



# **Private Sector Housing Enforcement Policy**

**2009**

## **Enforcement Framework**

This document follows the principles contained in the Enforcement Concordat issued by the Cabinet Office. The policy is based on the principles of openness, clear standards, proportionality, consistency of approach, targeting to areas of greatest risk or need, and transparency.

The Policy recognises the Human Rights Act 1998 and the Code of Practice for Crown Prosecutors, and complies with the Police and Criminal Evidence Act 1984, Regulation of Investigatory Powers Act 2000 and The Criminal Procedures and Investigations Act 1996.

Where appropriate, the Policy also recognises the Regulators Compliance Code. This is a new statutory Code of Practice for Regulators which came into force in April 2008. The code applies to Parts 2 to 5 of the Housing Act 2004. It also applies to Parts 8, 9 and 10 of the Housing Act 1985 (Area Improvement, Slum Clearance and Overcrowding), and Part 8 of the Housing Act 1996. In accordance with the Code, this policy helps to promote efficient and effective approaches to regulatory inspection and enforcement, which improve regulatory outcomes without imposing unnecessary burdens. In certain instances, the Council may conclude that a provision in the Code is either not relevant or is outweighed by another provision. Any decision to depart from the Code will be properly reasoned, based on material evidence and documented.

### **PART 1: GENERAL ENFORCEMENT**

In order to achieve and maintain consistency in private sector housing enforcement the Council will use the following range of enforcement options as appropriate:

- No Action
- Informal Action
- Statutory Action
- Formal Caution
- Prosecution
- Works in Default
- Emergency Measures

#### **No Action**

Where no action is possible, for example in cases that fall outside our legislative remit, or when the individual circumstances of the case lead the officer to determine that no action should be taken, the service user will be given advice on ways that they can deal with the matter themselves by taking their own legal action or such other means.

#### **Informal Action**

Informal action will include verbal advice and/or advisory letters and will generally be used as a preliminary step prior to any formal or statutory action.

Informal action is appropriate where one or more of the following apply:

- There is no legislative requirement to serve a formal notice and the

- circumstances are not serious enough to warrant formal action.
- Past history suggests that informal action can be reasonably expected to achieve compliance.
- There is confidence in the management or the individual.
- The consequences of non compliance will not pose a significant risk to occupiers or others.
- An effective solution with a suitable timescale can be agreed.

### **Statutory Action**

The Council will serve a formal notice where they have a statutory duty to do so, taking into account the following criteria:

- There are significant contraventions of legislation but prosecution is not appropriate.
- Where informal action has not achieved compliance.
- There is a lack of confidence that the individual or company will respond to an informal approach.
- There is a history of non compliance with informal action.
- Standards are generally poor with little management awareness or regard of statutory requirements.
- The consequences of non compliance could be potentially serious to the health and safety of the occupier or public health.
- Although it is intended to prosecute, effective action needs to be taken to remedy conditions, which pose an immediate risk to health and safety.

Officers authorised to take statutory action are identified in the Council's Scheme of Delegation (available on request).

Statutory notices will be served in accordance with the provisions of the appropriate legislation and will specify:

- The reason for the enforcement action being taken including an explanation of what is wrong, what is needed to put things right, what will happen if the notice is not complied with.
- A reasonable time scale for compliance having regard to the seriousness of the defects or contraventions.
- Written information detailing the right of appeal against the notice, and method for doing so.

### **Formal Cautions**

The Council may offer a Formal Caution as an alternative to prosecution in order to:

- deal quickly and simply with less serious offences
- to divert less serious offences away from the Courts, and
- to reduce the chances of repeat offences

The Council will only offer a Formal Caution where:

- a) there is evidence of the offender's guilt sufficient to give a realistic prospect of conviction;
- b) the offender admits the offence;
- c) the offender clearly understands the significance of a formal caution and gives informed consent to being cautioned, and
- d) the use of a formal caution is considered to be in the public interest.

### **Prosecution**

The Council recognises that the decision to prosecute is significant and could have far reaching consequences upon the alleged offender. The Council will only instigate legal proceedings where there is sufficient, admissible and reliable evidence that an offence has been committed by an identifiable individual or company, that there is a realistic prospect of conviction and that prosecution for the offence is in the public interest.

The decision to prosecute will only be made in consultation with the Portfolio Holder for Housing in accordance with the Constitution of Eden District Council, published in March 2008.

In making the decision to prosecute the following factors will be considered, in line with the guidance in the Code of Practice for Crown Prosecutors:

a) **The seriousness of the offence:**

- the risk to health
- identifiable victims
- failure to comply with a statutory notice served for a significant breach of legislation
- failure to comply with statutory management responsibilities resulting in a significant risk to health
- operating a licensable House in Multiple Occupation (H.M.O) without a licence
- failure to comply with the conditions attached to a licence issued in respect of a licensable H.M.O
- disregard for the public health for financial reward

b) **The previous history of the landlord/owner or person responsible:**

- offences following a previous history of similar offences
- failure to respond positively to past warnings
- failure to comply with statutory notices

- c) **The ability of witnesses and their willingness to co-operate;**
- d) **Evidence that the individual or company is concerned to prevent a recurrence of the problem;**
- e) **Whether a prosecution would be in the public interest and the importance of the case:**
  - the likely penalty on conviction
  - the offender's age and state of health
  - the offender's attitude to the offence
- f) **Whether other action, such as issuing a formal caution or the service of a statutory notice would be more effective;**
- g) **Any explanation by the individual/company.**

## **PART 2: SPECIFIC ENFORCEMENT of the HOUSING ACT 2004**

The Housing Act 2004 requires local authorities to base their enforcement decisions in respect of all types of residential property on assessments under the Housing Health and Safety Rating System (HHSRS). The system is based on twenty-nine possible hazards, and is structured around an evidence based risk assessment process. Local Authorities must inspect properties to determine whether there are Category 1 or Category 2 hazards present, using the method prescribed by regulations, having regard to Operating Guidance issued by the Secretary of State.

Assessment of hazards is a two stage process, addressing first the likelihood of an occurrence and then the range of probable harm outcomes. These two factors are combined using a standard method to give a score in respect of each hazard identified. The decision to take enforcement action is based on a three considerations:

- (a) the hazard rating score determined under HHSRS;
- (b) whether the local authority has a duty or power to act, determined by the presence of a hazard score above or below a threshold prescribed in the regulations, and
- (c) the authority's judgement as to 'the most appropriate course of action' to remove or reduce the hazard taking into account the most vulnerable potential occupant and the actual occupants.

### **Duties and Powers**

The Council must take appropriate action in respect of a Category 1 hazard (bands A-C) and may do so in respect of a Category 2 hazard (bands D-J).

The courses of action available to the Council where it has either a duty or a power to act are to:

- Serve an Improvement Notice requiring remedial works
- Make a Prohibition Order, which closes the whole or part of a dwelling or restricts the number or class of permitted occupants
- Suspend the Improvement Notice or Prohibition Order

- Serve a Hazard Awareness Notice
- Take Emergency Remedial Action\*
- Serve an Emergency Prohibition Order\*
- Make a Demolition Order\*
- Declare a Clearance Area\*

*\* Only in respect of Category 1 hazards*

For the purposes of assessing the hazard, it is assumed that the dwelling is occupied by the most vulnerable household (irrespective of what household is actually in occupation or indeed if it is empty). However, for the purposes of deciding the most appropriate course of action, regard is had to the actual household in occupation.

Where an authority takes action and the property owner does not comply, the Act retains the powers available to authorities to act in default. It also enables them to charge and recover charges for enforcement action.

### **Decision Rules**

The Council will have regard to the statutory guidance document 'The Housing Health and Safety Rating System: Enforcement Guidance' when deciding the most appropriate course of action.

Whether the Council has a duty to act in respect of a Category 1 hazard, or the power to act in respect of a Category 2 hazard, in either case the Council is obliged to give a formal statement of reasons for the action it intends to take.

The Council will take account of factors such as:

- Extent, severity and location of hazard
- Proportionality - cost and practicability of remedial works
- Multiple hazards
- The extent of control an occupier has over works to the dwelling
- Vulnerability of current occupiers
- Likelihood of occupancy changing
- Social exclusion
- The views of the current occupiers

Consideration must also be given to whether consultation is required with other enforcing bodies. In particular where the hazard of fire is identified there is a duty to consult with the fire authority as prescribed under section 10 of the 2004 Act.

## **Category 1 Hazards**

Where an assessment and rating of a property has resulted in a Category 1 hazard, the council will serve Statutory Notice. Where this formal action is being considered and the person responsible agrees to take action to resolve the matter, the Council may agree to defer formal action for a reasonable time. Deferred action will not be considered where there is an imminent risk to public health or safety.

## **Category 2 Hazards**

In addition to the Council's duty to take action where a Category 1 hazard exists, the Council will generally exercise its discretion to take the most appropriate course of action where a Category 2 hazard exists in the following situations:

### ***(a) Band D Hazards***

There will be a general presumption that where a Band D hazard exists, Officers will consider action under the Housing Act 2004 unless that would not be the most appropriate course of action.

### ***(b) Multiple Hazards***

Where a number of hazards at Band D or below create a more serious situation, where a property appears to be in a dilapidated condition, or where the conditions are such as to be affecting the material comfort of an occupying tenant.

### ***(c) Exceptional Circumstances***

In exceptional circumstances where (a) and (b) above are not applicable, the Director of Technical Services may authorise the most appropriate course of action to be taken.

## **Level to Which Hazards are to be Improved**

The Housing Act 2004 requires only that the works specified when taking the most appropriate course reduce a Category 1 hazard to Category 2 hazard. For example Band C and Band A hazards need only be reduced to Band D. The Council will generally seek to specify works which achieve a significant reduction in the hazard level and in particular will be to a standard that should ensure that no further intervention should be required for a minimum period of twelve months.

## **Tenure**

In considering the most appropriate course of action, the Council will have regard to the extent of control that an occupier has over works required to the dwelling. In normal circumstances, this will mean taking the most appropriate course of action against a private landlord and in most cases this will involve requiring works to be carried out.

Registered Social Landlords (Housing Associations) are also subject to enforcement, however where RSLs have a programme of works to make their stock decent, the Council will liaise as appropriate with the landlord over any works necessary to deal with Category 1 and 2 hazards in advance of any planned improvements. If an RSL is planning works which would deal with the

hazard, depending on the risk to the tenants, it may be appropriate to issue a Suspended Improvement Notice rather than an Improvement Notice, or to allow extra time on an Improvement Notice. However, if the RSL fails to respond to any such request for information, or if the proposed timescale is not considered acceptable based on the severity of the hazard, the Council will consider the need to pursue more urgent action.

With owner occupiers, in most cases they will not be required to carry out works to their own home and the requirement to take the most appropriate course of action will be satisfied by the service of a Hazard Awareness Notice.

However, the Council may in certain circumstances require works to be carried out, or to use Emergency Remedial Action or serve an Emergency Prohibition Order, in respect of an owner occupied dwelling. This is likely to be where there is an imminent risk of serious harm to the occupiers themselves or to others outside the household, or where the condition of the dwelling is such that it may adversely affect the health and safety of others outside the property. This may be because of a serious, dangerous deficiency at the property. Another example is a requirement to carry out fire precaution works to a flat on long leasehold in a block in multiple occupation.

### **Vacated Properties with Statutory Notice**

In cases where properties are subject to a statutory notice and the property is subsequently vacated, all notices or orders will be reviewed to consider whether the notices or orders may be varied, suspended or revoked. The Council will seek to deter landlords from undertaking retaliatory eviction and will not consider that removal of a tenant achieves compliance with the any Notice served, except in overcrowding situations where it was a specific requirement of the notice.

### **Action with Agreement**

The Act also makes provision for remedial works to be carried out by agreement. This is where the local authority arranges for the works to be carried out at the request of the person responsible and they are then charged for the full cost. If the costs incurred cannot be paid they must be placed as a charge against the property.

### **Accredited Landlords**

Before officers visit privately rented properties, they shall refer to the Accredited Landlord database to check whether the property is owned by an ELAS Accredited landlord. In such cases, the officer will also carry out an ELAS compliance check at the time of the visit. In addition to statutory action, consideration will be given to revoking the Landlords' membership of the scheme along with its associated benefits.

## **Powers of Entry**

Most of the legislation enforced by the Housing Team includes the power for authorised officers of the local housing authority to gain entry onto property for the purpose of carrying out the authority's duties under that legislation.

If an officer is unsuccessful in gaining entry by informal means, the Council will consider obtaining a warrant from a Justice of the Peace to provide for the power of entry by force if necessary. If prior warning of entry is likely to defeat the purpose of the entry then a warrant can be obtained.

The Council also has the power to require documents to be produced in connection with its enforcement (Parts 1 - 4 of the Housing Act 2004) by a notice. The notice will specify the consequences of not complying.

Copies of documents can be obtained and kept by the Council.

## ***Power to Charge for Enforcement Action***

In accordance with Sections 49 and 50 of the Housing Act 2004, the Council reserves the right to charge and recover the reasonable costs incurred in taking the most appropriate course of action.

The Council will charge where a formal notice or order is required to remove hazards, or when emergency remedial action is necessary.

The charge for a formal notice or order will be published annually in the Fees and Charges Policy, and will be reviewed annually.

A demand for payment of the charge must be served on the person from whom the Council seek to recover it. The demand becomes operative, if no appeal is brought against the underlying notice or order, at the end of the period of twenty-one days beginning with the date of service of the demand. As from the time when the demand becomes operative, the sum recoverable by the authority is, until recovered, a charge on the premises concerned.

Costs spent carrying out emergency remedial action may be recovered separately.

If the Secretary of State prescribes a maximum amount that may be charged to recover administration and other expenses incurred in taking enforcement action the Council will limit any charge accordingly.

## **Works in Default**

The Council may carry out works in default of a statutory notice. The cost of the works, plus the Council's reasonable administration charges based on an officer's hourly rate, will be charged to the responsible party and recovered through the civil court.

Charges may be made for abortive costs in preparing to carry out work in default where an order has been placed and the owner then carries out the work required.

Where there is no prospect of the money being recovered, the debt may be placed on the property as a land charge.

## **Emergency Measures**

The Council may use emergency enforcement powers under housing legislation where there is an imminent risk of serious harm. In such circumstances the Council will take whatever remedial action it considers necessary to remove an imminent risk of serious harm. This could include taking remedial action in respect of a hazard and the subsequent recovery of reasonable expenses or prohibiting the use of all or part of a property.

Such emergency measures will only be taken where the use of emergency powers is the most appropriate course of action. Where emergency measures are taken, the owner of the property or other relevant person will be advised of the method of appeal against the action taken.

## **Licensing of Houses in Multiple Occupation**

### **HHSRS and its Link to HMO Licensing**

The Council does not need to consider HHSRS before an HMO licence is issued. However, if during the licensing process the Council has reason to be concerned about the likelihood of Category 1 or 2 hazards, it will take action as described in this policy.

In HMO's the assessment of hazards is made for each unit of accommodation, which will reflect the contribution of conditions in the common parts and other areas connected to the unit of accommodation. If an enforcement notice is served on an HMO and it reverts to single occupation, the Council will consider whether the impact of the hazard has diminished and take appropriate action.

Part 2 of the Housing Act 2004 introduces mandatory licensing of certain types of HMO (house in multiple occupation). Mandatory licensing has been introduced to tackle the worst properties in this sector.

Local Authorities may also introduce Additional and Selective licensing schemes within their area. These schemes are discretionary and the Local Authority will be expected to undertake research and prepare a report for the Secretary of State advising why such schemes are necessary in their area, to deal with specific issues. Eden does not currently operate such a scheme.

### **Duty to Licence HMO's**

Section 61 of the Housing Act 2004 places a duty on the local housing authority to licence certain types of HMO. The Council must take all reasonable steps to ensure applications are made. A charge will be made for the issue of an HMO licence. This charge will be published and reviewed annually.

Each licence application must be dealt with systematically and will require a degree of checking before a licence can be issued. Checks must be carried out within agreed timescales and a Notice either granting or refusing a licence must be issued before the licence itself is issued.

### **Fit and Proper Person and Management**

The purpose of HMO licensing is to ensure that the most high risk and poorly managed properties are targeted.

The requirement that the licence holder should be a fit and proper person is to ensure that tenants are protected, and the Act stipulates criteria that the licence holder must meet to be regarded as fit and proper.

Where the proposed manager or licence holder is not a fit and proper person, the applicant should be given the opportunity to review the current situation and make proposals that do meet these criteria. If this is not possible, it may be necessary to refuse the licence.

### **Provision of False or Misleading Information**

It is an offence under the Act to provide false or misleading information. On conviction a fine of up to level 5 on the standard scale can be incurred.

Where the HMO licence application form has been signed this is a declaration that information provided is correct. Should contradictory information come to light, prosecution will be considered.

### **Granting a Licence**

Where an application for a licence has been received and the Council is satisfied that the proposed licence holder is fit and proper, that the house is suitable for multiple occupation and the application submitted is valid, the Council must grant a licence.

Each licence must only relate to one HMO and can last for up to five years. In some cases it may be necessary to grant the licence for less than five years.

### **Refusing a Licence**

A licence can be refused if the Council is not satisfied that the criteria stipulated in the Act have been met.

If a licence is to be refused, the Council will give serious consideration to the consequences of this decision. Depending on the reasons for the refusal it may be appropriate to consider the options available for dealing with the property.

Where a licence is refused the Council has a duty to take on the management of the property by serving an Interim Management Order. A management order should be the last resort and other avenues will be considered before instigating this action, including a Temporary Exemption Notice

All reasonable steps must be taken to assist the proposed licence holder or owner of the property to either take action to allow the property to become licensed or to take the property out of use as an HMO.

### **Revoking a Licence**

A licence may be revoked under a number of circumstances, stipulated in the Act. In deciding to revoke the licence consideration must be given to the consequences of doing so. If the property is to remain a licensable HMO then the Council must make an interim management order. If it is no longer an HMO no further action is required.

## **Varying a Licence**

A licence may be varied where either the licence holder makes a request or the Council feels it is relevant to do so. It may be varied where there has been a change in circumstances, which also includes the discovery of new information.

## **Penalties**

There are a number of possible offences relating to HMO licensing. The Council will consider taking action where there is evidence of an offence and it is appropriate to take such action.

Offences include:

- Managing or having control of an unlicensed HMO that should have a licence. Prosecution can result in fines of up to £20,000.
- Allowing the HMO to become occupied by more than the agreed number of households or persons on the licence. Prosecution can result in fines of up to £20,000.
- Breaching licence conditions. A breach of licence conditions can lead to prosecution and up to £5,000 per breach.

Other penalties include:

- Rent Repayment Orders - if a person has committed the offence described above, in that no licence is being held for a property that should have one, then the Council or tenants can apply for a rent repayment order. The residential property tribunal can award this order, which requires the appropriate person to repay all rents and other periodical payments, and housing benefit for the period up to a licence being issued. The Order will state the amount to be repaid.
- Termination of Tenancies - Landlords will not be able to issue any section 21 notices under the Housing Act 1988 (recovery of possession on termination of a shorthold tenancy), whilst the HMO is unlicensed.

## **Interim Management Orders and Final Management Orders**

The Council has a duty to make an Interim Management Order in respect of an HMO where there is no reasonable prospect of it being licensed in the near future or it is necessary to protect the health, safety and welfare of the occupants.

An order can also be served in circumstances that the Council thinks are appropriate with a view to ensuring the proper management of the house pending the licence being granted.

Where a licence has been revoked for any reason and the property remains a licensable HMO an interim management order must be made if there is no reasonable prospect of the property regaining its licence.

Once an interim management order has been served the Council must take over the management of the property for up to twelve months. This includes carrying out any remedial works necessary to deal with the immediate risks to health and safety.

If there is still no prospect of a licence being granted after twelve months then a final management order must be made which may be in force for up to five years. If after five years there is no prospect of the property being licensed a further management order must be made.

The Council is under a duty to issue interim and final management orders where necessary. The Council will instigate this action where necessary but as a last resort.

All practical steps should be taken to assist the owner of the property to satisfy the licensing requirements. Management orders can be varied or revoked at any time as a result of a request from the owner or by the Council.

### **Temporary Exemption Notices**

A Temporary Exemption Notice (TEN) may be issued where an HMO that is due to be licensed is to be taken out of use as a licensable HMO. A person having control or managing an HMO can notify the Council of its plans and request that the property be exempt from licensing. The Council must then consider this representation and if appropriate, serve the temporary exemption notice. A TEN remains in force for a period of three months, after which the property must have a license if it is still in such a condition as to require one. If further notification is received and the authority considers that there are exceptional circumstances a second TEN may be served which will remain in force for a further three months.

### **Background documents**