Why the proposal to “appropriate” HRA assets should be withdrawn

Swindon Council is proposing to transfer assets – garages, shops and “amenity land” - from the Housing Revenue Account to the General Fund. Below I explain why the 'legal' justification for this proposal is wrong, how the proposal would be financially detrimental to the HRA and tenants and why it should be withdrawn.

1) **Housing Revenue Account 'ring-fence'; Background**

Council housing is accounted for in a 'ring-fenced' account within the General Fund. The ring-fence was introduced in 1989, primarily to prevent rates being used to support council house building. However, it also meant that council rents could not be used to support other services. Prior to 1989 transfers between the HRA and the General Fund were common. Rates had been used to support council house building from the end of the First World War. What is less well known is that rents were used by some councils to support other services. In the case of Dacorum Council at one time 40% of their non-housing services were paid for with tenants' rent. The 1989 Local Government and Housing Act changed this. “From 1st April 1st 1990 there were to be no transfers from the General Fund to make good deficits on the HRA, and transfers from the HRA to the General Fund were only allowed in certain prescribed circumstances” (*The HRA Ringfence*, Chartered Institute of Public Finance and Accountancy LAAP Bulletin 22).

When Margaret Thatcher introduced Right to Buy in 1980 and council homes began to be sold off to the sitting tenants, what were council estates when built began to include home owners and, later, tenants of private landlords. Services which were previously provided solely for council tenants were now provided for 'mixed communities'. The 1989 Act included rules for determining when the General Fund should make a contribution to the HRA and vice versa. Schedule 4 Part III of the 1989 Act said that where “benefits or amenities” were shared by the community as a whole, “the authority shall” (i.e. must) make contributions to their HRA “from some other revenue account of theirs” which will “properly reflect the communities share of the benefits or amenities”. Swindon Council does not appear to have been carrying out this duty (of which more later)

This led to debates about which account paid for what. In a famous legal case in 1992 brought against Ealing Council a tenant objected to his rent being used to pay for services which should have been in part paid for by the General Fund[1] since they were provided not only to tenants but to home owners as well. The tenant won the case and the local authority had to make a contribution from their General Fund to the HRA. We will take up the rest of the story on the relationship between the two accounts later.

2) **“Appropriation” of garages under the 1985 Housing Act**

In October Swindon Council's Cabinet announced that they were proposing to “appropriate” the garages owned by the Housing Revenue Account, i.e. to transfer them to the General Fund. This would mean the HRA losing the rent income from the garages, more than £1 million a year, and the General Fund gaining it. The grounds on which they were proposing this was said to be Part II of the 1985 Housing Act although they did not specify under which section of the Act. The council said that “Where the purpose for holding a property is not related to the provision of housing under Part II of the Housing Act 1985, the property should not be held within the HRA”. In fact the section relating to “appropriation”, section 19, says that “a local housing authority *may* (my emphasis) appropriate for the purposes of this Part (i.e. Part II Provision of Housing Accommodation) any land

1 This related to these services: Homeless Persons Unit, Housing Advisory Service and Warden Service.

for the time being vested in them or at their disposal". In Schedule 14 of the 1985 Act (The Keeping of The Housing Revenue Account) the only reference to appropriation says that where it has taken place for housing purposes "or the discontinuance of that purpose" then adjustments should be made in the accounts.

The rationale given for transferring the garages was that 67% of them are let to private individuals. "Overall the garages are predominantly achieving a General Fund need for the provision of parking in the Borough". We'll deal with this argument which we consider to be spurious, later.

3) **"Appropriation" under the 1972 Local Government Act...this time**

The council has now *implicitly admitted that their justification in the 1985 Act was a mistake*. In the document for the November 30th Housing Advisory Forum they said that the 1985 Act, Section 19 (2) "has no relevance" to "free standing garages and shops" (the October Cabinet document , by the way, did not mention shops). So the council has now decided that they will "rely on" Section 122 of the 1972 Local Government Act. Section 122 of this Act says that councils "may" appropriate land where "any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation".

This is power to appropriate *land* not buildings. There is no mention of buildings in this Act. In any case it pre-dates the introduction of the 'ring-fence' of the HRA by 17 years and I would suggest has no bearing on the operation of the ring-fence and "appropriations" to and from the HRA.

4) **The ring-fence is introduced by the 1989 Housing Act**

The 'ring-fence' operates within the framework of the 1989 Act. The CIPFA Bulletin 22 says that Section 74 defines the properties to which the HRA must relate to. These are the same as Section 417 and schedule 14 of the 1985 Act. The Department of the Environment issued Circular 8/95 on the operation of the ring-fence (the CIPFA Bulletin is a briefing on this). The circular was a response to enquiries from local authorities as to what should be included inside and outside the HRA. The circular stated that the "current statutory provisions governing the HRA" were Section 74 and Schedule 4 of the 1989 Act. As we shall see this still remains the case today and that is why the proposal to "appropriate" HRA assets under the 1972 Act is wrong.

Section 74, which deals with Housing Finance, refers to "houses and other buildings" which have been provided under Part II of the 1985 Housing Act, i.e. provision of housing. Part III of Schedule 4 deals with "special cases". Paragraph 5 explains accountancy adjustments which have to be made as a result of appropriation of land, for the purposes of housing or "on the discontinuance of use for those purposes". It says nothing about buildings.

Circular 8/95 says

"...certain properties which may originally have been provided under one of the powers in section 74 of the 1989 Act (or their predecessor powers) may no longer fulfil their original purpose. In these circumstances, the authority should *consider* (my emphasis) their removal from the HRA. Examples of properties which might fall into this category are estate shops and other commercial premises, such as banks, post offices, workshops, public houses, industrial estates and surgeries, where there is no longer any connection with the local authority's housing. The decision is for the authority to take, though they should be able to explain the basis of the decision to their external auditor and tenants, if called upon to do so. "

The circular specifically refers to "Garages (and Garage Sites) Let to Non-HRA Tenants". It says

"Where an authority has a policy of letting, on a long-term basis, blocks of HRA garages to people

who are not HRA tenants, the authority should consider appropriating the garages from Part II of the 1985 Act and accounting for them in the General Fund. The Department considers that, where tenants do not have the opportunity to rent the garages in a block, the provision of those garages does not form part of an authority's housing function. ”

Note the word block. Where blocks of garages are rented to non-tenants and tenants “do not have the opportunity to rent the garages in a block” then they should be accounted for in the General Fund. Clearly council tenants *do* have the opportunity to rent them and *are* renting them in Swindon. In that sense they still are part of the authority's housing function. This guidance is old by now but it has not been withdrawn or superseded. There is nothing in the Act or the guidance which says that if a majority of garages are owned by house owners or private tenants then the garages should be “appropriated” by the General Fund.

The interpretation that the use of garages no longer relates to the original housing purpose is spurious. Renting to council tenants was considered to be part of the housing purpose and remains so for our tenants even if they constitute a minority currently.

Circular 8/95 also mentions “play schemes”, saying that where these were used by the children of people other than tenants then the General Fund should make a “proportionate” contribution. It also says of “Statutorily Permitted Transfers Across the Ring-Fence”:

“Although, as a general principle, authorities do not have discretion to transfer expenditure and income between the HRA and the General Fund, there is a limited number of specific instances where this can or sometimes must occur. The relevant statutory provision is Schedule 4 to the 1989 Act and authorities should have particular regard to paragraph 3 of Part III of that Schedule. ”

Paragraph 3 refers to “shared amenities”.

5) **'Self-financing' and the ring-fence**

Prior to the introduction of the new housing finance system, 'self-financing', in 2012, the New Labour government gave notice that it intended to update circular 8/95. Its consultation document confirmed that transfers across the ring-fence *would continue to be governed by Section 74 of and Schedule 4 of the Local Government and Housing Act 1989*, as subsequently amended. The government intended to issue revised guidance in the summer of 2010, but they lost the general election. The coalition government decided that they would not issue new guidance. When they introduced 'self-financing' they simply said this about the operation of the ring-fence:

“Abolition of the subsidy system does not end the requirement for local authorities to maintain a statutory, ring-fenced Housing Revenue Account. Local authorities will still be required to account to their tenants for income from and expenditure to council housing separately from income and spending on other functions and services. This ensures that council tax payers do not subsidise services specifically for the benefit of tenants and that rent is not used to subsidise functions which are for the benefit of the wider local community.

In line with our emphasis on localism we do not intend to issue new guidance on the operation of the ring-fence. We expect local authorities to take their own decision, rooted in the principle that 'who benefits pays'.”
DCLG document “Implementing self-financing” Feb 2011

Notwithstanding this statement the government did not withdraw the existing guidance. Moreover, the Localism Act, which introduced 'self-financing', contained nothing about the ring-fence. It introduced *no amendments to existing law relating to the ring-fence*. There was nothing regarding the ring-fence in Schedule 15 of this Act, which related to the ending of the Housing Subsidy

System.

The fact that Schedule 4 of the 1989 Act *is still operational*, was shown when the government amended it to close a loophole which had arisen as a result of 'self-financing' (Part III Section 2 of Schedule 4). The drafters of the Localism Act failed to amend Schedule 4 of the 1989 Act to take account of the end of the subsidy system for local authorities in England. A number of local authorities took advantage of this loophole which allowed them to transfer money from the HRA to the General Fund when their HRA received no subsidy. Under 'self-financing', of course, there was no subsidy for *any* local authority. The coalition government closed this loophole by amending Schedule 4 except for Wales where the subsidy system was still in operation.

Clearly since the 1989 Act and Schedule 4 are still operational then the ring-fence *operates within the framework they provide* and not the general right to appropriate provided by an act 17 years prior to the introduction of the ring-fence. The citing of the 1972 Act for the “appropriation” of land which currently sits in the ring-fence is therefore spurious.

6) **“Amenity land” as well?**

The document for the recent Housing Advisory Forum announced that “various parcels of amenity land that were part of the original green space requirements when the estates were established” would be transferred as well. An officer has told us that this includes strips of land outside houses, but other than this we don't know exactly what land will be included. The rationale for doing this is supposedly that owner occupiers make no contribution towards the upkeep of these green spaces. The HRA is charged £50,000 towards the upkeep of it. This begs the question, when the council has had a legal responsibility to ensure that the General Fund makes a contribution towards the costs of “shared amenities” (cited in section 1 above), why have they failed to do so? Aren't they in breach of the law?

We are suspicious that this may be a land-grab which could present development opportunities for the General Fund. News of the Cabinet's proposal to become a property developer and house builder gives us cause for concern. Whether or not this fear is well-founded can only be tested by tenants being given a list of *all* the land which the council is proposing to transfer.

7) **The impact on Swindon's HRA**

The October Cabinet document said that the movement of assets to and from the HRA would produce “a fair and balanced outcome”. This would only be true if the HRA was losing no income. Yet by the council's own estimate the income which the HRA would **lose** as a result of the transfer of the garages and various shops/commercial properties is **£1,309,000**. Bear in mind that this is **annual** income. Multiply that by 25 years (what remains of the original 30 year business plan of 2012) and that adds up to over £32 million. Add inflation and *this would take possibly somewhere in the region of £40 million income out of the HRA*.

The key question for tenants is what would the HRA receive in terms of annual revenue as a result of the transferring of assets from the General Fund? The latest estimate from the council is **a loss for the HRA of £512,000 a year**. The housing officers predict an extra £100,000 rent from properties *not yet built* but even that would still leave a loss of £400,000 a year.

The ruling group is proposing a policy which will lead to the loss of income for the HRA at a time when its rent income is declining as a result of government policies. The rent cut alone is expected to produce £22 million less rent than planned for. Compare the estimated income in the 2012 business plan with the projected income in the Council's Medium Term Housing Financial Plan and it is expected to take in £44 million less rent in the next five years than planned for. The “appropriations” will simply add to the amount of income lost.

8) **What basis for "appropriation"?**

The document presented to the November 30th Housing Advisory Forum is contradictory. Having abandoned the idea of "appropriating" garages under the 1985 Act and proposing to do so instead under the 1972 Act the document then argues that the justification for "appropriation" lies in the 1985 Act which they have said has "no relevance" for the garages and shops!

"The view is the garages, shops and open space are no longer held for housing purposes. For example the majority of the garages are no longer let to secure tenants of the council and are, therefore, no longer being held for the purposes of meeting housing needs (as ancillary to the houses) under Part II of the 1985 Housing Act. In these circumstances the council would in any event need to consider whether to appropriate the garages from the HRA to the General Fund."

So they have to consider "appropriation" but not under the Act which provides the framework for the operation of the ring-fence! They conclude by saying that "in order for the council to rely upon the power under Section 122 of the 1972 Act to appropriate the garages to the General Fund, the council needs to be satisfied that "the garages, shops and open space" are no longer required for the purpose for which they were "immediately held prior to to the appropriation". They consider that "given the circumstances that now pertain on our estates e.g. the mix of tenures that has arisen through right to buy and other changes to tenure and the actual status of the majority of the garage tenants, this would not be an unreasonable position to take".

The HAF document conflates different Acts to try and justify appropriation by use of an Act which pre-dates the existence of the ring-fence; an act which refers only to land and not to buildings.

9) **Conclusions**

- The relationship between the General Fund and the ring-fence operates within the framework of the 1989 Act, not the 1972 Act. The 1972 Act deals with a general right to appropriate land but does not mention buildings.
- It appears that the council has not been carrying out its duty under the 1989 Act to make a contribution from the General Fund to the HRA for "shared amenities". Only the HRA has been charged for the upkeep of "amenity land". The remedy is for the council to carry out its *duty* under Section 4 of the 1989 Act and make the General Fund contribute to the costs.
- The proposal to appropriate the garages comes just a few months after a garages strategy was drawn up (at the end of July) and a series of options were proposed. There were no proposals for transferring them to the General Fund.
- We are told that because council estates are now mixed estates and "garages, shops and open space are no longer required for the purpose for which they were held immediately prior to the appropriation", transferring them to the GF "would not be an unreasonable position to take". That's a formulation which implicitly admits the weakness of their 'legal' justification. They have no obligation to follow such a policy.
- It might have made sense to have had a review which looked at the relationship between the HRA and the General Fund; what transfers are taking place, are charges for services to the HRA fair?, the absence of General Fund contributions towards "shared amenities"etc. But what has been brought forward is under the lash of extreme budgetary pressure on the General Fund rather than accounting of what should sit where.
- There might be some argument for transferring some of the shops/commercial properties. The transfers from the General Fund to the HRA which are suggested might comprise "a fair and balanced outcome". But the loss of revenue from garage rents and shops, would not. If the current proposals were withdrawn and a review was to take place then that might be acceptable. If not then the current proposals should be rejected because they are

damaging to the HRA.

- The supposed legal justification for the proposed transfer has all the hallmarks of convenient rationalisation to justify what is essentially a financially driven decision, the purpose of which is to fill the growing gap in the General Fund resulting from the government's austerity programme and the council's failure to increase council tax for 6 years. Fundamentally the council is proposing to bolster the General Fund *at the expense of the HRA and the tenants.* The current proposals are unacceptable because the 1972 Act has no relevance to the ring-fence and because appropriation as proposed will result in the loss of revenue to the HRA. It would not be the “fair and balanced outcome” that the Cabinet document said it would be.

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December 12th 2016
Amended December 16th to take account of new financial information.