

Swale Borough Council

Housing Enforcement - Civil Penalties Policy

Section 23(10) and 126 and Schedule 9 of the Housing and Planning Act 2016 (“the 2016 Act”) allow financial penalties to be imposed by Local Housing Authorities as an alternative to prosecution for certain housing offences. This Policy outlines how the Council will apply these penalties.

Under section 249A of the Housing Act 2004 and the 2016 Act, a Local Housing Authority may now impose a financial penalty on a person if satisfied, beyond reasonable doubt that the person's conduct amounts to a “relevant housing offence”.

The relevant housing offences are offences under the 2004 Act, namely:

- Section 30 – Failure to comply with an improvement notice
- Section 72 (1) – Failure to licence a House in Multiple Occupation (HMO)
- Section 72 (2) – Operating a licensed HMO which is overcrowded
- Section 72 (3) – Failure to comply with HMO licence conditions
- Section 95 (2) – Failure to comply with a property licence condition
- Section 139 – Overcrowding notice for HMO
- Section 234 – Non-compliance with the HMO Management Regulations

A person who commits any of the above-mentioned offences without reasonable excuse is liable on summary conviction to a fine of any amount in the Magistrates' Court or a financial penalty imposed by a Local Housing Authority as an alternative that must not exceed £30,000.

Breaches of banning orders

The 2016 Act also introduced banning orders under Chapter 2 of Part 2. A Local Housing Authority may apply to a First-Tier Tribunal for a banning order against a person who has been convicted of a “banning order offence”. A banning order offence is an offence set out in the Housing and Planning Act 2016 (Banning Order Offences) Regulations 2018 (SI2018/216).

A banning order made by a First-Tier Tribunal may prohibit a person from engaging in one or more of the following activities:

- Letting housing;
- Engaging in letting agency work;
- Engaging in property management work.

A person who breaches a banning order commits an offence under section 21(1) of the 2016 Act and is liable on summary conviction to imprisonment, or to a fine, or to both. However, a Local Housing Authority may instead impose a financial penalty under section 23 of the 2016 Act of an amount not exceeding £30,000.

Procedure in determining an appropriate penalty

The decision to impose a civil penalty will fall in line with Swale Borough Council's current enforcement policies published on the Council's website; the Council will usually seek to remedy the disrepair informally where appropriate.

Where the legislation allows a civil penalty to be issued or a prosecution, each offence will be considered on a case by case basis. Where the landlord has breached housing legislation in the past and continues to be considered such a poor landlord and a banning order is considered necessary, a prosecution will be the first choice with an aim to proceed for a banning order.

It should be noted that for certain offences within the Housing Act, letting agents, property agents and managing agents can also be prosecuted and therefore under this policy they can be issued with a civil penalty. The term "landlord" within this policy refers to all of these groups. The level of civil penalty issued can be different for each party in regard to the same offence and will consider the circumstances specific to the individual party.

The legislation does not permit Local Authorities to impose a civil penalty and prosecute for the same offence. The criminal standard of proof is required before issuing a penalty. There must be sufficient evidence for a 'realistic prospect of conviction' in accordance with the Crown Prosecution Service Code for Crown Prosecutors, and upon any appeal of a civil penalty the Local Authority must demonstrate an offence has been committed 'beyond reasonable doubt'.

If a landlord receives a civil penalty, that fact can be taken into account if considering whether the landlord is a fit and proper person to be the licence holder for a House in Multiple Occupation (HMO) or any other property subject to licensing.

Civil penalties are subject to appeal to the First Tier Property Tribunal (FTPT).

Determining the level of penalty and factors considered

In determining the amount of any civil penalty, the Local Housing Authority will give regard to the statutory guidance issued under Schedule 9 of the Housing and Planning Act 2016 and to any other relevant published guidance. This takes into account the risk to the occupants (as determined using the Housing Health and Safety Rating System) and the level of culpability of the landlord. The Council will therefore set any penalty at a reasonable level which it can objectively justify.

The Council will consider the following to ensure that the level of civil penalty given is appropriate:

- **The severity of the offence:** the more serious the offence, the higher the penalty should be;
- **The culpability and track record of the offender:** a history of non-compliance or deliberate action should increase the penalty amount;

- **The harm caused to the tenant:** the greater the harm or potential for harm, the higher the penalty should be;
- **The punishment of the offender:** the penalty should be set at a level to reflect how that offence could be dealt with in a court of law and should have an impact upon the recipient;
- **Whether it will deter the offender from repeating the offence:** the level of the penalty should be set to help ensure that the offender does not offend again;
- **Whether it will deter others from committing the offence:** the civil penalty will not be in the public domain. However, there is likelihood that there will be an awareness of penalties issued through informal channels. The level of the penalty should seek to demonstrate the impact that non-compliance can have; and
- **Whether it will remove any financial benefit the offender may have obtained as a result of committing the offence:** the offender should not benefit as a result of committing an offence i.e. it should not be cheaper to offend, than to properly manage and maintain a property.

Table 1: Levels of Culpability of the Landlord

Examples of factors that will be considered when determining the culpability include:

Very High Culpability	The Landlord/Agent has the intention to cause or threatened to cause harm: the highest culpability where an offence is planned (for example where the landlord deliberately removes/disables the heating or leaves work partially complete which exposes the tenant to risk or fails to comply with a correctly served improvement notice). A landlord will be deemed to be highly culpable when they intentionally breach or wilfully disregard the law.
High Culpability	The Landlord/Agent 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. This will also include ignoring warnings raised by the local Council, tenants or others and allowing risks, breaches or offences to continue over a long period of time. Despite several opportunities to comply, they have failed to do so.
Medium Culpability	The Landlord/Agent has knowledge of the specific risks entailed by his actions: even though they do not intend to cause harm to the tenants they fail to comply or act in a reasonable manner (negligent), for example, partial compliance with a schedule of work to an enforcement notice but failure to fully comply with all schedule items.
Low Culpability	The offence committed has some fault on the part of the landlord or property agent or there are other

	circumstances for example obstruction by the tenant to allow a contractor access for repairs, or damage caused by tenant negligence. Minor breaches, isolated occurrence or where significant effort has been made to comply but was inadequate in achieving compliance.
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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 (as assessed under the Housing Health and Safety Rating System).

Table 2: Levels of Harm to the Tenant

Harm Level 1	There is a very high likelihood of severe harm (i.e. death or life changing injury) to one or more of the occupants or visitors if the issue is not resolved. These will typically be rated as Band A in the Council's HHSRS assessment but may include multiple Category 1 hazards of a lower band.
Harm Level 2	There will be one or more Category 1 and/or multiple Category 2 hazards which carry some risk of life changing injury or death to the occupants.
Harm Level 3	There may be one or more Category 2 hazards, but these are unlikely to cause severe injury.
Harm Level 4	All other cases not falling within Level 1, 2 or 3, e.g. where there is a disrepair issue for which the landlord is responsible, but the risk to the health of the occupants or visitors is low.

Table 3: Fine Levels

Culpability/Harm	Harm Level 4	Harm Level 3	Harm Level 2	Harm Level 1
Low Culpability	£500-£999	£1,000-£1,999	£2,000-£3,999	£4,000-£7,999
Medium Culpability	£1,000-£1,999	£2,000-£3,999	£4,000-£7,999	£8,000-£15,999
High Culpability	£2,000-£3,999	£4,000-£7,999	£8,000-£15,999	£16,000-£19,999
Very High Culpability	£4,000-£7,999	£8,000-£15,999	£16,000-£19,999	£20,000-£30,000

Aggravating and Mitigating Factors to take into account

Once the Council has determined the appropriate levels of culpability and harm, it will then determine which fine level this equates to and how much the final penalty will be. The Council will start at the middle of the penalty level and take into account any aggravating or mitigating factors in order to determine the final amount to be demanded.

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.

Aggravating Factors

- Previous convictions giving regard to the offence to which it applies, and time elapsed since the offence;
- Offences motivated by financial gain ;
- Obstruction of the investigation ;
- Deliberate concealment of any activity/evidence;
- Number of items of non-compliance – the 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;
- Number of and vulnerability of people affected; and
- Actual harm

Mitigating Factors

- Co-operation with the investigation;
- Voluntary steps taken to address issues e.g. submission of 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 their vulnerability is linked to the commission of the offence;
- Exemplary conduct; and
- Tenant behaviour

Vulnerable Individual

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.

The following are examples of what the Council would potentially consider as a vulnerable individual(s):

- Elderly person
- Children
- Pregnant women

- Single parent families
- Receives domiciliary care
- Has health needs – mental health, drug dependency, alcohol dependency etc
- Requires assistance in conducting their own affairs
- Has payments made to him/her or to an accepted representative in pursuance of arrangements under the Health and Social Care legislation
- Receives a service or participates in any activity provided specifically for persons who have particular needs because of age, has any form of disability or has a prescribed physical or mental problem
- Financial issues – low income/benefits
- Those who have difficulty in understanding, speaking or reading English
- An individual in a difficult situation such as bereavement or threat of deportation etc.

The above list is not exclusive and other factors may affect vulnerability when considering the level of any penalty.

The Level of Penalty

The assumed starting point for the penalty will be the middle of the fine bands -

For example, someone found to have low culpability and placed into harm level four should expect to have an assumed starting point of £750. Each aggravating factor will generally increase the fine by 10% up to the maximum of that band, with mitigating factors reducing the fine by 10% to the minimum of the band. So, to be issued with the maximum of £999, there must be generally four aggravating factors and no mitigating factors.

If actual harm has occurred or the number of people exposed to the risk of harm is greater, as in an HMO, the Council may generally consider increasing the amount of financial penalty in line with the harm outcome. It is likely the Council will then seek to review the financial penalty upwards by 20% or more for any factor.

To ensure fairness and transparency, every decision to impose a financial penalty will be subject to review by a senior manager of the Council. In the first instance, the imposition of a financial penalty will be proposed by the Private Sector Housing Manager, who will provide an assessment of any written representations received. The proposal will be reviewed by the Head of Housing, Economy and Community Services and an officer of similar or higher seniority, and a final decision made by that senior manager before a notice of intent or final notice is served.

Notice of Intent

Before imposing a financial penalty, the Council must first give the offender notice of its intention to impose such a penalty. This type of notice is known as a "Notice of Intent".

The Notice of Intent must be served within six months of the offence date. However, if the offence is ongoing, the Notice of Intent may be served at any time while the

conduct is continuing. If the conduct stops, the Notice of Intent must be served within six months of the date the conduct ceased.

For example, if a person fails to licence an HMO subject to mandatory licensing without reasonable excuse, the Council may at any time while the HMO remains unlicensed, serve a Notice of Intent. If such a person makes a valid licence application, the Council will still have the option to serve a Notice of Intent, but if it chooses to do so, it must serve the Notice of Intent within six months of the date the valid licence application was made. The Notice of Intent must set out:

- The amount of the proposed financial penalty
- The reasons for proposing to impose the financial penalty, and
- Information about the right to make representations to the Council.

Written Representations

Any person served with a Notice of Intent may make written representations to the Council about the proposal to impose a financial penalty. Any representations must be made within 28 days of the date the Notice of Intent was served.

Written representations may be made in respect of any matter.

Review of Representations

The Council will carefully review any written representations received during the 28-day period before taking any further action. There is no statutory timeframe for the review process, but the Council will seek to make a decision as to its proposed course of action as soon as possible.

The Council will take one of the following courses of action:

- Withdraw the proposal to impose a financial penalty;
- Impose a financial penalty of an amount lower than that proposed in the Notice of Intent;
- Impose the financial penalty proposed in the Notice of Intent;
- Propose to impose a financial penalty of an amount higher than that specified in the Notice of Intent.

If the Council decides to withdraw the proposal to impose a financial penalty, it will confirm its decision in writing. If the Council decides to impose a financial penalty of a lower or equal amount to that proposed in the Notice of Intent, it will serve a Final Notice.

- If the offender has provided written representations that increase the severity of the offence committed, the Council may seek to impose a higher financial penalty. If the Council decides to take that course of action, it will withdraw the original Notice of Intent and serve a revised Notice of Intent proposing an increased financial penalty.
- The offender would then receive an additional 28 days in which to make further written representations.

Financial Position of the Offender

The offender may wish to submit information as to their financial position. If the Council was aware of the financial position of the offender before serving the Notice of Intent, the Council may have already made adjustments to the proposed financial penalty. However, this may not be the case and offenders are advised to use the 28-day period for submitting written representations to make the Council aware of their financial situation, particularly if they would have difficulties in paying the proposed financial penalty.

It is for the offender to disclose to the Council such data relevant to his financial position as this will enable the Council to assess what s/he can reasonably afford to pay.

Where the Council is not satisfied that it has been given sufficient reliable information, it will be entitled to draw reasonable inferences as to the offender's financial means from the evidence it holds and from all of the circumstances of the case which may infer that the offender can afford to pay any financial penalty.

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. When determining any gain as a result of the offence the Council will take into account the following issues:

- Cost of the works required to comply with the legislation;
- Any licence fees avoided;
- Rent for the full period of the non-compliance - reviewed in conjunction with any potential Rent Repayment Order;
- Growth of portfolio based on income received; and
- Any other factors resulting in a financial benefit

As offenders may own or manage one or more properties, it is likely that they will have assets that they can sell or borrow against. After taking into account any mortgages on the property, the Council may 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.

False or Misleading Information

It is important to note that any person, who knowingly or recklessly supplies information to the Council that is false or misleading in connection with any proposed financial penalty, is committing an offence and is liable on summary conviction in the Magistrates' Court to an unlimited fine.

Final Notice and Right of Appeal/ Contents of Final Notice

If the Council decides to impose a financial penalty following its review of any written representations received, it will serve a “Final Notice” on the offender.

The Final Notice will set out:

- 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; and
- The consequences of failure to comply with the notice.

The period in which a financial penalty must be paid has been determined by statute. All financial penalties must be paid within 28 days of the date the Final Notice was served.

Appeals

A person on whom a Final Notice has been served may appeal to the First-Tier Tribunal against:

- The decision to impose the financial penalty; or
- The amount of the financial penalty.

Appeals should be made within 28 days of the date the Final Notice was served.

Once an appeal has been lodged, the Final Notice is suspended until the appeal has been finally determined or withdrawn.

The First-Tier Tribunal have the power to confirm, vary (reduce or increase), or cancel the Final Notice. If the First-Tier Tribunal decides to increase the financial penalty, it may only do so up to the statutory maximum of £30,000.

As of 2019, the address and contact details of the First-Tier Tribunal (Southern Region) were:

First-Tier Tribunal - (Property Chamber) Residential Property
Havant Justice Centre
The Court House
Elmleigh Road
Havant
Hampshire
PO9 2AL

Email: rpsouthern@justice.gov.uk Tel: 01243 779 394 | Fax: 0870 7395 900

The address of the First-Tier Tribunal changes from time to time, but the latest address will be detailed on any Final Notice served and can be found at: <https://www.gov.uk/courts-tribunals/first-tier-tribunal-property-chamber>

Reduction for Early Acceptance of Guilt

As with criminal prosecutions, the Council is of the opinion that an early acceptance of guilt is in the public interest. It saves public time and money. An offender can demonstrate an early acceptance of guilt by paying the financial penalty within 21 days of the date the Final Notice was served. If payment is made within this time period, the offender can benefit from a 25% reduction in the amount of financial penalty payable.

A Final Notice will set out the finalised financial penalty amount determined having regard to this policy and an amount equal to 75% of that sum, which would be accepted if received within the 21-day period.

If the Council is required to defend its decision at the First-Tier Tribunal, there will inevitably be additional costs in officer time and expenses. As such, no reduction is available for cases subject to an appeal to the First-tier Tribunal. If an offender makes an early payment at the reduced rate, but then decides to appeal at a later date, the Council will generally seek the full finalised amount during the appeal proceedings.

Unpaid Financial Penalties

County Court

The Council will take robust action to recover any financial penalty (or part thereof) not paid within 28 days of the date the Final Notice was served.

An application for an order of the County Court will be made in respect of all unpaid financial penalties. A certificate signed by the Chief Finance Officer of the Council stating that the financial penalty (or part thereof) has not been paid will be accepted by the Court as conclusive evidence of that fact, in accordance with Paragraph 11 of Schedule 13A to the 2004 Act (relevant housing offences) and Paragraph 11 of Schedule 1 to the 2016 Act (breaches of banning orders).

In taking court action, the Council would seek to recover interest and any court expenses incurred, in addition to claiming the full amount of unpaid financial penalty.

Enforcement

If an offender does not comply with an order of the Court, the Council will make an application to enforce the judgement. The type of enforcement action pursued would depend on the circumstances of the case and the amount owed. The most likely types of enforcement action are shown below.

Court bailiffs

A court bailiff will ask for payment. If the debt is not paid, the bailiff will visit the offender's home or business address to establish whether anything can be seized and sold to pay the outstanding debt.

Charging Order - Order of Sale

The Council can apply to place a charging order on any property owned by the offender. If a debt remains outstanding after a charging order has been registered, the Council can make an application for an order of sale. The property would then be subject to an enforced sale and the proceeds used to settle the debt owed to the Council.

Attachment to Earnings Order

If the offender is in paid employment, the Council can apply to the Court for an attachment to earnings order. Such an order would require the offender's employer to make salary deductions. Amounts would be deducted regularly at the direction of the Court until the debt owed to the Council has been fully discharged.

Review

This Policy will be subject to review and amended to reflect any change in legislation, corporate policy or official guidance. Any amendment shall be in line with meeting the requirements of the legislation and the public interest.

Help and Advice

If you would like further advice or clarification, the Private Sector Housing Team can help.

Please ring us on 01795 417538 and speak to one of our officers. We can also be contacted by email on: housing@swale.gov.uk

Alternatively, you can write to us at:

Private Sector Housing Team
Swale Borough Council
Swale House
East Street
Sittingbourne
Kent
ME10 3HT

Category 1 Hazard: The highest rating of hazard under the Housing Health and Safety Rating System undertaken under the Housing Act 2004. These are all hazards assessed under the System to fall within bands A-C. These include hazards where the occupant or visitor to the property is likely to suffer serious injury or death as a result. The Council has a duty to take action where a Category 1 hazard has been identified.

Category 2 Hazard: Includes all of the lower hazard bands Identified under the Housing Health and Safety Rating System Assessment. The Council does not have a duty to act upon these, although it does have the power to do so if it deems necessary. Swale Borough Council will generally take enforcement action on high Category 2 hazards (i.e. Bands D and E) or take action where multiple Category 2 hazards have been identified. Action taken is at the discretion of the authority on a case by case basis.

Housing Health and Safety Rating System (HHSRS): The government mandated means of assessing a dwelling for housing defects under the Housing Act 2004.

Improvement Notice: A legal notice served by the Local Housing Authority requiring work to be undertaken. This can be served on the owner, managing agent or person the Council deems to be in control of the property.

Links

Housing and Planning Act 2016

<http://www.legislation.gov.uk/ukpga/2016/22/contents/enacted>

Housing Act 2004

<https://www.legislation.gov.uk/ukpga/2004/34/contents>

Housing Health and Safety Rating System

<https://www.gov.uk/government/publications/hhsrs-operating-guidance-housing-act-2004-guidance-about-inspections-and-assessment-of-hazards-given-under-section-9>