

To: **Executive Member for Culture, Delivery and Public Protection**
20 December 2023

**AMENDMENT TO FIXED PENALTY NOTICES ISSUED FOR BREACHES OF THE
ENVIRONMENTAL PROTECTION ACT 1990**

Executive Director of Delivery

1 Purpose of Report

- 1.1 To increase the current Fixed Penalty Charge for penalty notices issued for offences under Section 33 and Section 34 of the Environmental Protection Act 1990.

2 Recommendation

- 2.1 To increase the fixed penalty notice charge issued under the Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016 as amended to the levels set out in 5.7 below.

3 Reasons for Recommendation

- 3.1 To follow due process in the setting of Fixed Penalty Notice (FPN) levels to ensure that the issue of FPN's is legally robust.
- 3.2 To assist with recovering the cost of investigations and to ensure that those individuals that are responsible for this activity are held accountable as well as recovering the cost of clear up.
- 3.3 To act as a deterrent to those perpetrating these serious offences.

4 Alternative Options Considered

- 4.1 No change.
- 4.2 Setting the fee at a higher level. However, there is concern that this would lead to fewer payments being made and more challenge through the courts,

5 Supporting Information

- 5.1 Fly-tipping is the illegal depositing of household or commercial waste on land which has no licence to accept waste, such as on a roadside or in a field. It is usually the landowner's responsibility to remove the waste but if we can obtain evidence of where the waste has come from, the Public Protection Partnership (PPP) will investigate and if possible, take enforcement action against those responsible for the illegal deposits. Quite often the Council is the landowner and the cost falls to the public purse.
- 5.2 Fly-tipping is a criminal offence and one of the most common forms of anti-social behaviour that poses a significant environmental, social and financial issue. It blights our countryside and neighbourhoods, is a threat to livestock and local wildlife, a source of pollution, a danger to public health, and attracts other forms of anti-social behaviour and other enviro crime including arson, littering, graffiti and dog fouling.

- 5.3 Perpetrators of this crime can be fined or prosecuted. The council can prosecute offenders under Section 33 and Section 34 of the Environmental Protection Act 1990 and the courts can issue unlimited fines and or imprisonment for these offences.
- 5.4 Section 33 concerns itself with two matters namely the act of illegally depositing controlled waste on land or being a person in control, or in a position of control, of a motor vehicle used for carrying and illegal depositing of controlled waste. Section 34 concerns the offence of breach of 'duty of care' in relation to controlled waste i.e. not taking steps to ensure controlled waste under your control is disposed of properly.
- 5.5 The current penalties are set by the Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016. Currently the Council issues FPN's at the default levels with no discount for early payment. This means that an FPN for a Section 33 (fly-tipping) and a Section 34 (duty of care) offence is £200 regardless of circumstances. On the 31st July 2023 the maximum penalty for a Section 33 (illegal depositing of waste) related offences was raised to £1000 and the maximum penalty for Section 34 ('duty of care') offences was raised to £600. This was part of the governments 'Anti-Social Behaviour Action Plan'
- 5.6 A FPN can only be issued where:
- a. the enforcement officer has reason to believe that an offence has been committed;
 - b. a fixed penalty notice is a proportionate response in the circumstances (see below for circumstances under which a fixed penalty notice should not be issued);
 - c. there is sufficient evidence of the alleged offender's guilt to support prosecution if the fixed penalty is unpaid;
 - d. the alleged offender understands why the fixed penalty notice is being issued
 - e. the enforcement officer believes that the name and address given by the recipient are correct.
- 5.7 In the government consultation on the proposals to raise the penalties the factors that should be considered when setting penalty levels were set out as follows:
- "In determining the appropriate level for fixed penalties in their area, councils need to take into account the deterrent effect of different levels of penalty, as well as peoples' ability to pay and the levels of fines imposed locally for the relevant offence in magistrates' courts. Fixed penalties that are too low compared to the offender's ability to pay will not be effective in deterring them from committing the offence. Equally, fixed penalties that are higher than the likely fine that the court would impose in the event of conviction, or that that are too high for local conditions, are likely to lead to more cases reaching the courts, either because offenders cannot afford to pay the fixed penalty, or because they choose not to do so in the hope that the court will impose a lower fine. This would therefore lead to higher prosecution costs for councils. Neither of these scenarios achieves the overarching aim of deterring offenders from committing offences in the first place"*
- 5.8 The investigation and prosecution of fly tipping offences is undertaken by the Council's Public Protection Service. During the 2022/23 Financial Year 101 incidents were referred to the PPP and all were investigated. Two formal cautions, 14 warnings and 16 fixed penalty notices were issued. Six prosecutions were also taken through the Magistrates Court.

- 5.9 Having given consideration to the guidance on setting penalties in 5.6 above and taking account the clean-up and enforcement costs, officers are proposing that the penalties be increased to the following levels:
1. £400 for offences under Section 33 of the Environmental Protection Act 1990; and
 2. £300 for offences under Section 34 of the Environmental Protection Act 1990;
- 5.10 Enforcement will be used as part of a wider package of measures which will include deterrent activities such as CCTV, signage etc. The Council will also continue to remind those that control or produce controlled waste of their duties through regular awareness campaigns.
- 5.11 In all cases the 'evidential' and 'public interest' tests set out in the Code for Crown Prosecutors will be applied to the decision on any disposal route and where appropriate legal proceedings will be instituted in the Magistrates Court.

6 Consultation and Other Considerations

Legal Advice

- 6.1 The considerations for the Council, as Enforcing Authority, in setting the level of its Fixed Penalty Notices for s. 33 and s. 34 offences under the Environmental Protection Act (EPA) 1990 are set out in the body of the report.

Enforcing authorities have discretion to issue Fixed Penalty Notices as an enforcement option and, having chosen to do so, the Council may set the amount of its Fixed Penalty Notices within the now increased maximum range as specified in the Environmental Offences (Fixed Penalties) (Amendment) (England) Regulations 2023, namely within the range £150 minimum to now £1,000 maximum (up from £400 maximum previously) for s. 33 EPA 1990 offences (unauthorised deposit of controlled waste) and within the range £150 minimum to now £600 maximum (up from £400 maximum previously) for s.34 EPA 1990 offences (duty of care as respect of controlled waste).

Government codes of practice prescribe that Enforcing Authorities should run their enforcement operations efficiently, effectively, and economically. Whilst enforcing authorities may use receipts from paid Fixed Penalty Notices for their functions relating to littering, enforcement should, as far as possible, be self-financing and must not be used as a money-making exercise. The Council has discretion to fix the level of its Fixed Penalty Notices within the prescribed maximum ranges to reflect the cost of its littering enforcement functions and to act as a deterrent and as a proportionate response to the offence but must also reflect local circumstances, including local ability to pay and average local Court fines imposed for such offences. Setting the Fixed Penalty Notice amount too high may be counter-productive, leading to greater instances of non-payment and thus more cases going to Court instead.

As per the legislation, if no Fixed Penalty Notice amount were prescribed by the Enforcing Authority, a default Fixed Penalty Notice amount of £200 would apply in respect of each offence type.

To encourage prompt payment, the Environmental Protection Act 1990 also permits an Enforcing Authority, should it so determine, to offer a discount (Reduction) in the

Fixed Penalty amount if it is paid promptly. The period during which a discount for early payment may be offered must be no more than 14 days from date of service of the notice. It is recommended in the Government's code of practice that such period for applying the discount should not be for more than 10 days, to avoid confusion. However, as set out in the legislation, a discount scheme, if offered, still cannot ultimately reduce the amount of the Fixed Penalty Notice to be below £120 minimum for each offence type.

The purpose of a Fixed Penalty Notice is to offer the recipient a time limited opportunity to absolve themselves of liability to prosecution for the substantive offence in the event of non-payment of the Fixed Penalty Notice within the prescribed time limit. A Fixed Penalty Notice in lieu of prosecution should only be issued where the enforcement officer has reason to believe that one of the substantive offences has been committed and that a Fixed Penalty Notice, of the prescribed amount, is deemed a proportionate response in the circumstances. By means of published code of conduct and protocol, the Council ought to determine its procedure for issuing such Fixed Penalty Notices and the type of circumstances where offering such Fixed Penalty Notice might be deemed an appropriate and proportionate means of enforcement and those circumstances where it might not. Certain cases might be deemed unsuitable for Fixed Penalty Notice issuance at first instance and ought, instead, directly be prosecuted where the Courts, on conviction, would have the full range of sentencing options available to them as set out in the substantive legislation.

Financial Advice

- 6.2 This proposal would raise additional income as well as provide more of a deterrent.

Other Consultation Responses

- 6.3 None

Equalities Impact Assessment

- 6.4 There are no specific equality impacts associated with this decision

Strategic Risk Management Issues

- 6.5 It is important to ensure that a robust decision making process is in place to reduce the risk of these decisions being challenged.

Climate Change and Ecological Impacts

- 6.6 The recommendations in Section 2 above are expected to have no impact on emissions of CO₂ but could have a positive impact on the environment more generally.

Health & Wellbeing Considerations

- 6.7 The recommendations in Section 2 above are expected to have a positive impact on the environment which could enhance the wellbeing of local residents and businesses affected by fly tipping.

Background Papers

Environmental Protection Act 1990
Unauthorised Deposit of Waste (Fixed Penalties) Regulations 2016

Contact for further information

Sean Murphy, Public Protection Partnership - 01635 519840
Sean.Murphy@westberks.gov.uk