

**CODE OF PRACTICE
DEALING WITH APPEAL PROVISIONS OF SECTION 59(3)(a) ENVIRONMENTAL
PROTECTION ACT 1990**

**Code of Practice dealing with section 59(3)(a) of the Environmental Protection Act
1990 as substituted by section 25 of the London Local Authorities Act 2007**

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Transport and Environment Committee**

LONDON COUNCILS

London Councils is committed to fighting for more resources for London and getting the best possible deal for London's 33 councils. Part think tank and part lobbying organisation, we also run a range of services designed to make life better for Londoners.

London Councils represents all 32 London boroughs, the City of London, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority. It is in an ideal position to advise on a range of issues relating to London government and other matters of concern to Londoners.

This Code of Practice is published by London Councils Transport and Environment Committee (TEC). TEC is a statutory joint committee and aims to ensure that London boroughs' concerns and best practice are taken fully into account in the development and implementation of the whole range of transport and environment policies generated by the European Union, Government departments, and the Mayor of London.

FOREWORD

The quality of life in urban and rural areas is being negatively affected by unlawful waste disposal activities, including fly-tipping. Unlawful dumping of waste and fly-tipping are not just isolated nuisances but linked to other forms of enviro-crime.

Unlawfully dumped waste and fly-tips vary in scale and the type of waste involved - from small household items to the growing trend for large scale fly-tipping which involve several truck loads of construction and demolition waste.

Where unlawful dumping or fly-tipping occurs it can be highly visible and often has a significant negative impact on the public and their perception of the area. There is often a cost to the innocent victims and a large and rising annual cost to local authorities for the removal of the waste and subsequent enforcement action.

This piece of legislation will place a harder test on land occupiers to prove that they have done all they reasonably can do stop or minimise fly-tipping on their land. Previously, a land occupier only had to prove that they didn't know or didn't allow the fly-tipping to take place to appeal against a notice requiring them to remove waste.

London has not been complacent in tackling fly-tipping. In 2003 the Environment Agency (EA) produced 'Working Better Together' a memorandum of understanding (MOU) between the EA and the Local Government and the Welsh Local Government Associations, providing nationally agreed working arrangements and protocols for technical co-operation between the EA and local government to deliver specific environmental outcomes. London Councils and the Environment Agency have worked together to develop a 'Local Agreement' (a regionally agreed protocol). This document has driven the development of better working relationships between the EA, London Councils and the boroughs and sets out exactly who will be responsible for dealing with fly-tips and illegally dumped waste in particular circumstances.

London has also performed well in tackling fly-tipping and enforcing against it. The latest data from Flycapture (the national fly-tipping database run by Defra) shows that fly-tipping incidents across London were down 1.2% in 2007-08 compared to the previous year and that enforcement action by boroughs went up 17.7% for the same periods.

I believe that this Code of Practice provides the right approach for London and a good basis for ensuring the right balance between residents and businesses taking responsibility and the challenge of taking on the liabilities from unlawful waste disposal.

Councillor Mike Fisher,
Chairman, Transport and Environment Committee
London Councils

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INTRODUCTION

1. Section 33(1) of the Environmental Protection Act 1990 (“the 1990 Act”) prohibits the deposit of controlled waste in or on any land unless an environmental permit authorising the deposit is in force, and the deposit is in accordance with that permit.¹ A person who contravenes this section is guilty of an offence (see section 33(6)).
2. Pursuant to section 59(1) of the 1990 Act, if controlled waste is deposited in or on any land in the area of a Waste Regulation Authority or Waste Collection Authority in contravention of section 33(1) of the 1990 Act, the relevant authority may serve a notice on the occupier of that land requiring them to remove the controlled waste, and/or take steps to eliminate or reduce the consequences of its deposit.
3. Under section 59(2) of the 1990 Act, a person is entitled to appeal against the requirements of such a notice on two separate grounds. Those grounds are contained within section 59(3) and are as follows:
 - a) they neither deposited nor knowingly caused nor knowingly permitted the deposit of the waste (section 59(3)(a)); or
 - b) there is a material defect in the notice (section 59(3)(b)).
4. Section 25 of the London Local Authority Act 2007 (‘the 2007 Act’) substitutes the appeal provision in section 59(3)(a) of the 1990 Act, in respect of its application in the areas of London borough councils, with: *“the appellant took all reasonable precautions and exercised all due diligence to avoid the deposit of the waste”* (referred to from hereon as “the reasonable precautions and due diligence defence”).
5. The amendments made to the 1990 Act by the 2007 Act are discussed in greater detail below.
6. However, before those amendments can come in to effect, section 25(4) of the 2007 Act requires a Joint Committee to publish a Code of Practice (“CoP”) with respect to the operation of the reasonable precautions and due diligence defence.² London Councils Transport and Environment Committee is the “Joint Committee” for the purposes of this Act.
7. Following publication of the CoP, the amendments made by the 2007 Act come into force in respect of notices issued under section 59(1) in the areas of the borough councils. In

¹ The Environmental Permitting (England and Wales) Regulations 2007 (SI 2007/3538) came into effect on 6 April 2008 and substituted “waste management licence” with “environmental permit”. For the transitional provisions, see Regulations 69-71.

² “Joint committee” means any joint committee established under section 101(5) the Local Government Act 1972 and comprising at least one member from each borough council.

addition, the borough councils are required to have regard to the CoP when exercising powers under section 59 of the 1990 Act.

8. Section 25(6) of the 2007 Act requires that London Councils' TEC publish a notice setting out the date on which the amendments made by Section 25 come into effect in the London Gazette.

GENERAL PRINCIPLES

9. This Code of Practice is published following a decision of the London Councils TEC on 11 June 2009.
10. London Councils TEC has developed this Code of Practice in consultation with London boroughs, owners and occupiers likely to be affected and other stakeholders to provide guidance on the operation of "the reasonable precautions and due diligence defence" in section 59(3)(a) of the 1990 Act.
11. London Councils TEC will aim to ensure that, where feasible, there is consistency with the "Working Better Together Protocol Series: Protocol 6: Fly-tipping and Illegal Waste Activities"³ and the regional expression of protocol 6, agreed by the Environment Agency Thames Region and the London Councils Transport and Environment Committee on behalf of the London Boroughs.⁴
12. This CoP is agreed on the premise that the London boroughs will use all reasonable steps to develop co-operative and constructive partnership arrangements with owners and occupiers in each of their local authority areas, which will support the prevention, management and removal of unlawfully deposited waste.
13. London Councils TEC will be responsible for liaising with stakeholders in the review of this CoP and the on-going development of uniform policy initiatives for combating illegal waste activities and fly-tipping.

³ One of eight technical protocol, introduced to support the joint Environment Agency and Local Government Association/Welsh Local Government Association memorandum of understanding 'Working Better Together'.

⁴ Waste Related Enforcement: Memorandum of understanding: local area agreement between Thames Region Environment Agency and London Councils: April 2006.

DEFINITIONS

14. **“Borough council”** means a “London borough council and includes the Common Council of the City of London in its capacity as a local authority and "borough" and "council" shall be construed accordingly” (see section 2 of the 2007 Act).
15. **“Controlled waste”** means “household, industrial and commercial waste or any such waste” (see section 75(4) of the 1990 Act).
16. **“Due Diligence”**: There is no statutory definition, but this phrase may be defined as a method to ensure that the system or series of steps devised as “reasonable precautions” are followed correctly and are working properly. For example, monitoring and record keeping.
17. **“Fly-tipping”**: National Indicator 196 defines this as the illegal disposal of waste, colloquially known as fly-tipping. This term is generally understood to relate to an offence in respect of section 33(1) of the 1990 Act i.e. the deposit or disposal of controlled waste without an environmental permit, or its disposal in a manner likely to cause pollution of the environment or harm to health.⁵ It can be summarised as the unauthorised dumping of waste on land not licensed to receive it.
18. **“Land”** includes “land covered by waters where the land is above the low water mark of ordinary spring tides and references to land on which controlled waste is treated, kept or deposited are references to the surface of the land (including any structures set into the surface)” (see section 29(8) of the 1990 Act as including).
19. **“Operational land”** for the purposes of section 25 of the LLAA 2007, means land which is used by a protected party for the purposes of carrying on a statutory undertaking together with any land in which an interest is held for that purpose, subject to the particular provisions of sections 263 and 264 of the Town and Country Planning Act 1990 (see section 25(8) of the LLAA 2007).
20. **“Protected Parties”** are:
 - a) Network Rail Infrastructure Limited;
 - b) Transport for London; and
 - c) Any subsidiaries, servants, agents and contractors of the above named (see section 25(9) of the 2007 Act).⁶

⁵ Code of Practice On Litter and Refuse, Department for Environment Food and Rural Affairs (2006).

⁶ The names of these parties may change over time, and while every attempt will be made to keep this CoP up-to-date, local authorities should bear this in mind when exercising their powers to serve waste removal notices.

21. **“Reasonable Precautions”**: There is no statutory definition of “reasonable precautions” but it may be defined as a system or series of steps to ensure compliance with the law. In relation to the occupier of land, such a system should have regard to the risk of unlawful waste being dumped or disposed of on their land.
22. **“Waste Collection Authority”** means:
 - a) For any London borough, the council of the borough;
 - b) For the City of London, the Common Council (see section 30(3)(b) of the 1990 Act).
23. **“Waste Regulation Authority”** means, in relation to England and Wales, the Environment Agency (see section 30(1)(a) of the 1990 Act).

OUTLINE OF THE 2007 ACT

24. The purpose of this CoP is to provide guidance as to the operation of the reasonable precautions and due diligence defence introduced to section 59 of the 1990 Act by Section 25 of the 2007 Act. In addition to substituting section 59(3)(a), the 2007 Act also inserts a new subsection (3A).
25. This new subsection provides that where an appeal under section 59(3)(a) involves an allegation that the unlawful deposit of the controlled waste was due to the act or default of another person, the appellant cannot rely on that ground of appeal without having first served a written notice on the “Waste Regulation Authority” or “Waste Control Authority”⁷ at least seven days before the hearing of the appeal. The notice must contain such information as was in the appellant’s possession either identifying or assisting to identify the person alleged to be responsible for the unlawful deposit of the controlled waste.
26. There are some exceptions to the application of the amended section 59 of the 1990 Act. Subsection 25(8) of the 2007 Act provides that it shall **not** apply to notices served in respect of the following land:
 - a) the operational land of a protected party;
 - b) highway or special road for which the Minister is the highway authority (see section 1 of the Highways Act 1980 (c. 66));
 - c) land forming any part of an aerodrome within the meaning of the Aviation Security Act 1982 (c. 36);

⁷ The 1990 Act does not define a ‘Waste Control Authority’ - it is likely that Parliament intended the reference to be to a ‘Waste Collection Authority’ in line with section 30 of the 1990 Act.

- d) harbour premises within the meaning of Part 3 of the 1990 Act; or other land comprised in a port facility within the meaning of article 2 of Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security.

USING THE REASONABLE PRECAUTIONS AND DUE DILIGENCE DEFENCE

27. The service of a notice on an occupier of land where waste has been fly-tipped effectively creates a situation of “strict liability”. That is, regardless of whether the occupier of the land was in any way responsible for the deposit of the waste, they are assigned the responsibility for removing it or taking steps to deal with the consequences of its deposit - if an occupier does not comply with the requirements of a notice, they are guilty of an offence.
28. To balance situations of strict liability, statutes that create such offences usually provide a corresponding defence. In *Tesco Supermarkets v Natrass*, the Court stated the following in relation to the reasonable precautions and due diligence defence: “*the clear intention of Parliament is to mitigate the injustice, which may be involved in an offence of strict liability, of subjecting to punishment a careful and conscientious person who is in no way morally to blame*”.⁸
29. Although the trigger for the use of the reasonable precautions and due diligence defence in the context of the amended section 59 of the 1990 Act is an appeal, it still in effect operates as a defence.
30. Both parts of the defence must be shown in order for the defence to be successful and the requirements of the new section 59(3A) should be followed where an appellant seeks to rely upon an allegation that the waste was deposited by another person. If this section is not complied with, the allegation that another person was responsible can only be pursued if leave is granted by the court.
31. Where an appeal is made to the magistrates’ court under section 59(3)(a), the requirements of the notice concerned will be suspended until the appeal has been heard and determined (see section 59(4)). If the occupier can show that they took all reasonable

⁸ *Tesco Supermarkets v Natrass* [1971] 2 All ER 127.

precautions and exercised all due diligence to avoid the deposit of the waste, then the court must quash the notice (section 59(3)).

32. There is no definitive list of the steps an occupier of land must take to meet the reasonable precautions and due diligence defence. However, guidance in relation to other statutes employing that defence suggest they will need to be able to prove that they have:
 - a) assessed the risks of unlawful waste disposal on their land;
 - b) put in place a system or series of steps to eliminate those risks;
 - c) ensured that the system or series of steps to eliminate risk works;
 - d) documented the system; and
 - e) monitored and reviewed the system to ensure it remains effective.
33. In addition, the following guidance can be taken from court decisions that have considered the reasonable precautions and due diligence defence in different statutory contexts:
 - a. Doing nothing is unlikely to be sufficient. The courts have suggested that some kind of positive action is required. For example, it has been held to be insufficient to say that an operation or activity has previously been carried out with no cause for concern.
 - b. If a reasonable precaution is possible and not taken, unless the appellant can show why using that precaution would not have been reasonable in the circumstances, the defence is likely to fail. For example, the appellant would need to show that the precaution in question would have had no material effect in the particular circumstances.
 - c. The level of reasonable precautions may depend on the operating risk and the size of the operation concerned. For example, what is reasonable for a smaller business may not be satisfactory for a larger one.
34. Ultimately the courts will decide on a case by case basis, taking into account the particular circumstances, if the occupier of land has established the defence. However, before issuing a notice under section 59, a borough council should consider the general principle of partnership working outlined in paragraph 12 first, and then whether the occupier of the relevant land can evidence the points in paragraph 32. If it appears that the occupier of land may be able to prove the defence, then the borough council should carefully consider whether to issue a notice.

35. Guidance issued by ENCAMS and the National Fly-Tipping Prevention Group provides further information on fly-tipping, and the steps that can be taken to prevent it.⁹ Following on from that guidance, set out below are examples of what may be considered to qualify as reasonable precautions and due diligence.
36. This list is by no means exhaustive, and if anyone with responsibility for land has concerns with regard to fly-tipping, they should seek crime prevention advice from the Metropolitan Police..
- a) Assessing the risk of unlawful waste disposal might include:
- Seeking advice from the local authority on how to prevent fly-tipping on the land (it should be noted that a local authority's ability to respond will depend on their available resources);
 - Checking the flycapture database to see if the land is located in a fly-tipping hotspot;
 - Checking that any waste management contractor accessing the land is operating legally;
 - Checking access routes into and out of the land;
 - Checking how visible the land is from public areas such as the highway;
 - Checking that the occupier's own waste is securely contained as messy, uncontained waste may attract unlawful deposits of waste..
- b) Putting in place a system or series of steps to eliminate those risks might include:
- Physical improvements to the land such as installing gates or barriers;
 - Managing the site by keeping it tidy, and supervising deliveries or access onto the site;
 - Installing deterrents such as CCTV cameras and signage;
 - Installing or improving lighting to ensure the land is publicly visible;
 - Training staff so they know what to do if they witness fly-tipping or discover a fly-tip.
- c) Ensuring that the system or series of steps to eliminate risk works might include:

⁹ See "Tackling Fly-tipping, A guide for land owners and land managers", National Fly-tipping Prevention Group (April 2006) and "Fly-tipping and the Law, A guide for the public", ENCAMS (ENC/04/06).

- Monitoring to see if the frequency of fly-tipping is reduced because of the measures taken to eliminate risk;
- Regular maintenance of physical barriers and/or surveillance equipment.

d) Documenting the system might include:

- Records of checks carried out on waste management contractors;
- Records of training provided to staff on how to operate physical barriers or surveillance equipment;
- Records of training provided to staff on what to do if they find a fly-tip and how to secure and dispose of the waste.

37. Regular monitoring and review of the system that has been put in place is important. Fly-tippers may find CCTV 'blind-spots' or find ways to breach barriers. No system is guaranteed to prevent fly-tipping, but the important thing is to show that systematic monitoring is in place and that failures are identified and rectified as soon as possible.

APPENDIX A: Key regional and national stakeholders

National Government

Department for Environment, Food and Rural Affairs (Defra)
Environment Agency
Department for Business, Enterprise & Regulatory Reform (BERR) (now known as BIS)

Regional Government

Greater London Authority
Government Office for London

Local Government Bodies

London Councils
Local Government Association

London Boroughs

Protected Parties

Network Rail
Transport for London

Utility Companies

Thames Water
EDF
National Grid
BT
Virgin Media
National Joint Utilities Group

Major land owners / land managers

English Heritage
National Trust
The Royal Parks
Homes and Communities Agency
The Crown Estate
National Housing Federation
Land Securities