



# Cabinet



www.dacorum.gov.uk

<b>Report for:</b>	Cabinet
<b>Title of report:</b>	Dacorum Borough Council (DBC) Right to Buy (RTB) Leases – Service Charge Provisions
<b>Date:</b>	11 October 2023
<b>Report on behalf of:</b>	Councillor Simy Dhyani, Portfolio Holder for Housing and Property Services
<b>Part:</b>	I
<b>If Part II, reason:</b>	N/A
<b>Appendices:</b>	Appendix A – Comparison of current and proposed billing schemes
<b>Background papers:</b>	
<b>Glossary of acronyms and any other abbreviations used in this report:</b>	Dacorum Borough Council (DBC) Right to Buy (RTB) First Tier Tribunal (FTT) Housing Senior Leadership Team (HSLT) Strategic Leadership Team (SLT) Housing Committee Overview & Scrutiny Committee (HC&OSC)

### Report Author / Responsible Officer

Natasha Beresford, Assistant Director – Housing Operations and Safe Communities



Natasha.beresford@dacorum.gov.uk / 01442 228840 (ext. 2840)

<b>Corporate Priorities</b>	A clean, safe and enjoyable environment Building strong and vibrant communities Ensuring economic growth and prosperity Providing good quality affordable homes, in particular for those most in need
-----------------------------	--

	<ul style="list-style-type: none"> <li>• Ensuring efficient, effective and modern service delivery</li> </ul>
<b>Wards affected</b>	ALL
<b>Purpose of the report:</b>	<ol style="list-style-type: none"> <li>1. To highlight issues with the current position regarding the RTB lease template and to seek agreement to amend the leases as highlighted in the report.</li> <li>2. This report highlights issues with the billing calendar prescribed in the current lease with the intention of moving to a new simplified calendar for the charging of annual service charges (including Responsive Repairs).  This report does not cover the billing of Major works costs. <i>*Please see Introduction Point 1.2.</i></li> </ol>
<b>Recommendation (s) to the decision maker (s):</b>	To support the request to submit an application to the First Tier Tribunal (FTT) to vary DBC's leases.
<b>Period for post policy/project review:</b>	Annually or upon legislative change

# 1 Introduction/Background:

## 1.1 Background

- 1.1.1 Dacorum Borough Council (DBC) is not currently billing in accordance with the requirements of the RTB lease widely used in its leasehold stock.
- 1.1.2 Billing strictly in accordance with the lease disadvantages both DBC (because if actual costs are higher than estimated, DBC is unable to fully recover costs), and leaseholders, (because if actual costs are lower than estimated, DBC is unable to apply credits to service charge accounts).
- 1.1.3 The billing calendar prescribed in the lease is also overly complicated and cannot realistically be met by DBC.
- 1.1.4 In accordance with legal advice, it is recommended that the Council's leases are varied to a format most commonly used by social landlords, that is easier for the Council to operate, easier for leaseholders to understand, requires leaseholders to pay for the reconciled cost of service provision only, provides a greater time period for leaseholders to spread annual payments and provides the Council with funding for future service provision.

## 1.2 Major Works and Responsive Repairs

- 1.2.1 Repairs can be split into two categories; Major Works (sometimes also called Planned or Capital works) and Responsive Repairs (sometimes also called day-to-day repairs). Major works are carried out less frequently (e.g. roof and lift replacements), and, if any one leaseholder's contribution to the costs of the works is over £250, statutory Section 20 Consultation needs to be carried out. Responsive Repairs are smaller reactive works such as gutter repairs, replacing door handles, minor fencing repairs etc.
- 1.2.2 DBC's current lease template dictates that major works and responsive repairs are recharged to leaseholders as part of the same invoice.
- 1.2.3 The most common approach taken by Councils and Registered Providers is to separate the billing of major works and responsive repairs.
- 1.2.4 Leaseholders typically receive estimated costs of major works via statutory Section 20 Consultation Notices. These estimates would be followed by invoices for actual costs once works are complete.
- 1.2.5 Responsive Repairs are typically recharged as part of a cycle of regular annual bills. Leaseholders would receive an estimate at the start of the financial year followed by a reconciliation of actual costs at year end. Responsive repairs charges are included on invoices that also detail other annual charges, such as; grounds maintenance, electricity, cleaning etc.
- 1.2.6 Separating major works invoices from responsive repairs allows separate payment terms to be applied to each category. Typically responsive repairs costs (along with the costs of other annual services such as grounds maintenance, electricity etc.) can be paid over the coming year, before the following year's invoice is produced. Major works charges, being higher value, qualify for longer term payment arrangements to be made.
- 1.2.7 Upon variation/correction of DBC's current leases, the intention would be to split the billing of Major Works and Responsive Repairs. Payment Terms for Major Work's

charges is beyond the scope of this report, and, dependent upon the outcome of an application to vary/correct DBC's leases, would require a separate policy.

### **1.3 Fixed & Variable service charges**

- 1.3.1 Service charges under tenancies and leases may be fixed or variable.
- 1.3.2 The type of service charge is determined by the provisions of the tenancy agreement or lease: the landlord should comply with those provisions. It is not determined by how the landlord operates the charges in practice.
- 1.3.3 Customers with fixed service charges will only receive an estimate each year. Variable service charges are changed according to the actual costs. Typically social housing landlords charge tenants a fixed service charge, and, leaseholders a variable service charge.
- 1.3.4 The main effect of variable service charges is for surpluses and deficits to be carried forward to the next accounting period, in light of actual expenditure incurred. There is no limit on the amount of the increase provided that the overall charge is reasonable. For that reason, most leases allow for a variable service charge regime.

### **1.4 Typical Leasehold Service Charge Billing Calendar (Two Invoices)**

- 1.4.1 Most social landlords follow a two stage variable service charge billing process, as set out below.

#### February/March – Annual Estimate

- 1.4.2 At the beginning of the service charge year, landlords typically send an estimated service charge. When estimating the likely spend, landlords consider previous years' expenditure, any changes in contractual costs, and the rate of inflation.

#### 18 Months Later (September) – Annual Actual

- 1.4.3 Following the end of the financial year, landlords add up how much they have spent. During the year, they may have charged more (surplus) or less (deficit) than has been spent. They will then send a service charge statement with the actual costs.
- 1.4.4 Leaseholders are expected to pay any deficit once they've received their statement.

## **2 Key Issues and proposals:**

### **2.1 Issue**

The Council does not follow the approach typically applied by social landlords.

### **2.2 Current Dacorum Billing Calendar (Four Invoices)**

- Feb/March Ground Rent & Building Insurance Costs (Covering new financial year)
- August Current year Estimate covering April to September (no repairs)
- September Prior year repairs costs
- December Current year Estimate covering October to March (no repairs)

### **2.3 What does the lease require?**

- Feb/March Ground Rent & Building Insurance Costs (Covering new financial year)

- June Current year Estimate covering April to September (no repairs)
- June Actual reconciliation for prior year costs
- December Current year Estimate covering October to March (no repairs)

## **2.4 Issues with Current Billing Calendar**

- 2.4.1 The current approach is not in accordance with the requirements of the lease (i.e. billing is taking place in Sept rather than June). There is a risk of successful challenge from leaseholders at Tribunal that costs are not payable based on non-compliance with the lease.
- 2.4.2 The Council is effectively operating a fixed service charge for all services apart from repairs, as the lease requires an estimated charge, but does not allow a reconciliation of actual costs.

## **2.5 Issues with leases**

- 2.5.1 Landlords operating leases that use the financial year will send their 'Actual' statements by September to meet the statutory 18 month time limit. This is the most common arrangement in leasehold service charge billing. DBC's leases require invoices (for repairs) to be sent by 1<sup>st</sup> June, and this is over and above the statutory requirement. Sending 'Actual' reconciled statements by 1<sup>st</sup> June for a year that has ended on 31<sup>st</sup> March is not realistically achievable. A number of tasks need to be completed in order to send statements; Finance colleagues need to finalise year end, costs of various services need to be collated, scrutinised and queried with service provision teams, costs need to be loaded and tested on Orchard, statements need to be produced and mailed out, and direct debit changes need to be made.
- 2.5.2 The leases currently require four separate demands to be sent to leaseholders. Landlords typically send two (an estimate and an actual). Sending two demands would be easier for customers and staff to understand and would allow more transparency for customers. Sending four demands requires more resource (staff time, postage) and creates 4 occasions during the year where DBC writes to all leaseholders, each occasion generating its own customer queries and correspondence.
- 2.5.3 The leases contain two lists of services. One list relates to services to be included in an estimated charge, the other list relates to services to be included in an actual charge. The lists are not consistent and result in DBC being required to give an estimate for utilities, cleaning and other services, but not being able to give an actual reconciliation of these services. This disadvantages DBC (if actual costs are higher than estimated the Council will be unable to fully recover costs), and leaseholders, (if actual costs are lower than estimated then the Council will be unable to apply credits to service charge accounts).

## **2.6 RICS Best Practice**

The current lease template in operation does not require that DBC charges estimated charges for repairs. The proposal is for the varied lease to require the charging of estimated service charges for repairs, in-line with best practice, the RICS (Royal Institute of Chartered Surveyors) service charge code and the procedure followed by the overwhelming majority of other local authorities.

## **2.7 HRA**

Like many councils, DBC is navigating an unprecedented climate of financial challenge. Charging service charge estimates in advance of service provision is best practice and the most common approach amongst landlords of leasehold property (including local authorities and housing associations). Charging estimated costs in advance of service provision provides a sound budgetary position.

### 3 Options and alternatives considered

**3.1 Continue with current service charge billing regime** - This is not recommended as it is not in compliance with the requirements of the lease. Additionally, the current process is administratively onerous and a more transparent streamlined approach is commonplace amongst other social landlords.

**3.2 Charge in accordance with current lease template** - This is not recommended as the current template does not allow the DBC to vary the service charge in accordance with actual costs incurred. It creates a difficulty for DBC as there is no provision for reconciliation if the estimates are too low and actual costs exceed estimates. Additionally, the absence of any reconciliation of estimates could potentially be to the leaseholder's detriment – i.e. if the estimates were below the actuals, there is no provision for them to be reimbursed the balance or have it credited to their account. The timeframe of June billing is not achievable.

#### 3.3 Apply to vary the terms of the leases

3.3.1 The Council has obtained the opinion of Victoria Osler, Barrister, Five Paper Chambers, and Counsel's advice is that compliance with the current lease terms is not recommended as it would not allow for the effective recovery of costs. A variation to the lease is, therefore, proposed so that estimates can be included with service charge notification letters.

3.3.2 Varying the leases to make provision for an estimated bill at the commencement of the financial year, and, an actual reconciliation at year end, would halve the number of demands posted to leaseholders (from 4 to 2). This would reduce the time DBC staff spend on preparing these mail outs and dealing with subsequent queries and would free up staff time to deal with leaseholder queries and income recovery.

3.3.3 A process encompassing two annual demands, rather than four, (the most common process operated by social landlords), would be far more transparent and straight-forward for leaseholders (and staff) to understand.

3.3.4 One reason the recommended approach is the most commonly used in leasehold service charges is that it provides a sounder budget position for the landlord. Under the current process, DBC is re-charging leaseholders around 18 months after the service has been provided. Taking into consideration that many leaseholders pay service charges by Direct Debit instalments, in some instances, DBC may not be in receipt of payment for service provision until 3 years after the service has been provided. Charging estimated service charge costs at the commencement of the financial year would provide funding for service provision at a much earlier stage.

#### 3.4 Current and Proposed Calendar Example

	£	Current	£	New
Feb-25	100	25/26 Ground Rent & Ins	500	25/26 Estimated Service Charge
Jun-25	200	50% of 25/26 cleaning, utilities etc. (no repairs)		
Sep-25	100	24/25 repairs costs	100	24/25 Actual Service Charge Reconciliation

Dec-25	200	50% of 25/26 cleaning, utilities etc. (no repairs)	
	600		600

#### 4 Consultation

- 4.1 **Who has been consulted so far** - HSLT, SLT, Finance, Legal, Property, HC O&SC.
- 4.2 **Leaseholders** - The entire process would take approximately 9 months including; 2 letters to leaseholders (advising of the issues found, our desired remedy and seeking leaseholders' agreement to lease variation - 2 months), and, from application to the Tribunal to an actual decision (approximately 7 months). These are, however, only estimated timescales as they are dependent on how quickly the Tribunal can consider the application and whether it is subject to challenge.

#### 5 Financial and value for money implications:

- 5.1 There will be legal costs c. £20,000 (minimum) for an external barrister to draft a new template lease, prepare the Council's application to FTT, and represent DBC at the hearing. There is also a fee for making an application to FTT. The Land Registry fee will depend on whether they will accept a bulk application or require individual applications. Contact has been made with the Land Registry to ascertain the fee payable and the Finance Team will be updated as soon as this is known.
- 5.2 The proposed new lease would result in DBC charging service charge estimates at an earlier stage resulting in a more secure budget position for DBC. The changes would provide leaseholders with a greater period to make advance payments.
- 5.3 Administration costs would reduce in line with reduced demands sent to leaseholders. The income recovery process would be streamlined.

#### 6 Legal Implications

- 6.1 The current service charge regime operated by DBC is not in accordance with the requirements of the leases in its leasehold stock. The requirements of the lease are not implementable without disadvantaging the Council and leaseholders.
- 6.2 The appropriate remedy for the error in the current lease template is an application under section 35 of the Landlord and Tenant Act 1987 to vary the lease on the ground that it does not make satisfactory provision for the recovery of expenditure incurred by the Council on behalf of the leaseholders (section 35(2)(e)).

#### 7 Risk implications:

- 7.1 **Reputational** - The recommended approach of consulting with leaseholders, then seeking a decision from the Tribunal, would be an approach of 'best practice' and would demonstrate that DBC is seeking to follow the correct process to remedy an issue with its leases (with the involvement of leaseholders and an independent panel of expert judges).
- 7.2 **Taking no action** - There is a risk associated with not taking action. The legal advice obtained states that the current regime is not in accordance with the terms of the lease and that strict compliance would be prejudicial to the Council and would not allow for effective recovery of costs. To continue with the current process leaves the charges open to challenge with a high risk of unsuccessfully defending such a challenge.
- 7.3 **Communication** - Many of the DBC's leaseholders will be accustomed to the current approach to billing service charges. Any proposed changes or applications to Tribunal will need to be clearly communicated to leaseholders in advance.

- 7.4 **One-Off Increase to leaseholder charges due to introduction of new billing calendar**  
Introducing estimated repair charges for the first time will result in a one-off increase in the total charged during the change from the current billing calendar to the new billing calendar. Although, it is important to note that the proposed approach of two annual bills should enable charges to be more evenly spread throughout the year, whereas, the current approach of sending four annual bills can result in spikes of expenditure for leaseholders. DBC could aid this transition period by using one-off payment plans tailored to the transition period, before returning to a business as usual position following the transition.

Example A; 24/25 Actual Reconciliation Charge to be sent September 2025 – Usual practice would be for these charges, billed annually in September, to be paid over the following 6 months by March. As a one-off, this repayment period could be extended to September, spreading repayment over 12 months.

Example B; 24/25 Estimated Charge to be sent early 24/25 – It is unlikely that a varied lease will be achievable by March 2024, however, DBC could give leaseholders an estimate of what the charges are likely to be. Payment would not be mandatory, leaseholders would have the option of making payment (full or part) towards these estimates. The reconciled actual costs would be payable when billed in September 2025. Supporting info would be provided with the charge explaining why it might be prudent to pay towards these estimated charges. \*The timing of this charge would be dependent on the progress of the Tribunal application at the time.

## 8 **Equalities, Community Impact and Human Rights:**

Community Impact Assessment reviewed/carried out and annexed.

Human Rights – There are no Human Rights Implications arising from this report.

## 9 **Sustainability implications (including climate change, health and wellbeing, community safety)**

There are no sustainability Implications arising from this report.

## 10 **Council infrastructure (including Health and Safety, HR/OD, assets and other resources)**

There are no Council infrastructure Implications arising from this report.

## 11 **Statutory Comments**

### **Monitoring Officer:**

The approach recommended in this report will ensure that the lease accurately reflects the applied practice for billing service charges and therefore minimise the risk of legal challenge.

### **S151 Officer:**

The proposal to change the current leases in regards to service charge arrangements and to introduce a billing cycle that supports those lease changes will reduce the existing risk in regards to a non compliant lease and recharge process.

The proposed process is in line with good practice, is more efficient and will support more effective financial monitoring.

## 12 **Conclusions:**

- 12.1 The recommended lease variation and new approach to billing service charges is in line with best practice and one operated by the vast majority of landlords of leasehold property.



- 12.2 The recommendations would provide financial benefit to leaseholders and DBC alike.
- 12.3 The proposed new simplified approach would be administratively easier to operate, clearer to customers, and, enable customers to manage payment via equal monthly payments spread throughout the year.