trowers & hamlins

QUARTERLY HOUSING UPDATE

Spring 2024

Contents

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Foreword

It has been a busy start to the new financial year and we have already hosted two important events for the affordable housing sector.

Firstly, we were thrilled to launch our Rethinking Regeneration report (which can be found here: Rethinking regeneration). Regeneration has been at the heart of the firm's DNA, and so we are truly proud to lead the debate in the industry about what makes for successful regeneration and how both the public and private sector can deliver regeneration more effectively.

Secondly, we hosted over 140 delegates at our Affordable Housing summits in our London and Manchester offices bringing together a stellar cast of industry leaders to discuss the challenges facing the sector and what we can expect in an election year. We've summarised the key takeaways from the summits here: Affordable Housing Summit 2024.

Finally it has been a pleasure to welcome Natalie Singh to Trowers' affordable housing team – Natalie brings a wealth of experience to the team, having worked in the sector for a number of years and is one of the affordable housing sector's most highly regarded finance lawyers. Natalie's arrival bolsters the strength of our affordable housing practice as well as bringing additional expertise in the fields of ESG and sustainability linked finance as well as joint venture and property development finance.

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Development acquisitions – avoiding the worst case scenario

The recent high profile demolition of a new development shows the need for strong contractual protections in development agreements.

Readers have probably seen the commentary around the new build development at Darwin Green, Cambridgeshire, but if you are not familiar with it, 88 units that were part of a larger, high profile development and that were either complete or close to it are having to be demolished because of defective foundations.

The issue was caught before the units were sold or occupied, but that's not to say it's not a serious problem. As well as being embarrassing, it will cost an estimated £40 million to deal with. Presumably, there are many furious purchasers with time-limited mortgage offers.

It made the news because it's unusual for something so basic to go wrong, but if it can happen here, it (or something equally serious) could happen again elsewhere. What if these were affordable units, and the issue emerged after contracts were exchanged? Or after completion? What recourse might an RP have if this happened to units it was in contract for?

Negotiating development agreements always involves striking a balance. Developers' and RPs' drivers overlap to an extent, but are quite different, and this plays out in the balance of rights and obligations in the contract.

A housebuilder's standard form of contract will, unsurprisingly, be friendlier to the developer and lighter on obligations, and there's not necessarily anything wrong with an RP signing up to that. There can be good reasons not to heavily negotiate such an agreement. For example, on a repeat, 10/90 turnkey, section 106 deal, risks may be perceived to be low. RPs build and value good relationships with developers. Competition for sites is fierce. But, there can be an incentive not to be seen to be awkward, and RPs should always be considering the risk profile for each transaction. We must be wary that repeat deals do not lead to a gradual erosion of protections, and that each contract is specific to the risks of each site.

If a defect does arise, the first question is who is responsible. Keeping foundations as our example, it could arise from a negligent survey, inadequate design, or poor workmanship, each of which could be the responsibility of separate people. Are the provisions of the development agreement (DA) wide enough that the developer is liable for the actions of its consultants and sub-contractors? Did the developer accept responsibility for the design as well as the delivery of the works?

If not, it is generally very difficult to claim against anyone that you are not in a contractual relationship with, so we need to consider the web of agreements between the parties. If the defect was caused by someone other than the developer, does the RP have a direct contractual relationship with them, for example through collateral warranties? This is not common on a s106 scheme, but it should certainly be sought on land-led deals. If there's no contractual relationship, then you could be in difficulty.

A second question is when the defect emerged. If before handover, then the RP is in a stronger position. It will be able to refuse to take the affected units, as they will not be practical complete (usually expressed in terms of being completed in accordance with the DA and ready for occupation).

All DAs will set out a date by which the units should be ready, but the consequences of them being late will depend on the specific drafting of each one. Liquidated and ascertained damages (LADs), charged as a fixed sum per week, provide a powerful incentive to the developer to be on time, and are often strongly resisted for the same reasons. If there's no LADs, there is just the blunt instrument of termination for breach of contract to consider. Whether this is available will be highly dependent on the facts, and does it really achieve what the RP wants anyway?

If it emerged after handover, is it within the defects liability period, which is usually only twelve months? If it is then again, the developer will usually be responsible, but if outside it, developer's standard form agreements often exclude all liability. A substantial retention provides protection if the developer fails to sort the problems out; but for something like foundations it will almost certainly be insufficient.

If it is the case that its outside the defects liability period, then the RP will have to rely on the latent defects insurance (NHBC or similar). While this helps, it is an insurance policy, and subject to the exclusions and caps in the same way as any other policy, so is probably not a cure-all.

Aside from the legal aspects, a more fundamental question is whether the developer itself is robust enough that the RP is confident it has the capacity to deal with problems and the longevity to be around if future problems emerge. This is a question of financial strength, and a small developer or an SPV present a different risk profile to a large national housebuilder. If the developer becomes insolvent, is it covered by the latent defects policy at all? Our perception is that policy providers are becoming less willing to offer this.

This is necessarily a brief overview of a complicated subject. If protections are not agreed at heads of terms stage, they can be very difficult to negotiate later. As always, keep risk constantly under review, and take advice early.

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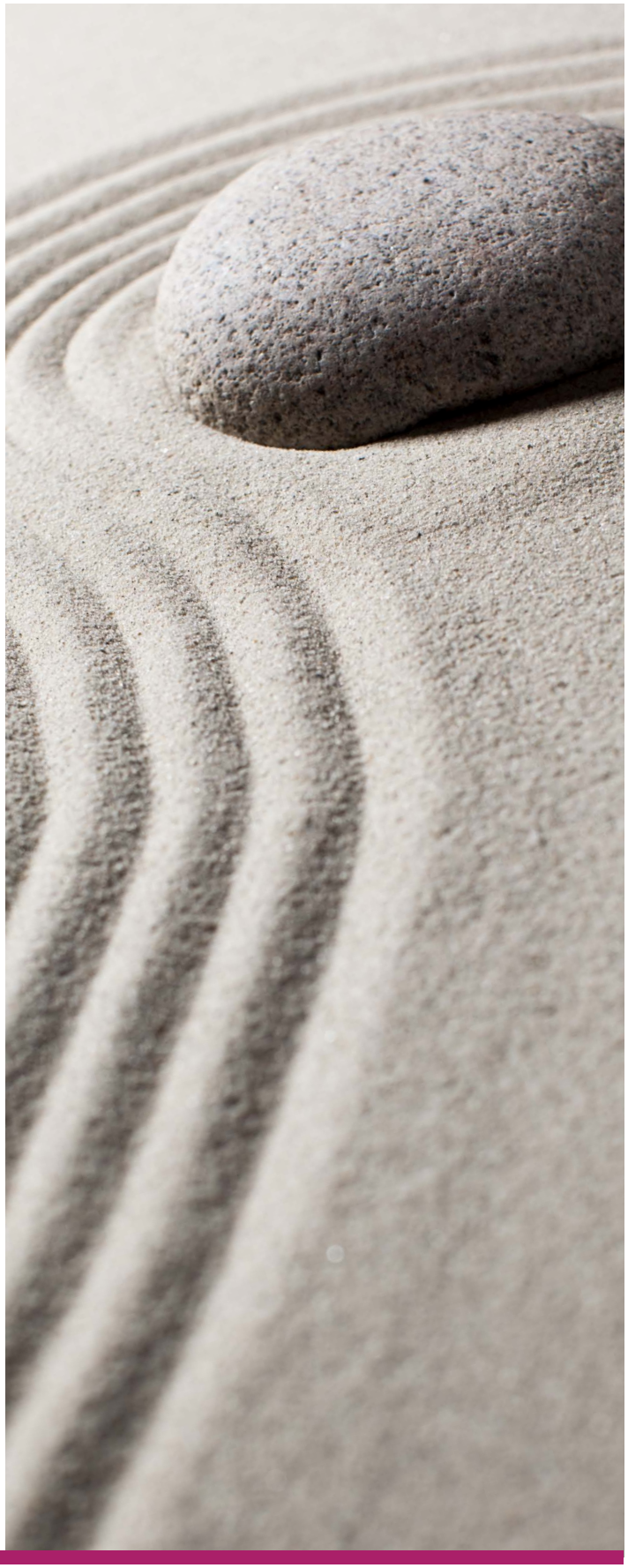

Temporary accommodation – can councils weather the storm?

There is nothing 'perfect' about the storm local housing authorities are facing – and at the eye of that storm is temporary accommodation. The scale of the problem is daunting and, quite apart from the human cost, the financial cost is staggering. This has increased hugely in recent years, and the pressure on council budgets has contributed to headlines about the 'end of local government'.

This clearly cannot be dismissed as General Election year hyperbole. The figures speak for themselves. Everyone involved in council housing needs to engage with the issue and think hard about solutions.

What can we suggest to clients and colleagues? As lawyers, we specialise in rules, legal or otherwise – and the flexibilities within them. But before discussing those rules it is worth stepping back to emphasise, first, councils' strengths. We sometimes focus overly on vulnerabilities. In other words, what 'cards' do councils have in their hands?

- Housing income – it is easy to forget that amid all the gloom that council housing generates income. Most other council services are just that – services with no income to pay for them. Income does not just fund services – it can be leveraged, i.e. support borrowing to fund capital expenditure.
- Access to lenders – councils have straightforward and cost-effective access to the capital markets through the Public Works Loan Board – and (presumably) because housing is income-producing there is no need to add to cost of that borrowing by making the minimum revenue provision to which other council borrowing is subject.
- An unimpeachable 'covenant' – this forbidding term refers to a council's financial power. Council may not feel powerful, but third parties know that they can rely on councils' statute-based strength. They do not have to worry about their local authority borrower becoming insolvent.
- Professional expertise – councils have long corporate memories, based on decades of dealing with all the challenges that changing social and political circumstances throw at them. Decision-making is certainly 'bureaucratic' (because that is what public service dictates), but it is based on the input of a wide range of professional skill and experience.

How then could councils use these general strengths to help deal with the provision of temporary accommodation?

Allocating costs – many councils may assume that temporary accommodation is 'simply' a General Fund issue. That is understandable. The costs of discharging a council's homelessness duties under part 7 of the Housing Act 1996 must indeed be allocated to the General Fund. But the accommodation itself, whether 'ordinary' housing or hostel/move-on accommodation, can be provided under part 2 of the Housing Act 1985 – in which case the cost of doing so is allocated to the Housing Revenue Account. The distinction is between 'bricks and mortar', on the one hand, and homelessness services (assessing applications, determining whether a duty exists, and so on), on the other. The former is a ring-fenced HRA cost (off-set by the rent or fee income), while the latter is a General Fund cost (borne by the council, outside the ring-fence).

Using capital not revenue – the HRA may or may not be under less severe pressure than the General Fund, but both find revenue hard to release. Capital may be less constrained; and the key point – sometimes overlooked – is that the HRA ring fence applies to revenue. The capital account sits apart from the two revenue accounts. If the capital derives from borrowing it is only the borrowing (revenue) costs which must be allocated according to the ring-fence rules. This points to ways of funding additions to the council's own stock, rather than paying third parties to provide expensive and (sometimes) unsatisfactory accommodation. And the strength of a council's 'covenant' means there is potential to access institutional investment at scale, not forgetting the acquisition programmes supported by such investment?

Acquiring homes – or building new ones – councils have been trying hard to increase their stock in recent years and are increasingly familiar with the opportunities and constraints. Finding the right approach depends on a combination of grant rules, s106 requirements, RTB receipt rules, statutory consents, and so on. Many councils have established their own housing companies. Few however have adopted programmes aimed at 'producing' temporary accommodation. It is easy to understand why, but with costs escalating to unsustainable levels the benefit of a joined-up approach – general needs and temporary accommodation together – has obvious attractions.

Maximising cost recovery – there are two issues here. As far as rent is concerned, there is an exclusion from the Rent Standard for temporary social housing, though not for property held in the HRA or for freehold - and certain leasehold - property held in the General Fund. The Rent Standard however only applies to below-market rents – and the use of Local Housing Allowance rates should – in principle - ensure that this is not the case. There are however technical issues to work through: the possible application of the requirement to set 'reasonable'

rents and the way temporary accommodation is defined for Subsidy and Universal Credit purposes. As for other charges, these are most likely to relate to personal support – with most costs of this kind costs met out of the General Fund, not the HRA. We describe the application of the HRA ring fence to welfare and similar costs in our Unofficial HRA Manual.

The spiralling costs of temporary accommodation would not be causing such widespread concern if there were easy solutions; but this analysis demonstrates that there is flexibility in the 'system' and scope to make effective use of both councils' current resources and any additional support the Government provides.

For further information, including a copy of our Unofficial HRA Manual, please contact:

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Single Family Build to Rent – What is it and why is it important?

Build to Rent (BTR) is the umbrella term in the UK market for purpose built, institutionally owned and professionally managed residential property which is rented on the open market (rather than sold).

There are two main types of BTR property:

- 'Multifamily' or 'Build to Rent Apartments', which largely comprises BTR apartments located in urban areas; and
- 'Single Family' or 'Build to Rent Houses' which are BTR houses generally located in suburban areas.

Single Family Housing (SFH) is defined as high quality, 'well located' (i.e. usually in areas with open/green spaces and close to amenities) houses, or, sometimes, low rise flats.

Investment in SFH is growing rapidly, with a recent Savills report outlining that by January 2024, £3.5 billion had been invested in SFH with almost £1.5 billion of that being invested from January to November 2023 alone.

A new industry body for SFH (the UK Single Family Association) was launched on 22 February 2024 and has attracted lots of attention in the sector.

So what is it about SFH in particular that's generating such interest?

'Plugging the gap'

With higher interest rates affecting mortgage affordability and the ongoing cost-of-living crisis, mortgages are becoming an unrealistic option for buyers meaning demand for rental accommodation is rising faster than supply. At the same time, buy-to-let landlords are being hit with increased finance costs and tax disincentives on their properties which are prompting many to sell up as their investments cease to work for them. This in turn causes a reduced supply in the rental market which, together with increasing demand, drives up rents.

SFH is a product which can help to plug this 'rental gap' as institutional landlords are more able to navigate the current financial uncertainties. Additionally, given demand and a projected increase in long-term renters over time, SFH is viewed as a 'safe bet', particularly as more people are giving up on the idea of home ownership and considering other options. SFH is proving particularly popular with younger occupiers under 45 who have above average income but are nonetheless being increasingly priced out of the home ownership market. Instead, they are looking for alternative quality, well managed, long-term options which offer more permanent communities and are suitable for supporting a family without the pressures of saving for a deposit.

Inclusion of SFH in developments presents an opportunity for investors to offer rental products with longer tenures (due to lower tenant turnaround and higher tenant retention), higher rental income and higher rent collection rates. Tenants 'staying put' is also appealing as this reduces the number of void units which minimises associated income loss.

Investors also appear largely unconcerned that non-recoverable arrears will increase as a result of the Renters Reform Bill principally due to their arrears and resident screening processes.

Senior living

SFH isn't just for working-age families. The senior living sector is seeing a rise in solely rented schemes both by pure rental operators such as Birchgrove, and operators who traditionally used for-sale models now offering rental options for up to 20-25% of their stock. The level of take-up evidences that the "home-is-your-castle" generation see the benefits of a more flexible option for their active retirement. This may be because they want a quick move, want to preserve their family homes for their children, or simply want to try these operators' offerings without the fuss of conveyancing or paying SDLT.

ESG

Investors' ESG strategies also contribute to the increasing popularity of SFH. They are largely targeting a minimum EPC of 'B' or higher and SFH has an impressive track record of 72% of homes having an EPC of 'B' or above as opposed to 12% for existing private rental dwellings. The opportunity to include amenity spaces and facilities within SFH developments which are designed to encourage social interaction, health and wellbeing of residents also allows sites to better align with such strategies.

De-risking and diversifying sites

SFH can be delivered alongside homes for sale as it targets a different area of demand. It therefore contributes towards de-risking sites and accelerating housing delivery, meaning housebuilders can deliver to buyers and investors simultaneously. SFH is also less affected by the seasonal variations in private sales so can help to stabilise development income which is a plus for investors and housebuilders alike.

In addition to the benefits sitting alongside private sale units, SFH sits comfortably alongside other tenures including affordable housing.

Mixed-tenure sites which include affordable products not only further align with investor ESG strategies, but also meet demand from a range of household types, income brackets and age groups meaning different tenures co-exist which promotes a strong sense of community and social cohesion. This engenders numerous further benefits including: access to quality houses for various income levels; enhanced employment and educational prospects; reduced stigma associated with particular areas/tenures along with reduced segregation, crime and antisocial behaviour.

Mixed-tenure sites have the additional benefit of allowing residents to move between tenures as their circumstances change while staying within their community. This further strengthens community ties as residents are able to stay in an area for longer.

Onwards and upwards…

Investors' ambitions in the sector appear to be growing with surveys in late 2023 indicating that 80% of investors are seeking to increase their portfolios to 2,500 homes or more within a five-year timeframe. With demand continuing to increase, delivery accelerating and plenty of new investors joining the party, the future of SFH is looking bright.

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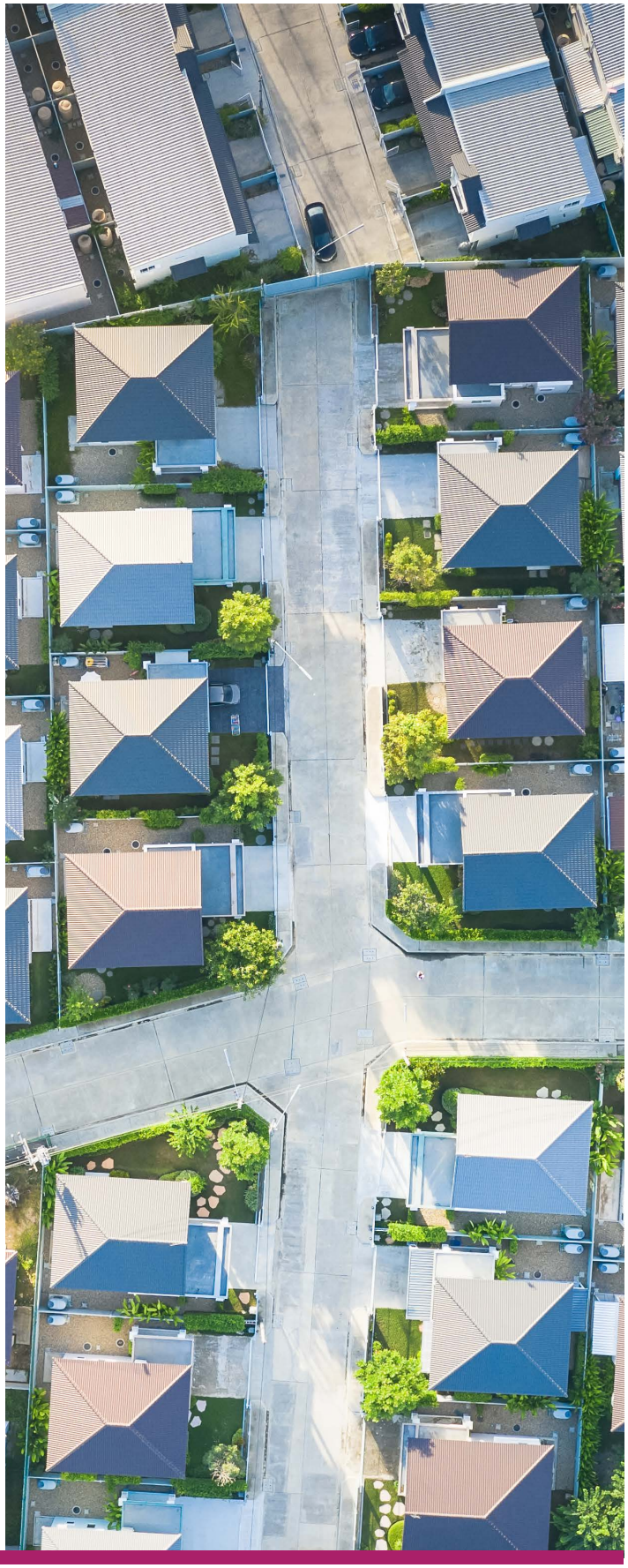

Slot in applications: The problems with overlapping planning permissions

It is common for developers to submit applications to vary planning permissions in response to changes in social, environmental, market and economic factors. In some cases, what a developer wants to build no longer falls within the parameters of the original planning permission. Sometimes the changes required are so significant that they exceed the limits of section 73 applications (often called minor material amendments) and section 96A applications (often called non-material amendments).

Until recently in this kind of scenario a developer may have considered making a "slot-in" application (sometimes also called a drop-in application): that is to say a standalone planning application that overlaps and slots into a phase or part of an existing consented planning scheme with the intent that the new "slot in" permission will be built out alongside the remainder of the original wider planning consent. Typically, a slot in will relate to a distinct phase, and the intention will be to develop the rest of the planning scheme under the original consent.

However, as a result of the Supreme Court judgment in the case of Hillside Parks v Snowdonia National Park Authority [2022] UKSC 30 "slot-in" applications should be treated with extreme caution due to the risk of "slot-in" permissions (if implemented) potentially making it unlawful to carry out further development under pre-existing planning consents.

Following on from the Hillside Judgment, the High Court has recently handed down judgment in the case of R (on the application of Aysen Dennis) v London Borough of Southwark [2024] EWHC 57 (Admin) which highlights why developers and local authorities should continue to approach this issue with caution.

We consider each of the judgments in turn and summarise the implications for those contemplating seeking changes to existing planning schemes:

Hillside

In the case of Hillside a full detailed planning permission was granted in 1967 for the development of 401 dwellings in Snowdonia National Park with a detailed masterplan drawing, showing the location of each dwelling and the layout of the roads for the estate. Between 1996 and 2011 six planning permissions were granted for dwellings departing from the 1967 masterplan, which were built and occupied.

The question for the Supreme Court was whether, in light of these subsequent permissions, the 1967 permission was still valid. In consideration of this question, the Court upheld the Pilkington principle (Pilkington v Secretary of State for the Environment [1973] 1WLR 1527), which held that where development is carried out pursuant to a subsequent planning permission which makes it physically impossible to carry out development pursuant to an earlier permission, then the earlier permission can no longer be relied upon in respect of development that has not yet been carried out. The Hillside decision explored a concept of "severability": the idea that a planning permission could be expressed in such terms so as to allow a developer to build out part of a site under planning permission A (i.e. the original permission), whilst building out other parts under planning permission B (i.e. a slot in permission). This would only be possible if permission A could be interpreted to have granted consent for development that has severable parts so that implementing a different permission on a severable part did not prejudice the original planning permission. Unfortunately, the Supreme Court did not say what the test for "severability" is, and this is therefore something that is subject to uncertainty. For example, in the context of a phased permission, should each phase be construed as a severable part of the original permission?

Dennis v LB Southwark

In the case of R (on the application of Aysen Dennis) v London Borough of Southwark [2024] EWHC 57, the London Borough of Southwark (LBS) granted an outline planning permission (the OPP) in 2015 for part of the Aylesbury Estate to be delivered in three phases. Part of the first phase (phase 2A) of the OPP was built out by Notting Hill Genesis (NHG) between 2020 and 2023.

NHG then submitted a submitted in 2022 a 'slot-in' application for detailed planning permission for phase 2B to deliver a greater number of new homes, in line with changes to the development plan policies (the Slot-In Application). The officer report in respect of the Slot-In Application considered that, if granted and built out, would not prevent the remaining phases of the OPP being built out as the situation was different to Hillside in that the OPP was a phased permission in outline.

Following a resolution to grant the Slot-in Application, NHG submitted an application under section 96A of the Town and Country Planning Act 1990 to make a non-material amendment to vary the description of the OPP to state that it was a "…severable phased permission…". The section 96A application was subsequently granted.

The claimant challenged LBS' approval and argued that this amendment was in fact "material" (falling outside of the auspices of section 96A) in that "the purpose and effect of the amendment is to change the bundle of rights granted by the OPP".

It was common ground between the parties that if the OPP was not already "severable", then the amendment was material and therefore the grant of the amendment under section 96A was unlawful. The case therefore turned on whether a planning permission that was expressed as a phased permission could be interpreted as being a planning permission whereby each phase was a severable part of the permission. The Court held that "the mere fact that development is to be implemented in phases (following approval of reserved matters) does not alter the effect of the Pilkington principle where an inability to satisfy the physical impossibility test cannot be circumvented. In this regard there is no material difference as a matter of principle between detailed and outline permissions."

The High Court considered the OPP in some detail, noting parts of the planning statement, design and access statement, design code strategy and parameter plans as well as conditions. The Court noted the application documents which appeared to show the intention to deliver comprehensive regeneration of the Estate. The Court considered that the phasing plan, and sequence of delivery of the phases set out in the design and access statement were inconsistent with a 'severable planning permission. The Court held, looking at the OPP and the submissions as a whole, that there was "no contra-indication, let alone a clear indication, that the OPP was severable".

The court ultimately ruled in favour of the claimant and concluded that the OPP was not severable prior to the grant of the S96A consent, and as such the amendment was a material amendment. The grant of the s96A consent was therefore unlawful and quashed.

Impact

The key lessons from both Hillside and Dennis are as follows:

- Avoid submitting slot-in applications where an existing consent is deemed not fit for purpose for a particular phase, unless you are content that the remainder of the existing consent no longer needs to be relied upon or you have received legal advice that the existing consent is 'severable' and that the slot-in will not make it physically impossible to carry out later phases of the existing consent;
- if you are looking to acquire a site where the planning consent you intend to rely on may have been affected by slot-in permissions, obtain a legal opinion before proceeding;
- when buying land that forms part of a wider planning scheme that has not been fully built out, make sure you obtain appropriate contractual protections from the owners of the wider planning scheme that they will not implement any slot-in permissions that could prejudice the planning consent that you intend to rely on;
- when selling land that forms part of a wider planning scheme that has not been fully built out, if you are retaining land for future development make sure you obtain appropriate contractual protections from buyers that they will not implement any slot-in permissions that could prejudice the planning consent that you intend to rely on in respect of the retained land; and
- when submitting new planning applications, carefully consider how the application documents, description of development and planning conditions can be drafted so as to make it clear that the resulting permission will be a permission of severable parts, i.e. individual acts of development and ensure that planning policies are assessed against each act and justified in planning terms and undertake a legal review before submitting the application. However, even with careful drafting it remains unclear in law what is required to create "severable parts" and therefore caution is advised.

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The importance of robust cyber and data governance in the housing sector

Cyber security is an issue of increasing importance in the housing sector and last year it overtook health and safety as the primary strategic concern flagged by housing organisations, as identified in Inside Housing's Risk Register Survey 2024. Fundamental to cyber security is effective data management and failures to achieve this by housing organisations have contributed to some of the more recent failings in the housing sector.

The regulators also have an increased focus on data management and security within the sector. The Information Commissioner's Office (ICO) has published guidance on the lawful use of residents' personal data whilst the Department for Levelling Up, Housing and Communities (DLUHC) and the Regulator of Social Housing (RSH) have launched consultations focussing on the rights of residents and the provision of tailored and appropriate housing and services to residents. By doing so, there is a demand for a greater understanding of residents and their needs, achieved through the processing and sharing of residents' data.

So, how can the sector ensure that it protects residents and their data in the provision of housing and services?

The ICO's guidance – using data protection law to safeguard residents

With its increased focus on data management in the sector, the ICO has published guidance to remind housing organisations of their obligations under data protection law and highlighting the importance of safeguarding residents and their data. In its guidance, the ICO warns that a failure to understand and adhere to data protection law can put residents at risk of physical and mental harm. An increasing number of residents are complaining to the ICO about the poor data practises of their housing organisation, including the compromise of personal data and a failure to carry out necessary services.

The ICO has identified the following common issues and concerns in the housing sector:

- **Inappropriate disclosures of personal data**, which must only be disclosed when it is necessary and appropriate. When deciding whether to make a disclosure, housing organisations must consider whether there is a lawful basis for sharing the personal data.
- **A lack of understanding of data protection law** to the detriment of tenants who need housing support. The lack of understanding involves not only the improper disclosure of personal data but also the refusal of residents' requests and a failure to provide them with the services and support on the incorrect assumption that to do so would breach data protection law.
- **A failure to keep accurate records** of residents' data which causes issues for both housing organisations (including the payment of compensation to residents and loss of residents' trust and confidence) and residents (who do not receive the appropriate level of service).

To ensure the proper and lawful processing and sharing of residents' personal data, housing organisations should (i) prioritise staff training on an ongoing basis (ii) practice good records management and (iii) be open and honest with residents and inform them of how their personal data is collected and used.

The Regulators' requirements for data governance

The need for good data governance in the sector doesn't stop with the ICO. DLUHC has launched a consultation which focusses on housing organisations providing residents with key information relating to their rights, the provision of accommodation, services and facilities, the relevant regulatory requirements and how they can complain.

Alongside this, the RSH has issued four draft Consumer Standards setting out the outcomes which all registered providers will be expected to achieve. They are (i) The Safety and Quality Standard, (ii) The Transparency, Influence and Accountability Standard, (iii) The Neighbourhood and Community Standard and (iv) The Tenancy Standard. The objectives of the Consumer Standards are to ensure that residents can be involved with the management of social housing and to support well-managed, safe and appropriate quality social housing.

Whilst, on the one hand, the ICO is focussed on the proper and lawful processing of personal data, DLUHC and the RSH are focussed on housing organisations knowing their residents and understanding their needs; to achieve this personal data is essential. Whilst there appears to be an immediate tension between the two approaches, it is clear that increasing data quality and data management is high on the regulators' agendas. Housing organisations will need to take stock and navigate how to collect and use residents' personal data to provide services and keep residents safe, and adhere to the new Consumer Standards, all whilst complying with data protection law. Data protection law should not be a barrier to sensible, careful and lawful data processing.

CyberSecure 360 – how housing organisations can strengthen their cyber and data defences

Recent years have seen a number of cyberattacks on housing organisations which have debilitated their operations and had a significant impact on the services available to residents. Consequently, those housing organisations affected have been implementing measures to strengthen their cyber and data defences. It is no surprise that cyber resilience has been identified as the primary strategic concern for the sector.

Cyber risk management must go hand in hand with good data governance and taking a pre-emptive look at your organisation's cyber risks now will leave you better placed to deal with the fallout from a cyber-attack. CyberSecure 360 is our service designed to provide your organisation with expert guidance and comprehensive services, aimed at strengthening your business against ever-evolving cyber risk. Whether you are looking to test your cyber-readiness, or seeking assistance with mitigating the impact of a breach, our unique cyber risk management services will help you embark on your cyber journey with confidence.

If you would like to discuss how to implement robust cyber defences, please contact us at cyber360@trowers.com.

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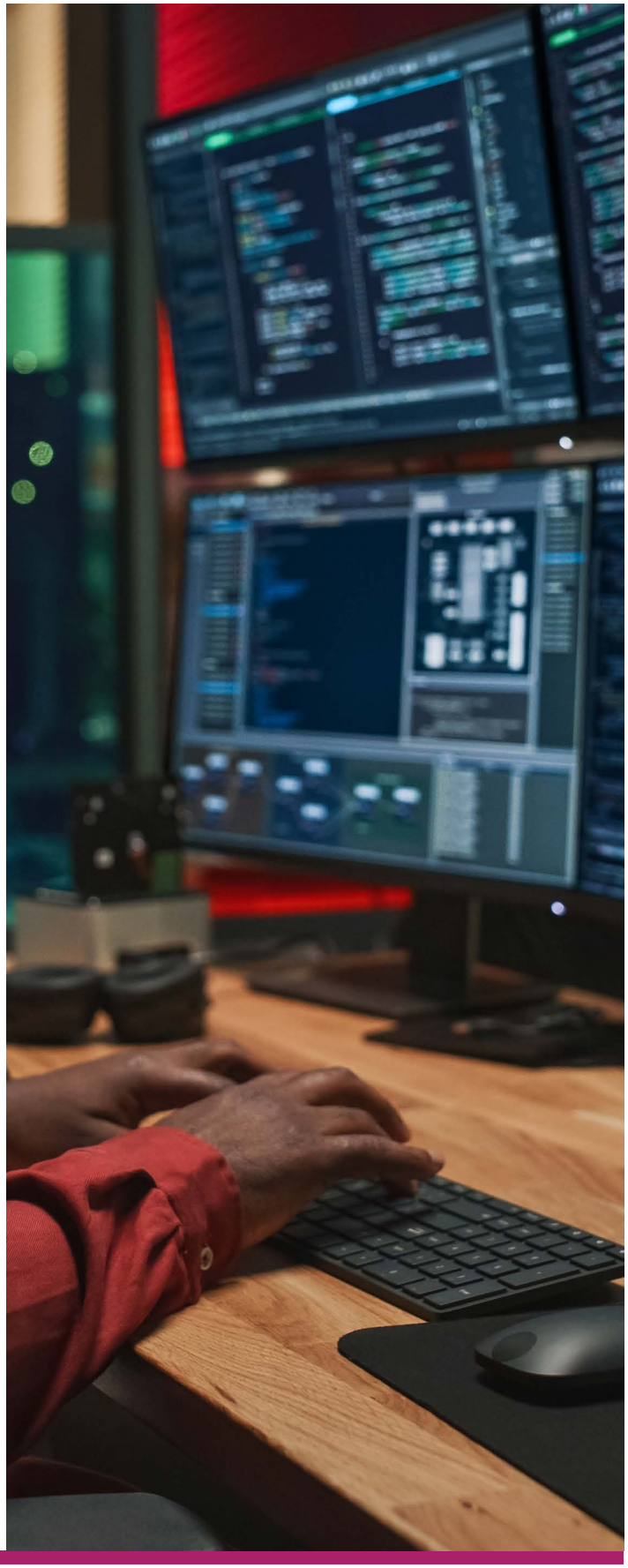

Why are developers setting up their own for-profit RPs?

Of the 69 for-profit RPs, nearly a third are sponsored by property developers. What has attracted these businesses to move into the operational side of the social housing sector, and why might other developers consider doing the same?

There are a number of factors at play. Primarily, developers are looking to secure best value from the properties they are building, both in capital terms in relation to initial sales and also being able to benefit from the relatively stable long-term rental income affordable housing is capable of generating. For a number of years, developers in certain geographic locations have reported difficulties in finding RPs willing to purchase their s106 mandated properties. In a market where 'traditional' not-for-profit RPs are rightly concerned with existing stock investment requirements, some developers have seen the potential for this issue to become more widespread. Where deals are there to be done, there has also been a sense that the pricing does not reflect true value for the developer. Both factors have encouraged developers to consider retaining the affordable housing that they develop.

In addition, a number of developers have been attracted by the ability to access Homes England and Greater London Authority grant funding directly. This diversifies the funding types and sources available to them and enables them to develop more affordable housing and to generally strengthen their relationship with these key stakeholders as well as arguably de-risking larger sites .

Developers have also been interested in establishing their own RPs for non-financial reasons; it can allow for better control over placemaking on large schemes or regeneration sites. It can also allow land acquisitions to be structured in more creative ways when it is known that the site will remain within group ownership. In such situations where the affordable and market properties are owned within the same group, it can also allow for 'joined up' property / housing and site management. Where a group has its own housing / property management platform, a number of developer sponsored RPs have entered into housing management agreements with those platforms. Alternatively, they have typically sought to partner with a 'traditional' not-for-profit RP for the provision of housing management services.

There are of course other benefits for developers. It gives them wider optionality for their pipeline of stock, and additional ways of reacting to the market. For example, in an area where market sales are slower than anticipated it may be possible for such properties to be acquired by the for-profit RP to be converted to shared ownership or intermediate rent tenures.

In an increasingly challenging regulatory and economic climate, developers are rightly exploring all their options in an effort to deliver continued growth.

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Right up a ‘Royal’ Street?

The City of London can trace its origins back 1000s of years, and part of that unique history are a series of Charter Streets.

What are they?

Charter Streets (the Streets) are a network of streets, alleys and passages within the City of London that existed prior to 1667. For many years there was a long-standing dispute between the City of London Corporation (the Corporation) and the Crown Estate (the Crown), as to the ownership of these Streets. This dispute ended in 2009, when the Crown sold its interest in the Streets to the Corporation.

Development concerns to consider

But what does this mean for anyone seeking to develop in the City of London.

If any owner of land adjacent to a Street would like to carry out development that will encroach on the Street (at ground, airspace or subsoil level), they will need to negotiate with the Corporation to acquire an interest in that area. The interest which is acquired will depend on the nature of encroachment but may be a lease or transfer (if for example the building footprint encroaches on the Street) or a licence or easement (if for example a cleaning cradle over sails the Street).

Where an existing development encroaches on to a Street and the necessary interest has not been acquired, it may be possible to retrospectively approach the Corporation, consider indemnity insurance, apply for adverse possession (if applicable). Alternatively, owners may wish to ‘let sleeping dogs lie’.

As ownership of the Streets lies with the Corporation, the Streets are not subject to ad medium filum – a legal rebuttable presumption that the boundary of a disputed highway extends to the medium line of the road. Where the ad medium filum rules apply, owners of land on each side of the highway may effectively each own half of the highway unless evidence is provided to the contrary.

How to identify them

There is no comprehensive list of the Streets, but the Crown lodged cautions against first registration against each Street which, following the 2009 sale were transferred to the Corporation.

A caution against first registration means that if any party tries to register title to this Street (or part of it) the cautioner gets notified. A cautionary title register is produced by the Land Registry, and this will identify the Street as a Charter Street. This cautionary title number will also be flagged on an Index Map Search and so can be identified when undertaking due diligence.

Care must be taken to examine the extent of the title held by the Corporation, as the Streets may have evolved overtime, resulting in only slivers of the street as it stands today being considered a Charter Street. It may also be established that a street with a registered caution against first registration was not a part of the original street that was deemed a Charter Street.

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Shaken but not stirred – are the bond markets attractive again

Following a near doubling of the cost of long-term funding, capital markets activity in 2023 was a rare occurrence. As a result, for registered providers (RPs) 2023 saw much more of a shift towards shorter-term bank finance and an increase in uncommitted products with only glimpses of capital markets deals.

Positively, 2024 has already seen a stronger opening of the capital markets. The headline in the Financial Times as I write this is 'UK Corporate Bonds Revival' with a piece on pension funds 'piling into UK corporate bonds'. The Banking & Finance team at Trowers & Hamlins have advised on the £400 million issue by Sovereign Network Group (January 2024) and the establishment of Peabody Trust's £1 billon Medium Term Note Programme (February 2024) and there are a number of RPs actively preparing for issuance whether that be for a bond, a sustainability bond or an MTN programme. However, despite seeing these green shoots of recovery, the markets are still more volatile than before the 2022 mini budget and this is something many are conscious of. Timing is going to be critical.

To help those who are considering an issuance in this calendar year (or beyond) we have summarised the different routes for issuing notes / bonds; what sustainable bonds are; and some tips for preparing for successful issuance.

Which route?

Reference to 'capital markets' encompasses a wide range of possible issuance options. All of the options are methods of raising finance by issuing debt to investors on the capital markets and involve the promise to repay the holder of Bonds/Notes on a specified maturity date. Determining the right route is a key initial question to answer. One way (but not the only way) to determine the right option for issuance is to look at the size of issuance required. If an issuer is looking to raise less than £100 million then a private placement or accessing the capital markets via an aggregator may be the appropriate route (albeit it is possible to raise more than £100 million via either an aggregator or through private placements). However, if an issuer is looking to raise upwards of £150 million then a public bond may be more appropriate (at this size, the costs of issue, which can be higher for a public bond than a private placement, become more justifiable). For a Medium Term Note (MTN) programme (a platform for multiple issues of Notes), these are generally set up for £1 billion and above and, whilst the set up costs are higher again than for a 'standard' bond, an MTN programme provides for speed and flexibility to raise funding when needed.

Along with issuance size, any decision on route to market will also need to take into account matters such as set up / issuance costs, flexibility to raise funding quickly, covenant package and relationship requirements (is it preferred for this to be bi-lateral).

When looking at the difference between an MTN programme and a standard bond, under an MTN programme, issuers can issue multiple series of Notes with a range of coupons (potentially fixed and floating rate) and tenures at different times. With a standard bond issuance, further funding can be raised under a standard bond at future dates (through the sale of retained bonds or tapping the bond); but the maturity date and coupon of the bonds would be the same as for the original issue.

Sustainability, green and social bonds

There are many types of 'sustainable' bonds – sustainability-linked bonds, green bonds, social bonds and sustainability bonds. Amongst RP bond issuances, the majority in recent years have been sustainable bonds.

Green bonds are bond issued in connection with projects that have an environmental benefit, social bonds for activities to deliver social outcomes / benefits and sustainability bonds combine both types of activity. The proceeds of such bonds are applied to finance or refinance new and / or existing eligible green and / or social projects.

Sustainability-linked bonds don't have a use of proceeds restriction but, they are instead designed to incentivise an issuer in terms of setting objectives through KPIs and sustainability performance targets which, if met will have a financial incentive.

Green bond principles, social bond principles and sustainability bond guidelines have been developed by the International Capital Markets Association and, whilst voluntary, they outline best practices when issuing sustainability bonds aiming to promote transparency and disclosure. The principles also contain high level categories for eligible green / social projects

How to best prepare

One of the most important factors for issuance in the current market will be timing and being ready to take advantage of more favourable market conditions quickly will be critical. Some of the ways we advise RP issuers to prepare are by: getting all documentation ready and having all required board / delegation approvals in place. It is worth thinking about the key aspects of appropriate disclosure, particularly the risk factors and the interplay between these and the information contained in investor presentations. For a debut issuance, consider having ratings for the issuer in place (this can be done well in advance of appointing advisers) and determining the issuing entity (and incorporating the vehicle if this is required) at an early stage. It is possible to set up MTN programmes in advance of a first issuance.

The time taken to secure properties can be lengthy so having properties charged and ready to allocate will also assist with being able to be nimble. Consider carrying out a review of your available stock to allow a more strategic selection of properties most easy to charge.

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New building safety regime comes into force: what you need to know

New building regulations came into force on 6 April 2024, implementing the requirements of the Building Safety Act 2022. Here's what you need to know about the new regulatory regime.

In August 2023, the Government published secondary legislation importing the new regulatory regime for building and design work anticipated by the Building Safety Act. A six-month transitional period was introduced to allow the industry to catch-up with the changes and to exempt some existing projects from the scope of the new regime.

The new regulatory regime came fully into force 6 April 2024. Therefore, social landlords undertaking new building or design works need to operate under the new rules, with strict penalties for those who don't comply.

Building Safety Regulator

The Act establishes a new national Building Safety Regulator, located within the Health and Safety Executive, with responsibility for all buildings in England. The Regulator has a broad range of powers to regulate the built environment and will also prosecute breaches of the new regime.

As from 6 April 2024, the Regulator becomes the building control authority for all new and existing "Higher-Risk Buildings" (HRBs). These are defined as residential buildings that are at least 18 metres or seven storeys tall (measured from ground level) and containing at least two residential units. Care homes and hospitals meeting these height requirements will be HRBs for their design and construction phase.

Dutyholders and Competency requirements

The Building Regulations etc. (Amendment) (England) Regulations 2023 establish new Dutyholder roles in respect of most building work and design work covered by the Building Regulations 2010 and commencing after 1 October 2023.

The Dutyholders roles replicate the existing CDM Regulations roles of Client, Principal Designer, Principal Contractor, Designer and Contractor, though these roles are additional to the CDM obligations. Social landlord clients undertaking building work and design work must appoint a Principal Contractor and Principal Designer for the work, ensure that these and other appointees are "competent", as defined in the new legislation.

Gateways regime for Higher-Risk Buildings

Social landlords commissioning new HRBs ("HRB Work") or undertaking major works to existing buildings ("Work to Existing HRBs") will be required to comply with the three-stage Gateways regime set out in the Building (Higher-Risk Buildings Procedures) (England) Regulations 2023.

Gateway 1, which has been in force since August 2021, requires the submission of fire safety information as part of planning approval applications for HRB projects.

Gateway 2 requires the client (or someone on its behalf) to submit a Building Control Approval Application to the Regulator, setting out detailed designs and method statements for the project and details of key appointees. The Regulator has 12 weeks to determine any HRB Work application and 8 weeks for Work to Existing HRB applications, and may approve applications unconditionally or subject the completion of specified requirements. Relevant projects must not commence until approval has been granted, and any projects commencing without approval will be an offence under the Building Act.

During the construction phase, the client and principal dutyholders must establish a digital facility for the storage of Golden Thread Information; a Mandatory Occurrence Reporting System for the reporting of safety occurrences on-site; and a Change Control log. Key changes to the project classified as "Notifiable Changes" must be notified to the Regulator before the change can be undertaken. Significant changes classified as "Major Changes" must be approved by the Regulator before they can be undertaken.

Following completion of the works, the client or someone on its behalf must submit a Gateway 3 application, now called a "Completion Certificate Application", setting out final as-built drawings and completed versions of the documents submitted at Gateway 2, together with statements from the client and principal dutyholders that the project is compliant with the Building Regulations. The Regulator has 8 weeks to determine Completion Certificate Applications, which again may be approved unconditionally or subject to fulfilling specified requirements.

In-occupation obligations for HRBs

Following the issue of a Completion Certificate, the owner of the common parts of the building (the "Accountable Person") or the exterior of the building ("Principal Accountable Person") will become legally responsible for managing safety risks in that building for its entire occupation period.

For newly built HRBs, the Accountable Person must register the building with the Regulator before the building can be legally occupied. Occupation of an unregistered building will be an offence under the Building Safety Act, except where partial occupation was approved as part of the Gateway 3 application.

Existing HRBs were required to be registered with the Regulator by 1 October 2023. The Regulator has announced plans to "call in" all existing HRBs to be registered over the next 5 years.

What to do next

The new regulatory regime will require social landlords to rethink the procurement, planning and management of most building and design work undertaken in respect of their properties. Non-compliance with the rules will now be an offence, and individuals within organisations may also be held liable for breaches of the rules.

Given the high stakes, social landlords should familiarise themselves with their new obligations and ensure that the relevant requirements are being met.

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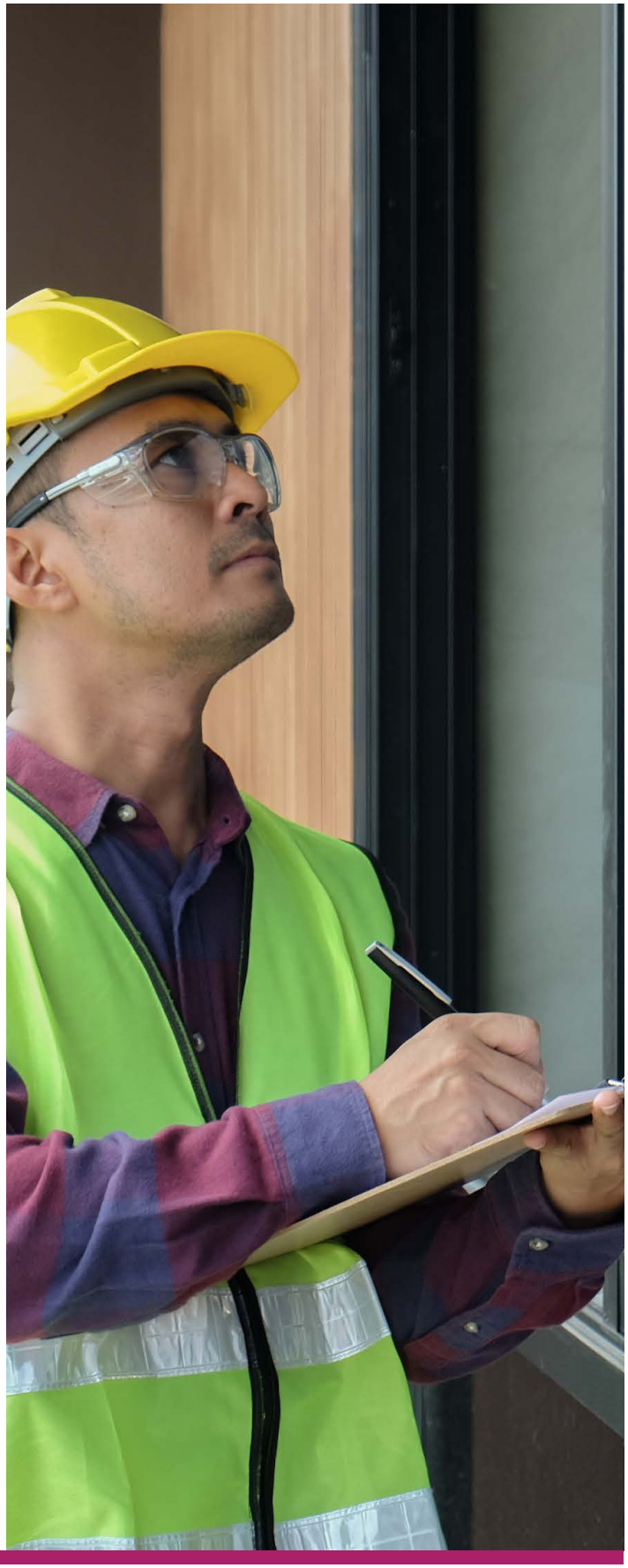

Heat network regulation – What it means for social landlords

In October 2023, the Energy Act 2023 became law, bringing in the most extensive reform of the energy market in the past decade. Amongst other measures, the Energy Act appoints Ofgem as the regulator of heat networks and introduces regulation into the heat sector. Here's what social landlords need to know.

Heat networks supply heat directly to consumers across a network of underground pipes carrying hot water. They can provide heat to a large area and can make use of inaccessible large-scale renewable and recovered heat sources, such as large rivers, geothermal and industrial heat. For social housing properties without the space required for individual air source heat pumps (ie flats), heat networks can provide an efficient solution that works within limited space constraints.

Decarbonising the heat supply to social housing is an essential step in meeting the net zero targets for the sector and increasing connections to heat networks play an important role in the Government's net zero strategy. Government funding such as the Social Housing Decarbonisation Fund is available for landlords who are looking to fund connections to low carbon heat networks.

The heat sector has been unregulated and customers connected to heat networks traditionally rely on the protections provided in landlord and tenant legislation or on the voluntary standards imposed on heat suppliers set out in the Heat Trust. Following the Energy Act, the sector will now be regulated. The Government and Ofgem ran a consultation last year on the approach to heat network regulation and consumer protection.

Here are the key takeaways for social landlords following the Consultation:

- **Scope of regime:** Two activities will fall within the scope of regulation: (i) operation of relevant heat networks; and (ii) the supply of heating, cooling or hot water to consumers through a relevant heat network. Landlords will need to review whether they are carrying out one or both those activities.
- **Fair pricing:** The consultation seeks views on the approach to pricing. Key outcomes are intended to ensure that pricing is not disproportionate, that it is transparent and that consumers do not take on a high level of corporate risk. It remains to be seen whether landlords will be required to provide information on a public register on the heat pricing used at their networks.
- **Quality of service:** Ofgem will set Guaranteed Standards for the performance of heat networks. There is also likely to be a compensation regime for failure to meet Guaranteed Standards. We expect that Guaranteed Standards and relevant service level compensation will be aligned with the current Heat Trust standards as a starting point. Landlords who have schemes that do not currently align with the Heat Trust standards will need to consider how to manage future compliance with Ofgem's Guaranteed Standards and how compensation payments will be funded.
- **Transparency:** The consultation has a focus on information that needs to be provided to the consumer (pre purchase/sale) and during occupation/ownership and expects a more standardised approach to metering and billing, building on the existing Heat Network Metering and Billing Regulations. Ofgem wants a regime that provides consumers with clarity on the terms of their supply and the quality of service they can expect. This is likely to require certain information to be included either in separate heat supply agreements or as part of lease or tenancy agreements.
- **Customer vulnerability:** The consultation proposes to identify vulnerable customers and be clear on the protections offered (e.g. all heat networks to have a Priority Services Register and to promote it where appropriate). This concept is already covered by Heat Trust rules and most landlords already have additional protections in place for vulnerable customers.
- **Landlord and tenant considerations:** Many existing landlord-run/operated schemes will need to consider the interface with landlord and tenant legislation – especially the need to consult for long-term works/services arrangement (e.g. operation/maintenance of heat networks). Leases/tenancy agreements will also need to be reviewed to consider how they may address the new requirements.

The consultation closed on 27 October 2023 and the first tranche of consumer protection rules that govern heat networks is expected to be introduced via secondary legislation in 2025. The Government also separately consulted on the approach to Heat Network Zoning to expand area-wide heat networks which closed on 26 February 2024.

How can social landlords get ready for regulation?

Existing landlord-run arrangements are the most likely to be affected by the new regulations. Pending the publication of the new regulations, here's what social landlords can do to ready themselves for the new regime:

- Review existing communal/district heat networks within your portfolios and consider whether you are a heat supplier or heat operator (or both).
- Review how operation and supply of heat is currently managed on your schemes (including any contractual arrangements with operation and maintenance contractors or metering and billing providers) and how this might need to change in a regulated landscape.
- Consider whether existing leases/tenancy agreements are appropriate or whether separate/updated heat supply agreements are required.
- Consider future customer communication strategy with tenants/leaseholders (eg notifying price changes and changes in approach to operation/service provision).

Ofgem also recommends that landlords should be following existing good practice in the sector such as the Heat Trust rules in order to prepare. With regulation expected next year, Landlords will need to be ready for the new regime.

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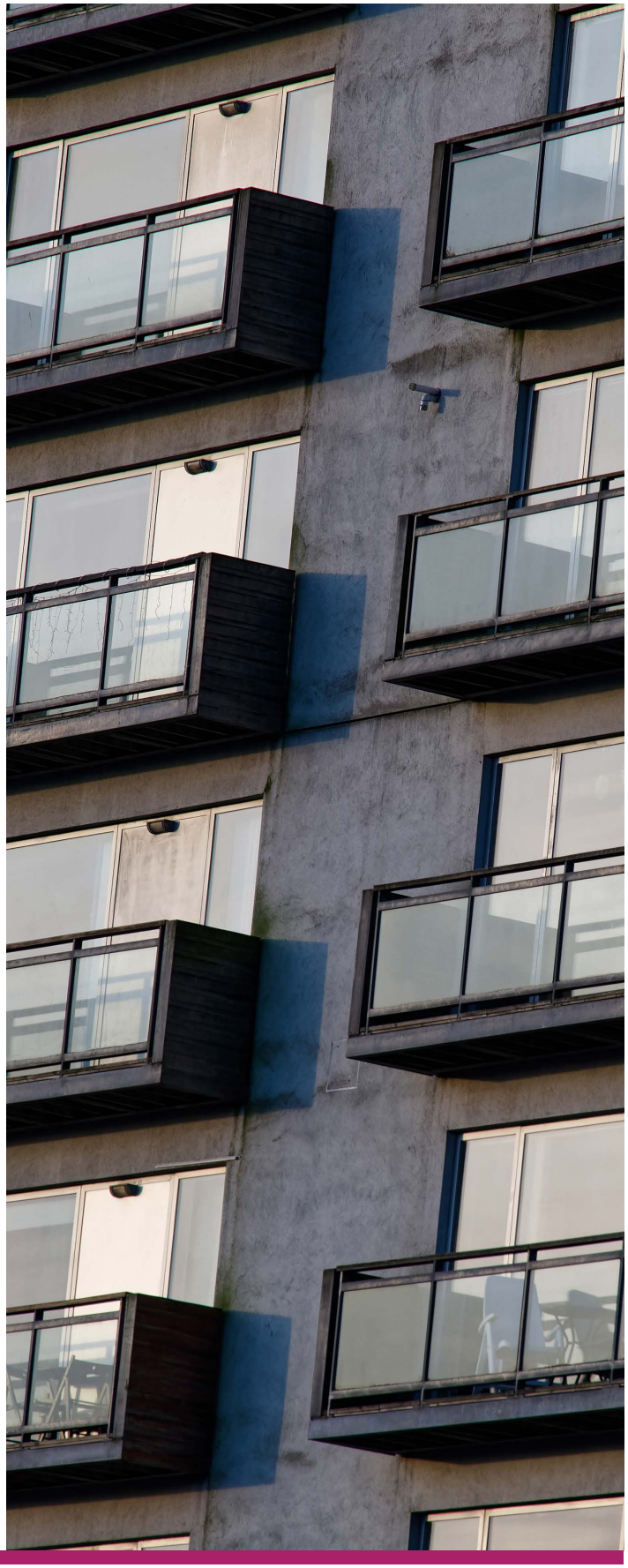

Practical completion and the effects of the new higher risk building regime

Practical completion is an elastic concept generally understood as marking the point at which the works under a building contract are complete, save for minor defects, and the client can take possession or occupation of the building.

It is an important landmark during the lifecycle of a construction project as practical completion triggers, amongst other things, the start of the defects liability and maintenance periods, final payment to the contractor and payment of the retention. This is also the stage when the employer becomes responsible for the insurance and general maintenance of the building.

Interpretation of practical completion

Despite its significance and implications, practical completion is not normally a term which is defined in standard form building contracts and there are no precise factors establishing exactly when this milestone is achieved in all construction projects. As such, it is often at the discretion of the employer's agent/contract administrator or architect to certify practical completion. As the Court of Appeal indicated in the case of Mears v Costplan Services (South East) Ltd [2019] EWCA Civ 502, practical completion may be "easier to recognise than define" and courts may adopt a more flexible and pragmatic approach where the notion is not defined.

The inherent flexibility in the concept of practical completion serves a purpose in catering for different clients and different types of projects which may have varying standards in terms of what practical completion should entail. A commercial developer in a busy development market is likely to be more lenient in its approach to accepting practical completion, and a contractor will be keen for practical completion to be certified as soon as possible to pass responsibility over to the developer. In these circumstances, disagreements over what practical completion constitutes may be less likely. On the other hand, in an agreement for lease, a tenant of a commercial unit, for instance, who is not yet prepared to commence fit-out works, open for trading or start paying rent will be more meticulous in its approach. Similarly, a Registered Provider who is to subsequently rent out its properties to housing association tenants and who may also be under an obligation to comply with provisions relating to practical completion in its funding agreement, is likely to adopt a stricter approach in ensuring that all requirements are met before practical completion is certified.

It is in situations where parties' interests do not align or where parties are trying to avoid the consequences of achieving this milestone that the lack of a strict test or specific procedures to determine practical completion can give rise to disputes as to whether it has occurred. This is particularly the case where the building contract is silent on this point.

Parties should always consider amending standard form building contracts to define practical completion.

It is not only building contracts that refer to practical completion: it is often a key event under a development agreement or an agreement for lease.

For Registered Providers, in particular, practical completion under these documents will usually mean, as a condition precedent, compliance with a very detailed list of handover requirements.

The definitions of practical completion in the building contract and the development documents may not match, and it is common to see practical completion achieved under the building contract, where the definition may be looser or non-existent, and not under the development agreement, where the definition is very lengthy and specific.

This may lead to disputes, as the developer will be caught between one test for practical completion under the building contract, which will trigger financial consequences such as the release of part of the retention, and another, more onerous test for practical completion under the development agreement, which will trigger the completion of the development transaction and the Registered Provider taking possession.

Care should always be taken to differentiate between the practical completion requirements of the particular documents in a development project.

Ideally, there should be one, consistent standard for establishing practical completion across the development and construction documents, but where this is not the case it is important to establish what the different tests for practical completion might be, the different obligations that will be imposed on the parties and the consequences under each separate contract.

Building Safety Act implications for practical completion

Another layer of complexity is added to the process of certifying practical completion by the "gateway" system of building control for higher-risk buildings (that is, buildings with at least two residential units which are at least 18 metres in height or have at least seven storeys) introduced by the Building Safety Act 2022.

Under the gateway regime, higher-risk buildings must be approved by the Health and Safety Executive, as Building Safety Regulator, at three stages of the project, known as gateways: firstly, at the planning application stage (gateway one), secondly, before the commencement of construction works (gateway two) and finally, before occupation of the building (gateway three).

The employer under the building contract is now required to obtain a construction completion certificate from the Building Safety Regulator before the building can be occupied. The Regulator has an eight week period within which to determine a valid application.

Gateway three will need to be factored in to building contacts and development documents, and how they define practical completion, and we suggest that parties should take care to define practical completion and also to set out how gateway three will affect practical completion. It may be appropriate, for example, to specify that practical completion should not be granted until the completion certificate has been issued.

Practical completion is already fertile source of disputes and the Building Safety Act has introduced a new set of issues for litigation. Careful consideration of the issues and the drafting will ensure that your contract does not set a new legal precedent.

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Leasehold Reform Bill on retirement housing

Most people in the sector are aware of the Leasehold and Freehold Reform bill which is currently with Parliament. Much analysis has been done of the benefits (or otherwise, depending on your view) for leaseholders, and the consequences for landlords.

The bill was introduced in the context of creating a more balanced environment for homeowners and to give them more control. However, there are products where these issues do not apply. Seniors' housing is one example, where the majority of residents move in specifically because they want to divest themselves of the burden of home ownership. Here we explore the potential effects on seniors' housing based on the current drafting of the bill (as at 28 February 2024).

The headline impact of the new rules would see a ban on new leasehold houses. Exemptions for retirement housing have only been included on the third reading in the Commons in late February. This would allow for new leases to be granted in respect of retirement houses as long as certain conditions are met. We say "certain", but in fact there remains uncertainty. Whilst the provisions impose age restrictions (including for those taking an assignment), and require the house to be part of a retirement scheme where all of these leases granted meet the same conditions (potentially barring some inter-generational schemes), the currently drafted exemption for retirement housing permits the Secretary of State to specify further conditions by regulation. We will have to wait and see whether more clarity is gained following passage of the bill through the Lords.

Additionally, there are further administrative requirements to be met, including obtaining certification from an appropriate tribunal that the lease is a permitted lease, additional marketing requirements and a requirement to serve a warning notice (in a similar manner to that required under the LTA 1985) which must be acknowledged by the tenant. Landlords of retirement housing will have to take steps to ensure that they comply with these requirements, or they may be subject to a financial penalty up to £30,000 and the occupier may have the right to acquire the freehold (or superior leasehold) for no consideration.

This would be particularly disruptive in retirement housing where leases often include obligations to pay deferred management charges which create a significant portion of the value for investors and operators. Such deferred management fees themselves may become subject to additional scrutiny as these could be interpreted as an estate management charge, which would become subject to the same regime as variable service charges. Fixed service charges, which are commonly used in the sector, would also come under enhanced scrutiny.

Remaining provisions of the bill would (amongst others) seek to make it cheaper and easier for some leaseholders (including of retirement housing) to extend their leases, buy their freeholds and increase the standard lease extension term to 990 years with ground rent reduced to zero. This increases the risk of enfranchisement which some investors have approached tentatively in the past, although given the reasons for which residents move into these schemes it still seems an unlikely outcome.

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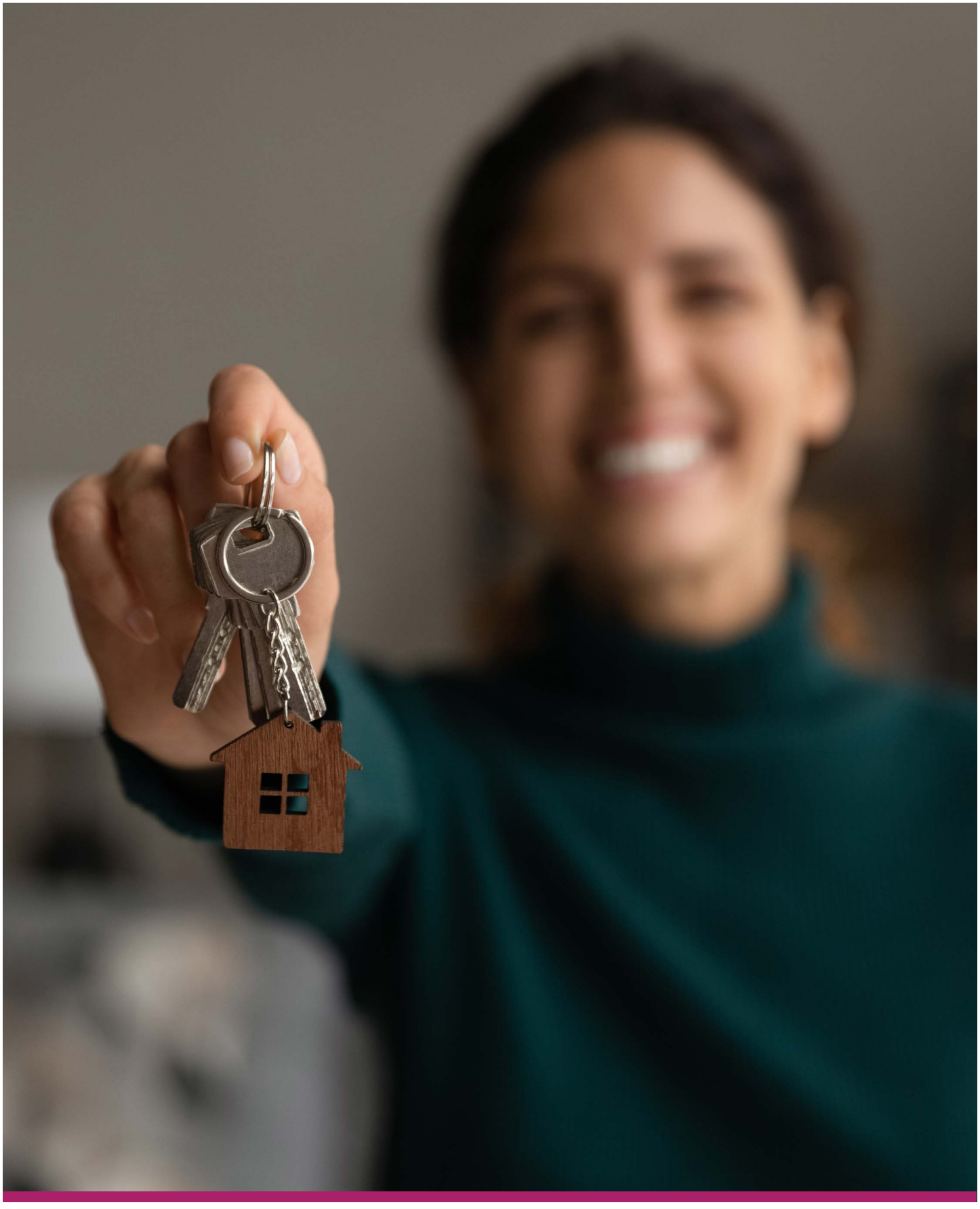

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