Legal update ———— December 2013

Housing and Regeneration
For profit Registered Providers

Introduction
The provision of social housing has historically been associated with not-for-profit (usually charitable) organisations, and until recently, only not-for-profit organisations could become Registered Providers of social housing.

While many of these not-for-profit organisations make surpluses on their activities, all of this must be reinvested into those social housing businesses, and no distributions can be made to shareholders or members.

Since the implementation of the Housing and Regeneration Act 2008 (the 2008 Act), it has been possible for profit-making organisations to be registered with the regulator – now the Homes and Communities Agency (HCA) – opening up a range of new possibilities, and we have seen an increasing number of clients registering “for profit” Registered Providers.

What does this mean?
Registered Providers of social housing (RPs) are businesses which are registered with, and regulated by, the HCA. “Social housing” in this context can mean either or both of low cost rental accommodation (rental accommodation provided at below market rates) and low cost home ownership products, such as shared ownership housing.

Why register?
Registration offers a number of advantages.

Firstly, registration enables an organisation to access grant funding from the HCA (or from the Greater London Authority (GLA) in London) to finance social housing provision. Rented housing provided with HCA/GLA grant funding must be owned by an RP, and we have now seen the allocation of grant funding to for-profit providers.

Secondly, in relation to loan finance, there is a well-developed specialist market of social housing lenders, which includes some of the largest and most well-known banks in the UK. These lenders have considered regulation by the HCA (and its predecessor regulators, the Housing Corporation and Tenant Services Authority) as reducing a borrower’s credit risk, and so have historically been willing to price funding accordingly.

There are also a number of tax advantages potentially available to RPs, including an exemption from Stamp Duty Land Tax (SDLT) on the purchase of land which is funded with certain forms of public subsidy, significantly reducing the cost of property transactions for RPs.

As well as financial benefits, there are commercial advantages to registration. One particular structure being used by a number of developers is the establishment of a for-profit provider as a subsidiary of an existing business to allow whole sites – including the affordable elements – to be developed, owned and managed within the same corporate group so speeding up development (because the need to negotiate with third party social landlords is removed), reducing transaction costs and enabling a streamlined approach to estate or block management.

Registration also offers presentational benefits. In the eyes of both a provider’s residents and the wider public, the willingness of a provider to be subject to regulation may indicate a standing in the sector which is not attached to non-registered businesses. Although it remains to be seen how much of a presentational benefit this may be to profit-making businesses in the longer term, HCA registration may come to be seen as a badge of quality among providers, distinguishing registered businesses from those who have chosen not to be registered.

Why not?
Registration has historically been associated primarily with regulation and restriction. However, a further element of the changes introduced under the 2008 Act was a move towards less prescriptive regulation compared to that imposed under the previous regime.

The regulatory burden on profit-making RPs is less onerous than that relating to non-profit providers, including the absence of any oversight by the HCA of a provider’s constitutional arrangements, and the lack of the power of the regulator to appoint and remove directors (a power which applies to not-for-profit RPs).
The HCA requires regular reporting by any RP (with a reduced level of oversight for smaller organisations), and can initiate investigations into providers’ affairs if it has concerns.

The HCA regulates the conduct of RPs by reference to published standards. These cover areas including:

- Governance, financial viability and value for money;
- Tenant involvement and empowerment;
- Rent levels; and
- The quality of accommodation.

It is the enforcement of the “economic” standards – those relating to governance and financial matters – which has historically given confidence to third parties regarding providers’ viability. These standards are proactively enforced by the HCA, while the “consumer” standards – relating to the way in which providers’ services are delivered – will only result in regulatory action where there is a risk of “serious detriment” as a result of a breach, e.g. gas servicing and other statutory requirements.

Providers are required to restrict the rents they charge tenants in their social housing by reference to HCA policy, which limits both the rents which can be charged, and the annual increases which can be applied.

A further, and significant restriction on the business of an RP is the requirement for the consent of the HCA before the RP can dispose of, or grant security over, any social housing dwellings (although obtaining this consent is not usually a complicated matter).

If grant is used to finance development, the HCA, in its separate capacity as funder of social housing, or the GLA in London, may impose conditions regarding the use and/or disposal of properties, and these will also need to be complied with. These may include “recycling” the grant funding for further similar development, or recovery by the funder.

It is also worth noting that, if an RP forms part of a larger business which also includes non-registered elements – for example, where an RP is set up as a subsidiary of a for-profit property business – the HCA will seek to ensure that public funds are protected, and that the non-registered element of the business will not prejudice the regulated activities carried on by the RP.

In 2013, the HCA began an extensive consultation on changes to its regulatory framework, including proposals designed to protect public investment in social housing. While the proposals are yet to be finalised, the HCA are likely to require proceeds from certain social housing sales to be reinvested in social housing rather than being distributed to shareholders.

Process for registration
The process for registering with the HCA consists of demonstrating to the HCA that an entity is legally capable of being registered, and that it meets the HCA’s published criteria.

Broadly speaking, a for-profit provider must be a legal entity of one of a number of categories (including companies limited by shares, whether public or private), and must provide or intend to provide social housing in England.

Once the HCA is satisfied that this (very low) level of qualification is met, it will proceed to assess the extent to which a provider meets its published standards. With the exception of its requirements on financial viability, these standards need not be met at the point of registration, as long as the applicant can demonstrate a reasonable path to meeting those standards within a reasonable timescale.

Opportunities
The market for the provision of social housing represents relatively uncharted territory for profit-making businesses. The opportunity to register as a provider of social housing permits a profit-making business to take advantage of benefits which have, until now, only been available to not-for-profit organisations; provides the prospect of an investment return in the provision of social housing; and offers commercial advantages for developers in their approach to mixed programmes and deals in the social housing sector.

Developments since 2010 have seen public companies, including large developers, moving into the regulated sector, operating registered businesses as part of their wider operations. There is also a growing body of profit-making RPs, developing know-how and industry practice of their own, and bringing new and innovative ideas to social housing provision.

These moves are amongst a number of exciting changes to the market for social housing provision in England, with a range of new opportunities for innovation, which we are assisting clients in exploring.

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