

LEGAL ALERT

Rollits
SOLICITORS

SOCIAL HOUSING BULLETIN

FREEDOM OF INFORMATION ACT

The Freedom of Information Act 2000 came fully into force on 1 January 2005. Since that date any person making a request for information to a public authority is entitled to be informed in writing by that authority whether it holds information and, if so, to have that information communicated to them.

The Act contains a schedule setting out a long list of bodies which are regarded as being public authorities and therefore subject to the provisions of the Act. Typical public authorities are government departments, local authorities, NHS bodies, maintained schools, the armed forces, the police and most government established organisations. The Housing Corporation is contained in the list. The list can be added to by government order.



Currently Registered Social Landlords (RSLs) are not designated as public authorities under the Act. However, following the UK government's decision that RSLs are deemed to be public authorities for the purpose of the EU Procurement Regulations it is quite possible that the government may at some stage in the not too distant future decide that RSLs should be designated as public authorities for the purposes of the Act. The Department of Constitutional Affairs is currently considering this issue. If RSLs are to be deemed as covered by the Act then they will be required to comply with all its provisions including the preparation of a Publication Statement. However, there would be a period for consultation to take place to ensure that sufficient time is given for the RSLs to put the necessary procedures in place.

Even though RSLs are not currently covered by the Act they do provide information to public authorities covered by the Act and that information can be disclosed by public authorities to persons requesting information under the Act. There are certain exemptions from disclosure, including those relating to confidentiality and trade secrets. However, to qualify as confidential information disclosure would have to constitute at law an actionable breach of confidence. Merely writing 'confidential' on a document or correspondence would not necessarily mean it would qualify as confidential material for the purposes of the exemption.

It is suggested that RSLs which provide information to public authorities should carry out a review of the information that they provide. They should also consider entering into dialogue with public authorities to agree guidelines as to how requests involving the RSL's documents might be dealt with.

It should also be understood that RSLs are entitled to seek information under the Act from public authorities and this might also be useful in certain circumstances.

As the Act is particularly complex it is suggested that legal advice is taken in respect of particular issues.

EU PROCUREMENT RULES AND REGISTERED SOCIAL LANDLORDS

In late 2004 the UK government finally accepted the European Commission's view that RSLs are to be treated as public bodies and are therefore subject to EU Procurement Rules.

The Housing Corporation has issued a guidance note confirming that this applies to all contracts where they exceed specific thresholds. The Procurement Regulations apply across the whole of the businesses of RSLs except with respect to the purchasing of an interest in land or dwellings.

They are applicable to all procurements whether or not publicly funded.

RSLs must now ensure that their procurement processes comply with the Procurement Regulations. Accordingly, all contracts to be awarded which exceed the specific threshold must follow the appropriate procedure. The thresholds are due to be amended shortly but, as at January 2004, they were for works contracts £3,834,411 and for supplies and services contracts £153,376.

In carrying out a valuation to see if the threshold has been reached RSLs will have to aggregate the following:-

- a) the estimated value of separate contracts required to meet a single requirement;
- b) all public works contracts entered into or to be entered into in respect of a single building;
- c) all supply contracts for a single requirement of goods;
- d) all services contracts for a single requirement for services;
- e) in certain circumstances the consideration paid or to be paid where a series of contracts or a renewable contract is entered into for services of the same type.

If RSLs have not already done so they should be taking immediate steps to ensure that they have the appropriate procedures in place to ensure compliance with the public procurement regime.

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The provision of social housing through the use of planning agreements under Section 106 of the Town and Country Planning Act 1990 is now well known and used by RSLs throughout the country. However the provisions imposed by local planning authorities vary but those RSLs that operate in York, Harrogate and the Ryedale areas will have now become familiar with what are well meant but somewhat complicated provisions for social housing. In particular, these agreements require the provision of dwellings which are required to be disposed of at a discount price which discounted price is to be maintained in perpetuity. The concept of a property being sold at half of its open market value and having to be resold at that price forever is an attractive concept and one which enables buyers who are in need of such housing to obtain an initial investment in the property market.

However this concept is difficult to translate into legal documentation in a meaningful way in order to carry out the local planning authorities' intentions. Most of these types of planning obligation require the involvement of an RSL to act as a form of "policeman" for the future. The RSL's role is to administrate future process to make sure that the property is sold to the correct category of people and at the appropriate discount. In the case of leasehold flats this does not present too many problems. However, in the case of individual houses this idea runs across a number of legal concepts where the intentions of the local planning authority can be thwarted.

Most of the planning agreements in this situation insist that the house is acquired by the RSL as a freehold interest and then is let under a long lease to the buyer with restrictions in the lease preventing it being sold at any more than a set percentage of its open market value. So far so good. However, such a concept fails to take into account the effects of the Leasehold Reform Act 1967 which, subject to certain conditions, gives the tenant rights to acquire the freehold of the property. If the tenant were to acquire the freehold in these circumstances then the lease disappears, the role of the RSL ceases and part of the intention of the local planning authority is thereby defeated. It is fair to point out that, provided the planning agreement is specific enough, the provisions in the planning agreement will still bind the property but nonetheless the effectiveness of the RSL's policing role will have ceased.

There are mechanisms to avoid the difficulties referred to above. If a shared ownership lease is granted in accordance with the conditions set out in regulation 3 of Schedule 4A of the Leasehold Reform Act 1967 then enfranchisement whilst the tenant owns less than a 100% share is not possible. The thinking is that if such a lease is granted to a tenant at the discount percentage then even though the lease will give them the right to staircase up to 100% they will be deterred from doing this simply because of the cost. In these circumstances it is possible to grant the lease on a shared ownership basis within the regulation even though no rent is payable for the unowned share.

There is no perfect solution to this conundrum but we do think that everybody involved in this field ought to consider the alternatives available and the possible outcomes of taking any particular course of action when they are drafting planning agreements in these circumstances.

SHARED OWNERSHIP – A REMINDER

Shared Ownership Leases have been a part of the Social Housing toolbox for many years now. However, it is very easy to forget that there is a considerable amount of guidance and regulation relating to shared ownership leases which needs to be observed by a Landlord RSL.

In this respect we would recommend that anybody practising in this area obtains and reads the booklet entitled "Shared ownership: Joint guidance for England" which has been prepared jointly between the Housing Corporation, Council of Mortgage Lenders and National Housing Federation. This guidance was issued in October 2004 under ISBN 0-9544578-7-0. Particularly we would highlight the following areas:-

Although there are sample leases published by the Housing Corporation, RSLs tend to adopt their own. Nonetheless RSLs must certify that the leases concerned contain the fundamental clauses specified by the Housing Corporation.

Although not of direct concern to an RSL Landlord who is granting a shared ownership lease, a tenant may elect to pay Stamp Duty Land Tax by reference to the market value of the property, in which case no further SDLT will be payable should the tenant decide to acquire further shares in the property. However, if a tenant staircases to 100% acquiring the freehold reversion or the full leasehold interest then this financial transaction will be notifiable to the Inland Revenue even though no further tax is payable. If however the tenant decides to pay SDLT on the value of the interest purchased at the date of the grant of the lease, then further staircasings are neither notifiable nor chargeable provided the tenant does not staircase above 80%. However, if the tenant staircases above 80% or staircases to 100% so acquiring the freehold reversion or a full leasehold interest, then such transactions are both notifiable and chargeable. As a matter of good practice we would suggest that on the granting of any new lease by an RSL that the papers presented to the buyers solicitors should include some explanation as to how SDLT is applied to shared ownership leases.



Any shared ownership lease granted should contain a restriction (applied in accordance with current Land Registry requirements) specifying that no deed varying the terms of the lease can be made without the Housing Corporation's consent.

All new shared ownership leases granted by RSLs must provide that the RSL will give the tenant's lender at least 28 days written notice of the Landlord's intention to commence possession proceedings. RSLs should provide a signed undertaking in the form required by the Housing Corporation on every grant and assignment of a shared ownership lease.

It should be noted that the joint guidance referred to above will be reviewed and updated on a biennial basis in consultation with the Housing Corporation.

INFORMATION

***If you have any queries on any social housing matters please contact:
Clive Gardner on (01904) 688502***

This bulletin is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this bulletin useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 1 April 2005

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