

Building Safety Levy

Consultation response

7 February 2023

Summary

The National Housing Federation supports the policy intent of the levy, to contribute to the costs of making all buildings safe. However, in order to minimise the impact of the Building Safety Levy on the supply of affordable homes, we recommend the following measures:

1. The transitional arrangements are structured so that the Building Safety Levy is not payable in relation to developments that had been granted planning permission before the Building Safety Levy is introduced.
2. The following developers should be excluded from paying the levy:
 - Non-profit registered providers of social housing; and
 - Companies that are wholly owned by non-profit registered providers of social housing.

This would be consistent with the exclusion afforded to such entities in relation to the Residential Property Developer Tax.
3. The term 'Client' must be tightly defined, so that there can be no dispute as to the identity of the 'Client' in any given housing development.
4. Homes developed by limited liability partnerships in which a non-profit registered provider of social housing (or its wholly-owned subsidiary) is a member should benefit from a reduced rate of levy, proportionate to the registered provider's share of the limited liability partnership's profits.
5. Affordable housing (as defined by the National Planning Policy Framework) should be excluded from the Building Safety Levy, including affordable homes contributed under planning obligations. Supported housing should also be excluded.
6. There should be a mechanism whereby the Building Safety Levy can be clawed-back in the event that any part of a building in respect of which the levy was paid is subsequently transferred to a registered provider of social housing and used to provide affordable homes.

Response

We write in response to the request for views on the design and implementation of the Building Safety Levy, as set out in the consultation document published on 22 November 2022 by the Department for Levelling Up, Housing and Communities.

The National Housing Federation is the representative trade body for housing associations in England. We are the voice of England's housing associations. Our members provide homes for around six million people, and are driven by a social purpose: providing good quality housing that people can afford. We support housing associations to deliver that social purpose, with ambitious work that leads to positive change.

Our members are non-profit registered providers of social housing, whose activities are overseen by the Regulator of Social Housing (RSH, an executive non-departmental public body, sponsored by the Department for Levelling Up, Housing and Communities). According to the 2022 global accounts of private registered providers, as published by the RSH, registered providers of social housing invested £12.3bn in new housing supply during the year ended 31 March 2022, which included the development of 49,000 social homes. In addition, they invested a record £6.5bn in their existing stock of affordable homes.

Clearly, therefore, registered providers of social housing are critical to the delivery of affordable homes in the UK. This supply of affordable housing is vital as there are currently 8.5 million people in England with some form of unmet housing need. Indeed, housing associations' developments constitute between a quarter and a third of all new homes developed in England every year.

The ability of registered providers to maintain investment at these levels is already being impacted by requirements to meet challenging energy performance and carbon reduction targets in relation to existing housing stock, rising costs of materials, staff and finance, and by the requirement to apply below-inflation increases to rent. It is therefore essential that the Building Safety Levy does not exacerbate financial pressures on registered providers and inhibit the supply of affordable housing at a time when the increase in housing supply, particularly the supply of affordable housing, is a priority of government.

Housing associations are committed to ensuring all homes are safe. Since the tragic fire at Grenfell Tower, housing associations have worked hard to assess safety risks and take urgent action to remediate buildings where needed. Registered providers of social housing are already undertaking significant remediation and mitigation works to buildings that need them, and are planning to do more in the future. The largest housing associations in London are planning to earmark a total of at least £3.6bn for this work over the next 15 years, and across the country housing associations expect to spend more than £10bn on making buildings safe.

We therefore support the broad policy intent of the levy, to contribute to the costs of making all buildings safe. The National Housing Federation is, however, concerned that the levy could, without appropriate safeguards, have a negative impact on the supply of affordable homes.

In the above context, our response to the consultation document is limited to selected questions raised in the consultation document. In preparing our response, we have consulted extensively with our members and with our tax advisers, RSM. We are also grateful for the opportunity to discuss our concerns with the Department for Levelling Up, Housing and Communities.

Question 18: What amount of grace period should be set for projects that have already started the building control process on the date the levy goes live?

It is proposed that, under transitional arrangements, projects that are already at commencement stage on the date the levy goes live will not be subject to the levy, and there will be a grace period for any project that has entered the building control process on the date the levy comes into operation.

In our view, these proposed transitional provisions are inadequate. Our members may be involved in mixed-use developments (eg through joint ventures), which have already been granted planning permission, but which may not enter the building control process until after the Building Safety Levy is introduced. Those developments might be expected to deliver a certain number of affordable homes, but the financial viability of the entire scheme could then be threatened by the imposition of the levy, which would represent an additional cost that could not have been anticipated at the time planning permission was sought.

By way of example, one of our members has a joint venture regeneration scheme where the sale of homes on the open market will finance the demolition and rebuilding of over 250 affordable homes. They highlighted that the scheme has already received planning permission, but if the scheme has not entered the building control process before the Building Safety Levy goes live, the levy is likely to affect the viability of the scheme. If that were the case, the scheme would need to be redesigned and a new planning permission sought, resulting in a delay to the delivery of the scheme and a reduction in the number of affordable homes that are developed.

We therefore recommend that the transitional arrangements are structured so that the Building Safety Levy is not payable in relation to developments that had been granted planning permission before the Building Safety Levy is introduced.

Question 19: What are your views on the above exclusions? Please set out whether you agree or disagree and give reasons for your answers.

For the reasons outlined above, and as explained in more detail below, it is our view that all homes developed by non-profit registered providers of social housing should be outside the scope of the Building Safety Levy, including homes developed by wholly-owned subsidiaries of non-profit registered providers. In addition, homes developed by a partnership in which a non-profit registered provider (or a wholly-owned subsidiary of a non-profit registered provider) is a member should benefit from a reduced rate of levy.

Non-profit registered providers of social housing typically consist of a 'parent' housing association, which undertakes regulated social housing activity, including in particular the development, maintenance and provision of affordable homes.

The parent housing association will often hold investments in commercial subsidiary companies, the activities of which may include the development of homes for sale or rent on the open market. Ultimately, the profits from the development of non-social homes by a registered provider's subsidiary companies will be returned to the housing association (e.g. by way of gift or dividend).

The parent housing association may also hold interests in joint ventures with, for example, commercial housebuilders or local authorities, which might develop homes

of various tenures including homes for sale or rent on the open market. Typically, the joint venture would be established as a limited liability partnership, with a wholly-owned subsidiary of the registered provider being a member of that limited liability partnership. The housing association's share of the profits from the development of non-social housing by the joint venture will again be returned to the housing association.

The profits returned to housing associations as a result of the development of non-social homes by wholly-owned subsidiary companies and joint ventures provides essential funds to enable housing associations to invest in additional affordable homes. The funds play a vital role in 'bridging the gap' between the amount that needs to be spent on affordable housing, on the one hand, and the funding available from government grants and debt, on the other. Indeed, many developments by registered providers of social housing would simply not be financially viable without this 'cross-subsidy' model (where profits from the development of homes for sale or rent on the open market are used to subsidise the development of affordable homes).

It follows, therefore, that the Building Safety Levy, if payable by non-profit registered providers of social housing, their subsidiary companies or joint ventures, would negatively impact the supply of affordable homes at a time when our members are already experiencing intense financial pressures. This would be a clear step in the wrong direction when we know that there are 4.2 million people in England that need access to social rented housing.

It should be noted that none of the surpluses or profits realised by a non-profit housing association or its wholly-owned subsidiary companies can be distributed by the housing association – all such surpluses and profits must ultimately be reinvested in affordable homes.

For the reasons outlined above, it is our view that the following developers should be excluded from paying the Building Safety Levy:

- non-profit registered providers of social housing; and
- companies that are wholly owned by non-profit registered providers of social housing.

It is noteworthy that HM Treasury understood the negative impact that the Residential Property Developer Tax would have on the supply of affordable

housing, if housing associations were to be within its scope. The legislation in relation to the Residential Property Developer Tax, which was introduced by Finance Act 2022, therefore excluded non-profit registered providers and their wholly-owned subsidiary companies from the scope of the tax (see sections 34(3) and 34(4) of Finance Act 2022). We ask that an equivalent exclusion is granted to non-profit registered providers and their wholly-owned subsidiary companies in relation to the Building Safety Levy.

In addition, homes developed by limited liability partnerships in which a non-profit registered provider of social housing (or a wholly-owned subsidiary) is a member should benefit from a reduced rate of levy, proportionate to the non-profit registered provider's share of the limited liability partnership's profits. For example, if a non-profit registered provider (or a wholly-owned subsidiary company) is entitled to 25% of the limited liability partnership's profits, all non-affordable homes developed by the limited liability partnership should benefit from a 25% reduction in the levy (any affordable homes developed by the limited liability partnership should be excluded from the levy – see our response to question 21, below). Any such reduction in the levy could be conditional on the limited liability partnership providing a copy of a signed Members' Agreement at the final certification stage of the proposed payment process, which sets out how the limited liability partnership's profits are to be shared between its members.

Without appropriate safeguards it would in principle be possible for the Members' Agreement to initially state that, say, 75% of the limited liability partnership's profits will be allocated to a non-profit registered provider (which would result in a 75% reduction in the rate of levy), only for the agreement to be amended at a later date and the non-profit registered provider's share of profits reduced to, say, 10%. There will therefore need to be an obligation on the limited liability partnership to pay an additional amount of levy if the non-registered provider's profit share is reduced in future. In order that the profit sharing arrangements can be verified, the Building Control Officer or other person responsible for the final assessment of the levy could be given the power to require a limited liability partnership, which has claimed a reduction in the rate of the levy, to provide copies of its partnership tax returns, as submitted to HM Revenue & Customs (the returns will set out the basis on which the limited liability partnership's profits have been shared between its members).

Supporting evidence

We have gathered evidence and case studies from our members, which illustrate the need for the safeguards referred to above.

Using different scenarios depending on the potential rate of the levy, one of our members calculated that the levy could lead to a reduction of around 30% of the affordable housing that would otherwise be financed through their development of homes for sale on the open market. They assessed that every £500,000 increase in financial contributions could result in the loss of approximately eight affordable homes (for mixed-tenure schemes based on a 60:40 ratio of market sale and affordable units).

Another member highlighted several examples of market-sale schemes that would be impacted by the levy, including three joint venture high-rise buildings, a regeneration scheme, and other larger land-led developments. On all of these developments, all their private sales are used to cross subsidise the delivery of affordable units. The levy would therefore directly reduce their ability to deliver more affordable homes.

They pointed out, if they are subject to this new levy, the vast majority of regeneration schemes would struggle to deliver the required levels of affordable housing within the constraints around funding for replacement homes and increased Infrastructure Levy in many local authorities.

These examples clearly demonstrate that, without a wider exemption, the levy will directly impact the supply of affordable housing in England.

Identity of the 'Client'

It is proposed that the 'Client' will be responsible for payment of the levy. The term 'Client' is (loosely) defined in Annex A of the consultation document as "... any person or organisation for whom a construction project is carried out... The Client may be a company or an individual and may also be the Principal Designer and/or Principal Contractor". According to paragraph 24 of the consultation document, "The Client will usually be the industry/developers carrying out the building works. We consider that as the Client holds responsibility for the construction project, they should also be responsible for payment of the levy."

Large housing developments are often entered into as joint ventures involving multiple parties, such as private landowners, public bodies (eg local authorities), registered providers of social housing and commercial developers. In such situations we envisage it being extremely difficult to apply the above definition in order to identify the 'Client' for the purpose of the Building Safety Levy.

There must be no room for misunderstanding in terms of who a 'Client' is in relation to a housing development, and who is responsible for the levy. This is particularly important if one of the parties to the development is a registered provider of social housing. The parties to the development will need to know with certainty, at the outset, whether the registered provider is the 'Client', and hence is able to benefit from the exemption from the levy. There should be no room for dispute on the matter.

We are therefore of the view that the definition of 'Client' for the purpose of the levy is extremely important, and should be considered very carefully when drafting the regulations so as to leave no room for dispute.

Question 21: Do you agree Affordable Homes should be excluded from payment of the levy? Please give your reasons for your answer.

We agree that the development of affordable homes should be excluded from payment of the Building Safety Levy. The exclusion of affordable homes should be in addition to the exemption for non-profit registered providers of social housing and their wholly-owned subsidiaries (see our response to question 19).

Affordable homes are often developed by commercial housebuilders under 'section 106' planning obligations, and acquired by registered providers of social housing so that they may make the new homes available to those in housing need. In 2021/22, 25,307 affordable homes were delivered under 'section 106' planning obligations, representing 47.3% of all affordable homes, and 12.0% of all homes, developed in England. Clearly, therefore, 'section 106' planning obligations play a vital role in the supply of affordable housing. We are concerned that, if the Building Safety Levy is payable by commercial developers on their development of affordable homes, then they will inevitably seek to recover that additional cost through higher prices for the sale of the completed affordable homes to registered providers of social housing. Developers might also use the levy as a rationale to reduce the number of affordable

homes that are capable of being delivered by a particular scheme.

It is therefore in our view essential that the development of affordable homes, including in particular affordable homes developed under 'section 106' planning obligations, are excluded from payment of the levy.

Defining 'affordable housing'

As far as we are aware, 'affordable housing' does not have a statutory definition and is instead defined primarily through policy and practice. Planning policy is often the main source of definition, while definitions from official targets and funding programmes (such as those administered by Homes England) might also be used. The regulations in relation to the Building Safety Levy might therefore be the first place that the term 'affordable housing' is given legal definition.

Given that it is proposed that the Building Safety Levy will be administered by local authorities, the definition of 'affordable housing' might be taken the National Planning Policy Framework (see 'Annex 2: Glossary' to that document), which includes:

- affordable housing for rent;
- starter homes;
- discounted market sale housing; and
- other affordable routes to home ownership.

Claw-back of levy on change of use

It is not uncommon for registered providers of social housing to acquire completed or partially completed buildings from commercial housebuilders other than under the terms of planning obligations. For example, a commercial housebuilder might have intended to develop homes with a view to selling them on the open market, but due to changes in the economic environment might subsequently decide to sell or lease some or all of the housing units to a registered provider of social housing, which would then use those units as affordable homes.

In these circumstances, the commercial housebuilder would have paid the Building Safety Levy, and would inevitably seek to pass that cost on to the registered provider of social housing through an increase in the purchase price.

To ensure that the Building Safety Levy is not incurred indirectly by registered providers of social housing, we request a mechanism whereby the Building Safety Levy can be clawed-back by the developer in the event that any part of a building in respect of which the levy was paid is subsequently transferred to a registered provider of social housing and used to provide affordable homes.

Question 24: Do you agree supported housing should be excluded from payment of the levy? Please give reasons for your answer.

A number of our members are involved in the provision of supported housing, and are finding it increasingly difficult to maintain their financial viability. Given this, and the clear need to increase the availability of social care in order to relieve pressures on the National Health Service, it seems to us clear that the development of supported housing should be excluded from the Building Safety Levy.

Question 32: Do you consider that we should set a discounted levy rate for the entirety of a development where that development provides a specified proportion or affordable housing?

While we do not consider that a discounted levy rate should necessarily be set for the entirety of a development where that development provides a specified proportion or affordable housing, we do feel that it would be beneficial for a local authority to have the flexibility to reduce the levy rate where doing so would result in more affordable housing.

In some cases, a commercial housebuilder might be capable of developing a particular site in way that delivers sufficient affordable homes to meet the requirements of that location while paying the full amount of the levy on the development of homes for sale on the open market.

In other cases, there might be an acute shortage of affordable homes in a particular area, and the application of a reduced rate of levy on homes built for sale on the open market may enable a commercial housebuilder to deliver a greater proportion of affordable homes than would otherwise be the case.

There is unlikely to be a 'one size fits all'. In our view, it would be beneficial if the Building Safety Levy was flexible enough to enable discounts to be applied to the levy where this would result in more affordable homes to meet local demand.