

Name of meeting: Cabinet
Date: 01 September 2020
Title of report: - Code of Practice for commercial property relationships during the COVID-19 pandemic

Purpose of report

The report seeks approval to adopt the Government’s Code of Practice for commercial property relationships to provide a basis for future negotiation with tenants of the Council’s leased estate seeking support to mitigate the economic impacts of COVID-19.

Key Decision - Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards?	Yes Expenditure >£250,000 and affects more than 1 ward
Key Decision - Is it in the Council’s Forward Plan (key decisions and private reports?)	Yes
The Decision - Is it eligible for call in by Scrutiny?	Yes
Date signed off by <u>Strategic Director</u> & name Is it also signed off by the Service Director for Finance? Is it also signed off by the Service Director for Legal Governance and Commissioning?	Karl Battersby – 21st August 2020 Eamonn Croston - 21st August 2020 Julie Muscroft – 21st August 2020
Cabinet member portfolio	Cllr Graham Turner, Portfolio Holder for Corporate Strategy and Asset Strategy

Electoral wards affected: All

Ward councillors consulted: None specifically

Public.

(Have you considered GDPR?) Yes.

1. Summary

- 1.1 The Council's holds a large number of non-operational properties throughout its various services (the leased estate) including a diverse range of retail and industrial units and non-commercial properties managed on behalf of individual services. In response to the COVID-19 pandemic, the Council agreed to defer commercial rental payments for the first quarter of 2020/21 whilst the economy was affected by the UK-wide lockdown.
- 1.2 As the majority of Kirklees businesses have now re-commenced trading the Council has resumed its normal charging regime for tenants of its leased estate. Whilst many businesses have received grants or other forms of financial support from the Government, it is clear that some remain in financial hardship.
- 1.3 The Government has published a Code of Practice for managing commercial property relationships during the pandemic. This suggests that those tenants that can afford to pay rent during this period should, but where landlords are able to support tenants in genuine difficulty they should try to do so.
- 1.4 The report recommends that the Council adopts the Government's Code of Practice to provide the basis for managing future requests for financial support on a case by case basis.

2. Information required to take a decision

- 2.1 The Council holds a wide-ranging leased estate of non-operational properties including:
 - the Commercial Portfolio (Retail, Office, Industrial, Ground Leases)
 - the Non Commercial Portfolio (Farms, Gardens, Garages, long leasehold interests etc)
 - the network of nine Business and Enterprise Centres
 - the Housing Shop Portfolio (Shops on Housing Estates)
 - properties held for regeneration purposes (The Piazza, The Arcade etc)
 - properties managed centrally on behalf other services (Nurseries in Schools, Cafes in parks, etc).
- 2.2 The leased estate contributes to the Council's wider aims and objectives (e.g. regeneration, economic development) and also generates income to support revenue budgets. Income is generated by the Council granting leases/tenancies of its land and buildings to individuals/businesses to use in exchange for rent/fees. Cabinet adopted a new Corporate Estate Management Policy in May 2017. This covers the Council's non-operational land and property holdings.
- 2.3 In response to the COVID-19 pandemic, the Council agreed to defer commercial rental payments for the leased estate for a three month period commencing in April 2020. Market traders were subject to separate arrangements. The purpose of the deferral was to provide additional financial support for tenant businesses whilst they accessed the package of Government support (small business grants, furlough scheme etc).
- 2.4 Normal charging has now recommenced following the deferral period. For tenants paying monthly in advance (predominantly of the business/enterprise centres) invoicing resumed on 1st July 2020. The majority of tenants (who are on quarterly in advance payments terms) will be invoiced as normal from 1st October 2020.

2.5 The Council's recent business survey indicates that 95% of Kirklees businesses have been impacted by the virus/lockdown in some form, the degree of impact varies considerably as some businesses have been able to continue trading whilst others have had to close. As the national lockdown has now eased and most sectors have been able to return to trading, it is now appropriate for the Council to consider how it should address repayment of deferred rents, and the provision of any future financial support to tenants of the leased estate.

Code of Practice for Commercial Property Sector

2.6 Government has published a voluntary Code of Practice for the commercial property sector during COVID-19, set out at Appendix 1. The Code aims to encourage commercial tenants and landlords to work together to protect viable businesses. It sets out a series of principles that should underpin negotiations between landlords and tenants but does not seek to prescribe the specific arrangements (e.g. rent deferment, rent-free periods etc) that should follow.

2.7 The Code of Practice is expected will be in place until at least 24 June 2021. It has been developed in close collaboration between Government and business organisations including:

- British Chambers of Commerce
- British Retail Consortium
- Federation of Small Businesses
- Royal Institution for Chartered Surveyors.

2.8 The Code encourages tenants to continue to pay their rent in full if they are in a position to do so, and to pay what they can if not. It further acknowledges that landlords should provide support to businesses in greatest need if they are able to do so, whilst having regard to their own commitments and fiduciary duties. The Code sets out four core principles that should underpin negotiations between commercial landlords and tenants to negotiate new payment terms:

- transparency and collaboration – emphasising the mutual interest in business continuity and the need to act reasonably, swiftly, transparently and in good faith
- a unified approach in dealings with other stakeholders (e.g. utility companies or banks) in managing the economic impacts of COVID-19
- Government support – a recognition that where either landlord or tenant has received financial support in relation to the virus, this has been provided to help businesses meet their commitments, including rent and other property costs
- acting reasonably and responsibly at all times.

2.9 The Code of Practice suggests that landlords should consider tenant requests to renegotiate rent on case by case basis, but taking into account the impact of the following factors on their entire business:

- the closure period impacting the tenant's business, and ability to trade via other means
- the duration and extent of restricted trading due to social distancing requirements
- extra costs and obligations through protecting customers to adhere to social distancing requirements

- needs of other stakeholders such as banks, employees, suppliers during this period
- Government support received and how this has been used
- the tenant's previous track record under its lease terms and any concessions to the tenant already agreed
- the impact that providing support may have on the tenant's competitors and on other support already offered to tenants
- possible alternative considerations in a regulated sector, for example, pubs that are regulated under the Pubs Code.

2.10 The Code of Practice further considers service and insurance charges, noting that any such charges support the ongoing maintenance and insurance of business premises and should generally be paid in full, unless the reduced utilisation of premises during lockdown has resulted in a reduced requirement for ongoing maintenance.

2.11 On this basis, it is proposed that the Council adopts a case by case approach to considering further requests from tenants to renegotiate rent payments, based on the principles set out in the Government Code of Practice. This will allow further support to be focused on those businesses that can demonstrate that they are in genuine need, and enable budgets to be managed proactively to account for further reductions in or deferment of rental/service charge income.

2.12 Adoption by the Council of the Government's Code of Practice will also create a policy framework for consistency and transparency of decision-making. Support for the Code of Practice from key business organisations including the British Chambers of Commerce and Federation of Small Businesses is also helpful in this context. If adopted, the Code of Practice will sit alongside and supplement the existing Corporate Estate Management Policy; in matters relating to negotiation of rental payments in response to COVID-19, the Code of Practice will take precedence whilst it remains in force.

Support for tenants

2.13 Whilst some tenants may be able to return to normal payment cycles, it is acknowledged that others may require support including

- an extended time period to pay the deferred rent (the Code of Practice is in place until at least June 2021 and it is proposed that any repayment terms agreed are concurrent with the Code)
- offering a rent free or reduced rent period of up to six months (for the worst effected businesses)
- renegotiation of the lease agreement if there are benefits to both parties in doing so.
- in extreme circumstances, where a business is unlikely to continue trading and all other support has been exhausted, early surrender of the lease may be appropriate.

2.14 The Council will establish a simple online application process to manage further requests for rent concessions from tenants. In accord with the Code of Practice, evidence from tenants seeking support will be sought on the impact of the virus on trading; the level of Government support received and how this has been used; and information in relation to State Aid and other matters, to support applications. These will be considered by a small panel of officers drawn from relevant services. Appraisal guidance will be developed to ensure the adoption of a consistent approach to evaluating applications and the type and level of concession that it is appropriate to adopt.

Options

2.15 The Council could determine not to adopt the Code of Practice and fail to offer further support for those commercial tenants that remain in financial hardship as a result of the pandemic. This would not be in the interests of the affected businesses or the Council in that it could lead to an increase in business failures and vacancy rates across the leased estate.

2.16 The Council could adopt a blanket approach to the provision of financial support and offer a further rent deferment period to all tenants of the leases estate. Whilst many businesses have received grants or other forms of financial support from the Government, it is clear that many also remain in financial hardship. On this basis such an approach would not be fair to all tenants, or indeed affordable for the Council.

Costs

2.17 The overall rental income from the Councils leased estate is currently just under £4.5 million per annum. The decision to defer rents for q1 2020/21 reduced cashflow by £885,000 – of which approximately £485,000 is from the commercial estate/ housing/ regeneration portfolio and £400,000 from the business and enterprise centres.

2.18 If the Council adopted a uniform approach to the provision of future support to tenants this could generate a significant revenue pressure for the Council. Applying three months rent free for all tenants would result in lost income of £1.125m and six months rent free would reduce income by £2.25m. This would have a very significant impact on the Council's ability to continue to invest in and maintain the current property portfolio.

2.19 In this context, adopting a case by case approach to target to those businesses in greatest need of support, in accord with the Code of Practice, will have a less significant impact on income.

Expected impact/outcome/benefits

2.20 The expected outcomes/benefits of the proposals will include reducing the financial impact on businesses of the lockdown and related economic impacts of COVID-19. The Code of Practice will provide a consistent basis for negotiation with tenants and enable the Council to focus future financial support on those businesses in greatest need.

Risks

2.21 There are a number of risks associated with the adoption of the Code of Conduct, including:

- financial risks – considering future requests for support on a case by case basis could reduce the level of certainty in relation to budgets/income streams relating to the leased estate

- reputational risks – some tenants may be dissatisfied that the Council has returned to its usual charging arrangements for the leased estate, or dissatisfied with the outcome of an application for support under the scheme.

2.22 These risks will be managed and mitigated by officers, with the proposed approach to negotiating future support underpinned by the adoption of a national Code of Practice supported by the Government and key business organisations. It is considered that the positive reputational benefits of providing further support for affected businesses and charities in greatest need outweigh any negative reputational impacts of the proposals.

3 Implications for the Council

Working with people

3.1 The proposals will support the Council's efforts to work together with people and communities to find shared solutions. The Council has drawn on learning from the implementation of the earlier COVID-19 support programmes and this will inform delivery of future support for tenants under the Code of Practice. The operation of the scheme will be kept under regular review in response to business feedback.

Working with Partners

3.2 The Code of Practice has been developed by the Government in response to feedback from business organisations and other groups. The Council will work with local partners including the Mid Yorkshire Chamber of Commerce and Industry and the Federation of Small Businesses (who have endorsed the Code of Practice) in order to publicise the scheme and support engagement with tenants.

Place Based Working

3.3 The scheme will support those commercial tenants that are in greatest need, including those in some of the area's most deprived communities. Ward Councillors will be fully engaged in the process to encourage eligible businesses and charities to apply for support.

Climate Change and Air Quality

3.4 There is some evidence to suggest that the changes in behaviour brought about by the lockdown have reversed the decline in air quality and improved emissions during this period. Whilst this initiative is unlikely to have a significant impact on climate change, the Council will ensure that the climate emergency and opportunities for low carbon growth are central to the economic recovery planning process.

Improving outcomes for Children

3.5 There will be no impact.

Other (legal/financial/human resources)

3.6 Decisions to award short-term financial support for tenants must be made with reference to the statutory framework governing the holding and disposal of land and premises by the Council. Section 123 of the Local Government Act requires that the Council should not grant a lease of more than seven years 'for a consideration less than the best that can be reasonably obtained'.

- 3.7 The General Disposal Consent 2003 removes the requirement for local authorities to secure the consent of the Secretary of State for any disposal/lease where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted is £2,000,000 or less. Specific consent is not required for the disposal of any interest in land which the authority considers will help it to secure the promotion or improvement of the economic, social or environmental well-being of the area.
- 3.8 Implementation of the Code of Practice will be in accord with s123 of the Local Government Act 1972 and the General Disposal Consent 2003. In applying for financial support, tenants will be required to demonstrate that granting such an award will contribute to the economic, social or environmental wellbeing of the district.
- 3.9 The provision of further financial support for tenants of the leased estate must be compliant with State Aid regulations. It is anticipated that most applicants will be awarded aid based on the De Minimis rules although it is possible that some awards will be granted under the UK COVID-19 Temporary Framework. The Council will write to all tenants granted further support advising them of the State Aid compliance route that has been applied and requiring them to certify their eligibility for aid as a condition of receipt of the grant.
- 3.10 The scheme will be administered by existing Council Officers. No additional resources will be required to support implementation of the scheme.
- 3.11 An Integrated Impact Assessment (IIA) has not been undertaken for the proposals as a result of the short timeframe for implementing the scheme in response to COVID-19 pandemic. An IIA will be undertaken during the first three months of implementation.

4 Consultees and their opinions

- 4.1 A number of key business organisations have endorsed the Code of Practice. Engagement with stakeholders including Mid Yorkshire Chamber of Commerce and Industry, Federation of Small Businesses and other groups will continue as the scheme is implemented and it will be shaped in response.

5 Next steps and timelines

- 5.1 Subject to approval by Cabinet, the Code of Practice will become an adopted policy of the Council. Next steps will include
- further engagement with tenants and business organisations to publicise the proposed approach
 - those tenants that indicate that they are unable to return to usual payment arrangements will be invited to apply for further support, providing the evidence set out in paragraph 2.14.

6. Officer recommendations and reasons

1. Cabinet notes the content of this report and approves the adoption of the Government's Code of Practice for commercial property relationships to provide the basis for future negotiations with tenants of the leased estate in relation to further financial assistance
2. Cabinet delegates authority to the Strategic Director (Economy and Infrastructure) and the Service Director (Finance), in consultation with the Portfolio Holder for Corporate Strategy and Asset Strategy, to establish an appropriate scheme of financial assistance for tenants of the Council's leased estate, in accord with the principles established in the Code of Practice.
3. Cabinet delegates authority to the Strategic Director (Economy and Infrastructure) to implement and monitor the scheme of financial assistance

Reasons

1. To enable Cabinet to adopt the Code of Practice to provide a consistent basis for negotiations with tenants of the leased estate in relation to further financial assistance
2. To enable rapid and efficient implementation of the proposals in accordance with the scheme of delegations.
3. To enable rapid and efficient implementation of the proposals in accordance with the scheme of delegations.

7. Cabinet portfolio holder's recommendations

The Cabinet Portfolio Holder supports the recommendations, which have been developed at the request of Cabinet in order to provide a framework for future negotiations between the Council and tenants of the leased estate in relation to financial support. By adopting the Code of Practice the Council is maintaining a consistent approach in following the guidance and policies of the Government during the pandemic, in relation to business support.

8. Contact officer(s)

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9. Background Papers and History of Decisions

N/a

10. Strategic Director responsible

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