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# Social Housing Focus

## Prevention of Social Housing Fraud Act 2013 update

As is frequently the case with loudly-heralded pieces of legislation designed (we are told) to deliver sweeping reforms and new powers to address one particular social ill or another, the Prevention of Social Housing Fraud Act 2013 arrived with something of a shout but since then has really delivered only whimpers in terms of reported use of the Act by local authorities and housing providers.

It may be that this is because of Local Authorities' stretched finances for investigating and pursuing potential cases (whether on their own behalf or on behalf of partnering Housing Providers) or simply because the cases which may be in the pipeline have not yet reached, for the most part, the stage of prosecutions and publicity.

By way of a very brief reminder, the Act created new offences of unlawfully sub-letting and parting with possession of property let on secure and assured tenancies from local authorities and social housing providers, as well as new powers for local authorities to investigate and prosecute such offences and new remedies such as the Unlawful Profits Order enabling the defrauded landlord to recover (at least potentially) the proceeds of the offence.

One case which does seem to highlight some good practice at work in this field, however, has taken place in Bodmin, Cornwall, where Cornwall Council's Corporate Fraud team and Cornwall Housing Limited had been working closely together since the summer of 2014 to share information to enable them to identify and prosecute tenancy fraud. In December of 2014 a successful conviction under the new Act was secured against a Bodmin woman who had unlawfully sub-let her housing association property contrary to an express term of the tenancy. She pleaded guilty to the offence and received a 12 month conditional discharge as well as being ordered to pay just over £1,300 in investigation costs and a £15 "victim surcharge." It does not appear as yet that any order to recover unlawful profits has been made.

However, the property was recovered and the Council and the housing association capitalised on the reporting of this case in the local area by launching a widely-publicised "keys amnesty" encouraging those who may be operating in breach of the law by unlawfully subletting or parting with possession of council or housing association property to "come clean" and return the keys for a limited period at the start of 2015.

More recently, in February this year, a 40 year old woman was successfully prosecuted under the Act in Northampton when it was discovered following a Council-led investigation that as well as her tenancy of social-housing flat in the town, she also had a tenancy for a council flat in London. She was ordered to pay a fine of £500, costs of a further £500 and £50 "victim surcharge". It will be interesting to see whether these successful prosecutions coupled with measures such as the keys amnesty produce a measurable response in reducing housing fraud in those areas.

We are aware that some of our Social Housing clients are working actively with relevant local authorities to share information and to identify and investigate potential tenancy fraud, whilst others are not yet at that stage. Still others are struggling to achieve the necessary "buy-in" to enable them to pursue initiatives aimed at tackling tenancy fraud, either opting for a policy of denial that it's a problem for them, or citing limited resources to undertake the necessary investigation and follow up.

Of course, each provider will have its own competing priorities and budgetary constraints to manage, but with many Local Authorities seemingly willing to take the lead in assisting providers to carry out investigations, with the statistics suggesting that a significant percentage of applications for social housing in many areas are made fraudulently and with ever increasing pressure on the availability of suitable housing stock, the pressure is surely going to grow on all concerned to make use of the powers and remedies made available by the Act.

*Andrew Digwood*

## Also in this issue

# "Comment"

It has been a strange old year for the Social Housing Sector. Universal credit has not been the disaster that some feared it might be although it is still not fully implemented and therefore there may be mischief there yet. However most providers have adjusted their systems, engaged more staff to work across the spectrum to minimise effects. One hopes this will continue to be effective.

Whilst certain providers have continued to ride high, there seems to be a general perception amongst residents that service is not as satisfactory as it was. For the most part it is still good and no doubt all providers will be working hard to turn this around.

A final little thought is what we will have after the Election in May. All parties make noises about the importance of affordable housing but no clear and coherent strategy has been set out by any party and of course promises made by the coalition in the run up to the Election may prove to be empty if a Government of wholly different hue is elected.

Danny Alexander has made the welcome announcement that the affordable homes programme should continue in its current format until 2020 and made a ground breaking announcement of direct commissioning of 10,000 homes in Cambridgeshire. Sadly there is a distinct lack of detail about how this direct commissioning will actually be delivered and how it will negotiate the hurdles of the planning process etc. It is however a significant departure from letting the market fill the gaps.

The Conservatives as usual favour a market led approach with or without incentives.

Labour is all for provision by the State but with the greater emphasis on Regional or Local decisions and provision and have threatened rent caps which will panic the private landlords.

The Liberal Democrats seem to favour a central interventionist approach with perhaps a greater emphasis on capital commissioning rather than income led investment.

Whilst the chances of a Liberal Democrat Government being elected are about as good as Italy's chances of winning the Rugby World Cup in 2015, the election is very hard to call and there is every chance that neither Labour nor the Conservatives will be able to form a majority government on their own and this will give the smaller parties such as UKIP, the Liberal Democrats and, controversially, the SNP considerably more say in what happens in Government than their number of seats would justify. It is very difficult to gauge, depending on how a coalition is made up, what sort of housing policy we may be facing following the election.

***Douglas Oliver***

# Q&A

## Douglas Oliver, Head of Social Housing Sector team

Who are you?

*I am the Head of the Social Housing Team at Rollits.*

How long have you been involved in Social Housing?

*I have worked in Social Housing Law for 20 years.*

Why Social Housing?

*I fell into it more or less by accident but liked the work and the people so stayed with it.*

Most satisfying moment?

*When we finally got on site with the JRHT Derwentthorpe Scheme after many years via a Planning Enquiry, a Village Green Enquiry and a referral to the EU.*

What changes do you most notice since you started in Social Housing?

*On the whole, the sector is much more business-like and professional but there does seem to be more red tape.*

If you were a man of leisure what would you be doing?

*Globetrotting with fly rod in hand! Salmon in Russia, Sea Trout in Argentina, Trout in New Zealand, Bone Fish in Cuba.*

# A time for action

## Social housing providers should get involved in the Community Infrastructure Levy consultation process as a matter of course.

In early December 2014 the Government, following a consultation process that took place in March of that year, announced that for sites of 10-units or less, and which have a maximum combined gross floor space of 1,000 square metres, affordable housing and tariff style contributions should not be sought. This announcement followed the measures introduced within the Growth and Infrastructure Act 2013 where any person (for a period up to April 2016) against whom an affordable housing requirement is enforceable may apply to the Local Planning Authority to modify, replace or remove the said requirement if it can be evidenced that the development is economically unviable. The appeal procedure introduced within the Growth and Infrastructure Act applies to affordable housing requirements only. The stated reasoning being such provisions introduced by the Government is to stimulate and encourage developers to commence projects without the burden of unviable affordable housing requirements.

However, where does this leave the social housing provider? The introduction of the National Planning Policy Framework as well as other Government initiatives such as the Help to Buy scheme does appear to have brought a degree of confidence to the market. As our economy recovers and open market prices increase, development becomes more viable and the natural progression should therefore be that affordable housing can be provided in greater numbers. However, experience has shown that the property market remains volatile and difficult to predict.

Looking forward, one aspect of planning policy that has grown in influence, especially over the past 12 months, is that of the Community Infrastructure Levy ("CIL"), which ultimately dramatically changes how planning contributions are provided and in turn has the potential to have a direct impact on the supply of affordable housing. CIL is a charge on new development, which is intended to provide a more certain and transparent basis for developers to price schemes. Importantly, most forms of social housing are not subject to CIL, and benefit from mandatory relief. Care must be taken to ensure that the particular type of affordable housing is protected by such a relief, which is set out in detail in the CIL Regulations and includes, for example, properties let by a registered provider of social housing on an assured tenancy. If mandatory relief is not available then the Local Authority may still offer discretionary relief, but appropriate enquiries will at all times need to be made.

Exceptional Circumstances Relief may, if so made available by the Local Charging Authority, apply where a Section 106 Agreement has been entered into and the payment of CIL would have an unacceptable impact on the economic viability of the development (and any such relief would not constitute state aid to be approved by the European Commission). However, once the CIL Charging Schedule has been adopted the intention is for this to be non-negotiable, and therefore it is anticipated that Exceptional Circumstances Relief will apply only on rare occasions (especially given the level of viability testing that will have been undertaken to adopt CIL in the first place). Currently, affordable housing will not be provided as part of CIL. Instead, affordable housing will continue to be supplied under the Section 106 regime (which will exist in a scaled back capacity dealing with on-site matters only). CIL will instead focus on providing new and maintaining existing infrastructure, such as roads, schools and flood defences.

From April 2015, a Local Authority that does not have an adopted CIL Charging Schedule will be able to pool no more than 5 contributions for an item of infrastructure. It is this deadline that has galvanised Local Authorities to progress the implementation of CIL and accordingly the number of Authorities that have adopted CIL has gone from a trickle to a flood.

Why is this so important for affordable housing? Well, as stated, the whole basis of CIL is that it is intended to be transparent and non-negotiable. If the level of CIL is fixed at a rate that is too high then the danger is that this will lead to a squeeze on the level of affordable housing provided under the Section 106 Agreement, as this remains capable of negotiation. Having raised this point with a number of Local Authorities who have implemented CIL the general consensus was that it is too early to tell, with no apparent shortfall in the amount of affordable housing being evidenced to date. However, such an issue should in any event be considered within the viability tests undertaken by the Local Authority as part of the process for adopting CIL. Any Local Authority who wishes to implement CIL must first, following detailed viability testing, produce a Preliminary Draft Charging Schedule, which will, along with the supporting evidence, be subject to public consultation. A Draft Charging Schedule will then be prepared that will again be the subject of public consultation and the final form of Schedule will be examined in public by an Inspector before adoption can finally occur. It is during the course of this consultation process that a third party can truly get involved and potentially influence the level of CIL set in their region. It is therefore in the interests of any social housing provider to take action and get involved in the CIL process as soon as possible, focussing specifically on the viability tests undertaken by the Local Authority and how affordable housing has been taken into account (if at all).

The Planning Advisory Service has a checklist that is available for use by Local Charging Authorities when setting the rate of CIL and this makes it quite clear that the Authority should assess the impact of the CIL rates on affordable housing. This is further supported by Government guidance on the evidence base and method for setting the CIL rate.

The likelihood is therefore that the Local Charging Authority will consider affordable housing within the CIL calculation. However, it is unlikely that such Authorities will have access to the same evidence base that both social housing providers and private developers have, which is why it is imperative that such interested parties get involved (and work together if possible) in order to challenge what may in fact be a an unrealistically high level of CIL based on inaccurate viability testing.

It is accepted that some private house builders may not wish to release confidential detailed sales figures in order to challenge the viability testing and this represents one of the difficulties faced in the CIL regime, but this may be the only way to overcome an unacceptable burden on the future development of both open market and affordable housing alike.

*David Myers*

# Revised conflicts of interest guidance published by the Charity Commission

Social housing providers should always ensure that they have effective procedures in place when dealing with the issue of conflicts of interest. Although many social housing providers are not registered charities, it would be good practice to follow the Charity Commission's guidance for their organisations.


The guidance was re-published in May 2014 following a public consultation. It has been developed in light of the frequency of improperly handled conflicts of interest across the Commission's casework. The new guidance has been designed to improve general levels of understanding amongst trustees about this common governance issue and to be clearer about what is expected of organisations and the people running them regardless of their size and the extent of the risks posed.

One of the features of the guidance includes a simple three step approach to managing conflicts of interest. This includes declaring any conflicts of interest. Although declaring conflicts of interest is primarily the responsibility of the affected trustee, the organisation should ensure that they have strong systems in place so that individuals have a clear understanding of the circumstances in which they may find themselves in a position of conflict of interest and understand their personal duty to declare them. Conflicts of interest can arise in situations in which a trustee might personally profit from a proposed transaction by the organisation or where a trustee might be connected to a party which the organisation might be looking to employ, engage their services or benefit in some material way.

The second step is to consider removing conflict of interests. Trustees must consider the issue of the conflict of interest so that any potential effect on decision making is eliminated. A serious conflict of interest can include those which are so acute or extensive that the trustees are unable to make their decisions in the best interests of the charity or those which are present in significant or high risk decisions of the trustees or for example are associated with inappropriate trustee benefit.

The third step is to follow the organisation's governing document. Where trustees have decided against removing the conflict of interest they must consider how to make a decision only in the best interests of the organisation. Trustees must follow any legal or governing document requirements which say how the conflict of interest must be handled. The trustees should also consult and follow their own conflicts of interest policy if they have one. Where there are no legal or governing document provisions about managing conflicts of interest, and there is a proposed financial transaction between a trustee and the organisation, or any transaction or arrangement involving trustee benefit, then the trustee benefit must be authorised in advance and the affected trustee to be absent from any part of any meeting where the issue is discussed or decided. The individual should not vote or be counted in deciding whether a meeting is quorate.

Other features of the guidance include considering conflicts before new trustees are appointed and the Charity Commission gives illustrative examples to demonstrate the principles in action. The Charity Commission advises that trustees read this guidance to understand the basics and to ensure good governance. The Charity Commission guidance is CC29 and is available at charitycommission.gov.uk.

*Sarah Greendale*

## Information

If you have any queries on any issues raised in this newsletter, or any social housing matters in general please contact Douglas Oliver on 01904 688537 or email douglas.oliver@rollits.com.

This newsletter 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 newsletter useful.

If, however, you do not wish to receive further mailings from us, please write to Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law stated is as at 18 March 2015.

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