

**TONBRIDGE & MALLING BOROUGH COUNCIL**

**COMMUNITY AND ENVIRONMENT SCRUTINY SELECT COMMITTEE**

**19 July 2023**

**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 FIXED PENALTY NOTICES FOR WASTE DUTY OF CARE OFFENCES**

**This report sets out details of the legal “duty of care” of householders to ensure that they only give their waste to a licensed waste carrier. It also asks Members to consider the level of Fixed Penalty Notices for this offence and whether this should be altered from the current legal default level.**

**1.1 Background**

1.1.1 Under the current legislation relating to waste, householders are required to take reasonable measures to ensure that waste produced on their property is passed onto an ‘authorised person’. An authorised person is defined in legislation but is normally a local authority (usually for most household waste) or a registered waste carrier.

1.1.2 A householder’s legal duty is set out in the ‘Waste Duty of Care Code of Practice’ issued by DEFRA. Failure to comply with the legal obligations is a criminal offence and the primary circumstances where a householder would be deemed to have done so are:

- where an individual passes waste to an unauthorised waste carrier, and;
- where fly-tipped waste is traced back to an individual who is found to have failed to take reasonable steps to ensure that they transferred the waste to an authorised waste carrier.

1.1.3 Those found breaching their Duty of Care obligations face prosecution and a fine of up to £5,000 in a Magistrates Court. Prior to 2018, the only option for local authorities to address breaches of the Duty of Care Regulations was to take the offender to court. However, revised Regulations were introduced in 2018 which allows Fixed Penalty Notices (FPNs) to be issued as an alternative to prosecution. FPNs allow a more proportionate approach to deal with householders who breach their duty of care and provide an opportunity for an individual to discharge all liability for the Duty of Care offence by payment of a financial penalty.

## 1.2 Level of Fixed Penalty Notice

1.2.1 Penalties for offences relating to breaches of Household Duty of Care obligations are required to be set within limits set by legislation as per the table below:

Offence	Default penalty	Minimum Penalty	Maximum Penalty	Minimum Discounted Penalty (10 days)
Household Waste Duty of Care	£200	£150	£400	£120

1.2.2 Members will note that legislation sets a default penalty level for Household Duty of Care offences of £200 and this can be currently applied in TMBC. Members are asked to consider whether the default penalty level of £200 should be retained, or whether an alternative level should be set within the limits set by legislation.

1.2.3 For further context, the table below shows the current FPN levels for other relevant offences that TMBC have adopted.

Offence	Maximum Penalty	Discounted Penalty (10 days)
Fly Tipping	£400	n/a
Waste Carrier Offences	£300	n/a
Business Waste Duty of Care	£300	n/a
Litter	£150	£100

It is worth noting that this Council has previously adopted the maximum level available within the current legislation for fly tipping, waste carrier & business waste Duty of Care offences, with no discounted penalty for those offences. The maximum penalty for littering offences has also been adopted, but with a discounted penalty for early payment.

1.2.4 In considering the level of FPN for Household Duty of Care, the levels set by other Kents Authorities is also shown below:

Local Authority	Duty of Care FPN	Early Payment
Ashford BC	£300	n/a

Canterbury CC	£300	£180
Dartford BC	£300	n/a
Dover DC	£200	n/a
Gravesham BC	£400	£250
Maidstone BC	£300	n/a
Thanet DC	£400	£300
Tunbridge Wells BC	£400	n/a

- 1.2.5 The FPN will only be offered for breaches of duty of care once an authorised officer has considered the case in detail, including the alleged offender’s history of previous offences; the impact on the environment & community; motivation for the offence; and the impact of cleaning up the resultant fly tipped waste. Guidance on when to issue these FPNs will be produced, and officers trained to ensure a consistent approach to decision making & for transparency.

### 1.3 Awareness of Duty of Care obligations

- 1.3.1 Whilst the duty of care Regulations provide for formal enforcement action to be taken in cases of non-compliance, this is not deemed to be the primary intention for the Legislation. Instead, they provide an opportunity for the Council to work with householders to help ensure that waste is dealt with properly and responsibly and does not get into the hands of unauthorised waste carriers, or other irresponsible individuals, who may then resort to fly-tipping.
- 1.3.2 Waste is often not fly-tipped by the individual that produced it but by the person they used to take it away. Some people pose as legitimate waste carriers and then fly-tip waste and there are incidences of householders paying a “man in a van” to take away their unwanted waste only for it to be fly-tipped or disposed of at an unlicensed site. Reducing the flow of household waste to unauthorised carriers or irresponsible individuals will help the Council in its efforts to reduce incidents of fly-tipping or other illegal waste disposal practices.
- 1.3.3 It is likely that some householders will be unaware of their legal obligations under the ‘Duty of Care’ Regulations or of the consequences of failing to take reasonable steps to determine the person that took their waste was authorised to do so. To this end, whilst enforcement action would be considered where appropriate, the Council will aim to reduce breaches of the household waste duty of care by ensuring that householders are fully aware of their legal obligations. There are an increasing number of individuals offering services to take away waste and provide ‘tip runs’, particularly on social media, and it is vitally important

that the Council does all it can to ensure that householders are fully aware of their duty of care requirements to help them avoid falling victim to fly tippers and running the risk of action being taken against them as result.

- 1.3.4 Over recent years, the Council, working with other Kent councils through the Kent Resource Partnership, have run a number of campaigns aimed at increasing householders' awareness of their Duty of Care responsibilities, and the potential consequences of not taking appropriate action when having waste taken away. Even an authorised waste carrier may still fly-tip waste so it is important that individuals gather as much detail as possible about a person who is taking their waste away and where it is being disposed of, not only to meet their legal obligations but also because if the waste is found fly-tipped the information can be used to help the Council identify the offender.
- 1.3.5 Officers will take the opportunity to further inform householders of their duty of care obligations in a number of ways, including social media, advertising sites and placing information on the Council's website.
- 1.3.6 Information provided will advise householders who are looking to use a private contractor - or any other person - to remove waste from their property, of how they can meet their legal obligations by carrying out checks beforehand to establish that they are a genuine and reputable company or individual. Actions that householders will be advised to perform will include:
- ensuring that the individual or company is a registered waste carrier and making a note of their waste carrier number (this can be done by asking to see their waste carrier licence issued by the Environment Agency or checking online on the Environment Agency website);
  - asking the waste carrier to provide their full address and telephone number;
  - asking for details of where they are proposing to take their waste;
  - recording the registration number of any vehicle removing waste from their home; and
  - not being afraid to ask questions as a reputable collector will happily provide any information requested.
- 1.3.7 However, it should be noted that whilst the Council will, within available resources, make best endeavours raise awareness of this issue with householders, absence of knowledge is not a defence for individuals who may commit an offence and be served with an FPN.

## **1.4 Options**

- 1.4.1 Having considered the relevant legislation and as outlined above, there are a number of options available to Members:

- 1) not to set a local level for Household Duty of Care FPNs and use the default level of £200 as set by the legislation;
  - 2) set a local level for Household Duty of Care FPNs at the minimum amount of £180 as set by the legislation;
  - 3) set a local level for Household Duty of Care FPNs at the maximum amount of £400 as set by the legislation;
  - 4) set a local level for Household Duty of Care FPNs at a level in between the minimum & maximum, such as £300 to be in line with the waste carrier and business Duty of Care offences;
  - 5) in addition to one of the above, set an early payment discounted level.
- 1.4.2 Considering that fact that all other relevant FPN levels have been agreed at the maximum legal amount, consideration could be given to Option 3 above though potentially with the addition of an early payment discounted level as highlighted at Option 5.

## **1.5 Legal Implications**

- 1.5.1 The minimum, maximum and default levels of fixed penalties are prescribed in legislation. The Environmental Protection Act 1990 (as amended) allows waste enforcement authorities such as the Council to issue fixed penalty notices to suspected offenders as an alternative to being prosecuted for an offence under the Act.
- 1.5.2 The fixed penalty payable to a waste enforcement authority such as the Council is to be an amount specified by that authority. Unless the enforcement authority specifies a specific amount, the fixed penalty amount shall be £200. The fixed penalty amount specified by enforcement authorities must not be less than £150 and not more than £400.
- 1.5.3 If a person issued with a fixed penalty notice under the 1990 Act does not pay it by the time for payment specified in the notice then they may be prosecuted for the littering offence in the Magistrates' Court or, depending upon the seriousness of the offending, the Crown Court. The maximum fine upon conviction in both Courts is potentially unlimited.
- 1.5.4 There is no statutory duty to consult with the public in relation to the issue of the level of fixed penalty notices issued under section 34ZA of the Environmental Protection Act 1990. There is also no legitimate expectation that waste collection authorities will conduct a non-statutory consultation with the public, on the basis that this is a matter related to a waste collection authority's regulatory enforcement functions. As a result, there is no risk that the requested decision will be subject to a successful challenge by way of judicial review.

- 1.5.5 It is not anticipated that the use of FPNs would affect the case load for our legal team, although prosecutions for breaches of duty of care 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.
- 1.5.6 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.
- 1.5.7 In practice, a breach of household duty of care investigation normally necessitates some communication with the offender and allows for an officer to assess their attitude towards the offence and gain further evidence of the fly tipper. 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 Any FPNs issued for Household Duty of Care offences will result in additional income to the Council, but as the Council does not yet issue such FPNs, the variance to existing income cannot be calculated.
- 1.6.2 The behaviour change that is expected to be achieved through enforcing this offence should result in a reduction in the number of FPNs that could be issued following their initial introduction.

## **1.7 Risk Assessment**

- 1.7.1 There may be an initial element of reputational risk when the FPNs are first introduced, but the communication elements detailed in 1.3 above will help to mitigate this risk somewhat. However, it should be noted that whilst the Council will, within available resources, make best endeavours raise awareness of this issue with householders, absence of knowledge is not a defence for individuals who may commit an offence and be served with an FPN.
- 1.7.2 Setting the FPN level for duty of care offences at £400 would mean that a householder who failed to comply with their legal obligations would face the same financial penalty as an individual who intentionally committed a fly tipping offence. Some may perceive the latter to be a more serious crime than a Duty of Care offence.
- 1.7.3 Setting the FPN level at the highest allowable amount would however send a message to strongly encourage householders to ensure that they meet their legal obligations. It would also mirror the approach taken to other relevant FPN levels already adopted by the Council.
- 1.7.4 Setting the FPN level too low could result in the financial penalty for non-compliance being cheaper than the costs of paying an unauthorised individual to remove waste, with costs then potentially being incurred by the Council or private

landowners for clearing waste that may become fly tipped. Setting the FPN level too low may also be seen by some that the Council is not providing enough of a deterrent to those who are aware of their legal obligations but choose to deliberately fail to comply with them.

## **1.8 Policy Considerations**

1.8.1 Community, Procurement and Crime & Disorder Reduction.

1.8.2 The enforcement activities carried out by the Waste Services team and its third party enforcement resource are compliant with the Council's Corporate Enforcement Policy and with the Waste & Street Scene Enforcement Policy, as well as with Government guidance on litter & fly tipping investigation and enforcement.

## **1.9 Recommendations**

1.9.1 The Committee is requested to consider this report and the options given at 1.4.1 above, and to make recommendations to Cabinet on the setting of the level of Fixed Penalty Notices for Household Duty of Care offences.

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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