

London Borough of Hammersmith & Fulham

The Defend Council Homes Unit

Report

January 2018

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1. Introductory letter

Dear Leader,

I am pleased to enclose with this letter the report of the Defend Council Homes Unit.

After it became clear that the Council's decision to approve the Residents' Commission's recommendations was to be frustrated, we were delighted when you asked myself, Anthony and Peter to form the Unit early last year.

Your commitment to continue the search for a way of safeguarding council residents and their homes, and your expression of faith in us, in asking us to take on this task, have given us a unique sense of responsibility over the last few months.

We believe we have arrived at, if not a perfect solution, a plausible legal model capable of protecting residents and the Council's housing stock against unwarranted and unwanted redevelopment. Our report explains how we arrived at the model and how it would work in terms of legal principles. It has not been part of our remit to lead a consultation with residents, but we know this will be one of your priorities if you decide to pursue the recommendations in our report.

Our recommendations outline what the Council will need to do to develop the model and put effective safeguarding arrangements in place. While our proposals are innovative and in some respects untested, we are in no doubt that the unprecedented pressures on housing in London, and in particular the pressures on council housing in our Borough, call for new thinking.

The tragedy of the fire at Grenfell Tower midway through the year meant that the term 'safeguarding' subsequently took on a new set of meanings in relation to council housing. This has prompted us to consider whether some of the elements in our proposed safeguarding model – the scope of the Policy, the role of the Advisory Body – could usefully be applied in a wider context. We have referenced these in the report without developing the ideas in detail.

I hope you and Cabinet colleagues will find the report helpful,

Yours sincerely

Shirley Cupit

*Shirley Cupit
Chair, Defend Council Homes Unit
Resident, Queen Caroline Estate*

2. Background

As land values and property prices have continued to rise in London it has become increasingly difficult to maintain a supply of affordable housing to meet the needs of the capital. And there are many instances of regeneration schemes where estates of affordable housing have been replaced by higher value, higher cost market housing but with a significantly reduced quantum of new affordable housing. The impact of London's housing market on households with low incomes is becoming an almost daily national news item¹.

The tension between rising land values and the need for affordable housing is most keenly felt in boroughs like Hammersmith & Fulham, where property prices are among the highest in the country. Not only does this militate against the development of new affordable housing, it also creates a latent pressure to release the development value tied up in land occupied by existing council estates.

This has been a key underlying theme in the story of the West Kensington and Gibbs Green estates, where residents have for more than eight years been caught up in a complex and controversial scheme involving the recycling of development values. An active campaign to oppose the current scheme has seen the production of an alternative 'People's Plan' and an application to the Secretary of State for the residents to take the estates into community control.

The deal that involved West Kensington and Gibbs Green being sold to the developers of the Earls Court regeneration project is an example of what could have happened – and could still happen – to other estates in the Borough unless proper protections for residents and their interests can be put in place.

The present administration of the Council was determined to protect residents living in council housing from unwanted regeneration or redevelopment and campaigned in the 2014 local elections on a manifesto pledge to, '... work with residents to give them ownership of the land their homes are on.'

Early in 2015 the administration set up a Residents' Commission on Council Housing (the Residents' Commission) to look at ways of delivering this pledge. After eight months' work, including public hearings, study visits and extensive consultation, the Residents' Commission concluded by recommending that the Council transfer the ownership of its housing to a new community controlled housing association, where it would be out of the reach of future administrations of the Council.

The Residents' Commission's recommendations were pursued for a further twelve months before it was finally accepted that, in the absence of financial support from the Government, a transfer of ownership could not proceed.

¹ e.g. "... 292,000 people left [London] in the year to the middle of 2016, up 14% on a decade earlier ... The trend is being driven by people leaving London's relatively expensive housing market but also by financially squeezed councils sending homeless families out of the capital ... because they cannot afford to buy housing stock in London." Guardian, 30 December 2017.

3. DCHU – composition and remit

By the end of 2016, although it was clear that the proposed transfer of the stock into community control could not be achieved, it was equally clear that the potential threat to council homes and estates had not diminished in any way.

In January 2017, the Leader of the Council asked us, three former members of the Residents' Commission, who had stayed with the process from early 2015 through to the demise of the transfer programme, to form the Defend Council Homes Unit (DCHU). The primary aim of DCHU was to find an alternative, but still effective, way of 'safeguarding' council homes, in line with the administration's manifesto pledge.

Our remit was set out in terms of reference that are reproduced here in italics, in each case followed by a brief commentary:

a) The provision of affordable, quality homes in places where people are proud to live is at the heart of the Council's vision. The DCHU has been established specifically to ensure that the Council's existing housing stock (HRA stock)² is subject to appropriate safeguards such that it can continue to be a major part of such provision in the Borough of Hammersmith & Fulham

In a narrow sense, we were tasked with finding safeguards against wanton disposals of the Council's stock. But in keeping with the administration's manifesto pledge it was also an essential part of our remit to find a way of putting control in the hands of residents. In other words, the broader task was to find a way of ensuring that residents' homes could not be sold off or otherwise disposed of unless the residents themselves had been fully involved and consulted on the terms of the disposal and, subject to standards of reasonableness, given their consent.

b) On the basis that the RCCH's recommendation to transfer the HRA stock to a Community Gateway Association is unlikely to be achieved in the near future, DCHU will explore the options which remain open to the Council to achieve its strategic objectives. Such options will be evaluated against the "key messages" of the RCCH as set out in the Report, DCHU will therefore consider whether the options have the potential to:

- i. safeguard council homes and estates for the future;*
- ii. give residents greater control over their homes;*
- iii. protect tenants' rights and keep rents and service charges at levels residents can afford; and*
- iv. fund improvements to homes and housing services.*

The options we have considered are described in section four of this report. It is important to say that our principal focus has been on identifying options that meet the first three of these criteria and that there has been less of a focus in the work we have carried out thus far on finding new ways to fund improvements to homes and housing services. A technical appraisal of the options considered is set out at appendix one of this report and the preferred option is outlined in section five.

c) DCHU will, with the assistance of external advisers, closely focus on the legal and financial viability of any HRA stock option explored.

² Housing Revenue Account – the statutory account for councils' landlord functions

We have been greatly assisted by the Council's external legal advisers, Trowers and Hamlins, both in exploring potential safeguarding models and in testing their legal viability. The question of financial viability only arises in the case of options involving a change of ownership, and on this matter it has not been considered necessary to obtain external advice.

d) In evaluating HRA stock options, DCHU will consider how to engage with and involve residents and key stakeholders in order to include their views in the most effective ways.

Throughout the period of our work we have reported progress to the regular meetings of the Housing Representatives' Forum. We also took part in the Borough-wide 'Love Where You Live' roadshows organized by the Council's Resident Involvement Team.

Our report proposes that, if the Council should approve our recommendations, one of the key steps in implementation of the preferred option will be consultation with residents and, in the case of secure tenants, it will be necessary to carry out a statutory consultation under section 105 of the 1985 Housing Act.

e) DCHU is non-partisan. This is why its membership will not include Council officers or Councillors and it will analyse HRA options independently of the Council. Nevertheless, DCHU will be supported by the Council, both practically and financially. Should DCHU's activities conflict with these Terms of Reference, the Council will be entitled to reconsider its support. The Council will not withdraw its support from DCHU without first providing the Chair with notice of any matter which it considers to be in conflict with the Terms of Reference and an opportunity for DCHU to remedy such matter (if it is remediable).

We have operated independently of the Council but have been supported by the Council both practically and financially. To date there has been no instance of our activities conflicting with our terms of reference.

f) DCHU will report its findings and proposed solutions to the Leader of the Council.

This report covers our findings and proposed solutions and has been made in the first instance to the Leader of the Council.

4. Options considered

The starting point for the first stage of our work was to revisit some of the ground covered by the Residents' Commission on Council Housing and review the 'safeguarding' options considered in 2015.

"Large scale voluntary transfer" (known as LSVT or "housing transfer" in English housing policy) was at the core of the option recommended by the Residents' Commission. We quickly ruled out further investigation of this option as the financial and policy conditions that prevented implementation of the Residents' Commission's recommendations are still in place. Should central government policy around financial support for LSVT change in the near future, this option is always worth revisiting as it is the benchmark against which other safeguarding options must be assessed. That is, while secure tenants must give their consent to any LSVT through a formal ballot, a transfer of ownership into community control still has the capacity to deliver the administration's manifesto commitment most completely. However, being effectively unavailable, the LSVT option was not assessed in our options appraisal.

A Community Land Trust³ (CLT) – the CLT option was originally rejected by the Residents' Commission on advice that a decision to vest HRA assets in such a Trust could be judged unreasonable, by fettering the future discretion of the Council. There are also complexities around the likely requirement that a CLT be a *housing provider* registered with the housing regulator (essentially, the CLT would also need to be a housing association). But aspects of the CLT concept are carried forward to three of the options that we have considered in this phase of our work.

The options in scope

From this point onwards, the work that the DCHU has undertaken has been "novel" in a legal sense: we have been exploring issues that have not all been tested previously in the context of social housing. The options that we have developed and appraised represent different legal mechanisms to achieve the same end and have emerged from a process of dialogue with lawyers, officers and elected members. While our appraisal criteria are 'givens' handed down from the work of the Residents' Commission, the detailed options themselves have not yet been discussed with residents or their representatives. Inevitably, there is some common ground between some of the options, but at this stage of our work the following are those we have considered as being *in scope*:

1. **A disposal to, and leaseback from, a Community Land Trust.** This would involve a CLT being granted a legal interest in the council's housing by means of a transfer by the Council (sale at nominal value) of the freehold that is then subject to an immediate long leaseback to the Council by the CLT. This would leave the Council as the landlord as now, but any disposals – for example, for a redevelopment scheme – would require the consent of the CLT. The CLT board could be constructed on similar lines to the Community Gateway model referenced by the Residents' Commission. In other words, residents could be substantially represented on the CLT either as a majority on the board or as a blocking minority.

³A Community Land Trust is a not for profit organisation set up to develop and/or manage housing and land on behalf of a community. Further information on CLTs in England and Wales is available at www.communitylandtrusts.org.uk

It was immediately clear that this model presents certain legal risks and technical difficulties that arise from the initial sale, such as discontinuity of tenancies, rights of enfranchisement and the need to obtain a specific consent from the Secretary of State. But from our conversations with residents and elected members, we gauged that there is significant interest in the CLT model and we kept it in scope for this stage of our work.

Key elements – *CLT with freehold interest in housing stock; CLT consent required for disposals*

Key issues – *establishment of CLT; Secretary of State's consent; reasonableness of disposal of freehold; change of tenancy status for tenants*

- 2. A disposal of a legal interest in the HRA land to a CLT.** This is a further development of the CLT idea that would involve separating the legal interest in the HRA land from that of the homes and buildings that sit on the land. The CLT would be granted an interest solely in the land element, with ownership of the homes and other buildings on the land remaining with the Council as now. Conceptually, this option would circumvent some of the technical difficulties of option one above, but other legal complexities arise: just for example, the idea of separating the legal interest in land from that of the buildings on the land is relatively novel in conveyancing in England and Wales. Also, the viability of both variants of the CLT option would depend on being able to withstand a legal challenge, particularly on grounds of reasonableness.

Again, the model might rely on a CLT with a substantial component of resident control and the model could be constructed such that “ordinary” conveyancing, such as right to buy sales, would not be affected.

Key elements – *CLT with legal interest in land element only; CLT consent required for disposals*

Key issues – *establishment of CLT; legal novelty; reasonableness; conveyancing issues*

- 3. A restriction on title in respect of the HRA land and property in favour of a CLT.** Land ownership in England and Wales is recorded or *registered* at the Land Registry, a government body. This option involves the Council placing a restriction on any change of ownership (disposal) of HRA land and property. A restriction is an entry into the register of title to a property that prevents or regulates any change of title, or ownership. The option would involve the Council registering a restriction to the title to its HRA land and property that refers to a separate agreement between the Council and a CLT. This agreement would only allow the lifting of a restriction for redevelopment under certain conditions other than ‘exempt’ disposals (for example, the sale of right to buy properties, granting of short term commercial leases, or leases of electricity substations). Compliance with the terms of the agreement when registering a disposal would need to be certified by the Council’s solicitor.

In practice, the restriction would mean that any developer seeking to buy HRA land for redevelopment from the Council would know that without full compliance with the restriction, and certification from the Council's solicitor, the developer would be unable to register a title to that land. As registration is a fundamental element of land ownership, a non-compliant deal could not go ahead.

We would expect the agreement to stipulate that "compliance" would require full consultation of residents affected by a redevelopment proposal in advance and potentially a ballot to establish residents' consent.

Key elements – *CLT (or similar body); restriction on title; agreement between CLT and Council; certification by Council solicitor*

Key issues – *establishment of CLT (or similar body); legal novelty; risk that agreement could fetter Council discretion*

4. **A Council policy commitment supported by a restriction on title.** This option came to our attention when the legal team sought counsel's advice on aspects of option three above. Counsel pointed to case law that helped to define a "legitimate expectation" on the part of recipients of council services that certain actions will be taken (or not taken) by the local authority.

Legitimate expectation is a well-known legal concept, which takes two forms – *procedural* and *substantive* – and incorporates the general requirement that any council decision must be reasonable.

In simple language, if the Council, through an explicit policy commitment, were to "promise" residents that it would not permit the redevelopment of their homes without their consent – and in making that promise, create the conditions for a *substantive legitimate expectation* that the "promise" would be met – then the Council hasn't made a token promise: it has made a commitment that can be enforced by the courts.

As an additional safeguard, a restriction on title would be registered by the Council as in option three above, but instead of referring to compliance with an agreement with a CLT the restriction would refer to compliance with the Council's policy. Although this option does not require the establishment of a CLT, we envisage that some kind of advisory body would be needed to exercise oversight on residents' behalf.

Key elements – *policy commitment; principle of legitimate expectation; restriction on title; advisory body*

Key issues – *drafting and adoption of policy; legal novelty; establishment of advisory body*

Appendix one sets out our technical appraisal of these options to come to a single recommendation on the way forward.

5. The preferred option

The development of the options described in the previous section has been sequential, as we have worked through the ramifications of each option and have moved on, at each stage, towards a model that has given us greater confidence. Our confidence in option four, our preferred option, has naturally been reinforced by the fact that it emerged as the highest scoring option in the technical appraisal.

In this section we attempt to go beyond the essential legal concepts to describe the practical operation of the preferred option. This is based on the model's four main elements as follows:

a) The Policy

The Council adopts a Policy – we have provisionally called it the Defend Council Homes Policy – that sets out how residents' interests will be protected in the event of a redevelopment proposal that could result in the disposal of their homes. An initial draft of such a Policy is at appendix two of this report.

The Policy in itself represents a procedural commitment to all residents of council housing in the Borough, but within it, as part of this procedural commitment, is an undertaking to give certain substantive commitments to residents affected by redevelopment proposals:

- first, in the event of specific proposals coming forward that could involve the disposal of homes in a given area, through written undertakings to the residents in that area setting out how they will be consulted on, and involved in, the consideration of those proposals;
- second, in the event of a specific scheme that would involve the disposal of homes in the area coming forward for planning approval, through further written undertakings to the residents affected setting out their rights and entitlements and how they will be treated in the event of the scheme being implemented.

b) The Advisory Body

Interpretation and application of the Policy and any substantive commitments are carried out with reference to an Advisory Body, potentially to be composed of residents and experts nominated by professional bodies. Among other things the Advisory Body is responsible for advising on what represents Best Practice in implementing key aspects of the Policy.

c) The Restriction on Title

In addition to adopting the Policy, the Council registers a 'restriction on title' with the Land Registry covering the entirety of the land and buildings held in the HRA. The restriction (which prevents the title of anything covered by the restriction changing hands) can only be lifted if the Council's Solicitor certifies either that the Policy (including any written undertakings given by the Council to residents) has been complied with or that the disposal is exempt – with reference to a defined list of exemptions.

d) The Principle of Legitimate Expectation

The existence of the Policy, followed at subsequent stages as appropriate by the receipt of written undertakings by the Council, creates for residents a 'legitimate expectation' that the Policy, and especially the more specific written undertakings, will be complied with by the Council. This therefore represents a means of legal redress against the Council should a resident's 'legitimate expectation' not be met.

The significant effect of this set of arrangements is to commit the Council to Best Practice in any situation where it is considering the disposal of residents' homes. Importantly however, the restriction on title element will also act as a discipline on the Council in circumstances where, for example, a development partner might be approached with a view to redeveloping an area or estate. Any due diligence process will alert the developer to the need to deal with the restriction before any redevelopment requiring disposals can proceed.

6. Implementation

If the Council should decide to implement the safeguarding model we have described as our preferred option, it will be necessary to determine a detailed timescale for implementation. The key stages that would need to be factored into the timescale are as follows:

i) Finalising the Policy

The draft Defend Council Homes Policy attached to this report at appendix two gives an outline of the kind of policy document that we believe would be required to serve the proposed model. The draft Policy incorporates comments by Trowers and Hamlins, but has not been circulated widely. It is anticipated that further work will need to be done to consult relevant stakeholders and frame the Policy such that it is fit for the purpose of the safeguarding model. We have speculated that there may be a case for widening the scope of the Policy such that it extends to other safeguards for residents, for example, in relation to health and safety issues, but this is a matter for the Council.

ii) Restriction on Title

It will be necessary to register the restriction on title with the Land Registry. The principle of registering such a restriction has not yet been raised with the Land Registry. It may be necessary therefore to take further advice on the appropriate form of restriction and the process of having it registered. The restriction is based on, but does not mirror previously accepted practice and the Land Registry may not accept a widespread and sensitive Restriction without question.

iii) Consultation

As a minimum, the Council will need to carry out a section 105 consultation (consultation on matters of housing management) with its secure tenants. This would involve first, notifying all secure tenants of the Council's proposed introduction of the policy and second, considering any representations made by tenants. The Council may decide to consult more widely than this and go beyond the minimum requirements.

iv) Formal Council approvals of Policy and Restriction on Title

Following the conclusion of formal consultation, the Council will need a formal resolution to adopt the Policy, and it is anticipated that the Land Registry will need a formal resolution by the Council in order to register the restriction on title. The timetable for formal reports will need to take account of the statutory consultation timetable.

v) Advisory Body: composition; terms of reference; recruitment; resourcing

Further work needs to be done to determine the most appropriate form for the proposed Advisory Body. Although it is reasonably clear what range of functions it will need to exercise for the purposes of the Policy, there are questions to be resolved about its constitutional relationship with the Council, its membership, and its modus operandi. There is also a question about its relationship with the body of council residents whose interests it is intended to serve.

Once these fundamental questions of governance and accountability have been resolved it will be possible to move to the practical tasks of drafting terms of reference, recruitment and putting administrative and logistical support in place.

As with the Policy itself, we have speculated that the Advisory Body might potentially be given a broader watchdog role, but this is a matter for the Council.

vi) *Development of Best Practice Guidance*

One of the Advisory Body's key roles is to establish and maintain a body of guidance on Best Practice. An initial framework of the areas to be covered by such guidance is set out in the draft Policy. It is envisaged that the Advisory Body will need to engage and consult with residents and representative groups in order to develop and update appropriate guidance and that it will need support from Council officers and if necessary external advisers in compiling the necessary documentation.

7. Cost and resource implications

Our terms of reference require us to ‘... *closely focus on the ... financial viability of any HRA stock option explored.*’ It will be clear that the context for this was the outcome of the Residents’ Commission’s recommendations, which ultimately foundered on the question of financial viability. As outlined earlier in this report, options involving a change of ownership were ruled out at an early stage, not least on account of the need to resolve the matter of the Council’s HRA debt.

Our focus has instead been on the legal viability of introducing new protections for residents in circumstances where the Council retains ownership of the stock and the existing parameters of the HRA essentially remain in place. The relative novelty of the options we have reviewed means that we have been unable to look to previous examples to give a sense of the scale of cost and resource implications of implementation. We are, however, reasonably satisfied that the cost implications of our proposals are of an order of scale significantly less than a LSVT (housing transfer) of the homes. This is because there is:

- i. No proposal to move away from council ownership of the properties, i.e. no need to cover off existing HRA debt;
- ii. No necessity to engage third party funders or funder’s lawyers;
- iii. No necessity to engage the teams of specialist external advisers normally required for an LSVT process;
- iv. No necessity for the resident consultation on our recommendations to be on the scale of the informal and formal consultation (including a mandatory ballot of tenants) required for a LSVT process.

Nonetheless there will inevitably be resource implications arising from our recommendations and their quantification requires further work. The costs will, in the main, arise from:

- the need for further legal advice;
- the need to consult with residents on the introduction of the Policy;
- if the consultation outcome is in support of the Policy, the costs of implementing the legal mechanisms around Restriction on Title and “promise” at the heart of Legitimate Expectation;
- the need to set up and provide administrative support to the Advisory Body.

8. Recommendations

Our recommendations are as follows:

1. That our preferred option – a Council policy commitment supported by a Restriction on Title – be approved as the most effective way of providing residents of council housing in Hammersmith & Fulham with protection against the unwanted redevelopment of their homes and estates.
2. That, to put this protection in place, the Council takes the following actions:
 - i) quantifies and allocates the resources required;
 - ii) develops an implementation timetable;
 - iii) develops and finalises a draft Policy, along the lines of that presented at appendix two of the report, as the basis for formal consultation with residents;
 - iv) takes further advice with a view to registering a Restriction on Title with the Land Registry covering the entirety of the land and buildings held in the HRA;
 - v) carries out formal consultation with residents on the draft Policy and, subject to any representations made, adopts the Policy;
 - vi) takes steps to determine the form, composition and terms of reference of the proposed Advisory Body and commences a process of recruitment.

Appendices

Appendix 1: The options appraisal

This appendix sets out how we assessed each of the options against a set of appraisal criteria in order to make a recommendation about the way forward. Options appraisal is not an exact science and so the appraisal uses a mixture of numerical scores and star ratings as a means of differentiating the various models.

Defining the appraisal criteria

Section two of this document laid out the DCHUs terms of reference. Among other matters, these give an initial direction to the appraisal by identifying the overarching criteria as follows:

- i. safeguard council homes and estates for the future;*
- ii. give residents greater control over their homes;*
- iii. protect tenants' rights and keep rents and service charges at levels residents can afford; and*
- iv. fund improvements to homes and housing services.*

As described in section two, none of the options has the capacity to better fund improvements to homes and housing services and so every option would score the same against this criterion. We have therefore not used it as part of the appraisal matrix. At the same time, it has been appropriate to introduce implementability criteria into the appraisal. We have therefore built on and developed the appraisal criteria by drawing out key elements as follows:

- i. Safeguard council homes and estates for the future**
 - a. Protection from unwanted redevelopment
 - b. Continuity of Council's core housing management presence/function
- ii. Give residents greater control over their homes**
 - a. "Passive" control – continuity of the *quiet enjoyment* of a tenancy
 - b. Boosting "active" control such as greater opportunity to participate in key decisions both at an individual level and via representative organisations
- iii. Protect tenants' rights and keep rents and service charges at levels residents can afford**
 - a. Tenancy rights are unaffected or even improved
 - b. Proposed option is cost-effective in terms of implementation costs against resultant benefits
 - c. Proposed action can be implemented on a timely basis

Scores in the matrices range from 1 – 5 where 5 represents a "maximum good" and 1 the "least good". Asterisks represent legal and regulatory risks where three asterisks represent the highest risk. Each of the options is assessed on this basis in the tables below.

| Option one: CLT leaseback | | Comments | Score |
|---|--|--|-------|
| (i) Safeguard | a). Protection from unwanted redevelopment | | 3 |
| | b). Continuity of council management | Complexity of legal effects of tenancy break | 2 |
| (ii) Greater control | a). "Quiet enjoyment" | Difficult to persuade tenants to cede rights | 1 |
| | b). Boost participation | Places on CLT board | 3 |
| (iii) Protect rights | a). Rights stable or better | Tenancy break | 1 |
| | b). Cost-effective implementation | Consent issues and campaign difficulty | 1 |
| | c). Timely implementation | Specific SoS consent needed | 1 |
| Total score | | | 12 |
| Legal and regulatory complexity | | | ** |
| Risk of challenge on reasonableness grounds | | | *** |

| Option two: CLT land-only interest | | Comments | Score |
|---|--|---|-------|
| (i) Safeguard | a). Protection from unwanted redevelopment | Some legal novelty | 2 |
| | b). Continuity of council management | | 4 |
| (ii) Greater control | a). "Quiet enjoyment" | Substantially unaffected | 3 |
| | b). Boost participation | Places on CLT board but with less control | 2 |
| (iii) Protect rights | a). Rights stable or better | Potentially less protection | 2 |
| | b). Cost-effective implementation | | 3 |
| | c). Timely implementation | Some legal novelty | 2 |
| Total score | | | 18 |
| Legal and regulatory complexity | | | *** |
| Risk of challenge on reasonableness grounds | | | ** |

| Option three: Restriction on title in favour of a CLT | | Comments | Score |
|---|--|--|-------|
| (i) Safeguard | a). Protection from unwanted redevelopment | Slight concerns about a reasonableness challenge | 4 |
| | b). Continuity of council management | | 4 |
| (ii) Greater control | a). "Quiet enjoyment" | Potentially less protection | 3 |
| | b). Boost participation | Places on CLT board | 3 |
| (iii) Protect rights | a). Rights stable or better | Potentially less protection | 2 |
| | b). Cost-effective implementation | | 4 |
| | c). Timely implementation | | 4 |
| Total score | | | 24 |
| Legal and regulatory complexity | | | ** |
| Risk of challenge on reasonableness grounds | | | ** |

| Option four: Policy commitment and Restriction on Title | | Comments | Score |
|---|--|---|-----------|
| (i) Safeguard | a). Protection from unwanted redevelopment | Two devices in tandem provide maximum protection | 5 |
| | b). Continuity of council management | | 4 |
| (ii) Greater control | a). “Quiet enjoyment” | Two devices in tandem provide maximum protection | 5 |
| | b). Boost participation | Advisory body offers less scope than a CLT but Policy gives major say in key decisions, | 4 |
| (iii) Protect rights | a). Rights stable or better | | 4 |
| | b). Cost-effective implementation | Two devices in tandem mean slightly greater costs than Op 3 | 2 |
| | c). Timely implementation | Not considered complex | 4 |
| Total score | | | 28 |
| Legal and regulatory complexity | | | ** |
| Risk of challenge on reasonableness grounds | | | * |

We acknowledge the qualitative nature of this analysis – but when the appraisal scores are set against the legal advice we have received in this phase of our work, it is clear that option four – the combination of a Legitimate Expectation “promise” alongside a restriction on the title of the Council’s HRA land offers the best prospect of any of the options to fulfil the manifesto commitment on social housing made by the present administration of the Council. In particular, the advice we have about the varying possibility of legal challenge on grounds of reasonableness for the first three options satisfies us that option four is both the most effective and best grounded of the options we have considered.

The “status quo” option

In public sector options appraisals, it is common to compare the outcome of the best “change” option with the “no change” option of keeping things as they are. We have not formally scored the no change option, but while no change involves no implementation cost or effort, it also does nothing to deliver the protection from unwanted redevelopment that so many residents have said they want to have. The threat of unwanted redevelopment is also a threat to the tenancy rights and quiet enjoyment of affected tenants.

So, while the status quo option incurs no immediate cost – it also confers none of the benefits of our proposed way forward.

Appendix 2: (draft) Defend Council Homes Policy

The Council is committed to the principle that residents of council housing are entitled to live in their homes without fear of unwanted redevelopment. This Policy is designed to protect residents' interests by upholding this principle.

The Council will appoint an Advisory Body in relation to the residents' interests in matters covered by this Policy and to advise the Council on Best Practice in implementing the Policy.

The Council will only allow the redevelopment of long-term residential properties in its ownership if residents' interests are safeguarded, which means (in particular):

- all residents whose properties could be affected by redevelopment proposals will be informed before a formal options appraisal and issued with a written Council notice setting out how they will be consulted and how they will be involved in the options appraisal process including masterplanning and, as appropriate, the procurement of planners and/or development partners;
- there will be full and open consultation on the redevelopment options before any formal decisions are made to proceed with the redevelopment, with appropriate opportunities for all residents formally to express their views on the options;
- the Council will publish the results of such consultation and may carry out further discussions and consultation with residents as necessary to establish the levels of support for preferred options. Where appropriate, the Council may ask affected residents to vote on preferred options in a ballot, the ballot to be conducted having regard to a set of rules endorsed by the Advisory Body;
- if a redevelopment scheme emerges as the basis for an application for planning approval, all residents whose properties would be affected by the scheme will be issued with a written Council notice (the Notice) as soon as is practicable and in any event before the relevant planning permission is submitted. The Notice will include specific undertakings by the Council to the affected residents setting out how their right to a home will be safeguarded on the implementation of the scheme (the redevelopment programme). The nature of such undertakings will vary but we describe in the following two main bullet points the rights and entitlements which must be addressed in the form of Notice to (i) tenants and (ii) leaseholders;
- the rights and entitlements of tenants in the Notice will include the following:
 - no tenant will be required to move home, temporarily or permanently, unless this is necessary for the redevelopment programme to proceed or advisable on health and safety or other reasonable grounds;

- suitable temporary replacement homes will be provided for tenants if it would be unsafe or impracticable for them to remain in situ during the redevelopment programme;
- unless the tenant agrees otherwise, any permanent replacement home will be:
 - of equivalent tenure;
 - equipped with the same or equivalent facilities;
 - (so far as possible) equally convenient;
 - comparable in cost (including cost-in-use) with the home being replaced
- the Council will undertake the redevelopment in a manner which is consistent with Best Practice and will have regard to the recommendations of the Advisory Body
- the rights and entitlements of leaseholders will be consistent with the conditions of their lease and with any policy or policies adopted by the Council, having regard to the recommendations of the Advisory Body as to what constitutes Best Practice with regard to leaseholders affected by redevelopment.

This Policy operates at two levels – procedural and substantive:

- a) Procedural – the Policy involves a Borough-wide commitment to follow procedures based on and giving effect to the principles described above (so that residents can legitimately expect that any development affecting their homes will be subject to those procedures).
- b) Substantive - the Policy also involves a commitment that will be integral to any set of redevelopment proposals to translate the principles described above into substantive promises which will be contained in the Notice issued to affected residents (so that such residents can legitimately expect those promises to be honoured), both at the options appraisal stage and at the stage of a redevelopment scheme being submitted for planning approval.

In applying this Policy (procedurally and substantively) the Council will have regard to the recommendations of the Advisory Body and, in particular, what in the Advisory Body's view constitutes Best Practice for the redevelopment in question (based on the guidance described below).

The Advisory Body will develop and from time to time update guidance on what, in its view, constitutes Best Practice for the redevelopment of council housing and council estates (including any good practice guidance issued from time to time by the Mayor of London) (Guidance). Aside from the general requirements of equality, diversity and human rights, this Guidance will cover all three phases of any redevelopment as follows:

- before:
 - developing overall redevelopment priorities and options for the area/estate;
 - procurement of development partners;

- carrying out options appraisals;
- masterplanning;
- developing re-housing options and packages – with (where appropriate/possible) the right of return;
- compensation and support packages – statutory and discretionary;
- consultation (and, where appropriate, rules for ballots);
- residents' access to paid-for independent advice.
- during:
 - decanting/rehousing;
 - site conditions and security;
 - health and safety;
 - liaison with contractors;
 - taking up complaints;
 - community support and temporary facilities;
 - monitoring the project plan – with a supply of adequate information;
 - support for residents' representatives/groups and general liaison with residents.
- after:
 - return to new/old homes – including protection of tenancy rights;
 - monitoring the delivery of promises and objectives;
 - ongoing funding of replaced/new estate/community facilities.

The Council will adhere to such Guidance unless:

- there is a compelling reason for not doing so;
- it explains that reason to the Advisory Body and takes account of its views; and
- it consults with residents and their representatives (justifying any divergence from the Advisory Body's views) before any steps are taken and/or decisions made.

The Policy will be underpinned by a Restriction on Title entered in the Land Registers of all the Council's housing estates. The Council promises to register and maintain the Restriction as an integral part of this Policy and the Council Solicitor will only permit its release in circumstances which are consistent with this Policy, namely, where the Council Solicitor is in a position to certify either that the relevant paragraphs of the Policy have been complied with or that, in the case of exempt disposals [to be set out in an Appendix hereto], they do not apply.

Appendix 3: Note on the functions and composition of the Advisory Body

The Advisory Body will be responsible for exercising the following functions:

- generally, monitoring the operation of the Policy having regard to residents' best interests
- developing, updating and, as necessary, interpreting 'Best Practice' guidance
- tailoring of 'Best Practice' guidance to the circumstances of specific schemes
- approving exceptions to 'Best Practice'
- affirming that procedural and substantive commitments have been met
- endorsing ballot rules/procedures

It will be important that in the exercise of these functions the Advisory Body is not granted powers that could fetter the Council's discretion; nonetheless the Advisory Body's role needs to be 'locked in' to the operation of the Policy in such a way that it cannot be bypassed.

There may be scope to add to the Advisory Body's functions, should it be desirable for its role in safeguarding the best interests of residents of council housing be extended – e.g. as a scrutiny or watchdog body with a wider remit.

In terms of composition, the essential thing is to ensure that the Advisory Body has appropriate levels of expertise, experience and credibility to carry out its functions. Moreover, it may need to be a relatively small body that can be convened readily and conduct its business efficiently.

An option that prima facie fulfils these criteria would be a type of 'standing committee' composed of residents' representatives and experts nominated by recognised organisations such as the Joseph Rowntree Foundation and/or the Chartered Institute of Housing. This model raises a question of how residents' representatives might be selected. In any event it will be necessary to determine what kind of relationship the Advisory Body should have with the Council, on the one hand, and residents, on the other.

Appendix 4: Note on legal matters

Restriction on title

A restriction on title is, essentially, a bar on a change in property ownership unless certain conditions are met. Title (ownership) is registered with the Land Registry. There are certain standard forms of restriction that may be registered, stipulating in each case the conditions to be met for a restriction to be lifted.

For the purposes of the Defend Council Homes Policy it is envisaged that a restriction would be registered on the titles of all of the Council's housing estates and potentially of all its street and 'pepper potted' properties.

The wording of the restriction might be along the following lines:

"No disposition of the registered estate by the proprietor of the registered estate is to be registered without a certificate signed by the Solicitor to the London Borough of Hammersmith and Fulham of [address] that the provisions of the [Defend Council Homes] Policy have been complied with or that they do not apply to the disposition".

Examples of 'exempt' disposals (i.e. where the restriction would be held not to apply) are as follows:

- (a) exercise of Right to Buy
- (b) short term commercial property leases
- (c) statutory undertakings – utilities, highways authority etc.
- (d) grant of a tenancy (e.g. in the context of shared ownership) by the Council
- (e) compulsory purchase orders
- (f) 'compliance' disposals (e.g. disposals to comply with legislation such as that which would have required councils to sell their higher value voids)
- (g) disposals for the "community benefit" (public land, sports facilities etc.)

The above circumstances will need to be expanded upon in the Policy but in principle, disposals falling within limbs (a) – (f) should be relatively easy to define as they are largely a question of fact. Disposals of the type contemplated in limb (g) may be more controversial. There could be an argument for the Advisory Body to have a role here, either as a consultee or in framing relevant Best Practice guidance.

Legitimate expectation

The principle of legitimate expectation most clearly illustrated in *the Coughlan case*: Ms Coughlan was a severely disabled person who had been promised by a council that she could stay on in her care home. Despite the promise, the local authority attempted to renege on its commitment. The courts found that Ms Coughlan had a legitimate expectation that the council would honour the promise it had made.

A direct quotation from the leading textbook cited in our legal advice may help to demonstrate how these concepts can move a "promise" to become an "obligation" as it was in respect of Ms Coughlan's accommodation.

“Where the Court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the Court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course would amount to an abuse of power.”