Report from: Ann Windiate, Director of Community Services

Author: Ray O’Shea – Homelessness & Housing Options Manager

1 Purpose of item

1.1 The purpose of this report is to consider and address the issues raised by the introduction of the Tolerated Trespassers Scheme by mhs homes in relation to the possible impact on Medway residents.

2 Recommendations

2.1 Members are asked to consider this item.

3 Background

3.1 Councillor Murray requested that an item be placed on the agenda of the meeting held on 28 March 2006 relating to the introduction of Tolerated Trespasser by mhs homes. This item was subsequently deferred as meetings were scheduled to be held between mhs homes, Medway Council and Shelter following this meeting.

3.2 The Director met with representatives from Shelter and the Citizens Advice Bureau on 15 May 2006.

3.3 There has been no meeting with mhs homes specifically to discuss in detail their policy on Tolerated Trespass but the matter was one of a number of issues of common interest raised with them at a regular partnership meeting recently.

4 What is Tolerated Trespass?

4.1 The term “tolerated trespasser” is applied to a person who was a tenant but whose tenancy has come to an end following a court order for possession but who nonetheless remains in occupation in circumstances tolerated by the former landlord.

The term “tolerated trespasser” was coined by Lord Browne-Wilkinson in a House of Lords case (Burrows v Brent LBC [1996]) in which he
said “I think it is fair to characterise the former tenant as a trespasser whom the landlord has agreed not to evict – a tolerated trespasser – pending either the revival of the old tenancy or the breach of the agreed conditions”.

4.2 The term most typically refers to former secure tenants of social landlords who have been the subject of formal possession proceedings. However immediate possession is not sought and the occupation of the tenant is permitted so long as they comply with the terms of the “suspended possession order” granted by the court in respect of paying their rent and a further sum off their arrears. A breach of any such suspended possession order would bring an end to the tenancy and while the landlord permits the former tenant to remain in occupation of the accommodation he will be a ‘tolerated trespasser’.

4.3 It is fairly common practice for some social landlords to use legal proceedings for possession as an expedient to collect rent whilst having no real intention to evict the tenant with the consequential loss of accommodation and homelessness – providing, of course, that the arrears are controlled and eventually cleared.

4.4 This allows the court some discretion and the landlord the opportunity to go back and quickly obtain a warrant for possession in a matter of weeks (rather than the months that possession proceedings can take) should there be non-compliance with agreed rent payments. Courts have historically been reasonably receptive to grant these judgements as a means to an end and arrangements can be made to pay off arrears and allow the occupier to continue residing at the property.

4.5 The status of ‘tolerated trespassers’ does result in a significant loss of the rights and protections they enjoyed when they were tenants – these losses most notably include:

- the right to have repairs carried out
- the loss of the Right to Buy where this exists
- in the event of death, succession rights for surviving family members

4.6 It should be borne in mind that a tenant who complies with a suspended possession order will retain his status as such and his rights under his tenancy agreement. It is only where the terms of the suspended possession order have been breached that the status of ‘tolerated trespasser’ will arise. If a suspended possession order has been breached, payment of all the outstanding arrears or an agreement to do so will not revive the previous tenancy or create a new tenancy. Only the court can revive a tenancy (whilst the suspended possession order is still active) by postponing the date for possession or setting aside the possession order. This revival of the tenancy works retrospectively, and the logical consequences of this include
bringing into being a repairing liability which has been dormant through the limbo period.

4.7 Where a suspended possession order has been breached and the arrears have been cleared it is, of course, possible for the former tenant to apply to the landlord for and to be offered a new tenancy. The terms of any such new tenancy may not automatically offer the full range of rights/protection that had been in the original tenancy. The former tenant may need to obtain his own independent advice on any such new terms and on the basis of that advice, decide whether or not to accept the tenancy.

5 mhs homes’ position

5.1 This section has been provided by mhs homes to explain the context of their Tolerated Trespass Policy.

5.2 mhs homes approach towards Tolerated Trespassers should be viewed as part of their wider approach to housing management and customer service. Ironically, whilst most successful businesses know who their best customers are and go out of their way to provide them with excellent service, housing organisations tend to be able to identify only their worst customers and tend to provide those bad customers by default with good service and honour the rights previously offered to that customer even though the customer may have reneged on his part of the agreement by failing to pay the affordable rent.

5.2 mhs homes has introduced a gold service for its good tenants which entitles them to better services, preference for tenancy benefits, a free handyman service, a discount card and a special magazine with information and offers. Tenants who owe serious rent arrears or have otherwise breached the terms of their tenancy will not qualify – at least for the time being - to be gold tenants and will not therefore receive these additional benefits and services. In addition, tenants who, despite the efforts made by mhs homes to avoid court action, become tolerated trespassers lose both the valuable additional rights granted with their original tenancy and the additional benefits and services offered to its tenants outside the tenancy agreement. Good tenants have long questioned why bad tenants appeared to get the same benefits and rights as those who pay their rent regularly and maintain their tenancies properly; this widespread change of approach to housing management reflects that rebalance of rights.

5.3 An additional right lost by some of mhs homes’ tolerated trespassers is the rent guarantee granted to tenants who transferred from the Council in 1990. This guarantee limited rent increases during the life of the tenant (and their first successor) to a maximum of inflation plus 1%. Currently the average rent for these tenants is the lowest in Kent.

Having lost their rent guarantee, these occupiers will have their rent (or mesne profits to be technically precise) increased to the affordable rent
level paid by mhs homes’ tenants who were not the beneficiaries of the original rent guarantee. In order to minimise the impact of this increase it will be spread over a number of years with annual increases set at a maximum of inflation plus 10%.

5.4 It is understood that individual tenants of mhs homes who have become tolerated trespassers have made representations and their advocates/representatives at Shelter are seeking to challenge the matter legally. There will also be monitoring of activity pertaining to these cases within the Housing Options/Homelessness Teams.

5.5 There is no reason why the affected tolerated trespassers on low incomes should not be entitled to claim the additional housing costs via Housing Benefit if they are claimants when rents are annually increased thus avoiding further arrears. mhs homes takes the view that since there are no more tolerated trespassers now than there were tenants in breach of court orders previously (these being precisely the same people) there should thus be no more homelessness resulting from rent arrears than has previously been the case.

5.6 mhs homes is committed to working with the Council in reducing homelessness in Medway and contributes more than any other housing association towards housing the homeless and reducing reliance on the use of bed and breakfast accommodation (including operating above and beyond the requirements of its contract with the Council) it would be somewhat incongruous if it was to operate a policy which somehow added to the Council’s burden.

6 Financial & Legal implications

6.1 A pre-January 1989 Council tenant who became tenant of mhs homes and subsequently a tolerated trespasser will have lost all of their rights under their original tenancy. Where this right included a rent guarantee and a new tenancy is granted to that person, there is no requirement for the new tenancy to also be subject to that rent guarantee.

6.2 The Council would have a legal duty under Part VII of the Housing Act 1996 and Homelessness Act 2002 to secure temporary accommodation for priority need groups who lose accommodation. Regard would also need to be given to any administrative costs borne by the Council. mhs homes have indicated that there are approximately 100 affected households and regard the tolerated trespasser scheme to be effective in getting residents to consider the importance of paying arrears and avoiding eviction.

7 Background papers

Community Services Overview and Scrutiny, 28 March 2006 – agenda item 5B

Contact for further details:

Name   Ray O'Shea
Phone no. - 01634 333574
Email – ray.shea@medway.gov.uk