

PRIVATE SECTOR HOUSING FEES AND CHARGES – CIVIL PENALTIES

Cabinet Member: Cllr Ray Stanley
Responsible Officer: Simon Newcombe, Public Health and Professional Services Manager

Reason for Report: To update members with the proposed civil penalty fines for Housing Act 2004 offences as an alternative to prosecution, as discussed in the fees and charges paper of 14th March 2017.

RECOMMENDATION(S): That the PDG recommend that Cabinet approve the proposed civil penalties approach and fines as set out in this report.

Relationship to the Corporate Plan: Enforcement activity undertaken by the Private Sector Housing team contributes to the corporate plan in the ways described below. Introducing civil penalties is another tool to help the team ensure compliance within the sector as follows:

Economy - Improving and regenerating our town centres

- *Ensuring that flats over shops are promoted and safe for occupation, and*
- *Inspecting and regulating houses in multiple occupation that are often found in town centres.*

Homes – Facilitating the housing growth that Mid Devon needs, including affordable homes

- *Working with landlords to improve housing conditions across the private rented sector*
- *Bringing empty homes back into use across the various tenures including private rented, affordable rent and home ownership.*

Community - Promote physical activity, health and wellbeing

- *Working to improve health inequalities by ensuring the private housing sector is safe to live in and does not adversely affect health and wellbeing.*
- *Enforcing standards within houses in multiple occupation to ensure that residents residing in these properties are protected from harm.*

Environment – Reduce our carbon footprint

- *Ensuring that rented accommodation meets minimum government energy efficiency requirements.*

Financial Implications: Income received from a civil penalty is retained by the Council and can only be used towards the statutory functions in relation to its enforcement of standards in the private rented sector. The Council may also apply for costs and expenses incurred in relation to the enforcement action and this provision is already set-out in the adopted enforcement policy for the service (Public Health Services Enforcement Policy August 2016).

Any income generated from this activity is unpredictable based on the nature of enforcement action. It is therefore not possible to forecast any income levels for the year.

Legal Implications: The ability to use civil penalties as an alternative to prosecution has been introduced through the Housing and Planning Act 2016 section 126 and schedule 9, which has made amendments to the Housing Act 2004. The Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017 came into force on 6th April 2017 with statutory guidance being issued after this date. The Council is expected to develop and document its policy on when to use a civil penalty. More information is contained in the report.

Risk Assessment: There are no major risks. Failure to agree the civil penalties and have an appropriate policy in place means the Council will be unable to issue civil penalties.

Equality Impact Assessment: A full equality impact assessment has not been undertaken; however the Department for Communities and Local Government has carried out an impact assessment on these new powers. If the Council implements the civil penalty then each case will be considered on a case by case basis taking account of the impact on the individual and any relevant protected characteristics (age, disability, gender reassignment, pregnancy and maternity, race, religion or belief and sex).

1.0 Legal basis and scope

1.1 Section 126 and schedule 9 of the Housing and Planning Act 2016 came into force on the 6th April 2017. These provisions give the Council as the local housing authority the power to issue a financial penalty for certain Housing Act 2004 offences after the 6th April 2017 as an alternative to prosecution.

1.2 The offences include:

- Failing to comply with an Improvement Notice (section 30)
- Offences in relation to licensing of Houses in Multiple Occupation (section 72)

- Offences in relation to licensing of houses under part 3 of the Act (selective Licensing) (section 95)
- Offences in relation to the contravention of an overcrowding notice (section 139)
- Failure to comply with management regulations in respect of House in Multiple Occupation (section 234)

1.3 A civil penalty can only be imposed as an alternative to prosecution. The legislation does not permit the Council to impose a civil penalty and prosecute for the same offence. If a person has been convicted or is currently being prosecuted the Council cannot impose a civil penalty in respect of the same offence. Similarly, if a civil penalty has been imposed, a person cannot then be convicted of an offence for the same conduct.

2.0 **Policy approach and decision-making**

2.1 The Council is required to have a policy in place that details when to prosecute and when to consider a civil penalty. This is partially covered by the existing Public Health Services Enforcement Policy and Appendix G (Supplementary Enforcement Policy Issues - Private Sector Housing) of the policy will be updated to provide more detail as set out herein.

2.2 In line with the Enforcement Policy and the formal guidance on civil penalties under the Housing and Planning Act (DCLG April 2017) then prosecution may be the most appropriate option where an offence is particularly serious or where the offender has committed similar offences in the past. However, that does not mean civil penalties should not be used in cases where serious offences have been committed. As set out below, a civil penalty of up to £30,000 can be imposed where a serious offence has been committed and the Council may decide that a significant financial penalty (or penalties if there have been several breaches), rather than prosecution, is the most appropriate and effective sanction in a particular case.

2.3 The decision on whether to use civil penalty powers (and to what extent) or to seek a prosecution will be made the by service manager or director in conjunction with legal services.

2.4 Where the Council decides to prosecute, it should consider the scope for working together with other local housing authorities where a landlord has committed breaches in more than one local authority area.

2.5 Overall, each case will be considered on an individual basis, however the principles in determining the form of action will be:

- What outcome are we trying to achieve – e.g. set an example, get the works done or a deterrent to committing future offences (a civil penalty will not be in the public domain unlike a prosecution).
- Severity of the offence – is prosecution a better option based on the significance of the offence and the impact it has had.
- Type of property and its occupiers – are the occupiers particularly vulnerable.

2.6 Where the civil penalty is considered the most appropriate course of action the council must provide guidance on how the fine levels will be set. Section 6 of this report provides a proposed fine setting methodology; each case will need to be assessed on an individual basis using this framework as a guide.

3.0 **Burden of proof**

3.1 The same criminal burden of proof is required for a civil penalty as for a prosecution. This means that before formal action is taken the Council must be satisfied that if there was a prosecution there would be a realistic prospect of conviction.

3.2 The Council must determine beyond reasonable doubt that the offence has been committed and this evidence would be required if an appeal is made against the civil penalty.

3.3 As also outlined in the service Enforcement Policy, the local authority must also consult the Crown Prosecution Service code for Crown Prosecutors when determining whether to take action. There are two stages to this code:

- The evidential stage, and
- The public interest stage.

4.0 **Procedure and appeals**

4.1 The procedure for imposing a civil penalty is set out at Schedule 13A of the Housing Act 2004 and summarised in the DCLG guidance. There is no scope for the Council to deviate from this procedure and therefore it is not duplicated for the purposes of this report.

4.2 At any time, if circumstances dictate, the Council may withdraw a notice or reduce the amount specified in a notice in relation to a civil penalty.

4.3 A landlord receiving the final notice of a civil penalty may appeal to the First-tier Tribunal against the decision to impose a penalty or the penalty amount.

The appeal has the effect of suspending the notice and requirement to pay until determined.

5.0 Enforcement and other consequences

- 5.1 Where the landlord or property agent fails to pay a civil penalty, the Council should refer the case to the county court for an Order of that Court. If necessary, the Council should use county court bailiffs to enforce the order and recover the debt.
- 5.2 The Council's powers to carry out works in default under the Housing Act 2004 are unaffected by the civil penalty provisions.
- 5.3 If a landlord receives a civil penalty, that fact can be taken into account if considering whether the landlord is a fit and proper person to be the licence holder for a House in Multiple Occupation (HMO) or any other property subject to licensing.
- 5.4 Where a landlord receives two or more civil penalties over a 12 month period, the Council will include that person's details in the database of rogue landlords and property agents. While it is not compulsory requirement, under the DCLG guidance Councils are strongly encouraged to do so. This will help ensure that other Councils are made aware that formal action has been taken against the landlord.
- 5.5 The establishment of a national rogue landlords and property agents database is a new requirement on the Government brought in by the Housing and Planning Act 2016 and any entry must be maintained for at least 2-years. It is the responsibility of local authorities to manage the information on the database and ensure it is current.

6.0 Proposed Civil Penalties

- 6.1 In setting a civil penalty level the Council should consider the following factors:
 - Severity of the offence
 - Culpability and track record of the offender
 - The harm caused to the tenant
 - Proportionate punishment of the offender
 - Deter the offender from repeating the offence
 - Deter others from committing similar offences.
 - Remove any financial benefit the offender may have obtained as a result of committing the offence.

- Assessment of assets and income

6.2 Determining the offence category – Culpability

- **Deliberate**– An intentional breach by a landlord or property agent or flagrant disregard for the law. For example, by failing to comply with a notice or regulations.
- **Reckless**– An actual foresight of, or wilful blindness to the risk of offending, but decides to take the risk nevertheless. For example, failing to comply with a strict liability in the HMO regulations.
- **Negligent**– The failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding the offence. For example, partial compliance with a schedule of work to an enforcement notice but failure to fully comply with all schedule items.
- **Low or no culpability**– The offence committed has some fault on the part of the landlord or property agent but there are other circumstances for example obstruction by the tenant to allow a contractor access for repairs, or damage caused by tenant negligence.

6.3 Determining the level of fine – Severity

- **Level one** – Major impact – Serious and substantial risk, including imminent risk, to the health and safety of the occupiers and/or community as a result of the offence, with potentially life threatening results or loss of major limbs. Housing defects that may present such a risk maybe associated with electrical hazards, carbon monoxide exposure, fire safety risks, risk of explosion or structural collapse, exposure to asbestos or radiation. This is not an exhaustive list and also includes property management failings that could lead to a major risk to the occupiers/neighbours and/or community. Where the risk has been realised the fine is likely to be greater or there may be a decision to prosecute as an alternative.
- **Level two** - Serious Impact – Serious risks to the health and safety of the occupiers and/or immediate neighbours, leading to serious injury or disease requiring prolonged treatment and/or hospital admission. Housing defects that may present such a risk maybe associated with falls, lack of heating, collision and entrapment, any other hazards or management issues that could lead to a serious risk to the occupiers and immediate neighbours.

- **Level three** – Minor impact – Risk of injury or disease to the occupiers resulting in treatment at the doctors. Examples of housing defects that could present such a risk include damp, mould or hygiene issues and any other hazards or management issues that could lead to a risk to the occupiers.

6.4 The table below provides an indication of the level of fine that is likely to be appropriate. As part of the considerations mentioned in 6.1 above, the Council should assess of the assets including any income of the landlord or letting agent. £30,000 is the maximum level of fine permitted under the legislation.

6.5 In order for officers and landlords to understand how this assessment could work, the asset assessment has been based on the number of properties either being managed or owned by the landlord or agent. This table provides a guide to setting the fine, however the Council should also make an assessment on all assets and income and not just rental income.

Civil Penalties – Guidance on level of fine

Type of landlord/agent	Category of offence	Starting point for level 1 – Major impact	Starting point for penalty Level 2 – Serious impact	Starting point for penalty Level 3 – Minor impact
Landlord/Property agent with 1-10 properties	Deliberate	£12,500	£10,000	£7,500
	Reckless	£6,500	£5,000	£3,500
	Negligent	£3,000	£2,500	£1,500
	Low culpability	£1,250	£1,000	£750
Landlord/Property agent with 11 – 30 properties	Deliberate	£22,500	£20,000	£17,500
	Reckless	£17,500	£15,000	£12,500
	Negligent	£12,500	£10,000	£7,500
	Low culpability	£7,500	£5,000	£2,500
Landlord/Property agent with 31+ properties	Deliberate	£30,000	£25,000	£22,500
	Reckless	£22,500	£20,000	£17,500
	Negligent	£17,500	£15,000	£12,500
	Low culpability	£12,500	£10,000	£7,500

7.0 Summary

- 7.1 This report sets out the criteria for using a civil penalty as an alternative to prosecution and the methodology to be used in setting civil penalty fines.

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Circulation of the Report:

Members of the Homes Policy Development Group
Cabinet Member with responsibility for Housing (Cllr Ray Stanley)
Leadership Team

List of Background Papers:

Housing and Planning Act 2016
<http://www.legislation.gov.uk/ukpga/2016/22/contents>

The Rent Repayment Orders and Financial Penalties (Amounts Recovered) (England) Regulations 2017
<http://www.legislation.gov.uk/uksi/2017/367/contents/made>

Civil penalties under the Housing and Planning Act 2016 – Guidance for Local Housing Authorities (Department for Communities and Local Government)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606653/Civil_Penalties_guidance.pdf

Public Health Services Enforcement Policy (August 2016)
<https://www.middevon.gov.uk/residents/public-health/public-health-enforcement-policy/>