



Report to Cabinet

Date:	12th December 2023
Title:	Fly-Tipping Enforcement Policy Review and Government Fixed Penalty Notice Increase to Fly-tipping & Failure in Householder Duty of Care (as from 31.07.23)
Cabinet Member(s):	Gareth Williams, Cabinet Member for Climate Change & Environment
Contact officer:	David Rounding, Lead Enforcement Officer
Author:	Martin Dickman, Service Director, Communities, Neighbourhood Services
Ward(s) affected:	All Wards

Recommendations:

- 1. Agree and adopt the revised Buckinghamshire Council Fly-Tipping Enforcement Policy 2023, which sets out criteria to issue a Fixed Penalty Notice (FPN) to an offender based on admissions being made.**
- 2. Agree and adopt the revised FPN upper limits approach (Option 2a), to address the recent Government change to increase the upper limits of FPNs for Fly-tipping and Failure in Householder Duty of Care.**
- 3. Agree delegation to the Service Director for Neighbourhood Services, in consultation with the Cabinet Member for Climate Change and Environment and with Legal Services, to make any technical and legal compliance changes related to the Fly-Tipping Enforcement Policy, following implementation and adoption after the date of this decision.**

Reason for decision:

1. The Council is committed to the principle of good enforcement as set out in the Legislative and Regulatory Reform Act 2006, with the purpose of enforcement action meaning the Council can meet compliances.
2. These amendments will align the Council with the new Government legislation recommendations to increase Fixed Penalty Notice (FPN) upper limits and clarifies the issuing of FPNs in line with the Councils 'Zero Tolerance' position in respect to fly-tipping.

1. Executive summary

- 1.1 The Buckinghamshire Fly-Tipping Enforcement Policy was adopted by Cabinet in April 2020. The policy is reviewed periodically in order to remain appropriate to meet the necessary compliance requirements. Cabinet is requested to agree to the revised Fly-tipping Enforcement Policy 2023 (Option 2a) with two key changes:
 - a) An increase in Fixed Penalty Notice (FPN) limits
 - b) New criteria to issue an FPN to an offender based on admissions being made.
- 1.2 The amendments are highlighted in **Bold & Italics** in the revised Policy in Appendix A.
- 1.3 Government has confirmed the desire for local authorities to take a more robust approach to tackle waste crime and toughen existing deterrent measures to change behaviours. The Department for Environment, Food and Rural Affairs (DEFRA) announced an increase in statutory Fixed Penalty Notice (FPN) upper limits effective from 31st July 2023, which supports DEFRA's wider work to tackle waste crime.
- 1.4 Local authorities have the freedom to determine fixed penalty rates within the limits set out below. The FPN maximum levels have been confirmed as:
 - **Fly-Tipping** – increase from £400 to £1,000.
 - **Failure in Householder Duty of Care** – increase from £400 to £600.

and

 - **Littering** – increase from £150 to £500. Changes to the litter FPN Upper limit are not being considered as part of this report. A Littering Enforcement Strategy is being progressed; *a separate decision report will consider appropriate litter enforcement.*

2. Fly-Tipping Enforcement Policy & Revised Upper FPN Limits

- 2.1 Upon becoming a unitary authority, Buckinghamshire Council (BC) adopted the ability to issue Fixed Penalty Notices (FPNs) to fly-tipping offenders and those householders whose negligent failure in their 'duty of care' as producer of the waste contributed to the fly-tipping taking place. The Council adopted the Fly-tipping Enforcement Policy in April 2020 which includes issuing fixed penalties for Fly-tipping at the maximum allowed rate of £400, with the offer of a 25% reduction if the penalty was paid within 10 days, allowing a payment of £300, and for Failure in Duty of Care by a householder at a maximum allowed rate of £400, with the offer of a 25% reduction with a payment of £300 as an incentive for early payment. These rates applied both to the act of small-scale fly-tipping, and to householders where their waste was found dumped after they had not duly checked the waste carrier's credentials (usually where the waste has later been found fly-tipped in Bucks).
- 2.2 The Legislative and Regulatory Reform Act 2006 enables provision to be made for the purpose of removing or reducing burdens resulting from the following legislation and promoting regulatory principles:
 - a. regulatory activities should be carried out in a way which is transparent, accountable, proportionate, and consistent.
 - b. regulatory activities should be targeted only at cases in which action is needed.
- 2.3 The Council is committed to the principle of good enforcement as set out in the Legislative and Regulatory Reform Act 2006 and believes that the purpose of enforcement action should be to achieve compliance with legislation enforced by the Council. Where the Council believes a business or an individual is in breach of certain legislation, it may issue a FPN requiring that business or individual to pay the Council within a specified period.
- 2.4 FPNs provide local authorities with a visible and effective way of responding to environmental damage and crime. FPNs sit between the lowest form of sanction, a 'Simple Caution', and the prosecution of offenders at court.
- 2.5 Our main objectives of enforcement action are to educate offenders, change future behaviour, and to deter members of the public from committing any type of waste crime, using the most appropriate enforcement responses to secure legislative and regulatory compliance.
- 2.6 Taking the necessary proportionate enforcement action against waste crime provides both the Council and residents reassurance that we are delivering on our statutory duty to keep our land and highways clear of waste. FPNs are a means by which offenders of relatively minor waste criminality can discharge their liability for the offence. If an offender fails to pay within 14 days, standard practice will be to follow up with court prosecution.

What are the new regulations (2023) amendments?

2.7 The Environmental Offences (Fixed Penalties) (Amendment) (England) Regulations (EOR) 2023 provide Buckinghamshire Council with the option to increase upper limits of the current FPNs, relating to the offences listed below from 31st July 2023 and is relatable to Fly-tipping and Failure in Householder Duty of Care. Regulation 2 is associated with Littering.

Regulation 1 - regulations came into force on 31st July 2023 and confirms that although the regulations extend to England and Wales, they only apply in England.

Regulation 3 – increases the upper limits for FPNs for the following:

- Section 33ZA - for an offence under section 33(1)(a), involving the disposal of controlled waste on land without a permit (which includes Fly-tipping) offences from £400 to £1000.
- Section 34ZA – for an offence under section 33(1)(a), involving the Failure in Householder waste Duty of Care from £400 to £600.

2.8 It is important to note that the level for a fixed penalty should be appropriate for the individual offence. FPNs that are too high could lead to substantial non-payment rates and will be counter-productive for the Council through increased officer time and legal costs which might not be recovered at court. When a payment is not received and where there is overwhelming evidence against the offender, the Council will explain to the offender that a prosecution in court will be sought. At present, we have a payment rate around 95%.

2.9 A fixed penalty notice will *only* be issued in cases which comply with the Code of Crown Prosecutors, that is, where the “Evidential Test” (*Does the evidence in the case provide a realistic prospect of conviction?*) and “Public Interest Test” (*Is it in the public interest to prosecute? That means asking questions like how serious the offence is, the harm caused to the victim, the impact on communities and whether prosecution is a proportionate response*) have been met. An FPN is issued, in the first instance, as an alternative to a prosecution and due consideration will be given to prosecuting for the offence if they decide not to pay the fine

2.10 On prosecution, the Waste Enforcement team asks for 100% of the Council's legitimate costs to be paid, however the average award is around 75% by the court (of which we recover 97% of the 75%). While there is a small risk in that we only recover around 73% of our costs, if we did not prosecute non-payment, there would be a larger risk that word would get round that there is no ‘need to pay’.

- 2.11 The policy has also been updated to reflect the ‘Failure by business to furnish Duty of Care documents’ and the ‘Failure to provide evidence of waste carrier registration’. Although there have not been any amendments to these offences, including these penalties in the future policy would enable further transparency.
- 2.12 To address the new Government FPN upper limit increases, this paper recommends the adoption of the revised Buckinghamshire Council Draft Fly-Tipping Enforcement Policy 2023 which is attached as Appendix A. The proposed revised FPN limits are detailed below in table 1.

Table 1 – Revised FPN Upper Limits

Offence	Current Limit	Revised Limit
Failure in Householder Duty of Care Section 34ZA	£400	£600
Fly-Tipping Section 33ZA	£400	£1000

3. Other Options Considered

- 3.1 **Option 1** – ‘remain as is’. This would be business as usual to remain unchanged and would mean that there may be instances that FPNs are issued to offenders who neither wish to account for, and/or show no remorse for their actions. The adopted Buckinghamshire Council Fly-Tipping Enforcement Policy would remain unchanged including the FPN limits as agreed in 2020. This option is not recommended.
- 3.2 **Option 2a** – the recommended option, to agree and to adopt the revised Buckinghamshire Council Draft Fly-Tipping Enforcement Policy 2023 (Appendix A) and to accept the FPN upper limits approach.
- 3.3 **Option 2b** – to agree and adopt a revised Buckinghamshire Council Draft Fly-Tipping Enforcement Policy 2023 and inclusive of an option for a discount if there is early payment. Research into the position taken by seven neighbouring local authorities has revealed the consensus is to discount for early payment ‘an average’ of around 20%.

This option is not recommended, but it is proposed that the rates of payment will be monitored and closely reviewed holistically during the first 6 months of adoption and implementation, and if payment of FPNs at the non-discounted level becomes sub optimal, the paper does recommend a delegation to the Service Director of

Neighbourhood Services in consultation with the Cabinet Member for Climate Change and Environment to implement a change to this approach if desired.

4. Legal and financial implications

- 4.1 An FPN is an alternative to prosecution; if an alleged offender does not pay an FPN, then enforcing authorities should be prepared to prosecute them for the original offence. It is therefore crucial that prior to issuing an FPN, local authorities have sufficient evidence to support a prosecution in view of the increased penalty amounts and the requirement for enforcement action to be proportionate. Where FPNs are issued without the necessary supporting evidence, the Council may find themselves subject to challenge.
- 4.2 The Department of Environment, Food and Rural Affairs (DEFRA) Guidance for Local Authorities on Householder Waste Duty of Care FPNs (updated 11th December 2018) states that a fixed penalty notice is not an appropriate sanction for: *“operators in the Waste Management Industry; repeat offenders or those responsible for large scale Fly-tipping or Fly-tipping of hazardous waste”*.
- 4.3 By inference, if unsuitable for an FPN these cases should usually also be considered unsuitable for an offer of simple caution to be made by way of case disposal unless overwhelming circumstances indicate that would be appropriate.
- 4.4 Statutory Guidance in the form of the Litter and Refuse: Code of Practice (updated 26th September 2019) makes it clear that any monies raised from issuing a FPNs relating to Fly-tipping can only be used on functions under Part II of the Environmental Protection Act 1990 “Waste on Land”. Any income will be reinvested back into the Waste Enforcement Team functions.

Risks

- 4.5 Currently 95% of FPNs are paid. The money from FPNs supports the ongoing work of the Waste Enforcement Team. This money is not available to be used more generally by the Council. There is a risk that increasing the amount of FPNs without discount could lead to an increase in non-payment due to affordability, however offering no discount is in line with the recent statutory changes.
- 4.6 In the event of non-payment prosecution should follow. DEFRA advises that *“Failure to follow up an unpaid FPN with prosecution for the original offence will discredit the use of fixed penalties and the duty of care itself. The need to pursue unpaid fixed penalty notices must be considered in the development of an enforcement strategy and the necessary resources made available. It is not acceptable for an authority to decide after a fixed penalty notice has been issued that it does not have the resources to prosecute if the notice is unpaid”*.

- 4.7 Buckinghamshire Council will seek to prosecute all cases at court where FPNs have been issued but not paid. Appropriate resource will need to be in place to manage the non-payment process. There is sufficient resource to manage current levels of prosecution, and this will be monitored through implementation should the recommendations in this report be agreed.
- 4.8 A significant increase in prosecutions will require additional legal resources to manage this work as well as additional officer time in preparing the evidence for prosecution and attending court. These costs are not 100% recovered from the defendant even in the event of successful prosecution. A successful prosecution may also not result in a fine of the same level being issued, as the Court will take account of a Defendant's income in determining the level of the fine.
- 4.9 Finally, the length of time a prosecution could take would cause significant delay in any fine being paid if the Court determined that to be an appropriate disposal of the case.
- 4.10 The repayment rate will be closely monitored during the first 6 months of adoption and implementation by the Enforcement team and Legal services.

4A. Director of Legal & Democratic Services Comment

- 4.11 The director has read and commented on the report. The only comment was on the third recommendation and to include the wording "and in consultation with Legal Services" which has now been added.

4B. Section 151 Officer Comment

- 4.12 The minor budget changes will be incorporated in the proposed budgets as part of the Medium-Term Financial Planning process.

5. Corporate implications

- 5.1 In relation to climate change and sustainability, Fly-tipping and Failure in Householder Duty of Care is no different from general waste in terms of environmental consequences, where it is left to break down into a broad range of chemicals. It is far better dealt with by recycling metals, glass, and paper etc, which all have far lower energy input requirements than making new items from raw materials. Even the fuel and energy used for transport for collection of litter can be avoided where waste is not allowed to leave the general cycle. Therefore, the increase to FPNs with an option for early payment, may deter people from waste crime and influence behaviour change.
- 5.2 An Equalities Impact Assessment (EqIA) screening (Appendix B) has been undertaken which does not show the need for a full EqIA assessment.

5.3 A Data Protection Impact Assessment (DPIA) full assessment has been undertaken please see **Appendix C** (*draft versions*). There are no envisaged implications and is in adherence with Council process and procedures.

5.4 DEFRA guidance states that in no circumstance should enforcement activity be considered a means to raise revenue. The recommendation provides an acceptable balance between value for money (VfM) and service provision requirements compared to other options considered.

5.5 The health, safety, and welfare of all investigating officers is continuously reviewed to ensure their work environment is safe. Officers use body work cameras if conducting on the door interviews and dashcams whilst investigating any fly-tipping incidents.

6. Local councillors & community boards consultation & views

6.1 Local councillors and community boards will be provided with an update on FPN upper limit increases and early payment options for Fly-tipping and Failure in Householder Duty of Care should the recommendations in this paper be agreed.

7. Communication, engagement & further consultation

7.1 The outcome will be communicated, and a high-level communications plan implemented. Stakeholders include:

- Residents
- Community boards, Parish, Town, and elected Members
- Neighbouring Local Authorities

7.2 As part of the implementation plan, the changes to the upper limits of FPNs for Fly-tipping and Failure in Householder Duty of Care will be further developed. Discussions with the necessary internal stakeholders have taken place to ensure the public, internal and external stakeholders are updated.

8. Next steps and review

8.1 Should the recommendations in this paper be agreed, and following the call-in period, the Fly Tipping Enforcement Policy 2023 will become effective. Public communications are planned for December 2023 and January 2024.

8.2 Published policy documents and the Council website will be updated to replace the existing 2020 policy to reflect the amendments.

9. Background papers

- **Appendix A – Buckinghamshire Council Fly-Tipping Enforcement Policy Amendment 2023**

- **Appendix B – EQIA – Fly Tipping Enforcement**
- **Appendix C – DPIA – Fly Tipping Enforcement**

10. Your questions and views

- 10.1 If you have any views that you would like the Cabinet Member to consider, please inform the democratic services team. This can be done by email to democracy@buckinghamshire.gov.uk.

