

Commonhold as default tenure – Issues for developers

On 3 March 2025 the government published a White Paper on its proposed new commonhold model for homeownership in England and Wales. The White Paper confirms the commitment of the government to make commonhold the default tenure for new residential blocks. To this end the government will be consulting later this year on the best approach to banning new leasehold flats and will be seeking the views of the property industry and consumers on where exceptions should apply. The Housing Minister, Matthew Pennycook, has promised to introduce these reforms within the life of this Parliament.

The White Paper has been published ahead of the draft legislation, which will follow in the second half of this year, with a view to increasing understanding of how the commonhold model will evolve and what the new commonhold model will look like. The White Paper sets out the government's responses to the recommendations made by the Law Commission in its "Reinvigorating Commonhold" report issued in July 2020. However, the White Paper indicates that the government has not finalised its thinking and highlights a number of areas which remain unresolved, so there is an opportunity for the property industry to influence how the new model will work.

KEY FEATURES OF COMMONHOLD

Commonhold allows the residents of a building to own the freehold of their individual flat (called a "unit") and to manage (or appoint someone to manage) the shared areas through a company known as the "commonhold association". When a new development is registered as commonhold the commonhold association, which takes the form of a limited company, is set up by the developer. The units are individually registered and owned by the developer initially before being transferred to the unit owners, who will automatically become members of the commonhold association. The governing framework for the commonhold association is the known as the "commonhold

community statement" (also known as the rulebook) that defines the rights, responsibilities and rules for all the unit owners. The template of the rulebook is set out in the legislative framework although local rules can be added for individual blocks or developments.

FLAWS IN THE CURRENT SYSTEM

The government acknowledges that the original 2002 legislation was not fit for purpose and the current system of commonhold suffers from a "combination of limitations and flaws" that has made it less flexible than leasehold and harder to utilise, in particular, in larger mixed-use sites. One major flaw is that shared ownership tenure is not accommodated by the current system. This has resulted in fewer than 20 developments being built comprising fewer than 200 units since the system came into operation in 2004. The Law Commission's 2020 report made 121 recommendations of which 102 related to new developments and 10 related to the conversion of existing leasehold properties to commonhold. In this briefing we will concentrate on the proposed reforms relating to new developments.

INCREASED FLEXIBILITY FOR NEW DEVELOPMENTS

Adopting the Law Commission's recommendations the following new flexibilities will be incorporated into the commonhold system so that it is no longer "one-size-fits-all" and will be able to cater for the complexities of large mixed-use developments:

- enable commonholds to be tailored for mixed-use developments, by using "sections" that will allow only unit owners within those sections to vote on matters affecting those sections which could obviously be used to differentiate commercial units from residential units. It is proposed that the sections can be created at the outset by the developer or, later, on conversion or by the commonhold association (where 75% of all votes held by the unit owners have

agreed). The paper contains some guidance on the qualifying criteria for the sections with the detail to be set out in the draft legislation;

- providing for separate heads of costs to be allocated between different unit owners according to usage of services, such as gym facilities only used by residential units or a loading bay only used by commercial units. A Code of Practice on the allocation of costs may be provided to help developers get allocations right at the outset and minimise disputes later on;
- accommodate shared ownership leases and home purchase plans in commonhold which will not be subject to the ban on new leaseholds. Shared owners will be able to exercise all voting rights associated with the unit (apart from on a decision to terminate the commonhold) and will be expected to comply with the rulebook;
- enable developers to build new commonholds in phases by expanding the development rights to include such rights as they deem necessary for completion and sale of units on the site. However, these rights will be potentially fettered by safeguards to buyers in circumstances where there is a concern that the rights are not being exercised in appropriate ways such as where there is an unreasonable interference with the rights of the unit owners; and
- clarifying the procedure for handover of the site from the developer to the unit owners so that control will pass to the owners once more than 50% of the units have been sold. Certain anti-avoidance measures are also proposed such as ensuring that the developer does not take powers of attorney from buyers of units or attempt to control how unit owners vote by inserting terms in purchase contracts.
- introducing a right for unit owners to challenge amendments to the rulebook;
- introducing annual elections for directors and giving commonholds a power to replace existing directors in cases of mis-management;
- allowing for the appointment of professional directors where the commonhold association is unable to do so due to lack of willing unit owners;
- requiring the commonhold's budget to be subject to a yearly vote before it can be passed instead of being set by the directors;
- provide that every commonhold must maintain a reserve or sinking fund towards future repairs, which will allow the cost of major works to be budgeted for over the years and will reduce the risk of large and unexpected bills, and provide new flexibility on borrowing from or redesignating a reserve fund; and
- introducing a new right, exercisable within 6 months of the unit owners gaining effective control (meaning here having 75% of the available voting rights), for a commonhold association to cancel a long-term contract which has been entered into by the developer or by the association when controlled by the developer. (This may have consequences for district heat and decentralised energy schemes.)

COMMONHOLD RULEBOOK CHANGES

In addition, the reforms recommended by the Law Commission to the commonhold rulebook have been accepted by the government the most notable of which are as follows:

- raising the threshold for changes to the rulebook from a simple majority of 50% to 75%;

IMPLICATIONS FOR DEVELOPERS – WHAT TO DO NOW

The government accepts that the general public's understanding of commonhold is currently limited and that it is proposing a significant change of market practice. Whilst there seems to be little doubt as to the determination of the current government to make commonhold the default tenure for new residential blocks there is a concern that the changes will introduce uncertainty and disruption to new housing supply. Accordingly, the forthcoming consultation on the draft legislation and the ban on new leasehold flats will invite the views of the property industry on whether there are circumstances where leasehold tenure will still be justified.

It is interesting to note that the White Paper expresses the hope that commonhold might even become an attractive tenure for commercial units, such as retail and industrial estates and shopping

centres, but the commercial property sector is far more sanguine about leasehold and seems unlikely to welcome any potential disruption.

Developers should therefore familiarise themselves with these proposals. There is a window of opportunity to influence the government's plans for commonhold. Whilst developers of residential estates have in the last couple of years embraced the right to manage company as a workable exit strategy following the sale of units within a development, the proposed commonhold model will present a number of challenges which need early consideration.

The following challenges will, in due course, need to be addressed by developers:

- setting up the commonhold association at an early stage in the development programme;
- anticipating at what stage in the development programme control of the association is likely to be lost and assess whether this will have any prejudicial effect on their ability to develop and sell the remainder of the development;
- considering how to discharge their management responsibilities in running the commonhold association whilst they remain in control of the association;
- making sure that sufficient development rights are reserved to enable a phased development programme and potential changes in the design of the development; and
- considering how sales of affordable, PRS and commercial units will be catered for and planning the sections that each of these tenures will be allocated within the association.

All these challenges will need careful thought and early engagement with professional advisers who are up-to-speed with the proposed changes. It will be important for developers to engage with the forthcoming consultation process to ensure that the new model is fully fit-for-purpose.

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This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.