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SCOTTISH FUTURES TRUST LIMITED

LEGAL OPINION

Council Built Homes for Market Rent and Sale

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1 **BACKGROUND**

1.1 We were instructed by Scottish Futures Trust Limited (“SFT”) in 2019 to provide a note of advice outlining the key legal issues related to a specific local authority in Scotland developing homes for private sale on land already in the ownership of that local authority.

1.2 We have now been instructed by SFT to prepare a legal opinion on the legal basis and structure to support Council built homes for market rent and sale in Scotland. SFT’s objective is to advance the existing analysis further and, ultimately, to provide a ‘proof of concept’ that enables more homes to be delivered across Scotland with a broader mix of type and tenure that will meet local need.

1.3 The legal opinion is set out in the sections that follow. As instructed, the focus of the opinion is on how legal constructs can enable local authorities to deliver homes for market rent and sale where the private sector is unable, or unwilling, to deliver the types of homes required in the locality or sufficient volume to meet demand. It assumes, critically, that local authorities will not, otherwise, look to compete in the housing market.

1.4 This opinion is structured in broad thematic sections, as follows:

1.4.1 **Local authority statutory powers:** in section 2, we set out the underlying premise of the power to advance wellbeing; the legal restrictions and other constraints on its use; as well as the legal and policy requirements for its application. We also consider the risk of challenge to local authorities exercising their statutory powers and mitigations that might be employed, as well as whether there are other statutory powers that offer alternative avenues to local authorities.

1.4.2 **Establishing an evidence base:** in section 3, we consider the need for local authorities to develop a robust justification for reliance on the power to advance wellbeing; both in terms of establishing how their communities would directly and tangibly benefit and in terms of demonstrating why local authority intervention is necessary, by evidencing the underlying premise that the private sector is unable or unwilling to meet the need identified.

1.4.3 **Structures to support delivery:** in section 4, we explore the three broad categories of legal structure to support delivery: establishing a wholly-owned subsidiary company; entering into an LLP with a private or public sector joint venture partner; or pursuing delivery in-house, by procuring public contracts for works and services. We consider each delivery model in turn and highlight their relative advantages and disadvantages, with a summary table and structure diagram provided for ease of reference at Annex 1 and 2.

- 1.4.4 **Mitigations:** in section 5, we draw out what we consider to be the key actions for local authorities to mitigate the risk of legal challenge.
- 1.4.5 **Next Steps/Conclusion:** in the final paragraphs at section 6, we draw together our key conclusions from the opinion by summarising the preliminary steps to be taken – led by SFT - and the actions to be undertaken by local authorities on an ongoing basis to ensure their approach is as robust as possible.
- 1.5 The themes of sections 2 – 5 reflect the four topics set out in the scope provided to us by SFT. A more detailed breakdown of the scope, and the specific questions addressed in this opinion is provided at Annex 3.
- 1.6 This legal opinion has been prepared solely for the benefit of SFT and may not be relied upon by any party other than SFT without our express written agreement. For the avoidance of any doubt, we understand that this opinion will be shared with third parties (including local authorities) for their consideration, but that such third parties will seek independent legal advice on the matters detailed in it.
- 1.7 Finally, by way of background, and for the purposes of continuity, we have made occasional reference to our previous legal advice where we consider that to be appropriate. We are, however, satisfied that the advice comprised within this legal opinion is standalone and does not need to be read alongside that previous advice. References are simply for context.

2 **LOCAL AUTHORITY STATUTORY POWERS**

2.1 *Underlying premise and introduction to the power to advance wellbeing*

- 2.1.1 The underlying premise of this section 2 is that local authorities are corporate entities established by statute and must exercise their powers (in respect of their decision-making, the carrying out of their duties, undertaking their range of functions, etc) within the bounds of what is conferred by enabling legislation.
- 2.1.2 Decisions taken by local authorities beyond their statutory powers may be declared *ultra vires* – rendering them invalid and unenforceable. To give it its literal meaning, a local authority acting *ultra vires* means it has operated ‘beyond legal powers’.
- 2.1.3 Local authorities in Scotland derive their powers from a wide range of primary and secondary legislation; but the key statutes establishing local authorities, governing how they operate and establishing their key powers and duties are:
- (a) **Local Authorities (Goods and Services) Act 1970**, which makes provision with respect to the supply of goods and services by local authorities to certain public bodies, and for purposes connected with that.
 - (b) **The Local Government (Scotland) Act 1973**, which establishes many local authority powers and responsibilities.

- (c) **The Local Government etc. (Scotland) Act 1994**, which sets the current structure of local government in Scotland.
- (d) **The Local Government in Scotland Act 2003**, which introduced a range of new duties for local authorities, including requirements to secure best value, engage in community planning and additional enforcement and financial functions. This Act is of particular relevance to the concepts considered in this legal opinion.
- (e) **The Local Governance (Scotland) Act 2004**, which sets out provisions for local government elections and expenses, and new requirements for the membership of local authorities (including pay and pensions).

2.1.4 In its Policy Memorandum, introducing the Local Government in Scotland Bill (as the Local Government in Scotland Act 2003 was then) in the Scottish Parliament in May 2002, the Scottish Government was explicit in its description of a new wide-ranging power to be conferred on local authorities to “*change the current approach where local authorities may only carry out those functions required or permitted by various pieces of legislation*”¹.

2.1.5 That proposed new power was the **power to advance wellbeing, now enshrined at section 20 of the Local Government in Scotland Act 2003**, giving local authorities in Scotland the statutory power to do **anything** which they consider likely to promote or improve the wellbeing of its local authority area and/or persons within that area². Section 20 reads:

Power to advance well-being

- (1) *A local authority has power to do anything which it considers is likely to promote or improve the well-being of—*
 - (a) *its area and persons within that area; or*
 - (b) *either of those.*
- (2) *The power under subsection (1) above includes power to—*
 - (a) *incur expenditure,*
 - (b) *give financial assistance to any person,*
 - (c) *enter into arrangements or agreements with any person,*

¹ Paragraph 6, SP Bill 53-PM

² Local authorities may consider that “wellbeing” intuitively sits in the context of activities such as education, public realm, regeneration, housing, net zero, placemaking etc, but the legislation is set much wider than that.

- (d) *co-operate with, or facilitate or co-ordinate the activities of, any person,*
 - (e) *exercise on behalf of any person any functions of that person, and*
 - (f) *provide staff, goods, materials, facilities, services or property to any person.*
- (3) *The power under subsection (1) above may be exercised in relation to, or for the benefit of—*
- (a) *the whole or any part of the area of the local authority;*
 - (b) *all or some of the persons within that area.*
- (4) *The power under subsection (1) above includes power to do anything—*
- (a) *in relation to, or for the benefit of, any persons or place outwith the area of the local authority; or*
 - (b) *in any such place,*
- if the authority considers that doing so is likely to achieve the purpose set out in that subsection.*
- (5) *The Scottish Ministers may, by order, extend the meaning of “well-being” for the purposes of this section.*
- (6) *Such an order shall be made by statutory instrument but not unless a draft of it has been laid before and approved by resolution of the Scottish Parliament.*
- (7) *Before laying such a statutory instrument, the Scottish Ministers shall consult such associations of local authorities as they think fit.*

2.1.6 This was, at least in principle, a move of the dial for local authorities from the rigidity of identifying prescribed enabling legislation to support a decision or undertaking, to a framework that recognised the need to give local authorities a level of confidence to engage progressively with the needs of their communities without falling foul of the principle of *ultra vires*.

2.1.7 Indeed, it was seen as a necessary addition to the existing range of statutory powers: “Local authorities play a vital role in delivering public services in Scotland but are too often constrained by the current legislative framework in which they must operate. The legislative basis for local government in Scotland has been built up over a number of years and the application of case law has led to a degree of uncertainty about the extent to which local authorities can undertake activities beyond prescribed functions. The power to advance well-being is intended to give

local authorities the necessary responsibility and scope to work in genuine partnership with others to improve the communities they serve.”³

- 2.1.8 It is, therefore, in-keeping with this objective that the power to advance wellbeing is expressed in broad terms – it empowers local authorities to do **anything** they consider likely to promote or improve the wellbeing of their area and includes a broad spending power in pursuit of promoting or improving wellbeing. While the applicable legislation sets out examples of potential activities that may be undertaken using the power (including incurring expenditure; giving financial assistance; or providing goods, staff, materials, facilities, services or property), the list is described in the statutory explanatory notes as “*illustrative, rather than limiting*”.
- 2.1.9 However, as noted in our previous advice to SFT, notwithstanding the stated intention to loosen certain constraints on local government activity, in the few cases in which a judgement on the power to advance wellbeing has been reported, the courts have applied a restrictive interpretation to the power having regard to their concern about its interplay with the *ultra vires* doctrine and the extent to which it is curtailed by the principle that local authorities can only do what they are *specifically empowered to do*.
- 2.1.10 The risk that, absent a clear power to undertake a given venture, a court may hold a local authority’s actions to be *ultra vires* has, understandably, somewhat undermined market confidence in relying on the broad permissive power to advance wellbeing and, perhaps as a result of this, there is little evidence of its use in practice (either in terms of reported case law or in terms of publicly accessible council documentation).
- 2.1.11 We consider this risk in more detail at section 2.5 below, and give some consideration to whether (and how) this might manifest in practice, on the basis that local authorities might be able to get comfortable with it as a theoretical risk and one which, if the power to advance wellbeing is exercised in the manner intended – and with a robust audit trail – is capable of mitigation.
- 2.1.12 It is, however, prudent to first consider whether there are any *other* statutory powers that could be relied upon by local authorities to enable them to develop homes for market rent and sale tenures in Scotland. It occurs to us that this part of the exercise is perhaps not aligned with what the Scottish Government describes the power to advance wellbeing to be: a “power of first resort”. But, we consider it to be a sensible exploratory exercise, given that, in practice, it has not been used as such.

³ Paragraph 54, SP Bill 53-PM

2.2 *Statutory powers – development of homes for market rent and sale in Scotland*

Local Government (Scotland) Act 1973 (the “1973 Act”)

- 2.2.1 In our previous advice to SFT, we identified that local authorities have the general power – “*for the purpose of any of their functions or for the benefit or improvement of their area*” - to erect buildings or execute any other works on any land belonging to them. They may also convert, alter or improve any existing building or other works belonging to them⁴.
- 2.2.2 We previously suggested that, while not in and of itself sufficient to *specifically* empower local authorities to develop the tenure of homes in question for market rent and sale, section 78 of the 1973 Act potentially supports (and mitigates against the risk of) using the broader power to advance wellbeing, by, at the very least, enabling the erection of housing units. Critically, this is only in so far as it can demonstrate that the development of housing for private sale and rent could be said to be for the purpose of any of that local authority’s functions or for the benefit or improvement of its area. It is helpful that the power can be used in circumstances that go beyond the facilitation of a local authority’s functions, to situations where there is a benefit or improvement in respect of its area. There is, plainly, an element of overlap here with the criteria for the exercise of the power to advance wellbeing, which is that it must promote or improve the wellbeing of the local authority area and/or persons within that area. We consider this to be a decisive element of building the evidence base needed to justify this kind of activity - whether relying on the wellbeing power, or the power to erect buildings, etc.
- 2.2.3 Local authorities also have the power (in terms of section 74 of the 1973 Act), to dispose of land (land in this context includes individual houses, as per the Interpretation Act 1978⁵ and we assume, for these purposes, that the land would not form part of any common good land, which is subject to separate considerations) “*in any manner they wish*” so long as it does not achieve less than the best consideration that can reasonably be obtained (and so long as it has not been acquired or appropriated land for planning purposes under the Town And Country Planning (Scotland) Act 1959 Part II). “Disposal”, as we understand it, would include sale or lease (either to private individuals or to a special purpose vehicle established for the purpose), as both would be an act whereby the local authority is deprived of the benefit of the land in question⁶.
- 2.2.4 Further, local authorities also have the power to “acquire by agreement any land, whether situated inside or outside their area”⁷ for the purposes of “(a) any of their functions under this or any other enactment, or (b) the benefit, improvement or

⁴ S.78 Local Government (Scotland) Act 1973

⁵ Schedule 1 to the Interpretation Act 1978 defines “land” as “includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

⁶ Written Submission from Professor Robert Rennie - Submitted in response to a request from the City of Edinburgh Council (Portobello Park) Bill Committee

⁷ S.70 Local Government (Scotland) Act 1973

development of their area” (subsection (b), again, setting the power in terms which are wider than the facilitation of statutory functions and dovetailing with the language of the wellbeing power).

2.2.5 They are also empowered to “appropriate for the purpose of any functions, whether statutory or otherwise, land vested in them for the purpose of any other such function.”⁸ In other words, where a local authority owns land used for one purpose, it can appropriate that land for another local authority purpose.

2.2.6 These provisions establish that, at least at an individual component level, local authorities have the explicit power to:

- (a) acquire land by agreement for the purposes of their functions or for the benefit, improvement or development of their area;
- (b) appropriate land in their ownership for another purpose;
- (c) erect buildings or execute other works on land belonging to them – again, if they are satisfied that to do so would benefit or improve their area; and
- (d) dispose of land (including buildings) for not less than the best consideration that can reasonably be obtained.

2.2.7 Perhaps what is not captured here are the other, ancillary but necessary, activities required to support the kind of offering in question, such as, for example, the marketing of units to individuals for private sale or rent; and/or ongoing management of market rental housing; and/or possible factoring/property management services. There is, by contrast, an attraction in seeking to rely on a more holistic wellbeing power that would support the underlying objective, thereby enabling multifaceted, supplementary activities to be captured, alongside the more obvious individual components.

2.2.8 In the same vein, local authorities will be aware of the “subsidiary power” set out at section 69(1) of the 1973 Act, to “do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.” The key to section 69(1) of the 1973 Act is that it confers upon a local authority a power to carry out an act which “facilitates, or is conducive or incidental to” a particular activity only to the extent that that activity is itself within the local authority’s statutory functions. There also needs to be a sufficiently close link between any act purported to be authorised by section 69(1) and the underlying statutory function that the local authority is discharging. By contrast, the power to advance wellbeing was introduced to enable local authorities to innovate and engage in novel activities for the benefit of their

⁸ S.73 Local Government (Scotland) Act 1973

communities: it is not confined to the scope of a local authority's statutory functions. We consider the requirement to demonstrate benefit for the community in the context of the power to advance wellbeing at section 2.4.

Section 9, Local Government in Scotland Act 2003

- 2.2.9 In addition to the power to advance wellbeing, the 2003 Act also introduced special provision for local authority contracts for the construction of buildings or works.
- 2.2.10 Section 9 of the 2003 Act provides that a local authority may enter into agreements with **any person** for the construction or maintenance by the authority of any buildings or works. Such agreements are to be governed by regulations made by the Scottish Ministers under the section. It is of note that this provision is focussed on construction and maintenance works carried out **by** the authority and that there is no restriction on who the agreement might be with (ie. it is not restricted to other public sector bodies).
- 2.2.11 Again, while useful, this provision is perhaps only a partial answer to the question of statutory power to embark on the kinds of projects envisaged in this paper. It is also, critically, not yet in force⁹. It cannot, therefore, be relied upon by local authorities as at the date of writing. It is, however, to our mind, a helpful indication of the intention of lawmakers to accommodate this kind of development activity by local authorities. We suggest that it might provide support to any counterargument required on the question of *vires* as regards use of the wellbeing power in the context of the construction or maintenance of buildings for market rent or sale (which would obviously be a key element to the subject matter in question). It may also be a useful reference point in any dialogue with Scottish Government, as discussed at section 3.

Housing (Scotland) Act 1987 (the "1987 Act")

- 2.2.12 It is perhaps worth noting that the power to acquire land under section 70 of the 1973 Act, as noted above, may be relied upon by a local authority for the purposes of providing "*housing accommodation*" in terms of Housing (Scotland) Act 1987 "*notwithstanding that the land is not immediately required for those purposes.*"¹⁰
- 2.2.13 It is perhaps also relevant to note that section 236 of the 1973 Act notes that "Nothing in sections 70 to 78 of this Act shall affect any provision relating to the acquisition by agreement or compulsorily, appropriation, letting or disposal of land, the erection of buildings or the execution of works by a local authority contained in any of the following enactments or any instrument made thereunder— (d) The

⁹ While we do not know why this section of the 2003 Act has been held back for the time being, we note that under section 9(2) the Scottish Ministers may make regulations to restrict the exercise of the power by reference to the likely gross expenditure of the local authority in any financial year occasioned by its exercise of the power and to otherwise prescribe how local authorities are to exercise it. Scottish Ministers must consult before enacting any such regulations, which may explain the delay.

¹⁰ S.10(3) Housing (Scotland) Act 1987

Housing (Scotland) Act 1987”. We take this to mean that the powers and duties of local authorities in terms of the 1987 Act are intended to operate as set out in that Act, and that the 1973 Act should not be taken to cut across them. This is not at all remarkable as, given the very specific duties and powers assigned to local authorities as regards the provision of housing and prevention of homelessness, it is appropriate that local authorities have a clear framework within which to operate.

2.2.14 The 1987 Act, in broad terms, gives local authorities the power to provide housing in their area of operation. The 1987 Act sets out a framework of specific duties and relative powers, including:

Specific Duties:

- (a) Every local authority has a duty:
- (b) to consider the housing conditions in their area and the needs of the area for further housing accommodation;
- (c) to have regard to the amenities of the locality;
- (d) to take action in relation to homelessness and threatened homelessness;
- (e) to inspect houses of non-tolerable standards (and to secure that all houses in their district which do not meet the tolerable standard are closed, demolished or brought up to the tolerable standard within such a period as is reasonable in all circumstances);
- (f) to inspect overcrowding and inform in writing the landlord and the occupier of a house of the permitted number of persons in relation to the houses;
- (g) to offer house loans and other financial assistance in special cases set out in the 1987 Act; and
- (h) to offer local authority grants for improvement, repair and conversion in prescribed cases set out in the Act.

Specific Powers:

- (i) To provide housing accommodation:
 - (i) by the erection of houses on any land acquired or appropriated by them;
 - (ii) by the conversion of any buildings into houses;
 - (iii) by acquiring houses;

- (iv) by altering, enlarging, repairing or improving any houses or other buildings which have, or a right or interest in which has, been acquired by the local authority.
- (j) To provide shops, facilities and welfare services in connection with housing accommodation;
- (k) To acquire and dispose of land, houses and buildings (which may be made suitable as houses) in connection with the provision of housing (including the power to sell or lease the land or part of the land to any person under the condition that that person will erect on it, in accordance with plans approved by the local authority, and maintain, such number of houses of such types as may be specified by the authority, and when necessary will lay out and construct public streets or roads and open spaces on the land, or will use the land for purposes which, in the opinion of the authority, are necessary or desirable for, or incidental to, the development of the land as a building estate in accordance with plans approved by the authority);
- (l) To arrange execution of works of sub-standard housing;
- (m) To arrange repair of housing in serious disrepair;
- (n) To take action in relation to making demolition and closing orders;
- (o) To take action in relation to houses of multiple occupation and overcrowding; and
- (p) To offer home loans, grants and other forms of financial assistance for home improvements (eg. the Housing (Scotland) Act 2006 had implemented the recommendation of the Housing Improvement Task Force (Stewardship and Responsibility: A Policy Framework for Private Sector Housing in Scotland, 2003) that primary responsibility for the repair and maintenance of private sector houses rests with their owners, while recognising the need to provide support where necessary and that local authorities have a range of powers to enforce work on private homes and broad discretionary powers to provide assistance to homeowners).

2.2.15 It is, however, with interest that, while the context and general application of the 1987 Act (and subsequent enactments) have been very much set within the affordable housing sector (being generally understood to be social housing (with local authorities acting in their capacity as a social landlord) and, more recently, mid-market housing¹¹), we noted in our review that there is no definition in the 1987

¹¹ Which we understand is generally set, in terms of rent levels, at 80% of the Local Housing Allowance or 80% of the local median private rent - 33% higher than a comparable social rented property (Scottish Government Publication: Rent affordability in the affordable housing sector, 2019)

Act (or more recent housing legislation) of “housing accommodation” which explicitly constrains its meaning to housing within the affordable housing sector¹².

2.2.16 The preamble to the 1987 Act notes that it is “An Act to consolidate with amendments to give effect to recommendations of the Scottish Law Commission, certain enactments relating to housing in Scotland.” Those recommendations of the SLC – set out in their report on the Consolidation of the Housing Acts of May 1985¹³ - have been of some assistance in exploring why “housing accommodation” has not been explicitly constrained to the affordable context.

2.2.17 Paragraph 4 of the SLC report explains that “Originally all housing legislation was confined in its operation to working class housing” and quoted Lord Denning in his criticism of the use of the expression:

*“These words ‘working classes’ have appeared in a number of Acts for the last hundred years. I have no doubt that in former times it had a meaning which was reasonably well understood. ‘Working classes’ fifty years ago denoted a class which included men working in the fields or the factories, in the docks or the mines, on the railways or the roads, at a weekly wage. The wages of people of that class were lower than most of the other members of the community, and they were looked upon as a lower class. That has all now disappeared. The social revolution in the last fifty years has made the words ‘working classes’ quite inappropriate today. There is no such separate class as the working classes. The bank clerk or the civil servant, the school teacher or the cashier, the tradesman or the clergyman, do not earn wages or salaries higher than the mechanic or the electrician, the fitter or the mineworker, the bricklayer or the dock labourer. Nor is there any distinction between one or the other. No one of them is of a higher or lower class. In my opinion, the word ‘working classes’ used in the Acts are quite inappropriate to modern social conditions.”*¹⁴

2.2.18 The SLC report notes that Parliament, in section 1 and Schedule I of the Housing Act 1949, removed the references to the “working classes” in almost all contexts in housing legislation, thus making the provisions applicable to all housing and recommended that the phrase should not be carried forward in the consolidation of the Housing Acts.

2.2.19 It went on to consider specific contexts in which the phrase should not be used, including provisions on overcrowding in which it considered there “*to be no satisfactory alternative way of restricting the operation of the overcrowding provisions. On the other hand, to apply those provisions to all housing appears unlikely to have any significant practical effect, or to create extra work for local authorities, because overcrowding (as defined in the Act, by reference to the number and size of rooms) appears unlikely to be found in the dwellings to which the*

¹² S.111 of the Housing (Scotland) Act 2001 defines “housing accommodation” to say that it “includes flats, lodging-houses and hostels”, which is perhaps indicative of the affordable housing context, but not in explicit terms.

¹³ <https://www.scotlawcom.gov.uk/files/1212/7989/7340/rep94.pdf>

¹⁴ H.E. Green & Sons v. Minister of Health (No. 2) [1948] 1 K.B. 34 at p. 38

provisions are in theory extended. Accordingly we recommend that the restriction should simply be omitted" (our emphasis). What the SLC appear to be saying here is that removing the problematic reference to "working class" has the effect of extending the provisions on overcrowding *in theory*, but that the practical outworkings of this are unlikely to change the practices of local authorities.

- 2.2.20 Another specific context referred to in the report is the power of bodies corporate to sell or let land for housing purposes, which it notes goes back to section 11(2) of the Housing of the Working Classes Act 1885. It explains that "*As with the other provisions mentioned above in which housing for the working classes is referred to, there appears to be no satisfactory alternative to substituting a reference to housing generally. This would extend the provision so as to enable a body corporate to dispose of land for housing other than working class housing, notwithstanding that a greater profit might be realised by some other kind of development.*" While not strictly relevant to local authority duties and powers, it is a further explicit reference by the SLC to the extension of these provisions to a wider pool of housing beyond that which was previously restricted to "*houses for the working classes*".
- 2.2.21 It does, therefore, appear to us that, on the recommendation of the SLC, the 1987 Act refrains from any explicit restriction of "housing accommodation" to the affordable sector – whether by reference to rent levels or other objective measure.
- 2.2.22 If this approach was to follow though the entirety of the housing legislative landscape, it might (at least in theory) extend the powers and duties of local authorities in relation to housing beyond its capacity solely as a social landlord. Our concern with this approach, however, is that it may not correspond to the way in which the 1987 Act deals with the practical aspects of how local authorities are to manage their housing stock – including, for example, allocation of housing on a priority basis and the operation of local authority Housing Revenue Accounts, which operate to record expenditure and income relating to local authority houses provided under the powers and duties of the 1987 Act and impose certain restrictions on the disposal of such houses¹⁵. These are not consistent with the notion that "housing accommodation" has a meaning beyond the scope of the affordable sector.
- 2.2.23 Indeed, in its Guide to Glasgow City Council's Statutory Duties and Powers, May 2021, the Council noted that "The 1987 Act gives local authorities the power to provide housing in its area. However, the exercise of these powers would require the Council to maintain a Housing Revenue Account (HRA) under section 203 of the 1987 Act." This reflects our view that the power of local authorities to develop housing to respond to local need in terms of the 1987 Act triggers the requirement

¹⁵ For completeness, we understand that in terms of the Housing (Scotland) 2001 (Alteration to Housing Finance Arrangement) Orders 2004, 2007 and 2008, the requirement to operate a HRA ceased to apply to Dumfries and Galloway Council, Scottish Borders Council, Glasgow City Council, Argyll and Bute Council, Western Isles Council and Inverclyde Council. For these local authorities, any income and expenditure which would previously have been accounted for in the HRA now falls to be paid into or out of the General Fund. This also means that these authorities do not receive any housing support grants, presumably because, following stock transfers to RSLs, they no longer operate housing stock of their own.

to maintain an HRA, in respect of which there are prescribed checks and balances applicable to property transactions that would not be consistent with the market-approach envisaged by SFT for the purposes of this opinion.

2.2.24 Accordingly, while it was a route worth exploring in view of the apparent widening of the language around the provision “housing” flowing from recommendations of the SLC, the practical out workings of the 1987 Act are likely to be such that any housing developed through the application of these powers would be caught up in the system for managing affordable housing. While there are, for example, options for carving certain categories of housing out of the HRA with the Secretary of State’s consent, this would seem to be a rather convoluted approach which may present certain error traps for local authorities seeking to navigate new terrain using tried and tested powers in a different context. It seems to us that a very clear and well evidenced business case in favour of the use of the power to advance wellbeing would offer a clearer and more transparent route to undertaking projects with an element of novelty.

2.2.25 Accordingly, we consider in the paragraphs below what legal and policy criteria local authorities might need to satisfy for reliance on the power to advance wellbeing. It is, however, prudent to first consider what limitations and constraints might apply in this context, with a view to addressing these as far as possible in the development and satisfaction of applicable criteria.

2.3 *Power to advance wellbeing – legal restrictions on its use*

2.3.1 The power to advance wellbeing is a **permissive** power: it only confers power where it does not conflict with other legal restrictions. The power under section 20 above does not enable a local authority to do anything which it is, by virtue of a “limiting provision”, unable to do.

2.3.2 We have, therefore, considered whether there are limiting provisions that conflict with the power to advance wellbeing in the context of developing housing for market sale and rent.

2.3.3 It is, of course, difficult to definitively and exhaustively say that no enactment prohibits, prevents or limits the relevant power. We have, however, identified the explicit limits placed on the power to advance wellbeing as set out in section 22 of the 2003 Act and the wider references made under it, as well as considering relevant interpretive case law. At section 2.6 below, we give consideration to other potential statutory limitations and wider constraints.

Section 22 – 2003 Act

2.3.4 In terms of the limits on the power to advance wellbeing set out in section 22 of the 2003 Act, a “limiting provision” is one which—

- (a) prohibits or prevents the local authority from doing anything or limits its powers in that respect; and
- (b) is expressed in an enactment (whenever passed or made).

2.3.5 A limiting provision is, therefore, one which – by the application of legislation - **expressly** prohibits, prevents, restricts or limits the exercise of the power to advance wellbeing. Per subsection (3), the power is **not** limited by what may be deemed an **implied restriction** – for example, by the absence from any enactment of a provision conferring any power. We consider this clarification to be a helpful mitigation against the risk that a local authority might be unsure whether the power to advance wellbeing is consistent with certain other provisions: a limiting provision is one which is **explicit rather than implied**.

2.3.6 In terms of the explicit prohibitions set out in section 22, we note that local authorities may **not** use the power to advance wellbeing to:

- (a) unreasonably **duplicate** the statutory functions of another body or person without their consent (subsections (4) and (5)). It is for the local authority to consider whether any proposed action is reasonable;
- (b) carry out certain activities as part of **trading operations** which may be done under the Local Authorities (Goods and Services) Act 1970 (subsection (6)). This legislation makes provision with respect to the supply of goods and services to certain public bodies and other persons in prescribed circumstances. We consider this, and how it might impact upon local authority built housing for market rent and sale, in detail at paragraphs 2.3.8 - 2.3.36 below;
- (c) do anything “for the purposes of enabling the authority to raise money by levying or imposing any form of tax or charge, by borrowing or otherwise” (subsections (7) to (9)). This is to be distinguished from obtaining value from an asset disposed of by a local authority in furtherance of the power to advance wellbeing. Indeed, it is made clear that this does not prevent local authorities from “imposing reasonable charges for anything done by the authority under section 20 above.” In other words, this is not a blanket ban on generating income from activities undertaken on the basis of the wellbeing power; but it does prevent local authorities from exercising the wellbeing power **for the purpose of raising money**. Note that this can, to an extent, be distinguished from the wellbeing power available to local authorities in England and Wales, which may not be used “to raise money (whether by precepts, borrowing or otherwise)”¹⁶ – it is not expressed in terms of “purpose”. In Scotland, local authorities may be able to establish that developing homes for market sale and rent advances wellbeing in their area – perhaps in line with their regeneration priorities or other reasons - but the critical point is that this must not be for the purposes of enabling the local authority to raise money. The benefit to the local area and/or the people within it

¹⁶ Subsection 3(2) Local Government Act 2000

would need to be established as part of the evidence base for taking the action in question, which would, also demonstrate that the generation of funds was a consequential, secondary, outcome (as well an explanation as to how any charges are arrived at); and

- (d) some activities can be done under the power to advance wellbeing but only with the consent of the Scottish Ministers. These are:
 - (i) doing anything outside of the United Kingdom for the purpose of promoting or improving economic development of the local authority's area (subsection (13)); and
 - (ii) providing certain financial assistance listed under section 92(5) of the Housing (Scotland) Act 2001 (subsection (14)) – for example, giving a guarantee or indemnity.

2.3.7 Subject to our comments below on the **application of the 1970 Act**, we are of the view that nothing in section 22 of the 2003 Act would prevent local authorities using the power to advance wellbeing to build housing for market sale and rent, so long as the requisite justification has been established and supported by evidence, which makes clear that it is not done for the purpose of raising money and any charges imposed are reasonable.

Local Authorities (Goods and Services) Act 1970

2.3.8 Section 22(6) of the 2003 Act provides that local authorities **cannot** use the power to advance wellbeing to do “*anything which may be done under the Local Authorities (Goods and Services) Act 1970*”. In theory, this does not in and of itself restrict what authorities can and can't do but determines which regulatory framework - and applicable restrictions - apply.

2.3.9 It is important that this restriction on the use of the power to advance wellbeing is fully considered in this context, as – while it is accepted that local authorities will not look to compete in the housing market purely for commercial objectives – in delivering the kinds of projects in contemplation here, there may be **particular activities** undertaken as **part of that overarching objective** that are, at least arguably, trading activities.

The 1970 Act – the principles

2.3.10 The Local Authorities (Goods and Services) Act 1970 (the “**1970 Act**”) sets controls on the level to which a local authority - or any of its departments - can enter into trade agreements for the **provision of goods and services** outside of the local authority itself.

2.3.11 The 1970 Act empowers local authorities to enter into an agreement in relation to any “*relevant trading operation*” (i.e. a trading operation for which the authority keeps separate trading accounts), for the:

- (a) supply by the authority to the person of any goods or materials;
- (b) provision by the authority of any services;
- (c) use by the person of any property belonging to, or facilities under the control of, the authority; or
- (d) carrying out by the authority of works of maintenance in connection with land or buildings for which the person is responsible.

2.3.12 Where, however, it is proposed that such an agreement is entered into with a person other than a public sector body¹⁷, that trading operation is subject to a financial statutory limit on income set by the Scottish Ministers¹⁸. In other words, a local authority **cannot** enter into an agreement **outside of the public sector** if the commercial services income¹⁹ accruing to it in any financial year will exceed the statutory limit without obtaining the prior consent of the Scottish Ministers.

2.3.13 A trading operation is defined by section 1(1P) of the 1970 Act as “*a trading operation which is carried on for the purpose of enabling a local authority to raise money, by borrowing or otherwise.*” This means that local authorities can, in contrast to the wellbeing power, undertake activities, where it is permitted by the 1970 Act, **specifically for the purpose of raising money**.

2.3.14 We note with interest that the provisions applicable to England and Wales are cast slightly differently. For England and Wales, the provisions extend only to agreements among local authorities and prescribed public bodies and allows for the provision of profit within those arrangements. It does **not** permit provision to the private sector or the public and there is, therefore, no need for a statutory limit on the income accruing. We understand that local authorities in England and Wales rely on this to avoid wastage from spare capacity and in order to obtain and share economies of scale.

2.3.15 While this is not strictly of relevance to the provisions applying in Scotland, it is of some assistance to us in considering the interaction between the 1970 Act and the wellbeing power in England and Wales, by way of comparison.

¹⁷ A “public sector body” includes: another local authority; a public body; a person who, in certain circumstances, is providing goods or services to the local authority; or a person that has functions of a public nature or engages in activities of that nature and the purpose / effect of the agreement is to facilitate discharge by that person of those functions / activities.

¹⁸ Which has not yet been set – please see below.

¹⁹ The definition of which would need to be explored with local authorities’ finance/accounting teams.

2.3.16 At the Report Stage in the House of Lords on the Bill for the Local Government Act 2000, the Minister (Baroness Farrington of Ribbleton) said as follows in connection with the clause that became section 2 of the Local Government Act 2000 (being the promotion of well-being – the equivalent to our section 20 of the 2003 Act):

“My Lords, I am afraid that we must oppose Amendments Nos. 5 and 10. There is a good deal of unnecessary confusion, both inside and outside the House, about the effect of the well-being provisions on the ability of local authorities to engage in trading activities. Therefore it may be helpful to set the record straight.

At present, authorities’ ability to trade in goods and services is controlled by the Local Authorities (Goods and Services) Act 1970. This permits authorities to charge for goods and services only where these are provided by the authority to a ‘public body’ as defined by that Act. The goods and services Act is a permissive piece of legislation. It does not therefore contain any prohibition, restriction or limitation that would bite on the new well-being power by virtue of Clause 3(1). In other words, once Clause 2 comes into force, local authorities will be able to provide goods and services to anyone. It will no longer matter whether they are a ‘public body’ as defined by the 1970 Act, or not. But, while they will be able to provide goods and services to anyone, they will not be able to charge for them. Clause 3(2) specifically prevents authorities from using the well-being power to raise money. Therefore they will only be able to charge for goods and services using the power in Section 1(3) in the 1970 goods and services Act and this limits charging to circumstances where authorities are trading with ‘public bodies’. In other words, nothing in the current Bill will change the current ability of local authorities to engage in trading.”²⁰

2.3.17 What is clear from this extract is that there is an interaction in England and Wales between the wellbeing power and the power to supply goods and services under the 1970 Act: the wellbeing power enables local authorities to provide goods and services to anyone, but **not charge for them**²¹; and the 1970 Act empowers local authorities to charge for goods and services but only where they are trading with public bodies. To the extent that local authorities in England and Wales do charge non-public sector bodies for goods and services, we assume this is facilitated by another relevant statutory power, such the power of general competence.

2.3.18 The position in Scotland can be similarly characterised, but with some important distinctions: the wellbeing power enables local authorities to provide goods and services to anyone, but not charge for them unless they are “reasonable charges for anything done by the authority under section 20”²² and not prohibited by existing legislation; and the 1970 Act empowers local authorities to charge for goods and

²⁰ (Hansard, HL Vol.610, col.338 (February 28, 2000).)

²¹ Subsection 3(2) of the Local Government Act 2000 provides that “The power under section 2(1) does not enable a [community council] to raise money (whether by precepts, borrowing or otherwise).”

²² Subsection 22(8)(b) 2003 Act. Note that this would not allow local authorities to charge for anything done in pursuance of their functions relating to education in schools; the provision of a public library service; the registration of elections; the conduct of elections; and such other functions as may by order be prescribed for the purposes of this subsection by the Scottish Ministers. We also consider the requirement for the charge to be “reasonable” below.

services but only where they are trading with public bodies or where the income does not exceed the statutory limit or is permitted by the Scottish Ministers²³. In Scotland, where the local authority **does** impose a charge in terms of the wellbeing power, it must publish its reason for doing so and an explanation of how it arrived at the amount of the charge and local authorities must be mindful of that when developing their business case / economic strategy for use of the wellbeing power.

- 2.3.19 We understand that there has been some doubt over whether the 1970 Act actually offers local authorities in Scotland a route to trading outside the public sector, due to the fact that no statutory limit has ever been fixed by the Scottish Ministers. On this, the Association for Public Service Excellence says the following:

“A further source of doubt about the amended Goods and Services Act is the inclusion of a restriction on the amount of income that a council can generate from trading activity conducted outside the public sector. This statutory limit is to be set by ministers, who are also provided with a power to allow it to be exceeded. No such limit has been set, leading to a divergence of opinion over whether it is therefore zero or unlimited. Although there are numerous examples of Scottish councils trading under the power without having been challenged and Ministers have not felt it necessary to set the limit, the issue has not been considered by the courts and legal advice should be sought as appropriate.”²⁴

- 2.3.20 We take the view that the limit has to be regarded as **zero**, and that **no** such trading activity is permitted, because of the wording at section 1(1H) of the 1970 Act, which provides: “Where, for any trading operation, no amount has been so fixed, the prohibition in subsection (1A) above applies, the condition of its application set out in that subsection being ignored.” In other words, where no statutory limit has been fixed, the default prohibition on trading outside of the public sector applies (unless prior consent is granted by the Scottish Ministers to that trading activity, per subsection 1(1I)).

- 2.3.21 Broadly, the effect is that unless the Scottish Ministers give consent in any particular instance, a local authority can legitimately generate income from the provision of services only if the customer in relation to those services is a public sector body.

The 1970 Act – the practical application

- 2.3.22 Having set out the strict legal position based on the wording in the 1970 Act, it should be recognised that – as a matter of practice – there are in fact a number of instances where local authorities in Scotland do engage in income-generating activities which appear to infringe the provisions set out above. These include services as diverse as car parking facilities to the provision of trade waste collections and many more in-between. Some degree of flexibility, so far as that issue is

²³ A change to the previous position under the 1970 Act that was, notably, brought in by the 2003 Act (being, of course, the legislation that introduced the power to advance wellbeing).

²⁴[https://www.apse.org.uk/apse/assets/File/Taking%20a%20commercial%20approach%20-%20a%20guide%20for%20local%20councils%20in%20Scotland\(1\).pdf](https://www.apse.org.uk/apse/assets/File/Taking%20a%20commercial%20approach%20-%20a%20guide%20for%20local%20councils%20in%20Scotland(1).pdf)

concerned, is generally considered to apply by reference to the principle that a local authority can reasonably make use of surplus capacity by providing services rather than have that surplus capacity standing idle – but strictly speaking, there is nothing in the detailed wording of the 1970 Act which sets out that principle as an exception to the strict requirements imposed by these statutory provisions. Absent such exceptions, it must be recognised that any significant level of external trading income could be open to challenge.

- 2.3.23 While this has been a necessary analysis on the interaction between the 1970 Act and its possible limitation on reliance of the power to advance wellbeing, we would highlight that this is only relevant so far as the development of homes for market rent and sale could be regarded as a *trading operation*. To the extent that any activity being undertaken in pursuit of the delivery of market housing is a trading operation, that activity cannot be underpinned by the power to advance wellbeing.
- 2.3.24 Subsection 1(1O) provides that “*References in this section to a trading operation are, in relation to a local authority, references to a trading operation for which, in accordance with proper accounting practices (within the meaning of section 12 of the Local Government in Scotland Act 2003) the authority keep trading accounts*” and subsection 1(1P) notes that it is “*carried on for the purpose of enabling a local authority to raise money, by borrowing or otherwise.*” Scottish Government further describes a trading operation as one which is “*provided in a “competitive environment”, that is the user has discretion to use alternative providers; and the service is provided on a basis other than straightforward recharge of costs, that is users take the service on the basis of quoted lump sums, fixed periodical charges or rates or a combination of these*”.
- 2.3.25 However, we note that section 1(2) specifically provides that the 1970 Act does **not** authorise a local authority “*(a) to construct any buildings or works*”. Given that any use of the power to advance wellbeing in this context would necessitate the local authority constructing buildings and works (whether directly or through a third party), it seems to us that any possible cross-over between the wellbeing power and local authority trading powers and restrictions as regards the construction element can be put aside. Certainly, that was the conclusion reached by Fife Council in its assessment of the use of the power to advance wellbeing to support its development at Raith Drive, Kirkcaldy, which we refer to at paragraph 3.4.2 below.
- 2.3.26 To our mind, there does, however, remain a question mark over the delivery of services to the public associated with the provision of housing for market rent and the extent to which this would be regarded as a trading operation. It seems to us entirely possible that the provision of housing for market rent could be found to be one which is provided in a “competitive environment” (albeit, there may be some merit in the argument that the market failure which has led to the local authority’s intervention demonstrates that there is no competitive environment) – and the

“market rent” aspect of it could represent a “fixed periodical charge” that goes beyond the recharge of the local authority’s costs²⁵.

- 2.3.27 In order to aid this analysis, we have given consideration to whether the 1970 Act is explicitly carved out of (or otherwise dealt with in) legislation providing for the provision of housing in the affordable context. We consider there to be merit in the argument that, as it is not explicitly carved out, the provision of rental services may not necessarily have to be regarded as a trading operation for the purposes of the 1970 Act. By way of comparison, section 107 of the Housing (Scotland) Act 2001 explicitly provides that the maintenance, by local authorities, of houses owned by registered social landlords is permitted by the 1970 Act on the basis that a registered social landlord is to be regarded as a public body – ie. it is public to public trading. This is clear indication that the provision of maintenance services for the benefit of registered social landlords **is** regarded as a trading operation, albeit one which is not subject to restriction in terms of the 1970 Act, whereas there is no explicit reference to the 1970 Act in the context of housing services to the public at large.
- 2.3.28 We suspect, however, that there will remain a risk to the extent that the provision of market rent housing is seen as a commercial activity more akin to trading than the provision of social housing (and related services, such as the provision of welfare services, or the sale or hire-purchase of furniture to the occupants of houses provided by the local authority). It may come down to a question of “commerciality”. Note that in Scottish Government’s Policy Memorandum (referred to at paragraph 2.1.4 above), the Scottish Government indicated that it would regard services **where the income received is greater than the costs of providing that service as commercial activity**²⁶. We think this is a point which would benefit from exploration with Scottish Government (see paragraph 2.3.33 below).
- 2.3.29 This question aside, we have also given consideration to whether the restriction on trading in turn restricts reliance on the wellbeing power. Note that section 22(6) of the 2003 Act provides that: “*The power under section 20 above does not enable the doing of anything which may be done under the Local Authorities (Goods and Services) Act 1970*”.
- 2.3.30 If we are saying that, due to the absence of a statutory limit on income derived from such trading operations, the prohibition on local authorities entering into agreements for the supply of goods or services with persons outwith the public sector applies, then it is, by extrapolation, **not** something “*which may be done under the Local Authorities (Goods and Services) Act 1970*”. Arguably, then, the restriction applied by section 22(6) is not activated. We are, however, concerned that such an interpretation would be an impermissible attempt to circumvent the prohibitions and limitations in the 1970 Act and, at the very least, would not be in the spirit of the 2003 Act, which we would suggest is intended to ensure that local authorities apply

²⁵ The accounting rules would, presumably, offer local authorities a framework for determining how costs and charges are accounted for relative to each other.

²⁶ Paragraph 62.

the correct decision-making framework (and thus any applicable restrictions) to a given decision or act.

- 2.3.31 It seems to us that what is intended by the restriction under section 22(6) of the 2003 Act is to make clear that the wellbeing power cannot be considered an adequate basis for trading on anything other than a cost recovery basis (cost recovering being a “*reasonable charge*” as per subsection 22(8)(b) 2003 Act). Scottish Government’s statutory guidance²⁷ on “best value” as provided for in the Local Government in Scotland Act 2003, provides that “*a local authority which secures Best Value will be able to demonstrate ...the power to advance well being is not used to raise money, beyond imposing reasonable charges for the work undertaken ...[and]... where the authority’s activities count as entering into an agreement to supply goods and services, the Local Authorities (Goods and Services) Act 1970 is observed*”. It seems to us, then, that the power to advance wellbeing may be used to justify activities for which a reasonable charge is imposed, but where that activity moves into the territory of *trading*, it is the 1970 Act that applies, potentially prohibiting that trading (subject to Scottish Ministers’ consent or statutory limit on income).
- 2.3.32 This is a much more fluid position than exists under England’s wellbeing power, where there is no carve out for reasonable charges – perhaps one of the motivators for England and Wales introducing the power of general competence (see paragraph 2.7.1 below).
- 2.3.33 We think, given that there is potentially a “spectrum” here in terms of when imposing “reasonable charges” goes beyond cost recovery, to the point at which it becomes commercial trading with members of the public – particularly as regards the provision of market rental services - there is a clear need for dialogue with Scottish Government, as more particularly discussed at section 3.3.
- 2.3.34 While we would generally hold to the view that a local authority cannot establish a separate entity with powers that go beyond that which a local authority is itself empowered to do, a question which could, potentially, be put to Scottish Ministers for a view in this context might be whether they would be supportive of the argument that a separate entity (either wholly owned by a local authority or jointly with another party) may engage in trading without falling foul of the 1970 Act restrictions, providing that none of the profits are distributed to the local authority (ie. any income would be recycled by that entity and used in furtherance of that entity’s activities). If they were supportive of this argument, this might deal quite neatly with any overlap between the 1970 Act and the wellbeing power, and also provide a clear direction as to the preferred structure.
- 2.3.35 A variant of this, which might also merit exploration with Scottish Government, might see a wholly owned subsidiary of the local authority establishing a special purpose vehicle with a third party (most likely, an LLP with the subsidiary and third

²⁷ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2004/04/best-value-guidance/documents/0028846-pdf/0028846-pdf/govscot%3Adocument>

party as the two members) to deliver the market housing projects. The advantage of this is that it similarly seeks to deal with any concerns about the indirect routing of profits to the local authority from the market-rent vehicle, while also drawing in a joint venture partner (the advantages of which we discuss at section 4 below).

- 2.3.36 Subject to that dialogue, we consider it prudent for local authorities to consider whether they might be prepared to develop a business case/evidence base for reliance on the power to advance wellbeing for the development of market level housing in their area as a stand alone initiative; with a separate statutory powers justification for the provision of rental services (to the extent required and subject to Scottish Ministers' consent to this under the subsection 1(1I) of 1970 Act or an appropriate statutory income limit). If such consent/statutory limit is not forthcoming (and Scottish Government are not minded to provide direction on the alternative structures suggested above), local authorities may need to consider whether they would be prepared to develop housing to meet the needs of their communities, as per the evidence base for use of the wellbeing power, but transfer that developed housing to a third party (for best consideration) to deliver the ongoing services. Conceivably, by developing the housing (including executing any necessary remedial site works), the local authority may have intervened sufficiently to draw in private sector interest.

2.4 *Case law - scope of the power to advance wellbeing*

- 2.4.1 While case law on the subject is very limited, there are two particular cases that are relevant in defining the scope of the power to advance wellbeing. The first is *R (on the application of Risk Management Partners Limited) v Brent London Borough Council [2009] EWCA Civ 490*. Our key take-away from this judgement is that the power to advance wellbeing is **not a power of general competence – there are criteria to be satisfied**.
- 2.4.2 In this case, the English equivalent of the wellbeing power was challenged, but the principles emerging from the judgement are relevant to the Scottish context. A number of London authorities set up a mutual insurance company, aiming to save money on insurance that could be used elsewhere for the wellbeing of the citizens in their areas. The legal basis was that this was incidental to their functions and covered by the power of wellbeing. The court held that there must a **direct link** between the wellbeing of citizens in an area and whether they could be said to benefit directly from the action taken under the wellbeing power. Delivering savings which could be used to fund front-line services was not a direct link to the wellbeing of citizens.
- 2.4.3 This case went all the way to the Supreme Court, but by that time, the scope of the dispute had narrowed considerably. The Local Democracy, Economic Development and Construction Act 2009 had, by that time, been given Royal Assent; section 34 of that Act gives power to local authorities to enter into mutual insurance arrangements of the kind in issue in this case, thereby largely superseding any

question as to the statutory power of local authorities to enter into such arrangements.

- 2.4.4 The earlier court of appeal judgements do, however, go into some detail on the breadth of the wellbeing power, which is useful for the Scottish context. Both LJ Pill and LJ Moore-Bick quote the judge at first instance, who summed up the point about the need for the power to be used to directly affect the well-being of a local authority's area: "*It is one thing for a local authority to give financial assistance to a company so that it can carry out activities that benefit the local authority's area; it is another to give financial assistance to a person in order to obtain a financial reward which can in turn be used to benefit its area; and it is a yet further step away from the well-being power if there is no assurance that the profits will be so used.*"
- 2.4.5 In making this judgement, the court was rejecting the submission of Brent that "the potential and substantial economic benefits arising from participation in LAML [London Authorities Mutual Limited] would be invested in the local authority's area, for the benefit of its economic, social and/or environmental well-being."
- 2.4.6 This goes to the notion set out in our previous advice note that wellbeing isn't established solely on the basis that a given activity would promote a local authority's own economic wellbeing – there has to be a direct impact on the wellbeing of the area.
- 2.4.7 An analogous line of thinking, that may be useful, is the distinction in charity law between "primary purpose" trading and trading which would be liable to tax. Trading carried on directly by a charity should generally be limited to "primary purpose" trading ie. trading which is carried on in the course of carrying out its primary charitable purposes. It is not sufficient that the income derived from the trading activity is re-invested in the charity's activities; the focus is on the nature of the trading activity itself.
- 2.4.8 The second relevant case is *Portobello Park Action Group Association v The City of Edinburgh Council [2012] CSIH 69*. This case explored the scope of the power to advance wellbeing and makes clear that it is not without limits. "Anything", as per section 20, does not actually mean "anything".
- 2.4.9 Edinburgh City Council sought to use the wellbeing power to appropriate an area of inalienable common good land for the site of a new school. Whether a new school was directly linked to the wellbeing of the citizens was not in question. Rather, the case focused on the scope of the power.
- 2.4.10 The Council argued that since the Local Government (Scotland) Act 1973 did not expressly bar the appropriation of inalienable common good land, there was no limiting provision to disapply the wellbeing power conferred by 2003 Act, entitling the Council to do anything which it considered likely to promote or improve the wellbeing of part of its area.

- 2.4.11 The court held that there are restrictions on what can be done under this power, beyond the limits found within the 2003 Act (which was relevant to the facts and circumstances here).
- 2.4.12 The reference to "anything" in section 20(1) of the 2003 Act could not be understood as conferring on a local authority the right to act in breach of contractual, trust or title obligations, or to the detriment of established third party rights, and could not constitute a blanket entitlement to disregard planning or other administrative constraints, or the general provisions of domestic or European law. It was inconceivable that section 20(1) could have been intended, while sections 73-75 of the 1973 Act remained in force, to allow a local authority in pursuit of wellbeing to bypass any need for sanction and dispose of inalienable common good land without recourse to the court. The 2003 Act therefore conferred no relevant power on the Council.
- 2.4.13 This judgement reminds us that there are, potentially, legal constraints on the use of the power to advance wellbeing beyond those that are set out in this paper. That is because the facts and circumstances of a given decision or act are set within its own context. In the same way that any private developer would have operate within the day-to-day constraints of the legal environment in which it operates, the development of housing by local authorities would have to be done in accordance with the law of contract, planning law, third party rights, human rights law, data protection, employment legislation and other situational legal constraints. Appropriate due diligence must be carried out in respect of each and every proposed development, in order to flush out issues potentially lurking beneath the surface.

2.5 *Power to advance wellbeing – grounds for challenge, mitigations against JR and remedies*

- 2.5.1 Given the constraints on the power to advance wellbeing and the interaction with the *ultra vires* principle, we have considered the grounds on which a local authority may be challenged and what mitigations and remedies might be available in that context.

Grounds for judicial review

- 2.5.2 The principal route of action against a local authority is by way of judicial review. The petition for judicial review should be raised against the authority which made the decision. The grounds for so doing can be divided into the following broad categories:
- (a) the decision is **unlawful**;
 - (b) there has been a breach of **human rights**;
 - (c) a process has not been properly followed; or

(d) the decision is **unreasonable**.

2.5.3 While at this stage we cannot be certain on the *specific grounds* which the complainant might seek to rely on, these could include:

(a) Acting in a matter which was *ultra vires* (as referred to above, meaning outside the scope of its powers);

(b) Unlawful use of **discretionary powers**:

(i) the decision was based on an error of fact or law (there was no evidence to support the decision which was taken: e.g. that the council had erred in the evidence assessed which supported its view that providing market level housing was required in its area or an appropriate use of resources);

(ii) the decision was based on irrelevant considerations or left out of account relevant matters (eg. by failing to consider that other providers were undertaking equivalent housebuilding activities);

(iii) the decision was made for an improper purpose, including malice or dishonesty (conceivably, this might include competing in the housing market, rather than improving wellbeing); or

(iv) the decision is so unreasonable that no reasonable public authority could have come to it (this is a very high test);

(c) **Bias**: whether the “fair-minded and informed observer, having considered the facts... would conclude that there was a real possibility” of bias. This might arise in the context of **how** a local authority made certain decisions as to the decision to develop houses at a particular site, rather than the overarching use of the power to advance wellbeing;

(d) **Procedural unfairness**: this is often used where there is a duty to consult; where reasons for a certain decision have not been given; or where the public body has otherwise failed to follow the correct process (including in cases where such a process has been designed by the public body itself (rather than being dictated by statute)).

2.5.4 Grounds for a complaint will be fact-specific, but in all cases, local authorities should consider the specific nature of its project against the most recent subsidy control rules, to avoid a risk that it is considered to be giving unlawful subsidy (as considered in other sections of this opinion).

Remedies

2.5.5 The granting of a remedy in judicial review proceedings is at the discretion of the court. The most common remedies include:

- (a) **Reduction** - quashing of the original decision and remitting it back to the relevant decision-maker or authority;
- (b) **Declarator** - declaring the right or obligation which is the subject of the application to exist, for example that the local authority does not have the powers to proceed;
- (c) **Suspension** - an order halting the act which is the subject matter of the judicial review proceedings;
- (d) **Interdict** - an order preventing damage to the petitioner's rights, by preventing the project going ahead either entirely or in certain respects;
- (e) **Specific performance** - on order obliging an act to be performed; or
- (f) **Damages** - for example, payment by means of making reparation.

2.5.6 A judicial review brought against a local authority in connection with a project may seek a combination of the above remedies, and depending on the stage of the project, it is likely that an interdict may be sought while proceedings are ongoing. Judicial reviews should, in principle, be heard within 12 weeks of Answers being lodged (3 weeks after the Petition is lodged). However in practice there can be delays, so it may mean a delay of up to 6 months.

Timing

2.5.7 An application for judicial review must be brought promptly and in any event within three months of the date on which the grounds giving rise to the application arose. The court has a discretion to allow an application out of time where it is equitable to do so.

2.5.8 It is possible that the project could be challenged at different stages, as it is decisions, acts, and failures that can be judicially reviewed. For example, a challenge could be made to the decision to proceed with a project, or in respect of a specific site chosen, or with the decision making process at any of these stages. It is critical for challengers that the judicial review is brought at the appropriate stage, and it may be a defence for a local authority that a challenge is premature or out of time.

Who is permitted to bring a judicial review?

2.5.9 Judicial review petitions can be raised by corporate entities, individuals and other organisations (such as pressure groups, local campaign groups, etc) as set out above. The parties that might be interested in challenging local authorities could potentially be a diverse range, including for example:

- (a) those concerned with the principle, eg. commercial housebuilders;

- (b) those with specific concerns about a particular site, eg. residents, local groups; and
- (c) those concerned by the actions of the local authority as regards its use of funds.

2.5.10 Interested parties may also be named in a petition for judicial review. This means the petition should be served on the interested party, who then has the right to enter proceedings (although not obliged to) and see the pleadings of the parties. A respondent may take issue with the petition, if it considers there is an interested third party who has not been named or served, or a third party not named may apply of its own accord to become an interested party. In practice, this could look like:

- (a) a petition against a local authority might name another local authority taking forward a similar project as an interested party, meaning the interested local authority should be served with the petition in the first instance and can seek to enter the action;
- (b) a local authority in receipt of a petition might consider that another local authority (or perhaps, the Scottish Government) ought to be an interested party and makes an application to the court that not all relevant parties have been named, and this should be remedied; or
- (c) a petition may not name another local authority, but on becoming aware of the petition, the other local authority considers it should be an interested party, then it can apply to the court for permission to be added as an interested party.

Mitigation against JR and defence

2.5.11 Judicial review is primarily concerned about the manner in which the decision-maker has applied the relevant rules – in other words, the court is more interested in the **process of decision making** than the actual result. The strongest mitigation against a judicial review is therefore a robust and compliant decision-making process. Local authorities should consult internal policies and procedures for decision-making of this nature and scale; ensure compliance; and keep a robust audit trail. This is part of the broader mitigation strategy outlined at section 5.

2.5.12 In judicial review proceedings, the court does not substitute its judgment for that of the decision-making body. Rather, the court ensures that the decision has been made within the confines of whatever rules apply, and failing which it returns the decision to the decision-maker to remake. The authority's ability to re-take the decision may be hampered by other factors, such as the time delay caused by defending a judicial review, or due to subsequent decisions made. However it is open to the decision-maker to re-take the same decision, remedying any default the court has identified.

2.5.13 If a judicial review is raised against a local authority, then the authority will have the choice to either defend or concede the judicial review. It is possible to settle a judicial review by agreement between the parties, but this is less common, and typically requires a concession by the authority in respect of the decision. The

willingness or ability of the authority to settle or concede will depend on the nature of the decision under review, strengths of the case, and the legal grounds for the challenge.

- 2.5.14 Defences to a judicial review will depend on the exact legal grounds of the claim made, and the relevant factual matrix. As set out above, a judicial review may seek to challenge the exercise of the power, or **how** the power is exercised. This legal opinion addresses the nature of the power being exercised, and the basis on which this can be done, in order to minimise the risk of being *ultra vires*. As a general overview, the primary defence will be that the local authority is **lawfully exercising its powers for a lawful purpose, and made the decision fairly**. The mitigations set out at section 5 below include examples of measures that local authorities can adopt to mitigate against the risk of challenge. Following proper decision making processes is essential and this will be for local authorities to manage, in-keeping with general principles, and specifically by reference to its own policies, processes (standing orders; delegations of authority and such like), and factual circumstances.
- 2.5.15 Judicial reviews are expensive for petitioners to bring, and are not necessarily straightforward. Courts can often be reluctant to interfere with the decision-making of public bodies. Challenges are perhaps most likely from larger entities or groups which are better resourced, or have more to gain by a challenge. While pre-action correspondence is not an essential part of the judicial review process, it is often best practice to engage with complainers at any early stage to deal with complaints openly, and this can avoid the need for a judicial review.
- 2.5.16 The Local Government (Scotland) Act 1973 requires every local authority to make arrangements for the proper administration of their financial affairs and to secure that the proper officer of the authority has responsibility for the administration of those affairs. Particularly where a decision involves the award of money / commercial advantage to a third party, it will be especially important that the local authority can demonstrate that the arrangement has been properly considered in terms of best value, and meets the overriding obligation that public funds are disbursed with due consideration as to the suitability, effectiveness, prudence, quality and value of a decision. Where a decision involves larger expenditure, the higher the risk of challenge and scrutiny.
- 2.5.17 In terms of mitigation against review, the key will be proper decision-making. Good decision-making is a process, which begins when getting ready to make a decision, including: assessing the situation; gathering and analysing the necessary information to take the decision; making the decision in-line with established procedures; notification of the decision; and potentially giving reasons. Local authorities will also have specific local factors to consider, particularly in terms of the facts to be considered and the processes to be followed. Local authorities should have reviewed and considered the Scottish Government guide for public authorities in Scotland to

decision-making and the law.²⁸ This guide provides a checklist which identifies many of the key considerations during the process. Local authorities may also be required to take appropriate legal or other advice throughout the process to mitigate risk, and this may also be useful in defending any challenge.

2.5.18 Key considerations a local authority should have when taking a decision include:²⁹

Power to take the decision	What is the purpose of the power in question? Are the reasons for taking the decision in accordance with the power? (This goes to the question of whether the decision is <i>ultra vires</i>).
Influencing factors	What factors must be taken into account? What factors may be taken into account? Are the facts relied upon accurate? Has the local authority sought input from those with up to date information? Has it consulted appropriately? Where representations have been made, has the local authority taken account of them and is it appropriate to do so? Has anything irrelevant been considered?
Making the decision	Procedural correctness: is the decision free from bias, or the appearance of bias? Is the decision maker impartial and independent?
Additional duties	Has the Equality Act 2010 been complied with? Does this decision breach any legitimate expectations? Has discretion been appropriately and proportionately applied?
Recording the process	Have the above points been recorded? A robust audit trail of decision making processes is critical to evidence that the power has been applied in a reasonable way.

2.6 *Power to advance wellbeing – other constraints on its use*

2.6.1 While we are mindful of our comments above as regards the requirement for a limiting provision to be explicit, not implied, we note below certain specific statutory obligations which might be relevant for local authorities to consider as part of their decision-making due diligence, particularly as regards the evidence base that a local authority would need to establish to support the use of the wellbeing power.

Housing (Scotland) Act 1987

2.6.2 We note at paragraph 2.2.14(b) above that the 1987 Act imposes a general duty on local authorities to consider the needs of their area for further housing accommodation. Local authorities are also obliged to have regard to the amenities of the locality and to inspect houses of non-tolerable standards. There are also

²⁸ [Process - Right First Time: a practical guide for public authorities to decision-making and the law - second edition - gov.scot \(www.gov.scot\)](http://www.gov.scot/Resource/0045/0045_0001_0000.pdf)

²⁹ The judge over your shoulder — A guide to good decision making

specific duties owed by local authorities to persons found to be homeless, which require local authorities to secure available accommodation for homeless persons.

- 2.6.3 Local authorities would need to be satisfied, and provide evidence to support its finding, that its area is sufficiently well catered for in terms of affordable housing provision such that this would not be an impediment (either legally or, perhaps from a reputational or political perspective) to the development of private housing for sale or rent on the open market.

Local Government & Planning (Scotland) Act 1982

- 2.6.4 Local Authorities have the duty under this Act to ensure that there is adequate provision of facilities for the inhabitants of its area for recreational, sporting, cultural and social activities.

- 2.6.5 This does not, in principle, constrain a local authority's use of the power to advance wellbeing, but again emphasises that the proposal would need to be mindful of the broader context, with appropriate due diligence carried out to support the local authority's view that market value housing would advance the wellbeing of its area (on the basis that a lack of facilities for recreational, sporting, cultural and social activities in and around a proposed housing development might undermine any such view) and perhaps with some consideration being given to how income generated by the delivery of housing might help to improve such facilities.

Local Government in Scotland Act 2003

- 2.6.6 In addition to the power to advance wellbeing, the 2003 Act also introduced the concept of the duty to secure best value to local authorities. It is the duty of a local authority to make arrangements which secure "best value", being described in terms of securing continuous improvements in the performance of the authority's functions ("functions" covering local authorities duties and powers). In so doing, the local authority is required to discharge its duties and exercise its powers in a way which contributes to the achievement of sustainable development.

- 2.6.7 An authority which secures best value will be able to demonstrate, among other things, sound management of resources, making the best use of public resources, including employees, contractual agreements, ICT, land and property and financial resources – keeping a considered and appropriate balance between cost, quality and price.

- 2.6.8 In this context, it means that in exercising its power to advance wellbeing in its area by developing homes for market rent and sale, a local authority must maintain a balance between the quality of the outcome delivered and the cost of it. Local authorities must consider the efficiency, effectiveness, and economy of pursuing such outcomes and how well those actions comply with the requirements of equal opportunities legislation (more on this below).

- 2.6.9 In its guidance on the power to advance wellbeing, the Scottish Government notes that “sustainable development is usually seen to be development which secures a balance of social, economic, health and environmental well-being in the impact of activities and decisions, and which seeks to meet the needs of the present without compromising the ability of future generations to meet their own needs. Since sustainable development is most often interpreted as the point where a balance between social, economic, health and environmental objectives is struck, there are obvious links between sustainable development and well-being.”
- 2.6.10 Further, in exercising the power to advance wellbeing, local authorities should also have regard to community planning, as set out in the 2003 Act. According to Scottish Government guidance on the power to advance wellbeing, this does not mean that any potential use of the power must first have featured in a Community Plan, nor that every exercise of the power has to have a Community Planning basis, but, where it impacts on or raises expectations of Community Planning partners, Government would expect local authorities to engage them appropriately.

Equality Act 2010

- 2.6.11 Local authorities will be well versed in the requirements of the Equality Act 2010. Broadly, a public authority exercising its public functions must have regard to the need to:
- (a) eliminate discrimination, harassment and victimisation;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- 2.6.12 Exercising its power to advance wellbeing would be regarded as the exercise by a local authority of its public functions. Accordingly, these requirements must be built into the due diligence / evidence gathering and reporting exercise carried out by the local authority in furtherance of any development proposal. Note that public authorities must publicise equality outcomes and report progress in meeting the outcomes at least every four years, so there is a reflective aspect to this, which should inform future activity.

Audit

- 2.6.13 As with other statutory functions, the use of the power to advance wellbeing – for whatever purpose – is potentially subject to audit by local authority auditors appointed by the Accounts Commission. If it is found that there has been a contravention of the law, or a loss due to negligence or misconduct, the Controller of Audit may make a report to the Accounts Commission which may apply sanctions

to officers or members who are responsible. Local authorities will, therefore, wish to take into account all relevant Government guidance and codes of conduct on managing public money.

Subsidy control and procurement

- 2.6.14 Against the backdrop of a section discussing constraints, while not specifically a constraint on the exercise of the power to advance wellbeing in principle, in this particular context it is appropriate to bear in mind the application of the rules on subsidy control and procurement. If a local authority will be carrying out all development work on land in its ownership directly, then procurement rules need not apply. However, given few local authorities will have the capacity to develop housing in-house, it would be common for them to tender for bidders to carry out the works. As such, procurement procedures will be applicable, depending on the value of the contract at hand.
- 2.6.15 Turning to the sale of land in local authority ownership, all disposals of land by local authorities must comply with the rules on subsidy control, stemming from the UK's agreement with the EU on trade and co-operation, following its withdrawal from the Union³⁰. This is true regardless of the structure put in place to facilitate a project of this kind (eg. whether the local authority is disposing of the land to a wholly-owned subsidiary or other joint venture entity with which it is involved).
- 2.6.16 This can become particularly relevant if a local authority is seeking to dispose of land at less than best consideration. Local authorities then run the risk of being viewed as providing a subsidy to the owner, developer and/or the occupier of the land and property, depending on the nature of the development and the disposal. There are, of course, specific duties on local authorities to secure best value for disposals of land³¹. Disposals of land at market value are less problematic, although care should be taken around ascertaining the value of the land to ensure subsidy control compliance. Generally, an independent expert valuation of the land will satisfy this requirement, and this should be carried out by one or more independent asset valuers prior to any sale or disposal negotiations. However, care should always be taken in these circumstances.
- 2.6.17 The European Commission and courts have determined that, so far as state aid law is concerned, the construction of social housing is an economic activity, albeit one which could benefit from state funding by virtue of it being a "service of general economic interest". Public authorities in the UK are (pending the new UK subsidy control legislation coming into force) relying on guidance and directions published by the European Commission on the application of the rules on state aid control as a safe-harbour on the basis that compliance with the state aid regime will (as a general rule of thumb) comply with the rules on subsidy control. Accordingly,

³⁰ https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

³¹ See above at paragraph 2.2.3.

where, a local authority is not building “social” housing (which we would consider capable of extension to homes being let to those in need at less than a market rent), then the local authority would need to have regard to the requirements of subsidy control law.

- 2.6.18 The decisions of the European Commission have, through the decision relating to Liverpool City Council and its construction and operation of a cruise terminal, demonstrated that it is possible for a local authority to give state aid (and by extension, a subsidy) **to itself**. In other words, if the local authority uses its public funds to cross-subsidise a commercial or economic activity, it must do so as if it were funding a third party. Accordingly, if a local authority sought to fund the construction of non-social housing, it would have to do so on a market economy investor basis – likely involving full commercial or market returns on that funding to the public purse (to be distinguished from distribution to the local authority of income from the commercial activity – see paragraph 2.3.34). Otherwise, the local authority could be viewed as having given its “commercial arm” unlawful subsidy. We consider this in more detail in the context of structures for delivering market housing at section 4 below.

Political, reputational and practical constraints

- 2.6.19 During the course of our review of the exercise by local authorities of the power to advance wellbeing, it has been apparent to us that – at least in terms of public record – it has been infrequently used. We suspect this is largely due to commentary on the Brent case³² and also to a comparison with the broader and apparently more robust English local authority general power of competence³³, which has perhaps undermined market confidence in the “safety” of the wellbeing power. This may impact on the ability to secure funding for schemes which rely on the power.
- 2.6.20 A further difficulty that this presents is that there is little precedent to rely on or standard practice to implement. Public sector bodies, sitting within a landscape of political and public accountability, are not customarily at ease with pursuing novel objectives. Local authorities may, understandably, react with caution at the prospect of using a largely untested power. We are, however, mindful of the themes summarised by the Christie Commission³⁴ of empowering communities, local services providers working together, outcomes tailored to community needs and of prevention and reducing inequality – all of which may require new ways of working. Local authorities are, therefore, increasingly innovating to deliver functions more efficiently and more in line with their own area’s needs. This approach, we would suggest, lends itself to reliance on the power to advance wellbeing.
- 2.6.21 This does, of course, require the political will to support it. Politically, local authorities may not have sufficient support for pursuing a market economy activity

³² Which was a reasonably high profile challenge, covering a number of legal disciplines.

³³ See paragraph 2.7.1

³⁴ <https://www.gov.scot/publications/commission-future-delivery-public-services/>

– particularly if there are pressures as regards the sufficiency of affordable (including social and mid-market rent) housing in their area, or even in immediately neighbouring areas. More likely is that there are simply other – not necessarily competing – priorities and resourcing commitments, which push this down the political agenda.

- 2.6.22 There may well be restrictions in terms of scale (of the development / the housing market area), tenures offered, type of housing (general or specialist), particularly if the local authority is unable to sufficiently demonstrate that certain tenures or types of housing are required to advance the wellbeing of the area. This goes to the need for a clear and robust evidence base, setting out with **specificity** how the wellbeing of the area is to be advanced.
- 2.6.23 These are not legal restrictions *per se*, but manifest as such in the proper exercise of the wellbeing power in view of the fact that it needs to be **proactively justified** – it is not a general competence power. We consider this need for proactive justification in the paragraphs below.

2.7 ***Power to advance wellbeing – legal and policy criteria for its use***

- 2.7.1 A 2009 report from the Communities and Local Government Committee recommended to the UK Government at the time the introduction of a “general power of competence” if local authorities could show that they were unable to effectively use the wellbeing powers contained in the Local Government Act 2000 (the English and Welsh equivalent legislation to the 2003 Act). Following case decisions on the *vires* issues concerned with the wellbeing power³⁵, the Conservative Party’s 2009 paper on Local Government included a commitment to introduce a general power of competence, which was subsequently introduced through the Localism Act 2011. Section 1(1) of the Localism Act 2011 provides that a local authority has **power to do anything that individuals generally may do**.
- 2.7.2 In addition to dealing with the potential *vires* issues, the power of general competence in force in England does not impose a requirement to **identify a specific benefit**.
- 2.7.3 By contrast, to rely upon the power to advance wellbeing in Scotland, local authorities must identify – in specific terms – how (in this case) the development of housing for market rent and sale in their area would promote the wellbeing of the area and/or the people living within it.
- 2.7.4 It is, of course, for each and every local authority to decide whether and how development for sale or rent of houses on the open market is likely to promote or improve the wellbeing of its area and/or persons in it: “persons within that area”

³⁵ Most notably the case of *R v Risk Management Partners Limited ex parte The Council of the London Borough of Brent and the London Authorities Mutual Limited and the Council of the London Borough of Harrow*, referred to in more detail below.

may include persons resident in that area or who are otherwise present in the area, for example tourists and commuters. The power can be used in relation to the whole local authority area or any part of it (eg. a specific town or community), or all or some of the persons within it.

2.7.5 In its Power to Advance Well-Being Guidance (to which local authorities are obliged to have regard³⁶) the Scottish Government recognises that different local authorities may have different views about the factors that constitute the wellbeing of their area – hence “wellbeing” is not specifically defined in statute or elsewhere. For example, a council may be able to identify those within its area of operation that would benefit from the strategic regeneration of certain sites through the development of market level private housing and be able to articulate, with specificity, what that benefit is. As noted above, courts have stated that a **direct link** must be identified between the wellbeing of citizens in an area and whether they could be said to **benefit directly** from the action taken under the wellbeing power³⁷.

2.7.6 The guidance details “key factors which contribute to promotion or improvement of wellbeing” as including:

- (a) **Economic factors** such as the availability of suitable and high quality jobs, measures to encourage local small businesses, efficient and effective transport links, lifelong learning, training and skills development, the provision of infrastructure and new information and communication technologies etc;
- (b) **Social factors** such as the promotion of good quality and affordable housing; safe communities; the encouragement of the voluntary sector; looking after the needs of children and young people, particularly the most vulnerable; access to the arts or leisure opportunities; access to education etc;
- (c) **Health related factors** such as the promotion of good physical, social and mental health and developing and promoting policies which have a positive impact on health outcomes, especially on health inequalities; and
- (d) **Environmental factors** such as the availability of clean air, clean water, clean streets, the quality of the built environment, the removal of objects considered hazardous to health, removal of disfiguring or offensive graffiti from buildings, protecting communities against the threat of climate change, freedom from a high risk of flooding, improving and promoting biodiversity and accessibility to nature.

2.7.7 Conceivably, local authorities will be able to position the development of market level housing in their areas across each of these key factors drawing out the particular priorities for their area, with reference to locale-specific data (noting, for

³⁶

<https://www.webarchive.org.uk/wayback/archive/20150220071351/http://www.gov.scot/Publications/2004/04/19276/36157>

³⁷ See paragraph 2.4.6 above

the avoidance of any doubt, that these key factors should not be read as constraining local authorities in the development of their own business case).

2.7.8 In terms of its use, the guidance notes that the 2003 Act sets out illustrative examples of the kind of action that can be taken under the power:

- (a) incur expenditure;
- (b) give financial assistance to any person;
- (c) enter into arrangements or agreements with any person;
- (d) co-operate with, or facilitate or co-ordinate the activities of, any person;
- (e) establish companies, joint ventures, trusts and partnerships;
- (f) exercise on behalf of any person any functions of that person; and
- (g) provide staff, goods, materials, facilities, services or property to any person.

2.7.9 While illustrative only, this list provides helpful indication that it is envisaged that local authorities will have a broad spending power and may provide financial assistance by any means local authorities consider appropriate, including by way of grants, loans, guarantees or indemnities as elements of financial packages, or contributions in cash or kind. It also confirms that local authorities are to be empowered to make arrangements or agreements with any person and to allow them to co-operate with, or facilitate or co-ordinate the activities of any person. Again it is for local authorities to consider what such arrangements or agreements might be and whether they would be likely to advance wellbeing, but an example might be the formation of or participation in a special purpose vehicle, specifically set up to further a particular objective.

2.7.10 In situations where powers are conferred in general terms, such as with the power to advance wellbeing, each circumstance will turn on its own facts. However, having regard to the Scottish Government guidance and the possible constraints on use of the power to advance wellbeing, we consider that the following non-exhaustive list of issues would need to be given due regard by local authorities in pursuing a course of action of building homes for sale or market rent on the basis of section 20 of the 2003 Act:

- (a) whether a direct link can be identified between the wellbeing of citizens in an area and whether they could be said to benefit directly from the development of housing for sale or rent on the open market;
- (b) whether it can be clearly demonstrated that the benefit to the area/the people within it is the primary objective (ie. that it can be robustly evidenced that the activity is not for

the purposes of enabling the local authority to raise money – any income generation is a secondary concern);

- (c) any charges imposed are reasonable, with a fully developed rationale for its charging structure and an explanation of how it arrived at the amount of the charge;
- (d) whether the land in question is already held for specific planning purposes;
- (e) whether the affordable housing needs of the local area are already sufficiently met³⁸;
- (f) whether the needs of homeless people in the local area are being sufficiently met by local authority services and accommodation;
- (g) whether the proposed development is in line with the best value obligations on the local authority and whether the proposed development adheres to the Scottish Government’s guidance on the best value concept (see paragraph 2.6.6);
- (h) whether due regard has been given to the way in which the proposed development supports the public sector equality duty (see paragraph 2.6.11);
- (i) whether the proposed development facilitates the provision of recreational, sporting, cultural and social facilities for the inhabitants of the local authority area; and
- (j) whether it furthers the aims of any local development plans which are in place.

2.7.11 Due consideration should be given to all of the above, along with any locale-specific considerations. In developing its justification, having due regard to the criteria set out above and in the Scottish Government’s guidance, local authorities should be informed by, and be responsive to, the views of the people and communities in the area, by way of public consultation and stakeholder engagement (which we consider further at section 5). It is important that local authorities use the information given here as a framework, but not as a definitive checklist. Local authorities must exercise independent judgement based on the facts and circumstances relevant to their own priorities. Where a decision-maker does not genuinely exercise independent judgment in a matter, it may be regarded as a fettering of discretion, which in and of itself would be a ground for judicial review. It is therefore, important, that local authorities give consideration to the principles outlined in this opinion and consider them in the context of the needs of their communities.

3 ESTABLISHING AN EVIDENCE BASE

3.1.1 We have considered in the section above the significance of local authorities developing a robust justification for reliance on the power to advance wellbeing and setting out - with specificity - how the development of housing for market rent and

³⁸ On the basis that considering the provision of affordable housing and the needs of homeless people are statutory functions of local authorities – delivery of market housing is not.

sale in their area would promote the wellbeing of the area and/or the people living within it.

3.1.2 Part of that justification will, of course, need to address why it is that the local authority considers its intervention to be necessary. In other words, the local authority will need to establish that the private development sector is not meeting this need, and demonstrate why it is in furtherance of the wellbeing of their area (and/or the people in it) for the local authority to use public funding to remedy that. This goes both to the idea that there must be a direct link between the wellbeing of citizens in an area and whether they could be said to benefit directly from the action taken under the wellbeing power³⁹ and also to the potential risk associated with engaging in a commercial activity that would, under normal market conditions, be conducted by the private sector.

3.1.3 In terms of understanding this need, we have considered whether analysis of key housing and planning documents (e.g. draft NPF4, LDP, HNDA, LHS, HLA and SHIP) and understanding of market capacity and delivery would provide a sufficiently robust evidence base against which need can be identified and intervention can be justified for the delivery of homes for market rent and sale under the power to advance wellbeing.

3.2 *How would a local authority demonstrate housing market failure and / or provide other evidence to align with the use of the wellbeing power?*

3.2.1 We consider that key planning and housing documents such as the Housing Need and Demand Assessment (HNDA), Local Housing Strategy (LHS) and Local Development Plan (LDP) would provide a starting point for understanding market capacity and delivery against which the private development sector's inactivity / failure to meet housing demand could be assessed. However, we do not consider that these documents alone would provide a sufficiently robust evidence base to justify intervention in the form of local authorities delivering market homes for rent and sale on the basis of the private development sector's inactivity.

3.2.2 A local authority intending to use the power to advance wellbeing would first need to define the basis upon which the private development sector can be said to have failed and demonstrate that this had happened within its area in order to justify public sector intervention. In our view, it would not be enough simply to demonstrate that there is continuing disequilibrium between housing supply and demand. **It must be demonstrated that the private development sector's failures are causing that undersupply.** This would mean:

³⁹ Having regard to the "key factors" set out in Scottish Government's guidance, as referred to at section 2.7 above, and bearing in mind the Brent case, which established that wellbeing isn't determined solely on the basis that a given activity would promote a local authority's own economic wellbeing – there has to be a direct impact on the wellbeing of the area/the people with it.

- (a) defining what is meant by the “market” – does this mean private developers, or the system as a whole, which would include planning authorities, utility providers and other consenting bodies,
- (b) defining the area in which it is considered that market failure has occurred (whether that is the whole of a housing market or submarket area or specific locations within those areas),
- (c) determining the level of demand for private housing in the area, and
- (d) demonstrating a consistent pattern of failure by private developers over a number of years to meet that demand.

3.2.3 The HNDA is the principal tool for assessing housing need and forecasting the likely level of demand for housing by tenure in a local authority area. The HNDA informs the authority’s calculation of the housing supply target in the LHS and LDP, being the number of affordable and market sector houses to be delivered in each housing market area over the relevant period.

3.2.4 HNDAs are often the focus of disputes with housebuilders who can be critical of the inputs and assumptions made in the forecasting of housing need and demand. However, where a HNDA has been assessed as robust and credible by the Scottish Government, it is reasonable for a local authority to use the estimates of housing need in the HNDA as the basis for its housing supply targets in the LHS and LDP.

3.2.5 Sites are allocated in a LDP to meet the housing land requirement (the housing supply target plus a generosity allowance) on the basis of the HNDA. In future, the housing land requirement for each local authority will be determined centrally through National Planning Framework 4 (NPF4) once it is approved by the Scottish Parliament. LDPs will have to allocate sites to meet a ten year Minimum All-Tenure Housing Land Requirement set out in NPF4.

3.2.6 LDPs are subject to an extensive consultation process which provides private housing developers the opportunity to comment on and object to housing supply targets and the assumptions on which they are based, and to proposed land allocations, and are usually subject to examination by independent Reporters whose recommendations must be accepted by local authorities (subject to limited exceptions).

3.2.7 The outcome of the process should therefore be an adopted LDP that sets realistic and achievable housing supply targets and allocates effective sites on which housing can be delivered to meet those targets within the plan period. We consider that if the HNDA, LHS and LDP are up-to-date, they can be relied on by local authorities as a robust evidence of the level of housing demand in an area.

- 3.2.8 While local authorities can allocate land for development in LDPs they have limited influence over when market housing is delivered on site. It is up to housebuilders to decide whether to bid for available sites and when to bring forward planning applications and implement permissions. If development is not being progressed on allocated housing sites over a prolonged period, this could be evidence of market failure. However, it could be the case that the housebuilders proposed alternative sites during the development of the LDP, and would therefore argue that the planning authority has caused the market failure by allocating sites that were undeliverable or not viable.
- 3.2.9 Local authorities should use annual Housing Land Audits (HLA) agreed between the local authority and housebuilders to establish the level of housing that is being delivered in an area. The HLA monitors the number of annual house completions in an area and the amount of land that is available for development. If HLAs show under-performance against the housing supply target for market housing over a number of years then this could indicate market failure. Although it would only be the starting point.
- 3.2.10 Housing Land Audits should distinguish between land which is effective (i.e. which has no constraints to development) and land which has constraints and cannot contribute to the housing land requirement within 5 years. Where a local authority can demonstrate through the HLA that effective sites are not being brought forward for development and that the rate of delivery of housing is well below what is required to meet the housing demand, it could begin to construct a case that there has been market failure. Depending on the available evidence, that market failure could be in a particular location within the local authority area or in relation to the delivery of a particular type or tenure of housing.
- 3.2.11 In pressured housing market areas, housebuilders will often seek to show that there has been a failure to deliver housing and that the local authority is not maintaining an effective 5 year housing land supply in order to justify the grant of planning permission, often on unallocated sites. The local authority, for its part, will usually maintain that there is an effective 5 year housing land supply and that housing is being delivered to meet targets. In this scenario the roles would be reversed, with local authorities having to demonstrate a pattern of under-delivery in their area, while private sector developers opposed to local authority housebuilding would be motivated to demonstrate over-delivery.
- 3.2.12 We consider that it would be **necessary for local authorities to investigate fully the reasons for under-performance in the delivery of private housing in a particular area before concluding that there is market failure which would justify intervention**. The failure to develop new private sector housing for rent and sale in a particular area may be caused by many different factors, which may or may not be caused by private developers.

- 3.2.13 Where housing demand is strong, market failure could occur because housing developers are not interested in developing allocated sites and consider that the planning risk involved in developing unallocated sites is not worth taking. Other factors may include a lack of infrastructure, failures in the local planning system which mean that planning permission is difficult to obtain even on allocated sites, or sites being considered unviable because they require costly remediation or because of the level of developer contributions required.
- 3.2.14 In such cases, developers may not pursue development in the area which will mean an undersupply of housing against housing supply targets although local demand for housing may be strong.
- 3.2.15 These factors may also have an impact on the ability of local authorities to deliver market housing for rent or sale although local authorities will not be looking to generate profit in the same way as private developers. Local authorities must apply the same planning policies when determining planning applications for their own developments as they apply to private sector housing development. This may include paying developer contributions for education, transport etc to provide the infrastructure required to mitigate the impacts of the development.
- 3.2.16 Developer contributions can have a positive role in ensuring that the infrastructure that is required to support housing development is delivered. Certain types of infrastructure, such as new roads, railways or trams, can increase demand for housing in areas that may previously have been regarded as undesirable places to live. However, the level of developer contributions required by local authorities in certain areas may mean that private developers cannot deliver the level of profit they require and so do not take forward development.
- 3.2.17 Local authorities will need to act carefully in seeking to establish that market failure has occurred. They would need to be able to demonstrate that there are sufficient sites that are viable and effective for developers to develop and that the only reason that these have not been delivered is lack of developer interest, rather than any underlying problem such as failures in the planning system or lack of infrastructure.
- 3.2.18 Issues such as the failure of planning authorities to grant planning permission or lack of infrastructure could be resolved by other means, rather than resorting to the power to advance wellbeing to deliver homes in place of private developers.
- 3.2.19 We would recommend that a local authority that is considering the use of the power of wellbeing should consider commissioning external advice from development consultants to establish whether development sites in the housing market area are viable from a housebuilder's perspective. This could take the form of a development appraisal commonly undertaken by housebuilders to establish the viability of development on a site. If it can be shown that sites are objectively viable but there is no developer interest in the sites, then that could provide evidence of the private development sector's failure to meet housing demand.

3.3 ***Could the use of the power to advance wellbeing be reinforced by the Scottish Government producing guidance that sets out how the power can be used by local authorities for delivery of homes for market rent and sale (for example through planning policy)?***

3.3.1 It bears repeating that the power to advance wellbeing is not, and was never intended to be, a power of general competence. Indeed, in its Policy Memorandum introducing the Local Government in Scotland Bill (which then became the Local Government in Scotland Act 2003), the Scottish Government explicitly noted that *“The definition of a “power of general competence” is open to interpretation, and one literal meaning could imply a wide-ranging general power that is not subject to any restrictions, limitations or prohibitions. This has never been the Executive’s policy intention.”*⁴⁰ This is echoed in comments that we are aware of anecdotally, articulated by a Scottish Government civil servant that there was a notion that a power of general competence would lead to local authorities competing with the private sector.

3.3.2 Accordingly, the restrictions imposed on the wellbeing power underpin the principle that local authorities need to act within the prevailing legislative framework for local government: it is not designed to supersede existing limitations on what a local authority can and cannot do (for example, as regards trading). It is, however, clear that the Scottish Government intended the wellbeing power to encourage innovation and partnership working, subject to sensible safeguards. The difficulty for local authorities is, of course, interpreting how those safeguards are to be applied in practice – particularly in the context of “commercial” activity, which many local authorities already engage in (albeit, we understand, not under the auspices of the wellbeing power), notwithstanding what we would regard as the proper interpretation of the 1970 Act⁴¹.

3.3.3 It is, therefore, our view that engagement with the Scottish Government on the extent to which the power to advance wellbeing can be relied upon to address the kinds of market failures noted above at section 3.2 - even where the activity in question moves into the territory of commercial trading - is essential as part of developing an initial proof-of-concept.

3.3.4 In particular, we consider there to be merit in engaging with Scottish Government and, to the extent possible, seeking formal guidance on:

- (a) Whether it would regard the sale of housing by a local authority on a market basis and/or the provision of rental services outside of the affordable sector as a “commercial activity”.
- (b) Whether it would, as a matter of principle, be prepared to consent to local authorities engaging in this commercial activity, where the local authority is able to demonstrate that its intervention is limited to addressing market failure (robustly evidenced) and if

⁴⁰ Paragraph 68

⁴¹ See paragraph 2.3.22

it is, what that evidence would need to comprise. Consent would – having regard to the wording of the 1970 Act – need to be on a case by case basis, but having an in-principle view might generate a necessary degree of assurance for interested local authorities and thus momentum which may, in turn, encourage Scottish Government to set a statutory limit which could be applied to this kind of activity more generally (to the extent it is needed).

- (c) Whether, as highlighted at paragraph 2.3.34, it would be supportive of the argument that a separate entity (either wholly owned by a local authority or jointly with another party, or indeed wholly or jointly owned by a subsidiary of the local authority) may engage in trading without falling foul of the 1970 Act providing none of the profits are distributed to the local authority.

3.3.5 It is of note that the 2003 Act gives the Scottish Ministers power to extend the meaning of wellbeing; intended as a mechanism to define “wellbeing” should, for example, a court of law define it in a way that limits use of the power as intended. We do not, however, necessarily consider the scope of the meaning of “wellbeing” to be the limiting factor facing local authorities. Rather, we consider the challenge to lie in the development of an evidence base to support a local authority’s intervention in, what would ordinarily be, a private sector venture and to navigate the possible restrictions on engaging in commercial activity.

3.3.6 It would, however, do no harm at all to have assurance from Scottish Government that the meaning of “wellbeing” goes beyond – for example - something akin to the statutory charitable purpose most often underpinning the activities of registered social landlords: “*the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage*”⁴² but actually encompasses the advancement of a higher level of quality of life etc⁴³ – given that the development of housing for market sale or rent will not be focussed on the delivery of social or mid-market housing.

3.3.7 Given what appears to us to be the infrequent use of, and low level of market confidence in, the power to advance wellbeing, any guidance or policy document from Scottish Government that **promotes its utility** would be of assistance.

3.3.8 To go even further, section 57 of the 2003 Act allows Scottish Ministers to seek to amend, repeal or revoke or disapply any enactment that prevents or hinders use of the power to advance wellbeing. This provides a means by which the Scottish Government and Scottish Parliament can consider legislation identified as hindering the use of the power of wellbeing and, if appropriate, take action without needing to wait for an opportunity through primary legislation. Given that the 1970 Act is explicitly and specifically included as a restriction on the use of the wellbeing power, we do not think the Scottish Government would be minded to disapply that

⁴² Section 7(2)(n) of the Charities and Trustee Investment (Scotland) Act 2005 asp 10 (Scottish Act)

⁴³ Perhaps with reference to “Delivering Economic Prosperity” Scotland’s National Strategy for Economic Transformation document dated March 2022

restriction on a wholesale basis. Rather, we consider the more evidence-based dialogue, seeking consent and/or a statutory limit on income generated (to the extent it is necessary), would be better received.

3.3.9 Nevertheless, it would be open to local authorities to consider whether there is merit in exploring with the Scottish Government whether there is any appetite to introduce new legislation which would support this kind of activity. It our understanding that there is nothing in the current legislative programme which would obviously accommodate this, but we are conscious that SFT is better placed than we are to explore this possibility. By way of particular example, SFT may wish to consider exploring with Scottish Government whether there is any prospect, in the next legislative year, of them bringing into force section 9 of the 2003 Act into force, thereby permitting local authorities to enter into agreements with any person for the construction or maintenance by the authority of any buildings or works (see paragraphs 2.2.10 - 2.2.11).

3.4 *Case Studies*

3.4.1 As noted above, there is a dearth of case law on the application of section 20 of the 2003 Act. Aside from the two key cases mentioned above at paragraphs 2.4.1-2.4.13, any case law referencing the power to advance wellbeing has been fact-specific and offers little that could be extracted and applied as a matter of general principle to parallel situations⁴⁴. In any event, we take the view that case law is only partially helpful in developing the thinking on these matters – since case law is limited to those scenarios that were (at least from someone’s perspective) deficient, and fails to capture those projects that have been successfully implemented.

3.4.2 We have, therefore, searched for publicly available examples – that have not, as far as we can tell, come before the courts - that could be referenced by way of case study, which involve aspects that are relevant to this opinion. We are grateful to SFT for its efforts in connecting us with local authorities for this purpose.

Fife Council - Raithgates House

In 2014, the Council’s executive committee approved the former Raithgates House site as the preferred location for the development of new build residential accommodation for looked-after-children.

Subsequently, the Council considered what was best to be done with the remaining site around Raithgates House. It considered the option of leaving the rest of the site vacant, but there were concerns that this would leave the residents isolated and make their integration into the surrounding community more challenging. It also considered the sale of the rest of the site to a developer, but there were concerns that the Council could not control what was built and when, thereby leaving either a vacant site or exposing the residents to a building site. It was considered

⁴⁴ We had, for completeness, looked to see if there was caselaw on the use of the power to advance wellbeing in the context of regeneration activities.

that the best option was a comprehensive development of the whole Raithgates site as an alternative to placing the balance of the site on the open market.

Accordingly, in December 2016, Fife Council's Head of Assets, Transportation and Environment submitted a recommendation to the Council's executive committee to: a) authorise the construction of private dwellings on part of the former Raithgates House site; and b) authorise the advertisement and subsequent disposal of the properties at best consideration.

The recommendation paper noted that "*There is no specific legal provision that allows Councils to build out new housing for sale on the open market*" (which accords with the findings of our review). However, it determined that the statutory basis on which these recommendations could be authorised and implemented was the power to promote or improve the well-being of the area and persons within that area by providing a safer community and benefitting the social and mental wellbeing of young persons resident in the community. We do not know what other statutory powers were considered but ultimately discounted by the Council.

Advancing wellbeing

Fife Council outlined in its paper that its objective for the development of housing for sale on the open market was part of a wider project to deliver new build residential accommodation for looked-after-children as part of an integrated community. Fife Council identified that the power to advance wellbeing was being exercised for the benefit of young people resident in its area, to encourage a safer community, equality of opportunity and to provide a benefit to their social and mental health, noting that the stigma surrounding many looked-after-children is significantly reduced if they live in accommodation which is built in the same style and with the same materials as the surrounding houses.

The recommendation detailed that the Council's Legal Services were supportive of the use of the power to advance wellbeing. It acknowledged in the paper that "*whilst this use of the power is novel and untested Legal Services have considered that, having followed the Guidance and obtaining external legal advice [see para 2.6.7], the risk of a legal challenge is relatively low*"⁴⁵.

Crossover with trading

It is of particular note that Fife Council determined that, "*in these particular circumstances*", the sale of the houses did not constitute a "trading operation". While we do not know the rationale applied by Fife Council in coming to this conclusion, we assume that it conducted an assessment as to the cost vs. income of the project and determined that it would not be an activity that would need to be, in accordance with proper accounting practices, recorded in the Council's trading accounts. We note, however, that the recommendation included an acknowledgement that the business plan for the sale of open market housing envisaged a "net receipt to the Council". In other words, the Council had determined that there would be profits from the sales, so it would appear that the Council was **not** simply covering its costs. It seems to us that the factors relevant to the Council's assessment of whether the sale of the houses would fall within the bracket of a "trading activity" may have been connected to the nature of the transaction and its underlying objective: ie. the delivery of housing to create an integrated community for the benefit of the looked-after children – rather than for the purpose of generating income. It is, however, of note that Fife Council were not proposing to engage in market rental services, which may, conceivably, have shifted the balance of this assessment.

⁴⁵ Page 177 Fife Council Executive Committee Papers for meeting of Tuesday, 13th December, 2016 9.30 a.m.

Comments

The Council's assessment of the sale of the housing on the open market as not falling within the category of trading activity is of particular note here, given what we consider to be the strict interpretation of the 1970 Act (see paragraphs 2.3.8 - 2.3.36 above). It is, therefore, particularly helpful – both from the perspective of using the wellbeing power (particularly in novel circumstances) and from a trading perspective - that we've not found any public record of a legal challenge being mounted against the Council to their use of the wellbeing power in these circumstances. We would, however, flag that there was some political push back: SNP councillor Neale Hanvey accused the council of engaging in “casino politics” and claimed there had been a lack of detailed information⁴⁶. The decision was ultimately made to progress with the recommendation.

In terms of its process, practice and mitigations, we note that the Council:

- facilitated a drop-in event, at which members of the public were encouraged to engage with a number of options and subsequently respond to the Council's written consultation;
- minuted the fact that the Scottish Government's guidance had been considered and the key factors mentioned in the guidance extracted for the purposes of the recommendation; and
- recorded, in considerable detail, how the young people living at Raithgates House would directly benefit from living as part of an integrated community – as opposed to the other options considered.

We consider these to be key aspects of Fife Council's approach and would commend any local authority looking at a project of a similar nature to follow Fife Council's approach here. Notwithstanding, while we understand that this development has gone ahead, as noted above, it was not without political challenge, highlighting the fact that the barriers potentially facing local authorities go beyond those of a legal nature.

City of Edinburgh Council - Edinburgh Living

A joint venture between City of Edinburgh Council and Scottish Futures Trust, Edinburgh Living, offers homes for mid-market rent throughout Edinburgh. We understand that the mid market rent homes are let and managed on behalf of Edinburgh Living by Lowther Homes, part of the Wheatley Group, who were appointed to deliver this service by way of a sub-contract from the Council, following a procurement process at the end of 2018.

Edinburgh and South East Scotland City Region Deal

We also understand that while the Edinburgh Living concept was in development, it coalesced with the business case for the Edinburgh and South East Scotland City Region Deal (the “City Region Deal”). The City Region Deal included funding to “*deliver the regional housing programme, transforming regional housing supply and driving economic and inclusive growth across Scotland*”⁴⁷. Interestingly, the City Region Deal seemed to go beyond support to the provision of affordable housing (although this was undoubtedly a primary objective), referring to the regional housing programme as aiming to “*accelerate the delivery of affordable housing and housing across all tenures, enable the development of seven major strategic housing sites and*”

⁴⁶ <https://www.thecourier.co.uk/fp/news/fife/345992/fife-councils-luxury-homes-plan-will-go-ahead/>

⁴⁷ Paragraph 2.62 Edinburgh and South East Scotland City Region Deal

*drive efficiencies across the public sector estate*⁴⁸ (our emphasis). The City Region Deal included the following commitment: “*The Scottish Government will provide a funding package comprised of a one-off £16.1 million capital grant and consent for the City of Edinburgh Council to on-lend up to £248 million to establish a new housing company with Scottish Futures Trust (SFT) to deliver a minimum of 1,500 homes at mid-market rent and competitive market rent levels*”⁴⁹ (our emphasis). Accordingly, there seems to us to have been, at least at this point, some recognition at Government level that local authority led mixed-tenure housing was necessary as part of a wider programme for transforming regional housing supply.

Edinburgh Living LLPs

In addition to the mid-market rent delivery vehicle, we note that “Edinburgh Living (MR) LLP” – being the market rent vehicle established between Edinburgh and SFT - had been incorporated in 2017, prior to City Region Deal being finalised. We understand, however, that while the mid-market rent vehicle has delivered on a number of city projects (with the benefit of government grant funding and council on-lending), the market rent vehicle has not delivered market rent housing to date, primarily due to the buoyant market in Edinburgh for non-affordable/mid market properties and the resultant political reluctance to engage in such activity⁵⁰. It is, however, understood that there is a vehicle for use when the operating conditions and financial landscape can accommodate it.

It is, perhaps, worth highlighting that it is our understanding that the objective of the Edinburgh Living initiative was to increase housing supply for people on low and moderate incomes through the provision of housing for intermediate (ie. mid-market) and market rent. So, while the initiative has established a basis for offering homes at market rent, its underlying objective is still focussed on increasing the supply of housing for people on low and moderate incomes (presumably on the basis that increasing supply will assist with affordability and access to the rental market). The main distinction between the mid-market rent and market rent model is simply the availability of Scottish Government grant funding in respect of the provision of mid-market housing.

We consider this aspect to be significant in the context of establishing an evidence base for intervention. While we understand that the statutory basis for the establishment of the Edinburgh Living vehicles was not based on the power to advance wellbeing, **both** LLPs appear to sit within the context of assisting a particular category of persons in the council’s area – rather than one LLP engaging in activities in the affordable housing sector and the other seeking to pursue purely commercial objectives in competition with the private sector.

4 STRUCTURES TO SUPPORT DELIVERY

- 4.1 There are a number of factors that local authorities may wish to consider in deciding which legal structure to use to deliver local authority built housing for market rent and sale. Two of the most important factors are the procurement and subsidy control implications.
- 4.2 Local authorities will all be familiar with public procurement and will understand how to carry out a procurement exercise. However, depending on the scale and complexity of the contract,

⁴⁸ Paragraph 2.63 Edinburgh and South East Scotland City Region Deal

⁴⁹ Paragraph 2.64 Edinburgh and South East Scotland City Region Deal

⁵⁰ As per our discussion with Elaine Scott of City of Edinburgh Council on 1 February 2022

this could be a very labour-intensive process, both in terms of procuring the contract or framework and then in ongoing contract management.

4.3 The new Subsidy Control Bill, which will introduce a new subsidy control regime in the UK, is currently working its way through the Houses of Parliament, and significant amendments have been proposed by the Committee Stage of the House of Lords⁵¹. Until it comes into force, there is an intermediate stage where subsidy control is mostly governed by international agreements. The main document currently governing subsidy control is the UK/EU Trade and Cooperation Agreement, which is very permissive but non-specific. In the absence of detailed rules, public bodies have on the whole taken the approach of complying with the old EU “State Aid” regime as a safe harbour. In this note, we have taken the view that public bodies will want to avoid subsidising private construction businesses in this context, rather than detailing how they might do so in compliance with each of these three regimes.

4.4 There are different options available to local authorities when it comes to legal structures with which to deliver housebuilding for market rent and sale. The best option will vary according to context and preference, taking account of the best ways to manage the risk and to resource the project. We see the most appropriate structures that could be used as falling into three broad categories:

- setting up a subsidiary or ALEO of the local authority;
- entering into an LLP with private or public sector members; or
- directly procuring contracts for works and services.

4.5 Indicative diagrams showing the structure of each model can be found at Annex 2. Each of these models could be used for a project from start to finish (with the exception of Local Authorities not being able to grant private residential tenancies, as outlined at paragraph 4.8.4 below) or for a smaller part of the process. For example, a local authority may carry out remedial work in order to prepare land, before then deciding to sell the land to a developer or to allocate the building work to an ALEO or LLP. We will look at each in turn and highlight advantages and disadvantages to be considered. A Summary Table including relevant examples is provided at Annex 1.

4.6 *The Subsidiary Model*

4.6.1 One option that local authorities could look to use would be to set up a limited company as a wholly owned subsidiary to carry out the project. An ALEO (arms length external organisation) is formally separate from the parent local authority, but is subject to its control or influence by reason of ownership. They provide operational flexibility and dedicated resources to specific services offered by the local authority, but must be managed carefully to ensure that appropriate oversight and accountability are maintained. These principles are especially true when it

⁵¹ [Subsidy Control Bill publications - Parliamentary Bills - UK Parliament](#)

comes to finances: an ALEO can be a good way of ring-fencing money for a project, but Audit Scotland have been clear that local authorities must continue to apply the “Following the Public Pound” principles to ALEO spending⁵².

- 4.6.2 This model has been used by many English local authorities to form “Local Housing Companies”, in view of the requirement under the Localism Act 2011 for local authorities to conduct any commercial activity through a company⁵³. Some Scottish local authorities have used this model to form charitable companies for various purposes, but the restriction of acting in furtherance of charitable objectives means that a subsidiary company for building homes for market sale and rent would not be eligible for charitable status. Housing Companies, such as Fortior Homes in Stoke on Trent or Goram Homes in Bristol, have the legal capacity to do anything that a private company can do – giving them the flexibility to carry out work themselves, contract out to third parties or to enter into partnerships with private companies when they wish to. This would include selling and renting on market conditions.
- 4.6.3 The power to advance wellbeing (and its limitations) apply in theory only to local authorities (per s61(c)(iii) of the 2003 Act) and therefore not to their subsidiaries. However, this is of little to no practical use as the local authority would have to consider its competency in establishing, funding and directing the strategy of the subsidiary company. This means that the limitations of the power to advance wellbeing apply to the subsidiary in practice because it is controlled by the local authority and in all matters of the subsidiary’s governance, the local authority would have to conduct itself within the parameters of its statutory powers.
- 4.6.4 Use of the subsidiary model would carry with it the advantage of ring-fencing any risk to a separate legal personality, with the local authority’s liability being limited to the value of shares or guarantee. However, a company of this nature would be subject to corporation tax on any profits made. The company would be incorporated by registration at Companies House, and its constitutional documents would be publicly available.
- 4.6.5 Setting up the company, and any contracts between the local authority and the company, would be exempt from procurement regulations as the company would be a “controlled person” under Regulation (13) of the Public Contracts (Scotland) Regulations 2015. This would be on the basis that the local authority would control all of the shares in and exercise day-to-day control over the company and the company would carry out more than 80% of its activities in the performance of tasks entrusted to it by the local authority. However, contracts between the subsidiary company and a third party (such as a contract for construction of new houses) would be subject to the public contracts regulations in the same way as contracts awarded

⁵² See Accounts Commission report ‘Councils’ use of Arm’s-length Organisations’ prepared by Audit Scotland May 2018 pg 18, Exhibit 7. The Following the Public Pound Code sets out six principles that require councils (or local authorities) to have a clear purpose in funding an ALEO, set out a suitable financial regime, monitor the ALEO’s financial and service performance, carefully consider representation on the ALEO board, establish limits to involvement in the ALEO and maintain audit access to support accountability.

⁵³ Section 4(2) of the Localism Act 2011

by the local authority directly so would have to be procured in accordance with procurement law as appropriate.

4.6.6 Although the subsidiary company would be treated as part of the local authority and therefore a public body for procurement purposes, that does not apply to subsidy control. Investment in the subsidiary – whether by equity or loan – could be seen as a subsidy granted by the local authority. This is because public bodies can act as economic operators – and in this case would be. As noted at paragraph 2.6.18 above, this pitfall was highlighted in a case where the European Commission held that Liverpool City Council had in fact awarded state aid to themselves.⁵⁴ To avoid this, local authorities would have to fund the subsidiary as a “market economy investor” – or in the terms of the Subsidy Control Bill, on “terms that might reasonably have been expected to have been available on the market”. Therefore, the local authority must fund the company as though it were funding a third party. Grants of equity (or of land) would need to be accompanied with appropriate returns that match those it could expect to get if investing the land as a market economy investor. For example, Fortior Homes, has been financed by deferred loans from their local authority. This will require detailed accounts to be maintained along with apportionment of funds and costs to demonstrate that subsidisation has not occurred.

4.6.7 A subsidiary company is also sufficiently distant from the local authority to not be a “*local authority landlord*” under the Housing (Scotland) Act 2001. This means that a subsidiary could grant private residential tenancies, whereas the nature of a lease entered into by a local authority would be that of a Scottish secure tenancy (“SST”) (considered further at paragraph 4.8.4 below), a form of tenancy that comes with security of tenure and other preferential terms – which, as set out at paragraph 4.8.4 below, would not be in keeping with a market rent approach.

4.7 *The LLP Model*

4.7.1 Limited Liability Partnerships (“LLPs”) are bodies corporate with separate legal personality. They are incorporated by registration at Companies House, and have unlimited capacity to do anything that any legal person can do. Members of an LLP have limited liability in that, generally, they do not need to meet the LLP’s liabilities. In terms of corporate law, an LLP is very similar to a company limited by shares. However, the main difference is that although LLPs are treated as a separate legal entity from their members, for tax purposes LLPs are treated as partnerships. This means that members are taxed as partners, each being liable for tax on their share of the LLP’s income or gains. A local authority, as a member of an LLP, would benefit from its Corporation Tax exempt status on receipt of its share of the LLP’s profit. An LLP must have two members. This requirement could, conceivably, be met (in the absence of a JV partner) through membership by a wholly owned subsidiary of the local authority with a minimal profit share entitlement.

⁵⁴ SA.35720 (2014/NN) (ex 2012/PN)

- 4.7.2 As with the subsidiary model, the LLP would be an economic undertaking (as it would be building, buying, selling and renting in the property market) and so public funds would be subsidies unless given on terms that might reasonably have been expected to have been available on the market – meaning the local authority would have to have suitable returns guaranteed. LLPs would also be able to provide private residential tenancies as, like subsidiary companies, they do not meet the definition of “*local authority landlord*” under the Housing (Scotland) Act 2001.

Partnership with a private sector member

- 4.7.3 Public/private LLPs have been used for housing in Scotland through, for example, National Housing Trusts (NHTs) which are made up of a local authority, Scottish Futures Trust and a private member. In the NHT model, affordable homes are built by a private developer on land they already own, sold to an NHT LLP, rented for five to ten years, and then sold on. This model has been a success in terms of the number of homes built but has not entered into the market sale or rent sectors.
- 4.7.4 The appeal of this scenario is that the initial equity available would not be limited to public funds, and the LLP would benefit from the market experience of the private sector member. However, it may be difficult in some cases to offer a commercially attractive partnership to private sector members. If the market is failing to deliver a certain kind of housing in a local authority’s area, this is likely because private sector developers can make better returns elsewhere. Local authorities may have to consider how to improve the proposal of a partnership for a private sector partner.
- 4.7.5 If the LLP partner is to be a housebuilder who would deliver the construction, the local authority would be required to procure the position of joint venture partner through a regulated procurement procedure. This is because the contract for works would go hand in hand with membership of the LLP for that company. The same would apply to a property management or factoring company who was then to carry out those services for the LLP. A partnership with a private sector company who would not be contracted for works or services – perhaps a property investor or other investment fund – would not have to be procured. Contract for works and services would then have to be subsequently procured by the JV through a regulated procurement.
- 4.7.6 An LLP with a private sector member may be more likely to attract subsidy control challenges. Where competitors have not been selected, they may see this as a more direct threat to them than a purely public sector undertaking.
- 4.7.7 In the particular context of putting a land asset into a joint venture LLP, one method of ensuring that this is done on market terms would be by equating the capital contribution of the local authority (i.e. the value of the land) to the investment to be contributed by the procured private sector joint venture partner, be it in terms of cash or an in-kind contribution by way of the carrying out of the construction works

– potentially, with additional cash contributions by either party to ensure 50/50 contributions.

- 4.7.8 If the local authority is concerned that the land in its current condition is unlikely to be attractive to a JV partner, it may wish to consider undertaking remediation works at the site. To make it more attractive without inadvertently granting subsidy, they ought to have regard to the European Commission’s decision in “*SA.36346 (2013/N) – Germany – GRW land development scheme for industrial and commercial use*”. This decision permitted the German authority to revitalise land for subsequent construction of industrial and commercial infrastructure without there being State aid in the hands of the developer, but only in so far as there was not an identified end-user of the affected part of the site. This means that the remediation work would have to be carried out before any JV partner was identified – potentially with the risk of there then not being one available. The same principle would apply if a local authority was to improve land for market sale. This could not be done with an identified buyer (unless the cost of such works and the improvement in value of the site are clearly accounted for in the sale price), but could be done as general remedial work. The local authority could also do the remedial work as part of its contribution to the JV but would have to do so on market terms – and in doing so would potentially lose the effect of making the proposition more commercially attractive to potential private sector partners.

Partnership with a public sector member

- 4.7.9 If a public sector partner is to act as a contractor – such as by carrying out the construction work or housing management services - then the procurement regulations would apply to enter into this partnership as with a private sector partner. However, it may be that two public sector bodies with a common interest in developing housing for market sale and rent wish to create an LLP as a way of pooling resources and sharing expertise. In this case, the local authority would not have to procure a partner, but the LLP would have to procure any subsequent contracts, such as works and services, by regulated procurement processes.
- 4.7.10 Edinburgh Living LLP is an example of this common interest approach. While Edinburgh Council is the 99.999% owner, SFT also maintains a stake and therefore motivation to support the project. Edinburgh Living rents out properties that it owns at mid-market rent, but has a separate LLP established to do so at market rent. This has not happened so far, mostly due to a political prioritisation of social housing and mid-market rent, and the state of the private sector rental market in Edinburgh, which is booming. This does, however, suggest that local authorities in areas with different housing market circumstances could use the model. The momentum to start Edinburgh Living came from grant funding under the Edinburgh and South East Scotland City Region Deal, which was available largely because it was for mid-market rent. Local authorities seeking to use a similar model for market rent would need to consider a suitable approach to funding this according to their specific circumstances.

- 4.7.11 This approach may be limited by needs for resources. A project of this scale requires considerable resource and experience – both in construction and ongoing property management – and local authorities are already pressed for funding and staffing requirements. A private sector partner could bring finance and expertise with them in a way that a public sector partner likely couldn't. One way of addressing resource and experience issues is for public sector partnerships to contract key work out to private sector bodies with relevant skills. For example, Lowther Homes (a subsidiary company of Wheatley Group) lets and manages homes for mid market rent on behalf of Edinburgh Living via contract. Lowther were appointed to deliver this service following a procurement process at the end of 2018. This would be one key contractual arrangement of this model and, as mentioned below, would have to be procured by a regulated process.
- 4.7.12 A public sector LLP partner could be another local authority (perhaps a neighbouring local authority with a common interest in the project); or an executive non departmental public body such as SFT (who have participated in comparable work through the NHT model) or one of Scotland's enterprise agencies; or even a subsidiary of the local authority.

4.8 *The Direct Procurement Model*

- 4.8.1 The only example we have seen to date of a Scottish local authority building homes for market sale under the power to advance wellbeing is Fife Council's Raithgates House development in Kirkcaldy. Some work on this site was done by council employees directly and some was contracted out to a private sector housebuilder. Although the justification was not related to market failure, the implementation is a model that can be followed. A more detailed explanation of the fact-specific rationale behind the decision to do this can be found under the *Case Studies* heading at paragraph 3.4 above, in the Establishing An Evidence Base section.
- 4.8.2 There are several advantages to developing houses directly via a tender process for the works contract. The local authority could decide on the appropriate procurement process to use and run a tender for a contractor to construct the houses. If the local authority goes out to tender with its own specified design, it would give it control over the quality standards required for the development and the timescales for delivery, which may provide comfort to local authorities that have been previously dissatisfied by the quality/lead-in time offered by volume housebuilders.
- 4.8.3 Running a competitive procurement, paying the successful contractor a market rate then selling or renting the housing at market rate, there should be no subsidy implications. There would also remain the possibility of the local authority incentivising the work by meeting the construction costs up front with a loan, so long as this was done on market terms with a sufficient return on sale of the properties.

- 4.8.4 One significant disadvantage to this approach is that it would only work with market sale and not rent. This is because local authorities are prohibited from granting private residential tenancies (PRTs) by Paragraph 14 of Schedule 1 to the Private Housing (Tenancies) (Scotland) Act 2016. For local authority landlords, the alternative to PRTs are SSTs but these come with a range of statutory controls that are not consistent with a market rent arrangement so are not suitable for this model. For example, a landlord cannot unilaterally end an SST by giving notice in the normal way under a PRT, but only in specific circumstances by court order. This prohibition on granting PRTs applies to “*local authority landlords*”, defined by S11(3) of the Housing (Scotland) Act 2001 as “*a landlord which is a local authority, a joint board or joint committee of two or more local authorities, or the common good of a local authority, or any trust under the control of a local authority*”, meaning it would not apply to an ALEO or an LLP of which a local authority is a member.⁵⁵ Local authorities would also have to bear in mind that any pre-existing SSTs would survive the transfer of the housing units to a non-local authority, by reason of the protections provided to such tenants.
- 4.8.5 While it may seem that this approach could be the most easily resourced, it would almost certainly require a dedicated team within the local authority to manage the procurement process, the tendered contract and the subsequent works by the successful bidder. Without a joint venture approach, and in the absence of relevant expertise within a local authority, there could be a missed opportunity to benefit from the expertise of other organisations in relation to house building for sale and/or market rent.
- 4.8.6 In terms of partners and partnership working, the direct procurement model means that any relationship is likely to be less close – limited to delivering on specific requirements for a limited period. Successful bidders will be awarded contracts on the basis of their proposed price and ability to deliver the works or services required.

4.9 ***Key Contractual Arrangements***

- 4.9.1 This section seeks to give a high-level overview of the contractual relationships that would go into making each model work. There is significant overlap between each model and so we have not covered everything in as much detail each time. Basic questions such as identifying a source of funds and staff resources will apply in similar ways to each model, and the public contract regulations and the ongoing need for contract management will apply to the same extent, albeit potentially at different stages, in each process.

⁵⁵ We are not aware of any wholly owned Council subsidiary granting PRTs although there are various examples of LLPs (such as Edinburgh Living LLP and Steadfast Homes LLP) granting these. Furthermore, a number of RSLs with similar constraints have commercial subsidiaries capable of granting PRTs.

Subsidiary Model

4.9.2 The key contractual arrangements and documents required for the subsidiary model would be:

- (a) articles of association and policies of subsidiary company;
 - (i) These would set out the powers and objectives of the company as well as the processes for decision making, appointment of directors and distribution of any profits.
 - (ii) Drafting will need to be sensitive to the fact that this will be publicly available.
- (b) internal policies of the company, including employment contracts and policies, director's agreements, data protection, insurance, etc.;
- (c) These could be largely taken and or developed from local authority documents so wouldn't be too difficult to produce.
- (d) a service agreement (or equivalent) between the local authority and the subsidiary managing the relationship between the two;
 - (i) This would determine what services the subsidiary is to deliver and what would be done internally by the local authority, which would have a bearing on allocation of resources.
 - (ii) It should also detail how the effectiveness of the model will be reviewed and the allocation of assets will be determined.
- (e) loan agreements between the local authority and the subsidiary if that is how the project is to be funded;
 - (i) Loans must be made on market terms to avoid subsidy control issues.
 - (ii) Consideration will also have to be given to where the money comes from at the local authority end - for example on-lending of PWLB money.
 - (iii) Scottish local authority borrowing for capital projects from the Public Works Loan Board (PWLB) is not capped, but there is a duty to "have regard to generally recognised codes of practice and guidance in relation to capital finance and treasury management" (Regulation 4 of the Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016). The explanatory note to these regulations cites the CIPFA Prudential Code and CIPFA Treasury Management Code as examples of such codes of practice. Loans which are to be lent on (other than to other statutory bodies or common good funds) are subject to restrictions under regulation 2(2) of the same Regulations including needing

the consent of the Scottish Ministers (as well as needing to comply with subsidy control rules).

- (f) potentially partnership agreements between the subsidiary and other partners (inc. private sector) if they are to enter into any partnerships; and
 - (i) If the partnership is effectively a contract of works and/or services, then this would have to be done by a regulated procurement.
 - (ii) Partners may look for financial guarantees from the local authority as the parent of the new company.
 - (iii) An example of a subsidiary partnering with the private sector can be seen in Fortior Homes' work with Novus and Genr8 (discussed further at paragraphs 4.10.1-4.10.2 and the Summary Table at Annex 1).
- (g) procurement documents for any works or services which are contracted in relation to the housing, including, for example, for its design and construction and/or marketing and ongoing management (in relation to any housing for market rent).
 - (i) This will include a contract specification, invitation to tender, assessment criteria, and other relevant documents depending on the procurement process which is followed.
 - (ii) Local Authorities will have dedicated procurement staff who could carry this out on behalf of the subsidiary, but for capacity reasons the subsidiary might have to have their own procurement team.

LLP Model

4.9.3 The key documents for the LLP model would be:

- (a) the members' agreement;
 - (i) This will manage the relationship between partners, the powers and objectives of the LLP, the decision-making process and so on.
 - (ii) If a partner is going to carry out works, then this is effectively a works contract and must be procured by the local authority as such.
 - (iii) Unlike articles of a company, while an LLP is incorporated by registration at Companies House, the Members' Agreement will not be publicly available.
- (b) potentially a management agreement;

- (i) This is a further contractual agreement between partners as to how the operation of the LLP will work in practice. It covers financial arrangements, roles and responsibilities, day to day management, etc.
- (c) internal policies of the company, including employment contracts and policies, director's agreements, data protection, insurance, etc.;
- (i) Essentially the same as in subsidiary model.
- (d) loan agreements between the local authority and the LLP if that is how the project is to be funded; and
- (i) Essentially the same as in subsidiary model.
- (e) if LLP is to contract out work and services, procurement documents at that stage.
- (i) As in subsidiary model, the procurement could be carried out by the local authority or LLP.

Direct Procurement Model

4.9.4 This model would require substantially less contractual documentation than the others. Local authorities will be well used to procuring works and services contracts. The questions of funding and resource management apply though, and it may be harder to delineate (or ring-fence) money and staff time if it is an internal project.

4.10 ***Examples in Practice***

Subsidiary Model

4.10.1 Housing companies – wholly owned subsidiaries to build housing for councils – are increasingly common in England, with one report suggesting over 80% of councils used this model.⁵⁶ Not all of them offer homes for market sale and rent, but some have done so with apparent success. Fortior Homes describes their purpose on their website like this:

- (a) “Fortior Homes was established in October 2016 to improve the availability and quality of private sector housing to meet rising demand in Stoke-on-Trent.
- (b) There are certain gaps in housing provision in the city, so Fortior Homes is focussed on stimulating or even leading the market in those sectors.”

4.10.2 Using this model has not prevented Stoke-on-Trent City Council from working with the private sector either, as Fortior have carried out projects in partnership with

⁵⁶ <https://www.insidehousing.co.uk/news/news/more-than-80-of-councils-now-own-housing-companies-research-finds-71050>

companies including [Novus](#) and [Genr8](#). Some further examples of housing companies are listed in the Summary Table at Annex 1.

- 4.10.3 Subsidiary companies have been used by local authorities in Scotland for various things, but not for building housing for market rent and sale as far as we are aware. One example is High Life Highland – a company limited by guarantee and registered charity which is a subsidiary of the Highland Council and runs services on their behalf in culture, learning, sport, leisure, health and wellbeing. Other examples of this model include Glasgow Life and Fife Sports and Leisure Trust. These organisations carry out statutory functions of local authorities – of which market housing development is not one – and so are not equivalent in terms of underlying objective. However, they illustrate a model by which local authorities can carry out commercial activities and charge fees but not for the purpose of raising money for the local authority. In other words, trading of a kind which is not a trading operation for the purposes of the 1970 Act (see paragraph 2.3.8 to 2.3.36 of the Local Authority Statutory Powers section. Although the statutory basis may be different (statutory functions compared to power to advance wellbeing), the legal structure of these examples could be replicated in the context of building homes for market sale and rent.

LLP Model

- 4.10.4 SFT have pioneered the National Housing Trust (NHT) model, which has been used widely across Scotland by various local authorities to deliver affordable housing. While the financial arrangements would be different, the legal structure of the LLPs would not need to be very different in order to deliver homes for market sale and rent. One criticism of the NHT model has been that tenants have been removed when their homes have been sold – this would be avoided if homes were built for direct market sale or committed to market rent and therefore kept by the LLP.
- 4.10.5 One of the challenges of a purely public LLP is that it misses out on the capital investment available from private sector partners. Edinburgh Living LLP had the advantage of starting with a significant grant from the Edinburgh and South East Scotland City Region Deal. However, where one of the aims was to provide housing at competitive market rent levels, they have so far only provided homes for mid-market rent. Edinburgh Living LLP is almost entirely owned and funded by the City of Edinburgh Council, so in many ways is operationally similar to a Housing Company.
- 4.10.6 This is similar to the model that has been followed by Steadfast Homes LLP – a joint venture between Stirling Council and a Stirling Council company, Strevelin Homes Limited. Steadfast Homes then subsequently employ Stirling Council as managing agent to maintain their properties, collect rent, monitor common areas and arrange repairs. This gives Stirling Council the benefits of a separate legal entity (such as being able to grant PRTs), but allows them to maintain control over the project and carry out most of the work internally.

Direct Procurement Model

4.10.7 Fife Council developed and sold four homes on a site where they were building a children's home. This was done by a combination of council employees and by procuring construction works from Stewart Milne. This was done under the power to advance wellbeing, but the justification was very specific to this circumstance. The land owned was bigger than was needed for the children's home, and it would improve the wellbeing of the vulnerable children by not selling and having a separate, subsequent development next door. However, it demonstrates that the model can be effective and there is no reason the same couldn't be done with a different justification under the power to advance wellbeing. A more detailed explanation of the rationale behind the decision to do this and the use of the power to advance wellbeing can be found under the *Case Studies* heading at paragraph 3.4 above, in the Establishing An Evidence Base section

5 MITIGATIONS

5.1 We have given consideration, in the sections above, to possible delivery models with a view to assisting local authorities to develop a "proof of concept". That is, of course, based on the assumption that local authorities have an enthusiasm to pursue projects of this nature, which we appreciate will be, to a large extent, determined by their risk appetite. Risk (and the mitigations to manage that risk) will, as a matter of course, present itself across projects in a number of guises: be it legal; financial; reputational; environmental; political; resource-based; practical etc and will be very much set within its local context.

5.2 It is, however, appropriate for us to summarise the risk factors associated with the principle of *ultra vires*, in the context of local authorities relying on the power to advance wellbeing for the construction and delivery of housing for market sale and rent, and our suggested mitigations to deal with it.

5.3 First, in situations where powers are conferred in general terms, such as with the power to advance wellbeing, each circumstance will turn on its own facts. So in each case, the **evidence base needs to be robust**. In practical terms, we think this means:

5.3.1 **Public consultation:** Through public consultation (such as workshops; drop-in sessions; written consultations), local authorities must establish that there is a **need** for housing for market sale and rent.

5.3.2 **Data analysis:** Local authorities must be able to point to information emerging from its function as a planning authority or otherwise to demonstrate the **absence of private sector activity** in meeting that need.

5.3.3 **Stakeholder engagement:** To mitigate risk further, local authorities should engage in proactive stakeholder engagement with relevant contractors, developers, house builders and others connected with the sector, to understand the barriers to private sector activity. It might be that the local authority could alleviate any identified

barriers, thereby facilitating private sector activity and ultimately achieve its objective in a less interventionist way⁵⁷.

- 5.4 Proactive stakeholder engagement can take many forms, but one we have seen in practice which has the benefit of a nation-wide audience and being a clear marker as to a local authority's intentions is use of a Prior Information Notice ("PIN") published in Public Contracts Scotland (PCS), inviting proposals from the market⁵⁸. This might have the effect of generating new ideas which might negate the need for local authority intervention, or may serve to evidence the absence of private sector activity further. Critically, it also puts the market on notice of the local authority's intentions, which is a helpful mitigation against judicial review.
- 5.5 A PIN is one example of engaging with the market through PCS. Another route, albeit one which is slightly more unusual in this context, might be to procure a dynamic purchasing system ("DPS"), which is an electronic purchasing system open to any bidder to participate in so long as they satisfy selection criteria set by the buyer. A particular advantage of a DPS – and the reason for specifically highlighting it here - is that there is no limitation to the number of participating bidders – indeed, new bidders can be added at any time during the life of the system. Local authorities would, of course, need to take detailed advice on whether a DPS would be a suitable mechanism for testing the market in this particular context (DPS is generally used for off-the-shelf commodities and it would need to be constructed carefully to align with the Public Contracts (Scotland) Regulations 2015), but at least in principle, a DPS offers an **open system** in which interested market players can participate on an ongoing basis, which, at the very least, might help to evidence the absence of private sector interest over a period (as opposed to the snapshot in time that a PIN would be able to evidence).
- 5.6 **Bringing each of these elements together:** Local authorities must demonstrate, with specificity, how their area and/or the people living within it would **directly benefit** from this need being met by the local authority – ie. by the development of housing for market sale and rent by the local authority.
- 5.7 Second, in developing its evidence base, local authorities must have due regard to the criteria set out the Scottish Government's guidance⁵⁹ and keep an audit trail that it has done so – ideally, by minuting the detail of the guidance "key factors" which have been considered in the council papers. This goes to one of the key mitigations against a judicial review, that the local authority has properly considered the influencing factors:
- 5.7.1 What factors **must** be taken into account?
- 5.7.2 What factors **may** be taken into account?

⁵⁷ Examples of this may be planning permission issues or lack of infrastructure, as discussed at section 3.2 above.

⁵⁸ For example, City of Edinburgh Council has published a PIN to provide the market an opportunity to present proposals to the Council to support the acceleration of the Council led affordable homes programme and to engage with private sector partners to bring forward land which is not owned by the Council.

⁵⁹ As referred to at paragraph 2.7.6 above.

- 5.7.3 Are the facts relied upon accurate?
 - 5.7.4 Has the local authority sought input from those with up to date information? Has it consulted appropriately?
 - 5.7.5 Where representations have been made, has the local authority taken account of them and is it appropriate to do so?
 - 5.7.6 Has anything irrelevant been considered?
- 5.8 Third, given what we have described as the “spectrum” of when imposing “reasonable charges” under the power to advance wellbeing goes beyond cost recovery, to the point at which it becomes commercial trading – particularly as regards the provision of market rental services – a very important mitigation here is to engage with the Scottish Government on these issues, as described at section 3.3.
- 5.9 Fourth, flowing from the above, to the extent that the Scottish Government indicates a preference for one structure over the other (whether relating to commercial trading or other factor), a key mitigation will be to ensure that the appropriate structure is properly instituted, having regard to the key contractual arrangements set out in section 4.9 above. While Scottish Government need not determine the vehicle/contractual structure each and every time, there may be an established structure for dealing with (for example) the commercial trading element, which local authorities would likely want to replicate. Indeed, whatever structure is established as the delivery model, local authorities must put the necessary checks and balances in place to ensure the proper functioning and governance of any new subsidiary or joint venture vehicle (or indeed, any new in-house function, which may necessitate changes to standing orders and the like).

6 CONCLUSION / NEXT STEPS

6.1 *Suitability of the Power to Advance Wellbeing*

- 6.1.1 We have considered a wide range of statutory powers and assessed their scope in the context of empowering local authorities to build homes for market rent and sale. There is, for the avoidance of any doubt, **no specific statutory provision** that allows local authorities to build out new housing for sale on the open market. While certain well established statutory powers afforded to local authorities (such as those set out in the Local Government (Scotland) Act 1973) offer a basis in law for certain activities that would form a necessary part of any development project (such as the power to acquire and dispose of land (with certain conditions)), there would be (we surmise) an uncomfortable gap in respect of other – ancillary, but necessary – activities in the context of these projects, such as (by way of illustration) the marketing of properties or factoring/property management. We see an attraction in seeking to rely on a more holistic, overarching, power that would support the **underlying objective**, thereby enabling multifaceted, supplementary activities to be captured, to the extent that they further that underlying objective.

- 6.1.2 With this in mind, we consider the wide-ranging **power to advance wellbeing**, as set out at section 20 of the Local Government in Scotland Act 2003, which gives local authorities in Scotland the statutory power to do **anything which they consider likely to promote or improve the wellbeing of its local authority area and/or persons within that area**, to have considerable merit.
- 6.1.3 Indeed, the Scottish Government expressly intended the wellbeing power to encourage innovation and partnership working, subject to sensible safeguards. Accordingly (and subject to those safeguards) it seems to us that a very clear and well evidenced business case in favour of the use of the power to advance wellbeing would offer a clearer and more transparent route to undertaking projects with an element of novelty, than seeking to proceed on the basis of piecemeal local authority powers for different elements of the project.
- 6.1.4 The power to advance wellbeing is, however, a permissive power: it only confers power where it does not conflict with other legal restrictions. There are, accordingly, a number of relevant limitations on the power and key safeguards to be considered and actioned by local authorities in their use of the power. First, however, we set out a number of preliminary matters to be discussed with Scottish Government, with a view to establishing a proof of concept.

6.2 *Preliminary matters - engagement, led by SFT, with Scottish Government*

- 6.2.1 **We have, in the context of our review of the limitations on the power to advance wellbeing, considered its interaction with the rules on local authority trading:** the power to advance wellbeing enables local authorities to provide goods and services, but not charge for them unless they are “*reasonable charges*”. Where a local authority does impose a charge in terms of the wellbeing power, it must publish its reason for doing so and an explanation of how it arrived at the amount of the charge. It must be clear that the power is not being used for the **purpose** of raising money. Local authorities should be mindful of that when developing their business case / economic strategy for use of the wellbeing power.
- 6.2.2 Where, however, a charge is imposed that generates an income which is greater than the costs of providing that service, it may be considered to be a **commercial activity**.
- 6.2.3 This is important because - while it is accepted that local authorities will not look to compete in the housing market purely for commercial objectives – in delivering the kinds of projects in contemplation here, there may be **particular activities** undertaken as part of that overarching objective that are, at least arguably, **trading activities**⁶⁰. There is an **express prohibition** on using the wellbeing power to carry out trading operations which may be done under the Local Authorities (Goods and Services) Act 1970.

⁶⁰ For example, the provision of market rental services; property management services; maintenance services, to name but a few.

- 6.2.4 It seems to us, then, that the power to advance wellbeing may be used to justify activities for which a reasonable charge is imposed, but where that activity **moves into the territory of trading**, it is the 1970 Act that applies, which is **potentially prohibitive**, subject to Scottish Ministers’ consent or a statutory limit being set on trading income⁶¹ - something that the Scottish Government has not set to date, which effectively makes it zero.
- 6.2.5 To be clear, there are instances where local authorities in Scotland **do** engage in income-generating activities, but since (absent a statutory limit on income) there is nothing in the 1970 Act which allows for this without the consent of the Scottish Ministers, it must be recognised that any such trading – particularly where there is a significant level of income – could be open to challenge.
- 6.2.6 We refer above to there being an attraction in relying on a holistic, overarching, power that supports an underlying objective. We still consider this to be the preference, but given the potential “spectrum” here in terms of non-commercial/commercial activities involved in projects of this nature; with a critical tipping point where imposing “reasonable charges” goes beyond cost recovery, to the point at which it becomes commercial trading with members of the public, we think there is a clear need for **dialogue with Scottish Government**.
- 6.2.7 **As a preliminary step**, in order to move towards a proof-of concept – we think it is important that SFT (with support of interested local authorities) engages with Scottish Government on the interaction here with the rules on local authority trading – as well as, more generally, exploring the extent to which Government supports projects of this nature, in principle. In particular:
- (a) A first key question would be whether the Scottish Government is supportive, in principle, of the objective of local authorities developing housing for market rent or sale and whether they are comfortable with local authorities proceeding on the basis of the power to advance wellbeing⁶². Although not necessarily determinative, this could have a significant effect on local authorities’ confidence to undertake a project of this nature.
 - (b) Section 9 of the 2003 Act introduced special provision for local authorities to enter into agreements with any person for the construction or maintenance by the authority of any buildings or works. This section is, however, not yet in force – perhaps because the Scottish Ministers are yet to make regulations to restrict the exercise of this power. It is, to our mind, a helpful indication of the intention of lawmakers to accommodate this

⁶¹ Generated outside of public to public sector trading.

⁶² Particularly, to seek assurance that “wellbeing” in the context of housing provision is considered to be broader than the statutory charitable purpose most often underpinning the activities of registered social landlords: “the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage” and actually encompasses the advancement of a higher level of quality of life.

kind of development activity by local authorities and may, therefore, be a useful reference point in dialogue with the Scottish Government.

- (c) It would be helpful to understand the Scottish Government's position on the distinction between "reasonable charges" under the 2003 Act and "trading operations" under the 1970 Act. There is potentially a spectrum of financial models between the two, and it would be helpful to understand how far along that spectrum "reasonable charges" can go before becoming a "trading operation".
- (d) To the extent necessary, it would be helpful to understand whether Scottish Government would, as a matter of principle, be prepared to consent to local authorities engaging in certain trading operations (or, indeed, setting a statutory limit on income), where the local authority is able to demonstrate that its intervention is limited to addressing the inactivity of the private sector (robustly evidenced) and if it is, what that evidence would need to comprise.
- (e) Finally, while we would generally hold to the view that a local authority cannot establish a separate entity with powers that go beyond that which a local authority is itself empowered to do, we would welcome a view from Scottish Government on whether it would be supportive of the argument that a separate entity (either wholly owned by a local authority or jointly with another party) may engage in trading without falling foul of the 1970 Act restrictions, providing that none of the profits are distributed to the local authority (ie. any income would be recycled by that entity and used in furtherance of that entity's activities). If Government was supportive of this argument, this might deal quite neatly with any overlap between the 1970 Act and the wellbeing power, and also provide a clear direction as to the preferred structure.
- (f) A variant of this, for exploration with Scottish Government, might see a wholly owned subsidiary of the local authority establishing a special purpose vehicle with a third party (most likely, an LLP with the subsidiary and third party as the two members) to deliver the market housing projects.

6.2.8 Subject to that preliminary dialogue, we consider it prudent for local authorities to consider whether they might be prepared to develop a business case/evidence base for reliance on the power to advance wellbeing for the development of market level housing in their area as a **stand alone initiative**; with a separate statutory powers justification for the provision of rental services (to the extent required and subject to Scottish Ministers' consent to this or an appropriate statutory income limit). If such consent/statutory limit is not forthcoming (and Scottish Government are not minded to provide direction on the alternative structures suggested above), local authorities may need to consider whether they would be prepared to develop housing to meet the needs of their communities, based on a suitable evidence base for use of

the wellbeing power (as set out below), but transfer that developed housing to a third party (for best consideration) to deliver the ongoing services. Conceivably, by developing the housing (including executing any necessary remedial site works), the local authority may have intervened sufficiently to draw in private sector interest.

6.3 *Ongoing Safeguards to be actioned by local authorities each time the power to advance wellbeing is implemented*

- 6.3.1 The power to advance wellbeing is not a power of general competence – **there are criteria to be satisfied by local authorities each and every time the power is utilised**. In particular, local authorities must demonstrate a **direct impact** on the wellbeing of citizens in the area, who could be said to benefit directly from the action taken under the wellbeing power. Local authorities must demonstrate, with specificity, how their area and/or the people living within it would directly benefit from this need being met by the local authority – ie. by the development of housing for market sale and rent by the local authority. Local authorities must have due regard to the criteria set out in the Scottish Government’s guidance on the power to advance wellbeing⁶³ and keep an audit trail that they have done so – ideally, by minuting the detail of the “key factors” listed in this guidance.
- 6.3.2 Local authorities should be able to clearly demonstrate that the benefit to their area/the people within it are the **primary objective** (ie. that it can be robustly evidenced that the activity is not for the purposes of enabling the local authority to raise money – any income generation is a secondary concern). Any charges imposed would need to be demonstrably **reasonable**, with a fully developed rationale for the charging structure and an explanation of how the amount of the charge was arrived at.
- 6.3.3 Local authorities must be able to demonstrate **why they consider their intervention to be necessary**. This will require identifying what the market has failed to provide, and demonstrating why it is in furtherance of the wellbeing of their area (and/or the people in it) for the local authority to use public funding to remedy that failure.
- 6.3.4 While consideration of key planning and housing documents such as the Housing Need and Demand Assessment (HNDA), Local Housing Strategy (LHS) and Local Development Plan (LDP) would provide a starting point for understanding market capacity and delivery against which market failure could be assessed, we do not think this, in and of itself, is sufficient. We consider that it would be necessary for local authorities to investigate fully the reasons for under-performance in the delivery of private housing in a particular area before its intervention can be robustly justified. We would also recommend that local authorities consider commissioning external advice from development consultants to establish whether development sites in the housing market area are viable from a housebuilder’s perspective. If it

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<https://www.webarchive.org.uk/wayback/archive/20150220071351/http://www.gov.scot/Publications/2004/04/19276/36157>

can be shown that sites are objectively viable but there is no developer interest in the sites, then that could provide support for local authority intervention.

6.3.5 A further way of establishing developer interest (or lack thereof) and of mitigating against the risk of challenge (considered in more detail below) in that respect would be to engage with the market by publishing a Prior Information Notice (“PIN”) on Public Contracts Scotland. Another route, albeit one which is slightly more unusual in this context, might be to procure a dynamic purchasing system (“DPS”). In principle, a DPS offers an open system in which interested market players can participate on an ongoing basis, which, at the very least, might help to evidence the absence of private sector interest over a period.

6.3.6 **Mitigating risk:** risk will, as a matter of course, present itself across projects in a number of guises: be it legal; financial; reputational; environmental; political; resource-based; practical etc and will be very much set within each local context. If, however, a local authority acts beyond the scope of the power to advance wellbeing, there may be grounds for this action to be challenged by judicial review. To mitigate against this, the key action is to ensure **proper decision-making**, which has taken account of key considerations including:

- (a) whether the local authority has the power to take the decision;
- (b) what **influencing factors** must and may be taken into account;
- (c) whether the decision is made in a **procedurally correct way** by an impartial and independent decision maker;
- (d) whether additional duties, such as the public sector equality duty, have been complied with;
- (e) whether the decision making process has been recorded, creating a robust audit trail.

6.3.7 In addition to ensuring a direct link has been established and ensuring that a robust evidence base exists for local authority intervention, further examples of **relevant questions local authorities may wish to consider in the course of their decision-making** are:

- (a) whether the land in question is already held for specific planning purposes;
- (b) whether the affordable housing needs of the local area are already sufficiently met;
- (c) whether the needs of homeless people in the local area are being sufficiently met by local authority services and accommodation;

- (d) whether the proposed development is in line with the best value obligations on the local authority and whether the proposed development adheres to the Scottish Government’s guidance on the best value concept;
- (e) whether due regard has been given to the way in which the proposed development supports the public sector equality duty;
- (f) whether the proposed development facilitates the provision of recreational, sporting, cultural and social facilities for the inhabitants of the local authority area; and
- (g) whether it furthers the aims of any local development plans which are in place.

6.3.8 Due consideration should be given to all of the above, along with any locale-specific considerations. In developing its justification, local authorities should be informed by, and be responsive to, the views of the people and communities in its area.

6.3.9 For example, Fife Council relied on the power to advance wellbeing in order to construct, advertise and sell private dwellings on part of a site which was used to develop new build residential accommodation for looked-after-children (Raithgates House). Fife Council’s approach in evidencing and justifying its decision included:

- (a) facilitating a drop-in event, at which members of the public were encouraged to engage with a number of options and subsequently respond to the Council’s written consultation on the decision;
- (b) minuting the fact that the Scottish Government’s guidance on the power to advance wellbeing had been considered and extracting the key factors mentioned in the guidance extracted for the purposes of recommending the course of action; and
- (c) recording, in considerable detail, how the young people living at Raithgates House would directly benefit from living as part of an integrated community – as opposed to the other options considered.

6.3.10 Another example is Edinburgh Living – a project of Edinburgh City Council and SFT – which has established two special purposes vehicles: one for market rent and one for mid-market rent. The aim of both is to increase housing supply for people on low and moderate incomes through the provision of housing – for both mid-market and market rent. We consider this focus on a particular category of persons in the local authority’s area to be a helpful example in the context of establishing an evidence base for intervention and in terms of identifying a clear need in the area (albeit, it is our understanding that the Council did not rely on the power to advance wellbeing in this context).

6.4 *Structures to Support Delivery*

- 6.4.1 Finally, in terms of next steps, local authorities should begin to consider the potential models and corporate structures to support delivery of housing development projects.
- 6.4.2 There are different options available to local authorities depending on their specific development aims, whether housing for market sale and/or market rent (recognising that local authorities that enter into tenancies directly (as opposed to through a subsidiary) would, by operation of law, enter into Scottish secure tenancies (in respect of which there is security of tenure and affordable rent levels, rather than the form of private residential tenancies available to private sector landlords)). The most appropriate option will vary according to context and preference, taking account of the best ways to manage the risk and to resource the project. We see the most appropriate structures that could be used as falling into three broad categories:
- (a) setting up a wholly owned subsidiary of the local authority;
 - (b) entering into an LLP with private or public sector members; or
 - (c) directly procuring contracts for works and services (which was the approach taken by Fife Council in the example referred to above).
- 6.4.3 One implication of each of these structures is where the procurement regulations would apply to any contracts for works or services. In the LLP model, if the LLP partner is to provide works or services (such as partnering with a housebuilder who would deliver the construction), the local authority would be required to procure the position of joint venture partner through a regulated procurement procedure. This is because the relevant contract would go hand in hand with the partner's membership of the LLP. Specific arrangements should also be considered in the context of the subsidy control regime as necessary.
- 6.4.4 We think it is conceivable that preliminary discussions with Scottish Government will involve consideration of an appropriate structure. While Scottish Government may not actually prescribe a particular model (and, in any event, local authorities will need to be comfortable with the structure as appropriate to its own context), principles may emerge from SFT's dialogue with Government that make one model more viable from a statutory powers perspective than another. For example, if Scottish Government indicates that it would be supportive of the argument that a separate entity (either wholly owned by a local authority or jointly with another party) may engage in trading without falling foul of the 1970 Act restrictions providing that none of the profits are distributed to the local authority, that may have a bearing on the choice of legal construct. Conversely, if Scottish Government indicates discomfort with the commerciality of the proposition here, and local authorities need to consider reducing the scope to – for example – the construction

of housing but not the ongoing provision of services, local authorities may be minded to procure contracts for works and manage those contracts in-house.

ANNEX 1: SUMMARY TABLE OF POSSIBLE VEHICLES FOR DEVELOPMENT INCLUDING EXAMPLES OF PREVIOUS/CURRENT MODELS

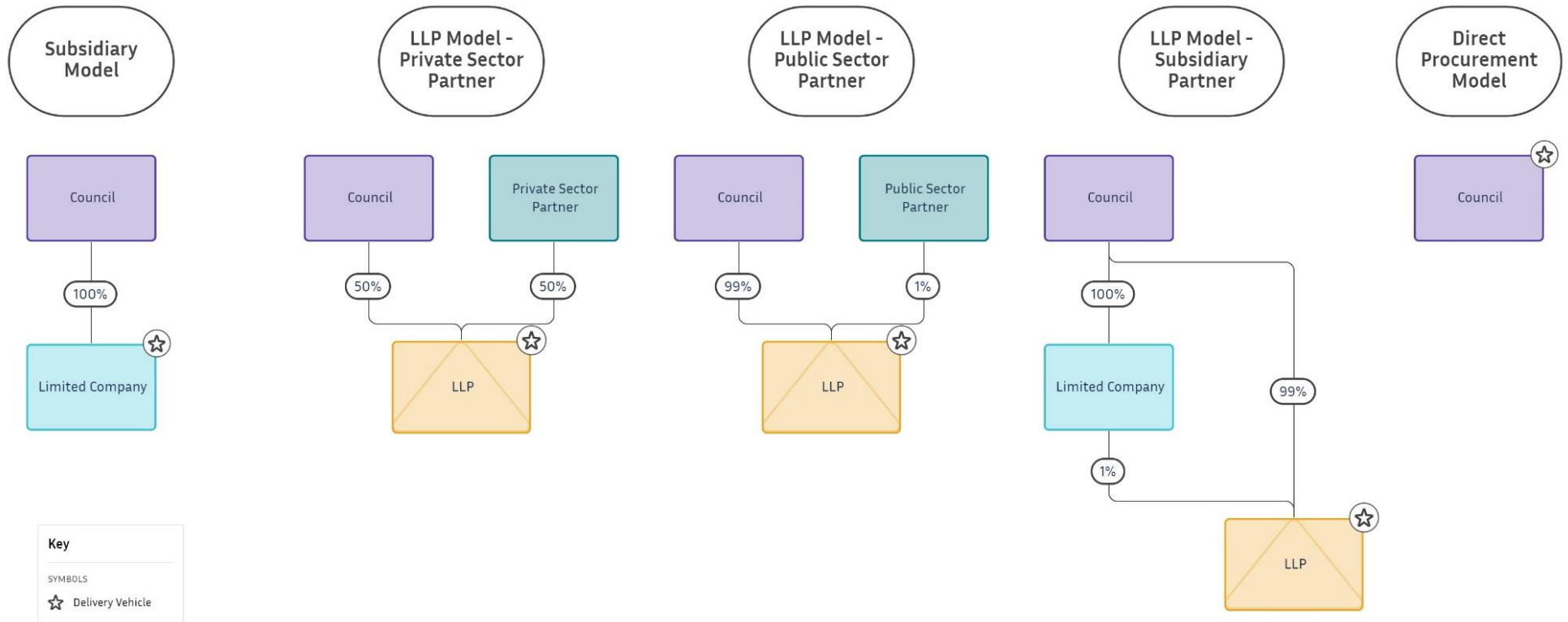
	Advantages	Disadvantages	Procurement Implications	Subsidy Control Implications
Limited Company, wholly owned by local authority	Limited liability. Separate legal personality. Ring-fencing of risk. Can grant private residential tenancies.	Tax opaque i.e. corporation tax due on profits of entity. Lacks benefit of private sector financial input and expertise.	Entity will be required to comply with procurement regulations and tender for the works contract to build the homes.	Land cannot be gifted to the entity for nil consideration if it is then subsequently used for commercial purposes. The local authority would need to act as an investor and seek some form of repayment or return for the contribution of land in order to ensure subsidy compliance.
	<p>Examples</p> <p>Fortior Homes (sale and rent) - wholly owned subsidiary of Stoke on Trent City Council, financed by deferred loans from the Council. Builds new homes for sale and rent as well as buying properties on open market to strengthen portfolio. Has worked in partnership with private companies including Novus and Genr8. Establishment of the company and the activities undertaken by it are underpinned by the general power of competence and not a charity so no limitations on what the company can/can't do.</p> <p>This model seems to be increasingly common in England. Other examples include Sheffield Housing Company (primarily sale, also shared ownership and rent), Brick by Brick in Croydon (sale only) and Goram Homes in Bristol (sale and rent).</p>			

LLP including private sector member	Limited liability. Separate legal personality. Ring-fencing of risk. Can grant private residential tenancies. Tax transparent i.e. members responsible for tax of profits passed up from the LLP to them – the local authority would benefit from its tax exempt status.	Depends on finding an interested private sector partner. If there is sufficient private sector interest, there may be no need for local authority involvement.	Local authority will be required to tender for the joint venture partner if they are to provide goods or carry out works or services.	Land cannot be gifted to the entity for nil consideration if it is then subsequently used for commercial purposes The local authority would need to act as an investor and seek some form of repayment or return for the contribution of land in order to ensure subsidy compliance Reliance on German land development scheme (SA.36346) would permit the local authority to improve the condition of the site without Subsidy constraints, so long as the JV partner had not been identified at the time of the works.
	<p>Examples</p> <p>National Housing Trust (rent and then sale) is a similar model, but includes a third member (SFT). This has been widely used. The combination of rent and then sale has led to some criticism as tenant’s homes are sold whether they can afford to purchase or not.</p>			
LLP with only public	Limited liability.	Lacks benefit of private sector financial input and expertise.	Entity will be required to comply with procurement regulations	Land cannot be gifted to the entity for nil consideration if it is

sector members.	<p>Separate legal personality.</p> <p>Ring-fencing of risk.</p> <p>Can grant private residential tenancies.</p> <p>Tax transparent i.e. members responsible for tax of profits passed up from the LLP to them – the local authority would benefit from its tax exempt status.</p>		<p>and tender for the works contract to build the homes.</p>	<p>then subsequently used for commercial purposes.</p> <p>The local authority would need to act as an investor and seek some form of repayment or return for the contribution of land in order to ensure subsidy compliance.</p>
<p>Examples</p> <p>Edinburgh Living (rent only) (a partnership between the City of Edinburgh Council and SFT, although owned 99.999% by the Council) avoids the problem levelled at NHTs by only offering properties for rent that they own outright. They are financed by borrowing from the local authority, although have also received a significant Scottish Government grant. Edinburgh Living was established as part of the Edinburgh and South East Scotland City Region Deal (pages 24-25)</p> <p>Steadfast Homes (mid-market rent) in Stirling (a partnership between Stirling Council and Strevelin Homes Ltd) follows a similar model, and then contracts the Council to provide property management services. This means that, essentially, they have the benefit of being a separate LLP while keeping operations internal to the Council.</p>				
Direct procurement	<p>Potential to retain control of design and quality standards, so resolves issue of quality which has been identified in previous</p>	<p>Requires a certain level of expertise in-house in terms of managing the relevant contracts.</p>	<p>Local authority will be required to comply with procurement regulations and tender for the</p>	<p>Running a competitive procurement, paying the successful contractor a market rate then selling the products at</p>

for works contract	deals with volume housebuilders.	Not able to grant private residential tenancies. Lacks benefit of private sector financial input and expertise.	works contract to build the homes.	market rate, there should be no subsidy implications The local authority may need to treat any public funding of construction costs as a loan and require both repayment and a return (interest) on the sale of the houses.
	<p>Examples</p> <p>Fife Council (pages 6-7) developed and sold four homes on a site where they were building a children’s home. This was done by a combination of council employees and by procuring work from Stewart Milne. This was done under the power to advance wellbeing, but the justification was very specific to this circumstance. The land owned was bigger than was needed for the children’s home, and it would improve the wellbeing of the vulnerable children by not selling and having a separate, subsequent development next door.</p>			

ANNEX 2: MODEL DIAGRAMS



ANNEX 3: SFT SCOPE

1 THE STATUTORY POWERS AND LEGAL TEST:

1.1 Earlier legal advice procured by SFT identified the power to advance wellbeing (as per Part 3 of the Local Government in Scotland Act 2003) as the statutory basis for intervention by Councils:

1.1.1 Following your review of the earlier legal advice, does the use of this power to advance wellbeing require further consideration and are any other statutory powers available for use by Councils to enable them to develop homes for market rent and sale tenures in Scotland?

Please see sections 2.1 *Underlying premise and introduction to the power to advance wellbeing* and 2.2 *Statutory powers – development of homes for market rent and sale in Scotland*.

1.1.2 On what grounds could a Council be challenged for using the power to advance wellbeing (and any other powers identified) and what mitigations and remedies would be available to any challenge(s)?

Please see section 2.5 *Power to advance wellbeing – grounds for challenge, mitigations against JR and remedies*.

1.2 Who might be motivated to challenge Councils on the provision of homes for market rent and sale, and what legal grounds could there be for such a challenge to Councils (e.g. a subsidy / state aid challenge)? What mitigations and remedies would be available to the Councils?

Please see section 2.5

Power to advance wellbeing – grounds for challenge, mitigations against JR and remedies.

1.3 The power to advance wellbeing is a permissive power, it only confers power where it does not conflict with other legal restrictions. What legal restrictions might conflict with the power to advance wellbeing and how would Councils address such a position)?

Please see section 2.3 *Power to advance wellbeing – legal restrictions on its use* and 2.4 *Case law - scope of the power to advance wellbeing*

1.4 Are there other legal constraints that Councils might face in demonstrating the power to advance wellbeing, including, but not restricted to, issues of scale (of the development / the housing market area), tenures offered, type of housing (general or specialist) and price?

Please see section 2.6 *Power to advance wellbeing – other constraints on its use*

- 1.5 Through case law or policy, has a legal test/precedence been established for Councils to apply when using the power to advance wellbeing? If so, these should set out, with an explanation of how they may apply to the development of homes for market rent and sale by Councils.

Please see section 2.7 *Power to advance wellbeing – legal and policy criteria for its use*

2 **THE EVIDENCE BASE:**

- 2.1 In terms of understanding need, from a legal perspective (and tying back to the questions above), would analysis of key housing and planning documents (e.g. LDP, HNDA, LHS and SHIP) and understanding market capacity and delivery provide a sufficiently robust evidence base against which need can be identified and intervention can be justified for the delivery of homes for market rent and sale under the power to advance wellbeing? Essentially, how would a Council demonstrate housing market failure and / or provide other evidence to use the power?

Please see section 3.2 *How would a local authority demonstrate housing market failure and / or provide other evidence to align with the use of the wellbeing power?*

- 2.2 Could the use of the power to advance wellbeing, by Councils, be reinforced by the Scottish Government producing guidance that sets out how the power can be used by Councils for delivery of homes for market rent and sale (for example through planning policy)?

Please see section 3.3 *Could the use of the power to advance wellbeing be reinforced by the Scottish Government producing guidance that sets out how the power can be used by local authorities for delivery of homes for market rent and sale (for example through planning policy)?*

- 2.3 Identify and explain how any case law (pro and against) involving the power to advance wellbeing has been used as a basis for development (housing and other) and area regeneration by Councils, and how it might strengthen or weaken the Councils use of the power to advance wellbeing for delivery of homes for market rent and sale.

SFT can assist in identifying and establishing contact for current staff in Councils where relevant case law can be identified.

Please see section 3.4 *Case Studies*

3 **STRUCTURES:**

- 3.1 Advise what legal structures could be used by Councils to deliver the Council Build for Rent and Sale approach (recognising that homes may be sold or let). Set out the advantages and disadvantages of the different legal structures and consider which are optimal for managing the challenges (including, but not limited to, the consideration of direct delivery, joint ventures, ALEOs, LLPs, etc). Advise who the optimum public and / or private sector partners are for each legal structure.

Please see sections 4.1 - 4.5 for context and sections 4.6 *The Subsidiary Model*; 4.7 *The LLP Model*; and 4.8 *The Direct Procurement Model* for details. Please also see Annex 2.

- 3.2 Provide a high level summary of the key contractual arrangements that would be required to build and deliver the homes (and potentially operate them) under each legal structure (again recognising that there is the opportunity to develop homes for sale and/ or market rent at a single site). This should include governance and funding considerations, on-lending restrictions, subsidy controls and procurement routes.

Please see section 4.9 *Key Contractual Arrangements*

- 3.3 Set out in the legal opinion any exemplar legal structures (building upon 3.1 and 3.2) that are used elsewhere in the UK for delivery of Council build homes for market rent and sale. Advise on the success of these structures and whether they are applicable in a Scottish context?

Please see section 4.10 *Examples in Practice*

4 **MITIGATING RISK:**

- 4.1 Consider the risk of Councils being found to have acted ultra vires when using the power to advance wellbeing and outline how this could be mitigated against.

Please see section 5 MITIGATIONS