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SCARBOROUGH BOROUGH COUNCIL

**Private Sector Housing Civil Penalties
Policy**

September 2018

Scarborough Borough Council

HOUSING CIVIL PENALTIES POLICY

1. Introduction

1.1 The Housing and Planning Act 2016 introduces a number of amendments to the Housing Act 2004 and gives Councils the power to impose civil penalties (fines) as an alternative to prosecution for certain offences under the Housing Act.

1.2 Civil penalties are an alternative when a landlord breaches one or more of the sections of the Housing Act 2004 below:

Section 30 – failure to comply with an Improvement Notice

Section 72 – mandatory licensing of Houses in Multiple Occupation

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 Houses in Multiple Occupation

1.3 The law allows a maximum financial penalty of £30,000 per offence.

1.4 This policy sets out how the Council shall use these new powers and how it will determine the size of each civil penalty.

1.5 This policy should be read in conjunction with the Councils Residential Regulation Enforcement Policy. That policy sets out the Councils approach to housing enforcement matters more generally and describes the process and powers used by the Council to both investigate and where needed take formal action against landlords for breaches of housing legislation.

1.6 The Council in exercising its functions must have regard to the Guidance for Local Housing Authorities issued by the Ministry of Housing, Communities and Local Government.

2. Deciding on an appropriate sanction

2.1 Where offences are committed and the Council believes that it has a realistic 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.

2.2 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 be satisfied that, if the case were to be prosecuted in the magistrates' court, there would be a realistic prospect of conviction. 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.

2.3 The Council should consult the Crown Prosecution Service Code for Crown Prosecutors when assessing if there is sufficient evidence to secure a conviction.

3. Process for Imposing a Civil Penalty

3.1 Where the Council decides that a financial penalty is the most appropriate action as an alternative to prosecution, the Council will follow the process set out below.

3.2 A “Notice of Intent” will be served on the person suspected of committing the offence. The Notice will 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.

3.3 The person to whom the notice relates will be given 28 days (beginning on the day after that on which the notice was given) to make written representation to the Council about the proposal to impose a financial penalty. If the landlord challenges either the proposal to impose a civil penalty or the level of the civil penalty they should where appropriate provide relevant and satisfactory documentary evidence to support their representations. .

3.4 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 such information on a case by case basis.

3.5 Following the 28 day period a final notice may 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 (28 days beginning on the day after the notice was given)
- e. information about rights of appeal to the First Tier Tribunal
- f. the consequences of failure to comply with the notice.

3.6 The Council can at any time withdraw either the Notice of Intent or Final Notice or reduce the level of penalty imposed. This will be in the form of a written notice to the person on whom the notice has been served.

3.7 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 be in the public interest. Any limitation period to prosecute should be considered before a civil penalty is withdrawn.

3.8 The person who has been served a Final Notice has the right of appeal to the First Tier Tribunal within 28 days In the event of an appeal against the council

decision the penalty would be suspended until the decision has been determined.

- 3.9 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 upheld it will be for the Tribunal to specify the period in which the landlord is to pay any fine imposed.
- 3.10 There is a **reduction of 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.
- 3.11 The discount will only be applied to the landlord when the Council serves the Notice of Intent and payment is made in full within 28 days.
- 3.12 The Council reserves the right not to allow a reduction (or reduce the reduction rate) if the level of gain is deemed to be in excess of the level of gain to the landlord.

4.0 Recovery

- 4.1 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. This process will be the Council's existing recovery policy and procedures for the collection of such debt including pursuance of the debt via the county courts if appropriate.
- 4.2 A certificate signed by the Chief Finance Officer for the Authority including the outstanding amount due will be accepted by the courts as conclusive proof of any outstanding payment due to the Council.

5.0 Determining the Level of the Civil Penalties

- 5.1 The Council has adopted a three staged approach to determine the level of a Civil Penalty. These stages reflect the requirements on the Council as laid out in statutory guidance.

Stage 1

The Council will determine the level of penalty based on:

- a) the culpability and track record of an offender
- b) the level of harm caused, or risk of harm that might foreseeably be caused to the tenants
- c) The Council will then assess any aggravating or mitigating factors that exist in the case to see if any adjustment should be made to the penalty.

Stage 2

The Council shall calculate the costs associated with investigating, determining and applying a civil penalty and these shall be added to the initial punitive charge.

Stage 3

The Council will make adjustments to the determination of the level of penalty having regard to:

- a) Whether the fine acts as a deterrent and removes any gain.
- b) The totality of the fine(s)

Stage 4

The Council will adjust final determination should the offender provide written information/proof to demonstrate that the impact of the level fine would be unfair and disproportionate.

5.2 Stage One – Setting the setting the initial determination

- 5.3 The initial determination is based on the culpability and track record of an offender and the level of harm done to the tenants.

High Level of Culpability

A person will be deemed to be highly culpable when they knowingly, intentionally or recklessly disregarded and broke the law. Acts committed knowingly or intentionally are more serious than acts committed recklessly. For example where one or more of the below applies:

- They have previous convictions having regard to the offence to which the penalty applies.
- Despite a number of opportunities and warnings to comply they have failed to do so.
- A high level of risk was caused with the reckless action or inaction of the landlord/agent (for example the failure to remedy Category One Hazards under HHSRS).
- They are a member of a recognised landlord/letting agency association or accreditation scheme;
- They are an experienced landlord/agent with a portfolio of properties

Medium level of culpability

A person will be deemed to have a medium level of culpability when they commit an offence through an act or omission a person exercising reasonable care would not commit. For example:

- No previous convictions having regard to the offence to which applies.
- A medium level of risk was caused with the reckless action or inaction of the landlord/agent (for example the failure to remedy Category Two Hazards under HHSRS).

- The landlord/agent was aware of the compliance issue and made reasonable efforts to comply with their legal duties but these were not sufficiently or adhered to or implemented.

Low level of culpability

A person will be deemed to have a low level of culpability when a person fails to comply or commits an offence with little or no fault. Possible examples may include:

- The breaches are minor
- It was an isolated occurrence
- A significant effort has been made to comply but was inadequate in achieving compliance
- Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
- Vulnerable individual(s) where their vulnerability is linked to the commission of the offence

Level of harm

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

A **high** level of harm could constitute one or more of the below:

- A high level of physical or psychological harm to the tenant
- Highly adverse impact on the tenant(s) for example worsened financial circumstances or the creation of homelessness.
- Harm to a vulnerable individual
- Serious risk to adjacent properties

A **medium** level of harm could constitute:

- Medium risk of physical or psychological harm to the tenant

A **low** level of harm could constitute:

- A low level of physical or psychological harm to the tenant

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

5.4 Vulnerability

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 should be greater when vulnerability is an issue. Examples of vulnerable households would include the elderly, households that include people with a physical or mental disability,

households with young children or households at higher risk of exploitation including people with a history of homelessness or migrant workers.

- 5.5 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 up to a maximum of £30,000. The table below shows the level of fine for each level of culpability and harm, including the **minimum** level of fine which will be imposed for each classification. The Council can go outside the level of fine band if it thinks it appropriate to do so. The level of fine shall be adjusted depending on mitigating and aggravating factors and the investigative charge up to a maximum of £30,000 (see below).

Level of Culpability	Level of Harm		
	High	Medium	Low
High	£20,000 -£30,000	£10,000- £20,000	£5000 -£10,000
Medium	£10,000- £20,000	£5,000- £10,000	£3000 - £5,000
Low	£5000 - £10,000	£3000- £5,000	£2,000- £3000

5.6 **Aggravating and mitigating factors**

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

- 5.8 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 convictions having regard to the offence to which the penalty applies and time elapsed since the offence
 Motivated by financial gain
 Obstruction of the investigation
 Deliberate concealment of the activity/evidence
 Record of letting substandard accommodation
 Record of poor management/ inadequate management provision
 Lack of a tenancy agreement/rent paid in cash

Mitigating factors could include:

Cooperation with the investigation e.g. turns up for the 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 recognised landlord accreditation scheme
 Health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns
 No previous convictions

Vulnerable individual(s) where there vulnerability is linked to the commission of the offence
Good character and/or exemplary conduct

5.9 For each aggravating or mitigating factor which applies to each specific case the level of fine will be adjusted by £500 of the initial fine, up to the maximum £30k or down to the minimum fine for each determined level of culpability and harm as shown in the table above.

6.0 Stage 2 – Calculating the investigative charge

6.1 Cases that result in the Council issuing civil penalties clearly entail investigative and preparation costs. These costs shall be reflected in the level of civil penalty imposed.

6.2 Investigative costs shall be based on the actual number of officer hours undertaken and the average hourly rate of the officers involved and the service costs. The level of charge is published within the Councils Residential Regulation Enforcement Policy.

6.3 In cases where charges are already levied for action undertaken (for example in relation to the service of Improvement Notices) these costs shall not form part of any investigative charge.

6.4 If an investigation leads to one or more civil penalty being imposed, the initial investigatory costs will be divided equally and added to each civil penalty.

7.0 Stage 3 – Adjustments to the penalty

7.1 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. In doing this the Legislation aims to ensure that the fine imposed acts as a sufficient deterrent.

7.2 When determining any gain as a result of the offence the Council will take into account any factors resulting in a financial benefit including;

- Cost of the works required to comply with the legislation
- Any licence fees avoided
- Rent received for the full period of the non-compliance
- The actual or potential cost of re-housing any tenants by the Council

7.3 If the level of financial gain is **greater** than the financial penalty, the penalty shall be adjusted upwards to the maximum potential level of £30,000.

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

7.5 The total financial penalty is cumulative and the Council shall therefore add up the financial penalties for each offence and consider if they are just and proportionate.

7.6 If the aggregate total is not just and proportionate the Council shall 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.

8.0 Stage 3- Final determination of the level of any civil penalty

8.1 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.

8.2 It is for the offender to disclose (within the 28 day notice period) such information that is relevant to their financial position as this will enable the Council to assess and determine what they can reasonably afford to pay.

8.3 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.

8.4 As many offenders will be landlords who own one or more properties, it is likely they will have assets they can sell or borrow against. After taking into account any mortgages on the property, the Council will determine the amount of equity that could be released from the property. If an offender claims that they are unable to pay a financial penalty and shows that they have only a low income, consideration will be given to whether any of the properties can be sold or refinanced.

9.0 First-Tier Tribunal and Defence Charges

- 9.1 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.
- 9.2 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.
- 9.3 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.
- 9.4 The Council will robustly seek to recover its legal costs in the event that it is required to defend its decision at a Tribunal.

10.0 Rent Repayment Orders

- 10.1 A rent repayment order is an order made by the First-tier Tribunal requiring a Landlord to repay a specified amount of rent.
- 10.2 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.
- 10.3.1 Rent repayment orders have now been extended through the Housing and Planning Act 2016 to cover a much wider range of offences including the failure to comply with an Improvement Notice.
- 10.4 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
- 10.5 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.
- 10.6 The Council must consider a rent repayment order after a person is the subject of a successful civil penalty the Council will always consider making a subsequent application for a rent repayment order to recover monies paid through Housing Benefit or through the housing element of Universal Credit.
- 10.7 The Council will also offer advice, guidance and support to assist tenants to apply for a rent repayment order if the tenant has paid rent themselves.