

## Affordable Rents and Charitable Status

## BRIEFING

A guidance document recently issued by the Charity Commission has suggested that Housing Associations should take legal advice on how their new Affordable Rent product may have an impact on their charitable status.

This Briefing outlines the circumstances in which you may need to take further advice and those cases where it is completely safe for you to make your own decisions. In nearly all cases, we see no reason why re-letting and developing at Affordable Rents should create any problem.

### Why is there a problem?

The Charity Commission have indicated that dwellings need to be available at rent levels which make them accessible to poor applicants. Otherwise the letting will not amount to the relief of poverty for the purposes of a charitable activity. They are concerned that if prospective tenants could not afford to pay 80% of market rent, the provision of a dwelling cannot normally be part of the business of a charity, which exists to relieve poverty (which is the qualification that most charitable registered providers rely on).

### What is the Charity Commission really saying?

As the Charity Commission makes clear in their response to a Tenant Services Authority's consultation paper, "a key point is that the ability to access the benefit is more important than the level of rent charged." In other words, the critical issue for a charity that exists to relieve housing need is

not the degree of discount to market rent levels, but the requirement that the dwelling is available to someone who is in housing need. If that person can afford the rent only because housing benefit is available, the requirement may still be satisfied despite the fact that he or she could not do so without benefit.

However, if the dwelling cannot be occupied at Affordable Rent levels because it is unaffordable to someone in housing need, even if they were able to claim the maximum level of benefit available, it is questionable whether providing the dwelling is charitable. Having said that, the test of housing need (or poverty) is always relative, and depends on the precise circumstances. Therefore, the fact that an Affordable Rent may be close to the margins of making a dwelling inaccessible to someone in housing need is not necessarily fatal.

The decision whether a development or individual letting will be accessible to people in housing need is made by the charity itself based on its interpretation of the circumstances at the time, and a test for this is set on the next page.

### How do you decide who is poor (or in housing need) for these purposes?

In the case of housing, it is probably safe to say that someone is "poor" if they cannot afford to house themselves in a property that is reasonably necessary for themselves and their household and



paid out of the resources available to their household (both capital and income).

Inevitably there are grey areas which may make the decision difficult. The available resources have to allow for the costs of living and working. The property shouldn't be overcrowded nor under occupied, but its location may be dictated by family support (given or received) or employment requirements, and so on.

"Reasonably" may require that you treat a number of factors in combination. For instance, if I have savings of £50,000 it is unlikely that I can buy somewhere to live anywhere in Greater London. However, if I am 95 it's likely to be sufficient to pay the rent for the rest of my life but not if I am 25.

This inevitably leads to the next question.

### **Who decides who is poor?**

It always has to be the trustees or board (or staff acting on delegated authority) who make the decision. It is not lawyers, nor the Charity Commission, nor the courts.

Basically the trustees have to address themselves honestly to the questions set out above and make their own honest decisions about how to allocate their resources. "Honest" in this sense goes to the basis on which the question is answered. It might not be honest to base the decision on what your development director demands to have as an answer, or what the Homes and Communities Agency has indicated as its basis for making grant

available, rather than deciding who you think the poor are, and how the poor will benefit.

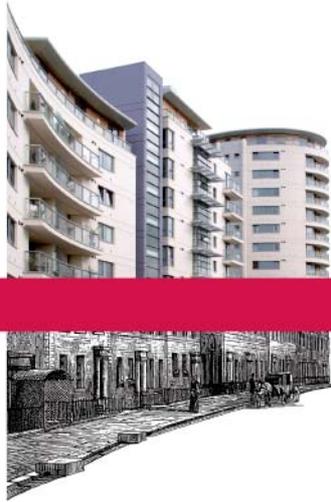
Lawyers, the Charity Commission and the courts can tell when no reasonable trustee could have come to a particular conclusion; they cannot make the decision that the trustees have to make. If you like they can set the boundaries beyond which you can't trespass, but they can't set your own particular boundaries.

### **What happens if you get it wrong?**

The first myth to nail is that you lose charitable status. The simple way of stating the rule is "once a charity always a charity". If you can't carry out your charitable purposes (there are no more poor, elderly or disabled without reasonable housing) then you have to ask permission to carry out some other charitable purpose. You don't stop being charitable.

You might pay tax. Carrying out your charitable purpose, even if you charge for it, is a tax free activity. Investing your assets and charging a market rent is also tax free (although you are under a duty to get a proper return so less than market rent might be a problem). Non-charitable trading is, in principle, taxable.

If you've lost the charity money (or ensured its assets aren't available for its charitable purposes) the trustees (as in the board members who made the decision) can be required to make good the loss out of their own pockets. This is unlikely but definitely something to take further advice on as there are complex defences.



In particular you should note that the Charity Commission expects that trading activity is carried out so as to minimise tax, and may view any tax paid and not recovered as a potential personal liability of the trustees.

**So how do you make sure you keep inside the boundaries?**

As always the key is clear and minuted decisions recording the basis of the approval. The basic policy decisions you make on allocation and development need to address the charitable purpose questions, and the basis of the decisions needs to be recorded, as well as the facts or assumptions that have been taken onto account. A minute of the reasons for a decision of a body corporate is for all practical purposes final (the Charity Commission and the courts can't infer a different reason when the actual one is recorded).

You do need to keep checking that you are still getting it right. It's too easy to think something like "we did sub-market rents for nurses last year – so sub-market for key workers is charitable" forgetting that the nurse decision was based on proximity to the hospital and not the fact they were key workers. Mission creep has to be controlled.

A quick chat with your lawyers is (relatively) cheap and will let you know quickly if there is an issue you need to consider more carefully, or if there really isn't a problem. Remember that none of this is new as these issues have always needed to be addressed, even if perhaps the outcome was usually more clear-cut in the case of social rents.

If there are any particular problems you need covered in more detail do please get in touch.

If you need any further information please contact:

**Andrew Murray**  
**Partner : Winckworth Sherwood Solicitors**

DT: 020 7593 5092  
E: [amurray@wslaw.co.uk](mailto:amurray@wslaw.co.uk)

**Keith Jenkins**  
**Partner : Winckworth Sherwood Solicitors**

DT: 020 7593 5051  
E: [kjenkins@wslaw.co.uk](mailto:kjenkins@wslaw.co.uk)

**Louis Robert**  
**Partner : Winckworth Sherwood Solicitors**

DT: 020 7593 5159  
E: [lrobert@wslaw.co.uk](mailto:lrobert@wslaw.co.uk)