

<b>Report Title</b>	<b>Civil Penalties Policy</b>
<b>Purpose of Report</b>	To recommend to Committee the adoption of a Gloucestershire wide Policy with regard to the implementation of new powers to issue Civil Penalty Notices in relation to offences under the Housing Act 2004.
<b>Decision(s)</b>	<b>The Committee RESOLVES to adopt the Gloucestershire Civil Penalties Policy contained in Appendix A to this report.</b>
<b>Consultation and Feedback</b>	Consultation has taken place with; Other Gloucestershire District Councils Gloucestershire Branch of the NLA Gloucestershire Small Landlords Association
<b>Financial Implications and Risk Assessment</b>	Currently any issues with landlords are dealt with before a civil penalty would be issued, and so it is not expected that income would increase significantly under this policy. If however, enforcement action is required in the future, this policy would allow penalties to be issued. As detailed in the report, any income received from a civil penalty would need to be allocated to the statutory functions in relation to the enforcement of private sector housing standards.  Lucy Clothier, Principal Accountant Tel: 01453 754343 Email: <a href="mailto:lucy.clothier@stroud.gov.uk">lucy.clothier@stroud.gov.uk</a> Report author to comment on the Risk Assessment
<b>Legal Implications</b>	The proposals set out in the report and the Civil Penalties Policy at Appendix A are consistent with the statutory guidance. There are no significant legal implications that are not dealt with in the body of the report.  Mike Wallbank Solicitor Advocate and Deputy Monitoring Officer Tel: 01453 754362 Email: <a href="mailto:mike.wallbank@stroud.gov.uk">mike.wallbank@stroud.gov.uk</a> R2501D0602C2002

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<b>Options</b>	Not to adopt a policy
<b>Performance Management Follow Up</b>	As part of normal section management process
<b>Background Papers/ Appendices</b>	Appendix A Gloucestershire Civil Penalties Policy

## 1. BACKGROUND

1.1 The Housing & Planning Act 2016 introduced a range of measures to enforce against non-compliant 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 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 2018)
- Banning orders for the most serious and prolific offenders (scheduled to come into force on 1 October 2018).

1.2 The civil penalty powers contained in the Housing and Planning Act 2016 complement the existing enforcement tools that local authorities have under the Housing act 2004, i.e. to prosecute, issue Simple Cautions and/or carry out the work in default of Landlords who fail to comply with housing legislation. It also has the advantage of the ability for the local authority to retain the fines to enable them to resource continual improvements in the private rented sector.

1.3 Civil penalties are available as an alternative to prosecution for certain specified housing offences as follows:-

- Failing to comply with an improvement notice (section 30)
- Failure to comply with management regulations in respect to Houses in Multiple Occupation (HMO) (sec 234)
- Offences in relation to licensing an HMO (Part 3 of the Act)
- Breaching of an overcrowding notice (section 139)
- Breaching a Banning Order (awaiting implementation regulations)

## 2. ISSUES FOR CONSIDERATION

- 2.1. Following discussion with other Gloucestershire and Oxfordshire Council's it is proposed to use a matrix which has been developed by Oxford City Council following draft DCLG guidance to assess the circumstances of the offence to determine the most appropriate action to take and the penalty to be imposed (up to a maximum of £30,000). This matrix will be used to offer transparency and aid consistency in the enforcement process and will assist in defending appeals against decisions of imposing civil penalties and the penalty amount. This may be amended subject to any further regulations or guidance released by the Secretary of State.
- 2.2. The draft civil penalty policy in appendix A has been written in liaison with the five district councils in Gloucestershire and in consultation with the local branch of the National Landlords Association and The Gloucestershire Landlords Association. It sets out the basis on which the matrix has been developed and the assessments that will be made in determining the appropriate action and penalty fine level.
- 2.3. Enforcement officers will assess each case carefully to decide whether to issue a civil penalty or undertake other enforcement interventions in line with our enforcement policy and the enforcement matrix. Please note if a civil penalty is chosen, a prosecution cannot be sought.
- 2.4. Civil penalties are subject to appeal to the First Tier Property Tribunal (FTPT), therefore it is important that the Council sets the penalty at reasonable level, which it can successfully defend upon appeal.
- 2.5. The additional enforcement options to issue CPN's are a power and not a duty it is therefore an option for this council not to implement them, however, failure to do so will reduce the councils ability to more effectively improve landlord behaviour and use the revenue from the fines imposed to invest in private rented sector improvements.
- 2.6. Tenants, other residents and landlords in areas where there are high levels of private rented properties, will be more likely to report any properties that they consider to be badly managed and maintained if they believe there is a likelihood that the landlords will be held to account if they fail in their duties.
- 2.7. The ability to recover fines will depend on the Local Authority having robust mechanisms to pursue, where necessary, debt recovery through the Civil Court. The recovery procedure will depend upon the individual circumstances of each case and where recovery is difficult decisions will be made in consultation with Legal Services.
- 2.8. It should be noted however, that this is an alternative action to prosecution and this authority has not needed to seek to prosecute a landlord for non compliance within the last 10 years.
- 2.9. Should the Civil Penalty Policy be adopted, the authority to issue the Civil Penalty Notices listed in paragraph 1.3 will rest with the Council's Head of

Health and Wellbeing, in consultation with the Head of Legal Services, in accordance with section C5B of the Scheme of Officer Delegations.

- 2.10. The fixed penalty policy will need to be published on the website.

### **3.0 Financial Implications**

- 3.1 The Government has now published regulations that state the income from Civil Penalties can be retained by the Local Authority. The income must be used to cover the administration and legal costs and the expenses incurred in carrying out its private rented sector enforcement function. Any amount outside of that has to be paid in to the Consolidated Fund.

<http://www.legislation.gov.uk/ukxi/2017/367/contents/made>

### **4.0 Enforcement Options**

- 4.1 Section 126, Section 249A and Schedule 9 of The Housing and Planning Act 2016 introduced a new Civil Penalty as an *alternative* to a criminal prosecution for offences listed above. The procedure for imposing a civil penalty is set out at Schedule 9 of the Act. Non-payment of the Civil Penalty may be enforced through the County or High Court by an Order of that Court. There is a right of Appeal against the Civil Penalty in the First Tier Property Tribunal who has the power to confirm, vary, increase or reduce the size of the penalty as set out in the 'Final Notice' or cancel the Civil Penalty.

- 4.2 Local Authorities will have a choice whether to prosecute or impose a Civil Penalty for which the legal maximum is up to £30,000. A minimum penalty level has not yet been set. The legislation does not permit local authorities to impose a Civil Penalty and prosecute for the same offence in respect of the same conduct. The same criminal standard of proof is required before issuing the Penalty. There must be sufficient evidence for a 'realistic prospect of conviction' in accordance with the Code of Crown Prosecutors, and upon appeal of the Civil Penalty the Local Authority must demonstrate a criminal offence has been committed 'beyond reasonable doubt'.

- 4.3 The highest risk relates to the significant likelihood of landlords appealing to Tribunal against the level of the fixed penalty fine. This is mitigated by having an open and transparent Countywide policy which utilises a robust system developed by a Local Authority with significant experience in this field.

## **5. RECOMMENDATION**

- 5.1 That the Gloucestershire Civil Penalties Policy contained in Appendix A be adopted.

**GLOUCESTERSHIRE****Policy on 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 developed by Oxford City Council 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	Advisory letters Invitation to Landlord events Charge confidence in management revisit fee
2	Minus 11 to minus 30	Revoke accreditation Informal letter Charge confidence in management revisit fee
3	Minus 31 to minus 40	Commence investigation Serve Section 16 and 235 notices Revoke accreditation Consider revoking licence Formal action
4	Greater than minus	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**

<b>High (Deliberate Act)</b>	Intentional breach by landlord or property agent or flagrant disregard for the law, i.e. failure to comply with a correctly served improvement notice
<b>High (Reckless Act)</b>	Actual foresight of, or willful blindness to, risk of offending but risks nevertheless taken by the landlord or property agent; for example, failure to comply with HMO Management Regulations
<b>Medium (Negligent Act)</b>	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.
<b>Low (Low or no culpability)</b>	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

<b>High</b>	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.
<b>Medium</b>	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.
<b>Low</b>	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.

### Rationale for Action

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 adopted a spreadsheet developed by Oxford City Council 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.

<b>Low Culpability/High Harm</b> Band 4	<b>Medium Culpability/High Harm</b> Band 5	<b>High Culpability/High Harm</b> Band 6
<b>Low Culpability/Medium Harm</b> Band 3	<b>Medium Culpability/Medium Harm</b> Band 4	<b>High Culpability/Medium Harm</b> Band 5
<b>Low Culpability/Low Harm</b> Band 1	<b>Medium Culpability/Low Harm</b> Band 2	<b>High Culpability/Low Harm</b> 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
- Willingness to partake in the Gloucestershire Fit To Rent landlord accreditation scheme
- 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.