

“Implementing reforms to the leasehold system in England”

A response by the Leasehold Knowledge Partnership

We welcome the government’s decision, announced in December 2017, that the leasehold system is not working in the consumers’ best interests, and is in need of reform.

We therefore support the work of both the Department and the Law Commission in looking at proposed reforms, with the objective of making the leasehold system work more effectively than it has in the past.

We take this opportunity to remind government that LKP has spent many years as one of the few groups consistently arguing that the leasehold system is not working well. We therefore welcome the fact the Department has moved a very long way from the Minister’s position in 2010 at which point he was arguing that the system was balanced and mostly working well.

We note, with some concern, that this second consultation proposes a number of concessions to the supply side of the sector. This is a consequence of what the document describes as meetings with providers in the sector.

Firstly, these concessions have not been subject to public scrutiny. Secondly, they are set out as pre-agreed, i.e. assumptions as opposed to options. These assumptions now need to be challenged, but consultees are expected to do so without having sight of the relevant evidence provided to the government in these private meetings.

As the government is aware, it is in receipt of complaints from professional bodies in the sector about the number of consultations now in progress. It is inevitable that many of the 6,000 respondents to the original consultation will choose not to respond further. This disinclination to continue to engage with yet another consultation does not provide evidence of any satisfaction with the existing systems. We hope the Secretary of State understands the growing frustration at the slow progress towards change.

LKP makes this submission as a registered charity in compliance with our objects. Those objects include helping to educate and inform the sector. While our main role is to help leaseholders, it should be noted we also operate an accreditation system for managing agents in the sector wishing to comply with certain ethical standards. We also fully accept that developers must be allowed to make a profit from their work and that landlords should be entitled to their legitimate fees for work they may do. However, we do not endorse the view that these landlords are somehow the “custodians” that ensure the long term viability of leasehold homes. As we explained to the Communities Select Committee, the vast bulk of landlords’ interest starts and ends in making a profit from people’s homes.

LKP also acts as secretariat to the APPG on Leasehold and Commonhold Reform. The views expressed in this response result from our experience over the last 10

years and from the input of the members of the APPG and their constituents' experiences.

Question 1: Do you have views on any further means to implement the ban on unjustified new residential long leases being granted on non-exempt houses?

We fully endorse the ban on the sale of new build leasehold houses. We note the complication of the definition of a house and in particular properties built above a shared podium. We would urge the government to prescribe the legitimate circumstances under which these types of homes, which may look like a house but which might still be legally defined as a flat, can come into existence. We would urge that such definitions are written to limit the developer's opportunity to find loopholes in the law.

Question 2: Do you have any views on how to provide appropriate redress for the home owners should (a) a long lease be incorrectly granted upon a house or (b) a long lease be granted at a ground rent in excess of the cap, after the legislation has taken effect?

We would encourage the government to ensure that all costs, which may result from the failure of a new build property to comply with the legislation, either as freehold or with an incorrect ground rent, should be borne by the developer. Those costs must include any reasonable professional fees that the consumer may incur.

Question 3: To ensure there is a workable definition of a 'house', we would welcome your views on the type of arrangements and structures which should or should not be considered to be a 'house' for the purpose of the ban on new leasehold houses.

Since such issues have been the subject of Supreme Court decisions we see no purpose in LKP suggesting anything other than that the legislation should follow the definition as defined by the courts over many years.

Question 4: With the exception of community-led housing, do you agree that any exemptions provided which allow the continued granting of new long leases on houses should have their ground rents restricted as proposed?

We fundamentally disagree with the proposal to allow an exemption for community led housing. This issue is being considered very differently in this consultation to that set out in the original consultation. It appears to be an arbitrary assumption coming from the private meetings.

We do not dispute that the community groups may have made their case for an exception for the right moral reasons. We would however argue that it has totally the wrong impact.

There are a number of points to be made:

- 1) There is a logical inconsistency in the community housing movement arguing for the continuance of the landlord and tenant model.
- 2) The argument for a modest ground rent seems illogical. If the argument is that these funds are to be used for community projects then why do they need to be constrained to a fixed amount?
- 3) The argument that such a system allows control of ownership, and is needed for shared ownership, seeks to bend the landlord and tenant model to fit the quite legitimate objectives of the community housing movement, as opposed to finding the right model that actually would fit.

It would perhaps have been far better if the government had proposed a specific element in the commonhold system that allows for both shared ownership and community projects which seek to follow whatever legitimate social objectives the group has established.

If the current leasehold system does not allow the service charge to be used for communal projects then ground rent is not the solution.

We would urge both the community movement and officials to speak to the Law Commission to ensure that both shared ownership and community housing is properly addressed in the commonhold reform process, rather than leaving open this gateway to leasehold inefficiencies and abuses.

Question 5: Are there any other conditions that should be applied to exemptions from the leasehold house ban to make them acceptable to consumers?

No. We do not believe there should be any exception for any group. If the National Trust or the Crown Estate or retirement providers or social housing groups consider they should be able to keep the freeholds of new houses then they should perhaps be obliged to build them to rent rather than for "sale".

It cannot be argued that we should keep some leasehold houses because the land was sold on a leasehold basis. There is an existing right to buy the freehold on those homes with very limited exceptions. We should not extend the basis of those exceptions.

Question 6: Do you agree that there should be an exemption for shared ownership houses?

No. As set out above, i.e. the comments on community developments bending the leasehold model, it remains a flawed approach.

The government is committed to reforming commonhold legislation and this could and should provide a much better long term model for shared ownership. It is entirely wrong that under the current model someone can lose their home as a rental tenant even though they may own 75% of their lease.

Question 7: Do you agree that there should be an exemption for community-led housing developments such as Community Land Trusts, cohousing and cooperatives?

For the reasons mentioned above, the answer is again no.

We are concerned this issue has been included in the consultation without proper debate.

Question 9: Do you agree that there should be an exemption for land held inalienably by the National Trust and excepted sites on Crown land?

We accept that the rights to enfranchise in respect of buying a freehold or collective freehold should continue to be limited on Crown and National Trust land. We do not think there should be an exemption for enfranchisement in terms of extending a lease.

Question 10: Do you agree that the law should be amended to allow the inclusion of newly created freeholds within existing estate management schemes?

Yes, we agree with this proposal, however to work effectively it will require the implementation of the Law Commission's 2011 work on positive covenants, or an equivalent thereof.

We do not agree with an exception being granted on agricultural land

Question 11: Are you aware of any other exceptional circumstances why houses cannot be provided on a freehold basis that should be considered for an exemption, in order to protect the public interest or support public policy goals?

We accept there may be some argument that a local authority or the rail network may need to reserve its position over the long term control of a small element of land they choose to make available to housing. We would ask why further protections are needed beyond those provided by existing compulsory purchase orders?

Question 12: Do you agree that there should be no further transitional arrangements after the commencement of the legislation to permit the sale of leasehold houses?

We agree the ban should apply from the date of commencement. We do not believe the argument that developers have somehow purchased land predicated on the sale of ground rents. Such land purchases are inevitably speculative and the developer will build only at the point they believe the project will be viable. We do not accept the argument that ground rents are needed to make marginal sites viable. The data shows little or no evidence to support this argument.

Engagement with the sector since December 2017

Overview comment: We note with disappointment that the Department has engaged with developers and freeholders on the ground rent issue, but not with LKP or the APPG. Had we been consulted we would have disputed the “evidence” provided in these private meetings.

Question 13: Are there justifiable reasons why ground rents on newly created leases should not be capped as a general rule at a maximum value of £10 per annum, but instead at a different financial value?

We fundamentally oppose the move from the original consultation’s clear proposal of a “peppercorn” ground rent (no monetary value), to a “nominal” rent of £10 or potentially higher.

Persimmon, Bellway and Taylor Wimpey informed the Communities Select Committee on November 19 2018 that the £10 ground rents are so low they may as well be peppercorn. They also assured the committee that peppercorn ground rents would have no effect on supply.

We have provided the government with the detailed legal view of one of the leading lawyers in the leasehold field, who explained why the move away from peppercorn will create many problems. We will not repeat that submission here other than to explain that he made it very clear why we should keep to the peppercorn proposal.

We also note and warn the government that the move away from peppercorn may have a number of potential consequences.

- 1) The continuation of ground rents re-opens the way to the various abuses we see in the sector, which the original consultation sought to bring to an end.
- 2) The £10 fee is not an economic amount to collect, and therefore can only be justified if the freeholder intends to make an income via other opaque charges and fees.
- 3) As was made clear in the LKP commonhold debate in parliament in 2014, so long as there are incentives to build leasehold it will kill the prospect of growing the commonhold market, because leasehold abuses offer additional profit incentives.

Question 14: Are you aware of separate ground rent being charged in addition to a rent on the retained equity in shared ownership leases?

We are aware anecdotally of ground rents on shared ownership homes. We oppose such rents.

Question 15: Do you represent a community-led housing provider which does not rely on ground rent income?

No we obviously do not represent a community led housing provider. As set out above we are concerned that deficiencies in leasehold legislation are being used to argue for the retention of ground rents. Both RMC and RTM companies also face some issues collecting all fees needed. An RTM obviously has no right to ground rents and many RMCs also have no access to these income streams where there is a third party landlord.

Fixing the problems with collection rights rather than the continued reliance on a fixed and potentially inadequate ground rent income for community projects seems a far better solution.

Question 16: Do you agree there is a case for making specialist arrangements permitting the charging of ground rents above £10 per annum for properties in new build retirement developments?

No. We do not agree the fee should be £10 or more, as we have argued above. We have made clear it must remain a peppercorn.

We also do not believe there should be a ground rent exception for retirement developments. As mentioned above, we are concerned that the Department has chosen not to speak to LKP or the APPG, and appears not to have considered the input provided to the APPG meetings over the years and specifically on this issue in July this year.

<https://www.leaseholdknowledge.com/appg-july-11-robust-debate-over-retirement-ground-rents-and-event-fees>

It is disappointing that the consultation does not record the fact that there is disagreement among retirement providers, the majority of whom do not support ground rents. It is disappointing that the consultation has not considered the view of AgeUK, who do not support ground rents.

We also fundamentally disagree with the government proposal that somehow pensioners could choose their level of ground rent, and either defer their service charges by paying a higher fee or have a lower ground rent in exchange for higher service charges.

This proposal is fundamentally flawed and counter factual.

As has been set out in many public meetings and much research, consumers can easily be led into making an uneconomic decision. The Law Commission secret shopper test showed almost no providers set out the issues to potential consumers as they should.

Someone buying a retirement home may also do so in a state of extreme stress following the bereavement of their partner.

The proposal of a pensioner somehow choosing their ground rent also seems deeply flawed given that this rate is only set at the start of the lease. How would prospective buyers of second hand property choose between flats when one has a high ground rent and the other a low ground rent?

Question 17: What positive or negative impacts does paying ground rents have on older people buying a home in the retirement sector? Please give your reasons and if you think the impacts are negative explain what measures might mitigate them.

The argument from some retirement suppliers that somehow ground rents provide for communal areas appears to be a new argument. It has emerged in the last 10 years. We have seen no evidence to support this claim. Yes of course retirement homes have larger communal facilities, but this is reflected in their price.

The ground rent sale is simply an additional short term profit stream which has a long term detrimental impact on the value of the home.

LKP has provided much evidence to show the poor second hand values in the retirement market. Developers assert that these low second hand values are due to the flats' condition or the age of the building. These arguments seem flawed and again unsupported by evidence. By their very nature all buildings become older but it seems only in the retirement sector are values so poor.

Question 18: Do you agree with our approach to the treatment of mixed use leases?

We have no experience of this issue.

Question 19: Are there any other circumstances in which mixed use (a) should be within scope of the policy or (b) excluded from the scope of the policy?

We have no experience of this issue.

Question 20: Do you agree with the circumstances set out above in which a capped ground rent will apply in replacement leases?

No we do not agree because the existing enfranchisement legislation sets out that the ground rent must be reduced to a peppercorn. We have clearly argued that the cap of a peppercorn (no monetary value) should remain.

We believe most of the scope of this question falls within the remit of the Law Commission's project on this issue.

Question 21: Do you agree there should be no further transitional period after commencement of the legislation permitting ground rents above £10 per annum?

For the reasons set out above we do not believe there should be a transitional period and that the new legislation should propose a peppercorn.

Question 22: Should we provide freeholders with a right to change the management of the services covered by an estate rent charge or contained within a deed of covenant arrangement?

We support the proposal that freehold house owners should be entitled to the same rights to change their management and in particular to the Right to Manage as leaseholders. We also support the proposal that they should have similar rights to determine the reasonableness of costs via a challenge at the property tribunal.

Question 23: What will be the impact of these proposals on companies or bodies that provide the long term management of communal areas and facilities?

Any company providing services to a freehold estate should fall under the same safeguards as are being reviewed for the regulation of all property agents project.

Currently this is the least regulated sector of the market. Strict controls must be introduced to limit the sorts of permission fees and charges that are being made in what is now known as "fleecehold".

Question 24: What would constitute a reasonable deadline for managing agents and freeholders to provide leasehold information?

This is not a specialist area of knowledge for LKP and we would therefore endorse the Conveyancing Association's recommendation of 10 working days.

Question 25: What would constitute a reasonable maximum fee for managing agents and freeholders to provide leasehold information?

Again, we would endorse the Conveyancing Association's recommendations on this issue, and in particular that there should be a maximum fee split between the landlord, the landlord's agent and the managing agent, to avoid the growing trend of multiple fees being charged by each of these parties.

We accept the argument that for larger and more complex sites additional information may be needed, but on these sites the bulk of the information will also be requested more often. It should not be assumed there is therefore a direct correlation between the size of site and the fee that must be charged.

The consultation should also consider those fees charged by landlords for a licence to assign and their use of this power to frustrate the sale.

Question 26: What would constitute a reasonable fee for managing agents and freeholders to update leasehold information within 6 months of it first being provided?

As per above we endorse the proposal of the Conveyancing Association. The level of updated information will on most occasions be minimal and there should be no additional charge.