

TUNBRIDGE WELLS BOROUGH COUNCIL

ENFORCEMENT AND PROSECUTION POLICY

1. INTRODUCTION

- 1.1 The Sustainable Community Plan for Tunbridge Wells contains a wide ranging vision, two key elements of which state that the borough should expect to have an Environment that is conserved and enhanced, both for ourselves and the benefit of future generations, and, a prosperous local economy. These aims are the basis for three of the Borough Council's Corporate Priorities, which seek to Care for our Environment and Promote and Maintain a thriving and diverse Local Economy and have Housing suitable for Local People.
- 1.2 Although the Council has a number of powers, for example, planning & regeneration, to promote these objectives, effective enforcement is an essential part in ensuring that the Council has the ability to maintain and enhance the environment. This in turn promotes the Borough as a good location for business and investment. The Council's Draft Strategic Plan, currently subject to public consultation, sets out how we will use enforcement powers constructively to meet both the Community Plan and corporate objectives which are informed by public opinion and results of consultation. The Council aims to provide a service that embodies good practice, Best Value and individual human/legal rights, in accordance with our principles of fair and equal enforcement.
- 1.3 This policy is an 'umbrella' policy intended to apply to all Service areas. However, various additional service-specific requirements that apply to specific enforcement activities within the Council are set out within the individual Service's Enforcement Policy. Detailed service-specific policies and procedures, where needed, are held, updated and reviewed by the Service departments. Information on these may be obtained from the relevant department.

- 1.4 The primary function of the Council's enforcement work is to protect the public, the environment and groups such as consumers and employees. At the same time, a thriving local economy is promoted when these functions are carried out in an equitable, practical and consistent way. The Council is committed to achieving these aims and maintaining a fair and safe trading environment.
- 1.5 The effectiveness of legislation in protecting consumers or sectors in society depends crucially on the compliance of those who are regulated. The Council regards prevention as better than cure and recognises that most businesses and residents of the borough want to comply with the law. It will, therefore, take care to help businesses and others meet their obligations without unnecessary expense, whilst taking action, including prosecution, against those who flout the law or act irresponsibly.
- 1.6 The Council has also adopted the Central and Local Government Concordat on Good Enforcement (Enforcement Concordat), which commits it to good enforcement policies and procedures.

2. PURPOSE AND METHODS OF ENFORCEMENT

- 2.1 The purpose of enforcement is to ensure that preventative or remedial action is taken to secure compliance with legal requirements. The Council's preferred method of ensuring compliance is by working with those who are covered by this policy. Although the Council expects full voluntary compliance with legal requirements, it will not hesitate to use its enforcement powers where necessary.
- 2.2 There are a variety of enforcement actions available to the Council. They include, but are not limited to:

ADVICE/EDUCATION

The provision of advice on how to comply with the law.

LOCAL BUSINESS PARTNERSHIP

Working with the business community to help them understand and comply with the law.

WARNING LETTER

A warning that a recurrence or continuation of an infringement may result in legal action.

STATUTORY NOTICE

A wide range of legal powers exist which can require people to take remedial action or cease a particular course of conduct. Failure to comply with a statutory Notice will often result in a prosecution. Statutory Notices are served in circumstances where there has been a continuing failure to comply with legal requirements or where there is a likelihood that there will be a failure to comply with legal requirements.

WORKS IN DEFAULT

The Council may carry out works in default of a statutory Notice where:

- works required by a statutory Notice have not been carried out; **and**
- there is an imminent risk to the occupant (s'), visitor (s'), public health/safety or the environment, such that the consequences of not taking immediate action would be unacceptable; **or**

- statute does not permit prosecution for non-compliance with a statutory Notice.

Where the Council incurs costs for carrying out works in default they may be passed on to the individual or company

EMPTY DWELLING MANAGEMENT ORDERS

An EDMO gives the Council the right in certain circumstances to take possession of an empty dwelling and manage them.

COMPULSORY PURCHASE ORDERS

The Council has the power to acquire property for certain purposes, even if the owner does not want to sell. The law gives us powers to do this where buildings or land that are privately owned are needed to be improved or redeveloped for the benefit of the area or to buy land which is needed to help deliver social and economic change.

SIMPLE CAUTION

A specific form of warning where an individual admits committing an offence. These are used in cases where a prosecution could be brought but there are strong mitigating factors. The Council will have full regard to the Home Office Guidelines when administering official cautions.

FIXED PENALTY NOTICES

Fixed penalty notices can only be used in respect of certain legislation [eg Environmental Protection Act 1990, Dogs (Fouling of Land) Act 1996]. The service of a fixed penalty notice will be carried out when the circumstances of the offence satisfy one or more of the following criteria:

- The offence is sufficiently serious to warrant prosecution.
- There is sufficient evidence of the offender's guilt to give a realistic prospect of conviction in case of non-compliance with the fixed penalty notice.
- The offender has expressed remorse and a willingness to comply with the law in future.
- The officer believes that a fixed penalty notice will prevent repeat offences.
- The offender admits that they are guilty.
- The offender will accept the fixed penalty notice and understands its significance.
- It is in the public interest to issue a fixed penalty notice rather than instigate prosecution proceedings.

Fixed penalty notices may be cited in prosecution proceedings in relation to

a similar offence committed within three years of the caution's issue.

PROSECUTION

The prosecution of cases in the criminal courts. Depending on the circumstances, the Council does not always warn or issue a statutory Notice before taking a prosecution.

3. PRINCIPLES OF ENFORCEMENT

3.1 The Council believes in firm but fair regulation. Underlying this are the principles of: **proportionality** in the application of the law and in securing compliance; **consistency** of approach; **transparency** in how the Council operates and what those who are regulated can expect from the Council; and **targeting** of enforcement action.

3.2 Proportionality

Any enforcement action taken by the Council will be proportionate to the risks posed and to the seriousness of the breach. As far as the law allows, the Council will take into account the circumstances of the case and the attitude of the individual or company when considering what action to take.

3.3 Consistency

The Council aims to carry out its duties in a fair, equitable and consistent manner. Consistency does not mean simple uniformity. Officers will need to exercise their professional judgement and discretion according to the circumstances of each individual case.

Arrangements are in place to promote consistency in the interpretation and enforcement of legislation through liaison with other Local Authorities across the country. The Council must also have regard to statutory codes of practice,

advice provided by LACORS (Local Authorities Co-ordinators of Regulatory Services), central government departments and other agencies.

3.4 Transparency

Transparency is important in maintaining public confidence in the Council's ability to regulate. It means helping those regulated and others to understand what is expected of them and what they should expect from the Council. It also means making it clear why an officer intends to or has taken enforcement action.

The Council trains its staff and has procedures to ensure that:

- Where remedial action is required, it is clearly explained (in writing in most cases) why the action is necessary, when it must be carried out by, and that a clear distinction is made between best practice and legal requirements.
- Opportunity is provided to discuss what is required to comply with the law before formal enforcement action is taken unless urgent action is required, eg to protect the environment, to remove risks to health and safety, or to prevent evidence being destroyed.
- Where urgent action is required, a written explanation of the reason is provided as soon as practicable after the event.
- Written explanation is given of any rights of appeals against formal enforcement action at the time the action is taken.

The Council maintains a Public Register of information as required by law.

3.5 Targeting

Targeting means making sure that regulatory effort is directed primarily towards those whose activities are likely to give rise to the most serious breaches of legislation and to promote the Corporate Priorities of maintaining a thriving and diverse local economy, caring for the environment, developing safer and stronger communities and having housing suitable for local people .

The Council has systems for prioritising regulatory effect. They include:

- Responding to complaints from the community about regulated activities.
- The inspection of premises according to risks posed.
- Gathering and acting on intelligence **about** illegal activities.

3.6 **Human Rights**

In carrying out its duties, the Council will respect the rights and freedoms guaranteed to individuals under the Human Rights Act 1998.

3.7 **Enforcement in Council run Premises**

Certain premises run by the Council will be subject to enforcement visits which are relevant to the particular field of operation. These visits will be carried out in accordance with the appropriate legislation and relevant Codes of Practice. Any serious or significant contraventions which are detected during the course of such visits will be notified to the appropriate Council Director and copies sent to the Council's Head of Legal, HR and Democratic Services and the Council's Chief Executive without undue delay who will then take appropriate action to ensure the contravention is abated.

3.8 **Avoiding Potential Conflicts of Interest**

The Council is fully aware of the potential conflicts of interest that may arise in an enforcement situation either through the operation of Council run services, the contracting in of enforcement services, or responsibilities under the home or originating authority principle. The Council will therefore discharge its duties impartially in accordance with the principles of this policy

3.9 **Out of Hours Service**

The Council provides a service to deal with emergency situations that may occur outside normal office hours

4. **LEGAL AND POLICY CONTEXT**

4.1 **The Enforcement Concordat**

Enforcement actions are taken within the context of a legal and policy framework.

Council services will carry out their enforcement-related work with due regard to the Enforcement Concordat. This Concordat arises from a central government initiative. The Concordat lays out the principles of good enforcement. These are:

- Publishing clear standards, setting out the level of service and performance that businesses and the public can expect to receive.
- Dealing with the public and businesses in an open and honest way.
- Providing a courteous, efficient and helpful service.
- Responding promptly and positively to complaints about the service.
- Ensuring that enforcement action is proportionate to the risks to the public.
- Carrying out duties in a fair, equitable and consistent manner.

A full version of the Enforcement Concordat is available by visiting the Cabinet Office website at:

www.cabinetoffice.gov.uk/regulation/reform/enforcement_concordat/index.asp

Where a decision to prosecute is made, this decision will be taken in accordance with the Code for Crown Prosecutors, which details considerations to be taken into account before commencing prosecution proceedings and is outlined below in this policy. A full copy of the code is available from:

The Crown Prosecution Service

50 Ludgate Hill

London EC4M 7EX

Tel: 0207 796 8000

Web: <http://www.cps.gov.uk/Home/CodeForCrownProsecutors>

Enforcement decisions and actions will be made with due regard to the provisions of:

- The Police and Criminal Evidence Act 1984
- The Human Rights Act 1998

- The Crime and Disorder Acts 1984 & 2004
- Regulation of Investigatory Powers Act 2000
- The Criminal Procedures and Investigations Act 1996
- Equal Rights and anti-discrimination legislation
- All other relevant legislation applicable from time to time

If it is in the public interest, matters concerning non-compliance may be shared, where necessary, with other enforcement agencies. Any such action will be undertaken in compliance with the Data Protection Act 1998.

4.2 **Confidentiality**

We will ensure that the identity of persons contacting us, and any information supplied by them, is not revealed to a third party except:

- where the law requires; or
- where the case goes to court or tribunal; or
- with the prior written agreement of the person supplying the information.

People wishing to remain anonymous may do so and information supplied in connection with breaches of legislation will be investigated wherever possible regardless of the anonymity of the complainant.

5. **AUTHORISATION OF OFFICERS**

5.1 Only officers who are competent by training, qualification and/or experience will be authorised to carry out enforcement action. Officers should also have sufficient training and understanding of the policy to ensure a consistent approach to their duties. Officers are required to show their authorisations/warrants on demand.

5.2 Enforcement services of the Council are required to carry out their duties, including carrying out the escalation of enforcement actions, in accordance with set procedures. These procedures vary depending on the Service area involved in dealing with any non-compliance. Officers dealing with the public

are required to identify which service area they represent. Officers may take into consideration actions taken by other service areas in deciding what enforcement action to take when carrying out their duties.

- 5.3 Procedures applicable to the service areas are available on the Council's Internet website.

6. APPLICATION OF OUR POLICY

- 6.1 All Officers will have regard to this policy when making enforcement decisions ('enforcement' includes informal letters, fixed penalty notices, legal notices, formal cautions and prosecution).
- 6.2 Any departure from this policy must be exceptional, capable of justification and be fully considered by the relevant Head of Service, before a final decision is taken. This proviso shall not apply where a serious risk of injury to health or safety or to the environment is likely to occur due to a delay in any decision being made. A record of all departures from this policy shall be kept. The relevant Head of Service, Director and/or Chief Executive shall, as soon as is practicable, be informed of any such departures.

7. PROSECUTION

- 7.1 The Attorney General's guidelines on criteria for prosecutions endorsed the principle that suspected criminal offences should not automatically be the subject of prosecution. The decision to prosecute an individual or company is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case, a prosecution has serious implications for those involved – the victim, every witness and the defendant(s). The purpose of this policy is to ensure the Council can make fair and consistent decisions about prosecutions based on the Code for Crown Prosecutors.

8. GENERAL PRINCIPLES FOR PROSECUTION

- 8.1 Each case is unique and must be considered on its own merits, but there are general principles that apply in all cases. There are two stages in the decision to prosecute.
- 8.2 The first stage is the **evidential test**. If the case passes the evidential test, consideration must be given as to whether a prosecution is in the public interest.
- 8.3 The second stage is the **public interest test**. The Council will only start to prosecute when the case has passed both tests.

9. THE EVIDENTIAL TEST

- 9.1 The Council must be satisfied that there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge. Consideration must be given as to what the defence case may be and how that is likely to affect the prosecution case. A realistic prospect of conviction is an objective test. It means that a jury or a bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
- 9.2 When deciding whether there is enough evidence to prosecute, consideration must be given as to whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern, but there will also be cases in which the evidence may not be as strong as it first appears. The following questions must therefore be asked:
- 9.3 Can the evidence be used in court?
Is it likely that the evidence will be excluded by the court? There are certain legal rules which may mean that, although evidence may seem relevant, it cannot be given at trial. For example, is it likely that evidence will be excluded because of the way it was gathered or because of the rule against hearsay as evidence? If so, is there enough other evidence for a realistic prospect of conviction?

- 9.4 Is the evidence reliable?
Is it likely that a confession is unreliable, for example, because of the defendant's age, intelligence or lack of understanding?
- 9.5 Is the witness's background likely to weaken the prosecution case? For example, does the witness have dubious motives that may affect his or her attitude to the case, or does he/she have a relevant previous conviction?
- 9.6 If the identity of the defendant is likely to be questioned, is the evidence about it strong enough?
- 9.7 Evidence should not be ignored merely because there is uncertainty as to whether it can be used or is reliable. It should be looked at closely when deciding if there is a realistic prospect of conviction.

10. THE PUBLIC INTEREST TEST

- 10.1 The public interest test must be considered in each case where there is sufficient evidence to provide a realistic prospect of conviction. In serious cases, a prosecution will usually take place unless there are public interest factors against prosecution, which clearly outweigh those in favour (see paragraph 11 below). Although there may be public interest factors against prosecution in a particular case, quite often, the prosecution should go ahead and those factors can be put to the court when sentence is being passed. Consideration should also be given to the probable public benefit of a prosecution and the importance of the case, e.g. whether it might establish a legal precedent in other companies or other geographical areas.
- 10.2 The Council must balance factors for and against prosecution carefully and fairly having regard to any explanation offered by a potential defendant and also the previous history of the party concerned. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the

need to prosecute but others may suggest that another course of action would be better.

11. PUBLIC INTEREST FACTORS IN FAVOUR OF A PROSECUTION

11.1 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if: -

- A conviction is likely to result in a significant sentence.
- The offence was committed against an officer of the Council – eg obstruction
- The defendant was in a position of authority or trust.
- The evidence shows that the defendant was a ringleader or organiser of the offence.
- There is evidence that the offence was premeditated or came about because of the defendant's neglect or failure to take all reasonable precautions and exercise all due diligence to avoid committing the offence.
- The victim of the offence was vulnerable.
- There is evidence of corruption.
- The defendant's previous convictions or cautions are relevant to the present offence.
- The defendant is alleged to have committed the offence whilst under an order of the court.
- There are grounds for believing that the offence is likely to be continued or repeated, for example by a history of recurring conduct, or the offence, although not serious in itself, is widespread in the area where it was committed.
- A prosecution would have a significant positive impact on maintaining community confidence.

12. SOME PUBLIC INTEREST FACTORS AGAINST PROSECUTION

12.1 A prosecution is less likely to be needed if:

- The court is likely to impose a very small or nominal penalty.
- The offence was committed as a result of a genuine mistake or misunderstanding and the offender is prepared to put right any loss (these factors must be balanced against the seriousness of the offence and a defendant must not avoid prosecution simply because they can pay compensation).
- The defendant is willing to prevent a recurrence of the offence.
- The defendant is able to establish a statutory defence.
- The loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by misjudgement.
- There has been a long delay between the offence taking place and the date of the trial, unless:
 - The offence is serious
 - The delay has, in part, been caused by the defendant(s)
 - The offence has recently come to light
 - The complexity of the offence has meant there has been a long investigation
- A prosecution is likely to have a very bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence.
- The defendant is elderly or is, at the time of the offence, suffering from significant mental or physical ill-health, unless the offence is serious or there is a real possibility that it may be repeated.
- Other courses of action such as the issuing of a Formal Caution in accordance with Home Office Circular 59/1990 or an Improvement Notice or imposing a prohibition would be more appropriate or effective.

13. THE RELATIONSHIP BETWEEN THE VICTIM AND PUBLIC INTEREST

13.1 The Council prosecutes cases on behalf of the public at large and not just in the interests of any particular individual. However, when considering the

public interest test, the Council will always take into account the consequences for the victim of the decision whether or not to prosecute and any views expressed by the victim or the victim's family.

14. WORKING WITH OTHER REGULATORS

14.1 In some circumstances, risks to the public, employees and the environment are also dealt with by other authorities. Where appropriate the Council will liaise with all other authorities before taking enforcement action.

14.2 In some situations, risks to the public, employees and the environment, are also addressed by more specific legislation enforced by other authorities. In order to avoid duplication, the Council will, in such circumstances, seek to agree which other regulator should ensure that any such risks are adequately controlled. In determining the most appropriate enforcing authority, regard will be had to the following principles:

- relative effectiveness of the available legislation.
- degree of expertise held by each authority.
- efficient use of resources.
- general suitability of the respective authorities to deal with the risks in question.
- relevant enforcing authority legislation.

Relevant information will be shared with other enforcement bodies, where appropriate.

15. MONITORING COMPLIANCE WITH THE POLICY

15.1 An audit of the enforcement action undertaken by the individual Service will be carried out on an annual basis, in order to monitor compliance with this policy. The audit results will be reported through the individual Service Management Team Meetings and Business Plans.

16. COMPLAINTS ABOUT OUR SERVICE

- 16.1 Complaints, comments and suggestions about the Service are always welcome. Details of the Council's Complaints procedure are available on the Council's website or on the complaints leaflet.
- 16.2 Complaints will be dealt with in accordance with the Council's Customer Complaints Procedure. An acknowledgement will be sent within 3 working days and a response provided within 15 working days.
- 16.3 After following the Council's Customer Complaints Procedure, the complainant always has the option of raising their complaint with the Local Government Ombudsman, who will independently assess whether or not the Council has responded fairly and correctly.

17. STATUS AND REVIEW

- 17.1 The Tunbridge Wells Borough Council adopted this policy on
- 17.2 This policy will be subject to an annual review by Service Managers with additional reviews as and when required to accommodate changes in legislation and local needs. The Head of Legal, HR and Democratic Services will present the results of these reviews to Cabinet. The Council will seek the views of businesses and other stakeholders when undertaking such reviews.
- 17.3 This is a public document. Further copies of this and associated documents can be obtained from

18. EQUAL OPPORTUNITIES

- 18.1 Tunbridge Wells Borough Council should ensure that all recipients of enforcement action taken in accordance with this Policy, including both formal and informal action and advisory visits, receive fair and equitable treatment irrespective of their race, ethnicity, gender, sexuality or any disability.