

POLICY FOR IMPOSING FINANCIAL AND PUBLICATION PENALTIES UNDER THE ENERGY EFFICIENCY (PRIVATE RENTED PROPERTY) (ENGLAND AND WALES) REGULATIONS 2015

Cabinet	19 November 2020
Report Author	Richard Hopkins, Private Sector Housing Manager
Portfolio Holder	Cllr Helen Whitehead, Deputy Leader and Cabinet Member for Housing and Community Services
Status	For Decision
Classification:	Unrestricted
Key Decision	No
Previously Considered by	Not applicable
Ward:	All wards

Executive Summary:

The council has a statutory duty to enforce The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 in respect of domestic private rented property. Since 01 April 2020, private landlords have been prohibited from renting out homes that are subject to an Energy Performance Certificate (“EPC”) with an energy efficiency rating of F or G.

The council, as the enforcement authority, is empowered to impose financial and publication penalties on private landlords who breach their duties under the regulations. This report seeks the agreement of Cabinet to adopt a policy that would allow the council to impose such penalties for breaches that occur on or after 01 December 2020.

Recommendation(s):

That Cabinet:

1. Approves the adoption of the proposed “Policy for imposing financial and publication penalties under The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015” annexed to this report; and
2. Delegates authority to the Director of Housing and Planning, in consultation with the Cabinet Member for Housing and Community Services, to approve minor amendments to the policy.

Corporate Implications

Financial and Value for Money

The enforcement obligations placed on the council will rest with the Private Sector Housing Team. The extent to which these regulations will place additional burdens on the team is unclear at the present time. However, it is hoped that the existing team will be able to manage the additional responsibilities within existing resources. The council will be able to retain any income generated by financial penalties.

Legal

Under Regulation 34, local authorities and local weights and measures authorities are under a statutory duty to enforce the regulations. The enforcement duties are shared between the council and Kent County Council (Trading Standards). The council is responsible for enforcing the regulations in respect of domestic private rented properties, while Kent County Council is responsible for enforcing the regulations in respect of non-domestic (commercial) properties.

The council has the power to impose financial and publication penalties under Regulation 38 by serving a Penalty Notice. Regulation 40 sets out the maximum financial penalties that can be imposed by the council. Amended non-statutory guidance was issued by the Department for Business, Energy & Industrial Strategy ("BEIS") in April 2020, namely: *The Domestic Private Rented Property Minimum Standard - Guidance for landlords and Local Authorities on the minimum level of energy efficiency required to let domestic property under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, as amended.*

The council's constitution allows the Cabinet to delegate decisions to an individual Cabinet member or an officer. The proposal that the Cabinet delegates authority to the Director of Housing and Planning, in consultation with the Cabinet Member for Housing and Community Services, to approve minor amendments to the policy is therefore permitted within the constitution.

Corporate

The enforcement activities associated with the regulations will help support the Communities objective of the council's Core Business Objectives 2019-2023. The Communities objective includes a plan to *"Improve standards and safety in homes across all tenures"* and enforcing the regulations will assist in delivering this plan.

Equality Act 2010 & Public Sector Equality Duty

Members are reminded of the requirement, under the Public Sector Equality Duty (section 149 of the Equality Act 2010) to have due regard to the aims of the Duty at the time the decision is taken. The aims of the Duty are: (i) eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act, (ii) advance equality of opportunity between people who share a protected characteristic and people who do not share it, and (iii) foster good relations between people who share a protected characteristic and people who do not share it.

Protected characteristics: age, sex, disability, race, sexual orientation, gender reassignment, religion or belief and pregnancy & maternity. Only aim (i) of the Duty applies to Marriage & civil partnership.

This report relates to the following aim of the equality duty:

- To eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the Act.

Persons from vulnerable groups can sometimes have limited housing choices. In particular, families with young children, older persons and those with a disability can find themselves in poor quality privately rented accommodation that lacks adequate provision for insulation and space heating. Consequently, the council's enforcement activities often involve safeguarding the health, safety and welfare of persons with the protected characteristics of age and disability. Therefore, the enhanced enforcement capabilities provided by financial penalties will help to minimise disadvantage and contribute to the needs of many residents with protected characteristics.

The equality duty is a continuing one and should be considered and reviewed while enforcing the provisions of the regulations.

An Equality Impact Assessment has been undertaken and is annexed to this report.

CORPORATE PRIORITIES

This report relates to the following corporate priorities:

- *Communities*

1.0 Introduction and Background

- 1.1 The council has a statutory duty to enforce The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 in respect of domestic private rented property. The regulations were designed to help ensure that those private tenants in most need of more thermally efficient homes, particularly vulnerable people and the fuel poor, are able to enjoy a more comfortable and healthier living environment and lower energy bills. They are also part of the Government's wider strategy to reduce UK greenhouse gas emissions.
- 1.2 The tenants of all privately rented homes must be provided with an Energy Performance Certificate ("EPC") by their landlord, unless their property is subject to a statutory exemption. Every EPC provides an energy efficiency rating using a scale from A to G, with homes with an A rating being the most energy efficient, and those with a G rating being the least energy efficient. Since 01 April 2020, the regulations have prohibited private landlords from renting out homes which have an energy efficiency rating of F or G.
- 1.3 If the council is satisfied that a private landlord has breached a duty under the regulations, it has the power to serve a Penalty Notice that imposes a financial and/or publication penalty. However, before the council can impose any such Penalty Notice,

it must first have an adopted policy which is just and proportionate. The purpose of this report is to propose the adoption of such a policy.

2.0 Duties of private landlords

2.1 Under the regulations, private landlords must either:

- Ensure that their rented properties are subject to an energy efficiency rating of E or above; or
- Register a valid exemption on the PRS Exemptions Register.

2.2 There are a number of valid exemptions available to private landlords. In summary, these are:

- Where all relevant improvements have been made (or there are none that can be made) within the cost cap of £3,500 (inc. VAT);
- If the lowest cost recommended improvement would exceed the £3,500 (inc. VAT) cost cap;
- Where wall insulation has been recommended, but a recognised expert is of the opinion that it would be detrimental to the property;
- If a third party withholds consent (e.g. tenant, superior landlord, mortgage, freeholder, or planning authority);
- If, according to a recognised expert, the recommended measures would decrease the value of the property by more than 5%;
- When a person recently becomes a landlord in prescribed circumstances, a six-month exemption will apply.

2.3 Most statutory exemptions are available for a five-year period, unless otherwise stated above.

2.4 The PRS Exemptions Register is provided by the Government on Gov.uk. Private landlords can register exemptions at:
<https://prsregister.beis.gov.uk/NdsBeisUi/used-service-before>

3.0 Powers of local housing authorities

3.1 In summary, the council has been given the following statutory powers under the regulations:

- **Power to serve a Compliance Notice** - If it appears to the council that a private landlord is in breach of the prohibition on letting properties with an energy efficiency rating of F or G, it may serve a Compliance Notice on that private landlord requiring such information as it considers necessary to enable it to monitor compliance.
- **Power to impose a Penalty Notice** - If the council is satisfied that a private landlord has breached a duty under the regulations, it has the power to serve a Penalty Notice that imposes a financial and/or publication penalty. A Penalty Notice may be served in respect of an ongoing breach or a breach that occurred in the 18 months preceding the date of the service of the notice.

4.0 Procedural requirements

- 4.1 There is no requirement to serve a Notice of Intent under the regulations. However, If a Penalty Notice is served by the council, the private landlord is entitled to request that the council reviews its decision to serve a Penalty Notice.
- 4.2 Following the receipt of any request to review a Penalty Notice, the council must carefully consider any representations received and decide whether to confirm or withdraw the notice. Once the council has made its decision, it must serve notice of that decision on the private landlord.
- 4.3 If the council decides to confirm a Penalty Notice after its review, the private landlord has the right of appeal against that decision to the First-tier Tribunal. If a private landlord does not ask the council to review its decision to serve a Penalty Notice within the specified timescale, there does not appear to be any legislative provision that allows the private landlord to make an appeal to the First-tier Tribunal.

5.0 Financial penalties

- 5.1 There are four potential financial penalties that can be imposed by the council. The types and the statutory maximum amounts are set out below:
- Breaching the ban on letting a property with an F or G rating for less than three months: **£2,000**;
 - Breaching the ban on letting a property with an F or G rating for three or more months: **£4,000**;
 - Registering false or misleading information on the PRS Exemptions Register: **£1,000**;
 - Failing to provide information to the council demanded by a Compliance Notice: **£2,000**.
- 5.2 In respect of any one tenancy, a private landlord cannot be subject to multiple financial penalties that exceed a total of more than £5,000.
- 5.3 The maximum financial penalty amounts are not high when compared to other types of housing offences and breaches, where such penalties may be up to £30,000. However, the council is expected to take a graduated and proportionate approach to setting the level of financial penalties. The proposed policy provides for the following financial penalties:
- Breaching the ban on letting a property with an F or G rating for less than three months:
 - First breach under the regulations: **£1,000** (or £750 if paid within 21 days);
 - All other breaches: **£2,000** (or £1,500 if paid within 21 days);
 - Breaching the ban on letting a property with an F or G rating for three or more months:
 - First breach under the regulations: **£2,000** (or £1,500 if paid within 21 days);
 - All other breaches: **£4,000** (or £3,000 if paid within 21 days);
 - Registering false or misleading information on the PRS Exemptions Register:
 - First breach under the regulations: **£500** (or £375 if paid within 21 days);
 - All other breaches: **£1,000** (or £750 if paid within 21 days);

- Failing to provide information to the council demanded by a Compliance Notice:
 - First breach under the regulations: **£1,000** (or £750 if paid within 21 days);
 - All other breaches: **£2,000** (or £1,500 if paid within 21 days).

5.4 In the proposed policy, the “first breach” means the first breach by the private landlord of any duty under the regulations, and does not refer to the first breach under each specific type of breach. For example, a private landlord may first fail to comply with a Compliance Notice, and be subject to a financial penalty of £1,000. If it is later found that the private landlord has, for more than three months, been in breach of the prohibition on letting substandard property, this breach will not be a first breach, and so a further financial penalty of £4,000 will be payable.

5.5 For the purposes of identifying a first breach, only Penalty Notices that have been served on the private landlord within the previous five-year period will be taken into account.

5.6 Where a private landlord has committed multiple breaches in respect of the same tenancy and the financial penalties add up to more than £5,000, one or more of the financial penalties would be adjusted down such that the statutory maximum of £5,000 is not exceeded.

5.7 The council has, through the CIEH Kent Housing Technical Group, suggested the above-mentioned financial penalty policy to the other councils in Kent and it is understood that most will be adopting this approach to issuing financial penalties under the regulations.

6.0 Publication penalties

6.1 A publication penalty means publication on the PRS Exemptions Register, by the council, of the following information:

- The name of the private landlord, but only when the landlord is not an individual;
- Details of the breach;
- The address of the property at which the breach occurred;
- The amount of financial penalty.

6.2 The proposed policy includes a provision to issue publication penalties in respect of all Penalty Notices served by the council, unless there are exceptional circumstances. The regulations also provide the council with discretion as to how long the details of each breach should stay on the PRS Exemptions Register, subject to a minimum period of 12 months. The proposed policy includes a provision for all breaches to be registered for a period of three years, with the option to reduce this period in exceptional circumstances.

7.0 Current position

7.1 In late 2019, the council successfully submitted a bid to the Government’s PRS Innovation and Enforcement Fund 2019/20 in the sum of £34,742. The bid was entitled: “Thanet Cold Homes Finder - A project to proactively identify privately rented homes which have an Energy Performance Certificate (“EPC”) rating of F or G.” The

original project was intended to last for 10 weeks until the end of March 2020, but was extended owing to the Covid-19 pandemic.

- 7.2 In January 2020, the occupiers of approximately 3,400 homes with an F or G rating were contacted by letter to highlight the new regulations and the upcoming ban on existing substandard rented property. Advice was given by the project officers and information began to be gathered. However, owing to the Covid-19 pandemic, the final phase of the project was hindered. The council decided not to write to private landlords at the end of March 2020, as proposed, to avoid unnecessary distress for private landlords and tenants alike at a time of heightened anxiety. Nevertheless, officers continued to gather evidence over lockdown and the summer, and were able to help private landlords achieve compliance.
- 7.3 By July around 390 target properties remained, which had either been confirmed as privately rented or likely to be privately rented. Land registry information was obtained and all owners of those properties were contacted by letter. A copy of that letter has been annexed to this report. Around 90 responses were received and help and guidance offered.
- 7.4 While the Thanet Cold Home Finders project has now completed and the grant funding is exhausted, the Private Sector Housing Team will begin enforcing the regulations following the approval of an enforcement policy.

8.0 Commencement

- 8.1 The policy is proposed to take effect from 01 December 2020 and apply to all relevant breaches of duty that occur on or after that date.

9.0 Options

- 9.1 There are three options available to the council, namely:

Option 1: To adopt the proposed “Policy for imposing financial and publication penalties under The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015” annexed to this report.

Option 2: To adopt the proposed “Policy for imposing financial and publication penalties under The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015” annexed to this report, subject to amendment.

Option 3: To not adopt the proposed “Policy for imposing financial and publication penalties under The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015” annexed to this report.

- 9.2 In the event that the policy is adopted, with or without amendment, its ongoing ability to deliver just and proportionate sanctions will remain under review. While not expected, it is possible that minor anomalies may arise in its application. It is therefore proposed that the authority to approve minor amendments to the policy is delegated to the Director of Housing and Planning, in consultation with the Cabinet Member for Housing and Community Services.

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Reporting to: Bob Porter, Director of Housing and Planning

Annex List

Annex 1: Policy for imposing financial and publication penalties under The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
Annex 2: Copy of letter to private landlords (July 2020)
Annex 3: Equality Impact Assessment

Background Papers

The Domestic Private Rented Property Minimum Standard - Guidance for landlords and Local Authorities on the minimum level of energy efficiency required to let domestic property under the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, as amended. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882957/Domestic_Private_Rented_Property_Minimum_Standard_-_Landlord_Guidance_2020.pdf

Corporate Consultation

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