
Report to Place Committee

Date of Meeting: 4th November, 2021

Subject: Private Sector Housing Repairs Legislation Update

Report by: Strategic Director (Place)

1.0 Purpose

- 1.1. This report sets out the current position in relation to Mixed Tenure works, relating to Housing Revenue Account (HRA) assets.
- 1.2. The report details actions including potential pilot considerations, areas of further investigation, resource requirements and aspects which until primary legislation is altered, might not be resolved.

2.0 Recommendations

- 2.1. It is recommended that the committee agrees and note the following points:-
 - 2.1.1. To note the change the 'off the shelf' buying back policy to allow for owners, in certain situations (7.2), to contact the council to ask us to purchase the property, where their property meets the advertised criteria and where the Council would achieve vacant possession and a clean title.
 - 2.1.2. To agree that legislative changes, such as those envisaged by Housing to 2040, with establishment of a common standard across all tenures could assist with the challenges expressed in this report.
 - 2.1.3. Explore the mechanism and feasibility of engagement options for homeowners in mixed share works including;
 - 2.1.3.1. A "Golden Share" where the council obtain a percentage of the property value in return for front funding common works,
 - 2.1.3.2. Consider buying back property in mixed HRA tenure blocks, to facilitate common repairs/improvements and potential allow for sitting tenants/owners to remain in situ,
 - 2.1.3.3. Consider with legal and finance expertise, whether owners in mixed tenure HRA blocks could pay an ongoing proportionate share of the rent, which would guarantee all communal repairs, maintenance and improvements taking place, without any

recourse for any charging mechanisms – i.e. the establishment of a proper factor.

- 2.2. Note the service is considering examining mixed tenure blocks where the HRA is in minority ownership, to potential dispose of some or all of these assets in line with agreed council policy, where the funds received would be ring-fenced to re-invest in alternative affordable housing supply only.
- 2.3. Note that process relating to door entry repairs and installations (3.6/3.7).
- 2.4. Note the list of future actions highlighted at point 10.0.
- 2.5. Otherwise note the remainder of the report commenting and challenging as appropriate.

3.0 Background

- 3.1. For a number of years, the council have encountered difficulties implementing obligations to maintain properties located in tenements and four in a block flats where there is mixed ownership. Despite the legal position, which clearly states all owners have a responsibility towards repairs and maintenance of shared parts, some private owners refuse to contribute towards common repair work costs, claiming not to have the finances to pay their relevant share of such works, or dispute whether the work is a repair or improvement/enhancement.
- 3.2. The lack of engagement and/or agreement from homeowners significantly impacts on the Council's Scottish Housing Quality Standard (SHQS) position and poses a serious risk factor to meet our commitment of meeting this minimum standard for social housing. Private owners are not under the same obligation to meet the SHQS, which means that it could be argued that Council tenants in blocks with mixed ownership are not being provided with the same standard of housing as neighbours in a fully Council owned block. This is not a situation which should, and clearly can't, continue indefinitely. The Scottish Government, in the Housing to 2040 discussion paper, outlined that legislation will be brought forward to ensure consistent standards across all tenures should deal with this issue in the long term.
- 3.3. Many council properties have now reached an age where major works are needed including re-roofing and common upgrade works such as controlled door entry systems within shared flats, otherwise the assets will need replaced at a greater financial, economic and environmental cost. These projects require significant financial contributions by property owners as detailed in their title deeds. As reported to Council in June 2013, it was assumed then some £12m of owner's contributions would be required, in relation to HRA works in mixed tenure situations. Allowing for basic inflation this figure will have risen to at least £15m in today's prices. Following the cessation of grant funding for homeowners in 2009, there has been little incentive or encouragement for them to become involved in repair and maintenance works as mentioned. As the Councils capital programme has now started a focus on mixed tenure works, we are receiving clear and unambiguous feedback that owners want a clear specific recharge policy from the Council Revenues Team, on repayment options.

- 3.4. If common areas are allowed to deteriorate to such poor condition as Council properties cannot be let, this will clearly have a detrimental impact not only on the asset value, but on the business model and void rent loss. There is ultimately a risk that assets such as this could deteriorate to the point where they will be beyond refurbishment and repair options and will require demolition.
- 3.5. Secure door entry systems/controlled entries is a requirement of the SHQS. Being unable to replace and upgrade, existing systems in many areas due to lack of homeowner participation is responsible for the majority of current SHQS failures reported by Clackmannanshire Council.
- 3.6. Where existing door entry systems is in place, any works required to it are classed as a repair, even if this requires the system to be fully replaced because it is beyond repair. It can therefore be repaired and costs recovered without too much difficulty (see above for requirement of repayment options).
- 3.7. If required to install a door entry system where none previously exists, although essentially an improvement which would, at common law require the consent of all owners, a legal exception has been made, which means that a majority decision is all that is required for the door entry systems installation to proceed.
- 3.8. 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 failing common area conditions such as close painting and secure common door maintenance. This can result in rent losses, property refusals as well as a poor product for our tenants.
- 3.9. Where the Council is the majority owner of a block, works can be instructed. However, owners still need options regards paying for the works if they are unable to afford to pay for works up-front. Where the Council is in the minority ownership or have a 50/50 ownership split, the reluctance of owners to engage with the works can easily postpone works for many years as without agreement from owners the Council is at a legal stalemate.
- 3.10. The proposals in this report seek to offer a range of methods which will encourage owners to engage with common repair works, commit to their legal responsibility towards the repair and maintenance of their, and their neighbours, home while also recognising that many of the works are expensive and cost prohibitive for some owners.

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. 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. This 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. As a registered property factor, the Council also has a duty to owners of former council housing to carry out factoring services to ensure the maintenance of properties. All property factors must comply with 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 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, therefore, is the primary policy document for arranging repairs in mixed tenure blocks. However, the Statement of Services 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 ensure the available funding to ensure its responsibilities to tenants are met. It would be beneficial to seek specialist legal advice to review the Council's factoring position to ensure we are meeting our legal responsibilities both as a landlord and a property factor. The specialist advice can also examine, whether the council could play a more central factoring role i.e. charge a proportion of the rental fee for a guarantee of repairs, maintenance and improvement actions taken by the council on their behalf.

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") 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 currently recovery methods available to the Council, which involve placing a charging order on the title deeds of property. However, if an owner is unable to pay their share in full, all recovery methods place a resource requirement on the Council's General Fund to cover costs until repaid. The type of charging order used depends on the severity of the condition of the property, i.e. a Repayment Charge can only be used if a Work Notice has been served under Housing (Scotland) Act, 2006. A Work Notice requires a property to be below the tolerable standard, ideally, as a responsible landlord the Council aims to be proactive and address repair and maintenance issues before they become this severe. These processes are dependant on General Fund employee resources, where the Strategic Service provision has been scaled back in recent years. Moreover, this is also a service which could be called up by other landlords within the area. Therefore, examining this area might require demand pressures to be approved as part of the General Fund budgetary process.
- 5.7. Charging orders are robust methods to ensure funds are paid and although, unavoidable in some situations, these recovery methods are not without risk. In most cases the property will require to be sold before outstanding money is repaid, therefore, these methods could become a lengthy legal process with costs perhaps not being recovered for a number of years.

6.0 Review of Common Area Upgrades

- 6.1. As previously mentioned many common area works cannot be progressed due to the lack of engagement from sharing owners. It is therefore recommended that a Common Area Upgrade pilot project is established with a pilot proposed for High Street, Tillicoultry, with external legal advice, due to the pressure of the in-house service. Approximately one third of the flatted properties in High Street are privately owned.
- 6.2. The Council have majority ownership in all blocks, meaning we can legally progress the works, even if some owners do not agree to come on board. However, it would be in everyone's best interest to be able to encourage owners to take part willingly, rather than force the works upon them. This is where it will be beneficial to have a range of repayment options to offer to owners who may not be in a position to pay for works in full.
- 6.3. The intention is to carry out secure door entry replacement and upgrading works along with security and emergency lighting enhancement as well as close painting. Works will be instructed through the Council's term contractor McGills.
- 6.4. Initially, sharing owners who are unable to front fund, will have their share secured through a charging order placed against their title. However, if agreeable with Finance, a range of repayment options could be presented to owners giving the opportunity to repay sums over 12, 24, 36, 48 and 60 months depending upon both the value to be repaid and the owners financial circumstances. Similar processes with homeowners in other local authorities, such as City of Edinburgh, attract both a significant administration charge of

over 20% but also an interest rate of 8%. Currently Clackmannanshire Council sundry debtors policy does not have an agreed process to charge interest, therefore, this is an issue which requires further discussion and agreement before it can be put in place.

- 6.5. Ideally, works to common areas should be done as preventative measures, not reactive repairs. The Council would benefit from a funding/repayment policy which encourages owners to become involved in works before they become an emergency situation. A repayment policy which details repayment terms and limited options for length of repayment would help encourage and engage owners and assist them in understanding the need for works to be done prior to a property suffering water ingress, or some degree of structural disrepair.
- 6.6. As engagement with owners is key to progressing this pilot, and other similar projects, it is prudent to consider the information an owner would expect to receive to allow them to make an informed decision when being asked to contribute towards repair costs. As much as is reasonable practicable an owner should be provided with detailed costs of their share, with repayment options at an early opportunity as possible. This information would be accompanied with a caveat that costs could change if the works were yet to be tendered.
- 6.7. 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 this scheme but a provision for this will be made in the accounts. Furthermore, the Council will be securing its investment against the title deeds for the private properties.
- 6.8. Failure by the owner to make timely 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 notice of potential liability or charging order would be registered against the property with Registers of Scotland.
- 6.9. Moving forward, the Housing Service will be carrying out a programme of roof and wall upgrade works across our asset portfolio on a 15 year upgrade programme. It is expected that following the pilot, similar works will be instructed, with private owners then being recharged their share as set out within their title deeds, where the Council is in a majority ownership or have agreement to proceed.

7.0 Buy backs

- 7.1. Currently the Housing Service does occasionally buy 'Off the Shelf' properties, depending upon the needs of the allocation policy. Only properties which are advertised on the open market, at the time of need, are considered.
- 7.2. In September, 2017 members agreed with point 2.1.2 of the committee paper, 'Mixed Ownership and Common Repairs' that the Housing Service should explore options to 'buy back' properties within common blocks where it will allow the council to secure a majority share. 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 option would only be considered where the private owner can evidence they do not have sufficient resources to meet both the

costs of the common repair works and their ongoing repairs costs. To ensure transparency on this issue, criteria for qualifying properties detailing size of properties and areas considered for purchase would be regularly published on Clacksweb to minimise wasted demand by the public and ourselves.

- 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.

8.0 'Golden Share' Properties

- 8.1. Where an owner is unable to afford the cost of the common works in their block, they could ask the Council to consider taking a percentage share of the value of their home in lieu of payment for the works.
- 8.2. This option would generally only be considered when undertaking a package of high value works such as roof and render works combined. It may be necessary to impose a minimum percentage value but this will be explored to ensure the Council is able to sufficiently recover all costs associated with the owner's share of the works.
- 8.3. The owner would be responsible for seeking their own independent legal advice if this option was being considered.
- 8.4. The Housing Service is in discussion with Scottish Government on this issue and the potential of leaving sitting tenants in situ. This topic will require further legal exploration and may require changes to the existing Housing Allocation Policy.

9.0 Disposal of Property

- 9.1. In the September, 2017 committee paper previously mentioned, members agreed, (point 2.1.3), to declare as surplus for disposal on the open market property where the Council is in minority ownership due to the other properties having been sold through the right to buy scheme.
- 9.2. 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).
- 9.3. Any properties deemed to be surplus for disposal will be subject to the current procedure for declaring HRA properties surplus, which requires both initial approval at Committee and final ratification by Council. This procedure will be reviewed regularly to ensure our duty to maintain property condition can be carried out in a reasonable timescale.

- 9.4. Disposals of all HRA assets are made in full compliance with both the Council's statutory obligations and Scottish Ministers' requirements.
- 9.5. In these rare situations, under the Council's allocation policy, tenants would be made a direct offer of rehousing through powers delegated to the Head of Service in consultation with the Senior Manager – Legal and Governance.

10.0 Future Actions

- 10.1. As previously mentioned in this report there are some actions which require further discussion and examination to be taken across Services in order assess if the Council has appropriate policies to fully implement the potential options described.
- 10.2. An overview of these is detailed as follows;

Action	Lead Service
<u>Recharge policy</u> Robust sundry debtors recharge policy which safeguards the return of public funds and gives owners sufficient information on repayment terms. Should also include administration charges and interest charges where appropriate.	Finance & Revenues
<u>Secure Door Entry Systems - Pilot Project</u> Replacement/upgrade door entry systems in High Street, Tillicoultry	Property Services
<u>Factoring Legal Position</u> Explore the use of an external legal specialist to examine Council's legal responsibility in relation to common repairs involving owners and ensuring there are appropriate factoring arrangements	Legal/Housing
<u>Buy Back Policy</u> If agreed, publish criteria on Clacksweb and review/update when necessary	Housing
<u>'Golden Share' Properties</u> Housing to discuss with Scottish Government on legal implications. May require amendments to existing Housing Allocation Policy to accommodate changes.	Housing
<u>Additional Funding</u> Explore option for Scottish Government to increase Home Energy Efficiency Programme for Scotland (HEEPS) grants to Councils. Recently City of Edinburgh Council negotiated an uplift in funding from £7k to £12 - £15k.	Development Services/Housing

11.0 Consultation

11.1. An outline of these issues was highlighted at the CTRF AGM in September, 2021. As these proposals develop then further engagement will occur.

12.0 Sustainability Implications

12.1. If the recommendations in the report are agreed these steps will assist in maintaining the Council's assets while encouraging homeowners to meet their legal responsibilities to repair and maintain their homes.

13.0 Resource Implications

13.1. Financial Details

13.2. The full financial implications of the recommendations are set out in the report. This includes a reference to full life cycle costs where appropriate. Yes X

13.3. Finance have been consulted and have agreed the financial implications as set out in the report. Yes X

13.4. Staffing

13.5. It will be necessary to outsource legal advice due to resource issues currently experienced by our Legal team and the need for specialist advice. Staffing resources in relation to the action and issues highlighted in this paper are predicated in the Place organisational redesign process which includes additional resourcing in this area. This level of work cannot proceed without those structural proposals being approved and staffing resources being employed.

14.0 Exempt Reports

14.1. Is this report exempt? Yes (please detail the reasons for exemption below) No X

14.0 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)

Clackmannanshire will be attractive to businesses & people and ensure fair opportunities for all	X
Our families; children and young people will have the best possible start in life	X
Women and girls will be confident and aspirational, and achieve their full potential	<input type="checkbox"/>
Our communities will be resilient and empowered so that they can thrive and flourish	<input type="checkbox"/>

(2) **Council Policies** (Please detail)

15.0 Equalities Impact

15.1 Have you undertaken the required equalities impact assessment to ensure that no groups are adversely affected by the recommendations?

Yes No

16.0 Legality

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

17.0 Appendices

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

18.0 Background Papers

18.1 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) No

Mixed Ownership and Common Repairs by Head of Housing & Community Safety, September, 2017

Author(s)

NAME	DESIGNATION	TEL NO / EXTENSION
Elizabeth-Anne Syme	Private Sector Housing Coordinator	2426
Murray Sharp	Senior Manager (Housing)	5113

Approved by

NAME	DESIGNATION	SIGNATURE
Pete Leonard	Strategic Director (Place)	