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## **RESPONSE ON BEHALF OF THE CITY OF LONDON LAW SOCIETY PLANNING AND ENVIRONMENTAL LAW COMMITTEE TO THE STARTER HOMES REGULATIONS TECHNICAL CONSULTATION**

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The views of its Planning & Environmental Law Committee in respect of the Starter Homes Regulations Technical Consultation are set out below.

### **Introductory remarks**

1. On the basis that the technical consultation relates to details for the regulations to be made under powers contained in the Housing and Planning Bill, we have refrained from making comments on matters of principle in relation to starter homes. Our comments below are intended to assist the government in ensuring that the regulations are comprehensive and effective.

2. Our members would be pleased to attend a meeting with CLG to explain our comments below in further detail or to answer any questions that you may have. We would also be willing to provide further input and support in relation to the drafting of the relevant regulations and any model clauses, if this would be helpful.

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## General comments

### Relationship with other forms of affordable housing

3. Our primary concern relates to the inter-relationship between the statutory starter homes requirement and local planning policy requirements to provide further affordable housing in addition to starter homes.

4. The technical consultation does not expressly address this issue. Annex A suggests that setting the starter homes requirement at 20% of new homes is intended in future to replace nearly all of the affordable housing currently provided by the private sector. This follows from the statement that starter homes would make up approximately 22% of all private developer completions if the financial value of existing developer contributions towards affordable housing were redirected towards starter homes.

5. It is equally clear, however, that many local planning authorities will continue to expect developers to provide affordable housing in addition to starter homes, in particular affordable rented units. The technical consultation does not state whether this will be permitted, but we assume that local planning authorities will be entitled to adopt local planning policies that seek additional affordable housing should they wish.

6. We are concerned that, in the absence of clear guidance from government, this will place an unacceptable burden on developers. There is already considerable tension between developers and local planning authorities over the amount of affordable housing that can be provided where policy compliance is expressly (or in practice) "subject to viability". Even where viability reports demonstrate that a development can only bear a limited amount of affordable housing, developers are often told that a higher proportion must be provided in order for the development to have any prospect of receiving support from elected members for the grant of planning permission. For multi-phase developments, a number of authorities also seek review mechanisms to ensure that, should economic circumstances improve, a higher proportion of affordable housing is provided in later phases.

7. This situation can only get worse once the starter homes requirement is introduced. We acknowledge the certainty that the starter homes requirement is intended to provide to developers and local planning authorities alike. But government must issue clear guidance on the extent to which local planning authorities are entitled to seek additional affordable housing over and above the requirement.

8. The new duty placed on local planning authorities to promote the supply of starter homes in carrying out their planning functions suggests that, where viability allows a developer to provide more starter homes than the minimum requirement, or to provide starter homes at a discount greater than 20%, this should not be rejected by a local planning authority that has its own preference for the extra provision to be delivered as affordable rented housing instead. It would be helpful for this also to be clarified.

**Recommendation:** CLG guidance should be published alongside the starter homes regulations to address the extent to which local planning authorities are entitled to require developers to provide other forms of affordable housing in addition to the starter homes requirement (including through review mechanisms).

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## Update of local plans

9. It follows from our comments above that existing local plan policies in relation to affordable housing will be out of date when the starter homes regulations come into force if local plans are not updated to take account of the starter homes requirement.

**Recommendation:** CLG guidance should address the weight to be given to affordable housing policies in local plans where there is conflict with the starter homes requirement or the duty to promote the supply of starter homes.

## CIL

10. Under the current CIL system, CIL is payable in priority to the provision of affordable housing. Existing CIL charging schedules will have been set without reference to the starter homes requirement, which will have an impact on land values and the viability of new developments. Charging schedules may therefore need to be reviewed in order to avoid the risk of developments becoming unviable and housing delivery being stalled as a result.

**Recommendation:** CLG guidance should encourage charging authorities to review their CIL charging schedules where appropriate to have regard to the introduction of the starter homes requirement.

11. The CIL Regulations do not provide any exemptions or reliefs that would automatically apply to the provision of starter homes. Regulation 49A provides discretionary social housing relief in relation to qualifying dwellings where the relief is made available by the charging authority.

**Recommendation:** the CIL Regulations should be amended to provide an automatic relief for starter homes.

## Allocation of starter homes

12. The technical consultation is silent on the question of what type of units in a residential development should be allocated as starter homes, in terms of their size, number of bedrooms, location in the development, whether the units should be pepper-potted across the site or all provided in the same block, etc. All of these matters will fundamentally affect the cost to the developer of providing the starter homes within the development.

13. Furthermore, should starter homes be provided to the same design standard as the private housing in the development or can they be provided to a lower specification in order to reduce the sale price and therefore increase affordability? We assume there will be no restrictions placed on the service charges payable by the occupiers of starter homes compared to the occupiers of market homes given that they are not to be allocated by reference to affordability.

14. These issues are particularly relevant where the developer is expected to provide affordable housing in addition to starter homes. The local planning authority may apply pressure on the developer to provide those units which involve the least subsidy as starter homes (e.g. the smallest units), in order to maximise the amount of profits that remain available for the provision of other affordable housing (see paragraph 8 above).

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15. It is not clear whether the government intends for developers to have the right to choose these matters in its absolute discretion, or whether they are to be for negotiation between the developer and the local planning authority through the section 106 agreement. At present, the latter situation typically prevails in relation to affordable housing but this can often cause delays in the negotiation and completion of section 106 agreements.

**Recommendation:** the starter homes regulations should provide that the developer has the right to choose which units at the development can be sold as starter homes, without the need for the local planning authority's approval. This will ensure maximum flexibility in relation to unit sales. Questions of design in relation to starter homes should be approved in the usual way through the planning process when the planning application for the development as a whole is determined. Service charges should not be restricted.

#### Eligibility criteria

16. The technical consultation explains that starter homes will only be available for purchase by first-time buyers under the age of 40 (subject to the various exemptions proposed in the consultation).

17. It is not clear, however, whether local planning authorities will be entitled to impose additional eligibility criteria, either in their local plan policies or through the negotiation of section 106 agreements for individual sites. For example, it is common for developers to be required to sell affordable housing units only to people who meet defined maximum household income criteria. Alternatively, some authorities require developers only to dispose of affordable housing to people nominated by the local planning authority, or based on some other assessment of housing need, including residency in the borough or other local connections.

18. We assume that the government does not intend such restrictions to apply to the sale of starter homes, but this should be clarified.

**Recommendation:** the government should clarify whether local planning authorities are entitled to impose further eligibility criteria beyond those expressly set out in the regulations.

#### Non-UK and investment purchasers

19. It is not apparent from the technical consultation whether starter homes will be available to be purchased by people who are not already resident in the UK (or EU). This should be clarified.

20. Similarly, there appears to be no requirement for a purchaser to occupy the starter home. Given that purchasers must be first-time buyers and cannot sub-let a starter home in the first five years of ownership (as intended), the risk of starter homes being purchased as investments and left unoccupied would appear to be low. We are aware, however, that purchases by overseas investors of residential units as "asset lockers" has become an issue in parts of London. This is something that the new Mayor of London is committed to tackling and would benefit from further consideration in relation to starter homes.

**Recommendation:** CLG guidance should state whether purchasers must be resident in the UK / EU in order to be eligible to purchase a starter home.

#### Section 73 applications

21. The technical consultation does not address whether the starter homes requirement will apply to applications for planning permission made pursuant to section 73 of the Town and Country Planning Act 1990. Such applications include proposals using the "minor material amendments" procedure.

22. It would be inappropriate to apply the starter homes requirement to a section 73 planning application, since the development will already be subject to existing affordable housing requirements negotiated when the planning permission was first granted.

**Recommendation:** the starter homes regulations should state that planning permissions granted pursuant to section 73 are exempted from the starter homes requirement.

#### Help to Buy

23. It would be helpful to know whether the government intends that purchasers of starter homes will be entitled to apply for Help to Buy assistance (including equity loans and mortgage guarantees) to help fund their purchases.

**Recommendation:** CLG guidance should clarify what products are available to purchasers of starter homes.

### Answers to specific questions

#### Question 1

- Do you support restrictions on the sale and sub-letting of starter homes for 5 years following initial sale? Do you support allowing individuals to sell at a higher proportion of market value as the number of years they have lived in the home increases? If not, what other approaches can we adopt to meet our objectives?

We support restrictions on the sale of starter homes. It appears that the individuals who purchase the unit have the potential to receive a windfall of a minimum of 20% market value on the sale of the unit, assuming the market does not fall. It is right that individuals should not purchase units solely to receive a short term gain at the expense of the landowner. We consider that the timescale should not be any shorter than 5 years. A longer period might be considered, but of no more than 8 years. If the period of restriction is increased to longer than 5 years, then we believe that all restrictions on sub-letting should fall away after 5 years.

We agree with the concept of tapering in principle. We assume that all onward purchasers would also need to be qualifying first time buyers. However, we anticipate difficulties if there is a very long taper period. We question what the market will be for homes that are in the latter end of the taper period if, as the government anticipates, there are also new starter homes coming on to the market available at the full discount. That in itself may dampen the resale prices of the properties and ultimately affect their initial attractiveness.

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We recognise the need to prevent starter homes being used as buy-to-let investments. However, we also consider that home owners (particularly those in the qualifying age bracket) may be required to work or study in another part of the country, or abroad, for a temporary period during their careers. It would be unduly onerous to require them either to leave their home vacant, or to sell it, in those circumstances. Some flexibility needs to be allowed to address this.

#### Question 2

Do you agree that flexibility over the age 40 restriction should be given when joint purchasers are looking to buy a starter home, one purchaser being under 40 years old but the other older than 40?

Yes. We support the provision of flexibility regarding the range of potential purchasers.

#### Question 3

Do you agree that there should be an exemption from the age 40 restriction for injured military services personnel and those whose partner has died in service?

Yes. We support the provision of flexibility regarding the range of potential purchasers.

#### Question 4

Would a site size of 10 units or more (or 0.5 ha) be an appropriate minimum threshold for the starter home requirement? If not, what threshold would be appropriate and why?

We agree that this would be an appropriate threshold and is consistent with the government's approach regarding the provision of affordable housing on such sites.

#### Question 5

Should the minimum percentage requirement be applied uniformly on all sites over 10 units to provide a single requirement across the country?

We consider that any starter homes requirement should be kept as simple and straightforward as possible. On that basis, we consider that the minimum percentage should be applied uniformly as a starting point.

#### Question 6

If so, do you agree that 20% represents a reasonable requirement for most areas?

Viability varies hugely across the country and other consultees would be better placed to comment on the appropriate percentage that could be set by way of a starting point. However, from our experience, there are many sites around the country where the affordable housing provision is less than 20% (whether due to significant infrastructure or other abnormal costs or competing section 106 priorities). Careful thought is therefore required as to whether 20% is too high and would result in numerous claims for an exemption from the starter homes requirement based on viability.

## Question 7

Do you support an exemption from the Starter Homes requirement for those developments which would be unviable if they had to deliver any affordable housing including Starter Homes? If so, how prescriptive should the viability test be in the regulations?

Yes, authorities should have the ability to agree to a lower percentage if appropriate on the grounds of viability. As noted above, the need to assess the viability of proposed developments is already commonplace. Many sites simply cannot bear the affordable housing, community infrastructure levy and other section 106 requirements that authorities seek to impose on top of infrastructure needed to release the site.

We do not see a need for the regulations to set out “a prescriptive test” as to viability. The assessment of viability requires expert assessment and judgement. The critical aspects of a viability appraisal can vary between sites, in terms of the need to incentivise landowners (depending on how and why those landowners hold the land) and provide sufficient margin for developers. We are concerned that over-prescribing a mechanism could have adverse effects on development.

The test should build on existing guidance on viability assessments in planning applications (e.g. the RICS guidance note Financial Viability in Planning) and should not be viewed in isolation.

We have assumed that where a viability exemption from the starter homes requirement is successfully claimed, the development will not be required to provide any other affordable housing instead of starter homes. If this is correct, it would be helpful for it to be stated explicitly in guidance.

## Question 8

Do you support the proposed exemptions from the starter home requirement? If not, why not?

Yes, we support the proposal to exempt dedicated supported housing including residential care homes and student housing from the starter homes requirement. We note the related question on commuted sums below.

## Question 9

Should group custom build developments and developments with a very high level of affordable housing such as estate regeneration schemes be exempt? If not, why not?

We agree that estate regeneration schemes with a high level of affordable housing provision should be exempt from the starter homes requirement. We note that it will be difficult to define the nature of the schemes that will be captured, but assume that there will be a requirement to substantially replace existing affordable housing to qualify.

In general, we consider that other schemes that authorities, registered providers or other bodies are bringing forward to deliver traditional forms of affordable housing should be exempt from the requirement.

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We do not have strong views about custom build developments, but it is not immediately clear why they should not be subject to the starter homes requirement if they exceed 10 units or are built on a site of more than 0.5 hectares.

#### Question 10

Are any further exemptions from the starter home requirement warranted, and why?

We do not have any immediate suggestions for further exemptions. However, we recommend that the government should keep this under review and that the category of exemptions should remain open and subject to additions as the new system beds down.

#### Question 11

- Do you support the use of commuted sums to deliver starter homes where the local planning authority agrees?

Yes. However, we suggest that clear guidance is provided on what constitutes a "high value area" as referred to in the technical consultation, to avoid disputes with local planning authorities (particularly in London).

The consultation paper states that "in line with existing practice on affordable housing contributions, we propose that the local planning authority must agree to an off-site contribution." We are not aware of any local planning authority being compelled to accept an off-site contribution under current planning policy, so if this is intended in relation to starter homes then it needs to be set out explicitly in the regulations or in accompanying guidance.

We would also welcome guidance on how commuted sums may be applied by local planning authorities. For example, are off-site contributions limited to use for the direct provision of starter homes by local planning authorities themselves, or can they be paid to another developer (at that developer's discretion) to increase the number of starter homes, or the amount of starter homes discount, on a different private sector development in the authority's area?

#### Question 12

- Do you support the proposal that private rented sector housing (for institutional investment) and specialist older people's housing should meet the requirement through off-site contributions?

We agree that purpose built private sector rented housing and specialist older people's housing should not be subject to the on-site provision of starter homes.

However, we are not convinced that PRS developments should be subject to the payment of a commuted sum. The majority of PRS schemes are of marginal viability and we therefore believe that they should be exempted from the starter homes requirement all together. This will help to ensure the maintenance of a healthy private rented sector alongside the provision of starter homes.

#### Question 13

- Do you agree that Starter Homes monitoring reports should be an annex to the Authority Monitoring Report?

Yes.

#### Question 14

- Do you agree that these reports establish the key actions taken to support starter home delivery and the outcomes in terms of permissions granted and completions?

Yes. We suggest that the content of the reports should also include the value of off-site contributions paid to the local planning authority and how those contributions have been applied.

#### Question 15

- Do you agree that April 2017 is a reasonable date for the first report to be published? If not, do you have alternative suggestions and why?

We do not have a strong view on this, but we note that very little monitoring information is likely to be available in April 2017. Assuming that the starter homes regulations come into force later this year, and assuming also that the requirement only applies to applications submitted after the regulations take effect, few planning permissions to include starter homes are likely to have been granted before April 2017. A later date may therefore be preferable.

#### Question 16

- Do you support a transitional provision for the starter home regulations?

Our general comments above refer to the need for local planning authorities to update their local plan affordable housing policies and to review their CIL charging schedules. We believe that a reasonable transitional period to allow them to do this would be appropriate and would help to establish more certainty for developers and reduce disagreements with the local planning authority when negotiating section 106 agreements.

We therefore suggest a transitional period of at least 6 months to allow this process to take place.

#### Question 17

- Is there further evidence we should be considering in our assessment of equalities implications?

We have no comments in response to this question.

#### Question 18

- Assessment of impact questions

The impact assessment has not yet been published so we are not in a position to answer these questions.

In relation to question (vi), however, we believe that costs will increase in relation to the negotiation of section 106 agreements if the issues raised in our general comments above are not fully addressed in the starter homes regulations and accompanying guidance. The relationship between the starter homes requirement

and the requirement to deliver additional affordable housing is of particular importance and, in our view, is most likely to cause disagreements between developers and local planning authorities if this remains a matter for negotiation on a case-by-case basis.

To discuss this consultation response further, please contact:

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