

Report to Neighbourhoods Select Committee

Date of meeting: 17 November 2015

Subject: Enforcement of waste containers stored on public highway

Officer contact for further information: Jim Nolan

Committee Secretary: Adrian Hendry



Recommendations/Decisions Required:

(1) That member's support proposed formal action against commercial premises that store waste on the public highway without consent from the highway authority, subject to an assessment of the impact of non-compliance..

(2) Members consider the wider implications of setting a precedent for enforcement of storing household waste/wheelie bins on the public highway, based on the same assessment principles as adopted for pursuing enforcement action against commercial bins.

Report:

1. The Environment & Neighbourhoods (EN) team are responsible for enforcing waste law across the district. The EN team receive complaints about commercial premises storing waste on the public highway and also find examples of poor commercial waste management whilst out in the district.

2. Waste stored on the highway can cause similar issues as fly-tipping. It can look unsightly, pose a hazard to users and encourage others to dump waste in the area and by the bins. Any spillages of waste can easily escape onto the highway causing litter and marking of the surface. Grease deposits from waste spillages can build over time if the same location on the highway is used.

3. It is illegal to store waste in a container or directly on the surface of the public highway without the consent of Essex County Council (ECC) as the highway authority for the district. In theory commercial premises can apply to ECC for consent to store a waste container on the highway with the necessary damage liability cover in place; however ECC currently have no formal process to accept or consider the suitability of such a proposal. We can safely assume that all bins stored on the public highway within the district have no consent and are therefore illegal, akin to fly-tipping waste on the.

4. There are some examples where a well managed commercial bin stored on a public highway causes no significant issues or complaints and storage on the highway appears to be in keeping with the commercial use of the public highway in that area e.g. a service road. Despite the lack of formal consent, in this scenario, it would appear draconian to require the bin to be removed, if there is no obvious space for the waste to be stored inside the boundary of the commercial property.

5. There are a number of areas in the district where commercial premises store waste on the public highway on a permanent basis, usually contained in a commercial trade bin. As the container is undoubtedly unauthorised, whether or not EFDC should enforce the law and require the bin to be removed is entirely at our discretion.

6. Appendix 1 provides two pictures highlighting the issue. Figures 1 and 2 show commercial trade bins that are permanently stored on the highway, with waste dumped by the side of the bins. The photos also show some staining of the highway. In the background of figure 2 one can also see a household waste wheelie bin positioned on the footpath that forms part of the public highway.

Why do some businesses store waste on the public highway?

7. Some businesses store their waste on the public highway because they have limited or no external space on their property to store a wheelie bin, or because it is too difficult to move the waste from their property to a point on the highway where it can be collected. There are also a number of commercial premises who simply fail to manage their waste storage effectively and fail to use the space they have available to store their waste on their property securely. They may simply fail to bring their bin back onto their property after a collection and continue to use the bin whilst it is on the highway.

8. Most commercial premises will have been developed with adequate space for waste to be stored on site e.g. rear yard/garden or specifically designed waste storage area. Over a number of years some commercial land owners have chosen to develop their land and extend their buildings into these areas or utilise the bins storage area for another use e.g. sitting area for customers. This removes the capability of the commercial use to easily store waste on their property without a significant conflict with the current use.

9. This situation may then be adopted by the next commercial tenant or owner, who has not directly benefited by the development and removal of the external waste storage area, but then, finds they have a commercial property with no external space to store commercial waste between collections. Collections are costly, so these commercial premises then choose to leave a bin on the public highway, where the waste can be collated for a weekly collection.

10. One may wish to criticise the planning process that allows such development and the loss of waste storage areas without particular consideration of the consequences, but irrespective of any criticism and potential improvements in this area, we are left with a number of commercial premises with no areas readily available to store waste.

Enforcement

11. The EN team have little difficulty in pursuing enforcement action against commercial premises that simply fail to manage existing facilities and the space they have available to store their waste securely on their property. In most cases this is simply a matter of failed management which can be resolved informally, with the potential for prosecution or a fixed penalty notice for failure to comply with a notice (s.47 Environmental Protection Act 1990) helping to ensure compliance.

12. However, when the commercial premises has no obvious area to store waste externally, the implications of enforcement are likely to have a greater impact on the commercial use, meet more resistance and ultimately require the commercial property to seek other more costly options to store and dispose of their waste.

13. There is a risk that the costs of waste disposal will cause a small business to fail and certainly that has been an issue that has been raised in the past that has deterred enforcement action to rectify waste stored on the public highway.

14. Officers believe that the issue of commercial waste bins being stored on the highway has been under-enforced in the past because of these fears, but this has resulted in some areas (particularly in Waltham Abbey town centre) with too many commercial premises being "allowed" to store waste on the highway.

15. Officers propose to increase the level of enforcement to remove some commercial

waste stored on the highway, when it is judged that the waste is causing a significant detriment to the area. However before doing so, we would like Members to be aware of the issues related to this enforcement work, so that they can voice any concerns and be prepared to respond to any commercial owners who may contact them in response to any enforcement action and difficulties that they have with compliance.

16. Officers are concerned that we avoid setting a precedent/expectation that formal enforcement action will be taken against all types and occasions when bins are illegally stored on the public highway irrespective of the impact caused, once we start formal proceedings against some commercial premises who fail to comply after a reasonable timescale (and this may be up to 3 months for commercial premises that have been “allowed” to store waste on the highway and under-enforced in the past).

17. In addition, formal action against commercial waste stored on the highway may also lead to more pressure to enforce against household wheelie bins stored on the highway, which can generally be dealt with informally or tolerated due to the minimal impact.

18. For example, in the case highlighted at Appendix 1 figures 1 & 2, if the EN team start formal proceedings to require the commercial bins to be removed from the highway, one can easily imagine that the owner of the commercial property will question whether or not the Council will also be taking action against the resident who appears to be storing a household wheelie bin on the highway and if not, is he being targeted unfairly?

19. The waste law to control this is a simple “yes/no” decision i.e. has the bin/waste got consent or not. But to apply this test over the whole of the district could result in formal action against many commercial properties and residents where waste bins are stored on the highway but cause little impact or complaint. Enforcing the law with no discretion would be draconian and unpopular, with no opportunity at this time for residents or commercial properties to make a reasonable application to ECC for approval.

20. To allow sensible enforcement of this issue, but retain some discretion, we recommend that the council adopts a procedure to assess the impact of the breach of the waste legislation before deciding whether or not EFDC should seek to use waste laws to remove bins containing waste stored on the highway.

21. The EN officers are experienced in assessing enforcement issues and weighing up a variety of factors before deciding if formal action should be taken on balance, so it would be entirely in keeping with a typical enforcement approach to assess the impact before officers consider using the blunt instrument of “do you have consent or not?” and enforcing accordingly.

22. EN officers are authorised to issue Community Protection Notices (CPN). A CPN may be issued by an authorised person if satisfied that, on reasonable grounds, that;

i. the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature of the quality of life of those in the locality: and

ii. the conduct is unreasonable

23. Using the same principle, officers can assess “does the location of the bin on the highway cause significant detriment to the locality of the area?” This type of assessment would take into account factors such as:

- the locality,
- unsightliness,
- degree of obstruction of the highway,
- maintenance and cleanliness of the bin,
- any dumping around the bin,
- presence of odours, flies, rats, etc.

- staining on the highway
- level of complaints.

24. This approach would lead to under-enforcement in some cases, but it would not constitute consent that can only be provided by ECC subject to adequate liability cover (and any other checks they may wish to impose). There is a risk of an implied consent if we choose to under-enforce and therefore potentially a claim against the Council if a bin on the highway we have chosen to under-enforce became involved in an accident. We would endeavour to mitigate this risk by ensuring that the owners of any bins that we investigate and decide to under-enforce would be written to confirming that although we have chosen not to enforce waste law, this does not provide them with consent and they should seek approval from ECC, with suitable damage liability cover.

25. The general principle that waste should not be stored on the public highway without consent would still be maintained. Therefore, commercial or household owners who are simply failing to manage their bin and space available to store their waste on their own property correctly, should still expect formal action to be taken if the matter cannot be resolved informally. However, where there is no obvious resolution (i.e. no space to store waste without substantial changes), the impact of the storing waste on the highway without consent would be assessed on a case by case basis before deciding if formal action should be taken at that time. This decision could be kept under review as the impact may vary over time.

26. In the example shown in appendix 1 figures 1 & 2, it is clear that the commercial bins would be judged to be detrimental to the quality of life of those in the locality and after a reasonable time period (3 months in this case), formal action would be taken by the Council if they are not removed. Conversely the one household bin that can be seen in the background of Appendix 1 figure 2 may well be tolerated if there is no better solution readily available.

27. A further example, of a live case is shown at appendix 1 figure 3. Despite a number of attempts to persuade the occupier of the property adjacent to the wheelie bin to return their wheelie bin onto their property (they appear to have adequate space, albeit access to the bin storage area can be tricky) the occupier continues to store their waste on the public highway. The impact of doing so in this case is limited to the unsightliness of the bin permanently being stored on the footpath. In this photo the lid of the bin is open, potentially overflowing, adding to the unsightliness but this is often not the case. A local resident regularly complains about the bin being left in this area due to the unsightliness.

28. If one sticks to the general principle that waste should not be stored on the public highway without consent, **and** commercial or household owners who are simply failing to manage their bin and space available to store their waste on their own property correctly should expect formal action to be taken, then formal action should now be taken in this case. The householder appears to have adequate space and they have provided no evidence to the contrary to suggest they cannot comply. In fact the resident has failed to respond to all communications.

Would zero tolerance be a better long term solution?

29. There is a risk that adopting a procedure that effectively allows some bins to be stored on the highway depending on the impact, might actually encourage some commercial and residential properties to attempt to do the same.

30. Indeed a freeholder of a number of properties in Waltham Abbey has questioned the logic of allowing some and not others to leave waste on the highway and made it quite clear that he takes his responsibilities as a landlord very seriously, taking great care in ensuring his tenants recycle and manage their waste correctly, to the point where one of his employees makes sure bins are pulled out for collection and then returned to the properties. He is steadfast in his view that freeholders and managing agents should take a much greater share of responsibility in these issues as they are profiting from the tenants who live within.

31. Zero tolerance for enforcement issues often appears attractive due to the clarity it provides, by removal of the need for constant detailed assessment and review on a case by case basis, but zero tolerance can rarely be upheld when one is faced with a breach of the law that has little impact but a substantial affect on the person who is not comping with the law if they are forced to comply.

32. Officers accept that adopting a procedure that allows reasonable discretion does provide an opportunity for the boundaries of that discretion to be tested. However, we would reiterate that the general principle that waste should not be stored on the public highway without consent would still be maintained, so we believe that this risk can be managed sufficiently.

Should the decision to pursue formal action be influenced by the financial impact on the commercial premises?

33. If an officer has assessed that the location of a bin on the highway is causing a detrimental effect on the quality of life of those in the locality, then it follows that formal action should be taken if the bins are not removed after a reasonable time period/warning. For some commercial premises that have insufficient external storage areas, finding an alternative solution may not be an easy option and undoubtedly will incur additional cost.

Options available include:

- Renting available land in the near vicinity to store suitable bins
- Store the waste inside their building (potential conflict with health and safety especially for food businesses).
- Daily timed waste collections (expensive and providers may not be available, although the Council would be required if requested to collect their waste at cost. The Council does not currently provide any commercial waste collection services).
- Reopen/redevelop their existing site to provide adequate waste storage facilities (this may not be practical, likely to be expensive and may require planning approval).

34. In our view, once it has been determined that the location of the bin on the highway is detrimental to the locality, the financial impact and difficulties that this may pose the commercial property should not deter action. It may appropriate to provide a longer timescale for compliance but action should not be prohibited due to the financial impact. The cost of waste disposal is a burden on all commercial operators and incurring costs to do this adequately is a part of that business. We accept that this may cause short term issues, but in the long run, correct waste storage and problem bins removed from the public highway outweigh this.

35. In the example give at appendix 1 the commercial property appears to have no external areas available to store waste and will have to seek an alternative option if we enforce removal of their bins from the highway.

36. In various parts of the district, parking in local streets is a problem, exacerbated by commuter parking. Some residents choose to reserve a parking space by leaving their bin on the highway. If the bin contains waste, which is likely to be the case other than a brief period after collection, the owner of the bin is unintentionally committing a waste offence because they do not have consent to store their waste on the highway. An example of this is shown in Appendix 1 figure 4.

37. We propose to apply the same “detriment to the amenity test” to determine whether or not the Council should seek to control this activity using waste law.

Reason for decision:

Officers believe that the issue of commercial waste bins being stored on the highway has

been under-enforced in the past. This has resulted in some areas (particularly in Waltham Abbey town centre) with too many commercial premises being “allowed” to store waste on the highway.

A decision is requested to support reasonable enforcement action without setting a precedent for draconian action district wide.

The principles applied to this decision also affect how officers will respond to complaints about household wheelie bins stored on the highway. It appears sensible to consider the approach to these issues at the same time.

Options considered and rejected:

Continue to under-enforce and allow bins that are causing significant issues to remain on the highway, with an inconsistent, undefined approach to enforcement.

Seek to impose draconian control across the district i.e. no consent means no bin will be allowed to remain on the highway.

Consultation undertaken:

Issue has been discussed at length with Environment & Neighbourhood officers who are seeking clarity on the enforcement approach they should adopt. There has been no wider consultation at this stage.

Resource implications:

Budget provision: Existing

Personnel: Existing Environment & Neighbourhood Officers

Land: N/a

Community Plan/BVPP reference: N/a

Relevant statutory powers:

The Environmental Permitting (England and Wales) Regulations 2010 – s.12
Environmental Protection Act 1990 - s.46 and s.47 EPA

Background papers: None

Environmental/Human Rights Act/Crime and Disorder Act Implications:

Consistent enforcement applying the same enforcement principles to all is in keeping with principles underlying Human Rights and equal opportunities. If we intending to effectively choose when to enforce the law, that requires consent to place a bin on the highway, we need to ensure that all are treated fairly applying the same test.

Key Decision reference: (if required): N/a

Appendix 1 - Commercial bins stored on the highway.



Fig. 1



Fig. 2

Appendix 1 – Household wheelie bin issues



Fig. 3 Household wheelie bin on pavement



Fig. 4 Household wheelie bins being used to reserve parking