

Report to the Cabinet

Report reference: C-076-2009/10
Date of meeting: 1 February 2010



Portfolio: Environment
Subject: Fixed Penalty Notices - Policy
Responsible Officer: Jim Nolan (01992 564083).
Democratic Services Officer: Gary Woodhall (01992 564470).

Recommendations/Decisions Required:

- (1) That the level of fixed penalties be set at the statutory default level;
- (2) To determine whether a discount for early payment for a fixed penalty should be offered and if so to set the level of discounted penalties at the statutory minimum allowable for that offence;
- (3) That the maximum period of payment permitted to attract a discounted penalty (should one be available) be 10 days;
- (4) That the policy for the issue of Fixed Penalty Notices (FPNs) attached at appendix A be agreed and incorporated within the adopted Environment & Street Scene Enforcement Policy; and
- (5) That subject to recommendations (1), (2) and (3) above, authority be given to advertise the Council's intent to introduce the use of fixed penalty notices and the adopted penalties and discounts .

Executive Summary:

Fixed Penalty Notices (FPN) are a means by which an authorised officer of the Council can give a person who they have reason to believe has committed an offence the opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty. The Council is able to retain the receipts from fixed penalties.

Where a FPN is given then no proceedings will be instituted for that offence before the expiration of 14 days following the date of the notice being issued and if the Fixed Penalty is paid the recipient cannot be convicted of the offence. If the fixed penalty is not paid, the recipient will be prosecuted for the original offence, not the non-payment of the fixed penalty.

Reasons for Proposed Decision:

Cabinet in 2008, as part of its consideration of the Safer, Cleaner, Greener initiative, endorsed the use of FPNs as an enforcement tool. In order to be able to use FPNs, the Council needs to formulate a policy for their use, fix the penalties and discounts which apply to the relevant offences and advertise its intention to use FPNs within the District

Other Options for Action:

To reverse the decision of Cabinet and not to authorise the use of FPNs at this time, or to delay their implementation until a later date.

Report:

Background

1. FPNs can be issued by local authority officers for certain offences where the legislation permits and where the officer is authorised to do so. These notices provide a quick, visible and effective way of dealing with low level environmental crimes, and provide an alternative to formal prosecution in the Courts.
2. A fixed penalty is not a fine. Payment of the penalty by the recipient discharges their liability to conviction for the offence for which the FPN was issued. It does not constitute an admission of guilt, but removes the possibility of the creation of a record of criminal conviction.
3. There are fixed penalty levels set for abandoned and nuisance vehicles, waste collection and transfer offences and noise from licensed premises. All other penalty charges can be varied by local authorities within a range. Where a fixed penalty is given then no proceedings will be instituted for that offence before the expiration of 14 days following the date of the notice being issued and if the fixed penalty is paid the recipient cannot be convicted of the offence. If the fixed penalty is not paid, the recipient will be prosecuted for the offence, not the non-payment of the fixed penalty. The Council will pursue through the Courts all alleged offenders that have chosen not to discharge their liability to conviction for an offence by paying a fixed penalty charge.

Core offences

4. The Council has the power to take enforcement action against persons that commit a variety of environmental crimes. The following are considered to be the Core Offences for which we may issue a FPN in lieu of prosecution:

(a) Dropping litter

5. The Environmental Protection Act 1990 (EPA) created the offence of leaving litter:

“...if any person throws down, drops or otherwise deposits in, into or from any place to which this Section applies and leaves anything whatsoever in such circumstances as to cause or contribute to or tend to lead to the defacement by litter of any place ... he shall be guilty of an offence”.

6. This relates to places in the open air to which the public are entitled or permitted to have access without payment, including any covered place open to the air on at least one side and to which the public has access.

7. The Clean Neighbourhood and Environment Act 2005 (CNEA) extended the scope of that offence so that it became an offence to drop litter anywhere in the open air (including rivers and lakes) regardless of ownership, except in locations where the public does not have access or the owner of the land has given permission for the dropping of litter or a legal authorisation exists to do so.

8. The CNEA also makes it clear that litter includes smoking-related litter and discarded chewing gum; increases the fixed penalty charge and allows receipts from the charges to be

retained by the Council. If found guilty of a litter offence, the offender can be fined up to £2,500, or a term of not exceeding three months imprisonment, or both.

(b) Abandoning a vehicle

9. Under the Refuse Disposal (Amenity) Act 1978, a person commits an offence if he, without lawful authority, abandons on any land in the open air, or on any land forming part of a highway, a motor vehicle or anything that has formed part of a motor vehicle. The CNEA allows local authorities to issue Fixed Penalty Notices to persons alleged to have committed such an offence.

10. There is no legal definition of an abandoned vehicle. Authorised officers must use their discretion when forming decisions on abandonment using guidance issued by DEFRA. Authorised officers will normally only be able to arrange for the removal of a vehicle from a highway or public land. Abandoned vehicles on private land can be removed at the request of the occupier, but the cost of doing so will be recharged to the occupier.

11. If found guilty of abandoning a vehicle on a highway or on land in the open air, a person can be fined up to £2,500, or a term of not exceeding three months imprisonment, or both.

(c) Nuisance vehicles

12. The CNEA made it an offence to leave two or more motor vehicles parked within 500 meters of each other on a road or roads where they are exposed or advertised for sale, or to cause two or more motor vehicles to be so left. This only applies to persons who are carrying out a business of selling motor vehicles. The CNEA also made it an offence to carry out restricted works (repair, maintenance, servicing, improvement or dismantling) on a motor vehicle on a road. This only applies to persons who are in the course of a business of carrying out restricted works or for gain or reward.

13. Authorised officers will only be able to take enforcement action, including the removal of a vehicle, for nuisance vehicles on a road. A person found guilty of a nuisance vehicle offence can be fined up to £2,500, or a term of not exceeding three months imprisonment, or both.

(d) Dogs

14. The CNEA enabled a dog control order to be made in respect of any land (subject to the following two exemptions) which is open to the air and to which the public are entitled or permitted to have access (with or without payment). There exemptions are:

(a) land placed at the disposal of the Forestry Commissioners under section 39(1) of the Forestry Act 1967; and

(b) land over which a road passes. The definition of road includes public rights of way (including footpaths) and roads and footpaths through private estates, provided the public have access to them.

15. The Dog Control Orders (Prescribed Offences and Penalties, etc.) Regulations 2006 provide for five offences which may be prescribed in a dog control order:

(i) failing to remove dog faeces;

(ii) not keeping a dog on a lead;

(iii) not putting and keeping a dog on a lead when directed to do so by unauthorised officer;

- (iv) permitting a dog to enter land from which dogs are excluded; and
- (v) taking more than a specified number of dogs onto land.

16. There is a strict procedure to be followed in order to make a dog control order and no such orders are in place within the District.

(e) Fly Posting and Graffiti

17. Local authorities are required to make reasonable attempts to enter into partnership arrangements with property owners to deal with fly posting and graffiti. All parties should work in partnership to remove fly posters and graffiti within agreed times and minimise the need for removal notices. Such a partnership currently exists between the Council and Virgin Media.

18. Under the Town and Country Planning Act 1990 (TCPA 1990), it is an offence to display an advertisement in contravention of the regulations made under the act. These regulations relate to the permission for the display of the material, and the nature and size of the material to be displayed. Under the TCPA 1990 the Council can take action against those responsible for fly posting and remove illegal posters and placards and recover the cost incurred in doing so from those who have displayed them, or caused them to be displayed. It is appropriate for a distinction to be drawn between, for example, a poster advertising a local community or charitable event and a poster advertising a commercial activity.

19. The CNEA amended the defence for a landowner charged with a fly posting offence so it is now necessary for the landowner to prove that the advertisement was displayed without his knowledge or that he took all reasonable steps to prevent the display or to secure its removal. The Anti-social Behaviour Act 2003 (ASBA 2003) allows the Council to serve FPNs on persons who commit 'minor' graffiti or fly posting offences.

20. The Anti Social Behaviour Act 2003, as amended by the CNEA, allows the Council to serve a Defacement Removal Notice on owners, occupiers and operators of street surfaces of buildings and street furniture whose property is defaced with detrimental fly posting or offensive or detrimental graffiti.

(f) Littering from premises

21. The EPA empowers the Council to tackle street litter generated through the activities on adjacent premises, by serving Street Litter Control Notices on businesses. These notices are specifically designed to help deal with food and drink packaging and other litter from 'fast food' outlets or litter from cash machines. The CNEA extended the use of these notices to include mobile operations, such as burger vans, and introduced the use of fixed penalties for failure to comply with a notice. The Council is able to serve a notice on a business, which requires them to clear up the litter and implement measures to prevent the land from becoming defaced again. A person found guilty of failing to comply with a Street Litter Control Notice can be fined up to £2,500.

(g) Litter on land

22. Litter Clearing Notices can be used by the Council where land has become defaced by litter and refuse and this is seen as detrimental to the amenity of the area. These notices have been introduced by the CNEA and replace the Litter Control Areas created by the EPA.

23. Litter Clearing Notices are used where local authorities do not have a duty to clear litter and refuse, most commonly private land. The Council is able to specify the areas and the

standard to which the land must be cleared. If the land is not cleared satisfactorily, the Council can enter the land, clear it itself and recover the costs of doing so. A person found guilty of failing to comply with a Litter Clearing Notice can be fined up to £2,500.

(h) Failure to produce waste transportation documents

24. Section 34 of the EPA sets out the waste duty of care, which applies to anyone who is the holder of controlled waste. Waste must be passed on to an authorised person and the producer must retain a waste transfer note that sets out certain details of the waste. These waste transfer notes must be kept for two years. Section 53 of the CNEA extends the powers to investigate illegal waste disposal or duty of care offences to authorised council officers.

25. There is no need for householders to have waste transfer documentation for waste that is collected by the Council. If, however, householders employ a contractor to remove waste from their property (such as garden or building waste) they have a duty to take reasonable measures to ensure that their waste is passed on to an authorised person. The duty emphasises the responsibility that residents must not support illegal waste transfer and fly tipping, whether knowingly or unknowingly. It is an offence where a person has failed to carry out their duty to provide the necessary authority for transporting waste. A householder, business or waste carrier found guilty of failing to provide the necessary authority for transporting waste can be fined up to £5,000.

26. If a person is not able to furnish the relevant waste transportation documents, the Council will allow that person 14 days within which to produce the documentation.

(i) Noise

27. Powers under the Noise Act 1996 have recently been extended to licensed premises, and these powers make it an offence to exceed permitted level between the hours of 11.00pm and 07.00 am and allow the council to serve a FPN.

Penalties, discounts etc

28. As stated above, FPNs carry with them different levels of fixed penalty depending upon the offence committed. There is a government set default for each plus in many instances the penalty can also be set locally if authorities so wish. The following table sets out the available ranges:

FPN offence	Default penalty	Local range available	Lowest discounted level
Abandoned vehicle	£200	None	£120
Nuisance parking	£100	None	£60
Litter	£75	£50 to £80	£50
Street litter control	£100	£75 to £110	£60
Unauthorised leaflet distribution	£75	£50 to £80	£50
Graffiti & flyposting	£75	£50 to £80	£50
Failure to produce waste transfer notice	£300	None	£180
Failure to produce waste carriers papers	£300	None	£180
Waste receptacles	£100	£75 to £110	£60
Dog control	£75	£50 to £80	£50
Noise	£100	£75 to £110	£60
Failure to nominate keyholder (in designated	£75	£50 to £80	£50

alarm areas)			
Noise (licensed premises)	£500	None	None

29. The Council has the option of adopting the default fixed penalty (column 2 above) or, where permitted, adopting one which falls within the limits of the amounts set in column 3 above. If Cabinet conclude that a local penalty is appropriate, it is suggested, for the purposes of consistency, that the local penalty for a particular penalty band should be the same, i.e. the same local penalty for each of the default penalties. It should also be noted that, if a discount for early payment is to be offered, then the local penalty should in all cases exceed the lowest discounted penalty set out in column 4 above. Since the maximum period allowed for payment of a FPN is 14 days, the period for the payment of a discounted penalty must be less. Defra guidance suggests a maximum of 10 days.

30. It is suggested at this stage that the local penalty should mirror the statutory default penalty and that if a discount is to be offered it should mirror the minimum discounted penalty suggested by Government. The table below sets out the effects of that suggestion.

FPN offence	Statutory default penalty	Minimum statutory discounted penalty	Suggested local penalty	Suggested local discounted penalty
Abandoned vehicle	£200	£120	N/A	£120
Nuisance parking	£100	£60	N/A	£60
Litter	£75	£50	£75	£50
Street litter control	£100	£60	£100	£60
Unauthorised leaflet distribution	£75	£50	£75	£50
Graffiti & flyposting	£75	£50	£75	£50
Failure to produce waste transfer notice	£300	£180	N/A	£180
Failure to produce waste carriers papers	£300	None	N/A	N/A
Waste receptacles	£100	£60	£100	£60
Dog control	£75	£50	£75	£50
Noise	£100	£60	£100	£60
Failure to nominate keyholder (in designated alarm areas)	£75	£50	£75	£50
Noise (licensed premises)	£500	None	N/A	N/A

FPN policy

31. Cabinet at its meeting on 7 September 2009 approved and adopted the Environment & Street Scene Enforcement Policy. The section on the range of enforcement options available makes reference to the use of FPNs. Some general guidance is provided in respect of their use but it is appropriate, if Cabinet decide to go forward with their use, to amend the enforcement policy to provide greater detail on their applicability and use. That supplementary section of the enforcement policy is appended to this report and Cabinet is requested to agree to incorporate it within the Directorate's general enforcement policy.

Resource Implications:

There are no cost implications for the introduction of the use of FPNs. The officers are in place and have been trained to use FPNs and the costs of administering the system can be contained within existing operational budgets.

The proceeds from FPNs are retained by the Council. However, it is important to note that the issue of FPNs should not be predicated on the generation of income; they should be issued only

where it is an appropriate action in accordance with the Directorate's Enforcement Policy. On that basis it is not possible to estimate the scale of any income which might be generated.

Legal and Governance Implications:

A range of legislation applies to these offences and the associated FPNs, including
Environmental Protection Act 1990
Clean Neighbourhood and Environment Act 2005
Control of Dogs (Non-application to Designated Land) Order 2006
The Dog Control Orders (Prescribed Offences and Penalties, etc.) Regulations 2006
The Anti Social Behaviour Act 2003
The Noise Act 1996

Defra has also published guidance on the use of FPNs which has been considered and incorporated within this report and in the FPN policy document particularly.

The use of FPNs should be undertaken in full compliance with the Environment & Street Scene Enforcement Policy as amended by the FPN policy attached as appendix xx to this agenda.

Safer, Cleaner and Greener Implications:

This scheme introduces the use of FPN's as outlined in the Safer, Cleaner, Greener Strategy adopted by Cabinet on 7 September 2009. The appropriate usage of FPNs should enable the Council's authorised officer to achieve higher standards of compliance for a range of environmental and associated legislation.

Consultation Undertaken:

Whilst in strict terms no public consultation will take place the council are strongly recommended through Defra guidance to advertise their intention to introduce the scheme for three months prior to the first FPNs being issued.

Background Papers:

Guidance on fixed penalty notice provisions issued by DEFRA .

Impact Assessments:

Risk Management

In any enforcement activity a risk to the officer exists, and is this particularly so with the issue of FPNs. A specific risk assessment has been prepared for this activity which has identified the training and provision of protective clothing required to undertake this duty safely. All the officers empowered to issue FPNs have successfully undertaken Essex Police training and are accredited under the Essex Police Community Training Scheme. This provides them with some additional powers, including the right to demand a name and address and also enables them to call for Police assistance should that become necessary in the course of their enforcement duties.

Equality and Diversity:

Did the initial assessment of the proposals contained in this report for relevance to the Council's general equality duties, reveal any potentially adverse equality implications? Yes

Where equality implications were identified through the initial assessment process, has a formal Equality Impact Assessment been undertaken? Yes

What equality implications were identified through the Equality Impact Assessment process?

It was identified that people with certain disabilities, learning difficulties or where English was not their first language would sometimes inadvertently commit an offence (dropping litter for example) or be unable to understand the process.

How have the equality implications identified through the Equality Impact Assessment been addressed in this report in order to avoid discrimination against any particular group?

Yes the proposed policy deals with this by indicating that where a suspect appears to be unable to understand what is being offered to them, there is any doubt about their ability to understand English or where physical impairment has resulted in an offence being committed, then a FPN shall not be issued (See FPN policy statements G4 and G6)