trowers & hamlins

QUARTERLY HOUSING UPDATE

Winter 21/22

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Foreword

It has been a genuine pleasure this Winter to work with some brilliant people at Legal & General and the British Property Federation on the steering group for what I believe is a hugely important research paper Delivering a step change in affordable housing supply. The paper is not only important for the stark realities of the financial firepower that is needed to meet the under supply of affordable housing in England (some £34bn a year) but the reality that new funding models are going to be needed if a step change in supply is going to be achieved.

From my perspective (both as Chair of the BPF's Affordable Housing Committee and in my "day job" working with Housing Associations, Local Authorities and investors) there are three messages that I take from the report.

Firstly, I genuinely hope that this report can put to bed the "us and them" debate that has plagued discussion about the role of new entrants to the affordable housing sector in recent years. The paper makes it clear that there is a genuine need for partnership working between the traditional housing association sector and new equity investors and in both this edition of Quarterly Housing Update and in future editions we will be exploring how those partnership models can work.

Secondly, and as the paper highlights, partnerships between Housing Associations and investors can offer smaller and mid-sized associations a genuine alternative to merger; whilst mergers can undoubtably bring benefits they do not always bring with them the additional development capacity that might be assumed and with merger there remains the ever present risk of landlords becoming too remote from their residents. Partnership models can address those concerns.

Finally, the report serves as a timely reminder that Government must also play its part and whilst the recent AHP is clearly a step in the right direction, as the report flags, there is more that can be done to support affordable housing supply.

As ever, this edition of Quarterly Housing Update brings together expertise from across Trowers & Hamlins and in particular the articles in this edition flag just how complex the implementation of new policy can be, and how both housing associations and local authorities need to remain alert to policy and legal changes that are afoot and which will materially impact on how housing and housing services are delivered.

Rob Beiley
Partner, Real Estate
+44 (0)20 7423 8332
rbeiley@trowers.com

Building Safety Bill – what about the residents?

One of the key aims of the Building Safety Bill is to put residents at the heart of the new regulatory system. This article looks ahead to the new resident-focused obligations that landlords of higher risk buildings (and their residents) will need to get ready for.

Scope of the new provisions

The Building Safety Bill introduces a new regulatory system for the management of building safety in "higher risk buildings", meaning buildings of 18 metres or more in height, or seven or more storeys, containing at least two flats. The most significant of the new in-occupation obligations on landlords are the creation of the new accountable person and building safety manager roles, as well as the requirement to prepare a building safety case and register it with the new building safety regulator. However, there are various other new obligations that the principal accountable person (usually the landlord) will need to comply with once the provisions come into force.

Residents' engagement strategy

For the first time, it will be a statutory requirement for a resident engagement strategy to be produced for each higher risk building. The primary purpose of the strategy will be for residents aged 16 and over (and non-resident owners) to be encouraged to participate in the making of building safety decisions. It will need to set out:

- what information will be provided to residents;
- what decisions they will be consulted on;
- how residents' views will be taken into account; and
- how the appropriateness of consultation undertaken will be measured.

Further guidance is due to follow in the form of regulations issued by the Secretary of State.

Requests for information

The Bill introduces significantly increased rights to building safety information for residents. Where a resident makes a request for prescribed information or a copy of a prescribed document, the accountable person will be obliged to provide such information.

The Secretary of State is due to issue regulations setting out the types of prescribed information that will fall within scope of the new provisions, but examples are likely to include full, current and historic fire risk assessments, planned maintenance and repair schedules and the fire strategy for the building. The regulations may also provide that any obligation of confidentiality will not be breached by disclosing such information, although it is expected that there will be exemptions where disclosure would cause security issues or relating to the disclosure of sensitive personal information.

Complaints procedures

The Bill introduces obligatory internal complaints procedures, which will need to be put in place so that residents can raise concerns regarding the safety of their building or the accountable person's compliance with their building safety duties. Where complaints cannot be resolved by the internal procedure, residents will be entitled to escalate their complaint to the building safety regulator.

Residents' duties

The Bill introduces the following new duties upon residents:

- not to act in a way that creates a significant risk of a building safety risk materialising;
- not to interfere with or damage a "relevant safety item" (which is defined as anything forming common parts that is intended to improve building safety); and
- to comply with an accountable person's request for information that is reasonably required to enable them to perform their duties.

The accountable person will be empowered to serve a contravention notice if the duties are not complied with, specifying steps the resident should take. This may specify a sum payable by the resident if repair or replacement of a relevant safety item is required. Contravention notices can ultimately be enforced by the County Court upon the application of the accountable person, if required.

Access to premises

The Bill introduces significant new access rights, by which the accountable person will be entitled to request access in order to:

- assessing and manage building safety risks; and
- determine whether residents' duties have been contravened.

Access requests will need to set out the purpose for gaining access, explain why it is necessary, request access at a reasonable time and provide at least 48 hours' notice. If access is not provided, the accountable person will be entitled to apply to the County Court to enforce the access request on a specified date.

With great power comes great responsibility

As may be seen from this summary, the Bill arms residents with new powers to seek disclosure of building safety information and generally to hold landlords and accountable persons to account. This is likely to lead to a much higher degree of transparency and visibility as to the building safety processes that are put in place. In return, the Bill places substantial responsibilities on residents to ensure they play their part in keeping the building safe.

Once the Bill has passed into legislation and the Secretary of State has made the regulations setting out further details, there will be much for landlords to get to grips with before the provisions come into force, most likely between 12-18 months from the Bill being enacted.

Douglas Rhodes

Partner, Dispute Resolution and Litigation
+44 (0)20 7423 8343
drhodes@trowers.com

Sofia Limpo

Trainee Solicitor, Dispute Resolution and Litigation
+44 (0)20 7423 8370
slimpo@trowers.com

Government Response to the Transforming Public Procurement consultation

Key points for local authorities and housing associations

On 6 December 2021, nearly 12 months following the publication of the Government's Green Paper on Transforming Public Procurement, the Government published its long-awaited response to the consultation, having concluded its lengthy review of more than 600 responses received from contracting authorities, bidders and professional advisers (the Response).

In addition to amending some of their initial proposals to address feedback raised by the respondents, the Government has also provided some clarification within the Response itself and has also promised much-needed guidance in the future. This article briefly outlines the key issues for local authorities (LAs) and housing associations (HAs) ahead of the introduction of new legislation.

Procurement procedures

The Response confirms that we will move away from the current set of procedures (which are often viewed as complex and inflexible for contracting authorities to apply) and there will instead be three main procedures to choose from (which are described as modern and flexible):

1. The Open Procedure (which will be retained for simple or "off the shelf" products);
2. The Competitive Flexible Procedure (which will replace the current restricted, competitive dialogue, competitive procedure with negotiation and innovation partnership procedures, and will give contracting authorities the freedom and flexibility to negotiate and innovate in order to get the best from the private, charity and social enterprise sectors); and
3. The Limited Tendering Procedure (which will replace the existing negotiated procedure without prior publication and which will be available for use in certain specified circumstances, such as extreme urgency).

In practice, it is likely to take contracting authorities some time to get used to changes in the procedure, but the Government has promised further guidance (and model procedures) which LAs and HAs might find of assistance in transitioning to a new approach to procurement.

Awarding contracts to the right supplier

The transition from Most Economically Advantageous Tender (MEAT) to Most Advantageous Tender (MAT) enables contracting authorities to take account of wider considerations beyond price or other economic criteria when awarding contracts. It will also be possible for award criteria to be unrelated to the subject matter of the contract in specified circumstances, and evaluation will no longer have to be made solely from the point of view of the contracting authority.

Largely, this is a reshuffling of the deckchairs, and LAs and HAs are already leading the field in terms of achieving the best outcomes possible for their communities and residents (such as incorporating social value outcomes and priorities into their procurements). It is hoped that the move to MAT should allow LAs and HAs greater flexibility in terms of taking account of key strategic considerations (such as net zero carbons priorities, and making use of evaluation criteria which bring Scope 3 emissions under better scrutiny and which will assist in promoting carbon savings), and this should emphasise the ability to take a broader view of evaluation criteria.

Using the best commercial purchasing tools

The Response confirms that the Government will proceed with its proposals for open and closed frameworks, with closed frameworks limited to four-year terms, and open frameworks to eight year terms (subject always to the ability to exceed those durations where there is a relevant justification to do so).

Of particular note, open frameworks will be able to have new suppliers appointed, but will need to be re-opened for competition. Practically, LAs and HAs will need to consider how useful open procedures will ultimately be given the requirement to reopen the competition.

The Response also retains the possibility to charge suppliers when awarding a call-off under frameworks, continuing the ability to use procurement tools as commercial models. However, of note, any profits made by contracting authorities through charging for access to commercial purchasing tools will need to be used solely in the public interest (although this is unlikely to prove problematic for LAs and HAs).

Ensuring open and transparent contracting

In the Response the Government retained its stance on embedding transparency by default throughout the entire procurement lifecycle, though it did take account of the concerns raised around the additional burden, cost and potential anti-competitive implications. To reduce this burden, there will be a value threshold of £2 million or more before appropriately redacted contracts need to be published alongside the contract detail notice, and debrief letters will also no longer be required. This value threshold will be a relief to smaller LAs and HAs for whom the cost of reporting, redacting and publishing lower-value contracts would have been significant.

The proposal to introduce a central digital platform for commercial data goes to the heart of the transparency proposals and is intended to save cost and time through its "tell us once" approach. As a result, it will be imperative for contracting authorities to maintain a fully functional IT system to enable them to discharge their transparency obligations.

Looking forward

Although the new regulations are unlikely to come into force until 2023, LAs and HAs will need to ensure they have adequate resources to fulfil the new transparency requirements whilst also maximising the benefits of the additional flexibility and simplification of the regime. Despite the Government's detailed Response, the actual implications of the new regulations will not become clear until they are published. There will be a six month "go live" period between the detail being published and the regime "going live" – LAs and HAs are well advised to use this period constructively: to ensure that their staff are trained and competent in applying the new rules and that they are in a good position for the new regime.

Whether or not the new regime will have the desired effect will depend on how successfully they are implemented and embraced by contracting authorities in practice. The sector as a whole will need to ensure that those responsible for procurement are trained and upskilled in order to take advantage of the new flexibilities provided, without getting bogged down by the enhanced transparency obligations.

Rebecca Rees
Partner, Real Estate
+44 (0)20 7423 8021
rrees@trowers.com

Stuart Brown
Associate, Real Estate
+44 (0)20 7423 8143
spbrown@trowers.com

Right to Buy receipts: the new acquisition cap

Following the Government's 2018 consultation on the use of Right to Buy (RTB) receipts, the rules for local authorities on spending retained additional receipts changed last year. Most of these changes came into effect on 1 April 2021 and are covered by our previous article on the new rules. To recap, the changes which have already been introduced include:

- Increasing the time limit for use of the receipts from three to five years – this covers not just future receipts but existing ones (i.e. back to 2017-18).
- Requiring yearly rather than quarterly pooling returns and payments to the Secretary of State – this adds to the benefit of the extra two years by removing the complexity of four rolling deadlines each year. The Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2021 (which came into force on 30 June 2021) changed the period by reference to which a poolable amount is calculated from a quarter to a financial year.
- Increasing the cap on the cost of a replacement home that can be met from RTB receipts from 30% to 40% – this covers social and affordable rent homes "across the board", i.e. for existing and future receipts, for all eligible tenures (see below) and throughout England.
- Allowing RTB receipts to be used to deliver shared ownership homes and First Homes – this applies the new 40% cap to these tenures as well as social and affordable rent, although there is no obligation on authorities to extend the use of receipts like this.

To retain their additional receipts, local authorities must enter into an agreement with the Secretary of State allowing them to use, subject to certain restrictions, their RTB receipts to provide social housing (the RTB Retention Agreement). The updated RTB Retention Agreement which incorporates the new rules came into effect on 1 April 2021.

The Department for Levelling Up, Housing and Communities (DLUHC) also published new guidance 'Retained Right to Buy receipts and their use for replacement supply' (the Guidance) on 8 July 2021. This replaces all existing guidance on the use of RTB receipts.

The acquisition cap

Although most of the changes came into effect on 1 April 2021, the "acquisition cap" will be introduced from 1 April 2022. This is a new cap on the proportion of retained RTB receipts that local authorities can use for acquisitions (as opposed to development).

The Government's policy objective behind the cap is to ensure that RTB receipts are being used to contribute to overall supply as much as possible. In its consultation response published last year, the Government stated that the original decision to allow local authorities to use RTB receipts for acquisitions was based on the expectation that "this freedom would be used sparingly". However, in reality, acquisitions made up around 48% of RTB replacement homes.

Therefore, in the financial year 2022-2023, no more than 50% of dwellings delivered using retained RTB receipts can be delivered as acquisitions. This is calculated based on the total number of homes delivered. The 50% threshold will reduce progressively over the following years as set out below, until the 2024/25 financial year when it stabilises at 30%:

2021-2022	No cap
2022-2023	50% cap
2023-2024	40% cap
2024-2025 onwards	30% cap

The first 20 units delivered each year are excluded from the cap and this applies to all local authorities.

DLUHC has said that the purpose of the phased approach is to give local authorities time to prepare for the introduction of the cap and "ramp up their building programmes." However, from 2025/26 onwards, local authorities will be able to use retained RTB receipts for acquisitions in the following way – 20 freestanding acquisitions plus 30% of the total number of units 'delivered'.

Some types of acquisitions will be exempt from the cap, including acquisitions from an authority's own housing company or ALMO and regeneration projects that contribute to net supply. However, acquisitions of new build from private developers will not be exempt.

There is no actual definition of what counts as an "acquisition" and what counts as "development" in the updated RTB Retention Agreement and Guidance, so this will need to be considered on a case by case basis in terms of assessing how retained RTB receipts will be deployed.

Local authorities can of course continue to acquire properties above the cap, but any such acquisitions cannot be funded using RTB receipts.

Delivering "additionality"

Whilst many respondents to the Government's consultation disagreed with the introduction of the cap on the basis that acquisitions can provide speed and flexibility to meet local housing needs, the Government's motivation for introducing these changes appears clear: it is directing local authorities towards developing themselves or with partners to bring genuine additionality to the sector.

Whilst restrictive, the RTB Retention Agreement does allow local authorities to use RTB receipts in a variety of ways to deliver additionality, often through working with not for profit registered provider and other third party partners. The introduction of the acquisition cap makes partnership working to develop new homes even more crucial for local authorities wishing to spend their RTB receipts.

We have advised many local authorities, housing associations and other third parties on the different types of models that can be used to deliver new housing in accordance with the RTB Retention Agreement. Local authorities do not want to be in a position where they have to hand over retained RTB receipts to the Government. Changing the period of spend from three to five years will certainly help, though explicitly limiting the spend on acquisitions will mean that some local authorities will need to change their delivery approach.

Scott Dorling
Partner, Real Estate
+44 (0)20 7423 8391
sdorling@trowers.com

Sarah Monaghan
Solicitor, Real Estate
+44 (0)20 7423 8588
smonaghan@trowers.com

Deferring leaseholder payment arrangements while remaining compliant with FCA regulation

Last month, Michael Gove, Secretary of State for Levelling Up, Housing and Communities announced the latest measures aimed at tackling the building safety crisis. Key amongst these was the unveiling of a plan for £4 billion of the costs of removal of dangerous cladding on buildings over 11 metres in height to be met by developers, contractors and manufacturers rather than leaseholders.

The announcement will be welcome news to the leaseholders affected, who will no longer be facing ruinous bills to meet their share of the costs of cladding removal. The announcement did however only relate to the cladding issue, and did not include mention of help in meeting the costs of other aspects of fire or building safety.

With the Government currently saying that no further money will be forthcoming, many leaseholders therefore still face the prospect of having to pay service charge bills that they simply cannot afford. This being the case, some social housing providers will consider offering their leaseholders a longer period over which to pay their share of the remediation costs. RPs that are minded to do this should be aware of the possibility of such deferred payment arrangements being regulated by financial services legislation.

Deferring service charge payments until a later date is regarded as giving a form of credit, and therefore may require authorisation from the FCA under consumer credit legislation. Many social housing providers s already have authorisations from the FCA to enable them to do things like provide regulated debt advice, hire equipment to users of telecare services and/or administer back books of shared equity mortgages. Some already have the authorisations that would enable them to offer deferred payment arrangements to leaseholders.

For social housing providers that are considering offering deferred payment arrangements to leaseholders, authorisation to do so will be required from the FCA unless one of the following exemptions applies:

- the deferred payment is an informal arrangement under which the leaseholder is given additional time to pay and is not charged interest or other fees. The FCA regards this as the landlord exercising unilateral forbearance, which it does not regulate. The difficulty here is that it's not always clear where informal arrangements end and formal arrangements (that may require FCA regulation) begin. Generally, if the leaseholder is being asked to sign up to a written agreement, then the arrangements can be regarded as formal. Given the likely sums involved, an informal arrangement is unlikely to be suitable in this context;
- the repayment plan lasts for no longer than 12 months, involves no more than 12 repayments and involves no interest or other charges. Again, given the likely sums involved, it will not be a realistic proposition for most leaseholders to repay within this period; or
- the deferred amount is secured by a charge and is interest free. The charge document could either require regular repayments, or that the deferred amount becomes repayable in full if the property is sold. This latter option can be helpful for leaseholders who do not have a regular income but do have equity in their property.

In order to enter into deferred payment arrangements that do not fall within the above exceptions social housing providers are – as things stand - very likely to need authorisations from the FCA.

FCA authorisation does involve some rigmarole, both in terms of obtaining authorisation in the first place, and thereafter in ongoing compliance with FCA regulation. This rigmarole can however be worthwhile, given that it can prevent social housing providers from committing the criminal offence of engaging in FCA regulated activity without having the correct authorisations in place, and allows them to offer the widest range of repayment options to hard pressed leaseholders.

Tom Wainwright
Senior Associate, Real Estate
+44 (0)161 838 2068
twainwright@trowers.com

The Construction (Retentions Abolition) Bill 2021-22 – What does it mean for affordable housing?

Retentions, what are they?

As many housing providers or anyone engaged in development acquisitions may be aware, retention clauses are often used within land acquisition deals where providers enter into build contracts and development agreements with construction obligations. The mechanism for a housing provider to hold back a certain percentage of payment for the construction works until any defects/ outstanding works are complete is common. It is something which is often agreed amicably between the parties at the Heads of Terms stage in a development acquisition.

What is the Bill and when could it come into force if passed?

The Construction (Retentions Abolition) Bill was introduced by Lord Aberdare in the House of Lords on 25 October 2021. The proposed Bill seeks to amend the Housing Grants, Construction and Regeneration Act 1996 by inserting a new section dealing with retentions or rather the abolition of retentions. This is not the first time such a proposal has been introduced and many before Lord Aberdare have failed to change the legislation surrounding the practice of cash retention in England and Wales. Developers often find that retention money is withheld unreasonably for minor defects and outstanding construction work which is not detrimental to the use and enjoyment of the property. Not only does this cause cash flow problems for developers, but many smaller developers are also at a greater risk of becoming insolvent before the retention money is released to them.

If the Bill becomes an Act of Parliament, then in summary we can expect to see the following:

- Any construction contract or an agreement with construction obligations, which contains a clause enabling an employer to withhold retention monies will be defective from 25 January 2025;
- Any retentions still withheld on or after that date must be repaid in full within seven days.

What does this mean for development acquisitions and affordable housing?

When negotiating land acquisition deals and entering build contracts, most housing providers seek comfort in the additional security that comes with an agreed retention clause. Development acquisitions to provide affordable housing can be quite complex, costly, and crucial for the housing provider who may be relying on GLA/ HCA funding. The inclusion of a carefully drafted retention clause provides security if construction works are not fully completed or if there are defects. Without the provision of a retention, affordable homes may not be constructed and completed to a standard which complies with the housing provider's requirements. The impact could result in housing providers seeking to delay certifying practical completion based on minor snagging items or defects, increase their handover requirements, be more risk aversive when embarking on new schemes and dealing with existing ones. In the absence of a retention, housing providers may find themselves negotiating Latest Defects Guarantees and Warrantees as an alternative; not only will this be expensive but agreeing who will bear the cost may also be difficult.

An alternative way forward

At present, the proposed Bill is waiting a second hearing in Parliament. If the Bill is passed, housing providers and developers may need to work collectively to agree a sensible alternative, which works for both parties. The housing provider and the developer could take a pragmatic approach and include a retention but ensure that the retention funds are held in a designated account. This approach may be adopted in the coming years and may have more of a chance of finding its way through to the Housing Grants, Construction and Regeneration Act 1996.

Henna Khan
Associate, Real Estate
+44 (0)121 214 8827
hkhan@trowers.com

Joint ventures – preparation for separation

Housing associations using joint ventures for development has been a well-established trend now for more than a decade, enabling the sharing of risk and reward, and, for the most part, fruitful partnerships with housebuilders, local authorities, investors, and other participants.

The recent Sector Risk Profile report, issued by the RSH in October 2021, identified that forecasts for development "have now broadly returned to pre-pandemic levels" and that more than 70% of the market sale units sold by sector-controlled entities are anticipated to be delivered by way of joint ventures.

Certainly, joint ventures look here to stay. But what happens to the partnership and to the development itself in the event of a 'divorce'?

Given that joint ventures have been a popular delivery tool for a few years now, it's not surprising that we are now seeing 'cracks' in some partnerships. This is compounded by market pressures as construction input cost inflation is currently rising sharply and firms face severe shortages of materials and lack of available transport capacity. The Financial Times recently reported that hundreds of UK construction businesses are going into insolvency every month as a result of rising costs in the sector.

It is critical therefore for housing associations to assess the financial strength of their chosen joint venture partner, as well as identifying a partner with an aligned philosophy. Those providers which have already entered into a joint venture should also review these issues periodically to ensure that risks are appropriately managed.

As part of this process, housing associations should consider their options on exit and for bringing in a replacement partner in the event that their original partner gets into financial difficulty or businesses stop to be aligned strategically

Typically, a joint venture is formed by way of a corporate vehicle, such as a limited liability partnership (an "LLP"). A well-drafted LLP agreement will contain detailed provisions to allow for the removal of an insolvent joint venture partner, for exit, in the event of deadlock, or even on occasion, a right to exit.

In such cases, housing associations will need to consider:

- the timescales to which they would need to work when using such provisions. Will new board approvals be required and how long will that process take?
- the mechanism for setting the price at which any buy-out would be undertaken and the flexibility that they may have to bring in a third party
- the terms of the service agreements with the joint venture partner, for example DM services. It is usual for these agreements to provide for a no-fault right of termination exercisable both by the service provider and by the client in the event that the partner is no longer a party to the joint venture, but the relevant provisions will need to be reviewed to ensure that they are fit for purpose. If the housing association is keeping the project, how will it be administered in the absence of the relevant service provider?
- issues arising from the construction supply chain. Which entity (the LLP or JV partner) has entered into the key appointments and trade contracts? If the partner leaves the joint venture, can the housing association and any replacement partner keep the supply chain going? In the event of the departure of the joint venture partner housing associations would need to assess whether it is in a position to continue to instruct the relevant contractors, or whether it needs to negotiate a novation of the appointment (or, as this would involve the outgoing joint venture partner in negotiations, potentially negotiate a new appointment). Joint ventures which are established on a contractual basis, will also need to consider how contractors are appointed. Use of joint appointments can ensure that the remaining partner can continue to instruct and rely on the work of the contractors, but the outgoing partner would remain liable under the relevant appointment unless released by the contractor. Parties may wish to consider building in pre-agreed novation rights.
- the procurement position needs to be navigated but there are certain "safe harbours"' where a replacement partner can be appointed without having to run a regulated procurement exercise.
- If the housing association is leaving the joint venture, what will happen to the affordable housing contracts, should they survive, and if they do, is the housing association sufficiently protected now that is no longer has any input at LLP level.

Ideally housing associations will consider these issues prior to entering the JV, so that protections can be addressed at the outset, and so the joint venture can continue to deliver the project in the event of a separation, bringing in replacement partners as desirable.

Fortunately, most partnerships do not end in divorce, but we are increasingly seeing separation as a result of market pressures and as businesses strategic paths change, taking them away from their original partners. As such, considering the 'pre-nup' is an important part of the marriage process.

Amy Shaw
Partner, Real Estate
+44 (0)20 7423 8384
ashaw@trowers.com

Ian Dobinson
Partner, Corporate
+44 (0)20 7423 8576
idobinson@trowers.com

The new shared ownership model leases – FAQs

The updated model leases for the 2021-2026 Affordable Housing Programme were first published in May 2021 and many in the sector are now at the stage of fully considering the practical implications of the new model leases.

So how have the changes been received? The overall response has been positive and, from a user perspective, the new formatting (especially the expanded particulars and the definitions at the start of the lease) is much appreciated. It is also very welcome that the broader changes to the suite of leases have been carried forward to the updated versions of the 2016-2021 model leases as published on the 21 September 2021, creating a more consistent approach across the two programmes.

Whilst some of our clients have been keen to be early adopters of the new model on a voluntary basis, the additional responsibilities created by the 2021-2026 AHP funding requirements in particular the 1% staircasing and the 10 year initial repair period are yet to be introduced at scale.

To help with some of the internal conversations we know are ongoing around the new leases, we have set out below answers to some frequently asked questions which we have received over the last few months.

What are the changes?

A summary of the changes introduced in the new model leases can be found here: https://www.trowers.com/insights/2021/july/the-shared-ownership-leases---affordable-homes-programme-2021-to-2026

Can I still use the old 2016-2021 AHP model leases?

Yes, provided the scheme is part of the 2016-2021 AHP or not grant funded.

You should bear in mind, as flagged above, that the 2016-2021 model leases were also updated on the 21 September 2021, including a slightly updated rent review clause (as indeed were the new model leases) and so you should ensure that the latest version of the relevant lease is used.

Do I need to update older 2016-2021 AHP leases to the new version published in September 2021?

Whilst Homes England recommend adoption of the updated versions from September 2021 onwards, the previous forms remain compliant and providers have not been asked to reissue updated leases where scheme documentation was already prepared prior to the publication of the updated versions.

Do I need to use the new Key Information Documents with 2016-2021 AHP leases?

Whilst it might be considered good practice to do so given that the new Key Information Documents provide more detailed customer focused information, the new, more detailed Key Information Documents found at paragraph 11.3 of the Capital Funding Guide (CFG) do not need to be used on 2016-2021 schemes.

The old Appendix 3 (containing standardised key information in the older model leases) has been removed from the updated versions of the 2016-2021 model lease published in September 2021. However, unlike the new 2021-26 format, the Key Information Document for use with the new form of 2016-21 leases (which can be downloaded at paragraph 11.2.2 of the CFG) currently mirrors the wording of the previous Appendix 3.

When must the new 2021-2026 model leases be used?

All AHP 2021-2026 grant funded schemes (included nil grant schemes under that programme) should use the relevant new form.

What about for Section 106 schemes?

Properties developed as part of new Section 106 Schemes may also be caught. On 24 May 2021 a Ministerial Statement was made to clarify when Section 106 Schemes would be caught. The full statement can be found online and (https://questions-statements.parliament.uk/written-statements/detail/2021-05-24/hlws48) which includes the following:

We recognise that many developers will have been preparing planning applications under different assumptions. The new requirement for the new Shared Ownership model will not apply to sites with full or outline planning permissions already in place or determined (or where a right to appeal against non-determination has arisen) before 28 December 2021 (or 28 March 2022 if there has been significant pre-application engagement).

Where a Section 106 precedent stipulates the form of lease to be used (typically by reference to the Homes England model form of lease) Written Ministerial Statements and the National Planning Policy Framework are material planning considerations rather than binding rules. So local planning authorities would be able to depart from this if they wanted to. There is therefore discretion on the part of local planning authorities.

In general, the new model leases should only start to apply to Section 106 Schemes where the planning was determined after 28 December 2021 (or 28 March 2022 if there has been significant engagement pre-application) and only then if the local planning authority requires it.

It will be worth having an eye on how this develops in practice in the areas you operate in.

Where can I find the HPI index to calculate the value of the 1% additional share?

The UK House Price Index (HPI) datasets can be downloaded from https://landregistry.data.gov.uk/app/ukhpi. You should be wary that the published datasets could vary (both up and down) as and when more sales data becomes available to the Land Registry and so evidence of the index as recorded on the date of the calculation should be kept (e.g. by printing the website as a pdf and saving the same).

The HPI data used should be for the relevant local authority and also the relevant property type (i.e. flat/terraced house/semi-detached/detached). It is important to ensure that the relevant type of property is recorded where provided in the definition of “HPI Index” in the 1% Staircasing Schedule of the lease so that when it comes to preparing the calculation, the person doing so can check which subset index to obtain without having any wider knowledge of other than as included in the lease and any supplementary valuations since the start of the lease.

Keith Cornell
Senior Associate, Real Estate
+44 (0)161 838 2089
kcornell@trowers.com

Suzanne Benson
Partner, Real Estate
+44 (0)161 838 2034
sbenson@trowers.com

New money, new ideas: Part 1 – joint venture approaches

The scale of new equity investment that is being deployed in the affordable housing sector shows no sign of abating; research published by Savills in 2021 suggested that at least £23bn might be deployed by 2026.

At the same time as new equity investment arrives in the sector, the traditional housing sector faces well documented headwinds to maintain its development "run rate"; as we are all aware, associations are having to make very difficult decisions about the allocation of capital into new build programmes as compared to investment in existing stock- not least because of the huge challenges in funding building safety works and the move towards net zero.

So how can Associations maintain a development pipeline in these challenging times?

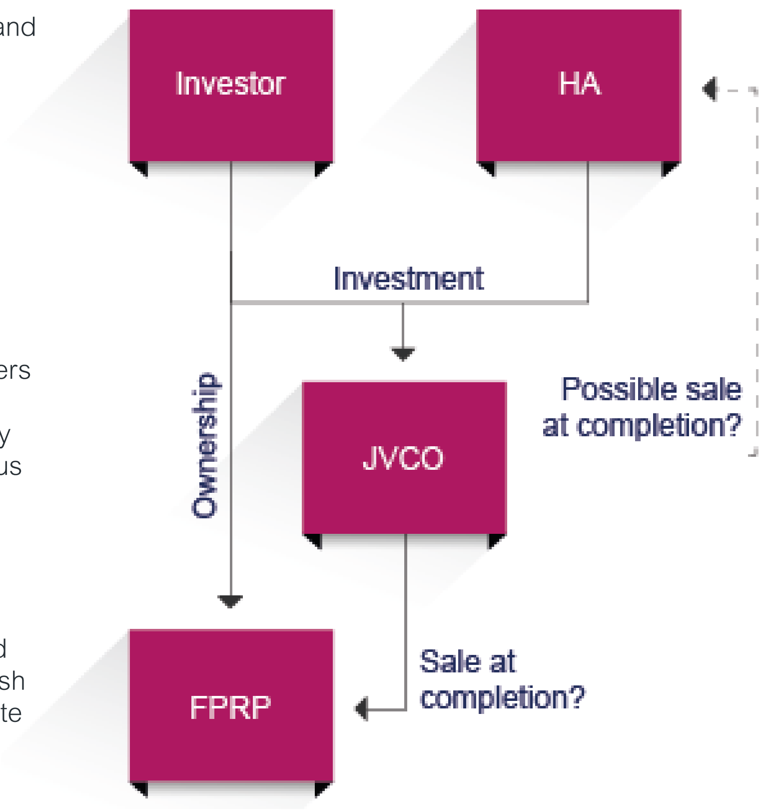
In my mind, a substantial part of the answer must be collaboration between traditional housing associations and new equity investors. Indeed recent research published by Legal & General and the British Property Federation demonstrates that the only way of achieving affordable housing delivery of 145,000 dwellings a year is by harnessing the power of equity investment.

Equity investment and partnership working can come in many shapes and forms, and part of the challenge for boards and executive teams alike is to understand the models that are available and to work through what approach might suit them best. Our teams here at Trowers are already working delivering these models at scale, and over the course of the next few editions of Quarterly Housing Update expert colleagues will look at the various models that are being deployed in the sector.

We start the series by looking at joint ventures between traditional housing associations and equity investors. Clearly joint ventures are nothing new for the housing association sector and there is already a wealth of good practice that associations can build on in how to establish and operate joint ventures and to settle on an appropriate balance of risk and reward in structuring these models.

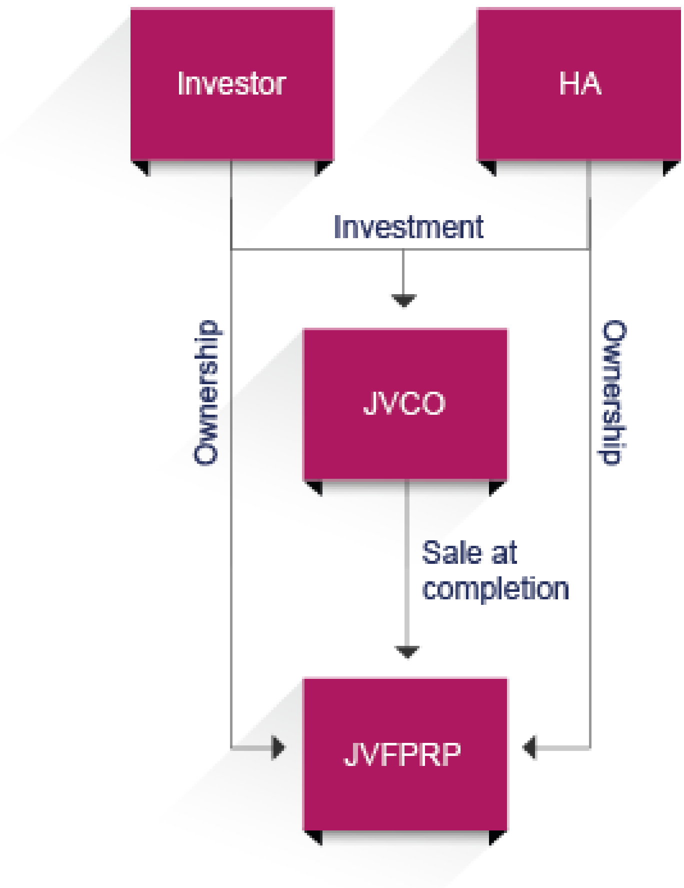
What is different about the concept of a joint venture between a housing association and a For Profit Registered Provider (FPRP) is the flexibility that such a model might offer once the dwellings have been completed; in a conventional joint venture between a developer and a housing association the completed affordable housing stock is more often than not transferred back to the housing association joint venture partner. Whilst this clearly reduces the risk to the housing association during the development phase (and during the sales phase if the development involves the sale of properties on the open market) the model remains constrained by the housing association's own balance sheet (in other words there is a finite capacity for the association to acquire new stock- whether that be from a joint venture or otherwise).

Under a joint venture with an FPRP the parties have the choice about where completed stock sits at completion; indeed the model doesn't necessarily require a definitive decision on the ownership of the stock at the outset of the joint venture- there may well be flexibility built in that allows different routes depending on the financial capacity of the association at the relevant time; moreover it might also enable a split of tenures (for example it might be that shared ownership stock is owned by the FPRP whilst rental tenures are owned by the housing association). This model enables the development joint venture to achieve greater scale because the offtake at completion isn't constrained. This is shown in a diagrammatic form below.



For the housing association this model allows their development team to continue to operate at scale notwithstanding the possible diversion of financial resources to invest in existing stock; it also enables the housing association to be retained as housing manager for the entirety of the scheme so that from a customer experience perspective, the standard of housing management would be the same regardless of who their landlord was.

So where might this model go next? The obvious conclusion (and we are working on such a project as we write this article) is to extend the joint venture to the landlord role, so that a housing association forms a FPRP in partnership with an equity investor as shown below. Not only would this model bring with it all of the advantages outlined elsewhere in this article, but it forges a genuine long term partnership that gives the association a long term stake in the new properties. For many associations this form of partnership could offer a real alternative to merger and may well enable them to "stay local" (or in the case of specialist providers – for example in the later living or in extra care sectors) to scale up their development.



Robert Beiley
Partner, Real Estate
+44 (0)20 7423 8332
rbeiley@trowers.com

Lizzie Pillinger
Senior Associate, Real Estate
+44 (0)20 7423 8670
lpillinger@trowers.com

trowers & hamlins

trowers.com

Key Contacts

Tonia Secker

3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
e tsecker@trowers.com

Digby Morgan

10 Colmore Row
Birmingham
B3 2QD

t +44 (0)121 214 8800
f +44 (0)121 214 8801
e dmorgan@trowers.com

Georgina Savill-James

The Senate
Southernhay Gardens
Exeter
EX1 1UG

t +44 (0)1392 612475
f +44 (0)1392 612601
e gsavill-james@trowers.com

Suzanne Benson

55 Princess Street
Manchester
M2 4EW

t +44 (0)161 838 2000
f +44 (0)161 838 2001
e sbenson@trowers.com