



Derby City Council

Housing and Urban Renewal Cabinet
Member Meeting
11 October 2017

ITEM 7

Report of the Strategic Director for
Communities and Place

Civil penalties as an Alternative to Prosecution under the Housing and Planning Act 2016

SUMMARY

1.1 The Housing and Planning Act 2016 introduced civil penalties of up to £30,000 from 6 April 2017 as an alternative to prosecution for certain offences under the Housing Act 2004.

1.2 These are:

- Section 30 (failure to comply with an Improvement Notice) <http://www.legislation.gov.uk/ukpga/2004/34/section/30>
- Section 72 (offences in relation to licensing of HMOs) <http://www.legislation.gov.uk/ukpga/2004/34/section/72>
- Section 95 (offences in relation to licensing of houses under Part 3 (Selective Licensing) <http://www.legislation.gov.uk/ukpga/2004/34/section/95>
- Section 139(7) (failure to comply with an overcrowding notice for a non-licensable HMO) <http://www.legislation.gov.uk/ukpga/2004/34/section/139>
- Section 234 (breach of Management Regulations in respect of an HMO) <http://www.legislation.gov.uk/ukpga/2004/34/section/234>

A new Schedule 13A has also been inserted into the 2004 Act which prescribes the procedures that the Council must follow before imposing a financial penalty, for imposing the penalty, the appeal process and the procedure for recovery of the penalty.

1.3 The power to impose a civil penalty as an alternative to prosecution for these offences was introduced by section 126 and Schedule 9 of the Housing and Planning Act 2016.

1.4 In determining the civil penalty amount, regard shall be taken of the statutory guidance issued under schedule 9 of the Housing and Planning Act 2016.

1.5 The criminal burden of proof, that is 'beyond all reasonable doubt', must be satisfied before a civil penalty can be issued as an alternative to prosecution. The Council must satisfy itself that there would be a realistic prospect of conviction, given the evidence available.

1.6 Income received from a civil penalty can be retained by the Council provided that it is used to further the Council's statutory functions in relation to their enforcement activities covering the private rented sector, as specified in Regulations. <http://www.legislation.gov.uk/uksi/2017/367/regulation/4/made>

RECOMMENDATION

- 2.1 To endorse the use of civil penalties as an alternative to prosecution for certain offences under the Housing Act 2004.
- 2.2 To endorse the process for determining the level of penalty set out at Appendix 2.

REASONS FOR RECOMMENDATION

- 3.1 To enable the Housing Standards Team to more effectively deal with rogue landlords operating in the City

SUPPORTING INFORMATION

4.1 Government Guidance

The Government's Department for Communities and Local Government (DCLG) have published the following document: "Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities"

<https://www.gov.uk/government/publications/civil-penalties-under-the-housing-and-planning-act-2016>

This is statutory guidance to which local housing authorities must have regard. This guidance recommends certain factors a local authority should take into account when deciding on the level of a civil financial penalty and further recommends that local authorities develop and document their own guidance on determining the appropriate level of financial penalty in a particular case.

- 4.2 In accordance with the new section 249A (4) of the 2004 Act, the amount of a financial penalty is to be determined by the Council. Although the statutory guidance recommends factors a local authority should take into account when deciding on the level of penalty, it does not go into any level of detail in this regard. The Council therefore has discretion in determining the appropriate level of civil penalty in a particular case.

4.3 Guidance for officers.

Appendix 2 gives guidance to officers in the Housing Standards Team on how to make decisions on the level of a financial penalty under the 2016 Act. In developing this guidance, regard was taken of certain parts of the 'Magistrates' Court Sentencing Guidelines' and discussions were also held with neighbouring Local Authorities.

In the interests of transparency and openness, the detail of this guidance will be presented at landlord meetings to be held in the near future.

The guidance will be under constant review and amendments will be made as and when appropriate.

OTHER OPTIONS CONSIDERED

5.1 None – not applicable

This report has been approved by the following officers:

Legal officer Financial officer Human Resources officer Estates/Property officer Service Director(s) Other(s)	Lucie Keeler Amanda Fletcher Michael Kay
For more information contact: Background papers: List of appendices:	Rob Rylott 01332 642366 rob.rylott@derby.gov.uk “Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities” - https://www.gov.uk/government/publications/civil-penalties-under-the-housing-and-planning-act-2016 Appendix 1 - Implications Appendix 2 - Process for determining the level of penalty

IMPLICATIONS

Financial and Value for Money

- 1.1 Penalty charge receipts will be returned to the Housing Standards budget.

Legal

- 2.1 The support of Legal Services will be required in confirming that sufficient evidence is available before officers' in the Housing Standards Team impose penalty charges. Their support will also be required in the event of an appeal to a First Tier Tribunal.

Personnel

- 3.1 None arising out of this report

IT

- 4.1 None arising out of this report

Equalities Impact

- 5.1 None arising out of this report

Health and Safety

- 6.1 None arising out of this report

Environmental Sustainability

- 7.1 None arising out of this report

Property and Asset Management

- 8.1 None arising out of this report

Risk Management and Safeguarding

- 9.1 None arising out of this report

Corporate objectives and priorities for change

- 10.1 Enforcement of housing standards in the private rented sector contributes to the Councils objective of protecting the health, safety and wellbeing of the public by ensuring safe and decent housing standards. The use of civil penalties will significantly assist the Housing Standards Team in driving out, or turning round the behaviour of, rogue landlords.

Process for determining the level of a civil penalty for offences under the Housing Act 2004

Guidance for Housing Standards Staff: 2017-18

Step 1: Determining the level of harm

The highest level of harm that may be caused to occupiers of the dwelling, because of the offence is determined; the table below is used in this context.

Level of harm	Examples of harm that may be caused because of the offence
Very high	Death from any cause; lung cancer; mesothelioma and other malignant lung tumours; permanent paralysis below the neck; regular severe pneumonia; permanent loss of consciousness; 80% burn injuries.
High	Cardio-respiratory disease; asthma; non-malignant respiratory diseases; lead poisoning; anaphylactic shock; cryptosporidiosis; legionnaires disease; myocardial infarction; mild stroke; chronic confusion; regular severe fever; loss of a hand or foot; serious fractures; serious burns; loss of consciousness for days.
Medium	Eye disorders; rhinitis; hypertension; sleep disturbance; neuro-psychological impairment; sick building syndrome; regular and persistent dermatitis, including contact dermatitis; allergy; gastro-enteritis; diarrhoea; vomiting; chronic severe stress; mild heart attack; malignant but treatable skin cancer; loss of a finger; fractured skull and severe concussion; serious puncture wounds to head or body; severe burns to hands; serious strain or sprain injuries; regular and severe migraine.
Low	Pleural plaques; occasional severe discomfort; benign tumours; occasional mild pneumonia; broken finger; slight concussion; moderate cuts to face or body; severe bruising to body; regular serious coughs or colds.

Step 2: Determining the culpability of the offender

Next the culpability of the offender is determined using the table below: With regard to culpability there is inevitable overlap between the factors described in adjacent categories. Individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category

Culpability
Deliberate: The offender intentionally or flagrantly breached the law - the offence was a premeditated or planned act of defiance
Reckless: The offender foresaw the risk of offending but nevertheless went ahead and offended
Negligent: Offence committed through act or omission which a person exercising reasonable care would not commit.
Low or no Culpability: Offender committed offence with little or no fault on their part.

Step 3: Determining the offence category

The offence category is selected from the table below using only the ‘level of harm’ and ‘culpability’ factors.

Step 4: Selecting the starting point for the penalty

The starting point for the penalty is then selected also using the table below.

Offence category	Starting point for civil penalty
Deliberate	
Very high level of harm	£27,500
High level of harm	£25,000
Medium level of harm	£20,000
Low level of harm	£15,000
Reckless	
Very high level of harm	£22,500
High level of harm	£20,000
Medium level of harm	£15,000
Low level of harm	£10,000
Negligent	
Very high level of harm	£17,500
High level of harm	£15,000
Medium level of harm	£10,000
Low level of harm	£5,000
Low/No culpability	
Very high level of harm	£12,500
High level of harm	£10,000
Medium level of harm	£5,000
Low level of harm	£2,500 - minimum starting point for penalty

Step 5: Adjusting the penalty from its starting point

The table below contains a non-exhaustive list of factual elements providing the context of the offence and factors relating to the offender. Factors are identified from this table which should result in an upward or downward adjustment from the starting point. In particular, relevant convictions or penalty charges and/or a history of non-compliance are likely to result in an upward adjustment. The penalty might normally be increased by £500 for each aggravating factor up to a maximum of £2,500 and the penalty might normally be decreased by £500 for each mitigating factor up to a maximum of £2,500.

Aggravating factors potentially increasing penalty	Mitigating factors potentially reducing penalty
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction.	No previous relevant convictions.
History of penalty charge notices having	No history of penalty charge notices.

regard to nature of offence and its relevance to current offence.	
History of one or more cases where works were done without agreement (work in default) at properties owned by the offender or where emergency measures have had to be taken (ERA or EPO).	No works in default or emergency measures (ERA or EPO) have been taken.
History of non-compliance with warnings by DCC or other authorities.	Evidence of immediate steps taken to comply with the law.
Impact of contravention on the mental and physical health of the tenant(s) as perceived by the tenant(s).	History of good character and/or exemplary conduct.
History of ignoring requests from tenants to remediate hazards.	Mental disorder or learning disability, where linked to the commission of the offence.
History of obstruction of officers from DCC	Serious medical conditions requiring urgent, intensive or long-term treatment.
	Age and/or lack of maturity where it affects the responsibility of the offender.

Step 6: Taking a step back

At this point 'a step back' is taken to consider whether the financial penalty meets, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

If any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, are not well covered in the financial penalty arrived at in step 5, a further adjustment is made to the penalty figure. The derived economic benefits in commissioning the offence are estimated so that this can be done.

Step 7: Including the costs to the Council in the penalty charge

The costs of preparing a case and serving the requisite penalty charge notices are also added to the penalty charge.

Step 8: Assessment of the offender's assets and income

The offender is assumed able to pay a penalty up to the maximum unless they can demonstrate otherwise. An assessment of the landlord's assets and income (not just rental income) so far as they are known, or appear will be carried out in advance of the service of a 'notice of intent'. This assessment will assist officers if a representation or appeal is made on the grounds that the offender cannot afford to pay the penalty.

Step 9: Serving the Notices

After consultation with the Team Leader in Housing Standards and the Council's Legal Team, the Case Officer shall give the offender a notice of proposal ('notice of intent') to impose a financial penalty.

A person who is given a notice of intent may make written representations about the intention to impose a financial penalty; any representations must be made within 28 days from when the notice was given.

At the end of the period for representations, the Head of Service for the Housing Standards Team shall after consultation with the Case officer and Team Leader, decide whether to impose a penalty and, if so, the amount of the penalty.

If the decision is to impose a financial penalty, a 'final notice' requiring that the penalty is paid within 28 days shall be given.

A person who receives a final notice may appeal to the First-tier Tribunal against: the decision to impose a penalty; or the amount of the penalty.

Failure to apply for an HMO licence

A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed but is not so licensed. This offence is one where in itself there is no harm or potential harm to occupants in consequence of that failure.

However, HMOs by their very nature pose increased risks to the health and safety of the occupants. Lack of space has been linked to a number of health outcomes, including psychological distress and mental disorders, especially those associated with a lack of privacy and childhood development. Crowding can result in an increase in heart rate, increased perspiration, reduction of tolerance, and a reduction of the ability to concentrate. Crowded conditions are also linked with increased hygiene risks, an increased risk of fire and accidents, and the spread of contagious disease.

Failure to apply for a licence without a reasonable excuse is therefore considered to be a very serious offence as it prevents the Council assessing the fitness of a landlord to run the HMO. Failure to apply will also prevent the Council from imposing a maximum occupation level and extra controls on a landlord's management practices. The culpability of the offender is consequently the principal determinant of the penalty charge.

The starting point for the civil penalty in this context - having considered the 'culpability factors' - will be as follows.

Offence category	Starting point
Deliberate	£27,500
Reckless	£17,500
Negligent	£7,500
Low/No culpability	£2,500

The starting point will be adjusted as described above. All subsequent steps are as above.

Notes:

Maximum penalty charge

Penalty charges must be capped at £30k.

The totality principle

If there are multiple breaches of the HMO management regulations or of HMO licence conditions, a separate template for each offence must be completed. The financial penalties for each offence should be added up and consideration given as to whether the total penalty is just and proportionate. If the aggregate total is not just and proportionate, each penalty should be proportionately reduced so as to reach a just and proportionate total. Separate financial penalties can then be imposed.

Offences where it is not appropriate to use this model to determine the level of penalty

Certain offences under the HMO Management Regulations and certain breaches of HMO licence conditions require a different approach when setting the level of penalty. The offences in themselves do not directly cause any potential for harm to occupants, but a failure to comply might have adverse consequences, the extent of which depends on the offence itself. These offences will therefore attract a fixed penalty. The Council's costs in preparing a penalty charge file will however be added to the fixed penalty.

The tables below list the offences and show the fixed penalties for the remainder of 2017-18.

The Management of Houses in Multiple Occupation (England) Regulations 2006

Regulation number	Regulation	Penalty if regulation contravened
3 (a)	The manager must ensure that—his name, address and any telephone contact number are made available to each household in the HMO;	A fixed penalty of £250 will be imposed for this offence
3 (b)	The manager must ensure that—such details are clearly displayed in a prominent position in the HMO.	A fixed penalty of £250 will be imposed for this offence
6(1)	The manager must supply to the local housing authority within 7 days of receiving a request in writing from that authority the latest gas appliance test certificate it has received in relation to the testing of any gas appliance at the HMO by a recognised (Gas Safe) engineer.	A fixed penalty of £750 will be imposed for this offence
6 (3)(a)	The manager must ensure that every fixed electrical installation is inspected and tested at intervals not exceeding five years by a person qualified to undertake such inspection and testing;	A fixed penalty of £250 will be imposed for this offence
6(3)(b)	The manager must obtain a certificate from the person conducting that test, specifying the results of the test;	A fixed penalty of £250 will be imposed for this offence
6(3)(c)	The manager must supply that certificate to the local housing authority within 7 days of receiving a request in	A fixed penalty of £250 will be imposed for this offence

	writing for it from that authority.	
7(4)(a)	The manager must ensure that outbuildings, yards and forecourts which are used in common by two or more households living within the HMO are maintained in repair, clean condition and good order;	A fixed penalty of £125 will be imposed for this offence
7(5)	If any part of the HMO is not in use the manager shall ensure that such part, including any passage and staircase directly giving access to it, is kept reasonably clean and free from refuse and litter	A fixed penalty of £125 will be imposed for this offence

Breach of HMO licence condition

Licence condition number	Licence condition	Potential level of harm if licence condition is breached
	Gas safety	
1.3	The licence holder shall produce to the Council for its inspection, a gas safety certificate obtained within the last 12 months in respect of the house annually for their inspection	A fixed penalty of £750 will be imposed for this offence
	Safety of electrical appliances.	
2.7	The licence holder shall ensure that a record of visual inspections and tests is maintained.	A fixed penalty of £250 will be imposed for this offence
2.8	The licence holder shall submit to the Council on demand the record of visual inspections and tests within 14 days of the Council's demand.	A fixed penalty of £250 will be imposed for this offence
	Furniture and Furnishings (Fire Safety)	
3.3	The licence holder shall supply to the Council on demand, a declaration as to the safety of such furniture.	A fixed penalty of £750 will be imposed for this offence
	Smoke & Carbon Monoxide Alarms	
4.3	Throughout the period of the licence, inspection and servicing certificates in the format recommended by BS 5839 – part 1:2002 (Annex G 6), [shall be submitted to the Council within one month of each check] [shall be submitted to the Council within 14 days of its demand.]	A fixed penalty of £750 will be imposed for this offence
4.8	The licence holder shall supply to the Council on demand - within 7 days - a declaration as to the condition and	A fixed penalty of £750 will be imposed for this offence

	position of any smoke alarms and/or carbon monoxide alarms in the property.	
	Emergency Escape Lighting	
5.2	Throughout the period of the licence, periodic and test certificates in the format recommended by BS 5266 – part 1: 2005 (Annex C) shall be submitted to the Council within 14 days if its demand.	A fixed penalty of £750 will be imposed for this offence
	Written Agreements	
6.1	The licence holder shall supply to the occupiers of the house a written statement of the terms on which they occupy it.	A fixed penalty of £150 will be imposed for this offence
6.2	The licence holder shall supply to the Council on demand a copy of the written statement.	A fixed penalty of £150 will be imposed for this offence
	Safety of Electrical Installations	
7.3	The licence holder shall supply to the Council on demand the latest electrical installation condition report (EICR) in the format recommended in BS 7671	A fixed penalty of £250 will be imposed for this offence
	General Public Health and Environmental Housing Standards and so on	
8.1	The licence holder shall ensure that the exterior of the house is maintained in a reasonable decorative order and in reasonable repair.	A fixed penalty of £125 will be imposed for this offence
8.2	The licence holder shall ensure that gardens, yards, paths and drives, where present, are maintained such that their condition does not adversely affect the amenity of the neighbourhood. To that extent the licence holder shall ensure that gardens, yards paths and drives and other areas within the curtilage of the house are kept in a reasonably clean and tidy condition and free from rodent infestations at all times.	A fixed penalty of £125 will be imposed for this offence
8.3	The licence holder shall ensure that suitable and adequate provision for refuse storage and collection is made at the house. This shall include closable bins of suitable capacity as specified by the Council. The licence holder shall make arrangements for	A fixed penalty of £125 will be imposed for this offence

	<p>any rubbish additional to that within the dustbins to be collected and/or disposed of as soon as reasonably practicable; and, pending collection/disposal, such rubbish shall where practicable be stored at the rear of and within the curtilage of the dwelling.</p> <p>The licence holder shall require the occupiers of the house to ensure that all refuse containers are returned within the curtilage of the property on the same day that they are emptied by the Council.</p>	
	Landlord and Tenant Issues	
9.1	The licence holder shall ensure that notification in writing is given to all occupants at the beginning of their occupancy of the arrangements in place to deal with emergency and other repairs.	A fixed penalty of £250 will be imposed for this offence
9.2	The licence holder shall ensure that all reasonable and practical steps are taken to prevent or reduce anti-social behaviour by the occupants and all persons visiting the house	A fixed penalty of £125 will be imposed for this offence
	Licence Holder	
10.1	The licence holder shall inform the Council in writing if they no longer reside at the address given, and provide the authority with new address details within 21 days of a change	A fixed penalty of £125 will be imposed for this offence
10.2	The licence holder shall inform the Council in writing where there is a change in any managing agent within 21 days of such a change.	A fixed penalty of £125 will be imposed for this offence
10.3	If the licence holder is a managing agent, they shall inform the Council in writing if the person who is specified as the main contact ceases to be employed by them, and inform the authority of a new contact within 21 days of such a change	A fixed penalty of £125 will be imposed for this offence
10.4	If the licence holder is a managing agent, they shall inform the Council in writing if they cease to have an interest in the property within 21 days of such a change.	A fixed penalty of £125 will be imposed for this offence
	Fit and Proper Person	
11.1	The licence holder shall inform the	A fixed penalty of £750 will

	<p>Council in writing if, since becoming the licence holder, he/she commits any of the actions described within the clauses below. Notification to the authority shall be within 21 days of such a contravention.</p> <p>Committed an offence involving: fraud dishonesty violence drugs Sexual Offences Act Schedule 3.</p> <p>Practised unlawful discrimination on grounds of sex, colour, race, ethnic or national origins or disability in connection with a business.</p> <p>Contravened any provision of housing or landlord and tenant law.</p> <p>In particular:</p> <ul style="list-style-type: none"> a) subject to proceedings by a local authority b) where the local authority has had to carry out works in default c) subject to a management order under the Housing Act 2004 d) or been refused a licence or breached conditions of a licence. <p>Acted in contravention of any Approved Code of Practice.</p>	<p>be imposed for this offence</p> <p>Note: In these circumstances revocation of the licence must also be considered.</p>
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