

Housing Development Policy Framework

1. Introduction

- 1.1 The Housing Development Policy Framework sets out the Council's approach to delivering affordable housing for social rent, mid market rent and shared equity. The Framework aims to enable the Council to maximise opportunities to increase its housing stock through a range of mechanisms.
- 1.2 The Council began a comprehensive programme of new build in 2011. Since then, almost all new development has taken place on land within Council ownership (either HRA or General Fund) and using traditional methods of procurement. Over the years development activity has increased significantly with the current programme aiming to deliver around 300 units over 5 years. However, a number of factors can negatively impact on our ability to deliver, including lack of availability of land and staff resources, and lack of ability of contractors to retain skilled trades so that a quality product can be delivered on programme and at reasonable cost.
- 1.3 In order to maintain a comprehensive programme of housing development it is recognised that a range of development approaches are needed to ensure the Council is able to maintain the pace and scale of delivery. This will allow the Council to respond to a number of emerging challenges.

2. Background

- 2.1 Generally, where the Council requires the building or development of new housing, this involves the letting of a public works contract by the Council to a building contractor for the works. The public procurement rules apply to such contracts. At the same time, the Council has powers to buy land and buildings for the carrying out of its functions, which include the provision of housing as housing authority. Land transactions are excluded from the scope of the public procurement rules.
- 2.2 There are therefore options open to the Council in terms of how to secure land or buildings for the development of housing. However, the interplay between these options is legally complex, often contentious and legal challenges can arise striking at the Council's approach to the option selected. A successful legal challenge is costly, potentially nullifies work done to date and is reputationally damaging.
- 2.3 This document sets out broad priorities and principles to guide the approach required on the selection of a given option.

3. Our Development Priorities

- 3.1 The Council is committed to 'creating places people are proud to call home'. Increasing the supply of affordable housing is a critical element of ensuring that people in Angus can access good quality affordable housing.

- 3.2 The Council's core priority in new build development is for energy efficient homes which meet the needs of the population. The Council supports the Scottish Government's drive towards net-zero housing by 2045 and where possible will prioritise development and new build opportunities which further progress this aim.
- 3.3 The Council is seeking to increase the number of homes which are available for people with particular needs, including people requiring wheelchair standard housing. In developments of 10 units or more, at least 20% of units will be suitable for people with particular needs. In smaller developments the number of units suitable for people with particular needs will be maximised but may not reach 20% due to the constraints in developing small sites.
- 3.4 The Housing Supply Target estimates the number of new affordable homes required in each housing market area and progress against this will be taken into account when deciding how to prioritise development and new build activity.
- 3.5 The Council will take these factors into account when deciding whether a development or new build opportunity is a good fit with the strategic priorities of the development programme.

4. Our Development Principles

- 4.1 The following principles are drawn from a review of the leading case law on the issue. The principles are a guide only; difficult cases will have to be reviewed individually with legal advice to be provided on their merits.
- (i) The overriding principle is that the contract should be judged on the whole circumstances of the transaction to ascertain what its true objective is / will be. If its objective is a genuine land transaction for housing, "no strings attached", it is a valid land transaction. If its objective is the building of housing "to the Council's order", it is a public works contract.
 - (ii) To do so, the Council should look at option selection objectively, as if it was the court on a legal challenge, and assess the whole circumstances, including all the strings attached both now and in the future. It must be recognised that public procurement will sometimes be required and expectations managed accordingly.
 - (iii) A Court would judge the parties' intention, especially the Council's, on a legal challenge. There does not need to be any question of bad faith or deliberate sham. However, if the procurement rules are deliberately and consciously not followed, that amounts to a serious breach of the rules and the whole purchase contract / development agreement can be annulled by the court.
 - (iv) Nonetheless, if a contract is a genuine land transaction then the land development exemption in the public procurement rules applies. The

exemption has an emphasis on the buying of real estate (land and buildings) but the courts have confirmed that it also applies to the Council as seller or landlord.

- (v) If the contract does not oblige the contractor to do anything, it is not a contract for the purposes of the procurement rules.
- (vi) A public works contract arises if there is a specific legally binding contractual obligation to undertake the work or works (now or in the future).
- (vii) If however the work is merely “incidental” to the land transaction then the procurement rules do not apply. The land transaction cost includes the developer’s price for the building as offered for sale on the open market (“off plan”).
 - a. *For example, the works would not be subject to the procurement rules if their scope and value is small compared to the value of the sale, and would not have been pursued if the land was not being sold, and if the main purpose of the sale was not to achieve those works. On the other hand the works would be unlikely to be “incidental” if they involved a wide range of works or a lengthy programme of works activity. The more “off plan” the housing is, the more likely it is to be objectively judged as a land transaction not subject to the procurement rules.*
- (viii) A public procurement contract requires a link between the service and the authority or the residents in its area. In the case of housing development, that link will always be present so there is a greater need to be on sure ground than for other, more commercial transactions.
- (ix) The interplay between the public procurement rules and land development agreements is highly complex. In any case where a proposed land deal with an external party also involves the carrying out of works to the land or the provision of supplies or services to the Council or for public benefit, case-specific legal advice must be taken with a full analysis of all the relevant factors.

5. The Housing Development Policy Framework

- 5.1 The Policy Framework will guide the selection of housing development opportunities by ensuring the Council takes cognisance of relevant land transaction or procurement rules. This will be done on a site by site basis taking into account the matters such as the construction stage and the extent of involvement in the design and/or mix.
- 5.2 The Policy Framework identifies five base models with a number of variations within each model. The base models are:

- i) Purchase units as offered on the market (units likely to be completed or under construction)
- ii) Purchase units offered on the market but with incidental changes (likely to be units under construction or not yet built)
- iii) Purchase housing land for development (units will be subject to a separate agreement)
- iv) Purchase housing land for development (units delivered under the same agreement)
- v) New build to Council's specification and design (land owned by developer or Council)

5.3 The following table sets out the range of options and summarises the approach required applying the above principles.

Housing Development Summary Criteria

NO.	OPTION	VARIANT	APPROACH
1	Housing units as offered by the market (units built or under construction)	A – take as they are B – choose from developer's standard customer choices e.g. kitchen and bathroom. This is still "as offered" by the developer.	This is a land transaction, the procurement rules do not apply. <i>Direct purchase / negotiation with the landowner / developer</i>
2	Housing units as offered on the market but with incidental changes (refer to section 6 for definition) to the developer's standard and a price adjustment negotiated with the developer (units under construction / not built)	A – incidental changes - to Angus Council minimum standards i.e. HfVN and sprinklers B – incidental changes – which are a preference C – sites offered as part of a developer's Planning Obligations and as per A or B	This is a land transaction, the procurement rules do not apply. <i>Direct purchase / negotiation with the landowner / developer</i>
3	Housing land only – units will be subject to a separate agreement	A – housing land offered on the market B – housing land offered to the Council following an advertised call for expressions of interest	This is a land transaction, the procurement rules do not apply. However, there is a legitimate expectation of transparency to secure best value and offer a fair opportunity to the market where the Council is seeking sites to be brought forward.

NO.	OPTION	VARIANT	APPROACH
			<p><i>A – Direct purchase / negotiation with landowner / developer</i></p> <p><i>B – Advertised call for expressions of interest in providing, assessment on published criteria. Notification of decision with reasons.</i></p>
4	Housing land for development (units not built)	<p>A – off plan selection</p> <p>B – as A plus choose from developers standard customer choices i.e. kitchen and bathroom</p> <p>C – as A and B plus incidental changes to Angus Council minimum standards i.e. HfVN and sprinklers plus incidental changes – which are a preference</p>	<p>This is a land transaction, the procurement rules do not apply.</p> <p>However, there is a legitimate expectation of transparency to secure best value and offer a fair opportunity to the market.</p> <p><i>Advertised call for expressions of interest in providing, assessment on published criteria. Notification of decision with reasons.</i></p> <p><i>Direct purchase / negotiation with the selected landowners / developers.</i></p>
5	Housing units built to the Council's standards / specifications (units not built)	<p>Council land</p> <p>A – to Angus Council supplied full specification plus identified housing mix</p> <p>B – adding developers' standard customer choices</p> <p>Other land owner</p> <p>As A and B above</p>	<p>This is a procurement, the procurement rules apply.</p> <p>Council Land</p> <p><i>Seek tenders or call –off from a framework agreement advertised using Public Contracts Scotland and put in place following the public procurement rules.</i></p> <p>Other land owner</p> <p><i>Advertised call for expressions of interest in providing. Assessment on published criteria. Notification of decision with reason.</i></p>

6. Definitions

6.1 “Housing for Varying Needs (HfVN)” - A standard set out in design guide produced by Scottish Homes at the request of The Scottish Office. It was first published in 1998. The guidance sets out good practice in the design of all housing to ensure homes are barrier free and fit for purpose. It has design criteria which will meet the needs of older people, ambulant disabled people and wheelchair users as well as general needs.

6.2 “Angus Council Incidental Changes” - Refer to build modifications which could be delivered in different ways. It covers possible changes to a property type planned for the private sector and adapting it to meet the needs of the social rented sector. Modifications which are Angus Council minimum standards are covered by legislation, policy, standard or similar i.e. HfVN refers to a standard set of design criteria which can be delivered in different ways. This same principle applies to sprinklers which is an Angus Council new build policy. Other modifications which are a preference could be required depending on room layout, design and stage of construction, for example:

- Leaving space for kitchen appliances rather than having integrated appliances
- Provision of opening wooden wardrobe doors rather than sliding doors
- Wet wall round any bath/shower area rather than tiling
- Free standing WC & WHB rather than fitted
- Provision of extra storage space in place of an ensuite

(These examples are not a definitive list of what may be classified as an incidental change. Other modifications may be equally appropriate.)