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CHERWELL DISTRICT COUNCIL

Arlingclose Mortgage Scheme Advice

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Contents

1 INTRODUCTION

1.1 Cherwell District Council (**Council**) is considering whether to participate in a self-build mortgage indemnity scheme set up by Arlingclose Limited (**Scheme**). We have been asked to advise to help the Council prepare a report to the Executive as part of the decision-making process. This paper:

1.1.1 responds (in Section A) to vires issues raised under question 1 of the Council's briefing paper;

1.1.2 responds (in Section B) to question 3 in the briefing paper around how development profit can be used.

1.2 We have agreed with the Council to provide a further paper with comments on the draft deed of indemnity and sale contract supplied by Arlingclose.

2 EXECUTIVE SUMMARY

2.1 The Council has the statutory power to indemnify mortgage lenders in certain circumstances. There is a slight lack of clarity in the drafting of this power around whether it can be relied on to give an indemnity before a mortgage advance is made. However, we consider this to be a low risk as two other powers could potentially be used to supplement it.

2.2 The involvement of Graven Hill Developments does not of itself create any additional vires issues.

2.3 The Council could lawfully use local connection criteria to determine eligibility for participation in the Scheme.

2.4 The Council has a broad statutory power to borrow that could potentially be relied on to fund the Scheme.

2.5 There are a number of State aid issues created by the Scheme, but none of these should provide a barrier to implementing it. The most suitable option for ensuring compliance is to ensure market terms are adopted, for example, in relation to any loan by the Council to Graven Hill Developments.

2.6 The deed of indemnity is unlikely to be a contract that is subject to the Public Contracts Regulations 2015, and so could be entered into without breaching those regulations.

2.7 If Graven Hill Developments has been set up as a non-contracting authority, it may award works contracts to develop the units without tendering them under the Public Contracts Regulations 2015. However, if it has been set up this way, it is unlikely to be a Teckal body to which the Council could directly award contracts. The Council will therefore need to consider what level of control it would like to exercise over the company's development activity without triggering an obligation to tender a contract.

2.8 It will be lawful for the Council to receive a dividend from Graven Hill Developments.

3 CONTEXT

3.1 The key background, taken from the Council's briefing paper and the Arlingclose documents, is set out below:

3.1.1 the Council has previously set up an arm's length trading company using the general power of competence:[1] Graven Hill Village Development Limited (**Graven Hill Developments**), whose purpose is to develop up to 1,900 self-build and custom build units at its Graven Hill site. Development funding is typically provide by debt from the Council;

[1] Section 1(1), Localism Act 2011.

3.1.2 units are constructed on behalf of individuals who wish to purchase self or custom build homes. However, it has become apparent that there are insufficient market lenders who are willing to provide finance, possibly because self and custom build is perceived as higher risk, or because they would commonly require stage payments during the construction phase;

3.1.3 Arlingclose has developed the Scheme to help address this difficulty and so increase the number of self and custom build properties. The Scheme broadly operates as follows:

(a) a local authority sets up a professional panel, including lenders, a broker and contractors;

(b) individuals who wish to self or custom build apply to the local authority for land, financial support or both;

(c) successful applicants are referred to the broker to arrange mortgage finance, which is typically 95% of loan-to-value;

(d) the authority enters into a mortgage indemnity deed with the selected lender and Arlingclose under which it indemnifies the lender for up to 20% of each mortgage advance – this means that the lender is willing to lend up to 95% of LTV. In return, the lender will pay (1) the Council a premium of between £500 and £1,500 per advance, (2) Arlingclose an advisory fee of 30 basis points of the principal loan;

(e) the authority also enters into a sale contract with the individual borrower requiring payment of a 5% deposit, and agrees to transfer on completion the land and the unit specified by the borrower;

(f) the authority then commissions contractors to build the unit in accordance with the specification, and recovers the costs of doing so from the sale proceeds received on completion;

3.1.4 in the current circumstances, the Scheme would operate slightly differently because of the existence of Graven Hill Developments as landowner. This would mean:

(a) the Council would provide financial support by way of the indemnity deed but no land;

(b) it could be required to lend sufficient funds to Graven Hill Developments for each development;

(c) Graven Hill Developments would enter into the sale contract with the individual borrower, who could also be required to pay a reservation fee;

(d) Graven Hill Developments would receive the purchase price upon completion, and could then decide to pay an interim or final dividend to the Council from distributable profits.

SECTION A: VIRES

4 POWER TO INDEMNIFY

4.1 The Council has the power to provide an indemnity to a mortgage lender under section 442, Housing Act 1985 (**HA 85**). Officers have questioned whether this power could be relied on in the current circumstances as the property will not have been built at the time the indemnity is given, which in turn means that the mortgage will not have been advanced. The legal paper on the Scheme prepared by Browne Jacobson for Arlingclose advises that an indemnity could be given in such circumstances. Although we agree with this interpretation, the Council should be aware that there is a slight lack of clarity in the wording that means there will be a residual risk that it cannot be relied on. However, we do not consider this risk to be material, and it would be reasonable for the Council to rely on the power in these circumstances. This is considered in more detail below.

4.2 Section 442 (1) states:

"*A local authority may enter into an agreement with a person or body making an advance on the security of a house (or a building to be converted into a house) whereby, in the event of default by the mortgagor, and in the circumstances and subject to conditions specified in the agreement, the authority binds itself to indemnify the mortgagee in respect of the whole or part of the mortgagor's outstanding indebtedness and any loss or expense falling on the mortgagee in consequence of the mortgagor's default.*"

4.3 This power can only be exercised for one or more of the purposes set out in section 435, HA 85, which are broad, and for local housing authorities, such as the Council, include acquiring or constructing a house or converting another building into a house.

4.4 Although the section 442 power is broad, it is conditional on the indemnity agreement being entered into with a person or body making an advance on the security of a house or a building to be converted into one. This sentence could be interpreted to mean that the indemnity can only be given at the time a secured loan is provided, although we consider it unlikely that the court would interpret it so restrictively. There is no explicit requirement for the indemnity and the secured loan to be entered into simultaneously, and in effect the indemnity will not "go live" until the mortgage has been advanced and the lender has paid the premium due under clause 3.2 of the indemnity. It would therefore be reasonable to conclude that the deed of indemnity is in fact only an offer to provide an indemnity conditional of the loan being advanced.

4.5 To mitigate the risk that would be created by relying on section 442, the Council could seek to rely on section 111, Local Government Act 1972, and so argue that providing such an indemnity was incidental to the explicit power:

"*Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (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*"

4.6 In addition, there would be scope to rely on the general power of competence as further authority for providing the indemnity.

4.7 In conclusion, in our view it would be reasonable for the Council to rely on section 442, but it would be possible to challenge its use on the grounds that the mortgage advance was not made at the same time.

4.8 To mitigate the risk of successful challenge, the Council could seek to supplement the power by relying on the incidental power in section 111, Local Government Act 1972 and on the general power of competence. Although this approach would not remove the risk entirely, it should be sufficient to enable the Council to obtain sufficient comfort as to the lawfulness of participating in the Scheme,

particularly as we note from the Arlingclose papers that 112 authorities have already signed up to it, of which 98 are "live". If this is the case, then it would be reasonable to assume that a challenge on this basis would already have been raised.

5 VIRES AND GRAVEN HILL DEVELOPMENTS

5.1 The Council has asked whether the involvement of Graven Hill Developments would have any vires implications, for example in relation to the use of the power to indemnify. Subject to what is said below about State aid, we do not believe that there will be any as long as the Council complies with its usual decision-making processes, and the well-established public law principles of acting reasonably, transparently and taking into account all relevant considerations in its relationship with the company.

5.2 Although not a vires issue, the involvement of Graven Hill Developments does potentially have an impact on what rights the Council would have in the event that a claim is made under a deed of indemnity. Under section 442, an indemnity may, if the borrower is made party to it, enable or require the local authority in specified circumstances to take a transfer of the mortgage and assume rights and liabilities under it. The borrower is not a party to template indemnity deed, and this would therefore limit the Council's ability to take a transfer of the mortgage. Further consideration would need to be given to this issue if this is a right that the Council would like to have, taking into account the fact that it is not the landowner and would not be a party to the sale contract between Graven Hill Developments and the borrower / purchaser.

6 WIDER VIRES ISSUES

6.1 The Council has asked what wider vires issues there could be in light of a reference to them in Browne Jacobson's legal paper (paragraph 47). It is not clear on our reading of that paragraph exactly what is being referred to, but it could relate to the need for each local authority participating in the Scheme to obtain the necessary internal approval before entering into a deed of indemnity and / or a sale contract.

6.2 The Council is currently preparing a report to go to the Executive to decide whether to implement the Scheme, and so is complying with its decision-making processes to obtain the necessary approval. If officers prefer not to return to the Executive for further approvals, it would be possible to obtain delegated authority to finalise the legal documents and enter into any that are required to implement the Scheme (or a pilot of it, as is currently envisaged).

6.3 Although not a pure vires issue, the Council will need to establish clear acceptance criteria for applicants to the Scheme to ensure that it is acting in accordance with the broad public sector principles referred to earlier. In relation to this, the Council has asked about local connection criteria, and this is considered in the next section.

7 LOCAL CONNECTION CRITERIA

7.1 In our view, it is permissible to impose a requirement that the Scheme is available only to persons within the Council's area. We understand that it is frequently a condition of Local Authority Mortgage Schemes that mortgages are only available in certain specified postcodes. "Local connection" is a principle derived from homelessness and allocations (Parts 6 and 7 Housing Act 1996). It is frequently defined as having lived within a district for 6 of the last 12 month or 3 of the last 5 years.

7.2 Local authority allocation schemes have been challenged in the past on the grounds that a strictly applied "local connection" criterion unlawfully discriminates against (for example) households fleeing domestic violence in a different borough. The Council should be aware of its obligations under the Equality Act 2010 not to discriminate against individuals with protected characteristics. Inflexible local connection provisions have in the past fallen foul of the Equality Act on grounds that, to the extent they exclude from the waiting list households who have recently arrived in borough having fled domestic violence, they indirectly discriminate against women.

7.3 We would therefore advise that any "local connection" requirement should include an ability for the Council to exercise its discretion, and to consider each case on its own facts in order to avoid indirect discrimination.

8 FIDUCIARY DUTY AND VIRES

8.1 The Council expects to be able to fund the Scheme from capital and reserves, at least in the early stages, but is aware that it could need to make alternative arrangements in the longer term because of its potential scale and the lack of certainty about market conditions. In view of this, it has asked us whether there are any vires implications created as a result of its financial obligations under the Local Government Acts and in respect of its general fiduciary duty to rate payers.

8.2 As long as the Council acts within its powers and in accordance with the usual public law principles then we do not believe any additional vires issues will be created as a result of its financial obligations and fiduciary duty. The Council has a statutory power to borrow for "*any purpose relevant to its functions… or for the purpose of the prudent management of its financial affairs*"[2]. Both limbs are drafted broadly. For example, "functions" has been defined by the courts to include all powers and duties. Should the Council need to borrow in the future to fund its liabilities under the Scheme it would therefore have the statutory power to do so provided that it acts within the wider prudential framework, including the Prudential Code for Capital Finance in Local Authorities. In determining the affordability of its capital plans under the Code, the Council would need to have regard to its financial commitments and obligations to Graven Hill Developments (paragraph 33).

8.3 If borrowing becomes necessary, we would recommend that specific Executive approval is sought and that a clear link is demonstrated between the purpose of the borrowing and the specific function that it relates to. This will provide the Council with a robust audit trail in the event of any suggestion that using public funds for the Scheme is a breach of its fiduciary duty. Although we cannot see any merit in such a challenge, it would be preferable to have a clear audit trail underpinning the decision.

9 STATE AID

9.1 The Council has asked whether the Scheme may have State aid implications, and if so whether there are any exemptions that could be relied on. In summary, the Council is right to raise State aid as the rules could potentially be infringed by participating in the Scheme. However, if the Council does so on market terms then this is unlikely to be the case. An overview of the rules is set out below together with an analysis of how they could apply here.

Overview

9.2 The State aid rules prohibit government bodies from using their resources to provide selective subsidies to organisations in a way that could distort competition and affect trade between Member States. Aid can take various forms, including transferring land for less than market value, and providing loans, guarantees or equity investments below market terms.

9.3 The consequences of breaching the rules are potentially serious, and can result in an order from the courts or the European Commission (**Commission**) to repay the aid plus interest at the reference rate. Challenges can be brought through the courts or by way of complaint to the Commission, in which case the Commission will conduct a formal investigation on behalf of the complainant. There is a ten-year limitation period for bringing challenges, which means the risk remains for longer than most other types of challenge. The consequences of challenge and length of the limitation period mean the parties on both sides of a transaction are incentivised to ensure that potential aid is provided compliantly.

9.4 There are various ways of complying with the rules, for example:

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[2] S.1 Local Government Act 2003

9.4.1 the market economy operator principle (**MEOP**), which can be relied on where a benefit is provided on market terms (i.e. there is no element of subsidy because a market operator in similar circumstances would enter into the transaction on similar terms);

9.4.2 the De Minimis Regulations[3], which permit aid up to €200,000 over a three-year period; and

9.4.3 the exemption for services of general economic interest (**SGEI**), which are services that the Commission has recognised as not being provided sufficiently by the market, but which should be encouraged for the public good, for example, social housing.[4]

9.5 In the absence of a suitable exemption, it is necessary to go through a formal notification procedure with the Commission, and until that has been completed successfully, no aid can be given. This is a lengthy process of six to twelve months, and it is always preferable to use an existing exemption or restructure a proposal if possible.

Application of the rules to the Scheme

9.6 Aid could potentially be provided under the Scheme on four levels:

9.6.1 Graven Hill Developments;

9.6.2 the commercial lenders;

9.6.3 Arlingclose; and

9.6.4 the contractors appointed to develop the homes.

9.7 The simplest method of complying with the rules in these circumstances is by relying on the MEOP i.e. by engaging with the third parties listed above on commercial terms that would be acceptable to a private sector operator in similar circumstances. Decisions by the courts and the Commission confirm that there will be no advantage if the transaction is in line with normal market conditions,[5] and that a local authority has a wide discretion in deciding whether or not it is acting on commercial terms.[6]

Graven Hill Developments

9.8 The Council could be required to lend Graven Hill Developments the funds required to develop a particular unit. It will therefore need to do so on market terms in order to comply with the MEOP exemption, which means that the Council will need to undertake a benchmarking exercise to understand on what terms the market would be likely to lend to Graven Hill Developments. This should include considering not only the interest rate but also the level of security provided and any transaction fee.

9.9 In the absence of specific market data, the Commission[7] has established a method that can be used as a proxy to calculate what rate would be MEOP. This cannot be used as a substitute for what the market would offer. We would be happy to advise about this in more detail if required.

9.10 For completeness, we understand that the Council owns 100% of the shares of Graven Hill Developments. We would expect any equity investment made by the Council also to have been made on market terms.

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3 Regulation 1407/2013/EU.

4 Commission Decision (2012/21/EU).

5 For example, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, or *Commission* v *EDF*, C-124/10 P, ECLI:EU:C:2012:318.

6 *Sky Blue Sports & Leisure Limited and others* v *Arena Coventry Limited and others* [2016] EWCA Civ 453

7 Communication from the Commission (2008 / C14 / 02) on the revision of the method for setting the reference and discount rates.

Commercial lenders

9.11 The Council will charge the commercial lenders a premium for providing the indemnity. If the premium is on market terms then the Council could rely on the MEOP. If it is less than the market would charge then there would be a risk of breaching the rules as it would in effect be providing a subsidy by not charging the market rate.

9.12 In the absence of specific market data, the Commission has published guidance on how to calculate whether a guarantee is being provided on market terms, and this could be used here. The guidance sets out "safe harbour" conditions that if met can be relied on as the basis of the MEOP. These include that (1) the guarantee does not cover more than 80% of the outstanding loan and (2) a market-oriented price is paid for it.

Arlingclose

9.13 On our current understanding of the Scheme, Arlingclose is not paid by the Council, and instead it receives an advisory fee from the lender under the indemnity deed. This means that there is no transfer of State resources to it and that it is paid directly by a private undertaking. The broad principle established by courts and the Commission is that such an arrangement does not constitute aid, which means it would be difficult to demonstrate that the rules had been breached in these circumstances.[8] To mitigate any residual risk there may be, we recommend that the Council considers benchmarking the level of the advisory fee against the market. As well as providing support in favour of the MEOP should a court or the Commission conclude that aid had been provided indirectly, this will also enable the Council in broader terms to demonstrate that the Scheme provides value for money for borrowers.

Contractors

9.14 The Council will appoint a panel of professional advisers and, possibly, works contractors that Graven Hill Developments can call on. As a contracting authority, under the Public Contracts Regulations 2015 (**Regulations**) the Council must run competitive tenders when awarding above-threshold contracts unless a specific exemption from doing so applies. When a contractor is selected competitively under the Regulations, including by the use of a framework agreement, the State aid rules will not be breached because:

9.14.1 there has been an open and transparent tender process removing any selectivity i.e. the market will have been given the opportunity to bid; and

9.14.2 the tender process will establish market rates for the services being provided i.e. the MEOP will apply.

9.15 A professional advisor or works contractor in these circumstances will therefore not be a recipient of aid as it is providing services for value, tested through a competitive process, and to the extent that any aid element is involved, it will not distort competition as the benefit is openly competed.

10 PROCUREMENT

10.1 There are three main procurement issues to be considered in relation to the Scheme, and these are set out below in turn.

Arlingclose

10.2 We have considered whether the Scheme, in particular the deed of indemnity between the Council, the lender, and Arlingclose is a contract for services for the purposes of the Regulations. In our view it is not. The definition of a public contract is a contract for pecuniary interest concluded in writing

[8] *PreussenElektra*, C-379/98.

between one or more economic operators and one or more contracting authorities having as their object the execution of works, the supply of products, or the provision of services.

10.3 The deed of indemnity is of course a contract in writing, and money is paid under it. However, the Council is not taking out a loan (which would in any event be excluded from the scope of the Regulations). It is stepping in as security in the event of default by the third party borrower. While not decisive of the question whether this is a public contract, the fact that the money received by Arlingclose is paid by the lender tends to support the view that Arlingclose is providing services to the lender, not to the Council, by facilitating the giving of an indemnity by the latter.

Status of Graven Hill Developments

10.4 We are not aware of exactly how Graven Hill Developments was structured when first established, but it could potentially be classed as a contracting authority subject to the Regulations. If so, it will be obliged to comply with the Regulations when tendering the works and any other contracts required for developing the units. Contracting authority status will turn on whether it:

10.4.1 operates in normal market conditions;

10.4.2 aims to make a profit; and

10.4.3 bears its losses.

10.5 Local authority trading companies are sometimes set up as non-contracting authorities to enable them to act more commercially and responsively, and this approach may have been taken in relation to Graven Hill Developments. If so, it will be able to award contracts without first running compliant tenders under the Regulations. However, in these circumstances, we would recommend monitoring the position as the test is on ongoing one, and this should reduce the chance of inadvertently becoming subject to, and failing to comply with, the Regulations.

Awarding contracts to Graven Hill Developments

10.6 The Council is likely to be familiar with the Teckal exemption in the Regulations that allows it to award a contract without competitive tender in certain circumstances. These are:

10.6.1 it must exercise a degree of control over the entity awarded the contract which is similar to that it exercises over its own departments;

10.6.2 more than 80% of the activities of the entity are entrusted to it by the Council; and

10.6.3 there is no private participation in its capital.

10.7 If Graven Hill Developments was structured as a non-contracting authority then it is unlikely to have been established as a Teckal entity. Although the tests for each are different, they do have close similarities, and case law has confirmed that it is very difficult for a non-contracting authority to have Teckal status.[9] If this interpretation of the company's status is correct, the Council will need to consider how, and to what extent, it can control any of its development activity without breaching the Regulations. This is because works contracts are defined broadly in the Regulations to include:

"…*the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work*".

10.8 If the Council were to provide finance to Graven Hill Developments on terms that contained positive obligations to undertake a specific development then doing so could potentially fit within this definition. To reduce the risk of this being the case, if any enforceable obligations are included then

[9] *LitSpecMet UAB* v *Vilniaus lokomotyvu remonto depas UAB and another* [2017] EUECJ C-567/15

they would need to be conditional on the company first exercising its discretion and deciding to develop a particular property.

10.9 As an alternative, the Council could consider structuring the loan so that it is given on much broader terms, but on condition that the money is repaid if it isn't used within a defined time period. This would be in addition to any control the Council may already have under a shareholder's agreement with Graven Hill Developments, as well as by way of the planning process.

11 ADDITIONAL VIRES ISSUES

11.1 As noted earlier, the Council would receive a fee from the lender of between £500 and £1,500 in respect of each advance. This is described in the indemnity deed as "consideration for the provision of the Indemnity in relation to a Product Agreement under the Scheme."

11.2 As a local authority, the Council needs to have statutory authority permitting it to charge the fee. It would be possible to seek to rely on the power to do anything calculated to facilitate, or is conducive or incidental to, the discharge of a function, which in this case would be section 442, HA 85. However, in our view relying on the power to charge for discretionary services on a cost recovery basis[10] would be preferable in light of challenges that have been brought following reliance on the incidental power.

11.3 Although the power to charge to provide and charge for discretionary services would limit the Council to charging only on a cost recovery basis, this is not strictly defined. It would therefore be for the Council to determine a reasonable calculation for determining the costs that should be accounted for in calculating the charge.

11.4 If the activity could be seen as being undertaken for a commercial purpose then the obligation to act by way of a company[11] could be engaged. Commercial purpose is not a defined term in the legislation, but is broadly interpreted as doing something for profit rather than for policy reasons. We understand that the Council's interest in the Scheme is not to generate profit, but to help increase the supply of housing in its administrative area. If so, then it could be reasonable to conclude that the Scheme and the related charge to lenders is not being provided for a commercial purpose.

11.5 There is a potential tension between the need to charge a market rate for the fee in order to rely on the MEOP exemption in relation to the State aid rules, and charging on a cost recovery basis. However, in our view the risk of challenge is greater under the State aid rules.

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10 Section 93, Local Government Act 2003 and section 3, Localism Act 2011.

11 Section 4(2), Localism Act 2011.

SECTION B: PROFITS

12 USE OF DEVELOPMENT PROFIT

12.1 The Council would prefer any profit generated by Graven Hill Developments to be paid to it by way of a dividend to the General Fund. Some internal concerns have been raised about this approach. As an alternative, it has been suggested that profit could instead be used to enable Graven Hill Developments to charge less than the market price for a property – this could be for the full amount of the profit, or for a proportion of it with the balance being paid by dividend.

12.2 We understand that Graven Hill Developments was set up under the general power of competence to act as an arm's length development vehicle that could potentially deliver a return to the Council. We note that it is a company limited by shares, which would fit with such a structure, and which is also one of the types of entities that a local authority is permitted to use when undertaking an activity for a commercial purpose.[12] Local authorities often use companies limited by shares when they wish to generate a return because of their ability to pay dividends. It would seem perfectly possible for the Council to receive a dividend from Graven Hill Developments in these circumstances.

12.3 However, whether Graven Hill Developments pays a dividend is at the discretion of its directors. They will only be able to pay one if it would be lawful to do so under the Companies Act 2006. In addition, there could be a shareholder's agreement between the Council and Graven Hill Developments containing obligations or restrictions around doing so. We suggest that the articles of association and any such shareholder's agreement are reviewed in order to be clear on this issue.

Discounted sale

12.4 There is no legal reason why Graven Hill Developments could not sell a unit at a discount if the directors believe it is in the company's best interests. This assumes that doing so would not create a risk of it becoming insolvent or have negative tax implications.

12.5 From the Council's position, foregoing dividend payments could potentially amount to State aid in favour of Graven Hill Developments. It might be possible to structure the arrangement to fit within the SGEI exemption, which would require ring fencing of this part of the company's activities to avoid cross subsiding the market sales. However, disposing of housing by sale rather than affordable rented housing does not fit squarely with the exemption, and so further thought would need to be given to this if the Council is minded to pursue it in principle.

HRA and wider risks

12.6 The Council has asked whether there are wider risks to adopting the discounted sale model in addition to the reputational and political risks that it has already identified. For example, whether it could be obliged to re-open a housing revenue account (**HRA**).

12.7 The Council is a local housing authority under the HA 85, but does not have to maintain an HRA if the Secretary of State has agreed to waive the obligation to do so.[13] An HRA must be maintained in respect of houses and other building provided by a local housing authority under Part II, HA 85. This obligation does not apply to houses or buildings that have been disposed of.

12.8 As the custom and self-build units will be developed on land owned by Graven Hill Developments and then sold, it is difficult to see any grounds for triggering an obligation to reopen an HRA. If the Council decided to purchase any of the units then the position would be different, particularly if it intended to let them. It would be possible to argue that they were provided under the general power of competence rather than Part II, HA 85. However, there would be a legal question whether it was an appropriate use of that power given the presence of Part II, and the ability to apply for Secretary of State consent to own up to 200 units under Part II without the need to reopen the HRA.

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12 Section 4, Localism Act 2011.

13 Section 74(4), Local Government and Housing Act 1989.

Bevan Brittan LLP