

## **CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL**

### **POLICY FOR THE USE OF CIVIL PENALTIES FOR HOUSING OFFENCES**

This policy is intended to operate in accordance with the City of Bradford Metropolitan District Council's Private Sector Housing Enforcement Policy (the Enforcement Policy) published by the Council and the Civil Penalties under the Housing and Planning Act 2016, Guidance for Local Authorities published by the Department of Communities and Local Government (DCLG).

#### **Introduction**

The Housing and Planning Act 2016 introduces a number of amendments to the Housing Act 2004. Schedule 9 of the Housing and Planning Act 2016 inserts a new Section 249A into the Housing Act 2004 which establishes the legal basis for imposing civil penalties as an alternative to prosecution for specific offences under the Housing Act 2004.

Civil penalties are an alternative when a landlord fails to comply with:

- Section 30 – failure to comply with an improvement notice
- Section 72 – mandatory licensing of HMO
- Section 95 – licensing under Part 3 of the Housing Act 2004
- Section 139 – failure to comply with an overcrowding notice
- Section 234 – breach of management regulations in respect of HMO

The Government has laid out statutory guidance as to the process and the criteria that needs to consider when determining Civil Penalties. These are:

- Level of culpability
- Level of harm
- Severity of the offence
- Aggravating Factors
- Mitigating Factors
- Penalty to be fair and reasonable
- Penalty to be such as to be a deterrent and remove the gain derived through the failure to comply

The statutory guidance indicates that the Council should ensure that the civil penalty acts as a punishment, takes into account any previous patterns of offending and no offender should benefit as a result of committing an offence.

The legislation allows a maximum financial penalty of £30,000 per offence. In determining the level of any penalty the Council will have regard to local circumstances, the relevant local enforcement policy and the relevant Government guidance detailing the factors to take into account, as shown above.

The overriding principle when considering civil penalties is that the landlord (as defined by the Housing Act 2004 as the owner, person having control or the licence holder) should not make any financial gain as a result of their failure to comply with the relevant legislation.

### **What is the burden of proof for a civil penalty?**

The proof is the same as set out previously for the offences under the Housing Act 2004. 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 realistic prospect of conviction.

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 the civil penalty including the alternative option of prosecuting for the offence?

In considering the evidence and making decisions officers will have regard to the Evidentiary Stage of the Full Code Test in the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions and the Public Interest Stage of the Full Code Test in the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions.

All decisions as to determining whether or not to pursue a Civil Penalty will be in accordance with the Private Sector Housing Enforcement Policy and will be documented.

### **Process for Imposing a Civil Penalty**

Where it has been determined that a financial penalty is the most appropriate course of action the Council will follow the process set out below:

A "Notice of Intent" shall be served on the person suspected of committing the offence. The Notice shall specify:

- a. The amount of any proposed financial penalty
- b. The reasons for proposing the financial penalty
- c. Information about the right to make representation to the Council.

The person to which the notice relates will be given 28 days to make written representation to the Council about the proposal to impose a financial penalty.

To enable the Council to consider any representations made it will be the landlord's responsibility to provide appropriate and satisfactory documentary evidence to support their submission. Failure to provide such evidence within the timescale will mean that the Council will not be able to consider any representation against the level of penalty imposed.

Representations can only be made by the recipients served with a Notice of Intention. No other parties have an automatic right to make representations. The Council will consider any information provided on a case by case basis.

Following the 28 day period the Council will decide, whether it receives written representation or not:

- a. Whether to impose a financial penalty on the person, and
- b. The value of any such penalty imposed.

If the Council decides to impose a financial penalty, a final notice will be issued imposing that penalty. The final notice will specify:

- a. the amount of the financial penalty,
- b. the reasons for imposing the penalty,
- c. information about how to pay the penalty,
- d. the period for payment of the penalty,
- e. information about rights of appeal to the First tier Tribunal
- f. the consequences of failure to comply with the notice.

The Council can at any time withdraw either the Notice of Intent or Final Notice or reduce the level of penalty imposed. Where a decision is made to withdraw or vary a notice the person on whom the notice was served will be informed in writing.

If the Council decides to withdraw a civil penalty, it has the right to pursue a prosecution against the landlord for the original offence for which it was imposed. Each case will be considered on its merits and decisions will be taken have regard to Crown Prosecution Service guidance and the Council's Enforcement Policy.

A landlord who has been served a Final Notice has the right of appeal to a First Tier Tribunal. In the event of such an appeal the civil penalty would be suspended until the appeal is determined or withdrawn.

Payment of the civil penalty will be within 28 days of the date of the Final Notice, unless appealed. Where appealed and the decision to serve the Notice is upheld it will be for the Tribunal to specify the period in which the landlord is to pay any fine imposed.

The Council will normally consider a reduction of up to a third of the penalty if at the first opportunity the landlord admits guilt for the offence and immediately remedies any outstanding issues. This is in line with the Sentencing Guidelines. Any reduction will only be available for the first offence and will not be less than the minimum level of penalty or the level of financial gain plus £2000 or 10% (whichever is the greater). Any subsequent offence will not be subject to any reduction.

The discount will only be applied to the landlord when the Council serves the Notice of Intent and the following criteria is met:

- The payment is made within the 28 days of the date of the Notice of Intent
- The payment is made in full

At any point after 28 days of service of the notice of the Notice of Intent there will be no further offer of any reduction in the level of penalty.

If the financial penalty imposed is not paid within the appropriate time period, either 28 days from the date of the Final Notice or within such time as determined by the First Tier Tribunal the Council will commence proceedings to recover the debt owed. This will include the recovery of any additional costs to the Council from having to undertake such action.

A certificate signed by the Chief Finance Officer for the Authority including the outstanding amount due will normally be accepted by the courts as conclusive proof of any outstanding payment due to the Council.

In setting a financial penalty, the Council may conclude that the offender is able to pay any financial penalty imposed unless the offender has supplied any financial information to the contrary.

It is for the offender to disclose to the Council such data relevant to his financial position as this will enable it to assess and determine what they can reasonably afford to pay.

Where the Council is not satisfied that it has been given sufficient reliable information, the Council will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. ***This may include the inference that the offender can pay any financial penalty.***

When considering the level of any financial penalty the final determining factor will always be the level of financial gain as a result of the landlord's failure to comply with the relevant legislation.

### **Consequences of a Civil Penalty**

Financial Penalties are an alternative to criminal proceedings. A landlord cannot be prosecuted for the same offence once the penalty has been paid and the matter concluded.

Where a civil penalty has been imposed on a landlord it will not automatically prevent the Council from granting a licence under Part 2 or 3 of the Housing Act 2004. The Council will consider each case on its merits including the reasons for the penalty and the extent of the person's involvement in any property under consideration.

Where a person has received two financial penalties under this legislation in any 12 month period, irrespective of the locality to which the offences were committed, the Council will normally consider making an entry on the national database of rogue landlords and property agents. When considering making an entry, the Council will have regard to any guidance issued by the Secretary of State and best practise available.

### **Determining the Level of the Civil Penalties**

Section 143(1) Criminal Justice Act 2003 states: "In considering the seriousness of any offence the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably caused". It also considers harm as encompassing those offences where harm is caused but also those where neither individuals nor the community suffer harm but a risk of harm is present.

In order to set the level of the penalty the Council will determine the offence category using the culpability and harm factors below:

### **Level of Culpability**

The level of culpability of a landlord will depend upon a number of factors:

#### **High level of culpability**

A landlord will be deemed to be highly culpable when they intentionally or recklessly breach or wilfully disregard the law.

Factors that will contribute to this assessment will include:

- They have a history of non-compliance
- Despite a number of opportunities to comply they have failed to do so
- They have been obstructive as part of the investigation
- Failure to comply results in significant risk to individuals
- They are a Member of a recognised landlord association or accreditation scheme
- They are a Public figure who should have been aware of their actions
- They are an Experienced landlord with a portfolio of properties who is failing to comply with their obligations
- Serious and/or systematic failure to comply with their legal duties

#### **Medium level**

A landlord commits an offence through an act or omission a person exercising reasonable care would not commit.

Factors that will contribute to this assessment will include:

- It is a first offence – with no high level culpability criteria being met
- Failure is not a significant risk to individuals
- The landlord had systems in place to manage risk or comply with their legal duties but these were not sufficient or adhered to or implemented.

#### **Low level**

A landlord fails to comply or commit an offence with little fault.

Factors that will contribute to this assessment will include:

- No or minimal warning of circumstances/risk
- Minor breaches
- Isolated occurrence
- A significant effort has been made to comply but was inadequate in achieving compliance

The above examples are not exclusive and other factors may be taken into account when considering the level of culpability.

## **Level of Harm**

When considering the level of harm both the actual, potential and likelihood of the harm will be considered:

### **High level of harm**

A high level of harm could constitute:

- Serious effect on individual(s) or widespread impact
- Harm to a vulnerable individual
- High risk of an adverse effect on an individual

### **Medium level of harm**

A medium level of harm could constitute:

- Adverse effect on an individual – not high level of harm
- Medium risk of harm to an individual
- Low risk of a serious effect
- The Council's work as a regulator to address risks to health is inhibited

### **Low level of harm**

A low level of harm could constitute:

- Low risk of harm or potential harm
- Little risk of an adverse effect on individual(s)

The above examples are not exclusive and other factors may be taken into account when considering the level of harm.

The statutory guidance states that the harm caused and vulnerability of the individual are important factors in determining the level of penalty.

The Housing Act 2004 defines a vulnerable individual(s) as one who is at greater harm and therefore the penalty proposed will normally be greater when vulnerability is an issue.

### Determination of the Level of Penalty

The statutory guidance makes it clear that it is for each Council to determine the level of fine imposed under the Housing and Planning Act. The table below shows the initial level of fine for each level of culpability and harm, including the minimum level of fine that the Council will normally impose for each classification:

DETERMINATION OF CIVIL PENALTY LEVEL				
LEVEL OF CULPABILITY	LEVEL OF HARM			MINIMUM FINE LEVEL (when considering mitigating factors)
	HIGH	MED	LOW	
HIGH	25000	15000	7500	6000
MED	15000	10000	5000	4000
LOW	7500	5000	2500	2000

### Adjustments to the Initial Penalty Determination

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

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 on the circumstances of each case.

#### Aggravating factors could include:

- Previous relevant convictions and time elapsed since those convictions
- Motivated by financial gain
- Obstruction of the investigation
- Deliberate concealment of the activity/evidence
- Number of items of non-compliance – greater the number the greater the potential aggravating factor
- Record of letting substandard accommodation
- Record of poor management/ inadequate management provision
- Lack of a tenancy agreement/rent paid in cash

When considering previous offences regard will be given to the guidance on Banning Orders as well as any other relevant offence such as trafficking etc.

#### Mitigating factors could include:

- Co-operation with the investigation e.g. turns up for a PACE interview
- Voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt for the offence(s)
- Willingness to undertake training
- Willingness to join a recognised landlord accreditation scheme
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns

- No previous convictions
- Vulnerable individual(s) where their vulnerability is linked to the commission of the offence
- Good character and/or exemplary conduct

For each aggravation or mitigating factor which applies to each specific case the level of fine will normally be adjusted by 5% of the initial fine, up to the maximum £30k or to the minimum fine for each determined level of culpability and harm as shown in the table above.

The only exception to this principle will normally be for the number of items of non-compliance which will be 5% for the first 5 items and 10% for any number of items greater than this level of non-compliance with items on any notice which has not been complied with.

### **Totality Principle**

If issuing a financial penalty for more than one offence, or where the offender has already been issued with a financial penalty, officers will consider whether the total penalties are just and proportionate to the offending behaviour.

Where the offender is issued with more than one financial penalty, officers will consider the following guidance from the definitive guideline on Offences Taken into Consideration and Totality.

‘The total financial penalty is inevitably cumulative.

The Council will determine the financial penalty for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the Council.

Officers will add up the financial penalties for each offence and consider if they are just and proportionate.

If the aggregate total is not just and proportionate officers will consider how to reach a just and proportionate financial penalty. There are a number of ways in which this can be achieved.

For example:

- where an offender is to be penalised for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a financial penalty. This should reflect the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences;
- where an offender is to be penalised for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate financial penalties for each of the offences. The Council should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the Council should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be passed.



Where separate financial penalties are passed, the Council must be careful to ensure that there is no 'double-counting.'

### **Final determinate of the level of any civil penalty**

The final determinate of any civil penalty MUST be the general principle:

#### **THE CIVIL PENALTY SHOULD BE FAIR AND PROPORTIONATE BUT IN ALL INSTANCES SHOULD ACT AS A DETERRENT AND REMOVE ANY GAIN AS A RESULT OF THE OFFENCE**

The statutory guidance states that a guiding principle of civil penalties is that they should remove any financial benefit that the landlord may have obtained as a result of committing the offence. This means that the amount of the civil penalty imposed must never be less than what it would have cost the landlord to comply with the legislation in the first place.

When determining any gain as a result of the offence the Council will take into account the following issues:

- Cost of the works required to comply with the legislation
- Any licence fees avoided
- Rent for the full period of the non-compliance
- Any other factors resulting in a financial benefit – potential cost of rehousing any tenants by the Council
- As a deterrent, the cost to the Council of their investigation.

When determining whether a penalty is fair and proportionate then the following issues will be considered:

- Impact of the financial penalty on the offender's ability to comply with the law
- Impact of the penalty on third party – employment of staff, customers etc.
- Impact on the offender – is it proportionate to their means – loss of home etc.

It must be remembered that as landlords they are property owners and if they claim inability to pay and show their income is small then there can always be consideration to the property(ies) they own which can be sold or refinanced.

As part of any investigation into a landlord's ability to pay the following needs to be considered:

- Company House records if a limited company
- Credit checks – these will show outstanding debts and commitments on properties the landlord owns
- Size of portfolio – could a landlord sell a property to finance the penalty
- Refinance – is there the ability to raise money against their asset base.
- Rental income on their portfolio not just the property to which the offence relates
- Personal income including their own home

All decisions will be documented. This will include the reasons for the financial penalty and how the amount of the penalty was determined.