



Development Compliance Policy

Date policy was adopted by Council:	27 July 2012
Resolution number:	140/12
Previous Policy review date:	November 2013
Next Policy review date:	July 2016
Reference number:	C1379419

1 ADMINISTRATION

1.1 Purpose of Policy

The aim of this policy is to establish clear guidelines for the investigation of matters of non-compliance with and breaches of the following legislation:

- *Environmental Planning and Assessment Act 1979 and Regulations.*
- *Local Government Act 1993 and Regulations*

The policy provides principles for the exercise of discretion by Council Officers in deciding what enforcement action will be taken. By documenting this policy Queanbeyan City Council aims to ensure transparency, procedural fairness and natural justice.

In this policy it is acknowledged that Council 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.

In developing this policy reference has been made to the following legislation, in addition to the legislation listed above:

- *Government Information (Public Access) Act 2009;*
- *Fines Act 1996;*
- *Impounding Act 1993; and*
- *Privacy and Personal Information Protection Act 1998.*
- *Land and Environment Court Act 1979.*
- *National Construction Code*

1.2 Objectives

- Provide guidelines for Council Officers on how to determine whether complaints of unlawful activity require investigation;
- Provide a standard approach by which Council Officers undertake the investigation of unlawful activity;
- Provide a legal and administrative framework to assist Council Officers to determine when to take enforcement action and what enforcement action is to be taken;
- Specify the criteria for the exercise of discretion in determining whether enforcement action is warranted;
- Provide options for dealing with unlawful activity; and
- Provide information to the public about Council's role and policy on enforcement.

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1.3 Scope of this Policy

This policy applies to all elected representatives of Queanbeyan City Council (comprising all Councillors and the Mayor) in their deliberations on unlawful activity.

This policy applies to all staff and accredited certifiers at Queanbeyan City Council involved in the investigation of unlawful activity and in enforcement action.

This policy applies to the investigation of, and enforcement action on, all unlawful activity (as defined in this policy).

1.4 Terms used in this Policy

Term	Meaning
EP&A	<i>Environmental Planning and Assessment Act 1979</i>
BCA	<i>National Construction Code Series - Building Code of Australia</i>
LGA	<i>Local Government Act 1993</i>
GIPAA	<i>Government Information (Public Access) Act 2009</i>
PIPPA	<i>Privacy and Personal Information Protection Act 1998</i>
L&E	Land and Environment Court
PCA	Principal Certifying Authority
PIN	Penalty Infringement Notice (fine) issued for prescribed offence - the value of the fine is prescribed by legislation

Unlawful activity: defined as an activity or work that has been or is being carried out:

- Contrary to the terms or conditions of a development consent, approval, permission or licence.
- Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land.
- Contrary to a legislative provision regulating a particular activity or work.
- Without the required development consent, approval, permission or licence (from NSW Ombudsman Guidelines, 2002).
- Contrary to NSW legislation for which Council is the appropriate regulatory authority.

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Vexatious complaints: complaint has been made without sufficient grounds and for the purpose of causing annoyance and irritation to others (Macquarie, 1990).

Trivial and frivolous complaints: complaints that are lacking in seriousness, importance or significance and not worth serious consideration (Macquarie, 1990) (Council's Complaints Procedure has a section on dealing with frivolous and vexatious complaints).

Authorised Officer: any employee appointed by the General Manager as an Authorised Officer for the purposes of the *Local Government Act* or *Environmental Planning and Assessment Act*.

1.5 Submitting Complaints or Requests

Council will accept complaints alleging unlawful activity by telephone, email, in writing or at Council's administrative offices. ***The name, address and contact details of the person lodging the complaint will be required before any action is taken.***

1.6 Privacy

The name, address and contact details of the person lodging the complaint will be recorded on Council's action request system. The recording of this information is required as Council may need to rely on evidence from the complainant to prove any alleged offence and commence enforcement action.

Council will take all reasonable measures to protect the privacy of the person submitting a complaint by not releasing their details. However Council may be required to disclose this information in a variety of circumstances including the following:

- Access to the information is permitted under legislation, including the GIPAA or the LGA;
- Access to the information is permitted under another Council policy;
- Legal proceedings are commenced and the information is disclosed in evidence served; and
- The nature of the allegation otherwise makes it a necessity.

Complainants must be aware that in some circumstances it may be possible to ascertain their identity by the nature of the allegation.

1.7 Procedural Fairness and Natural Justice

Council has a duty to act fairly and to ensure the principles of procedural fairness and natural justice are adhered to when investigating unlawful activity. In this regard Council will:

- Inform people of the substance of any allegations made against them. This need not occur until an appropriate stage in the investigation;
- Inform people of the substance of any adverse comment proposed to be made about them and provide them an opportunity to put their case. This may not be necessary if an order is to be made or other Court proceedings are initiated;
- Consider any submission put forward by the parties to the matter;
- Make reasonable enquiries or investigations before making a decision;
- Ensure no person decides a case in which they have an interest;
- Act fairly and without bias; and
- Conduct the investigation without unnecessary delay.

1.8 Responding to Alleged Unlawful Activity

Other than complaints received in writing (which will be recorded in Council's document information system) all other notifications of alleged unlawful activity should be logged in Council's customer action request (CARS) system and directed to the responsible person using the automated 'Pathway' system. Council has developed a *Complaints Policy, Procedure and Staff Guidelines* which sets out the steps for dealing with complaints. Council also has in place a *Customer Service Charter* which sets out how Council should deal with its customers.

All complaints and matters regarding unauthorised activity will be investigated unless:

- the matter has already been actioned and resolved; or
- a private certifier acting as PCA is responsible for monitoring compliance with the conditions of development consent. Council **will** investigate matters where:
 - the PCA fails or is unable to appropriately action a matter or where it is in the public interest;
 - the PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite that action;
 - where the complaint relates to development on a Council property; and / or
 - where the complaint relates to development which has caused a pollution incident.

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- Council has no jurisdiction (such as NSW Work Cover issues on building sites or some internal matters within strata buildings);
- The activity is determined to be lawful without an investigation; or
- The complaint is deemed to be frivolous or vexatious in nature.

If a decision is made not to investigate a complaint, the decision will be recorded with clear reasons why it was not investigated. The complainant will then be notified of the decision and reasons for the decision.

1.9 Building Professionals Board (BPB)

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

Under Section 21 of the *Building Professionals Act 2005*, any person can make a complaint to the BPB in relation to the professional conduct of an accredited certifier.

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

1.10 Responding to Complainants

Council will ensure that the complainant's expectations are realistic and explain at the outset that Council's objectives are to:

- Maintain the integrity of the natural and built environment;
- Serve the public interest;
- Give fair and impartial consideration to their complaint; and
- Investigate or take action.

Council will advise any complainants if action is being taken (but not necessarily the details of the actions) or the reasons why no action was taken.

1.11 Options for Dealing with Unlawful Activity

Council has discretion in deciding whether to investigate a complaint or whether to take enforcement action. The criteria for making these decisions are outlined in Sections 1.12 and 1.13 of this policy.

If enforcement is not warranted or feasible the following alternative approaches will be considered:

- Taking no action on the basis of lack of reliable evidence or other appropriate reason such as minimal impact, cost and minimal public benefit;
- Liaise with the person who carried out an unlawful activity to advise them on the relevant requirements and seek an explanation of why the activity has occurred;
- 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;
- Referring parties for mediation with the Community Justice Centre or alternatively for private mediation; or
- A letter requesting works to be carried out or works to cease in lieu of more formal action.

If it is considered enforcement action is required, it will be taken in accordance with this policy and legislative processes and may include:

- Issuing a verbal direction (emergencies only)
- Issuing a Notice;
- Issuing an Order;
- Issuing a Penalty Infringement Notice;
- Initiating criminal proceedings for an offence; or
- Initiating civil proceedings to either remedy or restrain unlawful activity.

1.12 Guidelines for Deciding What Action to Take

The circumstances of each case will be considered in light of the following before any action is taken:

- ***The breach is not a matter for Council – i.e. it is not a matter able to be dealt with by the legislation available to Council e.g. dividing fences, WorkCover matters.***

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- ***The breaches are inconsequential or have little impact.*** Consideration will be given to the material impact that the breach might have on the interests of any party, as well as any detrimental impact on the amenity of the area or environment in general.
- ***The non-compliance could be remedied by action on the part of the person responsible.*** Council will attempt to ensure compliance by informal means such as a letter, negotiation or education.
- ***The public interest.*** The public interest will depend on the number of people affected, impact of enforcement action and any circumstances of hardship affecting the complainant or the person subject of the complaint.
- ***How long the unlawful activity has been occurring and whether enforcement action is barred by statute.*** A time limit might prevent Council from taking legal action.
- ***Previous warnings 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.
- ***Whether Council has any policies or guidelines which are specific to the activity –*** Council can adopt policies to deal with particular activities and these should be taken into account before deciding what action to take e.g. Orders policy on footpath obstructions.
- ***Flagrant breach of the relevant legislation.*** If the unlawful activity has been carried out with apparent knowledge of the legislation and a deliberate decision to circumvent that legislation.
- ***The costs of enforcement versus public benefit.*** Consideration will be given to the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action.
- ***Any doubt over the evidence or the offence.*** Consideration will be given to whether the collected evidence clearly identifies an actual breach.
- ***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.

1.13 Priorities for Investigation and Action

Unlawful activity will be investigated and actioned in accordance with the following priority and turnaround times. The priority will be determined by the investigating officer in consultation with senior management if appropriate.

Priority 1: Urgent and life threatening matters and serious incidents where the environment or public health and safety is at immediate risk. These will be actioned on the day the complaint is received or the day immediately following. Priority 1 matters include:

- Unsafe buildings, unsafe building works and fire safety matters where public safety may be affected; and
- Activities where serious environmental harm may arise.

Priority 2: General compliance matters that do not present an immediate danger to the environment or the safety of the public. Priority 2 matters will be actioned within 10 working days. Priority 2 matters include:

- Development carried out without consent or activity carried out without approval; and
- Activity carried out not in accordance with development consent or approval.

Note that response times may vary depending on staff and other resources. However Council will acknowledge the complaint and keep the complainant informed.

1.14 Authorised Officers, Delegated Authority and Lawful Powers of Entry

Council has delegated authority and authorised certain staff under relevant legislation to carry out their investigative duties and take necessary action.

The delegations for Council staff to initiate various levels of enforcement action are authorised by the General Manager. Council's Authorised Officers are appointed to assist Council in administering various legislation under its control. Authorised Officers:

- Carry out inspections and assessments to verify and ensure compliance with various Acts and Regulations, and with notices, orders, licences and approvals etc;

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- Where non-compliance is found, review options for prevention and corrective action including warnings or notices of contravention;
- Conduct investigations to obtain evidence as to whether a contravention has occurred including entry onto premises where necessary for such investigations;
- Take samples and measurements; and
- Undertake enforcement action or give directions with confirmed cases of unlawful activity.

Lawful powers of entry for Authorised Officers are specified in each Act. The following are commonly used to implement powers of entry to land:

- *Local Government Act 1993* – CHAPTER 8 PART 2 Entry onto Land. Officers may be authorised to enter any premises in accordance with this Part and with S191 and to carry out investigations and inspections in accordance with S192. The Authorised Officer must be in possession of an Authority under Section 199 for the power to be used; and
- *Environmental Planning and Assessment Act 1979* – PART 6 Division 1A Entry onto Land and other Powers. Officers may be authorised, in writing by Council, to enter land and premises to carry out inspections of buildings or structures being erected on the land, in accordance with this Division.

2 DEVELOPMENT AND BUILDING

2.1 Context

Development consent is required for all development, unless it is of a minor nature and can be Exempt or Complying Development. Development includes landfill, excavation, demolition and building as well as the use of land or premises.

Where a development application has been submitted Council will either grant consent, usually subject to conditions or refuse an application. Any approved development must then be undertaken in accordance with the consent.

If development is undertaken without consent or not in accordance with the conditions of consent then it is an unlawful activity.

Council becomes aware of unlawful activity through routine inspections by Council officers and receipt of complaints or requests from members of the public.

Where Council has been appointed the Principal Certifying Authority (PCA) for development, Council staff will identify non-compliance with conditions of consent, unlawful building work and unlawful uses.

2.2 Additional Guidelines for Deciding What Action to Take

In addition to the criteria listed in 1.11 and 1.12 the circumstances of each case should be considered in light of the following questions before any action is taken:

- ***If consent had been sought for the unlawful activity is it likely that development consent would have been granted?*** In these circumstances Council will be less inclined to proceed with legal action especially if an owner takes action to address the situation such as demolition or lodging an application for continued use of a building.
- ***Was the unlawful activity or work carried out on a heritage item or in a conservation area?*** Council's Heritage Advisor will be consulted to assess whether there is adverse impact on heritage significance and whether remedial action is warranted.
- ***Were the particular condition or conditions of development consent that are not being complied with clear?*** A condition of consent that is unreasonable or ambiguous can be unenforceable.
- ***Do existing use rights apply or have approval requirements changed?*** The activity may have been lawfully established prior to the need to obtain approval and therefore should not be considered unlawful.
- ***Is there a draft Local Environmental Plan (LEP) that would make the unlawful activity permissible or legal?*** If there is a draft LEP that would make the unlawful use legal (for example that would make the unlawful activity exempt development) consideration should be given to discontinuing enforcement action until gazettal. If a draft LEP would make the unlawful activity permissible with consent consideration should be given to deferring enforcement action until such time as a development application can be lodged.

2.3 Unauthorised Buildings

Council does not have the authority to retrospectively grant development consent for buildings that have already been constructed. Council therefore will not grant development consent for existing structures that have been built unlawfully..

Under S109(F)(1)(A) of the EP&A Act a Construction Certificate cannot be issued in relation to building works that have commenced.

Council may however grant consent for the continued land use of an existing building, providing the use is a lawful use.

Continued Use Development Application – The applicant may be required to lodge structural engineer’s certification with an application for continued use of a building. The certification may be required where it is necessary to demonstrate that the building is structurally sound. An Occupation Certificate will not be issued for continued use of a building or continued use of an existing premises. Conditions may be placed on the consent for the continued use of a building or continued use of an existing premises.

Building Certificates – A Building Certificate is a certificate that is issued by Council which states that Council will not take any action under the Environmental Planning & Assessment Act 1979 or the Local Government Act 1993, to order or take proceedings for an order to have the building (covered by the certificate) demolished, altered, added to or rebuilt, or to take proceedings in relation to any encroachment by the building onto land under the control of Council, for a period of seven (7) years. A certificate is often applied for when selling houses or other property. It is issued under Section 149D of the *Environmental Planning and Assessment Act*.

A Building Certificate is not a compliance certificate and does not take the place of a development consent or Construction Certificate. However, it is recognised that persons who may have carried out unlawful works may apply for a Building Certificate and Council is legally obliged to process applications.

Council may still take action against a person who carried out unlawful works, irrespective of whether a Building Certificate is applied for. Such action may include the issue of penalty infringement notices or prosecution in the Courts. Council may require additional information to be submitted with a Building Certificate Application to assist it in determining the application. This may include, but is not limited to, survey certificates, certificates as to structural adequacy, bushfire information and the like.

Section 96 Modification – Where unauthorised works have not been carried out not in accordance with the development consent, (and by

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implication outside the terms of a valid Construction Certificate) and an Occupation Certificate has not yet been issued for the development, the following applies:

- Advice to the land owner that they may apply for a S96 modification of the development consent (although this cannot be required); and
- Clause 148 of the *Environmental Planning and Assessment Regulation 2000* recognises that an application may be made to modify an existing Construction Certificate to incorporate changes to the building works prior to works being commenced. The circumstances where such an application may be appropriate includes where a S96 application to modify the consent has been determined by approval. The issue of a modified Construction Certificate under those circumstances is reasonable and would allow the issue of an Occupation Certificate on completion of the works.

2.4 Notices and Orders

If it is decided to initiate formal action Council will issue a Notice of Proposed Order under the EP&A Act to the owner or operator of the illegal works or use. The Notice of Proposed Order will specify the terms of the proposed Order and allow time for the person to take the requested actions or respond to Council as to why they should not take the action or to propose alternative action. The time allowed will depend on the nature of the illegal works and consideration of the time needed to take requested action.

If the use would be permitted by development consent Council will allow the person to lodge a development application for 'continued use' and defer action until such application has been determined.

If no response is received to a Notice of Intent within the specified time Council will issue an Order.

If no response is received to an Order Council officers will liaise with Council's solicitors in regard to prosecution and/or consideration for enforcement options. .

2.5 Penalty Infringement Notices

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

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

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

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

2.6 Missed Inspections

Inspection of the critical stages of building is mandatory under the EP& A Act and inspection of the installation of plumbing and drainage are required as conditions of approval under the NSW Plumbing Code. When inspections are missed it is often not possible for Council's Building Surveyors to determine whether the work undertaken is satisfactory. This affects the next stage of inspections and the issue of an Occupation Certificate or plumbing final.

Council may seek statutory declarations, structural adequacy certificates or other documentation in order to be satisfied that the work, the subject of the missed inspection, has been carried out satisfactorily.

A PIN may be issued for missed inspections. **Principal Certifying Authority (PCA) Matters**

Council recognises that the PCA is the authority responsible for ensuring compliance with the conditions of development consent. Persons making complaints regarding a site where a Private Certifier is the nominated PCA will be advised to contact the PCA in the first instance. This will give the PCA an opportunity to address the issues and take the appropriate action.

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Where a complaint is received in writing regarding a site under the responsibility of a Private Certifier, Council will forward this to the PCA with a request to investigate and respond. Should the PCA not address the issues raised by the complainant within a reasonable time, Council will investigate the complaint.

Council may lodge a complaint to the Building Professionals Board if it appears a Private Certifier has not acted in accordance with their obligations under legislation or has not acted in the Public Interest.

Council may suggest to complainants who are not satisfied with the performance of a Private Certifier to contact the Building Professionals Board directly.

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POLICY:-	
Policy No:	
Policy Title:	Development Compliance – Sustainability Policy
Date Policy was adopted by Council:	27 June 2012
Resolution Number:	140/12
Previous Policy Review Date:	November 2013
Next Policy Review Date:	July 2016
PROCEDURES/GUIDELINES:-	
Date Procedure/Guideline (if any) was developed:	
RECORDS:-	
Container Reference in TRIM: Policy	SF080616
Container Reference in TRIM: Procedure	SF070289
Other locations of Policy:	Intranet (linked to TRIM Container)
Other locations of Procedures/Guidelines:	Intranet (linked to TRIM Container)
DELEGATION (if any):-	In accordance with Delegation Register
RESPONSIBILITY:-	
Draft Policy developed by:	Manager Development Control
Committees (if any) consulted in the development of the Draft Policy:	Nil
Responsibility for Implementation:	Group Manager Sustainability & Better Living
Responsibility for Review of Policy:	Group Manager Sustainability & Better Living

INTEGRATED PLANNING FRAMEWORK:	
Community Strategic Plan:	Strategic Priority No. 6
Delivery Program Title:	Landuse Regulation
Operational Plan:	Program No. 526

Senior Authorizing Officer	Position General Manager	Name Gary Chapman	Signature/Date  28 June 2012
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ACTION	COUNCIL MEETING DATE	RESOLUTION NUMBER	REPORT ITEM NUMBER
NEW/RECONFIRMED/ AMENDED			
New	27 June 2012	140/12	Item 4
Amended	27 November 2013	251/13	Item 5.8

DATE REVIEWED	REVIEWER POSITION	REVIEWER NAME