

Having trouble with unlawful development activity?

unlawful development

What is unlawful development activity?

Many activities cannot occur without a development consent from council. Activities that usually require development consent include building a house or major home extensions, demolition, or changing a use of a factory or office. Some development may be exempt from requiring consent, or complying as defined by the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* as amended from time to time.

When a development consent is issued, it almost always contains conditions. Consent for building work usually includes conditions to ensure the building is structurally sound. Consent for particular types of use of land usually include conditions such as limits on hours of operation.

It is unlawful for certain types of development to occur without consent, or for a development to occur without complying with the consent conditions.

How do I find out if development consent is required or has been granted?

If you want to find out if a development consent is required or has been granted, take note of the activity and its location.

If the activity is the use of a property, sometimes it helps to keep records of the use in a diary. Try to speak to the owner about your concerns. If this does not resolve the matter, contact the council.

Tell the planner or the building surveyor responsible for the location what you observed and ask for details of any development consents that might have been issued for the site. You may be told that the activity is permitted without consent, that consent has been granted, or that it is required but has not been granted.

Has consent been granted?

If development consent has been issued ask for a copy of the conditions attached to the consent. If the consent is for a dwelling, you are also entitled to see a plan showing the height and the 'footprint' of the work. You usually have to pay for copies.

If you are concerned, after reading the conditions of consent, that they are being breached, consider whether they are serious enough to report to the council. For instance, is the breach affecting third parties? Is it creating a danger? Can you approach the owner directly to discuss the breach before taking it up with the council?

Investigating possible unlawful development

If the activity requires consent but it has not been granted or you decide to report possible breaches of the conditions, you can ask the council to investigate. Make sure the request is in writing even if you are told verbally that the matter will be investigated.

Investigation usually starts with an inspection of the site. Get a commitment from the staff to report to you after the inspection or phone them the following day to find out what happened.

What next?

The next step is to determine whether there is evidence of a unlawful activity. This may take some time. If the issue is complex, the council may need to conduct more inspections, seek legal advice or consult other government agencies. It is reasonable to expect progress reports from council staff. Ask to be advised in writing when a decision is reached.

If there is evidence of unlawful activity, the council must decide if further action is warranted. It is wrong to assume that all cases justify action. If an unlawful development is minor and would most likely have been consented to had an application been made, it could be reasonable for the council to take no action. Similarly, if a breach of condition is minor and has little impact on third parties, it may be reasonable to take no action.

Ask if the council has a policy on investigation and enforcement action covering your case. These policies are usually called enforcement and prosecution policies or local orders policies. If it does, read the policy and make sure the decision the council takes is reasonable in light of the policy. Ask if there are any recent cases of a similar nature to find out if the council is acting consistently.

Taking action

Councils have several options if they decide to take action. They range from issuing a warning or a fine, issuing a notice of intention to issue an order to do or to cease doing certain things, to taking legal action to prosecute the developer over the activity.

If you are well acquainted with the development, you may be asked to give evidence if the matter goes to court. This is a decision for the council's legal advisers who are in the best position to decide if you can help council's case. Ensure you are informed of the progress of an action being taken.

What if I am unhappy with the council's response?

If you believe the council's response to the unlawful activity is inadequate, you can complain to the general manager and ask if anything more can be done. You can ask to look over the council file. This might assist you in deciding if the council records on the matter are adequate and support the council's decision.

You might be able to take legal action over the matter. Anyone has the right to go to the Land and Environment Court and ask the court to remedy or restrain a breach of planning or building laws. This includes unlawful activities like work carried out without consent or activities carried out in breach of conditions of consent. However, legal action like this is expensive and you may be liable for the other side's costs if you lose.

Can the Ombudsman help me?

The Ombudsman gives a high priority to complaints about unlawful activity. The Ombudsman expects councils to:

- impose sensible and enforceable conditions on development consents
- systematically audit compliance with development consents
- have complaint handling systems that provide for logging reports of unlawful activity, investigation and reporting back
- investigate these reports in a timely fashion
- decide on further action taking account of the particular circumstances of the case and having regard to previous practice, and
- develop policies on investigation and enforcement setting out the criteria they will consider when deciding what action to take.

If you believe your council has not met these expectations, you should consider making a complaint to the Ombudsman. In most cases, we ring or write to the council and ask them to put their side of the story.

If we believe the council's response to a report of unlawful activity is unsatisfactory, we can ask for further action to be taken. We give highest priority to cases which suggest that a council's systems and procedures for handling reports of unlawful activity are deficient.

If you believe an accredited certifier has wrongly certified that a development complies with all requirements, you can complain about the accredited certifier to the Building Professionals Board. It can investigate and take certain actions arising from complaints about the professional conduct of the accredited certifier.

Other assistance

Complaints about the general administrative conduct of councils, councillors and council staff can also be made to the Office of Local Government (OLG):

Chief Executive, Local Government
Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

Phone: 02 4428 4100
Email: olg@olg.nsw.gov.au

Complaints about alleged corrupt conduct of councillors or council staff can be made to the Independent Commission Against Corruption (ICAC):

Chief Commissioner
Independent Commission Against Corruption
Level 7, 255 Elizabeth Street
Sydney, NSW, 2000

GPO Box 500
Sydney, NSW, 2001
Phone: 02 8281 5999
Email: icac@icac.nsw.gov.au

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Contact us for more information

Our business hours are: Monday to Friday,
9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

Level 24, 580 George Street
Sydney NSW 2000

Email nswombo@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000

Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524

National Relay Service 133 677

Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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This fact sheet is one of a series produced by the NSW Ombudsman. Feedback is welcome.