

HOMES POLICY DEVELOPMENT GROUP 21 MARCH 2023

THE USE OF FLEXIBLE TENANCIES

Cabinet Member(s): Councillor Ashley Wilce, Cabinet Member for Housing
Responsible Officer: Simon Newcombe, Corporate Manager for Public Health, Regulation and Housing

Reason for Report & Recommendation: The use of flexible tenancies can be challenging and this report sets out some of the issues impacting their use. Members are asked to give consideration as to whether or not they would like Mid Devon Housing (MDH) to undertake further research and to work up a project plan setting out a proposal to consult tenants and other stakeholders on the continued use of these tenancies.

Recommendation: That Members agree the development of a project plan setting out proposals to consult tenants and other stakeholders on the continued use of flexible tenancies by Mid Devon Housing for discussion and agreement at a future meeting of the Homes Policy Development Group

Financial Implications: The activity of the landlord service, known MDH is accounted for with the Housing Revenue Account (HRA). The HRA is ring fenced and subject to specific financial controls.

Budget and Policy Framework: The HRA is funded in large part by rental income. Any consultation relating to the continued use of flexible tenancies has to be funded using budgets with the HRA. However, there are monies set aside for tenant engagement which could be used.

Legal Implications: The Housing Act 1985 applies with regard to the management of Council housing. The relationship with tenants is set out in our Tenancy Agreement. This details the rights and responsibilities of both parties including those obligations relating to repairs. The tenancy agreement also takes account of other relevant legislation including that which amended the original Housing Act, the Localism Act 2011 and the Anti-Social Behaviour, Crime and Policing Act 2014. There is a legal obligation to consult tenants with regard to any changes which MDH wishes to make to the Tenancy Agreement.

The Tenant Involvement and Empowerment Standard within the Regulatory Framework for Social Housing, as operated by the Regulator for Social Housing (RSH), requires registered providers of social housing (RPs) such as MDH, to ensure that tenants are given a wide range of opportunities to influence and be involved in the formulation of their landlord's housing-related policies and strategic priorities; agreeing local offers for service delivery.

Risk Assessment: The use of flexible tenancies requires review but any proposals to change the available forms of tenure that can apply to tenants of MDH must involve consultation with tenants to ensure statutory and regulatory compliance. Failure to do so could result in complaints, negative regulatory judgement, judicial review and reputational risk.

Equality Impact Assessment: MDH is currently reviewing our approach to the collection of data relating to the needs of tenants to support compliance with the regulatory requirement that we should understand these and tailor services accordingly. A project is currently being discussed to ensure that we maximise the data available relating to diversity of our tenants.

Relationship to Corporate Plan: Supporting and growing active tenant engagement is a priority for the Council.

Impact on Climate Change: If the proposal is agreed, Officers will ensure that any project plan prioritises the use of electronic means of engagement with tenants and other stakeholders in order to minimise the use of paper and printing involved in such a consultation.

1.0 Background

- 1.1 Council tenants became secure tenants following the 1980 Housing Act. After the 1996 Housing Act, introductory tenancies came into being. The Introductory Tenancy Scheme was introduced in Mid Devon from 4 April 2004 as a means of combatting anti-social behaviour and other serious breaches of tenancy by new Council tenants.
- 1.2 From 2003, landlords could demote tenancies in response to issues arising from a failure to adhere to conditions of tenancy and the Council did, on occasions, use this as a means to manage tenancy issues. Then, the Localism Act 2011 introduced flexible tenancies of up to 5-years with an introductory tenancy form for new Council tenants. These are otherwise known as fixed term tenancies.
- 1.3 All tenancy agreements contain rights and responsibilities for both parties and the relationship between landlord and tenant is based on the particular agreement used at the letting. The grounds for possession relating to secure tenants are set out in Schedule 2 of the Housing Act 1985.
- 1.4 Secure tenants have security of tenure because once they have this type of tenancy, they can remain in the property until they pass away, subject to meeting the requirements of the tenancy agreement. At the time, the press described these tenancies as “lifetime tenancies”.
- 1.5 Flexible tenancies were introduced to enable social landlords to offer fixed term tenancies to new social tenants. A decision to renew them at the end of the term can be made following a detailed review of factors including income, employment status, under-occupancy and behaviour.
- 1.6 The 2016 Housing and Planning Act set out proposals to ensure that all new lettings offered by Councils in relation to general needs housing were made using flexible tenancies. However, the plans were abandoned in August 2018 with the launch of the Social Housing Green Paper following the disaster at Grenfell Tower.
- 1.7 Research undertaken by Watts and Fitzpatrick (2018) to look into the effectiveness of fixed term tenancies identified some tension between two “competing visions” of social housing: one focused on meeting the acute housing

needs of high numbers of households by increasing what may be termed as “tenancy churn” or the “flow” of tenants through social housing; and the other focussed on meeting the longer-term and wider needs of households for stability, belonging and connectedness to their homes and communities. The research involved housing associations, and Councils such as Mid Devon District Council with retained housing stock.

- 1.8 The research also found that the practical consequences of using fixed term tenancies had yet to be fully understood given that the use of these tenancies was relatively new and experience of tenancy renewals was limited. The impact of these tenancies in terms of the resourcing required to manage them, their effect on both tenants and the areas where they reside, and their capacity to deliver more empty homes for those in need needed to be considered as more tenancies ended and what happened in terms of renewing them.

2.0 The Existing Tenancy Strategy

- 2.1 A registered provider of social housing (RP) such as Mid Devon Housing (MDH) can only use flexible tenancies if the strategic housing authority, the Council in this case, specifies that they can be used within the tenancy strategy.
- 2.2 The existing tenancy strategy was adopted in 2012 and is due for review. RPs which work in the District are required to have regard to this and it should set out a description of the high level objectives that RPs should include in their policies. In particular, these policies must relate to:
 - The kind of tenancies they grant
 - The circumstances in which they will grant a tenancy of a particular kind
 - Where they grant tenancies for a fixed term, the length of the terms
 - The circumstances in which they will grant a further tenancy on the coming to an end of an existing tenancy.
- 2.3 The existing tenancy strategy states that the Council is committed to the use of fixed term or flexible tenancies as it considers that this would enable the best use of the social housing stock in the District.
- 2.4 The proposed review of the tenancy strategy, a document which relates to the Council’s strategic housing function, is likely to propose a softening of this requirement to enable RPs working in the District, including MDH which manages the retained housing stock, to move away from the use of fixed term tenancies if they feel that it is appropriate to do so. Recommendations will be made to Members at the time as this policy is considered by the Homes Policy Development Group (PDG).

3.0 The Use of Flexible Tenancies

- 3.1 The Council has been using flexible tenancies since 8 April 2013. The need to “make best use of the housing stock” influenced the decision to introduce this form of tenure. However, there was also support for the view that social housing should be available to those who need it the most at the time when they need it the most; meaning that it is there as a safety net for those in housing need,

offering a “helping hand” to enable them to get into a position whereby they can resolve their housing needs in a different way at the end of the fixed term.

- 3.2 Currently, the majority of those tenants who have never previously held a social housing tenancy are issued with introductory tenancies lasting a year which can be extended in certain circumstances as set out in our introductory tenancy policy. They are then usually issued with a flexible tenancy lasting 5 years so in effect will have a right to reside in their new home for a period of 6 years after first moving in.
- 3.3 However, in some circumstances, tenants will be issued with a tenancy for a shorter fixed term of 2 years.
- 3.4 The regulatory framework for social housing contains a requirement set out in the Tenancy Standard which compels social landlords using flexible tenancies to have an agreed tenancy policy. This requirement arises due to the need to demonstrate that they have complied with the policy when seeking to end a flexible tenancy. The ending of the tenancy can also trigger a complaint and landlords need to be able to demonstrate that any action taken was in line with policy previously agreed (in order to deliver openness and transparency).
- 3.5 The tenancy standard also requires social landlords to: “develop and deliver services to address under-occupation and overcrowding”. Landlords are expected to make the best use of the housing stock available.
- 3.6 As stated, there is a relationship between social landlords and strategic housing authorities. As a Council with retained stock, MDDC needs to ensure that the tenancy policy developed by the Council in the landlord role corresponds with the tenancy strategy agreed as a policy of the housing authority. The tenancy strategy is likely to be reviewed during 2023 so a review of flexible tenancies would be timely.

4.0 Arguments for and against the Use of Flexible Tenancies

- 4.1 As stated, the rationale used in Mid Devon in support of the use of flexible tenancies was related to a desire to make best use of the housing stock. In our District, there is an aging population and this was reflected in the diversity of the tenants in our homes. There were levels of under-occupation and the aim of the new strategy was to increase turnover in order to ensure that the supply of homes was increased. Later on, welfare reform became a significant driver in relation to this aim and the Devon Home Choice policy now gives priority to those wishing to downsize, thereby supporting the aim of making best use of the housing stock.
- 4.2 In addition, the desire to give those in need a “helping hand” for a short time whilst they really needed was a key influence on the decision to adopt this form of tenure in Mid Devon. The ability to end a tenancy on the grounds of anti-social behaviour was given less priority although when the tenancy strategy and the tenancy policy were adopted, they both contained clauses which stated that this could be grounds for non-renewal of the tenancy at the end of the term.
- 4.3 At the start, there was some concern about the risks associated with the use of flexible tenancies. For example, it was felt that the use of flexible tenancies

could impact tenants individually and collectively. This risk was identified on the basis that people may not feel settled or emotionally connected to their new home due to the fact that they may not be there for a long period. This, in turn, could then impact community cohesion due to the fact that some people did not feel that they would be living in their neighbourhood for a long period.

4.4 Other considerations to inform the discussion relating to the use of flexible tenancies include:

- Secure tenancies are more attractive to tenants
- Different types of tenure complicate the lettings process with the resulting administrative burden
- Secure tenancies support the development of sustainable communities
- People may be reluctant to decorate or to fully furnish their home if they have a flexible tenancy leading to increased void costs
- People with flexible tenancies may find it difficult to find a mutual exchange because secure tenants may not wish to lose their security of tenure
- Families who have flexible tenancies may undergo the stress of a review of their household circumstances only to find that their tenancy is renewed
- The administrative costs associated with the review of a flexible tenancy
- Any decisions relating to the review of a flexible tenancy must account for the long term health needs and disabilities found in each household
- Flexible tenants have the Right to Buy and if there is a concern that the tenancy will not be renewed, they may exercise this right in order to remain in their home. This may not have been something that they considered previously but the thought of losing their property may focus their attention on the options available to enable them to stay put.

5.0 The Management of Flexible Tenancies

5.1 There is an administrative burden associated with the use of flexible tenancies.

5.2 These tenancies need to be monitored carefully at the beginning and then they need to be reviewed in line with the provisions of the legislation before a decision can be made not to renew one.

5.3 A court can only refuse possession if the correct procedure has not been followed by the landlord or if the court is satisfied that the decision not to grant another tenancy was otherwise “wrong in law”.

5.4 There are three conditions which must be met before a case can be referred to Court for a possession order:

- The fixed term has ended
- The tenant has been given no less than 6 months’ notice in writing
 - Stating that the landlord does not propose to grant another tenancy on the expiry of the fixed term
 - Giving the reasons why
 - Informing the tenant of their right to request a review and the timescale for this

- The tenant has been given no less than two months' notice in writing stating that the landlord requires possession of the property
- 5.5 If the tenant refused to vacate the property, the landlord must commence possession proceedings. Therefore, the review procedure must be lawful and Officers need to ensure that they do everything in the timescales expected and in line with published policy.
- 5.6 Tenants have a right to a review of the decision to end the flexible tenancy.
- 5.7 Our tenancy management policy 2022, incorporated in the tenancy standard policy 2022, which was recently adopted by the Council, states that the following will be taken into account in relation to any decision not to renew a flexible tenancy, although this list is not exhaustive:
- Household profile, including under-occupation
 - Income and savings
 - Tenancy conduct
 - Whether the property was adapted for someone no longer resident there
- 5.8 The review of flexible tenancies is resource intensive. During the pandemic, Officers needed to make adjustments to deliver Covid-secure practices. Previously, Officers had visited individual households and sought to examine any supporting evidence in person. Officers are now endeavouring to visit tenants, in line with good practice, in order to discuss matters more fully with tenants but this creates a burden due to the impact on the time of the Officers.

6.0 Unintended Consequences Arising from the Use of Flexible Tenancies

- 6.1 Several issues have emerged over time and are widely recognised as being problematic with regard to the management of flexible tenancies. These issues can be summarised as follows:
- **Inflexibility around joint tenants** - if one joint tenant has left the home, the landlord cannot simply renew the tenancy at the end of the fixed term in the sole name of the remaining joint tenant. This scenario is covered by the Housing Act 1985. Due to legal considerations, Council landlords have to serve the relevant 6-month and 2-month notices prior to not renewing the tenancy at the end of the fixed term. Possession proceedings must be started and possession obtained prior to creating a new sole tenancy. This then raises the question of whether or not it would be reasonable to recharge the remaining tenant under the circumstances.
 - **Enforcement and court outcomes** - if a social landlord seeks to enforce the relevant terms of a flexible tenancy in relation to rent arrears, and the Court does not grant outright possession, instead making an Order for suspended possession, this results in the flexible tenancy becoming a secure tenancy.
 - **Forfeiture and Council liability** - tenancy agreements must include a clause which allows landlords to forfeit (the MDH flexible tenancy agreement includes this). If the landlord serves a Notice of Seeking Termination on a flexible tenant on grounds other than rent arrears, due to

legal issues, the landlord is required to serve the same Notice as the rent arrears but outlining the grounds. A Section 146 Notice must also be served and once this has been done, the landlord has to waive the right to collect rent.

- Once a landlord has elected to forfeit, any action incompatible with the decision to forfeit can (and often does) amount to the landlord having waived the breach. The most common example of waiver would be a demand for, or acceptance of rent after service of a Section 146 notice. So, if there is a demand for, or acceptance of rent by the landlord, in the period between electing to forfeit (service of Notice of Seeking Termination and/ or a Section 146 notice) and the issuing of proceedings, it can be argued that the landlord has waived the right to forfeit.
- **Evidencing significant change in circumstances/right to social housing** - very few flexible tenancies are not renewed on the basis that frequently it is difficult to prove that the circumstances of the tenants have changed to such an extent that they should not remain in social housing. Experience has shown that any decision not to renew tends to result in requests for appeals and challenges, usually relating to the impact that any decision to end the tenancy would have on individual members of the household.
- Given the current issues associated with the cost of living, many people would now find it difficult to find alternative accommodation in the private sector or to secure a mortgage offer which would allow them to purchase a home, even if they did have a high level of income.

7.0 Consulting Tenants and Other Stakeholders

7.1 There are statutory and regulatory obligations relating to the need to involve tenants in any decisions around the type of tenancy agreements in use. If Members agree that Officers can work up a project plan relating to a consultation on the continued use of flexible tenancies, this will include options for consideration.

7.2 Potentially, these could include:

- Halting the use of flexible tenancies
- Maintaining the status quo – but with increasing stock numbers this has implications in terms of the resource needed to manage flexible tenancies going forward
- Adopting a blended approach – based on people and/ or property type. For example, retain the use of flexible tenancies for larger homes including three bedroom and larger units. Another option would be to use tenancies of differing lengths or retaining the use of 2 year flexible tenancies for cases where there are exceptional circumstances.

7.3 Other registered providers have made changes to their tenancy policies. Curo, a housing association based in Bath, is converting fixed term tenancies to assured tenancies when the current term ends on each contract. Other major registered providers including Sanctuary, Peabody and London & Quadrant are

also phasing out fixed term tenancies. More locally, LiveWest are using a blended approach and have reduced use of flexible tenancies.

- 7.4 Dacorum Council ceased the use of 5-year flexible tenancies with effect from 1 April 2020. They issue new Council tenants with a new secure tenancy. Waverley Council consulted tenants and all new ones are now issued with a secure tenancy with effect from 5 July 2022. They will be converting current flexible tenancies in phases. MDH have identified that many other stock holding Local Authorities have reviewed these tenancies and are reducing or ending use.

8.0 Recommendation

- 8.1 That Members agree the development of a project plan setting out proposals to consult tenants and other stakeholders on the continued use of flexible tenancies by Mid Devon Housing for discussion and agreement at a future meeting of the Homes Policy Development Group

Contact for more Information: Simon Newcombe, Corporate Manager for Public Health, Regulation and Housing, snewcombe@middevon.gov.uk or 01884 255255.

Circulation of the Report:

Members of the Housing PDG
Cllr Ashley Wilce, Cabinet Member for Housing and Property Services
Leadership Team
Corporate Management Team
Legal Services

Further Information:

The tenancy agreement currently in use by Mid Devon Housing:

<https://www.middevon.gov.uk/residents/mid-devon-housing/help-and-support/strategies-and-policies/tenancy-agreements/>

The Housing Strategy & other policies currently in use by the Council as a landlord:

<https://www.middevon.gov.uk/residents/mid-devon-housing/help-and-support/strategies-and-policies/>

Research:

Watts, B., & Fitzpatrick, S. (2018). *Fixed Term Tenancies: Revealing Divergent Views on the Purpose of Social Housing*. Heriot-Watt University. Available at <https://researchportal.hw.ac.uk/en/publications/fixed-term-tenancies-revealing-divergent-views-on-the-purpose-of->