

London Borough of Enfield

Cabinet

Meeting Date **16 September 2020**

Subject: **Approval of the Implementation and setting fee levels for financial penalties under the Housing and Planning Act 2016 and other legislation**

Cabinet Member: **Cllr George Savva**
Executive Director: **Sarah Cary**

Key Decision: **KD 5145**

Purpose of Report

1. This report seeks delegated authority for the implementation and setting of the level of financial penalties to be imposed under the Housing Act 2004 (as amended by the Housing and Planning Act 2016 section 126 Schedule 9) (“HA 2004 (as amended)”) and The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 (“ESSPRS Regulations”).
2. Financial penalties are significant tools to address poor housing conditions and non-compliant and criminal landlord activity in the private rented sector. The introduction of financial penalties will re-enforce the Council’s commitment to tackle those landlords who do not comply with their statutory obligations and enable the Council to penalise the worst landlords by direct economic sanctions. These proposals concur with the Government’s intention to prevent landlords from benefiting from their criminal behaviour and has issued strongly worded guidance that it expects Councils to make full use of them.
3. The intention is that the use of financial penalties will not only prevent the businesses of criminal and irresponsible landlords from profiteering from illegal and dangerous practices but aims to have a positive impact by bringing about a change in landlord behaviour. Financial penalties will deliver swifter action against landlords and will also result in financial penalties being received and retained directly to the Council for reinvestment into the local authority’s statutory functions in relation to the private rented sector.

Proposal(s)

4. To approve the proposed framework for determining the financial penalty and the penalty charge framework as outlined in Appendix 1. The framework was developed in accordance with Section 249A and Schedule 13A of the HA 2004 (as amended), the Civil Penalties under the Housing and Planning Act

2016: Guidance for Local Housing Authorities, April 2018 (Statutory Guidance) and the ESSPRS Regulations 2020.

5. The decision by an officer to issue a 'Notice of Intent to serve a financial penalty' will be reviewed by their line manager before it is sent. It is recommended that the Head of Service in the Private Rented Sector Property Licensing & Enforcement Service or the Head of Regulatory Services be delegated the authority (and officers delegated by them) to consider any representations made by recipients of 'Notices of Intent' and determine the amount of financial penalty to impose ('Final Notice') in accordance with the framework in Appendix 1. This will assist with consistent decision making.

Reason for Proposal(s)

6. With approximately 34% of Enfield's homes now privately rented, the regulation of the private rented sector requires effective enforcement to ensure compliance. Financial penalties can be used as an alternative to prosecutions, but the ability to prosecute is still retained for the more serious offences. Therefore, financial penalties are an additional enforcement tool and will deliver swifter action against rogue landlords.
7. The Statutory Guidance expects local authorities to develop and document its own policy on determining when to prosecute and when to issue a civil financial penalty, including the appropriate level of financial penalty as well as determining which option it wishes to pursue on a case-by-case basis in line with its policy. Appendix 1 proposes a framework to assist officers with determining the approach and the appropriate level of financial penalty to ensure consistency and transparency.
8. The report also provides information on other relevant legislative changes to improve the regulation of the private rented sector.

Relevance to the Council Plan

9. The Financial penalties framework contributes towards the Council Plan as follows:
 - **Good homes in well-connected neighbourhoods:**
10. The levying of financial penalties will contribute positively to 'improving the conditions and standards in Enfield's private rented sector. Responsible landlords will continue to sustain and grow their businesses, while the use of these new enforcement measures will provide the Council with an additional tool to tackle those landlords who neglect their legal responsibilities. The process for determining to issue a financial penalty and the penalty charge structure will ensure fairness and tackle inequality.
 - **Safe, healthy and confident communities:**

11. The levying of financial penalties will contribute positively to growth and sustainability in Enfield as it will provide an additional deterrent for landlords to evade their responsibilities in the letting and management of their properties but rather encourage landlords and agents to let accommodation that is safe and free from hazards. Residents can expect to receive a standard of accommodation that is fit for purpose, contributing to the physical and social wellbeing of our neighbourhoods.

- **An economy that works for everyone:**

12. The imposing of financial penalties will create stronger communities in Enfield by encouraging landlords to comply with their responsibilities in the letting and management of accommodation. Working in partnership with agency partners to tackle landlords and agents who do not adhere to their responsibilities will ensure Enfield is a safe and healthy place to live, visit and do business in.

13. The Enforcement staff will continue to promote good practice and provide advice to landlords about renting as it is acknowledged that the private rented sector is a key player in the provision of accommodation for the Council in the discharge of their duties under the Homelessness provisions.

Background

- **Financial Penalties**

14. The Housing Act 2004 (as amended) permits local housing authorities to impose financial penalties as an alternative to prosecution for the following offences:

- Failure to comply with an Improvement Notice (section 30);
- Offences in relation to licensing of Houses in Multiple Occupation (HMO) (section 72);
- Offences in relation to licensing of houses under Part 3 of the Housing Act 2004 (section 95) (Selective licensing);
- Offences of contravention of an Overcrowding Notice (section 139)
- Failure to comply with management regulations in respect of Houses in Multiple Occupation (section 234).
- Breaching a Banning Order (Housing & Planning Act 2016, section 21 and Schedule 1)

15. The Statutory Guidance expects local authorities to develop and document their own policy. The local housing authority, in the exercise of its functions, is expected to develop a policy on determining when to prosecute and when to issue a civil financial penalty including the appropriate level of financial penalty as well as determining which option it wishes to pursue on a case-by-case basis in line with its policy. Further, any determination to impose a financial penalty must be in accordance with Section 249A and Schedule 13A of the HA (2004) (as amended), which outlines the outlines the for imposing

financial penalties and appeals and enforcement requirements concerning financial penalties.

16. The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 came into force on 1 June 2020. The Regulations require landlords to ensure that the electrical safety standards are met during the period of a specified tenancy, and to ensure every electrical installation is inspected and tested at regular intervals (not more than 5 years) by a qualified person. The Regulations allow the Council to issue financial penalties against landlords who fail to undertake the necessary inspections and repairs in relation to the electrical system in private rented accommodation. It is for the Council to determine the size of the financial penalty imposed and the penalty must not exceed £30,000. More than one penalty can be imposed in the event of a continuing failure. Any financial penalty is in addition to the costs that the Council is entitled to recover in relation to the remedial action it has carried out.
17. The Housing and Planning Act 2016 introduced new measures enabling local authorities to impose financial penalties as an alternative to prosecutions, as outlined at paragraphs 1 and 2 above, concerning specific housing enforcement offences and breaches to the ESSPRS Regulations (see paragraph 42).
18. The council now proposes to introduce a regime of financial penalties through a framework for determining financial penalties as set out at Appendix 1.
19. Table A (Appendix 1) indicates the factors the Council must have regard to when setting the level of financial penalty to ensure that the penalty is set at an appropriate level in each case.
20. Table B (Appendix 1) provides the framework for determining the financial penalty charge to be levied. When setting a financial penalty, the Council can consider the cost of investigating the offence(s) and preparing the case for formal action. Further adjustment can be made to the financial penalty amount for aggravating factors, such as multiple hazards, having a history of providing substandard accommodation or not meeting legal requirements.
21. Table C (Appendix 1) illustrates examples of aggravating and mitigating factors that may increase the seriousness of offence to justify increasing the level of financial penalty.
22. The legislation does not set a minimum financial penalty but the maximum penalty a local housing authority can impose is £30,000 per offence. The maximum penalty is to be reserved for the most serious cases and/or repeat offenders, meeting the Government's aim of clamping down heavily on criminal landlords. Councils are able to retain the money from any financial penalties issued, and the revenue ring-fenced for its statutory functions in relation to the private rented sector.
23. Landlords receiving a financial penalty have the right to appeal to the First-Tier Tribunal in respect of the decision to issue a financial penalty, the

amount of the penalty and in respect of any deviations from the prescribed framework process.

24. Only one financial penalty can be issued for each of the housing offences listed in paragraph 15. However, a financial penalty can be issued for each separate breach of the management regulations in respect of HMOs (section 234 of the Housing Act 2004). In cases of multiple offences, a totality principle may be applied where it is considered the total amount of the financial penalties is not considered proportionate to the offending behaviour.
25. A framework has been developed for officers to follow in determining the level of a financial penalty charge to levy. This framework and the legislative process to follow is referred to in Appendix 1. The framework will ensure consistency and fairness of approach in the enforcement process. It will also enable a robust mechanism within which to defend any challenges or appeals against decisions of imposing civil penalties and/or the penalty amount.
26. Consideration is given to reducing the amount of penalty charge by 20% if the recipient of the financial penalty pays in full within 28 days. This is to incentivise landlords to pay the penalty and discharge their liability swiftly.
27. The purpose of enforcement and the use of financial penalties is to secure compliance and in particular to improve housing conditions and standards resulting in better outcomes for residents. The financial penalty framework in Appendix 1 will be reviewed after 12 months from introduction with a view to assessing its success in meeting these purposes, and that the level of penalties imposed is having a deterrent effect on offending.

Main Considerations for the Council

28. Approval of the financial penalty framework in Appendix 1 meets requirements of the s249A and Schedule 13A of the HA 2004 (as amended) and the Statutory Guidance as well as the incorporation of the penalties regime under the ESRPRS Regulations in how the Council determines when to use financial penalties (and which monetary value to impose)

Safeguarding Implications

29. There is likely to be a positive impact achieved through enforcing compliance because a higher proportion of vulnerable people live in private rented accommodation. This enable housing inspection and enforcement officers to identify concerns into potential safeguarding of children and adults and refer such cases to the appropriate safeguarding hub for intervention.

Public Health Implications

30. Poorly managed private rented properties cause neighbourhood problems with refuse, overcrowding and antisocial behaviour in addition to substandard living conditions for Enfield residents relying on this sector for housing. The introduction of an additional enforcement tool will contribute to a safer

healthier living environment for many of our tenants and residents so the benefits of an improved sector will be felt borough wide.

Equalities Impact of the Proposal

31. The Equalities Impact Assessment is attached. The introduction of financial penalties complement and build on the options already available to Housing Enforcement in tackling bad practice and criminal landlords, and therefore the levying of financial penalties will directly benefit tenants living in the private rented sector. The positive impacts will also benefit compliant landlords; residents and communities and will not be adversely affected on the basis of their protected characteristics, for example age, gender, and ethnicity. The positive impacts will directly benefit tenants in the private rented sector.
32. It is recognised from the work undertaken by Housing Enforcement staff that some of the worst rented properties offer accommodation at the lower end of the rental market with respect to standards and affordability. The use of these sanctions will consequently be more prevalent in some of the borough's wards compared to others. An aim of introducing these powers is to continue to bring parity to the private rented housing sector, so renters get an increased confidence in securing decent and safe accommodation.

Environmental and Climate Change Considerations

33. There are some considerations:

Consideration	Impact of Proposals
Adaptation and resilience	These proposals do not deal with matters which directly impact on climate change adaptation and resilience.
Energy consumption	These proposals cover enforcement of minimum energy efficiency ratings (minimum of 'E') in privately rented properties. It is illegal to rent out properties that are EPC rated lower than this (rated 'F' or 'G') so by enforcing this, energy consumption should be reduced in private rented housing (approximately 6.3% of all privately rented stock is rated 'F' or 'G').
Carbon emissions and offsets	Delivery of the proposals should not lead to any increase in emissions and no offsets are proposed.
Environmental	These proposals should have positive environmental impacts in respect of the street scene and quality of life for residents.
Procurement	No additional procurement of goods or services is proposed.

Risks that may arise if the proposed decision and related work is not taken

34. If this decision is not implemented the Council will continue with its regime of prosecuting 'relevant housing offences' which is costly and time consuming. Implementation of the framework regime in line with the legislative and Statutory Guidance provisions will enable the Council to introduce another more robust and effective enforcement tool within its housing enforcement armour as well as being more cost effective and efficient method of enforcement.

Risks that may arise if the proposed decision is taken and actions that will be taken to manage these risks

35. One of the likely consequences from the issuing of financial penalties will be appeals to the First Tier Tribunal from landlords. This risk will be mitigated by officers having their decision to issue the 'notice of intent to serve a financial penalty' reviewed by their line manager. Also, a Head of Service will review any representation received following service of the 'Notice of Intent' before any 'Final Notice to impose the financial penalty' is served. In addition, legal advice will be taken when needed, and comparison of best practice with other local authorities. In addition, officers will receive necessary training and will be guided by procedures that will be regularly reviewed and updated.

36. A likely challenge will be difficulty collecting the income from the penalties imposed. This risk will be mitigated by obtaining legal and financial resources as required in order to deliver the appropriate options for debt recovery for each case which could include applying for county court judgements, and a charging order to secure the debt against the defendant's interest in the property.

37. There is a potential risk is that the resource required to levy financial penalties as an alternative to prosecution proceedings will be greater than the level of income received from fines. The use of, and costs associated with financial penalties, will be reviewed regularly to ensure it remains efficient and effective.

38. A reputational risk may arise if the Council is perceived that financial penalties are being implemented for financial gain rather than for necessary enforcement. This risk will be mitigated by clear communications and will emphasise that any income from financial penalties can only be used to reinvest into the Council's statutory functions in relation to the private rented sector.

Financial Implications

39. The cost of introducing and administering financial penalties are met from the existing service staffing budgets within Regulatory Services and Legal Services. Penalties will be issued on a sliding scale basis depending on the severity of the offence, with penalties ranging from £500 to £30,000. At this stage, it is not possible to estimate the level of income from these penalties as the number of penalty notices that could be issued and paid is unknown at this stage.

40. There will be some additional costs in processing the financial penalty paperwork, responding to any representations and then defending appeals as it is highly likely that a landlord receiving a financial penalty will appeal to the Residential Property Tribunal. It is anticipated that any additional costs will be met through the income generated through levying financial penalties where appropriate as an alternative to prosecution proceedings. It is likely that the operation of the additional and selective licensing schemes when introduced will generate increased enforcement and increased use of financial penalties. The costs of additional enforcement in relation to the licensing schemes (including the staffing costs of administering and recovering financial penalties) will be met from the licence fees.
41. The monies received by the council from financial penalties will be retained by the Council to reinvest into its statutory functions in relation to private rented housing enforcement.
42. Where a landlord has committed an offence, the Council may apply for a Rent Repayment Order to recover monies paid to the landlord as housing benefit/universal credit for a period of up to 12 months.

Legal Implications

43. The HA 2004 (as amended) at Section 249A and Schedule 13A outlines the requirements for implementing a regime for imposing financial penalties as an alternative to prosecution concerning certain 'relevant housing offences' in respect of premises in England. A 'relevant housing offence' is an offence provided within the following provisions of the HA 2004 (as amended):
- section 30 (failure to comply with improvement notice),
 - section 72 (licensing of HMOs),
 - section 95 (licensing of houses under Part 3),
 - section 139(7) (failure to comply with overcrowding notice), or
 - section 234 (management regulations in respect of HMOs).
44. A financial penalty cannot be issued unless the evidence has met the criminal standard of proof test for the 'relevant housing offence', namely, that the evidence meets the 'beyond reasonable doubt' test demonstrating there is sufficient evidence to provide a realistic prospect of conviction. Accordingly, the Council must be satisfied beyond reasonable doubt that the landlord has committed the offence(s), and if it is in the public interest to issue a financial penalty or prosecute. Where a financial penalty is determined as the most appropriate course of enforcement action, a prosecution cannot be taken for the same offence
45. Section 249A(3) provides only one financial penalty can be imposed with regard to the same conduct and Section 249(4) states the maximum financial penalty which can be imposed is £30,000. There is no minimum penalty provision.

46. Schedule 13A paragraph 12 of the HA 2004 (as amended) imposes a mandatory requirement on a local authority to have regard to any guidance issued by the Secretary of State concerning the functions therein and at Section 249A. The Statutory Guidance issued requires the Council to develop and document its own policy on determining when to prosecute and when to issue a civil financial penalty including the appropriate level of financial penalty as well as determining which option it wishes to pursue on a case-by-case basis in line with its policy. The Council seeks to do this in compliance with the Statutory Guidance at Appendix 1.
47. The Private Rented Sector Housing Enforcement Policy includes guidance on how financial penalties will be used against rogue landlords and letting agents under the Act. This includes matters such as circumstances when a criminal prosecution will be issued as opposed to a financial penalty, which will usually be where an offence is particularly serious and where an offender has previously committed similar offences.
48. The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020 came into force on 1 June 2020. The Regulations impose a mandatory requirement on landlords to ensure that the electrical safety standards are met during the period of a specified tenancy, and to ensure every electrical installation is inspected and tested at regular intervals (not more than 5 years) by a qualified person. The ESSPRS Regulations allow place mandatory enforcement requirements on the Council where private sector landlords fail to comply with the electrical safety standards. Part 5, Regulation 11 of the ESSPRS Regulations allows a local authority to impose a financial penalty (or more than one penalty in the event of a continuing failure) up to the sum of £30,000 where it is satisfied, beyond reasonable doubt, that a private landlord has breached a duty to the electrical safety standards at Regulation 3.

Workforce Implications

49. This will be delivered using existing staff resources, and the new service when additional and selective licensing is introduced.

Property Implications

50. There are no property implications.

Other Implications

51. None.

Options Considered

52. The introduction of financial penalties will supplement and enhance the existing enforcement options currently available to the council. If financial

penalties are not introduced, we will continue to use criminal prosecution through the courts for contraventions of housing law by landlords and managing agents in the private rented sector.

53. Prosecution can be resource intensive and time consuming with cases often taking many months to reach a court hearing. Financial penalties would provide more efficient and swifter sanctions for non-compliance but with criminal prosecution still reserved for the more serious offences.

Conclusions

54. It is recommended that the introduction of financial penalties for enforcement of contraventions in housing standards in the private rented sector is approved, and the framework in Appendix 1 which sets out how officers will determine the level of financial penalty to impose.

Report Author: Sue McDaid
Head of Regulatory Services and Corporate Health & Safety
Sue.mcdaid@enfield.gov.uk
020 8379 3680

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Appendices

Appendix 1: Framework for Financial Penalties under the Housing Act 2004 as amended by the Housing and Planning Act 2016 and The Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

Background Papers

The following document has been relied on in the preparation of this report:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697644/Civil_penalty_guidance.pdf