

TONBRIDGE & MALLING BOROUGH COUNCIL
COMMUNITIES AND ENVIRONMENT SCRUTINY SELECT COMMITTEE

07 February 2024

Report of the Director of Street Scene, Leisure & 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 – LITTERING & FLY TIPPING OFFENCES

1.1 Summary

1.1.1 This report sets out proposed Fixed Penalty Notice levels for littering and fly tipping for this Committee to consider and make recommendations to Cabinet.

1.2 Background

1.2.1 The Councils' Waste Services team are responsible for the investigation & enforcement of waste-related offences including littering & fly tipping, waste carrier offences and duty of care breaches. Enforcement of waste-related offences can take various forms from a warning letter to criminal prosecution. The investigating officer will determine the action to be taken based on the evidence obtained, the impact of the offence, repeated or multiple offences and any mitigating circumstances.

1.2.2 For littering & fly tipping offences, this work is currently carried out by a third party, National Enforcement Solutions (NES), on a trial basis. Originally in place for 12 months from October 2022, the trial has been extended in order for officers to be able to procure a longer-term solution through a formal contract tender procurement process, as considered by this Committee at its meeting of 14 June last year and as subsequently agreed by Cabinet.

1.2.3 Fixed Penalty Notices offer offenders an alternative to criminal prosecution and pay a 'fine' instead. As such, in the first instance FPNs are generally issued to offenders for littering offences and for small to medium scale fly tips where sufficient evidence can be obtained. Currently, payments for FPNs are made to NES who retain the FPN income. Under the proposed new contract, a proportion of that income will be paid to the Council to be ring-fenced for enforcement & cleansing services.

1.2.4 In July 2023, as part of its Anti-Social Behaviour Action Plan, the UK Government laid down a Statutory Instrument to increase the levels of Fixed Penalty Notices

(FPNs) for littering & fly tipping offences. Supporting guidance issued subsequently confirms that fees for FPNs should be set at an appropriate level to reflect local circumstances, including local ability to pay. The maximum level at which councils can set littering FPNs has been increased from £150 to £500, and for fly tipping offences the maximum has been raised from £400 to £1,000. In its Anti-Social Behaviour Action Plan, the Government has stated that:

“...taking proportionate & effective enforcement action against people who intentionally or carelessly damage their local environment is a practical step authorities can take to change behaviour and deter others from offending... Local authorities will have the freedom to set the rates that offenders should pay, within the limits above. Revenue from fines will be reinvested locally in clean up & enforcement – meaning perpetrators pay for local councils to continue toughening their approach in future years.”

1.3 Review of Current Fixed Penalty Notice Levels

- 1.3.1 This Council’s current level of FPNs for littering & fly tipping are set out below. There is currently a reduced level for early payment of FPNs for littering, but no reduction for fly tipping offences.

| Offence | Early payment amount | Full amount |
|-------------|----------------------|-------------|
| Littering | £100 | £150 |
| Fly tipping | n/a | £400 |

- 1.3.2 These levels were set at the previous maximum amounts as set by Government, prior to the potential levels as introduced by their Statutory Instrument of July 2023. Since the start of the current trial with NES and up to 20 December 2023, 3,319 FPNs have been issued for littering offences, and 118 for fly tipping & other waste offences. Current payment levels of 78% are being achieved, with the majority (81%) of paid littering FPNs being paid early at the lower level of £100.
- 1.3.3 In July, the Government laid down the Statutory Instrument to increase a number of FPNs, enabling councils to consider the charges they currently make and increase them as appropriate, bearing in mind the subsequent guidance that fees for FPNs should be set at an appropriate level to reflect local circumstances, including local ability to pay. The new maximum (and minimum) levels of FPNs available to councils for littering & fly tipping offences are:

| Offence | Maximum | Minimum | Minimum discounted (early payment) |
|----------------|----------------|----------------|---|
| Littering | £500 | £65 | £50 |
| Fly tipping | £1,000 | £150 | £120 |

1.3.4 Officers have carried out a survey of Kent councils – including Medway Council - as to their current levels of FPNs following the Government’s Statutory Instrument & associated guidance. These are set out below:

| Council | Littering | Fly Tipping |
|------------------------|------------------|--------------------|
| Ashford BC | £75 | £400 |
| Canterbury CC | £200 | £1,000 |
| Dartford BC | £75 | £400 |
| Dover DC | £100 | £400 |
| Folkestone & Hythe DC | £100 | £300 |
| Gravesham BC | £150 | £400 |
| Maidstone BC | £500 | £1,000 |
| Medway | £150 | £400 |
| Sevenoaks | £100 | £400 |
| Swale BC | £150 | £400 |
| Thanet DC | £100 | £400 |
| Tonbridge & Malling BC | £150 | £400 |
| Tunbridge Wells BC | £150 | £400 |

1.3.5 It can be seen that, although the levels vary significantly between lowest & highest, only Maidstone BC have adopted the revised maximums for both littering & fly tipping, with Canterbury CC adopting the maximum for fly tipping only. However, Maidstone has adopted a ‘sliding scale’ approach with two levels for both offences. First or small-scale incidents are issued at a lower level for both offences, with the maximum levels of penalties being used for repeated littering

offences and for multiple fly tipping offences by the same individuals. This approach is consistent with this council's own approach to decision-making on actions to be taken on waste-related offences, based on the evidence obtained, the impact of the offence, repeated or multiple offences and any mitigating circumstances. This in turn complies with TMBC's Corporate Enforcement Policy.

| Maidstone BC - Offence | Level 1 | Level 2 |
|-------------------------------|--|---|
| Littering | Single Item: £250 Early payment £200 | Repeat offence; multiple items; rural/high speed roads (difficult to clean) £500 |
| Fly tipping | Single item/black sack (excluding hazardous) £600 Early payment £520 | Multiple items; multiple locations; hazardous waste £1,000 |

1.3.6 NES also report that on their contracts with councils elsewhere, similar approaches have been adopted. This is due to the fact that much higher FPN charges tend to result in a higher proportion of non-payment, and a resulting higher requirement in resources & costs pursuing cases as prosecutions through the courts. Anecdotal evidence also indicates that if such cases do get to court, often the resulting fines are as low – or even lower – than the level of the original FPN. This is generally due to the fact that court-levied fines are determined on affordability, which the Government advise councils to take into account when setting their own FPN levels in the first place.

1.4 Options

1.4.1 Option 1:

The Council could decide to retain the current FPN levels and not increase them following the Government's changes to the higher maximum levels available to councils. This would keep the Council in line with a number of other Kent councils but would not take advantage of the opportunity for an increased deterrent for these offences offered by the government's Statutory Instrument. Nor would it necessarily reflect Members' previously adopted stance of taking a zero-tolerance approach to littering & fly tipping in the Borough. However, this would comply with the Government's guidance on affordability of FPNs.

1.4.2 Option 2:

The Council could decide to increase the FPN levels to the maximum level allowed within the Government's Statutory Instrument. This option would raise the FPN level for every detected littering offence to £500 and for fly tipping to £1,000. However, there is significant risk that this would result in a much higher proportion of FPNs not being paid, leading to higher costs & resource implications arising from the resulting increase in prosecutions being taken to court. As detailed at 1.3.6 above, court-levied fines are determined on affordability of the offender, so would likely result in being lower than the original FPN. If prosecutions are not sought for non-payment, the FPN process would be undermined and lead to further increases in non-payment. This approach may also not comply with the Government's guidance on affordability of FPNs, particularly in relation to littering, nor the Council's own Corporate Enforcement Policy.

1.4.3 Option 3:

The Council could decide to increase FPN levels to a middle value (such as £300 for littering and £700 for fly tipping) which may act as a further deterrent for both offences, whilst potentially remaining more affordable in order to try to maximise payments received and reduce the risk of increased prosecutions. This could be increased still further at a later date once the impact of the changes – both on the number of detected offences and the rate of non-payment - had been assessed. This approach would comply with the Government's guidance on affordability, acting as a halfway house between current charges and the Government's new maximums.

1.4.4 Option 4:

The Council could decide to create two levels of FPN charges for littering, similar to that adopted by Maidstone BC. This would require two levels of FPN to be created for littering but retain only one level for fly tipping which can be considered to be the more serious offence. Littering offences would be split into those incidents involving small scale/single items where it was a first detected offence for the individual and those where larger and multiple items had been littered and/or where it was a repeated offence by the same individual. The latter would incur the maximum of £500, whereas the former would incur a charge of £250 reducing to £125 paid early. Fly tipping cases would be retained as a one-level offence due to the seriousness, impact on the environment and most likely financial benefit obtained through illegal disposal. This offence would incur the maximum of £1,000 with no early payment reduction.

| Offence | Level 1 | Level 2 |
|----------------|---------------------------------|---|
| Littering | Small Scale/Single Item £250 | Repeat offence; multiple items; rural/high speed roads (difficult to clean) |

| | | |
|-------------|--------------------|--------------------------------------|
| | Early payment £125 | £500 No early payment reduction |
| Fly tipping | n/a | £1,000 No early payment reduction |

This option would ensure that the maximum deterrent was available to the Council whilst retaining the ability to take into account the severity of the offence; impact on the environment; and the relative cost to the taxpayer of clearing up the litter/fly tip. Being able to offer two levels of FPNs for littering offences would also ensure that the consequences are proportionate to the offence, as per the Council's Corporate Enforcement Policy.

Offering early payment options for Level 1 littering offences also helps with adhering to the Government's guidance on affordability of the penalties, encourages early payment of the FPNs and reduces the necessity of having to pursue late payments and ultimately take littering prosecution cases through the court system.

Should Option 4 be selected and a two-Level approach be recommended the Council will work with the incoming contractor and Legal Services to establish the precise details of what would be considered Level 1 and Level 2 for littering.

1.4.5 Should the Council adopt any of the options outlined above, with the exception of Option 1, changes will be needed for to the current finance & administration systems operated by NES. Should Option 4 be adopted, these will require significant changes to how the littering FPNs are administered & monitored, and current policies revised to ensure that the two-tier system would be delivered in a consistent & transparent way, particularly in the event of a challenge or criminal prosecution cases being taken forward. As such, it is recommended that should any of the options – apart from Option 1 – be adopted, the changes should be introduced at the beginning of the new formal contract arrangements, as these levels can be built into the tender documents.

1.4.6 Should the Council adopt any of the options outlined above, again with the exception of Option 1, promotional budgets would be required for changing existing signage and other publicity materials as required to ensure that awareness is raised of the revised FPN levels in order to act as a further deterrent. New signage would initially be installed at known litter & fly tipping 'hot spots' using the intelligence gathered by the Waste Services team and by NES during their trial. Further signage would be produced for installing reactively at any new 'hot spots' that may become apparent. Once the new formal contract is in

place, it is expected that the costs of signage & other publicity initiatives would be paid for from income received from the new contractor under the 'income-share' arrangements.

- 1.4.7 Taking all the options into account it is the view of Officers that option 4 should be supported.

1.5 Legal Implications

- 1.5.1 Fixed Penalty Notices are available for a range of offences, in particular – for the purposes of the report – the Environmental Protection Act 1990. There is no statutory requirement to have a Fixed Penalty Notice Policy, but doing so supports consistency & transparency in decision making. This Council can set its own FPN amounts within a specified range set out in the relevant legislation, which were amended this year by the Environmental Offences (Fixed Penalty Notices) (Amendment) (England) Regulations 2023.

- 1.5.2 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 function. As a result, there is minimal risk of a successful challenge by way of judicial review.

1.6 Financial and Value for Money Considerations

- 1.6.1 The behaviour change that is expected to be achieved through increasing the current level of FPNs for littering & fly tipping offences may result in a reduction in the number of FPNs that could be issued following the increase. This may impact on any future income stream the Council receives through the proposed formal enforcement contract service. Currently all income received from FPNs issued by NES is retained by them, so any risk associated with a potential drop in income currently lies with NES rather than the Council. This will not be the case with the proposed new contract.

- 1.6.2 The costs of additional signage referred to at 1.4.6, should one of Options 2 to 4 (or a combination) be adopted, would be paid for from existing Waste & Street Scene budgets, and/or from income received from the new formal enforcement contract.

1.7 Risk Assessment

- 1.7.1 The risks associated with each of the four options outlined in this report are provided at 1.4 above.
- 1.7.2 Setting the FPN level at the highest allowable amount may send a message to strongly encourage potential offenders to ensure that they do not offend. It would

also mirror the approach taken to the FPN levels for waste-related offences already adopted by the Council. However, this may also result in much higher proportion of FPNs not being paid, resulting in potentially higher costs for prosecutions.

- 1.7.3 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 choose to commit littering & fly tipping offences.

1.8 Equality Impact Assessment

- 1.8.1 The issues discussed through this paper have a remote or low relevance to the substance of the Equality Act. There is no perceived impact on residents.

1.9 Policy Considerations

- 1.9.1 Community and Crime & Disorder Reduction - 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.
- 1.9.2 Climate Change - The recommendations in this report are considered to impact positively on the Council's Climate Change Action Plan, in respect of reducing levels of potentially pollutant material escaping into the natural environment.

1.10 Recommendations

- 1.10.1 The Committee is requested to consider the review of current Fixed Penalty Notice levels for littering & fly tipping offences, the options identified in the report and make recommendations to the Cabinet.

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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