

Making Empty Dwelling Management Orders fairer
Government proposals to amend the EDMO Legislation
Response from the Empty Homes Network
February 2011



Introduction

We welcome the opportunity offered by Eric Pickles to make the EDMO legislation more equitable. Our proposals below are intended to make sure that the interests of the community and tax-payer on the one hand and the rights of the empty property owner are appropriately balanced.

About the Empty Homes Network

We are a national network launched in 2001 as the *National Association of Empty Property Practitioners* with the support of the government and the Empty Homes Agency. Since 2002 we have been fully independent. Most of our members work for local authorities in private sector housing or housing enabling teams; we also have members belonging to housing associations, regeneration companies and private sector firms. Our main role is to support one another to make work in tackling empty homes as effective as possible by sharing best practice and information.

Principles

We recognise that the current government wishes to restrict the use of EDMOs to cases where an empty dwelling is a problem for the local community. Assuming this to be the case, we think the EDMO framework should be guided by the following principles:

1. The criteria used to establish that an empty dwelling is a problem suitable for EDMO action should be clearly stated.

Empty dwelling owners, local authorities and Residential Property Tribunals all need to be clear about the circumstances in which EDMO action can and can't be taken.

2. The requirement "that there is no reasonable prospect that the dwelling will become occupied in the near future" is fundamental and should be retained

Even if a dwelling has been empty and a local problem for many years, EDMO action is only warranted if there is no probability of the owner bringing the home back into use themselves in the near future.

3. The local authority should be empowered to act quickly to protect the local community.

If an empty dwelling is a problem for a community it needs to be dealt with quickly. Where councils' interventions are reported in local newspapers, neighbours often question why it has taken the council so long to act.

4. Local authorities should be able to demonstrate support from the local community for action to tackle the empty home..

If the reason for taking action is the impact of the empty dwelling on the local community, then it is reasonable to see this reflected in community support.

5. The reasonable costs of taking action should fall on the neglectful owner not the tax-payer, reflecting also the significant financial gain to the owner of the local authority action.

The reasonable costs of enforcement action are normally rechargeable to the culpable owner, but this is not the case with EDMOs. Yet the owner benefits from many thousands of pounds of rental income per year, through the council letting the home on their behalf instead of it standing empty. A community that has endured the problems associated with an empty home should not have to pay for the privilege of seeing those problems addressed, whilst the owner makes money at their expense.

Changes to the legislation

The changes required to make the EDMO legislation more equitable should in our view be introduced simultaneously as a single, coherent package of amendments. We recognise that some of the important changes suggested below cannot be implemented without changing primary legislation¹. We request that the government introduces the necessary amendments as a matter of urgency, given the importance attached by the Coalition to tackling empty homes.

However, for convenience, we have separated out the changes that can be made by secondary legislation from those that require primary legislation.

Changes that can be implemented via secondary legislation

Introduction

This section relates to those changes that can be implemented relatively quickly by using the delegated powers given in the Housing Act 2004, 134(5). This allows the government to do any of the following via a statutory instrument:

- add to the list of exception cases where EDMO action cannot be taken
- increase the amount of time a home is required to be empty before EDMO action can be taken
- change the requirements for procedures and evidence when an EDMO application is brought before a Residential Property Tribunal.

Currently, additional exception cases and procedural requirements are laid out in S.I. 2006/367 *The Housing (Empty Dwelling Management Orders) (Prescribed Exceptions and Requirements) (England) Order 2006*.

Length of time a property is empty

The government is proposing to increase to two years the length of time a property must be unoccupied before an EDMO application can be approved. In practice, given that the average period that homes have stood empty prior to an EDMO application has been seven years, this might make little difference. However, the following points should be noted:

- With the revised requirement that only problem properties can be tackled through an EDMO, the extension of time seems to condone a tardy response from local authorities to those properties and gives the wrong message to neglectful owners. Where an urgent response is necessary, it will not be possible to use an EDMO, or the threat of an EDMO, to move matters forwards.
- Logically, as it is incumbent on the local authority to demonstrate that **the subject property will remain empty without the EDMO action**, it is difficult to see what is gained by making fixed criteria in respect of the previous history of the problem property. The most important question is what happens next and the Residential Property Tribunal will of course take into account the history as it considers the likelihood of the dwelling being returned to use. This requirement smacks of the unnecessary rule-making that the government claims to be committed to ending. In practice it is unlikely that a property will come before a tribunal before two years have elapsed but vigorous local authority intervention might legitimately have started before then in respect of a problematic empty.
- Residential Property Tribunals have shown their even-handedness and thoroughness in dealing with EDMO applications. They should be allowed to make their decision based on the actual circumstances of the case rather than arbitrary criteria.

In summary, with EDMOs restricted to problem properties, we do not see any positive value in introducing this new criterion around length-of-time-empty. It is contrary to Principle 3 above and would reduce the value of the EDMO as a power held in reserve to encourage owners to bring their homes back into use.

If this change is, nevertheless, introduced, it needs to be done carefully, bearing in mind that the current legislation recognises unlawful occupation (thus including squatting) as a relevant form of occupation². If the power under s.134(5)(b) is used to extend the qualifying period specified at s.134(2)(a) **any episode of squatting would actually bar the local authority from tackling the problem empty via an EDMO** for a further two-years, which we assume is contrary to the intention of the proposals under discussion.

These problems could be addressed by using the power at s.134(5)(a) instead of s.134(5)(b). Lawful and unlawful occupation could be distinguished by adding a more tailored criterion to the list of exceptions: for example, it would be possible to except “a property that has been lawfully occupied within the last two years”.

In addition, communities should not have to see the legitimate actions of its council frustrated for trivial reasons. Recalcitrant owners might do this by claiming that a property had been occupied at some point within the period specified by the Act, or by introducing signs of occupation immediately before an inspection of the property by the Residential Property Tribunal. This could

be hard to challenge if the claimed period of occupation was very short; and this would become harder still if the qualifying period was extended to two years.

Within the main council tax legislation³, short periods of occupation (up to six weeks) are ignored when determining how long a home has been unoccupied for the purposes of council tax exemption classes “A”, “B”, “C” and “F”. We think for the reasons given above and for the sake of consistency the same criterion should be adopted as part of the EDMO legislation. Ideally, this would be done by changing the primary legislation; but, at the very least, if the qualifying period is extended via s.134(5)(a) as we have suggested above, it should be accompanied by the provision that “in considering whether a dwelling has been unoccupied for any period, any one period, not exceeding six weeks, during which it was occupied shall be disregarded.” (Wording from S.I. 1992/558⁴).

We are aware of cases where councils have applied for an EDMO with the consent and support of the owner⁵. EDMOs give council protection that allows them to help owners in ways that they might otherwise consider too risky. For example, under an EDMO a council’s expenditure on refurbishment could become a first charge on the property, which would not be possible with a purely voluntary or contractual arrangement between the owner and the council. The wording of any changes to the legislation needs to be such that it **permits a voluntary EDMO regardless of the length of time empty.**

Responding to problem empties

If EDMOs are to be restricted to empties that are detrimental to the community, key questions are:

- whether any new criteria to capture the element of detriment should be highly prescriptive or whether they can be more generic, relying on the interpretation of the Residential Property Tribunal given the particular circumstances of the case
- the importance attached to the views of the local community in the process.

In support of the localism agenda, we think the experience of the local community and its wishes should be a key consideration in deciding whether an EDMO application is successful. The simplest approach is to allow the Residential Property Tribunal to make its decision based on the evidence of problems associated with the empty property and in particular the reactions of members of the community to it, and to the course of action proposed by the local authority..

If the focus of an EDMO application is to shift in this way, then the local authority needs to submit the relevant evidence to the RPT. This can be secured by using s.134(5)(c) to add to the Prescribed Requirements. We understand that this is what the government proposals are likely to be.

In amending the legislation, care needs to be taken to use forms of words that are broad enough to capture the range of negative impacts that a problem property may have. For example “nuisance” may be used in a common-sense way, as in the phrase “neighbour nuisance”; but it also has specific legal meanings, established through statute and case law (as in “statutory nuisance”, “private nuisance”, “public nuisance”), which are more restricted. Thus it is not the ideal word to capture the full scope of detriment associated with a problem empty.

To illustrate, the following would not be expected to qualify as “nuisances” in legal terms:

- The property being boarded up
- Unsightly piles of building rubble or other non-organic rubbish within the curtilage of a dwelling
- Delapidated buildings or boundary structures that might put neighbours at risk of injury or might create fear of such injury
- Broken windows or other unsightly features that could affect the whole perception of the neighbourhood
- The property having been squatted by anti-social people, and having been a source of local crime
- Crime being committed at the property (eg its use as a cannabis farm or in identify fraud)
- Rowdy or anti-social behaviour in the street associated with the empty home
- Vandalism and arson aimed at the empty property

Thus a more generic term such as “detriment to neighbours or the local community” would be a better option.

It will also be important that any wording does not preclude action being taken where there the detriment has been restricted to an immediate neighbour who may have been severely affected by the problematic empty dwelling.

Notification to owners

The government has stated that it wishes to see the owner given 3 months’ notice of the local authority’s intention to apply for an EDMO. We do not see any problem with this. We suggest that, additionally, the local authority is required to inform the owner if at any subsequent point they decide *not* to apply for an EDMO.

Quantifying the benefits to the owner

We think it will be helpful if local authorities are required to provide reasonable estimates of the probable financial benefit (including increases in capital value) accruing to the owner if an empty property is brought back into use via an EDMO for the full 7 years available under the legislation . This would be a further procedural requirement introduced via s.134(2)(c).

Evidence and reporting by the Residential Property Tribunal

In reporting their cases, Residential Property Tribunals should be required to give an adequate summary of the detriment experienced and the response from the local community, sufficient for the public at large to satisfy themselves that the EDMO power is not being abused; and the estimate of financial benefits to the owner just described. (This refinement might be secured via a letter from the government rather than changes in the legislation.)

Changes that require amendment to primary legislation

Definition of “unoccupied”

As indicated above, the current unqualified requirement that a dwelling must be “wholly unoccupied” gives too much scope for the owner to frustrate legitimate interventions by claiming trivial or fictitious periods of occupation. The changes required to bring the EDMO legislation in line with mainstream Council tax legislation are therefore strongly recommended.

Exclusion of publicly owned dwellings

We believe the blanket exemption from EDMO action granted to public sector owners by paragraph 133(2)(b) is unjustified. This section should be repealed. There should be a presumption that publicly owned dwellings should be put to good use for housing. If there are reasons why a dwelling should not be brought into use via an EDMO these can be considered by the Residential Property Tribunal.

In addition, we believe that there need be no “nuisance” criteria applied to publicly owned dwellings: as previously stated, there should be a presumption in favour of publicly owned dwellings being occupied unless there are strong reasons why they should not be.

The alternative of a Public Request to Order Disposal exists but these are only likely to be granted if the public sector owner does not have long-term plans for the re-use of the building or land on which it stands. An EDMO would be appropriate in those many situations where a publicly-owned empty dwelling might be redeveloped at some point in the future but is not currently being used.

Financial aspects – recognising the benefits of local authority intervention

Introduction

It is insufficiently recognised that EDMOs generate substantial financial benefits for the owner of the previously empty property. In principle, the net rental income⁶ received when the property is let by the local authority accrues to the owner. This makes EDMOs quite unique amongst enforcement tools. Some of the net income is diverted to pay off the costs of refurbishment, but the refurbishment itself adds capital value to the home. The owner also avoids losing value through the continued and possibly accelerated deterioration of the property if it had remained empty or in its delapidated state.

We think that it is entirely appropriate for the owner to receive a fair share of the benefit of the property being let. But this should not be at the expense of the local community, without whose intervention the home would not have been let and whose intervention was only necessary because the owner allowed the property to become a problem.

Legitimate costs

The process leading up to an application for an Empty Dwelling Management Order involves time-consuming activities such as documenting the problems associated with the property, liaising with concerned neighbours, tracing and negotiating with absentee owners, preparing the EDMO documentation and so on. Indeed, the resources required can be significant enough to deter local authorities from taking action to address problem properties. Many such costs are recoverable in other Housing Act 2004 enforcement action: but not in the case of Empty Dwelling Management Orders. There should be a fair apportionment, **whereby all the local authority's legitimate costs are deducted from the rental stream or direct from the owner** by introducing provisions comparable to those in paragraph 14 of Schedule 3 to the Housing Act 2004 (*Recovery of expenses and interest from other persons profiting from taking of action*).

Improvements to procedures

Reviewing the procedures

Evidence from practitioners show that the large majority of EDMO action is successful before an EDMO application is ever heard by an RPT. In many cases where an interim EDMO has been granted, the effect is to bring the owner to the table to take action themselves or in partnership with the council so that there is no need to proceed to the final EDMO. Nevertheless, the very demanding nature of the procedures required for an interim EDMO is sufficient to deter many authorities from initiating the process. The view has emerged among practitioners that it could be in the interests of everyone, including the empty dwelling owner, if it were possible to move to an interim EDMO more easily, perhaps reserving the RPT hearing to the final EDMO or to situations where the owner appeals against the EDMO or the hearing is requested by the local authority.

Any changes of this nature would require a thorough review of the operation of the legislation as it currently stands to ensure fairness and avoid perverse consequences: we recommend that such a review is undertaken.

Voluntary EDMOs

As previously mentioned, voluntary EDMOs should be a recognised option within the legislation. This could involve introducing powers similar to those given in Part 1 of Schedule 3 to the Housing Act 2004 (*Action taken by agreement*).

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2nd February 2011

Version history

(The Empty Homes Network is a democratic organisation that seeks to operate in as open and transparent a way as reasonably possible. All Empty Homes Network consultation responses are presented in draft form for our members to comment on to ensure that they reflect as closely as possible the views and experiences of our members. Where appropriate votes are taken by the Executive to resolve issues where diverging views are held).

Version 2

Substantially revised to reflect CLG draft proposals now released.

Version 3

Identifies issue of voluntary EDMOs

New proposals around de minimis periods of occupation and consistency with Council Tax legislation.

Major amendments to section on Financial Considerations. Issues related to rent levels and furniture removed.

Many small changes of expression.

Version 4

New “principle” of local support introduced.

Review of the implications of the word “nuisance”

Version 5

Highlighted desirability of changes to procedures.

Proposes that estimates of the financial benefits to owners be documented as a required part of the process.

Some minor other changes of wording

For further information or clarification

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¹ i.e the Housing Act 2004

² Housing Act 2004, s.134(7)

³ S.I. 1992/558, The Council Tax (Exempt Dwellings) Order 1992. See paragraphs 2(2) and 2(3).

⁴ As amended

⁵ See <http://www.ehnetwork.org.uk/library-item/voluntary-edmos-swale-case-study>

⁶ i.e net of reasonable management costs.