

Civil Penalty Notices under the Housing and Planning Act 2016

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1. Introduction

- 1.1 The Borough Council of Wellingborough is committed to improving standards in the privately rented housing sector. The majority of landlords in Wellingborough provide well maintained properties let responsibly. However, there are number of rogue and irresponsible landlords in the borough who knowingly rent out accommodation that is unlicensed, substandard and/or unsafe.
- 1.2 The council aims to support the government's policy to support good landlords who provide decent well maintained homes, and avoid unnecessary regulation which increases costs and red tape for landlords and also pushes up rents for tenants.
- 1.3 The council is committed to making full use of the range of powers available to improve standards in Wellingborough's privately rented housing sector.
- 1.4 Since 6 April 2017, local housing authorities have had the power to impose civil penalties of up to £30,000 as an alternative to prosecution for certain specified offences. Rent repayment orders have also been extended to cover a wider range of offences.
- 1.5 The guidance issued by the Secretary of State requires each local authority to have a policy in relation to when civil penalties will be used and what level of penalties will be imposed. It is expected that the maximum amount, of £30,000 will be reserved for the worst offenders. The actual amount levied in any case should reflect the severity of the offence as well as the landlords previous record of offending.
- 1.6 The purpose of this policy is to describe how the council will use its new powers, how it will decide when to prosecute and when to impose a civil penalty, and how it will determine the size of each civil penalty.
- 1.7 This policy is designed to ensure transparency, consistency and fairness in how and when civil penalties are imposed. Complementing the Private Sector Housing Policy, it will play a significant role in helping the council to promote and support good landlords and deal robustly with criminal, rogue and irresponsible landlords.
- 1.8 This Private Sector Housing Civil Penalties Policy contains information about civil penalties and rent repayment orders, and how the Council is planning to use them. It takes into account the statutory guidance that has been issued by the Government under Schedule 9 of the Housing and Planning Act 2016, and should be read in conjunction with the Council's Private Sector Housing Policy.

2. The Housing and Planning Act 2016

2.1 The government has advised that it aims to support good landlords who provide decent, well-maintained homes, and avoid unnecessary regulation which increases costs for landlords and pushes up rents for tenants. However, it has also pledged to crack down on rogue landlords who flout the law and knowingly rent out unsafe and substandard accommodation.

2.2 The Housing and Planning Act 2016 introduces a number of measures to help local authorities deal more robustly with rogue and irresponsible landlords:

- Civil penalties of up to £30,000 as an alternative to prosecution for certain specified offences (came into force on 6 April 2017);
- Extension of rent repayment orders to cover illegal eviction, breach of a banning order, failure to comply with an improvement notice and certain other specified offences (came into force on 6 April 2017);
- Database of rogue landlords and property agents who have been convicted of certain offences or received multiple civil penalties (scheduled to come into force on 1 October 2017);
- Banning orders for the most serious and prolific offenders (scheduled to come into force on 1 October 2017).

2.3 The Government states in its guidance that it would expect the maximum civil penalty of £30,000 to be “reserved for the very worst offenders”, it recommends that the actual amount imposed in any case should reflect the severity of the offence and take into account the landlord’s previous record of offending.

2.4 The Government recommends that, in order to ensure that the civil penalty is set at an appropriate level, local housing authorities should consider the following factors:

a. The severity of the offence

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

b. The culpability and track record of the offender

A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate 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

The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when the local housing authority imposes a civil penalty.

d. The punishment of the offender

A civil penalty should not be regarded as an easy or lesser option compared to prosecution. While the penalty should be proportionate and reflect both 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 help ensure that it has a real economic impact on the offender and demonstrates the consequences of not complying with their responsibilities.

e. Whether it will deter the offender from repeating the offence

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. Whether it will deter others from committing the offence

While the fact that someone has received a civil penalty will not 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 proactive in levying civil penalties where the need to do so exists and (b) that the level of civil penalty will be set at a high enough level to both punish the offender and deter repeat offending

g. Whether it will 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.

3. Offences covered by civil penalties

3.1 The power given to local authorities to impose a civil penalty as an alternative to prosecution for certain specified housing offences was introduced by section 126 and schedule 9 of the Housing and Planning Act 2016.

3.2 The council is able to impose a civil penalty as an alternative to prosecution for the following offences under the Housing Act 2004:

- Section 30 – Failure to comply with an Improvement Notice
- Section 72 – Offences in relation to licensing of Houses in Multiple Occupation
- Section 95 – Offences in relation to licensing of houses under Part 3 of the Act
- Section 139 – Offences of contravention of an overcrowding notice
- Section 234 – Failure to comply with management regulations in respect of Houses in Multiple Occupation

4. Considerations

- 4.1 Although the maximum civil penalty that can be imposed for an offence is £30,000, it is for the council to determine the level of civil penalty taking into consideration certain considerations.
- 4.2 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.
- 4.3 The Borough Council of Wellingborough will continue to take robust action against those landlords that flout the law, and it will ensure that its use of civil penalties is consistent, appropriate, proportionate and fair.
- 4.4 Civil penalties can only be used as an alternative to prosecution. This means that, if a civil penalty has already been imposed, the offender cannot be prosecuted for the same offence. Likewise, a person who has been (or is being) prosecuted for a particular offence cannot be issued with a civil penalty for the same offence.
- 4.5 Although only one civil penalty can be issued (as an alternative to prosecution) for each of the first 4 offences listed in Paragraph 3.2 above, a civil penalty can be issued for each separate breach of the HMO Management Regulations.
- 4.6 Where the Council is in a position to prosecute a letting agent and landlord for failing to obtain a licence for a licensable HMO, it has the option of imposing a civil penalty on the letting agent and the landlord instead, as an alternative to prosecution.
- 4.7 Where the letting / managing agent and landlord have committed the same offence, the Council can impose a civil penalty on both of them, as an alternative to prosecution. The level of the civil penalty imposed on each offender may differ, depending on the circumstances of the case.

Deciding on an appropriate sanction

- 4.8 The same criminal standard of proof is required for a civil penalty as for prosecution. This means that, before taking formal action, the council needs to satisfy itself that, if the case were to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction.
- 4.9 To achieve a conviction in the magistrates' court, the council must be able to demonstrate beyond reasonable doubt that the offence has been committed. The same principle applies in respect of civil penalties so, where a civil penalty is imposed and an appeal is subsequently made to the First-tier Tribunal, the Council will need to be able to demonstrate beyond reasonable doubt that the offence had been committed.

- 4.10 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 that civil penalties should not be used in cases where serious offences have been committed.
- 4.11 A civil penalty of up to £30,000 can be imposed where a serious offence has been committed and the council believes that the most disruptive sanction to impose on a rogue or irresponsible landlord is a financial penalty (or penalties if there have been several breaches), rather than prosecution.
- 4.12 If the council believes that it has a reasonable prospect of a conviction in a particular case, it will always consider a civil penalty in the first instance and only by exception will it seek alternative measures such as prosecution or formal cautions.
- 4.13 The use of civil penalties (and rent repayment orders) will not only prevent the businesses of rogue and irresponsible landlords from profiteering from illegal and dangerous practices, but it will also demonstrate the council's commitment to ensuring that it is offenders (rather than good, responsible landlords or the local council tax payers) who pay for the cost of housing enforcement.
- 4.14 As the council is allowed to retain the income it receives from civil penalties, this course of action will also provide the council with the opportunity to increase its housing enforcement activity in the borough.

5. Process for serving a Civil Penalty Notice

5.1 Where it has been determined that a financial penalty may be appropriate to impose as an alternative to prosecution, the council will follow the following process.

5.2 A “Notice of Intent” shall be served on the person suspected of committing the offence. The notice of intent will be given no later than 6 months after the council has sufficient evidence of the conduct to which the penalty relates or at any time when the conduct is continuing. The Notice shall specify:

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

5.3 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. The representation may be via any legible written format, but to aid respondents, a form will be included with the Notice of Intent. The representations will be considered by a senior officer.

Following the 28 day period the council will decide:

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

5.4 If the council decides to impose a financial penalty, a final notice shall be issued imposing that penalty. 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.
- consequences of non-compliance and miscellaneous provisions

5.5 If, after any appeal has been finally determined or withdrawn, a person receiving a financial penalty does not pay all or part of the penalty charge, the council will recover the penalty by order from a County Court. Where appropriate, the council will also seek to recover the costs incurred in taking this action from the person to which the financial penalty relates.

5.6 Financial Penalties are an alternative to criminal proceedings and as such if a penalty is imposed, no criminal proceedings can be initiated for the same offence.

- 5.7 The council may, at any time withdraw a notice of intent or final notice reduce the amount specified in a notice of intent or final notice. Where the council decides to take either action, it will write to the person to whom the notice was given.
- 5.8 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 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.

6. Civil Penalty Matrix

- 6.1 Generally, the maximum civil penalties will be reserved for the very worst offenders. The actual amount levied in any particular case will reflect the severity of the offence and take account of the landlord's previous record of offending.
- 6.2 In order to ensure that the civil penalty is set at an appropriate level, the council will consider the following factors (described in more detail in paragraph 2.6 above) that the Government has identified, in its statutory guidance, as being pertinent:
- 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
- 6.3 The final factor is an overarching one and, after all the other factors have been considered and applied, the council will need to ensure that the civil penalty that is set removes the financial benefit that has been gained from committing the offence.

Examples of Harm Categories

- 6.4 Officers should first determine the severity of the offence by looking at the harm and culpability categories. The table below contains factors relating to both actual harm and risk of harm.

High	<p>Serious adverse effect(s) on individual(s), other relevant parties and/or community</p> <p>High risk of an adverse effect on individuals including where persons are vulnerable.</p> <p>Housing defect giving rise to the offence poses an imminent or serious and substantial risk of harm to the occupants and/or visitors, for example Housing Health and Safety Rating System (HHSRS) imminent category 1 hazards</p>
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<p>Medium</p>	<p>Medium risk of an adverse effect on individuals including where persons are vulnerable.</p> <p>Tenant misled/disadvantaged by the failing.</p> <p>The housing defect giving rise to the offence poses a serious risk of harm to the occupants and/or visitors, for example HHSRS category 1 hazards, multiple high category 2 hazards</p>
<p>Low</p>	<p>Low risk of an adverse effect on individuals</p> <p>The housing defect giving rise to the offence poses a risk of harm to the occupants and/or visitors, for example low category 2 hazards under the HHSRS such as localised damp and mould.</p>

Examples of Culpability Categories

6.5 The table below contains factors relating to the culpability of a landlord in causing the offence.

<p>Very High (Deliberate Act)</p>	<p>Where the offender intentionally breached, or flagrantly disregarded the law, such as:</p> <ul style="list-style-type: none"> • Failure to comply with a correctly served improvement notice or overcrowding notice. • No attempt made to contact the local authority to discuss breaches. • Property knowingly let as substandard. • Repeatedly ignored reminders to apply for a HMO licence.
<p>High (Reckless Act)</p>	<p>Actual foresight of, or willful blindness to, the risk of offending but risks nevertheless taken by the landlord or property agent, such as:</p> <ul style="list-style-type: none"> • Disregard of advice from the local authority relating to property conditions. • Unwillingness to respond to tenant complaints • Failure to comply with HMO Management Regulations.

<p>Medium (Negligent Act)</p>	<p>Failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems that prevent the offence being committed, such as:</p> <ul style="list-style-type: none"> • Part compliance with a schedule of works but failure to fully complete all schedule items within notice timescale. • Partially completed licensing application forms. • 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. • Failure to inspect properties to identify required works.
<p>Low (Low or no culpability)</p>	<p>Offence committed with little or no fault on the part of the landlord or property agent, such as:</p> <ul style="list-style-type: none"> • Significant efforts made to address the risk but they were obstructed by the tenant to allow contractor access or damage caused by tenants. • Minor failings which occurred as an isolated incident such as low category 2 hazards under the HHSRS found in one property from a large portfolio. • Damage caused by tenants

6.6 Having determined the category the officers should refer to the following starting points to reach a penalty band. Officers should then consider whether further adjustments should be made for aggravating and mitigating features.

Starting points

Harm \ Culpability	High	Medium	Low
Very high	6	5	4
High	5	4	3
Medium	4	3	2
Low	3	2	1

Banding Levels

Band 1	£0 to £1,999
Band 2	£2,000 to £3,999
Band 3	£4,000 to £7,999
Band 4	£8,000 to £11,999
Band 5	£12,000 to £19,999
Band 6	£20,000 to £30,000

- 6.7 The starting point for each band will be the mid-point e.g. for Band 1 the mid-point will be £1,000. An offender will be assumed to be able to pay any financial penalty imposed unless they can demonstrate otherwise.

Aggravating Factors

- 6.8 The penalty can be increased within the assigned band based on aggravating factors. Officers will be mindful of aggravating factors when calculating financial penalties. Aggravating factors which will be considered include, but are not limited to:

- Previous convictions, having regard to a) the nature of the offences to which the conviction relates and its relevance to the current offence; and b) the time that has been elapsed since the conviction
- Motivation by financial gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact
- Obstruction of justice
- Record of providing substandard accommodation
- Refusal of free advice

Mitigating Factors

- 6.9 The penalty can be decreased within the band based on mitigating factors. Officers will be mindful of mitigating factors when calculating financial penalties. Mitigating factors which will be considered include, but are not limited to:

- 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 will always be expected
- Good record of maintaining properties
- Self-reporting, co-operation and acceptance of responsibility

Defence charges

- 6.10 A person who has been issued with a civil penalty has a right of appeal to the First-Tier Tribunal and this will involve a re-hearing of the council's decision to impose the civil penalty. The Tribunal has the power to confirm, vary (increase or reduce) or cancel the civil penalty that the council has issued.
- 6.11 The First-tier Tribunal can dismiss an appeal if it is satisfied the appeal is frivolous, vexatious or an abuse of process, or it has no reasonable prospect of success.
- 6.12 The council intends to defend its decision to issue civil penalties rigorously and this will involve not only officer time and resources but also specialist legal support.
- 6.13 The council will robustly seek to recover its legal costs in the event that it is required to defend its decision at a Tribunal. Therefore, each civil penalty notice that is unsuccessfully appealed will have the penalty increased by at least £2,000 per penalty charge for each person who has incurred the civil penalty.

Financial means to pay a civil penalty

- 6.14 When determining the level of a civil penalty, the council may make an assessment of a landlord's assets and any income (not just rental income) they receive when determining an appropriate penalty. 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 suitable and sufficient financial information to the contrary.
- 6.15 It is for the offender to disclose to the council such data relevant to his financial position as will enable the council to assess what s/he can reasonably afford to pay.
- 6.16 Offenders will be able to have their penalty reduced should they demonstrate that they are on a low income. The guideline figure for consideration as a low income household is a total household income under £440/week. This will be applied after all other relevant premiums have been included and if applicable will reduce the overall financial penalty by 50%.
- 6.17 To be applicable, the person served by the Notice of Intent must provide sufficient documented evidence of income.
- 6.18 The figure of £440/week is to be calculated after omission of income tax and national insurance.
- 6.19 The council reserves the right to request further information to support any financial claim, and where this is incomplete or not sufficiently evidenced may determine that the premium should not be applied

7. Rent Repayment Orders

- 7.1 A rent repayment order is an order made by the First-tier Tribunal requiring a landlord to repay a specified amount of rent.
- 7.2 The Housing Act 2004 introduced rent repayment orders to cover situations where the landlord of a property had failed to obtain a licence for a property that was required to be licensed, specifically offences in relation to licensing of HMOs.
- 7.3 Rent repayment orders have now been extended through the Housing and Planning Act 2016 to cover a much wider range of offences, described below.
- Failure to comply with an Improvement Notice (under section 30 of the Housing Act 2004)
 - Failure to comply with a Prohibition Order (under section 32 of the Housing Act 2004)
 - Breach of a banning order (under section 21 of the Housing and Planning Act 2016)
 - Using violence to secure entry to a property (under section 6 of the Criminal Law Act 1977)
 - Illegal eviction or harassment of the occupiers of a property (under section 1 of the Protection from Eviction Act 1977)
- 7.4 Rent repayment orders can be granted to either the tenant or the local housing authority. If the tenant paid their rent themselves, then the rent must be repaid to the tenant. If rent was paid through Housing Benefit or through the housing element of Universal Credit, then the rent must be repaid to the local housing authority. If the rent was paid partially by the tenant with the remainder paid through Housing Benefit/Universal Credit, then the rent should be repaid on an equivalent basis
- 7.5 A rent repayment order can be made against a landlord who has received a civil penalty in respect of an offence, but only at a time when there is no prospect of the landlord appealing against that penalty.
- 7.6 The council must consider a rent repayment order after a person is the subject of a successful civil penalty and in most cases the council will subsequently make an application for a rent repayment order to recover monies paid through Housing Benefit or through the housing element of Universal Credit.
- 7.7 The council will also offer advice, guidance and support to assist tenants to apply for a rent repayment order if the tenant has paid the rent themselves.

8. Guidance

8.1 This Policy has been developed with specific regard to:

- **The Housing and Planning Act 2016**
- **Civil penalties under the Housing and Planning Act 2016 Guidance for Local Housing Authorities** - Department for Communities and Local Government published April 2017
- **Private Sector Housing Policy** – Borough Council of Wellingborough. Updated September 2017.