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SCOTTISH STATUTORY INSTRUMENTS

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**2016 No. 146**

**The Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016**

**PART 6**

**Enforcement**

**Enforcement authorities**

- 20.**—(1) Every local authority is an enforcement authority for the purposes of these Regulations.  
(2) It is the duty of each enforcement authority to enforce these Regulations in its area.

**Power to require production of action plan**

**21.**—(1) An enforcement authority may require a person who appears to it to be or to have been subject to the duty under regulation 5(1)(a) or (2) in relation to a building or building unit to produce for inspection a copy of the action plan for that building or building unit.

- (2) The power conferred by paragraph (1) includes power—  
(a) to require the production in a legible documentary form of a copy of any action plan which is held in electronic form; and  
(b) to take copies of any action plan produced for inspection.

(3) A requirement under this regulation may not be made more than 6 months after the last day on which the person concerned appeared to the enforcement authority to be subject to the duty under regulation 5(1)(a) or (2), as the case may be, in relation to the building or building unit.

(4) A person who is subject to a requirement under this regulation must, unless that person has a reasonable excuse for not doing so, comply with that requirement within the period of 7 days beginning with the day after that on which it is made.

**Penalty charge notices – failure to provide action plan**

**22.**—(1) An enforcement authority may, if it believes that a person has breached any duty under regulation 5(1)(a) or (2), give a penalty charge notice to that person.

- (2) A penalty charge notice may not be given to a person under paragraph (1)—  
(a) in respect of a breach of the duty under regulation 5(1)(a), unless that person has failed to make an action plan available to a prospective buyer or tenant within a period of 9 days after a request for such an action plan was made to that person; or  
(b) after the end of the period of 6 months beginning with the day on which it appeared to the enforcement authority that the duty under regulation 5(1)(a) or (2), as the case may be, was breached.
- (3) A penalty charge notice must—  
(a) be in writing;

- (b) state the enforcement authority’s belief that a breach of regulation 5(1)(a) or (2), as the case may be, has occurred;
  - (c) give such particulars of the circumstances as may be necessary to give reasonable notice of the breach;
  - (d) require the person to whom the notice is given, within the period specified in the notice—
    - (i) to pay the penalty charge specified in the notice; or
    - (ii) to give notice to the enforcement authority requesting the authority to review the notice;
  - (e) state the effect of regulation 27(3);
  - (f) specify the person to whom and the address at which the penalty charge may be paid and the method or methods by which payment may be made; and
  - (g) state that there is a right to request a review of the notice and how and by what date a request for such a review is to be made.
- (4) The amount payable as the penalty charge is £1000.
- (5) The period specified under paragraph (3)(d) must not be less than 28 days beginning with the day after that on which the penalty charge notice is given.
- (6) The enforcement authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice.
- (7) The enforcement authority must withdraw a penalty charge notice where regulation 23 applies.
- (8) Any sum received by a local authority under this regulation shall accrue to that authority.

### **Defence where action plan unobtainable**

**23.—**(1) A person is not liable to a penalty charge for a breach of the duty imposed by regulation 5(1)(a) if it can be demonstrated that—

- (a) a request for an action plan was made at least 14 days before the relevant time, and despite all reasonable efforts and enquiries by that person, that person did not have possession or control of an action plan at the relevant time; or
- (b) in the case of a failure to make available an action plan to a prospective tenant—
  - (i) the prospective tenant was seeking to lease the building or building unit due to an emergency which required the tenant’s urgent relocation;
  - (ii) at the relevant time that person did not have possession or control of an action plan;
  - (iii) there was insufficient time in which that person could reasonably have been expected to obtain an action plan before letting the building or building unit to the prospective tenant; and
  - (iv) an action plan was provided to the tenant as soon as reasonably practicable after letting the building or building unit.

(2) In paragraph (1)(a) the reference to a request is to a request properly addressed to a person who usually provides or is likely to provide an action plan for the category of building or building unit in question and which includes such payment or an undertaking to make such payment as is usually necessary to obtain an action plan.

(3) In this regulation “relevant time” means the point in time at which one of the events specified in paragraphs (a) to (c) of regulation 4 first occurs.

### **Penalty charge notice - failure to implement building improvement measures**

**24.**—(1) An enforcement authority may, if it believes that an owner has breached any duty under regulation 8(1), give a penalty charge notice to the owner.

(2) A penalty charge notice may not be given under paragraph (1) if the building improvement measures identified in the current action plan for the building or building unit have been completed.

(3) A penalty charge notice must—

- (a) be in writing;
- (b) state the enforcement authority's belief that the owner has breached regulation 8(1);
- (c) give such particulars of the circumstances as may be necessary to give reasonable notice of the breach;
- (d) require the person to whom the notice is given, within the period specified in the notice—
  - (i) to pay the penalty charge specified in the notice; or
  - (ii) to give notice to the enforcement authority requesting the authority to review the notice;
- (e) state the effect of regulation 27(3);
- (f) specify the person to whom and the address at which the penalty charge may be paid and the method or methods by which payment may be made; and
- (g) state that there is a right to request a review of the notice and how and by what date a request for such a review is to be made.

(4) The amount payable as the penalty charge is £1000.

(5) The period specified under paragraph (3)(d) must not be less than 28 days beginning with the day after that on which the penalty charge notice is given.

(6) The enforcement authority may, if it considers that the penalty charge notice ought not to have been given, give the recipient a notice withdrawing the penalty charge notice.

(7) Any sum received by a local authority under this regulation shall accrue to that authority.

### **Reviews**

**25.**—(1) If, within the period specified under regulation 22(3)(d) or 24(3)(d) as the case may be, the recipient of the penalty charge notice gives notice to the enforcement authority requesting a review, the authority must—

- (a) consider any representations made by the recipient and all other circumstances of the case;
- (b) decide whether to confirm or withdraw the notice; and
- (c) serve notice of its decision and the reasons for it on the recipient.

(2) A notice under paragraph (1)(c) confirming the penalty charge notice must also state the effect of regulations 26 and 27.

(3) If, following a review, the enforcement authority is satisfied that—

- (a) the recipient did not commit the breach of duty specified in the notice;
- (b) in the case of a penalty charge notice given under regulation 22(1) the notice was not given within the time allowed by regulation 22(2)(b);
- (c) the notice did not comply with any other requirements imposed by these Regulations; or
- (d) in the circumstances of the case it was not reasonable for a penalty charge notice to be given to the recipient,

it must withdraw the penalty charge notice.

### **Appeal to the sheriff court**

**26.**—(1) If after a review the penalty charge notice is confirmed by the enforcement authority, the recipient may appeal against the penalty charge notice to the sheriff court of the sheriffdom in which the building or building unit is situated.

(2) An appeal against a penalty charge notice must be made within the period of 28 days beginning with the day after that on which the notice under regulation 25(1)(c) is given.

(3) The sheriff may extend the period for appealing against the notice on cause shown.

(4) An appeal must be on one (or more) of the following grounds—

- (a) that the recipient did not commit the breach of regulations 5(1)(a) or (2) or 8(1), as the case may be, specified in the penalty charge notice;
- (b) that in the case of a penalty charge notice given under regulation 22(1) the notice was not given within the time allowed by regulation 22(2)(b);
- (c) the notice did not comply with any other requirements imposed by these Regulations; or
- (d) that in the circumstances of the case it was not reasonable for the notice to be given to the recipient.

(5) An appeal against a penalty charge notice must be by summary application.

(6) The sheriff must determine an appeal against a penalty charge notice by upholding or quashing the notice.

(7) A decision of a sheriff may be appealed against as if it were a decision constituting final judgment in civil proceedings within the meaning of the Courts Reform (Scotland) Act 2014(1).

### **Recovery of penalty charges**

**27.**—(1) The amount of the penalty charge is recoverable from the recipient of the penalty charge notice as a debt owed to the enforcement authority unless—

- (a) the notice has been withdrawn or quashed; or
- (b) the charge has been paid.

(2) Proceedings for the recovery of the penalty charge notice may not be commenced—

- (a) before the end of the period specified in accordance with regulation 22(3)(d) or 24(3)(d) as the case may be; and
- (b) if within that period the recipient of the penalty charge notice gives notice to the authority requesting the authority to review the penalty charge notice, such proceedings may not be commenced—
  - (i) before the end of the period mentioned in regulation 26(2); and
  - (ii) where the recipient appeals against the penalty charge notice, before the end of the period of 28 days beginning with the day on which the appeal is withdrawn or determined.

(3) In proceedings for the recovery of the penalty charge, a certificate which—

- (a) purports to be signed by or on behalf of the person having responsibility for the financial affairs of the enforcement authority; and
- (b) states that payment of the penalty charge was or was not received by a date specified in the certificate,

is evidence of the facts stated.

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(1) 2014 asp 18.

### **Repayment of penalty charge**

**28.** If the penalty charge notice is withdrawn or quashed, the enforcement authority must repay any amount previously paid as a penalty charge in pursuance of the notice.