

## **Overview and Scrutiny – 6 September 2017 - Fly-tipping**

### **Community Protection – Enforcement**

#### **1. Offences, defences and penalties**

##### **1.1 What is fly-tipping?**

###### **Definition – Section 33 (1)(a) Environmental Protection Act 1990 (EPA)**

A person commits an offence if they

deposit controlled waste....., or knowingly cause or knowingly permit controlled waste..... to be deposited, in or on any land unless an environmental permit authorising the deposit is in force and the deposit is in accordance with the permit;

##### **1.2 Fly-tipping from motor vehicles**

###### **Additional Provision – Section 33(5) EPA**

Where controlled waste is carried in and deposited from a motor vehicle, the person who controls or is in a position to control the use of the vehicle shall, for the purposes of subsection (1)(a) above, be treated as knowingly causing the waste to be deposited whether or not he gave any instructions for this to be done.

##### **1.3 Defences**

###### **Section 33 (7) EPA**

It shall be a defence for a person charged with an offence under Section 33(1):

- that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or
- that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—
  - (i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution of the environment and harm to human health; and
  - (ii) particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done.

##### **1.4 Penalties for fly-tipping (Prosecution)**

###### **Section 33(8) EPA**

Fly-tipping offences are triable “either way” i.e. they can be tried summarily in the Magistrates Court or on indictment in the Crown Court.

A person who commits an offence under Section 33 (1) shall be liable

- (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine or both; and
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

## **1.5 Penalties for fly-tipping - Fixed Penalty Notices (FPNs)**

### **Section 33ZA Environmental Protection Act 1990 (effective 9 May 2016)**

The ability to offer FPNs for fly-tipping offences was introduced on 9 May 2016. FPNs give the recipient the opportunity to discharge liability for the alleged offence without the need to attend court, by payment of a fixed penalty to the local authority.

Legislation allows a local authority to set the amount payable for a fly-tipping FPN at any amount between £150 and £400 and a rebate for early payment can be offered if deemed appropriate. Nottingham's fly-tipping FPNs are set at £300 and no early payment rebate is available.

If a FPN is offered to an offender and is not paid, any subsequent prosecution is for the fly-tipping offence **not** for non-payment of the FPN.

## **2. Other relevant offences**

### **2.1 Duty of Care**

#### **Section 34 (1) Environmental Protection Act 1990**

A person i.e. a householder or a business, who produces or disposes of controlled waste has a duty to prevent a contravention of Section 33 and to transfer waste only to authorised persons.

Despite the existence of a free bulky waste collection service in Nottingham, experience shows that some residents still pay individuals, whose details they may have obtained from social media, free paper ads, or by whom they may have been approached, to take away their excess waste.

If the person to whom the householder passes their waste is not authorised to carry waste (i.e. not a licensed waste carrier) and the householder has not made reasonable enquiries as to their bona fides, and that waste is subsequently fly-tipped the householder may be in breach of their duty of care and be guilty of an offence under Section 34(2A).

### **2.2 Penalties for breach of duty of care**

#### **Section 34 (6) Environmental Protection Act 1990**

Any person who fails to comply with the duty of care shall be liable on summary conviction, or conviction on indictment, to an unlimited fine.

## **3. Burden of Proof/Proving an offence**

Fly-tipping/Breach of Duty of Care are criminal offences and all elements of any alleged offence must be proved to the criminal standard of proof, namely beyond reasonable doubt.

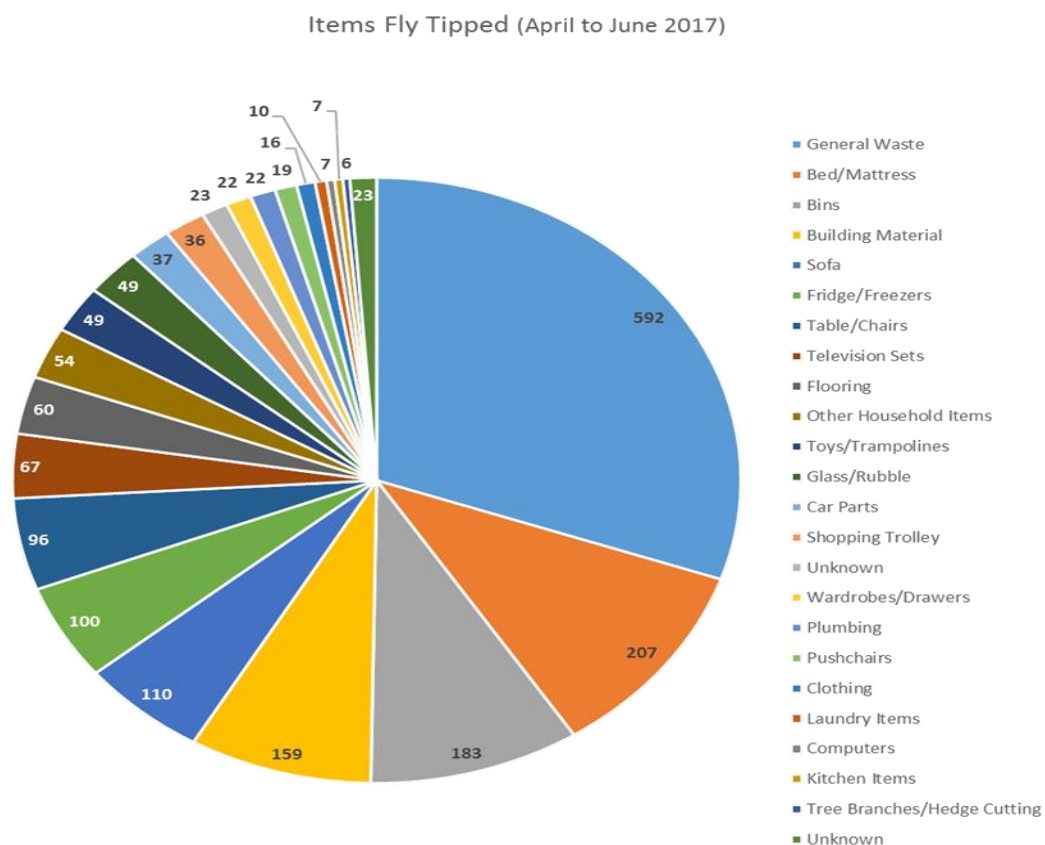
#### **4. Investigative Process**

- 4.1 Waste that has been potentially fly-tipped may be identified by a number of sources including Community Protection Officers (CPOs), street cleansing teams, residents/land owners, businesses etc.
- 4.2 Before clearance, potentially fly-tipped waste should be reported to CPOs, who will
- photograph the waste;
  - conduct an examination of the waste for the recovery of any evidence that may potentially identify the offender;
  - conduct appropriate local enquiries i.e. door to door enquiries of local residents, to ascertain whether anyone has witnessed the deposit of waste;
  - identify any further sources of evidence i.e. any Council or business owned CCTV in the locality that may have captured the offence;
  - if appropriate, conduct an initial interview, under formal caution, with any potential offender to establish whether any prima facie case can be established;
- 4.3 Once a CPO has completed their initial investigation, the waste can be removed. If waste has been deposited on private land, it is the responsibility of the landowner to safely dispose of the waste and to pay for the costs of doing so.
- 4.4 If the amount of waste deposited is small i.e. one or two black bags of waste, and an offender can be identified, CPOs can opt to issue a FPN for a littering offence pursuant to Section 87 of the Environmental Protection Act 1990. The FPN for littering is £75, with a rebate for early payment to £50 and may often be felt to be a more proportionate response to a minor offence than a fly-tipping prosecution or a fly-tipping FPN. However, the ability to issue £300 FPNs for any offence, no matter how small, which meets the fly-tipping definition does now exist.
- 4.5 If CPOs are unable to identify any relevant evidence which may support enforcement action no further action will be taken.
- 4.6 If CPOs identify evidence which points to potential offenders but are not able, or it is not appropriate for them, to make further enquiries the matter will be passed to an Enforcement Officer within Community Protection's ASB Team to investigate the matter further.
- 4.7 Enforcement Officers will take formal statements from any potential witnesses, obtain any relevant CCTV footage and other supporting evidence and will conduct formal recorded interviews pursuant to the Police and Criminal Evidence Act 1984 with any potential offenders with a view to establishing whether an offence can be proven.
- 4.8 If a prima facie offence is established the Enforcement Officer may

- Issue a warning or a formal caution (which stays on the Council's records for 5 years);
- Issue a fly-tipping FPN;
- Pass a file to Legal Services for prosecution;

## 5. **Practicalities and Limitations – Burden of Proof**

- 5.1 As stated above, fly-tipping is a criminal offence, and it needs to be proved to the criminal standard of proof i.e. beyond reasonable doubt. This is a high burden of proof and it is not easily met.
- 5.2 Fly-tipping is, predominantly, a crime of stealth. Perpetrators of fly-tipping are usually aware that what they are doing is illegal and often commit offences under cover of darkness and/or out of sight of direct witnesses.
- 5.3 If an offence is not witnessed, then unless there is any evidence contained within the waste to indicate a potential perpetrator, little or no investigation is possible. The chart below provides a breakdown of the types of fly-tipped waste reported between April-June 2017



- 5.4 As can be seen from the chart almost 75% of waste reported as fly-tipped is of a type where it is unlikely to contain any identifiers linking that waste to a particular offender i.e. beds/mattresses, building material, tables/chairs, car parts, plumbing etc.

- 5.5 Even where a personal identifier may be found in waste, i.e. a letter addressed to a named person, this is not in itself conclusive evidence that the named person had anything to do with the deposited waste, but it may provide a starting point for an investigation and may result in that person being called for formal interview.
- 5.6 Hearsay evidence is not generally allowed in criminal proceedings. Accordingly, if fly-tipping is reported by a witness, then that witness will need to be prepared to give a statement and to attend court and give evidence in the criminal proceedings.
- 5.7 Experience shows that whilst many citizens witness fly-tipping, and some are willing to report what they have seen, few are prepared to testify in court, often for fear of being identified to the alleged perpetrator who may themselves live locally and for fear of possible reprisals. In the absence of a witness being prepared to attend court, the case will usually fail before it reaches court, despite a significant amount of time and effort having been expended on the investigation.

## **6. Practicalities and Limitations – Fly-tipping or side waste?**

- 6.1 By virtue of Section 45 of the Environmental Protection Act 1990, Nottingham City Council, as a Waste Collection Authority has a duty to arrange for the collection of household waste (except in specific defined circumstances).
- 6.2 Under Section 46 (1) of the Environmental Protection Act 1990, where a waste collection authority has a duty to collect household waste, it may serve notice on the occupier of a property requiring them to place the waste for collection in receptacles of a kind and number specified.
- 6.3 By virtue of Section 46(11) of the Environmental Protection Act 1990 a waste collection authority is not obliged to collect waste that is placed for collection in contravention of the requirements of a Section 46 notice.
- 6.4 Section 46 notices are used widely within Nottingham to inform residents of the type of waste that should be placed in each differently coloured bin and to advise when bins are allowed to be placed on the street for collection and when they should be removed.
- 6.5 However, Nottingham does not, currently, have a defined side waste policy, the details of which could be included in any Section 46 notices, and it thus has a duty under Section 45 to collect side waste.
- 6.6 Whilst many householders are able to contain their waste within the bins provided, many are not, resulting in the presentation of side waste in a variety of formats, most notably black bags.
- 6.7 A proliferation of side waste may have a significant detrimental impact on the visual amenity of a street. However, if the side waste is genuine household waste, and has been put out for collection appropriately, it is not fly-tipping and no enforcement action is possible.

## **7. Pro-active measures to reduce fly-tipping**

### **7.1 Operation Cleansweep**

- 7.1.1 Operation Cleansweep is a multi-agency operation involving Community Protection, Police and other partner agencies including the Driver and Vehicle Standards Agency, Customs and Excise, Borders Agency etc which has been running since 2013.
- 7.1.2 The operation targets unlicensed waste carriers and unlicensed scrap metal collectors, as experience shows that these persons are likely to fly-tip waste that is of no commercial value to them
- 7.1.2 Nearly 400 vehicles have been stopped as part of Operation Cleansweep, with approximately 100 vehicles having been prohibited for vehicle defects or being dangerously overweight and 15 vehicles having been removed for having no insurance or the driver having no licence.

### **7.2 Duty of Care Trade Waste Inspections**

- 7.2.1 CPOs conduct regular routine inspections of all business premises within the City to check that businesses have appropriate arrangements in place for the disposal of their trade waste so as to meet the aforementioned duty of care under Section 34 of the EPA. Additional ad hoc inspections will be made if any cause for concern is identified in respect of the waste of a particular business.
- 7.2.2 Experience shows that when a business is experiencing financial difficulties one of the first cuts to be made is to cease paying for a licenced waste contractor to collect waste and dispose of it properly. This can result in waste being fly-tipped.
- 7.2.3 CPOs pass any identified breaches of the duty of care i.e. cancellation of a waste collection contract, to the ASB Team for further investigation. Enforcement Officers in that team will work with business owners to ensure that correct arrangements are re-instated and will take enforcement action if this cannot be achieved.

## **8. Facts and Figures**

- 8.1 The table below gives details of the nature and number of actions taken by Community Protection in 2016/17 and in the first quarter of 2017/18

Action	2016/17	Q1 2017/18
Waste investigations conducted by CPOs	8,808	2,330
Trade Waste Inspections conducted by CPOs	1,752	422
Littering FPNs issued for bagged waste offences	48	16
Formal cautions for fly-tipping	5	2
Fly-tipping FPNs	3	3
Fly-tipping prosecutions	3	2