

ITEM

ITEM

Executive – 7th June 2007

ENFORCEMENT OF NEW SMOKE-FREE LAWS

Report of Head of Environmental Health

Statutory Powers: Health Act 2006, Part 1

Financial Implications: Funding by means of a grant paid under Section 31 of the Local Government Act 2003 has been provided to local authorities by the Government to assist with the implementation of this legislation. This Council has been awarded with £7,204 for 2006-2007 and £35,267 for 2007-2008. The allocated amount is sufficient to meet the Council's expenditure demand (including officer time) for these periods, after which, the Government expect that the legislation will be virtually self enforcing.

Purpose

To approve an enforcement policy in relation to the smoke-free provisions of the Health Act 2006 and to make appropriate administrative arrangements. This report links to the Council's priorities of maintaining a clean environment (CP4) and creating the conditions for the growth and maintenance of quality economic activity (CP2).

Recommendations

That the Executive RESOLVES that:

The smoke-free enforcement policy forming the Appendix to this report be adopted.

Council be recommended to amend the scheme of delegations to reflect the provisions of Part 1 of the Health Act 2006 and that enforcement officers be authorised to act accordingly.

Background/The Issues

1. 1 The Health Act and the specific sets of Regulations made thereunder will mean that almost all enclosed and substantially enclosed public places and workplaces in England will be smoke-free from 1st July 2007. Members have been informed about the general provisions in the Members Bulletin. Local and national publicity campaigns have also been undertaken.
2. District and Unitary Councils are responsible for ensuring that the new legislation is introduced effectively and, although the Government are encouraging an educative approach in the lead up to implementation, complaints from the public or from employees will have to be investigated subsequently and appropriate action taken where contraventions are detected.
3. It is estimated that about 5000 premises will fall within the Council's jurisdiction and these include many where the Council has previously had no enforcement role, e. g. factories, schools etc.

4. It will be an offence for the manager or proprietor of premises not to have done everything reasonable to ensure persons do not smoke in smoke-free areas or to display the statutory signage. A person who smokes in such an area will also commit an offence. There are also provisions for fixed penalty notices. These provisions would also apply to the Council as an employer.
5. The Council has already adopted the Enforcement Concordat published by the Cabinet Office's Better Regulation Unit and detailed service enforcement policies, but needs to approve a policy directed at this new legislation.
6. To ensure a consistent approach, a model smoke free enforcement policy has been developed by a Devon wide forum and this has been used as a basis for the policy given in the Appendix. This is also based on national guidance.
7. The Council Scheme of Delegations will require amendment to take into account the new provisions.

Risk Assessment

Risk	Mitigation
Enforcement of the legislation may be seen to be discriminatory against smokers	The health care for the effects of second hand smoke is well documented. The legislation is not intended to make persons give up smoking but prevent ill health of those persons who do not smoke in enclosed or substantially enclosed areas
Enforcement of the legislation maybe unpopular and have a negative impact upon business	This policy seeks to adopt a balanced non-confrontational and educative approach to enforcement and the taking of legal proceedings is a last resort. Evidence from other countries in the British Isles where smoke free laws have been introduced, shows a high level of compliance and it is expected that the South Hams will be no different. Additionally, evidence has shown that smoke free laws have not had an adverse impact upon businesses and in many cases has shown to increase in profit. National surveys indicate that businesses want smoke free laws.

Conclusion

It is necessary for the Council to be transparent about its enforcement approach and this policy sets this out clearly. It also shows consistency with other local authorities approach to enforcement.

Peter Wearden
Divisional Environmental Health Officer

Executive
 7th June 2007

Ian Bollans
Head of Environmental Health

Background

Health Act 2006

'Implementation of smoke free legislation in England – Guidance for local council Regulating Officers' – LACORS March 2007

'Enforcement Concordat', Better Regulation Unit, Cabinet Office.

APPENDIX



South Hams District Council

Policy for the Enforcement of Smoke Free Legislation

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Appendix 1 Good Practice Recommendations

1. Statement of Aims and Objectives

It is this Council's policy, as enforcing authority, to seek to protect people working in or visiting enclosed or substantially enclosed public places from exposure to second hand smoke. This policy will also apply to vehicles used in connection with work and public service.

The Council will discharge its duty to enforce the provisions of Part 1 of the Health Act 2006 and regulations made there under in accordance with this policy statement.

The Council endorses and fully supports the Principles of Good Enforcement by taking a fair, proportional and consistent approach as set out in the Enforcement Concordat published by the Government's Cabinet Office. This has been formally adopted by the Council. The Council also endorses the European Convention on Human Rights as implemented by the Human Rights Act 1998.

The Council will ensure that all persons affected by the enforcement of smoke free legislation receive fair and equal treatment. Officers will be aware of the potential problems of comprehension where English is not the first language.

This policy will come into effect on the 1st July 2007 and will be reviewed annually or, at such time as deemed appropriate. Where possible, the Council will adopt a staged approach to enforcement by the use of education and the raising of awareness to facilitate these objectives. However, where it is appropriate, and where the seriousness of the situation dictates, enforcement action by the use of fixed penalty notices and the institution of legal proceedings will be used to ensure compliance with the law.

2. Legislation and Guidance on which this Policy is based

Health Act 2006 Part 1

The Smoke-free (Premises and Enforcement) Regulations 2006

The Smoke-free (Signs) Regulations 2007

The Smoke-free (Exemptions and Vehicles) Regulations 2007

The Smoke-free (Penalties and Discounted Amounts) Regulations 2007

The Smoke-free (Vehicle Operators and Penalty Notices) Regulations 2007

Department of Health Guidance

Guidance issued by the Local Authorities Co-ordinators of Regulatory Services (LACORS).

3. Offences

It is an offence for:

- A person who controls or is concerned in the management of smoke-free premises, to fail to cause a person smoking there to stop smoking;
- A person to smoke in a smoke-free place;

- A person who occupies or is concerned in the management of smoke-free premises to fail to ensure that no-smoking signs are displayed in accordance with the Regulations;
- Any person to intentionally obstruct an authorised officer in the exercise of his functions under the Act;
- Any person, without reasonable cause, to fail to give an authorised officer any facilities, assistance or information he reasonably requires.

4. Defences

It is a defence for a person charged with smoking in a smoke-free place to show that he did not know, and could not reasonably have been expected to know, that it was a smoke-free place.

It is a defence for a person charged with failing to stop a person smoking in a smoke-free place to show:-

- a. that he took all reasonable steps to cause the person in question to stop smoking, or
- b. that he did not know, and could not reasonably have been expected to know, that the person was smoking, or
- c. that on other grounds it was reasonable for him not to comply with the duty.

5. Enforcement principles

The Council will enforce the law through the principles of:

- a) **Proportionality** - this means ensuring that the level of enforcement is proportionate to the risk, and the seriousness of any breach of the law.
- b) **Consistency** - this relates to enforcement practice within this local authority, and also between this authority and other local authorities. Consistency does not mean uniformity, but means taking a similar approach in similar circumstances to achieve similar ends.
- c) **Targeting** - this means ensuring enforcement activities, such as inspections and investigations, are focused on activities giving rise to the greatest risk or the least well controlled.
- d) **Transparency** - this is the extent to which duty holders and members of the public are clear about what is expected of them and what they can expect from the enforcing authority in terms of advice and enforcement action.
- e) **Accountability** - this means enforcing authorities must have policies and standards against which they can be judged and, an effective and easily accessible mechanism for dealing with comments and handling complaints.

6. Enforcement Strategy

The Council will seek to execute this strategy by:-

- a) Providing guidance and advice to persons in control of enclosed or substantially enclosed work or public places, their representatives, the public and other duty holders as to the requirements regarding smoke-free places.
- b) Investigating complaints in accordance with the procedure detailed in item 8 below.
- c) Assessing compliance by inspections incorporated within any intervention/ inspection programmes carried out under other legislation for which the Council has responsibility (e. g. food safety, health and safety laws). Visits will also be made to places where there has been a history of non compliance with smoke-free laws or previous enforcement action under smoke-free legislation. Compliance assessment may also be made by visits to places of employment or open to the public especially those involving substantial numbers of persons or those not normally visited as part of any existing programme. (See item 7 below).
- d) Achieving consistency in enforcement standards through the training of staff, quality procedures and active participation in liaison arrangements with other local authorities, Government Departments and other agencies.
- e) Providing guidance and advice to new businesses and new employers at the planning stage of their venture.

Item 9 below shows the likely enforcement processes to be followed as regards the offences relating to smoking in smoke-free places, failing to prevent smoking in smoke-free places and failing to display the appropriate signage.

7. Inspections

Although the Council will not be embarking upon a rigid proactive inspection programme under this legislation (see item 6 above), Enforcement activities by inspection will involve different approaches depending on the circumstances:-

- a. Announced inspection – Authorised Officers will announce themselves to the person in charge on entering the premises, and show appropriate identification, prior to assessing compliance with the law.
- b. Inspection/visit to the premises by Authorised Officers prior to revealing their identity. Officers will assess compliance by observation within the premises, and subsequently announce themselves and show appropriate identification to the person in charge of the premises at the end of the period of inspection.
- c. Covert surveillance including a covert human intelligence source (CHIS) only where it is considered necessary and proportionate in the circumstances and where such action is duly authorised by an appropriate officer of the Council under the Regulation of Investigatory Powers Act 2000. For this course of action, there will need to be good reason to suspect that an offence is being committed

and evidence of that offence cannot be gathered in any other way.

- d. Vehicles – assessment for compliance in vehicles used in connection with work or public service will be carried out at the operator’s base or where the vehicle is stationary. This will be announced or unannounced dependant upon circumstances.

8. Complaint Investigation

The Council will, where possible, seek to protect the identity of the complainant during the investigation of an allegation about breaches of smoke-free laws.

The response to complaints received about non-compliance with the legislation will be prioritised taking into account the following factors:

- The number of complaints received about particular premises
- The number of people likely to be affected if the complaint relates to persons smoking in smoke-free premises.
- Whether the nature of the complaint suggests to the enforcing officer a degree of complicity between the various parties in the alleged offence.
- Whether the alleged offender has been previously warned, convicted or subject to fixed penalty notice regarding non compliance.

All complaints will be acknowledged within three working days, provided the complainant has given all necessary contact details.

The overriding principles in the enforcement strategy in dealing with complaints will be those of proportionality, consistency and transparency. If the investigation of a complaint reveals non-compliance with the law, the Officer will select the most appropriate enforcement response, taking into account the factors described in Section 5 of this Policy (Enforcement Principles). The complainant will be advised of the outcome of the investigation, provided they have given contact details.

If the Officer feels that no action is required, or the complaint is not justified, then the complainant will be advised accordingly. Where preliminary investigations reveal that the complaint is not within the scope or remit of this Council, the matter will be referred to the appropriate local authority and the complainant advised of this action.

Data Protection

Authorised Officers will ensure that they are aware of the Council’s Corporate Policy on Data Protection and will only disclose information to authorised personnel.

9. Formal Enforcement Action

In deciding upon the appropriate action, Authorised Officers will have due regard to this policy. The approach taken by the Council's Authorised Officers will follow the flow diagrams shown below

Figure 1 – Enforcement Flowchart – failure to display correct no-smoking signage

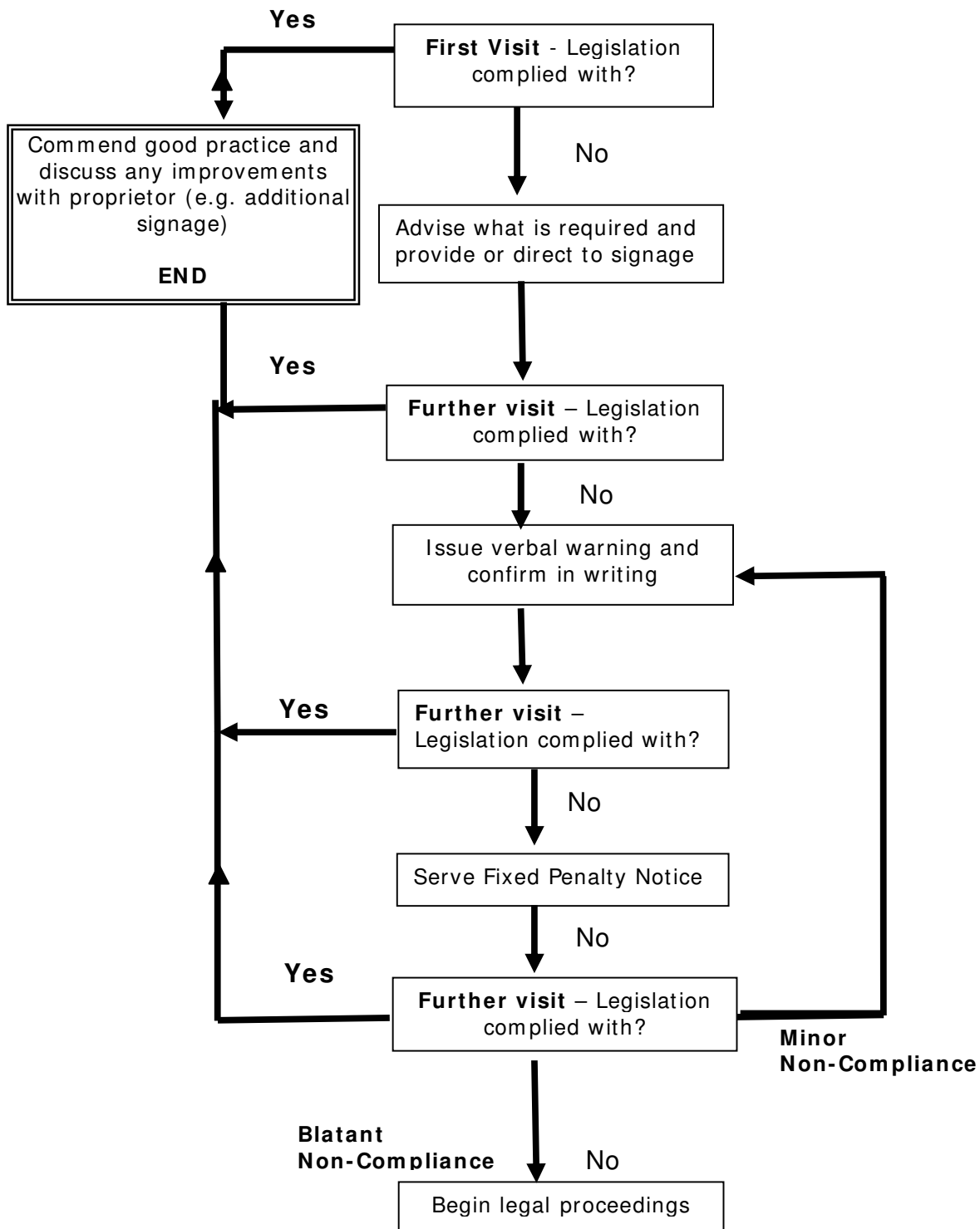
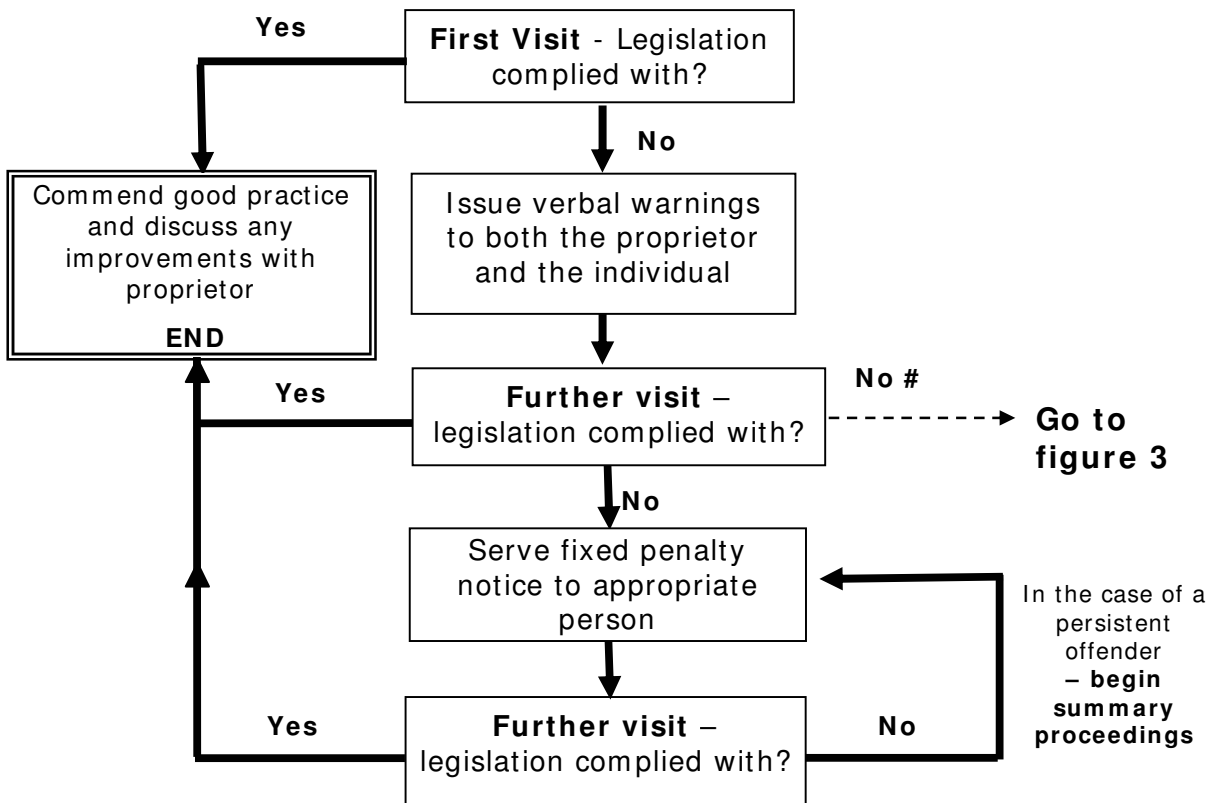


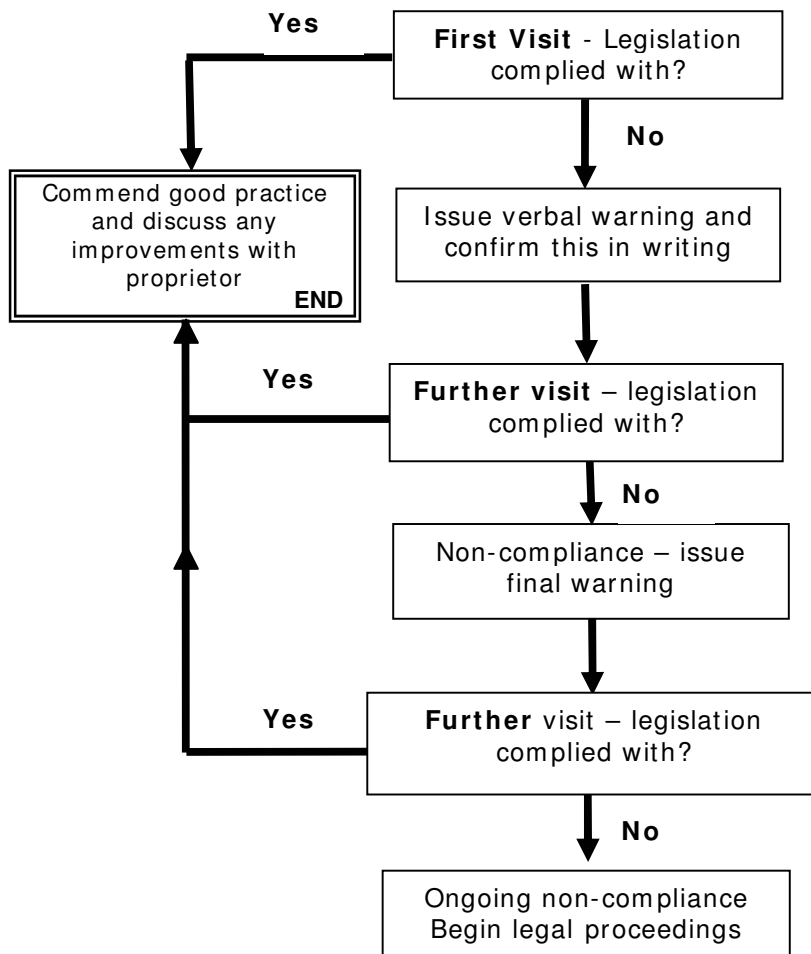
Figure 2 – Enforcement Flowchart – smoking in a smoke free place



There may be some instances where smoking is taking place on the same premises on several occasions. It would therefore be a matter to raise with management about the controls they have in place, in which case it would be appropriate to use figure 3 (failure to prevent smoking in a smoke-free place.)

Alternatively, smoking in a smoke-free place may be carried out by the same individual at the same or different premises, at which point it may be appropriate to serve a FPN on the individual.

Figure 3 – Enforcement Flowchart – failure to prevent smoking in a smoke free place



10. Advisory and Warning letters

An Authorised Officer may send an advisory letter as regards recommendations on good practice for compliance.

A warning letter will be issued at the initial stages that an offence is identified, unless there is a blatant disregard for the legislation. It will provide details of the alleged offence(s), and where necessary, the remedial work required and the time period for compliance.

11. Fixed Penalty Notices

A Fixed Penalty Notice may be issued when an alleged offence has been committed and a warning letter has already been issued. Fixed penalty notices apply to persons who smoke in a smoke free place, premises or vehicle (penalty of £50 discounted to £30 if paid within 15 days) or where the appropriate signage is not displayed at such places (penalty of £200 discounted to £150).

A Fixed Penalty Notice may be issued at the time if the authorised officer has reason to believe that a person is committing an offence or has committed an offence or, if appropriate, at a later date.

A Fixed Penalty Notice will:

- have details of enforcing authority on whose behalf authorised officer was acting
- identify the alleged offence and give particulars of the circumstances alleged to constitute that offence
- state the amount of the penalty and the period within which it may be paid.
- state the discounted amount and the period within which it may be paid.
- state the person to whom and the address at which payment may be made.
- state the method or methods by which payment may be made.
- state the person to whom and the address at which any representations relating to the notice may be made.
- state the consequences of not making a payment within the period for payment.
- inform recipient of notice of right to be tried for alleged offence and how to go about it

12. Institution of legal proceedings

In deciding whether to institute legal proceedings, the Code for Crown Prosecutors issued by the Crown Prosecution Service will be followed and consideration given to:

- whether there has been a blatant or systematic disregard for the law, particularly where the economic advantages of breaking the law are substantial and the law abiding are placed at a disadvantage to those who disregard it;
- the general record and approach of the offender, including previous offences at the premises in question or at other premises under the control of the same person or organisation;
- whether a fixed penalty notice has been paid within the appropriate time period
- whether it is in the public interest to prosecute;
- whether the evidence available provides a realistic prospect of conviction;
- whether an authorised officer has been obstructed in the lawful course of their duties
- whether or not the offender has taken all necessary steps to prevent a recurrence of the problem;
- the ability of any important witnesses and their willingness to co-operate

13. Authorisation of Officers

All Authorised Officers will be appointed under the Health Act 2006. When carrying out their duties, Authorised Officers must be able to produce their authorisation on request.

The following table outlines the degree of authority afforded to the various different types of Enforcement Officer involved:-

Task	Scope of authorisation	Comments/conditions
Power of entry to premises and vehicles	All authorised officers	
Power to require reasonable facilities, assistance and information.	All authorised officers	
Sending of advisory and warning letters	All authorised officers	
Service of Fixed Penalty Notices	All authorised officers specifically authorised to do so.	
Preparing prosecution report	All authorised officers	All reports to be assessed by Team Manager before presentation to Head of Service
Decision to prosecute	Head of Service	
Authorisation for Covert surveillance	Head of Corporate Services or Principal Solicitor	
Carrying out covert surveillance or use of CHIS	Authorised Officers who have received RIPA training	

14. Appeals and Complaints

The recipient of a Fixed Penalty Notice is entitled to make a representation relating to the Notice, the details of which will be given on the Notice.

The recipient of a Fixed Penalty Notice also has the right to elect to be tried before a court for the alleged offence. The procedure will be clearly explained to the recipient in the notes contained within the Notice, but the request for the hearing must be made in writing and before the payment period for the penalty expires. The Magistrates Court will be notified on receipt of a request for a hearing and the Court Rules will be followed.

The Council has adopted a formal complaints procedure and any person aggrieved by the enforcement action taken by the Council may register their complaint in accordance with that procedure. A copy is available upon request by writing to South Hams District Council, Follaton House, Plymouth Road, Totnes TQ9 5NE or telephoning 01803 861234 or via the Council's website at www.southhams.gov.uk

All our publications are available in alternative formats, such as large print or a language other than English. Please contact us on 01803 861234 or e-mail customer.services@southhams.gov.uk.

Appendix 1

Good Practice Recommendations

Ashtrays

Ashtrays would be helpful at door entry points to allow customers the facility of extinguishing their cigarettes safely and thereby comply with the law. Arrangements will need to be made for the proper emptying and disposal of these receptacles.

Management Controls

It is recommended that, and we will encourage those in control of smoke-free premises to:

1. Develop a smoke-free policy, (preferably written).
2. Develop a procedure for dealing with any people who smoke (preferably written).
3. Communicate to staff in both the policy and written procedure.
4. Keep a written record of any incident (and outcome) where a responsible member of staff confronts an individual for smoking on the premises.

Smoke-free policy and procedures

It is strongly recommended that owners and managers establish and implement written policy and procedures to demonstrate their compliance with the law. Guidance on developing a smoke-free policy is available see www.smoke-freeengland.co.uk or telephone the Smoke-free England information line 0800 169 169 7. Individual businesses and organisations can adapt this for their use, if they wish. There may be a case for two policies - one directed at staff who may wish to smoke and one detailing how customers are to be dealt with.

The procedures should contain items similar to the following:

- Draw the person's attention to the "No Smoking" signs in the area and inform them that he/she is committing an offence by smoking and may result in a fixed penalty fine for them of £50. Politely ask them to stop smoking.
- Direct them to the nearest place where they are able to smoke legally.
- Advise the person smoking that their actions could result in the person in control of the premises receiving a Fixed Penalty Notice or being prosecuted and receiving a fine of £2,500.
- Refuse the person service.
- If the person continues to smoke, ask them to leave the premises.
- If he/she refuses, implement normal procedures for anti-social/illegal behaviour on the premises.

- Maintain a written record of all such incidents and outcomes.
- If physical violence is threatened by the person smoking, notify and/or seek assistance from the Police.

The policy should identify members of management and/or staff who have responsibility for its implementation and review.

Staff

Employers and managers of smoke-free premises should ensure that all staff, including new members of staff, are aware of the no-smoking policy. All staff working in smoke-free premises should be aware of which member of staff or management present is the responsible person for dealing with any persons smoking.

Record of incidents

In order to assist any future defence that a person took “reasonable steps to cause the person in question to stop smoking”, each business should keep a documented record of incidents.

The following smoke-free policy template and guidance for dealing with persons smoking is provided for assistance.



SMOKE-FREE POLICY

PURPOSE

This policy has been developed to protect all employees, service users, customers and visitors from exposure to second-hand smoke and to assist compliance with the Health Act 2006.

Exposure to second-hand smoke increases the risk of lung cancer, heart disease and other serious illnesses. Ventilation or separating smokers and non-smokers within the same airspace does not completely stop potentially dangerous exposure.

POLICY

It is the policy of.....**Insert name of company**that all our workplaces are smoke-free, and all employees have a right to work in a smoke-free environment. The policy shall come into effect on Sunday, 1 July 2007. Smoking is prohibited in all enclosed and substantially enclosed premises in the workplace. This includes company vehicles. This policy applies to all employees, consultants, contractors, customers or members and visitors.

IMPLEMENTATION

Overall responsibility for policy implementation and review rests with**Insert name of manager** However, all staff are obliged to adhere to, and support the implementation of the policy. The person named above shall inform all existing employees, consultants and contractors of the policy and their role in the implementation and monitoring of the policy. They will also give all new personnel a copy of the policy on recruitment/induction.

Appropriate 'no smoking' signs will be clearly displayed at the entrances to and within the premises, and in all smoke-free vehicles.

NONCOMPLIANCE

Local disciplinary procedures will be followed if a member of staff does not comply with this policy. Those who do not comply with the smoke-free law may also be liable to a fixed penalty fine and possible criminal prosecution.

HELP TO STOP SMOKING

The NHS offers a range of free services to help smokers give up. Visit gosmoke-free.co.uk or call the NHS Smoking Helpline on 0800 169 0 169 for details. Alternatively you can text 'GIVE UP' and your full postcode to 88088 to find your local NHS Stop Smoking Service.

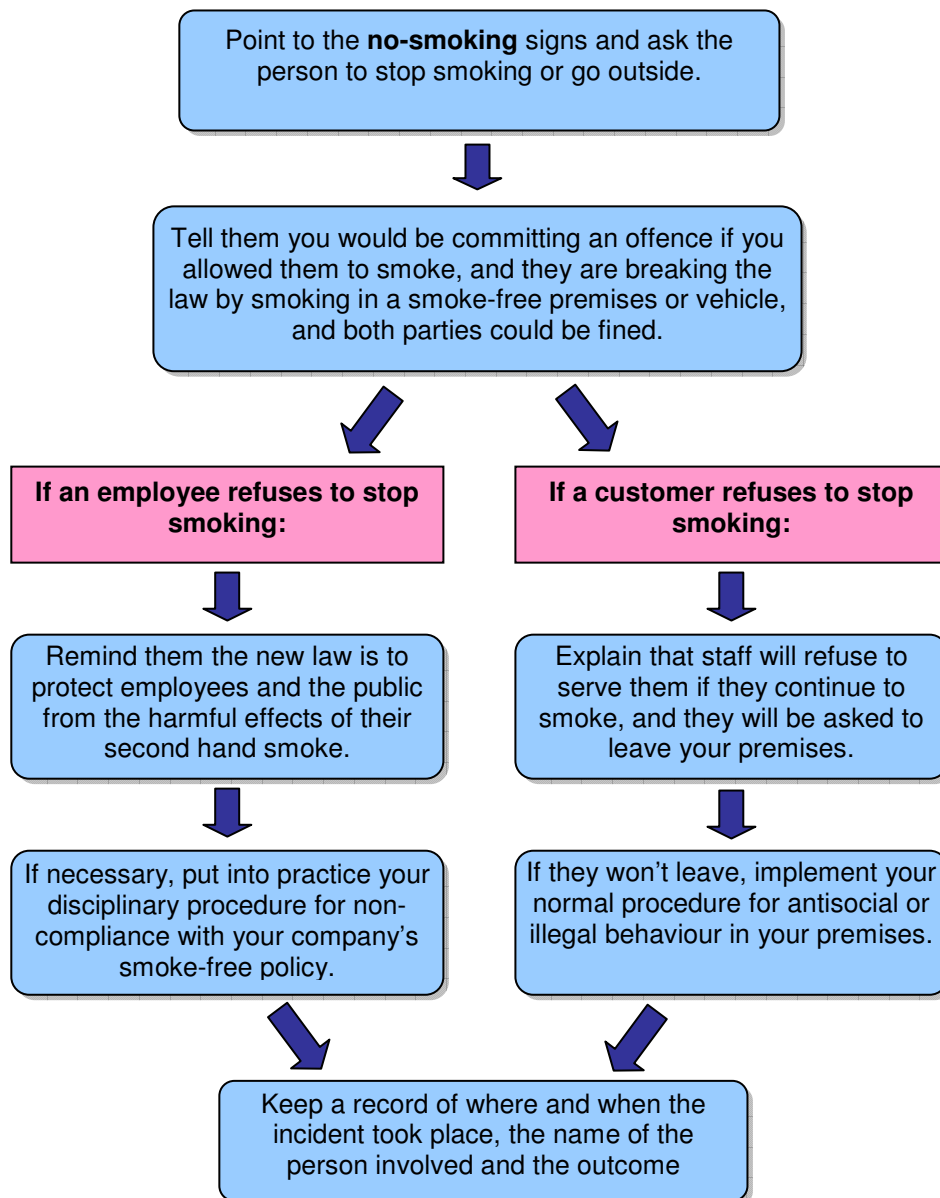
SignedDate

On behalf of the Company.....**Insert name of company**



HOW TO DEAL WITH SMOKING IN A SMOKE-FREE PLACE

If you are in charge of smoke-free premises and/or vehicles, you will have a legal responsibility to prevent people from smoking in them. If someone does smoke in any premises or vehicles you are responsible for, here are some practical steps you might take to deal with them.



If physical violence is threatened by a person smoking, we suggest you notify and/or seek assistance from the police