

TONBRIDGE & MALLING BOROUGH COUNCIL
STREET SCENE & ENVIRONMENT ADVISORY BOARD

07 November 2016

Report of the Director of Street Scene, Leisure and Technical Services

Part 1- Public

Matters for Recommendation to Cabinet - Non-Key Decision (Decision may be taken by the Cabinet Member)

1 THE UNAUTHORISED DEPOSIT OF WASTE (FIXED PENALTIES) REGULATIONS 2016

Summary

The Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016 came into force on 9th May 2016 and amended the Environment Protection Act 1990 (inserting S33ZA) whereby a fly tipping offence can be dealt with by means of a Fixed Penalty Notice (FPN).

1.1 Background

- 1.1.1 The aim of the new Regulations is to provide an efficient tool for tackling smaller scale and/or lower impact fly-tipping incidents. Enforcement options were previously limited to warnings, formal cautions or prosecutions.
- 1.1.2 Fly tipping is a very serious offence that can have far reaching consequences. In addition to the obvious visual blight on an area, it can be a hazard to road users, children and others in the community. It can make people feel less safe in the area and encourage further deposits and other anti-social activity.
- 1.1.3 Fly tipping is a difficult offence to prove. Most fly tips occur in remote locations and often at night, so Officers are usually limited to trying to find evidence within the waste and tracing its source. Even if the source is identifiable, often the waste carrier cannot always be tracked down, so successful enforcement action is rare and investigations can take a long time and utilise significant resource.
- 1.1.4 Although this Council has taken a number of successful prosecutions for waste offences, including fly tipping, we receive only a small amount of our costs back through the Courts system. For example, in 2015/16 we only managed to recoup investigative and clearance costs of £380, less than could be achieved through the service of one of the new FPNs.

- 1.1.5 Even when cases are successfully prosecuted in court, if the offender has limited income, only a proportion of costs (and sometimes none) will be awarded and the fines imposed are received by the CPS. This makes it more beneficial to the Council to serve FPNs for smaller offences as the penalty is received directly and provides some remuneration to partially offset the costs of dealing with the issue.
- 1.1.6 The following proposals have been developed in close liaison with Legal Services and have been informed by their considered advice on the new Regulations. They are also consistent with the existing Waste & Street Scene Enforcement Policy.

1.2 The Proposed Penalty

- 1.2.1 Some local authorities have previously resorted to using the littering FPN of around £80 for small fly tips to avoid the administrative burden and investigative costs of producing a case for prosecution. This was deemed to be a practicable solution but was not a proportionate penalty for such a serious crime.
- 1.2.2 The courts recognise the significance of fly tipping as a crime and can levy hefty sentences of up to £50,000 in Magistrates' Court and/or a 6 month custodial sentence or an unlimited fine and/or up to 5 years custody in Crown Court. This is compared to a maximum of £2,500 for a littering fine in Magistrates' Court.
- 1.2.3 The new regulations allow for the level of FPN to be set between £150 and £400. The existing legislation allows FPNs for littering to be set between £50 and £80. Our FPNs for littering have been set at the maximum of £80. In line with this, we feel it is appropriate to issue FPNs for fly tipping at the maximum level of £400. Other local authorities around the country, including Dartford BC, have also set the penalty at £400. Other Kent authorities are yet to set their level of fine, but have suggested through the Kent Resource Partnership that a consistent approach across Kent would be beneficial.
- 1.2.4 It is also proposed that no early payment discount is made available for these FPNs, despite a 40% discount currently being available for other FPN offences. This is purposeful; to distinguish fly tipping from lower level environmental crimes such as littering and dog fouling. It also reflects the level of resource and clearance & disposal costs associated with even minor fly tipping offences.

1.3 When the FPN will be offered

- 1.3.1 Unlike FPNs for littering and fouling which can be issued face-to-face at the time of the offence, FPNs for fly tipping will only be offered once the authorised officer has considered the case in detail, taking into account a number of elements including the offender's history, the impact on the environment and the community, and the motivation for the offence.
- 1.3.2 Guidance on when to issue the FPNs has been produced for officers, to ensure a consistent approach to decision making and for transparency.

1.4 Review of Current FPN Process

- 1.4.1 The process of determining our position for Fly Tipping FPNs prompted a review of the procedures for other waste-related FPNs currently issued.
- 1.4.2 To consolidate our more rigorous approach to fly tipping offences, it is also suggested that the current early repayment reductions for the following waste Duty of Care offences be removed as non-compliance with these requirements can be indicative of, and facilitate, the illegal deposit of waste:
- Failure to produce waste transfer notes as evidence of legitimate deposit of waste (s34 Environment Protection Act) is a technical offence often used when there is insufficient evidence linking an individual to the actual fly tip of waste;
 - Failure to produce authority to transport waste (S5/5B Control of Pollution Amendment Act 1989). It costs £154 to register as a waste carrier and this accountability helps authorities identify the person who removed waste if it is later tipped.
- 1.4.3 For both offences we currently issue FPNs of £300 that are reduced to £180 if paid within 10 days. For consistency of approach towards tackling fly tipping, it is proposed that this reduction be removed.
- 1.4.4 We also currently have an appeal process in place for all FPNs (littering, dog fouling and waste Duty of Care offences) so that individuals can dispute the service of an FPN.
- 1.4.5 We do not intend for there to be an appeal process for fly tipping FPNs due to the severity of the offence and as significant resources will be invested to gather sufficient evidence and satisfy the burden of proof before a fly tipping FPN is served. Therefore if a person wishes to decline the opportunity to settle the matter outside of court, we should proceed with prosecution in all cases.
- 1.4.6 We have evaluated the appeal process for all offences where we can issue FPNs and it is recommended that we remove the appeal mechanism completely for several reasons:
- It is not standard practice for Local Authorities to provide a formal means of appeal for Fixed Penalty Notices. Defra guidance mentions the appeal process but it is not a requirement. Sufficient evidence should be collected before an FPN is served to meet the burden of proof and render the majority of appeals obsolete;
 - In practise, most persons accused of an offence use their right to appeal to challenge the validity of the evidence we have gathered even if they do not dispute the actual offence.

- An appeal can be a lengthy process that involves the review of a case by a Solicitor, Street Scene Manager and the Director of Street Scene, Leisure & Technical Services. This is resource intensive and unnecessary when there is a complaints procedure already in place that could deal with genuine issues such as mistaken identity or mitigating circumstances. Disputes over the evidence gathered are most appropriately and expediently dealt with by the investigating officer or in court if they are unjustified.
- The covering letter sent with all FPNs contains contact details of the investigating officer and encourages the person accused to contact us if there is any query regarding the offence. Therefore individuals have a means of redress if there is an error in the service of an FPN. Additionally, all cases would be reviewed by the investigating officer and SSM before a prosecution case was compiled so there is already a mechanism to avoid us pursuing cases that are not robust.

1.5 Legal Implications

- 1.5.1 The proposals outlined above have been developed in close liaison with Legal Services and have been informed by their considered advice on the new Regulations. They are also consistent with the existing Waste & Street Scene Enforcement Policy.
- 1.5.2 It is not anticipated that the use of FPNs would affect the case load for our legal team- prosecutions for fly tipping will continue to be pursued wherever it is appropriate. It is intended that the FPN will be used as a more effective enforcement tool for the less serious cases where we would currently issue warnings and ask offenders to pay our clear up and disposal costs.
- 1.5.3 If the FPN is unpaid, we would seek to prosecute and publicise successful cases as a deterrent to further offences and to maintain our usual high payment rates.
- 1.5.4 In practice, a fly tipping investigation normally necessitates some communication with the offender and allows for an officer to assess their attitude towards the offence. As a result, FPNs are unlikely to be offered to an individual who we feel is unlikely to pay it, or if the alleged offender disputes the process or outcome of the investigation

1.6 Financial and Value for Money Considerations

- 1.6.1 The issuing of FPNs in certain cases for fly tipping offences will ensure that when paid the income comes direct to the Council. This can then be used to offset some of the costs of clearance and investigation. The adoption of the maximum level of fine and the removal of the early-payment reduction for related waste offences reflects the seriousness of these offences and the sentencing guidelines for them.

1.7 Risk Assessment

- 1.7.1 The failure to provide effective and efficient enforcement could result in criticism from residents and impinges directly on their view of the Council and their satisfaction with services delivered.

1.8 Equality Impact Assessment

- 1.8.1 The decisions recommended through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on end users.

1.9 Recommendations

- 1.9.1 It is **RECOMMENDED** to Cabinet that, with immediate effect, it:
- 1.9.2 **APPROVES** that delegated authority be granted to the Director of Street Scene, Leisure & Technical Services under the Environmental Protection Act 1990 as amended by the Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016 to make appropriate arrangements for the issue of FPNs for fly tips;
- 1.9.3 **SUPPORTS** the penalty charge of £400 for unauthorised deposits of waste with no early payment reduction and no appeal process;
- 1.9.4 **SUPPORTS** the removal of early payment reductions for Duty of Care offences often associated with fly tipping;
- 1.9.5 **AGREES** to the cessation of the appeal process for all offences where FPNs are served.

The Director of Street Scene, Leisure and Technical Services confirms that the proposals contained in the recommendation(s), if approved, will fall within the Council's Budget and Policy Framework.

Background papers:

Nil

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