

<p>Cabinet</p> <p>19 December 2017</p>	
<p>Report of: Ann Sutcliffe, Acting Corporate Director, Place</p>	<p>Classification: Unrestricted</p>
<p>Withy House Tenant Management Organisation (TMO) Termination Notice</p>	

Lead Member	Councillor Islam, Cabinet Member for Housing
Originating Officer(s)	John Coker, Strategic Housing Manager
Wards affected	Bethnal Green
Key Decision?	Yes/No
Community Plan Theme	A Great Place to Live

Executive Summary

Withy House TMO was set up in 1996 to manage a single block of 80 flats on Globe Road. A Management Agreement was signed on 10th July 1996 in accordance with the Housing (Right to Manage) Regulations 1994, under which the Council appointed the TMO to undertake responsibility for Cleaning, Caretaking & Grounds Maintenance, Day to Day repairs, Rent Collection and Arrears Control in the block. It has a staffing complement of one Caretaker and one part time Manager.

Following investigations by the Council and its agent, Tower Hamlets Homes, the Council now believe Withy House Tenant Management Co-operative (the TMO) to be in breach of its obligations under the Management Agreement. A breach notice was served in June 2016 followed by a termination notice in January 2017. Under the terms of the Management Agreement drawn up in 1996 the TMO has a right to seek a review of the decision to terminate the management agreement from the Housing Committee; the nearest equivalent decision-making body today is Cabinet

Recommendations:

The Mayor in Cabinet is recommended to:

1. Review the decision to terminate the Withy House Management Agreement
2. Decide on whether or not the decision to terminate the Management Agreement should be upheld.

1. REASONS FOR THE DECISIONS

The response from the TMO to the matters raised in the breach notice served on them in June 2016 did not indicate that the TMO had the competence or capacity then, or in the near future, to remedy the shortcomings identified in a draft internal audit. The Council is therefore not satisfied that the TMO has satisfactorily initiated the necessary action to remedy the breaches in the necessary timescale, or is likely to do so in the future. Public funds have already been put at risk due to the TMO's failings and remain at risk.

2. ALTERNATIVE OPTIONS

Alternative options considered, but not recommended by officers, are to either remove the delegated authority for specific functions e.g. repairs, but allow the TMO to continue under an action/improvement plan, or to offer the TMO more time to strengthen its action/improvement plan. Neither of these options really addresses the systemic failures of the organization, and would leave the risks identified by the LBTH audit to continue for an indefinite period. The officers and advisors' view was that that the time required to implement an action and improvement plan could extend to 18 months or more (assuming that there were sufficient volunteers among residents who were both willing and able to undergo the necessary training and devote the extensive personal time to achieving the outcomes required).

3. DETAILS OF REPORT

3.1 In November 2015, the new Chair of Withy House Tenant Management Organisation informed Tower Hamlets Homes (THH) of numerous concerns around the TMO's management and employment issues. This prompted a number of meetings and discussions within THH / London Borough of Tower Hamlets.

3.2 A decision was taken to carry out an Audit of the TMO's management & governance. This was carried out by the Council's internal audit team in February 2016.

3.3 At the same time, THH commissioned a Housing Consultant (& TMO specialist), to make contact with TMO Committee members and assess the members' understanding and competence, represent the council's interests and advise on Management Agreement (MA) options.

3.4 Internal audit findings

3.4.1 The Audit investigation concluded that the council could have Nil Assurance concerning the management & governance of the TMO. The audit found there had been a systematic failure of good governance that had put at risk the TMO's effective management. The audit identified long-standing failures in practice and procedure which compromised effective management. The audit found that there had been negligible training, guidance or support across the organisation and neither the members of the Management Committee nor the TMO staff had sought such assistance either from the council or from external agencies.

3.4.2 Furthermore, the audit found that there was a serious risk around the suitability of the TMO's repairs and maintenance contractors and that safety certification, checking of insurance and vetting of staff has not taken place.

- 3.4.3 A high level of rent arrears was found which indicated a systematic failure of arrears control. Appropriate financial procedures were not in place and the TMO had run up a deficit in the previous financial year of £11,000¹. This had substantially depleted the TMO's reserves.
- 3.4.4 The audit revealed that staff employment matters were inadequate and the basics of Contracts and Job Descriptions were not in place. In addition the TMO had failed to deal with a staff grievance, which had put the TMO at risk of facing potentially damaging Employment Tribunal proceedings.
- 3.4.5 The Committee operated without a Code of Conduct; committee administration was lacking; there was no schedule of agreed meeting dates, and no comprehensive minutes were held to record Management Committee decisions.
- 3.4.6 The audit found that the TMO budget was set by the bookkeeper rather than by the Management Committee.
- 3.4.7 There is no Business Plan in place and therefore no aims and objectives or longer term strategic plans in place.
- 3.4.8 The TMO had not held the five yearly ballot required by the Management Agreement since 2009. An absence of signed and dated agreed policies and procedures reflect the Management Committee's lack of understanding and competence in relation to their roles and responsibilities.
- 3.4.9 The audit identified a risk arising out of the absence of robust anti-fraud procedures and up to date bank mandate records. The audit also questioned the adequacy of committee members to implement the recommendations of the Audit Report.

3.5 Breach notice

- 3.5.1 Based on these findings, the council served a Breach Notice on the TMO on June 3rd 2016 outlining six specific breaches of the TMO Management Agreement (Appendix 1).
 - 3.5.1.1.1 **Breach 1** – Training and Information – failure to ensure that members, committee members and staff have access to training opportunities.
 - 3.5.1.1.2 **Breach 2** – Five Year Ballot – failure to ensure, that not less than once every five years, the tenants and leaseholders are consulted concerning the continuation of the management agreement by way of a secret ballot or anonymous questionnaire.
 - 3.5.1.1.3 **Breach 3** – Repairs and Maintenance – failure to maintain an approved contractor's procedure, retain copies of insurance certificates and report matters to a sub-committee/Board/General meetings.
 - 3.5.1.1.4 **Breach 4** - Rents & Arrears – failure to take prompt action to recover rent arrears and prevent arrears becoming serious, and failure to set up a rent arrears sub-committee.
 - 3.5.1.1.5 **Breach 5** - Financial policy and procedures – failure to set up a finance sub-committee, failure to make the Board aware of the financial situation, failure to involve management on budget setting, failure to maintain an effective account management system.

¹ The accounts of the TMO record a deficit for each of the financial years 2014/15 (-£9,167), 2015/16 (-£14,314) and 2016/17 (-£3,003)

3.5.1.1.6 **Breach 6** - Staffing & Employment, – failure to follow recruitment and disciplinary procedures, no job description for the TMO manager or contract of employment, no staff supervision procedures in place.

3.5.2 The TMO acknowledged receipt of the Breach Notice on 6 June 2016 and assured the Council that it would give the breach points its urgent attention. The TMO responded to the Breach Notice on 24 June 2016. In its response, the TMO accepted numerous failings identified in the Audit report and Breach Notice, and indicated its willingness to address the breaches by undertaking training for Management Committee members and revising and introducing procedures as outlined in the audit and Breach Notice.

3.5.3 Further correspondence between LBTH and the TMO took place in July 2016 to clarify matters regarding the Breach Notice, and attempts were made by THH on four occasions in September/October 2016 to contact the TMO to arrange a meeting, the TMO finally responded on 10th October and the meeting took place on 2nd November.

3.5.4 However, the breaches were substantially not remedied and, on 4th January 2017, LBTH served a Termination Notice on the TMO (Appendix 2) giving the requisite 3 month notice to expire, at the end of a calendar month, on 31st April 2017.

3.6 Options

3.6.1 The council was faced with 3 options when presented with the TMO's response:

Option 1 – remove the delegated authority for specific functions e.g. repairs but allow the TMO to continue under an action/improvement plan

Option 2 – offer the TMO more time to strengthen its action/improvement plan

Option 3 – terminate the agreement giving the requisite notice

3.6.2 These options were evaluated as set out below.

3.6.3 **Option 1** did not really address the systemic failures of the organisation. It would have simply addressed those areas of service delivery in which the TMO was failing most severely. Removal of such functions as caretaking and day to day repairs would more or less have removed the TMO's raison d'être.

3.6.4 **Option 2** left the risks identified by the LBTH audit to continue for an indefinite period until the effects of an improvement plan kicked in. If the scale of the task facing the TMO was less severe, this option might have appeared attractive. The officers and advisors' view was that that the time required to implement an action and improvement plan could extend to 18 months or more (assuming that there were sufficient volunteers among residents who were both willing and able to undergo the necessary training and devote the extensive personal time to achieving the outcomes required).

3.6.5 **Option 3** was the preferred option largely because the response from the TMO did not indicate that the TMO had the competence or capacity then, or in the near future, to remedy the shortcomings identified in the draft internal audit.

3.6.6 The amount and level of training required of Management Committee members was felt to be more or less equivalent to the level of training which a brand new TMO would be required to undertake before launching. Such a training programme is quite intensive and many developing TMOs take 2-3 years to achieve the required level of competency.

- 3.6.7 The matters concerning contractors and employment required immediate action and it appeared that the TMO did not have the requisite knowledge and experience at that moment (nor would it have in the immediate future), to undertake these actions.
- 3.6.8 It was surprising that Committee members' knowledge of TMO governance and practice was at such a low level that they seemed to be unaware of the failings of the organisation, the risks it faced and the financial difficulties it was in. Similarly, it called into question the TMO Manager's knowledge and competence, as they could and should have identified the key issues and brought the concerns to the attention of the Committee. It was irresponsible of the organisation that it had failed to deal with an employee grievance that may have resulted in the TMO facing a damaging and costly Employment Tribunal. The council was justifiably concerned that the TMO did not appear to have the capacity to reform and improve itself in a timely manner, if at all.

3.7 Legal Position

- 3.7.1 Following the audit and independent investigation, the council sought advice from the Legal Department about the wording and process of the Breach Notice. The legal advice indicated that the Council would be justified in pursuing Option 3.
- 3.7.2 Following agreement to follow Option 3, LBTH drafted a Notice Terminating the Management Agreement. The Notice period for termination was 90 days. During those 90 days, the Secretary of State was informed of the intention to determine the management agreement and, in his response, acknowledged that the requirements in respect of termination of the management agreement had been complied with.

3.8 Current Position

- 3.8.1 On 28th February 2017 the council was contacted by legal representatives of the TMO requesting that the Termination Notice be withdrawn as the TMO had remedied some of the breaches set out in the Termination Notice and notified the Council of its intention to serve a Counter Notice in accordance with the provisions of the management agreement. In this letter the TMO asserted, incorrectly, that the Termination Notice only cited 3 outstanding issues which required documentary evidence to satisfy concerns and listed the 3 ways in which the documents that were provided did comply with what was sought.
- 3.8.2 The TMO served a Counter Notice on 22 March 2017. This repeated the incorrect belief that the termination Notice was served in respect of only 3 out of the 6 breaches and that all the breaches had either been remedied at the date the Termination Notice was served or action had been initiated to remedy them. The TMO invited the Council to withdraw the Notice of Termination.
- 3.8.3 The Council provided the TMO with its response to the Counter Notice on 4 April 2017, informing the TMO that their assertion that the termination Notice was served in respect of 3 out of the 6 breaches in the Breach Notice was incorrect and went on to provide the TMO with detailed reasons as to why the Council was not satisfied that the breaches had been remedied or that action had been initiated to remedy them to its reasonable satisfaction.
- 3.8.4 A Notice of Dispute was then served by the TMO on 25th April 2017 (Appendix 3) and was rejected by officers on the basis that any Dispute should not delay the ability to terminate the management agreement in accordance with the MA.

- 3.8.5 Subsequent to this there has been an exchange of letters between the parties on a number of points which resulted in the original termination date of 31st April 2017, and a subsequent date of 31st July 2017, being suspended pending resolution of the ongoing communication.
- 3.8.6 A second Notice of Dispute has been served dated 22nd May 2017 concerning the decision not to accede to the first Notice of Dispute. Officers responded on 28th July 2017 (Appendix 4) but the TMO have requested on 16th August 2017 that the matter is now considered by the equivalent of the Housing Committee in accordance with their rights under the Management Agreement.
- 3.8.7 The Notice of Dispute that the TMO wishes the council to consider covers a number of issues. The areas of dispute are;
- The Breach Notice was not validly served
 - The TMO disputes there has been any breach of the Management Agreement
 - The Termination Notice was not validly served
 - The Termination Notice did not validly determine the Management Agreement
 - The council failed to give proper reasoned consideration to the counter notice served by the TMO.

The Breach Notice was not validly served

- 3.8.8 In responding to the Notice of Dispute officers have set out the reasons why they believe the areas highlighted should not delay the termination of the MA. Specifically;
- That the Breach Notice dated 3 June 2016 was served by way of letter, addressed to the Management Committee, by hand to the TMO Manager of Withy TMO at the TMO's registered office as well as by email on 3 June to Withy TMO's email address with the Secretary to the TMO copied in. This accord with paragraph 9.3 of Chapter 6 of the management agreement which states that notices 'may' be served by post (they can therefore also be served by hand and by email). Where they are sent by hand or by email there are no specifications as to who they must be served on. In this case the email was sent to the Secretary to the TMO. Further, in so far as the Notice was also served by letter addressed to the Management Committee, the Secretary to the TMO is part of the Management Committee and thus the Notice was sent to her. As such officers consider that there has been strict compliance with clauses 9.2 and 9.4 Chapter 6.
- 3.8.9 When considering whether the Breach Notice has been validly served an arbitrator will consider whether each and every specific requirement is an indispensable condition which renders the notice ineffective in the absence of full compliance, using a commercially sensible interpretation, and will consider whether there has been substantial compliance, including whether the Notice was sufficiently clear, and whether any prejudice has been caused to the TMO. Officers consider that the Notice was validly served and that:
- (a) communication by email is an extremely common commercial business practice;
 - (b) the Breach Notice and accompanying email was extremely clear; and

- (c) the TMO suffered no prejudice – on 6 June 2016 the Secretary wrote to THH to acknowledge receipt of the Breach Notice on 3 June 2016 and giving assurance that Withy TMO would give the breach points raised their most urgent attention.

Breach of the Agreement as Set out in the Breach Notice

- 3.8.10 The TMO did not admit breaches in the correspondence from their legal representatives despite;
- a) its previous attempts to try and (unsuccessfully) rectify the issues raised in the Breach Notice,
 - b) its failure to challenge the accuracy of the audit report; and
 - c) its failure to previously assert that it was not in breach of the Agreement.

- 3.8.11 Indeed, the TMO informed THH that it had ‘studied that attached draft Audit Report and were working hard to address your concerns’. Had there been a real issue relating to breach it is to be expected that this would be raised at the time. However, on the contrary, the communication, when dealing with the specific breaches, accepted that there had been breaches of the Agreement.

Termination Notice Validly Served

- 3.8.12 The Termination Notice dated 4 January 2017 was served by way of a hand delivered letter addressed to the Management Committee at the registered office of the TMO. It was also served by email to the TMO’s email address.
- 3.8.13 As stated in paragraph 6.8 of this report, officers contend that there was compliance with the terms of the management agreement because:
- a) communication by email is an extremely common commercial business practice;
 - b) delivery by hand to the registered office is a more effective way of assuring that the Termination Notice is safely received than registered delivery;
 - c) the Termination Notice was very clear; and
 - d) The TMO suffered no prejudice – it received the Notice promptly, was aware of the serious nature of the Termination Notice and was able to promptly seek legal advice as shown by the solicitor’s letter dated 28 February 2017.

Termination Notice Determined the Agreement

- 3.8.14 Clause 19.2.5 Chapter, which relates to the ways in which the management agreement can be terminated, states that, ‘upon expiry of 3 months written notice given to the TMO’. There is nothing in this clause that requires the Council to set out in the Termination Notice itself that the TMO had failed to remedy a breach or initiated the necessary action to remedy the breach to the reasonable satisfaction of the Council. All that is required is 3 months written notice. This was given.
- 3.8.15 In any event, as set out in some detail in the Council’s letter dated 28 April 2017 to the judicial review letter before claim, the Termination Notice clearly alleged, in the conclusion section of that letter, that, ‘the Council is not satisfied that the TMO has satisfactorily initiated the necessary action to remedy the breaches detailed above in the necessary timescale, or is likely to do so in the future...’. The reference to ‘the

breaches detailed above' were a reference to all six breaches detailed on the first and second page of that letter.

- 3.8.16 Clause 19.2.5 Chapter 1 of the MA provides that the agreement ends on expiry of the three months. The relevance of the failure to remedy the breach or to initiate the necessary action is to the time before the service of the termination notice. Once the notice is served, save for ability of the TMO to serve a counter notice and for the Council to withdraw the termination notice following its reasoned consideration of the counter notice, the termination notice takes effect on the expiration of the three months.
- 3.8.17 The Council's letter of the 4 April 2017 made clear why it was satisfied that there was either a breach and/or no necessary action had been initiated.
- 3.8.18 As part of the detail as to how the TMO was seeking to remedy the breaches the counter notice stated that a mentoring arrangement had been established with the Leathermarket JMB, a large TMO (1500 homes) in LB Southwark. However, enquiries have shown that this was not pursued past an initial enquiry through the TMOs solicitors. A further claim was made that, following contact with the Chair of the National Federation of Tenancy Management Organisations (NFTMO); the TMO would seek to achieve the NFTMO Kite for good governance. This is a highly detailed and onerous process requiring numerous procedures to be in place and which should also have been in operation for some time before the Kite mark could be achieved.

Consideration of Counter Notice

- 3.8.19 On service of the TMOs Counter Notice dated 22 March 2017 officers gave reasoned consideration to withdrawing the notice as required by clause 19.2.5 Chapter 1. This is evidenced by the Council's letter of 4 April 2017 which set out in detail its decision and the reasons for it. The TMO has produced no evidence to suggest otherwise. Following such consideration officers agreed not to withdraw the Termination Notice.

3.9 Integration of Withy House into Council management following the closure of the TMO

- 3.9.1 Should Cabinet uphold the decision of officers, the TMO would be entitled under the terms of the MA to refer the dispute to Arbitration under the Arbitration Acts 1950 to 1979. If the Arbitrator upholds the decision to terminate the MA, then the units at Withy House would be integrated back into THH's direct management.
- 3.9.2 THH will assess the caretaking, cleaning and grounds maintenance needs of the block and it will have service staff allocated to carry out these functions.
- 3.9.3 Following termination, repairs services will be delivered to the block in the same way as all other directly managed properties.
- 3.9.4 Staff at THH have been alerted to the possibility of taking on responsibility for services at Withy House since the original Termination was served. The Management Agreement can formally only end on the last day of the month therefore handover of services could be achieved with effect from 1st February 2018 (however it should be noted that should the TMO decide to exercise its entitlement to seek arbitration this would delay any handover timetable accordingly)
- 3.9.5 The Council may have a TUPE obligation to any staff currently employed by the TMO and this will be investigated in detail and discussed with the TMO. The TMO currently

employs one part time manager and a caretaker however both of these posts are believed to be filled by contracted staff. Bookkeeping and audit functions are outsourced.

- 3.9.6 The TMO will be advised to hold a Special General Meeting to dissolve itself as a Registered Society and an audit will be carried out within 3 months of any decision to terminate. This will identify any TMO assets and liabilities. The Council will have a claim to recover any reserves and funds specifically earmarked for Maintenance. Given the TMO's recent deficit, it will be hard for the TMO to claim it holds any surplus funds which the council would not be entitled to recover.
- 3.9.7 Throughout this period, if termination is to take place, the Council will ensure that channels of communication with all residents are opened and will ensure that they are informed about the demise of the TMO, the reasons for that and how things will change in the block's management going forward.
- 3.9.8 Withy House is a block of 80 properties. If Cabinet chooses not to terminate the Management Agreement the Council must consider the implications in terms of resources and staff inputs required and what support and assistance it will have to offer the TMO in order to turn itself around. Public funds have already been put at risk due to the TMO's failings and remain at risk.
- 3.9.9 At the end of the financial year 2016/17 rent arrears stood at £28,178 across the 52 tenancies managed. This equates to an average of £541.88 per tenant. Although there are no details as to the individual breakdown of arrears officers are aware that there are a small number of cases that are responsible for a large proportion of the arrears, including one where the figure stands at over £5,000. Worryingly, although the TMO have given assurances that the cases are monitored regularly and agreements to repay are in place, they have not taken any precautionary action to serve Notices to permit a swift escalation of recovery action should the tenant default on the agreement to repay. Whilst there is a small risk to the council's ability to instigate legal recovery of the outstanding debts there is a far greater risk to the tenants ability to repay the substantial arrears the TMO have allowed to accrue. There is also a concern that upon reversion to the council recovery action may need to be started from the beginning to ensure compliance with the pre-action protocol for possession claims required by the courts. This has been mitigated so far by the fact that the TMO are required to pay a sum for the rent collected based upon 100% of what is due (allowing for voids) rather than what has been collected. Any shortfall in collection the TMO is required to make good from their allowances. This may, in part, account for the 'overspend' recorded in their accounts over the past three years. Current rent collection is averaging 97.5% across the first two quarters.
- 3.9.10 If the decision to terminate is upheld, the Council can consider offering assistance to residents to ensure they can set up and run an effective TRA and look at options for use and management of the community space in the block. The block requires cyclical maintenance and re-decoration of the common parts. The Council may be able to offer assurances to residents that these will be delivered under direct management. The same applies to day to day services in terms of THH's Caretaking, Cleaning and Grounds services. Considering the current condition of the block it is not likely that residents will receive any less of a service than they do currently and indeed THH may manage, clean and maintain the block better than the TMO has been doing in recent years due to its decline in effective management.

3.10 Comments on the Cabinet report by Withy House TMO

Withy House TMO were provided with an advance draft of this report and have provided their comments in a response in Appendix 6

4. COMMENTS OF THE CHIEF FINANCE OFFICER

- 4.1 Following concerns that were raised in relation to the management and governance of the Withy House Tenant Management Organisation and a subsequent internal audit investigation that concluded that the Council could have nil assurance, a breach notice was issued to the TMO in June 2016. While the TMO did respond to this notice, accepting that there were numerous failings identified in the audit, the breaches appeared not to have been sufficiently dealt with to provide the assurances required that the proper financial governance arrangements were in place to manage the TMO and to not put public funds at risk. As a result a termination notice was issued in January 2017. This report requests that the Mayor in Cabinet reviews the decision to terminate the Management Agreement with the TMO in order to be satisfied that the correct course of action has been taken.
- 4.2 Three options were considered and evaluated at the time of the TMO response to the breaches and these are set out in Section 3.6 of the report. Following legal advice, Option 3 was considered to be the appropriate course of action for the Council and Tower Hamlets Homes (THH) to take.
- 4.3 If the Mayor in Cabinet upholds the decision to terminate the management agreement it is intended that the units at Withy House will be managed in future by THH. At that point, the TMO will be dissolved, and issues such as TUPE arrangements for existing TMO staff, and the treatment of the TMO's assets and liabilities will be addressed. A programme for the future management and maintenance of the block will also be determined. This may include the offer of support to residents to run a Tenants and Residents Association (TRA) and options for the use and management of the community space in the block. All costs related to the block are financed within the Housing Revenue Account.

5. LEGAL COMMENTS

- 5.1 The Procedure for termination the Management Agreement between the Council and Withy House TMO is governed by the terms of the agreement.
- 5.2 Clause 18 of the Agreement permits a Breach Notice to be served where the TMO is considered to be failing to perform a task or tasks delegated to it in accordance with the performance standards set out in the agreement. If following receipt of the Breach Notice the TMO fails to remedy the breaches or initiate the necessary action to remedy the breach to the reasonable satisfaction of the Council, the Council is permitted by Clause 19.2.2 to serve a three months' notice to end the Management Agreement.
- 5.3 Following service of the Termination Notice, the TMO is entitled to serve a Counter Notice and the council is required to give reasoned consideration to withdrawing the notice. If the Notice is not withdrawn, the TMO then has an opportunity to seek judicial review of the decision to terminate the agreement.
- 5.4 The other remedy available to the TMO is to serve a Dispute Notice if it considers that it is in dispute with the Council. Where a Dispute Notice is served, the agreement provides that the Council's director of housing or an equivalent officer should consider the dispute within 14 days and inform the TMO of its response. If the TMO

remains unhappy with the Council's response, it can request that the dispute is referred to the next meeting of Housing Committee. The Committee is then required to consider the dispute and inform the TMO of its decision within 7 days.

- 5.5 As there is no longer a Housing Committee within the Council, the Cabinet is considered to be the most appropriate committee to consider the dispute.
- 5.6 If Cabinet uphold the Termination Notice, the TMO will have an opportunity to refer the dispute to an Arbitrator whose decision will be final.
- 5.7 The TMO currently employs staff to carry out functions such as caretaking. If the Agreement is terminated then provision will need to be made for these employees. If the service provision is to be transferred to an alternative provider, the Council will have to have regard to the requirements of the Transfer of Undertakings (Protection of Employment) ("TUPE") Regulations 2006 (as amended). Should there not be a need for all the existing employees who currently provide the service then a redundancy situation may arise which will require consultation with the affected employees.
- 5.8 In respect of any employment disputes, there is ACAS guidance which sets out the steps which an employer should take. Failure to follow any resolution process, failure to meet with the employee, failure to provide a right of appeal or to take any necessary steps within a reasonable time frame can have financial consequences in respect of any Employment Tribunal claims as a Tribunal has the ability to increase any award to an employee by up to 25% as a result.

6. ONE TOWER HAMLETS CONSIDERATIONS

- 6.1 Equalities Impact Assessment (EIA) has been considered and there are no specific equalities implications arising from this report.. Following the decision, services provided to residents will remain substantially the same as before, but provided by THH rather than Withy House TMO. It is the council's duty to ensure that THH deliver efficient and effective services; accessible to all that meets the needs of different people.

7. BEST VALUE (BV) IMPLICATIONS

- 6.2 The Council is required to consider the value for money implications of its decisions and to secure best value in the provision of all its services. The Internal Audit findings at Paragraph 3.4 above note in detail the concerns which the Council has regarding the TMO's previous and current management of the properties, and Paragraph 3.6 identifies why the Council believes that the TMO is not in a position to remedy the breaches within a reasonable timescale. Integration of the housing services currently provided by the TMO into the direct management by THH will ensure that these services are provided to the same standard as is achieved across the remainder of the council's housing stock .

8. SUSTAINABLE ACTION FOR A GREENER ENVIRONMENT

- 8.1 There are no specific greener environment implications arising from this report.

9. RISK MANAGEMENT IMPLICATIONS

- 9.1 Retaining TMO Management of Withy House would not serve the aspirations of the Council or that of residents. Public funds have already been put at risk due to the TMO's failings and remain at risk. The Internal Audit report identified many systemic failings both in governance of the TMO and its management of the housing functions, which include responsibility for both rent collection and repairs and maintenance.

10. CRIME AND DISORDER REDUCTION IMPLICATIONS

- 10.1 There are no specific Crime and Disorder Reduction implications arising from this report

11. SAFEGUARDING IMPLICATIONS

- 11.1 There are no specific safeguarding implications arising from this report

Linked Reports, Appendices and Background Documents

Linked Report

NONE

Appendices

- **Appendix 1. Breach notice dated 3.6.2016**
- **Appendix 2. Termination notice dated 4.1.2017**
- **Appendix 3. Notice of Dispute dated 22.6.17**
- **Appendix 4 Response to Notice of Dispute dated 28.7.17**
- **Appendix 5 Letter requesting matter be considered by Housing Committee dated 16.8.17**
- **Appendix 6 Response by Withy House TMO**

Background Documents – Local Authorities (Executive Arrangements)(Access to Information)(England) Regulations 2012

NONE

Officer contact details for documents:

John Coker – Strategic Housing Manager (Ext 3782)



Directorate of Development & Renewal

The Management Committee
Withy House TMO
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Strategic Housing Team

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03 June 2016

Tel: 020 7 364 3782
Email: John.Coker@towerhamlets.gov.uk
www.towerhamlets.gov.uk

Dear Management Committee,

Management Agreement - Chapter 1 Clause 18 Failure to Perform 18.1 Breach Notice

Following investigations by the Council and its agent, Tower Hamlets Homes, in May 2016, the Council believes Withy House Tenant Management Co-operative (the TMO) to be in breach of its obligations under the Management Agreement entered into on 10th July 1996.

The specific breaches as are as follows:

Breach 1 – Chapter 1 Clause 10 Training and Information

The TMO has failed to comply with its training obligations to Committee Members and staff in accordance with in Clause 10 Chapter 1 of the Management Agreement as staff and Management Committee Members appeared to show a lack of awareness of their obligations under the Constitution during the investigations.

Breach 2 – Chapter 1 Clause 16.2 Five Year Ballot

The TMO has failed to demonstrate that all tenants and leaseholders support the continuation of the Agreement as required by Chapter 1 Clause 16.2 of the Management Agreement in that there has not been a tenant/leaseholder ballot since March 2008.

Breach 3 – Chapter 3 Repairs and Maintenance, (pages 66 – 75)

The TMO has failed to properly maintained an Approved Contractors procedure, retain copies of Contractor Insurance Certificates and report repair matters to a subcommittee, the Board or General Meetings as required by the Repairs and Maintenance Procedures in Chapter 3 page 66 -75 of the Management Agreement .

Breach 4 - Chapter 3 Clause 2.1 and Appendix 2 pages 91 – 98 Rents & Arrears

The TMO has failed to take prompt action to recover arrears of rent and to prevent the arrears becoming a serious issue as required by Chapter 3 Clause 2.1 and of the Management Agreement in that as at 28 February 2016 rent arrears in the sum of

£19,939.98 along with Former tenant's arrears of £16,556.71 had been allowed to accrue. Additionally, The TMO has failed to set up a Rent & Arrears subcommittee as required by Chapter 3 Appendix 1 of the Management Agreement.

Breach 5 - Chapter 4 Financial Management

Clause 5 Financial Control and accounting standards & Chapter 4 Appendix 2 Financial policy and procedures

The TMO has failed to set up a Finance Sub Committee in accordance with the provisions of Chapter 4 Appendix 2 of the management Agreement and failed to make its Board members aware of the TMO's serious financial situation. It has also failed to involve the Management Committee Members in budget setting and to generally maintain an effective account management system such that at the end of the financial year ended 31 March 2015, the accounts showed a deficit of £11,402k.

This suggests deficiencies in financial management and depletion in reserves. Despite this, the Board does not appear to have discussed the deficit and members who attended the General Meeting of 4 May 2016 appeared to be unaware of the deficit or how it had arisen, or what steps were being taken to address it.

Breach 6 - Chapter 6 Staffing & Employment

Annex A Page 192 Grievance Procedure 7 pages 195 – 203 Contract of Employment

The TMO has failed to adhere to its recruitment policy and disciplinary procedures set out in Annex A page 192 and pages 195 -203 of the management Agreement. In particular, it failed to follow the Grievance Procedure when it received a written Grievance from its then Caretaker in November 2015. This failure has resulted in the risk of the TMO facing an Employment Tribunal and exposing itself to possible financial loss.

Further, the TMO Manager does not appear to have a Job Description or Contract of Employment. This latter is not only a breach of employment law, it is also a breach of the Management Agreement.

Additionally, the TMO does not appear to have any staff supervision procedures in place.

Conclusion

Evidence of these breaches has been obtained through the internal audit. A copy of the internal audit report with details of the breaches and the remedial steps required to be undertaken by the TMO is enclosed with this Breach Notice.

In accordance with Chapter 1 Clause 18 of the Management Agreement, the TMO has 21 days from the date of this notice to remedy the breaches referred to in this Notice.

Please acknowledge receipt of this Breach Notice by return.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'J Coker', is written over a light blue horizontal line.

John Coker

**Acting Divisional Manager
Regeneration & ALMO Client Management**

The Management Committee

Withy House TMO

TMO Office
Globe Road
London E1 4AL

Strategic Housing
Development and Renewal
2nd Floor Mulberry Place
5 Clove Crescent

London E14 2BE

Tel: 020 7364 3782

Fax: 020 7364 2533

john.coker@towerhamlets.gov.uk

04/01/2017

Dear Management Committee,

Management Agreement - Chapter 1 Clause 19.1 Termination Notice

The Council wrote to you on 3rd June 2016 to advise that, following investigations by the Council and its agent, Tower Hamlets Homes, the Council believed Withy House Tenant Management Co-operative (the TMO) to be in breach of its obligations under the Management Agreement entered into on 10th July 1996.

The specific breaches quoted were as follows:

Breach 1 – Chapter 1 Clause 10 Training and Information

The TMO has failed to comply with its training obligations to Committee Members and staff in accordance with in Clause 10 Chapter 1 of the Management Agreement as staff and Management Committee Members appeared to show a lack of awareness of their obligations under the Constitution during the investigations.

Breach 2 – Chapter 1 Clause 16.2 Five Year Ballot

The TMO has failed to demonstrate that all tenants and leaseholders support the continuation of the Agreement as required by Chapter 1 Clause 16.2 of the Management Agreement in that there has not been a tenant/leaseholder ballot since March 2008.

Breach 3 – Chapter 3 Repairs and Maintenance, (pages 66 – 75)

The TMO has failed to properly maintain an Approved Contractors procedure, retain copies of Contractor Insurance Certificates and report repair matters to a subcommittee, the Board or General Meetings as required by the Repairs and Maintenance Procedures in Chapter 3 page 66 -75 of the Management Agreement.

Breach 4 - Chapter 3 Clause 2.1 and Appendix 2 pages 91 – 98 Rents & Arrears

The TMO has failed to take prompt action to recover arrears of rent and to prevent the arrears becoming a serious issue as required by Chapter 3 Clause 2.1 of the Management Agreement in that as at 28 February 2016 rent arrears in the sum of £19,939.98 along with Former tenant's arrears of £16,556.71 had been allowed to accrue. Additionally, the TMO has failed to set up a Rent & Arrears subcommittee as required by Chapter 3 Appendix 1 of the Management Agreement.

Breach 5 - Chapter 4 Financial Management - Clause 5 Financial Control and accounting standards & Chapter 4 Appendix 2 Financial policy and procedures

The TMO has failed to set up a Finance Sub Committee in accordance with the provisions of Chapter 4 Appendix 2 of the management Agreement and failed to make its Board members aware of the TMO's serious financial situation. It has also failed to involve the Management Committee Members in budget setting and to generally maintain an effective account management system such that at the end of the financial year ended 31 March 2015, the accounts showed a deficit of £11,402k.

This suggests deficiencies in financial management and depletion in reserves. Despite this, the Board does not appear to have discussed the deficit and members who attended the General Meeting of 4 May 2016 appeared to be unaware of the deficit or how it had arisen, or what steps were being taken to address it.

Breach 6 - Chapter 6 Staffing & Employment - Annex A Page 192 Grievance Procedure 7 pages 195 – 203 Contract of Employment

The TMO has failed to adhere to its recruitment policy and disciplinary procedures set out in Annex A page 192 and pages 195 -203 of the management Agreement. In particular, it failed to follow the Grievance Procedure when it received a written Grievance from its then Caretaker in November 2015. This failure has resulted in the risk of the TMO facing an Employment Tribunal and exposing itself to possible financial loss.

Further, the TMO Manager does not appear to have a Job Description or Contract of Employment. This latter is not only a breach of employment law, it is also a breach of the Management Agreement.

Additionally, the TMO does not appear to have any staff supervision procedures in place.

The TMO was given 21 days from the date of the notice to remedy the breaches.

You responded on 27 June 2016 accepting that you were in breach of the Management Agreement and stated that you intended to take steps to remedy those breaches. Managers from the council and THH have therefore continued to liaise with you in an effort to ensure that the residents of the TMO are provided with an efficient and value for money service.

At a meeting between the Management Committee, myself, Ann Otesanya and Christine Foley on 2nd November 2016, we informed you that the council still had serious concerns about the ability of the TMO to take appropriate remedial action for rectify the breaches within a reasonable time frame and requested that you provide various documentations to give the council the assurance that these matters are underway and sufficient to remedy the breaches.

Following this meeting, I wrote to you on 23rd November 2016 confirming our discussions and documentation we had asked you to provide us. These were:

Training

- A copy of the training programme for Management Committee members, (which must include the scope of each module, the overall aims and objectives, expected outcomes, details of the quality control measures in place, and anticipated timescales)
- A copy of the contract with the training provider

Repairs

- Copies of all documents and certificates relating to Health and Safety procedures
- Copies of all insurance documents relating to the current repairs contractor
- A copy of the procurement procedure for repairs contractors
- A copy of the Approved List of contractors, and all documents to support this

Ballot

- The timetable for the ballot
- The detailed plan of the arrangements put in place for conducting the ballot
- A list of the Officers on the Management Committee

Employment

- A copy of the Job Description for the TMO Manager

Although you have provided some of these items, I have noted that not all of the items were provided and of those that were provided, not all fulfil the requirements which we were seeking. Specifically:

- The Management Committee training programme provided gives no detail on the overall aims and objectives, expected outcomes, and details of quality control measures in place
- The procurement procedure and Approved List of repairs contractors with all supporting documentation was not provided
- No timetable or detailed plan for conducting the ballot was provided

Conclusion

In view of this, I regret to inform you that the Council is not satisfied that the TMO has satisfactorily initiated the necessary action to remedy the breaches detailed above within an acceptable timescale, or is likely to do so in the future. The Council has a duty to protect the interests of all residents of Withy House and to ensure that they receive services to the standard and quality to which they are entitled. Therefore, in accordance with Chapter 1 Clause 19.1 of the Management Agreement, I hereby serve notice that the Management Agreement will terminate with effect from 31st April 2017.

I will be in contact with you shortly to discuss the future management of Withy House.

Yours sincerely



John Coker
Strategic Housing - Acting Divisional Manager
Regeneration & ALMO Client Management

Appendix 3

NOTICE OF DISPUTE NO. 2

This Notice of Dispute is served by Withy House Management Board Limited, ("the TMO"), on Tower Hamlets London Borough Council ("the Council") pursuant to Chapter 6, Clause 16 of the Agreement between the

TMO and the Council made on or about 10 July 1996, ("the Agreement"), a dispute having arisen between the TMO and the Council as to whether the TMO was entitled to serve a Notice of Dispute, ("the first Notice of Dispute"), pursuant to Chapter 6, Clause 16 of the Agreement, the Council having purported to serve on the TMO a notice purporting to terminate the Agreement under Chapter 1, Cl 19.2.5.

Nature of the Dispute

The Council contends, as set out in its letter dated 3 May 2017, but the TMO denies, that on its true construction the Agreement does not permit the TMO to serve a Notice of Dispute after the Council has served a notice which purports to terminate the Agreement. The TMO contends that, on a true construction of the Agreement, it was entitled to serve the first Notice of Dispute notwithstanding that the Council has served a notice which purports to terminate the Agreement. For the reasons set out in the first Notice of Dispute, (a copy of which is annexed hereto), the TMO denies that the said notice was either (a) validly served; and/ or (b) if validly served was effective to terminate the Agreement.

Action which the TMO requires the Council to take

The TMO requires the Council to consider the first Notice of Dispute in accordance with the provisions of Chapter 6, Clause 16 of the Agreement.

NOTICE OF DISPUTE

This Notice of Dispute is served by Withy House Management Board Limited, ("the TMO"), on Tower Hamlets London Borough Council ("the Council") pursuant to Chapter 6, Clause 16 of the Agreement between the TMO and the Council made on or about 10 July 1996, ("the Agreement"), a dispute having arisen between the TMO and the Council as to (i) whether the Council was entitled to and/or did validly serve on the TMO a Breach Notice dated 3 June 2016 pursuant to Chapter 1, Cl. 18.1 of the Agreement; and (ii) whether the Council validly served on the TMO a notice dated 4 January 2017 purporting to terminate the Agreement under Chapter 1, Cl. 19.2.5 and, if served, whether the said notice was effective to terminate the Agreement with effect from 30 April 2017.

Nature of the Dispute

- (1) The Council contends, but the TMO denies, that the Council validly served a Breach Notice dated 3 June 2016 under Chapter 1, Cl. 18.1, ("the Breach Notice"), on the TMO. Chapter 6, Cl. 9.4 of the Agreement requires inter alia that any notice which the Council sends to the TMO under the terms of the agreement "shall be sent to the Secretary of the TMO at the TMO's Registered Office." The Breach Notice was not sent to the Secretary of the TMO.
- (2) Further or alternatively, the Council contends that the TMO was in breach of the Agreement as set out in the Breach Notice. The TMO does not admit the alleged breaches and the Council is put to strict proof in respect thereof.
- (3) Further or alternatively, the Council contends, but the TMO denies, that the Council validly served on the TMO a Notice dated 4 January 2017 under Chapter 1, Cl. 19.2.5 purporting to terminate the Agreement ("the Termination Notice") . Chapter 6, Cl 9.1.a of the Agreement requires that any notice served by the Council under Chapter 1, Cl. 19 "shall . . . be sent by recorded delivery post

to . . . the TMO's registered office." The Termination Notice was not sent to the TMO by recorded delivery post to the TMO's registered office.

(4) Further or alternatively, the Council contends, but the TMO denies, that the Termination Notice validly determined the Agreement in that (a) it failed to set out in respect of each of the alleged breaches in the Breach Notice whether it was alleged that the TMO had either failed to remedy the breach alternatively had failed to initiate the necessary action to remedy the breach to the reasonable satisfaction of the Council; and/or (b) the Council could not be reasonably satisfied on the date of the expiry of the Termination Notice that the TMO had failed to initiate the necessary action to remedy such breach of the Agreement as the Council can establish. The TMO has established a mentoring scheme with Leathermarket JMB, a large successful tenant management organisation, which will offer training, advice and support to the TMO. The TMO has also sought and received support and assistance from another in the Council's area. The TMO has sought advice from and attended a meeting with the Chair of the National Federation of Tenant Management Organisations, ("NFTMO"), and has applied to join NFTMO in order to avail itself of the training, support and other resources available from NFTMO to tenant management organisations; furthermore the TMO will carry out a good governance healthcheck and apply for a Good Governance NFTMO kitemark. In addition, the Council has failed to have regard to the following further steps taken by the TMO by virtue of which the TMO has initiated the necessary action to remedy any breach of the Agreement:

(a) Breach 1 (Chapter 1, Cl. 10): the TMO has established a comprehensive programme of training and information to members, committee members and staff

(b) Breach 2 (Chapter 1, Cl. 16.2): the TMO relied on Tower Hamlets Homes' representation that it would signal the need for a five year

ballot at the appropriate time. In any event the TMO held a ballot in January 2017 and has diarised the dates of future ballots;

- (c) Breach 3 (Chapter 3, Repairs and Maintenance): the TMO has established an Approved Contractors' procedure and submitted copies of contractor's insurance certificates. A sub-committee has been established and repairs matters are regularly reported to the Management Committee and General Meetings of the TMO.
 - (d) Breach 4 (Chapter 3, Cl. 2.1 and Appendix 2- Rents and Arrears): the TMO's obligation under the Agreement is to seek to prevent rent arrears becoming a serious issue. The TMO has initiated training whose object is to assist it in dealing with rent arrears and has established a Rent Arrears Sub-Committee and regular reporting on rent arrears to the Management: Committee. In breach of its obligations under Chapter 6, Cl. 8, the Council failed to respond to the TMO's request for training on rent arrears and a mentor to advise on finance and arrears issues. The level of arrears is monitored and appropriate action, including the institution of possession proceedings, is taken.
 - (e) Breach 5 (Chapter 4, CL 5 and Chapter 4, Appendix 2, Financial Management). The TMO has established a Finance Sub-Committee and has regularly reported financial issues including budget setting to the Management Committee. The deficit of £11,402 at 31 March 2015 does not indicate the absence of an effective account management system or deficiencies in financial management. The Management Committee is aware of and has taken action to address the deficit.
 - (f) Breach 6 (Chapter 6, Annexe A, staffing and employment, grievance procedure, contract of employment and staff supervision): the TMO is establishing staff supervision procedures. The TMO Manager has a job description. The TMO is committed to following its recruitment policy and disciplinary procedures including its grievance procedure.
- (5) Further or alternatively, the TMO contends but the Council denies, that the TMO having served a counter-notice within the meaning of

Chapter 1, CI 19.2.5 alleging that any breach of the Agreement was minor and did not in itself or considered with previous breaches constitute sufficient reason for ending the Agreement, the Council failed to give any proper reasoned consideration to withdrawing the Termination Notice.

Action which the TMO requires the Council to take

The TMO requires the Council to withdraw the Termination Notice.

Devonshires Solicitors
DX:33856 Finsbury Square

Governance Directorate
Legal Services

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London
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28 July 2017

Our Ref: TOWHH.1866/AB
Your Ref: SZD\WIT7\1\11041164

Dear Sirs

Re: WITHY HOUSE TMO - RESPONSE TO DISPUTE NOTICE

We write further to your letter dated 22 June 2017 and agreement to extend time to 31 July 2017.

In relation to the points raised in your Notice of Disputes our client responds as follows.

Notice of Dispute

(1) Breach Notice Validly Served

The Breach Notice dated 3 June 2016 was served by way of letter addressed to the Management Committee by hand to Nancy Hunt of Withy TMO at the TMO's registered office as well as by email on 3 June to Withy TMO's email address with the Secretary to the TMO Sue Rothern copied in.

Clause 9.3 only specifies that notices 'may' be served by post – they can therefore also be served by hand and by email. Where they are sent by hand or by email there are no specifications as to who they must be served on. In this case the email was

sent to Ms Rothern, Secretary to the TMO. Further, in so far as the Notice was also served by letter addressed to the Management Committee, the Secretary to the TMO is part of the Management Committee and thus the Notice was sent to her. As such our client considers that there has been strict compliance with clauses 9.2 and 9.4 Chapter 6.

Further, if, which is not accepted, there has not been strict compliance, there has been substantial compliance sufficient to render the Breach Notice validly served. Your client will be well aware that when considering whether the Breach Notice has been validly served the arbitrator will consider whether each and every specific requirement is an indispensable condition which renders the notice ineffective in the absence of full compliance, using a commercially sensible interpretation, to consider whether there has been substantial compliance including whether the Notice was sufficient clear and any prejudice has been caused to your client.

Our client considers that the Notice was validly served: (a) any non-compliance was extremely minor; (b) communication by email is an extremely common commercial business practice; (c) the Breach Notice and accompanying email was extremely clear; and (d) your client suffered no prejudice – on 6 June 2016 Ms Rothern wrote to our client to acknowledge receipt of the Breach Notice on 3 June 2016 and assuring that Withy TMO would give the breach points raised their most urgent attention.

(2) Breach of the Agreement as Set out in the Breach Notice

Our client is very surprised that your client does not admit breaches given your client's previous attempts to try and (unsuccessfully) rectify the issues raised in the Breach Notice, its failure to challenge the accuracy of the audit report and its failure to previously assert that it was not in breach of the Agreement. Indeed, your client informed our client that it had 'studied that attached draft Audit Report and were working hard to address your concerns'. Had there been a real issue relating to breach our client would have expected this to be raised contemporaneously. On the contrary, that letter, when dealing with the specific breaches, accepted that there had been breaches of the Agreement.

In any event our client will rely, inter alia, on the Internal Audit report dated May 2016, your client's responses including those set out in the letter of 24 June 2016, and the minutes and discussions of the meeting of 2 November 2016 to establish the breaches of the agreement. It is satisfied that there is more than sufficient evidence to establish breach.

(3) Termination Notice Validly Served

The Termination Notice dated 4 January 2017 was served by way of letter addressed to the Management Committee at your client's registered office address and delivered there by hand. It was also served by email to your client's email address.

Our client repeats the observations made above relating to substantial compliance. It considers that the Termination Notice was validly served as: (a) any non-compliance was extremely minor; (b) communication by email is an extremely common commercial business practice; (c) delivery by hand to the registered office is a more effective way of assuring that the Termination Notice is safely received than registered delivery; (d) the Termination Notice was very clear; and (e) your client suffered no prejudice – it received the Notice promptly, was aware of the serious nature of the Termination Notice and was able to promptly seek legal advice as shown by your letter dated 28 February 2017.

(4) Termination Notice Determined the Agreement

Clause 19.2.5 Chapter states that, 'upon expiry of 3 months written notice given to the TMO'. There is nothing in this clause that requires our client to set out in the Termination Notice itself that your client had failed to remedy the breach or initiate the necessary action to remedy the breach to the reasonable satisfaction of our client. All that is required is 3 months written notice. This was given.

In any event, as set out in some detail in our client's response dated 28 April 2017 to your client's judicial review letter before claim, the Termination Notice clearly alleged, in the conclusion section of that letter, that, 'the Council is not satisfied that the TMO has satisfactorily initiated the necessary action to remedy the breaches detailed above in the necessary timescale, or is likely to do so in the future...'. The reference to 'the breaches detailed above' where a reference to all six breaches detailed on the first and second page of that letter.

Clause 19.2.5 Chapter 1 provides that the agreement ends on expiry of the three months. The relevance of the failure to remedy the breach initiate the necessary action is to the time before the service of the termination notice. Once the notice is served, save for ability of the TMO to serve a counter notice and for the Council to withdraw the termination notice pursuant to its reasoned consideration, the termination notices takes effect on the effluxion of time.

Our client is again surprised at your current interpretation of clause 19.2.5 suggesting that the relevant date is the date of the expiry of the termination notice. This is because your client set out in significant detail, in its letter dated 22 March 2017, that the clear, natural and ordinary meaning of the clause was that the breach or failure to initiate the necessary action had to be extant at the date the notice was served. Our client agrees that that is the clear, natural and ordinary meaning of this part of the clause.

Further, our client's letter of the 4 April 2017 made clear why it was satisfied that there was either a breach and/or no necessary action had been initiated.

In relation to the alleged mentoring arrangement your client has advised has been established with the Leathermarket JMB, it is understood that your client has not pursued this past an initial enquiry through yourselves. With regard to your client's alleged contact with the Chair of the National Federation of Tenancy Management Organisation (NFTMO) our client is reliably informed that achieving the NFTMO Kite

mark is a detailed process requiring numerous procedures to be in place which should also have been in operation for some time before the Kite mark could be achieved.

(5) Consideration of Counter Notice

On service of your client's Counter Notice dated 22 March 2017 our client gave reasoned consideration to withdrawing the notice as required by clause 19.2.5 Chapter 1. This is evidenced by our client's letter of 4 April 2017 which set out in detail its decision and the reasons for it. Your client has produced no evidence to suggest otherwise.

As a result of the above our client will not be withdrawing the Termination Notice.

Notice of Dispute No. 2

Our client maintains its view that clause 16 chapter 6 does not permit a Notice of Dispute to be served once a Notice of Termination has been served. However, it confirms that it will apply and abide by clauses 16.4-16.6 Chapter 6 on a pragmatic basis in order to effectively reach a resolution on these issues.

As a result of the above our client has considered the first Notice of Dispute in accordance with the provisions of clause 16.5 Chapter 6.

Yours faithfully,

Amma Boateng

Senior Housing Lawyer

On behalf of the Acting Corporate Director Governance & Interim Monitoring Officer



FAO Amma Boateng

Our Ref: RYB\WIT7\1\11615184
Your Ref: TOWHH.1866/AB

London Borough of Tower Hamlets

Governance Directorate
Legal Services
Mulberry Place
5 Clove Crescent
London
E14 2BG

BY EMAIL INITIALLY:
amma.boateng@towerhamlets.gov.uk

16 August 2017

Dear Sirs,

Re: Withy House TMO

We write further to your letter dated 9 August 2017.

We have taken our client's instructions on the contents of your letter of 28 July 2017 and can confirm that our client is not satisfied with your response.

Firstly, we do not accept your comments about service of the Termination Notice and we do not agree that substantial compliance is sufficient for a notice such as this. There is clear case law that establishes that with a notice such as this which purports to terminate an agreement, complete fulfilment is required. The Management Agreement is clear that service of a Termination Notice under Chapter 1 Clause 19 must be served on our client by recorded delivery and it is clear from your response that this did not happen. As a result, we consider that the Notice is invalid.

Secondly, we continue to believe that there were not any breaches of the Agreement at the time of service of the breach notice, and in the event that any breaches are established, they were remedied within the time period given, or that necessary action had been initiated to remedy any breach. Our client is not satisfied as to your previous responses in relation to this.

We, therefore, write to request that the dispute is considered at the next meeting of the Council's Housing Committee under Clause 16.5 of the Management Agreement. Please advise when the next meeting will take place.

30 Finsbury Circus, London EC2M 7DT
Tel 020 7 628 7576 Fax 0870 608 9390 DX 33856 Finsbury Square
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**SUBMISSION TO THE MAYOR IN CABINET OF THE COUNCIL OF THE
LONDON BOROUGH OF TOWER HAMLETS ON BEHALF OF WITHY
HOUSE TENANT MANAGEMENT ORGANISATION**

Introduction

1. The Council is considering whether to uphold a decision of officers to terminate a Management Agreement made on 10 July 1996 between it and the Withy House Management Board Limited, a Tenant Management Organisation. As the officers' report makes clear Withy House is a small TMO comprising a single block of 80 flats. Under the Management Agreement the Council appointed the TMO to carry out cleaning, caretaking and grounds maintenance, day to day repairs, rent collection and arrears control. (Under the Agreement the TMO is liable to and has remitted to the Council in full all the rent due from tenants and long lessees whether paid or not.) In order to carry out its responsibilities under the Agreement it employs one caretaker and a part-time manager.

2. These Submissions do not address the highly technical legal arguments which are likely to arise in the event that the Council decides to terminate the Agreement. Withy House has no desire to proceed to an arbitration which will necessarily involve further delay and escalating lawyers' fees on both sides. Accordingly, these Submissions concentrate not on whether the Council was technically entitled to and did terminate the Agreement; but rather on the issue whether the Council *should* rather than *could* terminate the Agreement. For this reason the TMO does not accept (as appears to be suggested at paragraph 1 of the Recommendation to the Mayor in Cabinet) that recourse to arbitration is a satisfactory alternative to a review by the Mayor in Cabinet.

3. A TMO empowers its tenants and promotes a shared sense of community by giving locally-based tenants responsibility for important aspects of the management of their homes. Governments of all political parties have supported the development of TMOs since the 1980s and continue to do so.

4. A small TMO like Withy House necessarily relies on the involvement of volunteers. Although the officers criticise a number of technical failings on the part of the TMO, (in some cases fairly), significantly it retains a high level of support among tenants at Withy House. A recent petition asking the Council to support the TMO and not to terminate the Agreement was signed by a majority of the tenants; and in an independently supervised ballot in January 2017 of the 41 votes case the vast majority (37) voted in favour of the TMO continuing to run Withy House. (In both cases a turnout that compares favourably to the turnout in both the 2014 local elections and the Mayoral Election). The importance of the voices of social housing tenants being heard was recently acknowledged by the Prime Minister in her Channel 4 interview on 3 October 2017 following the Grenfell tragedy, and in the recent calls for the re-establishment of the National Tenant Voice. Removing the management of Withy House from the TMO would constitute a calculated failure to listen to the voices of the social tenants and long lessees who live there.

Context

5. Under the Agreement the Council is required to monitor and support the TMO in the performance of its obligations. Thus provision is made for the Council (and the TMO) to annually review each other's performance. The Council failed to carry out annual reviews which would have alerted the TMO to any concerns which the Council had before they reached the stage where the Council is considering

terminating the Agreement. The Agreement also makes provision that not less than once every 5 years or more frequently than once every 2 years, the Council is required to monitor the total performance by the TMO of its responsibilities under the Agreement and to produce a monitoring report identifying deficiencies in the performance of the TMO and make positive recommendations as to the steps which the TMO needs to take to rectify any deficiencies.

6. In about 2014 the Council carried out a monitoring review which found no deficiencies save for a minor matter concerning saving copies of signed cheques which the Council considered to be unwise (and which the TMO acted on).
7. Some of the failings which the Council identified in its May 2016 audit would have existed in 2014 but they were not identified as such, (far less advanced as a reason to terminate the Agreement). As a result the TMO should have been, but was not, alerted to the fact that the Council regarded some of the deficiencies which it claims to have found in May 2016 as serious.
8. There is a further issue here. Under its own agreement with the Council Tower Hamlets Homes is required to support the Council's TMOs. This reflects the Council's own obligation under the Agreement to support the TMO. This support is particularly important in the case of smaller TMOs who lack the resources to fund their own specialist support and advice. Prior to the May 2016 audit, THH failed to advise and support Withy House, (although it is acknowledged that more recently with the appointment of Mr Lee Page, the position has substantially improved). One obvious example of that failure is that THH undertook to remind TMOs in good time that it was necessary under the Agreement for a ballot to be held once every five years on the issue of whether the Agreement

should continue. That sort of detail is easily overlooked when volunteer members of the TMO are confronted with an Agreement running to more than 200 closely typed pages. THH failed to honour that undertaking. Withy House notes these criticisms of THH are consistent with the findings of the last Audit Commission report (2011) on THH before that body was abolished, where the Commission concluded that, notwithstanding that many other aspects of THH's performance were at least satisfactory, THH does not support the Council's TMOs well.

9. This lack of support is particularly unfortunate in the circumstances of this case: in 2015 the long standing Chair of the TMO unfortunately passed away. For many years she had been closely involved in the running of the TMO (both on and off the Committee) and had been very closely involved in its day to day operation. Her passing was a great loss to the TMO who had, with the benefit of hindsight, unwisely relied on her too heavily. When her inexperienced successor contacted THH for assistance in getting to grips with her new responsibilities, the response was not to offer support and advice (as required under the Agreement) but instead to hold "a number of meetings and discussions within THH/London Borough of Tower Hamlets", (see paragraph 3.1 of the officers' report), before carrying out an internal audit.

10. Before turning to the detail of the failings identified by the internal audit, the TMO would make one further general point: it is almost always possible to identify organisational shortcomings when an organisation is subjected to the type of comprehensive thorough-going audit of the type undertaken in this case. If it were necessary to demonstrate that, KPMG LLP's own audit of the Council shows that. It is always possible to find fault. The question is whether in all the circumstances it is proportionate and fair, having regard to the history as set out above and importance of listening to the voices of its tenants, for the Council to terminate the Agreement.

The alleged breaches

11. (i) training:

The Agreement requires the TMO is required to provide *access to* training for members and staff, in other words to make available the opportunity for training of any member or employee who wants it. To the extent that it was in breach of that requirement, (and the TMO contends that any member or employee who requested training would have had access to it), that breach has been remedied. The TMO has taken active steps to institute a programme of training, (independently of THH, which failed to respond to a request dated 16 September 2016 from the TMO for training), and actively encouraged members and employees to undertake it. Since September 2016 fourteen (14) training/mentoring sessions have been held, all of which were well-attended. The TMO has also actively pursued mentoring opportunities with other TMOs.

A Schedule detailing training in scheduled and undertaken in 2016 and 2017 is attached.

In its letter dated 4 April 2017 the Council objected to this programme of training on the basis that (a) it was unaware how the training was procured and (b) what the intended outcomes were. As to the latter the TMO contends that it is glaringly obvious that the intended outcome of the training was to improve the knowledge and skill-set of all those attending in the subject matter of the training. As to the former the TMO contends, (assuming that this is a relevant question at all), that it is equally obvious that the training was procured as a result of discussions with other TMOs and its legal advisers.

(ii) five year ballot.

A ballot was held in 2009 and the result was strongly in favour of the Agreement remaining in force. The TMO accepts that it failed to hold another ballot within 5 years but that was as a result, at least in part, of THH's failure, (contrary to its undertaking), to remind it to do so. This is part of the support which the TMO is reasonably entitled to expect from THH/the Council. A ballot was held in January 2017 in which 41 votes were cast of which 37 were in favour of the TMO continuing to run Withy House. Unfortunately only one ballot paper per household rather than one ballot paper to each tenant/long lessee was issued. The TMO will hold another ballot in order to remedy this technical defect, (although it is only fair to point out that this unintentional oversight only affected a maximum of 20 tenants, and given the numbers voting in favour of the TMO continuing to manage Withy House, would not have affected the overall outcome and furthermore this issue was not identified at the time by the Council in the course of extensive discussions about the conduct of the ballot).

(iii) failure to maintain an approved contractor's procedure, retain insurance certificates and report to a board or general meeting:

This related in part to the expiry of one contractor's insurance and gas safety certificates.

There is now an approved contractor's application, agreement (including appendix) in place and a system for checking and holding insurance and gas certificates. The relevant documents are available on request.

(iv) failure to take prompt action to recover rent arrears and establish a rent arrears sub-committee.

There is now a committee that deals with rent arrears and active steps have been taken to recover arrears. Over the period 2015-2017 the mean percentage of rent collected has exceeded 102%. It should be noted that under the Agreement the TMO is required to

and does account fully to the Council in respect of rent recoverable whether it is in fact recovered or not. Furthermore delays (on the part of the Council), in getting cases to court and in evicting defaulters (if necessary) is a significant factor in the accrual of rent arrears. At the end of 2016/17 the Council accepted that it was responsible for some £28,000 of rent arrears. The TMO has reviewed and updated its Rent Arrears Policy and Procedure.

The relevant documents are available on request.

- (v) failure to establish a finance sub-committee, to keep the Board informed and to involve it in budget setting and to maintain an effective account management system.

This has now been addressed. Insofar as the Council expresses concern about financial deficits it is important to bear in mind that the Council has been substantially underpaying the TMO's allowances between 2012/3 and 2016/17. The Council's breach notice alleges that the accounts show a deficit of £11,402 as at 31 March 2015. That sum is less than the amount that the Council owes the TMO as a result of the underpayment of its allowances since 2012/13. In any event it is not accepted that the accounts show a deficit. The TMO's net current assets at 31 March 2015 were £26,655.00.

- (vi) staffing and employment – failure to follow recruitment and disciplinary procedures, to provide a job description and written contract of employment for the TMO manager, no staff supervision procedures in place.

This is being addressed. The TMO has reviewed and up-dated its Recruitment Policy, Disciplinary Procedure and Standard Terms and Conditions for Staff. There is a job description for the Manager. These documents are available on request. The TMO is reviewing

the contractual position of its Manager with appropriate specialist advice.

Financial matters

12. It is relevant to note that in 2012/13 the TMO was notified that it was entitled to an allowance of £86,919 per annum (and more recently the TMO has been notified that in respect of 2017/18, an allowance of £98,072.85 was due and has been paid). However in respect of the years 2012/13 to 2016/17, the Council contended that it would not pay an allowance greater than £81,063.59 unless the TMO signed a new management agreement. In early 2016 the TMO had nearly finalised an agreement with the Council as to the new management agreement but the Council employee conducting the negotiations, (Nancy Hunt), left the Council's employ and since that time the discussions have been in limbo through the lack of an officer on the Council's side to carry them on. However, with very limited differences, the calculation of the allowances under the Agreement and under the proposed new management agreement are the same. The Council was not entitled to withhold allowances due to the TMO because the TMO declines to sign a new form of management agreement. It follows that since 2012/13 there has been a shortfall in the allowances between those due to and those paid to the TMO. The TMO calculates that that shortfall equates to a sum in excess of £50,000. This shortfall has been a further factor in any failure on the part of the TMO to purchase the expertise necessary to ensure that its procedures meet the exacting standards which the Council now insists on.

13. Going Forward

The TMO has put in place a Five Year Plan Overview proactively identifying issues which it intends to address in the medium term and is working on producing a detailed and comprehensive Five Year

Plan, (in collaboration with Mr Page), which will underpin its work over the next five years.

14. The TMO remains in dialogue with the Council's TMO Liaison Officer, Mr Page, with a view to further improving its policies, procedures and practices and is committed to doing so.

Conclusion

15. The TMO believes that it has made substantial progress since the service of the Breach Notice. Substantial numbers of new volunteers have come forward and demonstrated their commitment by attending training sessions and becoming actively involved in the work of the TMO. The TMO has taken on-board and acted on the advice and support which it has, (albeit only since the service of the Breach Notice), received from the recently appointed TMO Liaison Officer. It has reviewed and updated its policies. Importantly the TMO evidently retains the support of the majority of the tenants and long leaseholders at Withy House. The Council need have no concern that the TMO will not continue to further update and improve its practices but any concern that the Council does have can be met by reviewing the question of the termination of the Agreement in, say, 12 months time.
16. **The TMO accordingly invites the Council either to decline to terminate the Agreement; alternatively to postpone a decision on whether to terminate the Agreement for 12 months and to re-consider the position at that time in the light of the then circumstances.**

The Management Committee

Withy House TMO.

7 December 2017

**SUBMISSION TO THE MAYOR IN CABINET OF THE COUNCIL OF THE
LONDON BOROUGH OF TOWER HAMLETS ON BEHALF OF WITHY
HOUSE TENANT MANAGEMENT ORGANISATION**

Devonshires

Ref: RB

Withy House TMO Training Schedule 2016-18:

Already completed with Greg Robbins 2016

Date Scheduled	Title	Cost	Attendees	Checked date and signed	Overview of Training
26/9/2016	#1 Introduction to TMO Governance	£200	Sue Rotheron (Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson Tom Herbert	26/9/2016	a) Relationship of rules, policies, management agreement b) Committees/working groups c) Roles of officers
3/10/2016	#2 Committee Skills	£200	Sue Rotheron (Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson Tom Herbert	3/10/2016	a) Preparing for meetings – expectations b) Helping to ensure smooth running meetings and working with the chair c) How to ensure that a view is heard without dominating d) Reaching decisions and pursuing actions, including those between meetings e) Responsibilities of committee members
17/10/2016	#3 Keeping Your Co-op Financially Safe	£200	Sue Rotheron (Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson	17/10/2016	a) Sound procedures b) Approval of Expenditure c) Annual budget, monitoring, accounts, auditors
24/10/2016	#4 Maintenance	£200	Sue Rotheron	24/10/2016	a) Which repairs will be carried out

			(Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson		b) Who decides/actions c) Void inspections d) Value for money
31/10/2016	#5 Allocations	£200	Sue Rothern (Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson Tom Herbert	31/10/2016	a) How Choice Based Lettings works with the co-op b) Interviews – agreed questions c) Internal transfers d) Sharing information with the authority
Date Scheduled	Title	Cost	Attendees	Checked date and signed	Overview of Training
7/11/2016	#6 Charing Meetings – Greg Robbins	£200	Jane Stewart (Chair) Anna Collins Sue Rawlinson Barry Boardman	7/11/16	Being Clear what is on the agenda and what must be decided. Ensuring that all can contribute without one person dominating. Listening more than speaking so as to summarise the view of the meeting.
21/11/2016	#7 Taking minutes at meetings	£200	Sue Rothern (Secretary) Jane Stewart (Chair) Barry Boardman Sue Rawlinson	21/11/16	Providing a record. What is recorded? Showing how to layout minutes efficiently. What to leave out.
28/11/2016	#8 Arrears Action	£200	Sue Rothern (Secretary) Jane Stewart (Chair) Barry Boardman	28/11/16	Following Co-op Policy on Rent Arrears. Understanding impact of rent arrears on Co-op finances. Ways of working with tenants in arrears and support. Understanding LBTH legal action/

			Sue Rawlinson		
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Training 2017/8

Date Scheduled	Title	Subcommittee	Cost	Attendees	Checked date and signed	Overview of Training
21/6/17	Arrears Actions and Setting up rent surgeries	Tom Herbert and James Cross	£200.00	Jane Stewart (Chair) Sue Rothern (Secretary) James Cross (rent arrears sub-committee) Tom Herbert (rent arrears sub-committee) Barry Boardman (repairs sub-committee) Zoe Williams (Administrator) Greg Robbins	21/6/17	Arrears and rents managing session with Greg Robbins. This included setting up rents surgeries.

Date Scheduled	Title	Subcommittee	Cost	Attendees	Checked date and signed	Overview of Training
				Trainer		
28/6/17	Financial Management and Procedure	Tom Herbert and James Cross	£200.00	Jane Stewart (Chair) James Cross (rent arrears sub-committee) Tom Herbert (rent arrears sub-committee) Barry Boardman (repairs sub-committee) Zoe Williams (Administrator) Greg Robbins Trainer	28/6/17	Financial Management Training and Procedure for TMO's with Greg Robbins.
26/9/17	Tackling Anti-Social Behaviour in Social Housing Seminar (Devonshires)	Zoe Williams	Free	Zoe Williams and Jane Stewart	29/9/17	Free Seminar at Devonshire's Solicitors tackling with ASB procedure and any follow up help needed.
5/10/2017	Mentoring Session with 'David Nkrumah-Buansi' Manager from Wenlock Barn. At October	All members	Free	Jane Stewart (Chair) Tom Herbert (rent arrears sub-committee) Barry Boardman	5/10/17	Initial meeting with TMO Manager David Nkrumah-Buansi. He talked about the governance structure of their TMO and the issues they have had in the past.

	MC			(repairs sub-committee) Zoe Williams (Administrator) David Lucas (Local TMO)		Will set up further sessions with him TBC a date in January
11/10/2017 & 12/10/2017	Financial Management in Community Businesses – Liz Michael	All members	invoice d	Jane Stewart (Chair) Barry Boardman (repairs sub-committee) Sue Rethon (repairs sub-committee) Zoe Williams (Administrator) David Lucas (Local TMO) Alyssa Stanhope (committee) Liz Michael (Trainer)	11 & 12 / 10/2017	Liz Michael Management session which touched on Good governance, risk management, understanding accounts. Run over 2 evenings.
29/11/17	Policy review with Greg Robbins	Zoe Williams	To be Invoice d	Zoe Williams Greg Robbins	29/11/2017	Meeting between Zoe Williams the Housing Officer and Greg Robbins to review current policies and discuss the Council Breaches.

Date Scheduled	Title	Subcommittee	Cost	Attendees	Checked date and signed	Overview of Training
November and December 2017 – Ongoing	Seeking support and Liaison with Mr Danny Howcroft, Estate Director for Blenheim Gardens RMO. Also Delwayk Gardens TMO, Herne Hill	Zoe Williams	N/A	Zoe Williams		Mentoring advice on policies and governance that will be ongoing between Withy and 2 similar sized TMO's. Zoe Williams met with the Estate Manager on 1/12/17 to discuss policies and the potential of further mentoring in the future.
January 2018 (DATE TBC)	Meeting at Wenlock Barn to see the running of another successful TMO	All Members		N/A	TBC	Mentoring advice, ideas for the future running of the TMO.
February 9th 2018	'Governance Training for Board members' by Liz Michael	All Members	£2535	N/A	TBC	Advanced training session on Good Governance run in 4 parts: <ol style="list-style-type: none"> 1. Good Governance Organisational responsibilities. 2. Good Governance Organisational

						responsibilities. CNTN. 3. Board Members responsibilities. 4. Preparing for the Future.
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