

OVERVIEW AND SCRUTINY BOARD

22 JULY 2014

**DRAFT FINAL REPORT -
PARKING ENFORCEMENT ON
PRIVATE LAND**

PURPOSE OF THE REPORT

1. To highlight the Overview and Scrutiny Board's (OSB) findings, conclusions and recommendations on the subject of enforcement in relation to parking in privately operated car parks, and on private land, in Middlesbrough.

BACKGROUND

2. There are a number of sites in central Middlesbrough where parking is controlled via a fee paid to a private company, in a manner similar to a public car park.
3. At a meeting of The Executive in April 2014, the Mayor raised the issue of enforcement action in respect of such car parks. This followed a complaint from a member of the public who had received a penalty notice after parking in a private car park.
4. The subject was investigated as a short topic by the Overview and Scrutiny Board on 1 July 2014. A further meeting was held on 22 July 2014 to consider a draft final report. A Scrutiny Support Officer from Legal and Democratic Services co-ordinated and arranged the submission of written and oral evidence and arranged witnesses for the investigation. Meetings administration, including preparation of agenda and minutes, was undertaken by a Governance Officer from Legal and Democratic Services.
5. A record of discussions at the OSB meetings, including agenda, minutes and reports, is available from the Council's Egenda committee management system, which can be accessed via the Council's website at www.middlesbrough.gov.uk.

6. This report has been compiled on the basis of information submitted to the Overview and Scrutiny Board by the Council's Public Protection Operations Manager, who gave an overview of the topic and the associated issues that have been identified. It also uses information compiled by the Chair through informal meetings with the Council's Public Protection Operations Manager and Parking and Engineering Manager and other external research. The membership of the OSB was as follows:

Councillors NJ Walker (Chair) and Dryden, C Hobson, Junier, Mawston (Vice-Chair), McIntyre, P Purvis, Sanderson, P Sharrocks, M Thompson, JA Walker and Williams.

THE OVERVIEW AND SCRUTINY BOARD'S FINDINGS

7. Information is set out below under the following sub-headings:
 - Regulation and enforcement in respect of private car parks
 - Level of charges/penalties
 - The appeals process
 - Additional points raised by OSB
 - Action to date by Trading Standards Officers

Regulation and enforcement in respect of private car parks

8. The Secretary of State's Statutory Guidance to Local Authorities on the Enforcement of Parking Contraventions published in February 2008 stated that Civil Parking Enforcement introduced under the Traffic Management Act 2004 aimed to strike a balance between:
 - as much national consistency as possible, while allowing parking policies to suit local circumstances; and
 - a system that is fair to the motorist but also effective in enforcing parking regulations.
9. The way that local authorities operating Civil Parking Enforcement progress penalty charge notices (PCNs) - from what they contain, how they are served through appeal/payment to debt recovery in the case of non-payment - is laid down in regulations.
10. In contrast, parking enforcement on private land is unregulated and relies on the laws of contract and trespass. A driver who parks on private land/a private car park does so under a contract with the landowner. In order to discourage abuse of parking facilities, operators of private car parks can impose a charge on drivers who either do not pay or who overstay the time that they have paid for or are allowed to stay for free. This is generally through terms and conditions that are made known to the driver before parking and leaving their car. Signs are required to be displayed to highlight the terms and conditions. Essentially, the process relies on the motorist being deemed to have accepted the parking terms and sanctions if there is adequate signage.

11. There is no requirement to register such car parks and so no public record of where they exist in Middlesbrough.
12. In order to address long-term problems associated with parking on private land, enforcement measures were introduced via the Protection of Freedoms Act 2012. The Act banned the controversial practice of vehicle clamping on private land but recognised that landowners still have a right to recover fees from drivers who breach parking rules.
13. Private parking companies are therefore allowed access to Driver and Vehicle Licensing Agency (DVLA) records to trace vehicle keepers and hold the keeper liable for any parking charge.
14. Most infringements of parking conditions are now dealt with through the issue of parking (as opposed to penalty) charge notices. These notices are often very similar in appearance to local authority-issued penalty charge notices, leading the motorist to believe they represent a fine they are under a legal obligation to pay.
15. The parking charge notice will either be put on the offending vehicle, or the non-compliance will be detected by camera, with a parking notice sent by post to the vehicle keeper registered with the DVLA. This has led to extensive release of keeper details by the DVLA, accompanied by allegations of the use of coercive tactics to ensure payment. This has included the threat of bailiffs, escalating costs and impaired credit ratings.
16. Parking enforcement companies are only allowed access to DVLA information if they are members of an approved trade body. The British Parking Association (BPA) is currently the only trade body representing UK parking companies. The BPA's website includes the organisation's mission statement. This confirms that the BPA is a trade body that exists to represent the profession. The organisation is funded by annual membership fees that range from £154 to £5,925 plus VAT. There are currently 720 BPA members.
17. The BPA has published an Approved Operator Scheme Code of Practice for its members. Sanctions for breach of this code may include suspension or withdrawal of membership of the BPA. However, as the BPA is a professional organisation for the parking industry funded by its members, there have been allegations from consumer organisations (most recently BBC's Watchdog programme) around its failure to properly sanction its members following complaints from the public.

Level of charges/penalties

18. The penalty imposed on a motorist for breaching parking conditions depends on whether the transgression involves a Council-owned or private car park. In the case of local authority car parks operating Civil Parking Enforcement under the Traffic Management Act 2004, the Secretary of State for Transport regulates the levels of penalty charge. These are currently set at:

- a higher level of £70 (£35 discounted rate for prompt payment) for parking in places where it is always prohibited, for example in a disabled bay for a person who does not hold the required permit.
 - a lower level of £50 (£25 discounted rate for prompt payment) for less serious contraventions, such as overstaying in a car park.
19. Under the code of practice issued by BPA to private parking companies their penalty charge “....*must be based on the genuine pre-estimate of loss that you suffer. We would not expect this amount to be more than £100. If the charge is more than this, operators must be able to justify this amount in advance.*”
 20. It has been alleged that where a maximum fee is suggested this may become the norm, without a genuine calculation of the actual costs involved. The implication is that anything below £100 will not need to be justified and in fact in BPA guidance to its members it indicates that “*we consider £100 to be a fair and reasonable charge.*”
 21. Visits to private car parks in Middlesbrough by Trading Standards Officers and the Chair of OSB showed that such charges currently range from £60 to £100. An apparent anomaly has been highlighted in that the lower rates were found in the town centre where loss of income would be expected to be higher.
 22. It is a basic principle of contract law that the courts will not uphold penalties for breach of contract. Instead, as indicated earlier, these must be based on a genuine pre-estimate of loss without having to prove actual loss suffered.
 23. This means that costs to cover the issue of a ‘parking ticket’, staffing associated with enforcement and administration of fee collection etc. may be charged for in the calculation of pre-estimate of loss. However, costs, such as erection of signage or for the resurfacing/maintenance of car parks should not be included. On this issue, BPA guidance to its members advises that the pre-estimate of loss should include the “*limited additional administrative costs which occur as a result of the enforcement process.*” The BPA goes on to advise that other costs should be treated as general overheads and disregarded in the calculation of the charge. A recent case in Middlesbrough investigated by Trading Standards indicates this is not always adhered to.
 24. A further issue highlighted during OSB’s investigation relates to anomalies in respect of discounts for prompt payment of parking penalty charges. In the case of local authority car parks in Middlesbrough, a 50% discount applies for those who have used local authority car parks operating under Civil Parking Enforcement. However, the discount for prompt payment of a parking charge in respect of a private car park is 40% in accordance with the BPA Code of Practice.

The appeals process

25. Under an appeals procedure prescribed by a legal framework, motorists who wish to dispute a Council-issued penalty charge notice have the right of appeal to an independent Traffic Appeals Tribunal.
26. In respect of private car parks, The Protection of Freedoms Act requires members of an approved trade association to also offer appeals from aggrieved drivers to an independent body - Parking on Private Land Appeals (POPLA). POPLA is funded by the private car parking industry. The body does not charge motorists for making an appeal but they must first have made their case to the operator who issued the parking charge notice and have had the case rejected. POPLA can only consider appeals against parking charge notices issued by a member of the British Parking Association's Approved Operators Scheme. In the case of parking charges issued by a non-member, POPLA advises motorists to contact the issuer to enquire about options available.
27. Although POPLA's website includes a guide to motorists on the grounds of making an appeal. However this fails to mention the fact that the charge should be based on a genuine pre-estimate of loss and actually states in its guidance on appeals that the amount of a penalty charge cannot be used as grounds for appeal.
*"However, the fact that you think that the charge is excessive is **not** a valid ground of appeal"*
28. There has been criticism about the lack of independence of POPLA by motoring and consumer organisations. As a result, an Independent Scrutiny Board for Parking Appeals on Private Land met for the first time in February 2014. It is yet to be seen if this body will prove effective.
29. A further point of concern that has been highlighted relates to the impact on the discount for prompt payment in the case of an appeal. Where an appeal is made to POPLA, the full parking charge will always be due because the time for any early payment discount offered by the operator will have passed. This contrasts with many local authorities, including Middlesbrough Council's appeals process where the time limit for early payment is effectively extended until the outcome of an appeal is determined and a further short period of grace is allowed after the appeal. OSB notes that the authority has chosen to exercise discretion to apply these provisions.

Additional points raised by OSB

30. Additional points highlighted by Members of the Overview and Scrutiny Board during its consideration of this scrutiny topic were as follows:
 - a) The public is generally unaware of the differing payment/enforcement regimes between local authority and private car parks. Also, times where payment is required can differ significantly: Whereas Council car parks

generally charge until 6.00pm, some private car parks in Middlesbrough charge until 12.00 midnight.

- b) The Government sets maximum penalty charges and regulates the whole process of enforcement for Council-owned car parks. No such system exists for private car parks, where penalty charges can be double those of local authorities.
- c) The current Secretary of State for Communities and Local Government, Eric Pickles has frequently criticised local authorities for their approach to parking charges and enforcement. In a press release of 21 June 2014 the Minister has warned

“Over-zealous parking enforcement and unreasonable stealth fines by post undermine the high street, push up the cost of living and cost local authorities more in the long term”.

However he generally avoids mention of private car parks in such attacks where the penalties are invariably higher and the process of enforcement unregulated by government.

- d) The DVLA charges £2.50 for each electronic request for details. The BBC recently reported on 24 April 2014 that the number of electronic requests for personal details from the DVLA made by parking companies has gone up from 1,897,572 in 2012/13 to 2,430,130 in 2013/14. Figures suggest that the amount paid by the firms to the DVLA went up from £4,743,930 to £6,075,325. According to its most recent account the DVLA made a £10.3 million surplus on fees.
- e) Reference was made to one shopping parade in Middlesbrough that has seen a positive impact on trade because privately-enforced limited-stay parking has been introduced. This has freed parking spaces for shoppers. However OSB is not in any way challenging the practice of using parking regulation to free up car spaces for shoppers or visitors to local businesses as the Council has done in the town Centre, rather is examining the disparity between levels of penalties, appeals and enforcement procedures and practices.
- f) During the period 5 June 2011 to 5 June 2014 there were 25 complaints about car parking and clamping in Middlesbrough. The majority of these complaints concerned two companies. Complainants have also highlighted that communication by the companies can be poor, often with standard response letters being received that do not address the detailed queries raised by complainants. While OSB acknowledges that this level of complaints is fairly low, the view was expressed that this could be because motorists are generally unaware of issues such as rights of appeal. As such, there may be a tendency to simply acquiesce and pay the penalty charge concerned.

Action to date by Trading Standards Officers

31. The Overview and Scrutiny Board was advised that since the issue of private parking enforcement was first raised by the Mayor, and following discussions with the Chair of the Overview and Scrutiny Board, Trading Standards Officers have taken action on the subject.
32. The Public Protection Operations Manager wrote to one of the local operators that charges £100 for breaching its parking conditions to question their calculation of pre-estimate of loss. The operator responded to say that the charge is a genuine pre-estimate of loss and it is coincidental that this it is the same sum as the BPA maximum figure. However, the Overview and Scrutiny Board was advised that some of the items listed in the response letter from the parking company concerned should not be included in a calculation of pre-estimate of loss.
33. A similar letter is to be sent to a second Middlesbrough operator that charges £100, asking for their reasoning in arriving at this figure.
34. The Board was further advised that Trading Standards Officers are aware of a complaint sent to POPLA in connection with a parking charge levied at a private site in Middlesbrough in April 2014. This case is due for adjudication in July 2014. The complainant has specifically raised the issue of pre-estimate of loss and questioned the amount charged. Trading Standards are therefore awaiting the outcome of this case.
35. OSB supported the Public Protection Operations Manager proposed course of action to write to the BPA to highlight the issues that have been raised and to seek intervention. If the BPA response proves inadequate, or if further complaints are received, consideration will be given to serving a legal notice on the company/companies concerned requiring them to justify the costs charged.
36. OSB also supported the proposal for officers to consider how best the issues raised can be publicised to the motorist through the Council's website and via the Trading Standards Facebook page.

CONCLUSIONS

37. Having considered the submitted information, the Overview and Scrutiny Board reached the following conclusions:
 1. Motorists, especially those unfamiliar with the area cannot reasonably be expected to differentiate between varying penalties and charges in local authority and different private car parks. They are currently faced with a complex system with differing charges and levels of discount for early payment. These vary from discounted rates for overstaying, or failure to pay, of £25 in council car parks to more than double that sum at £60 in some private car parks. Despite the fact that such charges should represent a pre-estimate of loss - and should therefore represent the costs

incurred by the company in seeking and administering payment - some companies are charging the (pre-discount) maximum amount recommended by the British Parking Association of £100. The fact that some private companies charge only £60 suggests that genuine pre-estimate of losses may be less than £100. The Overview and Scrutiny Board's view is that these charges can amount to a disproportionately high 'fine' on the motorist.

2. Many motorists will simply pay the charge rather than risk higher costs by going through the appeals process. This has been found to be the case with examples followed up by Trading Standards Officers in Middlesbrough.
3. There appears to be a distrust of the appeals process operated by POPLA.
4. The British Parking Association (BPA) exists as a trade body to support its members. It is, therefore, not an independent adjudicator or ombudsman. Evidence suggests that member-companies that have breached the BPA's Code of Conduct have been dealt with in a manner that is less than robust. In this context, some parking companies in Middlesbrough appear to be breaching the BPA Code of Practice in that the maximum penalty charge is applied without proper regard to the principle of a genuine pre-estimate of loss. The lack of independence of the BPA, or any statutory regulations applying to private parking companies, fails to provide the protection for the motorist offered to those using local authority car parks. As the media has reported, nationally, parking control on private land at times appears to be an unregulated 'wild west' operation run by private companies with business models that appear to be based on generating income from drivers who default or fail to comply, rather than from effective management of a piece of land being operated as a car park, but who can access details of the registered keepers of vehicles.
5. Clarification/action is needed in respect of the following issues:
 - a) Whether penalties for contravention of conditions for parking in council owned car parks and private car parks should be the same.
 - b) Whether the percentage reduction for early payment of penalty charges should be the same for both private and local authority car parks.
 - c) Whether the clock should 'stop ticking' during the POPLA appeals process - ie to ensure that a discount for prompt payment also applies in the case of appeals relating to private car parks.
 - d) Whether there are grounds for private car parks to be independently regulated and their operators licensed.

- e) Whether there is a need for some form of scrutiny/accountability of the British Parking Association - at the moment the organisation regulates itself.
- f) Whether the Council can have any influence in areas where it operates as a landowner/landlord.

RECOMMENDATIONS

38. Following the submitted evidence, and based on the conclusions above, the Environment Scrutiny Panel's recommendations for consideration by the Overview and Scrutiny board and the Executive are as follows:
1. That The Executive calls on the Government to:
 - a) To protect the motorist and local economy by creating a 'level playing field' in respect of car parking enforcement, and so to introduce appropriate regulations relating to the conduct and licensing of private car park operators who are entitled to access records from the DVLA. This could be funded from the charge made by the DVLA when supplying such information.
 - b) In the interests of consistency and fairness, use national statutory limits for penalties and discounts that currently apply to local authorities in respect of all car parks, irrespective of whether they belong to local authorities or private operators.
 - c) Introduce a statutory appeals process to be followed by POPLA, or appropriate body that involves mandatory suspension of the higher penalty charge while the appeal process is followed, together with a short period of grace to pay the discounted amount following an unsuccessful appeal.
 2. That the Council considers whether action is necessary, and could be taken, to regulate private parking companies operating on Council-owned land in any future leases.
39. The Overview and Scrutiny Board is grateful to the following officers, who submitted evidence/information during the course of this investigation:
- J Wells - Public Protection Operations Manager, Middlesbrough Council.
 - S Webster - Group Leader - Parking and Traffic Regulation, Middlesbrough Council.

BACKGROUND AND REFERENCE MATERIAL

40. The following sources were consulted or referred to in preparing this report:
- Report to Overview and Scrutiny Board - 1 July 2014.
 - British Parking Association website
 - DCLG Press Release June 2014

- This is Money website
- Traffic Management Act 2004
- Secretary of State's Statutory Guidance to Local Authorities on the Enforcement of Parking Contraventions - February 2008
- British Parking Association (BPA) Approved Operator Scheme Code of Practice
- BPA Guide to Members-Parking Management on Private Land
- POPLA document 'Your opportunity to appeal against a parking charge notice'
- Middlesbrough Council Website
- BBC website
- AA website
- BBC 'Watchdog' - June 11 2014
- National Motorists Action Group (NMAG) website

COUNCILLOR NICKY WALKER

CHAIR OF OVERVIEW AND SCRUTINY BOARD

8 July 2014

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