

BRENT HOUSING PARTNERSHIP BOARD

Meeting: BHP Board	Date: 24 February 2011
Report Author: Janis Robert-Edwards	Title: Tenancy Agreement Issues
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Contains Private and Confidential Information:	No

1. Matters for Consideration

- 1.1 This report brings to the Board's attention three issues relating to the Council's Tenancy Terms and Conditions.
- 1.2 The first issue centres on the position relating to the comments of the Audit Commission in its Inspection Report dated 3rd April 2009, which was originally brought to the attention of the BHP Board on 26 November 2009.
- 1.3 The second issue relates to whether BHP should ask the Council to adopt a policy of applying for demoted tenancy orders.
- 1.4 The third issue relates to whether BHP should ask the Council to adopt a policy of granting introductory tenancies for new Council tenants.

2. Audit Commission Issue

- 2.1 In its Inspection report dated 3rd April 2009, the Audit Commission stated in page 16 that the Council's tenancy agreement had not been updated since 2004 and that there was a lack of clarity on where updates could be found following legislative changes to inform tenants of their rights and responsibilities. Although this was not stated in writing, the Audit Commission advised BHP officers orally that the Council's Tenancy Terms and Conditions should be amended to take into account the recent legislative changes, including those relating to the rights of civil partners to succeed tenancies following the enactment of the Civil Partnerships Act 2004.
- 2.2 BHP has discussed this matter with Council officers and sought legal advice from the Council's legal department. The advice received stated that firstly it was not necessary to amend the Tenancy Terms and Conditions to address the Audit Commission's concerns. In relation to the succession issue and the rights of civil partners, the succession procedure adopted by BHP in respect of Council tenancies

was amended and it was last updated in October 2008. Furthermore, the Tenant's Guide provided to Council tenants can be amended without having to amend the Council's Tenancy Terms and Conditions and BHP's website can be updated to include details about recent legislative changes to tenant's rights and responsibilities. BHP officers have confirmed they have reviewed and updated the Tenants' Guide.. In addition, BHP's website has been updated to reflect the changes in legislation mentioned above.

- 2.3 Council officers have expressed concern about going through the whole process of amending the Council's Tenancy Terms and Conditions to address concerns of the Audit Commission which can be adequately addressed without having to amend the Tenancy Terms and Conditions. In order to amend the Council's Tenancy Terms and Conditions, it is necessary to undergo a consultation exercise with tenants and the Council's Executive has to make the final decision before the amendments become effective. It is a very time consuming and costly process. The last time the Tenancy Terms and Conditions were amended was in 2004 and this was a very time consuming and costly process. Council officers take the view that it is neither necessary or proportionate to amend the Council's Tenancy Terms and Conditions to address the Audit Commission's concerns, especially at a time when there are tight restraints on the Council's budgets.
- 2.4 As for the way forward, a letter was sent to the Audit Commission on behalf of BHP by the Principal Lawyer (Housing & Litigation) in the Council's legal department on 3 November 2009 to raise the Council's concerns and to seek the Audit Commission's confirmation that it is not necessary to amend the Council's Tenancy Terms and Conditions to address their concerns raised in the Inspection Report of 3rd April 2009. The Audit Commission eventually submitted a response on 17 March 2010 stating that it would not insist on BHP changing its Tenancy Terms and Conditions. It added that it was a matter for BHP and the Council to decide whether they were satisfied with the existing Tenancy Terms and Conditions. In a telephone call between Arnold Meagher of Brent Council's Legal Department and Hugh Boatswain of the Audit Commission, Mr Boatswain said that he recommended that the Tenancy Terms and Conditions be reviewed to consider whether or not they should be amended to cover recent changes in legislation. Mr Boatswain said that he noted that the Council's succession procedure had been amended following the changes in the law regarding civil partnerships and that amendments were being made to the Tenants' Handbook and BHP's website.
- 2.5 Under section 103 of the Housing Act 1985 sets out the procedure in which the terms of a secure tenancy can be varied by way of a notice of variation which is served by the landlord on the tenant. Before serving a notice of variation, the Council landlord must serve a preliminary notice on tenants informing the tenant of the landlord's intention to serve a notice of variation, specifying the proposed variation and its effect and inviting the tenant to comment on the proposed variation within such time, as specified in the notice, as the Council landlord considers reasonable. The Council landlord must consider any comments made by those tenants affected within the specified time to make comments. Once this procedure has been carried out, the Council then has to serve a notice of variation specifying what the variations are and the date on which they take effect in compliance with section 103(4) and (5) of the

Housing Act 1985. Also, varying the terms of the Council's Tenancy Terms and Conditions will require the Council's approval via the Council's Executive.

- 2.4 The rights of succession following the death of a secure tenant are set out in sections 87 to 90 and 113 of the Housing Act 1985 and these rights are implied into tenancy agreements for secure tenants. As a result, it is not necessary to repeat these statutory rights in the Council's Tenancy Terms and Conditions or to make reference to the amendment of the rights which allow civil partners of deceased secure tenants to succeed their secure tenancies. Under section 87 of the Housing Act 1985, a person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either: (a) he is the tenant's spouse or civil partner; or (b) he is another family member of the tenant's family and has resided with the tenant throughout the period of 12 months ending with the tenant's death. Section 87(a) of the Housing Act 1985 was amended by the Civil Partnerships Act 2004 to include a civil partner being able to succeed upon the death of a secure tenant and this amendment has been in force since 5 December 2005.
- 2.5 At the BHP Board meeting of 26 November 2009, the BHP Board agreed to defer the matter to a later date as a response was awaited from the Audit Commission in response to the letter dated 3 November 2009 from Brent Legal Services.
- 2.6 The BHP Board is asked to note the response of BHP and the Council in respect of the concerns raised by the Audit Commission as set out in paragraph 2.1 above and in the letter from the Council's legal department and the Audit Commission's response dated 17 March 2010 as set out in Appendix 1 to this report.

3. Demoted Tenancies

- 3.1 BHP officers have given careful consideration as to whether to ask the Council to apply for demoted tenancy orders in situations where there is anti-social behaviour which is not serious enough to warrant the granting of a Possession Order. In the circumstances, BHP officers take the view that in light of the fact that there is a wide ranging review planned for ASB with new processes and sanctions being introduced in 2012, it will not be the best use of resources to introduce demoted tenancies at this point.
- 3.2 Demoted tenancies allow for local authority and registered social landlords to apply to the County Court to reduce the security of tenure for an existing tenant, similar to that of an introductory tenant starting his/her tenancy.
- 3.3 The Court may only make a demotion order if the tenant, or another resident or visitor to the tenant's home, has behaved in a way which is capable of causing nuisance or annoyance. The Court must also be satisfied that it is reasonable to make such an order. This is pursuant to section 82A of the Housing Act 1985 (as amended by section 14(2) of the Anti-Social Behaviour Act 2003).
- 3.4 The demotion of the secure tenancy is granted for a period of 12 months, unless the landlord serves a notice of proceedings for possession within the 12 month period in

order to issue possession proceedings. After the 12 month period, if no further action is taken, the demoted tenancy will revert back to a secure tenancy.

- 3.5 A demoted tenancy is not a secure tenancy. A demoted tenancy lasts for 12 months. A demoted tenancy has fewer rights than a secure tenancy and does not include the Right to Buy, or the right to take in a lodger or sublet part of the property. Also, the route to obtain possession of the property is different where the County Court has less discretion in demoted tenancies about whether to make a possession order. If a demoted tenancy reverts back to a secure tenancy, the tenant then has all the rights of a secure tenant.
- 3.6 A demoted tenancy cannot be brought to an end without an order from the Court. Section 143A of the Housing Act 1996 (as amended by the Anti-Social Behaviour Act 2003) states that possession proceedings to terminate a demoted tenancy cannot be brought unless the landlord has served on the tenant a notice under this section. However, the court cannot refuse a landlord's application for a possession order unless it takes the view that the procedure in sections 143E and 143F have not been followed.
- 3.7 The notice under section 143A of the Housing Act 1996 must state that the landlord has decided to apply to the court for an order for possession, setting out the reasons for the decision and informing the tenant of his right to request a review of that decision. The tenant has a right to request an internal review of the landlord's decision under section 143F of the Housing Act 1996 where the landlord decides to apply for a possession order.
- 3.8 The Demoted Tenancies (Review of Decisions) (England) Regulations 2004 set out the procedure which is to be followed in connection with a review of a landlord's decision to seek possession of a demoted tenancy and give details regarding the review procedure. The review must be undertaken by person who was not involved in the original decision. If the original decision was made by an officer, then any review of that decision by another officer may only be carried out by an officer occupying a more senior position within the landlord's organisation than the officer who made the original decision. The landlord must give the tenant no less than five clear days' notice of the date of the review. The tenant has the right to request an oral hearing and has the right to make written representations, whether or not there is an oral hearing.
- 3.9 If the review upholds the decision, the landlord can apply to the court to terminate the demoted tenancy and seek an order for possession. However, if the review does not turn out in the tenant's favour, like with introductory tenancies, it is possible for a tenant to seek a judicial review of the review decision by applying to the Administrative Court on grounds of either *Wednesbury* unreasonableness (i.e. no reasonable review officer would have made such a decision) or irrationality or procedural irregularity in the way the review was conducted.
- 3.10 BHP officers have a number of concerns about the demoted tenancy order process. Some of the sanctions of demotion (eg loss of Right to Buy of 12 months) do not affect recipients of demoted tenancy orders. The review process will cause increased administrative burdens on officers and will only serve to lengthen the process if the

final outcome is still going to be a Possession Order. Officers take the view that using the demoted tenancy order process is not cost effective for BHP. The BHP Anti-Social Behaviour Team had a total of three cases which officers consider could have gone through the demoted tenancy order process. However, there are other alternatives such as anti-social behaviour injunctions, applying for anti-social behaviour orders (ASBOs) and applying for possession orders under the Housing Act 1985 which usually serve as better deterrents to deal with offending tenants than demoted tenancy orders.

- 3.11 If BHP wants the Council to adopt the demoted tenancy procedure, it will need to consult tenants as required under section 105 of the Housing Act 1985 which states that secure tenants should be informed of the Council's proposals and make their views known within a specific period in matters of housing management where secure tenants are likely to be affected by a matter of housing management which, in the opinion of the Council, relates to a change in the practice or policy of the Council. From a constitutional perspective, if the BHP Board and Council officers and Members are persuaded to introduce demoted tenancies, it will be wise both legally and politically to seek the Council's approval to this change by way of a report to the Council's Executive seeking the authority of the Council's Executive to approve the seeking of demoted tenancy orders following the consultation required under section 105 of the Housing Act 1985.
- 3.12 Accordingly, BHP officers ask the BHP Board not to seek the council's approval to apply for demoted tenancies at this stage and recommend to the board that the matter be reconsidered in 12 to 18 months.

4. Introductory Tenancies

- 4.1 Under the Introductory Tenancy regime, Council tenants are "introductory" tenants for a trial period of one year before they become secure tenants. Some local authorities use this regime so that they can apply to the Court for mandatory possession orders (where the relevant legal and procedural requirements have been complied with as set out below) where there are tenants in the first twelve months of their Council tenancy who have breached their tenancy terms and conditions, mainly in relation to anti-social behaviour and rent arrears and other serious breaches of the tenancy terms and conditions. Introductory tenants have fewer rights than secure tenants. Similar to a demoted tenancy, an introductory tenancy does not include the Right to Buy, or the right to take in a lodger or sublet part of the property, or the right to carry out a mutual exchange or transfer to another property. Also, the route to obtain possession of the property is different where the County Court has less discretion in introductory tenancies about whether to make a possession order. After twelve months, an introductory tenant will become a secure tenant unless BHP/the Council has served a notice terminating the introductory tenancy within twelve months. Furthermore, BHP can extend the trial period of the introductory tenancy for a further six months if it serves a notice of extension on the tenant at least eight weeks before the original one year expiry date.
- 4.2 If BHP wants to extend the trial period from 12 months to 18 months, it must serve a notice of extension on the tenant at least 8 weeks before the 12 month expiry date

pursuant to section 125A of the Housing Act 1996 (“the 1996 Act”). The notice must set out the reasons for the decision and inform the tenant of his right to request a review of the landlord’s decision and of that time within which such a request must be made. The tenant has the right to request a review of the landlord’s decision under section 125B of the Housing Act 1996 within 14 days of being served with the notice to extend the introductory tenancy for a further six months. The procedure for carrying out the review is set out in the Introductory Tenancies (Review of Decisions to extend a Trial Period)(England) Regulations 2006. The review has to be carried out and the tenant notified of the review decision before the end of the original 12 month expiry date of the introductory tenancy.

- 4.3 If BHP wants to terminate the introductory tenancy before the term of the tenancy expires, it must serve a notice on the tenant under section 128 of the Housing Act 1996 stating that the court will be asked to make an order for possession of the property, stating the reasons for the landlord’s decision to apply for an order for possession and specify a date (no earlier than which a the tenancy can be brought to an end by a notice to quit) after which possession proceedings can be commenced in the County Court. The notice must also inform the tenant of his right to request a review of the landlord’s decision to seek an order for possession and of the time in which such a request can be made and that if the tenant needs help or advice about the notice and what to do about it, he should take it immediately to a Citizen’s Advice Bureau, a housing aid centre a law centre or to a solicitor.
- 4.4 An introductory tenant has the right to request a review of a decision to seek a possession order of a property let under an introductory tenancy under section 129 of the Housing Act 1996 and the request must be made within 14 days of being served with the notice of proceedings. The tenant has the right to request an oral hearing and has the right to make written representations, whether or not there is an oral hearing. The procedure for carrying out the review is set out in the Introductory Tenants (Review) Regulations 1997. If the review upholds the decision, the landlord can apply to the court to terminate the demoted tenancy and seek an order for possession. The review must be undertaken by person who was not involved in the original decision. If the original decision was made by an officer, then any review of that decision by another officer may only be carried out by an officer occupying a more senior position within the landlord’s organisation than the officer who made the original decision. The landlord must give the tenant notice of the date of the review, which must not take place less than five days after the tenant’s request for a hearing (unless the tenant consents otherwise) or if there is no hearing, not less than five days after the tenant receives notice of his right to make written representations. However, if the review does not turn out in the tenant’s favour, like with applying for demoted tenancy orders, it is possible for a tenant to seek a judicial review of the review decision by applying to the Administrative Court on grounds of either *Wednesbury* unreasonableness (i.e. no reasonable review officer would have made such a decision) or irrationality or procedural irregularity in the way the review was conducted. However, the court cannot refuse a landlord’s application for a possession order of a property which is subject to an introductory tenancy unless it takes the view that the procedure in sections 128-129 of the Housing Act 1996 (and the regulations laid by the Secretary of State pursuant to section 129 of the Housing Act 1996) have not been followed and that the Council has elected to operate an introductory tenancy regime under section 124 of the 1996 Act .

- 4.5 If BHP wants the Council's approval for BHP to adopt introductory tenancies for Council tenants, it must ask the Council to elect to operate an introductory tenancy regime pursuant to section 124(1) of the Housing Act 1996. In practical terms, this means that the Council's Executive must approve and elect to operate an introductory tenancy regime for Council tenants and this can be done by way of a report to a meeting of the Council's Executive. Otherwise, the introductory tenancy regime will not have any legal effect and this can be used as a defence in possession proceedings for properties pursuant to an introductory tenancy and could be used in judicial review proceedings to seek a declaration that the Council's introductory tenancy regime is unlawful.
- 4.6 It would be wise to present a report to the Council's Executive addressing both issues of demoted tenancy orders and introductory tenancies, especially if BHP is adopting one of the options and not the other. If the Council agrees to the implementation of introductory tenancies, BHP and the Council will need to consider the implications about what format the introductory tenancy agreement should take. Some local authorities grant introductory tenants combined tenancy agreements to sign which set out conditions that apply to both introductory and secure tenants so as to save the need for tenants to sign another tenancy agreement once they become secure tenants. This requires further consideration and should be discussed in any report to the Council's Executive if the BHP Board and Council officers recommend to the Council's Executive to elect to have an introductory tenancy regime. Of course, if the Board decides not to seek the Council's approval to implement the demoted tenancy and introductory tenancy regimes, it will not be necessary to submit a report to the Council's Executive.
- 4.7 The advantages and disadvantages are outlined in the table below.

Advantages	Disadvantages
Court must grant possession without proof of reasonableness or availability of alternative accommodation	Landlords are free to devise their own procedures to replace the use of suspended possession orders, so there is no consistency.
The court has no jurisdiction to entertain a defence based on invalidity of the landlord's review	Local authorities have to do background investigation to determine whether introductory tenancies are appropriate depending on type of tenancy previously held. This could affect void turnaround times.
Suspended Possession Orders are not appropriate for introductory tenancies	The only appeal from the decision to issue possession proceedings is the review by the local authority. Could be seen as not being independent or impartial.
If after a review the panel decides to uphold the decision to evict but to defer the eviction for a period on condition, for example, that the tenant pays the arrears there will be no need to serve new notice for subsequent breaches of that condition.	If a decision is made after the review not to terminate the tenancy, and there are further breaches of the tenancy agreement, a new notice giving reasons must be served on the tenant
The Review panel can rely on evidence not contained in the notice	There are no guidelines as to the status of an introductory tenancy where arrears are cleared before an eviction.

The Court cannot grant Stays of Execution on Introductory Tenancy cases	Local authorities who operate Introductory tenancies are not clear on how to deal with tenants on whom a notice has been served or a possession order granted, if the arrears are subsequently cleared. Some local authorities make the tenancy secure immediately
Unlike a notice under the Housing Act 1985, a notice here does not have to be in a prescribed form. It merely has to comply with the requirements of the act, i.e. it must state that the court will be asked to make an order for possession and it must state the reasons for the decision to apply for the order;	Local authorities have to identify introductory tenancies at the start of the arrears as the letters will be different from the standard.
<i>Introductory tenancies can be extended for a further six months</i>	<i>There are still no guidelines as to whether the tenant is entitled to an oral hearing and what level of representation is permitted.</i>
	The decision of the Review panel has no legal weight.
	There is no clarity as to whether a further introductory tenancy could be granted if the previous introductory tenancy was terminated by eviction.
	Realistically possession proceedings cannot start for at least six weeks as ample time must be allowed to arrange and carry out a review if a tenant requests one.
	Tenants whose review has been unsuccessful can apply for judicial review which could prove very costly for BHP and the council. Our legal cost per case is currently in the region of £20,000. If the tenant's judicial review application is successful, we have to pick up those costs as well.

4.7 Accordingly, BHP officers ask the BHP Board not to seek the Council's approval to adopt a policy of granting introductory tenancies.

5. Localism Bill and recent Case Law

5.1 The Localism Bill is currently at the Committee stage in the House of Commons. The Localism Bill, as currently drafted, proposes allowing local authorities to grant secure "flexible" tenancies to new tenants for a term of not less than two years. The Bill sets out provisions for local authorities to grant flexible tenancies to new tenants and to tenants whose introductory tenancies are coming to an end. The Bill sets out the review requirements against decisions to grant flexible tenancies and decisions to recover possession after the expiry of flexible tenancies. The Bill also allows local authorities to apply for demoted tenancies against tenants who have demoted tenancies. The Bill also seeks to restrict the rights to succession in respect of secure tenancies by proposing that the statutory right to succeed a secure tenancy will only apply to a spouse or civil partner of the deceased tenant who has lived at the

property as his main or principal home at the time of the tenant's death. The guidance coming from the Department of Communities and Local Government is that flexible tenancies are not intended to replace the use of introductory tenancies and demoted tenancies.

- 5.2 The Supreme Court case in the matter of *Manchester City Council v Pinnock* [2010] UKSC 45, which involved a demoted tenancy, ruled in 2010 that the demoted tenancies regime was compatible with the right to respect for the home as enshrined in Article 8 of the European Court of Human Rights. However, the Supreme Court added that when the County Court or any other court was asked to make an order for possession against a demoted tenant, the County Court had the power to consider whether it was proportionate to make the order sought and investigate and determine any relevant issues of fact. This gives the Court an element of discretion when deciding to make an order for possession against a demoted tenant. Judgments are awaited from the Supreme Court in the next month regarding the application of the reasoning in this case of *Manchester City Council v Pinnock* in cases involving introductory tenancies and non-secure tenancies.

6. Financial and/or Legal Implications

- 6.1 The legal implications regarding the issues raised are set out in the main body of the report.

Financial implications

- 6.2 In 2004 the cost of consultation on variations to the tenancy terms and conditions, initially estimated at £6000, rose to approximately £39,000 including fees payable to independent consultants, printing, postage, distribution fees and service of the variation notice. This was a particularly complex consultation process because there were 3 forms of tenancy agreement in existence at the time. Future consultation on variations to tenancy terms and conditions is likely to cost less than that incurred in 2004 but still a significant expenditure which is estimated to be in the region of £20,000, based on two mail outs to all tenants, staff time on evening consultation meetings and staff time on replies to queries raised.

Diversity Implications

- 6.3 If the BHP is minded to recommend that the Council adopts either demoted tenancies and/or introductory tenancies, it will be necessary to carry out an Equalities Impact Assessment regarding the effects of such policy changes.

7. Recommendations

- 7.1 The BHP Board is asked to note the response of BHP and the Council in respect of the concerns raised by the Audit Commission as set out in paragraph 2.1 above and in the letters set out in Appendix 1 to this report.

7.2 The BHP Board is asked not to seek the Council's approval to adopt a policy of applying for demoted tenancies against secure tenants of the Council at this stage and the BHP Board is asked to reconsider this matter in the next 12 to 18 months.

7.3 The BHP Board is asked not to seek the Council's approval to adopt a policy of granting introductory tenancies.

8. Access to Information

No restrictions apply.