

Item No.	Classification: Open	Date: 16 March 2021	Decision Taker: Cabinet Member for Public Health & Community Safety
Report title:		Trading Standards Financial Penalties Policy for Letting Agents and Landlords	
Ward(s) or groups affected:		All Wards	
From:		Business Unit Manager (Environmental Health & Trading Standards)	

RECOMMENDATIONS

1. To approve the adoption of the Trading Standards Financial Penalties Policy for Letting Agents and Landlords, in Appendix 1 of this report.
2. To delegate authority to the Strategic Director of Environment and Leisure (or equivalent) to make amendments to the financial penalty charge matrices to reflect any changes necessary due to changes in legislation, legal decisions, statutory and best practice guidance.

BACKGROUND INFORMATION

3. Southwark Council is an enforcement authority for a range of legislation regulating letting agents and landlords. The legislation this report concerns is:
 - a) The Redress Schemes for Letting Agency Work and Property Management Work (Requirements to Belong to a Scheme etc.) (England) Order 2014
 - b) Consumer Rights Act 2015 (Chapter 3)
 - c) Tenant Fees Act 2019
 - d) Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019
4. It is a duty of the local authority to enforce (a) and (d) above and the duty of a local weights and measures authority to enforce (b) and (c).
5. Legislation that places a duty on a local weights and measures authority is the responsibility of the Trading Standards team within Regulatory Services and so it is expedient that the team also deals with the legislation of (a) and (d) as they also regulate property agent businesses.
6. The legislation empowers enforcement authorities to issue civil financial penalties with regard to the following matters:

- a) Failure by letting agents to be a member of a redress scheme
 - b) Failure by letting agents to publish fees and other information
 - c) Landlords or letting agents requiring the payment of a prohibited fee or failing to comply with provisions about the treatment of holding deposits
 - d) Failure by letting agents to be a member of a client money protection scheme and to display or provide details of it
7. The adoption of a trading standards financial penalties policy for letting agents and landlords is needed to determine the appropriate level of financial penalty to issue in each particular case.
 8. Where a breach occurs the financial penalty that may be imposed is capped by statute at £5,000 and in some cases £30,000.
 9. When determining the financial penalty the Council must have regard to the following factors:
 - Severity of the breach
 - Punishment of the landlord or agent and the deterrent effect
 - Aggravating and mitigating factors
 - Fairness and proportionality
 10. A financial penalty may only be imposed after a notice of intent has been issued which affords the recipient to make representations about the intended penalty. A reduction, variation or withdrawal of a penalty can be considered where representations are made in the 28 days prescribed by the legislation.
 11. The need for a policy is created by the expectation in statutory guidance issued by Ministry of Housing, Communities and Local Government (MHCLG) on two sets of legislation namely the Tenant Fees Act 2019 and the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019.
 12. The guidance on the Tenant Fees Act 2019, published in April 2019 and updated in September 2020, states “enforcement authorities are expected to develop and document their own policy on when to prosecute and when to issue a financial penalty of up to £30,000 and should decide which option they wish to pursue, on a case-by-case basis, in line with that policy” (see www.gov.uk/government/publications/tenant-fees-act-2019-guidance).
 13. The guidance also states enforcement authorities should consult with the lead enforcement authority to ensure their policies on Tenant Fees Act penalties are in line with the national approach to promote consistency, alongside local priorities.
 14. The guidance on the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc.) Regulations 2019 issued in May 2019 states “enforcement authorities are expected to develop and publish their own policy on determining the appropriate level of financial penalties

to impose” and also “that enforcement authorities are expected to consider each breach on a case by case basis and for the maximum amount to be reserved for the worst offenders” (see www.gov.uk/government/publications/mandatory-client-money-protection).

15. The guidance also states enforcement authorities should take into account any information and intelligence published by the lead enforcement authority on the relevant letting agency legislation (with reference to client money protection) to ensure their policies are in line with the national approach to promote consistency, alongside local priorities.
16. This policy has been developed to fulfil these expectations and also to ensure that penalties issued under the legislation mentioned in paragraph 3(a) and 3(b) above, which are not covered by statutory guidance, are determined in a consistent, fair, proportionate and transparent manner taking into account relevant factors.
17. In addition to the statutory guidance mentioned above this policy has been drafted by having regard to a number of different considerations and factors including;
 - a) The Council’s Fairer Future Medium Term Financial Strategy and Integrated efficiency Plan 2017-18 to 2019-20
 - b) Southwark’s Long Term Housing Strategy to 2043
 - c) The Private Sector Housing Prosecution and Civil Penalties Enforcement Policy adopted by this Council
 - d) The enforcement policy published by Bristol City Council who are the lead enforcement authority appointed by the Secretary of State the purposes of the relevant letting agency legislation
 - e) The Model London Lettings Enforcement Policy produced by London Trading Standards

The Policy

18. The proposed Trading Standards Financial Penalties Policy for Letting Agents and Landlords and fee matrices are set out in Appendix 1. The policy explains the actions available to the Council and describes the reasons why the Council may take such action.
19. It summarises the measures available under the relevant legislation and details the policy approaches to be taken in relation to the financial penalties. It is designed to provide a consistent local approach when taking enforcement action in the private rented sector (PRS) whilst having regard to national statutory guidance and the lead enforcement authority policy where appropriate.
20. If the policy is adopted it will be published on the Council’s website along with appropriate signposting to other relevant guidance links.

KEY ISSUES FOR CONSIDERATION

21. A policy for financial penalties for letting agents and landlords is needed to fulfil the expectations detailed in paragraphs 12 and 14 and should have regard to the factors in paragraphs 13 and 15.
22. Consultation with the lead enforcement authority highlighted that local variations from their published policy are permitted, but there should be a defined decision record for deviation as these points are potentially areas of challenge.
23. This policy does deviate in order to take into account higher levels of community concern with regards to housing in Southwark and London specific factors which increase the vulnerability of tenants, and prospective tenants, within the rental marketplace.
24. This includes the transient business and residential population, the high level of occupancy, higher relative and increasing rents and the continued unaffordability of private rental accommodation.
25. The policy variations in respect of tenant fees and client money protection breaches involve the adoption of different fee calculation matrices. The simplified format and methodology are more aligned with the matrix already adopted in the Council's Private Sector Housing Prosecution and Civil Penalties Enforcement Policy.
26. This helps with a consistent approach which meet local priorities. Other than this the requirements referenced in paragraph 13 and 15 above have been taken into account.
27. In respect of breaches involving redress scheme membership and the display of fees by letting agents, the policy deviates from having a fee calculation matrix to a policy of starting at the maximum financial penalty and provides for them to be modified or withdrawn after any representations received have been considered.
28. This approach follows the non-statutory government enforcement guidance contained in the MHCLG document "Improving the Private Rented Sector and Tackling Bad Practice" published in 2015 and is also more aligned to the Council's Fairer Future Medium Term Financial Strategy and Integrated efficiency Plan 2017-18 to 2019-20 which states fees and charges capped by statute should be increased to the maximum level the cap allows.
29. The approach is also supported by an extensive body of First and Upper-tier Tribunal rulings that have been published further to appeals against penalty notices issued by enforcement authorities in London and beyond.
30. The overarching requirements detailed in paragraph 9 have not been deviated from.

Identified risks and how they will be managed

31. A consequence of determining to issue financial penalties as an enforcement outcome is the likely high level of representations being made in response to notices of intent to issue one. This is to be expected and internal procedures have been developed by the service to ensure representations will be considered by an officer panel suitably independent of the decision to issue a notice of intent.
32. Where the final notice after representations have been considered is challenged the recipient may appeal using the First-tier Tribunal (Property Chamber) process. This is part of HM Courts and Tribunals Service. Financial penalties cannot be pursued until any such appeal process is concluded.
33. The Tribunal will consider whether the Council has followed its own policy appropriately and take into account any mitigating circumstances. The support of legal services may be desirable at any such hearings however the procedure does allow for an officer to represent the Council. The tribunal does not usually award costs against the losing side.
34. A further risk is the potential difficulty of recovering the financial penalties from some of the recipients. The authority may recover the penalty or part on the order of the county court as if it were payable under an order of that court. Some recipients may be limited liability companies and/or have no financial assets from which monies can be recovered. However, the Council will use appropriate legal processes in order to recover as much debt as possible.

Policy implications

35. Statutory guidance creates the expectation that the Council adopts a policy in respect of tenant fees and client money protection penalties. In the absence of a policy the authority could be subject to challenge on the decision to issue and methodology relating to the determination of the amount of any particular financial penalty during the appeals process.
36. This policy supports Southwark's Long Term Housing Strategy to 2043. The strategy was agreed in 2015 and contains a vision for the future of housing in the borough whilst making specific reference to improving conditions in the private rented sector. There is a commitment to taking tough enforcement action against rogue landlords and letting agencies contained in principle 2.
37. This policy also supports the theme within the Council Plan 2018/19 - 2021/22 of "a place to call home" by helping drive up standards of compliance by letting agents and landlords in the private rental sector.
38. This Council's Fairer Future Medium Term Financial Strategy and Integrated efficiency Plan 2017-18 to 2019-20 seeks to maximise the

council's income generation by seeking income streams in line with council policies and priorities.

39. The strategy states discretionary fees and charges are reviewed annually and fees and charges capped by statute should be increased to the maximum level the cap allows.
40. These fees are listed on the annual fees and charges schedule approved by Cabinet but it would be contrary to the statutory guidance on tenant fees and client money protection to set them other than on a case by case basis and for the maximum amount to be reserved for the worst offenders.

Community Impact Statement

41. The issuing of financial penalties is a statutory enforcement tool that government has introduced. Their use will have a positive impact on legitimate compliant businesses, and also the wider community, as rogue agents and landlords will be deterred from engaging in detrimental practices.
42. Equality analysis demonstrates that the policy shows no potential for discrimination and implementation will help raise the profile of the Council's commitment to improve standards in the private rented sector and take a robust approach to enforcement.

Equality Analysis

43. This policy is concerned only with how financial penalties will be determined. Therefore the impact of the policy on any particular group with protected characteristics is largely neutral. Nevertheless the policy does form part of an enforcement process and in that context there is a potential for impact.
44. With regard to tenants and prospective tenants they are likely to be the major source of intelligence and complaints which could lead to an enforcement activity necessitating the use of this policy. In that respect it is vital that no particular group is less able to pass on information or make complaints.
45. With regard to the letting agents and landlords who may be subject to enforcement action statistics available for the financial and real estate sector indicate a vast majority of both employing small and medium enterprises (SMEs) and non-employing SME's in England are led by white ethnic groups (87% and 92% respectively).
46. It is proposed that data on the protected characteristics of the recipients of financial penalties be monitored to help ensure that no particular group is disproportionately impacted.
47. The Equalities Impact Assessment is provided in Appendix 2.

Resource Implications

48. The policy will be applied with existing staffing resources so there are no additional resources needed.
49. The legislation provides that enforcement authorities are able to retain monies raised through financial penalties with the proceeds reserved for carrying out enforcement functions in relation to the private rented sector.

Legal implications

50. In the absence of a policy the authority could be subject to challenge on the decision to issue and methodology relating to the determination of the amount of any particular financial penalty during the appeals process.
51. The potential outcomes of an appeal are that any final penalty notice could be quashed, confirmed or varied.

Financial implications

52. The overriding objective of the legislation is to protect tenants and improve business compliance. The ability to issue financial penalties should ultimately serve as a deterrent but will potentially result in additional income to the council. However, it is difficult to assess the financial impact arising from the adoption of the policy at this stage and should not be regarded as an income generation opportunity.
53. The financial impact of the adoption will be monitored on a regular basis as part of the departmental revenue monitoring process. Any additional income received from the issue of financial penalties will be used to support the council's statutory functions in relation to enforcement activities covering the private rented sector.

Consultation

54. No public consultation is necessary.
55. Statutory guidance states that enforcement authorities should consult with the lead enforcement authority to ensure policies on Tenant Fees Act penalties are in line with the national approach to promote consistency, alongside local priorities.
56. The lead authority was consulted with in November 2020. They did not require sight of the draft policy but responded as detailed in paragraph 22.

SUPPLEMENTARY ADVICE FROM OTHER OFFICERS

Director of Law and Governance

57. The legislation detailed in paragraph 3 allows financial penalties to be imposed by the London Borough of Southwark as an enforcement authority.
58. When considering the recommendations of this report, due regard must be given to the public sector equality duty (PSED) in section 149 of the Equality Act 2010. This requires the council to consider all individuals when carrying out its functions. Specifically, to have due regard to the need to eliminate discrimination, harassment, victimisation or other prohibited conduct; advance equality of opportunity and foster good relations between people with protected characteristics and those who do not. The relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The PSED also applies to marriage and civil partnership, but only in relation to the need to eliminate discrimination, harassment, victimisation or other prohibited conduct. Cabinet members are referred to the community impact statement in the report.
59. The decision being requested falls in accordance with part 3D of the Constitution.
60. The adoption of this new policy is an operational decision.

Strategic Director of Finance and Governance (FC20/028)

61. The strategic director of finance and governance notes the recommendations in this report that Cabinet Member for Public Health & Community Safety approves the adoption of the Trading Standards Financial Penalties Policy for Letting Agents and Landlords.
62. The strategic director of finance and governance services notes the resource and financial implications contained within the report. The strategic director also notes potential additional income to the council from the adoption of the policy, albeit such income is difficult to assess at this stage.
63. Officer time to effect the recommendation will be contained within existing budgeted revenue resources.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
None		

APPENDICES

No.	Title
Appendix 1	Trading Standards Financial Penalty Policy for Letting Agents and Landlords (with Appendices A&B)
Appendix 2	Equality Analysis

AUDIT TRAIL

Cabinet Member	Cabinet Member for Public Health & Community Safety	
Lead Officer	Sarah Newman – Business Unit Manager (Environmental Health & Trading Standards)	
Report Author	Paul Gander – Trading Standards Team Leader	
Version	Final	
Dated	20 January 2021	
Key Decision?	Yes	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / CABINET MEMBER		
Officer Title	Comments Sought	Comments Included
Director of Law and Governance	Yes	Yes
Strategic Director of Finance and Governance	Yes	Yes
Cabinet Member	Yes	Yes
Date final report sent to Constitutional Team		12 March 2021