



City of Ryde

**BUILDING WORKS
COMPLIANCE –
ENFORCEMENT POLICY**

ADOPTED ON 8 July 2008

(Effective 1 August 2008)

1. Introduction

This policy explains the approach that the City of Ryde will take in relation to unauthorised building activities in the City of Ryde. This includes:

- ❖ Non compliance with conditions of consent,
- ❖ Commencing work without approval

The City of Ryde 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 consistently and without bias.

The policy shall be followed in all but extenuating circumstances, and applies to all Health and Building staff and contractors where Ryde City Council has regulatory responsibility under NSW legislation. All Health and Building staff are expected to be familiar with relevant legislation to carry out their operational duties

This policy was adopted by the City of Ryde on 8 July 2008 and is effective from 1 August 2008.

2. Purpose of the Policy

The purpose of the policy is

- To confirm that the City of Ryde has a minimal tolerance approach to unlawful activity.
- To provide consistency in enforcement matters of development non-compliance, and to ensure transparency, procedural fairness and natural justice.

3. Principles

3.1 The City of Ryde Values

The City of Ryde Values will apply to all actions taken under this policy.

Council's Values are:

- Professionalism
- Teamwork
- Leadership
- Ethics
- Pride
- Recognition

This Policy aligns with the values and principles of the City of Ryde along with the requirements of any relevant legislation.

3.2 Responding to complaints of unlawful activity and building works

Complaints will be investigated and actioned in accordance with priority. Action should be instigated within the principles nominated in the Risk Response Model of the Enforcement Policy. Generally, response will be:

- a) **Urgent and life threatening matters** are a priority and will be actioned on the day of complaint. The severity of such incidents may be such that they may result in death, or ill health, or cause severe damage to property or the environment. Examples include: unsafe buildings, collapsed buildings, fire damaged buildings.
- b) **General compliance issues** within 3 working days. The severity of such incidents is such that there is no immediate potential for physical harm to persons, property or the environment, however there is potential for adverse amenity impacts. Examples include: alleged unlawful works and uses, work carried out not in accordance with the development consent.
- c) **Significant Nuisance Matters** an immediate response is required. Examples include working out of hours in residential areas, dust or excessive noise from building sites
- d) **General Nuisance matters** actioned within 7 days. Examples include minor alleged non-compliance that does not have an immediate adverse impact.

Health and Building staff will respond to all complaints or notifications relating to alleged unlawful activities and building work in keeping with Council's Values and Principles within 5 working days of receipt. Complainants will be advised of the progress and outcome of all investigations.

3.3 Investigating unlawful activity and building work

All complaints and matters regarding alleged unlawful activity and building work will be investigated unless:

- the matter has already been resolved; or
- a private Principal Certifying Authority (PCA) is responsible for monitoring compliance with the development consent and the matter relates to compliance with approved drawings. To assist customers, Council will always refer them to the PCA in the first instance to remedy a complaint. (Council will liaise with the PCA and investigate matters outside the scope of the property

boundaries, matters that are life threatening or may cause property damage or where there is likely to be significant local nuisance impacts); or

- the Council has no jurisdiction (for example, dividing fences); or
- the activity alleged to be unlawful is in fact determined to be lawful without an investigation required (for example, Exempt Development); or
- the complaint is frivolous, vexatious or trivial in nature.

If a decision was made not to further investigate the complaint, the decision will be recorded along with clear reasons why it was not investigated and the complainant will be advised in writing of the reason for the decision.

3.4 Authorised Officer Field Inspection Procedure

Council will delegate authority and authorise certain staff under relevant legislation in order for them to carry out their investigative duties and take necessary action. Council views the power to enter private property very seriously and will ensure that the exercise of these functions is in accordance with legislation.

All Council staff who carry out inspections on private land for regulatory purposes will:

- Have delegation to enter the premises and carry out investigations as specified in Councils delegations; and
- Be authorised by Council where this is required by specific legislation to permit inspections on private property; and
- Carry photographic identification demonstrating authorisation to enter private property under each specific Act; and
- Be conscious of any requirements relating to occupational health and safety.
- Be courteous and helpful.

It is at the discretion of the authorised officer on how to investigate and resolve any complaint, however the general procedure to be followed is:

- a) The officer prioritises the complaint in accordance with the risk response model.
- b) The complainant is contacted to substantiate the complaint, and to make a preliminary assessment. If it is determined that no further action is required, the officer immediately advises the complainant and records the reasons why no further action is required.
- c) If it is determined that further action is required, the officer inspects the subject premises to fully assess the situation and to advise the owner/occupier of the complaint. Before entering, the officer must introduce themselves by giving their name, title and the reasons why they are visiting the premises. Details of the persons

interviewed, notes relating to the inspection as well as any photographic evidence should be taken at this stage.

- d) Upon the immediate return to the office, the results of the inspection are recorded. Depending on the results of the inspection, appropriate correspondence shall be prepared and sent. The complainant shall also be advised of Council's actions along with a likely time frame for finalising the matter.

Note: All conversations and observations will be documented and recorded.

3.5 Options for action in confirmed cases of unlawful activity

Regulatory action is any formal and informal action taken to prevent or rectify infringements of the legislation. The regulatory options may differ with each case, but the principles of application should remain constant.

3.5.1 Non-Enforcement action where there is evidence of unlawful activity

In accordance with Council's values, a number of options may be considered instead of enforcement.

The following may be appropriate:

- a) Referring the matter to the relevant agency for further action if the breach does not fall under the jurisdiction of Council.
- b) Counselling the person investigated to educate them on the relevant requirements.
- c) Negotiating with the person who carried out the unlawful activity to obtain an undertaking from them to address issues of concern found during the investigation.
- d) Issuing a warning or caution to the offender, requiring work to be done or activity to cease in lieu of more formal action. Verbal warning shall be documented on Council records.
- e) Taking no action on the basis of no reliable evidence or other reasons such as frivolous or vexatious complaints or where Council has no jurisdiction.
- f) Referring parties for mediation with Community Justice Centre

The above approaches will be used with discretion and Council is obliged to uphold the law. This includes ensuring compliance with relevant administrative law principles such as acting fairly and equitably, and to act in the public interest.

These approaches also do not preclude Council from taking enforcement action.

3.5.2 Enforcement action

Enforcement action will be taken with a minimal tolerance approach. It is recognised that this approach is consistent with other local authorities with the same regulatory authority.

Enforcement action includes:

- Issuing of Notices and Orders requiring compliance with legislative requirements or those of an environmental planning instrument.
- Issuing a “penalty infringement notice” (PIN) or alternatively commencement of “criminal proceedings”
- Commencement of civil proceedings in Court to either remedy or restrain the unlawful activity. Examples include Class 4 proceedings in the Land and Environmental to enforce compliance with s121B of the Environmental Planning and Assessment Act 1979 or seeking of interlocutory or injunctive proceedings to prevent unlawful activity from occurring.

Before any enforcement action is taken, the Council must consider the following:

- Could the unlawful activity be carried out lawfully if development consent or an exemption from development was sought?
- Are the breaches technical or inconsequential in nature with no aggravating circumstances?
- Could the non-compliance be easily remedied by some action of the person responsible?
- Are the unlawful activities or works carried out on a heritage item and did they adversely impact on the heritage significance?
- Is the condition of the Development Consent not being complied with unreasonable, ambiguous or plainly unenforceable?
- Would action be in the public interest?
- Is there any doubt over the evidence or the offence?
- Has the person responsible been educated about Council’s policy? (i.e, did the person know that their actions were unlawful?)
- Are the costs of enforcing likely to be prohibitive for the nature of the offence?
- What are the chances of success if challenged?
- Has the person or company that carried out the offence had an opportunity to provide representation or submission on the matters?

If it is considered that enforcement action is required, it will be taken in accordance with legislative and Council procedures. Any court action requires a Council resolution. The General Manager may take this action without a Council resolution if the matter is urgent.

In taking enforcement action, Council recognises that there are statutory processes which provide for representations and appeals and thereby natural justice principles will still be observed.

Where a person is afforded the right to make representations to a Notice, Council requires those representations to be made in writing. This ensures representation documents can be recorded and filed in Council's record system. After written representations are considered, representations in person may be made if the Council considers this to be appropriate.

3.6 Special Provisions – Position on Principal Certifying Authority (PCA) and Private Certifiers.

Council recognises that when a Private Certifier is acting as the PCA, they are responsible for ensuring that the development is carried in accordance with the Environmental Planning and Assessment Act 1979, and the Development Consent. Persons making complaints regarding a development under the responsibility of a private certifier should be advised to contact the private certifier in the first instance. Where a complaint is received in writing, a copy of the complaint will be forwarded to the PCA with a request to investigate and respond.

While Council does not have legal control over Private Certifiers it will liaise with the Private Certifier, and will make every effort to ensure that requirements of the Environmental Planning and Assessment Act and Regulations are met, and that the health and safety of the public is not compromised. Council will investigate matters outside the scope of the property boundaries (such as building materials stored on nature strips, inadequate sedimentation control and the like, matters that are life threatening or where there is likely to be significant local nuisance impacts or may cause property damage.

Council will make complaints to the Accreditation Body if it was believed that a Private Certifier has not acted in accordance with their obligations under legislation or has not acted in the Public Interest.

Private Certifiers are required to submit copies of certificates and documentation relating to Construction Certificates and Complying Developments to Council under the provisions of the Environmental Planning and Assessment Act 1979. Council is not legally required and does not audit or review certificates issued by Private Certifiers.

4. Enforcement Response for Unauthorised Activity

4.1 Unauthorised Building Works – No approval

A Development Consent or Construction Certificate can not be issued retrospectively for building works already constructed. Building work carried out without a Development Consent or Complying Development Certificate or Construction Certificate, which do not fulfil the criteria of Council's Exempt and Complying Development Code are deemed to be unauthorised.

Action to be taken by Council will vary depending on whether the building work complies or does not comply with Council's policies and other relevant legislation, and the extent of the work undertaken.

Note: All conversations and observations will be documented and recorded.

No approval and building work does not comply with Council policies, BCA or other legislation.

The Officer will carry out an assessment of the unauthorised work to determine whether it would generally comply with Council's policies (including Heritage requirements), the BCA and any other relevant legislation. The owner may be requested to supply additional information, such as Works as Executed drawings to assist the officer carry out their assessment. Such details may also be referred to Council's Assessment Team for comment.

If the structure does not comply with any of the legislative requirements, a Notice of Proposed Order requiring the removal of the unauthorised work under the provisions of the Environmental Planning and Assessment Act 1979 shall be served on the owner of the subject property.

The Council may commence criminal prosecution proceedings in the Land and Environment Court in cases where significant unauthorised work has been carried out. The maximum fine that can be imposed by the Land and Environment Court is \$1.1million. In determining whether to pursue criminal prosecution the Council will have regard to those matters listed in 3.5.2 of this Policy. An example of when prosecution action is likely is when building work has been undertaken and any damage to the environment can not be corrected, such as the demolition of a heritage building.

If there is failure to comply with the requirement of any order then the Council will pursue civil proceedings to enforce the order. In these circumstances the Council may also commence criminal prosecution action.

Unauthorised building work (no approval) that complies with Council Policy, BCA and other Legislation

If sufficient evidence is provided to verify that the unauthorised work complies with the requirements of Council's policies, the BCA and other legislation, the Building Surveyor will prepare a report to the Manager of Environmental Health and Building with a recommendation of proposed actions. The matters for consideration listed in Section 3.5.2 of this policy will be taken into consideration when determining the appropriate action to be taken. In addition to the matters for consideration in Section 3.5.2, the following requirements will need to be satisfied:

- Evidence that the building is structurally adequate (Structural Engineer report).
- Building Code of Australia compliance such as evidence of termite control, waterproofing, smoke detectors etc,
- Basix requirements and any other energy efficient requirements
- Compliance with Councils DCP's
- Survey report indicating that the position of the structure complies.
- Works As Executed (WAE) plans
- The structure is aesthetically acceptable and does not cause an unreasonable impact on streetscape compliments the surrounding area.
- The building work does not have an unreasonable impact on the adjoining properties (eg, privacy, overshadowing and the like)

Except in exceptional circumstances a Penalty Infringement Notice for the unauthorised work will be issued.

Where a significant amount of unauthorised work has been undertaken the Council may elect to commence criminal prosecution proceedings.

4.2 Unauthorised Building Work Where Approval Has Been Granted

Work Not Being Undertaken with Conditions of Consent

Where the work is not being undertaken in accordance with conditions of consent that control the way in which the building works shall be undertaken the Council may issue, either a written warning or a Penalty Infringement Notice (PIN).

Warnings are appropriate for matters that do not cause a nuisance or disturbance to others (e.g. not having the PCA sign on the site) and PINs are the appropriate response for matters that cause a disturbance to others, this includes:

- Storage of builder's materials on the road or nature strip.
- Working out of approved hours
- Construction noise exceeds approved levels.

If there is ongoing non-compliance after the issue of a written warning then a PIN will be issued. If there is continued non-compliance Council may decide to commence criminal prosecution.

Building Work Does Not Comply with the Approved Plans and Details (but complies with Council policies and legislation)

If an inspection has revealed that the work was not being carried out in accordance with the approved detail, a Section 96 application may be requested, but only if the work is considered to comply with Council policies and other legislation. It should be noted however that such application will be assessed on its merits, and could be refused regardless whether the work has been completed.

The Development Assessment Team can provide assistance to the Building Compliance Team in determining if works comply with Council policies.

Except in exceptional circumstances a Penalty Infringement Notice for the unauthorised work will be issued.

Where a significant amount of unauthorised work has been undertaken the Council may elect to commence criminal prosecution proceedings as an alternative to issuing a PIN.

Building Work Does Not Comply With the Approved Plans and Details and Does Not Comply With Council Policies And Legislation

If an unauthorised structure does not comply with any of the legislative requirements, a Notice of Proposed Order requiring the removal of the unauthorised work under the provisions of the Environmental Planning and Assessment Act 1979 shall be served on the Owner of the Subject property.

The Council may commence criminal prosecution proceedings in the Land and Environment Court in cases where significant unauthorised work has been carried out. The maximum fine that can be imposed by the Land and Environment Court is \$1.1million. In determining whether to pursue criminal prosecution the Council will have regard to the matters for consideration listed in 3.5.2 of these Guidelines. An example of when prosecution action is likely is when building work has been undertaken and any damage to the environment can not be corrected, such as the demolition of a heritage building.

If there is failure to comply with the requirement of any order then the Council will pursue civil proceedings to enforce the order. In these circumstances the Council may also commence criminal prosecution action.

4.3 Building Certificates

Council does not support or encourage the submission of a Building Certificate Applications under the provisions of section 149D of the EP & A Act to justify unlawful works. However, it is recognised that persons who may have carried out unlawful works may apply for a Building Certificate to formalise those unlawful works.

Council may still take enforcement action against a person who carried out unlawful works, irrespective of whether they have applied for a Building Certificate.

5. Review of the Policy

This Policy will be reviewed within three (3) years of its adoption by the City of Ryde.