

EXECUTIVE BOARD – 21 DECEMBER 2010

Title of paper:	PUBLIC INTEREST REPORT – HOUSING ALLOCATIONS ETC	
Director(s)/ Corporate Director(s):	Director of Legal and Democratic Services	Wards affected: All
Portfolio Holder(s):	Councillor Chapman – Deputy Leader and Portfolio Holder for Resources, Economic Development and Reputation	Date of consultation with Portfolio Holder(s): Various
Contact Officer(s) and contact details:	Glen O’Connell, Director of Legal and Democratic Services	
Other officers who have provided input:		
Key Decision:		
	Yes / No	
Reasons for Key Decision:		
Expenditure of £500,000 or more in a single year		
Revenue income of £500,000 or more in a single year		
Savings of £500,000 or more in a single year		
Capital expenditure of £1,000,000 or more		
Capital income of £1,000,000 or more		
Significant effects on communities living or working in an area comprising two or more wards in the City		
Relevant Council Plan Strategic Priority:		
World Class Nottingham		
Work in Nottingham		
Safer Nottingham		
Neighbourhood Nottingham		
Family Nottingham		
Healthy Nottingham		
Serving Nottingham Better		
Summary of issues (including benefits to customers/service users):		
This report summarises action taken on legal issues arising from the District Auditor’s Public Interest Report on housing allocations issues and other matters. It concludes that legal avenues have been explored to reasonable conclusions and that further investment in officer time and external expertise is not warranted.		
Recommendation : That the positions of Nottinghamshire Police and the District Auditor be noted and that the report be accepted as evidence that the Council has taken all reasonable steps to pursue legal action in relation to the cases identified by the District Auditor in the public interest report.		

1 **BACKGROUND**

1.1 In January 2009 the District Auditor issued a Public Interest Report, under Section 8 of the Audit Commission Act 1998, in relation to issues arising from an investigation into the management of its housing stock. The recommendations were accepted in full by the City Council and are set out below.

“19 The Council and the NCH Board need to demonstrate that they have addressed the failings described in this report. They need to demonstrate that exemplary standards of public administration are now present in the management of council housing in Nottingham.

20 The Council should consider the issues raised and the recommendations we have made. Our recommendations are as follows:-

- Review the governance arrangements within NCH and retained Housing Services in the City Council to ensure they are both adequate and operating effective in respect of:
 - the declaration of interests in a formal register;
 - rules on avoiding involvement in cases where a personal interest or a personal association may be involved;
 - procedures for dealing with bullying and harassment; and
 - procedures to allow staff to raise issues confidentially (whistle blow) when they encounter irregularities or other issues of concern.
- Ensure that adequate and proportionate audit trail arrangements are in place to prevent allocations being made inappropriately in future.
- Ensure that the procedures governing manual allocations are operating in a proper manner and that adequate records are being maintained in support of these allocations decisions.
- Ensure that procedures prevent inappropriate restrictions on offers of housing being entered into the computerised allocations system and that adequate records are being maintained in support of decisions made.
- Ensure that procedures for the recruitment of temporary staff through the First Call agency are now operating in a proper manner, to minimise the risk of patronage or favouritism occurring.
- Ensure there are mechanisms in place that require councillors to register any potential conflicts of interest when seeking to advocate on behalf of local constituents.

21 The Council and NCH should also consider in detail the individual cases reported here and determine what action is necessary, particularly regarding the legitimacy of tenancies and right to buy purchases.”

1.2 Since the receipt of the report extensive work has been carried out by Nottingham City Homes Ltd and the City Council to improve systems in pursuit of 19 and 20 above. This report focuses on the recommendation in paragraph 21, and the following paragraphs summarise action taken, breaking down the cases in separate headings.

The case involving the alleged conduct of a City Councillor is being dealt with separately through the City Council's Standards Committee's local determination regime. The City Council engaged specialist external Leading Counsel to work with dedicated in-house legal resource, to review and pursue all recovery options including developing two types of claim, the application of which, in these circumstances, may have broken new ground. Costs, to date, of using external Counsel and backfilling in-house staff are set out in Section 4 below.

- 1.3 **Housing Act 1985 Ground 5 possession action** : Under the Housing Act 1985 the City Council can seek to repossess tenancies where a ground in the Act is made out. It is then a matter for the discretion of a County Court Judge whether to order possession in all the circumstances. Ground 5 is the relevant ground. "Ground 5 – The tenant is the person, or one of the persons, to whom the tenancy was granted and the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by (a) the tenant, or (b) a person acting at the tenant's instigation." The difficulty here is, to succeed, the Council has to show that the tenancy has been induced by reliance on the representation. Counsel has advised that the burden of proof here is the civil standard but very strong evidence is needed to sustain an allegation. Detailed analysis of the ground of possession, as applied to the cases, has shown that, it was quite clear that, whatever was stated by the applicant, it did not induce the decision to grant a tenancy, as it would have been granted anyway. This relates back to the underlying concern over inappropriate management of the allocation system allowing abuse of systems. Counsel and in-house staff have reviewed all the cases cited by the District Auditor and concluded that actions for repossession under this ground either had negligible or no prospects for success, on the basis of the evidence available.
- 1.4 **Challenge to "secure tenancy" status** : Security of tenure as a "secure tenant" will depend on ongoing status in occupying the premises as their only or principal home. The City Council would have to prove that a tenant was not in such occupation. One case was investigated via NCH to assess whether a claim could be pursued on that basis, but no evidence has yet been forthcoming. The case will remain under review.
- 1.5 **Ultra Vires** : Given the difficulties of pursuing repossession of tenancies outlined above, Counsel also developed an argument that tenancies granted outside of allocation policies were "ultra vires" (beyond powers) and, hence, could not give rise to statutory protection granted to secure tenants. This argument is intended to get around the Ground 5 problem and the evidential narrowness and uncertainty apparent in attacking the "secure tenant" definition. The difficulty with the ultra vires argument is that it does not involve any allegation of fault with the tenant and a court may be reluctant to find against a tenant in such circumstances. Independently of its development for Nottingham's situation, the argument has, very recently, been run in a case involving Birmingham City Council and was not accepted by the Court of Appeal. Following that judgement this avenue was abandoned, with Counsel acknowledging that the Birmingham case was on "all fours" with Nottingham's cases.
- 1.6 **Right to Buy** : The difficulties inherent in maintaining a tenancy possession action are amplified where the tenant has exercised a Right to Buy which has been accepted by the Council. The acceptance involves a recognition of the secure tenancy which would be difficult to deal with in a claim for return of the property. There are serious evidential difficulties with RTB cases, but two cases have been pursued:-
 - 1 A current RTB application, originally accepted, is being contested;
 - 2 Investigation of paperwork concerning a RTB sale showed a previous RTB history

which gave rise to a claim for recovery of overpaid RTB discount. Judgement was obtained for the City Council in the case, and has been secured by a charging order over the property.

- 1.7 **Fiduciary Duty/Civil Fraud** : This is an argument developing on the lines that specific senior managers had a “fiduciary duty” not to jeopardise the Council’s assets and create losses. Action was contemplated against one individual former senior manager. Counsel has advised that any proceedings would have to be strongly evidence-based, very probably defended and highly expensive to run. On the evidence, and having regard to the means of the former employee, it has been concluded that such proceedings, carrying a significant risk of failure and/or non-recovery of damages sufficient to match the City Council’s likely costs, would not be an effective use of public money.

1.8 **Involvement of external bodies**

District Auditor

Obtaining evidence proved a general difficulty in pursuing cases, given the lapse of time between the incidents and the Public Interest Report, but also because of statutory restrictions on the release of information by the District Auditor who, after taking legal advice, informed the Council that interview notes obtained in the course of investigations under the Audit Commission Act 1998 could not be released to the City Council (save in one case where the subject consented to the release).

Police - The Fraud Squad : After Counsel considered the Public Interest Report the Police were asked to review their position on whether they intended to take criminal proceedings on any cases. They have now confirmed that they are satisfied that their original exercise, which resulted in no criminal proceedings being taken, was carried out reasonably and in accordance with their procedures and that they will not be pursuing cases any further.

- 1.9 **Conclusions on litigation** : The Audit Commission recommendations, in the Public Interest Report were “that Nottingham City Council and Nottingham City Homes should ... consider in detail the individual cases reported ... and determine what action is necessary, particularly regarding the legitimacy of tenancies and Right to Buy purchases”. Decisions to proceed or not with cases have to have regard to the quality of evidence, likely outcomes and costs of proceedings. The public interest in taking stop/go decisions on litigation needs to balance public demonstrations of intent to deal with improper conduct and practices against the costs and uncertainties involved in the litigation. In these cases, given the background of marked improvements by NCH in management practices, it is felt that the public interest would not be best served by investing large amounts of additional resources in pursuing uncertain litigation. The District Auditor has been kept informed of progress on the cases and has been made aware of this opinion and has made express reference to this work in her recently issued Annual Audit Letter as follows:-

“32 Last year’s annual audit letter reported on the public interest report issued in January 2009 on your housing services from 2003 to 2005. That report highlighted concerns over the way in which properties had been allocated to tenants and the use of a council in-house employment agency to recruit staff into the housing Department. My annual audit letter recognised that there was already evidence of positive change within housing and made specific reference to the re-inspection of Nottingham City Homes (NCH) in January 2009 which

resulted in a two star rating;

- 33 During this year I have followed up on the progress made by the Council in dealing with the recommendations made in the public interest report not addressed by the inspection process. In particular, the progress made by the Council in considering in detail the individual cases highlighted by our investigation;

Progress re individual cases

- 34 I have considered the work carried out by the Council to review and pursue recovery options. I am satisfied that they have taken a robust approach and sought various options to facilitate recovery. I consider that making their decisions about whether or not to proceed with cases on the basis of the quality of evidence, likely outcomes and the cost of proceedings is a reasonable approach.”

- 1.10 **HR issues** : The senior management responsible for the allocations system, at the time of the Audit Commission investigations, have all departed, so there has been no opportunity to undertake disciplinary proceedings at this level. Most Housing Department staff transferred to Nottingham City Homes Ltd, so the City Council has had relatively few members of staff to focus on. The following summarises the position for those staff:-

- 1 Agency worker providing administrative support to a senior manager involved in several cases – services terminated.
- 2 Former ex-Housing department worker who moved to another Council department, was allegedly involved with sister in RTB/tenancy malpractice. Following investigation, disciplinary action not pursued. The employee took a claim against the City Council alleging race discrimination, which was subsequently withdrawn.
- 3 Groundsman allegedly provided tenancy outside allocation policy. Following investigation, disciplinary action not pursued.
- 4 Former Housing Department worker, who moved to another Council department. Allegedly manipulated allocation systems to prioritise a person connected with him. Investigation/disciplinary process resulted in a final written warning. The employee took a claim against the City Council alleging race discrimination, which was subsequently withdrawn.

2 REASONS FOR RECOMMENDATIONS (INCLUDING OUTCOMES OF CONSULTATION)

- 2.1 The City Council agreed to accept the recommendations in the Public Interest Report. The action taken since then flows from that, and this report presents the outcomes of that work.

3 OTHER OPTIONS CONSIDERED IN MAKING RECOMMENDATIONS

- 3.1 The City Council could pursue legal actions in respect of all, or some, of the classes of action referred to in this report. By doing this, it would incur very significant additional costs with very uncertain outcomes, given the prospect of costs awards against the City Council if actions fail, with consequential financial and reputational damage.

4 FINANCIAL IMPLICATIONS (INCLUDING VALUE FOR MONEY)

- 4.1 Costs, to date, for instructing Counsel and for backfilling the work of in-house solicitors who were dedicated to this work are £101,714.31 (excluding VAT). Counsel has indicated that the pursuit of litigation will involve substantially more costs for the Council.

5 RISK MANAGEMENT ISSUES (INCLUDING LEGAL IMPLICATIONS, CRIME AND DISORDER ACT IMPLICATIONS AND EQUALITY AND DIVERSITY IMPLICATIONS)

- 5.1 Legal issues are addressed in the body of the report. Counsel's advice has generally been that prospects for success in any litigation ranged from non-existent to, at best, uncertain, and that any such proceedings carried substantial costs, with high risks of costs awarded against the Council.
- 5.2 The investigative processes undertaken with City Council staff gave rise to race discrimination claims which were subsequently withdrawn.

6 LIST OF BACKGROUND PAPERS OTHER THAN PUBLISHED WORKS OR THOSE DISCLOSING CONFIDENTIAL OR EXEMPT INFORMATION

- 6.1 None.

7 PUBLISHED DOCUMENTS REFERRED TO IN COMPILING THIS REPORT

- 7.1 Public Interest Report 2009