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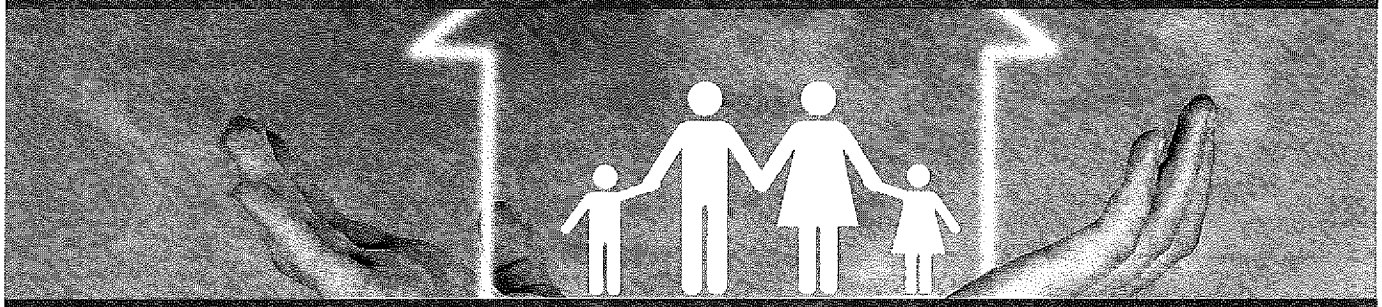

*Housing and planning Act 2016 – Implications for Social Landlords

*Affordable Housing Secured by Section 106 Planning Obligations

The Housing and Planning Act 2016 (the "2016 Act"), which received Royal Assent on 12 May 2016, ushered in a number of new housing policies including: Starter Homes; the sale of higher value local authority homes; pay to stay; extension of right to buy to housing associations and a new deregulated regime for social landlords, which all have significant implications for the Social Housing sector and for our Social Housing clients.

This briefing prepared by members of our Social Housing team summarises the key policy changes and the effect these proposals will have on Social Housing clients. Few provisions of the 2016 Act are in force and where we can, we have given proposed dates for implementation.

*Starter Homes

The Housing and Planning Act heralds a potential shake-up to the provision of affordable housing by private developers via section 106 planning obligations with the introduction of Starter Homes. These will be new dwellings sold to first time buyers between 23 and 40, discounted by at least 20% of open market value and subject to a cap of £450,000 in London and £250,000 outside London with restrictions on early sale and tapering of discount if sold during a specified period likely to be between five and eight years.

Much of the detail will follow in regulations but it is clear that Starter Homes will be part of the affordable housing mix, with a duty placed on Local Planning Authorities (LPAs) to promote them via s106 planning obligation agreements. Regulations may require LPAs to grant planning permission only where the Starter Homes requirement is met, subject to some exemptions, including rural exception sites.

If the Secretary of State considers that an LPA is failing in its duty to require Starter Homes or its local plan policies are incompatible with the requirement, then he will be able to issue a compliance direction.

Although the definition of affordable housing in the NPPF has yet to be changed, consultation on changes at the end of 2015 proposed an amendment which would encompass Starter Homes.

The likely implication is that any local plan policy requiring less than 20% affordable housing or specifying particular types of affordable housing will be non-compliant. Where policies require more than 20%, the LPA will only be able to require alternative tenures once the 20% Starter Homes requirement has been met. Many, if not most, housing need assessments will therefore be rendered out of date.

For many years s106 planning obligations have played an important role in the supply of social housing. Starter Homes are, in effect, a discounted open market product. The requirement for 20% of all new housing to be Starter Homes and for this to be regarded as part of the affordable housing mix will result in fewer units being available for social housing landlords to acquire from private developers. There is also likely to be a push from LPAs for any affordable housing which is not Starter Homes to be provided for rent, in many cases social rather than affordable rent, so the available tenures will also be restricted.

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*Small Site Exemptions

The day after the Housing and Planning Act received Royal Assent the Government achieved an unexpected victory in the Court of Appeal in the *West Berkshire* case[1] which concerned the legitimacy of the introduction of a small sites exemption and Vacant Building Credits (VBC), to reduce section 106 affordable housing requirements by way of a Ministerial Written Statement.

The Government's case being upheld, it lost no time in reinserting relevant paragraphs into the Planning Practice Guidance (PPG), as follows:

- Affordable housing or tariff-style obligations may not be required on sites of 10 units or less (or five units or less in designated rural areas such as AONBs) with a combined gross internal area of 1,000m2. The exemption does not apply to rural exception sites.
- On brownfield sites where vacant buildings are re-used or demolished, affordable housing requirements should be calculated on the increase in floorspace only, with the floorspace of vacant buildings off-set against the total floorspace to be provided. However, LPAs are required to consider whether the buildings have been vacated only to enable redevelopment to take place, or whether planning permission has recently been granted or expired for substantially the same development. VBC will not apply where buildings have been abandoned.
- The Court of Appeal made it clear that the statutory requirement to determine an application in accordance with the development plan is not overridden by these changes. The relevant paragraphs in the PPG will therefore form part of the "material considerations" which the LPA will need to consider when reaching a decision. This means that where there is an up to date development plan justified by robust evidence to support the policy, LP As may still be able to require affordable housing and other s106 financial obligations on smaller sites and on brownfield sites in accordance with those development plan policies.

West Berkshire and Reading Councils have indicated that they are considering whether to appeal. However, even if successful in the Supreme Court, this would be likely to be a pyric victory because the Housing and Planning Act 2016 gives the Secretary of State the power to make regulations which could achieve the same effect.

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[1] R (on the application of West Berkshire DC and Reading BC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441

*Sale of Higher Value Homes

Despite a spirited rear-guard action from the House of Lords, the proposals in the Housing and Planning Bill to require Councils to sell off their vacant high value housing assets to fund the extension of the right to buy passed largely unchanged into the Act. These provisions all came into force on 12 May, although regulations setting out the detailed procedures have yet to be made. Essentially:

- All local housing authorities (LHAs) in England which keep a Housing Revenue Account are under a duty to consider selling vacant higher value housing (yet to be defined in regulations) which appears on the Housing Revenue Account. This includes any housing which it has transferred to a private registered provider of social housing.
- The Secretary of Stage will, following consultation, make an annual determination of the payment which an LPA must make to him, based on the market value of the LHA's interest in any higher value housing that is likely to become vacant during the year, less deductions. This determination will only apply to LHAs which keep a Housing Revenue Account. It is unlikely to apply therefore to any authority which has previously disposed of all of its housing under a stock transfer scheme.
- The Secretary of State and an LHA may agree to reduce the amount which the LHA is required to pay to enable the provision of replacement affordable homes. Such agreement must include terms that the replacement will be on the basis of at least one for one outside Greater London and two for one (two new homes for one sold) within Greater London. However, these do not have to be like for like replacements or within the same area as the homes which have been sold.

There has, understandably, been much concern about these provisions. In areas of high house prices and land costs, it is very unlikely that LHAs will be able to afford to replace homes which have been sold with homes of a similar size or even in a similar location, which could well see a reduction in social housing provision in some areas such as the more expensive parts of London.

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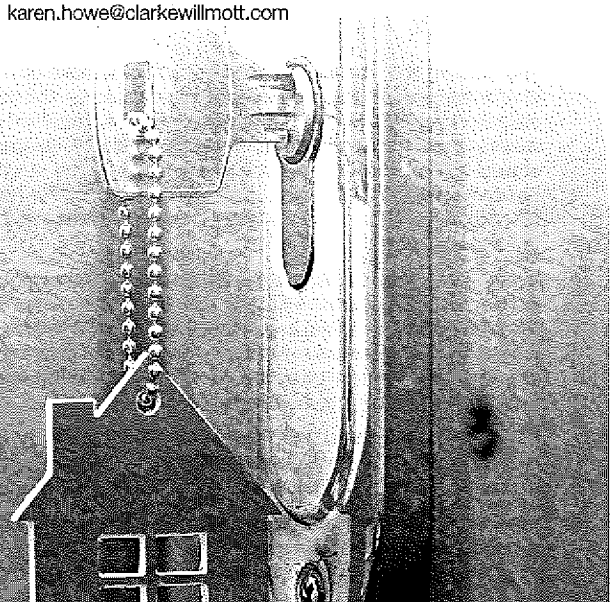

*Extension of the Right to Buy

Arguably one of the more controversial and scrutinised parts of the Housing and Planning Act 2016, during its passage through Parliamentary scrutiny, is the voluntary extension of the Right to Buy ("VRTB") to assured tenants of registered providers contained in Part 4, Chapter 1 of the Act.

Much of the detail of the VRTB process has yet to be fleshed out, however it is apparent that registered providers will retain discretion and have the ultimate decision on whether to sell an individual property to a tenant. In due course, once the finer points have been finalised, registered providers will need to have a clear policy and procedure for tenants exercising their rights under the VRTB. The VRTB has already been the subject of pilot projects by a number of Housing Associations.

Additionally, the Act allows the Secretary of State to provide grants to registered providers in respect of the right to buy discount so that registered providers do not "lose out" on receiving the full market for the property being sold to the tenants. In respect of properties in London, the Greater London Authority ("the GLA"), has the power to provide grants to registered providers in respect of right to buy discounts. In this circumstance, the grant may be subject to such terms and conditions as the GLA "considers appropriate".

The Act also provides for monitoring of compliance relating to the VRTB. This will be undertaken by the Homes and Communities Agency ("HCA") at the Secretary of State's request. Accordingly the HCA will report back to Secretary of State regarding compliance if requested to do so. The Act also provides the power for the Secretary of State to publish information about registered providers that have not met a certain "home ownership criteria" in relation to sale of properties to tenants.

The VRTB clearly brings with it some key practical and legal considerations for registered providers. The National Housing Federation has provided some helpful guidance to registered providers in their Briefing Paper, *"Voluntary Right to Buy, What you can do to prepare now"*, dated 19 May 2016, regarding what steps can start to be taken in preparation for the VRTB.

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*High Income Social Tenants

The ability to charge, so called High Income Social Tenants ("HISTs"), up to market rent based on their income threshold is not a new one. Also more commonly known as "pay to stay", it was first introduced by the coalition government in 2012 on a voluntary basis for all social landlords. In practical terms we understand that there was little or no take up of this from registered providers.

Subsequently, as part of the Summer Budget 2015, the Chancellor announced that the discretionary pay to stay scheme would be made compulsory (in England) for local authorities only. However, it would remain voluntary for registered providers.

The relevant provisions for registered providers in relation to HISTs appear at Part 4 Chapter 3 of the Housing and Planning Act 2016. The Act, in particular sections 89 – 90, allow but do not require, registered providers to implement a policy of requiring HIST, tenants or households with income above a certain threshold, to pay up to market rent. It is apparent from the Act that Regulations will be made in due course to confirm the criteria and threshold for tenants to be regarded as HISTs.

It is noted that "pay to stay" is voluntary for registered providers, however if registered providers chose to implement it they will need to follow a published policy in this regard. The policy must include possibilities for tenants to request reviews or appeals in relation to decisions made under that policy. Registered providers should certainly await the content of these Regulations before finalising any policy in this regard.

The part of the Act which provides some "teeth" for registered providers is section 90. It allows HMRC to disclose information to registered providers for the purpose of enabling them to ascertain individuals' income in order that they may operate their pay to stay policy. The Act does not, however, require HMRC to disclose information to registered providers and as such this may cause practical difficulties.

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*Removal of the HCA consents regime

Removal of the HCA's consent regime is one of a number of de-regulation measures to be introduced to help bring housing associations back to the private sector following the Office for National Statistics' decision to classify them as public sector bodies.

The removal of the consents regime will have significant implications for housing associations. They will be no longer required to seek the HCA's consent for:

- mergers, change of status, or restructuring;
- winding up or dissolution; or
- disposal of land, charging property, or change of ownership.

Some implications

- restructuring and creating new entities will be easier and in particular housing associations may consider establishing unregistered entities to provide homes for sale and private rent as a way to cross-subsidise social housing activity;
- moving stock between a housing association and a unregistered subsidiary will be easier, and establishing an unregistered arm will become an attractive option;
- focus on good governance and financial viability remains, something the HCA will continue to monitor through the in-depth assessments;
- a special administration regime for RPs, which gives the courts the power to appoint administrators if an RP gets into financial difficulty. It may be some time before it is clear whether this new regime will ease any concerns lenders have;
- removal of S133 may mean EUV-SH valuation basis will change but lenders are likely to resist significant changes to borrowing capacity.

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*Registered charities or exempt charities?

If the HCA consent regime is removed housing associations that are registered providers and also registered charities will be subject to the provisions of the Charities Act 2011 in relation to disposals and governance by the Charity Commission.

The requirements for disposal of land by charities regulated by the Charity Commission are different: for example the requirement that the property must be advertised before disposal. Disposals under the Voluntary Right to Buy scheme are unlikely to be advertised and therefore may not satisfy the legal requirements for sale without the consent of the Charity Commission. Obtaining that consent would add delay and cost to the transaction. Will the Charity Commission have the necessary resources to deal with the requests for consent?

Some registered providers who are also registered (non-exempt) charities have considered de-registering from the Charity Commission.

The option to become a 'community benefit society' or exempt charity would mean a change in regulator to the FCA. A small number of RPs would be in this situation according to the NHF, which does not foresee many of its members going through this process.

A decision to de-register and become an exempt charity has to be balanced and considered carefully, and although complying with regulation from the Charity Commission might lead to increased governance costs, converting to a 'community benefit society' also has substantial costs.

The switch may be unnecessary because the Charity Commission may consider removing requirements for a particular group of charities. The FCA will still need to find a way to regulate housing associations that are already exempt charities and we understand that the previous HCA consent requirements will be replaced by new notification requirements. Might the Charity Commission do something similar?

Once the changes take effect, most disposals by registered charities that are also registered social housing providers would then be eligible for self-certification under the Charities Act.

Self-certification is not onerous; it involves taking appropriate professional advice but does not require an order from the Charity Commission.

Some implications

Providers affected by the forthcoming changes i.e. registered charities should ensure that they are familiar with the Charity Commission's requirements, taking particular account of how they will affect the types of disposal in which the association is likely to engage. Specifically:

- Disposals under the Voluntary Right to Buy (VRTB) are unlikely to be advertised and therefore may not satisfy the legal requirements for sale without consent (this point does not apply to disposals under a statutory tenant purchase scheme, e.g. Right to Acquire, because such a disposal is in accordance with an Act of Parliament).
- A non-charitable subsidiary (or other non-charitable group member) will be a 'connected person' for the purpose of the Charity Commission regime.

For providers that are 'exempt charities' it is not clear yet how the removal of the HCA regime will affect disposals and operating the Voluntary Right to Buy scheme, even though they are not fettered by having to follow rules relating to disposals in the Charities Act 2011. Presumably any new notification requirements will be made clearer when the HCA consent scheme ends.

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*Conclusion

The Housing and Planning Bill has been the subject of much debate since its introduction. Much of the detailed implementation of the provisions of the Act has been left to Regulations, to be published in the coming months and we will provide an update when they are published. However direction of travel of the Housing and Planning Act is clear, to promote home ownership and to free registered providers associations from red tape so that they can concentrate on building homes for sale and promoting building capacity in the social housing sector.

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