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SCARBOROUGH BOROUGH COUNCIL

Commercial Regulation Services Enforcement Policy

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| 11 July 2018 | Commercial Regulation | 0.1 | Complete re-write to take account of many changes since 2007, including Regulators' Code. |
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| 0.2 | Public Health and Housing Portfolio – Cabinet member decision. | 11 July 2018 |
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1.0 Introduction

1.1 This Enforcement Policy is the first to be produced for the revised Commercial Regulation Team following a major re-structure in 2017. This Policy applies to the regulatory responsibilities within the following areas:

- Environmental Protection
- Food Safety, Public Health and Occupational Health and Safety
- Licensing

The Policy is intended to demonstrate the Commercial Regulation Team's approach to securing regulatory compliance and the options available within the legislation relating to the above areas.

The main focus will be on the activities that give rise to the most serious risks to the safety and health of the public and/or the environment or where a duty-holder seeks a commercial advantage by breaking the law.

1.2 In addition this Policy highlights the principles to be applied when carrying out enforcement work. The consistent application of these principles will ensure that all stakeholders are treated effectively and fairly.

1.3 Local Authorities are required to publish a policy setting out their approach to compliance and enforcement by the Regulators' Code, which was published by the 'Better Regulation' Delivery Office (now Regulatory Delivery, part of the Department for Business, Energy & Industrial Strategy) in April 2014.

The Regulators' Code establishes how Local Authorities and many other defined regulator bodies should interact with those whom they are regulating. In particular regulators should:

- Carry out their activities in a way that supports those they regulate to comply and grow
- Provide simple and straightforward ways to engage with those they regulate and hear their views
- Base their regulatory activities on risk
- Should share information about compliance and risk
- Should ensure clear information, guidance and advice is available to help those they regulate to meet their responsibilities to comply
- Should ensure that their approach to their regulator activities is transparent

We recognise that most individuals, businesses and other groups want to comply with the law. Our aim is to deliver regulatory and enforcement functions in an enabling and supportive style, helping businesses and others meet their legal duty without unnecessary expense. However, we will take firm action, including prosecution, where appropriate.

3.0 Scope

3.1 This policy applies to the following regulatory activities which fall under the remit of the Commercial Regulation team:

- **Environmental Protection** e.g. statutory noise nuisances, contaminated land, authorised processes, air quality and private water supplies etc.
- **Food Safety, Public Health and Occupational Health and Safety** e.g. food hygiene/safety, health and safety, skin piercing and tattooing activities etc.
- **Licensing** e.g. Alcohol and entertainment, Gambling, Taxi and Private Hire services, Street Trading and various other licensable activities.

It is recognised that the Council already has specific policies in place for some of these activities. This Policy does not seek to replace these other policies but to work alongside them in framing how we go about undertaking our regulatory duties.

It should be noted that Environmental health housing interventions (e.g. HMOs, Selective licensing, privately rented properties, statutory nuisances originating from domestic properties, apart from noise) are dealt with by the Council's Residential Regulation team (within Housing Services) and a separate enforcement Policy covers their activities.

3.2 Enforcement, in the context of this policy, includes action carried out in the exercise of, or against the background of, statutory enforcement powers. This is not limited to formal enforcement action such as prosecution, and includes, for example, the inspection of premises for the purpose of checking compliance with relevant acts and regulations, and the provision of advice to assist duty holders to achieve compliance. The term "duty holder" has a wide meaning and applies to those persons on whom the law places duties (e.g.: employers, the self-employed, employees and others, such as members of the public, who are causing a statutory nuisance to neighbours).

3.3 In relation to most areas of Environmental Health legislation, the choice of action will be based on an assessment of the risk that the contravention poses to the health, safety or welfare of the public and/or employees, and/or the environment and will take into account the full range of enforcement options available under the relevant legislation.

4.0 Access to the Policy

4.1 The Enforcement Policy is available on the Council's web site www.scarborough.gov.uk .

4.2 On request, assistance will be given to communicate this policy in other appropriate ways.

5.0 General Principles of Enforcement

5.1 Carry out our work so that it supports those who are regulated to comply and grow

We will:

- avoid imposing unnecessary burdens through our regulatory activities and choose proportionate approaches to those we regulate
- support or enable economic growth for compliant businesses
- ensure our officers have the necessary knowledge and skills to support those they regulate
- ensure our officers understand the legal principles of good regulation

5.2 Provide simple and straightforward ways to engage with those we regulate and hear their views

We will:-

- consider the impact on business and engage with business representatives
- in responding to non-compliance identified, officers will clearly explain what the non-compliant item or activity is, the advice being given, actions required or decisions taken, and reasons for these. Officers will also provide an opportunity for dialogue, with a view to ensuring that they are acting in a way that is proportionate and consistent. Where immediate enforcement action is required (e.g. due to an imminent risk to human health) although the officer will have to explain his/her actions, this must not be used to unduly delay the taking of necessary steps to remedy the said risk(s).

- provide an independent and clearly explained route to appeal against a regulatory decision or a failure to act in accordance with this policy.
- provide a timely explanation in writing of any right to representation or right to appeal. This will be in plain language and include practical information on the process involved.
- make available a clearly explained complaints procedure, so that complaints can easily be made about the conduct of an officer
- use a range of methods to receive and take on board customer feedback (e.g. customer satisfaction surveys)

5.3 Base our activities on risk

We will:

- take an evidence based approach to determine our priorities and allocate our resources where they would be most effective in addressing our priorities, i.e. primarily on those activities or premises that give rise to the most serious risks or where hazards are least well controlled and that action is focused on the duty holder
- consider risk at every stage of our decision making processes
- take into account the compliance record of businesses, including earned recognition and external verification approaches when assessing risk
- periodically review the effectiveness of our chosen activities in delivering the desired outcomes and make any necessary changes

5.4 Sharing information about compliance and risk

We will:

- follow the principle of “collect once, use many times” when requesting information
- where appropriate, share information, in a secure manner, with other regulators about those we regulate

5.5 Clear information, guidance and advice

We will:

- when providing advice and guidance, clearly distinguish between legal requirements and good practice
- produce guidance and information in a clear, accessible, concise format, written in plain language
- periodically review the guidance we produce to ensure it meets the needs of those we regulate
- provide reliable and sound advice to those we regulate
- where appropriate, work collaboratively with other regulators and have regard to their advice in reaching decisions

5.6 Ensure transparency in our approach

We will:

- set and publish clear service standards so those we regulate know what to expect from us
- regularly publish details of our performance against our service standards (including results of customer feedback)
- Our service standards will include clear information on the following issues:
 - a) How we communicate with those we regulate and vice versa;
 - b) our approach to providing information, guidance and advice;
 - c) our approach to checks on compliance (e.g. inspections, audits, monitoring and sampling visits and test purchases);
 - d) our enforcement policy, explaining how we will respond to non-compliance
 - e) our fees and charges and how they have been calculated;
 - f) how to comment or make a complaint against service provided and ways to appeal

5.7 We will be fair, independent and objective and not let any personal views about issues such as ethnic or national origin, sex, religious beliefs, political views or the sexual orientation of the suspect, victim, witness or offender influence our decisions. We will not be affected by improper or undue pressure from any source.

5.8 Scarborough Borough Council is a public authority for the purposes of the Human Rights Act 1998. We will apply the principles of the European Convention on Human Rights in accordance with the Act.

5.9 Each case is unique and must be considered on its own merits. There are however, general principles that apply in the way each case must be approached. We will also take a consistent approach, which does not mean uniformity, but taking a similar line in similar circumstances to achieve similar ends. These are laid out in this Enforcement Policy.

6.0 Training, Competency and Authorisation

6.1 Officers undertaking enforcement duties will be suitably trained and qualified so as to ensure they are fully competent to undertake enforcement activities. Officers will be appropriately authorised in accordance with the Council's scheme of delegation.

7.0 Deciding the action to take

7.1. Based upon the Code for Crown Prosecutors there are two issues to determine. The first is what level of enforcement action to take. The second is that, if the first decision is to take formal enforcement action, is that action viable and appropriate. There are two stages in determining whether formal enforcement action is viable and appropriate:

- Stage 1: the evidential test,
- Stage 2: the public interest test.

7.1.1 If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does meet the evidential test, the Council's legal services section will decide if formal enforcement action is needed in the public interest..

7.1.2 The Commercial Regulation team will only start, and continue, with formal enforcement action when the case has passed both tests. Paragraphs 7.2 to 7.5 below, detail how this policy applies to the consideration of taking a prosecution. The principles outlined apply equally to the other types of formal enforcement action that are available.

7.2 The Evidential Test

- 7.2.1 We must be satisfied that there is sufficient evidence to provide a 'realistic prospect of conviction' against each defendant on each charge. A realistic prospect of conviction is an objective test which 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 satisfied it is sure of a defendant's guilt.
- 7.2.2 When deciding whether there is enough evidence to prosecute, the ERM and legal services must consider whether the evidence can be used, is reliable and will be admissible as evidence in a court of law.

7.3 The Public Interest Test

- 7.3.1 The public interest will be considered in each case where there is sufficient evidence to provide a realistic prospect of conviction. A serious offence would also include the failure to comply with a Statutory Notice. 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 common public interest factors are outlined below.

7.4 Some common public interest factors in favour of prosecution.

- 7.4.1 The more serious the offence, the more likely it is considered that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:
- A conviction is likely to result in a significant sentence;
 - The offence was committed against a person serving the public, e.g. an officer was obstructed whilst attempting to carry out his/her duties;
 - The Defendant was in a position of authority or trust;
 - The evidence shows that the defendant was a ringleader or an organiser in the offence;
 - There is evidence that the offence was premeditated;
 - There is evidence that the offence was carried out by a group;
 - The victim of the offence was vulnerable, has been put in considerable fear, or suffered personal damage or disturbance;
 - The offence was motivated by any form of discrimination against the victim's ethnic or national origin, sex, disability(physical or mental), religious beliefs, political views or sexual preference, or the suspect

demonstrated hostility towards the victim based on any of those characteristics;

- There is a marked difference between the actual or mental ages of the defendant and the victim, or if there is any element of corruption;
- The Defendant's previous convictions or cautions are relevant to the present offence;
- The Defendant is alleged to have committed the offence whilst under an order of the court;
- There are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct; or
- The offence, although not serious in itself, is widespread in the area where it was committed.

Where inspectors are assaulted, enforcing authorities will seek police assistance, with a view to seeking the prosecution of offenders.

7.5 Some common public interest factors against prosecution

7.5.1 A prosecution is less likely to be needed if: -

- the court is likely to impose a very small or nominal penalty;
- the Defendant has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order, unless the nature of the particular offence requires a prosecution;
- the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
- there has been a long delay between the offence taking place and the date of the trial, unless:
 - the offence is serious;
 - the delay has been caused in part by the Defendant;
 - the offence has only recently come to light; or
 - the complexity of the offence has meant that there has been a long investigation;
- a prosecution is likely to have a bad effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence;
- the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated.

8.0 What level of enforcement action to take

8.1 Enforcement action can be one, or a number, of the following actions: -

- Prosecution
- Closure powers
- Review, suspension and/or Revocation of licence or permits
- Seizure
- Works in default
- Simple Caution
- Formal Notice
- Fixed penalty notices
- Informal Notice (verbal/written warnings, advice and premises improvement plans)
- Revisit of premises
- No action

A glossary of each enforcement action option term is explained in **Appendix 1**.

9.0 Liaison

- 9.1 Services within the Commercial Regulation team (e.g. noise pollution, licensing etc) will co-ordinate their enforcement activity to maximise the effective enforcement of any matters that are related to more than one of the services.
- 9.2 Where an enforcement matter affects a wide geographical area beyond the District's boundaries, or involves enforcement by one or more other local authorities or organisations (e.g.: Fire Authority, Police, Trading Standards etc); all relevant authorities and organisations will be informed of the matter as soon as possible and all enforcement activity co-ordinated with them.
- 9.3 Where appropriate, the matter will be first discussed with the relevant 'Primary Authority (if the business has a relevant Primary Authority Partnership arrangement in place) or other regulatory body before proceeding.
- 9.4 Monitoring shall be carried out by the ERM or Commercial Regulation Manager (CRM) to ensure that appropriate and full liaison is being undertaken.

10.0 Considering the views of those affected by offences

- 10.1 The Commercial Regulation team 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 (see section 7 above) the consequences of the decision whether or not, and how to take enforcement action for those affected by the offence, and their views will be taken into account.

10.2 Those people affected by the offence will be told about any decision that makes a significant difference to the case in which they are involved.

11.0 Re-starting a prosecution

11.1 Normally, if a suspect or defendant is advised that there will not be a prosecution, or that the enforcement action has been stopped, that will be the end of the matter. Occasionally there are special reasons why enforcement action will re-start, particularly if the case is serious. These reasons include:

- rare cases where a new look at the original decision shows that it was clearly wrong and should not be allowed to stand,
- cases which are stopped so that more evidence, which is likely to become available in the fairly near future, can be collected and prepared. In these cases, the defendant will be told that the enforcement action may well start again,
- cases which are stopped because of a lack of evidence but where more significant evidence is discovered later.

12.0 Enforcement Policy implementation

12.1 Officers will abide by the relevant enforcement policy when making all enforcement decisions. Any departure from the policy will be exceptional, capable of justification and be fully considered by the ERM before a decision is taken, unless it is considered that there is sufficient risk in delaying the decision, under which circumstances the officer must take the most appropriate course of action, as they see fit.

12.2 Scheduled internal performance review meetings will be undertaken to ensure that all enforcement activity is carried out in accordance with this policy.

12.3 Instances of non-compliance with this policy will be recorded and reported to the ERM, who will instigate appropriate action.

13.0 Guidance Documents

13.1 This policy takes account of all the relevant parts of the Code for Crown Prosecutors, applicable legislation and guidance including Approved Codes of Practice issued by Central Government departments, and national regulators such as the Health and Safety Executive, Food Standards Agency, OPSS, etc.

14.0 Further Information

The Code for Crown Prosecutors - (The Code) is issued by the Director of Public Prosecutions under section 10 of the Prosecution of Offences Act 1985. It sets out the basic principles Crown Prosecutors should follow when they make case decisions. It is a public document, and although it is written for members of the Crown Prosecution Service, it is widely used by others to understand the way in which Crown Prosecutors make decisions.

The Code for Crown Prosecutors can be downloaded on the crown prosecution Website at:
http://cps.gov.uk/publications/code_for_crown_prosecutors/index.html

Appendix 1

Glossary of enforcement action options terms

(1) Prosecution

This involves the offender(s) being summoned, by this Council, to a criminal court to answer a charge(s) for a breach(es) of legislation enforced by this department.

When consideration is given to prosecute regard shall be taken of the appropriate sources of guidance referred to in paragraph 13.1 of this Policy.

Officers must exercise their discretion in deciding whether to initiate a prosecution. Prosecution without prior warning and recourse to alternative sanctions may be appropriate in certain circumstances.

In terms of the public interest the list of factors stated in section 7.4.1 of this policy will be taken into account when making a decision.

For non-payment of certain licence fees, or where the Council have not received payment of costs for carrying out works to remove a serious imminent risk or remedy pollution, it will pursue debts through the appropriate court.

(2) Closure powers

The powers to close certain premises, both commercial and domestic (e.g. those who run businesses from home, such as home caterers), or prohibit processes, are available to authorised officers under various legislation enforced by the department. This option is taken when there is a serious and imminent risk to health or safety to the occupants, neighbouring premises' occupants, employees' customers or visitors.

Decisions of this nature will be based on the professional judgement of authorised officers, relevant legislation and government guidance.

There are powers available to the Council, where suitable and appropriate and where successful convictions have been secured, to apply to the courts to impose Prohibition Orders (e.g. Hygiene Prohibition Orders) on individuals who run businesses. Such Orders will be sought where the relevant criteria set out in legislation have been satisfied.

(3) Review, suspension and/or revocation of approvals, licences or permits

These powers are contained in legislation where local authorities issue approvals, licences or permits to businesses. Examples include the Licensing Act 2003,

Gambling Act 2005, Pollution Prevention and Control Regulations 1999 and Local Government (Miscellaneous) Provisions) Acts 1982 and 1976.

Powers to review, suspend or revoke approvals, licences or permits are contained in the Council's "Delegations to Officers". However, these are mostly held by the Council's Licensing Sub-committees. In terms of making a decision to review, vary, suspend or revoke licences/permits, one or more of the following non exhaustive criteria will be used:

- (a) The Operator or personal licence holder has been convicted of a relevant offence(s).
- (b) The potential for considerable harm.
- (c) The seriousness of the offence(s).
- (d) The history of compliance of the offender(s), i.e. apparent reckless disregard to the law, persistent poor standards, repeated breaches, etc.
- (e) A person/organisation has been engaged in fraudulent activity.
- (f) The operation is no longer being managed by a technically competent person.
- (g) Failure of the operator, licence holder, to pay the Council any annual or subsistence fee.
- (h) Where a licensed premises has been temporarily closed by the Police or Council for related reasons.
- (i) Where a successful prosecution has been obtained for a breaching licence conditions.

(4) Seizure powers

Authorised officers do have powers to formally seize items, such as food, and equipment (including musical systems) which will or could cause an imminent risk to health, safety or a nuisance to any person(s).

Decisions of this nature will be based on the professional judgement of authorised officers and relevant legislation and government guidance. We will always give full details of our actions to the offender(s) when we exercise this power.

(5) Works in default

This power exists where an authorised officer considers a relevant and serious issue requires urgent work to be carried out. This can occur where non-compliance exists and persists, for example in relation to statutory nuisances and actual or imminent risks of serious environmental pollution etc.

(6) Simple cautions

This option is used as a final warning and as an alternative to prosecution. Simple Cautions will be administered in accordance with relevant Ministry of Justice Guidance For a formal caution to be issued the following criteria must be satisfied:

- (a) Sufficient evidence must be available to prove the case.
- (b) The offender must admit the offence.
- (c) The offender must agree to be cautioned.
- (d) The offence must not have been committed by the offender before.

If the offender commits a further offence within 3 years of receiving a simple caution, this may influence our 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 or Wales, the caution may be cited in court, and this may influence the severity of the sentence that the court imposes.

(7) Formal notices

Formal or legal notices are available to use in most Environmental Health related legislation. They are served to require offenders to cease contravening their statutory duties, either contained in the relevant piece of law, or conditions imposed on any licence or permit issued to them. Some notices allow an offender a reasonable length of time to remedy the contravention(s). Other notices may require a business or process to cease trading or operating immediately where there is an imminent risk to health, safety, or environmental pollution to employees, members of the public, etc.

(8) Fixed penalty notices

Fixed penalty notices (FPNs) exist in smoke free legislation and can be served in lieu of a prosecution.

They are legal notices served on a business or individual in relation to observed contraventions by the authorised officer. FPNs require the offender to pay a financial penalty to the Council as an alternative to being prosecuted.

(9) Informal notices (written warning)

For some contraventions we will send the offender a firm but polite letter clearly identifying the contraventions, giving advice on how to put them right and including a deadline by which this must be done. Failure to comply could result in a formal notice(s) being served or more severe enforcement action being taken, depending on the seriousness of the breach(es).

The time allowed must be reasonable, but must also take into account the implications of the contravention(s) in respect of the legislation being enforced.

(10) Informal verbal warning

For minor breaches of legislation we verbally advise the offender clearly identifying the contravention(s), giving advice on how to put them right and including a deadline by which this must be done. Failure to comply could result in more severe enforcement action being taken. The time allowed must be reasonable, but must also take into account the implications of the contravention in respect of the legislation being enforced.

This course of action will only be appropriate where the breach is not serious; the past history is good and/or the consequences of non-compliance do not pose a significant risk.

(11) Revisits

Following the service of a Formal Notice, we will revisit the premises to check compliance has been achieved.

Following the service of an Informal Notice or provision of a verbal warning and/or advice, the investigating officer will use their professional judgement to follow up the matter and depending upon the legislative implications of the contravention, and the perceived likely response of the offender, will where necessary revisit the premises to check compliance has been achieved.

There will be occasions where revisits will take place for reasons other than enforcement/compliance purposes. For example, under the FSA's "Food Hygiene Rating Scheme" (FHRS) food business operators can request, after submission of the appropriate form and payment, to have their existing FHRS score re-assessed by an authorised officer of the Council. Such revisits will be undertaken in accordance with the FSA's "Brand Standard" for its FHRS.

(12) No action

In exceptional circumstances, contraventions may not warrant any action. This can be where the cost of compliance to the offender outweighs the detrimental impact of the contravention on the community, 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 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 well being. A decision to take no action must be recorded in writing and must take into account the legislative implications of the contravention.