



All-Party Parliamentary Group on Leasehold & Commonhold Reform

Response to consultation

Department for Communities and Local Government - July 2017

Tackling unfair practices in the leasehold market

Compiled by the APPG secretariat
Leasehold Knowledge Partnership in collaboration with APPG co. Chairs

Sir Peter Bottomley MP
Sir Edward Davey MP
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The All-Party Parliamentary Group on Leasehold & Commonhold Reform (APPG) responses to the Department for Communities and Local Government (DCLG) Consultation “Tackling unfair practices in the leasehold market”

The Government’s press release describes this project as a “**Crackdown on unfair leasehold practices**”

www.gov.uk/government/consultations/tackling-unfair-practices-in-the-leasehold-market

Introduction

Leaseholders have been abused, are being abused and will continue to be abused unless there are steps to prevent and penalise unfair treatment.

Some leaseholders of houses and of flats now have properties which are virtually un-saleable due to their lease terms. Recent attention to punitive ground rent provisions have illustrated the damaging disadvantage to which leaseholders have been subjected, for far too long.

The APPG (113 members) has heard views from the main political Parties and invited speakers, including those who presented to the APPG since its formation (2016) and previously at round table meetings held in Parliament (2014-2015). Almost overwhelming, the submissions have been that change to our feudal leasehold laws and regulations within the leasehold sector, including proper implementation of commonhold, is urgently needed.

The House of Commons library makes extensive reference to the work of the APPG in their Commons briefing paper ‘Leasehold and commonhold reform’¹. We would ask you to read the briefing paper and our interim report² as integral parts of this response.

Members of Parliament involved in the APPG pay public tribute to the charity, Leasehold Knowledge Partnership (LKP) and its Trustees, Martin Boyd with Sebastian O’Kelly, and Katherine O’ Riordan (Senior Parliamentary Assistant to Sir Peter Bottomley MP).

LKP have helped hundreds of leaseholders keep their homes and continue to do so with very limited resources.

There is a question not asked in the consultation:

Why has it taken so long for parliament, the civil-service advisers to ministers and government to stop the leasehold situation getting worse and to start dealing with the historic issues, which have been and are in plain sight?

QUESTIONS

¹ researchbriefings.files.parliament.uk/documents/CBP-8047/CBP-8047.pdf

² <https://www.leaseholdknowledge.com/wp-content/uploads/2017/04/AllPartyParliamentaryGroupLeaseholdReportApril27.pdf>

Q1: Are you responding as (please tick one):

A1: The All-Party Group on Leasehold and Commonhold Reform (APPG):

APPG objectives:

- To consider ways in which leasehold and commonhold legislation and regulation might be improved.
- To examine elements of current legislation and regulation which are seen as defective.
- To look at ways to reduce the opportunities for exploitation and ways to alleviate the distress and hardship faced by some leaseholders, particularly the more vulnerable and elderly leaseholder.
- To consider how the current cost imbalance at the leasehold property Tribunal might be addressed, how the Tribunal might be developed for use under revised commonhold legislation and how it might return to parliament's original intention as a low cost forum for disputes and redress.
- To consider and to make known objectionable and unacceptable behaviour in the sector.
- To consider those matters in leasehold insurance and service charge funds which currently fall outside the regulatory framework of the FCA.
- To consider the different issues faced in the private sector and in the social sectors.
- To liaise with and monitor the actions of the various government departments dealing with leasehold and commonhold issues along with the activities of publicly funded bodies working in this area.
- To review commonhold legislation to explore how to better implement this form of tenure so it works as parliament intended.

Q2: If you are responding as a private individual:

A2: N/A

Q3: If you are responding on behalf of an organisation, is the interest of your organisation as (tick all that apply):

A3: The APPG seeks to represent all interests and all parties on this issue. Over a number of years it has taken input from the broadest range of sources within the leasehold sector. Professionals including developers, landlords, managing agents, surveyors, trade bodies, academics, lawyers, the judiciary, government bodies, regulators and leaseholders have attended and/or spoken at APPG meetings and attended individual meetings with APPG co Chairs and APPG secretariat.

Q4: Please enter the first part of the postcode in England in which your activities (or your members' activities) are principally located (or specify areas in the box provided):

A4: England.

The APPG welcomes its new members from Welsh constituencies and understands that government has accepted that part of the legislation under this consultation applies to Wales.

Since this advice only came late in the consultation we hope that DCLG will continue to take input on those issues which impact Wales which continue to be administered via Westminster.

We urge DCLG to work in collaboration with the Welsh Government Assembly.

Q5: What steps should the Government take to limit the sale of new build leasehold houses?

A5: There would be merit in requiring such developments to migrate to an effective revised commonhold, now under consideration as part of the longer-term goals of the government.

The Land Registry data analysis by LKP shows that there has been a rapid growth in the sale of leasehold houses in recent years³ The APPG has seen little evidence to justify this change in commercial terms. We are aware of the detailed arguments now being put forward which suggest that there is a need to sell leasehold housing as the only way to manage a modern estate.

Freehold estates have existed for many decades. The question which should be asked is what has changed? If there were a generic need to sell houses as leaseholds then why is the growth of this form of tenure focused primarily in the North West?

As part of this consultation we are aware that the government has already been provided with expert legal opinion suggesting that existing rent charge schemes on freehold housing to cover estate costs is a perfectly workable solution. We understand that it is suggested that s.159 of the Commonhold and Leasehold Reform Act 2002 might be reviewed and extended to ensure that freehold covenant schemes work effectively.

We also note in our report the work of the Law Commission in 2011⁴ as a means of addressing some of the arguments on the current difficulties of enforcing positive covenants on freehold houses, and how these difficulties may be overcome.

We see little if any persuasive argument for selling leasehold houses in either the private or social sector. The only exceptions might be some community development schemes.

The APPG is aware of the Civil Justice Council (CJC)⁵ responses to this consultation and welcomes most of their comments. The APPG will be raising questions with the CJC regarding some of their factual submissions. Particular attention will be drawn to leasehold houses being purportedly sold for a lower price than freehold, and as a result leaseholders benefit.

There is no significant views from academics or data available to evidence this.

³ <https://www.leaseholdknowledge.com/last-year-64-8bn-leasehold-properties-sold-13-7bn-new-build-developers-make-300-500-million-year-freehold-sales>

⁴ <https://www.lawcom.gov.uk/project/easements-covenants-and-profits-a-prendre>

⁵ <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-response-on-tackling-unfair-practices-in-the-leasehold-market.pdf>

Q6: What reasons are there that houses should be sold as leasehold other than under the exceptions set out in paragraph 3.2?

A6: We accept that currently there may be a need for leases or commonhold in shared ownership sites. The development of commonhold would result in greater long-term benefit.

Other than in very exceptional circumstances it seems hard to justify selling long leasehold, simply to retain control of the land. The justification given is so that the owner has the option to re-develop at some unknown future date. If the land owner wishes to take this approach, they should build to rent instead.

(We have many protections, which allow for the circumstance where compulsory purchase is necessary.)

Q7: Are any of the exceptions listed in 3.2 not justified? Please explain.

A7: We see no evidence to justify the building of new leasehold houses, even if it is accepted that certain restrictions should apply to certain sites. Where freehold is available, it should be sold as freehold, either to an individual, or to the shared freeholders.

In the circumstances of charities, the government should perhaps consider whether it is equitable to preclude the right of enfranchisement while requiring leaseholders to pay large sums to extend their lease.

The APPG suggests a limited consultation on this matter. The APPG is happy to assist with the design.

Q8: Would limiting the sale of new build leasehold houses affect the supply of new build homes? Please explain.

A8: If current land prices are impacted by the potential additional incomes available from ground rents, those prices would rapidly change if ground rents were precluded.

Jolyon Harrison, CEO of MJ Gleeson Plc, (who build in the more affordable part of the market), made submissions during an APPG meeting, 11th September 2017⁶ that there is no justifiable reason for selling leasehold houses. Conversely, Clive Fenton, CEO at McCarthy & Stone argued unconvincingly in The Times⁷ (7th September 2017) that cutting ground rents “*means fewer flats*”.

⁶ <https://www.leaseholdknowledge.com/appg-tells-mps-ban-ground-rents-introduce-commonhold-summons-housebuilders-select-committee-end-rip-off-leasehold-permission-fees-managed-estates>

⁷ <https://www.thetimes.co.uk/article/ground-rent-cut-means-fewer-flats-c70hw02w5>

The APPG's interim report (April 2017)⁸ found there seems little direct evidence that offering leasehold houses results in lower costs to home buyers.

The evidence does show that overall leasehold houses cost slightly less than freehold homes but this seems more of a reflection of the area where the homes are built. The Land Registry data from (2016) as referenced in the APPG report, indicates that in 4 out of the top 5 areas in England where leasehold houses are sold, the cost of the leasehold houses were on average, higher than freehold.

We are aware that some developers will state that their current land purchases are predicated on the presumption they will be able to generate extra revenue by selling-on their ground rent incomes.

No developer has been willing, nor do we think able to provide specific evidence that ground rent income streams are needed to make a development viable.

If an argument were to be made about the need to keep these income streams in the short term it would fall away if the government restricts ground rents.

Q9: Should the Government move towards removing support for the sale of new build leasehold houses through Help to Buy Equity Loan, unless leasehold can be justified and where ground rents are reasonable (which could be a nominal or peppercorn ground rent), and if not, why not?

A9: Over many decades government should have had timely evidence concerning onerous lease terms.

During the APPG meeting (December 2016) attended by government officials, submissions were made on potential abuses under the Help to Buy Equity scheme. From anecdotal evidence presented to the meeting it was also suggested that the use of Help to Buy loans on leasehold houses may be damaging the second hand market.

Some of the lenders have provided evidence that a substantial number of leasehold houses (and also flats) may now be blighted by onerous lease terms.

Figures to be announced at the next APPG meeting will confirm that around 50% of the top ten lenders now impose restrictions on their lending criteria for leasehold homes with adverse ground rent terms.

Q 10: In what circumstances do you consider that leasehold houses supported by Help to Buy Equity Loan could be justified?

A10: None.

⁸ <https://www.leaseholdknowledge.com/wp-content/uploads/2017/04/AllPartyParliamentaryGroupLeaseholdReportApril27.pdf> Page 8 figure 2

We received a growing number of comments saying that developers have started to move away from selling leasehold houses within single sites. Some sites which started as leasehold are now selling as freehold. Earlier leasehold purchasers are stuck with adverse terms and lower value homes.

Q11: Is there anything further the Government could do through Help to Buy Equity Loan to discourage the sale of leasehold houses?

A11: The government should indicate it will no longer provide Help to Buy assistance on leasehold houses where ground rent is not peppercorn or, nominal.

The APPG is aware that providers in the sector are likely to come forward with some form of self-regulating code of conduct. There is no evidence historically that self-regulation has been effective.

There is evidence the sector may have already begun to move on from generating ground rent income streams. We are now seeing an increase in onerous covenants in freehold titles which seek to reflect many of the charges which had recently been imposed on leasehold houses.

The fact that the sector has moved so rapidly to find new income streams should alert the government to the sectors approach to self-regulation.

Too many cannot be trusted.

Q12: What measures, if any, should be considered to minimise the impact on the pipeline of existing developments?

A12: None.

If a developer has included a profit element based on potential ground rent incomes, or the benefits of selling on the rights to manage the site, then this is inevitably a speculative income stream.

Q13: What information can you provide on the prevalence of onerous ground rents? We are keen to receive information on the number and type of onerous ground rents (i.e. doubling, or other methods) and whether new leases are still being sold with such terms.

A13: The APPG's recent survey (August/Sept 2017) conducted by the charity LKP received over 2,800 replies. This survey is currently being evaluated. The initial analysis makes clear that many new build leasehold houses and flats, developed since 2005 face both large ground rents and have terms which a growing number of lenders have deemed outside their lending criteria.

The survey also shows a marked increase to the leaseholder in the cost of buying the freehold for their house once it has been sold-on to a third party investor. The actions of Taylor Wimpey in setting aside £130 million seems to give a clear indication that some of the developers now accept that their actions in setting these terms have been materially detrimental to the home buyer and therefore should be rectified.

To date, no developer has provided evidence why ground rent is necessary to sustain the viability of a development. Bob Bessell, CEO of Retirement Securities Ltd stated at an APPG meeting (December 2016),⁹ ‘...we have never charged ground rent because there is no justification for them’.

Q14: What would a reasonable ground rent look like, in terms of i) the initial annual ground rent, ii) the maximum rate of increase in annual ground rent, and iii) how often the rate of increase could be applied to an annual ground rent? Please explain your reasons.

A14: There is no clear reason, nor justification why ground rents should be any more than a peppercorn. This is the model already adopted for lease extensions covered by the Leasehold Reform, Housing and Urban Development Act 1993.

Q15: Should exemptions apply to Right to Buy, shared ownership or other leases? If so, please explain.

A15: No

Q16: Would restrictions on ground rent levels affect the supply of new build homes? Please explain.

A16: No

There is substantial demand for new build homes in England and Wales. While it could be speculated that some development funders might seek to limit their lending without the benefit of additional leasehold income streams, it could equally be argued that other development funders might be more willing to lend in a more certain market without gambling on the future role of ground rents and other leasehold incomes.

Potential home buyers have become more aware about onerous ground rent and leasehold terms. It may therefore be, that in the future, developers cannot guarantee that all buyers will be willing to pay the premiums that are currently available to the developer.

It is clear that these fees are now having a negative impact on the second-hand property price.

Q17: How could the Government support existing leaseholders with onerous ground rents?

A:17: There is substantive evidence that the problem of “onerous lease terms” in addition to “onerous ground rents” have been increasing since at least 2005 (if not before). This problem

⁹ <https://www.leaseholdknowledge.com/housebuilder-bob-bessell-says-no-justification-ground-rents>

applies to both leasehold houses and flats. Some of these properties have now become difficult to mortgage and have seen their values negatively impacted upon.

The government might wish to consider whether what has taken place constitutes mis-selling of new build homes in England and Wales.

If a leasehold house owner wishes to rectify their current position and acquire their freehold, they are obliged to wait two years after their purchase and then follow a complex and expensive route via the First-tier Tribunal (FTT). In a number of other countries they have moved to a much simpler model of fixing the sale price of the freehold which the leaseholder is entitled to buy at a simple multiple of the ground rent.

The APPG proposes that government should legislate to strike out unjustifiable, unreasonable onerous ground rent terms and any impact they may have on enfranchisement as well as looking to find a means of redress for leaseholders impacted by what the lenders have now deemed onerous ground rent terms.

It is possible the Competition and Market Authority (CMA) could do this work.

Q18: In addition to legislation what voluntary routes might exist for tackling ground rents in new leases?

A:18: The leasehold sector has existed for hundreds of years. We are not aware of any point in leasehold history where the sector has successfully self-regulated. The recent expansion in the sale of leasehold houses and of onerous leasehold terms provides clear evidence to the contrary. These issues cover both the new build and the second hand markets.

Even if developers, lenders, surveyors and solicitors could create some voluntary code in the new build market, there is no obligation for compliance. There is also no possibility that such voluntary rules could be enforced in the second hand market. We have seen repeated instances in the second hand market of gross exploitation and the most extreme abuses of the system.

Following the exposure over the last 18 months regarding what has been described by the national press as a 'leasehold scandal', and by government in this consultation as 'unfair terms', developers and freehold-investors have rapidly begun to change their practices.

Q19: Should the Government amend the Housing Act 1988 (as amended by the Housing Act 1996) to ensure a leaseholder paying annual ground rent over £1,000 in London or over £250 in the rest of England is not classed as an assured tenant, and therefore cannot be issued with a Ground 8 mandatory possession order for ground rent arrears? If not, why not?

A19: We are aware the government has now had considerable input on this matter and strongly support its intention to address this issue.

Q20: Should the Government promote solutions to provide freeholders equivalent rights to leaseholders to challenge the reasonableness of service charges for the maintenance of

communal areas and facilities on a private estate? If not, what management arrangements on private estates should not apply?

A20: Yes.

If a site is receiving property management services it should be entitled to seek redress via the specialist FTT, where they have expertise in these matters. It would seem essential that any costs be subject to the same test of reasonableness as applied in the leasehold sector. The APPG supports the judiciary's ongoing work to consolidate cases in a single hearing that would currently need to be heard in both the county court and FTT. We support the view this will help reduce costs.

Q 21: The Housing White Paper highlights that the Government will consult on a range of measures to tackle abuse of leasehold. What further areas of leasehold reform should be prioritised and why?

A21:

- a) The APPG has actively supported the review of commonhold as a workable, alternative to the ongoing difficulties faced in the leasehold sector. Almost none of the problems addressed in this consultation on "unfair practices" are new. The exception is the stance now being taken by developers to impose fees and terms in freehold sales. Despite these problems it has taken 15 years since the last major piece of commonhold and leasehold legislation to reach the point where government accepts that further change is needed.
- b) Notwithstanding repeated efforts of all political parties to resolve leasehold problems over many decades, we continue to have a great many consumer difficulties and market inefficiencies. In the last decade we have had two OFT¹⁰ investigations, a CMA¹¹ investigation and a Law Commission¹² report and reports by groups like the Greater London Authority (GLA¹³). All accept there are problems, but at best these have resulted in only very limited change. England and Wales is still currently burdened with layer upon layer of leasehold legislation, creating a matrix which provides much benefit to lawyers but little benefit to leaseholders.
- c) One of the issues to emerge in the leasehold house sale market is the conflict of interest that arises through the routine use of developer-recommended solicitors who in turn

¹⁰ <https://www.gov.uk/cma-cases/retirement-homes-hidden-exit-fees-investigation>

<https://www.gov.uk/cma-cases/access-control-and-alarm-systems-collusive-tendering>

¹¹ <https://www.gov.uk/cma-cases/residential-property-management-services>

¹² <https://www.lawcom.gov.uk/project/event-fees-in-retirement-properties/>

¹³

https://www.london.gov.uk/sites/default/files/gla_migrate_files_destination/Highly%20charged%20report%20March%202012.pdf

can recommend lenders and surveyors. The APPG has been presented with evidence¹⁴ that, particularly in the Help to Buy market, home buyers have little option but to use the developer recommended firms, and that they are presented with documentation and given little time to make a considered decision. We would recommend protections are put in place to protect leaseholders from these practices.

- d) The government should take action to protect those existing leaseholders with onerous lease terms which may now have become toxic. We accept that some of the pension funds which own these assets will claim any diminution of their incomes streams will have an adverse impact on the pensions that they manage. But this has to be weighed against the cost to the leaseholders who have been persuaded to buy their homes with these onerous terms.
- e) The statutory regulation of managing agents is vital. Almost all elements of the sector have supported this for years. The government has supported the work of groups such as ARMA and ARHM to self-regulate, but this has now demonstrably and unequivocally failed¹⁵
- f) We do not consider that current Ombudsman schemes are working as government intended and therefore should be reviewed. Of particular concern is the limitation in scope of the Finance Ombudsman and the Financial Conduct Authority (FCA) regarding oversight of leaseholders' funds and insurance matters. The three leasehold property management Ombudsman schemes all have financial caps on the size of awards they can make.
- g) The costs regime in the FTT is unfairly biased in the landlords' favour. Landlords/freeholders are usually entitled to pass on their costs via the terms of the lease but no reciprocal arrangement exists for the leaseholder.
- h) Although rights to challenge administration fees exist, it is often uneconomic to do so. The government should consider creating a reasonable table of costs.
- i) A full review of leasehold legislation is needed. This would allow a consolidation and updating of the many anomalies and deficiencies which, it is universally accepted, exist.
- j) There are many examples of anomalies in the legislation which have emerged. For example, the Right to Manage (RTM) legislation in the 2002 CLRA is now held to be limited to apply only to a single block from 2013 as a result of a supreme court decision¹⁶. In that case it was acknowledged that Parliament had always intended to consider how RTM might apply to a larger development but that it did not do so at the time. The absence of a review now means that many larger sites and many retirement sites are effectively precluded from exercising this right.
- k) Despite the passing of *Florrie's law*, we continue to see very high costs in the social sector. The government should consider what additional protections may be needed in this part of the housing market and whether social landlords should be prevented from

¹⁴ <https://www.leaseholdknowledge.com/leasehold-houses-sales-process-absolutely-disgusting-mps-told-laws-broken>

¹⁵ <https://www.leaseholdknowledge.com/arma-regulator-sally-keeble-quit-blocked-ruling-warwick-estates-lift-shaft-fatality>

¹⁶ <https://www.supremecourt.uk/cases/uksc-2011-0057.html>

spending large amounts of money on third party lawyers in the FTT to defend their position against lay leaseholders who have no right to costs. There seem no reason my judicial mediation should not be an obligation for all social landlords.

- l) The retirement sector is clearly still not working as well as it should/could. Leaseholders are often faced with falling asset values. The government should consider a cross department initiative to understand what actions and what home buyer protections are needed in this part of the market.
- m) Government has been informed of the need for a speedy, urgent, further review to address the injustice and abuses (some are deliberate) against park homes and retirement housing.
- n) A right of first refusal should be available to a leasehold house owner as it is for leaseholders in leasehold flats
- o) There is an urgent need to review the process and costs associated with lease extensions (Mundy v. The Trustees of the Sloane Stanley Estate [2016]). The government should consider adopting a fixed formula model as now used in other countries so as to reduce costs even further.
- p) Details of significant lease terms should be held by and be easily accessible from HM Land Registry.
- q) Government is aware of the APPG's concerns about the Leasehold Advisory Service (LEASE).

A final note

The government has made clear that it accepts that we have a “broken housing market” and that there are “unfair practices” in the leasehold sector, which need to be addressed.

Action is needed urgently, so that millions of leaseholders can be given greater protection and security and be treated more fairly within a sector which is presently open to abuse despite the systems that exist under current legislation.