

Welcome to the brave new world of Flexible Tenancies ...

Ian Alderson, Social Housing Partner, looks at the proposals for flexible tenancies and the implications for the social housing sector.

What is a flexible tenancy?

A flexible tenancy (FT) is a fixed term tenancy with a social or affordable rent. FTs are not intended to replace assured/secure "lifetime tenancies".

The minimum fixed term is two years and there is no maximum. The Government has recently said that terms of under five years should only be granted in "exceptional circumstances".

Housing Associations will use assured shorthold tenancies (ASTs) as FTs. Local authority FTs are a new tenancy type created by the Localism Bill.

Existing tenants aren't affected. On transfer to another social rent home, their new tenancy will have the same security as their previous tenancy. However, they may get a FT if they "choose" to move to an affordable rent home.

Whilst the Government says that using FTs is optional, in the future the Homes and Communities Agency (HCA) and lenders may make their use a funding condition for some schemes.

The Government's proposals

The proposals are set out in *Implementing social housing reform: directions to the Social Housing Regulator* (available on the CLG website, www.communities.gov.uk). The deadline for responding to this consultation paper is 29th September 2011.

FTs for housing associations will be introduced by the regulator, currently the Tenant Services Authority (TSA), amending the Tenancy Standard with effect from 1st April 2012, following a "direction" from the Government. The draft direction appears in the consultation paper.

It proposes the Tenancy Standard should be changed from requiring landlords to offer "the most secure form of tenure compatible with the purposes of the housing and the sustainability of the community" to offering "tenancies which are compatible with the purpose of the housing, the needs of individual households, the sustainability of the community and of the efficient use of their housing stock".

This is a significant change. It means "lifetime tenancies" to new tenants must be justified in terms of the factors listed above.

Potential legal problems

- *Pinnock -v- Manchester City Council* (Supreme Court, November 2010) held that if a court is asked by a social landlord to make a possession order, "the court must have the power to assess the proportionality of making the order". This dissolves the distinction between mandatory and discretionary grounds for possession in some cases and applies to possession cases brought at the end of FT fixed terms.
- The Government says housing associations can continue using starter tenancies and the fixed term will not start until the end of the starter period (12 months extendable to 18 months). So a FT will be a periodic AST during the starter period before converting into a fixed term AST and becoming a periodic AST again at the end of the fixed term. During the fixed term, the landlord cannot rely on the mandatory assured shorthold ground, but can whilst it is a periodic AST (before and after the fixed term). This will be difficult to manage and FT tenancy agreements will need very careful drafting.
- Tenancy agreements with terms of three years upwards should be executed by deed, otherwise they take effect as equitable tenancies.
- Tenancies of seven years upwards must be registered with the Land Registry, creating a significant administrative burden and cost.
- Long tenancies can create a liability for Stamp Duty Land Tax (SDLT). If this isn't paid, the tenancy agreement cannot be relied on in court. Affordable rent FTs in areas with high market rents may create a SDLT liability. For example, a 15 year FT (perhaps granted to tenants with young children) at an average rent during the term of £400 per week creates an SDLT liability of £1,145.

These changes mean that social housing landlords need to develop new tenancy agreements and policies and procedures.



For more information or advice on tenancies and how these changes may affect your housing please contact Ian Alderson on 0151 600 3317 or by email to ian.alderson@brabnerscs.com

Affordable Rents and charitable status

Stephen Claus, Head of Charities and Social Enterprise, looks at the issue of Affordable Rents for property owned by charities for Social Housing.



There has been a lot of coverage recently regarding the Coalition Government's housing reforms and in particular, the impact of the Affordable Rents product on the charitable status of housing associations. The Tenant Services Authority (TSA), as part of its public consultation on the proposals, wrote to the Charity Commission seeking its views, and in March of this year, the Commission provided its response¹.

As expected, the Commission states that whilst housing associations can, in principle, provide the Affordable Rents product, it *"cannot be definitive about whether the introduction of an affordable rents product by a particular association will affect its charitable status"*. The Commission reiterated the legal principle, codified by the Charities Act 2006 that charities (including obviously charitable housing associations) must be for the public benefit and also provided a number of key points that associations should consider when assessing Affordable Rents and charitable status.

The Commission has stressed that its response does not constitute a warning to housing associations. Reports, such as those seen on the web pages of Inside Housing and Civil Society, which suggest that the introduction of 80% rents will put the charitable status of associations at risk, were met with further comment from the Commission's soon to be former Head of Policy and Effectiveness, Rosie Chapman, who stated that *"it is misleading to state that charitable housing associations face losing charity status as a result of the introduction of affordable rents"*.

Ms Chapman went on to explain that *"trustee boards will need to look at the circumstances of their own association"* and ask themselves *"whether they are able to continue to further their*

charity's aims for the public benefit while applying the product". In simple terms, housing associations can start charging 80% rents and keep their charitable status, provided that they can demonstrate that they are still relieving poverty in accordance with public benefit principles², in particular, "principle 2c", namely that people in poverty cannot be excluded from the opportunity to benefit.

However, regardless of these reassuring tones, it is important that associations, when considering whether or not to implement Affordable Rents, are fully aware of the extent to which the implementation will exclude people in poverty and in particular, where Housing Benefit is capped below the level of rent charged.

The Commission recognises that this is unlikely to be an issue in areas of low rent. Tenants in receipt of Housing Benefit will be able to "afford" an 80% rent in areas where it does not exceed the new caps³. However, issues will arise in areas of high rent where 80% rents exceed the Housing Benefit caps. In these circumstances, associations will need to consider whether a person in poverty is excluded from the opportunity to benefit.

We consider that this issue, and the new fixed terms on which the product can be offered, represents a good opportunity for housing associations to examine the public benefit that they currently provide so as to protect themselves against any unwelcome, and potentially costly, enquiries. The issues concerning Affordable Rents have brought the issue of charitable status into the spotlight (much in the same way that the Charities Act 2006 did for independent fee charging schools) and should prompt trustee boards to consider not only Affordable Rents, but also the extent to which provision for existing beneficiaries satisfies the public benefit requirement.

Circumstances of housing association tenants can change and measures should be in place to ensure that beneficiaries continue to be in housing need as the failure to do so can have significant consequences. Associations should ensure that there can be no dispute as to their charitable status.

¹ The Commission's full response is available on its website: http://www.charity-commission.gov.uk/rss/updates/affordable_rents_response.aspx

² The Commission's public benefit guidance is available on its website: http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx

³ Details as to the new caps can be seen at Directgov: http://www.direct.gov.uk/en/N11/Newsroom/DG_192415



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'Town and Village Greens' – the implications for future development?

Kevin Halewood, Deputy Director of Planning, and Thomas Starkey, Solicitor in our Social Housing team, take a look at the town and village greens land classification with some useful tips for social housing developers.

Any area of land that has been used by local people for sports and pastimes as of right for at least 20 years is capable of being classified as a town or village green ('TVG'). The consequences of such a classification may frustrate or delay development of land.

The Law pertaining to TVGs has evolved significantly from its customary law origins. Under section 15 of the Commons Act 2006, anyone can apply to register land as a town or village green, where;

"a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years"

There is a body of case law analysing in detail each of the requirements above, but prevention (where possible) is better than the cure. Developers need to assess and address risks presented by TVG legislation, which many commentators see as providing a means for members of the public to submit spurious applications in order to stymie development.

Against this background, the Coalition Government is now actively looking at ways of protecting development sites and making sure that the legislation is used for its original purpose to preserve and improve the protection afforded to town or village greens and prevent those areas of land from being lost to unscrupulous landowners and developers.

Landowners should actively monitor their land

Until the legislation is reviewed by the Coalition Government it is imperative that landowners actively monitor the land they own to identify any activities by members of the public which could possibly amount to use of the land "as of right". Where such activity is detected, developers need to take positive steps to challenge that use and to show there is no acquiescence to it, including the following:-

1. Signage

You need to get it right. In *R v Oxfordshire County Council (2010)* – the landowner had erected signs which stated "No public right of way" however the court held that the signs directed only to the paths on the land and not the whole of the land. However, notwithstanding persistent vandalism and damage, appropriate signage was considered adequate (together with other evidence) to de-register a TVG which had been registered for 9 years *Betterment Properties (Weymouth) Ltd v Dorset CC 2010*.

2. Fencing

In the *Betterment* case above, the landowner had consistently taken steps to repair fences which were persistently damaged by members of the public. Where development land is fenced off, developers should ensure a regular inspection regime is implemented to maintain the integrity of the fences.

3. Due Diligence

Before buying land, developers should ensure that all appropriate searches and enquiries are made pre-contract. Remember, usually, the Seller's solicitor is bound by responses given in writing. A Commons Registration Search must be carried out. If there is doubt over former use of land, statutory declarations as to historic use should be sought from the owner or previous owner.

4. Compulsory purchased land with planning permission

In the recent case of *BDW Trading Ltd (t/a Barratt Homes) v Spooner (2011)* land was compulsorily purchased by local authority. The land was then sold to a developer and planning permission was granted. Subsequently, an application was then made to register the land as a TVG, the matter went to an inquiry and the inspector recommended registration as a TVG. The High Court held in that case, that the combination of the CPO and grant of planning permission trumped commons registration.

If all else fails then it may be possible to obtain legal indemnity insurance, but this will not prevent such registration and will be expensive. What it may provide, subject to the exact terms of the policy, is a war-chest to cover legal and other expenses in the event matters go to trial for determination. It may also cover wasted costs including architects fees, planning application costs and other associated costs. Importantly, it should also provide compensation for any reduction in land value arising as a result of land being determined as a TVG.



For more information or advice on how we can help you with any queries you may have please contact either:

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NHF's Model Rules 2011 – what's changed?

Rupert Gill, Partner in our Social Housing team, looks at the National Housing Federation's new Model Rules 2011 and considers their interaction with Governance best practice.



The National Housing Federation (NHF) has published an update to its Model Rules, updating the previous Model published back in 2005. Since 2005 the regulatory focus has shifted and in particular we now have the *Excellence in Governance: Code for Members and Good Practice Guidance* as published during 2010. As a result of this, whilst many of the Rules remain essentially as before, there are significant changes in certain areas. This article highlights some of those areas and goes on to consider what Boards ought to be doing in light of the publication of these new Model Rules.

Please bear in mind that the Model Rules have been written with Industrial and Provident Societies in mind as opposed to companies limited by guarantee. Therefore, appropriate adaptation will be required should your Association not be an entity registered under the Industrial and Provident Societies Act.

Composition of Members

No longer do the Model Rules prescribe there to be a certain proportion of tenant members. Instead it is left to each Association to determine this as a matter of policy in line with such legal requirements as it may be subject to. In light of this, the Boards ought to be considering whether they have appropriate policies for the admission of members and the composition of their membership.

Administration

Greater flexibility has been introduced by allowing for members meetings to be held on short notice with 75% of members agreeing, written resolutions of members and Boards, casting votes being available to the Chair of both a meeting of the Board and a meeting of the members and greater power to remove directors and shareholders.

In light of these, consideration ought to be given as to whether your Association wishes to take advantage of this increased administrative flexibility.

Board Composition and Duties

One of the big changes to the Rules has been them bring brought into

line with the 2010 Code of Governance. The roles and functions of the Board have been amended to be consistent with the Code and Board members are no longer subject to retirement by rotation but instead are elected for three year fixed term periods (to a maximum of nine years in total). The role of the Chair has also been expanded upon. Finally, the Model Rules anticipate that there will be certain supporting documentation in place, for example it anticipates that your Association will have a statement of obligations that each Board member is to adhere to (not just in relation to standards of conduct) and therefore simply adopting the Rules with no further follow up will not be sufficient.

Many Associations have undergone or are in the process of going through a Governance review. It will be important to ensure that such review includes your existing Rules.

Borrowing Limit

This has been increased from £100 million to £500 million and allows for currency swaps. Boards ought to be reviewing their Constitution to ensure that their actual borrowing level does not exceed their borrowing level permitted by their existing Rules. Bear in mind that any borrowing in a currency other than sterling the effect of exchange rate movements may have on the sterling value of that borrowing.

Summary

We would suggest the Boards would welcome the flexibility that the new Rules offer which make many of their provisions consistent with the Companies Act 2006. Your Rules need to be compliant with the Code or else your Board will have to explain each year why the Rules are not consistent. Accordingly, as part of any Governance Review it will be critical to ensure that the Rules are part of that review which we expect will require some amendment/replacement to all Rules, whether based on the 2005 Model Rules or earlier versions.



To discuss any of the issues in more detail please contact Rupert Gill on 0151 600 3106 or by email to rupert.gill@brabnerscs.com

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