trowers & hamlins

QUARTERLY HOUSING UPDATE

Winter 22/23

Contents

Follow us and join our online discussion

– Trowers & Hamlins **– @trowers** **– @trowers_law**

Foreword

In writing this foreword I am mindful of the core themes that have dominated my conversations with clients and contacts over the winter months and which were echoed at our recent affordable housing summit – namely the scale of challenges faced across the affordable housing sector (many of which are equally faced by developers and build to rent investors and operators). In particular the scale of the "ask" in ensuring requisite levels of investment are made in existing stock (in full recognition of the current political spotlight on the affordable housing sector as well as the ever urgent need to tackle the investment needs demanded by retrofit) whilst maintaining development pipelines. All at the same time as addressing ongoing issues with building safety and (perhaps above all) ensuring that the customer voice is at the heart of providers decision making.

From my perspective there are four key themes that I have taken away from those conversations

- Firstly, an acknowledgement that despite consistent messaging from the Regulator over the past few years about providers "not waiting to be told" there is still much to be done in the sector to give proper weight to the consumer voice.
- Secondly that as part of tackling both investment in existing stock (and to address concerns about the state and condition of existing stock) and the retrofit agenda, there is an ever increasing demand for providers to better harness data. Interestingly the importance of data was also flagged by a major institutional investor who participated in our recent summit as being of fundamental importance to any relationship between a housing association and an institutional investor.
- Thirdly, partnership working will continue to evolve and – to a large extent- provides perhaps the only practical solution for associations wishing to maintain or grow development pipelines.
- Finally – and if what I have said already sounds too gloomy- there are plenty of examples of best practice emerging in the sector and – perhaps as a recognition of the scale of the challenges facing the sector- there seems to be a greater than ever willingness amongst both associations and local authorities to share best practice and to collaborate. This can only be a good thing.

In the context of partnership working I would particularly draw your attention to Joshua Green's article in this edition which picks up on the themes explored in the BPF's toolkit on partnership working (https://bpf.org.uk/media/5763/bpf-affordable-housing-report-jan-23-high-res.pdf) and (in the context of consumer regulation) to Scott Dorling and Julian Jarrett's timely article about the regulation of local authority landlords by the RSH.

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

Five things you need to know about the student accommodation market in 2023

During the pandemic, there were quiet rumblings amongst investors as to whether the student accommodation market would face a downward trend in the long term, with university lectures being delivered online and students choosing (or in some cases being forced) to remain at home whilst in lockdown. However, the market continues to show its resilience with investors choosing to invest despite current market challenges.

1. Demand and supply

The demand for purpose built student accommodation (PBSA) is high, with an influx of both home grown and international students. Student numbers are rising with a marked increase in the number of postgraduate students in response to the economic downturn, which accounts for 40% of all growth over the last 12 months (despite representing only 22% of the student population).

The supply of houses in multiple occupation (HMOs), which are typically priced 20% below that of the average private sector PBSA bed, have decreased due to a combination of tax changes, surges in council tax and the after effects of the pandemic.

This is significant because those universities without adequate supply of either university-owned or nominated accommodation, are essentially forcing students to look further afield for accommodation, which then may impact the 'university experience' that most students dream of as well as contributing to the increasing concerns of the cost of living.

2. Investment and development

The development of new PBSA continues to be of interest to investors due to the lack of high quality stock, the huge demand from students and the increasing pinch on yields from the operations of existing buildings. However, delivering PBSA is challenging with planning continuing to be a barrier, development and labour costs being high, resulting in challenges in making schemes financially viable. Collaboration between universities, developers and planners, could help drive design and innovation in the sector, to ensure high quality accommodation is available and affordable to the majority of students, rather than the minority.

3. ESG

Environmental, Social and Governance (ESG) requirements have to be a primary consideration and there is continued discussion in how this can be seamlessly integrated into the sector. ESG will be specific to the particular asset or organisation in question and will be driven by regulatory requirements, but ultimately investors will require this at the forefront of any investment strategy. The sector is considering the "S" in ESG – the social agenda, and how offerings can be tailored to improve the wellbeing of students. "E" also plays a huge role, in a world where students are more vocal about their concerns on climate change than ever before.

Organisations should have a net zero-aligned ESG strategy and put frameworks in place to enable adaptation, flexibility and alternative ways of handling energy. Such sustainability strategies are all influencing investment decisions. In order to make this a true collaborative approach, in the student sector in particular, operators may want to think about finding creative ways to give students the ability to monitor their use of energy. This way, as with anything, if the individual is invested in making a change, the impact across an entire university could be monumental.

4. Affordability/Cost of living

The affordability of renting student accommodation in the UK continues to be a growing concern. Rents have outpaced inflation, but simply capping rents does not seem to be the answer. Therefore, the sector needs to be creative in how they propose to pass on the increase in utility costs to students – a challenge that will need to be addressed in 2023.

HMOs are generally on the more affordable end of the spectrum, however, students who rent in the private rented sector are more exposed to rising utility costs without much protection from landlords.

More than three quarters of students are worried that soaring living costs will affect their academic success, according to the office of national statistics (ONS). This is resulting in more students bunking the non-mandatory lectures, opting not to attend course related events and choosing to study at home to save money. This may all take a toll on their financial and mental wellbeing.

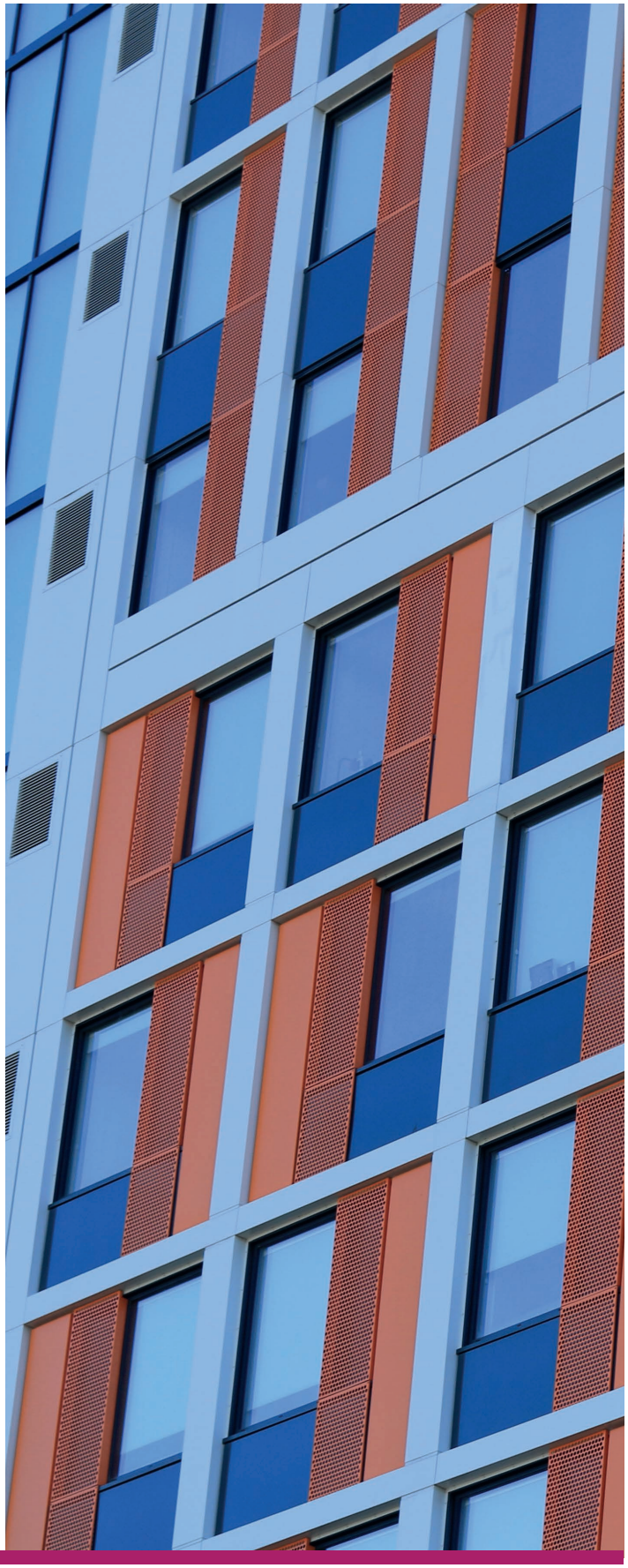
The quality of student accommodation is increasing, and the sector is seeing less price sensitive students gravitating towards the best rooms. However, even though there are still 175,910 bed spaces in operation (which are un-refurbished, and in desperate need of a makeover) there is a continuous battle between choosing to demolish and choosing to refurbish, bearing in mind the embedded carbon associated with new builds.

5. Building Safety Act

The Building Safety Act 2022 (BSA) is set to significantly impact the way PBSA products are constructed and designed. The gateway regime will seek to ensure building safety risks are considered at each stage of the design and construction of higher-risk buildings (higher-risk buildings are defined as a building that is at least 18 metres in height or has at least 7 storeys). It is important that developers recognise the financial impact that the changes under the BSA could have. They will need to take action to meet current and future obligations in good time to maintain viability of schemes, minimise risk, and steer clear of legal implications.

The PBSA sector continues to be an attractive sector in which to invest, and even though there are economic uncertainties ahead, the strong fundamentals which underpin the student accommodation sector, remain firmly in place.

Nikita Asher
Senior Associate, Real Estate
+44 (0)20 7423 8662
nasher@trowers.com



What local housing authorities need to know about the new approach to proactive regulation by the RSH

Since June 2022 the Social Housing (Regulation) Bill has been making its way through the parliamentary process, introduced into the House of Lords in June and received its third reading at the end of October. It is now being considered by the Commons before receiving Royal Assent.

The Bill, trailed in the Social Housing White Paper in 2020, has two very notable focus areas. These are: fundamental reform to the remit and powers of the Regulator for Social Housing (RSH) – from reactive to proactive regulation; and a focus on Health and Safety matters including tenant empowerment.

Health and safety regulation for social housing is broadly contained within the 'consumer standards', these apply to local authority registered providers (LARPs) in the same manner as Housing Associations – there won't be any special treatment.

The argument for reform in these focus areas was well made at the time. RSH's Consumer Regulation Review 2021-22 outlined examples of interventions on consumer regulation. It showed a marked increase in the number of regulatory referrals (up 10% – to 653- year on year) as well as the proportion of referrals being escalated to the Consumer Regulation Panel (increased from 40% to 46% year on year).

Of the eight findings of breach to the consumer standard, five were local authorities. Interestingly all five were as a result of self-referrals to the regulator, which shows, at least in those authorities, an appreciation of responsibility for compliance as well as a culture of openness. On the flip side, this also could be interpreted by some to mean local authorities are performing less well than Housing Associations, accounting for a disproportionate number of regulatory breaches. Since the end of the Consumer Regulation Review's period, LARP regulatory notices have continued to be published and consumer compliance issues are likely further to come under the spotlight following the RSH's new proactive approach to regulation. The RSH has encouraged LARPs to prepare for the shift to a more muscular regulatory approach.

Social housing health and safety is in the spotlight. The Regulator's new powers will be a key reform that ministers will surely hold up to show they are seeking to address the sector-wide issues. The recent issues in Rochdale and the way the Government directly intervened brings this into sharp focus.

Currently the RSH will only investigate a potential breach if there is a referral regarding non-compliance, either a self-referral or from an interested party, such as a tenant, charity or local politician. Furthermore, the RSH will only investigate if the failure is to the serious detriment of tenants or potential tenants. The 'serious detriment' hurdle is to be removed by the Bill, which lowers the bar for RSH's investigations. The Bill proposes that the RSH obtain more wide-reaching powers to seek assurance from LARPs on standards compliance. The new approach to proactive regulation will require upfront information from landlords which the Regulator will likely assess against the new tenant satisfaction reports to corroborate the landlord's evidence. Furthermore, in a show of even more muscularity, more recent amendments from the House of Lords have included a duty on the Regulator to implement a plan for regular and one-off inspections of RPs.

Housing Associations have a head start on local authorities in more proactive regulatory style, as LARPs have not been subject to In Depth Assessments (IDAs) as well as being organisations which are – as their name suggests – more concentrated and specialised on delivery of social housing. However, irrespective of the model used to inform the Regulator, establishing compliance with any new regulatory aspects will, put most obviously, simply require the LARP to be certain that it is complying with the current standards. That might sound trite but how does the LARP satisfy itself that it is complying with the standards? For Housing Associations there is typically a Board of Directors with strategic oversight. For LARPs the governance model will differ between local authorities. Those with committee systems might consider going back to the future and establishing a Housing Committee. What regular reassurance of regulatory standard compliance will those local authorities operating with a Cabinet system want to see? What enhanced and formal role, if any, will residents play in the assurance system? Good governance, as always, is key to getting this right.

Overwhelmingly the regulatory notices published by the RSH for local authorities have concerned the Homes Standard regarding health and safety matters relating to electrical, gas, water, asbestos and fire safety. Often this was where the local authorities had not completed the requisite inspections on a scale that amounted to a potential serious detriment to tenants.

With those breaches in mind, which are probably much more widespread than the number of regulatory notices suggest, an important aspect of the Bill that local authorities will need to address is appointing a health and safety lead. This person is responsible for monitoring the LARP's compliance with health and safety requirements relating to the health and safety of the tenants of social housing. They will need to have sufficient authority and resources to obtain information in order to assess the risks. They will need direct reporting lines to councillors. Authorities will need to build processes and systems that will help to inform that lead of the risks that are present.

Trowers & Hamlins will continue to monitor the progress on the Bill and especially as there is further consultation from the RSH on new regulatory standards and a new mechanism to regulate them. We expect further information from the RSH this year on a direction of travel. There is no reason for LARPs to wait for any of that to start taking steps to establish compliance systems and processes. It is also a good opportunity to consider your current governance model to see whether it could be further enhanced to respond to the new, more muscular, approach of the Regulator.

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

Julian Jarrett
Associate, Real Estate
+44 (0)20 7423 8649
jjarrett@trowers.com

Are charitable RPs obligated to invest for the best financial return?

Charitable RPs will be aware that there are different forms of investments that they can make. The rules around investment are covered in helpful guidance published by the Charity Commission called "CC14 – Charities and investment matters: a guide for trustees". Although most RPs are exempt, rather than registered, charities the guidance is still applicable to them.

First, a charitable RP may make a "financial investment" which is an investment made to achieve a financial return. Second, a charitable RP may make a "social investment" which is an investment made to achieve a social return. Then third, a charitable RP may carry out a "mixed-motive investment" which is an investment which cannot be justified solely as either a financial investment or a social investment but is, as the name suggests, a mix of the two.

When making a purely "financial investment" the question often arises as to whether a charitable RP is obligated to invest solely to make the largest financial return, or whether it can apply ethical principles when deciding what to invest in.

Charity law, and the Charity Commission's guidance, has supported the view that charitable RPs can take ethical considerations into account when making financial investments, even if that potentially means a lower rate of return but that it must be justified.

Some charitable RP have though felt that guidance around ethical investment was unclear about what was possible.

Helpfully then there has been a further clarification to the law around financial investment in the case of Butler-Sloss & Ors heard earlier this year in the High Court.

In short, the case reconfirmed that all charities, including charitable RPs, can apply ethical principles when making financial investments. The judge made the following points:

- A board member of a charitable RP's primary duty is to further the objects of the charitable RP , and the starting point to achieve this is that financial investments should be made to maximise the financial return, whilst balancing an appropriate level of risk.
- Board members of charitable RPs do though have discretion to take ethical investment decisions where they reasonably balance relevant factors. Particularly they should balance the likelihood and seriousness of a financial investment conflicting with the charitable RP's objects against the potential financial impact on the charitable RP from excluding certain investments. Financial impact here can include not just the potential lower return on the investment, but also the risk of losing donors or supporters and reputational damage.
- Board members do though need to be mindful of making decisions on a purely moral ground, where those morals may not necessarily be shared amongst supporters and beneficiaries and there may be legitimate differing views.
- If the balancing exercise is properly done and results in a reasonable and proportionate investment policy for the charitable RP, then the board members have complied with their legal duties.

The Charity Commission is now proposing to publish revisions to its guidance in Summer 2023, to reflect the judgment in this case. For now though, this is a helpful clarification around the law on financial investments and charitable RPs should feel empowered to take reasonable ethical decisions in relation to financial investments.

Darren Hooker
Senior Associate, Real Estate
+44 (0)20 7423 8360
dhooker@trowers.com

Be Aware: Shared ownership staircasing records

The records you don't want to lose

We have been advising for years about the need for accurate asset and liability registers and the importance of retaining records through the life of a Property. The need for documents may arise on a sale, equity investment, portfolio transfer or property charging transactions. Although some missing documents can be obtained from third parties, there is one record that is very difficult to find if missing: shared ownership staircasing information.

Staircasing records are not publicly registered

Whilst initial and final staircasing lease sales or transfers are registered at the Land Registry, interim staircasing transactions are not. Shared ownership record keeping remains surprisingly analogue. Typically it requires the Memorandum of Staircasing (MoS) to be physically attached to the back of the original lease. The RP freeholder then has the responsibility of updating its internal housing database with the new staircasing percentage sold and the revised rent payable and ensuring the original MoS is filed with the original lease.

The updated staircasing information must be accurately recorded on the housing database. Purchasers, investors looking to acquire shared ownership reversionary portfolios and funders are particularly interested in the accuracy of this information given it is a core factor in the value and management of the stock. You may be required to warrant the accuracy of this information to third parties on a transaction. If this information is missing or incomplete you may be misrepresenting the position and it may also mean that RPs are not collecting the correct rent on the leaseholder's share.

Reconstituting staircasing records

If missing, this important information needs to be reconstituted, but how?

If an external lawyer acted for the RP on the staircasing, they would be the best place to start. However staircasing is typically dealt with by an RP's in-house specialist staircasing team.

The leaseholder may be enjoying the 'rent break' and may not be minded to assist.

If the information cannot be located internally, we suggest two initial steps:

- Approach the solicitor who acted for the leaseholder to request certified copies of the MoS and
- Approach the valuer who valued the Property to provide the valuation.

Protect staircasing records

On all staircasing transactions we recommend:

- Accurately filing original leases so that the MoS can be attached and placed with the relevant lease.
- File the MoS promptly.
- Ensure your housing database is updated correctly after each and every staircasing.
- Ensure IT records are routinely backed up.
- Retain records of who represented the tenant and who carried out the valuation.

After reading this, do consider checking existing data so steps can be taken to complete any information gaps. The sooner this is done the better as information, and the possibility of reconstituting it, is easier when memory is recent. Uncovering deficiencies in records in the middle of a sale, charging transaction or portfolio transfer, when timetables must be met can, and does, cause unnecessary delays, risks of price chipping and increased costs.

Julia Robertson
Senior Associate, Real Estate
+44 (0)20 7423 8249
jarobertson@trowers.com

Mortgagee Exclusion Clause reviews can be an easy win to extract more security value

What is Mortgagee Exclusion Clause (MEC) for?

A MEC is relevant in any document which creates a binding restriction on use, occupation or saleability of that land. These restrictions will often restrict the use of dwellings to social housing. Documents that commonly contain such provisions could be a S106 planning agreement, a lease, a transfer or perhaps a nominations agreement.

A MEC within such a document, if correctly drafted, will mean that a funder, mortgagee and any future owner will be released from these restrictions and thus can sell the property to a wider market and at a higher Market Value Subject to Tenancy (MVST) value. The difference between this and the lower Existing Use Value (EUV) value where a MEC is found to be ineffective can be striking. On portfolio acquisitions, buyers and investors will also want to ensure that MEC provisions are adequate to enable them to seek higher valuations if and when they raise finance post acquisition. The devil is most definitely in the detail, and in the drafting, and getting it right, preferably as early as possible, is always worth the time.

In the not too distant past, any changes to such agreements were dealt with on a case by case basis. Trying to negotiate changes was commonly very time consuming and expensive. In recent years this process, and the outcomes, have been significantly assisted by agreement of standardised MECs amongst the funders and their solicitors, the borrower's advisors in the sector and local authorities. We can now say with some certainty that if this wording is used (in the current market), the higher MVST valuation will be available. It is important that this wording is strictly adhered to as, any change, even if small, can introduce uncertainty, and the smallest uncertainty can make funders and valuers unwilling to attribute MVST value.

MEC drafting is very technical and precise. It needs expert review which we are well versed in providing. Even a minor change can be very significant, and we urge our clients to have these provisions checked at the earliest opportunity to ensure we can facilitate a smooth transaction and achieve the best possible value for the property. Do ask development teams to pass on any documents prior to purchase or during development and we will happily review. Often at this stage issues can be pre-empted and resolved before they cause a delay or a more protracted problem. Increasingly we are being asked to review portfolios either prior to acquisition or which is already secured to a funder to consider if MECs are adequate in order to extract further value for clients. This can be a relatively easy way to raise additional finance without having to undertake a full charging programme.

What should a MEC include?

It is critical that where a restriction is going to bind existing and future owners and their funders, that a MEC correctly benefits the widest list of relevant parties. This will ensure that any type of funder can more readily sell the asset in an enforcement scenario. There will be more parties willing to buy if the property is not restricted. Funders can utilise more flexible enforcement methods if the list of beneficiaries to the MEC is widely drafted.

In today's market, funders might include, for example, banks, security trustees or bond holders and their legal standing varies. It may be the case that not all parties are included for the current deal but, if amending a clause, it is certainly worth creating a market standard MEC covering all required parties to ensure flexibility into the future.

If there are existing agreements in place restricting value, obtaining a deed of variation can be an easy fix to access more funding from existing arrangements. Seeking deeds of variation can take time so reviewing and addressing inadequate MEC provisions should be commenced early and in advance of any transaction.

Current standard wording

There are a number of beneficiaries that must be listed in a MEC in relation to affordable housing land for it to be effective. Beneficiaries must include a mortgagee and chargee and their successors in title as well as a variety of different appropriate receivers, including administrative receivers and certain other administrators or other appropriate persons appointed under security documentation to enforce security.

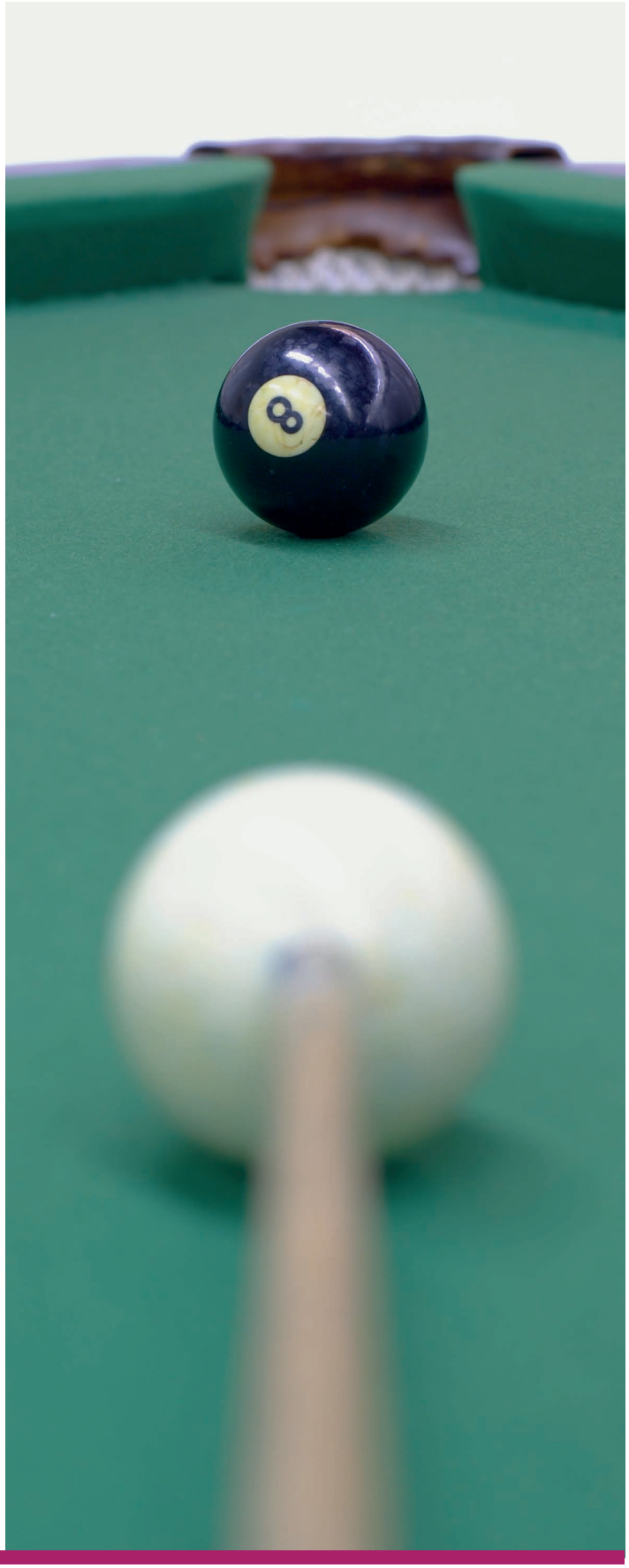
It is worth noting that it is extremely unhelpful to include or refer to a 'mortgagee is possession' because frequently a mortgagee will not be in possession, so this definition is too limiting.

In addition to specifically listed beneficiaries it is important to include a catch all provision to try and ensure any future funding models are covered.

The drafting must also ensure that the agreed strict timing limits in which the asset may be sold, are not exceeded and that all cost and expenses of such sale and enforcement action are recoverable.

We are very happy to review any documents which may contain any form of restriction and to advise on (a) whether or not it is binding and will affect value and (b) obtaining a deed of variation to enable a higher value to be available. Such review can save problems later in the life of a property and may even enable you to quickly realise extra value from the property.

Caroline Nugent
Senior Associate, Real Estate
+44 (0)20 8977 0749
cnugent@trowers.com



Potential impact of National Security and Investment Act 2021 on Registered Providers of social housing

On 4 January 2022, the NSIA came into force increasing the government's powers to review and intervene in certain transactions on national security grounds. These powers are exercised by the Department for Business, Energy and Industrial (BEIS) through its Investment Security Unit (ISU) and are retrospective for affected transactions that completed after 11 November 2020. The ISU can call in a transaction for up to six months after becoming aware of it, but there is a long stop date of five years from completion of the transaction. The NSIA does not distinguish between UK and overseas companies.

Share transactions that involve a third party "gaining control" of a company operating in sectors deemed to be high risk (including defence, energy, civil nuclear and transport) are subject to mandatory prior notification to the ISU in order to obtain its prior approval, otherwise they are void.

Asset transactions (such as a freehold purchase or sale) are not subject to mandatory notification to the ISU, but rather a voluntary notification procedure under which the ISU has 30 working days from notification to issues its clearance or call in for further review. Where a voluntary application has been made it is expected that in the contract completion of a transaction will be made conditional upon ISU clearance. Either party or all parties to a transaction can submit a voluntary notification to the ISU.

Current guidance from BEIS is that a land transaction is more likely to be considered to be a national security interest where "it is or is proximate to a sensitive site" with examples of such sites given as national infrastructure and government buildings. The same guidance confirms both that call in powers are rarely expected to be exercised for land transactions compared to share transactions and that buying a property for residential use next to a military site is generally considered to be a low risk to national security given the protection measures commonly in place at military sites.

If however a RP has national security concerns about land transactions involving or near to sensitive sites and potentially the other parties to those transactions, then the ISU has an informal pre-application service so that the views of the ISU can be sought in advance.

For further information and an assessment of the potential risks, please contact Alison Chivers or Mark Churchman.

Andrew Williams
Professional Support Lawyer, Real Estate
+44 (0)20 7423 8019
ajwilliams@trowers.com

Investment Association Guidelines 2022 update

On 15 November 2022, the Investment Association (IA) (the trade body and "industry voice" for UK investment managers) published updated "Governance and disclosure guidelines for housing associations seeking funding from capital markets". These represent a significant update to the 2017 iteration, and as might be expected, there is a significant shift in focus.

The guidelines suggest that housing associations significantly widen the information that may currently being made available to investors, particularly in relation to environmental, social and governance (ESG) matters. The guidance also provides a useful summary reminder to issuers of their obligations in relation to insider dealing and the management of inside information.

The introduction to the guidance indicates that the IA consider that most of the information sought will already be produced, and that the "only" shift is to ensure the information is made publicly available. Whilst this will certainly be true in some cases, others will no doubt be more challenging.

Easy wins

To the extent not already in place, the suggestions for regular bondholder update calls, a named investor relations contact and a dedicated section of the website should be relatively straightforward to implement. Some of the requested KPIs will no doubt be capable of publication, though associations should give some consideration to the format in which the data is presented to ensure that there is no inadvertent breach of data protection regulations.

Many, if not all, of the governance aspects will already be in place through the regulatory requirement for associations to adopt a corporate governance code.

ESG

Unsurprisingly, the IA state their members' preference for sustainable finance frameworks to be externally validated or accompanied by a second party opinion.

The Sustainability Reporting Standard is described as a "minimum" in terms of investor expectations regarding ESG matters and the full list of desired information in the area goes further, taking in Scope 1, 2 and 3 emissions and TCFD reporting. The latter, while not yet mandated for many housing associations, is increasingly expected as standard by investors.

Challenges

The ask to publish audited accounts within 3 months of the year end and committing to a set publication date will be challenging. A handful of sector issuers may be able to achieve this, but a shift of this nature is going to require additional audit resource (internal and external), which may or may not be available, particularly in terms of the pressures on external audit which have been experienced in recent cycles.

Some of the data may not be as readily available as the IA might hope, for example the ability of associations to charge unencumbered properties will likely be unknown until an attempt is made to prepare them for charging. The number of tenants claiming universal credit may be unknown as circumstances change.

Status of guidance

The guidance is not mandatory, but it does give a detailed insight into investors' wish lists. It should be required reading for those associations with listed public debt and would-be entrants to the capital markets and similarly illuminating for all treasury teams.

Eleanor James
Partner, Banking and Finance
+44 (0)161 838 2021
ejames@trowers.com

Development challenges: Expect the unexpected

Most developers will be familiar with the common issues which might affect delivery of a scheme. Yet what happens when your site is home to a rare species, a community asset or even buried treasure?

Rockwater Village, a beach resort scheme planned for the Dorset coast, has been in the news recently following the discovery of rare sand lizards nesting in nearby sand dunes, resulting in delays to delivery. Whilst there may be a multitude of issues which may crop up when planning and delivering a scheme, here we look at some of the weirder and more wonderful factors, from reptiles to relics, which may hold up or ultimately block developments.

Protected species

Some things are as true in the world of development as they are in show business; you should never work with animals. In the UK, it is fairly common to come across species in urban and rural settings, of which bats, badgers, otters, newts and breeding birds or fish (amongst others), have certain protections. The Department for Environment, Food & Rural Affairs (Defra) lists the species of plants and animals in England which are protected, as well as the habitats in which they can be expected to be present.

As with the Rockwater Village scheme, the presence of a protected species can delay a scheme if not managed carefully. If a proposed scheme is likely to affect a protected species, developers may need to undertake a detailed survey prior to submission of any planning application. In addition, planning conditions may be imposed to prevent harm or disturbance to a protected species or require mitigation measures to be put in place. Developers may also need to obtain a licence from Natural England or Defra prior to any works going ahead, but the requirements vary depending on any species which may be present.

Natural England has published a guide to preparing planning applications where there are protected species on or near a proposed development site which is available on the government's website. Nevertheless, specialist advice should always be obtained; please speak to Trowers & Hamlins' planning and environmental team for expert guidance in this area.

Protected areas and buildings

In some cases, the nature of the land which has been earmarked for development may mean it is unsuitable to be developed, especially if it holds a certain significance to the community.

Town and village greens are areas of open space which have been used by locals to "indulge as of right in lawful sports and pastimes". If an area of land has been used in this way for at least 20 years then an application may be made to register it as a town or village green under the Commons Act 2006. It is estimated that there are 3650 registered greens in England covering around 8150 acres. A town and village green registration may present a hindrance to development and requires specialist advice.

Protection can be afforded to buildings as well as areas of land; a property may be registered with its local authority as an asset of community value (ACV) if it furthers the "social wellbeing or social interests of the local community" or could do so in future. ACVs enjoy increased protection from development and if an ACV falls within the scope of proposed development plans, this can raise a number of issues requiring careful consideration.

Firstly, it is open to a local planning authority to decide whether an ACV listing should count as a material consideration when determining any planning application for change of use of a property. In addition, there are certain steps to be followed when an ACV is to be sold (or where a lease of more than 25 years with vacant possession is to be granted). A landowner must notify the local authority of its intention to sell the ACV (or grant a lease of the same) which triggers a six-week moratorium period allowing any interested community group to bid for the property. Any bids received during this period will trigger a further moratorium, during which the property may only be sold to a community group.

While this article touches upon some of the issues that an ACV can cause for a proposed development, we recommend that specific legal advice is sought where appropriate. For specialist advice in this area, please get in touch with Trowers & Hamlins for expert guidance.

Protected sites

The recent uncovering in Northamptonshire of the "most significant early medieval female burial in Britain", including a jewelled necklace now dubbed the "Harpole Treasure", is a relevant example of an unexpected discovery on a building site.

Leaving aside unexpected archaeological findings, there are certain areas in the UK which have been designated as areas of archaeological importance under the Ancient Monuments and Archaeological Areas Act 1979. Designation allows for any necessary investigations of the site to be undertaken before any ground works are commenced, which is intended to prevent any archaeological sites from being damaged or destroyed.

As rare a finding as the Harpole Treasure was, it is also rare, but not unheard of, for development works to uncover less pleasant discoveries, such as unidentified crime scenes. It is not unknown for human remains to be discovered in the ground during a redevelopment, which in most cases will necessitate an investigation by the police.

Just as every development has its own unique features, so too does the land on which it is to be built and this can lead to unexpected, and unusual, challenges. Whether it be crickets, cricketers or crypts, or even something more commonplace, please contact Trowers & Hamlins for expert advice on how challenges facing developments can be overcome.

Lilian Robinson
Solicitor, Real Estate
+44 (0)20 7423 8453
lerobinson@trowers.com

Managing the shifting employer/employee relationship

The Covid-19 pandemic has acted as a catalyst for change when it comes to working practices and there's been a fundamental shift in the dynamic between employers and employees. In the current environment employers must be prepared to listen to the needs of staff and adapt accordingly.

Flexible working

Flexibility is key and offering a flexible and personalised approach to working locations, hours and overall practices is a way of promoting employee satisfaction as well as boosting disability and support for working families. There are also legal changes to the flexible working regime on the horizon which employers need to be aware of.

The government has recently responded to its consultation, 'Making flexible working the default', which closed on 1 December last year. It emphasised that a key principle underpinning the changes is the recognition that there is no one-size-fits all for flexible working and individual agency and choice are key. The onus is on employers and employees having constructive, open-minded conversations to find arrangements that work for all parties.

The government confirmed that flexible working will become a day one right. The eight business grounds for rejecting a flexible working request will remain as they are. There will be a new obligation on employers to consult with the employee to explore the available options before rejecting a flexible working request.

The administrative process for making a request will be changed so that, instead of only being able to make one statutory request for flexible working in a 12-month period, an employee will be able to make two. Currently employers have three months within which to respond to the request; this will be reduced to a two-month period to make the process more streamlined. The government believes such changes support the overall policy objective of normalised flexible working.

Another change on the cards is that employees will no longer be required to set out how the employer might deal with the effects of their flexible working request. The government believes that, instead of the employee bearing the sole responsibility of setting out the business case, employers should be better at engaging with employees to jointly understand the impact of a request.

The government has said that it will develop enhanced guidance to raise awareness and understanding of the framework round making requests for flexible working, and will issue a call for evidence on how informal flexibility works in practice "in due course".

All the changes, other than the introduction of a day one right to make a flexible working request, will have to be taken forward by means of primary legislation. The government has already committed to supporting a Private Member's Bill, the Employment Relations (Flexible Working Bill), which is currently going through Parliament so it may not be too long before the changes come into effect.

Inclusivity and representation

Employers need to be aware of the importance of developing an inclusive culture to enable employees to know that they are being heard, seen and valued in the workplace and are safe to be themselves at work. Among other things, employers should be aware of, and supportive of, neurodiversity, the menopause, gender identity and caring responsibilities. Employees who feel valued will be more productive and engaged.

The Equality Act 2010 contains positive action provisions which enable employers to encourage people who share a protected characteristic to overcome or minimise the identified disadvantages, or participate in activities in which they are under-represented. Offering mentoring or shadowing opportunities, targeted training courses or positive action in recruitment can all be ways of moving towards a more inclusive environment.

Mental health and wellbeing

Since the pandemic there's been an increasing awareness of staff vulnerability. When it comes to managing mental ill health, Acas has produced various pieces of guidance, 'Managing staff experiencing mental ill health, 'Dealing with stress in the workplace' and 'Promoting positive mental health in the workplace' which it's useful to refer to. Employer may also wish to consider instituting wellness action plans (WAPs) for staff. Mind has put together a guide for line managers on WAPs which makes it clear that they are not necessarily just for those experiencing mental health problems, and can be useful for all employees to help identify how an individual's wellbeing can be proactively managed.

Putting in place a wellbeing strategy (which should cover three interconnected areas – physical, mental and financial wellbeing) is a great way of demonstrating that an employer is committed to its staff. An effective strategy should be tailored to individual organisational needs.

Engage in dialogue and demonstrate your values

Consider implementing an ESG strategy. Environmental, Social and Governance (ESG) criteria are an increasingly important way of showing that an employer has values which it believes are important. Many employees will want to feel that their employers are driving changes and have a sustainable business strategy. People want to work for an organisation that shares their values and for many an employer having an ESG strategy in place will be a must-have.

Finally, keep lines of communication open. Engage in a dialogue with employees and invest the time to get things right. The culture and values displayed by the employer will be a very important way of attracting and retaining employees, and these values should be clear and transparent and reflected in day-to-day practice. Employees who feel that their suggestions are being taken on board will more engaged and motivated and are more likely to give their best to an employer who takes the time to listen.

Nicola Ihnatowicz
Partner, Employment and Pensions
+44 (0)20 7423 8565
nihnatowicz@trowers.com

Energy Bill Relief Scheme – have you complied?

The UK is facing an unprecedented energy crisis. With households and businesses struggling to cope with fluctuating energy prices, and with regulation and guidance constantly changing, it is more important than ever for landlords to keep up to date with evolving energy policy – both to ensure they receive any available support and comply with any obligations to their tenants.

Energy Bill Relief Scheme

Established by the Energy Prices Act 2022, the Energy Bill Relief Scheme (EBRS) provides a discount per kilowatt hour for all non-domestic customers on wholesale gas and electricity prices. This applies retrospectively to the period from 1 October 2022 – 31 March 2023.

All licenced suppliers are obliged to apply reductions directly to bills of all eligible non-domestic customers and the Government will compensate suppliers for the discounts they are passing on. To calculate the discount, the wholesale portion of the Unit price is compared to a Government supported price (£211 per megawatt hour (MWh) for electricity and £75 per MWh for gas).

For fixed contracts agreed on or after 1 December 2021, the discount will reflect the difference between the supported price and the wholesale reference price the day the contract was agreed. For variable, deemed and other contracts, the discount will reflect the difference between the supported price and the relevant wholesale price, subject to a maximum discount of £345 per MWh for electricity and £91 per MWh for gas.

Pass-through requirements

The Energy Prices Act 2022 introduced regulations that require intermediaries to pass on the EBRS to final customers. Landlords that benefit from the EBRS and charge residents (either directly or indirectly) for electricity or gas in common areas or heat supplied through a heat network must consider if this benefit should be passed through to final customers.

The Energy Bill Relief Scheme Pass-through Requirement (England and Wales and Scotland) Regulations 2022 require a "just and reasonable" amount of the EBRS benefit to be passed through to end users.

Residents must be notified in writing of specific information including:

- The amount of EBRS benefit that the landlord/ intermediary has received;
- The amount that will be passed through to residents;
- Details of how such pass-through amount has been calculated and the basis on which it has been determined to be "just and reasonable".

This must be provided within 30 days of receipt of a billing update from the intermediary's energy provider, setting out the reduced tariff and application of the discount.

Additional requirements for heat networks

As heat suppliers typically purchase energy required for the supply of heating or hot water through a commercial contract, heat networks will receive the benefit of the EBRS.

Under the Energy Bill Relief Scheme Pass-through Requirement (Heat Suppliers) (England and Wales and Scotland) Regulations 2022 (as amended) heat suppliers are required to:

- Submit an EBRS pass-through notification to the Office for Product Safety and Standards (OPSS) by 6 January 2023. This is separate and additional to the more comprehensive notification requirements under the Heat Network (Metering and Billing) Regulations 2014 (as amended), although the deadline for any new or updated notifications under these Regulations has been extended until 31 March 2023.
- Register with the consumer redress scheme administered by the Energy Ombudsman.

Government guidance highlights that even if a landlord has appointed a separate billing provider or charges residents for heat supply via service charge, the landlord is still considered a "heat supplier" and subject to these obligations.

Upcoming changes

The EBRS was intended to be a temporary measure and the six-month scheme will come to an end on 31 March 2023. The Government has announced its replacement: the Energy Bill Discount Scheme (EBDS), which will run from 1 April 2023 – 31 March 2024.

Whilst the concept is similar to the EBRS, the level of support is significantly reduced. Eligible non-domestic customers will receive a discount only if wholesale prices exceed a specified threshold, subject to a maximum discount. Although at the date of this article, we are awaiting further details of the proposed regulations,

it is likely the pass-through obligations will continue to be applicable for any EBDS benefit.

Next steps for landlords

With a flurry of new energy-related regulation, and increasing scrutiny from regulators and residents alike, don't get left behind:

- Assess your properties – Landlords will need to review their portfolio to consider their approach. How are residents charged for heat, gas and electricity? Are there properties with communal and/or district heating schemes? The calculation of the pass-through amount will depend on the specific details of the property arrangements and this may be a good opportunity to review the efficiency of existing energy arrangements.
- Communications with tenants – Alongside regulatory requirements, landlords must consider how the benefit is communicated to residents. Where it is "just and reasonable" for the Landlord to retain a proportion of the EBRS benefit, careful consideration must be given to how this is conveyed to residents, to minimise the risk of potential challenge.
- Review the regulatory position – The EBRS Notification form should have been submitted on or before 6 January 2023 (for existing heat suppliers). We recommend any existing landlords that are heat suppliers who have not submitted the required notification do as soon as possible. Landlords should also take this opportunity to review compliance with the Heat Network (Metering and Billing) Regulations 2014. Failure to comply with regulatory obligations could lead to enforcement action by the OPSS.

Hannah Giebus
Solicitor, Projects and Construction
+44 (0)20 7423 8417
hgiebus@trowers.com

Diana Lupa
Trainee Solicitor, Projects and Construction
+44 (0)20 7423 8494
dlupa@trowers.com

Affordable housing partnerships – leveraging equity investment to enable delivery

There is a clear need for new sources of capital in the affordable housing sector: demand for affordable housing is consistently high, but many traditional Registered Providers of Social Housing (RPs) are already highly leveraged on the debt finance market.

Over the last 10 years, for-profit RPs have grown to provide some of this much-needed equity investment. In 2013, for-profit RPs owned or ran almost no affordable units; in 2022, that figure was close to 20,000.

This article will consider why RPs are entering into partnerships with for-profits, how RPs can choose an investor partner, and the forms that a partnership can take.

Why traditional RPs are considering partnerships

With inflation high and construction costs escalating, some RPs are struggling to fulfil their existing development obligations, let alone take on new projects to deliver more affordable homes.

This pressure on RPs is unlikely to subside soon. Despite being higher than some in the sector expected, the government's decision to set next year's rent cap below the rate of inflation will only increase pressure on RPs' cash flow. Further, following tragic incidents including the case of Awaab Ishak, government pressure to improve sub-standard and unsafe housing stock is set to intensify, and minimum energy efficiency standards for affordable housing were included Social Housing (Regulation) Bill (though they remain under debate in Parliament).

The additional capital that flows from partnering with an investor or for-profit RP releases equity to help RPs deliver or expand their development and retrofitting programmes. The involvement of a partner also allows for risk-sharing and each party uses their expertise to deliver a better scheme for the RP, the investor and crucially, for residents.

Selecting a partner

Recognising a need for new capital is one thing; identifying the right partner is a much more difficult task. Before an RP is tied to an investor both financially and reputationally, the RP needs to know that it is joining forces with someone who shares their vision and can deliver what they and their residents need.

In January this year, the British Property Federation (BPF) launched a toolkit to help RPs find the right partner. The "Affordable Housing Partnerships" toolkit assesses three aspects of finding a project partner:

1. Strategy

What does the partnership want to achieve?

- Does the for-profit share the RP's ambitions, and do they agree on the geographic spread of the investment?
- How long will the partnership last?
- What return is the investor hoping to achieve, and can the RP secure those whilst also delivering for residents?
- How much risk does each party want to take, and how will risk be apportioned?

2. Terms

- If the for-profit is acquired by another investor, should the RP be able to reconsider the arrangement? Likewise, if the RP merges with another RP, their financial strength, geographic spread and ambitions may change; can the for-profit reconsider their involvement at this point?
- Importantly, how and when does the partnership unwind? Neither party wants to be bound to the other if the arrangement is not producing the intended results.

3. Partner

The final question is focussed on the for-profit RP itself:

- Does the for-profit have a good reputation? If this is a longer term partnership, this question is especially important as the names of the RP and for-profit will be linked for the medium- to long-term.
- The for-profit's regulatory compliance record. The BPF has recently established a working group to create a voluntary code for for-profit RPs to highlight those who are achieving the highest levels of compliance.
- Does the for-profit have a skill-set or experience which complements the RP's?
- Does the for-profit have a strong track record in the sector?

What the partnership will look like

The BPF toolkit sets out options for how an RP and a for-profit can partner to deliver affordable housing.

Most structures involve the for-profit owning the stock: the RP could be granted a management agreement or medium-term lease of the stock. Sometimes these arrangement follow from the RP selling the stock to the for-profit.

Other options include the RP and investor setting up a joint venture (JV) vehicle to own and manage the stock, as seen in the recent tie-up between Hyde and AXA. This is a longer-term commitment and involves the JV itself being registered with the Regulator of Social Housing.

Which approach an RP chooses will depend on a number of factors:

Risk appetite – if the RP is risk-averse, they may want to bring to an end their role in a scheme promptly, so may opt for an outright sale to a for-profit. Alternatively, a more risk-tolerant RP may be open to taking a medium-term lease of affordable units from an RP on an index-linked rent.

Control – some RPs will not want the for-profit to be in control of the affordable housing asset, so would avoid models where the for-profit or JV owns the stock.

Length of commitment – if the RP wants a simple equity release, a sale to a for-profit may be best. At the opposite end of the spectrum, establishing a stand-alone JV would involve both parties committing to each other for the long-term.

Financials – RPs should consider the "cost" of an arrangement, evaluating the total commitment but also the timing of payments and the certainty of future costs. If, for example, an RP rents stock from the for-profit at an index-linked rent over 20 years, periods of high inflation (as we are experiencing currently) can increase the RP's rent costs unexpectedly for the remainder of the lease term.

Consider it early

The key to an effective partnership is to agree early and transparently what the parties are offering, considering both what the parties want from the arrangement and what they will bring to it. It is better to anticipate points of disagreement and plan for them, rather than be caught off-guard.

Joshua Green
Associate, Real Estate
+44 (0)20 7423 8604
jgreen@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