



**ENFORCEMENT AND
PROSECUTION POLICY FOR
UNAUTHORISED DEVELOPMENT
WORKS AND OTHER ACTIVITIES**



JUNEE SHIRE COUNCIL

POLICY REGISTER

POLICY TITLE: ENFORCEMENT AND PROSECUTION POLICY FOR UNAUTHORISED DEVELOPMENT WORKS AND OTHER ACTIVITIES

1. Intent of Policy

The Policy has been prepared so that the Council can be guided by adopted objectives and guidelines when determining the appropriate response in cases of unauthorised development and other activities.

2. Scope of Policy

The policy applies to the investigation and enforcement of complaints about unauthorised activities or failure to comply with the terms or conditions of Approvals and Orders. The policy is primarily directed at the regulation of development activity, unauthorised development and includes non-compliance with development consent and complying development certificate conditions.

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INTRODUCTION

I. Preamble

This policy has been prepared so that the Council can be guided by adopted objectives and guidelines when determining the appropriate response in cases of unauthorised development and other activities. The Council recognises that:

- non-compliance with environmental planning laws compromises the objectives of environmental planning legislation and the role of the local community in the determination of local planning rules.
- under the relevant statutes and case law, the Council's authority to take enforcement action is discretionary.
- available Council resources will affect the scope of the Council's enforcement strategy.
- planning law recognises that it is the impact on the environment of the unauthorised development or activity that is the basis for the unacceptability of the development or activity rather than the development or activity itself.
- the incidence of unauthorised development and activity is affected by the level of knowledge in the community regarding the scope, application and purpose of planning law.

This policy provides the considerations that the Council will take into account in the exercise of its discretion to take action in instances of unauthorised development.

Junee Shire Council views unauthorised building works or failures to comply with the terms and conditions of development consents and complying development certificates as serious. Regulations and systems are put in place for the benefit of the local community as a whole. The Council is committed to rigorously monitoring any unauthorised changes to development consents and complying development certificates or unauthorised building works.

Where unauthorised building works are identified the Council may:

- Issue a Penalty Infringement Notice.
- Issue a "Stop Work" notice where unauthorised building works are in progress.
- Offer owners either the option of demolishing the unauthorised works or submitting a Retrospective Development Application and Building Certificate to legitimise the unauthorised works.
- In cases where unauthorised works are found to be acceptable on a merit assessment, recommendation for approval of these works will always be submitted to the General Manager or a Council meeting for consideration and determination.
- Unauthorised building works which constitute major breaches may be prosecuted through either the District Court or the Land and Environment Court.
- If unauthorised building work is observed that is under the control of a Private Certifier, he or she will be reported to the Building Professionals Board of the NSW Department of Planning and Infrastructure.

2. Strategy, Objectives and Purpose

The Council's strategy in regard to unauthorised development or activity is:

- to carry out compliance actions that are fair, equitable, consistent and accountable to secure the confidence of the community.
- to establish a compliance regime whereby enforcement action recognises, and is appropriate to, the character and significance of the planning law breach.
- to recognise that to reduce the incidence and range of unauthorised development and activity it may be necessary, from time to time, to prosecute an offender to seek a court imposed penalty to act as a deterrent, and
- to recover the costs of any Council action to rectify unauthorised development or activity by seeking to recover the costs of its action from the person or persons who were responsible for the unauthorised development or activity.

The objectives of this policy are:

- to specify the heads of consideration for the determination of the significance of an unauthorised development or activity.
- to specify the way that the Council will determine the priority given to any instance or type of unauthorised development or activity.
- to outline the range of responses that the Council will use in any instance of unauthorised development or activity.
- to specify the matters for consideration in determining the type of response to any instance of unauthorised development or activity.

The purpose of this policy is to:

- enable the 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 a proactive policy statement regarding the enforcement of compliance with legislation and/or condition/s of development consent and complying development certificate consent, and
- foster prompt, consistent and effective action by the Council in response to allegations of unlawful activity whilst ensuring that the principles of natural justice are respected.

3. Responsibility

All Council staff who deal with the proactive enforcement of relevant legislation, in addition to written and oral action requests or complaints alleging unlawful activity, are responsible for implementing these policy guidelines. All notifications of alleged unlawful activity should be appropriately recorded by the Council Staff.

ENFORCEMENT CONSIDERATIONS

1. What Constitutes Unauthorised Works

Unauthorised work can take many forms, from very minor technical breaches where there is little or no environmental harm up to significant breaches of environmental laws where approval would never have been granted had the proper application been made.

An unauthorised development or activity is one that has been or is being carried out:

- contrary to the terms or conditions of a development consent, complying development certificate, approval, permission or license;
- contrary to an environmental planning instrument that regulates the developments or activities that can be carried out on particular land;
- contrary to a legislative provision regulating a particular development or activity, or;
- without a required development consent, complying development certificate, approval, permission or license.

The Council does not have unlimited resources and relies upon the public to make complaints and to provide evidence to assist the Council in taking enforcement action.

2. Enforcement Principles

Junee Shire Council is committed to:

- acting in the interest of protecting community health / safety and/or the environment;
- acting consistently, fairly and impartially;
- preventing discrimination on the basis of race, religion, sex, national origin, political association or other personal reason/s;
- ensuring the proposed enforcement action is in keeping with the relative severity of the offence/s;
- ensuring enforcement action is taken against the right person for the correct offence;
- ensuring that any actual or potential conflict of interest situations are managed in a fair, consistent and impartial manner;
- issuing cautions to the alleged offender/s, where necessary;
- disclosing all evidence relevant to the alleged offence/s;
- assisting the Court by providing all necessary information whether or not that information is in favour of the Council case;
- ensuring action is instigated within the specified time limits.
- making cost effective decisions concerning enforcement action having regard to the likely outcome if the matter proceeds to Court;

3. Natural Justice

Junee Shire 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 the 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.

HEADS OF CONSIDERATION IN TAKING ENFORCEMENT ACTION

I. Investigation and Discretion

Under NSW environmental planning statutes, the exercise of the Council's authority to enforce planning law is discretionary. This has the effect that:

- the Council does not have a legal obligation to take action to enforce planning law at the insistence of a third party
- the Council may choose not to enforce the law in particular circumstances or at all

However, the Council may commit a legal error if it does not turn its mind to the exercise of its statutory power in the event of a breach of the planning law. Under the common law, failure to take planning law enforcement action may constitute negligence in the event that a duty of care can be established to exist and to have been breached.

The Council needs to observe a number of matters for the exercise of their discretionary powers to be lawful (from Enforcement Guidelines for Council's, NSW Ombudsman June 2002):

- the power must be used for a proper purpose i.e. within the scope and purpose for which the power was given
- the decision-maker must give proper, genuine and realistic consideration to the merits of the particular case
- the decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision ie. the decision must not be manifestly unreasonable
- the decision-maker must give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance
- the decision-maker must not exercise a discretion in a way that is so unreasonable that no reasonable person could have exercised the power
- the decision-maker must not make a decision that is arbitrary, vague or fanciful

- the decision-maker must exercise a discretion independently and not act under the dictation or at the behest of any third person or body
- the decision-maker must not fetter its discretion by, for example, adopting a policy that prescribes its decision-making in certain circumstances
- the decision-maker must observe the basic rules of procedural fairness ie. natural justice
- the decision-maker must not act in a way that is biased or conveys a reasonable perception of bias

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.

2. Heads of Consideration

The selection of the appropriate response and priority given to the matter will be determined on the basis of the heads of consideration. Heads of consideration fall into three categories:

- legal
- community, and
- personal considerations.

Within these heads of consideration, staff must consider the following tests:

a) Test 1 – Likelihood of Consent

“Is the unauthorised development a form of development or activity that, but for the failure to make application for a development consent or an activity approval, would likely have been granted such consent or approval subject to appropriate conditions”.

An unauthorised development is understood to ‘pass’ this test in the event that it is likely that the development or activity would have been granted consent, had application been made for such consent prior to the undertaking of the development.

Development consent can in some cases, be granted retrospectively. Where development involves the use of land (rather than construction works) consent can be granted to continue that use. Further, the Council can modify an existing development consent so as to grant consent to works that have already been carried out, though the development must remain substantially the same as the development for which the Council originally granted consent.

b) Test 2 – Environmental Impact

“Is the unauthorised development likely to cause a significant environmental impact, including impacts on the natural and the built environment? The application of this test requires a determination of the fact of any environmental impact and an assessment of the degree of that impact.”

An unauthorised development is understood to ‘pass’ this test in the event that the impacts of the development or activity are negligible or insignificant and action to control the impacts is not required.

c) Test 3 – Public Safety

“Is the unauthorised development likely to lead to injury and/or to create a public liability?”

The application of this test requires a determination of the fact of any health and safety risk and an assessment of the degree of that risk.

An unauthorised development is understood to ‘pass’ this test in the event that no significant health and/or safety risk is created by the development.

3. Legal matters of consideration

TEST 1 – Likelihood of Consent

- There is a possible estoppel situation.

Has the Council created an estoppel situation? ie. Council has previously taken action or done or acted in a particular way that would prevent any action now? For example, where the Council had fifteen years ago issued a building approval for a commercial building where development consent was required.

- The breach is a technical breach only.

For example, a person has carried out landscaping without firstly gaining approval of the landscape plan but an inspection reveals that the landscaping has been satisfactorily carried out. Such a technical breach will generally not warrant Council taking action to remedy or restrain the breach of the Act.

- The unauthorised development or activity is “stale”.

Some prosecutions will be statute barred despite good evidence that unauthorised development has taken place. For example, if a use has been carried out for a period of twenty years and it meets the three principal heads of consideration. The Courts do not respond well to Councils that bring matters before the Court after a period of significant unjustified delay.

- The breach can be easily remedied.

The public interest in enforcing the law must be balanced with whether it is possible to easily remedy a breach.

- Chances of successful enforcement action in court are low.

The Council must take into consideration the likelihood that a court challenge to the Council’s response would be successful.

4. Community matters of consideration

- a) TEST 2 – Environmental Impact. (see detailed explanation above)
- b) TEST 3 – Public Safety (see detailed explanation above)

- Costs of legal action would outweigh the outcome achieved.

As well as the direct costs of legal action the Council needs to consider the indirect benefit of commencing Court proceedings as a deterrent to the offender and others who may offend in the future.

5. Personal matters of consideration

- a) The person in breach has shown contrition.

If a person acts appropriately by acknowledging their unauthorised development or activity and ceases that activity and seeks retrospective approval, it may be that not prosecuting the offender and/or providing time to comply would best serve the public interest.

- b) Inaction would cause hardship to the complainant.

A more coercive approach may be appropriate where the complainant does not have the option of taking civil action.

- c) Action would cause hardship to the person the subject of the complaint.

For example, the action would make the person homeless.

- d) The person has received previous warnings or has been the subject of legal action.

Has the person the subject of the complaint received a previous warning or other non-coercive approach or has the person been the subject of legal action. In these cases a more formal and coercive approach is likely to be more appropriate.

- e) An educative approach would be effective.

An educative approach can often be very effective. This can be dependent on the person involved rather than the type of breach.

6. Priority of Action

Priority of action will be given where the incidence of unauthorised development or activity meets one or more of the following criteria and as the Councils resources allow:

- a) continuation of the unauthorised development or activity would fail one of the three Tests.
- b) immediate action will readily prevent further unauthorised work being carried out (ie. Unauthorised building work is in progress).
- c) action is part of a Council adopted compliance program of consistently and fairly taking action against a type or range of illegal activity.

- d) the matter warrants prosecution and evidence must be collected and prosecution commenced within a statutory time period (generally 6-12 months).
- e) as a matter of fairness and equity, the matter should be dealt with in a manner that the Council has been dealing with similar matters.

This action plan does not preclude an urgent priority being allocated by staff or by Council resolution in critical cases, for example, involving life safety issues.

7. Types of responses

The Council's compliance action in the case of unauthorised developments or activities will involve one or more of the following types of responses:

a) No action

No action may be taken when the unauthorised development or activity is a technical breach only, when there is a lack of evidence, when no action is justified by the public interest or some other appropriate reason. The Council may not have authority to take action to remedy the breach and may be required to refer the matter to another government authority.

b) Educative

It may be that by counselling the person the subject of the investigation to educate them on the relevant Council requirements, the unauthorised activity or development will cease immediately without any likelihood of recurrence. For example, breaches of conditions of consent relating to noise are often easily remedied by an educative approach.

c) Negotiation

This may involve advising the person responsible as to the nature of the breach and the relevant Council requirements, then issuing a letter requiring that work be done or activity cease in lieu of more formal action. It may also involve issuing a letter that asks the person to "show cause" as to why the Council should not exercise its discretion to implement specified enforcement action.

Negotiation may involve asking the person to provide an undertaking to take action or cease action to bring the development into compliance. This may include the voluntary removal or alteration of building or other works, cessation of a land use, submission of a Section 96 Modification Application and submission of an application for a Building Certificate to legitimise the works.

d) Await Determination of Application

This option is relevant where it is likely that the development would gain consent (Test 1). In the case of unauthorised building work, it would be necessary for the building work to have ceased. The owner will need to obtain a retrospective Development Consent and a Building Certificate for the work already carried out prior to applying for a Construction Certificate to complete the building work. In most cases of unauthorised uses, it would be

necessary for the use to cease. However this will depend on an assessment of the activity against the other heads of consideration (e.g. is there a risk to public safety - Test 3).

e) Infringement Notice

The Council may issue a Penalty Infringement Notice. There are number of Penalty Notice offences under the Environmental Planning and Assessment Act 1979 and Local Government Act 1993. The most frequently used is for carrying out development without consent or not in accordance with consent.

f) Notices/Orders

The Council may issue a Notice of Intention to Serve an Order under the relevant legislation followed by, subject to the outcome of any representations made, service of an appropriate Order.

If the Order is not complied with, the Council may, under the Local Government Act 1993 and/or Environmental Planning and Assessment Act 1979:

- i. enforce the Order by undertaking the necessary work and recovering the costs from the proponent, or
- ii. commence court proceedings for the issuing of Court Orders to enforce the Council Order, or
- iii. issue a penalty notice for not complying with certain orders under the Environmental Planning and Assessment Act 1979 or Local Government Act 1993.

g) Injunction

The Council may commence court proceedings for immediate injunctive relief to prevent a breach from continuing or occurring. This is generally an action of last resort and will generally be preceded by at least a letter warning that the Council intends to take the action.

h) Prosecution

The Council may commence court proceedings for an offence against the relevant Act or Regulation and seek a penalty. While the penalty may be a deterrent to further breaches, separate action may need to be taken to restrain the breach.

Appropriate legal advice may be required as to the proposed type of response.

COMPLIANCE CHECK LIST

Administration Staff/Compliance Staff

1. Refer complaint/incident to appropriate officer for investigation along with:
 - property ownership details
 - property files
 - review and copy of any consents submitted or determined.

Compliance Staff

Step One

1. For all alleged breaches recorded, an initial desktop assessment will be done. This assessment is to comprise of:
 - a) a review of the Council records for applications, approvals, previous correspondence, or documentation relating to the land as well as the people that may be involved.
 - b) an assessment of the likely environmental harm, impacts on other resources and impacts on neighbouring properties.
2. Undertake a site inspection with another staff member to validate the complaint following the initial desktop assessment. The site inspection is required to gather information and evidence. During the investigation officers will gather evidence of the incident in order to establish if a breach has occurred and who may be responsible for the breach. Evidence may include videos, photographs, samples and physical evidence, witness statements, file notes and records of any interview.
3. Undertake a preliminary assessment of the situation relevant to:
 - a) taking no action on the basis of a lack of evidence or for some other appropriate reason.
 - b) counselling the person to educate them on the relevant Council requirements.
 - c) negotiating with the person and obtaining some undertakings to address the issues of concern arising from the investigation eg. a retrospective Development Application to legitimise the works.
 - d) issuing a letter requiring work to be done or activity to cease in lieu of more formal action.

Step Two

1. Should no action be taken or counselling be required, then make appropriate notes on file and advise the complainant.
2. Should action be warranted in accordance with the heads of consideration, advise owner/ occupier of the following:
 - a) Council's intentions – ie. Council's options:
 - the issuing of an oral warning
 - the issuing of a written warning
 - the issuing of a “show cause” letter
 - the service of a Notice of Intention to issue an Order
 - the service of written or oral Notices/ Orders/ Direction
 - the issuing of a penalty infringement notice/s
 - request for a retrospective Development Application and a Building Certificate
 - the recommendation to instigate legal action
 - the waiving of certain fees and the granting of an extension of time for compliance
 - the revocation of an approval:
 - the removal/ impounding of goods or items
 - the refusal of an application.
 - Council's expectations of the owner/occupier i.e. written response as to why unauthorised works were conducted and the submission of a retrospective Development Application and Building Certificate.
 - Time frame for compliance - 30 days (this allows the applicant to provide adequate plans and specifications)

Step Three

1. Should the owner/occupier not respond within 30 days:
 - a) send a follow up letter – allowing a further 14 days for compliance.

- b) arrange an interview with owner/occupier to establish evidence, such as:
- who carried out the unauthorised building works – owner/occupier/contractor?
 - when were the unauthorised works carried out?
 - what advice has been received regarding the structure eg. engineering design etc?

Step Four

- I. Consider appropriate response if owner/occupier does not respond:
- a) issuing a Notice of Intention to serve an Order under relevant legislation, followed by service of an appropriate Order (Local Government Act (LG Act) Sect. 124-128, Environmental Planning and Assessment Act (EP and A Act) Sect. 121B, and the Protection of the Environment Operations Act (POEO Act)
 - b) starting proceedings in the Land and Environment Court for an Order to remedy or restrain a breach of the relevant Act or Regulation (Sect.673 LG Act; Sect.123 EP and A Act).
 - c) seeking injunctions from the Land and Environment Court or the Supreme Court.
 - d) issuing a Court Attendance Notice in the Local Court.
 - e) issuing a penalty infringement notice.
 - f) taking proceedings for an offence against the relevant Act or Regulation (s. 691 LG Act, Sect.125 EP and A Act, Chapter 5 POEO Act).
 - g) carrying out the works specified in an Order under the LG Act at the cost of the person served with the Order (Sect.678 LG Act).

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