

Common houses – legal points to consider

In this note, we have referred to a hypothetical co-housing group, 'Community Co-housing'. Community Co-housing could be a limited company or a co-operative society, and we have assumed that it will own the housing site, granting leasehold interests to individual residents, all of whom are members.

Who owns the common house?

The common house could be owned by:

- 1) Community Co-housing; or
- 2) A separate entity, under a lease granted by Community Co-housing.

Setting up a separate legal entity would ring-fence any risks associated with the common house, for example, if a loan or grant has been received for the purposes of construction. It may also enable the common house to be held by a charitable entity, if the stringent necessary criteria are met, which could bring tax benefits. However, using a separate entity is likely to be more time consuming and more expensive (both in terms of set-up and ongoing administration), and the transfer of the freehold or grant of a lease of the common house to the separate entity from Community Co-housing may trigger an additional charge to stamp duty land tax (SDLT).

Activities and access by the wider community

Community Co-housing may wish to allow the wider public to access the common house, both to create buy-in from the local community, to generate income and to provide much needed community facilities operating on a different value system, that of collaboration. A number of issues would arise:

- 1) Access by the general public would make it more likely that the common house would be classified as a business, rather than as an extension of the residential units. If classed as a business, the local authority would be entitled to charge business rates on the property and HMRC would look to recover VAT from any charges levied for goods/services supplied e.g. in operating a community cafe (although they may do this even where there is no or minimal public access and even where financial contributions are voluntary). These considerations should be factored into the business plan, to understand if the proposition is viable. VAT is a complex area and advice should be taken from a suitably qualified accountant or tax adviser.

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- 2) Where charges are levied for goods/services supplied, any profits arising will be subject to corporation tax.
- 3) If a separate entity is set up to own the common house it may, in some circumstances, be possible to seek charitable status for that entity, which would engender tax reliefs. This would only work if the common house was to be used as a community resource for charitable purposes, akin to a village hall, and any benefits accruing to private individuals (i.e. the residents) were no more than incidental or ancillary. This means making sure that any personal benefits people receive (having regard both to their nature and amount) are no more than a necessary result or by-product of carrying out the charity's purpose. So, for example, if the common house was only used by the cohousing residents most of the time, it would be unlikely to qualify as charitable because it would be considered as generating a private benefit. On the other hand, if it was mainly used for charitable purposes by the general public for events which residents were also able to go along to, this may qualify as charitable. This is a complex area which will vary on a case by case basis so further advice should be taken¹.
- 4) Permitting community access would mean a wide range of legal obligations must be complied with, including disability access, fire, health and safety and food hygiene². Many of these issues would need considering at the design stage. There would also be public liability risks and Community Co-housing would need to consider taking out a suitable insurance policy. These are issues to consider when the general public is given access to a common house. If members of the general public don't have access, the only users would be members of Community Co-housing, so if someone did bring a civil action for breach, they would effectively be suing themselves. I have included a link to guidance issued by the Health and Safety Executive which includes a useful checklist.
- 5) If a group from the wider community could persuade a local authority that the common house furthers the social well-being or interests of an area, there is a

¹ The Charity Commission website has various useful guidance notes which cover these issues. See, for example: <https://www.gov.uk/government/collections/charitable-purposes-and-public-benefit> and https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/351597/Village_halls.pdf

² The Health and Safety Executive produces useful guidance on these issues, including a checklist: <http://www.hse.gov.uk/voluntary/village-legal.htm>

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risk that an application could be brought to register it as an asset of community value³. This gives local community groups the right to 'pause' any future sale of the asset, so they have time to raise finance to make a bid to buy it. Such registration may of course be seen as a positive step, as it would help to ensure that the facility remains in community use, even if Community Co-housing ceases to exist. It may make it an unattractive proposition to a lender, however, which could be crucial if Community Co-housing is borrowing money to build. We are not aware of any ownership models which would avoid this risk and although there is a statutory exemption for a residence and land connected to a residence where they are owned by a single owner, it would depend on the facts of each case and a common house may not qualify.

- 6) Practical matters will also need to be decided e.g. the times at which the general public is permitted access, security, range of permitted uses, cleaning etc.

Financing

Financing the build costs

There are two main options:

- 1) The build costs could be funded by the residents of Community Co-housing. The build costs could be considered "added value" to each dwelling, calculated on a proportional basis linked to the value of each one, so that each individual pays a bit more for the purchase of their own property. Alternatively, it could be funded by a loan from individual residents to Community Co-housing, repayable on the sale of their property.
- 2) Community Co-housing may obtain a separate bank loan or grant funding for the common house. Any loan would need to be repaid via a service charge to residents or through income generating activities and the bank may insist on the ability to sell the building as a residential home (via a charge over the common house) if the repayments were not met. If they do, they may not permit the common house to be used for community use because of the risk of it being registered as an asset of community value.

Note that VAT is likely to be payable on the build costs. Although new build residential dwellings may be zero-rated for VAT, the common house may not qualify for this

³ For more information about assets of community value, see <http://mycommunity.org.uk/programme/community-asset-ownership/>.

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because it would not be a residential dwelling. Further advice should be taken in each case.

Ongoing financing

There will be various costs associated with running the common house, such as insurance, maintenance, utilities, repairs and the cost of community activities. This could be recovered by including a service charge in leases issued to residents, so that it is payable by all residents. Running costs could also be subsidised by various income-generating activities, such as charges for use by non-residents, electricity generation or renting out rooms, although corporation tax would be payable on any profits.

Planning

When planning permission is granted for a housing site, a local authority usually insists that certain community facilities are also provided by the developer, through what is known as a Section 106 Agreement. Alternatively, they may request a financial contribution towards the cost of such facilities, via the 'Community Infrastructure Levy'. Such facilities could include a common house and we have known local authorities to insist on a 'shared use agreement', setting out how it is to be used. These obligations can be onerous and it underlines the need for co-housing groups to engage with planning authorities at an early stage, so they understand the nature of what a group is trying to do, and hopefully include planning proposals for common facilities which would be realistic for co-housing groups to meet.

The information in this toolkit is intended to highlight some of the legal issues which co-housing groups need to consider when establishing their community. It is not a substitute for taking legal advice. Every co-housing group will have different aims and aspirations and specific legal advice should be sought for specific situations.

Wrigleys Solicitors LLP has been working with co-housing groups since the 1990s. We would be delighted to meet your co-housing group to discuss your plans and offer an initial hour of legal consultation free of charge, to help you get started. Contact laura.moss@wrigleys.co.uk for more information.