

## APPENDIX 4

### Procedures and guidance note SERVICE TENANCY GUIDANCE

#### 1. Overview

It is intended that this guidance is read in conjunction with the Service Tenancies Procedure note to assist in explaining the reasons behind the procedure and the Council's current position. The Council has in the past and continues to grant service tenancies to some of its employees in order that they may better perform their duties, for example, being on site in order to lock and unlock gates and/or provide assistance and general security. Such employees are usually caretakers living in close proximity to or on school premises, or park keepers in large parks where security is an issue.

#### 2. General Principles

Service tenancies, if properly granted and documented are not secure tenancies under the Housing Act 1985.

And, in certain cases, the dwellings which comprise the service tenancies are, are not able to be purchased under the statutory Right to Buy Scheme.

There is much legislation concerning security of tenure of residential occupiers and case law concerning whether or not such occupiers are tenants or licensees. The aim of the distinction to be drawn is that a licensee would normally be outside the protection from arbitrary eviction afforded to residential tenants by statute.

Generally speaking, following the case of *Street-v-Mountford* it has been thought that occupational arrangements entered into between an employer and an employee whereby part of the obligation on the employee was to occupy premises allocated to him or her by the employer were not actually tenancies but mere licences. The judgement of Lord Templeman in *Street and Mountford*, which is a House of Lords decision, and therefore binding on lower Courts, states that "a service occupier is a servant who occupies his master's premises in order to perform his duties as a servant. In those circumstances the possession and occupation of the servant is treated as the possession and occupation of the master and the relationship of landlord and tenant is not created; .... The test is whether the servant requires the premises he occupies in order to better perform his duties as a servant."

However, the case was decided in May 1985 and it is quite likely that the first instance decision, upon which the judgement was based, was originally litigated prior to the coming into force of the Housing Act 1985. Nowhere in the judgement is there any reference to the Housing Act 1985 which, clearly contemplates such arrangements being tenancies.

There is specific reference in Schedule 1 paragraph 2 of the Housing Act 1985 which states "that a tenancy is not a secure tenancy if the tenant is an

employee of the landlord or of a local authority and his contract of employment requires him to occupy the dwelling house for the better performance of his duties." The case did not involve a local authority service tenancy scenario.

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A subsequent case called *Surrey County Council -v- Lamond* involved the repossession by that authority of caretakers' accommodation. Throughout the Judgement the occupant was referred to as a tenant and clearly both parties had agreed to the occupants status during the course of the litigation.

There is even a case involving Brent (*London Borough Of Brent - v - Charles*) in which the court found that a service tenant was not a secure tenant

It therefore seems clear that there is a category of tenant who occupies premises for the further and better performance of his duties at the behest of the employing Council that is not a secure tenant.

This is important from the council's point of view as it would not owe such onerous obligations to a service tenant as it would a secure tenant. For example it would not have to prove the grounds for possession set out in the Housing act, nor would it be under an obligation to rehouse.

There is an argument for treating a service tenant as a licensee in a similar way to the category of service occupant identified in *Street - v - Mountford* , but there is a provision in the Housing Act 1985, which specifically includes licences not specifically excluded by the Act within the category of secure tenancies. It therefore seem sensible to rely upon the statutory exception.

Clearly, if the Council were a private company the advice would be different. This is an important point as in the case of foundation schools the premises are owned by the governors, a body corporate and thus outside the provisions of the Housing Act 1985. When dealing with caretakers therefore, advice needs to be sought for each individual case and those occupants maybe better described as service occupants in certain circumstances.

Officers have considered very carefully what arrangements they are entering into when allowing an employee to occupy a dwelling for the further and better performance of his or her duties in order to protect the Council's position and regain occupation of those premises. Therefore the procedure note must be very carefully adhered to.

The Council's general policy has been that service tenants are entitled to count the period that they occupy Council accommodation towards qualification for Right to Buy and discount and depending on their length of service the council has indicated that it will rehouse the service tenant at the end of his or her tenancy. This policy is subject to change in the case of new service tenancies and it is likely the council will make one offer of accommodation at the end of the service tenancy, but this could be by way of nomination to a public sector provider such as a housing association.

It must be understood that a service occupant does not have an automatic right to either be re-housed at the end of his or her contract of employment or to a secure tenancy if the Council does so agree to assist in re-housing the occupant.

It is probably useful at this point to consider what the Council's objectives are in granting service tenancies. Certain questions to be asked in the procedure notes are designed to illicit whether or not these objectives are being met.

Firstly, it needs to be established that the Council has a need to locate a particular individual in a certain dwelling in order to make the job easier to perform. Such examples may include, as stated above, the need for caretakers to remain on site to facilitate locking and unlocking of premises or park-keepers whose very presence in a large open space may deter vandalism or enhance security.

Secondly it needs to be certain that it can reoccupy the premises to locate a subsequent employee in those premises to perform the same tasks, or if the need ceases it can repossess the premises for other uses. There may be an advantage to the council selling valuable premises which were never intended to be used for social housing.

It is therefore in the Council's interest to ensure that both the employment contract and the service tenancy are inextricably linked to ensure that the statutory protection afforded to the Council by the Act in relation to secure tenancies can be used and that the Council are not subsequently under an obligation to re-house a secure tenant bearing in mind the scarcity of available accommodation.

### **3. Contract of Employment**

It is vital that the contract of employment of the service tenant contains a contractual requirement for the tenant to occupy the dwelling for the further and better performance of his or her duties. This is because the essence of the protection conferred by the Housing Act 1985 and common law is that a person in occupation of premises at specific instruction is not in exclusive occupation of the premises but is in occupation by virtue of that contract. It cannot be stressed enough that the relationship between the contract of employment and the tenancy is vitally important to enable the Council to regain possession of the premises at the end of the contractual term of employment and it is where this link breaks down that problems occur.

There have been instances where an individual's contract has come to an end whether by retirement or redeployment and the individual has remained in the premises, sometimes without even paying rent. A secure tenancy has arisen over time and the council has lost the use of valuable premises, income and assumed obligations it never intended to.

The duties to be performed as part of the condition of occupancy should be adequately listed within the contract and there should be mechanisms for monitoring that particular contract (set out in the Procedure Note). If the employee's tasks change so that it is no longer necessary for him or her to reside in that dwelling then steps must be taken to ensure that the service tenancy is terminated and the occupant removed from the premises.

### **4. The Tenancy Agreement**

The Council has designed a form of service tenancy agreement in order to ensure that the Council has sufficient protection to enable it to recover

possession of the dwelling either at the end of the employee's contract of employment or earlier termination.

It is important that the tenancy is reviewed on an annual basis both as to rent (see Procedure Note) and again in conjunction with the contract of employment to ensure the dwelling is still being provided in order for the employee better to perform his or her duties.

The Council also needs to ensure that it is indeed the tenant who is employed under the contract of employment who is actually in occupation of the premises. If for any reason the tenant has moved out of the premises leaving remaining family members, again a secure tenancy could arise, with consequential loss to the council.

It needs to be clear who is responsible for what in terms of repairs and management.

The rent should be calculated as if the tenancy were a secure tenancy. If affordability is a problem on the part of the service tenant this should be addressed by way of allowance or salary, not rent reduction.

There may also be a service charge in addition to the rent.

The premises should also be properly managed and kept in good repair to protect the council's assets.

Hence the need for a regular review.

On termination the council should act speedily to repossess and in any event should not stop rent collection. The danger is delay. There are a few cases on this point which suggest that a reasonable period after the end of the contract to allow removal etc does not confer security on the occupant. However 9 months is too long and security will arise. The council has at least one case where an occupant has been allowed to remain in occupation for 11 years after his retirement and without payment of rent. This is wholly unacceptable and doubtless the occupant now has a secure tenancy.

The council's position is that service tenancies should really only be entered into in rare circumstances and there are several safeguards to protect the council. All tenancies must now be approved by the Chief Executive with the concurrence of the Lead Member for Finance and Management following a decision by Corporate Services Deciding Committee on 31 July 2001.

## **SERVICE TENANCY PROCEDURES**

### **1. Overview**

The Council has occasionally entered into contractual arrangements with employees as part of the employee's employment contract to provide the employee with accommodation for the further and better performance of his or her duties. These arrangements are only to be entered into in exceptional circumstances and they require the consent of the Chief Executive in consultation with the Borough Solicitor. These procedures are to be strictly followed when considering whether or not to enter into such arrangements and the subsequent granting of a service tenancy.

### **2 Necessity**

There is a strict test which determines whether or not a tenancy is a service tenancy and that is that the employee has to occupy the premises for the further and better performance of his or her duties. The distinction between a service tenancy and secure tenancy is that under a service tenancy the occupier does not have conferred upon him or her security of tenure under the Housing Act 1985 and can be thus easily removed from the premises without the Council having to discharge any obligations that it would have if the occupant was a secure tenant. It also prevents the dwelling being subject to Right to Buy legislation. These points are important if the Council is using such accommodation to enable employees to further and better perform their duties. Therefore it is important for the person granting the tenancy to establish whether such arrangements are necessary and appropriate and that the correct procedure is followed. It is essential that a written note of the decision together with reasons and the subsequent documents and final decision by the Chief Executive are kept with the file

### **3 Questions**

The following questions should be addressed in considering whether or not to grant a service tenancy:

- (i) What duties is the employee better able to perform from the accommodation proposed;
  - consider proximity to area worked;
  - hours of working and availability of public transport and/or parking;
  - security aspect e.g. physical presence of a person or family at a remote location deterring vandals;
  - if 24 hour presence on the site is not required why would the Council need to provide such accommodation;
  - if this accommodation were not available would it still be possible to perform the employment contract.
  
- (ii) Is the employee currently in a Council accommodation elsewhere and are the premises offered more suitable.

- If the employee is already a secure tenant care needs to be taken in entering these arrangements because of the difficulty in terminating such tenancies.
  - (iii) Is the arrangement likely to be for several years duration. If it is a short term arrangement it is unlikely that a service tenancy arrangement is appropriate.
  - (iv) Are there any re-organisations or proposed re-arrangements which would render this job redundant or are necessary within the next year. If so the cost of providing alternative accommodation maybe cheaper than tying up the dwelling for that particular purpose.
  - (v) Are there any proposals such as private finance initiatives which could transfer the employment of the employee to a new organisation, with the Council then having to transfer the dwelling to the new organisation. In these circumstances a service tenancy would not be recommended.
  - (vi) Has the proposed employee ever been a 'problem' tenant and in persistent arrears with rent.

#### **4 Employment Contract**

As stated above, it is important that the tenant has a properly drawn Contract of Employment making specific reference to the Council requiring the employee to occupy the premises for the further and better performance of his or her duties. Human Resources advice should be sought upon this point and although employment contracts vary, a specimen contract is annexed to this Procedure note showing an acceptable form of wording to link to the agreement. This contract should not be used without proper human resources advice. It must be linked to the occupation arrangements

It must also be made clear that the council does not intend to offer a secure tenancy at the end of the term of employment.

#### **5 The Service Tenancy**

A model form of Service Tenancy Agreement is annexed to this Procedure and should be prepared by Legal Services.

It is important that the Agreement used is in standard form in order to protect the Council's position on termination of the employment contract and simultaneous termination of the Agreement.

The property needs to be properly managed by the Service Unit granting the tenancy in order to ensure that the arrangement do not cease becoming service tenancy arrangements and become secure tenancy arrangements. There needs to be a link between the contract of employment and the service tenancy

Having asked the questions and satisfied him or herself the service tenancy is appropriate the papers should be submitted to the head of service for approval and referral to the Chief Executive for his express permission . That request to the Chief Executive should be by way of a written report with legal, financial and human resource implications.

Details of management procedures following a grant of the service tenancy are set out below.

It may be sensible to advise a service tenant to take independent legal advice on the arrangements that he or she is entering into if they so wish but the Council should not really reimburse the service tenant for that advice.

## **6 Management Arrangements**

It has been agreed that all service tenancies will be managed by the individual department but that they will be reviewed annually in February of each calendar year.

At the annual review a questionnaire will be completed by the Unit Manager responsible for the service tenant including the following:

- the state of the premises
- whether or not there has been a change in the employees duties;
- whether or not these arrangement are likely to continue for the next year;
- whether or not the service tenant is still in occupation of the premises;
- whether or not there are any other factors such as long term illness which would prevent the service tenant from carrying out his or her duties.

A copy of the questionnaire is annexed to this Guidance.

## **7 Rent**

As mentioned previously rents will be set annually and they will be based upon the secure tenancy rents charged by the Council. The basis of this charge is moving from a capital value charge but it will be the responsibility of the Manager to ensure that he or she obtains advice on rental from the Director of Housing on comparable dwellings. This will normally include a valuation unless one had been done recently.

There may also be a service charge payable in addition to the rent depending an what services are provided to the premises, such as upkeep of a communal play area.

It is proposed that each property let by way of a service tenancy should be reviewed every 5 years.

It is not intended that the rent should be in anyway subsidised. If there are issues about affordability of rent then alteration to the salary scale or additional payments in the employment contract should be considered rather than a reduction in rent.

## **8 Review**

The tenancy should be kept constantly under review and any changes in the nature of the duties or other issues which might affect the tenant's status should be dealt with quickly and appropriate advice sought. Case law has indicated that a service occupant remaining in occupation for a short period

after expiry of the service contract does not have conferred upon him or her security of tenure but this situation does not persist and it has been held in one case that the permission of the landlord to allow a person to remain in occupation of premises for nine months after termination of a contract of employment conferred security of tenure upon the occupant. It is therefore imperative that in cases of termination or change of circumstance matters are dealt with speedily to avoid the Council taking on obligations towards a service tenant which were never envisaged. The loss of the accommodation by virtue of it being occupied by a secure tenant rather than a service tenant has financial consequences for the Council as does the cost of re-housing.

## **9 End of Service Tenancy/Contract**

At the end of the service tenancy as stated above, it is important to act speedily. It has previously been agreed that the Council would make an offer of alternative accommodation at the end of a service tenancy but this procedure is now in the process of review. It must be understood that the Council is no longer willing to grant secure tenancies upon the expiry of a service tenancy and may well choose to offer a nomination to a social landlord instead. This would be considered by the Council to be a reasonable offer of alternative accommodation and, if refused, the Council would not consider that it owes any further obligations to the tenant. It must be made clear at the outset in writing that the Council does not consider itself under any obligation to rehouse the occupant merely because of the ending of the employment contract and service tenancy

In the circumstances, therefore, it is important that there is a meeting with the tenant prior to termination, if possible, to explain the various options available to the tenant and that the Council will be seeking possession of the premises forthwith upon termination.

In normal circumstances one month's notice of termination should be given with a requirement to deliver up vacant possession of the dwelling. This is to comply with the Protection from Eviction Act 1977. If it is intended to do something different legal advice should be sought.

It may be that the employees contract has been determined because of wrongdoing but that does not mean the council can ignore the proper notice procedure. There may be other members of the family in occupation and they too have certain rights.

It cannot be stressed enough, appropriate advice either from Human Resources or Legal Services should be sought in cases of difficulty to avoid problems arising and there will be central monitoring of service tenancy arrangements to ensure that these procedures are adhered to.

The Chief Executive will keep the grant of tenancies under review