

## Council Build for Market Rent and Sale

### Briefing Paper, August 2023

#### 1. Introduction

Scotland needs more homes to meet the needs of its population – this means that housing of different types and tenures is required.

Until now, delivering housing has meant that significant levels of new market activity has typically been split into two categories – private sector developers building open market value housing for sale; and Councils and Housing Associations building and retaining affordable homes for rent.

But what happens in an area where there is no active private sector development of homes for sale or rent, but there is demand for new housing from people that do not meet the requirements for affordable homes? This gap between supply and demand means that some people cannot get the homes they need. It will impact on an area's ability to attract and retain a mixed population, potentially impacting on its long-term economic and social resilience.

SFT has a remit to support the development and delivery of housing across different tenures to meet the economic and social needs of Scotland i.e. the role of housing as critical place infrastructure. Given this position, SFT has been exploring the potential for Councils to deliver more housing across a wide range of tenures, including development of market value housing for rent and/ or for sale.

This briefing paper presents a summary of our work to date in investigating the potential of Council built homes for market rent and/ or sale, and provides links to more detailed reports.

#### 2. What is the Issue?

While there are lots of places in Scotland with strong private sector market housebuilding activity, there are also many places with high levels of demand but low, or no developer interest. The reasons for this gap in developer interest will differ for each place and can include, but may not be restricted to:

- cost of development in some, typically rural, places;
- lack of market scale and the associated cost of delivering relatively small developments;
- issues around workforce capacity and skills; and
- the ability to generate higher returns in larger and urban areas.

This lack of open market value housing can have a significant impact on the demographic make-up of places and their long-term economic and social resilience. Having an adequate housing supply and choice is an essential pre-requisite to attract and retain a broad and mixed population base across age, social and other strata.

There is, however, no specific statutory provision that allows Councils in Scotland to develop new housing for sale and/ or rent on the open market, but there is a wide-ranging power – the power to

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advance wellbeing<sup>1</sup> – which gives Councils in Scotland the statutory power to undertake activities that will improve the wellbeing of their area and/ or persons within that area.

### 3. Why has SFT Investigated?

We have worked with partners to explore potential opportunities afforded by the power to advance wellbeing and to build our understanding with the aim of providing ‘proof of concept’ for delivery of a wider mix of housing in places where there is an imbalance in supply and demand.

This work is clearly aligned with SFTs outcomes, in particular:

- Outcome 1: we have a clear picture of Scotland’s future economic and social infrastructure needs.

By understanding the impact that lack of housing choice has on the economic and social resilience of places we can support Councils to develop new and innovative approaches to enhance the wellbeing of the people that live in that place.

- Outcome 3: Infrastructure investment is sustainable and affordable with an increased use of innovative funding and financing approaches.

By investigating innovative options and approaches for Councils to deliver market value homes for rent and/ or for sale, new infrastructure investment can be delivered that is sustainable and affordable.

- Outcome 8: The public asset portfolio is effective and place-based, driving collaborative service transformation with under-utilised public assets re-deployed to meet other policy objectives or divested to stimulate economic activity.

By exploring opportunities and powers for Councils to repurpose vacant and underused assets for housing (e.g. town centre commercial office units) they will have a more effective public asset portfolio, and additional economic outcomes for people and for place will be achieved.

### 4. What has SFT done?

Our analysis and investigation has been undertaken in three phases with input from partners including ALACHO<sup>2</sup> and Councils.

#### **Phase 1:** Can Local Authorities Deliver Housing for Sale or Market Rent in Scotland?

In England there has been a significant expansion in the number of Local Housing Companies set up and operated by Councils. Many of these Companies have delivered a mix of housing types and tenures, including market value housing for sale and/ or for rent.

Working with ALACHO, SFT investigated what has been delivered in England, and how. The output from this work informed discussion with interested Councils to identify if there was appetite for

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<sup>1</sup> The power to advance wellbeing is set out at section 20 of the Local Government in Scotland Act 2003.

<sup>2</sup> [Association of Local Authority Chief Housing Officers - Home \(alacho.org\)](http://alacho.org)

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similar activity to take place in Scotland, recognising that the legal operating context for Councils is different in England.

The research paper produced from this initial phase of work can be found [here](#).

**Phase 2: Legal Opinion: Council Built Homes for Market Value Rent and/ or Sale**

Following discussion with Councils on the Phase 1 work, and evidence of their continued interest in the approach, legal advisers were appointed by SFT to prepare an opinion on the legal basis and structure to enable delivery of Council built homes for market value rent and/ or sale in Scotland.

The objective was to test the application of the statutory power to advance wellbeing by Councils 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. The opinion presents the legal rationale for the approach, the risks and mitigations, and potential delivery structures that could be used by Councils.

The legal opinion produced from this second phase of work can be found [here](#).

**Phase 3: Advice Note on Council Build for Market Value Rent and/ or Sale Case Studies**

Following dissemination of the Phase 2 work and discussion with Councils there was a desire to obtain a practical and project related legal opinion. Drawing on the issues and opportunities that Councils expressed, legal advisers were appointed by SFT to prepare an opinion on five notional case study projects where an unspecified Council would deliver open market value housing for rent and/ or sale.

These case studies explore the use of the power to advance wellbeing as the statutory power for Councils to build homes for market value rent and/ or sale. The legal opinion is presented against a series of questions that help to define how any Council Build for Market Value Rent and/ or Sale project might be deliverable in a project specific setting.

The legal opinion produced from this third phase of work can be found [here](#).

## **5. What are the Findings?**

Overall there is a clear rationale for Councils in Scotland to build market value housing for rent and/ or sale i.e. the role of housing as critical place infrastructure. The approach seeks to address market failure in the delivery of new houses in places where there is demand but insufficient supply, thereby impacting on the ability of that place to attract and retain population and supporting its long-term resilience.

The approach would be based on the statutory power to advance wellbeing, with four key principles that projects must meet:

- The proposal must advance the wellbeing of the area and/ or the people that live in the area, but it must also take into account the scale of the opportunity, the resources required to deliver, the prospects of the opportunity being realised, and the level of risk.

- The proposal must clearly address market failure with a strong evidence base that demonstrates how and why the private sector will not, or cannot, deliver the houses to meet the identified demand.
- The Council's intent must not be driven by a desire to generate profit but must be clearly aligned with an identified need in the specific area where the housing will be built.
- The proposal must have the support of relevant stakeholders, based on robust consultation and engagement that is undertaken when the project is still at a formative stage i.e. before any decision is made to deliver the output.

Other key factors for consideration include:

- Projects can either be delivered direct by a Council or through a joint delivery structure with other public or private sector partner(s) – there are specific issues to be considered for each approach. The approach should be informed by the objectives of the project proposal.
- Projects can include housing delivery that is solely for market value rent and/ or sale, or can also include other tenures e.g. social rent and mid-market rent<sup>3</sup>.
- Where appropriate, the completed houses can be sold or rented with restrictions on occupancy e.g. for key workers or for permanent occupancy, but it can be difficult to regulate for the changing circumstances of occupiers following completion of a sale or the grant of a lease. There are, however, routes to secure obligations for occupancy restrictions.
- Councils must be mindful of subsidy control rules particularly, but not exclusively<sup>4</sup>, where subsidy is required to attract a JV partner. Where subsidies are to be provided the Council must consider whether the subsidy is prohibited and whether it will comply with the 'subsidy control principles'<sup>5</sup>.

## 6. What we want to do next

We want to work with Councils to advance the knowledge and experience in Scotland of using the statutory power to advance wellbeing as a route to deliver market value housing for sale and/ or for rent in places that are not attractive to the private sector housebuilders.

Our ultimate aim is to build a better understanding of Scotland's infrastructure needs and to ensure that there is a broad mix of housing choice to build and maintain the resilience of our places.

We would like to speak with Councils that may be interested in pursuing the delivery of Council Build for Market Value Rent and/ or Sale projects. This could also be aligned with our expertise in other areas including town centre living, shared ownership for older people, and mixed tenure development.

For more information please get in touch with Mhairi Donaghy, Associate Director – Place, Housing and Economic Investment [mhairi.donaghy@scottishfuturestrust.org.uk](mailto:mhairi.donaghy@scottishfuturestrust.org.uk).

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<sup>3</sup> Where only social rent and/ or mid-market rent homes are being delivered, Councils have other powers and should not use the statutory power to advance wellbeing.

<sup>4</sup> Subsidy rules may apply for direct Council delivery – where a public body is engaged in a market activity, subsidy rules can be triggered through the provision of funding by the body to itself for such purposes.

<sup>5</sup> Subsidy Control Act 2022