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## 1.0 Introduction

1.1 Fair and effective enforcement is essential to protect the health, 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. The purpose of this protocol is to provide guidance to ensure:

- 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.

1.2 This General Enforcement Policy will be supplemented by specific Appendices in relation to Specific Work areas, see index above.

## 2.0 Legal Status of the Enforcement Policy

2.1 The Committee of South Derbyshire District Council approved this policy on 18<sup>th</sup> November 2010

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2.2 This policy is intended to provide guidance for officers, businesses, consumers and the public. It does not affect the discretion of the Council to take legal proceedings where this is considered to be in the public interest.

### **3.0 Scope and Meaning of 'Enforcement'**

3.1 '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.

3.2 In certain circumstances we will seek to raise awareness and increase compliance levels by publicising unlawful trade practices or criminal activity. Where appropriate the results of specific court cases may also be published.

### **4.0 General Principles**

4.1 Prevention is better than cure and our role therefore involves actively working with businesses to advise on, and assist with compliance.

4.2 Where it is considered that formal action is 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](http://bre.berr.gov.uk/regulation/reform/enforcement_concordat/index.asp)

4.3 Enforcement decisions will be fair, independent and objective, proportionate, consistent and transparent and will not be influenced by issues such as ethnicity or national origin, gender, religious beliefs, political views or the sexual orientation of the suspect, victim, witness or offender. Such decisions will not be affected by improper or undue pressure from any source.

4.4 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 South Derbyshire District Council is a public authority for the purposes of the Human Rights Act 1998. We will, therefore, apply the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

4.6 This enforcement policy helps to 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.

4.7 In certain instances we may conclude 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.

### **5.0 Notifying Alleged Offenders**

5.1 If we receive information [for example from a complainant] that may lead to enforcement

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action against a business or individual we will notify that business or individual as soon as is practicable of any intended enforcement action, unless this could impede an investigation or pose a safety risk to those concerned or the general public.

- 5.2 During the progression of enforcement investigations (prior to any convictions), business proprietors or individuals and witnesses will be kept informed of progress. Confidentiality 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.

## **6.0 Deciding what level of enforcement action is appropriate**

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

### Levels of enforcement action:

- 6.2 There are a large number of potential enforcement options. The level of the action taken varies from no action through to proceedings in Court, depending on increasing seriousness

- No action;
- Informal Action and Advice;
- Fixed Penalty Notices;
- Penalty Charge Notices;
- Formal Notices;
- Forfeiture Proceedings;
- Seizure of goods/equipment;
- Injunctive Actions;
- Refusal/revocation of a licence;
- Simple Caution;
- Prosecution.

- 6.3 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.

- 6.4 Where the law has been contravened, there is a range of enforcement options available. 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 or negligently or involve deception, or where there is significant economic detriment.

### No Action:

- 6.5 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

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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. In such cases we will advise the offender of the reasons for taking no action. The decision to take no action rests exclusively with the Council and for example the cost benefit equation described above will not rule out formal action if it is judged in the Public Interest.

### Informal Action and Advice

- 6.6 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.
- 6.7 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.
- 6.8 Failure to comply could result in an escalation of enforcement action.

### Fixed Penalty Notices

- 6.9 Certain offences are subject to fixed penalty notices where prescribed by legislation. They are recognised as a low-level enforcement tool and avoid a criminal record for the defendant. Where legislation permits an offence to be dealt with by way of a Fixed Penalty Notice (FPN), the Council will normally administer a FPN on a first occasion, without issuing a warning.

### Penalty Charge Notices

- 6.10 Penalty Charge Notices (PCN) 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 the Council will normally issue a PCN without first issuing a warning.

### Formal Notice

- 6.11 Certain legislation allows notices to be served requiring the recipient 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.
- 6.12 All notices issued will include details of any applicable *Appeals Procedures*.
- 6.13 Certain types of notice allow works to be carried out in default. This means that if a notice is not complied with [a breach of the notice] the Council may carry out any necessary works to satisfy the requirements of the notice. Where the law allows, the Council may then charge the person / business served with the notice for any cost incurred in carrying out the work. Whenever the urgency of the notice allows, the Council will ensure any work, in default are achieved, economically, e.g. by

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obtaining multiple competitive quotes for the work, unless it is a matter of urgency.

### Forfeiture Proceedings

- 6.14 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.

### Seizure

- 6.15 Certain legislation enables authorized 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 receipt.

### Injunctive Actions

- 6.16 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.
- 6.17 Action under the Enterprise Act 2002; proceedings may be brought where an individual or organization 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.
- 6.18 Anti Social Behavior Orders (ASBO) and Criminal Anti Social Behavior Orders (CRASBO): Where the non-compliance under investigation amounts to anti-social behavior such as persistent targeting of an individual or a group of individuals in a particular area then, following liaison with the Council's Crime and Disorder Unit, where appropriate, an ASBO or CRASBO may be sought to stop the activity.

### Refusal, Suspension and Revocation of Licence

- 6.19 Under the Licensing Act 2003 where there is a requirement for a business to be licensed by the local authority, the licence may be granted unless representations or objections are received against the application. In such cases the Licensing and Appeals Sub Committee will hear the case and decide to grant, grant with conditions, or refuse the licence application.

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- 6.20 In addition to the above, in relation to the Gambling Act 2005, applications for premises Licence, the Licensing and Appeals Sub Committee may exclude activities or impose conditions on a licence.
- 6.21 Under the Licensing Act 2003, where a Review of a Premises Licence is sought under Section 51 of the Act, the options available to the Licensing Committee are:-
- To modify the conditions of Licence
  - To exclude a Licensable activity from the scope of the Licence
  - To removed the Designated Premises Supervisor
  - Suspend the Licence for a period not exceeding three months
  - Revoke the Licence
  - Issue a warning letter
  - No action
- 6.22 Under the Gambling Act 2005, where a Review of a Premises Licence is sought under Section 202 of the Act, the options available to 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, under Section 168 or remove or amend an exclusion
  - Add, remove or amend a condition under Section 169

### Simple Caution

- 6.23 A Simple Caution includes a formally documented admission of guilt, but is not a form of sentence, nor is it a criminal conviction.

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.

For details on the Home Office guidance (Circular 16/2008) visit:  
<http://www.homeoffice.gov.uk> and Annex D of this Document.

- 6.24 Furthermore South Derbyshire Policy is that:

- The offender should not have received a simple caution for a similar offence within the last 2 years.

- 6.25 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

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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.

### Prosecution

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

- Deliberately, negligently or persistently breached legal obligations, which were likely to cause material loss or harm to others;
- Deliberately or persistently ignored written warnings or formal notices;
- Endangered, to a serious degree, the health, safety or well being of people, animals or the environment;
- Assaulted or obstructed an Officer in the course of their duties.

### Proceeds of Crime Applications

6.27 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. Applications are made after a conviction has been secured.

## **7.0 Determining whether a Prosecution or Simple Caution is viable and appropriate**

7.1 We apply two 'tests' to determine whether a Prosecution or Caution is viable and appropriate. We follow guidance set by the Crown Prosecution Service when applying the tests:

7.2 For more information about the 'Code for Crown Prosecutors' visit:  
[http://www.cps.gov.uk/victims\\_witnesses/code.html](http://www.cps.gov.uk/victims_witnesses/code.html)

7.3 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.

### The Evidential Test

7.4 We must be satisfied that there is enough 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. A jury or Magistrates' Court should only convict if it is sure of a defendant's guilt.

### The Public Interest Test

7.5 The public interest must be considered in each case where there is enough evidence to

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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 better. The message sent to the Community by a decision to prosecute or not and its potential to affect future levels of compliance will be given consideration.

## **8.0 Who decides what enforcement action is taken**

8.1 Decisions about the most appropriate enforcement action to be taken are based upon professional judgment, legal guidelines, statutory codes of practice and priorities set by South Derbyshire District Council and/or Central Government.

8.2 Where appropriate, decisions about enforcement will involve consultation between or approval from:

- Investigating Officer(s);
- Senior Managers;
- Legal Services;.

8.3 The decision to prosecute must be ratified by the Head of Environmental Services.

## **9.0 Liaison with other regulatory bodies and enforcement agencies**

9.1 Where appropriate, enforcement activities 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 wide geographical area beyond the boundaries of South Derbyshire District Council, 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 We 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.

## **10.0 Considering the views of those affected by offences**

10.1 Environmental Health 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 enforcement decision.

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## **11.0 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.

## **12.0 Review of the Enforcement Policy**

12.1 This Policy will be reviewed annually, minor amendments or changes in law will be amended at the discretion of the Head of Environmental Services.

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## **Appendix A            Specific Enforcement Actions**

### **Investigation, Covert Surveillance and Targeting**

#### **1.0 Investigations**

- 1.1 Inspections and investigations will be carried out in a professional and consistent manner as set out below. This section must be read in conjunction with the General Enforcement Policy

#### **2.0 Authorisations**

- 2.1 Only Officers properly authorised by the Head of Environmental Services (or other listed Officers) will be responsible for undertaking investigations. Officers will only be authorised to deal with such investigations as they have qualifications or experience to undertake in accordance with the procedures laid down. They will follow procedures and guidelines in carrying out their duties.
- 2.2 Officers are issued with a personal warrant card, which will be carried with them at all times and will be shown upon request.

#### **3.0 Covert Surveillance**

- 3.1 During an investigation into suspected non-compliance with legislation, the Council may need to undertake directed covert surveillance from time to time. This may include using remote sound or video monitoring equipment as well as personal observation.
- 3.2 Where it is necessary to use covert surveillance techniques, the requirements of the Regulation of Investigatory Powers Act 2000 will be complied with.
- 3.3 In all cases where covert surveillance is required, such work will only be undertaken with the express permission of an authorised manager who is not directly involved with the investigation.
- 3.4 Requests for the authorisation of surveillance will be made in writing by the investigating Officer. All such requests will be accompanied by a statement which details the reason why covert surveillance is appropriate and proportionate, how it is to be undertaken, who is likely to be involved and any impact that might result from the surveillance.
- 3.5 In deciding whether or not to authorise covert surveillance, the authorised manager will have regard to any other policies relevant to the investigation and the alternative methods of conducting the investigation. Surveillance authorisations will only last for as long as deemed necessary.

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3.6 A register of authorised covert surveillance operations under Regulation of Investigatory Powers Act will be held by the Council. Authorisations will not be made public whilst there is an on-going investigation.

#### **4.0 Targeting**

4.1 Enforcement activities will be targeted towards situations which carry higher risks or where there is or could be a considerable impact as a result of the non-compliance with the law. Enforcement activities may also be targeted towards individuals who are primarily responsible, who have the greatest responsibility to ensure compliance with the law or who have been the subject of previous enforcement action. From time to time, the Council will engage in enforcement initiatives which are directed towards issues where there is a need to draw attention to the existence of legislation and its enforcement.

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## Appendix B

### Specific Enforcement Actions for Hackney Carriage or Private Hire Licences

#### 1.0 General

1.1 This section must be read in conjunction with the General Enforcement Policy. The examples given are not exhaustive but provide only illustrations. Although the following are specific, each situation should be taken on its merits and where variation to this Policy occurs then the reason must be included on the case file.

1.2 In relation to enforcement action the Council can instigate either formal statutory action for failure to comply with the provisions of the Local Government Provisions Act 1976 ("The Act") or for Breaches of South Derbyshire District Council Private Hire Conditions for Operators, Proprietors, Vehicles and Drivers made under the "Act". The alternative method of Enforcement is to place the matter before the Licensing and Appeals Sub Committee of the Council.

#### 2.0 **Grounds for Refusal, Suspension or Revocation of a Hackney Carriage or Private Hire Drivers Licence in accordance with Local Government Provisions Act 1976**

- Where application is for the GRANT of a licence, the Committee has to be satisfied that the applicant is a "fit and proper" person to hold a licence.
- All new applicants are required to pass a driving / knowledge assessment and undergo a medical examination prior to becoming licensed.
- Applicants are also subject to a criminal record check at regular intervals.
- The grounds for refusing to renew a licence, or for suspending or revoking a licence, are based on whether the driver has:-
  - (a) been convicted of an offence involving dishonesty, indecency or violence;
  - (b) been convicted of an offence under the Local Government (Miscellaneous Provisions) Act 1976;
  - (c) failed to comply with a requirement of the Local Government (Miscellaneous Provisions) Act 1976, or
  - (d) any other reasonable cause.

2.1 Under Section 68 of the Local Government (Miscellaneous Provisions) Act 1976 Licence may be suspended with immediate effect if such a decision is deemed necessary in the interests of public safety.

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### **3.0 Failure to Wear A Private Hire Drivers Badge**

3.1 The private hire drivers badge issued by South Derbyshire District Council, must :-

#### **Condition 4 Part B**

The driver shall ensure that the badge is current and worn on his / her clothing in such a position and manner as to be plainly and distinctively visible at all times when discharging his / her duties as a driver of a vehicle.

In particular

A licensed driver found not wearing the private hire identification badge will be cautioned in accordance with the Police and Criminal Evidence Act and asked to stop working until he / she has found it and is wearing it.

3.2 In this case the driver will be cautioned for the offence and a written warning issued. A second or subsequent incident(s) within a 12 month period would normally escalate the enforcement procedure to potentially a simple caution, potential prosecution or referral to the Licensing and Appeals Sub – Committee.

### **4.0 Driving Without A Licence Driver / Vehicle**

4.1 All incidents / complaints about unlicensed drivers of (Hackney Carriages) or private hire vehicles will be investigated. Where evidence of an offence is obtained, prosecution proceedings will normally be initiated. Where this is at the behest of a Licensed Operator then prosecution of the operator should normally follow or referral to the Licensing and Appeals Sub – Committee.

### **5.0 Vehicle Defects**

5.1 Where Enforcement Officers have reason to believe that the condition of a vehicle has (or may have) fallen below the standard expected by the Council, they must take action to secure the required improvements.

5.2 The nature and severity of any defects found will dictate the action taken and the officers will use their discretion having regard to the need to protect public safety.

5.3 These will usually fall into the following categories, which are set out below including the appropriate responses.

#### a) Serious Defects

- Impact upon the safety of the vehicles for the passenger, driver or other road users
- May cause imminent failure of a system or component
- Render the vehicle in breach of road traffic legislation.

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### **Enforcement Action**

Where there are serious defects a legal notice will be served (under Section 68 of the Local Government (Miscellaneous Provisions) Act 1976, which :

- Suspends the vehicle licence immediately
- Requires the vehicle to be submitted for a safety check at a designated garage.

Once served the vehicle cannot be used until for public / private hire until it has been deemed "fit" by the testing station (i.e. there are no serious defects).

If the examiner finds no serious defects but only minor defects then the suspension should be immediately lifted, but the vehicle must return within 7 days to ensure that all defects noted have been rectified.

The Cost of the original inspection will be met by the Council but subsequent inspections by the driver / operator.

#### b) Non – Serious Defects

- These are defects that cause the vehicle to fall below the Council's Standard, but are not sufficiently serious to warrant suspension of the vehicle licence. They may include minor mechanical defects or 'cosmetic' items.

### **Enforcement Action**

Where there defects noted in relation to the vehicle that are not considered serious by the Licensing Enforcement officer they will serve on the driver of the vehicle, a notice which does not suspend the vehicles licence but will require the driver / operator to take the vehicle for a safety check at the designated garage.

The Licensing Enforcement officer can also request the driver to attend the Councils Offices, with his vehicle so that the Officer can further examine the vehicle to determine if a safety check at the designated garage is required.

## **6.0 Accident Damage**

- 6.1 All accident damage that effects the safety, comfort or appearance of a Private Hire licensed Vehicle must be reported in accordance with the South Derbyshire Private hire licensing conditions, within 72 Hrs of the incident. Failure to do this may result in immediate suspension of the of the private hire vehicle licence (pending a safety check) and prosecution of the Private hire driver or Operator.

## **7.0 Using An Uninsured Vehicle**

- 7.1 Where Licensing Enforcement Officers have reason to believe that a vehicle used as a Private Hire Vehicle is / was uninsured they will carry out a full investigation. Where evidence of this offence is obtained the Council will refer the matter to the Derbyshire Constabulary who may initiate prosecution proceedings against the driver / operator. The

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Council may alternatively initiate prosecution for such an offence and any successful prosecution or the matter in general may result in referral to Licensing and Appeals Sub Committee.

## **8.0 Failure To Attend At The Required Time**

- 8.1 Where, following a complaint from a customer, Enforcement Officers, are satisfied that an operator has failed to attend a booking, the company will be issued with a written warning. Repeated failures to attend bookings will be brought before the Licensing and Appeals Sub- Committee for consideration of action against the operators licence.

## **9.0 Criminal Records Bureau Reports And Drivers Licence Checks**

- 9.1 CRB forms are now requested every 3 years from private hire drivers, and yearly checks are undertaken on drivers DVLC licences in order to determine if prosecutions have occurred on which have not been disclosed to the Licensing Section.
- 9.2 Where offences are revealed on CRB reports or disclosed on DVLC licences / check which have not been included on Private Hire Drivers renewal forms, then the matter may result in the immediate suspension of the Drivers licence depending on the severity of the case. Such incidents will be dealt with in keeping with the Statement of Policy Concerning the Relevance of Criminal Convictions Relating to the Determination of Applications / Renewals for a Private Hire Vehicle Drivers Licence.

## **10.0 DSA Tests - New Drivers**

- 10.1 Driving tests are undertaken by the Driving Standards Agency (DSA), when new applicants apply to become a Private Hire Driver. No licence will be issued until a driver has passed the appropriate examination and provided the Authority with a Pass Certificate.
- 10.2 However in circumstances where the Authority is satisfied that all other licensing application requirements have been verified and the authority is satisfied that the licence can be issued and where the DSA cancels the prospective Private Hire Drivers test then in these circumstances the following procedure may be adopted
- 10.3 Where the DSA have cancelled **in writing** an appointment with a prospective private hire driver, and the next appointment is specified in writing by the DSA, then the Authority will issue the Private Hire drivers Licence up to the date of the next DSA test.
- 10.4 If any driver subsequently fails the DSA drivers test the licence will be withdrawn forthwith, and remain withdrawn until the driver provides the Authority with an appropriate DSA pass certificate. In these circumstances no allowance will be made if the DSA cancels any tests. Should the driver fail their second DSA test, then the application will be rejected. No application will be considered before a 12 month period has elapsed.

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## 11.0 DSA Test - Existing Drivers

11.0 Where existing drivers are requested to sit a DSA test, perhaps due to the totting up procedure (6 Penalty Points or more etc). the following conditions will apply

- If the driver fails the DSA test on the first occasion, a second DSA test should be allowed
- If the driver fails the second DSA test a Committee report should be prepared and brought before the Licensing and Appeals Sub Committee for determination as to whether the licence should be revoked or other conditions applied as the Committee deems suitable.

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## **ANNEX C Specific Enforcement Actions for Simple /Corporate Cautions and Prosecutions**

### **1.0 Simple Cautions**

1.1 The purpose of administering a Simple caution is:-

- To deal quickly and simply with less serious offenders.
- To divert the offender from the criminal courts, and
- To reduce the chance of a further offence being committed.

The use of cautioning is not intended to be an alternative to written warnings, but should be seen as one step short of prosecution.

1.2 The “Simple/corporate caution” procedure is derived from the advice issued by the Home Office to HELS “See Home Office Circular 16/2008 This should be considered in the following circumstances:-

- When a prosecution would not be in the public interest.
- Where there has been non compliance of a Notice(s) for one or a breach of statutory provisions
- The time and resources involved in taking legal proceedings will be disproportionate to the fines that are likely to be awarded for a successful prosecution.

1.3 Before a caution can be administered, the following conditions must be satisfied:-

- The evidence available must comply with the Attorney General’s Guidelines on criteria for prosecution, i.e. a conviction is more likely than an acquittal before a court.
- The offender must admit to the offence.
- The offender must understand the significance of the caution and must agree to be cautioned (if the offender is a juvenile, his parent/guardian will have to consent).

1.4 A caution must not be used where an Officer feels that prosecution proceeds should not be instigated because the admissible evidence of the offence is insufficient, nor should it be used if the offenders admission is not clear and reliable.

1.5 Officers should decide whether a caution is appropriate before seeking the offender’s consent. When ascertaining if the offender consents to a Simple caution, the significance of it must be explained (i.e. that a record will be kept of it, that it may influence a decision to prosecute if a further offence is committed and that it may be cited in Court if subsequent proceedings result in a conviction for another offence).

1.6 Further advice on the technicalities of the “Simple / Corporate caution” and how, when and

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if the caution should be considered can be obtained from Legal Services Section.

- 1.7 A Simple caution should be given by a Senior Manager, preferably the Head of Environmental Services, or can be arranged to completed by Post.
- 1.8 A juvenile must always be cautioned in the presence of a parent/guardian or other "appropriate adult". A record of all Simple cautions should be kept and copies of Simple cautions given should be sent to the Office of Fair Trading for their records, but this does depend on the parent legislation.

## 2.0 Procedural Arrangements

2.1 Purpose of this document is to state the authority's policy with respect to:-

- Identification of circumstances when it is appropriate to use a Simple Caution.
- Confirmation that the use of Simple Caution will be in accordance with the Home Office Circular Home Office Circular 16/2008
- Identification of the Cautioning Officer by Designation.
- Course of action to be taken when a person declines the offer of a Simple Caution.
- Other bodies or authorities to be notified, if appropriate.

It is intended that the policy will ensure a consistent application of cautioning decisions.

## 3.0 The Aim Of Cautioning

3.1 The aim of a Simple Caution is to:

- Deal quickly and simply with less serious offenders;
- Divert them from unnecessary appearance in the criminal courts; and/or
- Reduce the chances of their re-offending.

## 4.0 The Procedural Policy

It is the policy of this authority that:

- The person will only receive a Simple Caution when the circumstances of the offence meet the criteria identified in the Home Office Circular 16/2008 .
- The Simple Caution will be administered by the "Cautioning Officer" from the Department who is at Head of Service level or above or if none are available Section Manager Normally the caution will be administered in person by the "Cautioning Officer".

*In exceptional circumstances the Caution may be administered by post.*

- The offender will be advised in writing of the proposal to issue a Simple Caution.
- The Simple Caution will be in writing using the prescribed form. Two copies of the form will be signed by the person receiving the caution, each copy will then be signed by the person administering the caution. One of the copies will then be issued to the person receiving the caution.
- Where the offender refuses to accept a caution or fails to return the signed copies within 14 days, consideration will be given to the institution of legal

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proceedings.

## **5.0 Recording Of Offences**

5.1 The circumstances of the offence will be recorded in the appropriate premises file and on a Authority (Flare)

## **6.0 Other Action**

6.1 The Lead Authority (if appropriate) will be notified of the details of the caution.

Where the offence relates to a complaint, the complainant will be notified that a Simple caution has been issued.

## **7.0 Prosecutions**

7.1 The policy details the criteria to be considered when considering legal proceedings.

## **8.0 Powers Of Prosecutions**

8.1 The Local Authority always has the discretion whether or not to prosecute for an offence and the decision to prosecute should be based on the circumstances of each case. The criteria for prosecution must, in general, be related to risk or the seriousness of the offence, rather than being a punitive response to minor technical regulatory transgressions. All factors in the relevant Codes of Practice or Parent legislation must be taken into account.

## **9.0 Prosecution Criteria**

9.1 A breach of legislation will not automatically result in institution of legal proceedings. The circumstances which are likely to warrant prosecution may be characterised by one or more of the following criteria:

- Where there is a blatant disregard for the law, particularly where the economic advantages of breaking the law are substantial and the 'law-abiding' are placed at a disadvantage in relation to those who disregard it.
- Where there has been reckless disregard for the health and safety of employees or others.
- Where there have been repeated breaches of legal requirements in a premises and it appears management is either un-willing or unable to deal adequately with them.
- Where a particular type of offence is prevalent in a particular area.
- Where there has been a serious accident, near miss or a case of disease arising from one or more substantial legal contraventions.
- Where a particular transgression has caused serious public alarm or disquiet.
- Where there are persistent poor standards for control of health and safety hazards.

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- The offence involves a failure to comply in full or part with the requirements of one or more statutory notices unless there are very exceptional circumstances.
- A Simple Caution has previously been issued for a similar offence.

## 10.0 Decision Making

- 10.1 The decision to institute legal proceedings does not preclude the issue of statutory notices or other enforcement action as well. Investigation and decision making will not be unduly prolonged or delayed and witnesses, complainants or other parties will be kept informed as to the progress of the case. In all cases, a decision will be made within two months following the end of investigations to ensure natural justice.
- 10.2 Before a prosecution proceeds, the Officer will be satisfied that there is admissible, substantial and reliable evidence that a criminal offence has been committed by an identifiable person or company. A *prima facie* case is not sufficient and the test to apply is whether there is *realistic* prospect of a conviction. The officer will take into account likely defences and also any possible mitigation that may be made.
- 10.3 If an officer is satisfied that there is sufficient evidence to warrant legal proceedings, then they must consider whether the public interest is served by a prosecution. Particular consideration will be given to the wishes / interests of any victims who may not wish to pursue the matter or act as witnesses for the prosecution.
- 10.4 Through-out the decision making process proper and informed legal advice will be sought.

## 11.0 Prosecution Of Managers

- 11.1 Officers will only consider a prosecution of a manager when an act or omission leading to offence being committed was within their managerial capacity. When contemplating such action the officer will consider:
- Whether the matter is clearly one over which the manager concerned had effective control;
  - Whether the manager had personal knowledge of the circumstances surrounding the event which merits prosecution, although was not necessarily personally aware of the matters at fault;
  - Whether the manager failed to take obvious steps to prevent the event that is the subject of the proposed prosecution;
  - Whether the manager received previous advice or warning of their responsibilities in relation to the type of act or omission in question; and
  - Where management is shared between two or more levels of managers, against whom it is possible to take proceedings. Only exceptionally should the more junior levels be prosecuted without similar action being taken against senior management.

## 12.0 Summary Or Indictment

- 12.1 Certain offences can be tried summarily or on indictment (known as *either way* offences) and in deciding whether to recommend prosecution on indictment the officer will consider:
- The gravity of the offence;

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- The adequacy or otherwise of the powers of the summary court to punish the offence;
- The record of the offender;
- The magnitude of the risk; and
- Any circumstances causing particularly great public alarm.

### 13.0 Manslaughter (Health & Safety Only)

- 13.1 The officer will clarify at an early stage for an offence involving a workplace fatality, as to whether the circumstances meet the legal test for manslaughter.
- 13.2 The officer will consider whether an act of gross negligence by an individual resulted in a death at work. If the officer is of the opinion that the accident passes the test for manslaughter, then they will refer the matter to the police or the Crown Prosecution Service, as appropriate.

### 14.0 General Procedural Matters

- 14.1 Once a decision to instigate prosecution has been taken, the matter will be referred, without undue delay, to the person(s) designated manager, who will check the details of the case prior to forwarding to the Head of Environmental Services who may authorise prosecution action.
- 14.2 The matter will then be referred to the Local Authority Solicitor or other such Officer as appropriate, who is authorised to conduct legal proceedings. The procedure for the submission of case reports will be followed.
- 14.3 The Lead Authority (if applicable) will be advised of prosecutions taken and their outcome. With respect to complaints, the complainant will always be advised of the outcome of the case.

### 15.0 General Arrangements

- 15.1 This section will discuss prosecution as a form of enforcement action and, in particular, what circumstances legal proceedings should be considered.
- Where there is blatant disregard for the law.
  - When there appears to have been reckless disregard for health or safety or persons at work or others.
  - Where there have been repeated breaches of legal requirements in an establishment (or in other branches of a multiple concern) and it appears that the management is neither willing nor structured to adequately deal with these, i.e. health and safety management.
  - Where a particular type of offence is prevalent in an activity or an area.
  - Where there has been a serious accident or a case of ill health arising from a substantial legal contravention where the prime consideration should be the seriousness of the contravention.
  - Where a particular contravention has caused serious public concern and local publicity would have a salutary effect.
  - Where there are persistent poor standards for control of health hazards.
  - A prosecution should not be taken where there is a known defence in law! The decision to prosecute does not preclude the service of Notices as well (if applicable).

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Where it is appropriate.

Once a decision to prosecute has been made by the Officer, this should then be discussed with the Line Manager.

## **16.0 Who To Prosecute**

- 16.1 Once a decision to prosecute has been made, the next step is to identify on whom legal proceedings should be instigated. To this end, if a company is involved a simple company search should be made and this should include a full financial breakdown and also the names and addresses of all the directors, partners etc.

## **17.0 Offences Under Haswa (Only)**

- 17.1 The power to institute proceedings for an offence in England and Wales is restricted to Officers, or by, or with the consent of the Director of Public Prosecutions (HASWA, Section 38). Therefore, it should be the Officer's name on the information relating to the prosecution (HASWA, Section 39).
- 17.2 The details of offences created by health and safety contraventions are given in HASWA, Section 33(1)(a) to (o). Whereas HASWA, Section 33(2) lists those of the foregoing offences that may be tried only on a summary basis. Section 33(3) of HASWA specifies other methods of action including indictment.

## **18.0 Possible Manslaughter Cases (Health And Safety Only)**

- 18.1 Firstly, the police investigate a death at work in the same way as they would investigate all other sudden deaths, but as they do not have a health and safety background or insight, they may not recognise that a workplace death was clearly foreseeable.
- 18.2 Conversely, authorised Officers are not themselves responsible for determining whether acts or omissions are reckless and provide the basis for a manslaughter charge, nor do they have the power to instigate manslaughter prosecutions. In investigation involving a fatality(s), the following should be borne in mind:-

### **18.3 Initial Investigation**

At an early stage the Officer should clarify whether the circumstances may meet the legal test for manslaughter, as defined below:-

- *Voluntary Manslaughter* - where the offence could constitute murder but there are mitigating circumstances such as provocation or diminished responsibility.
- *Involuntary Manslaughter* - where the accused did not have the express intention to kill the deceased but committed some grossly reckless or negligent act which resulted in the death.

Workplace deaths will invariably be in category (b), i.e. involuntary manslaughter.

### **18.4 Referral Of Evidence To Police**

The police will decide if any evidence referred to them warrants further action and if the facts of the case need to be reported to the Crown Prosecution Service (CPS). If evidence appears sufficiently strong, the following information should be forwarded (after the Officer's discussions with the Commercial and Licensing Manager) and Legal Service Section:

- Memo outlining the facts and possible offences.
- A copy of the accident investigation report.

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- Copies of any statements of witness/declaration of truths etc.
- Copies of other relevant documents, e.g. Notices, service records, policies, photographs, etc.
- A description of any objects which could be exhibits in legal proceedings.
- Officer's statement of witness which would form the draft information in relation to proceedings.

## **19.0 Crown Prosecution Service Consideration Of The Evidence**

19.1 The main tests the CPS will use are whether the prosecution is in the public interest and if there is sufficient evidence for a realistic prospect of conviction. In making the decision the CPS would need to be aware of:

- The evidence the Officer has obtained.
- The proposed defendant's previous health and safety record.
- Any public alarm.
- The District Council's policy to prosecute individuals when it is considered to be in the public interest.
- Any other possible proceedings in respect of health and safety offences, including their likely success/penalties.
- The Officer's understanding of the risks associated with the workplace.
- The Officer should ensure that his views are available to the CPS when they consider whether to proceed on a manslaughter case.

## **20.0 Progress Chasing**

20.1 Consideration of a possible manslaughter will take time but it should not delay or prejudice any further enforcement action by the Officer (as either action could enhance the other).

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## **ANNEX D Specific Enforcement Actions for Private Sector Housing Enforcement**

### **1.0 Scope**

- 1.1 The Private Sector Housing Team is part of the Environmental Services Division and undertakes the council's statutory functions in relation to private sector housing. This annex details our approach to enforcement in this regulatory area, which includes:
- assessment of hazards in residential premises under the Housing Health and Safety Rating System (HHSRS)
  - statutory nuisance affecting residential properties
  - standards of repair, amenity, fire precautions and management in Houses in Multiple Occupation including licensing of properties within the mandatory licensing scheme
  - standards in empty properties and bringing them back into occupation

### **2.0 Responsibilities**

- 2.1 The Private Sector Housing Manager will monitor the implementation and effectiveness of the policy, reporting to the Head of Environmental Services and the Housing and Community Services Committee.

### **3.0 Specific Enforcement Of The Housing Act 2004 Part 1& Housing Health & Safety Rating System (England) Regulations 2005**

- 3.1 The Housing Act 2004 introduces a requirement for local authorities to base their enforcement decisions in respect of all types of residential property on assessments under Housing Health and Safety Rating System (HHSRS). Local Authorities must inspect properties to determine whether there are Category 1 or Category 2 hazards present, using the method prescribed by the regulations above, having regard to operating guidance issued by the Secretary of State.
- 3.2 Assessment of hazards is a two stage process, addressing first the likelihood of an occurrence and then the range of probable harm outcomes. These two factors are combined using a standard method to give a score in respect of each hazard identified.
- 3.3 The decision to take enforcement action is based on a three considerations:
- (a) the hazard rating score determined under HHSRS;
  - (b) whether the local authority has a duty or power to act, determined by the presence of a hazard score above or below a threshold prescribed in the regulations; and
  - (c) the authority's judgement as to 'the most appropriate course of action' to remove or reduce the hazard taking into account the most vulnerable potential occupant and the actual occupants.

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## 4.0 Duties And Powers

- 4.1 The Act puts the Council under a general duty to take action in relation to a Category 1 hazards. Under this general duty, the Council must take the most appropriate of the following courses of action:
- serve an Improvement Notice
  - make a Prohibition Order
  - serve a Hazard Awareness Notice
  - take Emergency Remedial Action or make an Emergency Prohibition Order
  - make a Demolition Order
  - declare a Clearance Area
- 4.2 The Council cannot simultaneously take more than one of these actions unless they are emergency measures (Emergency remedial action followed by an improvement notice or prohibition notice is regarded as a single course of action).
- 4.3 The Act gives the Council discretionary powers to deal with Category 2 hazards. However, emergency measures, demolition or clearance are not permitted as the most appropriate courses of action.

***South Derbyshire District Council will generally exercise its discretion to take the most appropriate course of action where Category 2 hazards exist as follows:***

- ***B and D hazards***
- ***Multiple hazards at band D or below where they create a more serious situation when looked at together, even though no single hazard is evidence of serious risk to health and safety.***

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## 5.0 Most Appropriate Course Of Action

- 5.1 For the purposes of scoring hazards using HHSRS it is assumed that the property is occupied by the most vulnerable household. However, for the purposes of deciding the most appropriate course of action regard is had to the actual household in occupation. In reaching their decision the Council will take account factor such as:
- the extent, severity and location of the hazard
  - the cost and practicality of remedial works (i.e listed buildings)
  - presence of multiple hazards
  - the vulnerability of the current occupier
  - likelihood of changes in occupancy (ie tenant turnover)
  - tenure and responsibility for remedial work (i.e tenant, owner occupier)
  - view of the current occupier/owner
  - current occupation and the impact the Council's decision may have on the social exclusion of certain groups of people.

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5.2 Once a decision has been made the appropriate notice procedure must be followed. When taking any form of enforcement action a covering letter and the statement of reasons under section 8 must also accompany the notice and the schedule of works.

## **6.0 Enforcement Options**

### **6.1 Improvement Notices**

In the majority of cases properties are in such a condition that they can be repaired or improved rather than demolished or closed.

6.2 The Council will generally seek to reduce or remove hazards to a standard that will prevent the building elements deteriorating.

6.3 An improvement notice will specify the following information:

- which category of hazard it relates to
- the nature of the hazard and the premises/ property on which it exists;
- the deficiency giving rise to the hazard;
- the premises and nature of remedial action required;
- the date by which remedial action is to be started, (not less than 28 days);
- the period in which the remedial action is to be completed;
- notes in respect of the right of appeal.

6.4 An improvement notice will be revoked when it is complied with and may be varied by agreement.

## **7.0 Suspension Of An Improvement Notice (Or A Prohibition Order See Below)**

7.1 Normally an improvement notice would become operative 21 days after service and a prohibition order after 28 days. However both may be suspended. The notice may specify an event that triggers the end of the suspension, such as:

- non-compliance with an undertaking
- a change of occupancy

7.2 Consideration will be given to any request by the tenant to suspend the notice or replace the action by the issue of a hazard awareness notice where the works are likely to affect that tenants' health. All suspended notices and orders will be reviewed every 12 months or earlier as deemed to be appropriate.

## **8.0 Prohibition Orders**

8.1 A prohibition order may be used for either a category 1 or 2 hazard. It may prohibit the use of a part or all of the premises for some or all purposes, or occupation by particular numbers or descriptions of people.

8.2 A prohibition order will specify the following:

- whether it relates to a category 1 or 2 hazard;
- the nature of the hazard and the premises on which it exists

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- the deficiency giving rise to the hazard;
- the premises and prohibitions which are imposed;
- any remedial action that would result in the order being revoked. (An order becomes operative 28 days after it is made)
- notes in respect of the right of appeal.

8.3 A prohibition order will be revoked if the Council is satisfied that the hazard to which it relates no longer exists.

8.4 Regard will be had to the following matters when considering serving a prohibition order:

- the risk of exclusion of vulnerable people from the accommodation;
- whether the building is listed;
- the position of the premises in relation to neighbouring buildings;
- irrespective of any proposals the owner may have, the potential alternative uses of the premises
- any conservation or renewal area and any general proposals for the area
- the effect of complete prohibition on the well being of the local community and the appearance of the locality
- the availability of local accommodation for re-housing any displaced occupants
- whether it is appropriate to offer financial advice or assistance

## 9.0 Hazard Awareness Notice

9.1 Category 2 hazards i.e. a score of 500 or more will result in a hazard awareness notice being served. This will draw the attention of the owner to the desirability of remedial action. There will be no requirement to carry out the recommended works.

NB no informal action will be taken prior to the issue of a Hazard Awareness Notice.

9.2 A hazard awareness notice will specify:

- the nature of the hazard and the premises on which it exists;
- the deficiency giving rise to the hazard;
- the premises on which the deficiency exists;
- the reasons for deciding to serve the notice, including the reasons for deciding that serving the notice is the most appropriate course of action;
- the details of any remedial action, which the Council considers, would be practical and appropriate to take.

9.3 The advisory nature of the notice may result in monitoring of any premises to ascertain if works have been undertaken. The service of a hazard awareness notice will not prevent further formal action.

## 10.0 Emergency Remedial Action/ Emergency Prohibition Orders

10.1 The Council has the discretion to take emergency enforcement action in respect of hazards which present *an imminent risk of serious harm* to occupiers of those or other residential premises. This action will only be taken in exceptional circumstances and will require the following:

- the existence of a category 1 hazard

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- that the hazard presents an imminent risk of serious harm to the health and safety of the occupiers
- that no management order is in force in respect of the premises.

10.2 The Council can take remedial action to remove the hazard and recover reasonable expenses, or prohibit the use of all or part of the property. There are appeal provisions but any appeal will not prevent any remedial works being undertaken or prohibition order being made.

10.3 A notice will be served within seven days of remedial action being started. This will state:

- the nature of the hazard and the premises / property which it exists;
- the deficiency giving rise to the hazard
- the premises and nature of remedial action required;
- the power under which the remedial action has been (or is to be) taken;
- the date when the remedial action was (or is to be) ,started.
- notes in respect of right of appeal

## 11.0 Demolition

11.1 Where a Demolition Order is used, the Council will assist in the re-housing of the occupants who are displaced. The Council will consider the following matters in reaching a decision on a making demolition order:

- the availability of local accommodation for re-housing occupants
- the demand for, and the sustainability of the current accommodation if the hazard were remedied;
- the prospective use of the cleared site;
- the local environment, the suitability of the area for continued residential use and the impact on the area of the cleared site.

11.2 A demolition order may be replaced with a prohibition order if proposals are submitted for the use of the premises for use other than human habitation.

## 13.0 Clearance Areas

13.1 Clearance is unlikely to be the most viable option in most cases. However the following matters would be taken into account in reaching a decision on the most appropriate action.

- the likely long term demand for residential accommodation;
- the degree of concentration of dwellings containing serious intractable hazards;
- the density of buildings and street pattern around which they are arranged;
- the overall availability of housing accommodation in the wider neighbourhood in relation to housing needs and demands;
- the proportion of dwellings free of hazards and other, non residential, premises in sound condition which would also need to be cleared to arrive at a suitable site;
- whether it would be necessary to acquire land surrounding or adjoining the proposed clearance area; and whether added land can be acquired by agreement with the owners;
- the existence of any listed buildings;
- the results of statutory consultation;

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- the arrangements necessary for re-housing the displaced occupants and the extent to which occupants are satisfied with those arrangements;
- the impact of clearance on, and the scope for relocating, commercial premises;
- the suitability of the proposed after-use(s) of the site having regard to its shape and size, the needs of the wider neighbourhood and the socio-economic benefits which the after-use(s) would bring, the degree of support by the local residents and the extent to which such use would attract private investment into the area.

#### **14.0 Interim And Final Empty Dwelling Management Order**

- 14.1 Where property has been left empty for at least 6 months the Council has the power to request approval to issue an interim Empty Dwelling Management Order from the Residential Property Tribunal (RPT).
- 14.2 This gives the Council the power to take over the management of the house and seek to ensure it becomes occupied. The Council is required to engage with the owner to try and reach a solution before applying for such an order, which may last up to 1 year. This interim order may then be made final with the approval of the RPT if a solution has not been found in the first year. This final EDMO can last up to 7 years.
- 14.3 These powers will only be considered in very exceptional circumstances.

#### **15.0 Compulsory Purchase Order**

- 15.1 This option is only taken up in exceptional circumstances, for example;-
- Where the property has been derelict for some time and is having a detrimental effect on the local environment or neighbouring properties; or
  - Where the property appears to be abandoned and the owner cannot be traced; or
  - Where all other avenues for bringing the property back to a useful life have been exhausted; or
  - Where the property is suitable for immediate residential use, but is not likely to be occupied for residential purposes unless bought by the Council.
- 15.2 The making of a CPO has to be agreed by the Housing & Community Services Committee. The Department of Communities and Local Government must then approve it before it can be made.

### **GENERAL PROVISIONS**

#### **16.0 Retaliatory Eviction**

- 16.1 In cases where properties are subject to a statutory notice and the property is subsequently vacated, all notices or orders will be reviewed to consider whether the impact of any hazard has diminished, and whether notices or orders may be varied, suspended or revoked. The council will seek to deter landlords from undertaking retaliatory eviction and will not consider that removal of a tenant achieves compliance with the any Notice served.

#### **17.0 Action By Agreement**

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- 17.1 The Act makes provision for remedial works to be carried out by agreement. This is where the local authority arranges for the works to be carried out at the request of the person responsible and they are then charged for the full cost. If the costs incurred cannot be paid they must be placed as a charge against the property. The Enforced Sale Procedure may be used to recover costs, if considered appropriate.

## **18.0 Level Of Remedial Works Required**

- 18.1 It is the Council's aim that all properties will meet the decent homes standard as a minimum. The decent home standard requires that a home must not contain category 1 hazards; must be in a reasonable state of repair; must have reasonably modern facilities and services; must provide a reasonable degree of thermal comfort.
- 18.2 Where category 1 hazards are identified they must be reduced to a low category 2 as a minimum. Where this is not possible all reasonable steps must be taken to reduce the hazards as far as reasonably practicable. In some cases, such as listed buildings, category 1 hazards may remain. This scenario should have been considered when deciding which course of action is most appropriate and may influence the officer's decision as to which type of enforcement action to take.
- 18.3 When deciding on the remedial works, regard must be had to the seriousness of the hazard, the ideal that the property should achieve, and the level of work required that is reasonable to reduce the hazard significantly without incurring excessive cost.

## **19.0 Accredited Landlords**

- 19.1 Before officers visit privately rented properties, they shall refer to the Regional Accredited Landlord database to check whether the property is owned by an EMLAS Accredited landlord. In such cases, the officer will carry out a simple EMLAS compliance check at the time of the visit. For this purpose, the Regional Scheme Operator provides scheme compliance checklists. The officer will keep one copy for their records and send another to the Regional Scheme Operator and a further copy to the Regional Accredited Landlord. The findings from the compliance check will determine the course of action taken by the Regional Scheme Operator for any breaches of the EMLAS requirements. Action will normally be taken under the EMLAS regulatory procedures in the first instance, rather than the authority taking statutory enforcement action.
- 19.2 If the Regional Scheme Operator undertakes any compliance checks they will provide the Authority with copies of completed compliance checklists.
- 19.3 Authority reserves the right to over-ride this protocol at the discretion of the Private Sector Housing Manager and initiate formal statutory enforcement action in the first instance, if circumstances are such that it is appropriate to do so. Where this happens the authority will notify the Regional Scheme Operator of the course of action and the outcome. The Regional Scheme Operator will record these details against the landlord's EMLAS compliance performance.

## **20.0 Powers Of Entry**

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- 20.1 Most of the legislation enforced by the Private Housing Team includes the power for authorised officers of the local housing authority to gain entry onto property for the purpose of carrying out the authority's duties under that legislation.
- 20.2 If an officer is unsuccessful in gaining entry by informal means the Council will consider obtaining a warrant from a Justice of the Peace to permit entry by force if necessary.
- 20.3 The Council also has the power to require documents to be produced in connection with enforcement of Parts 1 – 4 of the Housing Act 2004 by a notice. The notice will specify the consequences of not complying.

## **21.0 Power To Charge For Enforcement Action**

- 21.1 Local authorities have the power to make a reasonable charge for administration and other expenses incurred in taking enforcement action as specified in section 49 of the Housing Act 2004.
- 21.2 The Council will charge for the time spent by officers where any of the enforcement options, other than the service of a hazard awareness notice, are used.
- 21.3 The charge will be calculated by multiplying the number of hours worked by the hourly rate (including overheads) for officers involved in the enforcement action.
- 21.4 The hourly rate will increase annually in line with pay awards and inflation.
- NB The cost of carrying out work in default will be recovered separately.
- 21.5 If the Secretary of State prescribes a maximum amount that may be charged to recover administration and other expenses incurred in taking enforcement action the Council will limit any charge accordingly.
- 21.6 A schedule will be sent detailing the time spent by Council staff in enforcing any notice, together with an invoice.
- 21.7 When a charge is imposed under section 49 of the Housing Act 2004 the sum recoverable becomes a charge on the premises concerned. If enforcement action has been taken against a named person or legal entity the Council will seek to recover the charge by sending out an invoice. The Council reserves the right to waive a charge for enforcement action in exceptional circumstances.

## **22.0 Licensing Of Houses In Multiple Occupation**

- 221 Part 2 of the Housing Act 2004 introduces mandatory licensing of certain types of HMO (house in multiple occupation). The licensing function has been introduced in order to:
- Ensure landlords are fit and proper persons or employ agents who are.
  - Ensure adequate management is in place
  - Ensure authorities have measures available to encourage landlords to co-operate with licensing

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- Where landlords are unwilling or unable to co-operate the local authority can step in to manage the property.
- Ensure tenants are protected
- Ensure high risk HMOs and their landlords are identified, so that health and safety measures can be dealt with under part 1 of the 2004 Act.

## 23.0 Definition Of An Hmo

23.1 The 2004 Act also introduces a new definition of an HMO. There are four categories or tests for an HMO:

- the standard test,
- the self-contained flat test,
- the converted building test and,
- certain converted blocks of flats.

### **A - The Standard test:**

Any building which consists of one or more units of accommodation which are not self-contained and where two or more households share one or more basic amenities, or where the accommodation is lacking basic amenities.

### **B - The self-contained flat test:**

Any part of a building which is a self-contained flat, which consists of one or more units of accommodation, in which two or more households share one or more basic amenities or where the accommodation is lacking basic amenities.

### **C - The converted building test:**

Any building, which has been converted and contains one or more units of accommodation, which are not self-contained (whether or not the building also consists of some self-contained units).

### **D - Certain converted blocks of flats:**

Any building which has been converted into and consists of self contained flats only, and it does not comply with appropriate building standards (e.g. the 1991 Building Regulations) and less than two thirds of the flats are owner occupied, (more than one third on short tenancies).

## 24.0 Properties Requiring A Mandatory Licence

24.1 **Properties that are three storeys or more high (basements are included as a storey), with 5 or more persons living there, who make up more than one household.**

24.2 There are some exceptions to this:-

- Any building that consists entirely of self-contained flats.
- Properties managed by a public sector body.
- Student accommodation, which is in the control of an educational establishment
- Buildings occupied by religious communities.
- Any building entirely occupied by owner/occupiers i.e. freehold estate or leasehold interest of at least 21 years.

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- Any building occupied by only two persons and who form two households.

24.3 The Licensing of Houses in Multiple Occupation (Prescribed Circumstances) (England) Order 2006, prescribes the definition of a licensable HMO. It also defines basements, attic spaces and mezzanine levels as a storey.

## 25.0 Applications For Licences

25.1 A complete application must contain a floor plan of the property including room sizes and have marked on it the location of bathrooms, toilets and kitchens as well as any smoke detectors and alarms. It must also have the required certificates, the correct fee and be signed by all, appropriate parties.

## 26.0 Fees And Charges

26.1 Section 63(3) provides that the local housing authority may require an application for a licence to be accompanied by a fee, which has been fixed by the authority.

26.2 The fee must only take into account all the costs incurred by the authority in carrying out their functions under part 2 of the act, such as processing an application and granting or refusing a licence.

26.3 The licence fee charged by **South Derbyshire District Council is £325.00** and will be reviewed at regular intervals to reflect how the scheme evolves and any additional costs incurred by the council.

## 27.0 Granting A Licence

27.1 Where an application for a licence has been received and the council is satisfied that the proposed licence holder is fit and proper, that the house is suitable for multiple occupation and the application submitted is valid, the local housing authority must grant a licence.

27.2 Each licence must only relate to one HMO and can last for up to 5 years. In some cases it may be necessary to grant the licence for less than 5 years.

27.3 A licence may not be transferred to another party. If the property is sold, the new owner or appropriate person must then apply for a new licence.

27.4 Before a licence can be granted the Local Housing Authority must serve a notice under schedule 5 part 1 paragraph 1 of the Act. It must state:

- the reasons for granting the licence,
- the main terms of the licence and
- the end of the consultation period.

27.5 This notice must be served with a copy of the proposed licence and the proposed conditions. It should be sent to the proposed licence holder and all relevant people named in the application.

27.6 The consultation period should be 21 days. In certain circumstances it may be necessary to allow more or less time. This should be no less than 14 days and up to 28 days.

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27.7 Once any representations have been considered the Local Housing Authority may decide to alter the licence. A further notice must be served which sets out the proposed modifications, the reasons for them and the end of the consultation period – normally 7 days.

27.8 If a response is not received within the agreed consultation period then the licence must be prepared with the proposed conditions. If any amendments are made at this stage the consultation procedure must be followed again.

27.9 Once the consultation period has ended and the proposed licence and conditions have been agreed, a further notice must then be served on the proposed licence holder and all relevant people advising of the decision.

27.10 Where the decision is to grant the licence the notice must state:

- The reasons for deciding to grant the licence and the date the decision was made
- The right of appeal
- The period within which an appeal can be made

27.11 This notice must be accompanied by a copy of the licence and the conditions and must be served within 7 days of the final decision being made. The Council will hold the original licence. Only copies of the licence and **conditions are issued to all relevant parties**.

27.12 The licence becomes operative at the end of the appeal period, which is 28 days. If an appeal is made, then it becomes operative on the date decided by the residential property tribunal. This depends on whether their decision is to vary, quash, or uphold the licence and its conditions.

## 28.0 Licence Conditions

28.1 The conditions must be appropriate in regulating the management, use and occupation of the house and its condition and contents (section 67).

Conditions may include:

- Conditions imposing restrictions or prohibitions on the use or occupation of parts of the house
- Conditions requiring that reasonable and practicable steps are taken to prevent or reduce anti-social behaviour by persons occupying or visiting the house.
- Conditions requiring facilities and equipment to be made available in the house in order to meet the standards set out under section 65 (HMO standards).
- Conditions requiring the facilities and equipment to be kept in good repair and proper working order.
- Where works are needed to meet the HMO standards, conditions may be set requiring the works to be carried out in timescales specified or determined under the licence.

28.2 The licence **must** include the conditions set out in schedule 4 of the Act as follows:

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- The licence holder must produce every year to the local housing authority for their inspection, a valid gas safety certificate that has been obtained within the last 12 months.
- The licence holder must keep electrical appliances and furniture provided by him/her in a safe condition
- The licence holder must supply on demand a declaration by him/her on the safety of the appliances and furniture.
- The licence holder must ensure that smoke alarms are installed in the house and that they are in proper working order.
- The licence holder must supply on demand a declaration by him/her on the condition and positioning of the alarms.
- The licence holder must supply to the occupiers of the house a written statement of the terms on which they occupy it.

## 29.0 Refusing A Licence

29.1 A licence can be refused if the local authority is not satisfied that the following criteria have been met.

- The house must be reasonably suitable for occupation by not more than the maximum households or persons specified in the application or a maximum decided by the authority.
- The proposed licence holder must be a fit and proper person having regard to the specified criteria and is the most appropriate person to hold the licence.
- The proposed manager should be the person having control of the house or be employed by an agent or employee of the person in control.
- The proposed manager must be a fit and proper person to be the manager.
- The proposed management arrangements must be satisfactory.

29.2 Before a licence can be refused a similar process must be followed as described above. The Local Housing Authority must serve a notice under schedule 5 part 1 paragraph 5 of the Act. It must state:

- the reasons for refusing the licence,
- the end of the consultation period.

29.3 The consultation period should be 21 days. In certain circumstances it maybe necessary to allow more or less time. This should be no less than 14 days and up to 28 days. The applicant or proposed licence holder should provide within their consultation, ways in which the reasons for refusing the licence can be rectified.

29.4 If, once the consultation period has ended, it is still not possible to grant the licence, a further notice must be served stating:

- The authority's decision to refuse the licence
- The reasons for the decision and the date it was made
- The right of appeal
- The period within which an appeal can be made
- The consequences of refusing the licence

29.5 This Notice must be served within 7 days of the final decision being made. An appeal can be made to the residential property tribunal within 28 days.

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### **30.0 Inspections**

- 30.1 All licensed HMOs must be inspected within 5 years of the licence being granted to check that the information supplied is correct and that the property is free from serious hazards. Depending on the total number of licence applications received and officer workloads, the PSH team will inspect all licensed properties within 3 months of application. However, this target will remain under review.
- 30.2 An officer must carry out an inspection in accordance with part one of the Act. Therefore, each unit of accommodation will be individually assessed along with any common areas. The purpose is to ensure that the HMO is free from category 1 hazards, however officers will be expected to follow the procedures and guidance set out in part 2 of this policy relating to category 2 hazards and priority hazards. Licensing does not preclude the property from having any of the enforcement action described in part 2 being taken in relation to any hazards found and in most cases an improvement notice will be the most appropriate course action.

### **31.0 Revoking A Licence**

- 31.1 A licence may be revoked under a number of circumstances.
- 1) Where the licence holder or any other person has committed a serious breach of a condition on the licence or repeated breaches.
  - 2) Where the authority no longer consider the licence holder to be fit and proper.
  - 3) Where the authority no longer considers the management to be satisfactory or the person involved to be fit and proper.
  - 4) Where the HMO ceases to be an HMO
  - 5) Where the authority believes the structure of the HMO is such that they would not normally have granted a licence. E.g. it is no longer suitable for the number of households or persons.
  - 6) By request of the licence holder or other relevant person
- 31.2 Where the decision is made to revoke the licence a notice must be served under schedule 5 part 2 paragraph 22 of the Act. It must state the reasons why the licence is being revoked and give a consultation period of 21 days. In certain circumstances it may be necessary to allow more or less time. This should be no less than 14 days and up to 28 days.
- 31.3 Where no representation is received or a final decision is made to continue with the revocation of the licence a further notice should be served stating the authorities decision, the reasons for that decision, and the right of appeal.
- 31.4 This notice must be served within 7 days of the final decision to revoke the licence.
- 31.5 In deciding to revoke the licence consideration must be given to the consequences of doing so. If the property is to remain a licensable HMO then the council must make an interim management order. If it is no longer an HMO no further action is required.
- 31.6 The revocation will come into force following a 28 day appeal period providing an appeal is not made to the residential property tribunal. If an appeal is made the revocation will become effective following the decision made by the residential property tribunal.

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31.7 Where the revocation has been made with agreement by the licence holder and other relevant persons it may not be necessary to serve notices relating to the consultation period. If the Council decides not to revoke the licence it must serve a notice advising of this decision and the reasons why it has been refused.

## **32.0 Varying A Licence**

32.1 A licence may be varied where either the licence holder makes a request or the local authority feels it is relevant to do so. It may be varied where there has been a change in circumstances, which also includes the discovery of new information.

32.2 The inspection may identify issues that were unknown previously. This may lead to the licence needing to be varied as a result with regards to the maximum numbers of households who are authorised to occupy the building.

32.3 The licence may also be varied where the applicable standards have been altered as a result of revision of regulations or where further regulations have superseded them. Before the licence can be varied the local housing authority must serve a notice under schedule 5 part 2 paragraph 14 on the licence holder and interested parties, stating the effect of the variation, the reasons for the variations, and give a consultation period of 21 days. In certain circumstances it maybe necessary to allow more or less time. This should be no less than 14 days and up to 28 days.

32.4 Where no representation is received or a final decision is made to continue with the variation of the licence a further notice should be served stating the authorities decision, the reasons for that decision, and the right of appeal.

32.5 This notice must be served within 7 days of the final decision to vary the licence.

32.6 The varied licence will come into force following a 28 day appeal period providing an appeal is not made to the residential property tribunal.

32.7 If an appeal is made the variation will become operative following the decision made by the residential property tribunal.

32.8 If the Council decide not to vary the licence it must serve a notice advising of this decision and the reasons why it has been refused.

32.9 Where the variation has been made with agreement by the licence holder and other relevant persons it may not be necessary to serve notices relating to the consultation period.

## **33.0 PENALTIES**

33.1 There are a number of possible offences relating to HMO licensing. It is the intention of the PSH team to take action where there is evidence of an offence and it is appropriate to take action.

The following offences apply:

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- A person commits an offence if he manages or is in control of an HMO that should have a licence but does not have one. Prosecution can result in fines of up to £20,000.
- A person commits an offence if he manages or is in control of an HMO and knowingly permits another person to occupy the house, which then results in the house being occupied by more than the agreed number of households or persons authorised by the licence. Prosecution can result in fines of up to £20,000.
- A person commits an offence if he is a licence holder or person on which restrictions/obligations apply and he fails to comply with any condition on the licence. A breach of licence conditions can lead to prosecution and up to £5,000 per breach.

Other penalties include:

- Rent Repayment Orders – if a person has committed the offence described above, in that no licence is being held for a property that should have one, then the local authority or tenants can apply for a rent repayment order. The residential property tribunal can award this order, which requires the appropriate person to repay all rents and other periodical payments, and housing benefit for the period up to a licence being issued. The Order will state the amount to be repaid.
- Termination of Tenancies – Landlords will not be able to issue any section 21 notices under the Housing Act 1988 (recovery of possession on termination of a shorthold tenancy), whilst the HMO is unlicensed.
- Category 1 and 2 hazards – where an inspection has been carried out and hazards have been identified the procedures laid out in the first part of this enforcement policy must be followed.

### **34.0 Appeals**

34.1 Appeals relating to any part of licensing are made to the residential property tribunal.

### **35.0 Unlicensed Hmos**

35.1 When an HMO is brought to the attention of the private sector housing team they will investigate whether the property requires a licence.

35.2 If the property does need a licence a letter and application pack will be sent to the owner advising of the need to licence and requiring an application to be made within 28 days.

35.3 Where the property is licensable and reasonable attempts have been made to contact the owner without success, prosecution should be considered.

### **36.0 INTERIM MANAGEMENT ORDERS AND FINAL MANAGEMENT ORDERS**

36.1 An interim management order is made for the purpose of securing any action that the authority considers necessary, to protect the health, safety and welfare of the occupants.

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- 36.2 An order can also be served in circumstances that the authority thinks are appropriate with a view to ensuring the proper management of the house pending the licence being granted.
- 36.3 The authority has a duty to make an interim management order in respect of an HMO where there is no reasonable prospect of it being licensed in the near future or it is necessary to protect the health, safety and welfare of the occupants.
- 36.4 Where a licence has been revoked for any reason and the property remains a licensable HMO an interim management order must be made if there is no reasonable prospect of the property regaining its licence.
- 36.5 Once an interim management order has been served the local authority must take over the management of the property for up to 12 months. This includes carrying out any remedial works necessary to deal with the immediate risks to health and safety.
- 36.6 If there is still no prospect of a licence being granted after 12 months then a final management order must be made which may be in force for up to 5 years. If after 5 years there is no prospect of the property being licensed a further management order must be made.
- 36.7 The Council is under a duty to issue interim and final management orders where necessary. The PSH team will instigate this action where necessary **but as a last resort**.
- 36.8 All practical steps should be taken to assist the owner of the property to satisfy the licensing requirements. Management orders can be varied or revoked at any time as a result of a request from the owner or on the local authorities initiative.

### **37.0 Temporary Exemption Notices**

- 37.1 A temporary exemption notice (TEN) may be issued where an HMO that is due to be licensed is to be taken out of use as a licensable HMO. A person having control or managing an HMO can notify the local authority of its plans and request that the property be exempt from licensing. The authority must then consider this representation and if appropriate, serve the temporary exemption notice. A TEN remains in force for a period of 3 months, after which the property must have a license if it is still in such a condition as to require one. If further notification is received and the authority considers that there are exceptional circumstances a second TEN may be served which will remain in force for a further 3 months.
- 37.2 If the authority decide not to issue a TEN a further notice must be served under section 62 (6) which details the decision, the reasons for it and the date on which it was made, the right of appeal and the period within which the appeal must be made.

**Schedule 1**

Enforcement Action: Initial Assessment Sheet (Private Sector Housing Team)

Address .....

Date & Officer (initials) .....

Level of Risk

No risk to occupants' health &/or safety	A
Risk to health &/or safety possible but unlikely	B
Potential minor effect to health &/or safety, potential for more serious effect in more vulnerable groups	C
Identified or potential serious effect on health &/or safety*	D

Previous History (relates to any formal/informal action taken in the past)

No previous history	A
Some, but acted promptly on informal action	B
Some, not acted promptly on informal action, but promptly on formal action	C
Considerable &/or failure to act promptly on formal action*	D

Confidence Rating (Prior experience or indication from recent contact or if no contact from condition of property)

Highly confident remedial works will be completed promptly & to an acceptable	A
Doubts exist	B
No or little confidence	C
Owner openly demonstrates unwillingness to undertake any action	D

**Interpretation of Scores:**

A's/B's only = Informal action, unless justification can be made to Manager

= Formal Action/Service of Notices should usually be D\* taken based solely on either of these circumstances.

Any other circumstances to be discussed with Manager or Officer to justify.

**Summary of action taken** (tick appropriate box)

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Informal				
Formal				
Referred to another agency				

## Schedule 2

### Deciding to Prosecute or offer a Formal Caution (Private Sector Housing Team)

The decision to prosecute or offer a formal caution should be made using the following two-stage process:

#### STAGE 1

CRITERION	PROSECUTE	OFFER CAUTION
Is the offence serious?	Yes	No
Is the offender old or infirm?	No	Yes
Has the offender a previous history of offending?	Yes	No
Is the offender willing to prevent a recurrence of the problem?	No	Yes
Would a prosecution be in the public interest?	Yes	No
Has the offender offered a reasonable explanation?	No	Yes

Ring the appropriate response to each criterion and total the number of rings in each column. The decision will be influenced by the total number of rings.

#### STAGE 2

Is the use of a formal caution appropriate given the views, circumstances and any action taken by the victim	Yes	No
--	-----	----

Recommendation of Investigating Officer: Formal Caution/Prosecution\*

\* Delete as applicable

Signed \_\_\_\_\_ Date: \_\_\_\_\_

Action agreed by Private Sector Housing Manager:

Signed \_\_\_\_\_ Date: \_\_\_\_\_

Action agreed by Head of Environmental Services:

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Approved by Environmental and Development Services Committee 18-11-10

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Signed \_\_\_\_\_ Date: \_\_\_\_\_

## **ANNEX E Specific Enforcement Actions for Food Safety**

### **1.0 Purpose**

1.1 The purpose of this document is to state the authority's policy with respect to:-

- Identification of officers appointed and authorised to take enforcement action.
- Identification of the limits of delegations for Food Enforcement Officers.

### **2.0 Authorisations**

2.1 Enforcement action under the Food Safety Act 1990 should be initiated by suitably qualified, experienced and competent Enforcement Officers.

2.2 The qualification and experience of authorised officers are prescribed by The Food Law Code of Practice. Consequently the authorisation of officers under Section 5 of the Act and the conferring of powers under Section 11 and 12 of the Act, will be in accordance with any other relevant code of practice.

### **3.0 Indemnification**

3.1 The Authority will indemnify authorised officers against the whole of any damages and costs or expenses which may be involved, if the Authority is satisfied that the officer honestly believed that they were acting within their powers and that their duty as an inspector entitled them to do it, providing the inspector was not wilfully acting against instructions

### **4.0 Hygiene Improvement Notices**

4.1 Hygiene Improvement Notices will be issued when one or more of the criteria below apply:-

- There are significant contraventions of food safety legislation.
- There is a lack of confidence that the proprietor will respond to an informal approach.
- There is a history of non-compliance.
- Standards are generally poor and management has little awareness of requirements.
- The consequences of non-compliance could be potentially serious to public health.

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- Effective action needs to be taken as quickly as possible to remedy conditions that are serious and deteriorating.
- Hygiene Improvement Notices will relate to the risk to health and will not be issued for minor technical contraventions.
- Hygiene Improvement Notices will only be issued by Officers who have been properly authorised to do so. They will only be signed by an authorised Officer who has personally witnessed the contravention.
- Authorised Officers will follow The Food Law Codes of Practice and guidance on the use of Statutory Notices.
- Authorised Officers will place realistic time limits on Statutory Notices, preferably agreed with the proprietor.
- The Authorised Officer will discuss with the proprietor the works that will be specified and fully consider other proposed options.
- Failure to comply with a Hygiene Improvement Notice will in general result in the institution of court proceedings.
- Information will be given to other bodies which should be notified of any formal action taken and its outcome. These may include Home and Originating authorities.

## **HYGIENE EMERGENCY PROHIBITION NOTICES**

### **The Food Hygiene (England) Regulations 2006 procedures**

#### **5.0 When to use Hygiene Emergency Prohibition Notices (regulation 8)**

5.1 Unless the use of Voluntary Procedures is more appropriate in the circumstances, Hygiene Emergency Prohibition Procedures should be used if an authorised officer has evidence that the health risk condition is fulfilled. If the appropriate evidence is found, a Hygiene Emergency Prohibition Notice may be served on the food business operator, followed by an application to a Magistrates' Court for a Hygiene Emergency Prohibition Order.

#### **6.0 Health Risk Conditions Where Use Of Hygiene Prohibition Procedures May Be Appropriate**

6.1 The following paragraphs provide examples of circumstances that may show that The health risk condition exists as defined by regulation 7(2)/regulation 8(4) i.e. there is an imminent risk of injury to health, and where an authorised officer may therefore consider the use of such prohibition powers. These examples are in no way prescriptive or exhaustive and are for illustrative purposes only.

#### **7.0 Health Risk Conditions Where Prohibition Of Premises May Be Appropriate**

- Infestation by rats, mice, cockroaches, birds or other vermin, serious enough to result in the actual contamination of food or a significant risk of contamination.
- Very poor structural condition and poor equipment and/or poor maintenance, or routine cleaning and/or serious accumulations of refuse, filth or other extraneous matter, resulting in the actual contamination of food or a significant risk of food contamination.
- Drainage defects or flooding of the establishment, serious enough to result in the actual contamination of food, or a significant risk of food contamination.

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- Premises or practices which seriously contravene food law and have been, or are implicated, in an outbreak of food poisoning.
- Any combination of the above, or the cumulative effect of contraventions which, taken together, represent the fulfilment of the health risk condition.

## 8.0 Health Risk Conditions Where The Prohibition Of Equipment May Be Appropriate

- Use of defective equipment, e.g. a pasteuriser incapable of achieving the required pasteurisation temperature.
- Use of equipment for the processing of high-risk foods that has been inadequately cleaned or disinfected or which is grossly contaminated and can no longer be properly cleaned.
- Use of storage facilities or transport vehicles for primary produce where the storage facilities or transport vehicles have been inadequately cleaned or disinfected.

## 9.0 Health Risk Conditions Where Prohibition Of A Process May Be Appropriate

- Serious risk of cross contamination.
- Failure to achieve sufficiently high processing temperatures.
- Operation outside critical control criteria, for example, incorrect pH of a product which may allow *Clostridium botulinum* to multiply.
- The use of a process for a product for which it is inappropriate.

## 10.0 Health Risk Condition No Longer Exists:

### Certificate (regulation 7(6)(a) and regulation 8(8))/health risk condition remains in existence: Certificate (regulation 7(7)(b) and regulation 8(9)(b))

- 10.1 In respect of Hygiene Emergency Prohibition Notices and Hygiene Emergency Prohibition Orders, the Food Authority should issue a certificate to the food Business operator within three days, if it is satisfied that the health risk condition no longer exists.
- 10.2 If the food business operator applies for such a certificate, the Food Authority must determine the position as soon as is reasonably practicable and within a period of no longer than fourteen days. If the Food Authority is satisfied that the health risk condition no longer exists, it must issue a notice of that determination to the food business operator and must do so within three days. If the Food Authority determines that the health risk condition remains in existence, it must issue a notice of that determination to the food business operator and should do so within three days.

## 11.0 Voluntary Procedures (Food Hygiene)

- 11.1 Voluntary Procedures to remove a health risk condition may be used, at the instigation of the food business operator, when the food business operator agrees that a health risk condition exists as defined by regulation 7(2)/regulation 8(4) i.e. there is an imminent risk of injury to health. An officer may suggest this option to the food business operator, but

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only when they are able to use regulation 8. If in doubt, the food business operator should be advised to take legal advice.

- 11.2 Any voluntary closure agreement should be confirmed in writing by the food Business operator or manager and the authorised officer, with an undertaking by the food business operator or manager not to re-open without the officer's prior approval.
- 11.3 If the manager of a food business offers to close voluntarily, the officer should confirm that the manager has the authority of the food business operator to agree to such voluntary action.
- 11.4 The officer should ensure that frequent checks are made on the establishment to ensure that it has not re-opened.
- 11.5 If the food business operator offers to close voluntarily, the officer should:
- consider whether there is a risk of the establishment being re-opened without the officer's knowledge and/or agreement (if this were to cause food poisoning, the Food Authority could be criticised for not having used statutory powers);
  - recognise that there is no separate legal sanction against a food business operator who re- opens for business after offering to close, although enforcement action for the actual breaches e.g. unsafe food, similar processing as before, etc, remains available; and
  - explain to the food business operator that, by making the offer to close, any right to compensation is lost.

## **12.0 Notification Of Legal Proceedings**

- 12.1 LACORS are currently negotiating where records of convictions and prohibitions should be recorded. At present there is no procedure for notification.
- 12.2 The Home Authority and/or the Originating Authority as appropriate will be advised of prosecutions taken and their outcome, in accordance with LACORS guidance.
- 12.3 With respect to complaints, the complainant will always be advised of the outcome of the case in writing.

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## ANNEX F Specific Enforcement Actions for Health & Safety

### 1.0 General requirements

- 1.1 Utilising Section 19 of HASWA, Director of Community Services is authorised by South Derbyshire District Council to appoint and Authorise Officers, for carrying into effect the relevant statutory provisions within the Council's field of responsibility. Such appointments are made in writing specifying which of the powers conferred on Officers by the above statutory provision, are to be exercisable by the person duly appointed.
- 1.2 Section 20 of HASWA lists the powers an authorised Officer can exercise for the purposes of carrying into effect any of the relevant statutory provisions within this Authority's field of responsibility. This authorisation is given in the Officer's warrant. Officers should ensure they are familiar with the scope and limits of these powers.
- 1.3 The Director of Community Services/ Head of Environmental Services and Commercial and Licensing Manager are also empowered to authorise other persons (not being appointed Officers) to accompany such Officers for the purposes of carrying out the duties for which they are appointed. This would apply to Section 20(c) HASWA, when an Officer considers it to be appropriate to take along another person to assist them in carrying out their duties. Such persons may be a photographer or a carpenter or an electrician, and would therefore have to be duly authorised.
- 1.4 The form is only valid for a temporary period and the duration of validity **MUST** be specified on the form. Enforcement action under the Health and Safety at Work etc. Act 1974 and associated legislation should be initiated by suitably qualified, experienced and competent Enforcement Officers (who have been duly authorised) following HSE Section 18 guidance.
- 1.5 Only officers authorised by the Authority under Sections 21 to 26 of the Health and Safety at Work etc. Act 1974 will serve improvement and prohibition notices.

### 2.0 Indemnification

- 2.1 Under Section 26 of HASWA, Officers are indemnified by South Derbyshire District Council, whereby the authority indemnifies the Officer against the whole or part of any damages and costs or expenses which they may have been ordered to pay or may have incurred, if the authority is satisfied that they honestly believed that the act complained of was within their powers, and that their powers, and that their duty as an Authorised Officer required or intitled them to do it.

### 3.0 Enforcement Procedures - Notices

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### **Improvement Notices**

- 3.1 Improvement Notices may be served by authorised Officers under Section 20/21 of HASWA for certain contraventions of the relevant statutory provisions. These Notices may be served where an Officer is of the opinion that:
- a) The contravention of one or more of the relevant statutory provision(s) is/are likely to continue or be repeated, or
  - b) One or more of the relevant statutory provisions are being contravened.
- 3.2 The Officer may serve on the person responsible an Improvement Notice. The Notice must include: -
- The Officer's opinion concerning the contravention;
  - Specification of the provision being contravened;
  - The reason for the inspector being of that opinion;
  - A requirement to remedy the contravention, and
  - A period within which the contravention must be remedied, which must not be less than 21 days (HASWA, Section 21).

## **4.0 PROHIBITION NOTICES**

- 4.1 Prohibition Notices may be served by an authorised Officer under HASWA. If an Officer is of an opinion that any activities carried on or likely to be carried on by, or under the control of the person in question, and the activities involve or will involve a risk of SERIOUS PERSONAL INJURY, the Officer may serve a Prohibition Notice on that person.

A Prohibition Notice shall: -

- State that the Officer is of that said opinion relating to the risk of serious, personal injury;
  - Specify the matters which in the Officer's opinion give, or as the case may be, will give rise to the said risk;
  - Specify the relevant statutory provision being contravened, and the reasons for that opinion, and
  - Direct that the activity concerned shall not be carried on unless the matters specified in the Notice have been remedied.
- 4.2 The Notice will normally be given immediate effect if the Officer is of the opinion that there is a risk of serious, personal injury. Alternatively, a period must be specified following which the Notice comes into effect (ie a Deferred Prohibition Notice). There is not minimum period to be allowed for compliance, as, in the event of an appeal, the Notice is not automatically suspended. Hence, the period allowed for compliance may be shorter than the appeal period (HASWA, Section 22).

## **5.0 Notice(S) Protocol**

### **PRELIMINARIES**

- 5.1 Once a contravention of HASWA or any relevant statutory provision has been established, the Officer must ascertain that they are correct in serving an Improvement or Prohibition Notice. The Officer should confirm the following:-

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- Are the premises “ours” to enforce?
- If there is a hazard, what Section or Regulation does it contravene?
- Is there a risk of serious personal injury?
- Who is responsible for the contravention, eg. the owner of the premises, the employer, the occupier of the premises, the person in control of the premises etc.

## 6.0 Person Responsible

6.1 Improvement Notices are served upon the person(s) who is/are contravening the relevant statutory provision or who has/have contravened it and is/are likely to continue or repeat it. Thus, if the business is a partnership then the full names of any partners must be obtained and Notices served on each of the partners. Similarly, for limited companies, the Notices should be for the attention of the Company Secretary at the company’s registered office and if requested, a copy of the Notice can be sent to the affected premises.

6.2 If a company states that their Notices will be accepted at an office/premises other than the Head Office / Registered Office, then ask for such a request to be made in writing. It may be required during legal proceedings to show that the Notice was ‘properly served’, i.e. at the correct premises. If a business is a partnership then the full names of all the partners must be obtained and Notices served on each of them, or a partner nominated by them to receive the Notices on their behalf.

## 7.0 Time Limits

7.1 The Inspector should discuss with the responsible person, once the main inspection has been completed, time limits to be allowed for compliance of all Notices to be served. The Officer should bear in mind the following factors when discussing these time limits with the responsible person:-

- Risks or hazards arising from the contravention balanced against the time and costs involved to comply with the Notice(s).
- The size of the activity/premises, e.g. a small corner shop would not require the same time of compliance for certain health and safety contraventions compared to a large hotel.
- External influences, e.g. availability of parts such as guards for a machine.
- Allowing time for the company to get a reasonable number of quotes from contractors for the works that will be specified in the Schedule.

7.2 Obviously it is not possible to specify times for particular types of Notice due to the factors mentioned above, and also, the ever changing relevant legislation/technology. Even so, Officers should ensure that they do follow a uniform approach to the time limits, both for their own work and in comparison to other Officers’ Notices in the Department. Where an Officer is to serve a Notice for a specific contravention for the first time, the Officer should consult the Principle EHO or one of the Commercial Team, for advice on recommended time limits. Likewise the Principle Officer is responsible for ensuring that their Officers are all following a consistent approach to time limits for specific and/or similar Notices.

## 8.0 Schedule Of Works

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8.1 The Notice(s) may include directions as to the measures to be taken to remedy any contravention or matters to which the Notice relates. This Department's policy is to attach a schedule to all Notices. The schedule may only ask for an activity to cease or list how a contravention/matter can be remedied.

8.2 The schedule may refer to any Approved Code of Practice, British Standard etc, and allow a choice of alternative remedies. Where works are required to remedy the matter contained in the Notice relate to buildings, then these must not exceed the requirements of the current Buildings

## 9.0 Authorisation of Notices

9.1 Once all the typed Notice(s)/Schedule(s)/covering letter(s) have been checked by the Officer for mistakes, corrections etc, they must be checked by the Principle EHO, or by the Commercial and Licensing Manager if the Principle EHO is not available.

## 10.0 Service Of Notices

10.1 Notices are normally served by hand if it is within the local authority's geographical boundary. Where the address is outside SDDC, the Notice must be sent by recorded delivery, obtaining proof of posting and subsequent confirmation of delivery/acceptance. To ensure 'proper service' the Officer should ensure that each Notice is signed by them.

10.2 Proper service can be affected by:

- Delivering it to the person(s) responsible or leaving it at its proper address, or sending it by post to him/her at the same address, or
- In the case of a body corporate, be served or given to the Secretary or the clerk of that body, or
- In the case of a partnership, be served or given to each partner or a nominated person having proper control, or management of the partnership.

The proper address is:

- The person's last known address, or In the case of a body corporate, via their secretary or clerk, at the registered or principal office, or
- In the case of a partnership, the principal office of the partnership, or where the company requests a specified address in the UK, other than the proper address, where the Notice will be accepted (this should be requested in writing).
- Serve on the day of the Notice date by hand, post or other arrangements by another Officer.

10.3 Notices to be served on an owner or occupier of any premises may be served by posting them at that premises or by addressing them to that person by name and delivering them by hand to a responsible person, resident or employee on the premises.

10.4 Ensure that you are serving the Notice at the correct address and if you are unsure or unable to obtain this, then do a 'Company Search'

## 11.0 Appeals Against Notices

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11.1 Appeals against Notices must be made to an industrial tribunal within 21 days of the service of the Notice. The procedure to be adopted by the industrial tribunal for receiving and hearing appeals is laid down in the Industrial Tribunals (Improvement and Prohibition Notices Appeals) Regulations 1974 and HASWA, Section 24.

11.2 Where an appeal is made against an Improvement Notice, the Notice is suspended until the appeal is determined or the appeal is withdrawn but appeals against Prohibition Notices do not automatically suspend those Notices. Any suspension of a Prohibition Notice can only be ordered by the Tribunal, and then only from the date of the direction (HASWA, Section 24(3)).

## **12.0 Extension Of Notices**

12.1 From time to time Officers will receive requests for extension of Notices. Such extensions are left to the discretion of the Officer who has to consider:

- Do factors beyond the control of the recipient of the Notice account for the request for an extension?
- Would such an extension cause undue risk compared to the original time limits?
- Is the extension time period requested reasonable?
- All applications for an extension of the notice should be before the expiry of the notice.

12.2 Even so, requests for extensions of Notices should be, preferably in writing, well before the compliance date of the Notice. If an extension is to be allowed, an Extension Notice should be prepared with the new compliance date. The Notice of Extension can then be typed and posted as normal mail to the recipient of the Notice.

## **13.0 Withdrawal Of Notices**

13.1 It is Departmental policy not to withdraw health and safety Notices, unless in particular circumstances the Inspector considers this to be appropriate or when the recipient of the Notice requests a withdrawal of the Notice.

13.2 Officers should be aware that Improvement or Prohibition Notices can only be withdrawn where it does not take immediate effect, ie before the compliance date of the deferred Prohibition or Improvement Notice (Section 23 of HASWA).

## **14.0 Non-Compliance Of Notices**

14.1 In circumstances where a Notice has not been complied with and does not meet the criteria for an Extension Notice, then legal proceedings for failing to comply with the requirements of the Notice should be taken. Only in exceptional circumstances should such action not be taken.

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## **ANNEX G Specific Enforcement Actions Fixed Penalty Notices Policy- Pollution Control**

### **1.0 Scope**

- 1.1 This policy relates to the issuing of Fixed Penalty Notices within functions associated with the operation of the relevant Environmental Services Section and provides information on Fixed Penalties and the offences under which such fines are available to the Authority.
- 1.2 This policy does not cover other Services of the Local Authority in relation to the issuing of Fixed Penalty Notices.

### **2.0 Objective**

- 2.1 To seek an improvement in neighbourhoods through the consistent and proportionate issuing of Fixed Penalty Notices to tackle a range of environmental issues, thereby helping to minimise pollution, harm to human health or adverse affect to neighbourhoods and to help make South Derbyshire a cleaner, greener and safer environment.

### **3.0 Introduction**

- 3.1 This guidance covers Fixed Penalty Notices issued for a range of environmental offences under the Environmental Protection Act 1990, Anti-Social Behaviour Act 2003 and a number of other pieces of legislation, as amended and extended by the Clean Neighbourhoods and Environment Act 2005.
- 3.2 The Clean Neighbourhoods & Environment Act 2005 makes significant changes to the Fixed Penalty Notice regime. In some cases it widens the scope of who may issue fixed penalties and that it is an offence under certain sections to fail to provide both name and address to any duly authorised officer. In addition, in many cases Local Authorities are also now able to specify both the fixed penalty fine that may be issued (within specific parameters) and introduce discounts for early payments of fixed penalty notices.

### **4.0 General Principles**

- 4.1 The general principles of enforcement outlined in the Environmental Health Enforcement Policy will be followed.
- 4.2 Where the option of a fixed penalty fine is available to negate direct court action, this will be utilised at every appropriate opportunity. Although the age of criminal responsibility is currently 10 years, any potential legal action against a child under 16 should only be taken following consultation with the relevant Manager (normally the Environmental Protection

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Manager for FPNs served by Safer Neighbourhood Wardens) and the Youth Offending Service. In any case, instances where juveniles are below 16 years contact will be made with the parent/guardian of that person. Any contact with parents/guardians will be in writing and will make them aware of their child's actions and the Authority's proposed action.

- 4.3 Fixed penalties can provide the Authority with an effective and visible way of responding to low-level environmental crimes and Central Government wishes to encourage Local Authorities and other agencies to use them as an alternative solution to placing persons through the judicial process.
- 4.4 Fixed penalties are one of enforcement mechanisms that would be utilised within the Environmental Health Enforcement Policy.
- 4.5 As fixed penalty notices are only intended to prevent the need to go to court and provide another means of enforcement, they will never be used where there is not sufficient evidence to take the matter to court. When such evidence exists, be it photographic or evidence retrieved from the scene, careful consideration should be made as to the likelihood that the evidence would persuade a court of law, as failure to pay the FPN would lead to Court action. If there is any doubt the relevant manager should advise.

## **5.0 Non-Payment Of Fixed Penalties**

- 5.1 Where fixed penalties fail to be paid within the specified period that the normal course of action would be to send a series of reminder letters and ultimately proceeding with a prosecution.

## **6.0 Instalment Payment Of Fixed Penalties**

- 6.1 South Derbyshire District Council understands that for certain individuals the payment of fixed penalties may be difficult. Consequently, persons who provide written confirmation explaining the reasons as to why payment may be difficult will be provided with the opportunity to make such payments in instalments. This will be agreed with the individual concerned and the relevant Manager but under no circumstances will the time for payment of instalments extend beyond 3 calendar months.
- 6.2 South Derbyshire District Council considers legal action as a serious step and wishes to avoid such action if at all possible, however in correspondence individuals will be informed that failure to make, or to continue with payments by dates specified, may result in this Authority proceeding with legal action in this matter.
- 6.3 In such instances individuals will be provided with 14 days to make payment of the full outstanding amount, with prosecution being the normal course of action where this amount fails to be received.

## **7.0 Appropriate Use Of Fixed Penalties**

- 7.1 The availability and level of fixed penalties for environmental crimes reflect the severity of the offences. It is important therefore that the correct fixed penalties are used for the correct

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offence (e.g. litter fixed penalties will not be used by this Authority to deal with illegal waste or fly-tipping offences or side waste problems from household or commercial/industrial premises).

- 7.2 Officers should feel free to approach anyone who they have reason to believe may be about to commit an offence e.g. dropping litter, dog fouling, with the aim of educating that person. Officers should also use their discretion as to whether it is safe to approach a person, e.g. if that person is with a group of people who appear to be drunk, the Officer may not wish to approach them without assistance.
- 7.3 Officers also have the discretion as to whether a fixed penalty notice should be served where it is found that that person may have accidentally committed an offence (e.g. dropped litter whilst pulling their hand from their pocket, litter dropped from bag whilst rummaging).

## 8.0 Three Strike Rule

- 8.1 The approach being adopted by the Section in relation to the issuing of fixed penalties in relation to dog fouling, littering and certain waste related offences.
- 8.2 Under this rule an individual will on the first and second offence be offered the opportunity to accept a fixed penalty and only on a third will face prosecution for any offences that are deemed to have taken place. It should be noted that other factors may result in a prosecution earlier (e.g. intent, attitude of offender, abusive to authorised officer, etc.).

## 9.0 Offences For Which Fixed Penalties Are Available

The table below (Table 1) lists the fixed penalties covered by this guidance, including the amount of each Fixed Penalty and the discounted amount for early payment

**Table 1**

Section & Legislation	Description of offence	Amount	Discounted to for early payment
s.6(1) Clean Neighbourhoods & Environment Act 2005	Nuisance parking	£100	£70
2A(1) Refuse Disposal (Amenity) Act	Abandoning a vehicle	£200	£140
88(1) Environmental Protection Act 1990	Littering	£75	£50
s.94A(2) Environmental Protection Act 1990	Street litter control Notices and Litter Clearing Notices	£100	£70
Schedule 3A, para.7(2) Environmental Protection Act 1990	Unauthorised distribution of literature	£75	£50
s. 43 Anti-social Behaviour Act 2003	Graffiti and fly posting	£75	£50
s. 5B(2) Control of Pollution(Amendment) Act 1989	Failure to produce authority(waste transfer notes)	£300	£210
s.34A(2) Environmental Protection Act1990	Failure to furnish(waste carriers licence)	£300	£210

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s.47ZA(2) Environmental Protection Act 1990	Offences in relation to Waste receptacles	£100	£70
s.59(2) Clean Neighbourhoods and Environment Act 2005	Dog control orders	£75	£50

## 10.0 Failure Of Alleged Offenders To Give Correct Details

- 10.1 Most fixed penalty provisions for environmental offences have been amended under provisions within the Clean Neighbourhoods & Environment Act 2005, to provide those authorised to issue fixed penalties with the power to require the name and address of a person they wish to issue with a fixed penalty.
- 10.2 Instances where persons fail to supply such details or give false or misleading information to an authorised officer, individuals if traced will not be provided with the option of a fixed penalty. Instead they will face prosecution for both the offence (e.g. littering) and for failing to provide their name and address.

## 11.0 Use Of Fixed Penalty Receipts

- 11.1 The various Acts under which fixed penalties are levied enable the Authority to use fixed penalty receipts only to help meet the cost of certain specified functions.
- 11.2 Instances where Local Authorities are categorised as 'excellent' or 'good' under the Comprehensive Performance Assessment, and is subsequently categorised accordingly by Order made by the Secretary of State, the Environmental Offences (Fixed Penalties) (Miscellaneous Provisions) Regulations 2006, or the Environmental Offences (Use of Fixed Penalty Receipts) Regulations 2006 allow that Authority to spend the penalty receipts on *any* of its functions.
- 11.3 In cases where a high performing Authority falls out of the 'excellent' or 'good' category, the Regulations allow it to continue spending its receipts on any function for the duration of one year. Specified functions in relation to different offences are listed in the following table:

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Table 2

<b>Description of Fixed Penalty offence</b>	<b>Where are the functions specified in the legislation?</b>	<b>Qualifying Functions for which receipts may be used</b>
Nuisance parking	s.8(2) Clean Neighbourhoods and Environment Act 2005	Functions under Refuse Disposal (Amenity) Act 1978  Functions under sections 99-102 Road Traffic Regulation Act 1984  Enforcement of sections 3 and 4 Clean Neighbourhoods and Environment Act 2005
Abandoning a vehicle	s.2C(2) Refuse Disposal (Amenity) Act 1978	Functions under the Refuse Disposal (Amenity) Act 1978  Functions under sections 99-102 Road (see s.10 CNEA 2005) Traffic Regulation Act 1984  Enforcement of sections 3 and 4 Clean Neighbourhoods and Environment Act 2005
Litter  Litter Clearing Notices  Street Litter Control Notices  Unauthorised distribution of literature  Graffiti and fly posting  Dog control orders	s96 Clean Neighbourhoods and Environment Act 2005	Litter-related functions under Part 4, Environmental Protection Act 1990      Graffiti and fly posting functions under section 43 Anti-social Behaviour Act 2003  Dog Control Orders functions under Part 1, Chapter 6 Clean Neighbourhoods & Environment Act 2005
Failure to produce authority (waste carriers licence)	s.5C(3) Control of Pollution (Amendment) Act 1989	Functions,, including enforcement regarding offences, under section 5 Control of Pollution (Amendment)

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Review Date 18/11/12			
		Act 1989	
Failure to furnish documentation (waste transfer notes)	s.73A Environmental Protection Act 1990	Functions, including enforcement regarding offences, under Part 2 Environmental Protection Act 1990	

## 11.0 Fixed Penalty Notice Returns

11.1 The various statutes oblige this Local Authority to supply the Secretary of State with such details of their fixed penalty receipts as they may require.

## 12.0 Issue Of Fixed Penalties To Juveniles

12.1 Where the option of a fixed penalty fine is available, this will be utilised (dependent on factors associated with the offence in question) to issue fixed penalties to adults and juveniles aged 10 to 15 years.

12.2 Instances where juveniles are below 16 years contact will be made with the parent/guardian of that person. Any contact with parents/guardians may be in person and will in all cases also be in writing.

12.3 Juvenile offenders may be provided with the opportunity to rectify the offence committed (e.g. pick up litter, remove dog faeces). If they comply with the request from an authorised officer they may be issued with a formal warning, however any persons failing to do so, or who become abusive to any authorised officer will automatically receive a fixed penalty notice or be liable to prosecution.

## 13.0 Issuing Fixed Penalties On Private Land

13.1 Authorised officers are required to gain the permission of the landowner or occupier before they can enter private land, unless that land is privately owned land to which the public are entitled to have access and they already have implied permission to enter. Once entry has been consented by the landowner fixed penalties may be issued.

13.2 The Authority has statutory powers of entry in certain circumstances to enter land.

## 14.0 Customer Care

14.1 Before any person starts dealing with any offences for which fixed penalty fines may be issued, they are required to read and understand the Environmental Health Enforcement Policy and this Fixed Penalty Notice Policy together with the relevant FPN procedure.