



Field Fisher Waterhouse

Appendix B White Paper

Proposed Local Authority Scheme for Mortgage
Assistance by way of Guarantee

An Overview of the Legal Issues

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1. The Scheme: An Overview

- 1.1 This White Paper considers the legal issues relating to a proposed scheme (the “**Scheme**”) which a Local Authority¹ could adopt and implement, and under which a Local Authority would give assistance to potential home-buyers to enable them to obtain a mortgage from a commercial mortgage lender. The Scheme is a private sector initiative being put together by [Sector] and a number of major mortgage lenders.
- 1.2 The Scheme is designed to address an issue that many potential home-buyers face. In current economic conditions, the amount which lenders are prepared to lend is typically restricted to a comparatively low percentage of the value of the flat or house to be bought. However, many potential home-buyers do not have the savings needed to cover the difference between the purchase price and the amount that can be lent.
- 1.3 Under the Scheme, if the potential buyer met certain criteria and had been accepted by a lender participating in the Scheme, a Local Authority would provide assistance to the potential buyer in the form of a guarantee² to that buyer’s proposed lender. The amount of the guarantee would be based on the difference between (a) the amount the lender would be prepared to lend (under its usual lending and loan-to-value criteria) and (b) the amount that the potential buyer would need to borrow in order to buy the flat or house in question.
- 1.4 By way of example, take a hypothetical potential buyer, with £10,000 of her own funds wishing to buy a flat valued at £100,000, but where the lender’s policies would only permit a loan of 70% of the flat’s value, ie £70,000. Under the Scheme the local authority would provide a guarantee to the lender for up to £20,000 to allow the lender to lend the potential buyer a total of £90,000.

¹ “Local Authority”, under the Housing Act 1985 (the legislation which would govern an English Local Authority in providing this assistance), means county, county borough, district or London borough councils, the Common Council of the City of London, the Council of the Isles of Scilly, the Broads Authority, joint authorities established by Part 4 of the Local Government Act 1985, joint waste authorities and the London Fire and Emergency Planning Authority. “Local Authority”, under the Housing (Scotland) Acts 1987, 2001 and 2006 (the legislation which would govern a Scottish Local Authority in providing this assistance), means any council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 where section 2 provides that a council shall be constituted for each local government area. This White Paper does not consider Local Authorities in Northern Ireland, the Broads Authority, joint authorities established by Part 4 of the Local Government Act 1985, joint waste authorities or the London Fire and Emergency Planning Authority.

² See part 2 of this White Paper for more detail as to the legal obligations that a Local Authority would be assuming.

- 1.5 Each guarantee would be for a fixed period – a maximum of, say, 5 years. The guarantee could be either unfunded or “cash-backed”. In the latter case, the Local Authority would deposit an amount with the lender, equal to the guarantee sum, for a fixed term. If a sum became payable under the guarantee, the payment of that sum could be effected by an amount equal to that sum being deducted from the deposit.
- 1.6 For both types of guarantee, and assuming no default by the buyer, the guarantee liability would terminate on the earliest of (i) the end of the agreed guarantee period, (ii) an early repayment of the mortgage and (iii) a refinancing of the mortgage with a different lender. In the case of a cash-backed guarantee, the fixed-term deposit would be repaid to the Local Authority (together with interest and, if payments under the guarantee are to be made by way of deductions from the deposit, net of any deductions).
- 1.7 It is expected that the arrangement between a Local Authority and each lender would be an umbrella guarantee, under which the Local Authority would agree to pay an amount (subject to a cap) for each borrower who met the Local Authority’s criteria and who subsequently defaulted on that loan. This would involve the lender, in effect, processing applications and determining whether or not a borrower met these criteria.
- 1.8 This White Paper sets out the legislative framework that would give a Local Authority the power to implement the Scheme. It also provides an outline of the policy and commercial issues that a Local Authority should consider when deciding whether, and how, to implement the Scheme.
- 1.9 Each Local Authority will, in addition to the legislative framework, need to consider how the Scheme would fit within its wider housing, social and other policies and whether the Scheme is consistent with these and appropriate for that Local Authority. Accordingly, nothing in this White Paper should be taken as a recommendation that the Scheme is appropriate for any particular Local Authority.

2. Legislative powers to effect the Scheme

England and Wales

- 2.1 The Housing Act 1985 (as amended) (the “**Act**”) provides the statutory framework for the Scheme. The Act allows Local Authorities to “advance money to a person for the purpose of acquiring a house” (section 435 of the Act (“**Section 435**”)³).
- 2.2 Section 442 of the Act (“**Section 442**”) allows a Local Authority to grant an indemnity to a lender to enable the lender to give a potential buyer⁴ a mortgage. In particular, sub-section (1) states that “a local authority may enter into an agreement with a person or body making an advance on the security of a house ... whereby, in the event of default by the mortgagor, ... the authority binds itself to indemnify the mortgagee in respect of the whole or part of the mortgagor’s outstanding indebtedness”.
- 2.3 In addition, sub-section (1A) of Section 442 requires that the advance has to be for a purpose specified in sub-sections (1) or (1A) of Section 435. The purposes set out in these sub-sections include:
- acquiring a house;
 - constructing a house; and
 - converting an existing building into a house.
- 2.4 The Act specifies that it is an **indemnity** which the Local Authority must give. As a technical point, an indemnity is a “primary obligation” between the lender and the Local Authority, rather than the “secondary obligation” created by a guarantee (in the strict sense of that term). The effect of this is that even if the mortgage is for any reason held to be unenforceable against the borrower, the indemnity will still stand so the lender can always require payment from the Local Authority if the borrower defaults. However, in practice, lender will invariably require that the obligations assumed would be indemnity obligations as well as guarantee obligations, and so this should be of minimal practical difference. Accordingly, where this paper refers to a “guarantee” it is being used generically to cover an instrument whereby one person assumes liability for the debts of another person rather than in the strict legal sense.

³ The full text of Section 435 and Section 442 is set out in the Appendix to this White Paper.

⁴ In this White Paper, we use “buyer” and “borrower” interchangeably to represent the person who will be borrowing the money from a lender in order to buy a house or flat.

- 2.5 In relation to the “cash-backed” guarantees, it should be noted that section 13 of the Local Government Act states that a Local Authority “may not mortgage or charge any of its property as security for money which it has borrowed or otherwise owes”. Any arrangement in relation to the terms of the deposit related to cash-backed guarantees would need to comply with section 13.

Scotland

- 2.6 The statutory framework for the implementation of the Scheme in Scotland is comprised in: the Housing (Scotland) Act 1987 (as amended) (the “**1987 Act**”); and the Housing (Scotland) Act 2006 (the “**2006 Act**”).
- 2.7 Section 214 of the 1987 Act (“**Section 214**”) allows Local Authorities in Scotland to “make advances for the purpose of increasing housing accommodation”.
- 2.8 In terms of Section 214, a Local Authority in Scotland may advance money to any person for the purpose of:
- (a) acquiring a house;
 - (b) constructing a house;
 - (c) converting another building into a house or acquiring another building and converting it into a house;
 - (d) altering, enlarging, repairing or improving a house; or
 - (e) facilitating the repayment by means of the advance of the amount outstanding on a previous loan made for any of the purposes specified above.
- 2.9 The Local Authority may make advances whether or not the houses or buildings are in the Local Authority’s area of operation.
- 2.10 In determining whether to advance money under Section 214, the Local Authority must have regard to any advice which may be given from time to time by the Scottish Ministers.
- 2.11 An advance under Section 214 may be made in addition to assistance given by the Local Authority in respect of the same house under any other Act or any other provision of this Act.
- 2.12 Section 229 of the 1987 Act (“**Section 229**”) allows a Local Authority in Scotland to enter into an agreement with a building society or other recognised body under

which the Local Authority binds itself to indemnify the building society or recognised body in respect of:

- (a) the whole or any part of any outstanding indebtedness of a borrower; and
- (b) loss or expense to the building society or recognised body resulting from the failure of the borrower duly to perform any obligation imposed on him by a heritable security.

In terms Section 229, the term “heritable security” means a standard security, which is a fixed charge over property and is the Scots law equivalent of a legal mortgage.

- 2.13 An agreement entered into pursuant to Section 229 may also, where the borrower is made party to it, enable or require the Local Authority in specified circumstances to take an assignation of the rights and liabilities of the building society or recognised body under the heritable security.
- 2.14 Any agreement entered into pursuant to the terms of Section 229 requires the approval of the Scottish Ministers.
- 2.15 Approval of the Scottish Ministers under subsection Section 229(1) may be given generally in relation to agreements which satisfy specified requirements, or in relation to individual agreements, and with or without conditions, as Scottish Ministers may think fit, and such approval may be withdrawn at any time on one month’s notice.
- 2.16 Before issuing any general approval under Section 229(1), Section 229(4) requires the Scottish Ministers to consult with such bodies as appear to them to be representative of: Local Authorities in Scotland; building societies; and the Financial Services Authority.
- 2.17 In Section 229, the term “building society” is defined as meaning a building society within the meaning of the Building Societies Act 1986.
- 2.18 The term “recognised body” means either: a specific body; or a class or description of bodies designated by order of the Scottish Ministers with the consent of the Treasury. To date, only two such orders have been made, designating only 9 entities as recognised bodies.
- 2.19 Accordingly, the scope of Section 229 is limited and only allows Local Authorities in Scotland to grant indemnities in favour of either a building society or one of the “recognised bodies” referred to above.

- 2.20 Section 71 of the 2006 Act ("**Section 71**") makes further provision for assistance by Local Authorities in Scotland for housing purposes. Section 71(1) provides that a Local Authority may provide or arrange for "the provision of assistance to a person in connection with the acquisition or sale (or the proposed acquisition or sale) of a house".
- 2.21 Section 71(3) provides that "assistance" in terms of Section 71(1) may "in particular" be in the form of guaranteeing or joining in guaranteeing the payment of the principal of, and interest on, money borrowed by the person (including money borrowed by the issue of loan capital).
- 2.22 Section 71(3) does not expressly include a reference to assistance by way of the grant of indemnities. However, the inclusion of the words "in particular" in Section 71(3) would appear to indicate that the list of forms of assistance set out in Section 71(3) is not prescriptive and that other forms of assistance under Section 71(3) may be provided.
- 2.23 However, it is relevant in this regard to consider the terms of the Housing (Scotland) Act 2001 (the "**2001 Act**"). Section 92 of the 2001 Act ("**Section 92**") gives Local Authorities powers to provide assistance to registered social landlords or other persons concerned with the provision of housing.
- 2.24 Section 92(4) provides that the forms of assistance which may be provided under Section 92 include: guaranteeing or joining in guaranteeing the payment of the principal of, and interest on, money borrowed by the landlord or person (including money borrowed by the issue of loan capital) (Section 92(4)(c)); and granting indemnities Section 92(4)(d)). Section 92 of the 2001 Act therefore draws a distinction between the giving of a "guarantee" and the granting of an "indemnity".

It is also relevant to consider the terms of Section 92(3) of the 2001 Act, which made provision for Local Authorities to assist individuals in connection with the acquisition of housing accommodation. Section 92(6) provided that assistance under Section 92(3) may "in particular" include guaranteeing or joining in guaranteeing the payment of the principal of, and interest on, money borrowed by the individual (including money borrowed by the issue of loan capital). Section 92(6) made no express reference to the granting of indemnities, although it would be reasonable to infer from the inclusion of the words "in particular" in that Section that the list of forms of assistance set out in Section 92(6) was not prescriptive and that other forms of assistance under Section 92(3) may have been provided.

The 2006 Act repealed Section 92(3) and Section 92(6), which have been replaced by the terms of Section 71. The terms of Section 92(3) were very similar to the terms of Section 71 and, in interpreting the scope of a Local Authority's

powers under Section 71, the terms of Section 92(2) (which remains in force) and Section 92(3) may be of relevance.

On balance, the terms of Section 71 are considered to be drafted in such a way as to allow Local Authorities in Scotland the power to grant the kind of guarantees contemplated by the Scheme, although it would be prudent to discuss matters with Scottish Ministers at an early opportunity in order to determine whether they had any particular views on the interpretation of Section 71 and the nature and extent of the powers granted to Local Authorities thereunder.

- 2.25 Section 71(4) provides that assistance under Section 71 may be provided on such terms as the Local Authority thinks fit (subject to any provision about such terms made by or under the 2006 Act).
- 2.26 Section 71(6) provides that the Scottish Ministers may by regulations make further provision about the provision of assistance under Section 71(1). To date, certain regulations have been implemented but these do not affect the proposals set out in this paper in relation to the Scheme.
- 2.27 Section 73 of the 2006 Act provides that a Local Authority must prepare and make publicly available a statement of the criteria by reference to which it determines whether to provide assistance under Section 71(1) in particular types of case and the form of the assistance. Such a statement may make different provision for different cases and the Local Authority may revise or replace such a statement from time to time.
- 2.28 The provisions of Section 71 afford Local Authorities in Scotland significantly greater flexibility as to the exercise of their powers than the provisions in Section 229. Accordingly, in implementing the Scheme in Scotland, there would be considerable advantage in using the terms of Section 71 of the 2006 Act as a basis for implementation of the Scheme rather than Section 229 of the 1987 Act.
- 2.29 The distinction between the terms "indemnity" and "guarantee" under Scots law is largely identical to the distinction between the two terms under English law.

In this paper, the term "guarantee" is being used generically to cover an instrument whereby one person assumes liability for the debts of another person rather than in the strict legal sense. As has been noted earlier in this paper, in practice, a private lender will invariably require that the obligations assumed would be indemnity obligations as well as guarantee obligations, and so this should be of minimal practical difference.

- 2.30 In relation to the “cash-backed” guarantees, although there is no provision of Scots law that explicitly prohibits the creation of security over the deposit, Schedule 3 of the Local Government (Scotland) Act provides that all monies borrowed by a Local Authority in Scotland must be secured on the whole funds, rates and revenues of the Local Authority and not otherwise. Accordingly, it would not be possible for security to be created over the deposit and any arrangement in relation to the terms of the deposit related to cash-backed guarantees would need to comply with Schedule 3.

Registrations

- 2.31 The Scheme would not require most Local Authorities to be registered under the Financial Services and Markets Act 2000⁵ with the Financial Services Authority or licensed under the Consumer Credit Act 1974⁶ with the Office of Fair Trading (“OFT”).

Conclusion

- 2.32 Sections 435 and 442 give Local Authorities in England and Wales the power to grant the kind of guarantees contemplated by the Scheme. Section 71 gives Local Authorities in Scotland the power to grant the kind of guarantees contemplated by the Scheme. What follows in Part 3 of this White Paper is how a Local Authority would utilise Section 442 or Section 71 (as the case may be) to decide whether, and how, to implement the Scheme.

⁵ The exemption for the registration requirements of the Financial Services and Markets Act covers Local Authorities that are county, county borough, district or London borough councils, the Common Council of the City of London, the Council of the Isles of Scilly, parish councils and community councils.

⁶ The exemption from the licensing requirements of the Consumer Credit Act covers Local Authorities that are county, county borough, district or London borough councils, the Common Council of the City of London and the Council of the Isles of Scilly.

3. Creating the policy

3.1 How do Local Authorities in England and Wales make use of Section 442?

3.1.1 The Act does not specify how Local Authorities should make use of Section 442. Each Local Authority will have its own constitution and its own ways of working. However, the following considerations need to be taken into account.

3.1.2 Housing strategies exist at national, regional and local levels. Consider how the Scheme fits in with existing national, regional and local housing strategies.

3.1.3 If Section 442 is intended to be used to adopt the Scheme, then it should be adopted by the Local Authority as a policy within the wider policy and budgetary framework – either as part of the Local Authority's housing strategy or as a sub-strategy. The policy could include statements about:

- how the policy will contribute towards the fulfilment of the Local Authority's strategic aims, objectives and priorities;
- how the policy will contribute towards the fulfilment of the Local Authority's housing strategy and any other relevant corporate strategies;
- the key priorities which the policy will address and the reasons for selecting them;
- the amount of capital resources that will be committed to implementing the policy and how this is budgeted for;
- a description of the types of assistance available, what the assistance will be used for, and what key outcomes will be achieved by each form of assistance;
- the circumstances in which people will be eligible for assistance;
- the amounts of assistance that will be available to eligible people, and how these amounts will be determined;
- the types and amounts of preliminary or ancillary fees and charges associated with the provision of assistance that will be payable and in what circumstances;
- the process to be used to apply for assistance;

- how people can obtain access to the process of applying for assistance;
- details of conditions that will apply to the provision of assistance;
- how conditions will be enforced and in what circumstances they may be waived;
- advice that is available, including financial advice, to assist people wishing to enquire about, and apply for, assistance;
- the arrangements for complaints about the policy and its implementation;
- the arrangements for applications for assistance to be considered where these fall outside policy;
- key service standards that will apply to the provision of assistance;
- a policy implementation plan;
- national and local performance indicators that are relevant to the policy and the targets that the Local Authority has set itself to improve performance;
- how (or if) the Scheme will be promoted or publicised;
- what information will be provided in the promotion of the Scheme;
- what training is needed for Local Authority employees and other agencies involved in implementing the Scheme.

3.1.4 A report (which includes a copy of the full policy document and the necessary budgetary details) should then be formally presented and adopted by the Local Authority according to its normal procedures for such matters.

3.1.5 Local Authorities should advise members of the public that they have adopted a policy. For example, Local Authorities may wish to publish the policy on their website. After publication a copy of the full policy should be available for public inspection. Copies could also be available through local Citizens Advice Bureaux, public libraries and sent to all partner organisations.

3.1.6 Once put into use, there will need to be regular monitoring of progress against performance targets, and broader aims and objectives.

3.1.7 Local Authorities will also want to be clear about who has the authority to exercise the power set out in Section 442. Depending on its constitution, the Local Authority may want to do this by way of a scheme of delegation. A scheme of delegation is a tool that can be used to specify which officers have authority to exercise certain powers on behalf of the Local Authority.

3.1.8 In the case of Section 442, the authority to decide whether to grant a mortgage guarantee is likely to be delegated to the chief housing officer. However in practice the Local Authority's finance department will also need to be involved in this process – both in designing and implementing the policy, in budgeting for implementation of the policy and in ensuring that relevant accounting practices are adhered to.⁷

3.2 Policy content

3.2.1 To the extent that the policy and budgetary framework has been correctly implemented in accordance with the provisions set out above, there are a number of policy and budget decisions that each Local Authority may make surrounding its implementation of the Scheme.

3.2.2 For policy decisions regarding this Scheme, there is no statutory authority available, so it is for each Local Authority to decide what they consider most appropriate for their boundary area. Here are some examples of policy considerations a Local Authority might face:

(a) Time limit, profit share and right of first refusal

(i) There is currently legislation in force for English and Welsh Local Authorities (under the Act) which, amongst other things, restricts home-owners who have bought their council home under a "Right to Buy" scheme from selling it within a specified time period without offering the house at full market value to the council landlord.

(ii) Whilst the Scheme is not a "Right to Buy" scheme, as a matter of policy – for Local Authorities in England, Wales and Scotland – it may be appropriate to consider whether any exploitation of this Scheme, which would give buyers financial benefit over and above owning their own home, should be restricted by placing a right of first refusal of sale or profit share option or suchlike for the benefit

⁷ See, for example, the accounting rules set out in the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003/3146 and the Local Authorities (Capital Finance and Accounting) (Wales) Regulations 2003/3239.

of the Local Authority. Such a right could, for example, be exercisable only during the life of the guarantee.

(b) Criteria for eligibility

A Local Authority is not restricted by law as to what should be included in their eligibility criteria for the borrowers applying for assistance from the Scheme.

- 3.3 How do Local Authorities in Scotland make use of Section 71?
- 3.3.1 The 2006 Act does not specify how Local Authorities in Scotland should make use of Section 71. Indeed, Section 71(4) provides that assistance under Section 71 may be provided on such terms as the Local Authority thinks fit (subject to any provision about such terms made by or under the 2006 Act).
- 3.3.2 However, Scottish Ministers have issued initial guidance in relation to the provision of assistance by Local Authorities in terms of Section 71 (“Implementing the Housing (Scotland) Act 2006: Statutory Guidance for Local Authorities: Volume 5 Scheme of Assistance”) (the “**Guidance**”).
- 3.3.3 Although such guidance is framed in a relatively general way, there are a range of considerations which must be taken into account in relation to implementation of the Scheme in Scotland.
- 3.3.4 Local Authorities in Scotland need to plan for the provision of assistance in terms of Section 71. Such plans need to be consistent with those dealing with enforcement provisions and with the wider Local Housing Strategy of the Local Authority.
- 3.3.5 Plans relating to the provision of assistance in terms of Section 71 should be subject to public consultation before implementation.
- 3.3.6 Information, advice and practical assistance represent fundamental tools to reach more owners than has historically been the case prior to the inception of the 2006 Act. The Guidance notes that such tools are highly cost effective and should be used proactively as well as reactively to drive a change in attitudes towards the role of the state in maintaining the condition of private households.
- 3.3.7 Local Authorities should consider providing access to assistance under Section 71 through a “One Stop Shop” (“**OSS**”) model. The OSS should be able to assist potential recipients of assistance with all initial enquiries and should facilitate applications for financial assistance.

- 3.3.8 Local Authorities should make decisions on the use of their powers to provide assistance as part of their wider strategic responsibilities on house conditions. They should ensure that they use resources in the most appropriate way to improve access to housing, taking into account the circumstances of each case.
- 3.3.9 Assistance under Section 71 should be targeted at those in most need.
- 3.4 OFT sub-prime lending guidance
- 3.4.1 Whilst a Local Authority is not required to hold a Consumer Credit licence to issue the guarantees contemplated by this Scheme, there is OFT guidance on non-status lending⁸ which we suggest that a Local Authority should consider in connection with the implementation of the Scheme – in particular around the means of publicising the Scheme and the criteria for eligibility.
- 3.4.2 “Non-status” is defined by the OFT as “those with impaired or low credit ratings and who would find it difficult generally to obtain finance from traditional sources on normal terms and conditions.” It may well be that some potential buyers who would be assisted by the Scheme fall within this definition.

⁸ This guidance is contained in a 1997 publication “Non-status Lending: Guidelines for lenders and brokers” (OFT 192) at http://www.offt.gov.uk/shared_offt/reports/consumer_credit/oft192v2.pdf. In the light of current economic conditions, the OFT has refocused its attention on sub-prime / non-status lending. The Financial Services Authority has also been reviewing the regulatory framework for the mortgages, including issues relating to applicants’ ability to meet repayments. This regulatory environment would need to be considered by Local Authorities, especially if there is a risk that the Scheme could be seen as encouraging borrowers to incur excessive indebtedness.

4. Commercial Considerations

4.1 Overview of Commercial Considerations

In deciding whether, and how, to implement the Scheme, a Local Authority should consider the following commercial issues:

- the amount of potential losses if a buyer defaults;
- the time at which the lender could require payment under the guarantee;
- the likelihood of recovering losses from a buyer;
- what fee (if any) the Local Authority would look for from a buyer;
- other issues relating to cash-backed guarantees.

4.2 Potential Losses and Timing

4.2.1 The maximum amount that a Local Authority could be required to pay under a guarantee will be set out in the guarantee.

4.2.2 For cash-backed guarantees, it is likely that the maximum amount payable will be the amount of the deposit placed with the lender plus any accrued interest on that sum.

4.2.3 It is anticipated that lenders will accept that demands may only be made once the mortgage has been enforced and the house or flat sold, and so the guarantee should cover just the shortfall between the amount lent and the amount recovered by the lender from the sale of the borrower's home.

4.3 Recovery from Borrowers

4.3.1 A Local Authority would need to consider that it may be unlikely to be able to recover from the borrower amounts paid under the guarantee. It would be possible to include in the documents to be signed by the borrower an undertaking to repay the Local Authority, if a demand is made under the guarantee. This could be supported by a second charge over the borrower's home.

4.3.2 However, the Local Authority would need to accept that the borrower is unlikely to be able to make such a repayment in a default situation – and the guarantee may anyway include a restriction on the Local Authority from seeking to be repaid if the lender has not been repaid in full or if there are still amounts owed under the loan.

4.4 Fee Payable by Borrower

4.4.1 There is nothing in the Act that specifically restricts Local Authorities from charging a fee for issuing guarantees.

4.4.2 However, a Local Authority would presumably need to consider what would be an appropriate level for such a fee and also the extent to which a fee would be compatible with the policy reasons for adopting the Scheme.

4.5 Cash-backed Guarantees

4.5.1 In addition to the issues relating to both types of guarantee under consideration, placing funds on deposit to secure the potential liabilities under a guarantee would give rise to the additional considerations.

4.5.2 The Local Authority would be exposed to the creditworthiness of the lender, in that the lender's obligation to repay the deposit would be an unsecured obligation, the same as an ordinary, fixed-term deposit (except that the Local Authority would presumably not be able to withdraw that deposit, even if it was prepared to incur the necessary costs involved in breaking a fixed-term deposit).

4.5.3 The Local Authority would also need to consider if placing funds on a fixed-term deposit, with the lender in question, was compatible with its overall investment policies.

is paper is for information purposes only and is not a substitute for detailed legal advice on specific transactions and should not be taken as providing legal advice on the topics discussed nor should it be taken as creating a specific solicitor-client relationship between the reader and Field Fisher Waterhouse LLP. The advice on matters of Scots law has been provided by an independent law firm and has not been separately verified by Field Fisher Waterhouse LLP.

Appendix

Housing Act 1985

Section 435. Power of local authorities to advance money.

- (1) A local authority may advance money to a person for the purpose of:
- (a) acquiring a house,
 - (b) constructing a house,
 - (c) converting another building into a house or acquiring another building and converting it into a house, [...]
 - (d) [...]

or for the purpose of facilitating the repayment of an amount outstanding on a previous loan made for any of those purposes.

- [(1A) A local authority which is not a local housing authority may advance money to a person:
- (a) for the purpose of altering, enlarging, repairing or improving a house, or
 - (b) for the purpose of facilitating the repayment of an amount outstanding on a previous loan made for any of those purposes.]
- (2) The authority may make an advance notwithstanding that it is intended that some part of the premises will be used, or continue to be used, otherwise than as a dwelling if it appears to the authority that the principal effect of making the advance would be to meet the applicant's housing needs; and in such a case the premises shall be treated as a building to be converted into a house.
- (3) The authority may make advances whether or not the houses or buildings are in the authority's area.
- (4) An advance may be made in addition to assistance given by the authority in respect of the same house under any other Act or any other provision of this Act.

Section 442. Agreement by local authority to indemnify mortgagee

- (1) A local authority may enter into an agreement with a person or body making an advance on the security of a house (or a building to be converted into a house) whereby, in the event of default by the mortgagor, and in the circumstances and subject to conditions specified in the agreement, the authority binds itself to indemnify the mortgagee in respect of the whole or part of the mortgagor's outstanding indebtedness and any loss or expense falling on the mortgagee in consequence of the mortgagor's default.
- (1A) The local authority may only enter into the agreement if the advance is for one or more of the purposes specified in subsection (1) or (1A) of section 435; and subsections (2) to (4) of that section apply in relation to power to enter into such an agreement as they apply to the power to make an advance under that section.
- (2) The agreement may also, if the mortgagor is made party to it, enable or require the authority in specified circumstances to take a transfer of the mortgage and assume rights and liabilities under it, the mortgagee being then discharged in respect of them.
- (3) The transfer may be made to take effect:
 - (a) on terms provided for by the agreement (including terms involving the substitution of a new mortgage agreement or modification of the existing one), and
 - (b) so that the authority is treated as acquiring (for and in relation to the purposes of the mortgage) the benefit and burden of all preceding acts, omissions and events.