



# Advice in connection with questions arising in respect of Key Worker Housing

5 September 2023

## SCOTTISH FUTURES TRUST ("SFT")

### KEY WORKER / KEY WORKER HOUSING ADVICE

SFT has instructed Brodies to consider and provide advice on the questions raised below:

**1 Please set out any legal test/definition of Key Worker and Key Worker Housing ("KWH").**

1.1 There is no legal test or definition of key worker and therefore it depends on the context. We have not identified an express definition of KWH.

1.2 The Scottish Government set up the "Affordable Housing for Key Workers" Project Group in 2014/15 which carried out work into identifying potential national policy needs for supporting key worker affordable housing. For their research, they adopted the following definition of "Key Worker":

*"A public sector employee who provides an essential service. (As well as workers in the public sector, it was noted that this definition could also apply to low paid employees in the private sector/ service industries who are also providing essential services)."*

"Essential services" were considered to cover a wide range of functions and salary bands and were not otherwise specifically defined.

1.3 During the COVID-19 Pandemic, the 2020 Scottish Government guidance in respect of School and Early Learning Closures stated that the definition of key worker for these purposes would vary depending on the local circumstances. They expected, however, any local definitions to include consideration of:

1.3.1 Category 1 – Health and Care workers directly supporting COVID response, and associated staff; Health and Care workers supporting life threatening emergency work, as well as critical primary and community care provision; Energy suppliers (small numbers identified as top priority already); staff providing childcare/learning for other category 1 staff.

1.3.2 Category 2 – All other Health and Care workers, and wider public sector workers providing emergency/critical welfare services (for example: fire, police, prisons, social workers), as well as those supporting our Critical National Infrastructure, without whom serious damage to the welfare of the people of Scotland could be caused.

1.3.3 Category 3 – All workers (private, public or third sector) without whom there could be a significant impact on Scotland (but where the response to COVID-19, or the ability to perform essential tasks to keep the country running, would not be severely compromised).

#### 1.4 Other examples of key worker definitions include:

1.4.1 Aberdeen City Council ("ACC") [Affordable Housing Supplementary Guidance](#) lists the following as key workers:

1.4.1.1 National Health Service Clinical Staff (excluding doctors and dentists);

1.4.1.2 Police Officers;

1.4.1.3 Teaching Staff within Schools, Institutes of Higher Education and Universities; and

1.4.1.4 ACC Staff in roles that have been unfilled for more than 6 months from the date of being first advertised.

1.4.2 Aberdeenshire Council's [Key Worker Guidance](#) provides a much more extensive list of who are considered key workers, categorising them broadly into:

1.4.2.1 Health and Care workers supporting critical primary and community care provision as well as staff providing childcare/learning for those workers;

1.4.2.2 Wider public service workers providing critical welfare services; and

1.4.2.3 All workers in the public sector where there would be a significant impact on Scotland if the work is not undertaken.

The Guidance can be found [here](#) for further details.

1.4.3 Perth and Kinross Council refer in their flyer for [Key Workers in need of housing](#) to registered nurses, teachers, police officers, social workers and firefighters as "examples" of key workers.

1.4.4 Falkirk Council's [Affordable Housing Supplementary Guidance](#) uses the same definition as that used by the Scottish Government's Affordable Housing for Key Workers Project Group (referred to above).

## 2 **What capability and flexibility is there for Local Authorities and RSLs to set allocation policies based upon a KWH classification?**

2.1 Allocations policies set by Local Authorities, Registered Social Landlords ("RSLs") and other housing providers will need to implement the relevant Local Authority's planning policy for the delivery of affordable housing (including housing for key workers), and the relevant policy would need to be in place prior to implementation. In the scenario whereby an allocations policy is to prioritise key

workers as a means of delivering against the relevant Local Authority's affordable housing policy, but the policy doesn't include reference to housing for key workers, reference to key workers could be included in that Local Authority's next Housing Need and Demand Assessment or alternatively set out in supplementary guidance.

- 2.2 NPF4 Policy 16(c) supports the provision of new homes which improve affordability and which address an identified gap in provision. While not specifically referring to key workers, Policy 16 (viii) mentions "*homes for other specialist groups such as service personnel.*" Service personnel is not defined but could encompass key workers.
- 2.3 Policy 16(e) requires proposals for market housing to provide at least 25% of the total number of homes as affordable housing unless a local authority justifies a lower or higher percentage. The contribution is to be defined in local development plans.
- 2.4 Policy 8(a) states that development within the green belt will be supported where the proposal is for residential accommodation required / designed for a key worker in a primary industry within the immediate vicinity of their place of employment where the presence of a worker is essential to the operation of the enterprise. Neither key worker nor primary industry is defined in NPF4, but it is usually taken to mean someone working in agriculture or forestry (e.g. in the Aberdeenshire Local Development Plan 2023) who needs to live on site for operational reasons.
- 2.5 Local Authorities require to take into account the policies in NPF4 when preparing their local development plans. They are encouraged to set out tailored approaches to housing which reflect locally specific market circumstances and delivery approaches.
- 2.6 Local Authorities and RSLs are given reasonable discretion in setting their affordable housing allocation policies, save that reasonable preference must be given to people who:
- 2.6.1 are homeless or threatened with homelessness;
  - 2.6.2 are "*living under unsatisfactory housing conditions*"; and
  - 2.6.3 are tenants in underoccupied social housing<sup>1</sup>.
- 2.7 Government guidance on [Housing Allocations](#) acknowledges that Local Authorities and RSLs are entitled to add their own (secondary) factors to those to be given reasonable preference, and the guidance includes specific reference to housing key workers as an example of a secondary reasonable preference category that could be applied in their allocation policies. The only caveat to including secondary reasonable preference categories in allocation policies is that they must not "dominate" a social landlord's allocation. While there is no steer as to what it would look like to

---

<sup>1</sup> Section 20 of the Housing (Scotland) Act 1987 (as amended).

dominate an allocation, we would presume 50% of the allocation would probably be considered significantly too high<sup>2</sup>.

Note also that (in limited circumstances) a key worker may already qualify for those above categories if they are, for example, living in unsatisfactory housing conditions.

2.8 Additional considerations that may be relevant to the setting of allocations policies focused towards KWH are:

2.8.1 RSLs have an accommodation duty under section 5 of the Housing (Scotland) Act 2001 ("the 2001 Act") in terms of which they can be required by a local authority to provide housing accommodation to a homeless person, and they will be conscious of this when setting allocations policies. It may be the case that they will not want to amend their allocations policies without prior consultation with the relevant Local Authority to make sure that they are not acting in a way which could be seen as limiting to their ability to meet their accommodation duty;

2.8.2 If a Local Authority was to re-work its allocation policy to accommodate key workers, this may have knock on implications for its homelessness strategy and ability to meet homelessness targets. This could be managed by developing an update to the homelessness strategy in tandem with an updated allocations policy; and

2.8.3 Where the Local Authority is the Landlord, any change to allocations policies will require an Integrated Impact Assessment that includes both an Equalities Impact Assessment ("EqIA") and a Socio Economic Impact Assessment to be undertaken. An RSL can undertake just the EqIA but may choose to do both.

In addition, there are certain factors that cannot be taken into account in allocation policies. These are set out in section 20(2) of the Housing (Scotland) Act 1987 (as amended).

2.8.4 **What legislation / case law would underpin this?**

Section 20 of the Housing (Scotland) Act 1987 (as amended).

---

<sup>2</sup> Scottish Government's position in its guidance is that secondary criteria should not dominate a social landlord's allocations policy. This is because those persons who meet the 1987 Act criteria have an identified need for housing that is established by statute. In practice this means that their need for housing is considered to be more pressing than the needs of other persons, so they should be afforded a considerable measure of priority. This will be the starting point for establishing the weighting of secondary factors applied to allocations policies. In practice, decisions on how allocations policies are framed will be assessed on a case by case basis in the context of the duties and provisions of the 1987 Act.

### 2.8.5 **What legislation / case law exists that would limit and / or prohibit restricting homes for Key Workers?**

See above the reference to secondary factors not dominating allocation policies. We could not identify any case law limiting or prohibiting restricting homes for key workers.

While the Local Authority would be subject to the Public Sector Equality Duty, the status of key worker is not a protected characteristic and therefore this would not be triggered.

### 2.8.6 **Building upon the above, could changes be made to existing legislation to provide flexibility for such KWH use?**

As mentioned above, there is considerable flexibility at present to provide for KWH in affordable housing / allocation policies. While technically section 20 of the Housing (Scotland) Act 1987 could be amended to add key workers to the list of primary reasonable preference categories (i.e., in line with the homeless or those living in unsatisfactory housing conditions), there would likely be policy reasons to prevent key workers (who may be on a reasonable enough salary) from being afforded this higher status.

### 2.8.7 **How specific can Key Worker descriptions be?**

See above in respect of question 1 some examples of the different types of key worker definitions.

Aberdeenshire Council's Key Worker Guidance lists some very specific roles as falling within the Key Worker definition (e.g. respite workers, winter maintenance workers and "very sheltered housing" officers). An allocation policy could also be restricted to specific types of Key Worker. For example the planning obligation in the *R (Arthur) v London Borough of Barnet v Community Health Partnerships Limited [2022] EWHC 2933 (Admin)* restricted the affordable housing provision to NHS Key Workers (within certain salary bands) only, with a cascade down to non-NHS Key Workers in other public sector roles<sup>3</sup>.

## 3 **Please advise of any differences between how Local Authorities and RSLs can provide for KWH. In addition, please advise of any differences between Local Authorities.**

3.1 As above, Local Authorities and RSLs can each provide for KWH in their allocation policies by giving reasonable preference to key workers for affordable housing. They have a reasonable amount of discretion in setting these policies and therefore there will be differences in approaches. Local

<sup>3</sup> A summary of this case is annexed.

Authorities and RSLs can each provide for KWH in the same way, any differences are not due to being an RSL or a Local Authority, they will be down to how they each choose to approach the allocation of homes and wider factors and considerations affecting their operations.

3.2 The provision of KWH would be set out in section 75 agreements, ensuring that affordable housing is provided to qualifying key workers.

3.3 Below are some examples of how Local Authorities are providing KWH. Other Local authorities may provide for KWH, but do not include it within their supplementary guidance or LDP:

3.3.1 ACC's Supplementary Guidance states that the criteria that must be met by key worker tenant occupiers are:

3.3.1.1 They must be a Key Worker (see the ACC definition above);

3.3.1.2 They must be a first time buyer or have not owned a home in Aberdeen City or Shire;

3.3.1.3 Maximum household income of £40,000 (unless in exceptional circumstances); and

3.3.1.4 It must be rented accommodation (Low Cost Home Ownership is not considered an acceptable form of KWH) at a rent not exceeding the Local Housing Allowance Level.

3.3.2 Falkirk Council's Affordable Housing Supplementary Guidance allocates specified key workers (nursing auxiliaries, supported learning assistants, Scottish Prison Service operations officers and care workers) a priority group for affordable housing. Outside of this group, the Council considers that generally key workers locally can afford a property, and therefore the requirements of a particular development will be agreed on a case-by-case basis and will be subject to a section 75 agreement.

3.3.3 Fife Council's Affordable Housing Supplementary Guidance states that where public funding is going into a development, it is considered difficult to justify any restriction on allocations based on key worker requirements. However private KWH will be considered on a case by case basis in the context of the overall affordable housing mix.

3.3.4 Perth and Kinross' Housing Supplementary Guidance is silent on KWH / allocations, however, as previously mentioned, they have issued a flyer to encourage key workers to get in touch with the Housing Options Team for a housing assessment. Employers of key workers are also encouraged to refer staff to the Housing Options Team. Therefore, key

workers are clearly a category of people in need of affordable housing that are being provided for.

- 4 Linked to the nature of the KWH distinction, what existing approaches for housing staff and workers across the types of areas thought of as Key Workers exist (e.g., but not limited to, health and police, tied housing)?**
- 4.1 As mentioned above, Councils can secure the provision of KWH pursuant to their affordable housing policies through the imposition of obligations under planning agreements (e.g. the Falkirk Supplementary Guidance). The provisions of the section 75 agreements can be specific to key worker type (e.g. exclusively NHS workers – see the reference to *R (Arthur) v London Borough of Barnet v Community Health Partnerships Limited* above) or could be more general to key workers. Although the Arthur case related to an English obligation, the same principle should be available in Scotland.
- 4.2 As the obligations within any section 75 agreement would need to be within the remit of the relevant local authority affordable housing policy, it will depend on the terms of those policies on whether KWH can be specified as a planning obligation.
- 4.3 We have included examples of current approaches taken by housing providers to provide accommodation for staff at 5 below.
- 5 What capacity is there to monitor the ‘fit’ of tenants with any Key Worker status and their access to such homes? Would there be any limitations on such monitoring of tenants as time passed?**
- 5.1 It is possible to monitor the "fit" of any key worker tenants at the point of the grant of the tenancy in the same way that affordable housing tenants are monitored/assessed. For example, it should be possible to require tenants to demonstrate a contract of employment as a key worker (e.g. a nurse with the NHS) and to identify their wage bracket.
- 5.2 The affordable housing provisions in the *Arthur* example<sup>4</sup> required all affordable housing units to be sold or let to NHS workers within certain salary bands. The pre-requisite of qualifying for the KWH was to be employed by the NHS (within the specific area).
- 5.3 Likewise, the ACC Supplementary Guidance sets out the criteria for tenants to qualify as key workers (e.g. maximum household salary of £40,000).
- 5.4 Where Local Authorities are providing the housing, it is up to them to determine whether they wish houses to remain affordable (or restricted to KWH) in perpetuity or only for the initial lease/sale. There

<sup>4</sup> *R (Arthur) V London Borough of Barnet V Community Health Partnerships Limited* [2022] EWHC 2933 (Admin). A summary of this case is annexed.



are various options available to the Local Authority to ensure the tenants / occupants still meet the various criteria to be eligible for KWH: they can include an obligation within the section 75 agreement to ensure the occupancy restrictions remain affecting the property; they can include it in the terms of the lease or disposal (including the imposition of a title condition); and, in tied housing cases, it can be a condition to a planning permission (providing it meets the tests set out within the Planning Circular 4/1988). It would be more difficult to monitor if a key worker tenant ceases to be a Key Worker during the period of occupation, and this becomes more difficult if the KWH is sold rather than rented to the Key Worker.

- 5.5 There is no statutory basis in either the 2001 Act applying to Scottish Secure Tenancies or the Private Housing (Tenancies) (Scotland) Act 2016 ("the 2016 Act") applying to Private Residential Tenancies, to obtain an order for vacant possession on the basis that the tenant no longer meets allocations criteria met at the start of a tenancy such as Key Worker status (save for the scenario whereby the tenant was an employee of the landlord at the point in time when a Private Residential Tenancy was granted. In this case, the First Tier Tribunal may grant an eviction order – see paragraph 8 below for further comments).

## **6 Building upon the above are there any case studies, projects or comparators which would demonstrate the application of the potential KWH classification? How do they work and what are the key lessons from their operations?**

- 6.1 There are currently models in operation which could be applied to the delivery of the KWH classification (although these do not currently operate to expressly deliver KWH).

### **6.1.1 Cairngorm Business Partnership Model**

In Summer 2022, a partnership between Highland Council, Highland Housing Alliance ("HHA") and Cairngorms Business Partnership developed the Cairngorm Housing Partnership ("CHP") to support the delivery of housing for employees of local businesses. Members of Cairngorms Business Partnership pay a small fee that allows their employees to take priority for available mid-market rental properties subject to meeting relevant criteria.

HHA, having built the housing to be leased, allocate homes on a preferential basis to tenants who meet allocations criteria which include a nomination from a member of the CHP and confirmation that that member will make a payment to the CHP equivalent to one month's rent and service charge. If a home becomes void following a letting to a nominee, HHA can call on the terms of a guarantee from CHP which will pay a sum equivalent to the rent which would otherwise be due to HHA if the home was occupied for a specified period of time.

Although not supporting housing for key workers specifically, this model offers a route to support the delivery of housing for key workers in areas where the delivery of housing for rent is affected by, in particular, seasonal and temporary worker trends (and so there is therefore a concern around void loss during the "off season") and/or where an historic lack of housing for rent results in there being limited rental income data and/or market demand information available to support viability appraisals.

Homes are let by HHA in terms of private residential tenancies ("PRTs"). It is an operating risk of the model that a tenant who meets the allocations criteria on entering into the PRT will be entitled to remain in the property notwithstanding that their employment has come to an end (this point is explored further below).

The scheme has not yet been operating for a significant period of time, however initial indications are that it has been successful, and there are plans for further homes to be delivered using this model.

#### 6.1.2 **Nomination Agreements**

Many developers of purpose built student accommodation ("PBSA") enter into nomination agreements with educational institutions ("institutions"). These provide that while the developer will retain ownership and control of the development (and its management) the tenant occupiers will be selected ("nominated") by the institution benefitting from the agreement. Tenancy agreements are granted by the developer to the tenant occupiers, and rents are payable to the developer.

The developer will usually undertake to the institution that it will provide various services in accordance with a service specification (such as managing the accommodation in accordance with the principles of good estate management, providing accommodation that is fully functional, safe, secure and meets all relevant statutory requirements, ensuring regular security checks and monitoring of the property is carried out and responding to incidents of repair within fixed periods of time). The rents payable by tenant occupiers will be stipulated in the nomination agreement.

The institutions will often have obligations to the developers to (among other things) provide students with details of rooms within the property on an equal basis with any other accommodation owned, used or managed directly or indirectly by the institution. There may or may not be provision for the institutions to guarantee the rental income due which would be payable to the developer but for a unit becoming void.

The benefit of nomination agreements for the developer is that they retain a large degree of control and flexibility over the future management of the property – nomination

agreements can be relatively short term – this is particularly true in the PBSA sector where occupation will not usually be in terms of PRTs (PBSA being specifically excluded from the 2016 Act). Usually, in the PBSA context, the term of the novation agreement will be for the duration of the academic year.

In the context of KWH, notwithstanding that the prevailing tenure would most likely be either PRTs or SSTs, nomination agreements could still provide a mechanism for the provision of key worker accommodation. Where development of accommodation intended for KWH is undertaken, a nomination agreement between one or more key worker employers would provide the developer of that accommodation (whether a local authority, RSL or third-party developer) with effectively guaranteed occupancy, significantly reducing void risk, and providing a route to securing occupation by key workers<sup>5</sup>.

For the employers with the nomination rights in terms of the nomination agreement, they benefit from guaranteed accommodation for their employees/key workers, assisting with recruitment and staff retention.

Operating KWH on the basis of nomination agreements, and providing that occupation would be in terms of PRTs or SSTs, would require recognition that unlike in the PBSA scenario, it would not be possible to recover vacant possession of a unit let to a nominee on the basis that the relevant employment came to an end (this point is explored further below).

### 6.1.3 **Tied Accommodation**

Tied Accommodation is accommodation provided by an employer, either in the form of a service tenancy or a service occupancy agreement. KWH developed and leased by the relevant employer would be tied accommodation.

Service occupancy agreements are relatively limited in their application and will be provided on the basis that the employer has provided the accommodation to the occupier as part of their job, no rent will be payable (or the rent will be covered by the employer) and the occupier will need to live in the accommodation to do their job. The last criterion is likely to be met where, for example, the occupier lives and works in a nursing home<sup>6</sup>.

---

<sup>5</sup> The terms of any nomination agreement proposed between a Local Authority or an RSL and an employer would need to be considered in the context of public procurement and subsidy control rules which may apply depending on the specific terms proposed.

<sup>6</sup> Note that in terms of Schedule 1, Paragraph 1 of the Housing (Scotland) Act 2001, where the tenant is an employee of the landlord or of any local authority and the contract of employment requires the tenant to occupy the house for the better performance of the tenant's duties, the tenancy/occupancy agreement will not be an SST.

Occupiers in terms of service occupancy agreements have limited rights, and these will depend on what is written in to the occupancy agreement and/or associated employment contract. If the occupier's employment with the employer comes to an end, the right to occupy will also come to an end.

Service tenancies are used in scenarios where the accommodation is provided by the employer, but the employee does not need to live in the accommodation to do their job, and rent is payable to the employer.

Service tenancies granted on or after 1 December 2017 take the form of PRTs unless granted by a Local Authority or an RSL in which case they will be SSTs, and occupiers in terms of service tenancies will have the same benefits as tenant occupiers occupying in terms of PRTs or SSTs which are not service tenancies.

#### 6.1.4 **Blue Light Housing**

In Inverness, a 117 unit mixed affordable tenure development (including homes for Social Rent, MMR and LIFT) by The Highland Council at Blar Mor included 26 homes for MMR. 20 of those MMR homes were delivered under the build contract for Highland Housing Alliance ("HHA") for MMR, the balance of 6 MMR homes were leased to HHA by the Highland Council specifically for the purpose of allocation to blue light workers, teachers and social care workers (who enter into PRTs with HHA at mid-market rents). During the lease term, HHA are responsible for the management and maintenance of the homes.

The lease arrangement of the 6 homes for blue light workers, teachers and social care workers between The Highland Council and HHA will continue for a period of 5 years. At the end of the 5 year term, if any of the 6 homes are void, HHA is obliged to offer those void homes back to The Highland Council (who could then allocate the home to a social tenant, granting them an SST).

### **7 Could the Local Authority or an RSL deliver, through agreement with another body, e.g. the NHS or the police, housing that would be accessible for only their staff with similar operations and provisions as those of the current housing body? For example, housing for nursing staff, tied to a hospital location.**

- 7.1 The use of a nomination agreement between the Local Authority or RSL and the employer would deliver this outcome. Particularly, this mechanism would enable the Local Authority or RSL to undertake management and maintenance operations in respect of the relevant units through their existing operating practices and systems (because notwithstanding the existence of the nomination agreement, the tenancy will be between the Local Authority or RSL and the employee). Effectively, it

would only be the nomination of a unit to a particular tenant meeting employment criterion which would set the units apart from the Local Authority or RSL's other housing stock.

- 7.2 However, it should be noted that where the holder of the landlord's interest in the housing to be occupied is the Local Authority or the RSL, the tenant occupiers' tenure would be SST as opposed to PRT<sup>7</sup>. Where PRT was the preferred tenure, and where the ownership of the housing was to sit with the Local Authority or RSL, the Local Authority or RSL should lease the housing to an appropriate arm's length vehicle prior to granting any PRTs<sup>8</sup>.
- 7.3 The alternative to the use of nomination agreements would be the lease of the housing to a third party— such as an employer intending to provide housing for its employees<sup>9</sup>. The third-party landlord would be responsible for fulfilling the obligations due by a landlord in terms of PRTs, and would also be obliged to meet any obligations due to the owner of the housing (i.e. the third party's landlord). These obligations could include responsibility for all matters connected with the property which would usually be the responsibility of the owner, such as maintenance and repair and compliance with title conditions and statutory notices. Consideration would need to be given to the length of this lease agreement, and likely outcomes for tenant occupiers at the end of the lease term. It is not clear from the terms of the 2016 Act that there is an eviction ground for the scenario where the landlord in terms of PRTs holds a leasehold interest in the property (as it is in terms of the 2001 Act), therefore PRTs existing at the point of termination may survive, and it would be for the owner to obtain an order for eviction on appropriate grounds if vacant possession was required.

## 8 **Looking at the different occupancy types, what ability does the Local Authority or RSL have to terminate an agreement for KWH should employment end and a tenant no longer qualify for KWH?**

### 8.1 **Scottish Secure Tenancies**

- 8.1.1 Where the landlord is a Local Authority or an RSL, tenants will occupy in terms of SSTs (irrespective of the rent charged, and whether this is generally at Social Rent or MMR levels). This will be the case unless the tenant is an employee of the landlord and the tenant's contract of employment requires the tenant to occupy the house for the better

<sup>7</sup> By virtue of the operation of s. 11 of the 2001 Act. It should also be noted that even in scenarios where the landlord was to be the Local Authority or the RSL, by virtue of Schedule 1 of the 2001 Act, a tenancy cannot be an SST where (i) the tenant is an employee of the landlord and the contract of employment requires the tenant to occupy the house for the better performance of the tenant's duties, or (ii) the landlord is a local authority landlord and the house occupied by the tenant is provided for the purposes of the Police Service of Scotland or the tenant is let the house expressly on a temporary basis pending its being required for the purposes of the Police Service of Scotland.

<sup>8</sup> A local authority could grant a lease to an arms length vehicle controlled by an RSL if it did not have its own suitable arm's length vehicle.

<sup>9</sup> Noting that where the tenure was to be PRT, the third party should not be a local authority, as RSL or Police Scotland.

performance of the tenant's duties<sup>10</sup> (in this scenario, the tenant's occupancy will be in terms of a tied service occupancy agreement).

8.1.2 In terms of the 2001 Act, subject to the exception discussed, there is no grounds for recovering vacant possession which are linked to specific continued employment. This is with the exception of where the landlord is Orkney Islands Council, Shetland Islands Council or Western Isles Council and the house is held by one of these Local Authorities for the purposes of its functions as education authority and:

- 8.1.2.1 is required for providing housing to a person who is or will be employed by the council for those purposes;
- 8.1.2.2 the Local Authority cannot reasonably provide a suitable alternative house for the accommodation;
- 8.1.2.3 the tenant was employed by the Local Authority for the purposes of its functions as education authority; and
- 8.1.2.4 such employment has terminated or notice of termination has been given<sup>11</sup>.

8.1.3 If the Local Authority or the RSL has leased the relevant housing to a suitable arm's length vehicle prior to granting leases to occupiers, tenancies will be PRTs<sup>12</sup>.

## 8.2 Private Residential Tenancies

8.2.1 In terms of the 2016 Act, there are limited circumstances in which a landlord can recover vacant possession<sup>13</sup> in terms of a PRT, and these may become more limited in the event that "no-fault evictions" are banned. It is an eviction ground that a tenancy was entered into to provide an employee of the landlord with a home and the tenant is not a qualifying employee<sup>14</sup>. In this scenario, the First-tier Tribunal may find that this ground applies where the tenancy was granted to a tenant because the tenant was an employee of the landlord<sup>15</sup> and at the point of issue of the notice to leave, the tenant is not employed by the

<sup>10</sup> Schedule 1, Paragraph 1 of the 2001 Act. In this case, the occupancy will be tied accommodation occupied on the basis of a tied service occupancy.

<sup>11</sup> Schedule 2, Part 1, Paragraph 14, 2001 Act.

<sup>12</sup> RSLs and local authorities should be wary of arrangements designed to avoid the creation of SSTs. Arguably, in this context, the use of a leasehold arrangement between the RSL or local authority as a means of delivering the PRT tenure is for the purpose of ensuring a reasonable supply of accommodation for key workers, but the approach is not free from risk of challenge.

<sup>13</sup> The available eviction grounds are set out in Schedule 3.

<sup>14</sup> Schedule Part 2, Paragraph 8, 2016 Act.

<sup>15</sup> or if there was an expectation that the tenant would become an employee of the landlord.

landlord and it is satisfied that it is reasonable to issue an eviction order on account of those facts.

8.2.2 This eviction ground will only be relevant in circumstances where the landlord is the employer of the employee, therefore the Local Authority or RSL (or their arms length vehicle) would need to be the tenant's employer for this ground to be available.

8.2.3 Where the Local Authority or RSL developed housing intended to provide KWH and it was important for the model that this eviction ground was available, the Local Authority or RSL could enter into a leasehold arrangement with the relevant employer to create a mid-landlord interest. The mid-landlord (the employer) would then be the party holding the landlord's interest in terms of the PRTs and this eviction ground would therefore be available.

### 8.3 **Occupancy Agreements as an Alternative to PRTs or SSTs**

8.3.1 In terms of PRTs, a tenancy will be a PRT where (i) the tenancy is one under which a property is let to an individual as a separate dwelling; (ii) the tenant occupies the property (or part of it) as the tenant's only or principal home; and (iii) the tenancy is not one which cannot be a PRT<sup>16</sup>. Schedule 1 of the 2016 Act prescribes tenancies which cannot be PRTs, and these include tenancies for low rent, shops, licenced premises, agricultural land, student lets and holiday lets. There is no provision for a tenancy provided in connection with employment not to be a PRT.

8.3.2 In terms of SSTs, a tenancy will be an SST where (a) the house is let as a separate dwelling, (b) the landlord is (i) a local authority landlord; or (ii) a registered social landlord, (c) the tenant is an individual and the house is the tenant's only or principal home, (d) where the landlord is a registered social landlord which is a co-operative housing association, the tenant is a member of the association, and (e) the tenancy (i) was created on or after such date as the order may specify in relation to the landlord, or (ii) was created before that date and is of a description specified in the order in relation to the landlord<sup>17</sup>. Part 7, Schedule 1 of the 2001 Act prescribes tenancies which cannot be SSTs, and these include premises occupied under employment (as discussed above, in a tied accommodation scenario) lettings to students and accommodation for homeless persons and offenders. As per the PRT regime, there is no general exclusion of tenancies

---

<sup>16</sup> s. 1, 2016 Act

<sup>17</sup> s. 11, 2001 Act

which are provided in connection with employment (save in the tied employment scenario)<sup>18</sup>.

8.3.3 Therefore, it is not possible to grant occupancy agreements with a view to circumventing the limitations of the PRT and SST regimes in terms of creating a clear route to recovering vacant possession of KWH in circumstances where key worker criteria are no longer met, after a tenancy has been granted.

## 9 In structuring any KWH approach, what would be the key elements that would need to be considered by the Local Authority or RSL to shape any future KWH proposals?

In our view, the key factors will be:

- 9.1 **Tenure** – Local Authorities and RSLs should consider whether the preference for KWH is for occupation to be in terms of PRTs or SSTs, and where PRTs are identified as the preference, a suitable mechanism (likely a leasehold arrangement discussed above) will be required to deliver this tenure rather than the default SST tenure.
- 9.2 **Control** – If the Local Authority or RSL would prefer to retain a high degree of control over the developed housing, a nomination agreement may be a more flexible option in terms of managing the rights and obligations of the relevant employer rather than a leasehold arrangement. However, in either case, the rights of tenants in terms of their tenancy agreements would need to be carefully considered. Particularly, the termination of a nomination agreement would not have any effect on the continuing existence of occupiers' rights in terms of their PRTs (or SSTs). There are grounds for recovering vacant possession in both the PRT<sup>19</sup> and SST<sup>20</sup> regimes in circumstances where the mid-landlord ceases to hold an interest in the property (as would be the case in a leasehold arrangement between a Local Authority or RSL and an employer), however the process to recover vacant possession would be lengthy, and in terms of the PRT regime uncertain due to the discretion available to the FTT to apply the eviction ground.
- 9.3 **Cost** – lease arrangements between the Local Authority or RSL and employer will be more expensive to put in place than nomination agreements due to LBTT implications arising in connection with the grant of the lease and (depending on the lease term) payment of land registration dues.
- 9.4 **Succession planning** – although PRTs would be unaffected, nomination agreements will not run with the land. If the Local Authority or RSL was to sell the developed housing for a capital receipt, any nomination agreement would fall away and need to be renegotiated between the employer and the

<sup>18</sup> Note that we have also considered Short Scottish Secure Tenancies (in terms of s.34 of the 2001 Act) however there is no legal basis for the use of these in the housing for key workers scenario under discussion.

<sup>19</sup> Schedule 3, Paragraph 1 of the 2016 Act

<sup>20</sup> Schedule 2, Part 1, paragraph 13 of the 2001 Act



new owner, whereas a leasehold arrangement would survive a change of ownership. In situations where tenancies are in the form of SSTs, there would need to be consultation with the Scottish Housing Regulator prior to any disposal.

9.5 **Consistency** – Local Authorities and RSLs may consider the allocations policies being applied within the local area, within neighbouring local authority areas and beyond. Although there will be circumstances where it will be desirable for allocations policies to include specific elements relevant to local factors, if policies are too disparate in their terms, this may put undue pressure on some Local Authority and RSL waiting lists, or otherwise be detrimental.

10 **Please advise of any additional areas/elements that SFT should consider in respect of KWH.**

This advice should be read in conjunction with Brodies LLP advice dated June 2023 in relation to five notional case studies prepared by SFT to inform a new approach to Council Built Homes for Market Rent and Sale based on the power of Councils under section 20 of the Local Government in Scotland Act 2003 to advance wellbeing. This advice considers in detail (among other things) legal mechanisms for restricting occupancy of houses to people with particular characteristics (including key worker status).

**Brodies LLP**

## ANNEX

**CASE SUMMARY: R (ARTHUR) V LONDON BOROUGH OF BARNET V COMMUNITY HEALTH PARTNERSHIPS LIMITED [2022] EWHC 2933 (ADMIN)**

This was a Judicial Review of the Local Authority's grant of planning permission for a 130-home residential development. The development was adjacent to a hospital, and the aim of the development was to provide good quality, affordable homes for NHS staff. The planning officer recognised that though the application would contravene important planning policies (the site was used as public open space), the benefits of the housing provision was a material consideration which outweighed the loss of public open space. Planning permission was granted, subject to a s106 Agreement (English equivalent of a s75 agreement) that all of the homes would be 'affordable housing units' and would be sold or let only to NHS key workers in a specified range of salary bands.

The Claimant argued, among other things, that (1) the planning committee failed to consider whether the application accorded with affordable housing policies and (2) that the specified salary bands in actual fact encompassed high earners.

The Court rejected these arguments:

- 1 Although the proposed development did not comply with affordable housing policies, the development did not fit the traditional mould of affordable housing as understood by those policies. Instead, the development was intended for a target group of occupiers through controls secured by the s106 Agreement and it was not to be assessed against the wider affordable housing policies. It addressed a specific need and there would be no element of open market housing.

To note: the Claimant argued that the availability of the affordable housing units to those on relatively high incomes meant the units were not genuinely for those whose needs were 'not met by the market'. This was rejected – the affordability of NHS employees would differ from the population at large, which is why the application was to be considered outside the framework of the affordable housing policies.

- 2 Though the planning report mistakenly suggested the upper level of the highest salary band was £51,688 when it was in fact £87,754, the rest of the planning officer's report and the s106 Agreement made it clear that the development was meant for eligible NHS workers earning entry to mid-level salaries.

### Detail on the affordability criteria:

The development aimed to address a specific need - accommodation difficulties faced by NHS staff, which presented sustainability challenges to the healthcare system. The proposed housing was aimed at meeting the affordability criteria of staff on a range of pay grades and enable staff in the area to live close to their place of work.

First, the affordability criteria was tied to the 'affordable salary bands' of NHS staff. The affordable salary bands were as follows:

- Band 3: £19,737 - £21,142
- Band 4: £21,892 - £24,157
- Band 5: £24,907 - £30,615
- Band 6: £31,365 - £37,890
- Band 7: £38,890 - £44,503
- Band 8A: £45,753 - £51,668

Second, the nomination agreement (annexed to the s106 Agreement) specified priority ranking – a cascade mechanism – for the provision of the key worker housing. It referenced geographic location based on employment and / or residence, so that priority would be given to (1) staff working in the London Borough of Barnet; then to (2) staff working in wider North Central London but having lived in Barnet mentioned previously for at least 2 years; then to (3) those working in wider North Central London but not having lived in the borough for two years; then to (4) workers, secondees or medical students employed in the wider catchment area. If the cascade had been followed and eligible occupiers hadn't been found for all of the units, they would then be offered to other public sector key workers before ultimately ending with the council's own waiting list.