

**LICENSING AND SAFETY COMMITTEE
2 OCTOBER 2008**

**ENFORCEMENT POLICY
(Chief Officer: Environment and Public Protection)**

1 PURPOSE OF DECISION

- 1.1 The nature of the Division's work is such that it must have in place an Enforcement Policy that sets out the procedure that will be adopted when seeking regulatory compliance.
- 1.2 The provisions of the Regulatory Enforcement & Sanctions Act 2008 have introduced a new Regulators Compliance Code which is statutory guidance. Our current Enforcement Policy must reflect the provisions within that guidance. Attached as Appendix A is a proposed revised Enforcement Policy. The Policy is brought to this Committee as part of the consultation process and reflecting the nature of the work of the Committee. The scope of the Policy requires it to be adopted by the Executive.

2 RECOMMENDATION

- 2.1 That the Committee considers the draft Enforcement Policy as set out in Appendix A prior to formal adoption.**

3 ADVICE RECEIVED FROM STATUTORY AND OTHER OFFICERS

Borough Solicitor

- 3.1 The relevant legal provisions are contained within the main body of the report and policy.

Borough Treasurer

- 3.2 There are no financial implications arising from the recommendation in this report.

Equalities Impact Assessment

- 3.3 The Policy seeks to ensure that any enforcement action is appropriate to the circumstances and that decisions are taken in a fair, equitable and consistent manner.

Strategic Risk Management Issues

- 3.4 There are no strategic risk management issues arising from the adoption of this Policy.

4 SUPPORTING INFORMATION

- 4.1 The Council is required to have an Enforcement Policy for its Regulatory Services. The current policy was adopted in February 2005 and is due for review. With the introduction of new legislation and guidance the timing of the review has been brought forward and a totally new document produced to reflect the mandatory guidance.
- 4.2 The Policy will need to go through the Executive prior to adoption but as part of the process it was considered appropriate to give this Committee the opportunity to comment. The Committee has responsibility for regulatory functions relating to licensing and health and safety, and therefore the Enforcement Policy impacts upon those functions.
- 4.3 The purpose of such a Policy is to set the framework for decisions when evidence of non-compliance with legislative provisions is found. It lays down the principles that will be applied and the matters that will be taken into consideration within the decision-making process. Officers are given varying degrees of authority and a management framework within which to act. In so doing they have constant regard to the principles in the Policy.
- 4.4 In circumstances when formal action such as a prosecution is taken it is not uncommon for a defendant to have due regard to the Policy when formulating any defence. They will often look to satisfy themselves that the decision-making process was in accordance with that policy and legal provisions impacting upon the policy. It is possible for a defendant to argue an abuse of process if decisions were not taken in accordance with an Enforcement Policy. This can result in a case being dismissed by the Courts before a trial has started. Additionally where for example, a licence is suspended or revoked and there is an appeal procedure available, if that revocation or suspension is not in accordance with our policy, this may be grounds for the decision to be overturned by a Court.

Background Papers

Regulators Compliance Code
Code for Crown Prosecutors
Human Rights Act

Contact for further information

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ENVIRONMENT & PUBLIC PROTECTION

ENFORCEMENT POLICY 2008

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EXECUTIVE SUMMARY

This Enforcement Policy provides guidance on the range of options that are available to the Council in relation to the approach to be taken in respect to the application of the legislative provisions enforced by Bracknell Forest Council's Environment and Public Protection Division.

The Council's primary objective is to achieve regulatory compliance. We recognise that prevention is better than cure, but where circumstances warrant formal action then we will do so. There is a wide range of options available to us as an enforcement agency, with action through the courts being the most serious. We will always look to enforce legislation in a way that is relevant and proportionate to the offence.

The Policy is built around a process of escalation.

Prosecutions will be related to risk, serious nuisance or other similar situations affecting any individual or the environment and will not be used as a punitive response to minor breaches.

The options available to us include:

- No Action
- Informal Action and Advice
- Fixed Penalty Notices
- Penalty Charge Notices
- Formal Notice
- Forfeiture Proceedings
- Seizure of Goods/Equipment
- Injunctive Actions
- Refusal/Revocation of a Licence
- Simple Caution
- Prosecution
- Proceeds of Crime Applications
- Restorative Approach

The Policy is designed to give clarity as to the Council's objectives and the methods for achieving compliance and the criteria that will be considered when deciding what the most appropriate response is to a breach of legislation.

The Policy seeks to ensure that there is a decision making process that has due regard to current Statutory Guidance and Codes of Practice, particularly the Regulators' Compliance Code, the Code for Crown Prosecutors and the Human Rights Act.

1 INTRODUCTION

1.1 Fair and effective enforcement is essential to protect the health and safety and economic interests of the public, businesses and the environment. Decisions about enforcement action and in particular the decision to prosecute have serious implications for all involved. Regulatory Services apply this Policy to ensure that:

- Decisions about enforcement action are fair, proportionate and consistent
- Officers apply current Government guidance and relevant Codes of Practice
- Everyone understands the principles that are applied when enforcement action is considered.

2 LEGAL STATUS OF THE ENFORCEMENT POLICY

2.1 The approved this policy on

2.2 This Policy is intended to provide general guidance for officers, businesses, consumers and the public as regards the approach that will normally be taken in relation to the enforcement of the relevant statutory provisions. It does not fetter the discretion of the Council to take legal proceedings where this is considered to be in the public interest.

3 SCOPE AND MEANING OF 'ENFORCEMENT'

3.1 This Policy applies to all the legislation enforced by Officers of the Environment and Public Protection Division.

3.2 'Enforcement' includes any action taken by officers aimed at ensuring that individuals or businesses comply with the law. This is not limited to formal enforcement action such as prosecution.

3.3 Officers will seek to raise awareness and increase compliance levels by making public details of evidence of unlawful practice and any legal action taken where in their opinion it is appropriate to do so.

4 GENERAL PRINCIPLES

4.1 Prevention is better than cure and the regulatory role therefore involves actively working with businesses to advise on, and promote opportunities to effect compliance.

4.2 Where formal action is considered necessary each case will be considered on its own merits. However, there are general principles that apply to the way each case must be approached. These are set out in this Policy and in the Regulators Compliance Code.

For more information about the Regulators Compliance Code visit:

http://bre.berr.gov.uk/regulation/reform/enforcement_concordat/index.asp

4.3 Every effort will be made to ensure that Enforcement decisions will be taken in a fair, independent and objective way. They will not be influenced by issues such as ethnicity, national origin, gender, religious beliefs, political views or the sexual orientation of the suspect, victim, witness or offender. Such decisions will also not be affected by improper or undue pressure from any source.

4.4 In making decisions we will take into account the views of any victim, injured party or relevant person to establish the nature and extent of any harm or loss and its significance in making the decision to take formal action.

- 4.5 The Policy is intended to help promote efficient and effective approaches to regulatory inspection and enforcement, which improve regulatory outcomes without imposing unnecessary burdens. This is in accordance with the Regulator's Compliance Code.
- 4.6 In certain instances it may be concluded that a provision in the Code is either not relevant or is outweighed by another provision. We will ensure that any decision to depart from the Code will be properly reasoned, based on material evidence and documented.

5 NOTIFYING ALLEGED OFFENDERS

- 5.1 Where information is received (for example from a complainant) that may lead to enforcement action against a business or individual, we will notify that business or individual as soon as is practicable of any intended enforcement action. The exception to this is where it is considered that doing so could impede an investigation or pose a safety risk to those concerned or the general public.
- 5.2 During the progression of enforcement investigations/actions, business proprietors or individuals and witnesses will be kept informed of progress. Confidentiality of witnesses will be maintained and personal information about individuals will only be released to a Court when required and/or in accordance with the Data Protection Act 1998.

6 DECIDING WHAT LEVEL OF ENFORCEMENT ACTION IS APPROPRIATE

A number of factors are considered when determining what enforcement action to take:

6.1 Levels of enforcement action:

- 6.1.1 There are a large number of potential enforcement options. The level of the action taken varies from no action through to proceedings in Court. Examples of main types of action that can be considered are shown below:

- No action
- Informal Action and Advice
- Fixed Penalty Notices
- Penalty Charge Notices
- Formal Notice
- Forfeiture Proceedings
- Seizure of Goods/Equipment
- Injunctive Actions
- Refusal, revocation or suspension of a licence
- Simple Caution
- Prosecution
- Restorative Approach

- 6.1.2 In assessing what enforcement action is necessary and proportionate, consideration will be given to:

- The seriousness of compliance failure
- The business's past performance and its current practice
- The risks being controlled
- Legal, official or professional guidance
- Local priorities of the Council

6.1.3 Where the law has been contravened, there is a range of enforcement options available to seek compliance with the law. Under normal circumstances, a process of escalation will be used until compliance is reached. Exceptions would be where there is a serious risk to public safety or the environment or the offences have been committed deliberately, negligently, involve deception, or where there is significant economic detriment.

6.2 **No Action**

6.2.1 In certain circumstances, contraventions of the law may not warrant any action. This can be where the cost of compliance to the offender outweighs the detrimental impact of the contravention, or the cost of the required enforcement action to the Council outweighs the detrimental impact of the contravention on the community. A decision of *no action* may also be taken where formal enforcement is inappropriate in the circumstances, such as where a trader has ceased to trade, or the offender is elderly and frail and formal action would seriously damage their wellbeing. Such decisions will take into account the public interest principle and in such cases we will advise the offender of the reasons for taking no action.

6.3 **Informal Action and Advice**

6.3.1 For minor breaches of the law we may give verbal or written advice. We will clearly identify any contraventions of the law and give advice on how to put them right, including a deadline by which this must be done. The time allowed will be reasonable, and take into account the seriousness of the contravention and the implications of the non-compliance.

6.3.2 Sometimes we will advise offenders about 'good practice', but we will clearly distinguish between what they *must do* to comply with the law and what is advice only.

6.4 **Fixed Penalty Notices**

6.4.1 Certain offences are subject to fixed penalty notices (FPNs). An FPN is recognised as a low level enforcement tool and there is no criminal record for the defendant. Where legislation permits an offence to be dealt with by way of an FPN, we may choose to administer an FPN on a first occasion without issuing a warning.

6.5 **Penalty Charge Notices**

6.5.1 Penalty Charge Notices (PCNs) are prescribed by certain legislation as a method of enforcement by which the offender pays an amount of money to the enforcer in recognition of the breach. Failure to pay the PCN will result in the offender being pursued in the County Court for non-payment of the debt. A PCN does not create a criminal record and we may choose to issue a PCN without first issuing a warning.

6.6 **Formal Notice**

6.6.1 Certain legislation allows notices to be served requiring offenders to take specific actions or cease certain activities. Notices may require activities to cease immediately where the circumstances relating to health, safety, environmental damage or nuisance demand. In other circumstances, the time allowed will be reasonable, and take into account the seriousness of the contravention and the implications of the non-compliance.

6.6.2 All Notices issued will include details of any applicable *Appeals Procedures*.

6.6.3 Certain types of Notice allow works to be carried out at default. This means that if a notice is not complied with [a breach of the notice] we may carry out any necessary works to satisfy the requirements of the Notice ourselves. Where the law allows, we may then charge the person/business served with the notice for all costs we have reasonably incurred in carrying out the work.

6.7 **Forfeiture Proceedings**

6.7.1 This procedure may be used in conjunction with seizure and/or prosecution where there is a need to dispose of goods in order to prevent them re-entering the market place or being used to cause a further problem. In appropriate circumstances, we will make an application for forfeiture to the magistrates' courts.

6.8 **Seizure**

6.8.1 Certain legislation enables authorised officers to seize goods, equipment or documents, for example unsafe food, sound equipment that is being used to cause a statutory noise nuisance, unsafe products or any goods that may be required as evidence for possible future court proceedings. When we seize goods we will give the person from whom the goods are taken an appropriate Goods Seized Notice.

6.9 **Injunctive Actions**

6.9.1 In certain circumstances, for example where offenders are repeatedly found guilty of similar offences or where it is considered that injunctive action is the most appropriate course of enforcement, then injunctive actions may be used to deal with repeat offenders, dangerous circumstances or significant consumer detriment.

6.9.2 Action under the Enterprise Act 2002: proceedings may be brought where an individual or organisation has acted in breach of community or domestic legislation with the effect of harming the collective interests of consumers. In most circumstances action will be considered where there have been persistent breaches or where there is significant consumer detriment. Action can range from:

- Informal undertakings
- Formal undertakings
- Interim orders
- Court orders
- Contempt proceedings

6.9.3 Anti-Social Behaviour Orders and Criminal Anti-social Behaviour Orders: where the non-compliance under investigation amounts to anti-social behaviour such as persistent targeting of an individual or a group of individuals in a particular area then, where appropriate, an ASBO or CRASBO will be sought to stop the activity.

6.10 **Refusal, Suspension and Revocation of Licence**

6.10.1 Where there is a requirement for a business, trader or person to be licensed by the local authority, to be licensed then officers have delegated authority to determine the licence unless representations or objections are received against the application. In such cases members of the Licensing Committee, may hear the case and decide to grant, grant with conditions, or refuse the licence application. In addition, in relation to applications for premises licences under the Gambling Act 2005, the Licensing Committee can exclude a condition from the licence.

6.10.2 The grounds for Refusal, Suspension or Revocation of a Hackney Carriage or Private Hire Licence are set out in the Guidance Notes and Conditions for Hackney Carriage and Private Hire Vehicle Owners, Operators and Drivers.

6.10.3 Under the Licensing Act 2003, where a Review of a Premises Licence is sought under Section 51 of the Act, the options available to members of the Licensing Committee are:

- To modify the conditions of Licence
- To exclude a licensable activity from the scope of the Licence
- To remove the Designated Premises Supervisor
- Suspend the Licence for a period not exceeding three months
- Revoke the Licence
- Issue a warning letter
- No action

6.10.4 Under the Gambling Act 2005, where a Review of a Premises Licence is sought under Section 202 of the Act, the options available to members of the Licensing Committee are:

- Revocation of the Licence
- Suspend the Licence for a specified period not exceeding three months
- Exclude a condition attached to the Licence, remove or amend an exclusion
- Add, remove or amend a condition

6.11 **Simple Caution**

6.11.1 A Simple Caution is an admission of guilt, but is not a form of sentence, nor is it a criminal conviction.

6.11.2 For a Simple Caution to be issued a number of criteria must be satisfied:

- Sufficient evidence must be available to prove the case
- The offender must admit the offence
- It must be in the public interest to use a Simple Caution
- The offender must be 18 years or over

6.11.3 Officers will also not offer a Caution where the offender has received one already for a similar offence within the last 2 years.

6.11.4 A record of the Caution will be sent to the Office of Fair Trading and the Local Authority Coordinating Body for Regulatory Services (LACORS) if appropriate, and will be kept on file for 2 years. If the offender commits a further offence, the Caution may influence our decision to take a prosecution. If during the time the Caution is in force the offender pleads guilty to, or is found guilty of, committing another offence anywhere in England and Wales, the Caution may be cited in court, and this may influence the severity of the sentence that the court imposes.

6.12 **Prosecution**

6.12.1 A prosecution will normally ensue where the individual or organisation meets one or more of the following criteria:

- Deliberately, recklessly, negligently or persistently breached legal obligations, which were likely to cause material loss or harm to others
- Deliberately or persistently ignore written warnings or formal notices

- Endangered, to a serious degree, the health, safety or wellbeing of people, animals or the environment
- An attempt to make financial gain at the expense of others
- Assaulted or obstructed an Officer in the course of his/her duties

6.13 **Proceeds of Crime Applications**

6.13.1 Applications may be made under the Proceeds of Crime Act for confiscation of assets in serious cases. Their purpose is to recover the financial benefit that the offender has obtained from his criminal conduct. Proceedings are conducted according to the civil standard of proof.

6.14 **Restorative Approach**

6.14.1 A restorative approach is where the victim, the person harmed, meets with the offender, the person causing the harm. A primary purpose of this meeting is to provide the opportunity for the offender to acknowledge and accept responsibility for the harm caused and for the victim to have their say on the harm caused. If appropriate and required, suitable restorative actions and/or compensation may be agreed and the process may influence future behaviour and compliance.

6.14.2 The officers will consider if a Restorative Approach is appropriate and will listen to requests from both victims and offenders for such an approach to be adopted. Where a victim and offender are in agreement the Council, sometimes together with other enforcement partners, will consider facilitating a Restorative Approach to assist in the reduction of harm and/or the resolution of conflict. A Restorative Approach may be utilised separately or in conjunction with other enforcement approaches.

7 **DETERMINING WHETHER A PROSECUTION OR SIMPLE CAUTION IS VIABLE AND APPROPRIATE**

7.1 Two 'tests' will be applied to determine whether a Prosecution or Caution is viable and appropriate. The officers will follow guidance set by the Crown Prosecution Service when applying the tests.

For more information about the 'Code for Crown Prosecutors' visit:

http://www.cps.gov.uk/victims_witnesses/code.html

7.2 A Caution or Prosecution proceedings will only be progressed when the case has passed both the evidential test and the public interest test. The principles outlined apply equally to the other types of formal enforcement action that are available.

7.3 **The Evidential Test**

We must be satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. A realistic prospect of conviction is an objective test that means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply.

7.4 **The Public Interest Test**

The public interest will be considered in each case where there is sufficient evidence to provide a realistic prospect of conviction. We will balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to

prosecute usually depend on the seriousness of the offence or the circumstances of the suspect. Some factors may increase the need to prosecute but others may suggest that another course of action would be more appropriate.

8 WHO DECIDES WHAT ENFORCEMENT ACTION IS TAKEN

- 8.1 The Council's constitution sets out the Council's Scheme of Delegation. Where delegated authority has been given to the Director of Environment, Culture and Communities he has authorised officers to act in varying capacity according to their professional background and seniority. All officers have warrant cards setting out the principle legislation they are empowered to enforce. Full details are available upon request. Where delegated authority is given this includes for a decision making process that is managed to ensure that the most appropriate enforcement action to be taken are based upon professional judgment, legal guidelines, statutory codes of practice and priorities set by the Council and/or Central Government.
- 8.2 Where appropriate, decisions about enforcement will involve consultation between or approval from:
- Investigating officer(s)
 - Divisional Manager(s)
 - Council solicitor(s)
 - Chief Officer: Environment and Public Protection

9 LIAISON WITH OTHER REGULATORY BODIES AND ENFORCEMENT AGENCIES

- 9.1 Where appropriate, enforcement activities with Environment & Public Protection will be coordinated with other regulatory bodies and enforcement agencies to maximise the effectiveness of any enforcement.
- 9.2 Where an enforcement matter affects a wider geographical area beyond the Council boundaries, or involves enforcement by one or more other local authorities or organisations; where appropriate all relevant authorities and organisations will be informed of the matter as soon as possible and all enforcement activity coordinated with them.
- 9.3 The Environment & Public Protection Division will share intelligence relating to wider regulatory matters with other regulatory bodies and enforcement agencies, and examples including:
- Government Agencies
 - Police Forces
 - Fire Authorities
 - Statutory Undertakers
 - Other Local Authorities

10 CONSIDERING THE VIEWS OF THOSE AFFECTED BY OFFENCES

- 10.1 The Environment & Public Protection Division staff undertakes enforcement on behalf of the public at large and not just in the interests of any particular individual or group. However, when considering the public interest test, the consequences for those affected by the offence, and any views expressed by those affected will, where appropriate, be taken into account when making an enforcement decision.

11 PROTECTION OF HUMAN RIGHTS

- 11.1 This Policy and all associated enforcement decisions take account of the provisions of the Human Rights Act 1998. In particular, due regard is had to the following:
- Right to a fair trial
 - Right to respect for private and family life, home and correspondence

12 REVIEW OF THE ENFORCEMENT POLICY

- 12.1 This Policy will be reviewed in the light of experience on an ongoing basis and not less than annually by the Chief Officer: Environment and Public Protection. Where changes are required these will be referred through the appropriate process.

13 AVAILABILITY AND COMMENTS

- 13.1 This policy will be made freely available and comments are welcomed at any time in writing to:

Chief Officer: Environment and Public Protection
Bracknell Forest Council
Time Square
Market Street
Bracknell
RG12 1JD