

Civil penalty as an alternative to prosecution under the Housing Act 2004

HEREFORD COUNCIL POLICY ON DECIDING ON A FINANCIAL PENALTY AMOUNT

Version Control					
Version	Date	Approved by:	Implementation date:	Location of Changes	Summary of Changes
1.0	20.04.2021	Environmental Health Service Manager	20.04.2021	First Draft	Not relevant.

Amendments to Policies

This Policy and Guidance was approved by operational decision, which can be viewed on the Council's website.

The operational decision granted authority to the Environmental Health Service Manager in consultation with the Relevant Portfolio Holder to consider and approve any future recommended amendments to the Policies and Guidance contained within this document.

The version control of this document is owned by the Environmental Health Manager who shall consider and propose amendments to the Assistant Director of Economy and Place in consultation with the relevant Portfolio Holder.

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Chapter 1 – Civil Penalties

Part A - Introduction

1. Introduction

- 1.1 This document contains both policy and guidance: Parts A and B are Policy and should be read as such but all other sections are guidance only. Parts A and B are in accordance with Section 3.1 of the 'Civil Penalties under the Housing and Planning Act 2016: Guidance for Local Authorities' published by the Department for Communities and Local Government, April 2017("the DCLG Guidance").
- 1.2 This document is intended to work in accordance with the Supplementary Environmental Health Housing Enforcement Policy published by Herefordshire Council.
- 1.3 In this document the Housing Act 2004 will be referred to as "the 2004 Act" and the Housing and Planning Act 2016 will be referred to as "the 2016 Act". The term "Landlord" will be used to refer to the "owner", "person having control", "person managing" or "licence holder", as defined under the 2004 Act. The term "the Council" will be used to refer to Herefordshire Council in its capacity as a Local Housing Authority.

2. What is a Civil Penalty?

- 2.1 A Civil Penalty is a financial penalty of up to £30,000 which can be imposed on a Landlord as an alternative to prosecution for defined offences under the 2004 Act. The amount of penalty is determined by the Council in each case; Part C sets out how the Council will determine the appropriate level of Civil Penalty. In determining an appropriate level of penalty, local housing authorities should have regard to the DCLG Guidance at paragraph 3.5 which sets out the factors to take into account when deciding on the appropriate level of penalty.
- 2.2 The Council considers that the most likely recipients of civil penalty notices will be those persons who are involved in the owning or managing private rented properties. However, the Council does have the power to impose them on tenants of Houses in Multiple Occupation, for offences under section 234 of the Housing Act 2004, and will consider doing so where it is deemed appropriate.

3. What offences can civil penalties be imposed for?

- 3.1 A civil penalty can be considered as an alternative to prosecution for any of the following offences under the 2004 Act:
- Failure to comply with an Improvement Notice* (section 30);
 - Offences in relation to licensing of HMOs (section 72);
 - Offences in relation to licensing of houses (selective licensing)(section 95);

- Contravention of an overcrowding notice (section 139);
- Failure to comply with management regulations in respect of HMOs (section 234).
- Failure to comply with duties of private landlords in relation to electrical installations in accordance with the Electrical Safety Standards in the Private Rented Sector (England) Regulations 2020

32 A civil penalty can also be used as an alternative to prosecution for breaching a banning order that has been made by the First-tier (Property) Tribunal under section 16 of the 2016 Act.

4. What is the legal basis for imposing a civil penalty?

4.1 Section 126 and Schedule 9 of the 2016 Act enables the Council to impose a civil penalty as an alternative to prosecution for specific offences under the 2004 Act.

5. What is the burden of proof for a civil penalty?

5.1 The same criminal standard of proof is required for a civil penalty as for a criminal prosecution. This means that before a civil penalty can be imposed, the Council must be satisfied beyond reasonable doubt that the Landlord committed the offence(s) and that if the matter were to be prosecuted in the Magistrates' Court, there would be a realistic prospect of conviction.

5.2 In determining whether there is sufficient evidence to secure a conviction, the Council will have regard to the Herefordshire Council - Enforcement Policy and the Crown Prosecution Service Code for Crown Prosecutors, published by the Director of Public Prosecutions. The finding that there is a realistic prospect of conviction is based on an objective assessment of the evidence, including whether the evidence is admissible, reliable and credible and the impact of any defence.

5.3 In order to actually achieve a conviction in the Magistrates' Court, the Council would need to be able to demonstrate beyond reasonable doubt that the offence has been committed. Similarly, where a civil penalty is imposed and an appeal is subsequently made to the First-tier Tribunal, the Council would need to be able to demonstrate beyond reasonable doubt that the offence had been committed.

The link below takes you to further details on the Evidential Stage of the Full Code Test for criminal prosecutions as set out in the Guide for Crown Prosecutors.

<https://www.cps.gov.uk/publication/code-crown-prosecutors>

6. What must be done before a civil penalty can be considered?

6.1 The Council must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the Landlord and that the public

interest will be properly served by imposing a civil penalty. The following questions should be considered:

- Does the Council have sufficient evidence to prove beyond reasonable doubt that the offence was committed by the Landlord in question?
- Is the public interest properly served by imposing a civil penalty on the Landlord in respect of the offence?
- Has the evidence been reviewed by the appropriate senior colleague at the Council?
- Are there any reasons why a prosecution may be more appropriate than a civil penalty? i.e. the offence is particularly serious and the Landlord has committed similar offences in the past and/or a banning order should be considered.

The weblink below takes you to further details on the Public Interest Stage of the Full Code Test for criminal prosecutions.

<https://www.cps.gov.uk/publication/code-crown-prosecutors>

7. When will the Council consider civil penalties as an enforcement option?

7.1 The Council will consider civil penalties for all Landlords that are in breach of one or more of the sections of the 2004 Act that are listed in section 3.1 or for breach of a banning order under the 2016 Act. Enforcement action will be considered on a case-by-case basis in line with the Herefordshire Council - Enforcement Policy and the Herefordshire Council - Supplementary Environmental Health Housing Enforcement Policy.

8. The Totality Principle

8.1 Where a Landlord has committed multiple offences, and a civil penalty could be imposed for each one, the Council shall consider the totality of the breaches and pursue civil penalties which are just and proportionate to the level of offending behaviour.

8.2 When calculating the penalty amounts for multiple offences, there will inevitably be a cumulative effect and care should be taken to ensure that the total amount being imposed is just and proportionate to the offences involved. The Council should apply the Totality Principle as set out in the following paragraphs.

8.3 A Landlord may also have committed multiple similar offences or offences which arose from the same incident. In these cases, consideration should be given to whether it would be more appropriate to only impose penalties for the more serious offences being considered and to prevent any double-counting.

- 84 Having regard to the above considerations, the Council will form a view about whether a Civil Penalty should be imposed for each offence and, if not, which offences should be pursued. Where a single more serious offence can be considered to encompass several other less serious offences and it is decided that it is not proportionate or appropriate to impose a penalty for each offence, the more serious offence is the one that should be considered for the Civil Penalty.
- 85 Deciding not to impose a Civil Penalty for some of the offences does not mean that other enforcement options, such as a prosecution or offering a simple caution, cannot be pursued for those offences.
- 86 Multiple offences will also indicate a higher culpability for those same offences, as it shows that they are part of a pattern of behaviour and not simply an isolated incident. Even where some offences do not have a Civil Penalty imposed for them, they can and should still be considered as part of any assessment of culpability for the other offences that do result in a Civil Penalty being imposed.
- 87 Individual civil penalties can be imposed for each breach of the HMO management regulations, under section 234 of the Housing Act 2004. However, where multiple breaches fall under the same regulation, consideration should be given to whether a single penalty should be imposed for each regulation that is breached, rather than for breach of each sub- section of the regulations. In such cases, the most serious breach, in terms of the culpability of the offender and the harm risked to the tenants, should form the basis for the civil penalty.
- 88 This approach will only be considered where one breach of a regulation can be considered to encompass the other breaches in severity and harm. Where this is not the case, such as multiple serious breaches of the same regulation, separate civil penalties can be imposed for each breach.

1. Where is the process for civil penalties set out?

- 1.1 Schedule 13A of the 2004 Act sets out the process which must be followed when imposing a civil penalty.

2. Notice of Intent

- 2.1 Before imposing a civil penalty on a Landlord, the Council must serve a 'Notice of Intent' on the Landlord in question. This Notice must be served within 6 months of the last day on which the Council has evidence of the offence occurring. This Notice must contain the following information:

- the amount of the proposed civil penalty;
- the reasons for proposing to impose a civil penalty, and;
- information about the Landlord's right to make representations to the Council.

3. Representations

- 3.1 Any Landlord who is in receipt of a Notice of Intent has the right to make representations against that Notice within 28 days of the date on which the Notice was given. Representations can be against any part of the proposed course of action. All representations from Landlords will be considered by an appropriate senior colleague.

- 3.2 Where a Landlord challenges the amount of the civil penalty, it will be for the Landlord to provide documentary evidence (e.g. tenancy agreements etc.) to show that the calculation of the penalty amount is incorrect. Where no such supporting evidence is provided, the representation against the amount will not be accepted.

- 3.3 Written responses will be provided to all representations made by the recipients of a Notice of Intent. No other parties have an automatic right to make representations but if any are received, they will be considered on a case by case basis and responded to where the Council considers it necessary.

4. Final Notice

- 4.1 Once the representation period has ended, the Council must decide, taking into consideration any representations that were made, whether to impose a civil penalty and the final amount of the civil penalty. The final amount of a civil penalty can be a lower amount than was proposed in the Notice of Intent but it cannot be a greater amount.

4.2 The imposing of a civil penalty involves serving a Final Notice and this notice must contain the following information:

- 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.

4.3 The period of payment for the civil penalty must be 28 days beginning with the day after that on which the notice was given.

5. Withdrawing or Amending Notices

5.1 At any time, the Council may withdraw a Notice of Intent or a Final Notice or reduce the amount of a civil penalty. This is done by giving notice in writing to the person on whom the notice was served.

5.2 Where a civil penalty has been withdrawn, and there is a public interest in doing so, the Council can still pursue a prosecution against the Landlord for the conduct for which the penalty was originally imposed. Each case will be considered on a case by case basis.

6. Appeals to the Tribunal

6.1 If a civil penalty is imposed on a Landlord, that Landlord can appeal to the First-tier Tribunal (“the Tribunal”) against the decision to impose a penalty or the amount of the penalty. The Tribunal has the power to confirm, vary (increase or reduce) the size of the civil penalty imposed by the Council, or to cancel the Civil Penalty. Where an appeal has been made, this suspends the civil penalty until the appeal is determined or withdrawn.

7. Payment of a Civil Penalty

7.1 A civil penalty must be paid within 28 days, beginning with the day after that on which the final notice was given (“the 28 day payment period”), unless that notice is suspended due to an appeal. Details of how to pay the penalty will be provided on the final notice.

8. Other consequences of having a civil penalty imposed

8.1 Where a civil penalty has been imposed on a Landlord, this will form a part of our consideration when reviewing licence applications for properties in which they have some involvement. This includes licences under Part 2 or Part 3 of the Housing Act 2004.

- 8.2 Whilst a civil penalty will not automatically preclude the Council from granting a licence where such persons are involved, the reasons for imposing the penalty and the extent of the person's involvement in the property will be considered.
- 8.3 Where a Landlord has two civil penalties imposed on them in a 12 month period, each for a banning order offence, the Council will include their details on the Database of Rogue Landlords and Property Agents.
- 8.4 "Banning order offence" means an offence of a description specified in regulations made by the Secretary of State under Section 14(3) of the Housing and Planning Act 2016.

9. Recovering an unpaid civil penalty

- 9.1 It is the policy of the Council to consider all legal options available for the collection of unpaid civil penalties and to pursue unpaid penalties in all cases through the county courts. Some of the orders available to the Council through the county courts are as follows:
- A Warrant of Control for amounts up to £5000;
 - A Third Party Debt Order;
 - A Charging Order, and;
 - Bankruptcy or insolvency.
- 9.2 A certificate, signed by the Chief Finance Officer for the Council and stating that the amount due has not been received by the date of the certificate, will be accepted by the courts as conclusive evidence of the payment due.
- 9.3 Where a Charging Order has been made, and the amount of the order is over £1000, the Council can consider applying for an Order for Sale against the property or asset in question. When considering which properties to apply for a Charging Order against, the Council can consider all properties owned by the Landlord and not just the property to which the offence relates.
- 9.4 Where the Civil Penalty was appealed and the Council has a tribunal decision, confirming or varying the penalty, the decision will be automatically registered on the Register of Judgements, Orders and Fines, once accepted by the County Court. Inclusion on this Register may make it more difficult for the Landlord to get financial credit.

10. Income from Civil Penalties

- 10.1 Any income from civil penalties is retained by the Council which imposed the penalty. The Council must spend any income from civil penalties on its enforcement functions in relation to the private rented sector. Further details

can be found in the Rent Repayment Orders and Financial Penalties
(Amounts Recovered) (England) Regulations 2017.

1. Overview

- 1.1 The Council has the power to impose a civil penalty of up to £30,000; this section sets out how the Council will determine the appropriate level of civil penalty in each particular case. The amount levied in each case should reflect the severity of the offence and take into account the Landlord's income and track record.

Generally, the Council expects the maximum amount to be reserved for the very worst offenders. The actual amount levied in any particular case should reflect the severity of the offence as well as taking account of the Landlord's previous record of offending. Council's should consider the following factors to help ensure that the civil penalty is set at an appropriate level:

- (a) **Severity of the offence.** The more serious the offence, the higher the penalty should be.
- (b) **Culpability and track record of the offender.** A higher penalty will be appropriate where the offender has a history of failing to comply with their obligations and/or their actions were deliberate 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.
- (c) **The harm caused to the tenant.** This is a very important factor when determining the level of penalty. The greater the harm or the potential for harm (this may be as perceived by the tenant), the higher the amount should be when imposing a civil penalty.
- (d) **Punishment of 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 both 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 help ensure that it has a real economic impact on the offender and demonstrate the consequences of not complying with their responsibilities.
- (e) **Deter the offender from repeating the offence.** 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 the penalty should therefore be set at a high enough level such that it is likely to deter the offender from repeating the offence.
- (f) **Deter others from committing similar offences.** While the fact that someone has received a civil penalty will not be in the public domain, it is possible that other Landlords in the local area will become aware through informal channels when someone has received a civil penalty. An important part of deterrence is the realisation that (a) the Local Housing Authority is 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.

- (g) **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 properly managed.

1.2 The calculation of the civil penalty is undertaken in two stages. The first is the penalty calculation; this is where the severity of the offence, the Landlord's track record and the Landlord's income are considered. The second considers the amount of financial benefit, if any, which the Landlord obtained from committing the offence. These two components are added together to determine the final penalty amount that will be imposed on the Landlord.

1.3 This calculation process is broken down and assessed in 7 steps:

Step 1: Culpability

Step 2: Seriousness of Harm Risked

Step 3: Penalty Band

Step 4: Offence mitigation and/or aggravating features

Step 5: Calculating financial benefit

Step 6: Combining figures to get total penalty amount

Step 7: Considering Landlord representations

1.4 The total amount of civil penalty cannot go above the maximum amount for the particular penalty band.

2. Determining the seriousness of the offence (culpability and harm) and the penalty band

2.1 The penalty band is determined by means of an assessment of the Landlord's culpability for the offence and the seriousness of harm risked to the tenants or visitors to the property. A higher penalty will appropriate where the Landlord has a history of failing to comply with their obligations and/or their actions were intentional. Landlords who manage a business are expected to be aware of their legal obligations. There are four steps to this process and each step is set out below.

Step 1: Culpability

2.2 Table 1 sets out the four levels of culpability that will be considered. Each level has accompanying examples of the behaviours that could constitute that particular level. The list of examples is not exhaustive and factors such as relevant historical non-compliance may also be considered. The behaviour of the Landlord should be compared to this table to determine the appropriate level of culpability. This exercise will be repeated for each offence that is being considered as the Landlord's culpability may vary between offences.

Table 1 - Levels of Culpability

<p>Very high (Deliberate Act)</p>	<p>Deliberate breach of or flagrant disregard for the law. Must be satisfied that the Landlord has the intention to cause harm, with the highest culpability being used when an offence is planned. The worse the harm intended, the greater the seriousness.</p> <p>Factors that may lead to that conclusion include:</p> <ul style="list-style-type: none"> • Portfolio Landlord (5+ units of accommodation) • Professional letting/managing agent as defined in Redress scheme legislation? • Serious and/or systematic failure to comply with their legal duties • Repeat offending
<p>High (Reckless Act)</p>	<p>Actual foresight of, or wilful blindness to, risk of offending, but risk nevertheless taken. Must be satisfied that the Landlord is reckless as to whether harm is caused, that is, where the Landlord 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.</p> <p>Factors that may lead to that conclusion include:</p> <ul style="list-style-type: none"> • Failing to put in place measures that are recognised legal requirements or regulations. • Ignoring warnings raised by the local Council, tenants or others for example failure to comply with an Improvement Notice and/or licence conditions. • Failing to make appropriate changes after being made aware of risks, breaches or offences. • Allowing risks, breaches or offences to continue over a long period of time. • Compliance achieved after the commencement of formal, for example the Council had served formal statutory notices to complete Works In Default at a Property or Notice of Intention to impose financial penalty.
<p>Medium (Negligent Act)</p>	<p>Offence committed through an act or omission, which a person exercising reasonable care would not commit.</p> <p>Factors that may lead to that conclusion include:</p> <ul style="list-style-type: none"> • Failure to take reasonable care to implement and

	<p>enforce proper systems to manage risk and avoid the commission of the offence.</p> <ul style="list-style-type: none"> • Some effort made to comply but insufficient for full compliance, e.g. failure to complete all items on a schedule of works within the specified timescale • Partially completing a licence application form • Submitting an application or completing works after the council have commenced an investigation for non-compliance. • It is a first offence – with no high level culpability criteria being met.
<p>Low (low or no culpability)</p>	<p>Offence committed with little or no fault on part of the Landlord.</p> <p>Factors that may lead to that conclusion include:</p> <ul style="list-style-type: none"> • Failings were minor and occurred as an isolated incident. • Significant efforts were made to address the risk but were inadequate on this occasion. • There was no warning/circumstances indicating a risk. • Failings mainly attributable to obstruction by the tenant or tenant damage. • Mental illness or disability of Landlord • Youth or age, where it affects the responsibility of the Landlord

Assessing a Landlord's culpability

- 23 When assessing culpability, consider all of the evidence gathered as part of the investigation into the offence.
- 24 Using the factors set out above, consider each category of culpability in the Table 1 and identify the one that the Landlord's behaviour falls within; where a Landlord's behaviour could meet more than one of the categories, choose the highest one of those met.
- 25 There are offences where liability is strict and no culpability need be proved for the purposes of obtaining a conviction, but the degree of culpability is still important when deciding the level of financial penalty. The extent to which recklessness, knowledge or negligence are involved in a particular offence will vary.
- 26 Sections 2.7 provides further guidance on when it is appropriate to consider past enforcement action taken against the Landlord.

Patterns on criminal behaviour or poor management

27 Where there are multiple offences and multiple hazards being considered, whether or not formal enforcement action will be taken for each offence or hazard, both show a pattern of behaviour and this should form part of any assessment of culpability. A single offence or less-serious hazard could be the result of an oversight or lapse in otherwise satisfactory management standards but multiple offences or hazards indicate a broader failure of management and a greater culpability for any offences committed. Where the number of breaches or hazards is high and/or serious in nature, it is likely that they represent a deliberate neglect of duty on the part of the manager and any assessment of culpability should take account of the 'deliberate' nature of the act.

Step 2: Seriousness of Harm Risked

28 Table 2 separates the seriousness of harm risked into three levels and each one has an accompanying description to illustrate what would constitute that level of harm risked.

29 The harm risked by the offence should be compared to the table to determine the appropriate level. This exercise will be repeated for each offence that is being considered as the seriousness of harm risked can vary between offences.

210 When using the table to determine the appropriate level, consideration should be given to the worst possible harm outcomes that could reasonably occur as a result of the Landlord committing the offence. This means that even if some harm has already come to tenants or visitors to the property, consideration should still be given to whether there was the potential for even greater harm to have occurred.

Table 2 - Seriousness of Harm Risked

Level A	The seriousness of harm risked would meet the guidance for Class I and Class II harm outcomes in the Housing Health and Safety Rating System ¹ .
Level B	The seriousness of harm risked would meet the guidance for Class III and Class IV harm outcomes in the 'Housing Health and Safety Rating System' ³ .
Level C	All other cases not falling within Level A or Level B (e.g. where an offence occurred but the level of harm to the tenants or visitors does not meet the descriptions for Level A or Level B).

Further information about the classes of harm and general guidance regarding the Housing Health and Safety Rating System please use the web link below:

¹ Office of the Deputy Prime Minister: London (2006), *Housing Health and Safety Rating System Operating Guidance*, page 47

Step 3: Penalty Band

- 211 Using the already determined level of culpability and the seriousness of harm risked, find the appropriate penalty level (1 – 5+) in Table 3.

Table 3 - Penalty Levels

Seriousness of Harm Risked	Culpability			
	Very high	High	Medium	Low
Level A	5+	5	4	3
Level B	5	4	3	2
Level C	4	3	2	1

Table 4: Penalty Bands

- 212 Compare the penalty level from Table 3 to Table 4 and this will give the penalty band for the offence. This penalty band determines both the starting amount and the upper limit for the penalty calculation.

Penalty Level	Penalty Band	Starting Point
1	£600 - £1,200	£900
2	£1,200 - £3,000	£2,075
3	£3,000 - £6,000	£4,500
4	£6,000 - £15,000	£10,500
5 / 5+	£15,000 - £30,000	£22,500

Step 4: Aggravating and Mitigating Factors

- 213 Once the starting point has been determined, the Council will then go on to consider factual elements providing the context of the offence and factors relating to the Landlord and will then add to or reduce the penalty to reflect any aggravating and mitigating factors identified. In particular, relevant recent convictions/civil penalties and or a history of non-compliance are likely to result in a substantial upward adjustment. The maximum adjustment that may be applied shall be capped at whatever the minimum or the maximum specified for the penalty band for the offence. However, the Council is not precluded from going outside of the range where the facts justify it.

- 214 Table 5 contains a non-exhaustive list of aggravating and mitigating factors.

Table 5

Aggravating factors:	Mitigating factors:
<ul style="list-style-type: none"> • Previous convictions for Housing Act or similar offence(s), having regard to the time elapsed since the conviction • Motivated by financial gain – i.e. they received income or avoided expenditure that they otherwise would not have. • Obstruction of the investigation, including but not limited to: <ul style="list-style-type: none"> ○ preventing or restricting access to the property; ○ failure to provide information in response to statutory Notice • Coercion or encouragement of others to obstruct the investigation • Deliberate concealment of the activity/evidence, including but not limited to: <ul style="list-style-type: none"> ○ instructing a tenant to not be in; not allow access to Proper; not to provide information • Record of letting substandard accommodation i.e. record of having to take letter with schedule of works and formal enforcement action previously whether complied with or not • Breaches of Management Regulations Observed (over and above the one taken action for) • Poor Management Practices: <ul style="list-style-type: none"> ○ Lack of training ○ Failure to comply with recognised regulations and industry standards (inventory; TDP; Redress scheme, No EPC and no exemption applies) ○ External condition of property ○ ASB issues • Property in poor condition <ul style="list-style-type: none"> ○ Imminent Risk Category 1 – resulting from the actions or inactions ○ Category 1 Hazards ○ Multiple or serious Cat 2 Hazards ○ Poor EPC – below Government Minimum Standard • Lack of a tenancy agreement • Rent paid in cash without appropriate cash handling procedures • Evidence of threatening behaviour/harassment of the tenant/Council Officers • Illegal Eviction from part or all of the property: <ul style="list-style-type: none"> ○ Threats ○ Steps taken towards illegal eviction i.e. denial of services 	<ul style="list-style-type: none"> • No relevant previous convictions or civil penalties • Owns a single property • No formal enforcement action taken under the Housing Act or similar within the last 2 years (legal notices, civil penalty, simple caution, prosecution) • No substantiated history of enforcement action including formal letters and formal written warnings • Property in good and safe condition and well managed • Cooperation with the investigation <ul style="list-style-type: none"> ○ Allowing access to the property ○ Attends PACE interview ○ Provide information requested • Evidence of addressing issues at the earliest opportunity after being made aware. • Evidence of proactive steps to undertaken training and improve knowledge including joining of industrybody • Level of tenant culpability • Evidence of health reasons preventing reasonable compliance – mental health, unforeseen health issues, emergency health concerns either affecting the proposed recipient of the financial penalty or, evidence of the impact on close family member. • Vulnerable individual(s) (owners not tenants) where there vulnerability is linked to the commission of the offence

- Ignore documented warnings from the Council
- Only comply once evidence collection has been commenced
- Only comply once formal enforcement action has been taken such as WID/NOI served



Step 5: Financial Benefit

- 31 The Council is permitted to consider all of a Landlord's income and assets when calculating a Civil Penalty, however full financial investigations will normally only be considered for the more serious offences.
- 32 For penalties that fall within bands 5 and 5+, a financial investigation of the Landlord will be usually carried out and all sources of income received by the Landlord can be considered as 'relevant income' for the purpose calculating the Civil Penalty. Specifically, the average weekly income of the Landlord for the 12 months preceding the date of the offence will be used. For penalties that fall within bands 1 to 4, the Landlord's income will still be considered but the 'relevant income' for the offence will normally be limited to the income that the Landlord received in relation to the property where the offence occurred.
- 33 For property owners, this will be the weekly rental income, as declared on the tenancy agreements, for the property where offence occurred and at the time the offence occurred.
- 34 For property agents, the relevant income will be any fees they received for the management of the property, as stated on the management contract between the agent and the other parties to the contract. Where the fees include VAT or any other charges, the gross amount of the fees will be used.
- 34 The Council will not normally consider a Landlord's assets but does reserve the right to consider assets in any cases where the Council considers it reasonable and proportionate to do so. Each of these cases will be dealt with on a case by case basis.

What if tenancy agreements or management contracts are not available?

- 35 Tenancy agreements and property management contracts can be requested using the Council's existing powers and this should be done where copies are not already available.
- 36 In cases where the Landlord is not forthcoming with this information or documentation, or where no tenancy agreement exists, the Council will estimate the average weekly income instead. This estimate will be made based on typical rents in properties of a similar type, size and area as the property to which the offence relates. Where the average rents vary within an area, a figure at the higher end of the average should be used. The Landlord will have an opportunity to make representations and provide evidence against this estimated figure if they deem it to be too high.

- 3.7 Representations against estimated incomes will only be accepted where sufficient evidence of the Landlord's income is provided to support these claims.

Relevant weekly income tables (5 and 6) from original guidance not included

Financial benefit obtained by Landlord

- 3.8 A guiding principle of Civil Penalties is that they should seek to remove the financial benefit which a Landlord may have obtained as a result of committing the offence. This helps to ensure that the amount of the Civil Penalty imposed will not normally be less than it would have reasonably cost the Landlord to comply in the first place.

How is financial benefit added to the Civil Penalty?

- 3.9 Calculating the amount of financial benefit obtained will need to be done on a case by case basis and it will be more common to add financial benefit to a Civil Penalty for some offences over others. The amount of any financial benefit that the Council will seek to remove through a Civil Penalty should also be proportionate to the severity of the offence.

How is the financial benefit determined?

- 3.10 The following paragraphs provide guidance on how the Council should determine the financial benefit in particular circumstances and how that financial benefit should be removed from the Landlord and added to the Civil Penalty. This guidance is not definitive and other forms of financial benefit can be considered where it can be demonstrated and evidenced.

Operating an unlicensed property

- 3.11 Landlords who are operating unlicensed properties are likely to be benefiting financially from the offence because they will usually receive rental income from occupants over and above the number that are legally permitted to occupy the property. Conversely, this means that any rental income from those occupants who are legally permitted to occupy the property is not financial benefit from the offence.
- 3.12 An example of this would be an unlicensed HMO that has five occupants and is subject to the mandatory licensing scheme under Part 2 of the Act. In this scenario, the Landlord is legally permitted to let the property to four occupants without needing a licence. As such, the rental income from the first four occupants is not financial benefit from the offence but the rental income from the fifth occupant potentially is and could be added to the Civil Penalty amount.

Landlord

For a property that is subject to both additional and mandatory licensing under Part 2 of the Act, the Landlord is only legally permitted to let the property to two occupants without needing a licence. As such, the rental income from the first two occupants is not financial benefit from the offence but the rental income from the third occupant is and could be added to the Civil Penalty amount.

- 3.13 Where an offence has been continuing over a period of time, such as is likely in the case of unlicensed properties, the income at the time of the offence may not be a static amount. For example, tenants may have come and gone over that period with the weekly rental income rising and falling accordingly. In such cases, a mean average of the weekly income, over the period of the offence, should be used as the relevant weekly income for the offence. The maximum amount of rental income that will be added to the penalty shall be capped at 12 months.
- 3.14 Once the rental income has been calculated for the offence period, the Council will then determine the amount that should be included in the financial penalty and that it is proportionate to the seriousness of the offence. The percentage of the rental income to be included will be dependent on the penalty band for the offence. Table 6 is a guide that will be considered when determining the rental income/financial benefit to be included.
- 3.15 An assessment of the financial benefit from operating an unlicensed property could also take account of any money saved by not applying for a licence and paying the application fee. However, if the Landlord has submitted a duly made application at the time of imposing the Civil Penalty, they have removed this benefit that they had previously obtained.

Over-occupying a licenced property

- 3.16 As with an unlicensed property, the licence holder for a licenced property is potentially obtaining financial benefit from an offence if they let the property to more persons than are permitted by the licence. The rental income from each person over and above the number permitted by the licence could be financial benefit from the offence and could be added to the penalty amount.
- 3.17 An example of this would be a property with a licence that permits four occupants but where the licence holder has allowed a fifth person to occupy the property. The rental income from the fifth person could be considered financial benefit from the offence. Table 6 is a guide that will be considered when determining the rental income/financial benefit to be included.

Breaching a condition on a housing licence

- 3.18 Whether or not a Landlord obtains any financial benefit from breaching a condition on a licence will largely depend on the nature of the condition itself.
- 3.19 If a condition required works to be carried out at a property, and the works had not been completed at the time of imposing the Civil Penalty, the cost of completing those works might be considered financial benefit that the Landlord has obtained from the offence. Effectively, the Landlord may have saved the money that it would have cost them to comply with the condition and this amount might be appropriate to add to the Civil Penalty.
- 3.20 Where a condition prohibits use of part of a property, the financial benefit from breaching the condition could be any money, such as rental income, that the Landlord obtained from not complying with the prohibition. This will most commonly be rental income from prohibited bedrooms that are let out in breach of the prohibition. Table 6 is a guide that will be considered when determining the rental income/financial benefit to be included.
- 3.21 It is important to note that if an occupant uses a prohibited bedroom but does have an alternative and suitable bedroom that they could have used instead, their rental income is unlikely to be considered as financial benefit. The Landlord is still committing an offence and a Civil Penalty may still be appropriate but the assessment of financial benefit will be different because they could have received the same income without committing the offence.

Failing to comply with an Improvement Notice

- 3.22 The financial benefit from failing to comply with an Improvement Notice could be the money saved by not carrying out the works required on the notice. However, where works in default are subsequently carried out, the Landlord will be charged for these works and this will remove any financial benefit that the Landlord might have obtained from the offence. As such, an amount to remove any financial benefit from the offence should only be considered where no works in default are being carried out and the Landlord has not subsequently completed the works after the deadline has passed.

Failing to comply with an Overcrowding Notice

- 3.23 If a Landlord continues to allow a property to be occupied by persons in excess of those stated on an overcrowding notice, any rental income from the extra persons could be considered financial benefit from the offence. This is similar to the financial benefit obtained from operating an unlicensed property or exceeding the maximum permitted occupancy on a licence for an HMO or house. Table 6 is a guide that will be considered when determining the rental income/financial benefit to be included.

3.24 It is important to check whether the additional persons do result in additional rental income for the Landlord as the rent may be paid for the property as a fixed amount with the number of occupants not being relevant to the amount. In such a case, the Landlord would receive the same rent whether or not they were in breach of the Overcrowding Notice and so the rental income would not normally be considered financial benefit from the offence.

Breaching the HMO management regulations

3.25 Similar to failing to comply with an Improvement Notice, the financial benefit from breaching the HMO management regulations could be the money saved by not carrying out the works required to not be in breach of the regulations in the first place. For some of the HMO management regulations, the cost of complying with them will negligible or nothing and so it will not be uncommon for the Council to consider there to be no financial benefit to breaching some HMO management regulations.

Breaching a Banning Order under the Housing and Planning Act 2016

3.26 Landlords who are subject to a banning order are banned from the letting, letting agency work or the managing of rented properties in England, with the exception of any such activities that the First-tier Tribunal has expressly permitted. As such, any income obtained from these activities in relation to properties in England is likely to be financial benefit from the offence and serious consideration should be given to adding this to the penalty amount. Table 6 is a guide that will be considered when determining the rental income/financial benefit to be included.

Table 6– Percentage (%) of financial benefit to be added for offences where income is derived from rent

Penalty Band	% of financial benefit to include
1	20%
2	40%
3	60%
4	80%
5	100%
5+	100%

Financial benefit and multiple offences

3.27 Sometimes, the same financial benefit will apply to multiple offences. For example, if a property is licenced for four persons and a fifth bedroom is prohibited, the licence holder would be committing two separate offences by

putting a fifth person in the prohibited bedroom. However, the financial benefit for both offences could be the rental income from additional person occupying the property. If separate Civil Penalties were to be served for each of the offences, it would not be correct or appropriate to add the financial benefit in full to both penalties. Instead, the appropriate amount should either be added to one of the Civil Penalties or divided between the two, as necessary.

Deductions from the amount of financial benefit

- 3.28 When considering the financial benefit that a Landlord obtained from an offence, the Council will normally use the gross amount and will not speculate about any deductions from this amount that the Landlord may have had to make. At the time of calculating the Civil Penalty, the Council is highly unlikely to be in possession of any evidence of legitimate deductions and in the absence of such evidence, the gross amount should be used for the penalty calculation.
- 3.29 If at the time of doing the calculation, the Council is in possession of clear and reliable evidence of deductions from the amount of financial benefit, only those which did not themselves provide a benefit to the Landlord are likely to be considered. Deductions that are unlikely to be considered, as they still represent a benefit to the Landlord, include: mortgage payments, management fees, maintenance and repair costs, and any other costs for which a service was received or which constitute an investment in the Landlord's businesses, properties or other assets.

Financial Benefit and Rent Repayment Orders

- 3.30 Where the financial benefit from an offence is the rental income, the Council may recover it as part of a Civil Penalty and pursue a Rent Repayment Order for the same money. However, where the rental income is derived from Housing Benefit the Council will normally seek to remove all of this through the financial penalty instead of making a separate application for a Rent Repayment Order. However, consideration will be given to which power is most appropriate for the Council to use on a case by case basis.

Step 6- Combining figures to get total penalty amount

- 3.31 The Council will need to be able to prove that financial benefit was obtained before it can be included in the Civil Penalty calculation. However, where it can be proven, the calculated amount should then be added to the Civil Penalty. If the total amount calculated is less than the upper limit for the penalty band, then this is the amount that will be used. However, if the amount calculated is greater than the upper limit for the penalty band, then the upper limit will be used instead.

Note: The penalty calculation should not be increased past the upper limit of the penalty band: however, where the Landlord has a history of non-compliance, it is appropriate to factor this into your assessment of their overall culpability. This could affect your initial assessment of the appropriate penalty level and lead to a higher penalty band being used as the starting point.

- 3.32 After determining that a Civil Penalty is appropriate and having calculated the level of the Penalty in accordance with this guidance, the Council will review the total amount to ensure that it is proportionate to the offending behaviour and properly balanced.

Step 7 - Considering Landlord Representations

Council withdrawal or amending of the notice?

- 3.33 The Council may at any time withdraw a Notice of Intent or Final Notice or it may reduce the amount specified in a Notice of Intent or Final Notice.

Landlord disputes financial benefit that was obtained from the offence

- 3.34 If, as part of their representations, a Landlord states that our calculation of the financial benefit obtained from the offence is incorrect, the onus is on the Landlord to provide clear and reliable evidence to support their assertion. In the absence of any such evidence, the amount of financial benefit in the calculation should not be altered.
- 3.35 If the Landlord is able to provide adequate evidence to support their claim, consideration should be given to whether the lower amount they claim is legitimate. For example, did they actually receive less than was calculated or are they claiming that certain costs should be deducted from this amount.
- 3.36 In the case of the latter, consideration should be given to whether these costs did in fact amount to financial benefit of another kind (E.g. covered mortgage costs or paid for services that were received). For more information about legitimate deductions from financial benefit calculations, see section 3.328 & 3.29)

Landlord takes action to remove or reduce the financial benefit during the representation period for a Civil Penalty

- 3.37 If the Landlord takes action during the representation period after a Civil Penalty has been proposed, i.e. before the Final Notice is served, which effectively removes or reduces any financial benefit from the offence, the amount of the Final Notice should be varied to reflect this. An example of this might be where the offence is failing to comply with an Improvement Notice and the Landlord completes the works, therefore removing or reducing the financial benefit, before the Final Notice is served.

3.38 If the Council decides to impose the financial penalty, it must give the person a notice ('Final Notice') requiring the penalty is paid within 28 days. The Final Notice must be in accordance with the requirements of Schedule 13A of the Act.