

Housing Strategy and Development Briefing Note 15/8

Rent Abatement Guidance

July 2015



Introduction

Welcome to a series of regular briefings prepared by the Housing Strategy and Development team on the big issues concerning housing. These briefings will be shared with staff, tenants and elected members and keep everyone up to date with regards the ever changing policy context that we are operating within.

The Housing Strategy and Development section is responsible for:-

- Providing the statutory strategic housing authority role within the local authority area;
- Strategic Housing Asset Management delivery;
- The delivery of the Council House New Build Programme and the delivery of the affordable Housing supply programme;
- Supporting the development of a culture of continuous improvement in Housing services and to facilitate opportunities to excel;
- Developing and implementing effective strategies for Housing Services within West Dunbartonshire;
- Developing the Council's housing strategy to ensure that it supports the delivery of our strategic priorities;
- Service development within Housing and Community Safety services; and
- Promoting effective management and the involvement of tenants across all aspects of Housing Services.

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Rent Abatement Guidance

Background:

In order to provide some clarity in relation to how rent abatements operate across the service, a staff working group was established in order to identify and outline the general principles around our approach to rent abatements and clarify where responsibility for decision making should rest.

Key Points:

The key areas of focus highlighted in discussion by the Working Group were:

- How does the system operate at present;
- Who has responsibility for decision making;
- What are the circumstances where a rent abatement should be applied;
- Should an abatement of rent be a landlord led option which can be used for reasons such as stimulating demand for a property or ensuring a previously unavoidable arrear does not occur; and
- What criteria/factors should apply when assessing a request for a rent abatement.

Following the working group's discussion, some general principles and guidance were sent out for consultation and for relevant staff in both housing and Finance to provide comment.

What it means for West Dunbartonshire

The attached guidance outlines a general approach to the issue of rent abatements, as opposed to a comprehensive policy which attempts to detail every circumstance where an abatement of rent could apply.

It clarifies where responsibility for decision making lies. It also makes clear that an abatement of rent can be landlord led, as well as tenant led. Finally, the Guidance should influence existing working practices and procedures, by for example, ensuring that discussions in relation to possible rent abatements are held with tenants when the opportunities arise.

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Intention of Guidance

The intention of this guidance is to outline some brief general principles to assist all parties in understanding our approach to the issue of rent abatements. It is not anticipated that a more detailed policy will be necessary; however this guidance should inform all working practices and procedures.

What is a rent abatement?

Rent abatements are essentially rent reductions that can take place either at the beginning of a rental period or at some point later in the tenancy. They can be used by the landlord as an incentive to enter into a lease agreement by supplying a tenant with what is sometimes referred to as free rent for a period of time. The same general concept of rent abatement may apply at a later date as a means of compensating the tenant for some type of inconvenience. The decision relating to when an abatement of rent should apply will rest with the landlord.

Circumstances where a request for an abatement of rent may be made

Landlord triggers

Housing staff may use an abatement of rent as one of many options available, aimed at increasing the desirability of a property and improving performance around void management. In this scenario, the landlord offers what is presented as free rent to potential tenants as a way of encouraging them to sign a lease and take possession of a property. The idea behind this approach is to help fill an empty property that is generating no rental income. The new tenant does not have to worry about a rent payment for the period agreed, making it easier to manage moving costs. Similarly, when new tenants are moving from accommodation such as temporary homeless accommodation, a rent abatement could be applied in circumstances where previously an unavoidable arrear would have been accrued.

This approach provides further tools to help reduce the number of empty properties and prevent rent arrears being accrued and fits into our wider flexible approach to Void Management.

Tenant triggers

A landlord is responsible for ensuring that properties being let are fit for habitation and in a good state of repair. An application for an abatement of rent could be expected from a tenant if these circumstances are not met.

The most commonly defined triggering event for rent abatement is a fire or other emergency, or circumstances which result in the property not being habitable. Similarly a tenant may apply for a reduction of rent if repairs are very disruptive and if some rooms can't be used during repair work for example.

Any agreed reduction would depend on how much of the property could not be used. For example, if half of a property was not able to be used while repairs were being

carried out, a 50% reduction of rent could be expected. Any relevant Health and Safety issues would need to be adequately addressed in these circumstances.

Factors to consider when assessing a request for an abatement of rent

Certain factors need to be considered in order for a request for a rent abatement to be agreed. Best practice would be for the tenant to notify the landlord of any serious issue and to apply for an abatement of rent in writing. A written request however, is not a requirement and an application can be accepted verbally. It is envisioned that an inspection of the property would be necessary to determine whether it is habitable and in a good state of repair.

It is recognised that tenants may not always notify the landlord directly about potentially serious conditions which could lead to a request for an abatement of rent. This could be affected for example, by whether a tenant reasonably believed other tenants had already highlighted an issue to the landlord or if there was a belief by the tenant that the issue should have been obvious to the landlord. Therefore a request for rent abatement may be made by a tenant at a date after the circumstances giving rise to the request have been rectified.

Factors to be considered when assessing a request for rent abatement

Did the tenant notify landlord of the circumstances at the time?

Did an inspection of the property take place and what was the outcome?

Did the tenant continue to occupy the property?

Did the tenant request alternative accommodation?

Did the tenant request rent abatement at the time?

Was a request for rent abatement made at a later date?

Part of the usual landlord / tenant relationship means that there should on-going contact between tenant and landlord relating to other matters. This contact provides an opportunity to ensure there are no current or past circumstances which give rise to any outstanding request for a rent abatement.

A specific contact when this opportunity should always be taken is as part of the pre-action requirements carried out when preparing any court action for non-payment of rent. This will ensure that resources will not be wasted taking court action when there is any potential of an existing arrear being reduced, in part or in full, due to an abatement of rent being applied.

Additionally, at a new tenancy visit and annual tenancy visit, the opportunity should be taken to confirm with the new tenant that no issues have arisen or been discovered since sign-up that may result in an application for an abatement of rent. As a result of these opportunities for communication, it is not expected that any request for rent abatement will be received over a year after the circumstances giving rise to any potential request had occurred.

Summary

This guidance provides a loose framework outlining when and how an abatement of rent can be applied. No policy could outline every potential circumstance however the factors which should be considered in the decision making process have been detailed above. The decision in relation to applying any abatement of rent will be made by appropriate staff within Housing and Community Safety, within the current structural arrangements this would be the Estate Management team. No other section other than that which provides the main landlord function can make a decision on any rent abatement. However, if they believe a tenant is entitled to such an abatement of rent, other service areas can request consideration to the appropriate service area (Estate Management Team).

Date approved by HMT:	14 July 2015
Review date:	July 2018
Consultation:	Staff working group and document cascaded for comment

Appendix 1 – Legal note

The following note has been taken from the Scottish Government website and appears in the notes relating to the Housing (Scotland) Act 2001.

<http://www.gov.scot/Publications/2002/09/15484/11209>

Note 8.3: General. The right of a tenant to withhold rent on breach of contract by the landlord is a common law right which goes to the core of the contractual relationship between them.

At common law, the obligation to pay rent is suspended where the landlord has failed in its obligations. The tenant may withhold (or retain) the rent until the landlord's obligation is fulfilled or until an abatement of rent is allowed and its amount fixed (Gloag on Contract (2nd edition 1929) p628; *Kilmarnock Light Co. v. Smith* (1872) 11 M 58). The right to withhold (or retain) rent is most typically done where the landlord is in material breach of its repair obligations (*Davie v. Stark* (1876) 3 R 1114; *Fingland and Mitchell v. Howie* 1926 SC 319) i.e. it has failed to carry out repairs within a reasonable time. Where the tenant has lost possession of part or all of the house as a result of the landlord's breach (or through some other supervening circumstance not being due to the fault of the tenant), he may be entitled to an abatement (i.e. reduction) in rent (e.g. *Stewart v. Campbell* (1889) 16 R 346; *Muir v. McIntyre* (1887) 14 R 470). Thus, the tenant may not be required to pay the retained rent once the landlord has fulfilled his obligations and retention of rent intended to force the landlord to do repairs may turn into an abatement of rent for the period of disrepair (e.g. *Renfrew District Council v. Gray* 1987 SLT (Sh Ct) 70). The common law right to retain rent may be modified by contract (e.g. *Glasgow Corporation v. Seniuk* 1968 SLT (Sh Ct) 47). See also *McBryde* (1987) *Contract, W. Green and Son*, para 14.39 et. seq.

However, in this Agreement, the common law position has been modernised and modified by tying it in to the landlord's complaints procedure. All social landlords have one and are expected to have one by Communities Scotland. The modification to the common law right proposed in this paragraph is designed to achieve a reasonable compromise between the need for the tenant to have repairs done within a reasonable time and the need for the landlord to retain some control over how and when repairs are carried out on its properties and which type. The paragraph warns the tenant that legal advice should be taken before exercising this right. This is so that the tenant can check his/her legal position and in particular whether the landlord is indeed in breach of its obligation. It is only where the landlord is in breach of its obligations as set out in this Agreement that the right of the tenant to withhold rent arises. If the tenant withholds rent where the landlord is not in fact in breach of its obligations, the landlord may well succeed in an action for eviction based on rent arrears. The requirement that the tenant put the rent in an account and is in a position to evidence that is intended as a safeguard for both landlord and tenant although it is not, strictly speaking, a requirement at common law. This provision provides a certain protection to tenants to avoid the possibility of the tenant either wrongly withholding rent or misunderstanding the nature of the remedy. The tenant's rights to claim damages are not affected by this paragraph. Neither are the tenant's rights to obtain an order for specific implement, to complain to the Ombudsman or to exercise the common law right to do the repairs and deduct the costs from the rent (subject to the requirements of that right). In addition, the statutory right to repair (see paragraph 5.18) guarantees the right to have certain urgent repairs carried out swiftly. It is thought that in these circumstances, this adjustment to the common law right is fair, reasonable and proportionate and does not fall foul of the Unfair Terms in Consumer Contract Regulations 1999.