new dwellings, alterations and additions to dwellings, granny flats, outbuildings, swimming pools, use of premises, alterations and additions to commercial and industrial development and other development. Complying development may be approved by a Council or private-sector accredited certifier. If the pre-determined prescriptive criteria is satisfied, it must be approved.

Councils do not have any authority to review or change the determination of a Complying Development Certificate and the validity of a Complying Development Certificate may only be challenged in the Land & Environment Court.

Any queries and concerns relating to complying development should be referred directly to the relevant accredited certifier for assessment and response. The accredited certifier has an obligation to investigate the matter and to take appropriate action.

## 18. Parking Offences

The enforcement of parking offences can, at times, cause concerns to drivers, residents and businesses. It is necessary to consider the rationale and importance of the road rules and why parking restrictions are in place.

The penalty amounts for parking offences are set by the NSW Government and Council is unable to vary these amounts.

Council's officers enforce parking offences in accordance with the NSW Road Rules. Council officers are required to be diligent and complete their assigned tasks and patrols in a professional, appropriate, consistent, unbiased and accountable manner in accordance with Council's policies and procedures. Council officers do not receive any benefits from the issue of penalty notices.

## 19. Abandoned Vehicles

Council's Rangers are authorised under the *Impounding Act 1993*, to investigate concerns about possible abandoned vehicles.

Council may proceed to impound a vehicle which is determined to be abandoned and the abandoned vehicle may be disposed of by sale or destruction.

The *Impounding Act 1993*, specifies the processes to be followed during an investigation through to sale or disposal.

Council may immediately impound a vehicle if the vehicle is causing an obstruction to traffic or it is a danger to the public. Otherwise Council's authorised officer is required to make reasonable inquiries to identify the owner of the vehicle, and give sufficient notice (e.g. 7-14 days) prior to determining if the vehicle is abandoned.

When assessing a vehicle which may be abandoned Council's authorised officer will take the following matters into consideration:

- The location of the vehicle
- If the vehicle is causing or likely to cause an obstruction to traffic or danger to the public
- The impact upon vehicular and pedestrian safety
- If the vehicle is parked legally or otherwise
- If the vehicle is currently 'registered' or not
- The size, condition and appearance of the vehicle
- The impact of the vehicle/s upon the amenity of the area.

Council will investigate requests from residents and the community about possible abandoned vehicles. However, Council may not proceed with an investigation if the particular vehicle is in good condition, legally parked, registered and not causing an obstruction or danger to the public, unless a period of 28 days has lapsed since first reported to Council. As the owner of the vehicle may be a resident of a nearby street and/or away on holiday and therefore it may be inappropriate to impound a vehicle within this period, unless it was causing an obstruction or danger.

If the owner 'claims' the vehicle within the period specified in Council's notice and the vehicle is legally parked and not causing an obstruction or danger to the public, Council is generally unable to determine that the vehicle is 'abandoned' or proceed to impound the vehicle.

If Council does determine that a vehicle is 'abandoned', Council's authorised officer may issue a Penalty Notice for the offence and the relevant towing and impounding fees and charges contained in Council's Pricing Policy are required to be paid to Council if a vehicle is impounded. Council will proceed to sell or dispose of the vehicle if it is not claimed by the owner beforehand.

If the vehicle is not currently 'registered' with the Roads Authority, Council will notify the Police and the Police may investigate the matter and take any appropriate enforcement action, in relation to matters under their jurisdiction.

However, the 'registration' status of a vehicle is not necessarily related to the determination of an abandoned vehicle. In some cases, a vehicle may be parked on a street for a long period of time and it may not be currently 'registered', but this does not enable Council to declare the vehicle to be abandoned merely because the vehicle is not currently registered.

## 20. Boat Trailers

Randwick City Council has recently resolved that the Randwick local government area be identified as a 'declared area' for the purposes of section 15A(1) of the *Impounding Act 1993*, which relates to the parking of boat trailers on roadways within the Randwick local government area.

Under these provisions, an authorised Council officer may impound a boat trailer that is parked on a public road and which has not been moved for at least 28 days.

Prior to determining whether or not to impound a boat trailer, Council is required to give a notice to the owner of the boat trailer, which specifies a period of not less than 15 days to move the boat trailer to avoid impounding by Council.

For the purposes of these provisions, (to avoid impounding) a boat trailer must be moved at least beyond the nearest intersection on the same street or, to another street.

These provisions aim to encourage owners of boat trailers to park their boat trailer on their own property or other off-street location and to 'free-up' on street parking for local residents.

In addition to the matters to be taken into consideration outlined in section 10 of this policy, prior to determining an appropriate course of action in a particular case, consideration will be given to:

- the impact of boat trailer parking in the area;
- the condition of the boat trailer (e.g. unsightly, state of disrepair or neglect);
- vehicular, pedestrian safety and amenity impacts;
- availability of any off-street parking for the boat trailer;
- the location of the boat trailer in proximity to the owners residence;
- the location and size of the boat trailer;
- the number of boat trailers parked in the area; and
- the 'registration' status of the boat trailer.

Council will implement these provisions in an appropriate and reasonable manner having regard to its operational resources and the impact and circumstances of each particular case. Council's authorised officers are also able to exercise discretion to determine the appropriate course of action in particular cases and to determine not to take regulatory action (e.g. if the boat trailer is not having a material impact upon parking or residential amenity).

Council's investigations will principally be 'complaints-based' and/or where it is identified by Council's authorised officers that the parking of boat trailers is having an impact upon the locality.

## 21. Education and Awareness

Council aims to take a proactive approach in preventing unlawful activities or breaches, including the provision of information to the public and applicants about planning and building requirements, conditions and regulatory requirements to be satisfied.

Council provides information to raise awareness and educate the community about compliance, enforcement and regulatory requirements.

## 22. Neighbour and Private Disputes

Council encourages positive relationships between neighbours but recognises that disputes can occur for various reasons. In some circumstances people complain to Council about their neighbour's behaviour or actions without discussing the issue with their neighbour beforehand.

Many neighbour disputes relate to noise, trees, fences, retaining walls, nuisances, trespass, pets, work on or near property boundaries or the alleged behaviour or actions of a person.

Neighbour disputes and nuisances are best resolved by neighbours engaging in constructive discussion and implementation of reasonable and amicable solutions. Involving Council in these types of disputes before attempting to resolve the issue with your neighbour may also be counter-productive and detrimental to on-going neighbourly relations.

Before referring reports about neighbour issues to Council, reasonable efforts should be made to resolving the matter between the parties beforehand.

Council also has limited authority and resources and is unable to intervene in neighbour issues and disputes which:

- are related to the behaviour or actions of persons (e.g. rude or aggressive behaviour, trespass, vandalism or deliberate actions aimed at annoying or disturbing neighbours)
- are of a minor, trivial, infrequent or inconsequential nature
- are principally related to a private nuisance, dispute or matter between neighbours or other parties
- do not have a material impact upon other parties
- relate to 'tit-for-tat' neighbour complaints of a minor, technical or historical nature
- are able to be addressed through other dispute resolution processes (e.g. Strata by-law disputes, Community Justice Centres or civil proceedings)
- relate to matters that can be resolved between the parties via mediation or other legislation (e.g. access to neighbouring lands, dividing fences, encroachments, alleged damage to premises or other activities)
- relate to private easements, rights-of-way or other restrictions on private property
- would have an unreasonable impact upon Council's resources.

These matters should be resolved between the parties directly or through mediation or civil proceedings.

The NSW Community Justice Centres provide mediation services to assist neighbours to resolve these types of disputes and Council encourages neighbours to attend mediation before contemplating any possible regulatory action.

Disputes relating to tenants, Strata developments and By-laws can be resolved directly through the Owners Corporation, relevant managing agent or NSW Civil and Administrative Tribunal (NCAT).

Importantly, Council has no jurisdiction or power to address the alleged inappropriate behaviour or actions of a person. Concerns about anti-social, threatening, intimidating, offensive or criminal behaviour or trespass should be made directly to NSW Police.

## 23. Related Guidelines, Policies and Procedures

- Enforcement Guidelines for Council's - NSW Ombudsman
- NSW Department of Planning Practice Note - Exercising Discretion
- Council's Business Rules and Standard Procedures
- Relevant Council Policies and Council resolutions

In the event of any inconsistency between this Policy and any Act or Regulation in relation to the same matter, the Act or Regulation prevail over this Policy.

*This Policy is principally based on the Enforcement Guidelines for Councils, published by the Office of the NSW Ombudsman, December 2015.*

## Annexure A - Summary of regulatory matters and typical enforcement options\*

| Offence Scenario   | Act / Reg.                            | Details of the case  | Warning / Education   | Penalty Infringement Notice | Notice &/or Order               | Local Court Proceedings           | L&EC Proceedings (e.g. class 4) |
|--|---------------------------------------|--|-----------------------|-----------------------------|---------------------------------|-----------------------------------|---------------------------------|
| <b>Dangerous dog/dog Attack</b>                            | Companion Animals Act 1998            | Dog has attacked another animal or person  |                       |                             | ✓                               | ✓                                 |                                 |
| <b>Nuisance Dog Order</b>                                  | Companion Animals Act 1998            | Failure to comply with a Nuisance Dog Order (i.e. possible danger to other people, unrestrained or barking dog)  |                       | ✓                           |                                 | ✓                                 |                                 |
| <b>Potential for pollution</b>                             | POEO Act 1997                         | Location of stockpile of soil/sand may cause pollution incident (i.e. in rain)   | ✓<br>(first occasion) |                             |                                 |                                   |                                 |
| <b>Pollution incident - minor</b>                          | POEO Act 1997                         | Soil, sand or other waste has or is likely to enter stormwater system  |                       | ✓                           | ✓                               |                                   |                                 |
| <b>Pollution incident - major</b>                          | POEO Act 1997                         | Pollutant e.g. oil or paint has entered stormwater system creek or ocean   |                       |                             | ✓                               | ✓                                 |                                 |
| <b>Site management</b>                                     | Local Govt. Act 1993 or EP&A Act 1979 | Articles located on footpath without approval - Possible safety hazard   |                       | ✓                           | ✓                               |                                   |                                 |
| <b>Building work outside of hours</b>                      | Env. Planning and Assessment Act 1979 | Carrying out building works outside of hours permitted in DA   | ✓<br>(first occasion) | ✓                           | ✓                               |                                   |                                 |
| <b>Unauthorised development</b>                            | Env. Planning and Assessment Act 1979 | Unauthorised development or non-compliance with consent conditions - generally   |                       | ✓                           | ✓                               |                                   |                                 |
| <b>Unauthorised building works (minor) - owner builder</b> | Env. Planning and Assessment Act 1979 | Construction of pergola awning by home-owner and the structure has no material impact on other parties and locality - No building or structural issues | ✓<br>(first occasion) | ✓                           |                                 |                                   |                                 |
| <b>Unauthorised building works - licensed builder</b>      | Env. Planning and Assessment Act 1979 | Unauthorised building work or non-compliance with consent - building or planning issues to be resolved   |                       | ✓                           | ✓                               |                                   |                                 |
| <b>Unauthorised building works - major</b>                 | Env. Planning and Assessment Act 1979 | Substantial unauthorised building work or non-compliance with consent - Planning and BCA compliance issues   |                       |                             | ✓                               | ✓                                 | ✓                               |
| <b>Variation to DA (minor) - Owner Builder</b>             | Env. Planning and Assessment Act 1979 | Minor variation to Development Consent (resolved promptly e.g. section 96 obtained)  | ✓<br>(first occasion) | ✓                           | ✓<br>(if not resolved promptly) |                                   |                                 |
| <b>Variation to DA or work without CC - General</b>        | Env. Planning and Assessment Act 1979 | Unauthorised variation to Development Consent or building work without prior Construction Certificate  |                       | ✓                           | ✓                               | ✓<br>(major or multiple breaches) |                                 |
| <b>Unauthorised/noncomplying use of premises - general</b> | Env. Planning and Assessment Act 1979 | Unauthorised or non-complying use of premises - Issues able to be reasonably addressed or resolved   |                       | ✓                           | ✓                               |                                   |                                 |

| Offence Scenario   | Act / Reg.                            | Details of the case  | Warning / Education   | Penalty Infringement Notice  | Notice &/or Order  | Local Court Proceedings | L&EC Proceedings (e.g. class 4) |
|--|---------------------------------------|--|---|--|--|-------------------------|---------------------------------|
| <b>Unauthorised use of premises - major</b>                                  | Env. Planning and Assessment Act 1979 | Unauthorised use of premises as a boarding-house, backpacker accommodation or brothel  |   |  | ✓  | ✓                       | ✓                               |
| <b>Fire safety offence - general</b>   | Env. Planning and Assessment Act 1979 | Failure to submit an annual fire safety statement after due date or failure to maintain fire safety measure or exit system   |   | ✓  | ✓  |                         |                                 |
| <b>Fire safety - major</b>   | Env. Planning and Assessment Act 1979 | Substantial fire safety breach or fire safety upgrading of development   |   |  | ✓  | ✓                       | ✓                               |
| <b>Food Safety - general</b>   | Food Act 2003                         | Failure to comply with Food Safety Standards   | ✓<br>(minor breach only)                                      | ✓  | ✓  |                         |                                 |
| <b>Food Safety - major</b>   | Food Act 2003                         | Multiple/substantial breaches of Food Safety Standards   |   |  | ✓<br>(inc. possible 'prohibition order')   | ✓                       |                                 |
| <b>Traffic/Parking</b>   | Road Rules 2014                       | Parking of vehicle in a 'School-Zone' or in a 'No Stopping' area   |   | ✓  |  |                         |                                 |
| <b>Traffic/Parking</b>   | Road Rules 2014                       | Parking of vehicle contrary to relevant adopted and sign-posted parking requirements   |   | ✓  |  |                         |                                 |
| <b>Vehicle is parked across or upon a Driveway or Access to a property *</b> | Road Rules 2014                       | A vehicle is partially or wholly parked across a driveway or other access/egress to/from a property.<br><i>[Also, refer to the notes below]</i>  | ✓<br>(If driver is present and immediately moves the vehicle) | ✓<br>(if vehicle prevents or impedes access to property or other parking restrictions apply) |  |                         |                                 |
| <b>Boat Trailer</b>  | Impounding Act 1993                   | Failure to move boat trailer within specified period/s.<br><i>The authorised officer shall also consider the matters contained in section 19 of this policy to determine the appropriate course of action.</i> | ✓<br>(Nil/Negligible impact)                                  |  | ✓<br>(Impound boat trailer e.g. impacts on street parking, public safety or amenity of area) |                         |                                 |
| <b>Tree Preservation Order - minor</b>                                       | Env. Planning and Assessment Act 1979 | Tree covered by TPO lopped without approval – minor impact on tree / amenity of locality   | ✓   |  |  |                         |                                 |
| <b>Tree Preservation Order - major</b>                                       | Env. Planning and Assessment Act 1979 | Tree covered by TPO removed without approval – significant impact on amenity of site / locality  |   |  |  | ✓                       |                                 |

## \* Notes:

- In some cases, the particular breach may be remedied or resolved prior to proceeding to the service of Notices, Orders or legal proceedings i.e. via negotiation or by promptly obtaining relevant approvals.

- Prior to determining an appropriate course of action, consideration is required to be given to the matters for consideration in section 10 of this policy, and the courses of action contained in the above table may not be suitable or sufficient in all cases.
- In the case of a minor, inconsequential or trivial breach, Council's authorised officer may issue a written warning or a formal caution, where appropriate.
- Generally, in relation to vehicles parked across or upon a driveway to a residential property, an authorised officer may determine not to take regulatory action, if the vehicle is not affecting the use of a public footpath; the vehicle does not materially affect access or egress to the property or vehicular or pedestrian safety, or; the vehicle belongs to the resident of the property (or visitor).