

Homes for Scotland

Consultation Response to Aberdeen City Council's ("the Council") proposed variation to SG 5.1 Affordable Housing (March 2102)

1. Introduction

1.1 Homes for Scotland have now had the opportunity to consult with its members regarding the alterations which the Council proposes to make to the subject statutory supplementary guidance.

1.2 In summary the proposed variations are that instead of having;

1.2.1 the value of the commuted sum payment established by reference to a value that is equal to the amount that an affordable housing provider would need in order to purchase an equivalent site identified for affordable housing, as is the current policy position, its value should be established by reference to a value that is equal to the difference between that affordable housing value (which is to be assumed to be nil unless contractual evidence to the contrary is exhibited) and the value of an equivalent site identified for open market housing (which is to be assumed to be 33% of the mean estimated open market selling price for the mix of housing units that would be delivered on-site in lieu of the affordable housing units) ("Proposed Alteration 1")

1.2.2 a standard sum for the Grampian housing market area that is reviewed annually, as is the current policy position, the value of the commuted sum payment should be agreed or, as the case may be, determined, on a site by site basis at the point when an application for planning permission is submitted ("Proposed Alteration 2"), and

1.2.3 a requirement to provide 25% affordable housing units on-site in circumstances where the number of units authorised to be constructed is greater than 20, as is the current policy position, consideration should be given in pre-application discussions to the policy requirement being provided in the form of a mix of on-site affordable housing units and commuted sum payments (Proposed Alteration 3").

1.3 In putting forward these proposed alterations for consultation, the Council has asked respondents to address the following questions, namely:

1.3.1 Is it appropriate to link the value of the commuted sum payment to the consequential increase in the open market residual land value of the site arising from the discharge of the on-site affordable housing requirement?

1.3.2 If the answer to the first question is that it would be inappropriate to make that link, how might the method of valuing the commuted sum be

otherwise amended to ensure that it "operates more fairly"?

1.3.3 Would the proposal to allow a mix of on-site delivery and commuted sum payments help improve the overall delivery of affordable housing?

1.4 The Council has confirmed that if these proposed alterations are approved (in whatever finalised form they may take) then ahead of formal adoption they will be notified to the Scottish Ministers in terms of Section 22 (6) of the Town and Country Planning (Scotland) Act 1997 .

2. Documents

2.1 In preparing this consultation response, Homes for Scotland has taken account of the planning policy and other advice contained in the following documents:

2.2 In chronological order in terms of publication these are:

- * Circular 1/2009: Development Planning (February 2009);
- * Chief Planner's Letter dated 28th October 2009;
- * Consultation on Calculating Commuted Sums for Affordable Housing;
- * Chief Planner's Summary of Comments regarding the said Consultation;
- * PAN 2/2010: Affordable Housing and Housing Land Audits (August 2010);
- * Chief Planner's Letter dated 15th March 2011;
- * Aberdeen City Council letter dated 1 November 2011 to the Scottish Government;
- * Policy H5 on Affordable Housing - Aberdeen Local Development Plan (February 2012)
- * Supplementary Guidance 5.1: Affordable Housing (March 2012)
- * Report to Enterprise Planning & Infrastructure Committee dated 22nd January 2013, and
- * Report to Enterprise Planning & Infrastructure Committee dated 21st May 2013

2.3 Before we address the issues raised by the questions which the Council has asked respondents to consider, Homes for Scotland would wish to remind the Council of the level of consultation which both it and the Scottish Government carried out on the issue of commuted sum valuation ahead of the Scottish Government's publication of PAN 2/2010: Affordable Housing and Housing Land Audits in August 2010 and the Council's subsequent adoption of its current supplementary guidance on affordable housing in March 2012.

3. Chief Planner's Letter dated 28th October 2009

2.1 Ahead of the publication of PAN 2/2010 in 2010 (and as part of the review of PAN 74) the Chief Planner wrote to Homes for Scotland, the Scottish Federation of Housing Associations, District Valuer Services and the Heads of Planning in October 2009 to seek their comments on "four options for the

appropriate basis on which to calculate commuted sums" (see PAN 2/2010 Consultation on Calculating Commuted Sums for Affordable Housing: Summary of Contents report published by the Scottish Government.)

2.2 These options were:

Option 1

"For the commuted sum to be equal to the *value of the land for affordable housing* of that part of the original site that would otherwise have been used for affordable housing if the planning authority had not determined that a commuted sum was acceptable (ie the amount required to allow an affordable housing provider to purchase an equivalent site identified for affordable housing elsewhere.)"

Option 2

"For the commuted sum to be equal to the *difference* between the value identified at Option 1 and the value of this land for market housing (ie the amount required to allow an affordable housing provider to purchase an equivalent site for housing on the open market.)"

Option 3

"For the commuted sum to be a standard sum set annually by the planning authority, being a typical or average sum calculated for the authority or housing market area as a whole, using one of the approaches [ie Option 1 or Option 2] set out above."

Option 4

"For the PAN to focus on planning advice and not to provide advice to planning authorities on land valuation or suitable approaches to commuted sums, referring to instead the forthcoming Royal Institution of Chartered Surveyors guidance."

2.4 In his Summary of Comments concerning the outcome of the consultation exercise, the Chief Planner confirmed that "the majority of respondents supported Option 3 as the most appropriate basis on which to calculate commuted sums because it provided certainty, consistency and speed." (our emphasis).

2.5 The Chief Planner also advised that the respondents who had selected Option 3 had also taken the view that clear details of a standardised method would be needed in order to create certainty, confidence and consistency between Councils and to avoid challenges to the Councils preferred approach.

2.6 Respondents also suggested that the "standard sum" approach proposed in terms of Option 3 should be:

- * set annually;
- * standardised/based on average values (the DV or an independent valuer can provide such values);
- * relate to the housing market area or local authority boundaries, different sums can be used in different areas, and
- * based on regularly reviewed, published data (to aid transparency)."

2.7 The advice set out in the Summary of Comments would have been an important relevant material consideration which the Scottish government would have taken into account when drafting PAN 2/2010. Given the subject matter of the consultation exercise, the advice set out in the Summary of Comments document would also have been an important relevant material consideration which the Council would have taken into account when it drew up its existing supplementary guidance on affordable housing. It remains relevant and important advice in terms of the Council's current consultation exercise.

3. PAN 2/2010

3.1 Having taken cognisance of the consultation responses on commuted sum valuation when drafting PAN 2/2010, the Scottish Government's guidance on the use of commuted sums in lieu of on-site affordable housing provides:

at paragraph 19 that:

"the contribution from the developer of a market housing site will normally be the provision of serviced land eg a proportion of the site which can be developed by or for a RSL or local authority. Such land can be transferred either at a value relating to its end use for affordable housing or by agreement between the developer and the RSL or local authority, at a lower value."

at paragraph 21 that:

"[e]xceptionally a site may be unsuitable for affordable housing for a variety of reasons, including the size of the site, location, topography, conversion of buildings where relevant standards cannot be met and other local circumstances such as whether an appropriate tenure mix can be delivered. In such circumstances the developer may offer to provide the contribution on another viable site within their ownership or in some cases provide a commuted sum as long as the proposed alternative will help to meet an affordable need in the same housing market area. Commuted sums should only be used sparingly. The decision to accept a commuted sum is one for the planning authority and the rationale for accepting a commuted sum should be set out clearly in local policy." (our emphasis)

and at paragraph 22 that:

"[w]here it is agreed that as an alternative to a contribution of land within the proposed development site is acceptable the developer will provide either land or homes or a commuted sum of a value equivalent to the cost of providing the percentage of serviced land required by the policy."

"Planning authorities may wish to consider a policy for calculating a commuted sum, but this should be the subject of consultation with stakeholders before being applied."

- 3.2 It was this national guidance which informed the Council's local development plan policy on the use of commuted sums in lieu of on-site affordable housing provision.

4. Chief Planner's Letter dated 15th March 2011

- 4.1 On 15th March 2011 the Chief Planner wrote again to the Heads of Planning in Scotland to remind them of the importance which the Scottish Government placed on "removing constraints to the development of housing land in the current economic climate."

- 4.2 The latest constraint which the Scottish Government had identified was the impact of cuts in public spending on affordable housing on the delivery of mainstream housing development in those parts of the country where local planning authorities already had or were proposing to put planning policies in place to deliver more affordable housing as part of private sector open market housing development. The Chief Planner highlighted the need for "realism and flexibility" in the drawing up and implementation of such policies.

- 4.3 Specifically he advised the Heads of Planning that:

"authorities will also be aware of the significantly lower levels of public funding that are likely to be available to support the development of affordable housing in the coming years. In these circumstances [the Chief Planner] suggest[s] that authorities in drawing up and implementing planning policies on affordable housing should consider whether contributions of 25% or more are likely to be deliverable in the current economic climate. Levels of affordable housing that act to stifle overall levels of housing development are likely to be counter-productive. In certain cases the effect could be that development would not proceed at all." (our emphasis)

- 4.4 The advice contained in the Chief Planner's letter would have been an important consideration which the Council took into account when it drafted its local development plan policy on the use of commuted sums in lieu of on-site affordable housing. It is also a relevant material consideration for the Council to take into account in the context of its current consultation.

5. Aberdeen City Council letter to the Scottish government dated 1st November 2011

- 5.1 The content of this letter is also relevant for the purposes of the current

consultation exercise. In this letter officers set out the Council's response to the Reporters carrying out the Section 19 examination into the proposed Aberdeen Local Development Plan regarding certain representations which it had received regarding the calculation of commuted sums.

- 5.2 The advice which the Council gave at that time, having considered the terms of the Chief Planner's letters, the Summary of Comments and the guidance set out in PAN 2/2010, was that:

"The current commuted sum was set on 1st January 2008, and is £25,000. Prior to implementation of this sum notification was sent to developers, and from 1st January this fee (sic) has been used for all commuted sum payments in the Aberdeen Housing Market Area. An assessment was made into what the average cost to a developer was to provide an affordable house or serviced land. This fee has the benefit of providing clarity to the development industry on the likely costs of providing affordable housing.

Supplementary Guidance 5.1 allows for the commuted sum payment to be altered, but that this is to be the subject of consultation with the development industry and notice of any change in fee will be given."

- 5.3 For the purposes of the current consultation exercise that remains important and relevant advice.

- 5.4 Circular 1/2009: Development Planning advises at paragraph 98 that:

"[Supplementary] Guidance adopted in connection with a plan falls when the plan is replaced, but if it remains up to date, authorities may readopt it in connection with the replacement plan after limited re-consultation, provided a proper connection with the plan remains." (our emphasis)

- 5.5 It follows, therefore, that in providing that advice to the LDP Examination Reporters in November 2011, the Council was satisfied that the approach to the valuation of commuted sums which they had put in place in 2008 not only remained "up to date" but also reflected the approach set out in Option 3 of the Chief Planner's letter of 28th October 2009, which had been thereafter identified in the Scottish Government's consultation as the option which had been selected by the majority of respondents as the most "appropriate basis on which to calculate commuted sums"

- 5.6 In providing this advice to the Scottish Government in November 2011 the Council would also have been aware of the enhanced status which their approved supplementary guidance on affordable housing (including the selected approach to the calculation of commuted sums) would acquire following the adoption of the new Local Development Plan.

- 5.7 Following submission of the proposed supplementary guidance to the Scottish Ministers in terms of the validation procedure set out in Section 22 (6) of the Supplementary Guidance on Affordable Housing referred to in Policy H5 was approved by the Council on 1st March 2012 ("the Existing Guidance").

- 5.8 In terms of Section 24 (1) (b) (ii) of the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"), supplementary guidance "approved" by the Scottish Ministers in terms of the notification procedure set out in Section 22 (6), would become part of the statutory development plan.
- 5.9 Account too would have been taken by the Council when giving that advice concerning its selected approach to the valuation of commuted sums of the terms of Section 16 (1) (a) (ii) of the 1997 Act. This provides that local planning authorities are required to prepare a new local development plan "at intervals of no more than 5 years"(our emphasis).
- 5.10 Taken together the statutory and policy framework provides an implied promise on the part of the national and local planning authorities to the development industry that once supplementary guidance has been taken through the appropriate consultation and validation processes, it will remain in place, absent any supervening changes in the law, policy or material circumstances, for the life of the local development plan. In other words once those processes have been carried out and the relevant supplementary guidance is adopted, the legitimate substantive expectation of the development industry is that the guidance will remain in place until it either falls or is re-adopted when the local development plan is replaced.
- 5.11 Against that background, we would now propose to examine the scope of the review which the Council is entitled to carry out in terms of its statutory policy on commuted sums.

6. The Local Development Plan Policy on Commuted Sums

- 6.1 The local statutory policy on affordable housing commuted sum payments is set out at Policy H5 of the Aberdeen Local Development Plan which was adopted on 29th February 2012.
- 6.2 Policy H5 provides that:

"Housing developments of 5 units or more are required to contribute no less than 25% of the total number of units as affordable housing. Further guidance on the provision of affordable housing from new developments is available in Supplementary Guidance on Affordable Housing."

- 6.3 It confirms that the approved supplementary guidance sets out the Council's detailed advice on how it expects commuted sums to be used in the context of affordable housing provision over the life of its current adopted local development plan.

7. The Approved Guidance

- 7.1 In relation to the provision of commuted sums for affordable housing, and reflecting the advice which the Council gave to the Scottish government in November 2011 ahead of its formal adoption in March 2012, the Approved

Guidance advises developers at paragraph 2.1 that:

"[a]ffordable housing requirements may be made on-site, off-site or by means of a commuted payment depending on the scale of development....Commuted sums will be negotiated between the developer and the Council. The figure for commuted sums is set by the Council, and the figure is currently £25,000 (as of August 2010). This figure is subject to change and the figure is reviewed annually. Any changes will be consulted on and published in advance of implementation on the Council's website." (our emphasis)

7.2 At paragraph 2.4 the Existing Guidance advises that:

"For developments of less than 20 units the provision of affordable housing may be on site, off site, or commuted payments." (our emphasis), and

At paragraph 2.5 that:

"For developments of 20 units or more the expectation is that the affordable housing contribution will be delivered on-site" (our emphasis).

7.3 The circumstances in which the headline policy contribution may be reduced are explained at paragraphs 2.6-2.8 of the Approved Guidance. This provides that where by reference to a financial appraisal a developer can demonstrate to the Council that there are "exceptional costs", the requirement for affordable housing contributions may be reduced to "ensure the cumulative burden on the overall development does not make the site unviable" (our emphasis).

8. The Valuation Methodology underpinning the Approved Guidance

8.1 It is clear from the advice which the Council gave to the Scottish Government on 1st November 2011 (see section 5 above) that the valuation method for the calculation of commuted sums as set out in the Approved Guidance is based on the third of the four approaches proposed by the Scottish Government in 2009 ie Option 3. As advised, that option proposed that the commuted sum could be *a standard sum set annually by the planning authority, being a typical or average sum calculated for the authority or housing market area as a whole, using one of the approaches [ie Option 1 or Option 2] set out above.*"

8.2 Having selected the "standard sum" approach, it follows, that the next issue for the Council to consider was whether when calculating the "typical or average" standard sum for the Aberdeen Housing Market Area, it should use the approach set out in Option 1 or Option 2. Crucially, for the purposes of this consultation response, it was the approach set out in Option 1 that was selected, namely;

"[f]or the commuted sum to be equal to the value of the land for affordable housing of that part of the original site that would otherwise have been used

for affordable housing if the planning authority had not determined that a commuted sum was acceptable (ie the amount required to allow an affordable housing provider to purchase an equivalent site identified for affordable housing elsewhere.)" (our emphasis)

- 8.3 It follows, therefore, that at the point when the Approved Guidance was adopted by the Council on 1st March 2012 and hived up by application of Section 24 (1) (b) (ii) of the 1997 Act into the development plan, the Council had carefully considered and thereafter rejected the approach to the valuation of commuted sums set out in Option 2 of the Chief Planner's October 2009 letter.
- 8.4 In taking its decision to re-adopt the approach to the calculation of commuted sums which it had approved in the form of supplementary planning guidance in 2008, it is safe to assume, given the terms of the Approved Guidance, that the Council would have carefully considered the terms of the Summary of Contents report prepared by the Chief Planner and agreed with the comment that the use of the approach to the valuation of the standard commuted sum set out in Option 2 was inappropriate. The Summary of Comments report confirmed that the majority of respondents had recognised that, if that approach were to be implemented, it could potentially result in the value of the standard sum being set at such a high level that its practical effect would be to dis-incentivise developers from using commuted sums. As the Summary of Content report explains, it would act as a "penalty to encourage on site provision" in circumstances where such a requirement would otherwise have been regarded as "unsuitable" for any one or more of the reasons set out in paragraph 21 of PAN 2/2010 (see page 3 of the Summary of Comments and para. 3.1 above).
- 8.5 Indeed evidence supporting that assumption can be found at paragraph 2.4 of the Approved Guidance where the Council makes it clear that in sites involving 19 units or less, developers are to have the flexibility of delivering the headline 25% policy requirement in any one of three forms, including the payment of a commuted sum. Had Option 2 been selected as the Council's preferred approach to the valuation of the commuted sum, its acknowledged effect would have been to render their use unviable. The practical effect, therefore, had Option 2 been selected would have been to rule out the payment of a commuted sum on sites involving less than 20 units.

9. Development Plan Policy on Commuted Sums

- 9.1 Against that legislative and planning policy background, we would now wish to consider the extent to which, as a matter of development plan policy, the Council is entitled to promote Proposed Alterations 1 and 2.
- 9.2 As part of that consideration it is important to understand what it is precisely that these Proposed Alterations involve.
- 9.3 It is clear from the terms of Proposed Alterations 1 and 2 that the Council is looking to substitute the approach to valuation of the commuted sum set out in

Option 1 of the Chief Planner's letter with the approach set out in Option 2. These two alterations, if approved, would have the effect of not only removing the Option 3 "standards sum" approach and replacing it with "site by site negotiation", they would also, crucially, change the underlying basis on which the commuted sum is calculated. The commuted sum would no longer be established and thereafter reviewed by reference to the price that affordable housing providers were actually paying for serviced land for affordable housing within the Aberdeen housing Market Area but rather by reference to a formula that purports to provide an estimate of the difference between the open market housing and the affordable housing residual land values.

- 9.4 On any objective assessment these proposed changes to an important part of the Statutory Guidance, were they to be implemented, would remove the flexibility of using commuted sum payments as a means of addressing the Council's affordable housing policy requirements. So far as Homes for Scotland's members are concerned, the implementation of these proposed alterations to the current Approved Guidance would have a major adverse impact on the delivery of housing development right across the Aberdeen Housing Market Area.
- 9.5 Turning now to consider whether the Council would be entitled, as a matter of law and planning policy, to press forward with and adopt Proposed Alterations 1 and 2 following the outcome of this consultation exercise.
- 9.6 The Council's statutory policy on the use of commuted sums in the context of affordable housing is set out in Policy H5 of the adopted Aberdeen Local Development Plan as supplemented by the Approved Guidance ("the Statutory Guidance").
- 9.7 When read against the legal and policy background and the level of previous consultation referred to in section 2-9 of this response, it is clear that the Statutory Guidance anticipates that it is only the headline figure of £25,000 which is to be subject to the annual review. In other words the scope of the annual review referred to in paragraph 2.1 of the Approved Guidance is expected to be confined to a consideration of the extent or otherwise to which the average amount required to allow an affordable housing provider to purchase an equivalent site may have either increased or decreased over the course of the preceding year.
- 9.8 If the average price paid for a plot of serviced land for an affordable house can be shown to have decreased over the course of the period since the figure of £25,000 was last reviewed in 2010, then, in term of the Statutory Guidance, that reduction in value should be reflected in a corresponding decrease in the level of the commuted sum payment set for the next year. Conversely, if the land prices paid by affordable housing prices has increased that increase too should be reflected through a corresponding increase in the current £25,000 figure.
- 9.9 What the Statutory Guidance does not anticipate, therefore, outside of a review of the local development plan itself, is that the underlying "approach" to

the valuation of the commuted sum should itself be the subject of annual review.

- 9.10 Having selected Option 1 as its preferred approach in terms of the calculation of the value of the standard sum following consultation and thereafter ratified that selection through the validation process enshrined in Section 22 of the 1997, the Council have created a legitimate substantive expectation on the part of the house building industry in Grampian. As indicated, this means that, as a matter of law, in the absence of the current valuation approach set out in the Statutory Guidance being superseded by more recent law or national planning policy or it being required to be reviewed as a consequence of any supervening material changes in circumstances, developers operating in the Aberdeen Housing Market Area are entitled to expect that it will remain in place throughout the duration of the current local development plan period. This ensures that the outcome of planning applications for housing development involving affordable housing can be decided with a degree of certainty and efficiency." (see paragraph 5 of Circular 1/2009)
- 9.11 Since the Approved Guidance was adopted by the Council in March 2012 it is self-evident that there have been no changes to either the relevant law or planning policy. It follows, therefore, that the issue then arising is whether Proposed Alterations 1 and 2 can be justified by reference to any supervening material change in circumstances that may have occurred since the current guidance on the issue of commuted sum payments was adopted in March 2012.
- 9.12 When considering this issue, regard has to be had of the explanations which the Council have given as justification for the proposed amendments.

10. Reasons provided for the proposed alteration to the Valuation Approach

- 10.1 The Council's justification for Proposed Amendments 1 and 2 is set out in the 22nd January 2013 Report from the Council's planning department to its Enterprise Planning & Infrastructure Committee entitled "Aberdeen Local Development Plan Policy on Affordable Housing Requirements for New Development" ("the Committee Report").
- 10.2 The Committee Report put forward two reasons to justify the Proposed Amendments, namely, a reduction in Government funding for affordable housing and the need to strengthen the policy regarding on-site affordable housing provision (see paragraphs 5.6-5.11 and of the Committee Report).
- 10.3 By changing the method of calculating the commuted sum from the "standard sum" approach outlined in Option 3 (whereby the value of that standard sum is established by reference to the value of the land for affordable housing as set out in Option 1) to the site by site valuation approach outlined in Option 2 (whereby the value of the commuted sum is set at a level that is deemed to represent the difference between the value of the land for market and affordable housing) the amount of commuted sum payable would increase significantly. The benefit of this proposed increase, according to the Council,

would be to *"make the option of a commuted sum less attractive"* with the result that *"the delivery of on-site [affordable housing] may become more attractive or a more realistic commuted payment will be received, which can meet a greater proportion of housing need."* (our emphasis)

10.5 Dealing with each reason in turn:

Reduction in Government Funding for Affordable Housing

10.6 At paragraph 5.5 of the Committee Report the Council acknowledge the terms of the letter dated **15th March 2011** which it and other planning authorities received from the Chief Planner highlighting the desire on the part of the Scottish Government to remove "constraints to the development of housing land in the current economic climate.

10.7 We have drawn attention to the date of this letter and to the advice from the Chief Planner to local planning authorities in March of 2011 that when drawing up planning policies on affordable housing that the level of requirement should not be set at a level that had the counter-productive effect of stifling mainstream housing development.

10.8 As indicated, it has to be assumed that when drawing up and consulting upon the Statutory Guidance over the course of the twelve month period leading up to its adoption on **1st March 2012**, the Council gave due and proper regard to the terms of the Scottish Government's advice. If that assumption is correct, as we have suggested it must be given the clear and unequivocal support set out in its letter to the Scottish Government dated 1st November 2011, it follows that in selecting both the standard sum approach set out in Option 3 and the method of calculating it set out in Option 1 rather than Option 2, the Council had concluded that that approach was the one that was most likely of the four options proposed by the Scottish Government to facilitate the delivery of affordable housing over the life of the new plan period. If that was not the case, why was Option 2 not selected and taken through a thorough consultation exercise ahead of the guidance on the subject acquiring development plan status in March 2012

10.9 Against that background, it seems illogical and indeed somewhat irrational for the Council to now put forward the fact that significantly lower levels of public funding are likely to be available during the plan period to support the development of affordable housing as a reason for changing its approach to the calculation of commuted sum payments in circumstances where:

- (a) it was already aware of the issue of reduced funding at the point at which it approved the current valuation approach and
- (b) rejected the alternative valuation approach which it is now proposing to introduce through Proposed Alterations 1 and 2 on the grounds that its introduction would be likely to stifle overall levels of housing development with the Aberdeen Housing Market Area.

- 10.10 It follows, therefore, that the reduction in public funding available for affordable housing does not constitute a relevant supervening change in circumstance justifying the promotion of Proposed Alterations 1 and 2.

Need to Strengthen the Policy regarding On-Site Delivery

- 10.11 The second reason which the Council has advanced as justification for the promotion of the Proposed Alterations 1 and 2 is that it would strengthen the presumption in the Statutory Guidance in favour of on-site delivery. If the value of the commuted sum is more "closely matched" to the increase in the value of the land that arises, as a consequence of the removal of the on-site affordable housing requirement, it follows, according to the Council, that the resulting reduction in the benefit to the developer that would otherwise be gained from making a commuted payment would improve the prospects of on-site delivery (see paragraph 5.14 of the Committee Report).
- 10.12 So far as Homes for Scotland is concerned, this second explanation is not only also illogical it is also contrary to national and local planning policy.
- 10.13 Dealing with each point in turn. Proposed Alterations 1 and 2 are intended to apply to all housing development proposals involving 5 or more units. No apparent account is taken of the fact that in terms of the advice set out in paragraph 2.4 of the Statutory Guidance (reflecting the national guidance set out in paragraph 16 of PAN 2/2010) there is no hierarchy of preferred form of delivery in terms of the way in which the H5 Policy requirement may be provided for developments of less than 20 units. The Statutory Guidance makes it clear that on such smaller sites the requirement can be delivered on-site, off-site or in the form of a commuted sum. It is, therefore, illogical for the Council to propose an amendment to the Statutory Guidance which would have the effect of raising the value of the commuted sum payment to a level that would effectively remove it as a viable option for a developer to put forward when promoting a site for less than 20 units.
- 10.14 As it would be extremely unlikely that a developer promoting a site of that size would be able to provide a similar amount of serviced land with planning permission elsewhere within the Aberdeen Housing Market Area, the practical effect of Proposed Alterations 1 and 2, were they to be introduced, would be to remove entirely the flexibility which PAN 2/2010, the Statutory Guidance and the Chief Planner (in terms of his letter of 15th March 2011) expects developers to have in terms of the form in which the affordable housing requirement is delivered. The effect, as indeed would appear to be the Council's intention, would be to restrict a developer's options to on-site delivery only.
- 10.15 Setting aside the "flexibility" issue, PAN 2/2010 in any event also makes it clear that there will be circumstances where "for a variety of reasons" a site may be "unsuitable for affordable housing". Given the clear and unequivocal terms of the Scottish Government's guidance, it again appears to be illogical and thus irrational for the Council to promote a proposed amendment to its Statutory Guidance which would effectively force affordable housing onto

unsuitable sites. If, as a result of the Proposed Alterations 1 and 2 the payment of a commuted sum was no longer a viable alternative option because it was set as a consequence of the change in the method by which it was calculated at an "unaffordable" level, it follows that the inevitable (and previously recognised and accepted) outcome would be that the development of the site would be stifled.

- 10.16 So far as the application of the Proposed Alterations 1 and 2 to the payment of commuted sums in relation to developments involving 20 or more units is concerned, the obvious question to be asked, given the clear advice set out in paragraphs 2.6- 2.8 of the Approved Guidance is why the Council has concluded that an increase in the amount of commuted sum sought would strengthen the existing policy presumption in favour of on-site delivery.
- 10.17 The Statutory Guidance makes it quite clear that on sites involving 20 or more units, 25% of the total number of units that are authorised to be constructed will require to be sold or let subject to a recognised category of affordable housing occupancy restriction. The Statutory Guidance makes it quite clear that that presumption in favour of on-site delivery will only be set aside in circumstances where the developer has been able to demonstrate by reference to "detailed financial information on the development costs and viability" that the site cannot afford the headline 25% on-site requirement.
- 10.18 On the basis that the Statutory Guidance is being followed by planning officers, it follows that an increase in the value of the commuted sum payment ought to have no impact whatsoever on the issue of whether or not a site is able to deliver the requisite headline number of affordable units on-site. The Statutory Guidance makes it clear that the purpose of the financial appraisal is to demonstrate to the Council why either the headline number of units should be reduced to a number that the site can afford or alternatively why the affordable housing requirement should be removed entirely. An issue concerning site viability should not be seen as an opportunity on the part of the Council to extract an enhanced financial payment. If that point is accepted, as Homes for Scotland would suggest it must, it follows that the reasoning behind the promotion of the Proposed Alterations 1 and 2 is fundamentally flawed.
- 10.19 Further support for the illogicality of the Council's position concerning the proposed changes to the way in which the commuted sum is calculated can also be found by contrasting those proposed changes with the terms of Proposed Alteration 3. This is the proposal that the headline 25% on-site affordable housing requirement for sites involving the promotion of 20 or more units should be amended so that the requirement can be delivered by means of a "mix of affordable housing and commuted payments."
- 10.20 If the principal objective behind the proposed changes to the way in which the commuted sum payment is calculated as set out in Proposed Alterations 1 and 2 is to make the delivery of on-site affordable housing "more attractive", why would the Council wish at the same time to promote a further amendment to the Statutory Guidance through Proposed Alteration 3 which had as its

primary objective the promotion of a reduction in the delivery of on-site affordable housing in favour of a mix of housing and commuted sum payments? Whilst for other reasons (see below), Homes for Scotland can see merit in this "mixed delivery" proposal, its promotion at the same time as the promotion of a policy alteration that is intended to strengthen the focus of on-site affordable housing simply serves to highlight the flaws in the Council's reasoning as regards why these proposed changes to the existing guidance are necessary.

- 10.21 It follows, therefore, that the assertion on the part of the Council that there is a need to strengthen the existing policy presumption in favour of on-site delivery on sites involving the promotion of 20 or more units is without foundation. If officers are allowing commuted sums to be paid in lieu of on-site affordable housing then that dispensation is presumably being given in the light of viability issues evidenced in a financial appraisal, which is precisely what the PAN 2/2010 and the Statutory Guidance expects. If, however, in what might otherwise be regarded as an informal "trial run" of the approach that the Council is now apparently looking to introduce in terms of Proposed Alteration 3, offers of commuted sum payments on larger sites are being accepted by the Council that would reflect a decision on its part to attach more weight in the decision-making process to the benefits of receiving a financial contribution towards the procurement of affordable housing rather than insisting that the policy presumption is followed and the 25% headline requirement is met in full on-site. Either way the matter lies entirely within the Council's own hands.
- 10.22 In the absence of (a) any supervening changes to the law or to national planning policy and (b) any other relevant material considerations which might suggest that the Proposed Alterations were justified, it follows that, as a matter of law, developers in the position of Homes for Scotland's members have a legitimate substantive expectation that the Statutory Guidance will remain unchanged until the current Aberdeen Local Development Plan is reviewed at which time it will either fall to be the subject of a fundamental overhaul or be re-adopted.
- 10.33 So far as Homes for Scotland is concerned, for the reasons outlined above, nothing has happened in terms of law or planning policy and no other material considerations have arisen since the Statutory Guidance was adopted in March 2010 which would justify the promotion far less the introduction of Proposed Alterations 1 and 2. For that reason Homes for Scotland is of the view that, as a matter of law, developers in the position are entitled to expect that the existing Statutory Guidance will continue in its current form.
- 10.34 Over and above the issue of their members' legitimate expectation, Homes for Scotland is also of the view that for the reasons outlined above Proposed Alterations 1 and 2 are in any event contrary to:
- (i) the national planning guidance set out in paragraph 21 of PAN 2/2010;
 - (ii) paragraphs 2.4 and 2.5 of the Approved Guidance, and
 - (iii) the advice set out in the Chief Planners Letter of 15th March 2011.

- 10.35 It is also of the view that the reasons put forward by the Council to justify Proposed Alterations 1 and 2 are illogical and thus *Wednesbury* unreasonable.
- 10.36 For the reasons outlined in paragraphs 10.33-10.35 above, Homes for Scotland has concluded that it would be ultra vires for the Council to implement Proposed Alterations 1 and 2. It, therefore, requests on behalf of its members that they are withdrawn pending the statutory review of the adopted Aberdeen Local Development Plan (February 2012).

11 Proposed Alteration 3

- 11.1 Homes for Scotland's members see a deal of merit in the proposal that further flexibility ought to be introduced into the practical application of Policy H5 so that the option of delivering a significant proportion of the headline 25% affordable housing requirement on large sites in the form of a commuted sum payment rather than on-site units was supported in policy terms.
- 11.2 A worked example may be of assistance in demonstrating the point. A 400 unit site would involve a 100 unit AH requirement. Fully funding such a 100 scheme for affordable housing would almost be impossible for an affordable housing provider (AHP) in the current economic climate. However, if 50 of the required 100 units were notionally delivered in the form of a commuted sum, it would raise £1.25m (50 x £25k). This sum could then be used to cross-fund the other 50 units through either an AHP (or by LCHO) thereby bringing the overall viability of the site to a point where at least 50% of the affordable housing project was capable of being delivered.
- 11.3 Notwithstanding these apparent merits, it has to be recognised too that this proposal is contrary to the provisions of paragraph 21 of PAN 2/2010 which advises local planning authorities that commuted sums should only be used "sparingly". For the reasons outlined in paragraphs 10.19-10.21 of this response, it is also contrary to the provisions of the Council's own Statutory Guidance insofar as it has the potential to undermine the strong presumption set out at paragraph 2.5 of the Approved Guidance that in sites involving 20 or more units the headline requirement will be delivered "on-site".
- 11.4 In the interests of consistency Homes for Scotland would also point out that if this proposed change to the existing guidance is to be promoted ahead of the review of the current local development plan, there would need to be evidence before the Council which suggested that an increased use of commuted sums on larger sites would have the potential to increase the delivery of both mainstream and affordable housing across the Aberdeen Housing Market Area. Given the fact that Proposed Alteration 3 is being promoted in the first place, it may well be that the Council has already reached that conclusion. But where it has misdirected itself is in concluding that that otherwise worthwhile objective would be achieved by altering the basis on which commuted sum is calculated so that a significantly increased (but unviable) level of payment is required.

12. The Proposed Formula

- 12.1 Setting aside the legal and policy issues outlined above, (and without prejudice to its right to challenge the introduction of Proposed Alteration 1 and 2 should the Council decide at the end of the current consultation exercise to adopt it and the Scottish Ministers endorse that decision by not serving a notice in terms of Section 22 (8) of the 1997 Act requiring that those alterations are not adopted) Homes for Scotland's members are united in their conclusion that the proposed formula that the Council has put forward as a means of calculating commuted sums on a site by site basis is unworkable.
- 12.2 If adopted, it would be counter-productive and stifle the delivery of both mainstream and affordable housing as officers and applicants tried to reach agreement on the level at which the commuted sum payment should be set. The "certainty, consistency and speed" of the current approach would be lost.
- 12.3 To appreciate how inappropriate this revised methodology would be, an understanding of how land values are calculated is necessary. Most development land is contracted on the basis of an estimated residual land value (RLV) carried out at the outset of the development process. Broadly speaking, RLV is the surplus remaining after deducting costs and the required profit margin from sales income. This is the price that is left to pay for the land. Costs include the costs of planning gain contributions and the cost of affordable housing provision.
- 12.4 It can be seen from this that RLV is dependent on the cost of providing AH, including commuted payments, and is a cyclical process. How can a developer proceed to acquire land if all such costs cannot be established as far as is reasonably possible up front. It should also be borne in mind that at this point in the calculation of RLV, sales income is also an estimate based on prevailing market conditions. The Council must appreciate that a developer takes a considerable risk when projecting future sales revenue as conditions can either deteriorate or improve over the course of what might be a considerable lead-in period between site acquisition and sales income being received. Actual sales income is not known until the last house is sold. Actual uplift in land value is accordingly contingent on site completion. So if commuted sums are to be dependent on sales income, the question that immediately arises is which figures are to be used, and at which point is the commuted sum to be paid. Should it be the estimated sales values at the point of contract (putting aside for the moment that there may be uplift involved) or the final sales figures which might emerge years later. If it is paid 'up-front' then all parties, including the Council, would be exposed risk. In the current risk averse climate the proposed approach would not be supported by the lenders.
- 12.5 The suggested use of the figure of 33% deduction from sales revenue as providing a reasonable means of assessing the RLV is also extremely problematic. As outlined above, costs have to be expended to deliver the sales income. For mainstream units (even as substitutes for affordable

housing) landowners expect a land value, construction costs have to be met and funded, and a profit is still required by lenders. To take 33% of revenue 'off the top' would clearly impact significantly on viability and (on the basis of our research to date) mean that very few projects could proceed.

- 12.6 Homes for Scotland would wish to remind the Council that Option 1 and Option 2 are both based on land values. As advised Option 1 is based on the amount required to allow an affordable housing provider to purchase an equivalent site identified for affordable housing whilst Option 2 is based on the difference between that amount and the amount that would be needed to allow an affordable housing provider to purchase an equivalent site for housing on the open market. To the extent that the 33% deduction exceeded the difference between those two land values it would constitute an unlawful development tax.
- 12.7 Homes for Scotland also have a significant issue with the proposal that in the absence of concluded missives between the developer and an AHL being exhibited to the Council, the calculation of the commuted sum payable in respect of the individual site should proceed on the basis that the land with affordable housing at its end use has a nil value. Given that the current £25,000 figure is based on comparison evidence of what AHPs are actually paying for sites for affordable housing within the Aberdeen HMA, it seems unreasonable in the extreme for the Council to promote a formula that assumes that the value of the land for that purpose is nil.
- 12.8 Perhaps even more significantly in terms of the unfairness of the proposed methodology, 33% is nowhere near a reasonable reflection of the 'land' element of average sales income. If, for example, a house builder were to promote a development of 5 high value (£600k) units of which one was to be deemed be affordable with the policy requirement stipulating that a commuted sum calculated at 33% of the sales price had to be paid, it follows that a commuted sum of £200k would require to be paid. This would represent an uplift of 800% on the current level. At such a level the commuted sum would be significantly greater than the actual open market residual land value. The Council will be aware that there is a significant demand for new housing at this price range. If this proposed amendment to the Statutory Guidance were to be approved it would inevitably lead to house price inflation in the Grampian housing market area.
- 12.9 The proposed formula is fraught with difficulties. As such its introduction would run counter to the clear advice which the Chief Planner gave to Heads of Planning in March 2011 regarding the need for "realism" when it comes to the drawing up and implementation of affordable housing policies.

13 Conclusion

- 13.1 For the reasons outlined above the Proposed Alterations are:

* contrary to the doctrine of legitimate expectation;

- * contrary to national and local planning policy and the advice set out in the Chief Planners letter of 15th March 2010, and
- * illogical and to that extent unreasonable.

13.2 Setting aside its members' principal objections to these Proposed Alterations the proposed formula is unworkable. If adopted, it would stifle the delivery of housing development across the Aberdeen HMA leading to house price inflation.

13.3 For the foregoing reasons Homes for Scotland request that the Council do not adopt it.

14. Response to the Questions

14.1 **Question 1** - Is it appropriate to link the value of the commuted sum payment to the consequential increase in the open market residual land value of the site arising from the discharge of the on-site affordable housing requirement?

14.2 No. For the reasons set out in section 13 of this response, it would not only be inappropriate but also unlawful for the Council to change the Statutory Guidance so that the value of the commuted sum payment was linked to the consequential increase in the open market residual land value of the site arising from the discharge of the on-site affordable housing requirement.

14.3 **Question 2** - If the answer to the first question is that it would be inappropriate to make that link, how might the method of valuing the commuted sum be otherwise amended to ensure that it "operates more fairly"?

14.4 Implicit in this question is the suggestion that the current method of valuation is somehow operating "unfairly". So far as Homes for Scotland's Grampian members are concerned, the current method of valuation is entirely fair because it achieves the objectives of "certainty consistency and speed" for developers and the Council alike. These were the benefits which the majority of the respondents to the Scottish Government's 2009 consultation believed the current method of valuation would deliver. It must be assumed that it was the underlying fairness that lay behind these recognised benefits which prompted the Council to re-adopt the current method of valuation in 2010 when it promoted it as part of its first edition of statutory guidance on affordable housing made under and in terms of Sections 22 and 24 of the 1997 Act.

14.5 So far as Homes for Scotland are concerned, the current approach to the valuation of commuted sums in the Aberdeen Housing Market Area is certain, consistent and speedy and for those reasons it is fair. Neither it nor its members see any reason for it to be changed.

14.6 **Question 3** - Would the proposal to allow a mix of on-site delivery and commuted sum payments help improve the overall delivery of affordable housing?

- 14.7 Homes for Scotland see a great deal of merit in this proposal as its members believe it would improve the delivery of both mainstream and affordable housing.
- 14.8 Indeed Homes for Scotland would suggest that there would be a great deal of merit in the current housing market if complete flexibility were to be introduced into the Existing Guidance whereby a developer was permitted to deliver the headline 25% policy requirement entirely in the form of a commuted sum in circumstances where it was known at the point in time when an application was submitted that no HAG funding would be available.
- 14.9 However, for the reasons set out at paragraph 11.4 of this response, Homes for Scotland is of the view that the Council would have to provide valid reasons for seeking to introduce the proposed "mixed delivery" option.

15. Proposed Changes to the Existing Guidance

- 15.1 Taking these points together and in order to address the queries in the consultation letter as regards (a) how the methodology might be amended to operate more fairly and (b) whether increased flexibility in the use of commuted sum payments might improve the overall deliverability of both mainstream and affordable housing, Homes for Scotland would recommend that whilst the existing approach to the valuation of commuted sum payments as set out in SG 5.1 should (and indeed must) remain, the remainder of the policy guidance would benefit from the following changes to its wording.
- 15.2 These proposed changes are set out as follows:

Paragraph 2.1 should be amended so that the following sentences are removed:

"Commuted sums will be negotiated between the developer and the Council. The figure for commuted sums is set by the Council, and the figure per plot is currently £25,000 (as of August 2010). This figure is subject to change and the figure is reviewed annually. Any changes will be consulted on and published in advance of implementation on the Council's website."

and replaced with the following:

"2.2 Commuted sums will be calculated initially on a fixed contribution per unit basis (currently £25,000) and thereafter reviewed by the Council annually, following consultation with the house building industry, by reference to appropriate comparison evidence of sale prices of development land for the average price for affordable housing within the Aberdeen Housing Market Area or, in the absence of such evidence, the residual land value method set out in the relevant edition of the RICS Guidance Note, Scotland on the "Valuation of land for affordable housing". In the absence of agreement as regards the appropriateness or availability of the available comparison evidence or,

as the case may be, the assessment of the average residual land value, the Council will refer the matter to an independent expert for final and binding determination.

2.3 The date of the annual review shall be fixed by reference to the month (currently August) on which the commuted sum for the preceding year was agreed or, as the case may be, determined. The figure fixed for the preceding year shall continue to be the relevant figure for the purposes of the application of Policy H5 until such time as the reviewed figure has been agreed or, as the case may be, determined.

2.4 The reviewed figure will be published on the Council's website."

15.3 The remaining paragraphs in SG 5.1 should be re-numbered accordingly.

16 Rejection of the Proposed Alterations

Homes for Scotland respectfully request that the Council rejects the Proposed Alterations and approves the modification to the wording of the Approved Guidance proposed in section 15 of this response.

DLA Piper Scotland LLP