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Lewes District Council



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Civil Penalties Policy

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Responsible (Executive Lead):	Gary Hall Head of Housing
Accountable (Operational Lead):	Rebecca Wynn Senior Specialist Advisor Housing Standards
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1. Introduction

1.1 Parts of the Housing Act 2004 were amended by the Housing and Planning Act 2016. Civil penalties were incorporated into Section 249A of the Housing Act 2004 as an alternative to prosecution for a number of offences under that Act.

1.2 A civil penalty is a serious matter. Imposing a financial penalty highlights a failure to comply with the relevant legislation. The service of a Civil Penalty Notice is a factor the Council can take into account when deciding whether to instigate criminal proceedings in future cases.

1.3 In addition the Council may also take it into consideration when determining whether a person is a fit and proper person and whether there are satisfactory management arrangements in place. Fit and proper person checks form part of assessing a licence application, for a House in Multiple Occupation (HMO) under the Housing Act 2004 – or any other scheme where Fit and Proper and satisfactory management arrangements must be considered.

1.4 The Council has the power to impose a civil penalty of up to £30,000 with a level of civil penalty imposed decided on a case by case basis in line with its policy.

1.5 The Government has laid out statutory guidance as to the process and the criteria it advises should be considered when determining civil penalties. A copy of this guidance can be found at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606653/Civil_Penalties_guidance.pdf

1.6 Paragraph 3.5 of the statutory guidance sets out factors that should be taken into account to ensure the civil penalty is set at an appropriate level in each case:

- Severity of the offence
- Culpability and track record of the offender
- The harm caused to the tenant
- 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

1.7 Local Authorities should make sure 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 i.e. it should not be cheaper to offend than to ensure a property is well maintained and properly managed.

1.8 The same criminal standard of proof is required for a civil penalty as for prosecution. So we will have regard to the Crown Prosecution Service Code for

Crown Prosecutors, when establishing whether there is sufficient evidence to secure a conviction:

<https://www.cps.gov.uk/publications/code for crown prosecutors/>

1.9 In deciding whether to undertake a prosecution or issue a civil penalty, the Officer will have regard to section 3.3 “Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities”. Each case will be decided on its own merits, however the following general principles will be considered when a decision is made whether to issue a civil penalty or to commence with a prosecution:

- A civil penalty will usually be preferred to prosecution where it is the person’s first offence (or first known offence), however where the offence is considered to be more serious a prosecution will be considered;
- For a second offence, if the offence is considered less serious a civil penalty will usually be considered, but in cases where the offence is considered to be more serious, a prosecution will usually be preferred;
- For subsequent offences, prosecution would usually be preferred

2. Issuing a Notice of Intent for a Civil Penalty

2.1 The first thing we must do, is determine whether the offence committed is one where a Civil Penalty can be imposed, under the Housing Act 2004.

2.2 These are;

- Section 30 – failure to comply with an Improvement Notice
- Section 72 – licensing of Houses of Multiple Occupation (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 HMOs and under the Housing and Planning Act 2016:
- Section 21 – breach of Banning Orders

2.3 Civil penalties will be issued where the Council consider it is appropriate to the circumstances of that particular case.

2.4 In deciding whether to impose a financial penalty or prosecute, the Council will look at each case to determine which course of action is most likely to achieve the aims of a sanction with regard to:

- punishment of the offender
- deterring the offender from repeating the offence or other housing offences
- deterring others from committing similar offences
- removing any financial benefit arising from having committed the offence

2.5 In considering the likely merits of a punishment in relation to these aims the Council will have regard to considerations such as:

- the likelihood of being able to recover a financial penalty
- the effect had by any previous sanctions imposed on that offender

- the likely impact of a criminal sanction on the offender
- the conduct of the offender, and anything else which is known about them which may be relevant to the aims above

2.6 The Council's considerations of what level of civil penalty will include, but not be limited to, factors such as:

- the severity of the offence
- the financial circumstances of the offender
- any previous action taken against the offender
- whether they ought to have known that they were in breach of their legal responsibilities
- the harm or potential for harm to the occupier
- the deterrence of further offending by the offender in question
- the deterrent value to others (whilst civil penalties will not generally be in the public domain, unlike prosecutions, it is recognised that other landlords may become aware through informal channels)
- the removal of any financial benefit the offender may have obtained as a result of committing the offence
- any other aggravating factors including the reaction of the offender to our intervention.

2.7 If it is decided to impose a civil penalty then a "Notice of Intent" will be served on the person suspected of committing the offence. The Notice will specify:

1. The amount of any proposed financial penalty
2. The reasons for proposing the financial penalty
3. Information about the right to make representation to the Council.

3. Consideration of Offender's Financial Assets and Income

3.1 In setting a financial penalty, the Council may conclude that the landlord is able to pay any financial penalty imposed - unless they have supplied the Council with any evidence to the contrary.

3.2 It is up to the landlord to disclose to the Council any information which is relevant to his financial position as this will enable an assessment to be made to determine what they can reasonably afford to pay.

3.3 If the Council do not receive sufficient reliable information, reasonable assumptions about what the landlord may be made. This may include the assumption that the Landlord can pay any financial penalty.

4. Representations in Response to a Notice of Intent

4.1 The Landlord, or person to whom the Notice relates, will be given 28 days to make written representations to the Council about the Notice.

4.2 Representations can be made against any element of the proposed action. Only the people named on the Notice of Intention have an automatic right to make representations. In some circumstances the Council may accept submissions from others, but this will depend on the individual case.

4.3 The onus will be on the landlord to provide appropriate and satisfactory documentary evidence to support their written representations. If they fail to provide such evidence, this is likely to affect the weight attached to their representations.

4.4 Where representations are received, the decision to impose a penalty and the value of any penalty shall be reviewed by a Senior Officer in conjunction with the Legal Services Department who may confirm or revise the decision.

5. Issuing the Final Notice of a Civil Penalty

5.1 Following the 28 day period the Council will decide (whether or not representations have been received):

- 1) Whether to go ahead and impose the financial penalty on the person, and
- 2) the value of any such penalty imposed.

5.2 If the decision to impose a financial penalty is taken, a **final notice** will be issued. The final notice will specify:

- the amount of the financial penalty
- the reasons for imposing the penalty
- information about how to pay the penalty
- the period for payment of the penalty
- information about rights of appeal to the First Tier Tribunal
- the consequences of failure to comply with the notice.

5.3 The Council can withdraw the Notice of Intent or the Final Notice at any time of the level of penalty imposed can be reduced. Any variation will be notified in writing to the people named on the original Notices.

5.4 Payment of the civil penalty must be paid within 28 days of the date of the Final Notice.

5.5 Landlords have the right to appeal a Final Notice. This appeal is to the First Tier Tribunal (Property Chamber) and details of how to make this appeal will be included with the Final Notice.

5.6 In the event of an appeal against the council decision, the penalty would be suspended until the decision has been determined.

5.7 Where a Tribunal agrees with the landlord (the appellant) – the Council may decide to vary the amount of the penalty and how long they have to pay it - or cancel it.

5.8 If we decide to withdraw a Notice of a civil penalty, we may pursue a prosecution against the landlord for the original offence for which it was imposed. Each case will be considered on its merits and according to the public interest.

6. Recovery of Civil Penalty

6.1 If the financial penalty is not paid within the appropriate time period proceedings will commence to recover the debt owed. The time period will be either 28 days from the date of the Final Notice, or within such time as determined by the First Tier Tribunal.

6.2 If the Council have to chase recovery of the debt the additional costs associated with it will be included. If needed, the Council can seek to recover the debt and any further costs associated with achieving this through the Courts.

7. Ongoing implications of a Civil Penalty

7.1 The seriousness of a Civil Penalty must not be underestimated. Although having a penalty imposed will not automatically deem a landlord not 'fit and proper' or not competent to fulfil their management functions, it will be taken into account in the same way as a prosecution for that offence would have. This may therefore prevent the landlord from being issued with a licence, for a House in Multiple Occupation.

7.2 Unless the penalty is withdrawn, a landlord cannot be prosecuted for the same offence once the penalty has been paid and the matter concluded.

7.3 Where a landlord or agent 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 consider making an entry onto the national database of rogue landlords and property agents, having regard to any guidance issued by the Secretary of State.

8. Recording the decision

8.1 The Council will record each decision and the reasons for the financial penalty along with how the amount of the penalty was obtained and the reasons for imposing it.

9. Determining the Level of the Civil Penalties

9.1 In order to set the level of the penalty that appears in the Notices, the Council will take the following steps:

Step 1 – banding the offence, by assessing two factors:

- the culpability and track record of an offender and
- the level of harm, or potential harm, to the occupiers

Step 2 - amending the penalty band based on aggravating and mitigating factors

Step 3 – a penalty review to ensure:

- the level is fair and proportionate, reflecting the Landlords ability to pay
- in all instances act as punishment and deterrent
- removes any benefit of the offence

10. Setting the Initial Level (Step 1)

10.1 Culpability and track record of an offender

The Landlord will be assessed against four levels of culpability:

High level

A person will be deemed to be highly culpable where the Council are satisfied that they intentionally or recklessly breach or wilfully disregard the law. Factors that may lead to that conclusion include the following:

- They have a history of non-compliance
- Despite a number of opportunities to comply they have failed to comply
- Have been obstructive as part of the investigation
- Are an experienced landlord/agent with a portfolio of properties who would be expected to have known of their responsibilities
- Serious and/or systematic failure to comply with their legal duties

Medium level

Where an offence is committed through an act or omission which a Landlord exercising reasonable care would not commit. Factors that may lead to that conclusion include the following:

- It is a first offence – with no high level culpability criteria being met
- The landlord/agent had systems in place to manage risk or comply with their legal duties but they weren't sufficient or complied with on this particular occasion

Low level

Where a person fails to comply, or commits an offence where;

- no or minimal warning given to offender
- the breaches are minor
- the offence is an isolated occurrence
- a significant effort has been made to comply but was inadequate in achieving compliance

The above however is not intended to be an exhaustive list of matters taken into account, when considering the level of culpability and other factors relevant to the individual case may be taken into account.

10.2 Level of harm or effect to the occupier and/or community

When considering the level of harm the Council will have regard to actual harm, the potential of harm and the likelihood of harm:

High level of harm

- actual harm to an individual
- high risk of harm to an individual
- serious level of overcrowding
- serious effect on individual(s) or widespread impact
- adverse effect on individual not amounting to significant

Medium level of harm

- moderate risk of an adverse effect on an individual
- moderate risk of harm to an individual (s) or broader impact
- public misled but little or no risk of actual adverse effect on individual

Low level of harm

- minimal adverse effect on individual(s)
- low risk of harm to an individual
- limited impact or effect on occupiers

10.3 The above is not intended to be an exhaustive list of matters to be taken into account when considering the level of harm and other factors relevant to the individual case may be taken into account.

10.4 The table below sets out the initial level of fine determination to be applied in respect of an individual case, having regard to the Council determinations as to that individual's level of culpability and level of harm to the occupier.

Determination of civil penalty level

	Level of harm/effect		
Level of culpability	High	Medium	Low
High	£30,000	£15,000	£7,500
Medium	£15,000	£10,000	£5,000
Low	£7,500	£5,000	£2,500

11. Making adjustments to the initial level (Step 2)

11.1 Consideration will be given to whether there are aggravating factors and mitigating factors in each case. This might affect the level of fine reached in Step 1 so that it is adjusted.

11.2 The types of factors to be considered are listed below. The lists are not exhaustive and other factors may be considered depending on individual circumstances to each case.

11.3 Aggravating factors may include, but are not limited to:

- Previous convictions having regard to the offence to which it relates and the time elapsed since that offence
- Landlord motivated by financial gain, profited from activities
- Obstruction of the investigation
- Established evidence of longer term impact on the wider community as a consequence of activities
- Deliberate concealment of the activity/evidence
- Number of items of non-compliance – greater the number the greater the potential aggravating factor
- A record of letting substandard accommodation
- A record of poor management/ inadequate management provision
- Lack of a tenancy agreement/rent paid in cash

11.4 Mitigating factors may include, but are not limited to:

- Co-operation with the investigation e.g. attends the voluntary PACE (Police and Criminal Evidence Act 1984) interview
- Any voluntary steps taken to address issues e.g. submits a licence application
- Acceptance of responsibility e.g. accepts guilt and remorse for the offence(s)
- Willingness to undertake training
- Good record of maintaining property
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
- Has no previous convictions
- Vulnerable individual(s) where their vulnerability is linked to the commission of the offence
- Previous good character and/or exemplary conduct.

11.5 For each aggravating or mitigating factor which applied to each specific case the level of fine will be adjusted accordingly based on the circumstances, up to the maximum fine of £30k.

12. Reaching the Final Determination of the Level of Penalty(Step 3)

12.1 The statutory guidance advises 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. It should not be cheaper to offend than to ensure a property is well maintained and properly managed.

12.2 The final consideration when setting the level of penalty is therefore, making sure that any financial benefit to the offender of committing the offence is removed,

and that as well as being fair and proportionate, the level of penalty acts as an effective deterrent.

12.3 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
- Any other factors resulting in financial benefit

13. Multiple Offences

13.1 Where the Council is satisfied that more than one offence is being committed concurrently in respect of a single property, they may issue multiple Civil Penalty Notices, (for example, where there are multiple breaches of the HMO Management Regulations). However, where satisfied on the merits of the case and/or where the Council consider that issuing multiple penalties at the same time would result in an excessive cumulative penalty, nothing in this policy shall require the Council to do that. The Council may take action in respect of one or some of the offences and warn the offender that future action in respect of the remaining offences will be taken if there is continuing non compliance to any relevant Housing legislation.

14. Income from Civil Penalties

14.1 The income received from a civil penalty can be retained by the Council, provided it is used to further statutory functions in relation to enforcement activities covering the private rented sector, as detailed in the statutory guidance issued to Local Housing Authorities.