

Committee: Cabinet

Date: 3 June 2019

Subject: Private Rented Property Licensing – Review of Mandatory Licensing Fees, Options for introducing Selective Licensing and Introduction of Civil Penalties

Lead officer: Steve Langley – Head of Housing

Lead member: Councillor Martin Whelton – Cabinet Member for Regeneration, Environment and Housing

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Recommendations:

1. To approve the Civil Penalties and Rent Repayment Order policy and charging system as set out in Appendix 1.
 2. To approve the introduction of a revised fee structure for HMO mandatory licencing charges.
 3. To approve the case for using the income from Civil Penalties, Rent Repayment Orders and the revised mandatory HMO licensing scheme so as to build capacity within the Housing Enforcement Team in order to meet statutory requirements
 4. To agree the renaming of the current Environmental Health Housing service to the Housing Enforcement Team which better reflects the current operating environment
 5. To approve the Housing Enforcement Policy
 6. That delegated authority be given to the Director of Community & Housing to approve minor adaptations and updates to the Housing Enforcement Policy, as and when required.
 7. To agree that further data analysis be carried to identify which area(s) will be adopted for Selective Licensing.
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1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY

Private sector housing plays a significant part in the housing provision within Merton, accounting for 24.8% of supply, and it is recognised that the majority of this housing is in good condition and well managed, however nationally the conditions in the private rented sector (PRS) tend to be less satisfactory than any other occupancy type. The Council has a responsibility to deal with unsatisfactory housing that presents health and safety hazards to the occupier. This report outlines our approach to securing that standards are met, seeks to ensure good

practice is maintained; and all properties let as residential dwellings, those in the private ownership, throughout Merton are of good quality and are well managed.

It is not disputed that the private rented sector should provide high standards, secure swift and effective access to justice and that the large volume of powers to protect tenants from poor housing are being used.

There are 140 Acts of Parliament containing more than 400 individual regulations affecting the private rented sector.

The current law in England has become more and more complex. It is not unsurprising therefore, that that local housing authorities, including Merton, have not carried out more enforcement over the years, and the responses to complaints of disrepair in the sector can vary.

The table below sets out the number of offences that received a prosecution or criminal conviction over a 10 year period. The data source was the GLA Rogue Landlord Database.

Borough	No of Offences		Borough	No of Offences
Kingston	0		Sutton	5
Merton	30 offences (from 1 prosecution)		Croydon	6
Bromley	1		Havering	8
Bexley	2		Richmond	8
Lewisham	2		Wandsworth	17
Lambeth	3		Hounslow	34

In the last few decades the size of the private rented sector has grown. This form of tenure has become home to more than 4.7 million people in England and is likely to grow.

Poor housing costs the NHS at least £1.4 billion each year and given more and more of the tenants are vulnerable and will have young families, it is important that we take steps to improve housing conditions in this sector.

This report summarises the types of enforcement and legislation which can commonly be used, and how we will try to boost standards across the private rented sector, realising of course it will not solve all the problems with “rogue landlords” but it will contribute towards improved quality and safety in housing condition and in doing so support the physical and mental health of residents.

In the context of housing enforcement and regulation regard must be had to the following:

- The Regulators' Code which promotes proportionate, consistent and targeted regulatory activity through transparent and effective dialogue and understanding between regulators and those they regulate. Regulators must have regard to this code when developing policies and procedures that guide their regulatory activity.
- The Government has pledged to crackdown on rogue landlords and has introduced a number of measures under the Housing and Planning Act 2016 to help local authorities deal more robustly with offenders.

2. DETAILS

2.1 Methods of Enforcement

The Housing Enforcement Team expects full voluntary compliance with the Law. Officers work with owners of housing to meet their legal obligations by providing clear and concise information about what they need to do to comply. Formal Action will be taken, including prosecution, against those who flout the law.

The principle piece of legislation used by the Housing Enforcement Team is the Housing Act 2004. Actions that will be considered include, but not limited to

- Informal action
- Serve a statutory notice
- Take emergency remedial action
- Suspend, revoke or refuse to renew a HMO licence
- Formal (simple caution)
- Civil penalty
- Works in default

The Government has pledged to a crackdown on rogue Landlords and has introduced a number of measures under the Housing and Planning Act 2016 to help the Council deal more robustly with offenders.

2.2 New Legislation Housing and Planning Act 2016

2.2.1 Civil Penalties

Section 23 and 126 and Schedule 9 to the Housing and Planning Act 2016 amended the Housing Act 2004 so as to provide for the imposition of civil penalties as an alternative to prosecution for certain specified housing offences.

This power is set out at section 249A of the Housing Act 2004, which states that a "local housing authority" may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England. A relevant housing offence for these purposes means one of the following offences under the Housing Act 2004.

- Failure to comply with an Improvement Notice.

- Offences in relation to the licensing of Houses in Multiple Occupation.
- Offences in relation to licensing of houses under Part 3 of the Act if the Council adopted selective or additional licensing in the future.
- Contravention of an overcrowding notice.
- Failure to comply with management regulations in respect of Houses in Multiple Occupation.
- Breach of a banning order.

Only one penalty, of up to £30,000 may be imposed on a person in respect of the same conduct. The Council cannot impose a civil penalty and prosecute for the same offence. Similarly, if a civil penalty has been imposed a person cannot then be convicted of an offence for the same conduct. The decision on when to prosecute and when to issue a civil penalty will be decided on a case by case basis (once adopted in accordance with the policy at Appendix 1).

Where it is determined to impose a civil penalty, the amount of that penalty will be calculated by reference to the Civil Penalty Policy.

A civil penalty will only be imposed where there is sufficient evidence to show the evidence of a relevant offence, such as to provide a realistic prospect of conviction if that breach was prosecuted in the Magistrates Court. The evidence must reach the standard of the criminal burden of proof i.e. beyond reasonable doubt. It is not to be considered an easier or softer option to prosecution. Where both a landlord and a managing agent have committed the same offence, a civil penalty can be imposed on both as an alternative to prosecution, and the level of penalty may be set at different levels.

A person who has been issued with a civil penalty has a right of appeal to the First-tier Tribunal and this will involve a re-hearing of the Council's decision to impose a civil penalty. The Tribunal has the power to confirm, vary (increase or reduce) the size of the financial penalty or cancel the civil penalty that the Council has issued.

The local housing authority must have regard to the exercise of functions pertaining to issue of civil penalties.

The guidance sets out factors which the local housing authority should take into account when deciding the appropriate level of penalty. These are:

- The severity of the offence.
- The culpability and track record of the offender.
- The harm caused to the tenant or likely to be caused as a consequence of committing the offence.
- Punishing and deterring the offender.
- Deterring others from committing similar offences.
- Removing any financial benefit from the offender

2.2.2 Rent Repayment

A Rent Repayment Order (RRO) is an order made by the First Tier Tribunal requiring a landlord to repay a specified amount of rent. The Housing Act 2004 introduced RROs to cover situations where the landlord of a property had failed to obtain a HMO License for a property that was required to be licensed. The Housing and Planning Act 2016 extends this power to cover a much wider range of offences as set out below.

- Violence when securing entry to a property – section 6 Criminal Law Act 1977.
- Eviction or harassment of occupiers of premises – section 1 Protection from Eviction Act 1977.
- Failure to comply with an Improvement Notice – section 30 Housing Act 2004.
- Failure to comply with a Prohibition Order – section 32 Housing Act 2004.
- Control or management of an unlicensed HMO – section 72 Housing Act 2004.
- Breach of a banning order – section 21 Housing And Planning Act 2016.

RRO's can be granted to either the tenant or the Council, although a tenant may apply for an RRO only if the offence relates to housing that, at the time of the offence was let to the tenant, and the offence was committed within 12 months of the application. If the tenant's rent was paid through Housing Benefit or through the housing element of Universal Credit then the rent is paid to the Council. If the tenant paid their own rent themselves it is repaid to the tenant. If the rent was paid partially by the tenant with the remainder through Housing Benefit the rent will be repaid on an equivalent basis.

The Council has a duty to consider applying for a rent repayment order if they become aware that a person has been convicted of one or more of the offences set out above. Tenants also have a right to apply to the First Tier Tribunal to make a rent repayment order and section 49 of the Housing and Planning Act 2016, specifies that the council may help a tenant to apply for a RRO by, for example the giving of advice or conducting proceedings on a tenant's behalf

The amount the First-tier Tribunal may require the Landlord to repay, will be dependent upon the offence committed, but must not exceed the amount of rent paid (by the tenant) or the amount of Housing Benefit or housing component of Universal Credit that the Landlord received (from the local authority) in respect of rent. Under the HPA 2016 a Rent Repayment Order (RRO) can be sought even when the Landlord has not been convicted of one of the offences listed above. Where this is the case, the First Tier Tribunal will need to be satisfied beyond reasonable doubt that the Landlord has committed the offences.

2.2.3 Banning Orders and the National Database of Rogue Landlords.

Section 15(1) of the Housing and Planning Act 2016 provides local authorities with a power to apply for a banning order against a person who has been convicted of a banning order offence. The order is made by the First-tier Tribunal (for a period of no less than 12 months) and operates to ban a landlord (and managing agent) from letting houses in England, or engaging in an English letting agency, or engaging in English property management work, or doing two or more of these things. A banning order offence is an offence of a description specified in the Housing and Planning Act 2016 (Banning Order Offences), Regulations 2017. These regulations specify a range of housing, immigration and other serious crimes. Statutory guidance has been issued on the exercise of this power.

The Housing and Planning Act 2016 has enabled the Secretary of State to create a central database of rogue landlords and agents. The purpose of this is to provide local authorities with a tool for keeping track of known rogues so that enforcement action and resources are focused on those individuals and organisations who knowingly flout their legal obligations and to assist in the identification of such individuals, especially those who operate across council boundaries. Merton is a signatory to the Rogue Landlord Database.

2.2.4 Houses in Multiple Occupation

Since 2006 the definition of a mandatory licensable House in Multiple Occupation (HMO) was a dwelling comprising of three or more storeys, that is occupied by five or more people living as two or more separate households, and where the occupiers share same basic amenities, such as washing and/or cooking facilities.

On the 1st October 2018, the definition changed and the scope of mandatory licensing for HMO's has been extended to bring smaller HMOs within the scheme.

Mandatory licensing for HMO's will include:

- All HMO's with five or more people, living as two or more separate households regardless of the number of storeys, and where the occupiers share some basic amenities. Effectively this means the storey requirement will be removed from the current definition.
- Purpose built flats where there are up to two flats in the block, and one or both of the flats are occupied by five or more people, living as two or more separate households, and where the occupiers share some basic amenities. This will apply to dwellings above or below commercial premises, bringing some flats above shops and high streets within mandatory HMO licensing as well as small blocks of flats which are not connected to commercial premises.

There are currently 174 mandatory licensed HMOs in Merton. The extended scope of the HMO definition will bring a significant increase in the number of HMOs that will require a licence to operate. Overall this will bring about improvements to the management and safety standards to residential properties in the private rented sector in Merton.

2.3 Housing Enforcement Policy

We are committed in tightening up enforcement processes and response to legislation. We have therefore refreshed our Private Sector Enforcement Policy which outlines the enforcement approach and the available enforcement powers we have at our disposal to manage non-compliance within a private sector housing setting. The draft policy is attached as appendix 3.

The policy seeks to:

- Clearly set out our approach to enforcement and the range of enforcement options available to officers under multiple pieces of legislation.
- Ensure our enforcement is consistent and transparent
- Ensure all new legislation is incorporated and acted on

2.4 Selective Licencing

In recent months concerns have been raised by a number of stakeholders, including residents and ward councillors, which have a high proportion of privately rented properties in their area and where there is concerns of increased anti-social behaviour and crime. These areas exist despite the Council and its partners seeking to use enforcement powers and providing guidance and assistance to provide assistance to private rented sector landlords to improve standards.

In order to address this challenge, this section of the report is recommending that the Council takes further steps to develop an adoption of a selective licensing scheme in addition to the Houses of Multiple Occupation (HMOs) licensing scheme already in operation.

The selective licensing scheme is a discretionary one, which would require all private landlords (with certain exemptions operating within a designated zone to operate under the terms of a license awarded by the Council.)

License conditions typically include a range of requirements aimed at ensuring that properties are safe and are managed in a satisfactory way.

Such a scheme would provide the Council with an additional tool to help better regulate privately rented accommodation and to uplift standards of management within the area. Selective license schemes last for five years and there is a fee payable to apply for the license which covers the cost of the administration and implementation of the scheme, including any required enforcement activity for non-compliance.

2.4.1 Identifying an area for Selective Licensing

For an area to be considered for a Selective Licensing scheme it must have a high level of privately rented housing. A “high level” is defined as being above average and currently the national average is 19.6%.

The table below sets out the size of the housing stock by ward with details of the percentage of the private rented sector.

	Housing Stock	% Private Rented Sector		Housing Stock	% Private Rented Sector
Hillside	4,251	38.4	Village	3,471	23.0
Colliers Wood	4,429	36.8	Merton Park	3,651	22.7
Abbey	4,568	35.7	Cricket Green	4,320	18.5
Dundonald	4,017	33.6	Longthornton	3,646	18.2
Trinity	4,275	33.5	Ravensbury	3,794	18.2
Graveney	3,459	32.8	West Barnes	3,615	16.8
Lavender Fields	4,029	30.1	St Helier	3,976	13.7
Wimbledon Park	4,285	27.8	Cannon Hill	3,450	13.4
Raynes Park	4,177	26.2	Pollards Hill	3,679	13.1
Figge's Marsh	4,225	23.0	Lower Morden	3,440	10.3
			Total	78,757	

In addition to having a high level of private rented housing, there are a number of other criteria that must be met in order to introduce a selective licensing scheme. These criteria are set out in the Housing Act 2004 and the Ministry of Housing, Communities and Local Government Guide.

The law states that a local authority may make a selective licensing designation if an area meets one or more of the following conditions:

- That the area is, or likely to become, an area of low housing demand (low demand being indicated by the value of residential premises compared to the value of other similar premises, the turnover of occupiers of residential premises, the number of premises available to buy or rent and the general appearance of the locality)
- A significant and persistent problem caused by anti-social behaviour
- Poor property conditions
- High levels of migration
- High levels of deprivation
- High levels of crime

2.4.2 Data Analysis

Following the example of other local authorities who have implemented Selective Licensing schemes, data would need to be analysed to Lower Layer Super Output Areas (LSOA – each area broadly equates to a distinct postcode.)

There are broadly 4 stages to determine the geographical extent of potential selective licensing areas, prior to any adoption. These are:

Stage 1

The first stage would be to identify those LSOAs in the borough with a proportion of private rented households in excess of the national average that are also experiencing low housing demand, anti-social behaviour and poor housing conditions.

Analysis will need to be undertaken to identify those LSOAs with a high proportion of privately rented properties that are also in the borough upper quartile for each of the following datasets held by the Council.

- The number of empty properties as a proportion of all housing stock.
- Occupier turnover rate per 1,000 households.
- ASB (reported to the Council) rate per 1,000 population.
- Fly tipping report rate per 1,000 of population.
- Rate of housing disrepair reports per 1,000 population.

Stage 2

To determine the geographical extent of potential selective licensing areas, the LSOAs most closely meeting the criteria of high private rents, Council ASB, poor housing conditions and low housing demand would then need to be considered along with their Middle Layer Super Output (MSOA) neighbours against all stage 1 datasets and the following datasets.

- Lower quartile house prices
- Rate of recorded crime per 1,000 population.
- Rate of Police recorded ASB per 1,000 population.

Stage 3

From this analysis an assessment can be made as to which LSOAs or group of LSOAs most closely meet the criteria for a selective licensing scheme.

Stage 4 - Consultation

Upon an area being proposed for selective licensing the Council has to undertake a full consultation. The consultation would include local residents, landlords and managing agents, members of the community who live or operate business or provide services with the proposed designated areas. The consultation would last for a minimum of 10 weeks.

Once the consultation has been completed the results would need to be published along with a summary of the responses received and how these responses have been acted upon.

Once designated the scheme cannot come into force in line with national guidance until three months after it is made.

2.4.3 Selective Licensing Next Steps

As illustrated in the body of the report, it will take time before the adoption of a selective licensing scheme can be legally implemented, given the requirement to fulfil the conditions of the Housing Act 2004 and associated government guidelines. The council will need to provide robust evidence before a recommendation can be made as to which area(s) should be designated. A further report will need to be prepared. A draft timetable is attached as Appendix 5.

Furthermore, given its complexities including analysing data sets and allowing for formal consultation and review of those representations, additional resources will be required to deliver both the initial proposal report and any subsequent project delivery activities.

The adoption of a selective licensing scheme requires some initial investment to set up the scheme and put in place back room infrastructure. The other key requirement is a comprehensive consultation. The licensing income can be used to assist in the set-up of licensing processing systems and the administration of the scheme. The council needs to build on the overall housing enforcement capacity and capability. The consultation costs may not be recoverable if a selective licensing scheme for designated areas is not agreed. The appointment of a project officer will be crucial in making the case for selective licensing and ensuring that such a proposal would stand up to legal scrutiny and challenge.

Additional operational staff resources would be required to be employed in the Housing Enforcement team in order to administer and enforce a selective licensing scheme. Whilst it is not possible to predict the actual additional costs for administering a selective licensing scheme at this stage, the costs of any additional resources will need to be met by the income generated from the scheme. Appendix 6 provides an outline of potential fees and charges.

2.4.4 Interventions that run concurrent with the development of Selective Licensing

It is important to set out that in addition to Housing Enforcement and working with landlords regarding HMOs, officers continue to discharge the council's statutory functions in accordance with the Housing Act 2004.

Officers are working with private sector landlords and tenants to ensure that minimum standards are met by the landlord for the safety of properties in accordance with targeted works under the Housing, Health and Safety Rating system. Since 1 January 2019 to 10 May the service has received 415 associated service requests.

In addition, officers have been carrying out targeted enforcement activities in the Graveney ward following concerns being raised by ward councillors. Of the 66 addresses brought to officer's attention, 60 properties have been visited and investigated. 30 properties are not considered licensable due to either being single family occupancy or not being licensable HMOs. There are now 29 addresses

considered licensable and the service has either received a completed HMO application forms or appropriate actions are being taken by officers.

Investigations into one case has resulted in steps to prosecute the landlord for an offence under the Housing Act 2004 and a court date has been set.

2.5 Fees and Charges

The Housing Act 2004 and the Housing and Planning Act 2016 specifies that all the income that a local housing authority receives from the imposition of civil penalties, recovery of Housing Benefit through rent payment orders, HMO Licensing and selective licensing can be retained by the local authority and spent on private sector housing enforcement and providing support for the private rented sector.

All charges must be reasonable and proportionate.

It is also the case that any income that a local authority receives from housing enforcement, but fails to spend on one of the activities listed above must be paid into a central government universal fund.

The current fee of £1,100 for a 5-unit mandatory HMO licence does not meet the cost of processing the licence or enforcement. The new proposed fee of £1,774.88 (of a typical 5 unit HMO) for processing and enforcement will meet the costs incurred by the Housing enforcement service for this statutory function.

Case Law, *R (on the application of Hemming (t/a Simply Pleasure Limited and others)) v Westminster City Council* [2017] has confirmed that fees such as those proposed in this report are paid in two parts, so that applicants pay an initial fee that covers the administrative costs involved in procedures and formalities of processing the application and then, if successful an additional fee, to cover the costs of managing and enforcing the licensing regime enforcement action. In addition, another recent case *R (on the application of Gaskin) v Richmond upon Thames* [2018] has confirmed that the fee charged on this two-part basis. A bipartite fee structure is therefore proposed, which is attached at Appendix 2.

2.6 Housing Enforcement Resources

As highlighted elsewhere in this report, the additional income generated from HMO licensing and enforcement work should be used to cover the infrastructure costs and officer capacity costs.

The Council has historically had a small team dealing with Housing Act 2004 investigations, interventions and HMOs, and the delivery of mandatory Disabled Facilities Grants. Since October 2018 additional officer capacity has been obtained, this includes two officers, and there are ongoing actions to recruit two further officers.

These costs can be met from the additional HMO licensing fees and/or other enforcement activities. A recent desktop assessment estimates that there are potentially 2000 properties that may require a licence following the introduction of new mandatory licensing regime on the 1st October 2018. It is anticipated that this will provide income in the region of £200k each year from HMO licensing fees, however we do not yet have an estimated income from Civil Penalties.

The size of the team will be kept under constant review so as to ensure that the additional costs do not exceed the additional income raised.

It is worth noting that private sector housing enforcement is not limited to private sector housing disrepair. Housing officers working within the Housing Options Team are also responsible for responding to allegations of harassment and illegal evictions under the Protection from Eviction Act 1977.

Whilst the government measures to tackle rogue landlords are welcomed, the new powers to the Council are largely untested as is the number of dwellings which may be subject to the new mandatory licensing scheme.

3. ALTERNATIVE OPTIONS

- 3.1 The Government have made it very clear that they expect local housing authorities to use the new powers provided in the Housing and Planning Act 2016 robustly as a way of clamping down on rogue landlords, so therefore to do nothing is not recommended.

4. CONSULTATION UNDERTAKEN OR PROPOSED

- 4.1 None for the purposes of this report.

5. TIMETABLE

- 5.1 If Leaders Strategy Group and the Council's Cabinet agree the adoption of Civil Penalties and the revised HMO Licence fee structure, these will be implemented immediately.
- 5.2 Draft timetable for Selective Licensing is attached as appendix 5.

6. FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

The Housing and Planning Act 2016 specifies that all of the income that the authority receives from the imposition of civil penalties, HMO licensing and the recovery of Housing Benefit can be retained by the local authority and spent on

private sector housing enforcement and providing support for the private rented sector.

However, any income that a local authority receives from civil penalties, HMO licensing and rent repayment orders but fails to spend in support of one of the activities listed above must be paid into a central government universal fund.

It is at this point in time difficult to predict precisely the income that will be generated, although officers will be monitoring the situation closely and where it looks probable that the expected outcomes are not being realised, the size of the Housing Enforcement Team will be reviewed

As civil penalties are an alternative to prosecution with the same burden of proof, they should not create additional workload. It is likely that landlords receiving a civil penalty may appeal to the First-Tier Tribunal so there may be some additional administration. Whilst it is not expected that the Council will need to apply for many RROs there will be additional administration with this process. In all cases support from Legal Services will be required.

7. LEGAL AND STATUTORY IMPLICATIONS

Section 126 of the Housing and Planning Act 2016 allows financial penalties to be imposed as an alternative to prosecution for certain offences as set out in Schedule 9 of the Act. Schedule 9 in turn amends the Housing Act 2004 including providing a new Section 249A which has financial penalties as an alternative to prosecution.

The Council has a statutory duty to mandatory licence certain types of HMOs as set out in the body of this report.

There is a risk that if there are substantial numbers of investigations regarding housing enforcement, this may lead to a corresponding increase in the number of cases requiring legal advice and assistance and this may, in turn, put extra pressure on the existing staffing resources within the Council's legal services.

8. HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

8.1 An Equality Impact Assessment is attached as Appendix 4.

9. CRIME AND DISORDER IMPLICATIONS

9.1 Section 17 of the Crime and Disorder Act 1998 imposes a duty on the Council in the exercise of functions on, and the need to do all it can

reasonably can to prevent crime and disorder in its area (including anti-social behaviour).

- 9.2 It is anticipated that extended mandatory licensing and housing enforcement will have positive impacts on community safety and crime & disorder.

10. RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 10.1 If a decision is taken to proceed with formal consultation of selective licensing, it must be carried out in compliance with statutory and case law requirements.
- 10.2 Licence fees must be set out and charged by recent case law and underlying legislation.

11. APPENDICES – the following documents are to be published with this report and form part of the report

- Appendix 1: Housing and Planning Act 2016 – Civil Penalties and Rent Repayment Orders
- Appendix 2: HMO licence fee structure
- Appendix 3: Housing Enforcement Policy.
- Appendix 4: Equalities Impact Assessment.
- Appendix 5: Draft timetable for selective licensing
- Appendix 6: Outline fees and charges for selective licensing

12. BACKGROUND PAPERS

None