



## **Castle Point Borough Council**

### **Housing and Planning Act 2016**

### **Civil Penalty Determination Policy**

#### **PART 1**

##### **1) Introduction**

- 1.1) Schedule 9 of the Housing and Planning Act 2016 amended the Housing Act 2004 and introduced new powers for Councils to impose financial penalties as an alternative to prosecution for certain offences under the 2004 Act.
- 1.2) Civil Penalties are now an alternative to prosecution when a landlord fails to comply with the following offences / breaches under the 2004 Act.
  - Section 30 – failure to Comply with an improvement notice
  - Section 72 – offences relating to the mandatory licensing of Houses of Multiple Occupation (HMO's)
  - Section 95 – offences in relation to the licensing of HMO's under part 3 of the Act
  - Section 139 – failure to comply with overcrowding notice
  - Section 234 – breach of management regulations in respect of HMO's (A civil penalty can be imposed for each separate breach of the regulations)
  - Section 21 (Housing and Planning Act 2016) – breach of a banning order
- 1.3) An amendment to the Housing Act 2004 (Schedule 13A) prescribes the procedures that a local housing authority must follow before imposing a financial penalty, the appeal process and the procedure for the recovery of the penalty.
- 1.4) The 'Civil Penalties under the Housing and Planning Act 2016 – Guidance for Local Authorities' was produced for this purpose as statutory guidance that the authority must have regard to. The guidance recommends certain factors a local authority should take into account when deciding on the level of civil financial penalty and recommends that Local Authorities develop and document their own policy on determining the appropriate level of financial penalty in a particular case.
- 1.5) This document was produced to act as the local policy of Castle Point Borough Council for the setting of civil penalties, where this is considered to be the most appropriate enforcement option having regard to the CPBC Private Housing Enforcement Policy.

## 2) **Burden of Proof for a civil penalty and consideration of enforcement options**

- 2.1) For a criminal prosecution and for a civil penalty to be imposed, 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 a reasonable prospect of conviction.
- 2.2) The Council will have consideration to the "Crown Prosecution Service Code for Crown Prosecutors" published by the Director of Public Prosecutions when considering the evidence:
  - Sufficiency of evidence – Evidentiary Stage of the Full Code Test
  - Public interest – Public Interest Stage of the Full Code Test
- 2.3) The Council will also have regard to its own Enforcement Policy when deciding on whether to impose a civil penalty or whether there is a more appropriate enforcement option, given the circumstances of the case (i.e. a prosecution.) The policy states that decisions and action taken shall be appropriate, fair, proportionate, consistent and transparent.

## 3) **Factors taken into account when setting appropriate level of fine**

- 3.1) The Council shall have regard to the following factors to ensure the correct level of fine is set correctly:

### ***i) Severity of offence***

The more serious the offence, the higher the penalty shall be.

### ***ii) The harm caused to the tenant or the potential harm to the tenant***

The greater the harm or potential for harm (class of harm taken from HHSRS guidance as set out under part 1 of the Housing Act 2004) the higher the amount should be when imposing a civil penalty.

### ***iii) Culpability and track record of the offender***

A landlord's previous history of compliance will be taken into account. Ignorance of the law is not a defense to protecting their tenant's health, safety and welfare. A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations 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.

### ***iv) Punishment of the offender (economic impact on 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 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 ensure that it has real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities. Each case will be considered on its merits and the action to be taken will be decided accordingly.

### ***v) Defer the offender from repeating and committing further offences***

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 penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.

### ***vi) Deterrence of others from committing similar offences***

An important part of deterrence is the realization that (a) The local housing authority is committed to improve housing standards in the private rented sector and proactive in levying civil penalties where the need to do so exists and (b) that the civil penalty will be set at a high enough level to both punish the offender and deter repeat offending. A consistent approach

in the issuing of civil penalties is necessary to deter the offender in question or others from committing the same offences.

**vii) *Financial gain – 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 well managed. When serving a civil penalty, any benefit the offender has made as a result of their action will be taken into account. The level of civil penalty will be higher the more financial gain has been made by the landlord to punish and deter repeat offending.

**4) Changes / review of policy document**

- 4.1) The policy shall be reviewed from time to time, for reasons which may include, but are not restricted to, changes in legislation and to ensure the effective operational working of the policy. Minor amendments to the policy document such as changes in offence categorisation scores, descriptions and offence category score ranges, may be made by the Environmental Health Operational Manager, in consultation with the Head of Environment. Major changes to the policy shall be subject to Cabinet approval.

**PART 2**

**5) Determination of a Civil Penalty**

- 5.1) The Department of Housing, Communities and Local Government published statutory guidance on Civil Penalties under the Housing and Planning Act 2016. This guidance has been followed in establishing this local policy document.
- 5.2) Castle Point Borough Council has adopted a scoring system which takes into account the factors that the statutory guidance allows to be used when making a decision as to the appropriate civil penalty.
- 5.3) 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.

**STEP 1 - Determining the offence category, fine starting point and range of penalty.**

- The Council will determine the offence category using Severity, Culpability, Harm and the track record of the landlord. Where an offence does not fall squarely into a category, individual factors may require a degree of adjustment to make an overall assessment and potentially result in a score that falls between two categories.
- The examples listed in each box of the matrix are for *guidance purposes only* and will be considered alongside the context and circumstances of each individual case.
- Table 1 shall be used to calculate a score (Severity + Culpability + Harm or Potential harm + Track Record = score)
- Table 2 shall then be used to indicate a final offence category (A, B, C or D,) based on the score, a fine range and starting point fine. The starting point fine amount shall then be adjusted, if necessary, during steps 2-8.

Table 1 – Scoring of the four criteria.

CRITERIA	Offence category A	Offence category B	Offence category C	Offence category D
Severity of offence.	One cat 1 hazard or breach  <b>Score 2</b>	Two cat one hazards or breaches (where one or less is band A)  <b>Score 4</b>	Two Cat one hazards or breaches where both are band A or Three+ cat 1 hazards (of which one or less is band A) or breaches  <b>Score 6</b>	Three+ cat 1 hazards (of which two or more band A) or breaches  <b>Score 8</b>
Culpability	Offence committed with little fault, i.e. significant efforts were made to address the risk, but were inadequate on this occasion or no warnings/circumstance indicating a risk  <b>Score 2</b>	Offence committed through act or omission which a person exercising reasonable care would not commit  <b>Score 4</b>	Actual foresight or willful blindness to risk of offending, but risk nevertheless taken.  <b>Score 8</b>	Intentional breach or, flagrant disregard of the law  <b>Score 16</b>
Harm or potential harm	Moderate (i.e. occasional slight pneumonia, regular serious coughs and clod, broken finger, mild concussion.)  <b>Score 2</b>	Serious (i.e. fracture, concussion, loss of finger, gastroenteritis, serious puncture wounds)  <b>Score 4</b>	Severe (i.e. serious burns, serious fractures, anaphylactic shock, cardio respiratory disease.)  <b>Score 8</b>	Extreme (i.e. death)  <b>Score 16</b>
Track record of landlord / agent	No history or good record of compliance  <b>Score 0</b>	Informal action taken and complied with on past occasion.  <b>Score 2</b>	Enforcement action, previously taken, for moderate or serious risks  <b>Score 4</b>	Enforcement action previously taken for severe or extreme risks  <b>Score 8</b>

Table 2 – Deciding on an offence category based on total score

Offence category	A	B	C	D
Score	0-12	13-24	25-36	37-48
Fine range	£1001-£2500	£2501-£7000	£7001-£17000	£17001-£30000
Starting point	£1750	£4750	£12000	£23500

- Above fine range set in accordance with Criminal Justice Act 1982 – standard scale points 3, 4, 5 & 6. Scale points 1&2 (<£1000) are not used due to the need for fines to act as a deterrent and/or to any economic advantage that a legal contravention may have provided to the landlord.

### **Step 2 Adjustments to the Initial Determination – Aggravating and mitigating factors**

- 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.
- 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 applies and time elapsed since the offence
- 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

#### **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

### **STEP THREE - Review any financial element of the penalty**

- The Council shall check whether the proposed level of financial penalty is proportionate to the overall means of the offender. The Council may increase or reduce the proposed fine reached at step two.

#### ***Obtaining financial information***

- The statutory guidance advised that local authorities should use their existing powers to, as far as possible, make an assessment of a landlords assets and any income (not just rental income) they receive when determining an appropriate penalty. Assets can be borrowed against or sold.
- In setting a financial penalty, the Council may conclude that the offender is able to pay any financial penalty imposed, unless the Council has obtained or the offender has supplied any financial information to the contrary. An offender will be expected to disclose such data relevant to his financial position to enable the Council to assess what an offender 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 offenders means from evidence it has received and from all the circumstances of the case.

#### ***General principles to follow in setting a penalty***

- The Council should finalize the appropriate level of penalty so that it reflects the seriousness of the offence and the Council must take into account the financial circumstances of the offender.
- The level of financial penalty should reflect the extent to which the offender fell below the required standard. **The financial penalty should meet, 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.
- The principle behind issuing civil penalty notices is that there is no financial gain to the alleged perpetrator of the relevant offences and that funds from the financial penalties should fund private rented sector teams in the Council. To cover the costs of the work put into the serving any financial penalty notice the costs of serving the notice will be added to the overall penalty. This will also act as a deterrent to non-compliant landlords as it is clear that landlords or agents who do not apply will know that they will have to pay for the cost of any enforcement action (where that has not been recovered under other powers).
- The Council will add the cost of officer time and resource used to serve the notice and this will be added to the penalty as a deterrent to non-compliant landlords or agents. This may be reduced or increased where a case is either very straightforward or alternatively takes longer than normal.

#### ***Review of the penalty***

- The Council will review the penalty and, if necessary adjust the initial amount

reached at step two to ensure that it fulfils the general principles set out above.

- Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the total financial penalty arrived at in step two. Where this is not readily available, the Council may draw on information available from enforcing authorities and others about the general costs of operating within the law.
- Whether the penalty will have the effect of putting the offender out of business will be relevant but in some serious cases this might be an acceptable outcome.

#### **STEP FOUR – Reductions for the wider impact on innocent third parties**

- The Council will consider any factors which indicate a reduction in the penalty and in so doing the Council should have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):
  - impact of the financial penalty on offender's ability to comply with the law or make restitution to victims;
  - Impact of the financial penalty on employment of staff, service users, customers and local economy.

#### **STEP FIVE – Reduction for early admission of guilt**

- The Council will take into account a potential reduction in penalty for an admission of guilt. The following factors will be considered in setting the level of reduction. When deciding on any reduction in a financial penalty, consideration will be given to:
  - The stage in the investigation or thereafter when the offender admitted guilt
  - The circumstances in which they admitted guilt
  - The degree of co-operation with the investigation
- Any reduction should not result in a penalty which is less than the amount of gain from the commission of the offence itself.

#### **STEP SIX - Additional actions**

- In all cases the Council must consider whether to take additional action. These may include works in default, Interim Management Orders or Rent Repayment Orders. The Council cannot however take a prosecution case for the same conduct as is the subject of a financial penalty notice.

#### **STEP SEVEN - Totality principle**

- 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 behavior.

- Where the offender is issued with more than one financial penalty, the Council should consider the following guidance from the definitive guideline Offences Taken into Consideration and Totality produced by the sentencing Council.
- The Council should 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 LA.
- The Council should 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 the Council should consider how to reach a just and proportionate financial penalties. 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 which reflects 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.'

#### **STEP EIGHT – Recording the decision**

- The officer making a decision about a financial penalty will record their decision giving reasons for coming to the amount of financial penalty that will be imposed. There is no requirement to publish the decision but it must be retained on file.