

Appendix 2

Cheltenham Borough Council

Policy for Civil Penalties under the Housing and Planning Act 2016

Introduction

1. The power to impose a Civil Penalty as an alternative to prosecution for certain offences was introduced by section 126 and Schedule 9 of the Housing and Planning Act 2016.
2. In determining the Civil Penalty amount, the Local Housing Authority will have regard to the statutory guidance issued under schedule 9 of the Housing and Planning Act 2016 and also to the DCLG developed Civil Penalty Matrix.
3. The approach to issuing a Civil Penalty is fundamentally made up of two stages, firstly determining the appropriate sanction and secondly (if appropriate) the level of Civil Penalty charged.
4. When determining the appropriate sanction the Council should satisfy itself that if the case were to be prosecuted there would be a 'realistic prospect of a conviction'. This is currently determined by consulting the Crown Prosecution Service "Code for Crown Prosecutors" which provides two tests: (i) the evidential test and (ii) the public interest test.

Background

5. Civil Penalties were introduced by the Housing and Planning Act 2016 under Section 126 and Schedule 9 of that Act. The powers enable Local Authorities to impose Civil Penalties of up to £30,000 in respect of the following offences:
 - a) Failure to Comply with an Improvement Notice under Section 30 of the Housing Act 2004;
 - b) Offences relating to Licensing of HMOs under Section 72 of the Housing Act 2004;
 - i Section 72 (1) being in control or managing an HMO which is required to be licensed but is not so licensed;
 - ii Section 72 (2) being in control or managing an HMO which is licensed but knowingly permitting occupation over and above the number authorised by the licence;
 - iii Section 72 (3) being a licence holder who fails to comply with any condition of a licence.
 - c) Offences in relation to Licensing of Houses under Part 3 of the Act (Selective Licensing);
 - i Section 95 (1) being in control or managing a house which is required to be licensed but is not so licensed;
 - ii Section 95 (2) being a licence holder who fails to comply with any condition of a licence.

- d) Contravention of an overcrowding notice under Section 139 of the Housing Act 2004;
 - e) Failure to comply with management regulations in respect of HMOs under Section 234 of the Housing Act 2004.
6. Statutory guidance has been issued by the Secretary of State under Schedule 9 (12) of the Housing and Planning Act 2016 and Local Authorities must have regard to this when exercising its functions in respect of civil penalties.
 7. The maximum penalty that can be set is £30,000. A minimum penalty level has not been set and the appropriate amount of penalty is to be determined by the Local Housing Authority. Only one penalty can be imposed in respect of the same offence.

Decision making

8. Ultimately, it is for the Local Authority to decide which option it wishes to pursue but as a general principle, local authorities should normally prosecute where an offence is particularly serious or where the offender has committed similar offences in the past.
9. Prosecution in serious cases demonstrates that the Local Authority will not hesitate to take formal action where needed and is likely to act as a strong deterrent both to the offender and other rogue landlords. A prosecution also enables the Local Authority to apply for a banning order following a successful conviction.
10. All Gloucestershire Councils have adopted an enforcement matrix which is used to determine the most appropriate course of action in enforcement cases. The principle of the enforcement matrix is to provide a score based on a number of factors, both negative and positive. Bands are provided to reflect the score produced and the appropriate courses of action for dealing with the identified situation.

Bands	Score	Recommended Action
1	Plus to minus 10	Charge higher licence fee Advisory letters Invitation to Landlord events
2	Minus 11 to minus 30	Revoke accreditation Informal letter
3	Minus 31 to minus 40	Commence investigation Serve Section 16 and 235 notices Revoke accreditation Consider revoking licence Formal action
4	< Minus 40	Formal action

11. The enforcement matrix provides guidance to officers carrying out investigations and ensures that enforcement is being carried out in a fair, proportionate and consistent way.

Factors in determining penalty levels

12. Clearly, a single level penalty will not be appropriate in all cases and when assessing the level of penalty to be imposed it is expected that the maximum amount would be reserved for the worst offenders. The actual amount levied should reflect the severity of the case and local authorities should have regard to the following.
- a) The seriousness of the offence
 - i The more serious the offence, the more likely it is that prosecution will be the more appropriate course of action
 - b) Culpability of the landlord – Factors to take into account when determining the culpability include where the offender –
 - i Has the **intention** to cause harm, the highest culpability where an offence is planned.
 - ii Is **reckless** as to whether harm is caused, i.e. the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences, even though the extent of the risk would be obvious to most people.
 - iii Has **knowledge** of the specific risks entailed by his actions even though he does not intend to cause the harm that results.
 - iv Is **negligent in their actions**.

Examples of Culpability

High (Deliberate Act)	Intentional breach by landlord or property agent or flagrant disregard for the law, i.e. failure to comply with a correctly served improvement notice
High (Reckless Act)	Actual foresight of, or wilful blindness to, risk of offending but risks nevertheless taken by the landlord or property agent; for example, failure to comply with HMO Management Regulations
Medium (Negligent Act)	Failure of the landlord or property agent to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence; for example, part compliance with a schedule of works, but failure to fully complete all schedule items within notice timescale.
Low (Low or no culpability)	Offence committed with little or no fault on the part of the landlord or property agent; for example, obstruction by tenant to allow contractor access, damage caused by tenants

- c) Harm or potential for harm
 - In determining the level of harm the Local Housing Authority will have regard to:
 - i The person: i.e. physical injury, damage to health, psychological distress
 - ii To the community; i.e. economic loss, harm to public health

- iii Other types of harm; i.e. public concern/feeling over the impact of poor housing condition on the local neighbourhood
13. The nature of the harm will depend on the personal characteristics and circumstances of the victim, e.g. tenant.
 14. Where no actual harm has resulted from the offence, the Local Housing Authority will consider the relative danger that persons have been exposed to as a result of the offender's conduct, the likelihood of harm occurring and the gravity of harm that could have resulted.
 15. Factors that indicate a higher degree of harm include:
 - i Multiple victims
 - ii Especially serious or psychological effect on the victim
 - iii Victim is particularly vulnerable

Examples of Harm Categories

High	Defect(s) giving rise to the offence poses a serious and substantial risk of harm to the occupants and/or visitors; for example, danger of electrocution, carbon monoxide poisoning or serious fire safety risk.
Medium	Defect(s) giving rise to the offence poses a serious risk of harm to the occupants and/or visitors; for example, falls between levels, excess cold, asbestos exposure.
Low	Defect(s) giving rise to the offence poses a risk of harm to the occupants and/or visitors; for example, localised damp and mould, entry by intruders.

16. Punishment of the offender
 - a) A Civil Penalty should not be regarded as an easy or lesser option compared to prosecution.
 - b) The penalty should be proportionate and reflect the severity of the offence.
 - c) The penalty should be set high enough to help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.
17. Deter the offender from repeating the offence
 - a) The ultimate goal is to prevent further offending and help ensure the landlord fully complies with all their legal responsibilities in future.
 - b) The level of penalty should be set at a high enough level to deter repeat offending.
18. Deter others from committing similar offences
 - a) Important part of deterrence is the realisation that the Council is proactive in levying Civil Penalties where the need exists and that the level of Civil Penalty will be set high enough to punish the offender and deter repeat offending.
19. Remove any financial benefit the offender may have obtained as a result of committing the offence.

- a) 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 managed.

Determining the amount of Civil Penalty

20. The Council has developed a spreadsheet for assessing the level of Civil Penalty that should be charged when offences have been committed and highlighted through the enforcement matrix as appropriate for a Civil Penalty.

21. The idea of the spreadsheet is that it takes into account all elements set out in guidance provided by DCLG and the approach the Council adopts through its enforcement policy and procedures.

22. The table below sets out the interrelation between harm and culpability as a determinant of the Civil Penalty banding.

Low Culpability/High Harm Band 4	Medium Culpability/High Harm Band 5	High Culpability/High Harm Band 6
Low Culpability/Medium Harm Band 3	Medium Culpability/Medium Harm Band 4	High Culpability/Medium Harm Band 5
Low Culpability/Low Harm Band 1	Medium Culpability/Low Harm Band 2	High Culpability/Low Harm Band 3

23. The assumed starting point (ASP) in each band will be the mid-point, i.e. for Band 3 the mid-point will be £12,500.

Band 1 = £0 to £4,999 Assumed Starting Point of £2,500	Low Culpability/Low Harm
Band 2 = £5,000 to £9,999 Assumed Starting Point of £7,500	Medium Culpability/Low Harm
Band 3 = £10,000 to £14,999 Assumed Starting Point of £12,500	Low Culpability/Medium Harm OR High Culpability/Low Harm
Band 4 = £15,000 to £19,999 Assumed Starting Point of £17,500	Low Culpability/High Harm OR Medium Culpability/Medium Harm
Band 5 = £20,000 to £24,999 Assumed Starting Point of £22,500	Medium Culpability/High Harm OR High Culpability/Medium Harm
Band 6 = £25,000 to £30,000 Assumed Starting Point of £27,500	High Culpability/High Harm

24. This approach ensures that the assessment of the level of Civil Penalty reflects the factors to be considered in the statutory guidance provided by the Secretary of State and takes into account the requirement to determine the appropriate sanction by using the score produced by the enforcement matrix as a guiding principle.

Aggravating Factors

25. The penalty may be increased by £1,000 for each aggravating factor up to a maximum of the top of the band level determined above.

26. In order to determine the final penalty the Council will consider any aggravating factors relevant to the case.

27. Below is a list which will be considered as part of the determination. This is not an exhaustive list and other factors may be considered depending on the circumstances of each case.

- 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 non-compliance
- Record of letting substandard accommodation
- Record of poor management/ inadequate management provision
- Lack of a tenancy agreement/rent paid in cash
- Already a member of an accreditation scheme or letting standard – so should know better

Mitigating Factors

28. The penalty may be decreased by £1,000 for each mitigating factor to a minimum of the bottom of the band level determined above.

29. In order to determine the final penalty the Council will consider any mitigating factors relevant to the case.

30. Below is a list which will be considered as part of the determination. This is not an exhaustive list and other factors may be considered depending on the circumstances of each case.

- Co-operation with the investigation
- Voluntary steps taken to address issues e.g. submits a licence application
- Willingness to undertake training
- Evidence of 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

31. When considering aggravating and mitigating factors the Civil Penalty imposed must remain proportionate to the offence.
32. Reference will be made to Magistrates Court Sentencing Council guidelines when considering relevant aggravating and mitigating factors.
33. An offender will be assumed to be able to pay a penalty up to the maximum amount unless they can demonstrate otherwise.

Civil Penalties – Multiple Offences

34. Where the Local Housing Authority are 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).
35. However, where satisfied on the merits of the case and/or where the authority considers that issuing multiple penalties at the same time would result in an excessive cumulative penalty, nothing in this policy shall require the authority to do that. The authority 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 they continue.

36. Maximum Levels

37. The Council takes the enforcement of housing conditions in the Private Rented Sector extremely seriously and proactively pursues enforcement action where it is considered to be necessary and appropriate.
38. There may be circumstances when the Council is dealing with offences that it considers will warrant a maximum penalty.

39. Recording of the decision

40. A record of each decision and the reasons for the financial penalty will be made and how the amount of the penalty was obtained and the reasons for imposing it.