

STRATEGIC PLANNING

Ashfield Municipal Council

Development Control Plan
2007



ENFORCEMENT POLICY

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1.0 OBJECTIVE

The aim of this policy is to establish clear guidelines for the management of Council's regulatory activities and implementation of enforcement action.

This policy aims to ensure that regulatory matters are managed in a consistent and transparent manner and the principles of procedural fairness and natural justice are followed.

This policy also provides guidelines on:

- The investigation of customer requests for action relating to regulatory matters.
- Options for dealing with unlawful activities and regulatory breaches.
- Matters for consideration and the exercise of discretion in dealing with regulatory action by Council
- Determining whether or not enforcement action is warranted.

Ashfield Council 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.

2.0 APPLICATION OF THE POLICY

The policy applies to all compliance and enforcement action where Council has regulatory responsibility under NSW legislation, including:

- Roads, footpaths and parking
- Pollution control
- Control of animals
- Unauthorised development (including non-compliance with consent conditions)
- Public health and safety issues
- Food safety
- Fire safety
- Tree preservation

3.0 RELEVANT LEGISLATION

This policy applies in relation to compliance and enforcement of all NSW Legislation administered by Council, including:

- Local Government Act 1993 & Regulations
- Environmental Planning and Assessment Act 1979 & Regulations

- Food Act 2003, Regulations & NSW Food Safety Standards
- Protection of the Environment Operations Act 1997 & Regulations
- Waste Avoidance & Resource Recovery Act 2001 & Regulations
- Noxious Weeds Act 1993
- Public Health Act 1991 & Regulations
- Companion Animals Act 1998 & Regulations
- Roads Act 1993 & Regulations
- Road Transport (Safety & Traffic Management) Act 1999, Regulations and Australian Roads Rules
- Impounding Act 1993 & Regulations
- Recreational Vehicles Act 1983
- Swimming Pools Act 1992
- Liquor Act 1982 & Regulations
- Fisheries Management Act 1994 & Regulations
- Tree (Disputes Between Neighbours) Act 2006 & Regulations

4.0 RESPONSIBILITY

The responsibility for implementing this policy rests with relevant Council officers, including the General Manager, Directors, Manager Environmental Health, Building Services, Development Services and relevant Authorised Officers (including; Environmental Health Officers, Building Surveyors, Development Compliance Officers, Community Enforcement Officers, Parking Patrol Officers and Development Assessment Officers).

Council consultants and contractors authorised to carry out functions on behalf of Council must also comply with this policy (as applicable).

5.0 INVESTIGATION OF ALLEGED OFFENCES AND BREACHES

Regulatory matters are generally initially identified via proactive programs and inspections carried out by Council officers or via customer request management (CRMs) or complaints received from residents or other parties.

All CRMs or complaints regarding regulatory matters are required to be investigated and acted upon promptly with the complainant kept regularly informed of progress in the matter in accordance with relevant legislative provisions and the standard procedures developed by the relevant Director or Manager.

Details of CRMs or complaints received by Council are required to be documented in Council's computerised data base and except in the case of urgent matters, CRMs or complaints relating to privately owned premises are required to be provided in writing wherever possible.

All complaints and alleged unlawful activities will be investigated by a relevant Council officer, except where:

- Advice has been provided to relevant parties and no further investigation is necessary,
- The matter has already been investigated and resolved to the satisfaction of the relevant Manager, Director or General Manager,
- Council is not the appropriate authority or has no jurisdiction to take regulatory action in relation to the particular matter (i.e. Matters under the jurisdiction of a State Authority such as Work Cover NSW or the NSW Department Environment & Climate Change, or internal matters in private Strata buildings),
- The activity is considered to be lawful without further investigation,
- The complaint is considered to be trivial, frivolous or vexatious,
- The relevant Manager, Director or General Manager has determined that investigation and/or regulatory action is not warranted (i.e. the extent of 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 complainant must then be advised of the decision and the reasons for not taking further action.

6.0 OPTIONS AND ENFORCEMENT

Following an investigation, there are a range of possible options available for Council to deal with a particular matter, depending on the nature of the matter or offence, relevant legislative provisions, circumstances of the case and the outcome desired.

Enforcement options may include:

- ◆ Take no further action due to the lack of documentary evidence of the 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
- ◆ Refer parties to the Community Justice Centre (CJC) for mediation (i.e. in instances where it is considered that mediation would be more appropriate to resolve a particular matter

rather than enforcement)

- ◆ 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 provide specified documentation, certification or the like
- ◆ Issue a Penalty Infringement Notice (on-the-spot fine) for the offence or breach
- ◆ Implement legal proceedings for the offence or breach (i.e. Local Court or Land & Environment Court)
- ◆ Implement proceedings for a Court Order or Injunction (i.e. to remedy or restrain a breach of relevant legislative provisions)
- ◆ Carry out the works specified in a Council Order under relevant legislation, at the expense of the person served with the Order.

Council has discretion in determining whether or not enforcement action should be taken in relation to a particular matter having regard to evidence available; the nature, extent and impact of the offence or breach; the circumstances of the case and the public interest.

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.

7.0 DETERMINING APPROPRIATE ACTION AND ENFORCEMENT

A range of matters are required to be taken into consideration when determining the appropriate course of action and any enforcement of a regulatory matter, including:

- 1) The nature, extent and severity of the offence or breach

- 2) The impact or potential impact of the offence or breach upon the natural or built environment
- 3) The impact or potential impact of the offence or breach upon the health, safety and amenity of the locality and community
- 4) Whether or not the breach is of a technical, inconsequential or minor nature
- 5) Whether or not Council is legally estopped from taking action
- 6) The time period that has lapsed since the date of the offence or breach
- 7) Whether or not the breach has been remedied or rectified
- 8) Whether or not an informal warning or provision of education would be appropriate in the circumstances
- 9) Whether or not the particular matter satisfies relevant regulations, standards and requirements (i.e. Building Code of Australia)
- 10) Whether or not the person has demonstrated contrition
- 11) Whether or not the person has been proactive in the resolution of the matter and assisted with any Council requirements and instructions
- 12) Whether or not a relevant development consent has been obtained or sought for the particular matter (i.e. variation to a consent)
- 13) Whether or not any previous warnings, instructions or advice was provided which has not been followed
- 14) Whether or not it is likely that consent would have been issued for the particular matter if consent had been sought
- 15) Whether or not any relevant requirements of Council have been or will be satisfied to address or minimise any potential impacts of the particular matter
- 16) Whether or not it was likely that the person was aware or should have been aware of the relevant regulatory provisions and requirements
- 17) Whether or not the person has demonstrated genuine mitigating circumstances or hardship

- 18) Whether or not the action would be reasonable and proportionate in the particular case
- 19) Whether or not the Council has sufficient admissible evidence to prove each element of the offence or breach
- 20) The likely chances of success if the enforcement action was challenged in Court
- 21) The costs and benefits of taking enforcement action or implementing proceedings (i.e. cost of proceedings, allocation of extensive resources compared to the likely outcome)
- 22) The circumstances of the particular case
- 23) The public interest

Further details on the matters to be taken into consideration when deciding whether or not to take enforcement action are provided in *Annexure 1*.

Examples of the key options available and possible courses of action for a number of regulatory scenarios are provided in *Annexure 2*.

8.0 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 an Authorised Officers access to a residential premises, unless permission has been obtained accordingly or the inspection relates to a current approval, or Council has obtained a Search Warrant from the Court Magistrate.

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.

8.1 Offences

Specific provisions for offences are contained within relevant legislation. Offences include:

Failure to comply with a particular legislative or regulatory provision (i.e. a provision of the *Environmental Planning & Assessment Act*, *Local Government Act*, *Roads Act*, *Companion Animals Act*, *Protection of the Environment Operations Act*, *Food Act* etc)

- ◆ Failure to obtain the required development consent or a construction certificate for development and building works (where required)
- ◆ Carrying out development or other activity contrary to relevant legislative requirements, development consent or other approval (i.e. carrying out development contrary to a condition of consent)
- ◆ Failure to comply with the terms of a Council Order or Notice
- ◆ Parking a vehicle or driving a vehicle contrary to the Road Transport Regulation - Australian Roads Rules
- ◆ Failure to provide specified documentation or certification to Council (i.e. annual fire safety statement)

8.2 Notices of Intention to Serve an Order

Most of the legislation administered by Council, contains provisions requiring Council to issue a Notice of Intention prior to the service of a formal Order (except in the case of an emergency). The Notice of Intention must contain specific information and it, in effect, provides the person with the opportunity to make representations to Council, to demonstrate why Council should not issue a formal Order or commence proceedings or take other regulatory action.

This process follows the principles of *procedural fairness*. However, at times, it may also have the effect of prolonging the effective resolution of a particular matter.

Representations may be made by the subject person or their solicitor and any representations are required to be made in writing, to ensure that any representations are appropriately recorded and considered.

Any representations made within the specified timeframe are required to be considered by Council prior to determining the appropriate course of action.

Statistically, in the majority of cases, matters are often addressed or resolved to an acceptable level during the Notice of Intention and Representations stages and it may not be necessary to serve a formal Order (i.e. development consent has been obtained in relation to a previously unauthorised use of a premises or by the person carrying out certain works).

8.3 Orders

Council may issue an Order (or Notice in some legislation) directing a person to carry out specified works or to provide specified information, documentation or the like, within a specified timeframe.

The legislation contains specific provisions relating to the service of Orders, which must be strictly followed. Council is also only able to issue an Order directing a person to do the matters specified in the legislation.

It is an offence to fail to comply with an Order and the relevant legislation generally contains provisions for the implementation of legal proceedings, penalties and in some cases, the issuing of penalty infringements for the offence.

The legislation also allows Council to enter upon the property and give effect to the terms of an order, including the carrying out of any work required by the order and to recover Council's costs.

8.4 Appeals against an Order

The relevant legislation contains provisions for a person to lodge a formal Appeal against an Order in the Land & Environment Court within a specified timeframe.

Appeals are required to be considered on the merits of the case and the legality and scope of the Order. Matters relating to any initial offence (i.e. the undertaking of unauthorised work) are not relevant matters for consideration by the Court, as separate provisions are available for criminal sanctions in relation to any initial offence.

Therefore, detailed consideration must be given to the possible service of any Orders and the likely outcome in the event of an Appeal.

For example, a Notice of Intention and/or a Penalty Infringement Notice may be issued in relation to a particular breach (i.e. an unauthorised structure). However, following consideration of representations, provision of information and certain works being undertaken, it may not be appropriate to proceed to serve an Order, having considered the impacts upon the locality, compliance with relevant planning instruments and regulatory standards, etc, as the likelihood of success in Court may be minimal.

8.5 Penalty Notices

Many of the Acts of Parliament which Council administers 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.

A Penalty Notice is served because it is apparent that an offence has been committed, but payment of the fine does not result in the recording of a criminal conviction. Non-payment of the fine is not dealt with by way of criminal sanctions, but is recoverable as a civil debt.

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 and DEC.

Penalty notices are generally most appropriate where:

- ◆ the breach is minor,
- ◆ the facts are apparently incontrovertible,
- ◆ 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 available may be insufficient 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 straightforward offences or breaches, to uphold the objectives of the relevant regulatory requirements and to act as a deterrent against further similar breaches, including:

- ◆ Parking offences
- ◆ Roads and traffic offences
- ◆ Waste and littering offences
- ◆ Failure to comply with public notices
- ◆ Companion animal offences
- ◆ Public safety offences
- ◆ Low impact pollution incidents
- ◆ Minor fire safety offences
- ◆ Low impact development control offences
- ◆ Essential services certification offences

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 penalty infringement notice are required to be made directly to the NSW Office of State Revenue.

Requests to waive penalty infringement notices are not to be made directly to Council.

The decision to waive a penalty notice 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 the Council's regulatory and enforcement functions, Council will 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
- ◆ the extent of evidence or circumstances may affect the successful defence of the infringement in the event of a Court hearing or appeal, or
- ◆ it is evident that Council has acted unreasonably in the issuing of the penalty notice, or
- ◆ legal advice has been obtained and it is considered appropriate to do so.
- ◆ having regard to relevant legal advice.

8.6 Follow-up of regulatory action

Council's investigating officers will follow up enforcement matters to determine compliance with Council's directions, Notices and Orders, to an acceptable level. If Council's Notices and Orders are not reasonably complied with, consideration will be given to taking further regulatory action, legal proceedings or penalties.

8.7 Education and Awareness

Council aims to take a proactive approach in preventing unauthorised development and other 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 also aims to provide information to raise awareness and educate the community about compliance, enforcement and regulatory requirements.

Council recognises that advice, negotiation and mediation may achieve compliance or a reasonable solution for the parties without the need to take enforcement action in certain circumstances.

9.0 UNPROVEN USES

This component of the policy relates specifically to situations where, through investigative work under taken by Council officers, work programs initiated by Council or specific complaints made to the Council it becomes evident that an unauthorised use has been noted.

This could involve instances where additional dwellings (flats, units, etc) have been noted in an existing building or where a non-conforming use has been noted as operating without a relevant consent from the Council. In many instances these cases would relate to long terms situations where the non-conforming use or activity has been ongoing for some time.

Where non-conforming uses are identified they will generally be investigated and reported to the Council for appropriate action. In situations where public safety is an immediate concern, particularly in relation to fire safety matters under the BCA, Council officers will serve the required Orders necessary to ensure that public safety is immediately addressed. In taking such action this does not imply that the Council is endorsing the unauthorised use or activity and such action will not prevent the Council from taking further action in relation to the matter.

9.1 Matters for consideration

Safety – in the first instance the initial consideration needs to be whether or not the continuation of the use or activity constitutes a risk to public safety. If public safety is at serious risk then immediate action needs to be taken to address the risk above all other considerations. This can be undertaken through the issuing of emergency orders and/ or injunctive relief depending on the matter and circumstances. Where orders are served in relation to fire safety and BCA compliance the property owner is to be advised that compliance with the order does not imply

that the Council endorses the unauthorised use or activity nor will it prevent further action being taken by the Council in relation to the unauthorised use or activity.

Onus of proof – property owners will be given a reasonable opportunity to establish the bona fides of the activity or use and provide evidence as to the history of the use of the property and their understanding of the circumstances arising in relation to the activity and use under question. Council staff and its solicitors will examine all information received in relation to such matters and undertake a thorough check of Council records to establish all relevant background information and history of use of the property. Where the examination of such information establishes reasonable doubt as to the bona fides of the activity or use the Council will generally err on the side of caution and not accept claims that are not supported by verifiable evidence.

Personal circumstances – the personal circumstances of property owners will be taken into consideration in determining appropriate action, i.e. whether or not the property owner was directly responsible for the activity or use, how long the property has been owned by the current property owner, and any issues of personal hardship arising in relation to the matter.

As a general guide the Council will not tolerate property owners who are directly responsible for the unauthorised use or activity as opposed to those who may have unwittingly purchased a property unaware that the use or activity was unauthorised. In circumstances where the Council may have refused consent to a proposal to develop a property and the property owner subsequently proceeds to undertake the proposal without consent the Council will prosecute the property owner.

In terms of personal hardship the Council will take into consideration individual circumstances which includes:

- the income(s) of the property owner(s).
- personal circumstances of the property owner(s)
- how much income is derived from the unauthorised use or activity.
- the willingness of a property owner(s) to enter into legally binding arrangements with the Council to consider limits or restrictions on the unauthorised use or activity continuing and its potential for further intensification.

Length of time – after investigation of the matter and establishing the length of time an activity or use has been occurring consideration will be given as to whether or not there is a realistic prospect for a successful action to have the activity or use cease. Legal advice will be obtained before making a determination in such cases.

Existing use rights – consideration will be given as to whether or not a decision to take or not take further action will have potential implications on the existing use rights of a property. This assessment will include an examination of future development potential, if any, of the property; the use of legal agreements or instruments to restrict and/or limit the future use of the property

and its development potential or require its conversion to a conforming use at a later time. In resolving what form of action is appropriate Council staff will obtain appropriate legal advice.

9.2 Authority for determining enforcement action

The Director Planning & Environment and General Manager will be the responsible officers in determining what form of appropriate action to take under this section of the policy when matters are likely to go to Court. Where deemed appropriate the Director and/or General Manager will refer specific matters to Council for determination and further action.

10.0 RELATED GUIDELINES, POLICIES AND PROCEDURES

- Enforcement Guidelines for Council's - NSW Ombudsman
- NSW Department of Planning Practice Note – Exercising Discretion

This Policy is principally based on the 'Enforcement Guidelines for Councils, published by the Office of the NSW Ombudsman, June 2002.

ANNEXURE 1

EXAMPLES OF MATTERS TAKEN INTO CONSIDERATION WHEN DETERMINING APPROPRIATE REGULATORY ACTION AND ENFORCEMENT

| Considerations | Comments/Examples |
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| 1. Does Council have sufficient evidence to prove the alleged offence? | To be able to implement any enforcement action, Council is required to possess sufficient evidence of the alleged offence (which can be substantiated in Court if required), including evidence of the person responsible for the offence to be successful in the event of a hearing or appeal. |
| 2. Is the offence or breach of a technical or inconsequential nature? | <p>Consideration is to be given to the nature, extent and severity of the offence or breach and any material impacts upon the health, safety and amenity of the environment and community.</p> <p>Consideration should be given to the likely costs and benefits of any enforcement action where breaches are solely of a minor technical nature or resulting in no material impacts upon any other party or the environment.</p> |
| 3. How long has the unlawful activity or breach been occurring and is enforcement action statute barred? | <p>The legislation may provide time limits in which to commence proceedings or take enforcement action.</p> <p>In addition, consideration should be given to the time which the offence or breach occurred and the 'reasonableness' of taking enforcement action if a significant time has lapsed since the time of the offence or breach.</p> |
| 4. Is the matter subject to estoppel? | Estoppel is a legal rule which prevents a person from later denying something which may have previously been relied upon by another person. For example Council may not be able to take action if Council has contributed in some way to the person acting upon a reasonable expectation that no action would be taken or if a matter had previously been brought to Council's attention and no action was taken at the time. |
| 5. Has the offence or breach affected the natural or built environment and/or amenity of the area? | Consideration should be given to the nature and extent of any actual or potential impact that the breach has or may have upon the natural or built environment, or upon the amenity of the locality and community. |

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| 6. Has the offence or breach affected or potentially affected the health, safety and well-being of the residents or community? | Offences or breaches which affect, or potentially affect, the health, safety and well-being of the residents or community would generally warrant affirmative and effective enforcement and remedial action. |
| 7. Can the matter be resolved by seeking and obtaining the relevant approval from Council (i.e. development consent or a Section 96 amendment to an existing consent)? | <p>If the legislation enables the particular matter to be resolved by obtaining the relevant approval (i.e. a development consent or a Section 96 amendment to an existing development consent), it may be appropriate to allow a reasonable period for the person to seek the necessary consent/s from Council, prior to taking any enforcement action, such as the service of possible orders to demolish unauthorised works or commencement of legal proceedings.</p> <p>Consideration should also be given to all other relevant factors, in particular, any current impacts upon the community and environment, which require the matter to be remedied expeditiously.</p> <p>If appropriate, having regard to the circumstances of the case, Council may still be able to issue a penalty infringement notice or commence legal proceedings for the initial offence or breach.</p> |
| 8. Has the relevant approval (i.e. development consent or section 96 amendment to the existing consent) already been obtained from Council in relation to the particular breach or offence? | <p>If development consent (or Section 96 amendment to an existing consent) has been obtained from Council in relation to the particular matter, Council would not be able to issue further Notices or Orders in relation to the subject matter.</p> <p>Council may (if it has not already done so), issue a penalty infringement notice/s or implement legal proceedings for the initial offence or breach, following consideration of the circumstances of the case and the nature and severity of the offence.</p> <p>However, if consent has been obtained from Council in relation to a previous breach (i.e. a section 96 application) and the matter was of a minor nature, with minimal impact, consideration would need to be given to the likelihood of success and the likely outcome of any possible enforcement action or legal proceedings for the initial offence.</p> |
| 9. Could the non-compliance or breach be easily remedied by the person responsible? | Generally, where appropriate, Council will attempt to ensure compliance by informal means, however, there is a need to consider and balance the public interest in |

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| | <p>enforcing the law. Consideration is also to be given to whether or not it is possible to remedy a breach and at what cost.</p> <p>In some cases, upon being advised of the regulatory requirements or breach, the responsible person may be pro-active and remedy the matter, rather than being subject to possible enforcement action.</p> |
| 10. Has the breach or unauthorised activity detrimentally affected a heritage item or the heritage significance of the area? | Where applicable, relevant Council officers will be consulted in assessing the detriment to the natural or built environment and possible remedies. |
| 11. Does the unauthorised work or activity comply with relevant criteria and Standards? | <p>Consideration should be given to compliance with relevant criteria and Standards (i.e. Building Code of Australia and fire safety requirements) and the extent and suitability of evidence provided to confirm compliance.</p> <p>If relevant criteria and Standards are not satisfied, appropriate and affirmative enforcement action may be warranted.</p> |
| 12. What is the intent and importance of the regulatory requirements? | Regulatory requirements which aim to ensure the health, safety and well-being of the community are considered to be of paramount importance and any offences or breaches of this nature would generally warrant affirmative and effective enforcement action. |
| 13. Would the enforcement action be in the public interest? | <p>Public interest considerations include:</p> <ul style="list-style-type: none"> ● Does the breach or unlawful activity affect the public interest (i.e. affect a number of people or the community generally), or does the breach primarily affect a private interest? ● Would enforcement action be in the public interest or would it primarily benefit only a private interest? ● Are there any circumstances of hardship applicable? ● Would enforcement action by Council impact unreasonably on certain parties or population groups (i.e. disadvantaged or elderly residents)? ● What other remedies are available to address the matter? For example, if a breach primarily affects a |

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| | 'private interest', the affected party should seek alternative remedies, such as civil action or mediation (i.e. disputes regarding trespass, alleged damage to premises or encroachments). |
| 14. Does the person or corporation exhibit contrition for the breach or offence? | In some cases, it will be appropriate to have regard to the behaviour of the offender and their willingness to remedy the breach or prevent a recurrence of the problem. |
| 15. Have any previous warnings, instructions or advice been provided to the person, which have not been followed? | If the investigation reveals that previous instructions, advice or a warning has been provided in relation to the particular matter, which has not been followed or complied with, a more formal enforcement approach is generally appropriate for any offences which have occurred. |
| 16. Is it likely that the person would generally have been aware, or should have been aware, of the relevant regulatory provisions, requirements or offence? | When deciding whether to take an educative approach or enforcement approach, consideration should be given to the following matters: <ul style="list-style-type: none"> <input type="checkbox"/> the reasonable likelihood that the person may have known or should have known the relevant requirements or rules, <input type="checkbox"/> level of contrition shown by the responsible person, <input type="checkbox"/> whether the parties have previously been advised of the regulatory requirements or provisions, <input type="checkbox"/> whether or nor any previous warnings or instructions have been provided, <input type="checkbox"/> the apparent level of intent shown by the responsible person. |
| 17. Is the cost of enforcing likely to be excessive having regard to the nature and impact of the offence? | Consideration should be given to the relative costs and benefits of taking formal enforcement action as opposed to taking informal action or an educative approach. Council's action should be commensurate with the seriousness of the breach and any impacts or potential impacts on other parties and the environment. |
| 18. Is the particular requirement (i.e. condition of development consent) which has not been complied with | A condition that is unreasonable, ambiguous or <i>ultra vires</i> may be unenforceable and may preclude Council from taking enforcement action or issuing Orders or the |

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| | unreasonable, ambiguous or <i>ultra vires</i> ? | like. |
| 19. | Does the legislation provide for representations or submissions to be made in the matter? | <p>Certain legislation contains provisions for the person responsible to make representations to Council prior to Council taking certain enforcement action (i.e. service of an Order to do certain things), which must be considered on their merits.</p> <p>However, in most cases, the provisions do not provide for representations to be sought or made prior to taking enforcement action for the initial offence or breach of the legislation or regulations (i.e. failure to obtain an approval or comply with a particular requirement).</p> |
| 20. | What are the chances of success if challenged? | <p>Council should take into consideration what the likelihood is of a successful appeal or court challenge against the proposed enforcement action.</p> <p>It may not be appropriate to take enforcement action (i.e. service of an Order or commencement of legal proceedings) if the chances of success, in the event of any appeal or hearing, are unlikely.</p> |
| 21. | Is the proposed course of action reasonable and proportionate? | <p>The proposed course of action for a particular breach or offence should be reasonable and proportional to the nature and extent of the breach or offence and the circumstances of the case.</p> <p>The costs and benefits of particular enforcement action must also be considered and compared against other possible solutions or action.</p> |
| 22. | Has consideration been given to other relevant factors and the circumstances of the case? | <p>To ensure that Council's enforcement action is appropriate, effective, reasonable and successful, particularly in the event of an appeal or Court hearing, consideration should be given to any other relevant factors and the circumstances of the particular case.</p> |

ANNEXURE 2

EXAMPLES OF KEY OPTIONS AND POSSIBLE COURSES OF ACTION*

| Offence Scenario | Act/Reg. | Details of the case | Warning/Education | Penalty Infringement Notice | Notice &/or Order | Legal Action | LEC Class 4 |
|--------------------------------------|-----------------------------|--|-------------------|-----------------------------|-------------------|--------------|-------------|
| Nuisance Dog Order | Companion Animals Act | Failure to comply with a Nuisance Dog Order (i.e. Possible danger to other people, unrestrained or barking dog) | | ✓ | | | |
| Traffic/Parking | Aust. Road Rules or LGA | Parking of vehicle in No Stopping signposted area | | ✓ | | | |
| Traffic/Parking | Aust. Road Rules | Parking of vehicle on footpath or nature strip | | ✓ | | | |
| Pollution of stormwater drain | POEO Act | Soil, sand and other building waste entered stormwater system | ✓ | ✓ | ✓ | | |
| Potential for pollution | POEO Act | Location of stockpile of sand may cause pollution incident (i.e. in rain) | ✓ | | | | |
| Minor building works - Owner | EP&A Act | Construction of pergola awning by owner –Where there is no material impact on other parties and locality – No BCA issues | ✓ | | | | |
| Site management | Local Govt. Act or EP&A Act | Articles located on footpath without approval – Possible | | ✓ | ✓ | | |

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|--|-----------|---|-----------------------|---------------------------------------|-------------------------|-----------------|-------------------|
| | | safety hazard | | | | | |
| Building work outside of hours | EP&A Act | Carrying out building works outside of hours permitted in DA – Licensed. Builder | | ✓ | ✓ | | |
| Minor building works – Licensed Builder | EP&A Act | Construction of alterations or additions to rear of existing dwelling – BCA issues to be resolved | | ✓ | ✓ | | |
| Major building works | EP&A Act | Substantial alterations and additions to the existing building – Planning & BCA compliance issues | | | ✓ | ✓ | ✓ |
| Variation to DA - Major | EP&A Act | Major variation to DA (i.e. substantial changes to approved development or use) | | | ✓ | ✓ | ✓ |
| Variation to DA - Minor | EP&A Act | Minor variation to DA (i.e. relocation of door/window) – Section 96 obtained | ✓ | | | | |
| Unauthorised Use - Major | EP& A Act | Unauthorised use of premises as backpacker accommodation, additional dwelling(s) or brothel | | | ✓ | ✓ | ✓ |
| Fire safety Minor | EP&A Act | Failure to submit an annual fire safety statement after due date | | ✓ | ✓ | | |
| Fire safety | EP&A Act | Fire safety upgrading | | | | | |

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|---|------------------------------------|---|--------------------|-----------------------------|-------------------|--------------|-------------|
| Major | | of existing multistorey development | | | ✓ | ✓ | ✓ |
| Tree Preservation Order Minor | EP&A Act | Tree covered by TPO lopped without approval – minor impact on tree / amenity of locality | ✓ | | | | |
| Tree Preservation Order Major | EP&A Act | Tree covered by TPO removed without approval – significant impact on amenity of site/locality | | | | ✓ | |
| Food Premises | NSW Food Act & Regulations | Unclean food premises. | ✓ | ✓ | ✓ | ✓ | |
| Vegetative Overgrowth and/or Noxious Weeds. | Local Gvt Act or Noxious Weeds Act | Vegetation causes, or is likely to cause, unsafe or unhealthy conditions. | ✓ | ✓ | ✓ | ✓ | |
| Accumulation of Rubbish | Local Gvt Act | Accumulation results in, or is likely to result in, unsafe or unhealthy conditions. | ✓ | ✓ | ✓ | ✓ | |

* 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 circumstances of the case and the courses of action contained in the above table may not be suitable or sufficient in all cases.