

BLUE MOUNTAINS CITY COUNCIL



DRAFT ENFORCEMENT POLICY



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1. PREFACE

Blue Mountains City Council is involved in a broad range of regulatory activities. In 1997 Council adopted a Prosecution Policy which focused on the institution of legal action in the Local and Land and Environment Court.

The Prosecution Policy intentionally did not cover the use of Penalty Infringement Notices by authorised officers under the provisions of the Self Enforcement Notice Scheme (SEINS), which is administered by the Infringement Processing Bureau.

An increase in the number of offences which can now be expeditiously and cost effectively dealt with by Council by the issuing of a penalty infringement notice has meant that the vast majority of Council's enforcement action is by the use of such infringement notices rather than in Court.

In recognition of the increase in the regulatory role in all Councils, the NSW Ombudsman in June 2002 published "Enforcement Guidelines for Councils" including a Model Enforcement Policy for all Councils.

This draft enforcement policy for Blue Mountains City Council, which will replace the Prosecution policy, is based primarily on the Ombudsman's model policy with some modifications to reflect local situations.

The draft enforcement policy reflects the need for the decision making process of Council's authorised officers to be carried out in a transparent, efficient, fair and consistent manner having regard for all the circumstances.

The inclusion of Appendix A and B at the rear of the draft policy can be interpreted as a guide to indicate the relative level of seriousness of some offences and therefore from a consistency viewpoint to determine whether or not Council may issue a warning prior to some level of formal action.

2. TITLE

Blue Mountains City Council Draft Enforcement Policy.

3. PURPOSE

The purpose of this policy is to:

- *Enable Council to acknowledge its obligation under Section 8 of the Local Government Act 1993 to ensure that the regulatory powers are carried out in a consistent manner and without bias, and*

- *Provide Council with the opportunity to state its proactive policy to enforcing issues of non compliance with legislation and/or condition/s of development consent, and*
- *Assist Council staff to act promptly, consistently and effectively in response to allegations of unlawful activity whilst ensuring that the principles of natural justice are respected.*

4. POLICY OBJECTIVES

The aim of this policy is to establish clear guidelines for the exercise of discretion in dealing *with proactive regulatory action by Council and customer service requests* or complaints about unlawful activity. It provides workable guidelines on:

- (1) How to assess whether complaints of unlawful activity require investigation
- (2) Options for dealing with unlawful activity
- (3) How to decide whether enforcement action is warranted.

5. ENFORCEMENT PRINCIPLES

Blue Mountains City Council is committed to: -

- (1) *Acting in the interest of protecting community health / safety and or the environment.*
- (2) *Acting consistently, fairly and impartially.*
- (3) *Preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s.*
- (4) *Ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s.*
- (5) *Ensuring enforcement action is taken against the right person for the correct offence.*
- (6) *Ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartially manner*
- (7) *Disclosing all evidence relevant to the alleged offence/s*
- (8) *Assisting the Court by providing all necessary information whether or not that information is in favour of Council's case.*
- (9) *Issuing cautions to the alleged offender/s, where necessary.*
- (10) *Making cost effective decisions concerning enforcement action having regard to the likely outcome at court.*
- (11) *Ensuring action is instigated within the specified time limits.*

6. APPLICATION

This policy applies to the investigation and enforcement of complaints about unlawful activity or failure to comply with the terms or conditions of approvals and orders.

While primarily directed at the regulation of development activity, the policy is also applicable to pollution control, regulation of parking, control over animals, unauthorised *development including buildings, non-compliance with development consent conditions, food safety, public health and safety issues, tree/s removal and land clearing.*

7. RESPONSIBILITY

All Council staff who deal with *the proactive enforcement of relevant legislation in addition to* written and verbal action requests or complaints alleging unlawful activity are responsible for implementing these policy guidelines.

All notifications of alleged unlawful activity should be logged in the *Customer Service Request System (CSRs) and directed to the responsible officer.*

8. DEFINITIONS

“Unlawful activity” is any activity or work that has been or is being carried out:

- (1) Contrary to the terms or conditions of a development consent, approval, permission *or other written authorisation from Council.*
- (2) Contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land
- (3) Contrary to a legislative provision regulating a particular activity or work
- (4) Without a required development consent, approval, permission or the like
- (5) *Contrary to New South Wales legislation for which Council is the appropriate regulatory authority.*

9. INVESTIGATING UNLAWFUL ACTIVITIES

All complaints and matters regarding unlawful activities will be reviewed to determine whether the matter requires enquiries/investigation. Further enquiries/investigation will not be initiated where:

- (1) *The matter has already been investigated and resolved, or*
- (2) *Council has no jurisdiction (for example, NSW WorkCover issues on building sites or amusement devices or an internal matter within strata*

buildings or where the Department of Environment and Conservation is the Appropriate Regulatory Authority etc), or

(3) The activity is determined to be lawful without an investigation.

In considering whether a complaint will warrant enquiry/investigation Council will consider a range of factors.

These include:

- (1) Is the matter within the jurisdiction of Council?
- (2) Is the complaint premature e.g. does it relate to some unfinished aspect of work that is still in progress?
- (3) Is the activity or work permissible with or without consent?
- (4) If the activity is permissible with consent, is there a consent in place?
- (5) Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and/or whether all conditions of consent are being complied with?
- (6) Is the complaint trivial, frivolous or vexatious?
- (7) Has too much time elapsed since the events the subject of the complaint took place?
- (8) Is there another body that is more appropriate agency to investigate? and deal with the matter?
- (9) Is the activity having a significant detrimental effect on the environment? or does it constitute a risk to public safety?
- (10) Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
- (11) Has the person or organisation complained of been the subject of? previous complaints?
- (12) Does the complaint have special significance in terms of the Council's? existing priorities?
- (13) Are there significant resource implications in relation to an investigation? and any subsequent enforcement action?
- (14) Is it in the public interest to investigate the complaint?
- (15) *The effective use of resources having regard to the circumstances of the case.*

If a decision is made not to investigate a complaint, this decision must be recorded with the reasons for that decision *and the complainant so advised.*

10. RESPONDING TO COMPLAINTS

Every effort will be made to ensure that all Customer Service Requests or complaints about alleged unlawful activity are actioned within the 'service standard' time allowed for resolving the category of complaint as indicated in the Customer Service Request system.

Action will be instigated within the following time frames:

(1) Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint. Examples include unsafe building works, dangerous awnings, collapsed building/wall, serious pollution, food safety issues and public health and safety matters, etc. As a guide these matter should be dealt with on the day of the receipt of a complaint.

(2) General compliance matters will be dealt with on a priority basis having regard to the relative seriousness of the matter. These examples include works not in accordance with consent or construction without consent, illegal use, noise and food complaints.

(3) Nuisance matters should be actioned within fifteen working days; examples include domestic noise matters, minor non-compliance such as overgrown land or other matters in which there are no likely immediate health or safety implications

Note that response times may vary depending on staff and other resources. However Council will acknowledge the complaint and keep the complainant informed in accordance with Council's service standards.

CONFIDENTIALITY OF COMPLAINANTS

Council will respect the privacy and confidentiality of information received as much as it can, however due to its statutory obligations and other requirements, confidentiality cannot be guaranteed. In all cases the person who made the complaint will be consulted before such a decision is made. The complainant's identity may also be disclosed where:

- the person consents in writing to the disclosure of that information; or*
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to the person who is the subject of the complaint, or*
- Council is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively.*

11. OPTIONS FOR DEALING WITH CONFIRMED CASES OF UNLAWFUL ACTIVITIES

Council will try to use the quickest and most informal option to deal with unlawful activity wherever possible unless there is little likelihood of compliance with such options.

Approaches to be considered will include:

- (1) Referring the complaint to an external agency for further investigation or prosecution.
- (2) Taking no action on the basis of a lack of evidence or for some other appropriate reason.
- (3) Counseling the subject of the investigation to educate them on the relevant council requirements.
- (4) Negotiating with the subject of the investigation and obtaining some undertakings to address the issues of concern arising from the
- (5) Investigation e.g. an application for modification of development consent.
- (6) *Referring the parties for mediation with the Community Justice Centre or alternatively for private mediation*
- (7) Issuing a letter requiring work to be done or activity to cease in lieu of more formal action.
- (8) Issuing a notice of intention to serve an order or notice under relevant legislation, followed by service of an appropriate order or notice (Local Government Act (LG Act) ss. 124-128, Environmental Planning & Assessment Act (EP&A Act) s. 121B, and the Protection of the Environment Operations Act (POEO Act) Pts 4.2-4.4 and 8.6)
- (9) Issuing a notice requiring work to be done under various legislation
- (10) Starting proceedings in the Land & Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulation (s.673 LG Act; s.123 EP&A Act)
- (11) Seeking injunctions from the Land & Environment Court or the Supreme Court
- (12) Issuing a *Court Attendance Notice* in the local court
- (13) Issuing a penalty infringement notice
- (14) Taking proceedings for an offence against the relevant Act or Regulation (s.691 LG Act, s.125 EP&A Act, Chapter 5 POEO Act)
- (15) Carrying out the works specified in an order under the LG Act at the cost of the person served with the order (s.678 LG Act).

All enforcement action will be monitored and a decision made in relation to non-compliance within 2 weeks of any deadline imposed.

12. TAKING ENFORCEMENT ACTION

From an operational perspective Council has a range of enforcement options including, but not limited to the following:

1. *The issuing of a verbal warning*
2. *The issuing of a written warning*
3. *The issuing of a “show cause” letter*
4. *The service of a Notice of Intention to issue an Order*
5. *The service of written or oral Notices/ Orders/ Directions*
6. *The issuing of a penalty infringement notice/s*
7. *The recommendation to instigate legal action*
8. *The waiving of certain fees and the granting of an extension of time for compliance*
9. *The revoking of an approval*
10. *The removal/ impounding of goods or items*
11. *The refusal of an application*

When deciding whether to take enforcement action, Council will consider the circumstances of the case. These include:

1. Has the council created an estoppel* situation? * A bar preventing one from making an allegation or a denial that contradicts what one has previously stated as the truth.
2. Is the breach a technical breach only?
3. When was the unlawful activity carried out and for how long?
4. How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?
5. Would consent have been given if it had been sought?
6. Can the breach be easily remedied?
7. Does the person in breach show contrition?
8. Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?
9. Has the person the subject of the complaint received a previous warning or other non-coercive approach or has formal legal action been taken?
10. Would an educative approach be more appropriate than a coercive approach?
11. What are the costs and benefits of taking formal enforcement action as opposed to taking informal or no action?
12. *Is there sufficient evidence to establish a prima facie case? Is there some doubt over the evidence or offence/s?*
13. *Has Council’s staff acted appropriately in investigating the matter and were standard procedures followed including officers having appropriate authorisation and delegation?*
14. What are the chances of success if the proposed enforcement action

- was challenged in court?
15. Is there a draft planning instrument on exhibition that would make the unauthorised use legal?
 16. What action would be reasonable and proportionate in this case?
 17. Is it in the public interest including there being a reasonable prospect of success?
 18. *Has the alleged offender been given an opportunity, if appropriate, to provide information as to why enforcement action should not be instituted?*
 19. *Has the alleged offender been advised, if appropriate, that no response to a show cause letter will result in the commencement of enforcement action?*
 20. *What is the likely length and net expense of the legal action.*

Council will ensure that the principles of natural justice are adhered to prior to a decision being made. The following principles will be addressed and implemented by Council:

- *Whoever is the subject of concern must know all the allegations in relation to their action;*
- *All parties to the complaint must have the right to be heard;*
- *All relevant submissions and evidence must be considered;*
- *Matters which are not relevant must not be taken into account;*
- *The person who makes the complaint must not determine the matter;*
- *The decision-maker must be fair and just.*

13. DELEGATIONS FOR ENFORCEMENT ACTION

Council staff delegated to initiate various levels of enforcement action is set out in *Council's Delegation Manual*. The legislation applicable to the delegations is as follows:

1. *The Australian Road Rules*
2. *Roads Act 1993*
3. *Impounding Act 1993*
4. *Companion Animals Act 1998*
5. *Food Act 2003*
6. *Public Health Act 1991*
7. *Swimming Pools Act 1992*
8. *Noxious Weeds Act 1993*
9. *Rural Fires Act 1997*
10. *Contaminated Land Management Act 1997*
11. *Environmental Planning and Assessment Act 1979*
12. *Local Government Act 1993*
13. *Protection of the Environment Operations Act 1997*
and the various Regulations made there under.

Appendix A

As a guide the following offences may result in a prior warning being given before any enforcement action is undertaken.

- *Annual Fire Safety Statement- non submission by owner*
- *Advertising signs without approval or unsightly*
- *Air pollution – smoky chimney*
- *Barking / Roaming dog, unregistered dog*
- *Commercial swimming pool not properly maintained*
- *Development / Activity without consent or not in accordance with a condition/s of consent*
 - *Minor development or old unauthorised development*
 - *Minor breach of consent condition/s*
- *Erosion & sediment control matters (owner builder / no prior warning) involving no imminent risk of pollution.*
- *Fire hazard of a less serious nature.*
- *Food safety/hygiene matters of a less serious nature*
- *Noise pollution*
 - *Air conditioner**
 - *Intruder alarm**
 - *Musical instrument and sound equipment**
 - *Power tools**
 - *Motor vehicle on residential premises**
 - *Use of refrigeration equipment fitted to motor vehicle**
- *Non compliance with an Order/Notice/Direction- work partly done or other mitigating circumstances*
- *Obstruction of Public Place / Road – (minor matters)*
Residential swimming pool issue not serious (eg resuscitation chart not provided)
- *Revocation of an approval (eg footpath dining/ place of public entertainment).*

** Mandatory warning required by legislation*

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.

Appendix B

Enforcement action in the form of the service of an Order or Notice or Penalty Infringement Notice or Court Action may be taken without prior warning

- *Dangerous Dog Order / Attacking Dog/ Restricted Dog*
- *Dangerous building/ awning*
- *Dangerous waterhole*
- *Deposit litter from vehicle.*
- *Development not in accordance with consent / risk to health & safety/bush fire protection/ notice of Intention issued by PCA*
- *Deposit litter / Dumped Rubbish*
- *Development without consent – unsatisfactory explanation / no explanation / repeat offender / prohibited development / risk to health & safety or environment*
- *Dilapidated building*
- *Erosion & sediment control matters*
- *Fire hazard threatening an asset.*
- *Food safety matters of a serious nature*
- *Failure to pay Clean Up / Prevention Notice fee*
- *Failure to comply with order / notice / cease use of premises / failure to comply with order regarding development consent / demolish remove unlawful building / threatening life / public safety / environment / amenity protection/ fence land / keeping of birds and animals/ remove object from public place/ contravene noise control notice/ noise pollution*
- *Littering*
- *Noise abatement direction*
- *Noise pollution generally after prescribed mandatory warning*
- *Not comply with condition of development consent/approval to operate*
- *Nuisance Dog Order*
- *Obstruction of road / public place involving safety.*
- *Obstruction / intimidation/ assault of a Council officer*
- *Open burning without approval*
- *Pollute Waters*
- *Parking offences*
- *Pollution Incident – Failure to notify*
- *Remove and /or damage tree/s*
- *Swimming Pool fencing / gates / open*
- *Street Trading without consent / approval*

Note that the above list of offences is an indication only and any offences not listed will be considered on their individual merits.