

Executive Decision Report

<p>Decision maker and date of Leadership Team meeting, Lead Member meeting or (in the case of individual Lead Member decisions) the earliest date the decision will be taken</p>	<p>Leadership Team – 6 February 2018 (Cllr Kim Taylor-Smith, Deputy Leader and Lead Member for Grenfell Recovery, Housing and Property)</p> <p>Forward Plan reference: 05189/18/K/A</p>	 <p>THE ROYAL BOROUGH OF KENSINGTON AND CHELSEA</p>
<p>Report title (decision subject)</p>	<p>FUTURE RELATIONSHIP WITH THE KENSINGTON AND CHELSEA TENANT MANAGEMENT ORGANISATION AND DECISION OF THE KCTMO TO HAND BACK SERVICES TO THE COUNCIL</p>	
<p>Reporting officer</p>	<p>Doug Goldring, Director of Housing Management</p>	
<p>Key decision</p>	<p>Yes</p>	
<p>Access to information classification</p>	<p>Public</p>	

1. EXECUTIVE SUMMARY

- 1.1. At its meeting on 10 January the Leadership Team considered an information report on the decision of the Board of the Kensington and Chelsea Tenants Management Organisation (KCTMO) to hand back the estate services it provides to the Council under the terms of the Modular Management Agreement (MMA). This report seeks authority to vary the MMA and to deal with other matters which flow from the decision of the KCTMO Board.
- 1.2. Council officers have been working with the KCTMO to manage the smooth transition of the housing management services to RBKC. It was agreed with officers that the earliest practicable date for the transfer

should be 1 March 2018. Despite this the KCTMO Board has insisted that the Council must take over the services on 7 February.

- 1.3. This report seeks authority to vary the MMA and to deal with other matters which flow from the decision of the KCTMO.
- 1.4. It should be noted that the agreements with the KCTMO for which approval is sought from the Leadership Team will ensure the continued existence of the KCTMO as a legal entity. It will remain independent of the Council and will be separately accountable for the Public Inquiry and the criminal investigation which have commenced since the tragic fire at Grenfell Tower.

2. RECOMMENDATIONS

- 2.1. That the Director of Housing Management following consultation with the Deputy Leader and Lead Member for Grenfell Recovery, Housing and Property has the authority to finalise the terms and complete a Deed of Variation of the MMA and Deed of Covenant to enable the KCTMO to hand back housing management services to the Council on 7 February 2018.
- 2.2. That it be noted that with effect from the 7 February 2018 all KCTMO employees save those retained by the KCTMO will become employed by the Council, under TUPE Regulations.
- 2.3. That the Director of Law in consultation with the Director of Housing Management has authority to conclude novation agreements in respect of any contracts between the KCTMO and suppliers under which the Council will replace the KCTMO in those third-party contracts.
- 2.4. That the Director Housing Management has authority to complete the necessary agreements with the KCTMO for the purchase of shares in the company called Kensington and Chelsea TMO Repairs Direct Limited (known as Repairs Direct) for £1 and thereby enable the Council to become its sole shareholder.
- 2.5. That Chris Buss, Director of Finance, Sue Harris, Executive Director of Environment, Leisure and Resident Services and Debbie Morris, Director of Human Resources be appointed as Directors of Repairs Direct as the existing board members propose to retire on the conclusion of the share purchase agreement.
- 2.6. That authority be delegated to the Chief Executive of the Council to appoint further directors as may be required from time to time to the board of Repairs Direct.

- 2.7. That authority be delegated to the Director of Finance to agree a revised financial settlement with the KCTMO.
- 2.8. That authority be delegated to the Director of Housing Management to make such other decisions and execute such other documentation as may be necessary for the orderly transition of the housing management services from the KCTMO to the Council.
- 2.9. Note that the Modular Management Agreement between the Kensington and Chelsea Council and the Kensington and Chelsea Tenant Management Organisation will continue but will be varied to take account of the decision of the KCTMO to hand back the management services whilst retaining certain functions.
- 2.10. Note that the KCTMO will continue to exist as a separate legal entity and will remain independently accountable in all the legal processes including the criminal investigation and the public inquiry.

3. REASONS FOR DECISION

- 3.1. The Board of the KCTMO has reluctantly decided it can no longer guarantee that the TMO can comply with its obligations under the Modular Management Agreement (**MMA**) with the Council.
- 3.2. This decision has been made because the period required to consult with residents could be a year or longer, this has greatly increased risks to service provision by the KCTMO.
- 3.3. Increasingly the KCTMO is being staffed by interims as it is difficult to recruit permanent staff and this leads to increased business risks.
- 3.4. In the view of officers, the KCTMO is a small organisation and it is not easy for it to come to terms with the enormity of the Grenfell tragedy whilst continuing to provide its services to other residents.
- 3.5. The Council and the KCTMO wish to ensure that the KCTMO remains accountable to the Public Inquiry and the public and for that reason the handback is being structured so that the TMO, its board and membership will remain intact and accountable.
- 3.6. The Council has no option but to accept the KCTMO's decision to hand back services, which has significant financial and other implications, as set out in this report. Therefore, a key decision is required.

4. BACKGROUND

- 4.1. The background is set out in the Information Report presented to the Leadership team on 10 January 2018.

5. PROPOSAL AND ISSUES

Deed of Variation and Covenant

- 5.1. It is not possible to terminate the MMA because under the terms of the KCTMO Articles of Association, once the MMA ends existing resident members would cease to be members of KCTMO. At present only RBKC residents whose homes are managed under the MMA are eligible to be members so if there is no MMA there will be no members. A company with no members which is not capable of existing would have to be wound up. It is in the public interest for the KCTMO to continue to exist throughout the period of the Public Inquiry and any criminal investigation so that it can be held legally accountable for its actions and participate in the Public Inquiry and in any criminal investigation.
- 5.2. Any changes to the MMA must be set out in a Deed of Variation. The KCTMO Board are insisting that the Council seals a Deed of Variation on 7 February.
- 5.3. The main terms of the agreed **Deed of Variation** are as follows:
- That the Board will hand back all management services on 7 February "The effective date" and on that date staff employed by the KCTMO will transfer to the Council by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
 - That between the effective date and 31 March there will be "transition period" and during that time:
 - o Relevant contracts will be novated or transferred from the KCTMO to the Council and leases of existing KCTMO offices will be assigned to the Council to enable the service to continue.
 - o KCTMO will assist the Council to provide housing services and staff will follow instructions given by the Director of Housing Management.
- 5.4. In addition, it will be necessary for the parties to enter into a Deed of Covenant which will deal with a number of issues, in particular where a legal commitment is necessary to ensure that the KCTMO continues to exist as a legal entity and to assist with the orderly transition of services. These issues are summarised below:
- That the KCTMO can take back the services if it can demonstrate that it is capable of providing the service and has the support of residents, as required by the MMA.

- That the KCTMO will remain in existence until the conclusion of all legal processes relating to the Grenfell tragedy including:

- the Inquiry;
- any criminal investigation and subsequent prosecution of the TMO as a consequence of the Grenfell Tragedy;
- any civil proceedings brought against the TMO or any of its staff or directors as a consequence of the Grenfell Tragedy;
- any statutory limitation period relating to the Tragedy has expired.

- The Council will continue to fund the KCTMO to enable it to continue in existence and to remain solvent during the above period.

- That the Council will take all steps in its control to ensure that the MMA does not terminate if this is necessary for the continuation of the TMO as a corporate entity with its current membership arrangements during the above period.

- That the Council will remove and not nominate any Councillors to the KCTMO Board in order to support the KCTMO's independence of the Council.

5.5. In addition, it is agreed that the KCTMO Board will act as a tenant scrutiny panel for the Council in relation to the performance of the Council of the management services under the MMA and that this role will continue until housing management services are transferred to another organisation following completion of appropriate consultation with residents under Section 105, Housing Act 1985.

5.6. It is proposed that the Director of Housing Management will prepare a 6 monthly report to the KCTMO Board about the management service.

The Council will also consult or inform the Board about issues such as:

- major works proposals
- changes in rents
- changes in allocation scheme
- the development of anti-social behaviour policies and procedures
- changes in tenancy terms

- Right to Buy (RTB) terms and RTB sales
- changes in management.

Service Delivery

- 5.7. The “hand back” of housing management services by KCTMO means that the Council will directly manage these functions including repairs, capital works, collection of rent and services charges and the management of the estates. It will have legal responsibility from 7 February but the operational date for the full transfer of services will be 1 March. There is a considerable amount of preparation to enable the effective transition to go ahead in terms of information technology (IT), branding and human resources (HR) which makes operational changes by 7 February 2018 unviable. Residents and staff will see little change until 1 March. For example, staff will still have KCTMO email addresses and residents will still be able to report repairs on the KCTMO website. This will change on 1 March.
- 5.8. The Council has no current plans to relocate the services currently provided by the KCTMO. To enable this to happen it will be necessary for the Council to take over the leases of existing KCTMO offices.
- 5.9. To enable the service to continue it will be necessary to “novate” or transfer to the Council KCTMO contracts.

Staffing

- 5.10. All contracts of all the employees of the KCTMO carrying out the services being taken on by the Council are expected to automatically transfer to the Council by the operation of the TUPE. Agency staff or staff providing services as contractors will not automatically transfer but can be taken on by the Council on an as-needed basis.
- 5.11. As at the date of this report, it is not known whether the KCTMO will wish to retain a small number of staff to act in an administrative capacity with respect to the Inquiry and/or its other residual functions. If such a wish is expressed, the Council can consider this proposal and arrangements can be made.
- 5.12. Because of the short notice of the intention to transfer services and a lack of staffing information, it has not been possible to set up payroll or make other administrative arrangements for the transferring employees. It is therefore proposed that the KCTMO continues to use its own payroll services to pay the staff for the whole of February (or longer if necessary) as an agent for the Council.

5.13. All relevant employees will be reminded that, with reference to the Inquiry, their first duty is to the Inquiry and they will be assured that under no account will any member of staff suffer a detriment on account of the evidence they may give.

Repairs Direct

5.14. Kensington and Chelsea TMO Repairs Direct Limited (known as Repairs Direct) is a company limited by shares and a wholly-owned subsidiary of the KCTMO. It has its own assets, employees and liabilities. It has a contract with the KCTMO for the provision of housing repairs. It is vital that the Council takes control of the Repairs Direct so that it can control the repairs service that residents receive.

5.15. The most straightforward way for the Council to gain control of Repairs Direct is acquiring the shares in the company owned by KCTMO. This means that the Council will acquire all control of Repairs Direct. However, the liabilities and staff will not transfer to the Council.

5.16. Repairs Direct is a separate legal person, which will be liable in respect of its own contracts and for torts (civil wrongs) committed either by the Company or by its officers in the course of their employment or in the exercise of Repairs Direct's functions. As a general principle, the Council will not be liable for the actions, omissions, debts, etc. of Repairs Direct.

5.17. The Leadership team has been asked to appoint Chris Buss, the Director of Finance, Sue Harris, Executive Director of Environment, Leisure and Resident Services and Debbie Morris, Director of Human Resources to the board of Repairs Direct. Further Directors will be required to be appointed from time to time and it is proposed that the Chief Executive be granted delegated authority to make those appointments on behalf of the Council, this would include any future replacements. It should be noted that as directors they may incur personal liabilities in connection with any breach of their directors' duties to Repairs Direct and/or any breach of statutory requirements. However, the normal indemnities will apply.

6 OPTIONS AND ANALYSIS

6.1. The Council is the landlord of 6748 social tenanted homes and 2608 leasehold properties and as landlord it has legal obligations in respect of the management of these properties, the performance of which have been delegated to the KCTMO under the MMA. The KCTMO has told the Council that it cannot guarantee the continued delivery of those management services.

6.2. The Council has the following aims:

- 6.3. The continuity and quality of service delivery to its tenants and leaseholders;
 - 6.3.1. The continued existence of the KCTMO and its accountability before the Public Inquiry and in any criminal investigation;
 - 6.3.2. To consult and actively engage with residents on the future options for the management of its housing stock.
- 6.4. There are a limited number of options the Council can consider in relation to the proposal set out in this report. These are:
 - 6.4.1. Refuse to accept the handback of services: The KCTMO Board has decided it must hand back management obligations to the Council because it can no longer guarantee that it can comply with its obligations under the MMA. If the Council does nothing or refuses to take on the services, then there is a real risk that the residents will suffer because of this, and the Council will be exposed to liability for this. This is not a viable option.
 - 6.4.2. Transfer the service to another provider: This is not an option now due to the fact the KCTMO has asked for the handback to occur as a matter of urgency. There is no realistic prospect of transferring the service to another organisation within this timescale. This may be an option in the long term but before considering this the Council is committed to consulting with residents.
 - 6.4.3. Terminate the MMA: As set out in the report it is not possible to simply end the MMA because the KCTMO must remain in existence to ensure it can participate fully in the legal processes arising out of the tragedy of the Grenfell fire.
- 6.5. In these circumstances, there is no real alternative to the Council taking over the services and agreeing a Deed of Variation to amend the MMA to enable this to take place, as well as entering into other legal commitments to ensure that the KCTMO continues to exist.

7 CONSULTATION

- 7.1 Following the decision made by KCTMO on 18 December 2017 the matter was brought to the Council's Housing and Property Scrutiny Committee on 15 January 2018. The Committee welcomed the open mind the Council had about future management arrangements and that any future change of housing management would have to be

because residents wanted something different.

- 7.2 The Committee wanted the Council to consider alternative resident scrutiny arrangements and the future resident engagement processes are a key deliverable of the residents' consultation exercise. There was a desire to expand the level of performance indicators provided and to make them more meaningful for future reports.
- 7.3 The reconvened Tenants' Consultative Committee (TCC) met again on 22 January 2018 and is set to meet on a regular basis. A draft scope for the tenants' organisation who will oversee the consultation with the residents across the borough has been prepared. Between the Council and residents, we are hopeful of finalising this by early March following feedback from residents. The Council would then seek bids and select with resident input the organisation who will carry out this exercise during this year.
- 7.4 The consultation exercise will determine what residents wish to see in terms of future engagement, management arrangements and services.
- 7.5 The Council has advised residents by letter of the service transition date of the 1 March 2018. We will be writing again before the operational handover date with more details about how services are accessed, although in almost all cases the initial contact points will remain the same. In addition, there are details on both websites of the planned changes.

8 EQUALITY IMPLICATIONS

- 8.1 In the short term there will no service changes and so an Equality Impact Assessment is not considered to be necessary for this report. When changes are made to processes or procedures there will be an assessment of the equalities impact as part of the decision-making and implementation processes. However, it should be noted that there may be a negative impact on service delivery due to the high turnover of staff employed by KCTMO and their reliance on temporary staff.

9 LEGAL IMPLICATIONS

- 9.1 The Council is a local housing authority under Part 2 of the Housing Act 1985 and has management obligations to tenants and leaseholders of its housing stock. It has delegated the performance of its management obligations to the KCTMO since 1996. The terms of the delegation are set out in MMA dated 26 November 2015, which supersedes previous agreements dated 28 February 1996 and 12 June 2006. This was made

under section 27 of the Housing Act 1985 in the form approved by the Secretary of State. The MMA allows for the parties to amend the terms by agreement, inter alia, by selecting different options from the model form of agreement approved by the Secretary of State, as is proposed here.

- 9.2 The KCTMO's Board has notified residents and the Council that "it can no longer guarantee that the TMO can comply with its obligations under the [MMA]". Therefore, the Council is on notice that there is a risk of a failure in service delivery.
- 9.3 The above gives rise to a risk of legal liability on the part of the Council. The Council owes non-delegable civil duties to its tenants in contract and in tort. For example, if the KCTMO does not comply with its obligations under the MMA to keep a tenanted property in repair, the affected tenant will have the right to sue the Council as landlord. If the disrepair is due to the KCTMO's breach of the MMA, the Council has a claim to be indemnified by the KCTMO. However, that indemnity is only worth having if the KCTMO has money or insurance proceeds to pay it. In addition, the Council owes duties of care enforceable in criminal law, specifically in respect of its tenants' safety. RBKC is on notice that KCTMO as its agent may fail to ensure tenants' safety, and therefore its duty of care may require it to step in.
- 9.4 By agreeing to the transfer of responsibility for housing management under the MMA to the Council on 7 February 2018, the Council will be giving up its right to an indemnity from the KCTMO in respect of any management failures before the operation of services has been fully handed back, on 1 March 2018. As set out in the report the Council has no other option but to agree to this in order to ensure an orderly transition of services and to ensure that the KCTMO continues to exist.
- 9.5 The Council has been informed that members of the KCTMO Board have stated that they will resign if the Council does not accept legal responsibility for housing management services from 7 February and agree to vary the MMA accordingly. Under the KCTMO's Articles of Association, the quorum for any decision by the board is 7, with a minimum number of 4 resident board members present who must constitute a majority of those present. If enough resident board members resign, leaving the Board inquorate, no decisions could be made (including authorising variations to the MMA) and it would be necessary for new members to be elected. Elections would take some time and, meanwhile, tenants and leaseholders would be left at risk of failing services.

- 9.6 If the Council and the KCTMO cannot agree a hand back, the only legal route to regaining control of management from the KCTMO would be termination of the MMA. However, terminating the MMA would conflict with the Council's overriding aim of ensuring that the KCTMO remains accountable to the Public Inquiry and the public, since, under its current Articles of Association, termination of the MMA would lead to the KCTMO having no members and thus cause the KCTMO to be wound up.
- 9.7 Under the proposed Deed of Covenant, the Council will promise to provide the funding properly required by the KCTMO to remain solvent until the completion of the Public Inquiry, the criminal investigation and any civil claims arising out of the Grenfell tragedy. This is likely to be a substantial financial commitment, the full extent of which is unknown. However, it is necessary in order to ensure that the KCTMO remains fully accountable to the public throughout these legal processes. The following liabilities are also highlighted, although they are subsumed within the above overarching financial commitment. A TUPE transfer of staff from the KCTMO to the Council transfers any former liability of the KCTMO to its staff to the Council, subject to the benefit of any employer's liability insurance in place. Both the Deed of Covenant and Deed of Variation include indemnities by the Council to the KCTMO of the costs and potential liabilities of the KCTMO caused by the hand back. The total extent of these liabilities is currently unknown.
- 9.8 Section 105 of the Housing Act 1985 requires the Council to consult with secure tenants on matters of housing management which, in the opinion of the Council, are likely to have a substantial effect on its secure tenants. The Legal team have taken advice from a QC as to the likelihood of a challenge to the handback succeeding on the grounds of a failure to comply with Section 105. The advice received is that the risk is low. It should also be noted that the Council is preparing formal consultation with all residents on the future of housing management in the borough.
- 9.9 It is proposed that the Council will buy a 100% shareholding in Repairs Direct, which undertakes the KCTMO's repairs work for a nominal sum. Repairs Direct Ltd is a company limited by shares and therefore in accordance with normal principles of company law the Council will not be liable for the company's debts or other liabilities.
- 9.10 The Council's housing powers are set out in the Housing Act 1985 and include a general power of management, regulation and control of the local authority's housing in section 21. A local authority also has power to participate in the ownership of a company by virtue of the general power of competence in section 1 of the Localism Act 2011. Investments should comply with CIPFA's Prudential Code for local authority finance.

- 9.11 Section 138 of the Local Government Act 1972 further provides that where an emergency or disaster involving destruction of or danger to life or property occurs and the Council are of opinion that it is likely to affect the whole or part of their area or all or some of its inhabitants, the Council may incur such expenditure as they consider necessary in taking action themselves (either alone or jointly with any other person or body and either in their area or elsewhere in or outside the United Kingdom) which is calculated to avert, alleviate or eradicate in their area or among its inhabitants the effects or potential effects of the event.
- 9.12 The Council therefore has sufficient public law powers to enter into the transactions that are the subject of this report.
- 9.13 The above legal implications have been prepared by in-house and external legal advisers.

10 FINANCIAL AND RESOURCES IMPLICATIONS

- 10.1 The costs associated with taking back the direct management of the housing stock will be met from the Housing Revenue Account (HRA). The HRA business plan is being refreshed to reflect transfer of responsibilities and the revised business plan will be presented to the 26 February meeting of the Leadership team.
- 10.2 The costs of ongoing support to the residual TMO functions will be included in the refreshed business plan. KCTMO currently has an outstanding loan to Your Credit Union. It is unclear at present as to whether this loan will remain with KCTMO or whether this should transfer to the Council. It is recommended that delegated authority be granted to the Director of Finance to determine this as part of the revised financial settlement with KCTMO.
- 10.3 The acquisition of repairs direct will have no immediate impact on the Council's finances. It should be noted that any future declared dividends would accrue to the General Fund not the HRA. The acquisition of Repairs Direct for a nominal sum is compliant with the CIPFA prudential code.

11. RISK MANAGEMENT

- 11.1 A project team has been sent up to work with the KCTMO on the transition of services. Workstreams covering HR, Finance, Operations, ICT Communications and Repairs Direct report to a Transition Board which in turn reports to a Strategic Board. The Board is chaired by Chris Buss the Director of Finance and comprises the RBKC transition

leadership team and senior officers from the KCTMO. The Housing Programme Board has overall responsibility for the project.

- 11.2 There is a small programme support team who are responsible for reviewing and checking reports and assisting the work-streams. This team also meets regularly to share information to quickly provide work-streams with wider progress and decisions.
- 11.3 A project risk assessment has been undertaken by the programme support team in conjunction with the work-stream leads. Risks are discussed and actioned within each work-stream and are discussed at the Transition Board. All high level risks are monitored by the Strategic Board. All risks have mitigating actions and owners. Programme wide risks are monitored at the Housing Programme Board.

Doug Goldring
Director of Housing Management

Local Government Act 1972 (as amended) – Background papers used in the preparation of this report

[Note: Please list only those that are not already in the public domain, i.e. you do not need to include Government publications, previous public reports etc.]

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