

***Tendring***  
***District Council***



# **Private Sector Housing Enforcement Policy**

**For  
Civil Penalties  
Under  
The Housing and Planning Act 2016**

**July 2018**

## **Contents**

- 1. Introduction and Policy Statement**
- 2. The Housing & Planning Act 2016 and Government Guidance**
- 3. Determining the Appropriate Sanction**
- 4. Procedure**
- 5. Determining the Level of the Civil Penalties**

## **SECTION 1 - INTRODUCTION AND POLICY STATEMENT**

### **From The Council's Portfolio Holder for Housing – Cllr P Honeywood**

- 1.1 Tendring District Council is committed to raising standards in the private rented sector, ensuring that residents of the district are provided with accommodation that is free from hazards that could adversely affect their health and safety, whilst making sure that the said accommodation is suitably managed and maintained for those occupying it.
- 1.2 We aim to focus our resources to take action against landlords who rent out properties that are in a substandard condition, and where necessary take formal enforcement action to ensure these landlords are prevented from continuing to flout the law. Formal enforcement action will also be taken against landlords who have failed to licence their properties and made financial gain as part of their non-compliance.
- 1.3 It is Tendring District Council's view that the non-compliant landlords in the district should bear the cost of enforcement action and be punished accordingly, and not the good landlords who continue to provide decent affordable accommodation for their tenants and who work with the Council to ensure these standards are maintained.
- 1.4 The Council is committed to implementing the new powers under the Housing & Planning Act 2016 to ensure good quality, safe and affordable private rented accommodation is available to residents of our district.
- 1.5 The new powers include the following measures that will allow Council's to focus their enforcement action against irresponsible landlords:
  - Civil Penalties of up to £ 30,000.00 for non-compliance instead of prosecution, if it is beyond reasonable doubt that an offence has been committed.
  - Extension of Rent Repayment Orders that cover Illegal Evictions, breach of Banning Orders and failure to comply with offences under Part 1-4 of the Housing Act 2004 and Management Regulations for Houses in Multiple Occupation (HMOs).
  - To include irresponsible or non-compliant landlords & property agents on a database of rogue landlords when convicted of certain offences or those who have been in receipt of multiple Civil Penalties.
  - Banning Orders for prolific offenders.
- 1.6 The overriding principle when considering civil penalties is that the landlord (as defined by the 2004 Act) should not have made any financial gain as a result of their failure to comply with the legislation.
- 1.7 This policy should be read in conjunction with the Council's Corporate Enforcement Strategy, existing Private Sector Housing Enforcement Policy and the Civil Penalties under the Housing and Planning Act 2016, statutory guidance for Local Authorities published in April 2018 by the Ministry of Housing, Communities and Local Government.



Signed.....

Cllr Paul Honeywood – Housing Portfolio Holder

## **SECTION 2 - THE HOUSING & PLANNING ACT 2016 AND GOVERNMENT GUIDANCE**

- 2.1 Schedule 9 of the Housing and Planning Act 2016 (“the 2016 Act”) amended the Housing Act 2004 (“the 2004 Act”) and has introduced new powers for Councils to impose financial penalties as an alternative to prosecution for certain offences under the 2004 Act.
- 2.2 Civil Penalties are now an alternative to prosecution when a landlord fails to comply with the following offences/breaches under the 2004 Act:
- Section 30 – failure to comply with an Improvement Notice
  - Section 72 – offences relating to the mandatory licensing of Houses in Multiple Occupation (HMO’s)
  - Section 95 – offences in relation to the licensing of HMO’s under Part 3 of the Act
  - Section 139 – failure to comply with an overcrowding notice
  - Section 234 – breach of management regulations in respect of HMO’s (A Civil Penalty can be imposed for each separate breach of the Regulations) Plus:
  - Section 21 of the Housing and Planning Act 2016 - breach of a banning order
- 2.3 The Government’s guidance published by the Ministry of Housing, Communities & Local Government entitled “Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities” is statutory guidance, to which local housing authorities must have regard. The statutory guidance recommends certain factors a local authority should take into account when deciding on the level of civil financial penalty and further recommends that local authorities develop and document their own policy on determining the appropriate level of financial penalty in a particular case.
- 2.4 The statutory guidance indicates that a Council should ensure that the Civil Penalty acts as a punishment, takes into account any previous patterns of offending and that no offender should benefit as a result of committing the offence.
- 2.5 The law allows a maximum financial penalty of £30,000.00 per offence. In determining the appropriate level of penalty a Council will have a wide discretion in regard to the circumstances and the Council’s policy seeks to set out further guidance in this regard.

## **SECTION 3 - DETERMINING THE APPROPRIATE SANCTION**

### **What is the Burden of Proof for a Civil Penalty?**

- 3.1 The proof is the same as set out previously for offences under the 2004 Act. For a criminal prosecution the Council must satisfy itself that it can show beyond reasonable doubt that the landlord has committed the offence and that if heard in a magistrates' court there would be a realistic prospect of conviction.
- 3.2 The Council will have consideration of the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions when considering whether there is sufficient evidence to secure a conviction.

The Code has two stages: (i) the evidential stage and (ii) the public interest stage. The Council will consider:

- Does it have sufficient evidence to prove beyond reasonable doubt that an offence has been committed by the landlord?
  - Is there a public interest in imposing a Civil Penalty on the landlord in respect of the offence?
  - Has the Council taken into account its own Enforcement Policy when deciding to impose a Civil Penalty including the alternative option of prosecuting for the offence?
- 3.3 Legal advice should be sought on the strength of the evidence and the public interest test, if the Private Sector Housing Team have any doubts.
  - 3.4 All decisions as to determining whether or not to pursue a civil remedy will be in accordance with the Enforcement Policy covering Private Sector Housing:

### **Private Sector Enforcement Policy**

All enforcement action will have regard to the Private Sector Housing Enforcement Policy and will be:

- **Appropriate** – Where possible the Council's Private Sector Housing Team will work with landlord's to achieve the desired outcome having regard for tenant's health and well-being, and take into account its legal duty at all times.
- **Fair** – The Private Sector Housing Team will take into account all parties involved when deciding on the most satisfactory course of action and look at the facts of the case that are readily available. Officers will be impartial and decide on the action for the best of those involved including the Council itself.
- **Proportionate** – The Council's approach will take into account severity of the offence, the nature of the breach and the previous record of any offender before deciding on the course of action warranted.
- **Consistent** – The Private Sector Housing Team will endeavour to be consistent in their approach to every case and take the relevant action based on

experience, professional judgement and in accordance with legislative requirements.

- **Transparent** – Officers of the Council will be impartial and work in accordance with this and existing policies and all parties will be informed in writing of any potential action that is being taken by the Council in a clearly defined manner. Officers will offer further advice and assistance where necessary to anyone that is part of the process of the enforcement action taken.

**3.5** The Council will have regard for the following factors to ensure the level of fine is set correctly:

**(a) Severity of Offence:**

The more serious the offence, the higher the penalty should be.

**(b) Culpability and Track Record of the Offender:**

A landlord's previous history of compliance will be taken into account and ignorance of the law is not a defence to protecting their tenant's health, safety and wellbeing. A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or they knew, or ought to have known, that they were in breach of their legal responsibilities. Landlords are running a business and should be expected to be aware of their legal obligations.

**(c) The harm caused to the tenant or potential for harm:**

This is a very important factor when determining the level of the penalty. The greater the harm or potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a Civil Penalty. The Council will use the existing Classes of Harm as set out under Part 1 of The Housing Act 2004 – The Housing, Health & Safety Rating System (HHSRS).

**(d) Punishment of the offender (Civil Penalty or prosecution):**

A Civil Penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect the severity of the offence and whether there is a pattern of previous offending, it is important that it is set at a high enough level to ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities. Each case will be considered on its merits and the action to be taken will be decided accordingly.

**(e) Deter the offender from repeating and committing further offences:**

The ultimate goal is to prevent any further offending and help ensure that the landlord fully complies with all of their legal responsibilities in future. The level of

the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

**(f) Consistency in Approach and deterring others from committing similar offences:**

While the fact that someone has received a Civil Penalty will not automatically be in the public domain, it is possible that other landlords in the local area will become aware through informal channels when someone has received a Civil Penalty. An important part of deterrence is the realisation that (a) the local housing authority is committed to improve housing standards in the private rented sector and proactive in levying civil penalties where the need to do so exists and (b) that the Civil Penalty will be set at a high enough level to both punish the offender and deter repeat offending. A consistent approach in the issuing of Civil Penalties is necessary to deter the offender in question or others from committing the same or similar offences.

**(g) Financial Gain – remove any financial benefit the offender may have obtained as a result of committing the offence**

The guiding principle here should be to ensure that the offender does not benefit as a result of committing an offence, i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed. When serving a Civil Penalty, any benefit the offender has made as a result of their action will be taken into account. The level of the Civil Penalty will be higher the more financial gain has been made by the landlord to punish and deter repeat offending.

### **Recording the Decision**

- 3.6 The officer making a decision to impose a financial penalty will record their decision in writing giving reasons for issuing the Civil Penalty and assessing the appropriate amount of financial penalty that will be imposed. There is no requirement to publish the decision but it must be retained on the file.

## **SECTION 4 – THE PROCEDURE**

### **4.1 Notice of Intent**

Before issuing a Civil Penalty the Council must be satisfied that if the case were to be prosecuted in court that there would be a realistic chance of conviction (section 3.2 above). The Council must initially give the individual in question a Notice of Intent that it is going to impose a financial penalty. The Notice of Intent must be given no later than 6 months after the authority has sufficient evidence of the conduct to which the penalty relates, or any time when the conduct is continuing. The Notice of Intent must set out the following:

- The amount of proposed financial penalty
- The reasons for proposing to impose the penalty; and
- Information about the right of the landlord to make representations

Representations must be made within 28 days from when the notice was issued. Following the end of the 28 day period for representations, the Council must decide whether to issue the penalty or cease action.

### **4.2 Final Notice**

If the Council decides to proceed with the Civil Penalty, it must give the individual a notice (Final Notice) requiring that the penalty is paid within 28 days. The Final Notice must set out:

- The amount of the financial penalty
- The reasons for imposing the penalty
- Information on how to pay the penalty
- The period for payment of the penalty (28 days)
- Information about the right to appeal; and
- The consequences of failure to comply with the notice

As part of the process, the Council may at any time withdraw the Notice of Intent or Final Notice; or reduce the amount specified in the Notice of Intent or Final Notice.

### **4.3 Appeal**

The individual on who the penalty was imposed then has the opportunity to appeal the Final Notice to the First Tier Tribunal against:

- The decision to impose a penalty; or
- The amount of penalty

If an appeal is lodged, the Final Notice is suspended until the appeal is determined or withdrawn. The tribunal will confirm, vary, increase / reduce the size of the penalty or cancel the Civil Penalty.

## **SECTION 5 - DETERMINING THE LEVEL OF THE CIVIL PENALTIES**

### **5.1 Calculating the Level of Fine**

Civil Penalties of up to £30,000.00 can be imposed for the most serious offences where irresponsible or rogue landlords have committed similar or other offences in the past. The Council can choose this course of action if they believe that a financial penalty would have more of a disruptive effect and ensure that further breaches are not committed in the future. The Council should also take into account the landlords assets and income (not just rental income) when determining the appropriate level of penalty. Any Civil Penalty must be fair and proportionate but in all instances, act as a deterrent and remove any gain as a result of the offence.

### **5.2 Relevant Factors for Deciding Level of Fine**

The following factors will be taken into account when setting the level of Civil Penalty (*see section 3 for more detail on each heading*):

- The severity of the offence
- The culpability and track record of the offender
- The harm caused to the tenant
- The punishment of the offender
- Whether it will deter the offender from repeating the offence
- Whether it will deter others from committing the offence
- Whether it will remove any financial benefit the offender may have obtained as a result of committing the offence

When deciding on the level of Civil Penalty the Council will have regard to the cost of investigating the offence and preparing the case for formal action along with costs it is likely to incur as part of any appeal to the First Tier Tribunal.

### **5.3 Financial Matrices for Civil Penalties**

The decision to issue a Civil Penalty must have regard for the aforementioned culpability factors and the seriousness of a potential harm outcome (factor) following an (HHSRS Assessment). The Housing Health and Safety Rating System (HHSRS), was introduced under The Housing Act 2004 (Part 1) as the assessment tool to be used when inspecting dwellings, and takes into account potential risks to health and safety of any occupier or potential visitor from any deficiencies identified. The assessment looks at 29 hazards and is founded on the logical evaluation of both the

likelihood of an occurrence that could cause harm, and the probable severity of the outcome of such an occurrence.

**(a) Severity of Offence and Culpability Table (following HHSRS Assessment)**

| <b>SEVERITY OF OFFENCE FACTORS</b>   | <b>CULPABILITY</b> |
|--|--------------------|
| Serious breach of legislation  | Very High          |
| History of failing to comply with legislation  | High               |
| A breach of legislation with capacity to cause a more severe harm outcome if left unattended | Medium             |
| Insufficient effort made to comply   | Medium             |
| Minor offence in isolation   | Low                |

**(b) Harm Factors and Category Table (following HHSRS Assessment)**

| <b>HARM OUTCOME</b>   | <b>HARM CATEGORY</b> |
|---|----------------------|
| Serious adverse effect on individual or high risk of serious adverse effect. Vulnerable people taken into account | Category 1           |
| Adverse effect but less than above. Medium risk of adverse effect, or low risk but of serious effect.             | Category 2           |
| Low risk of adverse effect.   | Category 3           |

**(c) Culpability & Harm Category Table**

The table below determines the initial score of the offence by considering culpability and harm, which will be used to the level of the Civil Penalty fine to be imposed.

| <b>Culpability</b> | <b>Harm Cat 1</b> | <b>Harm Cat 2</b> | <b>Harm Cat 3</b> |
|--------------------|-------------------|-------------------|-------------------|
| Very High          | 6                 | 5                 | 4                 |
| High               | 5                 | 4                 | 3                 |
| Medium             | 4                 | 3                 | 2                 |
| Low                | 3                 | 2                 | 1                 |

**(d) Criminal Justice Act 1982 – Standard Scale**

The Standard Scale has been used to provide a scale of Civil Penalty against each point to determine the **initial level** of Civil Penalty fine to be imposed.

| <b>Score</b> | <b>Level of Civil Penalty £</b> |
|--------------|---------------------------------|
| <b>1</b>     | 1 – 500                         |
| <b>2</b>     | 501 – 1000                      |
| <b>3</b>     | 1001 – 2500                     |
| <b>4</b>     | 2501 – 7000                     |
| <b>5</b>     | 7001 – 17000                    |
| <b>6</b>     | 17001 – 30000                   |

## **(e) Adjustments to the initial determination**

In order to determine **the final penalty** the Council will consider both the aggravating and mitigating factors in each case. These will adjust the initial level of the penalty based on these factors and set the final penalty.

Below is a list of both aggravating and mitigation factors which will be considered as part of the determination. The list is not exhaustive and other factors may be considered depending upon the circumstances of each case.

### **(i) Factors that Increase Seriousness**

#### **o Statutory Aggravating Factors:**

Previous convictions, having regard to

- The nature of the offence to which the conviction relates and its relevance to the current offence; and
- The time that has elapsed since the conviction

#### **o Other Aggravating Factors include:**

- Motivated by Financial Gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact
- Obstruction of justice
- Record of providing sub-standard accommodation
- Record of poor management or not meeting legal requirements
- Refusal of free advice or training
- Member of Accreditation scheme (knowingly committed an offence)

### **(ii) Factors reducing seriousness or reflecting personal mitigation**

- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which would normally be expected
- Good record of maintaining property
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Mental disorder or learning difficulties, where linked to the commission of the offence
- Serious medical conditions requiring urgent, intensive or long term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

#### **5.4 Civil Penalties and Housing Standards**

The income received from the enforcement of Civil Penalties will be retained and used to carry out further enforcement action across the private rented sector in the district. This will increase standards across the sector and provide our residents with better homes in which to live.