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LAWYERS

INVESTIGATION OF UNAUTHORISED BUILDING WORKS OR LAND USE

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1. Investigations of unauthorised works or land may be conducted by building surveyors and compliance officers (either in government or in private practice) for various reasons.
2. The fundamental obligation of the investigator is to act honestly, fairly and with integrity. The investigator should endeavor to record events truthfully, accurately and objectively (particularly in recording what the persons who are subject to the investigation might say). The investigator should also consider the legality of their actions when undertaking investigations, particularly when entering private property and recording evidence.
3. By taking proper investigations, the investigator should understand the nature of the complaint so that it can exercise its regulatory and enforcement functions under the relevant laws. The decision to prosecute, commence other legal action, or to refer the matter to other complaints procedure should not be formulated prior to the full investigation of the circumstances (unless there is an element of urgency – ie risk to health and safety, irreparable damage to buildings, or unauthorised constructions that are just about to take place).

Before the Inspection

4. Usually an investigator becomes aware of breaches through complaints from the community. Unfortunately, the complainant does not have the benefit of records

of what is permissible on the land and what development consents or approvals benefit the land. But that isn't to say that they don't have legitimate concerns.

5. The first step is to understand what is permissible on the land. The land may benefit from a development consent for a particular use, or have consent for certain buildings and structures. Try to get an understanding of what "should" be taking place on the land.
6. If an alleged breach relates to building work, obtain a copy of any approved plans prior to the inspection.
7. Find out the zoning of the land, including what can be done with or without development consent.
8. Council and its officers, in exercising their powers under the *Local Government Act 1993* or the *Environmental Planning and Assessment Act 1979*, should only enter residential land in the following circumstances:
 - a. By agreement with the occupier;
 - b. Under a search warrant obtained at the Local Court;
 - c. For the purposes of inspecting work carried out under a development consent, or inspecting work the subject of a building certificate (in which case, notice must be given to the occupier).
9. To enter non-residential premises, notice must be given in writing. The notice must nominate a date and time for the proposed inspection, and must be given prior to the day of the proposed inspection.
10. Officers may use reasonable force to enter premises provided the above criteria are met.
11. If in doubt, officers should consider seeking advice as to their rights of entry.

At the Inspection

12. Take the relevant documents, a notepad and a camera.

13. Take photographs of unauthorised building work and take notes of what you saw. This includes measurements where possible.
14. If an unauthorised use is involved, take notes and photographs of leads you that conclusion – eg for a boarding house/hostel photographs of beds, lockable room doors, share bathrooms, kitchens.
15. Interview the owner or the person who appears to be in charge of the works or the business. Try to interview each person independently – joint interviews become difficult to manage with people talking over each other and the evidence of that conversation is of less weight in that case. Ask for full names, positions and addresses.
16. Ask questions of occupiers such as tenants, lodgers or boarders. If you think it is an unauthorised boarding house or hostel, ask questions relating to their length of stay, relationship to the owner, or how they are paying for the stay.
17. Try to obtain an admission from the person responsible. However, remember to caution those that you suspect of breaches. A caution may take the following form:

I must give you an official caution. I am an authorised officer under the Environmental Planning & Assessment Act 1979, and I have reason to believe that an offence has been committed under the Environmental Planning & Assessment Act 1979. Therefore, I must caution you that you do not have to say or do anything, but anything you do say or do may be taken down and used against you. Do you understand?

After the Inspection

18. Prepare your file notes. Ideally you should have handwritten notes typed up – it makes other people's jobs down the track easier but also gives you the chance to recall events while they are fresh in your mind.
19. If the person responsible, ie the owner, was not present at the first inspection, try to arrange an interview with them – it could be onsite or at the Council.

Prosecutions

20. The criminal law seeks to regulate and control society under the threat of punishment. By taking criminal proceedings, the Council acts in the capacity of a public prosecutor in bringing a person (or company) to Court to answer a breach of a specified law.
21. Commencing prosecutions for breaches of legislation enforced by local governments authorities is an essential tool in creating a "deterrence effect". In relation to planning and environmental offences, the Chief Judge of the Land and Environment Court has stated:

There is a need for the upholding of the integrity of the system of planning and development control. This system depends on persons taking steps to obey the law by ascertaining when development consent is required and then obtaining development consent before carrying out development:
Byron Shire Council v Fletcher [\[2005\] NSWLEC 706](#) (25 November 2005)

22. The same deterrence effect applies to other offences enforceable by Councils, whether they relate to the *Food Act*, the *Local Government Act*, or the *Roads Act*.

Discretion

23. Having sufficient evidence of an offence is not the sole criterion for prosecution. The investigator has a discretion in responding to unlawful activity. Just as Council has the power to prosecute, Council has the power not to prosecute. For private certifiers, the discretion may rest in whether to report the relevant works to the consent authority and/or issue a notice of intention to issue an order.
24. The overriding principle is that the discretion be exercised in the public interest, and in accordance with the legislation.
25. Other options for Councils, rather than prosecution, may be:
 - a. Commence civil enforcement proceedings in the Land and Environment Court (usually a last resort to compel compliance in stopping unauthorised land use or to obtain orders for demolition);

- b. Issue an order against the relevant person (ie s 121B of the EPA Act or s 124 of the LG Act);
- c. Issue an "on-the-spot" fine – see Schedule 5 of the *Environmental Planning and Assessment Regulations*;
- d. Invite the offender to "regularise" the offending works/use by lodging a development application, s 96 modification or applying for a building certificate;
- e. Issue formal warnings letters;
- f. Verbally caution the offender;
- g. Take no action.

Evidence for Court

26. The general points for the collection of evidence in a prosecution are:
- a. WHAT – you will need to present to the Court, in as much detail as possible, the facts involved in the breach;
 - b. WHEN – You should know precisely when the breach occurred, eg: when the building work was carried out, when the tree was cut down;
 - c. WHO – You must know who is responsible for the breach, including who directed work to be done in breach the law.
27. Most planning and environment offences Council's prosecute are "strict liability". This means that an intention to commit the offence is not a necessary element to be proven.
28. Sometimes, the most difficult task is gathering the evidence. Council does not have a general power to enter land to obtain evidence, particularly residential land. The Courts have viewed that this right of privacy is a fundamental human right. Therefore, evidence that is obtained by trespass cannot be used in Court to prove any allegation.

29. There are evidentiary provisions within the LG Act and the EPA Act that state that certain things do not need to be proven. Some of these include:

- a. the incorporation of the Council (there have been numerous Court cases in the last five years alleging that Councils have no power and are not recognised at law – most of them point to the failure of a 1988 referendum to recognise them in the Commonwealth Constitution);
- b. the boundaries of the local government area;
- c. that the General Manager, or an authorised officer (with appropriate delegations) can issue an order or commence proceedings;
- d. that a person was the owner or in possession of an animal;
- e. that a person was the owner or occupier of land.

30. Councils have certain powers to compel a person to attend an interview, or provide information and records, if they are suspected of having knowledge of a breach of the law. At that interview, the person(s) should be informed that the interview will be recorded and that they must not provide false information.

31. Whilst this power exists, Council should consider the fact that this is an extraordinary power that is contrary to ordinary principles of criminal law. The loss of the right to silence means that Council's officers need to exercise this power cautiously and balance the value of any benefit in the context of the offence.

32. Telephone conversations should not be electronically recorded. You should only make a file note of what was discussed as part of the conversation.

33. When considering the evidence to be presented in a prosecution, don't assume the Court knows anything. You need to have all the evidence to "paint the picture" for the Court. You can't say to the Court "isn't it obvious?".

General Comments

34. When investigating the potential breach, you need to consider what your role is:

- a. You may be a council officer, in which case, you're bound by aspects of the *Local Government Act*, and what the role of the Council is under other legislation such as the *Environmental Planning and Assessment Act*.
 - b. If you're a principal certifying authority, your role in respect of the EPA Act or obligation to the Building Professional Board.
35. The investigation should also be undertaken with fairness and natural justice must be afforded to the alleged offender. This includes:
- a. Informing the offender of the nature of the complaint (taking into account potentially anonymous complaints) and the substance as to any of Council's assertions;
 - b. Providing an opportunity to the alleged offender to state their case or have their representative do so. However, the alleged offender should be given a caution that anything they do or say may be used as evidence against them in Court proceedings;
 - c. Consideration of the circumstances with the submissions put forward by the alleged offender and make an unbiased decision as to the next course of action.