Department of Health

PCT Estate

Future ownership and management of estate in the ownership of Primary Care Trusts in England

PCT Estate: Future ownership and management of estate in the ownership of Primary Care Trusts in England

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PCT ESTATE

Future ownership and management of estate in the ownership of Primary Care Trusts in England

Prepared by Capital Investment Branch

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1. INTRODUCTION

Objectives

1.1 *Equity and Excellence: Liberating the NHS* signalled the Government's intention to abolish Primary Care Trusts from April 2013. The Health & Social Care Bill currently before Parliament provides for their abolition and for the transfer of property on abolition. This guidance sets out the arrangements for the future of the PCT-owned estate and its transfer to new owners.

1.2 The principles underpinning these arrangements include:

- **Protecting assets and maintaining future flexibility**
  The arrangements should ensure that relevant estate is available for the provision of NHS services and should not prevent future changes in the delivery of services and the chosen provider.
- **Ensuring efficiency**
  Assets should be placed with the owner who has the best incentive to utilise them most effectively and invest in their development
- **Supporting the provision of safe, fit for purpose buildings**
  The estate in which health and social care is provided must be safe, secure and fit for purpose
- **Ensuring value for money**
  Surplus assets and those that are likely to have a short-term operational life should be identified, so that they can be made available for disposal within an appropriate timeframe.

- **Observing effective estate management**
  The estate should be managed effectively, both from a strategic and operational perspective, including the proper documentation of third party occupiers, proper cost management and use of the estate as an enabler for effective, high quality service delivery and modernisation.

1.3 This guidance provides an overview of the policy for the future of the PCT estate and provides detailed information about transfers to NHS providers. It supersedes the FAQs and other guidance/communications already issued regarding transfer of estate to aspirant Community Foundation Trusts (aCFTs).

Who this document is intended for

1.4 **PCT Directors and Managers** who will lead the changes from the transferor standpoint and will work with NHS providers, the Strategic Health Authority and the Department of Health to identify the most appropriate future arrangements for their organisation's estate, in accordance with the guidance provided in this document. In so doing they will need to:

- Reflect the principles on which this guidance is based and the specific issues covered in this guidance in developing their initial property transfer lists.
- Work with the proposed transferees to ensure that a sensible portfolio for transfer is compiled in each case.

- Consider the implications of their proposals for their employees. This will mean ensuring staff are engaged and consulted early, their interests are considered, decisions have due regard to workforce planning, high standards of workforce practice are met, and that change is led and managed well.
- Work with the transferees, the Strategic Health Authority and the Department of Health to ensure the timely transfer of the property portfolio to agreed destination(s). This will include ensuring that the legal arrangements relating to any third party occupiers are appropriately documented, in advance of completion of the legal transfer.

1.5 **SHA Directors and Managers** who as regional system managers are responsible for overseeing the transfer process and who will be expected to approve the PCT proposals. In so doing they will need to:

- Satisfy themselves that the PCTs have identified the most appropriate transferee for the various parts of the estate and that their decisions are consistent with the guidance in this document.
- Establish a rigorous process for approving the PCT's proposals for the future ownership of the estate.
- Work with the trade unions through the regional Social Partnership Forum to ensure that there is proper communication and effective joint working.
- Work with the PCTs, prospective transferees and the Department of Health to ensure that the process is completed in a timely manner and that the legal arrangements are properly documented.

2. TRANSFERS OF PCT- OWNED ESTATE.

The transfer of estate to Aspirant Community Foundation Trusts, other NHS Trusts and Foundation Trusts

2.1 **Aspirant CFTs, other NHS Trusts, and Foundation Trusts (FTs)** are to be given the opportunity to acquire part(s) of the PCT estate deemed 'service critical clinical infrastructure'. That is, premises integral to the provision of community services commissioned from these NHS Bodies. It is **only** this part of the PCT estate, which should be transferred to these bodies.

2.2 The PCT- owned estate is diverse in nature and will involve different legal interests including freeholds, leaseholds and property held on short-term licences or other informal arrangements. Property directly related to the delivery of clinical services is impossible to define across the entire estate, so pragmatic judgement will have to be applied on a case-by-case basis. However, the type of property envisaged likely to transfer is the property listed in Appendix A.

2.3 To ensure that balanced portfolios are compiled, aCFTs, other NHS Trusts and FTs requesting transfer of premises to them will be required to take the whole of the estate deemed 'service critical clinical infrastructure'. However, acknowledging that there may be efficiencies to be achieved by the receiving trust using their own estate in some instances, if the receiving trust has no use for some buildings and they can be relatively easily separated and disposed of, they may, at the discretion of the PCT be excluded from the transfer. These buildings will then remain in PCT ownership for alternative disposal arrangements.

2.4 Estate should not be transferred to the aCFT, NHS Trust or FT if it is known that they will be in occupation of a property on a temporary basis or for a short period only. In such cases, the occupation should be documented in accordance with the guidance in Estatecode (Chapter 9).

Transfer terms.

Freeholds and Long Leaseholds

2.5 In the case of freeholds or long leaseholds, transfers will be made at the Net Book Value (NBV) shown in the PCT's accounts at the point of transfer. Guidance relating to the accounting treatment for these assets will be issued shortly.

2.6 The transfers will be subject to an option to acquire, in favour of the Secretary of State for Health and an overage provision, which will apply if the SoS option is not taken up.

2.7 a) Option to Acquire

The Secretary of State for Health (or a body nominated by him) will have the option to re-acquire individual properties in the event that the aCFT, NHS Trust or FT:

- fails to retain a service contract,
- vacates a property or
- if the aCFT, NHS Trust or FT ceases to exist or
- the insolvency of the organisation.

2.8 Under these circumstances, the aCFT, NHS Trust or FT will be required to offer the property back to the Secretary of State (or a body nominated by him),

who will then have a discretion to decide whether he wishes to re-acquire the property. A decision will be made on a case-by-case basis.

2.9 The option will apply if the whole or only part of a building is affected. If the Secretary of State for Health decides to proceed with the acquisition of a property where parts of the building are still required for the delivery of community services, then appropriate occupancy arrangements may be negotiated.

2.10 The NHS body will not be able to pursue disposal of a property until the option to acquire process has been completed.

2.11 b) Overage
In the event that the Secretary of State decides not to proceed with acquisition of the property, he will notify the aCFT, NHST or FT. The organisation will then be free to dispose of the property.

2.12 Any disposal should be at market value, in accordance with the provisions of Estatecode. Under these circumstances, 50% of the gain achieved, based upon gross sale proceeds less the lower of the NBV at the date of acquisition or the NBV before any revaluation prior to sale, will be payable to the Secretary of State.

2.13 No overage payment will be required to the Secretary of State in the event of any loss.

2.14 These arrangements will need to protected by registration at the Land Registry.

2.15 In certain circumstances, for example where the disposal price may not reflect the potential future increase in value of a property, there may be a requirement to reserve overage in subsequent sales/transfers to third parties.

Leases and Licences

2.16 Leases (both finance and operating Leases) and Licences of PCT estate deemed 'service critical clinical infrastructure' should be assigned to the aCFT other NHS Trust or FT where they are to be in occupation for more than a temporary or short term period and where they are the majority occupier. It will not be possible to assign part of a Lease and it may be necessary to agree sub lettings to minority occupiers.

2.17 Where there is a requirement in a Lease or Licence for Landlord's consent to assign or a prohibition on assignment application should be made as soon as possible to the Landlord for consent to assign to the aCFT, other NHS Trust or FT.

2.18 Under the National Health Service Act 2006 the Secretary of State for Health may order the transfer of land held on Lease to an aCFT or other NHS Trust. The order will be binding on a Landlord notwithstanding that there is a requirement for Landlord's consent in the Lease. This provision may be used, if consent cannot be obtained.

2.19 Further the Health and Social Care Bill (as currently drafted – clauses 299 and 300) once enacted, would provide that the Secretary of State may in connection with the abolition of a PCT make a property transfer scheme transferring property, rights and liabilities (including those that could not otherwise be transferred) from a PCT to a 'permitted transferee'. An aCFT, other

NHS Trust and FT will each be permitted transferees and as such, where Landlord's consent is not obtained to an assignment of a Lease or Licence or where there is a prohibition on assignment contained in a Lease or Licence, the Secretary of State may make a transfer scheme transferring the property to the aCFT, NHS Trust or FT and this would be binding on a Landlord.

2.20 Any transfer or assignment of a Lease or Licence should provide for the Lease or Licence to be subsequently assigned either to the Secretary of State or to a body nominated by him, in the event that the aCFT, NHS Trust or FT:

- fails to retain a service contract,
- vacates a property or
- if the aCFT, NHS Trust or FT ceases to exist or
- the insolvency of the organisation.

An application to a Landlord for consent to assign to an aCFT, NHS Trust or a FT should therefore also include a request for a further consent to the possible subsequent assignment to the Secretary of State or to a body nominated by him.

2.21 If the Secretary of State declines an offer to have a Lease or Licence assigned to him or his nominee then the aCFT, NHS Trust or FT will be free to assign or transfer or otherwise deal with a property in accordance with the terms of the relevant Lease or Licence.

2.22 Where the Secretary of State declines an offer to have a Lease assigned to him or his nominee and the Lease is disposed of, overage as outlined above will apply on a disposal.

2.23 NHS LIFT will be dealt with separately and is excluded from these provisions.

<u>Transfer Orders</u>

2.24 A standard form for the Transfer Order, incorporating the buyback and overage provisions will be made available shortly.

2.25 There is no current power to transfer property from PCTs to FTs by means of Transfer Order. The power to transfer estate to FTs using transfer schemes is subject to the Health and Social Care Bill 2010 being enacted. Memoranda of Occupation should therefore be used for the time being. No transfers of land should occur by legal conveyance without the Department of Health's consent.

2.26 In the case of aCFTs, Transfer Orders do not need to be made simultaneous with Establishment Orders. However, the properties to be transferred must be identified and transferred in accordance with the timetable in Section 4.

<u>Shared Estate</u>

2.27 There is an underlying principle that only estate integral to the delivery of community services which they are commissioned to provide, should be transferred to aCFTs, other NHS Trusts and FTs. On this basis, where these organisations occupy accommodation classified as being in the service critical clinical infrastructure category, but shared by a number of users the following principles should be adopted:

- the property should be transferred to the <u>majority</u> occupier (provided this is a willing aCFT, other NHS trust or FT).
- if the majority of the property is vacant, then it should be retained by the PCT, for the time-being

- if the majority of the property is occupied by an organisation other than the aCFT, other NHS Trust or FT then it should be retained by the PCT
- in this context, majority means occupying more than 50% of the lettable floor area.
- for the purpose of establishing the majority occupier, different GP practices and other primary care users should be aggregated and counted as a single occupier, as this will point to the property being used primarily for delivery of primary care, rather than community care.
- Proper arrangements to document the occupancy rights of the minor occupiers (including the aCFT, other NHS Trust or FT if they fall into this category) and to agree an appropriate split of shared costs must be put in place by the PCT as soon as possible. In the case of properties identified for transfer/assignment to an aCFT, other NHS Trust or FT, then this must be completed prior to completion of the legal transfer.

2.28 To prevent fragmentation, the norm will be for the entire title to be transferred. There may be exceptions where a split of the title is being proposed. In these instances, it will be essential to ensure that each part is capable of separate beneficial occupation, both in the immediate and the longer term. Each building must be separately identified and the NBV (including land) apportioned. Rationale will be required in support of any proposed split of title, together with evidence that each part is capable of separate beneficial occupation, as outlined above.

Surplus estate/ aCFT.NHS Trust, FTs as minority occupiers

2.29 Surplus estate, should not be transferred, but remain with the PCT. A more detailed definition of surplus property is provided in Appendix B.

2.30 In the event that the aCFT, other NHS Trust or FT:

- will be a minority occupier in a property covered by Appendix A,
- needs to occupy property categorised as surplus in Appendix B, in the short term

an appropriate Lease or Licence, either co-terminous with the service contract or for a shorter period if necessary should be granted. Estatecode (Chapter 9) provides further guidance.

Liabilities, obligations and warranties

2.31 PCTs will also be expected to ensure that all liabilities, obligations and any warranties relating to the estate are transferred to the transferee. This will include any contracts for estates and facilities management services and works associated with the buildings. Specific legal advice may be required in connection with the transfer of some of the contracts and liabilities.

3. STAFF TRANSFERS

3.1 It is expected that the employment contracts of any PCT-employed staff maintaining and managing the buildings to be transferred will be subject to normal TUPE transfer requirements. The Health & Social Care Bill also contains provision for the Secretary of State to make staff transfer schemes and such schemes may provide for the transfer of such staff alongside property, which would be transferred under the Bill powers.

3.2 Organisations employing NHS staff have clear legal obligations when it comes to consulting their workforce over service change, and in any subsequent tendering or business transfer processes. Consultation with staff representatives should be based on the principles set out in Section 26 of Agenda for Change, at a stage that allows alternative proposals to be explored and developed. It is important to remember that consultation is more than the passage of information and should be conducted in the spirit of partnership. But equally it is not a joint decision making process. The NHS Employers' website has more information. Follow the link for 'NHS terms and conditions of service handbook'.

3.3 It is important to note:

- A failure to undertake the appropriate consultation may give rise to a legal challenge.
- Consultation required under the TUPE Regulations is not a substitute for this wider consultation process

3.4 It is understood that some PCTs have transferred estates staff to aCFTs even though estate itself hasn't yet been transferred, This is due to the property being occupied by the CFT on a Memorandum of Occupancy, under the terms of which responsibility for repairs etc. will be passed to the aCFT.

4 APPROVAL MECHANISMS

4.1 The relevant SHA will be required to approve all proposed transfers, taking account of any guidance issued by the Department regarding future commissioning arrangements. Where an aCFT, NHS Trust or FT will potentially be taking estate from more than one PCT, agreement of assets to be transferred must be reached with each PCT involved before SHA consent is sought.

4.2 The provisions of the Secretary of State Direction - 'Direction concerning all transactions involving property 2011' issued on the 10th February 2011 should also be observed. For ease of reference, a copy of the Direction is incorporated in this Guidance at Appendix C.

4.3 SHAs will in turn be required to submit the provisionally agreed lists to DH for final approval, using the attached template. Likewise, disputed matters should be referred to the Department, using the relevant part of the template

4.4 It is accepted that exceptional cases may arise which are not covered by this guidance and any proposed variation should be highlighted throughout the approval process, with an accompanying rationale.

4.5 Timetable

14 September 2011	PCTs to have reviewed and provisionally agreed lists of property for transfer to NHS bodies and for retention by PCTs
30 October 2011	SHAs to have approved PCT property lists
15 December 2011	DH to have reviewed and signed off SHA approved lists

5. REMAINING ESTATE

5.1 Estate which is not identified for transfer to aCFTs, other NHS Trusts and FTs should be retained by the PCT for the time being. The proposed arrangements for this part of the PCT – owned estate will be issued shortly.

5.2 Property which should not be transferred to aCFTs, other NHS Trusts or FTs will include the type of assets listed in Appendix B and outlined below.

- Government grant reserves and donated and charitable assets should not be transferred. Further guidance about these assets will be issued shortly.

- NHS LIFT properties should be excluded from transfers to aCFTs, other NHS Trusts, and FTs. These properties should be retained by the PCT for the time being. Any queries relating to these properties should be directed to John Mann email john.e.mann@dh.gsi.gov.uk.

- PFI/PPP properties should be excluded from transfers to aCFTs, other NHS Trusts, and FTs. These properties should be retained by the PCT for the time being. Any queries relating to these properties should be directed to John Mann john.e.mann@dh.gsi.gov.uk.

- PCT interests in ISTC buildings should be retained by PCTs for the time being. Any queries relating to these properties should be referred to Ben Masterson (ben.masterson@dh.gsi.gov.uk)

- Third Party Developments (3PDs). 3PDs where PCTs have taken the head lease or given a guarantee should be excluded from transfers to aCFTs,

other NHS Trusts and FTs. These properties should be retained by the PCT for the time being. Any queries about these properties should be directed to James Latta – james.Latta@dh.gsi.gov.uk.

- Other property that is used for primary care provision. Any queries about properties where the majority use is deemed to be primary care provision should be directed to James Latta – james.latta@dh.gsi.gov.uk.

- Surplus estate. A detailed definition of surplus estate is incorporated in Appendix B.

- Administrative estate. This will include the PCTs own headquarters buildings, other premises where the majority use is administrative and any administrative accommodation currently used for clinical services. Any queries about properties falling into this category may be referred to David Gubb – david.gubb@dh.gsi.gov.uk

NB: Any new contracts, which the PCT propose to enter into, are subject to the Secretary of State Direction - 'Direction concerning all transactions involving property 2011' issued on the 10th February 2011, attached as Appendix C for ease of reference

6. CONTACTS

6.1 Any queries from PCTs and aCFTs, other NHS Trusts and FTs should be addressed in the first instance to their SHA Provider Development Lead for local resolution. Issues not resolved locally should be referred to the Department of Health addressed to Pam Chapman (pamela.chapman@dh.gsi.gov.uk).

6.2 Specific issues relating to PFI/LIFT should be addressed to John Mann (john.e.mann@dh.gsi.gov.uk)

6.3 Specific issues relating to 3PD to James Latta (james.latta@dh.gsi.gov.uk)

6.4 Any queries relating to the PCT admin estate should be addressed to David Gubb (david.gubb@dh.gsi.gov.uk)

APPENDIX A. 'Service critical clinical infrastructure'

Property which will typically transfer to the occupying NHS body (subject to the other provisions in this guidance)

- premises in local settings integral to the provision of clinical community services including
  - accommodation with high specification equipment, theatres or wards
  - community hospitals

where these are majority occupied by the NHS provider, as detailed in paragraph 2.27.

APPENDIX B Property which will typically be retained by the PCT, pending further guidance.

- the PCT's administrative estate
- premises where the majority use is administrative and administrative accommodation currently used for clinical services
- the following categories of primary care premises:
  - properties where the majority occupiers are primary care providers
  - premises being used under the Equitable Access GP Health Centre Programme*
  - third party developer (3PD)head-leases
- ISTC properties
- properties, which are surplus, unutilised or part of a development programme:
  - surplus property even if not included in the PCT balance sheet as being held for sale
  - properties which are known to have a short future operational life i.e are likely to be available for disposal in the next three years.
  - any property asset that has not yet been declared surplus to requirements by the PCT but where a business case has been approved by the SHA that will require disposal of the property by the PCT to finance the capital investment in the approved business case
  - any land attached to a property which is unused and not required to support the effective use of the adjacent operational buildings
  - property which comprises part of a development or reconfiguration programme, which will not be completed by March 2013.
- Any property where an aCFT, NHS Trust or FT is not the majority occupier i.e occupying less than 50% of the lettable floor space

- Donated or gifted assets and Government reserves

*See The Week 3 February 2011 and Barbara Hakin's Letter that responsibility for the Equitable Access Programme GP Health Centre contracts will transfer to the NHS Commissioning Board.

In addition, NHS LIFT and PFI property should be retained by PCTs at the present time.

APPENDIX C

Directions concerning all transactions involving property – 2011

All Chief Executives of Strategic Health Authorities
All Chief Executives of Primary Care Trusts

16 February 2011

Gateway reference number: 15582
Dear Colleagues
Directions concerning all transactions involving property 2011

1. This letter contains directions to Strategic Health Authorities and Primary Care Trusts pursuant to sections 8 and 272(8)(b) of the National Health Service Act 2006 (the 2006 Act).
2. The Secretary of State for Health directs that Primary Care Trusts (PCTs) must not enter into any agreements relating to the acquisition, management and disposal of property or to interests in land or buildings, under paragraph 15 of Schedule 3 to the 2006 Act, or section 7 of the Health and Medicines Act 1988 except in accordance with paragraphs 3 and 4.
3. Where the value of the transaction is less than £35 million, the PCT must obtain the prior written consent of the Strategic Health Authority (SHA), in accordance with paragraph 8.
4. Where the value of the transaction is £35 million or above the PCT must obtain the prior written consent of:
   (a) the SHA in accordance with paragraph 8; and
   (b) the Department of Health.
5. Examples only (not a full list) of the transactions to which these Directions apply are
   (i) Disposals of freehold or leasehold property;
   (ii) Acquisitions of freehold or leasehold property, including the acquisition of a sub-lease over property;
   (iii) Granting of leases and sub-leases, and assignments of the same;
   (iv) Granting of licences in respect of freehold or leasehold property;
   (v) Granting of legal charges over freehold or leasehold property;
   (vi) Entering into contracts relating to their freehold or leasehold property such as management, maintenance or cleaning contracts;
   (vii) Placing land, when required, on the Register of Surplus Public Sector Land.
6. These directions apply to all new transactions, amendments to existing agreements and to transactions which have been approved under previous PCT delegated powers but where contracts have not yet been signed, but not to existing agreements. This is to ensure that such transactions do not

adversely affect the future implementation of the transfer of PCT owned property to other NHS or non-NHS organisations.

7. For clarification, these directions will not apply to any agreements relating to the reimbursement of GP premises' costs pursuant to the National Health Service (General Medical Services – Premises Costs) (England) Directions 2004[1]. However, they will apply to any new property transactions or amendments to existing transactions in respect of Local Improvement Finance Trusts, (which are approved by the Secretary of State for the purposes of improving primary care facilities and services in a particular area)[2] and externally financed development agreements[3].
8. The Secretary of State directs SHAs that in determining whether to approve a transaction, the SHA will only do so where it is satisfied that the proposal:
   (a) will not adversely affect the future implementation of the transfer of the PCT's owned property to other NHS or non-NHS organisations;
   and
   (b) is in accordance with (i) good estate management principles - guidance is available in the DH publication Health Building Note 00-08: Estatecode[4], (ii) the delegated limits for capital investment whereby all capital contracts entered into by PCTs with a value below £35m are required to have the prior approval of the SHA[5].
9. In satisfying itself as to the effect of the proposed transaction, the SHA must consider all relevant factors, including the duration of the contract, the timing and amounts of any payments due, and the best future use of the estate. In relation to the best future use of the estate, SHAs should have regard to the guidance set out in "Transforming Community Services – the assurance and approvals process for PCT-provided community services"[6].
10. SHAs must consider requests made to them pursuant to these directions for consent expeditiously. PCTs must provide all relevant information to the SHA and, where appropriate, the Department of Health to enable those bodies to make an early decision. This is particularly important where these directions now cover transactions approved under previous PCT delegated powers, but where contracts have not yet been signed.

Yours sincerely
David Flory
Deputy NHS Chief Executive

[1] http://www.pcc.nhs.uk/nhs-gms-premises-costs-directions-2004

[2] See the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) Regulations 2002, S.I. 2002/2375.

[3] A PCT has power to enter into such an agreement pursuant to paragraph 17 of Schedule 3 to the 2006 Act.

[4] This is available at www.spaceforhealth.nhs.uk, or by writing to the local Strategic Health Authority or Primary Care Trust.

[5] Delegated limits for capital investment, December 2010. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_122842.pd