

## Introduction

1. The Council received a complaint under the Compact on 22<sup>nd</sup> November 2011 from Terry Revill relating to the Council's decision to deduct £25,000 from the grant awarded to Flash Musicals for the Community Anchor Project (CAP) to pay rent on the property they occupy which the Council **claims is owed. Flash Musicals disputes that any rent is owed which is the crux of the matter. It is unfortunate that the 'independent' Officer missed this crucial point.**

***Any investigation should only be concerned with the terms of the complaint which, in this case, does not in any way refer to disputing the terms of the lease which clearly records the rent payable each year for the premises. The full grounds of the complaint are set out at paragraph 5 below.***

***In fact, the investigation has gone significantly further and looked into whether there is evidence of undertakings to provide SLAs apparently in perpetuity to fund the rent, which emerged as an issue during the investigation even though this was not raised in the initial complaint.***

2. The Compact is not a legally binding document or contract although a Compact in another Borough has been accorded the status of a "Document of Intent" in a High Court ruling which enables Judicial Review proceedings to be brought if it is breached. It is a mutual agreement between those who decide to endorse its principles and commitments to action. Its authority derives mainly from the respect accorded to it by the partners and the extent to which it influences future decision-making and development. It is intended to be of both practical and symbolic significance. It is the intention of those who have collaborated in producing it that it should have an authoritative focus in promoting good quality working relationships between the partners.

3. The local procedure for responding to issues raised under the Compact is for the Service Manager, Policy and Partnership to undertake an investigation. The investigation will, where possible, suggest both whether the issues raised have been substantiated and a recommended way forward. The draft investigation report will be sent to the complainant and the Council officers concerned for comments and, where appropriate, those comments will be incorporated into the final investigation report. Where a way forward is recommended, the comments of both parties on the practicality and acceptability of the recommendation are particularly welcome. **The Voluntary and Community Sector Forum has made the point that there is a conflict of interest with a Council Officer investigating the Council and it is disappointing that although discussions have been had about introducing a system which brings real independence this has not happened. Unfortunately, it means that the Sector can have very little confidence in the investigation or the report.**

***The Voluntary and Community Sector Forum has never previously made a point regarding a conflict of interest. In the negotiations over the updating of the Compact, the existing practice was confirmed without dissent.***

4. The final report will be considered by Harrow Chief Executives in the first instance and the Partnership Board who may endorse any recommendations made or make their own recommendations to the parties concerned.

## Issues

5. The complaint centres on the Council's decision to deduct at source £25,000 for the rent due to the Council for the premises occupied by Flash Musicals from the grant awarded for their Community Anchor Project. Five grounds for complaint regarding this decision have been advanced:

- a) The Full Cost Recovery Principle – All successful grants were paid only 72% of the amount that they had applied for. This included grant for 72% of the rent for the premises concerned. Therefore, the rent charged should have been reduced to 72% of the previously agreed amount;
- b) Independence of the Sector – Flash Musicals should have been given the respect and courtesy of being the right to manage its own money. Flash Musicals suggest that it has always made rent payments from the monies paid to it;
- c) Payment in advance of expenditure – Insufficient payments have been made in time to enable the work from which the grant was given to be carried out;
- d) Failure to minimise cost of working with Harrow Council to enable Flash Musicals to achieve value for money
- e) – Failure to ensure long term financial stability and optimum impact of voluntary and community sector delivery of services.

6. In response to a request for further information in relation to items (d) and (e) above, Flash Musicals have stated that:

“The Council has involved Flash Musicals in exchanges of emails and meetings which you will no doubt agree have cost implications. Following award of the grant, negotiations took place to amend the service specification to reflect the reduced resources available. Flash Musicals signed and returned the agreement on 7<sup>th</sup> October 2011. Flash Musicals was informed by email on 21<sup>st</sup> October 2011 stating that (“The SLA is awaiting signature. Once this has been done, grant payments will be released to you. These will be released in two instalments and the second instalment will be released upon satisfactory receipt of monitoring information. Your final grant award is £48,825.68 as set out in the SLA.”)

Instead the Council delayed and signed the agreement on 9<sup>th</sup> November 2011 and returned it with a letter dated 11<sup>th</sup> November 2011. Having to find resources to deliver a project for which funding has been awarded will cause financial stress to any organisation. The constant moving of goal posts by the Council makes it difficult for Flash Musicals to plan adequately and this has an impact on the organisation and the Community Anchor Project it has been awarded funds to deliver.”

“Delaying payment of a grant which has been awarded hampers the financial stability of an organisation. Flash Musicals is having to draw on reserves to support the Community Anchor Project as the Council has only paid £4,420.58 of the £48,825.68 awarded.”

“I hope you will acknowledge that far from being wide allegations, there are concrete instances of the Council having opportunity to reduce the costs of working with it and to enable financial stability of the organisation but failed to take them. Rather, it would seem that the Council has no awareness of the damage continued delays and uncertainty can have on the organisations

it is supposed to partner. More worryingly, since the Compact Complaint even the £19,405.10 has been withheld, causing even more financial stress and uncertainty.”

## The first complaint

7. The first ground for complaint centres on the Full Cost Recovery principle. The Funding and Procurement Compact Code (which is being reviewed ) states that the Statutory Sector will “recognise it is legitimate for voluntary and community organisations to include the relevant overhead cost in their estimates for providing a particular service, and where a full service is funded apply the full cost recovery principle.” The glossary in the current draft revised funding and procurement code explains the full cost recovery principle in the following terms:

### *“Full Cost Recovery*

*Full cost recovery means recovering or funding the full costs of a project or service. In addition to the costs directly associated with the project, such as staff and equipment, projects will also draw on the rest of the organisation. For example, adequate finance, human resources, management and IT systems are also integral components of any project or service. The full cost of any project therefore includes an element of each type of overhead cost, which should be allocated on a comprehensive, robust and defensible basis. The methods used by the voluntary and community sector to allocate full costs should follow these principles:*

- The method should be simple so that the amounts can be calculated without disproportionate effort*
- The method must be equitable where there are several funders of different services*
- Costs should be recovered only once; where a grant has been given specifically for other costs, those should not be included in calculating amounts to be paid by other funders.”*

8. Reading this explanation in conjunction with the provision relating to full cost recovery in the current code demonstrates that the statutory sector needs to recognise that it is legitimate for voluntary and community organisations to include in their grant applications the costs of ancillary or support services in addition to the costs directly associated with the project for which funding is sought. Further, the Code requires that where a service is funded, the full cost recovery principle should be applied.

9. The application for the Community Anchor Project (CAP) submitted by Flash Musicals included costs associated with the provision of the space for other organisations to meet such as a contribution to staff costs, volunteer costs, maintenance and refurbishment costs, accountancy costs, legal and insurance costs, the costs of an alarm, as well as costs directly associated with the project. The application was accepted as legitimate including the ancillary and support costs.

10 There were delays in initiating the grants process for 2011/12 and, as a consequence, each organisation in receipt of funding in 2010/11 was given one additional month’s funding at the 2010/11 level.

11. A total of 131 applications (including one from HAVS) were received by the deadline date requesting total funds of just under £2.3 million. 104 of these applications were assessed as meeting the first stage assessment in that they had a constitution, bank account and required policies. Panels of officers assessed these remaining applications and scored them on agreed criteria. The Grants Advisory Panel recommended to Cabinet that applications that

scored 95% or more should be funded. This would enable each of these 31 applications to be funded to 85% of the amount requested.

12. While this was agreed in principle, the arrangements also agreed for appeals meant that the percentage of the amount applied for in respect of these applications was subject to change. The remaining 73 applications were notified of their right to appeal with the provision that any appeals allowed would be funded by reducing the percentage of the sum applied for all organisations scoring 95% or more in their assessment.

13. Flash Musicals' application scored 91.67% in its assessment and therefore was not part of the cohort of 31 applications that were funded initially. **The reason Flash Musicals did not score 95% was because the assessors said the rent costs were unrealistic. Flash Musicals appealed on the grounds that it was the Council which was setting the unrealistic rent of £25 000.** However, on appeal, the application was supported along with a number of others which meant that the percentage of the funding sought for all successful applicants ( initially and at appeal) was set at 73.5% of the costs applied for.

***The assessment form does not state that the rent was unrealistic. It did question whether the allocation of core costs to this project was reasonable and asked why the organisation's income recorded on the application form differed from that in its accounts. The scoring also recorded that the organisation places great emphasis on continued Council funding which reduced the sustainability of the project.***

14. This means that the full service was not funded and that the condition set out in the Funding and Procurement Compact Code under which the full cost recovery principle was to operate had not been met. **The Council needs to recognise the difficulty it puts itself in when it splits hairs about full service or part of a service. The principle of full cost recovery is a recognition that it costs money to deliver a service and it is not reasonable for the Council to expect a service without paying the cost of delivering it.**

***There is an apparent disagreement about what "Full Cost Recovery" means. The definition included in this report at paragraph 7 means that all relevant costs should be eligible for funding whereas the definition put forward by Flash Musicals in the comments on paragraph 14 says that the Council should not expect a service to be provided if it is not prepared to pay for it. In fact, these definitions are not at odds with one another and the Council's approach of providing only a proportion of the funding sought was balanced by a determination to renegotiate the outcomes it expects to be achieved with from reduced funding levels.***

***However, for the avoidance of any doubt, the following definition is taken from the Association of Chief Executives of Voluntary Organisations***

***"Full cost recovery means recovering or funding the full costs of a project or service. In addition to the costs directly associated with the project, such as staff and equipment, projects will also draw on the rest of the organisation. For example, adequate finance, human resources, management, and IT systems, are also integral components of any project or service.***

***The full cost of any project therefore includes an element of each type of overhead cost, which should be allocated on a comprehensive, robust, and defensible basis."***

15. For clarity, however, it is perhaps worth considering what impact the full cost recovery principle could have had in this case. It appears that the funding and procurement code

suggests that the Council should accept that ancillary and support costs are a legitimate part of providing services and, where it intends that the full service described in an application should be provided, then it needs to fund all of the project and ancillary and support costs. None of the organisations that received funding for 2011/12 were funded for a full service and negotiations were undertaken with many groups to adjust the outcomes that could be achieved with the reduced level of funding that was made available. **The critical difference with Flash Musicals is that the cost of rent is in the hands of the Council and has been the subject of a long series of emails and letters. It is therefore reasonable to expect that either the Council negotiates a more 'realistic' rent as the assessors thought, or accepts that legal advice that Flash Musicals has had that the organisation should only pay whatever % of rent it receives from SLAs. Where it receives 100%, Flash Musicals will pay £25 000 as it did in 2008/2009. In 2010/2011, following a failure by the Council to provide an SLA for 2009/2010 as was agreed before the Tenancy Agreement was signed, Flash Musicals applied to the Main Grants Programme for a grant of £30 000 being £25 000 rent and £5 000 contribution to costs. Flash Musicals was only awarded £18 000 so on legal advice, paid a pro rata amount of rent. The Council demanded rent, Flash Musicals put forward the legal position it had been advised. The arguments vis-à-vis rent have been rehearsed. Flash Musicals does not owe rent.**

***The property is held within the Housing Revenue Account (HRA) and, as such, the Council is required to charge the market rent for the property. The rent is set out in the lease and that is the rent which is due to be paid; the rent is not determined by any SLA that may or may not be in place. The Council's legal services have confirmed that the rent to be paid is £25,000 per annum as set out in the lease and that is not affected by whether or not there is an SLA or the amount identified for rent in any SLA.***

***The Council has never been presented with any legal advice obtained by Flash Musicals and therefore cannot comment on the strength or otherwise of that advice.***

16. The real impact of the full cost recovery principle lies in whether or not the council would seek to disregard some of the costs included in applications. For example, there could be circumstances in which a funder seeking to support a project refused to include any contribution to accountancy costs, administrative overheads or any other ancillary and not directly project related expenditure. In all of the applications eventually funded for 2011/12, the reduction from the costs applied for was based on an affordability principle that, given the number of applications that were approved and the amount of funding requested, only a percentage – in this case 73.5% - could be afforded. All of the costs that organisations included in their applications were deemed to be eligible but, regrettably, not affordable.

17. The suggestion in this first ground for complaint is that the Full Cost Recovery principle should reduce the rent sought to equate to the grant given. This is a misunderstanding on at least two counts. First, the principle requires that all costs are deemed to be eligible and rent certainly was and secondly, it confuses the Council's role as a landlord with that as a funder. **The investigator misunderstands the grounds of the complaint. The Council negotiated with Flash Musicals to give up £100 per annum rent in exchange for a rent of £25 000 which will be covered by SLAs. The Council failed to provide the SLAs after the first year in breach of the said agreement. The Trustees of Flash Musicals applied to the Main Grants Programme as they had been advised that they needed to take steps to mitigate the damage caused by the Council's failure to abide by the agreement. Flash Musical's point here is that rent is a vital part of the project. The level of rent is set by the Council. If the Council is only paying 73.5% because of affordability, then it is unreasonable to expect Flash Musicals to pay more than 73.5% and taking 100% simply**

means that the project is not funded according to the Full Cost Recovery principle even at 73.5%

***Flash Musicals did not have an agreement for a ground rent of £100 per annum – that arrangement was with another organisation.***

***Throughout the investigation, it has been stated by Flash Musicals that they were offered SLAs for the foreseeable future to cover the rent. It has to be emphasised that there is no evidence in the Council's files and no documentary evidence has been produced by Flash Musicals to substantiate this.***

18. The property occupied by Flash Musicals is held in the Housing Revenue Account. The Council, under statute, has no discretion regarding rent charged for property held in the Housing Revenue Account and must charge market rent. Not to do so would, of course, be a detriment to the tenants of Council housing as well as unlawful. The Council as landlord therefore has to charge market rent for the property. **The investigator misses crucial points a more thorough investigation would have revealed. Although the property is held in the Housing Revenue Account, it is a fact that it was a derelict property when Flash Musicals moved in. It is a matter of record that Flash Musicals raised the money and brought the property into its present state. It is therefore unreasonable to set a rent after the property has been brought to its present well maintained standard without giving the tenant any credit for the investment. It was agreed that provided the Council gave SLAs to cover the rent of £25 000, Flash Musicals would not take the issue to Court. Flash Musicals had an arguable case that increasing rent from under £100 per annum to £25 000 is unreasonable especially when all the improvements were made by Flash Musicals. It is also a matter of record that a promise was also made to move the property from the HRA to the General Fund. Failure to do this was a breach of faith as has been the failure to honour the agreement to provide SLAs to cover the unreasonable rent.**

***The property was held by the original tenant under a full repairing and insuring lease; Flash Musicals moved into the property without landlord's consent while it was still leased to the original tenant. The rent of £100 was a ground rent granted to the original tenant.***

***The original tenant was Middlesex Young People's Club. There is no evidence on file to show that Flash Musicals was a member of that organisation. Even if there was, being a member of the organisation would not have conferred on Flash Musicals the right to occupy the building. The lease granted to the original tenant prohibited them from assigning or underletting the premises, thus occupation by Flash Musicals was unlawful.***

***The occupancy of the building by Flash Musicals was discovered when the lease renewal negotiations began. If a lease renewal can not be agreed between the parties, that is, the actual landlord and tenant, the matter can be referred to court. An illegal occupant of a building does not have the right to renew a lease.***

***The current rent of £25,000 is the market rent for the property legally payable by a new tenant.***

***The lease granted to the original tenant required then to keep the building repaired. Pictures on file dated 20<sup>th</sup> September 2005 show the building to be a little "tired" by***

**perfectly usable and the officer who made the inspection recalls it as such. Flash Musicals secured a grant from the Big Lottery to undertake the following:**

***New heating system;***

***New fire alarm;***

***Emergency lighting***

***Widening of fire escape doors and creation of a new fire escape path***

***Replacement of all doors with fire doors***

***New signage to comply with health and safety regulations***

***New fire fighting equipment***

***New fire escape for the stage area***

***Lockable seating.***

***On the face of it, these works do not appear to be those needed to bring a derelict building back into use.***

19. The lease is clear that the rent for the premises is £25,000 a year and includes provisions for the payment of interest on late payments except where the late payment of rent is due to a late payment of the SLAs entered into in 2008 or any future Service Level Agreement (or equivalent grant if Service Level Agreements cease to exist) which may be in place. This recognises that the Council can sometimes make late payments, which might be considered to be a detail, but does not imply any change to the rent level if an SLA or grant does not include the full amount of the rent applied for, which would have been a much more substantial issue. **The investigator failed to acknowledge that Flash Musicals has always reminded the Council that the Lease was signed on the understanding that SLAs would be provided to cover it. The provision in the lease about late payments can be interpreted to mean that if no SLA is paid, no rent is due.**

***Please see the comments at paragraph 17 relating to the SLA issue.***

***The provision regarding late payment in the lease reads “To pay the rent hereby reserved on the days and in the manner set out by BACS or cheque and not to exercise or seek to exercise any right of claim to legal or equitable set off save in the event of manifest error provided that the tenant shall not be deemed to be in breach of this clause if late payment of rent is due to late receipt by the Tenant of payment under the Service Level Agreements made between the Council and the Tenant dated 18<sup>th</sup> July 2008 and 9<sup>th</sup> October 2008 (or equivalent grant if Service Level Agreements cease to exist).”***

***It is difficult to see how this could be interpreted to mean that if an SLA is not made, no rent is payable. However, the clause does envisage a time when an SLA might not be in place, contrary to Flash Musicals assertion that SLA had been guaranteed for the foreseeable future.***

20. As funder, the Council agreed to negotiate about the outcomes that could be achieved with the reduced level of funding compared to the level sought and to recognise the inflexibility around the rent payable as would be the case if any other organisation were the owner of the premises concerned. The Council as landlord has no more reason to reduce the rent payable under a negotiated and agreed lease than an energy supplier has to reduce the costs of electricity consumed because a grant application has not been approved in full. It does have an obligation to agree to changes in the outcomes that the reduced grant can be expected to deliver. **This argument is untenable as it fails to deal with the issue that the Council has breached an agreement to provide an SLA to cover the rent. A reasonable energy**

supplier would negotiate a reduction in energy costs as it is in its interest that a business survives. No reasonable supplier destroys a business which provides a sustainable source of revenue because it wants to make a quick buck.

*Please see the comments on paragraph 17 regarding the provision of SLAs.*

***As regards the idea that an energy supplier would reduce costs to enable a business to survive, there is no known case of this happening as then, the energy supplier would be operating at a loss. Also, Flash Musicals does not represent a “sustainable source of revenue” to the Council as its funds are provided by the Council.***

21. I have, however, also seen a copy of the minutes of a meeting held on 17<sup>th</sup> November 2011 between the Council's Community Development and Property Management Services, representatives of Flash Musicals and Councillor Asante, in her capacity as a Ward Councillor. The minutes of this meeting present a view of the rent issue which is not included in the complaint but which needs to be considered. **The Minutes the Investigator saw had not been seen by those who attended the said meeting. They were full errors of fact which have since been corrected. It is a great concern that the Investigator relied on a warped view of the meeting.**

***The draft minutes supplied to the Investigator had not yet been circulated to those present at the meeting; however they did not contain any factual inaccuracies. Furthermore these notes are just notes they are not a verbatim set of minutes of the meeting. The notes were subsequently sent to attendees for their comments and agreement. A revised set of notes has been received from Cllr Asante. Officers have replied to these with comments requesting that some notes from the first set are included in the second set provided by Cllr Asante but to date we have no reply has been received.***

22. In brief, the minutes record Flash Musicals as stating that the lease was signed on the understanding that an SLA would be agreed in the sum of £25,000 a year to cover the rent. They felt that as they had substantially exceeded the targets in the SLA in 2008/09, they would have been given a further SLA for 2009/10. Both Flash Musicals and Councillor Asante feel that the Council has broken an undertaking to fund the costs of the rent and that the rent should be reduced in line with the reduction in the grant awarded. Flash Musicals also believe an instruction was given by Councillor Burchell (who left office in May 2006) to transfer the premises to the General Fund. **It is important to correct the misleading account of the meeting. The fact is, Flash Musicals was promised that provided they met their targets, a new SLA would be provided to cover the rent in future years. It is a matter of record that Flash Musicals exceeded targets set and delivered beyond expectation. It is a matter of concern that the Council failed to meet its end of the agreement. Surely that is a Compact issue. Secondly, it is a matter of record that Councillor Burchell, a member of Cabinet, gave instructions at a meeting attended by Flash Musicals that the property should be moved out of the HRA. It is a matter of real concern that Officers, relying on the fact that Councillor Burchell did not seek re-election in May 2006, failed to carry out the instruction, did not bring a report to Cabinet and took no steps to implement the order.**

*Please see the comments on paragraph 17 on the SLA issue.*

***At a meeting held on 3<sup>rd</sup> March, 2006 between the Council, the original tenant, Flash Musicals and Councillor Burchell, it was agreed that Councillor Burchell would enquire***



***about transferring the property out of the HRA to the General Fund. The matter was investigated by Andrew Trehern at the time and also with the new administration that came into power in May 2006. Because of the need for a capital payment from the General Fund to the HRA to enable the property to be transferred, it was agreed that the matter would not be pursued. No instructions were ever given for the property to be transferred and indeed the transfer would have needed Cabinet approval.***

23. The views expressed by Flash Musicals in this meeting can be summarised as: they signed the lease in the belief that rent payments would be covered by SLAs and that, if an SLA were not in place, there should not be a rental charge. On this basis, there would be no rent arrears owing. ***It is a fact that the Trustees of Flash Musicals signed the lease following several meetings; they agreed to drop their legal case concerning the unreasonable rent increase and the failure to honour a promise to move the building to the General Fund. Flash Musicals was told that the SLA would be renewed provided they met the targets set. Whilst Flash Musicals honoured its side of the agreement, exceeding targets and delivering beyond expectation, the Council failed to honour theirs by only providing an SLA for 2008/2009 and relying on the change of Administration to cover the breach of promise. Flash Musicals however, has kept the issue alive by presenting its case to Councillors of all parties. Most reasonable people recognise that no Trustee would sign away a rent of below £100 unless a promise had been made.***

***As pointed out above, Flash Musicals were not entitled to renew the lease enjoyed by the former tenant. The lease at an assessed market rent was signed by Flash Musicals and no corresponding agreement regarding SLAs can be found in the Council's files nor has such a document been produced by Flash Musicals.***

24. There is no documentation available to support or contradict this belief. However, the facts that are available do not lend plausibility to Flash Musicals' position. First, the SLAs that were agreed in 2008/09 seem to have been financed from the then Leader's Fund. This was a contingency budget to fund unexpected expenses arising during the year. It is very unlikely that the Leader's Fund could or would have been available to support ongoing expenditure. ***The Investigator failed to fully investigate the matter. First of all, it is unclear where he got the erroneous information that the SLA in 2008/2009 was paid from the Leader's contingency fund. There are emails showing that the funds came from Paul Clark, then Director of Children's Services and Javed Khan, then Director of Community and Culture. £10 000 came from the Children's Directorate and £15 000 from the Community and Culture Directorate. It is a great concern that a matter of fact should be so misrepresented. In any case, the source of funding does not provide evidence regarding whether or not the undertaking was made.***

***Officers from Children's Services have reported that the SLA for £10,000 from Children's Services was intended to be a one-off agreement and was funded from a Government Grant, the Youth Opportunities Fund, which has been abolished.***

***Officers from Community and Cultures believe that the funding for their SLA came from the then Leaders Fund although no documentary evidence has yet been located. The issue of the source of funding is significant because if it was not from within a mainstream base budget, it would be more difficult to ensure continuation of funding over more than one year. If the SLAs were funded from these insecure sources, it suggests that there efforts had not been made to ensure funding would continue over time.***

25. Flash Musicals did not submit a funding application for 2009/10. This does support the notion that they felt that funding for the rent would somehow be made available automatically. However, from the Council's point of view, there is no conceivable mechanism whereby such an outcome could come about without annual or, at the least once every three years, re-application. Further, as the 2008/09 SLA had been funded from the Leader's Fund, there was no budget identified from which to draw funding for a further SLA without an application to the grants budget being submitted. Also, it is equally inconceivable that a guarantee of future funding for an unspecified period could have been given when most organisations are subject to competitive annual bidding rounds, decisions are taken on the advice of the Grants Advisory Panel meeting in public and with dedicated transparency. The arrangement described by Flash Musicals at the meeting held on 17<sup>th</sup> November would most certainly have been contrary to the principles set out in the Compact. **There are errors of fact in this paragraph. As stated above the 2008/2009 SLA was not paid from the Leader's Fund but from 2 Directorates. Not all funding paid by the Council is subject to the same scrutiny. It is for this reason that a Review was undertaken in 2004. It is a matter of record that some organisations receive substantial amounts of funding from the Council without the scrutiny implied in this paragraph. Whilst this may be contrary to the Compact, it is still the practice of the Council. Please note that Flash musicals is a member of the Voluntary and Community Sector Forum and as a member of that community knows that there are funding arrangements that do not meet the transparency described above. When the Council failed to honour its promise to provide a new SLA in 2009/2010, following Legal Advice, Flash Musicals applied for funding from the Main Grants Programme.**

*In addition to the Council's grants programme, services are commissioned from other organisations, including the voluntary and community sector, using mainstream service funding and this is no different from purchasing other supplies and services. It is true that this funding is not subjected to the same scrutiny as the Council's grants process.*

*Officers of Children's Services and the former Community and Culture Directorate responsible for commissioning have been contacted to gather any information they might have relating to commissioning Flash Musicals in 2008.*

26. Finally, as is pointed out elsewhere in this report, the arrangement described by Flash Musicals would have been unlawful. **This is simply untrue. The 'market' rent set did not take account of the fact that the building was derelict and that Flash Musicals had made the investment. Flash Musicals had an arguable case and would no doubt have won substantial concession in Court but was asked to drop legal action so that the arrangement described above could be implemented.**

*The Council does not accept that the building was derelict, the market rent was properly assessed and accepted by Flash Musicals and there is no reference in the Council's files to asking Flash Musicals to drop a legal action.*

The second complaint

27. This relates to the independence of the sector and specifically to the decision of the Council to deduct the rent due for the premises from the grant awarded and schedule payments of the remaining amounts. The complaint states that "Flash Musicals has always made rent payments from monies paid and that when the Council gave a £25,000 SLA, Flash Musicals passported £25,000 to the Council. Flash Musicals has been consistent in making payments in accordance with the agreement it has with the Council."

28. The independence of the sector is referred to in the Compact's covering introduction and description before the various codes are introduced. In particular, the Compact includes a principle shared between the statutory and the voluntary and community sector that they both believe in "an independent and diverse voluntary and community sector that is fundamental to the well being of society." The covering introduction also quotes from the European Commission Communication 1997 on promoting the role of voluntary organisations which identifies features of such organisations including

"They are independent, in particular, of government and other public authorities, that is to say, free to govern themselves without interference according to their own rules and procedures."

The Funding and Procurement Code also requires the statutory sector to "Respect the independence of the sector".

29. To be able to assess this aspect of the complaint, it is important to determine the meaning of "independent" and "independence" in the Compact introduction and Funding and Procurement Code respectively. In the first instance, it appears that the Compact is referring to a voluntary and community sector that is able to determine its own position on questions of public policy. The statement referring to the independence of the sector follows immediately after a shared principle recognising that voluntary action and community involvement are essential components of a democracy which suggests a context for the "independent" shared principle being about the freedom to campaign and challenge Government, the Council and other bodies determining public policy. Similarly, in the Funding and Procurement Code, the statutory sector is required to respect the independence of the sector. Neither statement appears to speak directly to the issue of deducting money due to the Council as landlord from a grant. **Independence also means independence in running its financial affairs and managing its own payments.**

30. The standard SLA signed by the Council and organisations in receipt of grant funding, including Flash Musicals, does however include a relevant clause. At 5.10, the SLA states "The Council shall be under no obligation to pay the funding to the Organisation if any sums are owed by the Organisation to the Council." This is relevant because the Council believes that there are outstanding amounts from previous years owed in rent payments by Flash Musicals to the Council. **It is important to point out that there is a dispute about whether or not rent is owed. It is worth pointing out that the sentence referred to here was inserted into the agreement and the Council is relying on the fact that Flash musicals missed that modification. It is worth pointing out that at best, it is dishonest to slip in clauses without discussion but in any case it is not clear cut that the money is owed and should the case come to court, it would be in the interests of the Council to have put the money in an escrow account.**

***All grant recipients signed a standard SLA in 2011/12. These agreements replaced all previous funding agreements and included new clauses in a number of areas e.g. money owed to the Council, safeguarding etc. The Council's reserves are sufficient not to need to place disputed sums amounting to £25,000 per annum in an escrow account.***

31. To understand the Council's position on this issue, it is necessary to rehearse the history of the premises and lease. The land on which the premises stand was originally held by Whitchurch Boys Club on a ground lease at an annual cost of £70. The Club constructed the building and, eventually, sub-let it to Flash Musicals without the agreement of the Council. The Club had no statutory right to renew their ground lease because they had sub-let the

building. This is contrary to fact. Flash Musicals was a member of Middlesex Young People's Club which held the tenancy to the building. As a member organisation, Flash Musicals took responsibility for the building, repaired it and made it fit for use. Flash Musicals paid rent to the Council and the Council accepted those payments for several years. It was when the Council wanted £28 000 rent that the occupancy of Flash Musicals became an issue. It was agreed that these issues were debatable in a Court of Law but it was in everyone's interests that the matter was resolved outside Court. After a series of meetings, it was agreed that the rent would be set at £25 000 but SLAs would be given to cover the rent. It would have seemed churlish to refuse a settlement of a long running issue when the Council was offering a solution which would not cost Flash Musicals anything and would leave it free to run services for the people of Edgware and Harrow.

*Please see the comments at paragraph 18 above relating to the lease history of the building.*

*The rent accounts were sent to the original tenant for the duration of the original agreement. There is no record of who settled these accounts.*

32. The land and building are held in the Housing Revenue Account. There is no discretion open to the Council to accept less than the market rent for the property, as statute requires the Council to charge market rent and, as mentioned earlier, to do so would not only be unlawful but would disadvantage the tenants of Council housing property by reducing the income to the account that pays for management and maintenance of housing property. The property could be transferred to the council's general fund but only if it were 'purchased' by the general fund – that is a capital payment was made to the Housing Revenue Account from the General Fund. **Generally, this might be the case, but there could be agreements varying this depending on specific circumstances such as the fact that funds secured by Flash Musicals were used to improve the property to its present state.**

*The improvements listed at paragraph 18 might have supported a rent free period but not a rental below the market level. In the event, Flash Musicals had used the building for several years at a rental of £100 by unlawfully sub-leasing it.*

33. When the ground lease expired, it was agreed by Members that negotiations could be conducted with Flash Musicals, the unauthorised sub-tenant, which resulted in the granting of a lease at a market rental of £25,000 a year with effect from 1<sup>st</sup> April 2008. The lease includes a tenant's break clause on three months notice allowing the agreement to be terminated in the event that the property is no longer affordable. For the financial year 2008/09, the Council awarded two Service Level Agreements (SLAs) to Flash Musicals worth £25,000 and this income appears to have been used to pay the rent. These SLAs were resourced from the then Leader's Fund and Children's Services. **It was never agreed that Flash Musicals was an unauthorised tenant. Members were aware that Flash Musicals was a member of Middlesex Young People's Clubs and therefore it was arguable that they had every right to occupy the premises. In addition, the Council was accepting rent from Flash Musicals for several years so it is difficult to understand how their argument that Flash Musicals was an unauthorised tenant could hold up in Court. The two SLAs were from the Community and Culture Directorate and the Children's Services Directorate.**

*Please see the comments at paragraphs 18.*

34. In 2009/10, Flash Musicals seem not to have applied for grant funding and certainly no SLAs were awarded. No rental payment was received and, although the Council has continued to send out reminders regarding the rent arrears and has explained to Flash Musicals that, under the terms of the lease, rent is due whether or not an SLA is in place with the Council. **It is a matter of record that Flash Musicals pursued the Council for their breach of promise pointing out that targets had been exceeded. When it was clear that the Council had reneged on the agreement to provide SLAs provided Flash Musicals met targets set, Flash Musicals was asked to mitigate the loss by applying for funds from the Main Grants Programme. Each reminder from the Council received a reply from Flash Musicals.**

***Each request for the payment of rent from the Council was replied to with a denial that any rent was owed.***

35. In 2010/11, Flash Musicals did apply for and received a grant but in a lesser amount than they had requested. This enabled them to pay £18,000 in rent and, as is usual practice, this receipt was credited against the oldest debt.

36. The grant position for 2011/12 has been full set out above (paragraphs 9-13). At the time that the grant was awarded, the rent related debts stood at £53,237.70. Consideration was given to applying the whole of the grant awarded to meet these consolidated arrears in accordance with clause 5.10 of the Service Level Agreement but, in the event, it is proposed to only deduct the current year's rent was deducted at source. The current outstanding debt is therefore £28,237.70. **Flash Musicals does not accept this account. There is correspondence on this issue. Flash Musicals has taken legal advice and will defend the matter in Court if need be.**

37. The statement made in the complaint that "Flash has been consistent in making payments in accordance with the agreement it has with the Council" does not seem to be supported by the facts. I understand that Flash Musicals believe that their agreement with the Council allows for the rent for their premises to be payable only when the Council provides a grant and then, only to the extent that the grant funds the rent due. I have found nothing in any document to support that belief including in the service level agreement or the lease. Indeed the comments set out above (paragraph 18) show that the Council is not legally able to enter such an agreement. **The investigator does not seem to acknowledge that there are two different positions. Flash Musicals attended meetings where the Council made promises. Trustees signed the lease based on those agreements and did not pursue an arguable claim in Court. The Council has chosen to renege on agreements, relying on changes in Officers and Councillors to pursue a position which is not supported by the emails and meetings which provide a context to the Lease Agreement.**

***No records of meetings or emails have been discovered supporting Flash Musicals' position. If documentary evidence is in the possession of Flash Musicals, it would be helpful if it could be copied to the Council.***

38. As I can find no documentary evidence to support the belief that it is understood that Flash Musicals hold in relation to rent payments, and as there was a debt of more than £50,000 at the time of the most recent grant award, combined with the interpretation of the meaning of the "Independence of the Sector" within the Compact, I cannot support the argument that the Council acted unreasonably in deducting the current year's rent at source. **The investigator did not ask for further evidence which is available. Flash Musicals has been advised that the breach of promise by the Council can be successfully pursued in Court.**

***It is incumbent on someone making a complaint to provide evidence that exists to support their complaint. No such evidence has been produced.***

39. However, for completeness, I have considered the practical impact that the decision to deduct the rent at source had on the organisation. At worst, I can see that, if the decision was contrary to the Compact, it would amount to a lack of confidence in the organisation's financial competence and stability but, as the organisation has stated its willingness to pay the rent due, there has been no other practical impact. However, I recommend as a matter of some urgency that a common understanding of the terms of the lease, the obligations that it places on the parties to the lease and the relationship, if any, between the level of grant and the amount of rent due is achieved. At the same time, agreement to a way forward for dealing with the arrears needs to be achieved. It may be that the Partnership Officers can be helpful in this regard. **The Investigator fails to acknowledge that there is a disagreement about the amount of rent owed and it is therefore a misuse of power to deduct the money from the grant award. It is important to restate that the rent set was agreed only on the understanding that Flash Musicals would receive the rent as an SLA. Flash Musicals repaired a derelict property and invested sums which would have been acknowledged by a Court. It is important therefore to note that the rent of £25 000 is in dispute. Had the Council not deducted £25 000, there would have been more funds to deliver services to a vulnerable section of the community in a deprived ward. It is surprising that the Investigator fails to see this practical impact of the action.**

***Please see comments regarding the SLA issue throughout this report.***

***The Council does not accept that the building was derelict.***

***The Council does not accept that there is any reason to depart from the clear terms of the lease that rent of £25,000 is due. In circumstances where the Council believes that there were outstanding rent payments totalling £53,237.70, it would have been irresponsible both to the Council's housing tenants (as the rent was due to the HRA) and to the organisation which would have been put into further debt to not have netted off the rent arising from the current year's operations so as to maintain the historic debt at a consistent level (plus interest if levied).***

### The Third Complaint

40. The third ground for complaint relates to the Funding and Procurement Compact Code provision that the statutory sector will "Make payments in advance of expenditure (where appropriate and necessary) in order to achieve better value for money". In support of this complaint, Flash Musicals have stated that they "received £4,420.58 on 16/6/11 by BACS transfer and a payment schedule stating that it would receive 2 equal instalments of £22,202.55 in July/August 2011 and December 2011. This has failed to materialise. Rather they were notified on 14th November 2011 that £25 000 would be deducted from the grant awarded."

41. The purpose of the obligation on the statutory sector to make payments in advance of expenditure is to assist the cash flow of voluntary and community organisations. In normal years, grants are agreed before the beginning of the financial year to which they apply and payments are scheduled according to their size either a single payment at the beginning of the year or equal instalments at the start of each quarter. In 2011/12 however, the grants process was delayed and decisions were not confirmed until after the appeals process which was itself delayed by a call-in of the Cabinet's initial allocation. Final awards were agreed in May 2012.

It is a matter of record that most organisations received payments in June and July 2011. Flash Musicals did not. On 30<sup>th</sup> August 2011, at 14:45:23, Marianne Locke sent an email acknowledging receipt of the SLA agreement from Flash Musicals and that the grants team were processing the payment. No payment was received. On 21<sup>st</sup> October 2012, at 15:14:47 GMT, Kashmir Takhar sent an email confirming that Flash Musicals would receive £48 825.68 in two instalments. This did not happen.

*Interim payment of £4,420.58 was made on 16th June 2011 and one grant payment of £19,405.11 was made on 16th December 2011.*

*As to dates when other organisations received their payments: large grants recipients received theirs in two parts, with the second part being made on same date in December as Flash Musical's received theirs*

42. In acknowledgement of the delays that were anticipated, it was decided in January 2011 that the grants round for 2011/12 would be for an 11 month period and that all organisations in receipt of a grant in 2010/11 would receive an additional payment of one twelfth of their 2010/11 grant award where monitoring information had been received. It appears that no end of year monitoring information was received from Flash Musicals therefore this additional payment was not made. In addition and in recognition of the further delays caused by the appeals process all successful grant applicants in 2011/12 received their May payment ahead of SLAs being agreed. Flash Musicals have therefore received £4,420 so far this year. **The Investigator does not have the correct information. Flash Musicals received the payment of 1 month's payment as the monitoring had been sent as required.**

*The Council has no record of the monitoring information having been received. Flash Musicals did not receive their April extension payment as the monitoring information had not been received. This payment would have been of £1,500.*

43. The payment schedule sent to Flash Musicals indicating that two equal instalments would be paid in July/August and December 2011 was sent as a standard notification in the same way as to all other successful applicant organisations. All payments from the 2011/12 grants budget were however subject to SLAs being signed. The SLA with Flash Musicals was signed on 11<sup>th</sup> November 2011 but was subject to further discussions about the delivery targets that could be achieved as the organisation had less resource than it had believed would be the case as the Council had deducted the full rent costs rather than an amount commensurate with the level of grant received. In this sense, the SLA has still not been completed. **This is untrue. It was not standard notification; if it is standard practice to send standard notification which may or may not be relevant, then the Council needs to re-think the practice. Delivery targets were finalised and agreed in August (email evidence available). The Council then had the bright idea to deduct £25 000 which had an impact on delivery targets as it reduced the money available to Flash Musicals for delivery.**

*The signed SLA was received from Flash Musicals on 11<sup>th</sup> October.*

44. The issue of the outstanding rent was a subject of discussion with the organisation, amongst officers and with Members resulting in a revised payments schedule being prepared and emailed on 14<sup>th</sup> November. This showed that the grant to be paid minus the deduction for rent due would be £19,405.11 but did not specify a payment date or dates. **The decision by Council Officers to deduct £25 000 had an impact. It is misleading to imply that Members agreed with the decision to deduct rent money.**

***The report states that the deduction of rent was discussed with Members which is the confirmed recollection of the officers concerned.***

45. The Compact recognises the difficulties that organisations have in delivering outcomes ahead of receiving payments and specifically provides for payments in advance. However, this does not require payments to be made before documentation such as Service Level Agreements specify the outcomes expected have been completed. It would not help organisations to receive grants and incur expenditure without knowing what they were trying to achieve. In this case, there have been delays in agreeing the SLA, in part related to the rent issue, which have precluded earlier payment. **The delays have been caused by the Council and it is surprising that the Investigator cannot see the facts before him.**

***There was a delay between the receipt of the signed SLA from Flash Musicals on 11<sup>th</sup> October and the Council adding its signature on 11<sup>th</sup> November.***

46. If, when the SLA is agreed, it is still intended to make more than one payment, it would be appropriate to spread the rent deduction equally between the payments to be made rather than loading it all onto the earlier payment dates.

#### The Fourth Complaint

47. This relates to the costs to Flash Musicals of meetings, letters and emails, negotiations and other administrative work associated with satisfying the Council that the grant awarded could be released. Also, it includes the delay between 7<sup>th</sup> October 2011 when Flash Musicals signed the SLA and 9<sup>th</sup> November when the Council signed the same document. This ground for complain also refers to the difficulty in delivering a project without the promised funding being actually available and the problems in planning and delivering a project when the goal posts keep changing. The full grounds of this complaint are set out at paragraph 6 above. **The facts are the SLA was agreed in August. The Council delayed sending the document until October. Although Flash Musicals signed and returned the SLA in early October, the Council did not return the signed document until November and did not make a payment until December.**

**Please see comments above at paragraphs 43 and 45**

48. The issue of release of grant monies has been covered under the third ground for complaint. With regard to the other points made, the reasons for the delay in the signing the SLA were of the SLA were an unfortunately protracted period of negotiating revised SLA outputs/outcomes and checks that the Council needed to undertake before progressing with the issuing of the SLA to Flash Musicals. **The reasoning here does not accord with the facts.**

49. While it is no doubt distracting from the main business of delivering a Community Anchor, it is inevitable that ensuring that substantial amounts of public money, in this case almost £50,000, are spend properly and that the Council can be assured that value for money is obtained require exchanges of emails, letters and phone calls as well as a number of meetings. The grant processes need to be as efficient, minimalist and easy to operate as possible while providing assurance, reducing risk and ensuring clarity. The processes have evolved over a number of years and in response to events here and in other parts of the country, new pieces of regulation and recommended best practice. The processes are kept under constant review and the Council is assisted in this by a Grants Adviser elected from the voluntary and community sector to ensure that unnecessary bureaucracy is avoided. **The protracted negotiations are simply because the Council moves the goal posts when an**



agreement is in place. The Grants Advisor does not condone this behaviour which is contrary to best practice.

*The grant application form describes a service that an applicant organisation wants to provide and the cost of doing so. Last year, all approved applications were funded at 73.5% of the amount requested and, consequently, variations to the services that had been described were needed. In some cases, these negotiations were simple but in others they were less so and took longer. The Council has no interest in delaying unnecessarily the provision of services that it has agreed to fund but does have a responsibility to ensure clarity of objectives and outcomes that can be monitored.*

50. The processes remain under review.

51. The changing goal posts mentioned by the complainant seem to refer to the need to amend the deliverable outcomes as a result of, first, the grant awarded being less than the sum applied for and, secondly, the net grant being less than the applicants had anticipated due to the deduction of the full rent due. None of the applicants for grant assistance received the sum that they had applied for and all who were funded received the same percentage of the application sum as Flash Musicals. In the current grant system, this seems to be unavoidable and the Council aims, in addition to providing much needed services via voluntary and community organisations, to fund as many organisations as possible by spreading resources more thinly. All funded organisations have the opportunity to renegotiate deliverables based on the amount of funding awarded. The second redefinition of the outcomes in this case was caused by misunderstanding regarding the status of the lease and payments due under it and, hopefully, will not recur. **The Investigator misses the point. It is not the negotiation which is the issue. The whole Voluntary and Community Sector understands that negotiations were necessary as no one received the sum they applied for. The issue is the bad faith the Council has shown in its dealings with Flash Musicals which are documented above. An agreement was in place in August 2011, yet it took the Council until October to produce an SLA!!!!**

52. The Council is beginning to move from a grants system to commissioning. In this new system, the outcomes required will be specified and organisations asked to price the work needed. In this way, it is more likely that the service specification remains the same throughout although it may be that the quantum changes in response to the prices given. **Commissioning will not work if the Council does not deal with the issue of bad faith. If the specifications are set and the Council chooses to change them simply because it believes it cannot be challenged, it will be an unmitigated disaster. Good practice is important whichever system is used.**

53. There is nothing specific in the Compact that speaks to this ground of complaint although there are requirements about being proportionate in monitoring arrangements which can be interpreted more generally to reducing the administrative and time burden related to seeking and securing funding. The Council tries to do this to reduce its own costs as well as to assist the sector but any specific suggestions that could streamline further current processes are always welcome. **Perhaps the Investigator needs to re-read the Compact.**

#### The Fifth Ground

54. This relates to the Council's alleged failure to ensure the long term financial stability and optimum impact of voluntary and community sector delivery of services. Supporting information from Flash Musicals points to the delay in making payments in the current financial year. This aspect of the complaint has been extensively discussed above.

55. It might perhaps be useful to examine the concept of the Council's part in ensuring the long term financial stability of voluntary and community sector organisations and how the Council could ensure the optimum impact of the sector in delivering services. The Funding and Procurement Compact Code includes these objectives as one of its aims. It is a shared aim and one that is the responsibility of the statutory and the voluntary and community sector to pursue. Some of the specific issues that the voluntary and community sector are responsible for pursuing include:

- Diversifying their funding base as appropriate so that organisations are not reliant on one funder;
- Explore ways in which resources within the sector can be shared and maximised for example, by shared use of premises, joint delivery of services etc.

56. From the Council's perspective, the introduction of commissioning in 2012/13 with potential longer term funding agreements, the establishment of an interim CVS service to provide advice and guidance on fundraising, the development of a regular forum for dialogue between the Leader of the Council and Chief Executive with the Sector's elected representatives and the move towards commissioning support these aims as does the development and implementation of a Third Sector Strategy.

57. The Compact itself, a freely entered into set of undertakings and obligations, also speaks to the Council's and the Sector's determination to work together productively to provide the best possible outcomes for Harrow residents.

## Conclusion

58. The grounds of complaint in this case are not upheld in that:

- The full cost recovery principle was honoured for all applicants that were awarded funding in 2011/12 as all costs were considered eligible for funding;
- The full cost recovery principle does not mean that fixed costs payable by an organisation to anyone, including the Council as landlord, are variable according to the percentage of grant sought that is awarded;
- The lease is clear about the rent payable;
- Recognising the independence of the sector does not preclude the Council from deducting rent at source in accordance with clause 5.10 of the SLA
- Payments in advance are desirable but only once an SLA has been signed and delivery outcomes agreed;
- The additional time spent in trying to agree delivery outcomes with Flash Musicals is a product of a fundamental misunderstanding by Flash Musicals of their rent obligations under the lease; **the facts are it is the Council Officers who have misunderstood the facts. There is an attempt to sweep issues under the carpet. It is a fact that the Trustees of Flash Musicals signed a lease agreement of £25 000 on the clear understanding that the Council would provide SLAs to cover that rent. The Council has sought to cover its failure to honour that agreement by trying to mislead Members and Officers to rely solely on the lease agreement itself. We have taken legal advice and have been assured that should this matter come to Court, Flash Musicals would be entitled to damages for the breach of promise, the stress caused by the harassment of rent demands and the breach of the Compact that we can demonstrate. It is important to note that most of the Officers dealing with the matter now were not present when the lease was agreed.**

***The conclusions of this investigation are based on the evidence that has been produced. This includes a lease, records of grant awards made pictures relating to the state of the building in 2005, the history of the leases agreed and the statutory basis of the Housing Revenue Account and the governance of the Council which precludes individual Councillors from making certain policy and financial decisions.***

***If there had been any evidence relating to promises or guarantees of future SLAs, then this, too, would have been included but none has been discovered or provided by the complainant in support of their assertions.***

- That the long term financial stability of the sector and the optimum impact of voluntary and community sector delivery of services is a shared objective which is being actively pursued by the Council and Sector representatives.

**The conclusion is not surprising when it is based on erroneous information and misreading of the facts.**

Mike Howes  
6<sup>th</sup> December 2011

**Comments in bold**  
**Terry Revill**  
**Flash Musicals**  
**21<sup>st</sup> February 2012**

***Comments in bold italics***  
***Mike Howes***  
***6<sup>th</sup> March 2012***