

Tonbridge & Malling Borough Council

Corporate Enforcement Policy



1. INTRODUCTION

- 1.1 Economic regeneration is one of the key priorities of Tonbridge and Malling Borough Council. We are committed to supporting our businesses and wider community through co-ordinated regulatory delivery and by providing appropriate advice and guidance. However, there are occasions where organisations or individuals may come into conflict with the regulatory framework and on such occasions the Council may need to take appropriate action to deal with these issues.
- 1.2 This document sets out our Enforcement Policy and outlines what residents, businesses, consumers and workers can expect from the Council in performing its regulatory enforcement functions. In certain circumstances individual services such as Licensing, Planning, Street Scene & Leisure may have more detailed service specific enforcement policies which are published separately. Where no service specific policy is in place, the relevant service will apply the principles of this Policy.
- 1.3 The Council will apply the principles of the Regulators' Code¹ to promote an efficient and effective approach to regulatory inspection and enforcement, improving the outcome of regulation without imposing unnecessary burdens on businesses or individuals.
- 1.4 This policy also sets out the approach to be followed by authorised officers when making decisions in respect of the Council's compliance and enforcement activities. The Council is committed to ensuring that all authorised officers will abide by this policy, in addition to any relevant service enforcement policies.
- 1.5 Where any conflict arises between this Corporate Enforcement Policy and any service-specific policy in place, the provisions of the service-specific policy will apply. Any conflict between this Policy, any service-specific policy and any statutory or other legal requirement will be resolved in favour of the legal requirement.

Legislative Framework

- 1.6 The Council must have regard to the provisions of the Regulators' Code when exercising specified functions under the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (as amended). The specified regulatory functions include powers and duties relating to the following:
- a) Anti-social behaviour
 - b) Waste and Street Scene

¹ See Appendix B

- c) Environmental Protection
- d) Food safety
- e) Health and Safety
- f) Housing
- g) Licensing
- h) Public Health

1.7 In relation to Town & Country Planning, the enforcement regime is governed by the Town & Country Planning Act 1990. The Council's policy in relation to such enforcement is addressed in the Council's Planning Enforcement Plan.

2. AIMS AND OBJECTIVES

2.1 The policy reflects the Council's Corporate Strategy. In particular, valuing our environment and encouraging sustainable growth, promoting fairness and focussing on good value for money for the businesses and residents of the Borough in order to deliver good value services, strong leadership and address the needs of the borough.

2.2 The vision for Tonbridge and Malling is achieved by the Council working in partnership with key public sector organisations, residents, businesses, community and voluntary groups throughout the borough.

2.3 We will work with those we regulate and seek to promote compliance e.g. through advisory activities, intelligence-led checks and proportionate responses to regulatory breaches.

2.4 Whilst we will provide support, advice and guidance to those endeavouring to comply we will deal firmly with those that deliberately or persistently fail to comply.

3. PRINCIPLES OF GOOD REGULATION

3.1 The Council will ensure that the allocation of regulatory efforts and resources will be targeted so resources are focused on those least likely to comply and where risk is highest. This supports the Council's vision of providing strong local leadership.

3.2 The following principles will be applied in respect of any advice given:

- a) Advice given will distinguish between statutory requirements and advice or guidance aimed at improvement above minimum standards;

- b) Response to requests for advice on non-compliance will be provided without directly triggering enforcement action and will seek primarily to provide the advice and guidance necessary to help ensure compliance;
- c) Information and advice will be provided in plain language on the rules that we apply;
- d) We will provide information and advice in a way that enables individuals and businesses to clearly understand what is required by law.

Fair Enforcement

3.3 The Council is committed to fair and objective enforcement ensuring that all its policies are applied in a non-discriminatory manner and in a way which seeks to enhance good community relations.

3.4 The Regulators' Code states principles that we will have regard to:

- Regulators should carry out their activities in a way that supports those they regulate to comply and grow;
- We will choose proportionate approaches when dealing with those we regulate and consider if similar outcomes can be achieved by less burdensome means. When we design policies and operational procedures we will consider how we can minimise the costs of compliance for those we regulate to encourage and promote compliance;
- Regulators should provide simple and straightforward ways to engage with those they regulate and hear their views; Before changing policies and procedures we will consider the impact on those we regulate and we will clearly explain what the non-compliant item or activity is, the advice given, actions required or decisions taken and the reasons for this;
- Appeal mechanisms and complaints procedures will be clearly explained and publicised;
- Regulators should base their regulatory activities on risk;
- Risk priorities will be based on evidence and resources allocated appropriately. Intervention types will vary according to the risk level and we will recognise the compliance record of those we regulate, including earned recognition and external quality assurance schemes. We participate in the Primary Authority partnership approach which seeks to provide consistent advice that has been agreed with a single regulator;
- Regulators should share information about compliance and risk: Where it is legal to do so, we will work with other internal and external regulators to help target resources and minimise duplication;
- Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply. We will provide advice and guidance in a clear, accessible and concise format to help those we regulate understand and meet their responsibilities;

- Regulators should ensure that their approach to their regulatory activities is transparent. We will publish service standards that provide clear information on how we will communicate with those we regulate, how we can be contacted and our approach to compliance checks.

What is Enforcement?

3.5 There are 3 broad stages to any enforcement action taken by the Council.

These are:

- Investigation
- Assessment
- Action

Investigation

3.6 Where the Council becomes aware of activities suspected to be in breach of relevant legislation, the first step will be to carry out investigations to ascertain whether, and to what extent, activities are being carried out in breach of the relevant controls. The nature of those investigations will be specific to the circumstances and may or may not be protracted. Where necessary, the Council may also appoint external consultants to assist in the investigation and in evidence gathering.

Assessment

3.7 Once the Council has obtained sufficient information, it will assess the information obtained to reach a view on whether there has in fact been a breach of any legislative provision and, if so, what action if any it might be appropriate to take. This may be done in consultation with the Council's in-house legal team or external legal support where necessary.

Action

3.8 Following assessment of the issues, the Council may have a range of options in terms of the action it can take. These are set out in the "enforcement options" section below.

3.9 The nature of the Council's investigations may require that details are kept confidential. However, where possible and appropriate we will advise relevant parties of the current status of an investigation at appropriate stages.

4. ENFORCEMENT OPTIONS

- 4.1 There are a range of options open to officers involved in regulation. In the first instance we will seek to provide information, advice and guidance, unless breaches are severe with potentially serious consequences or otherwise require immediate action to be taken. Targeted and proportionate enforcement measures help to deliver the good value for money services and strong local leadership envisaged in the Council's Corporate Strategy.
- 4.2 When considering formal enforcement action the officer will discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach. This will not apply where immediate action is required to prevent or to respond to a serious breach or where to do so is likely to defeat the purpose of the proposed enforcement action.
- 4.3 The officer will give clear reasons for any formal enforcement action to the person or business against which action is being taken at the time the action is taken. The reasons will be confirmed in writing at the earliest opportunity. The complaints and relevant appeals procedure for redress will also be explained at the same time.
- 4.4 Businesses may enter into a contractual partnership arrangement (either individually or as part of a trade association) with a local authority- which may be TMBC or another authority- for the purposes of obtaining tailored advice on matters such as environmental health and trading standards. This is known as the "Primary Authority" scheme. Sole traders or businesses with only one outlet/ premises, can access an informal (i.e. non-contractual) version of this scheme, which is known as "Home Authority". If a business has a Primary Authority (or Home Authority scheme), the Council will contact the Primary or Home Authority before enforcement action is taken, unless immediate action is required because of imminent danger to health, safety or the environment. Officers will abide by LBRO guidance concerning the Primary Authority scheme.
- 4.5 The methods of enforcement selected will be calculated to produce the highest reasonable standards of compliance within the least time. In taking action to ensure compliance, officers will consider the following when deciding on the most appropriate enforcement method:
 - a) The seriousness of the breach
 - b) The different options for remedying the breach
 - c) The degree of risk
 - d) The circumstances of each case and the likelihood of recurrence
 - e) Previous history of the offender
 - f) Age and circumstances of the offender
 - g) Date of the offence
 - h) Likelihood of achieving a satisfactory outcome
 - i) Precedent effect
 - j) General attitude of the offender

- k) Legal imperatives, e.g. statutory requirement to serve a notice
- l) Relevant guidance
- m) Sufficiency of admissible evidence
- n) Public Interest
- o) Prevalence of the offence locally or nationally

4.6 A variety of enforcement options are set out below which could be used at any stage - they are not sequential.

Advice

4.7 In the first instance, consideration will be given to whether advice regarding a breach or potential breach of legislation is appropriate. When advice is given it will normally be put in writing unless the breach is very minor or the matter is rectified on the spot.

Referral to Mediation Service

4.8 In appropriate cases officers may consider a referral to the Mediation Service. An impartial, and confidential service that provides a process for those in dispute to reach agreement on a range of issues such as noise, rubbish, pets, damage to property, harassment, boundaries, fences and shared areas.

Warning Letter

4.9 In certain circumstances it may be appropriate to issue a warning letter bringing alleged offences to the attention of the person responsible for the alleged breach indicating ways to avoid commission of similar offences in the future. A warning letter will set out what should be done to rectify the breach and to prevent re-occurrence. If a similar breach is identified in the future, this letter will be persuasive in considering the most appropriate enforcement action to take on that occasion. Such a letter cannot be cited in court as a previous conviction but it may be presented in evidence.

4.10 A warning letter might be given, for example, for low community impact/ low risk "technical" breaches, where more formal action is not considered to be appropriate. If a warning letter is to be issued, it is essential that sufficient admissible evidence is available to substantiate the offence.

Voluntary Undertakings

4.11 The Council may accept voluntary undertakings that breaches will be rectified and/or recurrences prevented. The Council will take any failure to honour voluntary undertakings very seriously and enforcement action is likely to result.

Fixed Penalty Notice

4.12 Fixed Penalty Notices (FPNs) can now be issued for a variety of different offences. They are an effective enforcement tool as they allow officers time to focus on more detailed and complex cases. The FPN provides the offender with an opportunity to pay a financial penalty as an alternative to being prosecuted. If a fixed penalty is not paid, the Council may commence criminal proceedings or take other enforcement action in respect of the breach.

4.13 FPNs may be issued when an officer believes that an offence has been committed. The officer must therefore have adequate evidence to support a prosecution if the FPN is not paid. Normally FPNs would not be issued where the breach is more serious or recurrent e.g. the offender has already received a FPN for the same offence in the same year.

Orders and Statutory Notices

4.14 Subject to the specific rules governing the use of different notices and orders, these are generally used where there is a clear breach of the law, where the degree of risk or environmental impact or harm from the situation is significant and where a remedy needs to be secured within a set period of time. In some instances the service of a notice will be mandatory, for example, abatement notices under the Environmental Protection Act 1990. In some instances, the serving of orders and notices will be discretionary, such as Public Space Protection Orders under the Anti-Social Behaviour Crime & Policing Act 2014

Seizure of Property, Documents and Equipment

4.15 Officers will on occasion require evidence for their investigation and, where necessary, will use their statutory powers to enter upon land, seize property, documents or equipment. Where premises are searched this will be subject to the conditions in the Notice of Powers required by PACE. Occupier(s) will be given a notice summarising their rights together with the powers of the officer.

Simple Caution

4.16 The Council may issue a caution where there is sufficient evidence to prosecute but where the public interest is not best served by issuing proceedings. A caution can only be administered where the offender consents to the caution and admits the offence. It will be formally recorded and may be cited in subsequent court proceedings.

Prosecution

4.17 The Council will exercise its discretion when considering whether to initiate a prosecution. When deciding whether to prosecute, the Council will apply the Code for Crown Prosecutors, issued by the Crown Prosecution Service² and the decision whether or not to prosecute will be taken by the Council's legal team. In particular, the Council will consider whether there is a reasonable prospect of a

² See Appendix B

conviction, bearing in mind any statutory defence available to the defendant, and any other factors which may preclude a successful conviction. Where the circumstances warrant it, prosecution without prior warning may occur.

- 4.18 Once the Council has issued criminal proceedings for breach of a statutory notice, it is unlikely that the Council will withdraw proceedings simply because the offender subsequently complies or “regularises” the breach. This is because the criminal process is not a mechanism for securing compliance with statutory notices. Rather, the Court will need to consider whether any late attempt to comply mitigates the offence.

Costs

- 4.19 Investigations and enforcement activity arising from non-compliance is often very costly to Local Authorities. In all circumstances the Council will seek to recover its costs during civil and criminal proceedings including (but not necessarily limited to) prosecutions and food condemnation orders. Such costs may include the costs of investigation and enforcement, in addition to any legal costs. The Council will take all appropriate action to secure costs awarded by the Courts if such costs are not paid in a timely fashion, for example by way of charging order or by instructing bailiffs. A summary of the basis upon which the Council will seek its legal costs is set out at Appendix D. The Council will also seek to recover any barristers’ fees in full where external counsel has been appointed.

Proceeds of Crime

- 4.20 Where possible the Council will work with Accredited Financial Investigators and make use of the provisions of the Proceeds of Crime Act 2002.

Data Sharing

- 4.21 To facilitate the prevention, detection and investigation of crime, intelligence and information may be shared and exchanged with other Council departments, other Local Authorities or other agencies such as Police Forces, UK Border Agency, HM Revenue and Customs, Clean Kent, Kent Fire & Rescue Service, the Food Standards Agency, the Health and Safety Executive, Public Health England and others. Such sharing of data will comply with the provisions of data protection legislation.

Forfeiture

- 4.22 In some circumstances the legislation permits officers to seize goods and apply to the court for them to be made subject to a forfeiture order. The Council will exercise this power in appropriate cases e.g. seizure of noise making equipment.

Injunction

4.23 An injunction may be sought where the circumstances of any case cause a significant problem or threat to health and the normal process of law (statutory notices, prosecution etc.) is likely to be ineffective. Depending on the circumstances, the Council might not necessarily take other enforcement action before seeking an injunction.

Civil Injunctions for Anti-Social Behaviour

4.24 The Council has the power to apply to the magistrates' court for a civil injunction under the Anti-Social Behaviour, Crime & Policing Act 2014. Civil injunctions should be considered wherever it is thought that they will be a successful remedy for tackling anti-social behaviour and where other methods may be less effective. This does not necessarily mean that other methods have to be tried first.

Publication of Sentencing Outcomes

4.25 Deterrence is an important part of the Council's enforcement activities. To that end, the Council will consider publishing details of successful prosecutions in all cases. It is also important in maintaining transparency that the general public are kept informed of action which the Council takes.

4.26 When deciding whether to publish details of a prosecution, the Council will take into account the social need in making the information public. This will include factors such as:

- the significance of the offence committed;
- the effect of the offence in the local community;
- the frequency of such offences;
- whether the offence itself has attracted publicity

4.27 Where applicable, the Council will have to balance the public interest in publication with the data rights of the offender.

Arrangements for Monitoring and Review of Decisions Taken on Enforcement Action

4.28 Reviews of how the Enforcement Policy is practically applied and the outcomes of enforcement action undertaken will be carried out within Services. The results will be considered at team briefings.

5. ADMINISTRATION

Confidentiality

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

- a) where the law requires e.g. under Freedom of Information or Environmental Information Regulations;
- b) where the case goes to court or tribunal; or
- c) with the prior written agreement of the person supplying the information.

5.2 Persons wishing to remain anonymous may do so and information supplied in connection with breaches of legislation will be investigated where possible and feasible to do so. Where we are required to reveal the identity of a person who has contacted us we will inform the person accordingly.

Complaints

5.3 The Council will respond to complaints about the service it provides in accordance with the Council's Complaints Procedure which is available at:

<http://www.tmbc.gov.uk/services/council-and-democracy/complaints/complaints-procedure>

Implementation

5.4 Responsibility for implementation of this policy rests with the enforcement officers in the relevant departments. When the officer takes the view that enforcement action is required this will be discussed with their line manager and, if necessary, Head of Service who will decide on the appropriate action to be taken. This discussion should be recorded on the case file. Implementation will then be monitored by the relevant service head.

5.5 The Council's Scheme of Delegation specifies the extent to which enforcement powers are delegated to officers. Whilst delegation may often be to officers, in certain circumstances the decision to take enforcement action lies with the relevant Council Committee.

The list of officer delegated powers is available at:

<http://www.tmbc.gov.uk/services/council-and-democracy/councillors-democracy-and-elections/council-constitution>

Review of Policy

5.4 This policy will be reviewed and updated as required by legislation, guidance or other circumstances which may impact on the principles set out in this document.

APPENDIX A

Conflicts of Interest and Undue Influence

The enforcement role of the Council is an impartial one. However, the possibility of a real or perceived conflict of interest or undue influence arising remains.

Conflict of Interest

There may be circumstances short of a criminal offence which could give rise to a conflict of interest between a Council officer and a member of the public, for example:-

- Where the member of the public is socially acquainted with or related to the officer. Under these circumstances it would be difficult for the officer to act in an impartial manner and it would be unreasonable for the Council to expect this.
- Where an employee receives a request from a Councillor, Council employee or an Agency who they have close working contact with and the request for advice or assistance falls outside the normal remit for the service.

Undue Influence

Undue influence arises where a party exercises a dominant influence over the mind of another so that person is unable to exercise a free and independent will in the matter. For example, when an employee is undertaking regulatory activities where the business concerned involves a Councillor or a more senior Council employee, they should ask whether, if this were publicly known, it might be perceived as affecting the judgement or actions of the advisor.

Where an employee believes there is potential for a conflict of interest or undue influence to arise then the matter should be referred to their line manager for appropriate action/advice.

APPENDIX B

Relevant Requirements and Legislation Considered in the Preparation of this Policy

1. Principles of Good Regulation

The Legislative and Regulatory Reform Act 2006, Part 2

<http://www.legislation.gov.uk/ukpga/2006/51/contents>

This requires the Council to have regard to the Principles of Good Regulation when exercising a specified regulatory function. We will exercise our regulatory activities in a way which is:

- A.** Proportionate – our activities will reflect the level of risk to the public and enforcement action taken will relate to the seriousness of the offence,
- B.** Accountable – our activities will be open to public scrutiny, with clear and accessible policies, and fair and efficient complaints procedures,
- C.** Consistent – our advice to those we regulate will be robust and reliable and we will respect advice provided by others. Where circumstances are similar, we will endeavour to act in similar ways to other local authorities,
- D.** Transparent – we will ensure that those we regulate are able to understand what is expected of them and what they can anticipate in return, and
- E.** Targeted – we will focus our resources on higher risk enterprises and activities, reflecting local need and national priorities.

2. Regulators' Code, Statutory Code of Practice for Regulators, April 2014

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf

The Council has had regard to the Regulators' Code in the preparation of this policy. 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.

3. Enforcement Concordat (Cabinet Office 1998); Enforcement Concordat: Good Practice Guide for England and Wales; (Department of Trade and Industry, June 2003)

<http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file10150.pdf>

Tonbridge & Malling Borough Council has adopted the Enforcement Concordat and the Principles of Good Enforcement, which are: Standards, Openness, Helpfulness, Complaints, Proportionality and Consistency.

4. Human Rights Act 1998

Tonbridge & Malling Borough Council is a public authority for the purposes of the Human Rights Act 1998. We therefore apply the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 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 right to a fair trial and the right to respect for private and family life, home and correspondence.

5. Data Protection

Where there is a need for Tonbridge & Malling Borough Council to share enforcement information with other agencies, we will follow the provisions of data protection legislation.

6. Crown Prosecution Service: The Code for Crown Prosecutors, January 2013

http://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf

When deciding whether to prosecute, Tonbridge & Malling Borough Council has regard to the provisions of The Code for Crown Prosecutors as issued by the Director of Public Prosecutions. The Code is a public document that sets out the general principles to follow when decisions are made in respect of prosecuting cases. The Code sets out two tests that must be satisfied commonly referred to as the 'Evidential Test' and the 'Public Interest Test':

A. Evidential Test - *Is there enough evidence against the defendant?*

When deciding whether there is enough evidence to prosecute, Tonbridge & Malling Borough Council will consider what evidence can be used in court and is reliable. We must be satisfied there is enough evidence to provide a "realistic prospect of conviction" against each alleged offender.

B. Public Interest Test - *Is it in the public interest for the case to be brought to court?*

Tonbridge & Malling Borough Council will balance factors for and against prosecution carefully and fairly, considering each case on its merits.

7. Regulatory Enforcement and Sanctions Act 2008, Part 2

<http://www.legislation.gov.uk/ukpga/2008/13/section/11>

This established the Primary Authority scheme. We will comply with the requirements of the Act when we are considering taking enforcement action against any business or organisation that has a registered Primary Authority partnership. The Act also provides for the publication of a list of enforcement priorities for local authorities. We will have regard to any list of enforcement priorities published by the Better Regulation Delivery Office.

8. Food Law Code of Practice

<http://food.gov.uk/enforcement/enforcework/foodlawcop/>

9. HSE'S Enforcement Policy Statement

<http://www.hse.gov.uk/enforce/enforcepolicy.htm>

10. National Local Authority Enforcement Code

<http://www.hse.gov.uk/lau/la-enforcement-code.htm>

11. HELA's Guidance to Local Authorities on Targeting Interventions (LAC 67-2 (rev 4.1))

<http://www.hse.gov.uk/lau/lacs/67-2.htm>

This sets out the requirements for risk rating and frequency of interventions for enforcement of health and safety legislation.

12. HELA's Incident Selection Criteria Guidance (22-13 (rev 1), 2012)

<http://www.hse.gov.uk/lau/lacs/22-13.htm>

This provides a common proportionate, transparent and targeted approach to accident and incident selection and investigation.

13. Primary Authority Guidance (BRDO, September 2013)

<https://primaryauthorityregister.info/par/images/documents/pa-guidance.pdf>

14. Home Office: Anti-social Behaviour, Crime and Policing Act 2014: Reform of anti-social behaviour powers: Statutory guidance for frontline professionals

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352562/ASB_Guidance_v8_July2014_final_2_.pdf

APPENDIX C

Conduct of Investigations

All investigations will be carried out under the following legislation and in accordance with any associated guidance or codes of practice, in so far as they relate to the Council.

- a) *The Police and Criminal Evidence Act 1984*
- b) *The Criminal Procedure and Investigations Act 1996*
- c) *The Regulation of Investigatory Powers Act 2000*
- d) *The Criminal Justice and Police Act 2001*
- e) *The Human Rights Act 1998*

These Acts and associated guidance control how evidence is collected and used and give a range of protections to the public and potential defendants.

Our authorised officers will also comply with the requirements of the particular legislation under which they are acting, and with any associated guidance or codes of practice.

Appendix D

Basis of Cost Recovery in Legal Proceedings

1. Civil Proceedings

The Council has adopted the HM Courts and Tribunals Service guideline hourly rates National Band 1 (April 2010) for the calculation of costs to be recovered in civil proceedings. These costs are calculated based on the level of experience of the lawyer conducting the case. These are as follows³:

Band A £217 per hour
Band B £192 per hour
Band C £161 per hour
Band D £118 per hour

2. Criminal Proceedings

The criminal courts award costs on the basis of a “just and reasonable” test. The Council will benchmark the legal costs it seeks to recover in criminal proceedings against the average hourly rates of Crown Prosecutors (September 2009), which are:

Lawyers: £69 per hour
Paralegals £51 per hour
Support staff: £44 per hour

The costs sought may differ based upon the length and complexity of the case and whether proceedings are carried out in the Magistrates’ or Crown Court.

³ Band A: lawyers over 8 years’ experience, Band B: lawyers over 4 years’ experience, Band C: lawyers 0-4 years’ experience, Band D: legal trainees & paralegal staff