

## Amber Valley Borough Council Enforcement Policy in relation to the “Tenant Fees Act ”

### THIS IS NOT STATUTORY GUIDANCE

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Amber Valley Borough Council ("AVBC") has adopted this policy on deciding financial penalties and the appropriateness of prosecution as an alternative to imposing financial penalties under the relevant letting agency legislation.

It applies in relation to any decision to any decision made by the Council in its capacity as Enforcement Authority under the Tenants Fees Act 2019 respectively.

### 1. Statutory Guidance

The Ministry of Housing, Communities & Local Government ("MHCLG") has published the following document; Tenant Fees Act 2019: Statutory Guidance for enforcement authorities.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/819633/TFA\\_Statutory\\_Enforcement\\_Guidance\\_190722.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819633/TFA_Statutory_Enforcement_Guidance_190722.pdf)

This is statutory guidance to which enforcement authorities must have regard to in relation to enforcing the TFA 2019. This statutory guidance recommends certain factors that an enforcement authority should consider when deciding on the level of financial penalties under the TFA 2019 and further recommends that enforcement authorities develop and document their own Policy on determining the appropriate level of financial penalty in a particular case. This policy replicates the penalty provision set by the Lead Enforcement Authority.

### 2. Determining the level of the financial penalty

In accordance with the provisions of the TFA 2019 the level of financial penalties is to be determined by the Council. Although the statutory guidance recommends factors which may be considered it does not go into any significant level of detail in this regard. Each of the following factors will be considered as a part of the Council's decision making process and they are:

- a. The history of compliance/non-compliance
- b. The severity of the breach
- c. Deliberate concealment of the activity and/or evidence
- d. Knowingly or recklessly supplying false or misleading evidence
- e. The intent of the landlord/agent, individual and/or corporate body
- f. The attitude of the landlord/agent
- g. The deterrent effect of a prosecution on the landlord/agent and others
- h. The extent of financial gain as a result of the breach

Although the Council has therefore a wide discretion in determining the appropriate level of financial penalty in any particular case regard has been given to the statutory guidance and the policy set out by the Lead Enforcement Authority when making this policy.

The Council believes this to be a fair, relevant and reasonable model to follow; this policy was widely consulted on with various stakeholders.

Appendix 1 of this policy contains the processes that the Council will use in order to determine the level of financial penalty under the TFA 2019. All stages subsequent to the issue of a Notice of Intent are subject to statutory time limits and the suspension of the process should an appeal be made to the First Tier Tribunal.

## **Appendix 1 – The Council’s process for determining the level of penalty to set:**

### **STEP ONE – Determining the offence category**

The Council will determine the breach category using only the culpability and category of harm factors below. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting to make an overall assessment. Other discretionary factors may also be applied in order to reflect consistency and may consider decisions in other UK jurisdictions where they contain some relevant and persuasive content.

#### **Culpability**

**Very high:** Where the Landlord or Agent intentionally breached, or flagrantly disregarded, the law or has/had a high public profile<sup>1</sup> and knew their actions were unlawful

**High:** Actual foresight of, or wilful blindness to, risk of a breach but risk nevertheless taken

**Medium:** Breach committed through act or omission which a person exercising reasonable care would not commit

**Low:** Breach committed with little fault, for example, because:

- significant efforts were made to address the risk although they were inadequate on the relevant occasion
- there was no warning/circumstance indicating a risk
- failings were minor and occurred as an isolated incident

**Harm:** The following factors relate to both actual harm and risk of harm. Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.

#### **Category 1 – High Likelihood of Harm**

- Serious adverse effect(s) on individual(s) and/or having a widespread impact due to the nature and/or scale of the Landlord’s or Agent’s business
- High risk of an adverse effect on individual(s) – including where persons are vulnerable<sup>2</sup>

#### **Category 2 – Medium Likelihood of Harm**

- Adverse effect on individual(s) (not amounting to Category 1)
- Medium risk of an adverse effect on individual(s) or low risk of serious adverse effect.
- Tenants and/or legitimate landlords or agents substantially undermined by the conduct.
- The Council’s work as a regulator is inhibited
- Tenant or prospective tenant misled

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<sup>1</sup>Which may include any significant role in a trade or business representative organisation

<sup>2</sup>A wide definition of vulnerability will be used. See Appendix 2 for a non-exhaustive list.

### **Category 3- Low Likelihood of Harm**

- Low risk of an adverse effect on actual or prospective tenants.
- Public misled but little or no risk of actual adverse effect on individual(s)

We will define harm widely and victims may suffer financial loss, damage to health or psychological distress (especially vulnerable cases). There are gradations of harm within all of these categories.

The nature of harm will depend on personal characteristics and circumstances of the victim and the assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.

In some cases no actual harm may have resulted and enforcement authority will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

#### **To the community**

Some offences cause harm to the community at large (instead of or as well as to an individual victim) and may include economic loss, harm to public health, or interference with the administration of justice.

#### **STEP TWO - Starting point and category range**

Having determined the category that the breach falls into, the Council will refer to the following starting points to reach an appropriate level of civil penalty within the category range. The Council will then consider further adjustment within the category range for aggravating and mitigating features.

#### **Obtaining financial information**

The statutory guidance advises that local authorities can use their powers under Schedule 5 of the CRA 2015 to, as far as possible, make an assessment of a Landlord or Agent's assets and any income (not just rental or fee income) they receive when determining an appropriate penalty. The Council will use such lawful means as are at its disposal to identify where assets might be found.

In setting a financial penalty, the Council may conclude that the Landlord or Agent is able to pay any financial penalty imposed unless the Council has obtained, or the Landlord or Agent has supplied, any financial information to the contrary. The subject of a Final Notice, or a notice of intent where the subject does not challenge it, will be expected to disclose to the council such data relevant to his/her financial position to facilitate an assessment of what that person can reasonably afford to pay. Where the Council is not satisfied that it has been given sufficient reliable information, the Council will be entitled to draw reasonable inferences as to the person's means from evidence it has received, or obtained through its own enquiries, and from all the circumstances of the case which may include the inference that the person can pay any financial penalty.

#### **Starting points and ranges**

The tables in Appendices 4-6 below give the starting points, minimum and maximum financial penalties for each harm category and level of culpability for each type of breach:

- Appendix 4 First breach in respect of a Prohibited Payment
- Appendix 5 Second & subsequent breach in respect of a Prohibited Payment
- Appendix 6 Breach in respect of membership of a Redress Scheme

**Context** - Below is a list of some, but not all factual elements that provide the context of the breach and factors relating to the Landlord or Agent. The Council will identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In particular, relevant recent convictions<sup>3</sup> are likely to result in a substantial upward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range which will not exceed the statutory maximum permitted in any case.

### **Factors increasing seriousness**

Aggravating factors:

- Previous breaches of the TFA 2019
- Previous convictions, having regard to:
- The nature of the offence to which the conviction relates and its relevance to the current breach and the time that has elapsed since the conviction:

Other aggravating factors may include:

- Motivated by financial gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider/community impact
- Obstruction of the investigation
- Record of poor compliance
- Refusal of advice or training or to become a member of an Accreditation scheme

Factors reducing seriousness or reflecting personal mitigation:

- No previous or no relevant/recent breaches
- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of relationship with tenants
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Mental disorder or learning disability, where linked to the commission of the breach
- Serious medical conditions requiring urgent, intensive or long-term treatment and supported by medical evidence

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<sup>3</sup> See Appendix 3 for a list of relevant convictions

### **STEP THREE - General principles to consider in setting a penalty**

The Council will finalise the appropriate level of penalty so that it reflects the seriousness of the offence and the Council must take into account the financial circumstances of the Landlord or Agent if representations are made by the Landlord or Agent following the issue of a Notice of Intent.

The level of financial penalty should reflect the extent to which the conduct fell below the required standard. The financial penalty should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the breach; it should not be cheaper to breach than to take the appropriate precautions and a fundamental principle involved is that there should be no financial gain to the perpetrator from the commission of the breaches.

If issuing a financial penalty for more than one breach, or where the offender has already been issued with a financial penalty, The Council will consider whether the total penalties are just and proportionate to the offending behaviour and will have regard to the factors in STEP EIGHT below.

### **STEP FOUR- Issue Notice of Intent**

The Council will issue a Notice of Intent within 6 months of the enforcement authority having sufficient evidence that the Landlord or Agent has breached the TFA 2019. If the breach is ongoing the 6-month deadline continues until the breach ceases. A Notice of Intent can be served spontaneously. While there are slight variations in the Statutory requirements according to which breach is being addressed a Notice of Intent will typically contain the date of the Notice the amount of the proposed penalty, the reason for imposing the penalty and how the recipient can make representations concerning the penalty.

### **STEP FIVE – Consideration of representations and review of financial penalty where appropriate**

The Council should review the penalty and, if necessary adjust the initial amount reached at STEP FOUR, and represented in the Notice of Intent, to ensure that it fulfils the general principles set out below.

Any quantifiable economic benefit(s) derived from the breach, including through avoided costs or operating savings, should normally be added to the total financial penalty arrived at in step two. Where this is not readily available, the Council may draw on information available from enforcing authorities and others about the general costs of operating within the law. Whether the penalty will have the effect of putting the offender out of business will be relevant but in some serious cases this might be an acceptable outcome.

### **STEP SIX – Reductions**

The Council will consider any factors which indicate that a reduction in the penalty is appropriate and in so doing will have regard to the following factors relating to the wider impacts of the financial penalty on innocent third parties; such as (but not limited to):

- The impact of the financial penalty on the Landlord or Agent's ability to comply with the law or make restitution where appropriate
- The impact of the financial penalty on employment of staff, service users, customers and the local economy.

- The following factors will be considered in setting the level of reduction. When deciding on any reduction in a financial penalty, consideration will be given to:
- The stage in the investigation or thereafter when the offender accepted liability
- The circumstances in which they admitted liability
- The degree of co-operation with the investigation

The maximum level of reduction in a penalty for an admission of liability will be one-third. In some circumstances there will be a reduced or no level of discount. This may occur for example where the evidence of the breach is overwhelming or there is a pattern of breaching conduct.

Any reduction should not result in a penalty which is less than the amount of gain from the commission of the breach itself.

### **STEP SEVEN - Additional actions**

In all cases the Council must consider whether to take additional action. These may include further enforcement action itself or reference to other organisations where appropriate.

### **STEP EIGHT – Totality of breaching conduct**

Where the offender is issued with more than one financial penalty, the Council should consider the following guidance from the definitive guideline on Offences Taken into Consideration and Totality which appears to the Council to be an appropriate reference and guide.

As the total financial penalty is inevitably cumulative the Council should determine the financial penalty for each individual breach based on the seriousness of the breach and taking into account the circumstances of the case including the financial circumstances of the Landlord or Agent so far as they are known, or appear, to the Council.

The Council should add up the financial penalties for each offence and consider if they are just and proportionate. If the aggregate total is not just and proportionate the Council should consider how to reach a just and proportionate total financial penalty. There are a number of ways in which this can be achieved.

For example:

Where a Landlord or Agent is to be penalised for two or more breaches or where there are multiple breaches of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious breach a financial penalty which reflects the totality of the conduct where this can be achieved within the maximum penalty for that breach. No separate penalty should be imposed for the other breaches. Where a Landlord or Agent is to be penalised for two or more breaches that arose out of different incidents, it will often be appropriate to impose separate financial penalties for each breach. The Council should add up the financial penalties for each breach and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the Council should consider whether all of the financial penalties can be proportionately reduced. Separate financial penalties should then be imposed.

Where separate financial penalties are passed, the Council must take care to ensure that there is no double-counting.'

### **STEP NINE – Recording the decision**

The officer making a decision about a financial penalty will record their decision giving reasons for coming to the amount of financial penalty that will be imposed.

**Appendix 2 – Non exhaustive list of vulnerable people:**

- Young adults and children
- Persons vulnerable by virtue of age
- Persons vulnerable by virtue of disability or sensory impairment
- People on a low income
- Persons with a Drug or alcohol addiction
- Victims of domestic abuse
- Children in care or otherwise vulnerable by virtue of age
- People with complex health conditions
- People exploited where English is not their first language.
- Victims of Trafficking or sexual exploitation
- Refugees
- Asylum seekers
- People at risk of harassment or eviction
- People at risk of homelessness.

### **Appendix 3 – Non exhaustive list of relevant offences /breaches:**

- Housing law or landlord and tenant related
- Offences under:
  - The Public Health Acts of 1936 and 1961
  - The Building Act 1984
  - The Environmental Protection Act 1990
  - The Town and Country Planning Act 1990
  - The Prevention of Damage by Pests Act 1949
  - The Protection from Eviction Act 1977
  - The Local Government (Miscellaneous Provisions) Acts of 1982 and 1976
  - The Housing Grants, Construction and Regeneration Act 1996
  - The Local Government and Housing Act 1989
  - The Housing Act 2004
  - The Consumer Protection from Unfair Trading Regulations 2008

### **Offences involving fraud**

Offences in which the victim has been deprived of money, property or other benefit by misrepresentation/deception on the part of the offender including:

- Theft
- Burglary
- Fraud
- Benefit fraud (particularly where tenants are in receipt of Housing Benefit)
- Conspiracy to defraud
- Obtaining money or property by deception
- People trafficking
- Being struck off as a company director

### **Offences involving violence**

A conviction for the offence of:

- Murder
- Manslaughter
- Arson
- Malicious wounding or grievous bodily harm
- Grievous bodily harm with intent
- Actual bodily harm
- Grievous bodily harm
- Robbery
- Criminal damage where the intent was to intimidate or was racially aggravated
- Common assault

### **Common assault which is racially aggravated:**

- Assault occasioning actual bodily harm
- Possession of an offensive weapon
- Possession of a firearm

### **Offences involving drugs :**

- Consideration should be given to the nature of the offence and what bearing it could have on the Landlord or Agents business activities. The nature, quantity, purity and class of drugs should be taken into account. In addition,

where an offence of possession with intent to supply is involved regard should be had to the role and importance of, the subject in the supply chain

### **Offences involving sexual offences:**

- An offence contained in schedule 3 of the Sexual Offences Act 2003.

### **Unlawful discrimination:**

- Unlawful discrimination can include findings of an Industrial Tribunal on unlawful employment practice such as discrimination under the Disability Discrimination Act. Consideration should be given to the nature of the unlawful discrimination and what bearing it could have on the management of a licensable property.

### **Other offences**

- Modern Slavery/ Human Trafficking

Offences involving the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control of another person, for the purpose of exploitation is likely to attach a lower level of culpability.

## Appendix 4 – Financial Penalty in the case of a first breach in respect of Prohibited Payments.

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £5000.

		Range	
	Starting Point (£)	Minimum (£)	Maximum (£)
<b>Low culpability</b>			
Harm category 3	1250	250	2250
Harm category 2	1500	500	2500
Harm category 1	1750	750	2750
<b>Medium culpability</b>			
Harm category 3	2000	1000	3000
Harm category 2	2250	1250	3250
Harm category 1	2500	1500	3500
<b>High culpability</b>			
Harm category 3	2750	1750	3750
Harm category 2	3000	2000	4000
Harm category 1	3250	2250	4250
<b>Very high culpability</b>			
Harm category 3	3500	2500	4500
Harm category 2	3750	2750	4750
Harm category 1	4000	3000	5000

**Appendix 5 – Financial Penalty in the case of a second or subsequent breach in respect of Prohibited Payments within 5 years of a previous breach**

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £30,000.

	<b>Range</b>		
	<b>Starting Point (£)</b>	<b>Minimum (£)</b>	<b>Maximum (£)</b>
<b>Low culpability</b>			
<b>Harm category 3</b>	3500	2000	8000
<b>Harm category 2</b>	6500	4000	10000
<b>Harm category 1</b>	8500	4500	15000
<b>Medium culpability</b>			
<b>Harm category 3</b>	6500	4750	17000
<b>Harm category 2</b>	10500	5000	20000
<b>Harm category 1</b>	12500	5500	22000
<b>High culpability</b>			
<b>Harm category 3</b>	10500	5500	20000
<b>Harm category 2</b>	15000	6250	24000
<b>Harm category 1</b>	18000	7000	26000
<b>Very high culpability</b>			
<b>Harm category 3</b>	15000	7000	24000
<b>Harm category 2</b>	17500	7250	28000
<b>Harm category 1</b>	20000	7500	30000

**Appendix 6 – Financial Penalty in the case of a breach in respect of Membership of a Redress Scheme.**

The table below gives the starting points, minimum and maximum financial penalties for each harm category and level of culpability. Where exceptional circumstances apply the Council may reduce the minimum penalties further but may not increase them above the maximum permitted of £5000.

	<b>Range</b>		
	<b>Starting Point (£)</b>	<b>Minimum (£)</b>	<b>Maximum (£)</b>
<b>Low culpability</b>			
<b>Harm category 3</b>	1250	250	2250
<b>Harm category 2</b>	1500	500	2500
<b>Harm category 1</b>	1750	750	2750
<b>Medium culpability</b>			
<b>Harm category 3</b>	2000	1000	3000
<b>Harm category 2</b>	2250	1250	3250
<b>Harm category 1</b>	2500	1500	3500
<b>High culpability</b>			
<b>Harm category 3</b>	2750	1750	3750
<b>Harm category 2</b>	3000	2000	4000
<b>Harm category 1</b>	3250	2250	4250
<b>Very high culpability</b>			
<b>Harm category 3</b>	3500	2500	4500
<b>Harm category 2</b>	3750	2750	4750
<b>Harm category 1</b>	4000	3000	5000