

Cherwell District Council

Lead Member Decision – Lead Member for Housing

26 June 2020

<p>Minimum Energy Efficiency Standards in Private Rented Property - Revised policy</p>
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Report of Assistant Director Housing and Social Care Commissioning

This report is public

Purpose of report

To request the Lead Member approval of a revised version of the Council's 2018 Minimum Energy Efficiency Standards Policy. The revised policy provides additional flexibility in the setting of civil penalties in cases where landlords do not bring their privately rented properties up to the legal minimum standard set by the *Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (as amended)*.

1.0 Recommendations

The Lead Member is recommended:

- 1.1 To approve the revised version of the Council's Minimum Energy Efficiency Standards Policy which provides additional flexibility in the determination of civil penalties.
- 1.2 To delegate the determination of appropriate penalties under this Policy to the Assistant Director of Housing and Social Care Commissioning who may then provide sub-delegations, as required, to other appropriate officers.

2.0 Introduction

- 2.1 On the 1st April 2016 the *Energy Efficiency (Private Rented Property) (England and Wales) Regulations* came into force to improve the energy efficiency of privately rented property. The Regulations require domestic private rented properties to have a minimum Energy Performance Certificate (EPC) rating of E.
- 2.2 From 1st April 2018, landlords were prohibited from granting new tenancies for properties with an EPC rating below E.
- 2.3 Since 1st April 2020, the restriction has applied to all tenancies in scope of the regulations, including existing tenancies.
- 2.4 When first implemented, the Minimum Energy Efficiency Standards (MEES) provisions did not apply if the landlord was unable to obtain funding to cover the whole cost of the works to bring the property up to an E rating or above. However, amendments to the Regulations implemented on 15 March 2019 removed the "no

cost to the landlord” exemption. Now, if a landlord of an EPC F or G rated property is unable to secure third-party funding, they will need to use their own funds to cover the costs of improving their property to EPC E (or as close as possible). This requirement is subject to a spending cap of £3,500 (inclusive of VAT).

- 2.5 Local authorities are required to enforce the regulations. Non-statutory guidance has been issued by the Government to assist local authorities with policy preparation and enforcement work. Local authorities are responsible for determining appropriate penalties up to the limits prescribed by the Regulations.
- 2.6 Non-compliant landlords can be issued with a financial penalty of up to £5,000 in total for offences including: failure to obey a Compliance Notice requiring information; failure to register a property on the Government’s PRS Exemption Register; or registering false information (see table 1 below).
- 2.7 The Council may also publish details of the breaches on the PRS Exemption Register for 12 months or for any greater period as it sees fit.
- 2.8 The Council’s 2018 policy specified that penalties would be issued at the maximum permitted levels applicable to each relevant breach(s) and maximum total permitted fine. The proposed new policy (see Appendix 1) introduces some additional flexibility which practical experience of enforcing the regulations has indicated necessary.

3.0 Report Details

- 3.1 The Council’s Housing Standards Team have been pro-actively investigating MEES non-compliance since the Regulations came into force in April 2018. The existing policy dictates that where a breach of the Regulations is identified, the Council will investigate and where appropriate issue the maximum fine. However, experience of enforcing the Regulations has shown that this approach is not appropriate in all circumstances and can lead to proposed penalties that appear excessive in some situations. In a number of such cases the imposition of a penalty has been deferred.
- 3.2 In particular, experience in applying the existing policy has identified that it lacks the necessary flexibility to allow aggravating and/or mitigating factors to be taken into proper account. At present the only factor affecting the penalty is the duration of the offence. Factors such as culpability of the landlord and harm arising from the offence are also likely to be relevant and need to be included. The proposed ability to take account of aggravating and mitigating factors will ensure that landlords who have, for example, made simple errors and worked with the Council to rectify them are not facing penalties of the same size as landlords who have ignored the Council and shown intent to disregard the Regulations.

The setting of the maximum penalty also fails to take account of the possibility that the Council may decide to review its decision to serve a penalty notice, for example when new information comes to light, or when a landlord exercises his or her right to ask the Council to review its decision to serve a penalty notice. Following a review of representations received from a landlord, the Council may conclude that the penalty notice should be modified or even withdrawn or may wish to waive or reduce the penalty, allow the landlord additional time to pay, or modify the publication penalty.

The new policy is intended to avoid situations in which civil penalties are issued even though the amount may be considered disproportionate to the offence, or not issued even though there may have been technical breaches of the Regulations.

- 3.2 The inclusion in the new policy of a specified mechanism for adjusting penalties will also help reduce any prospect of adjustments to penalties being challenged on the grounds that they lack rigour and were made on an arbitrary basis.
- 3.3 The maximum fine applicable to each potential offence is outlined in Table 1 below. The proposed policy introduces a greater degree of flexibility which will ensure that whilst the most serious offences will continue to attract the maximum penalties, there is scope to take into account aggravating and mitigating factors identified by officers and issues raised in representations received from landlords.
- 3.4 The proposed new policy takes appropriate account of the Council's Enforcement Policy¹.

Table 1. Applicable Penalties and Publication periods

Failure	Financial Penalty	Publication Notice Period
Let a sub-standard property less than 3 months	£2000	None
Let a sub-standard property more than 3 months	£4000	1 year
Registered false or misleading information	£1000	1 year
Failed to comply with compliance notice (for information)	£2000	2 years
Failed to comply with compliance notice (to register on the PRS Exemption Register.	£2000	2 years
Maximum Total Fine/Publication *	£5000	3 years

**Further breaches may result in additional penalties*

4.0 Conclusion and Reasons for Recommendations

- 4.1 The Government has introduced financial penalties as a means of preventing landlords from profiting from non-compliance with legislation and to ensure compliant landlords are not disadvantaged. Penalties for non-compliance are also intended to influence behaviour change and result in pre-enforcement action on the part of those landlords who might otherwise fail to act.
- 4.2 The revised policy continues to support that approach but allows the circumstances of each case to be taken into account when a penalty is being determined. The maximum penalty will still apply for serious offences, but those involving simple error or technical offences can be issued with a reduced penalty.
- 4.3 Chasing payment for unpaid fines can be resource intensive and expensive; it is proposed that fines paid within 14 days of the penalty notice issue will be reduced by 25% to incentivise early payment.

¹ The joint SNC & CDC Enforcement Policy

5.0 Alternative Option and Reasons for Rejection

- 5.1 The following alternative option has been identified and rejected for the reasons given below.

Option 1: The Council could choose not to amend its existing MEES policy and continue to issue fines at the maximum level allowed by the legislation. In practice however, the lack of flexibility in being able to adjust fines on a case by case basis, taking into account aggravating and mitigating factors and landlord representations may lead to the issuing of disproportionate fines and/or the Council deciding that it is not appropriate to issue a fine even in cases where there are technical breaches of the regulations.

6.0 Implications

6.1 Financial and Resource Implications

- 6.1.1 No additional resource will be required. Any additional income generated by the issue of fixed penalty notices will contribute to the funding of the Council's services.
- 6.1.2 There is no financial risk to the Council.

Comments to be checked by Kelly Wheeler Principal Accountant, 01327 32230, kelly.wheeler@cherwellandsouthnorthants.gov.uk

6.2 Legal Implications

- 6.2.1 Regulation 34 of the *Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2016* SI 2015 No 660 requires local authorities to enforce compliance. A local authority is the 'enforcement authority' for its area².

Compliance Notice

An enforcement authority may, on or after 1st April 2018, serve a "compliance notice" on a landlord where the landlord appears to it to be, at any time within the last 12 months, in breach of one or more of the following - (a) regulation 23 (, (b) regulation 27. The authority may vary or revoke the order at any time in writing.

Penalty Notice

An enforcement authority may, on or after 1st April 2018, serve a "penalty notice" on a landlord where it is satisfied that the landlord has been at any time within the last 18 months in breach of one or more of the following - (a) regulation 23 (Prohibition on letting a substandard property), (b) regulation 27 (Prohibition on letting substandard non-domestic property) or (c) regulation 37(4)(a) (Compliance with a Compliance Notice), impose a financial penalty, a publication penalty, or both. The notice must specify any action the enforcement authority requires the landlord to take to remedy the breach and the period within which such action must be taken. If the landlord fails to take the action required by a penalty notice within the period specified in that penalty notice the enforcement authority may issue a further penalty notice.

Appeal

A landlord may, within the period specified under regulation 38(2)(h)(ii), serve notice on the enforcement authority requesting a review of its decision to serve a penalty

² But the County Council, as Weights & Measures authority, is responsible for enforcement of the Regulations as they relate to non-domestic property.

notice. If, after a review, a penalty notice is confirmed by the enforcement authority, the landlord may appeal to the First-tier Tribunal.

Debt

The amount of an unpaid financial penalty is recoverable from the landlord as a debt owed to the enforcement authority unless the notice has been withdrawn or quashed.

Comments checked by: Chris Mace, Solicitor, 01295 221808,
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6.3 Risk Implications

- 6.3.1 There is a reputational risk to the Council in not enforcing the Regulations effectively. The new policy will facilitate effective enforcement and reduce the risk of any particular penalty being viewed as disproportionate and the likelihood of any appeal against a penalty which we might otherwise have difficulties defending.

Comments checked by Louise Tustian, Head of Insight and Corporate Programmes 01295 22 1786; louise.tustian@cherwellgov.uk

6.4 Equalities implications

- 6.4.1 To the extent that poorer quality private rented accommodation is frequently occupied by vulnerable people, enforcement of this revised policy has the potential to continue to assist those residents in particular.

Comments checked by Caroline French, Policy & Projects Officer, Business Transformation Team 01295 251586; Caroline.french@cherwell.gov.uk

7.0 Decision Information

Key Decision N/A

Financial Threshold Met: **No**

Community Impact Threshold Met: **No**

Wards Affected

All wards

Links to Corporate Plan and Policy Framework

Business Plan 20-21: Housing that meets your needs - Raise standards in rented housing;

Lead Councillor

Councillor John Donaldson, Lead Member for Housing

Document Information

Appendix No	Title
1	MEES in Private Rented Property - Matrices for determining the appropriate penalty
2	Enforcement Flowchart
Background Papers	
None	
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