COMMUNITY SERVICES
OVERVIEW AND SCRUTINY COMMITTEE

11 SEPTEMBER 2007

TOLERATED TRESPASSERS

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1 Purpose of item

1.1 The purpose of this report is to review the impact of the introduction of the Tolerated Trespassers Scheme by MHS Homes 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 a tolerated trespasser policy by MHS Homes; as requested by the Committee this report provides a review of the impact of the policy.

3.2 There had been no meeting with MHS Homes specifically to discuss in detail their policy on tolerated trespass but the matter had previously been raised with them at regularly convened partnership meetings.

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 typically 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 The following section was originally provided by MHS Homes in July 2006 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 have 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 good 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 continues to be committed to working with the Council in reducing homelessness in Medway and contributes more than any other housing provider towards housing homeless people and reducing reliance on the use of bed and breakfast accommodation (including operating above and beyond the requirements of its contract with the Council).

6 Introduction of Guidance

6.1 In Summer 2006, the Department for Communities and Local Government introduced guidance to assist local housing authorities prevent the unintentional creation of tolerated trespassers.

The primary intention was “to inform Local Housing Authorities (LHAs) of recent developments concerning secure tenants who have become 'tolerated trespassers' as a result of the wording of a possession order made against them”.

New wording for the standard order postponing possession was agreed, together with a new procedure leading to obtaining a warrant for eviction. This mechanism ultimately sought to avoid the unnecessary creation of new tolerated trespassers. It also looked to make practical suggestions as to how existing tolerated trespassers could find appropriate remedies to their housing status.

6.2 Further to this the DCLG issued another paper in August 2007 - “Tolerated trespassers: A consultation paper” which acknowledges the
difficulties caused and the anxiety that residential occupiers might be experiencing; DCLG is seeking responses on the matter by 2 November 2007 and is summarised as follows:

“Many thousands of social tenants, both local authority and Registered Social Landlord (RSL) tenants, have become ‘tolerated trespassers’, seriously affecting their rights and causing practical difficulties for their landlords. Many tenants - and even landlords - may not even be aware of this. This paper looks at options for remediying the situation both in the future and for existing tolerated trespassers”

6.3 It should be noted that the document addresses local authority and registered social landlords. Whilst it is recognised that MHS are presently unregistered Medway Council has nevertheless provided them with copies of both documents. Officers are currently awaiting their response as to their position and how this might affect their tenants. A verbal update will be provided at the meeting.

6.4 MHS have stated that they have a dedicated service to assist tenants in rent difficulties, including two benefits advisors together with exercising their fundamental housing management role to address problems of this sort. They have a stated intention to prevent the loss of accommodation, and identify solutions prior to initiating legal proceedings.

7 Impact On Homelessness Service

7.1 The Homeless Persons Unit has not accommodated any MHS tenants who fall into the category of “tolerated trespasser”. That said, the policy that has been introduced would not logically encourage eviction and/or actual loss of accommodation.

7.2 If this were to be the case, Medway Council would have clear legal duties to provide temporary accommodation pending a decision on individual applications made in this way (as per Part VII of the Housing Act 1996 and Homelessness Act 2002 as amended).

8 Financial & Legal implications

8.1 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.

8.2 As an unregistered social landlord, MHS would not be subject to rent convergence criteria covering both local authorities and RSLs. That
said, tenancies that pre-date the legislative changes in January 1989 (Housing Act 1988) would retain rent control, as opposed to those granted after - specifically assured and/or shorthold tenancies – which are subject to a “market” rent.

8.3 Local authorities, RSLs and MHS will all have the potentiality to have tolerated trespassers within their housing stock. Following the governmental guidance issued and ongoing consultation exercise, it would be possible for local authorities and RSLs to adopt measures to ensure that the status of tolerated trespass ought not to recur. It is intended that MHS will also be given the fullest opportunity to outline their position. Numbers for tolerated trespassers in local authority/RSL stock can be obtained, and a request for the numbers in MHS housing stock has been made and will be provided when received.

7 Background papers

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

Legal Action Law & Practice/housing – May 2006, Tolerated trespassers: the problem and solution


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