

# **TENTERFIELD SHIRE COUNCIL**

## **POLICY STATEMENT**

### **HEADING:**

**Enforcement Policy for Unlawful Activities**

### **MEETING ADOPTED AND RESOLUTION NO.:**

**23 August 2017  
168/17**

### **HISTORY OF DOCUMENT PREVIOUSLY ADOPTED:**

<b>28 March 2012</b>	<b>118/12</b>
<b>25 March 2015</b>	<b>68/15</b>

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### **Policy:**

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

- 1.1 Tenterfield Shire Council has a minimal tolerance approach to unlawful activity.
- 1.2 This policy aims to provide consistency in enforcement action in matters of food safety, public health, environmental and development non-compliance and ensures natural justice principles are respected.
- 1.3 Tenterfield Shire Council's corporate values relating to responsive and responsible regulation, fairness and equity, accountability and integrity also apply to any action taken in accordance with this policy.
- 1.4 The Council acknowledges that it has an obligation under section 8 of the Local Government Act 1993 to ensure that the exercise of its regulatory powers is carried out consistently and without bias.

#### **2. ELIGIBILITY**

- 2.1 Implementation of this policy applies to all Planning, Health and Building Staff and Council Rangers, where staff are authorised to enforce local government, planning & environmental and other legislation in accordance with Councils Delegations of Authority Register.
- 2.2 Council's own employees and contractors carrying out works must do so in accordance with the law and this policy.
- 2.3 This policy applies to all persons and companies who are carrying out, or may have carried out, unlawful activities or works within the Tenterfield Shire Council Local Government area.

#### **3. DEFINITIONS**

- 3.1 "Minimal Tolerance" is the least amount of tolerance allowable to non-compliance for: Environment/Amenity; Health/Safety; Approvals Compliance; Fire Safety or the Keeping of Animals, whilst taking into

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**Policy Statement No. 1.051**  
**Date of Effect:** 23 August 2017  
**Name of Policy:** Enforcement Policy for Unlawful Activities

**Review Date:**  
August 2020

**Responsible Officer:**  
Chief Operating Officer

consideration Council's core values of fairness and equity as well as responsive and responsible regulations. It is a method of ensuring a consistent approach by all Council officers. The enforcement action taken will be dependent upon the circumstances in each case and consideration will be given to the various questions, as specified within Part 4.5 of this Policy.

- 3.2 "Vexatious complaint" means a complaint that has been submitted to Council with the sole intention of annoying a person or company/entity, or is without any substance. These will be handled in line with Council's Policy **Complaints & Unreasonable Conduct – 1.033**.
- 3.3 "Unreasonable complaint" means one that is repetitious, insists on pursuit of issues without merit, or as otherwise defined by Council's Policy **Complaints & Unreasonable Conduct – 1.033**, and will be handled in line with the same.
- 3.4 "Unlawful activity" is any activity or work that has been or is being carried out:
- a. Contrary to the terms or conditions of a development consent, approval, permission or license;
  - b. Contrary to the Tenterfield Shire Local Environmental Plan as amended that regulates the activities or work that can be carried out on particular land;
  - c. Contrary to a legislative or policy provision regulating a particular activity or work;
  - d. Without a development consent, approval, permission or licence; and includes unauthorised works and uses; and
  - e. Contrary to the laws of New South Wales in which Council is the regulatory authority.
- 3.4 "Delegations of Authority Register" means the Delegations Register adopted by Tenterfield Shire Council from time to time.

## 4. PROVISIONS

### 4.1 General Principles

- Proportionality – taking action that is reasonable and relates directly to the actual breach.
- Consistency – ensuring that similar issues are dealt with in the same way.
- Transparency – ensuring that we do and why we do it is easily understood i.e. being open about the way we go about doing things.
- Customer Service – working with the business or individual to achieve compliance with the law by being approachable, courteous and efficient.

- Prioritising – making sure that resources are targeted primarily on those whose activities give rise to the most serious risk.

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

All complaints or notifications to Council relating to alleged unlawful activity should be acknowledged to the complainant within 10 working days and in accordance with Councils Complaints Policy. Action should be instigated within the following time frames:

- Urgent and life threatening matters should be actioned as soon as possible following receipt of the complaint. This means either on the day received or the day immediately following. Examples include: unsafe building works, collapsed buildings, surcharging drains, serious incidents where public health or the environment is at risk and unauthorised demolition of heritage items or contributory items.
- General compliance matters within 10 working days. Examples include: works not in accordance with consent or constructed without consent, illegal uses, noise affecting several persons, food complaints.
- Nuisance matters actioned within 10 working days. Examples include: Domestic noise, minor non-compliances such as overgrown land or matters where there are no immediate adverse health or safety impacts.
- Out of hours action requests are dealt with by the Rangers in the first instance, followed by a more formal investigation by the Planning and Development staff, if required. Examples include: out of hours works without approvals, pollution incidents and companion animals matters.

All complaints should receive communication from the Council Officer handling the complaint within 21 days detailing the action taken by Council or the action that Council plans to take.

Timeframes may vary depending on staff and other resources. In such instances, complaint acknowledgment communications may include temporarily revised investigation times.

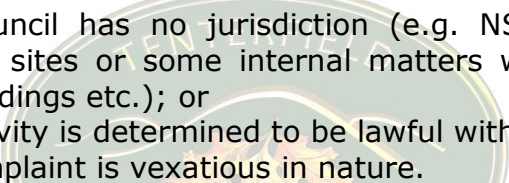
#### 4.3 Investigating unlawful activity

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

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

Note: Council will investigate matters where:

- a) The PCA fails or is unable to appropriately action a matter or where it is in the public interest;
- b) The PCA has taken all the action available under the legislation, but the offence continues or re-occurs despite that action;
- c) Where the complaint relates to Council property: and/or
- d) Complaint relates to an environmental pollution incident.

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

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

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

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

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

Approaches to be considered without taking formal regulatory action include:

- Taking no action on the basis of no reliable evidence or other appropriate reason.
- Counselling the person who carried out an unlawful activity to educate them on the relevant requirements. Council acknowledges the role of educational initiatives to achieve compliance in some situations.
- Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address the issues of concern arising from an investigation. For example, cease current unauthorised works and submit appropriate application for the remaining works to be completed.
- Referring parties for mediation with the Community Justice Centre or alternatively for mediation.
- A letter requiring works to be carried out or works to cease in lieu of more formal action i.e. a Warning Notice and letter.

Such action may be all that is required in minor breaches where no serious impacts have occurred.

Whilst these approaches recognise that Council may use discretion in the process, Council is also obliged to uphold the law, including compliance with relevant administrative law principles (For example: acting fairly and equitably), and to act in the public interest.

Where appropriate, a staged approach may be taken. This is to ensure compliance will be adopted by giving businesses and individuals the opportunity to discuss and remedy the breach before action is taken, unless immediate action is required.

#### 4.5 Enforcement action

Enforcement action will be taken with a minimal tolerance approach.

Enforcement action includes:

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

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

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

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

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

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

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

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

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

Consideration should be given to the degree of detriment or risk to the environment.

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

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

- **Would it be in the public interest?**

Some of the issues that should be considered are: Has the unlawful activity affected a significant number of people and would enforcement action impact unreasonably on certain population groups, particularly disadvantaged or marginalised groups. Are there

any circumstances of hardship affecting both the complainant and the person or business subject to the complaint?

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

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

- **Have previous warnings been issued?**

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

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

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

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

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

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

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

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

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

- **Is there any doubt over the evidence or the offence?**

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

- **What are the chances of a success if challenged?**

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

- **Does the person or business exhibit contrition for an offence?**

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

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

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

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

If it is considered that enforcement action is required, it will be taken in accordance with existing procedures and legislative processes.

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

#### 4.6 Importance of follow Up Action

Council staff will follow up matters reasonably required to be followed up to determine compliance. This includes conducting follow up inspections or re-inspections.

#### 4.7 Building Certificate Applications under section 149D of the Environmental Planning and Assessment Act 1979

Council recognises that persons who may have carried out unlawful works may apply for a Building Certificate under section 149D of the EPA Act to regularise or formalise such unlawful works. However, it is Council's policy that such applications should not be encouraged to justify unlawful works, and in some instances will still warrant the issue of a fine and/or Notice or Order.

#### 4.8 Community Education

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

### 5. RESPONSIBILITY/ACCOUNTABILITY

5.1 Council's Planning and Development staff, Environmental Health and Building Surveyors, will ensure this policy is implemented and associated procedures are followed and maintained. Council's Rangers must also ensure activities where they investigate and take enforcement action are in accordance with this policy.

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

5.3 The Director Strategic Planning and Environmental Services will review this policy every two years or as required by Council or senior management.

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

### 6. RELATED POLICES & PROCEDURES

The policy should be read in conjunction with the following Tenterfield Shire Council Policies:

- Customer Service Policy
- Delegation of Authority Register
- Complaints & Unreasonable Conduct
- Local Orders Policy 2015
- Local Approvals Policy 2014

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

