

Thursday, 11 November 2021

## Report of the Portfolio Holder for Social Housing and Homelessness Prevention

### Tenancy Management Policy – Council Housing

#### Exempt Information

None

#### Purpose

To set out the arrangements for the Tenancy Management Policy for council housing, specifically to deal with fixed term tenancies, following fundamental changes to case law as detailed in the report (shown at Appendix B).

#### Recommendations

Cabinet are recommended to:

1. Approve the revised `Flexible Fixed Term Tenancy Agreement 2021` (Appendix A) which includes the required forfeiture clause needed for all **new and renewable flexible fixed term tenancies**. Delegate authority to the Portfolio Holder for Social Housing & Homelessness Prevention to approve any final amendments to the tenancy agreement as necessary.
2. Accept the recent High Court of Appeal decision on flexible tenancies in the case of Croydon London Borough Council V Kalonga (Appendix B), which has forced Councils to review their tenancy management policies.
3. Endorse consultation on the basis of the tenancy management options for fixed term tenancies, detailed within the report, starting with the Housing & Homelessness Sub Committee and the Tenant Consultative Group.
4. Cabinet receive a further report on the future of fixed term tenancies in March 2022, as part of an updated Tenancy Management Policy (2022-2025).

#### Executive Summary

The Regulator Social Housing (RSH) requires housing providers, including Local Authority landlords', to evidence compliance with the [Tenancy consumer standards](#). This, along with legislation, sets out the basis under which tenants' hold the legal rights to their tenancies. Housing providers were required to publish a Tenancy Policy setting out how they intended to use the new flexibilities within the legislation relevant at the time, which included [Localism Act 2011](#).

The Council's Tenancy Management Policy introducing flexible fixed tenancies was first approved by Cabinet in September 2012. The existing Policy details how flexible fixed term tenancies were granted commencing 1st April 2013. The Policy also details a range of other tenant obligations including succession, ending of joint tenancies, assignment and other related practices.

Under this Policy, the Council currently has a total of **747 flexible fixed term tenancies**, as at 1<sup>st</sup> September 2021.

On 27<sup>th</sup> January 2021 the Court of Appeal handed down their decision in the case of *Croydon London Borough Council v Kalonga [2021] EWCA Civ77*. Details of this case are shown at Appendix B. Essentially the consequence of this case means that fixed term tenancies can only be ended by use of a forfeiture clause. Tamworth, like many other landlords, reliant on historic tenancy agreements, does not have this. It is therefore imperative that this is rectified immediately to ensure robust and efficient management of tenancies continues.

The Council has therefore been working closely with South Staffordshire Legal team to update a proposed flexible fixed term tenancy agreement (Appendix A), which contains the necessary forfeiture clause. If approved by Cabinet, the updated agreement will be issued to all **new and renewable flexible** fixed term tenants. This change will enable the Council to legally continue to terminate these new and renewable flexible tenancies within the term, if deemed necessary in-line with the applicable breach of tenancy policy i.e. rent arrears, anti-social behaviour and breach of tenancy.

With regards to **existing** flexible fixed term tenancies, the Council cannot vary these tenancies during the term without having a forfeiture clause included in the agreement, and this can only be done with the consent of the tenant. The Council is therefore limited in its options in terms of amending the existing flexible fixed term tenancy agreement. These options are summarised within the body of the report. This proposal is therefore designed to deal with the legal risks, whilst a full review of the Tenancy Management arrangements are undertaken.

Cabinet know that a full review of the Tenancy management policy will require consultation. As tenancy rights are complex it is recommended that the summary options, also set out in the report, form the basis of this discussion with stakeholders. Information is routinely shared with the Councils Tenant Consultative Group, but clearly this group will also consider future options around its Tenancy Management Policy.

Once consultation and feedback has been fully evaluated then a revised Tenancy management Policy will be reported to Cabinet by March 2022. The options set out on the wider tenancy choices will commence with a presentation to the Housing and Homelessness Sub-Committee, followed by usual stakeholder engagement – reported via Tenant Consultative Group. It is envisaged once this consultation has been undertaken a firm recommendation can be made to Cabinet by March 2022 on its overall Tenancy Management Strategy.

### **Matters for Consideration**

Flexible tenancies differ from secure tenancies in that there are for a fixed period, typically for either 2 or 5 years. Tamworth's current policy is to offer all new tenants 5 year terms, reviewable at 4 years 6months.

The aim of flexible fixed term tenancies was primarily for two reasons **1)** to enable a review of the tenant's circumstances to make best use of the council stock in view of circumstances and **2)** to consider affordable rent charging and these aims will be assessed as the consultation gets under way for the tenancy management policy.

As at 1<sup>st</sup> September 2021 the Council has a total of 747 existing flexible fixed term tenancies.

Time Remaining (All FFTTs)	Count Tenancies (All FFTTs)	
less than a year	84	11%
1 to 2 years	119	16%
2 to 3 years	147	20%
3 to 4 years	188	25%
4 to 5 years	207	28%
Expired and decision being undertaken	2	
	<b>747</b>	<b>100%</b>

52% of the 747 existing flexible fixed term tenancies are in rent arrears, as set out below.

Time Remaining (Arrears)	Count Tenancies (Arrears)	Sum Arrears
less than a year	40	£19,950.46
1 to 2 years	64	£33,202.82
2 to 3 years	78	£28,549.57
3 to 4 years	98	£41,153.23
4 to 5 years	104	£39,315.12
Expired	2	£806.67
	<b>386</b>	<b>£162,977.87</b>

It is imperative that the future of fixed term tenancies is considered as without addressing the legal provisions required in an updated tenancy agreement, allowing for a forfeiture clause, then rent arrears could escalate. It is impossible to forecast the extent of the arrears as assumptions can be made and whilst non-payment is possible, during the Pandemic when action was paused it did have a minimal impact on income recovery levels.

Whilst a review will take time and this does not immediately address existing agreements this is being managed through a variety of interventions

- **Close contact with tenants' to advise that non-payment may result in loss of tenancy upon fixed term tenancy renewal and potential disqualification from future rehousing via the councils housing register**
- **Ongoing discussions with the court user group to provide wider legal sanctions, i.e. money judgement orders, debt relief orders etc.**
- **Issuing all new and renewable fixed term tenancies with the required forfeiture clause to ensure possession action continues where required**
- **Consultation on all the options relating to tenancy rights so as to determine if ending fixed term tenancies is the best way forward in the future**

## Outcomes of Reviews to-date

Since the introduction of flexible fixed term tenancies on the 1<sup>st</sup> April 2013, 1229 tenants have been issued with new flexible fixed term tenancies (includes new tenancies and renewals) and only 8 tenants were not re-issued with a new tenancy as the property was no longer suitable for their needs, in-line with the allocations policy. This would suggest that this is not achieving the previously identified aims and will be a key consideration as we consult on their future use.

## Revising the Council's existing Flexible Fixed Term Tenancy Agreement

Currently the Council's flexible fixed term tenancies does **not** include a forfeiture clause, and therefore can no longer legally terminate any of these existing tenancies.

For the Council to continue with this type of tenancy, the Council will need to vary the existing flexible fixed term tenancy agreement by inserting a relevant forfeiture clause and publishing a revised Tenancy management Policy setting out these changes.

The Council has been working closely with South Staffordshire Legal team to draft a revised Flexible Fixed Term Tenancy Agreement, which contains the necessary forfeiture clause, and if approved by Cabinet will be issued to all new flexible fixed term tenants and on renewals (**Appendix A**).

All the terms and conditions of the existing Flexible Fixed Term Tenancy Agreement remain unchanged. The only additions refer to the necessary forfeiture clause which are set out at 2.2 of page 6 and page 10 (**Appendix A**).

This revised changes will;

- ✓ Successfully stabilise the Council's position by quickly bringing an end to issuing any further flexible fixed term tenancy agreement without the necessary forfeiture clause.
- ✓ Enables the Council to legally continue to terminate all new and renewed flexible tenancies which include the necessary forfeiture clause within the term, if deemed necessary in-line with the applicable breach of tenancy policy i.e. rent arrears, anti-social behaviour and breach of tenancy.
- ✓ Ensure that it is only the existing tenancies, which will be a reducing number in any event, that requires determinations (and which is subject to that wider consultation proposed below)

## Summary – Options for Existing Flexible Fixed Term Tenancy Agreement

Set out below is a list of all available options for dealing with the 747 current fixed term tenancy issues, this is distinct from the wider options in relation to **fixed term tenancies v secure tenancies** as that will need to be informed by consultation. Doing nothing has not been considered as clearly the Tenancy Management Policy requires a detailed review in order to address the existing impact of case law and those already on a fixed term tenancy in arrears.

As it is likely to take 4 months before the consultation and decisions are made on the future of fixed term tenancies the table below details how existing arrangements can be contained.

**Options Table – Dealing with Existing fixed term tenancy options pending a full review.**

Options	Benefits	Risks	Recommended Option Yes or No	Cost
1. Continue with Fixed Term Tenancies	Would enable continued recovery action	<p><b>Legally prohibitive without consent.</b></p> <p>Consent is not likely to be consistently achieved and would be administratively onerous</p>	No	
2. That a full assessment of fixed term and secure tenancies is undertaken as part of an updated Tenancy Management Policy	<p>Consent is likely to be achieved as the tenancy offer would be better than the existing terms</p> <p>Income recovery practices will be protected</p> <p>Tenancy agreement can be fully reviewed and all associated tenancy management practices also reviewed, i.e. succession</p>	<p>Requires consultation before political decisions can be taken</p> <p>The rent arrears currently shown in the report could risk increase, however the legal advice suggests there is no alternative</p>	Yes	
3. That all existing tenants be issued with a secure lifetime tenancy.	<p>As above</p> <p>Offering of secure tenancies will be a key option for consultation with the range of stakeholders but at this stage is subject to that process</p>	Without consultation this would be <b>inequitable</b> as there would be different tenancy terms and rights.	No	None/NA
4. Let remaining Fixed term tenancies come to an end without further intervention	A reducing number and would not require intervention	<p>The table above shows 53% of tenancies have 3-5 years remaining, without the forfeiture clause this could threaten income streams and recovery action</p> <p>Fixed term tenancies have come under review across the housing sector and there is a need to consider this continued approach as part of a revised and updated Tenancy Management Policy</p>	No	Rent arrears would not be possible to predict as even during the Pandemic when eviction action was paused income levels were contained

**Summary – Options for the future of Fixed Term Tenancies subject to consultation and equality impact assessment**

It is proposed that the Council commences consultation based on the headline options summarised below. It is proposed to develop this options table in collaboration with the Housing & homelessness subcommittee so that it provides a basis for detailed consultation. The report back to Cabinet in March 2022 will have evaluated the consultation and include equality impact assessment on its preferred approach. It is also anticipated that the case ruling will have been concluded in terms of appeal.

Options	Benefits	Risks
<p>1. Continue with Fixed Term Tenancies</p>	<p>Seeks to make best use of stock by encouraging people to occupy properties based on their circumstances</p> <p>Allows for affordable rent models to be adopted subject to relevant policy changes</p>	<p>Significant income implications as without consensus to convert existing fixed term tenancies to new forfeiture agreements - would be administratively burdensome, leading to range of differing legal agreements</p> <p>This could result in non-payment whilst fixed term tenancies expire</p> <p>Any breaches of tenancy and associated action will be limited to non-punitive sanctions</p> <p>Only 8/1229 Fixed term tenancies have been ended which suggests they aren't the best tool to make best use of stock</p>
<p>2. Adopt hybrid tenancy arrangements (2,5 year fixed term tenancies and life time tenancies)</p>	<p>Existing policy is already based on offering secure/life time tenancies to 1beds and sheltered accommodation with all remaining on FTT.</p>	<p>Perceived inequity if this is not just restricted to certain property types - the Equality impact assessment would have to fully test if it fair to offer a range of tenancy types</p>
<p>3. Adopt introductory and secure (lifetime) tenancies</p>	<p>Sector research shows that this is typical of many other housing providers</p> <p>Introductory tenancies do provide maximum opportunities for tenancy sustainment in the long run</p>	<p>Ensuring that those on introductory tenancies fully understand the legal obligations – given these are commonly referred to a “probationary tenancies”</p>
<p>4. Adopt secure (life time) only</p>	<p>Legal view is that this will result in resolving FTT issues as terms offered will be better</p> <p>Life time secure tenancies supports wider neighbourhood cohesion and community ownership</p> <p>Avoids transient tenancies</p> <p>Administratively straightforward and removes burden of reviewing all FTT when very few result in termination</p>	<p>Potential for legacy fixed term tenancies where there is no agreement or consent to move to a secure tenancy (for the remaining term of that FTT)</p>

	Reduces empty property costs associated with move on	
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## Financial Implications

**The financial implications for reviewing tenancy agreement, including adding a new forfeiture clauses and stabilising the current tenancy practice, is estimated to be c£9,500 and can be met from existing budgets as below:-**

- ✓ Legal advice from South Staffordshire Solicitors: £1000- £1500. This cost can be met from the existing legal budget.
- ✓ Printing of the Flexible Fixed Term Tenancy Agreement with forfeiture clause: £3000. This cost can be met from within existing neighbourhood budgets HR210230199.

The consultation exercise is expected to be in the region of £5k as this will require specialist advice, production of options literature and material for a range of stakeholders. This can be met from existing consultant fees budgets, HR210132050.

## Next Steps

Finalise new/interim FFT agreement	November 2021
Obtain Solicitors legal sign off	November/December 2021
Place order for FFT to be printed externally	November - December 2021
Train housing officers on the new grounds for possession etc.	November- January 2021
Commence using the new FFT agreement	December – January 2022
Commence review on options for fixed term tenancies	January 2022 - March 2022 With initial update to Housing & Homelessness Sub Committee 3/11/21
Report to Cabinet on future use of Fixed term tenancies	March 2022
Review and update the Tenancy Management Policy	Summer 2022

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## Appendices

Appendix A - draft flexible fixed term tenancy agreement with forfeiture clause

Appendix B – Statutory Case law and details

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