

## **Appendix G - Legal Advice on Charging for non-household waste disposal at HWRCs**

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**ADVICE NOTE:** We have been asked by KCC Waste Management to advise on the legal position with regards to the power of Kent County Council as waste disposal authority (WDA) to charge a fee for receiving any soil, rubble and hardcore, and plasterboard, which is delivered to Kent Household Waste Recycling Centres (HWRCs) by householders.

### **1. EXECUTIVE SUMMARY**

- 1.1. Under the Controlled Waste (England and Wales) Regulations 2012, waste from construction or demolition works, even if produced at a domestic property, is to be treated as industrial waste for the purposes of the legislation.
- 1.2. Accordingly, soil, rubble, hardcore and plasterboard (which for the purposes of this note are referred to collectively as construction waste) delivered to Kent HWRCs by householders would be classified as industrial waste and not household waste and, as a result, the duty of the WDA to receive such waste at HWRCs free of charge would not apply.
- 1.3. In the absence of any provision to the contrary, we read the Environmental Protection Act 1990 as allowing, but not requiring, the WDA to receive non-household waste from any persons at its HWRCs. Accordingly, this is a provision of a service for which the WDA could, under the Local Government Act 2003, levy a charge.
- 1.4. Practice by other local authorities, as well as governmental and non-governmental advice, shows that it is relatively common practice for WDAs to levy a charge for accepting construction waste at their HWRCs.
- 1.5. The position may change in pending guidance from DEFRA which wishes to avoid “backdoor charging” for ‘DIY’ waste as part of its litter and fly-tipping avoidance strategy. That guidance may lead to a change in the law (for example a reclassification) which would obviously change the legal answer. However, it may be non-statutory guidance which means that the policy position may be different from the legal position but we anticipate few Councils would depart from that.
- 1.6. In summary: our advice is that as matters stand it is lawful to charge for the acceptance of construction waste at HWRCs. This may change with pending guidance.

### **2. WASTE DISPOSAL AUTHORITY FUNCTIONS**

- 2.1. Sections 51(1) and 51(2) of the Environmental Protection Act 1990 (EPA) state that a WDA is under a duty to provide a place for the deposit of household waste, free of charge, by residents in its area.
- 2.2. Section 51(3) of the EPA provides that the WDA may, at such waste disposal sites, also take waste (whether household, commercial or industrial) from persons from outside their area and may charge a fee for doing so.
- 2.3. The EPA does not expressly address the WDA’s role in respect of non-household waste deposited by residents from its own area.

### **3. WASTE FROM CONSTRUCTION OR DEMOLITION WORKS**

- 3.1. The Controlled Waste (England and Wales) Regulations 2012 (the Regulations), which replaced the Controlled Waste Regulations 1992, describes at Schedule 1 Paragraph 3 waste which is to be treated as a particular category of waste because of its nature or the activity which produces it, regardless of the place where it is produced.

Item 9 deals with 'construction or demolition' waste:

No.	Description	Classification	Exemptions
9	Waste from construction or demolition works, including preparatory works	Industrial waste	The waste is to be treated as household waste for the purposes of section 34(2) and(2A) of the Act only (disapplication of section 34(1) and duty on the occupier of domestic property to transfer household waste only to an authorised person or for authorised transport purposes)

- 3.2. Therefore, waste from construction or demolition works, even if produced at a domestic property, is to be treated as industrial waste for the purposes of the legislation.
  - 3.3. It is worth noting that the word 'construction' for the purposes of the Regulations "includes improvement, repair or alteration".
  - 3.4. Accordingly, construction waste delivered to Kent HWRCs by householders would be classified as industrial waste and not household waste. The duty to provide facilities free of charge, under s51(1) EPA, would therefore not apply to such waste.
- 4. LOCAL AUTHORITY POWERS TO CHARGE**
- 4.1. Section 93 of the Local Government Act 2003 (LGA) permits a relevant authority (which, by virtue of section 1 of the Local Government Act 1999, includes an English local authority) to charge a person for providing a service if: (a) the authority is authorised but not required to provide such a service by an enactment, and (b) the person has agreed to its provision.
  - 4.2. While section 51(3) of the EPA does not expressly deal with non-household waste brought to an HWRC by a resident, the fact that it acknowledges that the WDA may wish to accept non-household waste brought to an HWRC by a non-resident, indicates that it also envisages the acceptance of non-household waste brought to an HWRC by a resident. In the absence of any provision to the contrary, we would conclude that the legislation intended to allow the acceptance of non-household waste by both a resident and non-resident.
  - 4.3. Accordingly, the provision of a facility by the WDA to receive construction waste brought by a person (whether or not a resident of its area) would satisfy s93(1)(a) LGA as being authorised but not required by law.
  - 4.4. In order to exercise its power under s93 LGA to charge for the provision of a service, the local authority must not be granted by any other statute the power to charge for such a service or be prohibited by a statute from charging for such a service.
  - 4.5. The imposition of charges by a WDA on persons bringing construction waste to its HWRCs would fall within these limitations – being neither expressly required nor prohibited by law.
  - 4.6. It is important to note that, under s93 LGA, the income derived from the charges must not exceed the costs of the provision of the relevant service within one financial year. Therefore, any charges imposed by Kent County Council in relation to construction waste, must be set by reference to this guideline, to prevent falling foul of s93, and rendering any such charges unlawful.

- 4.7. It is worth noting that the local authority has the discretion to charge only some persons for the service, and charge different persons different amounts for the same service. Therefore, it is possible for the WDA to apply different treatment to, for example, residents and non-residents, or private householders and contractors, who dispose of their construction waste at its HWRCs. The WDA may also wish to impose different charges (or indeed, no charges) on different categories of persons, and has the discretion to do so, by virtue of s93(5) LGA.

## 5. GUIDANCE AND MARKET PRACTICE

### WRAP Guidance to HWRCs

- 5.1. The Waste and Resources Action Programme published a guidance in January 2016 on household waste recycling centres, which suggests that 'DIY Waste', including inert material such as rubble and concrete; bricks and roof tiles; plasterboard; and soil from landscaping activities, are materials for which a charge can be levied upon receipt at a HWRC, in certain circumstances

### DCLG Guidance

- 5.2. Under the previous government, the Department for Communities and Local Government (DCLG) ran a consultation entitled "Preventing 'backdoor' charging at household waste recycling centres".
- 5.3. The response, published in January 2015, concluded that "The Government recognises that many local authorities charge at household waste recycling centres for the deposit of 'non household' waste such as car tyres and/or for users not resident within the local authority area. The discussion paper made clear that it did not intend to prevent local authorities from charging in either such way and this remains its view."
- 5.4. However, the Litter Strategy document published jointly by DCLG, Defra and the Department for Transport in April 2017, states the following: "Government's view is clear: DIY waste is classed as household waste if it results from work a householder would normally carry out. A number of local authorities have introduced additional charges for the deposit of waste which local authorities categorise as 'waste other than household waste'. However, as Government made clear following the consultation on preventing 'backdoor' charging at HWRCs, this can inconvenience residents and make disposing of their waste more difficult. There is also a risk these charges can be counterproductive and simply transfer costs to dealing with additional fly-tipping and littering. It is therefore important that, where charges are proposed, they are proportionate and transparent and are made in consultation with local residents so that local services meet local needs."
- 5.5. The document goes on to state that Government will work together with WRAP and local authorities to "review current guidance to ensure this reflects changes in the law and to make clear what can and cannot be charged for at HWRCs (including in respect of DIY waste); and explore ways of managing HWRC services to facilitate access for local householders (and their waste other than household waste) and for small businesses at proportionate cost. Revised guidance will be published by the end of 2017."
- 5.6. We are not aware at the date of this note that any such guidance has been published yet.
- 5.7. Pending that guidance, the legal position is that construction waste may be charged but the policy position is that it should not. Whether the guidance published has any standing in law will depend on its terms and whether it will be accompanied by any change in the statutory position. It will also be interesting to see how the expression "if it

results from work a householder would normally carry out" is defined and how widely. The emphasis may be on the "householder" (i.e. it is work that a lay person who is not a tradesman may tackle) or it may be on the "normally" (i.e. it is work that is day to day as opposed to a major project).

#### Existing Local Authority Treatment

- 5.8. A number of WDAs, including Kent's neighbours, impose charges or other restrictions on 'DIY' waste brought to their HWRCs.
- 5.9. Surrey County Council has since December 2017 been charging for the disposal of 'DIY' waste brought to its community recycling centres .
- 5.10. Northamptonshire County Council limits the amount of 'DIY' waste that people can bring free of charge to its HWRCs in any two-month period. Waste over this amount or frequency would be treated as trade waste to be brought to the appropriate facilities and charged accordingly .
- 5.11. East Sussex County Council takes a similar approach to Northamptonshire's, but stipulates that 'DIY' waste can only be accepted at its HWRCs if the work has been carried out/removed by the householder themselves. "Where residents use a contractor to do works at their property the contractor must arrange for the disposal of the waste either by arranging a skip hire or taking it to a licensed commercial waste facility."
- 5.12. However, in light of the Government's indications that it does not approve of charging householders for 'DIY' waste at HWRCs, some local authorities have suspended their charging policies for such waste.

#### 6. CONCLUSIONS

- 6.1. The Regulations require that 'construction or demolition' waste be treated as industrial waste rather than household. Accordingly, the WDA is not under any duty to accept such waste at its HWRCs free of charge.
- 6.2. According to our analysis above and the approach taken by many local authorities, the WDA has the discretion to impose charges and/or restrictions on construction waste brought to its HWRCs.
- 6.3. However, it is clear from Government statements, including those set out in the Litter Strategy April 2017, that the Government intends to publish guidance which will most likely restrict the ways in which WDAs can charge householders for bringing construction waste to HWRCs. There is a suggestion that some charges may be permitted, but no further detail is available yet on what these might be.
- 6.4. If the Council wishes to establish a policy for charging in respect of construction waste before such guidance is published, it ought to bear in mind the following statement from the Litter Strategy: "where charges are proposed, they are proportionate and transparent and are made in consultation with local residents so that local services meet local needs." It should also be prepared for the possibility that new guidance might be published imminently which could render any new charging policy at odds with Government policy.