

<b>Key Decision Required:</b>	<b>No</b>	<b>In the Forward Plan:</b>	<b>No</b>
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## CABINET

15 JUNE 2011

### REPORT OF FINANCE AND ASSET MANAGEMENT PORTFOLIO HOLDER

#### **A.6 SEAFRONT KIOSK LEASES: STANDARDS AND STANDARDISATION**

(Report prepared by John Higgins and Andy White)

#### **PART 1 – KEY INFORMATION**

##### **PURPOSE OF THE REPORT**

**To consider the principle of renewing the seafront kiosk leases currently being held over with a new standard lease including;**

- **A continued drive towards improving quality.**
- **Continued full repair and maintenance responsibilities.**
- **External/internal redecoration frequencies and colours.**
- **Provision for high quality outdoor tables and chairs in clearly delineated areas.**

**A further report in part B of this agenda informs Cabinet of the findings of a seafront kiosk condition survey and enforcement proposals**

**Further reports will seek approval of proposed terms for any new lease that varies from the terms/standardisations proposed in this report.**

##### **EXECUTIVE SUMMARY**

The seafront kiosk properties play a significant contributory role in the Council's vision for tourism and for Tendring as a 21<sup>st</sup> century resort destination. Appendix A provides artist's impressions which will be developed into design options for Clacton kiosks 1 to 3 and ultimately delivered subject to approval in readiness for the 2012 season utilising previously allocated Clacton Seafront improvements funding.

However, the Council's ability to influence kiosk change is limited by legal factors. In most cases this report proposes positive tenant engagement, negotiated standardised lease covenants and rigorous enforcement as key elements to affect quality improvements with a fall-back option to serve formal notices. An analysis of the legal aspects of these leases is included at appendix B.

##### **RECOMMENDATION**

**That Members authorise the Head of Leisure Services in consultation with the Head of Legal Services to enter into new seafront kiosk leases at full market rents based upon the terms recommended as option a in the Proposed Actions section of this report, and such others as officers including the Head of Legal Services consider appropriate.**

## PART 2 – IMPLICATIONS OF THE DECISION

### DELIVERING PRIORITIES

Renewing the seafront kiosk leases with negotiated improvements to improve and enhance the quality of the tourism offering thus significantly contributing to the corporate priority 'building a thriving tourism industry' and delivering sustainable economic growth within the Dovercourt area.

### FINANCE, OTHER RESOURCES AND RISK

#### Finance and other resources

The Council currently receives £95,850 income from the seafront kiosk leases. Maximising rental income from re-negotiated seafront kiosk leases – including their revised trading footprint through formalising the seated areas will further contribute to the Council's revenue budgets.

#### Risk

There is always a risk with any lease arrangements that the tenant will fall behind with payments, or that their business plans are unrealistic or that they will fail to keep the property in a good state of repair. Close financial management, positive tenant engagement, negotiated standardised lease covenants and rigorous enforcement are key elements to mitigate these risks.

### LEGAL

The actions proposed are within the Council's powers.

### OTHER IMPLICATIONS

#### Crime and Disorder Act 1998

Consideration will continue to be given to the Crime and Disorder Act 1998 and any design opportunities will seek to minimise theft and vandalism.

#### Equality and Diversity

There is no direct impact within the actions recommended by this report but consideration will continue to be given to these issues.

#### Health Inequalities

There is no direct impact within the actions recommended by this report.

#### Ward

All coastal wards directly.

## PART 3 – SUPPORTING INFORMATION

### BACKGROUND

Over time a number of the seafront and kiosk leases have reached and passed their contractual end dates. To date, a number have been 'held-over' with a view to reviewing the contents of the leases, removing any anomalies and standardising things.

A review of the seafront kiosk leases and a condition survey of the properties concerned has now been completed. The condition findings and recommend enforcement actions are discussed in a separate Part B report. This report considers lease standardisation.

The over-arching intended outcome is to improve the image/quality of the kiosks and

facilities which represent Tendring's foremost seaside tourism image in order to meet the Council's aspirations for these areas. That said, members should be mindful that the seafront kiosks are predominantly 1950s built utilitarian buildings.

Whilst the Tenants are required through the lease to maintain the property, Members have recognised the need to see a 'step change improvement' in the kiosk appearances. With cognisance to this aim on 7<sup>th</sup> April 2011 the incumbent Community, Partnerships and Renewal Portfolio Holder approved £72,000 funding as part of the allocation of the £200,000 Seaside Award (ref no. 2064) to undertake image branding/ refurbishment works to Clacton kiosks 1 to 3. In this regard the architects who had previously provided kiosk branding artist's impressions included as Appendix A to this report have now been commissioned to provide a range of designs for further consideration with the works projected to take place in the late winter/early spring 2011/12 in readiness for the 2012 tourism season.

The key areas of seafront kiosk concern which need to be addressed are as follows:

1. Improvements to the overall quality and kiosk image.
2. Lease standardisation i.e. removal of anomalies and irregularities.
3. Continued Tenant full repair and maintenance responsibilities and their rigorous enforcement.
4. External/internal redecoration frequency anomalies and colours.
5. The introduction and standardisation of high quality outdoor tables and chairs in clearly legally defined areas which are physically delineated and enforced.

Before, discussing the options available to Cabinet, members should first be appraised of the Council's legal position and obligations to its tenants. The properties are all let to tenants on leases that are secured by the provisions of Part II of the Landlord and Tenant Act 1954. The legal constraints around these leases and properties require the Council to approach the improvement of the areas with a degree of caution and with regard to the legal process appropriate. Further information on this is included at Appendix B

## **SEAFRONT KIOSK LEASE STANDARDISATION**

As previously identified changes to the leases need to be agreed by both parties through negotiation. In the Council's favour the Tenants want to renew their leases and they want to reach agreement as to extending their trading footprint - putting out tables and chairs for customers' use. The Council's property valuers, NPS, have confirmed that formalising the table and chair arrangements will increase the rental value of the kiosks so officers have a number of negotiation points in reaching new lease agreements.

The following key changes are recommended to Cabinet in order to achieve the required level of standardisation:

### **Lease Terms Standardisation**

Over time the seafront kiosk leases have evolved a range of term anomalies which require standardising, for example; some have a lease term of 7 years, some 14 years, different rent review periods etc. It is proposed to standardise the leases as far as possible to include 14 year leases with rent reviews every 5 years and on the last day of the term.

### **Continued Tenant Full Repair And Maintenance Responsibilities And Their Rigorous Enforcement.**

All of the Council's seafront kiosks are full repairing and insuring leases. It is not proposed that this changes (see options section) as on the whole this type of lease covenant provides the optimum balance between utilisation of Council resources to monitor and enforce against the general overall kiosk maintenance condition i.e. that they are in a reasonable state of repair (See Part B Report Appendix A). As an alternative, making kiosk maintenance the Council's responsibility would place additional resourcing requirements on the Council during a period where it is trying to achieve substantial budget reductions in line with Government requirements.

The key to balancing 'value for money' against this type of repairing lease from a Council perspective is that of ensuring that regular condition surveys are diarised and that rigorous enforcement takes place from now on.

### **External / Internal Redecoration Frequency Anomalies And Colours**

Over time the kiosk leases have developed a range of external decoration covenants, most requiring external decoration every 3 years with one exception which requires external decoration every 2 years. Given the current condition of the kiosks and the overarching intention to improve the kiosks image it is proposed that the new leases provide for a 2 year external redecoration requirement. Internal decoration covenants also vary between 3 and 7 years. Again, with image in mind it is proposed to standardise this internal decoration requirement to every 3 years.

A new standard lease covenant will provide the Council with means to seek to authorise or veto the tenant's proposed external colour schemes choice thereby ensuring that the kiosk image is in-keeping with image/ improvement goals.

### **Delineated And Enforced Outdoor Seating Areas**

Over the past few years kiosk Tenants have sought to increase their footprint and offering by providing seating areas for customers. In principle, the Council supports the idea of this positive shift towards an improved tourist offering however it has created the following issues which now need to be addressed:

1. The tables and chairs are encroaching on Council owned land and are now causing obstructions on the seafront promenades and footways.
2. Without formal agreement and clearly delineated areas enforcement is, at best, difficult.
3. The encroachment and kiosk expansion is causing friction with adjacent local businesses whose trading footprint is limited to their premises and forecourt area for which they pay rent etc.
4. Whilst some of the kiosks now use good quality metal furniture, the majority are utilising old, mismatched, poor quality white plastic furniture.

It is proposed to regularise the situation by changing the extent of land leased with the kiosks to include a regularised area for tables and chairs that neither restricts pedestrian nor emergency vehicle access. The area will be clearly delineated using discreet stainless steel pavement studs enabling rigorous enforcement by officers. The increased trading area will incur an increase in annual rent.

### **The Use Of High Quality Tables And Chairs**

The use of poor quality plastic furniture has a significant detrimental effect to the whole seafront scene and the introduction and standardisation of high quality furniture through an additional lease covenant will result in the Council having the powers to enforce removal of the poor quality furniture whilst significantly uplifting the ambiance. The new standard lease covenant will provide the Council with means to seek to authorise or veto the style of furniture used thereby ensuring quality improves.

### **Kiosk Quality and Image Improvements**

The proposed lease regularisation/changes will facilitate simpler, more robust enforcement which is one strand of improving the quality.

The second strand is through improving the relationship with the Tenants and working with them to improve the overall tourism offering. The Council has now held two Seafront Traders meetings on 18<sup>th</sup> November 2010 and 9<sup>th</sup> May 2011, which saw a frank exchange of opinions, good discussion and actions by both the Tenants and the Council.

The above actions will undoubtedly generate improvements and the planned Clacton kiosk image branding/refurbishment improvements projected to take place in the late winter/early spring 2011/12 in readiness for the 2012 tourism season will provide exemplar improvements for the kiosks across the District.

### **Kiosk Signage**

The kiosk leases already include a covenant restricting kiosks to one sign. Over time this has become almost universally ignored by the kiosk tenants, actively encouraged by ice cream manufacturers/ suppliers who supply a myriad of free advertising products; signage/ flags/ building facia surrounds, inflatable advertising etc. etc. Positive engagement supported by rigorous enforcement is again key to achieving compliance with the terms of the lease.

## **PROPOSED ACTIONS**

The Council has a number of potential actions in considering the new standard kiosk lease:

### **Action 1 – Standardise Lease Terms**

- Option a (recommended). Standardise wherever possible to a 14 year lease term with rent reviews at five year intervals with an additional review on the final day of the term. This length of tenure provides stability for both parties and provokes forward financial and business planning etc.
- Option b. retain a mixture of long and short lease terms. A short lease would adversely affect the rental value and does not encourage forward planning and investment.

## **Action 2 – Repairing issues**

- **Option a (recommended).** Retain the Tenants' responsibility for all repairs and maintenance as in the existing leases but seek additionally to adopt a pro-active approach to surveying and enforcement to achieve the desired outcome in terms of the overall attractiveness of the seafront..
- **Option b.** The Council could take on the responsibility for repair and maintenance. This would have a balancing effect in increasing rent levels and the Council would be entirely in the driving seat in setting the standards to be achieved. This option would be resource intensive and probably cost more to maintain. For these reasons this option is not recommended as this would place additional resourcing requirements upon the Council at a time when it is downsizing through necessity and could result in Tenant pressure to undertake maintenance that is perhaps unnecessary. Although there is a much stronger case for this option for more minor properties like remote deckchair stations where it is unrealistic to expect businesses to be able to fund the scale of investments that is needed.

## **Action 3 – Standardise external redecoration**

- **Option a (recommended).** Where possible standardise the external painting covenant to every 2 years with Landlord colour scheme approval and the internal decoration covenant to every 3 years to maintain a fresh and harmonised appearance to the seafront and take a small step towards re-branding the kiosks.
- **Option b** Clearly, these periods could be set shorter or longer. A longer period would not focus on improving the quality of the offer in a severely exposed environment whereas shorter periods would affect the lease rental values. The suggested periods are a balance between contributing towards achieving this goal without seriously affecting rentals.

## **Action 4 – Clearly delineating seating areas to be included in leases**

- **Option a (recommended).** Clearly defining seating areas and including them in leases will enable officers to ensure that minimum emergency vehicle access is maintained at all times, prevent adverse rights accruing, add to rental values and work with Tenants to improve the environment. Visible, yet discreet markers (e.g. stainless steel studs) will clearly show encroachment and facilitate easy enforcement.
- **Option b.** Enforce the removal of any unauthorised encroachment onto Council land and remove the seating. This would alienate our Tenants and remove the café culture which is fast becoming an established scene around the kiosks. This is particularly popular with the older generation with knock-on improvements in seafront vibrancy – a place for people of all ages to relax and enjoy.
- **Option c.** No action. If the Council does nothing then the encroachment left uncontrolled/ enforced will continue to get worse and will make the kiosk areas a tripping hazard for the partially sighted.

## **Action 5 – Specifying the standard of permitted external furniture**

- **Option a (recommended).** Requiring prior approval of the type/style of tables/chairs / parasols permitted and imposing minimum standards. This will remove the poor quality plastic furniture used by some kiosks and significantly improve the appearance of the area. This way forward also allows a kiosk to theme itself should

it so chose whilst giving the Council enforcement powers.

- Option b. Alternatively, the lease could insist upon a particular style/ type or material e.g. stainless steel but this will date the leases as fashions change over time.
- Option c. No action. If the Council does nothing then the Kiosk tenants will be unlikely to invest in furniture and no improvement will result.

#### **Action 6 – Standard Signage Covenant**

- Option a (recommended). Positive engagement and enforcement over a reasonable time period to remove any unauthorised signage/advertising – acknowledging that some products e.g. advertising facias are currently a material element of some kiosks.
- Option b (recommended). Rebrand kiosks and enforce rigorously from ‘day one’ of new image. Note: This action is included as an option in the regenerative seafront funding report(s).
- Option c. No action. However, if the Council does nothing then the Kiosk tenants have no incentive to improve.

#### **Action 7 – Negotiated approach in most cases.**

- Option a (recommended). Negotiate with the majority of tenants where possible to reach mutually agreeable terms for future use of the kiosks. The Council has only limited powers to force tenants to accept changes to lease terms and the initial assessment of the sites by officers indicates that only one of the kiosks are in such disrepair that formal action is likely to be successful (see legal assessment at Appendix C).
- Option b. Seek to serve notices and immediately take formal actions to impose changes on the tenants. With only three exceptions this approach is unwarranted and unlikely to be successful.

#### **BACKGROUND PAPERS FOR THE DECISION**

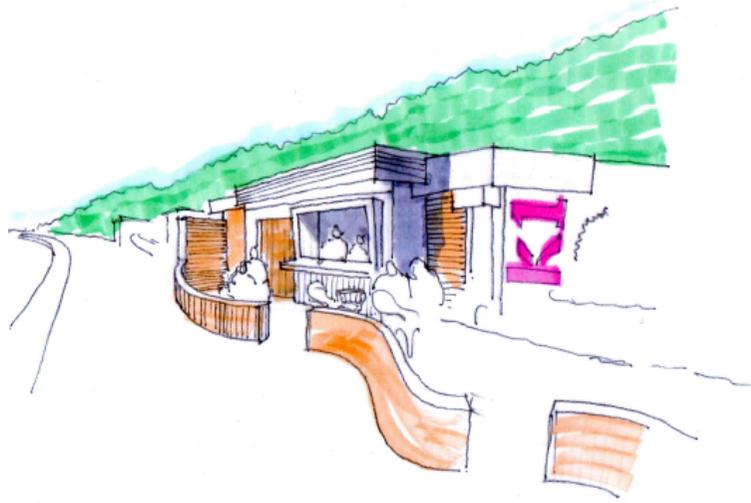
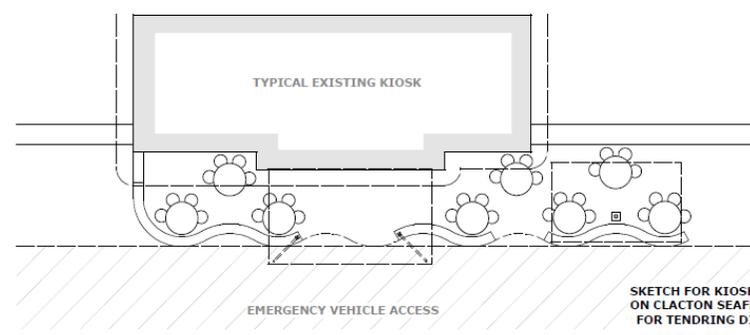
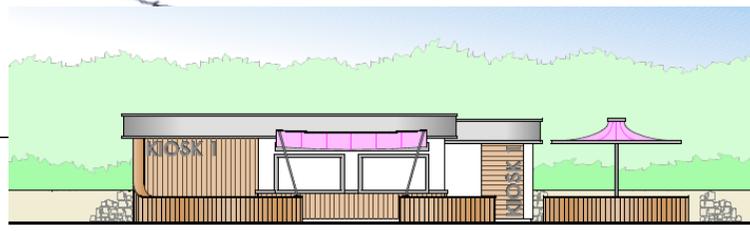
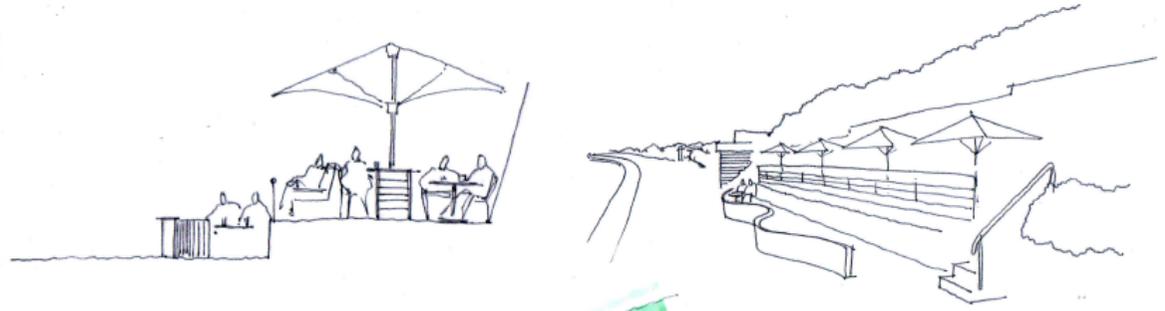
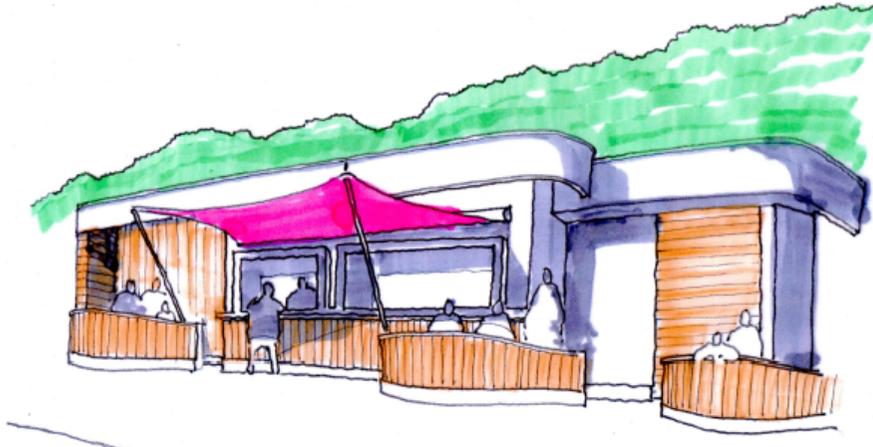
None

#### **APPENDICES**

**Appendix A – Artist Impression Of A Rebranded Kiosk**

**Appendix B - Legal position related to kiosk and seafront leases**

Appendix A: Artist Impressions Of A Rebranded Kiosk



SKETCH FOR KIOSK REFURBISHMENT  
ON CLACTON SEAFRONT PROMENADE  
FOR TENDRING DISTRICT COUNCIL

SKETCH 2/NOVEMBER 2010

Duncan Clark & Beckett

SKETCH FOR KIOSK REFURBISHMENT  
ON CLACTON SEAFRONT PROMENADE  
FOR TENDRING DISTRICT COUNCIL

**Tendring District Council**  
**Legal position related to kiosk and seafront leases.**

**What is a lease?**

A binding legal contract. The Landlord grants the tenant sole right (exclusive possession) to use land for a fixed time (term of years) in return for something (consideration). These three characteristics of a lease were set out in the judgement of the House of Lords in *Street v Mountford*. If these three elements are present a lease exists, whatever the parties seek to call it. Leases have specific terms included in them (covenants) and can be subject to some standard statutory terms (implied covenants). The terms are binding throughout the term of the lease (subject to some statutory protection of tenants) and can only be varied by mutual agreement either specific or implied.

**Are Leases always written?**

No. Leases for short terms can be informal, even verbal agreements. Leases can even be created by accident, where the three characteristics of leases above are created then a lease will be formed. If there is no explicit agreement this is called an implied lease. An implied lease benefits from the same statutory protections as a written one.

**Are Leases always for a number of years?**

No. Although the words "term of years" is used a lease can be for any length of time (provided it is shorter than the landlord's interest). Leases can be for (for example) a week or a month at a time. If the arrangement continues for whatever reason for a succession of such units it is called a periodic lease.

**Can a lease end before its end date?**

Sometimes. But only in specific circumstances:

- By mutual agreement. It's only a contract: anything can be agreed, voluntarily: by both parties.
- Break Clause. Some leases include provisions for one or other of the parties to end the lease at specific times. Redevelopment clauses are an example of break clauses. Break clauses are uncommon and as yet unknown in any TDC lease.
- Forfeiture. If the tenant has failed to meet their obligations the lease the landlord can seek a court order forfeiting it. Courts tend to have sympathy towards tenants and it is frequent for tenants to be given second and even third chances before courts grant forfeiture to a landlord
- Specific events. Leases can specify events or circumstances that will end them. Commonly leases include a provision that they will end absolutely on the bankruptcy of the tenant. Other provisions are possible but could be challenged if they appear unreasonable.

**Do leases end at their end dates?**

Only sometimes. Section 24 of the Landlord and Tenant Act 1954 provides that business tenancies can only end if a notice is served in accordance with section 25 between six and twelve months before the proposed end. The stipulated form draws the tenant's attention to their rights under the rest of the Act: to serve a counter notice seeking a new lease on similar terms and for the matter to be determined in the County Court if agreement cannot be reached. If the case reaches the Court there are only seven specific grounds (section 30) upon which the landlord can seek to oppose the granting of a new lease:

- a) where the tenant has failed to comply with the repairing obligations;
- b) if the tenant has been persistently late in paying rent which has become due;
- c) if the tenant has misused the premises or substantially breached obligations under the tenancy;
- d) if the landlord has offered and is willing to provide or secure reasonable alternative accommodation;
- e) if the landlord could let the property (if it's part of another) with the rest for more than he could separately;
- f) if the landlord intends to demolish, reconstruct or alter the premises in a way that he could not reasonably do so without obtaining possession of the holding;
- g) if the landlord intends to occupy the premises for business or as his residence.

In each case it is up to the landlord to show that these circumstances exist, to the extent that a new lease should not be granted.

The effects of the act can be avoided if the landlord and tenant follow a statutory process to exclude them before the start of the lease

Of course the lease can end in any event if both parties agree

### **Can tenants be forced to do repairs?**

Mostly not. In the event of repairs being desired by the landlord the appropriate formal action is the service of a notice under section 146 of the Law of Property Act 1925 specifying the term breached and repairs required. This notice can follow the noting of ad-hoc repairs or after a formal survey. In the latter case the notice is accompanied by a Schedule of Dilapidations that includes the relevant findings as above. Such a schedule at or approaching the end of a lease is called a Terminal Schedule, during the bulk of the lease it is called an Interim Schedule. Section 146 notices must give the tenant notice of their right to relief under provisions of the Leasehold Properties Repairs Act 1938, as modified by section 51 of the Landlord and Tenant Act 1954. This Act gives tenants the right during any lease of seven years or more (except in the last three years) to serve a counter notice claiming relief from repairing obligations. This prevents a landlord taking any further action in respect of the notice/schedule unless permission is granted by the County Court. Permission is only granted in certain circumstances:

1. The want of repair is causing loss in the value of the landlord's reversionary (at the end of the lease) value.
2. The repair is required to comply with legislation or a court order
3. The want of repair is affecting another occupier of part of the premises.
4. The want of repair can be addressed at a relatively modest current cost instead of a greater future one
5. If it appears equitable at the discretion of the court.

There is no right to relief from a repairing obligation that the tenant is required to meet at the start of a lease.

It is common for leases to contain a requirement for tenants to meet landlords costs in preparing surveys, schedules and notices: whether relief is claimed or not. This can make it cost effective for tenants to carry out repairs when informally requested to do so.

### **But if there is no relief surely the tenant can be forced to do the repairs?**

No. Many leases have provisions that allow landlords to carry out works in default and then to charge tenants the costs. Otherwise the landlord's recourse is to the courts where he can seek an order for specific performance but this is an equitable remedy and is only granted at the discretion of the court. More commonly the landlord would be awarded damages: a compensation for any loss he may have suffered. This may not meet the landlord's aspirations.

### **What about other breaches of the terms?**

No. The landlord can serve notice specifying the breach but if the tenant does not rectify the breach the landlord's recourse is to enter the property to rectify the breach if this is provided for in the lease. Other than this the next step is to seek a court order either as injunction to stop something or specific performance to make something happen. As above these remedies are at the discretion of the court and it is likely that a landlord that wins its case will be awarded damages rather than an order, especially in lieu of specific performance. Finally a landlord can seek the forfeiture of the lease but as outlined above this can be hard to achieve at least in the short term.

### **Can tenants be required to carry out improvements or renovations?**

No. Not unless it is provided for in the lease. In some cases repair clauses are drafted to include replacement of elements where this is necessary or to put premises into repair, but it is very rare for a lease to require improvements and where such provisions are made they will generally specify the work from the start of the lease. It is most unlikely that a tenant would agree to a lease that might require them to carry out improvements that may be defined at a later date.

**Can the terms of leases be changed?**

Only by mutual agreement, otherwise they are binding contracts throughout the term.

**But you can change them when the lease ends then?**

Sometimes. If the lease is contracted out of the Landlord and Tenant Act 1954 terms can be reconsidered before any renewal. But if the Act applies the tenant has a degree of legal entitlement and new terms can only be arranged by mutual agreement or at the discretion of the court.

**Note:**

This document is produced solely for the information of Tendring District Council Members in relation to leases of kiosks and seafront sites. It is not intended to include or comprise advice of any kind to any other party. Leases and properties have many different legal and other circumstances and requirements. Always seek appropriate professional advice on specific property issues.