

**CLACKMANNANSHIRE COUNCIL**

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**Report to:** Council

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**Date of Meeting:** 28<sup>th</sup> September 2017

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**Subject:** Mixed Ownership and Common Repairs

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**Report by:** Head of Housing & Community Safety

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**1.0 Purpose**

- 1.1. This report sets out three recommendations to deal with repairs to common property in mixed ownership.
- 1.2. The proposals are to work alongside current practices to maintain the Council's statutory obligations to tenants and owners.

**2.0 Recommendations**

- 2.1. It is recommended that the Council agrees:
  - 2.1.1. To set aside a budget of 500K from Housing Revenue Account (HRA) surpluses to fund the establishment of a self-financing loan scheme for private owners. The loan scheme would be used by private owners subject to specific criteria as set down in the Housing (Scotland) Act 2006 (the details of which are contained in Appendix 3);
  - 2.1.2. the acquisition of properties within mixed ownership tenements where major common repairs are required, subject to grant and budget availability and suitability of property;
  - 2.1.3. to declare as surplus for disposal on the open market, property where the Council (i) is the minority owner in a tenement block of mixed ownership; and (ii) has agreed with the Council's tenant to transfer his/her or their tenancy to another Council owned property to allow the such property to be sold with vacant possession.
- 2.2. And to note the remainder of the report, commenting and challenging as appropriate.

### **3.0 Background**

- 3.1. Local authorities can have difficulties implementing obligations to maintain properties located in tenements where there is mixed ownership. Despite the legal position (see below and appendices) some private owners refuse to agree to have the common repair works carried out; and/or do not have the finances to pay their relevant share of such works.
- 3.2. Many council properties have now reached an age where major works are needed, for example re-roofing. These projects will require significant financial contributions by the owners of the properties. There will be difficulty in arranging such work without a clear policy position on funding.
- 3.3. Were common areas to deteriorate to a condition where council properties could not be let this would clearly have a detrimental impact not only on the asset value, but on the business model. The income ensures that housing management services are provided, outstanding loan debt is serviced, and obligations to current and future tenants met.
- 3.4. The Council must therefore maintain all its tenanted properties regardless of mixed ownership issues. It is unacceptable, for example, for the Council to allow a tenanted property to suffer from penetrating dampness because it cannot reach agreement with an owner on meeting the costs of shared roof repairs.

### **4.0 Legal Obligations**

- 4.1. The Council's statutory repairing obligations to secure tenants are set out in schedule 4 of the Housing Scotland Act 2001<sup>1</sup> (Appendix 1). In summary the landlord is expected to keep a property in good condition throughout a tenancy, and to carry out in a reasonable time the repairs necessary to achieve this.
- 4.2. The Scottish Housing Quality Standard ("SHQS") is the Scottish Government's principal measure of housing quality in Scotland. The SHQS is a set of five broad housing criteria which must be met by the Council if the property is to pass SHQS.
- 4.3. The Scottish Housing Regulator, an independent executive agency of the Scottish Government, monitors landlord performance to protect the interests of tenants, ensuring compliance with statutory duties.
- 4.4. The Council also has a duty as a registered factor to owners of former council housing. The Act provides for a Code of Conduct which sets out a minimum standard of registered property factors as well as providing a statement of services to owners. The statement of services

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2001/10/schedule/4>

must set out in a simple and transparent way the terms and service delivery standards of the arrangement in place between the Council and the homeowner.

- 4.5. The Council's Statement of Services<sup>2</sup> therefore is the primary policy document for arranging repairs in mixed tenure blocks. That policy however does not deal with the funding of repairs where owners are unwilling or unable to contribute to common works. In such circumstances the Council will require to have the available funding to ensure that its responsibilities to tenants are met.

## **5.0 Current Legal Framework**

- 5.1. By way of background the legal position is dictated firstly by the title deeds for all the properties within a tenement.
- 5.2. The majority of ex-council houses contain conditions relating the common parts in the title deeds (common parts being defined as roofs, outside walls, common hall and stairs etc.) which includes amongst others (1) an obligation to maintain, repair and renew such common parts and for the owner's to pay their share of such costs; (2) decision making powers; and (3) provisions where the Council remains owner of one or more properties within a tenement/block to carry out any works necessary to maintain, repair and renew such common parts.
- 5.3. Where the title deeds are silent or there are gaps relating to maintenance and repair of the common parts the Tenement (Scotland) Act 2004 ("Tenement Act") (Appendix 2) would take effect to deal with such obligations or fill in the gaps of the title deeds
- 5.4. The Tenement Act sets out procedures which should be followed by the owners of the properties within the tenement when looking to carry out works to common parts (known as Tenement Management Scheme ("TMS")). Provided the relevant procedures are followed the decisions under the TMS will be binding on the owners (including paying the owner's relevant share of the costs of such common repairs etc.).
- 5.5. While the legal position is clear the main issue is getting the owner to pay for their relevant share of such common repairs where they are unwilling or unable to fund the cost.
- 5.6. There are a number of current options available to the Council in recovering the relevant owner's share which are noted in Appendix 4. However, the final remedy for the Council would be to pursue the debt in the courts which can be time consuming and costly. Therefore the proposals in this paper offer additional options to consider before resorting to court.

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<sup>2</sup> <http://www.clacks.gov.uk/document/4253.pdf>

## **6.0 Loan Scheme**

- 6.1. It is recommended that an initial budget of £500K is set aside from the HRA surplus to support the funding of works to private properties in mixed ownership tenement/blocks. The HRA cannot maintain its assets without this work being carried out. The expenditure will be made in the form of a loan.
- 6.2. Where an owner can show (through a means tested criteria, as set out in the scheme of assistance) he/she does not have the funds to be able to pay for his/her share the Council would allow such owners to obtain a loan from the budget for part or the whole of that owner's share of the common repair works.
- 6.3. Any such agreement will require (i) a minimum loan amount (ie where such owner's share of the common repairs exceed £1,000) (ii) provide for interest, legal costs and expenses to be added to the loan amount to ensure there are sufficient monies cover the Council's costs in administering such a scheme.
- 6.4. The authority to offer such loans is the Housing Act 2006, Scheme of Assistance (appendix 3). The loan would be offered at the Council's Public Works Loan Board (PWLB) pool rate. This is calculated at the end of each financial year. It is currently 4.852%. That rate would vary over the lifetime of the loan, adjusted each year by the pool rate. It should be noted that a 10 year PWLB is currently offered at 1.2%, but this additional borrowing would be added to the overall borrowing, which determines the pool rate.
- 6.5. Administration costs, and debt recovery procedures, are as set out in the statement of services. It should be noted that there is the potential of bad debts as a result of the loan scheme but a provision for this will be made in the accounts. Subject to discussions with Legal Services it may be cost effective to outsource the legal and debt collection work relating specifically to this proposal. In any case debt recovery costs could be recovered from the debtor through the relevant legal process.
- 6.6. It is intended that the budget will be self financing but may require to be added to in future years, either as a result of bad debts or the programme increasing. At the end of March 2017 there was £1.973m of HRA Reserves. The minimum balance of 4% of the Rental Income is equal to £0.740m leaving an excess of £1.233m. In terms of impact for the HRA Revenue any cost would be offset by a debtor liability for the income due and therefore have no immediate impact on the Reserve. After all appropriate remedies to recover the debt due the Council have been exhausted any bad debts deemed unrecoverable would be written off as part of the annual debt write off report.
- 6.7. Failure by the owner to make timeous payments would result in court action for payment. Further, to protect the Council in respect of the debt due in the event of a sale of the property a NOPL or Charging

Order would be registered against the property with Registers of Scotland.

- 6.8. In determining whether it is appropriate for the budget to come from the HRA consideration was given to the provisions of the Housing (Scotland) Act 1987 and the guidance in the Scottish Public Finance Manual. The provisions of schedule 15 of the Housing (Scotland) Act 1987 contain the detail of allowable expenditure. The allowable expenditure includes managing, maintaining, repairing and improving the council housing stock and this would be the section we would be looking to rely on. Expenditure which cannot be debited from HRA is any expenditure which exceeds the expenditure required for the provision of the service to tenants.
- 6.9. Previous legal advice in relation to procurement litigation was also reviewed. The difference with this proposal is that the loan is to be used to fund the proportion of the cost of common repairs due by non Council tenants. These repairs are necessary to maintain the HRA stock. It is the common repair element which brings this scheme within the HRA. The expenditure could be seen as benefitting private owners but the loan is only given to assist the private owner to meet their liabilities for the benefit of the whole property, part of which is owned in common with the Council. In contrast, the expenditure on the procurement litigation would not have in any way benefitted the tenants or the housing stock in any way. The litigation costs did not have any element of service provision, whereas the proposed loan expenditure clearly does as it allows any necessary common repair work to be carried out as quickly as possible.

## **7.0 Buy Backs**

- 7.1. The “off the shelf” purchase programme has successfully added over 80 units to the affordable housing stock in recent years. Many of these units have been brought back into the social sector after properties were purchased through the Right to Buy legislation. The right to buy ended on 1 August 2016. To date only properties advertised on the open market have been purchased.
- 7.2. It is recommended that, subject to grant and budget availability, the off the shelf purchase policy be widened to allow offers to be made to owners in mixed tenure blocks where it is considered this would provide an effective resolution to dealing with common repairs issues for the benefit of Council tenants in that block (perhaps where the Council is the majority owner). This would only be where the private owner can show clear evidence that they do not have sufficient resources to meet both the costs of the common repair works and their ongoing repairs costs.

- 7.3. The acquisition price would be set following survey and valuation carried out by an independent surveyor, whose appointment would be agreed by the owner and the Council.
- 7.4. The budget required for this would be contained within the budget provision made for off the shelf purchase in any year.
- 7.5. The carry forward budget from 2016-17 for Off the Shelf purchases was £820,000. There have been four purchases this year at a cost of £287,500 with grant funding of £145,000. This would leave a balance left this year of approximately £677,000 to support future purchases. However, the availability of Scottish Government grant cannot be guaranteed

## **8.0 Disposal of Property**

- 8.1. There are some tenements where the Council is in minority ownership due to the other properties having been sold through the right to buy scheme.
- 8.2. In such circumstances, where (a) an agreement cannot be reached with owners of the tenement to the common repair works required; (b) the Council's tenant is in agreement to transferring his/her tenancy to another Council property - such Council property would be designated as surplus for disposal on the open market with vacant possession. This ensures that the Council can meet its statutory obligations to its tenants and would in turn allow the Council to use other statutory powers to allow the tenement to be repaired (i.e. Works Notice).
- 8.3. Disposals of all HRA assets are made in full compliance with both the Council's statutory obligations and Scottish Ministers' requirements.<sup>3</sup>
- 8.4. In these rare situations, under the Council's allocation policy,<sup>4</sup> tenants would be made a direct offer of rehousing through powers delegated to the Head of Service in consultation with the Governance Manager.

## **9.0 Consultation**

- 9.1. The Clackmannanshire Tenants' and Residents' Federation has been consulted on the proposal.
- 9.2. A formal procedure is already in place for the Council to engage with owners as soon as such works are identified. The aim is to reach a prior agreement with owners on the works to be carried out and payment of their relevant share within a specified timeframe. The

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<sup>3</sup> <http://www.gov.scot/Topics/Built-Environment/Housing/16342/HRAconsentguidance>

<sup>4</sup> <http://www.clacks.gov.uk/document/3782.pdf>

statement of services asks for payment within 14 days, but it is considered 30 days after invoice is issued is more reasonable.

## 10.0 Sustainability Implications

10.1. The policy will assist secure the long term maintenance and upgrade of public sector stock, meeting Scottish Housing Quality Standard (SHQS) and The Energy Efficiency Standard for Social Housing (EESH).

## 11.0 Resource Implications

### 11.1. Financial Details

The full financial implications of the recommendations are set out in the report Yes ✓

Finance has been consulted and has agreed the financial implications as set out in the report. Yes ✓

### 11.2. Staffing

There are no additional staffing implications associated with this report.

## 12.0 Exempt Reports

12.1. Is this report exempt? No ✓  
(please detail the reasons for exemption below)

## 13.0 Declarations

The recommendations contained within this report support or implement our Corporate Priorities and Council Policies.

### (1) Our Priorities (Please double click on the check box )

The area has a positive image and attracts people and businesses	✓
Our communities are more cohesive and inclusive	✓
People are better skilled, trained and ready for learning and employment	<input type="checkbox"/>
Our communities are safer	✓
Vulnerable people and families are supported	✓
Substance misuse and its effects are reduced	<input type="checkbox"/>
Health is improving and health inequalities are reducing	<input type="checkbox"/>
The environment is protected and enhanced for all	✓
The Council is effective, efficient and recognised for excellence	✓

### (2) Council Policies (Please detail)

#### 14.0 Equalities Impact

- 14.1. Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations?  
Yes  No

#### 15.0 Legality

- 15.1. It has been confirmed that in adopting the recommendations contained in this report, the Council is acting within its legal powers.  
Yes

#### 16.0 Appendices

- 16.1. Please list any appendices attached to this report. If there are no appendices, please state "none".

Appendix 1 : Housing (Scotland) Act 2001 – Schedule 4 Repairing Standard

Appendix 2 : The Tenement (Scotland) Act 2004 – Tenement Management Scheme

Appendix 3 : Housing (Scotland) 2006 Scheme of Assistance – Grants and Loans

Appendix 4 : Recovery Options for Common Repairs

#### 17.0 Background Papers

- 17.1 Have you used other documents to compile your report? (All documents must be kept available by the author for public inspection for four years from the date of meeting at which the report is considered)

Yes (please list the documents below)  
As referenced in the report.

No

#### Author(s)

NAME	DESIGNATION	TEL NO / EXTENSION
Ahsan Khan	Head of Service	Extension : 2473
Lee Robertson	Solicitor	Extension : 2087

**Approved by**

<b>NAME</b>	<b>DESIGNATION</b>	<b>SIGNATURE</b>
Ahsan Khan	Head of Housing & Community Safety	Signed: A Khan
Nikki Bridle	Depute Chief Executive	Signed: N Bridle



**Housing (Scotland) Act 2001 – Schedule 4**

SCOTTISH SECURE TENANCY: LANDLORD'S REPAIRING OBLIGATIONS

The landlord in a Scottish secure tenancy must—

- (a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and
- (b) keep the house in such condition throughout the tenancy.

2. The landlord must, before the commencement of the tenancy—

- (a) inspect the house and identify any work necessary to comply with the duty in paragraph 1(a), and
- (b) notify the tenant of any such work.

3. The landlord must—

- (a) ensure that any work necessary to comply with the duty in paragraph 1(b) is carried out within a reasonable time of the tenant notifying the landlord, or the landlord otherwise becoming aware, that it is required, and
- (b) make good any damage caused by the carrying out of the work.

4. The landlord, or any person authorised by it in writing, may at any reasonable time, on giving 24 hours' notice in writing to the tenant or occupier, enter the house for the purpose of—

- (a) viewing its state and condition,
- (b) carrying out any work necessary to comply with the duty in paragraph 1(b) or 3.

5(1) In determining for the purposes of paragraph 1 whether a house is fit for human habitation, regard is to be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any building regulations in force in the area.

(2) For the purposes of sub-paragraph (1), "building regulations" has the same meaning as in section 338(1) of the 1987 Act.

6. In paragraph 5, "sanitary defects" includes lack of air space or of ventilation, lack of lighting, dampness, absence of adequate and readily accessible water supply or of sanitary arrangements or of other conveniences, and inadequate paving or drainage of courts, yards or passages.



## **The Tenement (Scotland) Act 2004 – Tenement Management Scheme**

### **Making decisions using the tenement management scheme**

The tenement management scheme (TMS) sets out procedures flat owners need to follow when making 'scheme decisions' about maintaining and repairing common parts. These rules can be used if your title deeds don't specify how decisions should be made, or if different owners' title deeds say conflicting things.

### **What decisions can be made under the tenement management scheme?**

Any decisions made under the TMS are known as 'scheme decisions'. Unless the building's title deeds say otherwise, flat owners can use the rules set out in the TMS to make scheme decisions about:

- carrying out maintenance work, including repairs and replacements, cleaning, painting, gardening and other day-to-day tasks
- appointing or dismissing a property manager or factor to run your building
- delegating power to a manager to inspect the building or make decisions to carry out maintenance
- arranging inspections of the building to decide whether maintenance work is required
- arranging insurance for the common areas
- authorising any maintenance of scheme property already carried out by an owner
- installing a new door entry system
- excusing an owner from paying a share in maintenance costs
- changing or taking back any previous scheme decisions.

### **How are decisions made?**

Decisions are made through majority voting, which means that over 50 per cent of the votes need to be in favour of a decision in order for it to be confirmed. Any decisions you make are binding, and can be enforced through the courts.

### **How does the voting system work?**

The voting system works as follows:

- Each flat has one vote, even if it has more than one owner.
- If you're making decision about repairs or maintenance to structural parts, each flat in the building will have a vote.
- If you're making decisions about repairs or maintenance to common property, only the flats that use that common property will have a vote.

If any of the owners didn't vote, you won't be able to start the work for at least 28 days, in order to give the absent owners a chance to appeal if they're not happy with the decision (see 'can I appeal a decision' below).

### **Emergency Repairs**

In an emergency situation, any owner can carry out repairs to scheme property without having to go through the voting process first. However, you can only do this if the repairs are needed to prevent the building from damage or in the interests of health and safety. For example, this could be the case if a water pipe has burst or gas is leaking into the building.



## Housing (Scotland) 2006

### Scheme of Assistance – Grants and Loans

#### **Terms and Conditions of the Loan**

1. Loan can only be made on application to the Council;
2. The application must contain specific particulars as laid out in the Act
3. There are requirements the Council must go through before determining an application which includes approved expense and applicants contribution to the works, if agreed.
4. On approving an application the following conditions must be met:
  - (a) that the owners of the property have consented in writing to the application and to being bound by the conditions
  - (b) Where the work has begun, that there were good reasons for beginning it before application as approved,
  - (c) That the property which the loan relates will provide suitable living accommodation for such period
5. If the property to which the loan relates form part of any premises containing more than one house the work being carried out will prevent the improvement of any other house in the premises
6. The Council will give consideration In determining the application for a loan, on whether the applicant is unable to obtain a sufficient loan on fair terms from a commercial lender – fair terms means terms in the opinion of the local authority are reasonable affordable having regard to the circumstances of the application and the prevailing interest rates
7. The Council may as a condition of paying the grant or loan impose a requirement that the work to which the loan relates is completed in a specified time scale (not less than 12 months)

#### **Terms of the Loan**

A loan may be made on such terms as the Council thinks fit which may include:

- Terms of interest and other charges
- Requirement that the loan and any such interest and charge be secured by a standard security over the property which the loan relates
- Repayment of the loan in such instalments or such amounts as determined by the Council
- Conditions for completion of the works
- There are other provisions within the legislation which deal with breach of loan conditions, limitation on further grants and loan applications and providing false statements in application



## Appendix 4

### Recovery options for Common Repairs

Where the Council has carried out the works, invoices issued and owners have refused or unable to pay then Council has a number of options in its powers in recovering the sums due for such repairs:

- pursuing the debt in the Courts. This can be successful with potential for recovery of the debt due in full. This avenue can also involve time and money with the potential having a debt being paid over a lengthier period of time than had the Council offered a payment plan to the owner.
- Notice of Potential Liability (the “NOPL”) – this is a notice which is registered in the Registers of Scotland against the title to the property and flags to any future purchaser that there is a debt due. Notice needs to be renewed every 3 years. The Council would still continue down the route of recovery of the debt through the Courts. It does not stop the property being sold by the owner but it is unlikely a purchaser would buy the property unless provisions were put in place to repay the debt to the Council prior to purchasing the property.
- Inhibition – where a payment decree is obtained against an owner, an inhibition would be used to prevent sale, transfer or disposal of the property. It would also prevent the owner from securing new loans against the house. In order to safeguard the Council interests it may be required to use inhibitions before an action for payment has been decided by the Court, to secure the debtor’s fixed property, pending the outcome of the Court action. Requires to be renewed every 5 years.
- Charging Orders – this would be under the Housing (Scotland) Acts.

The above methods, in some form, require the recovery of the debt, where the Council has already paid for that owner’s share of the common repair works

