Department of Health

Health Building Note 00-08 Part B: Supplementary information for Part A

October 2014

Health Building Note 00-08
Part B: Supplementary information for Part A

Preface

About Health Building Notes

Health Building Notes give best practice guidance on the design and planning of new healthcare buildings and on the adaptation/ extension of existing facilities.

They provide information to support the briefing and design processes for individual projects in the NHS building programme.

The Health Building Note suite

Healthcare delivery is constantly changing, and so too are the boundaries between primary, secondary and tertiary care. The focus now is on delivering healthcare closer to people's homes.

The Health Building Note framework (see next page) is based on the patient's experience across the spectrum of care from home to healthcare setting and back.

Health Building Note structure

The Health Building Notes have been organised into a suite of 17 core subjects.

Care-group-based Health Building Notes provide information about a specific care group or pathway but cross-refer to Health Building Notes on **generic (clinical) activities or support systems** as appropriate.

Core subjects are subdivided into specific topics and classified by a two-digit suffix (-01, -02 etc), and may be further subdivided into Supplements A, B etc.

All Health Building Notes are supported by the overarching Health Building Note 00-01 in which the key areas of design and building are dealt with.

Example

The Health Building Note on accommodation for adult in-patients is represented as follows:

"Health Building Note 04-01: Adult in-patient facilities"

The supplement to Health Building Note 04-01 on isolation facilities is represented as follows:

"Health Building Note 04-01: Supplement 1 – Isolation facilities for infectious patients in acute settings"

Health Building Note number and series title	Type of Health Building Note
Health Building Note 00 – Core elements	Support-system-based
Health Building Note 01 – Cardiac care	Care-group-based
Health Building Note 02 – Cancer care	Care-group-based
Health Building Note 03 – Mental health	Care-group-based
Health Building Note 04 – In-patient care	Generic-activity-based
Health Building Note 05 – Older people	Care-group-based
Health Building Note 06 – Diagnostics	Generic-activity-based
Health Building Note 07 – Renal care	Care-group-based
Health Building Note 08 – Long-term conditions/long-stay care	Care-group-based
Health Building Note 09 – Children, young people and maternity services	Care-group-based
Health Building Note 10 – Surgery	Generic-activity-based
Health Building Note 11 – Community care	Generic-activity-based
Health Building Note 12 – Out-patient care	Generic-activity-based
Health Building Note 13 – Decontamination	Support-system-based
Health Building Note 14 – Medicines management	Support-system-based
Health Building Note 15 – Emergency care	Care-group-based
Health Building Note 16 – Pathology	Support-system-based

Other resources in the DH Estates and Facilities knowledge series

Health Technical Memoranda

Health Technical Memoranda give comprehensive advice and guidance on the design, installation and operation of specialised building and engineering technology used in the delivery of healthcare (for example medical gas pipeline systems, and ventilation systems).

They are applicable to new and existing sites, and are for use at various stages during the inception, design, construction, refurbishment and maintenance of a building.

All Health Building Notes should be read in conjunction with the relevant parts of the Health Technical Memorandum series.

NHS Premises Assurance Model (NHS PAM)

The NHS PAM is a tool that allows NHS organisations to better understand the efficiency, effectiveness and level of safety with which they manage their estate and how that links to patient experience. The NHS PAM has two distinct but complementary parts:

- Self-assessment questions: supporting quality and safety compliance;
- Metrics: supporting efficiency of the estate and facilities.

For further information, visit the NHS PAM website.

How to obtain publications

Health Building Notes are available from the UK Goverment's website at:

https://www.gov.uk/government/collections/health-building-notes-core-elements

Health Technical Memoranda are available from the same site at:

https://www.gov.uk/government/collections/health-technical-memorandum-disinfection-and-sterilization

Introduction to Part B

HBN 00-08 Part B provides detailed advice about the active management of land and buildings used for healthcare services. By using this information, NHS foundation trusts (FTs) and NHS trusts (Trusts), together with NHS Property Services (NHS PS) and Community Health Partnerships (CHP), will be able to develop the opportunities to achieve efficiency savings plus reduced costs outlined in Part A. Also it will enable commissioners to understand and develop their own estate as well as assisting them when taking a strategic overview of the NHS estate for the development of NHS services.

Part B includes advice on:

- guidance and powers;
- general management of property including commercial opportunities for the benefit of patients, visitors and staff, and town planning;
- the selling of surplus property and where required, the buying of additional property.

Contents

1.0 Guidance and powers

To understand the regulatory framework in which NHS organisations are required to operate to provide a safe and compliant estate, see 'Guidance and powers' section (paragraphs 1.12–1.21) in Part A.

The fundamentals of decision-making

1.1 This document only provides a guide to the legal and other issues relevant to the NHS as of the date of publication. Accordingly appropriate legal, surveying and professional advice (from those with knowledge of NHS policy and procedures) should be obtained prior to proceeding with any land and property transactions.

1.2 NHS organisations will have to decide what is best in the circumstances and the actions taken will be on a case-by-case basis. They should base their actions on the principles, guidance and best practice set out in this document as well as other established property guidance.

1.3 All land and property transactions should be supported by a robust business case, which should include a comprehensive (and costed) option appraisal resulting in a preferred plan of action. This provides an audit trail of the decision-making process and a rationale for each decision. Transactions with other NHS organisations, local authorities and other public sector bodies should be explored before considering transactions with the private sector.

1.4 Any decision-making process should take account of relevant codes of conduct, accountability and probity. Generally compliance with HBN 00-08 should be seen as a means of achieving "good decision making", not as an end in itself.

Principles of ethical business conduct

1.5 NHS organisations should:

- have a clear policy on the acceptance of gifts and hospitality to avoid conflicts of interest and probity breaches;
- comply with all applicable laws, statutes, regulations and codes relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010. NHS organisations should not engage in any activity, practice or conduct which would constitute an offence under sections 1, 2 or 6 of the Bribery Act 2010 if such activity, practice or conduct has been carried out in the UK;
- have in place adequate procedures in line with the guidance published by the Secretary of State under section 9 of the Bribery Act 2010 designed to prevent their associated persons from undertaking any such conduct.

Powers to own land and property and carry out transactions

1.6 NHS organisations can generally only carry out transactions that are necessary or

expedient for the purposes of, or in connection with, their functions. Moreover, they should only own land that is required for health service purposes – any surplus should be disposed of for the benefit of the local health economy. The situation for NHS Property Services (NHS PS) and Community Health Partnerships (CHP) is different (see paragraph 1.21).

1.7 In addition to ensuring that the organisation has the statutory power to carry out any proposed transaction, the powers must be exercised lawfully.

1.8 NHS foundation trusts (FTs), NHS trusts (Trusts), the NHS Commissioning Board, operating as NHS England (NHS E) and clinical commissioning groups (CCGs) may acquire and dispose of freehold and leasehold land in their own right and name under the National Health Service Act 2006 (the Act), as amended subject to internal governance arrangements. NHS PS and CHP are both companies incorporated under the Companies Act 2006 and have powers, including the power to own and dispose of land, under their Articles of Association.

1.9 The position of the Secretary of State is slightly different since Secretaries of State have the full powers of natural persons, and do not need to identify a relevant statutory power to carry out land and property transactions (see paragraph 1.20).

Powers to carry out land and property transactions

NHS Foundation Trusts

1.10 FTs are established under Chapter 5 of Part 2 of the Act. They are part of the NHS but are free from central government control. They possess three key characteristics that distinguish them from Trusts:

a. they have freedom to decide locally how to meet their obligations;

b. they are accountable to local people, who can become members and governors;

c. they are authorised, licensed and monitored by Monitor.

1.11 FT's power to dispose of land or buildings, owned or leased, is limited by their classification as relevant assets under Continuity of Services Condition (CoS) 2 – 'Restriction on the disposal of assets' (one of the standard licence conditions issued by Monitor (2014) to providers).

1.12 Relevant assets are those that are required for Commissioner Requested Services (CRS). Where assets, including land and buildings, are such that without them the FT's ability to meet its obligations to provide CRS would reasonably be regarded as materially prejudiced, it is for the CCGs who commission the services to agree which services are or are not CRS. FTs must seek Monitor's approval to dispose of a relevant asset, unless Monitor has issued a general consent covering the transaction.

1.13 Non-relevant assets – that is, assets not required for CRS (for example a private wing) – may be disposed of by FTs without the approval of Monitor. Disposal includes a part sale of assets or granting an interest in them.

1.14 FTs have a greater ability to enter into land and property transactions including joint ventures and strategic estates partnerships. However, they must follow guidance and approvals as expected by Monitor or regulations. Any transaction or long-term commitment either through borrowing or otherwise can affect the FT's overall performance rating. For further details, see Monitor's (2014) guidance 'The asset register and disposal of assets: guidance for providers of commissioner requested services'.

NHS trusts

1.15 Trusts are established by a statutory instrument pursuant to section 25 of the Act.

Their general powers are set out in schedule 4 paragraph 14 of the Act (as amended):

> (1) An NHS Trust may do anything which appears to it to be necessary or expedient for the purpose of, or in connection with its functions.
>
> (2) In particular, it may acquire and dispose of property…

1.16 These powers are linked to the Trust's functions and are subject to delegated limits (see paragraphs 1.37–1.39 on delegated limits).

1.17 The functions of Trusts are set out in their Establishment Orders. Their principal function is to provide goods and services for the purpose of healthcare provision.

1.18 Trusts may not mortgage or charge any of their assets, or use them in any way as security for a loan (schedule 5 paragraph 3(3) of the Act).

1.19 Trusts have income generation powers (see paragraphs 1.29–1.33 for details).

The Secretary of State

1.20 The Secretary of State's power is set out in section 211 of the Act 2006:

> (1) The Secretary of State may acquire (a) any land, either by agreement or compulsorily, (b) any other property, required by him for the purposes of this Act.
>
> (2) In particular, land may be acquired to provide residential accommodation for persons employed for any of those purposes.
>
> (3) The Secretary of State may use for the purposes of any of the functions conferred on him by this Act, any property belonging to him by virtue of this Act, and he has power to maintain all such property.

There are additional provisions dealing with compulsory purchase.

NHS Property Services (NHS PS) and Community Health Partnerships (CHP)

1.21 NHS PS and CHP are private law companies incorporated under the Companies Act and have wide powers under their constitutions to own and manage land and interests in their land. They also have the powers of a general commercial company and, without prejudice to that, the powers to acquire and dispose of land.

NHS Commissioning Board (the Board) operating as NHS England (NHS E)

1.22 The Board is a separate statutory body created by amendments to the Act made by the Health and Social Care Act 2012. Section 13Y of the Act includes the power to acquire and dispose of land. This again relates to the power and functions of the body which include the commissioning of services. The Board is subject to National Property Controls administered by the Government Property Unit. These do not allow lease renewals, sales or acquisitions on new properties without the Minister for the Cabinet Office's approval.

1.23 The Board has powers to make grants to local authorities and others under section 256 and section 14Z6 of the Act. The Board should take into account any directions issued by the Secretary of State.

1.24 As hosted organisations within the Board, commissioning support units (CSUs) have the same powers subject to the internal governance arrangements of the Board.

Clinical commissioning groups

1.25 CCGs are authorised by NHS E and become statutory corporations on authorisation under sections 14A–14D of the Act (as amended by the Health and Social Care Act 2012). Their general powers are set out in section 2 of the Act and schedule 1A paragraph 20, which states:

[S2] The Secretary of State, the board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act…

[Schedule 1A]

20 The power conferred on a clinical commissioning group by section 2 includes, in particular, power to:

(a) enter into agreements

(b) acquire and dispose of property, and

(c) accept gifts (including property to be held on trust for the purposes of the clinical commissioning group).

1.26 As commissioning-only organisations, CCGs should only own property that is required to help them perform their core functions as health planners and commissioners. Ultimately, it is up to CCGs to decide whether a particular land transaction is "calculated to facilitate, or is conducive or incidental to, the discharge of any function".

1.27 The functions of CCGs are set out in the Act, particularly in sections 1I, 3, 3A and 14P to 14Z24.

1.28 CCGs have similar power to the Board to make grants to local authorities and others under section 256 and section 14Z6 of the Act. CCGs should take into account any directions issued by the Secretary of State.

Income generation powers

1.29 Section 7 of the Health and Medicines Act 1988 gave the Secretary of State wide powers to generate additional income for the purposes of the NHS. These have been applied to FTs, Trusts, NHS E and CCGs to acquire land and property by agreement and manage and deal with land and property in order to make money available for improving healthcare services.

The power to generate additional income is contained in:

- paragraph 20(1) of schedule 4 to the Act – for Trusts;
- sections 43 and 44 of the Act – for FTs;
- section 13W of the Act and subject to section 13W(2) – for NHS E;
- section 14Z5 of the Act – for CCGs.

1.30 Income-generation activities must not interfere with the duties and performance of the above-mentioned organisations.

1.31 Land and property may be acquired to enhance disposal proceeds of surplus land and property (for example by improved road access, or making a site large enough for a specific use).

1.32 FTs are not bound by any DH rules on income generation but may use them for guidance purposes. However, there are specific rules requiring governor approval for growth in non-NHS FT income; it must not interfere with an FT's duties and performance.

1.33 FTs can create separate operational companies to manage income-generating or commercial interests; the approval process should be rigorous with sound rationale and audit supporting decisions.

The decision-making process

1.34 Subject to delegated limits where applicable (see paragraphs 1.37–1.39) and the requirement to exercise their powers properly (see paragraphs 1.40–1.52), NHS organisations are responsible for making what they believe to be the best decisions concerning land and property for their organisation and the NHS as a whole.

1.35 The decision-making process should be clear, documented and of a high standard in

order to satisfy probity, governance and audit purposes. It should be informed by:

- national and local policy requirements for the NHS;
- estate strategies;
- government, DH and other guidance, including guidance from the Law Society and Royal Institution of Chartered Surveyors (RICS), and regulations, including accounting standards regulations and government accounting regulations;
- the business case.

1.36 If NHS organisations have concerns about the decision-making process, they should consult with their internal and external auditors and, if appropriate, financial and legal advisers.

Delegated limits

1.37 Only Trusts have delegated limits. Above its delegated limit, a Trust is required to obtain the approval of the NHS Trust Development Authority (NHS TDA) to any proposed capital investment or property transaction, which should be set out in a business case (see NHS TDA (2013)).

1.38 The delegated limit applies to capital investment and property transactions and the amount of disposal proceeds that can be retained by Trusts. These limits do not apply to FTs. CCGs do not, as such, have a delegated limit but have limited capital in any event. Relevant personnel should liaise with their finance departments to determine their organisation's delegated limits.

1.39 The NHS TDA has powers of approval for Trust capital business cases up to a limit delegated by the DH. The limit delegated to the NHS TDA by the DH is set through consultation with HM Treasury. Any capital business cases over the delegated limit of the NHS TDA will require approval by the DH and HM Treasury.

The proper exercise of powers

1.40 In addition to considering what powers an NHS organisation has, it is essential that those powers are exercised lawfully. There are a number of tests which any exercise of discretionary power by a public body must pass in order for it to be a proper exercise of that power. Although not strictly public bodies, as publicly owned corporations it is anticipated that the same standards should be met by NHS PS and CHP. These can be summarised as:

- Is the organisation acting legally?
- Is the organisation acting rationally?
- Is there a proper procedure for the exercise of the power, and is it being followed?
- Does the proposed use of the power amount to an abuse of power?

1.41 Each of these has a specific and sometimes quite technical meaning, as follows.

Legality

1.42 In order to properly exercise power, an NHS organisation must ensure that in so doing, it is acting in accordance with that power and not acting in breach of any other legal obligation. Any decision found to be ultra vires (that is, beyond the organisation's powers) can be set aside.

1.43 However, the obligations may take other forms. Of particular importance to the NHS will be the impact of Directions from the Secretary of State for Health and limits on capital transactions. If a Trust carries out a property transaction above its delegated limits, it will be acting illegally.

Rationality

1.44 This is a term that caters for two particular types of legal challenge to a decision by a public authority including an NHS organisation. In extreme cases an NHS organisation may be accused of acting in an unreasonable way.

More usually, the NHS organisation is charged with failing to take certain relevant factors into consideration or of having taken account of irrelevant factors. This may include failure to take adequate account of the potential risks to the organisation arising from a transaction.

Procedure

1.45 Where changes in the delivery of services may affect patients, there is a legal obligation for the NHS organisation to inform and consult patients either directly or through representatives.

1.46 Case law from challenges to NHS decision-making has emphasised the width of engagement of section 242 of the Act (public involvement and consultation), which is replicated for CCGs in section 14Z2 of the Act. Although the courts have recognised the need for this engagement to be proportionate to the scale of the change, it needs to be real and meaningful. Consultation must always take place at a stage when it can influence the decision.

1.47 In some cases, consultation with the local Healthwatch may suffice, but in others, a more direct attempt to involve and consult with patients may be required. Where the change is significant, there are also obligations to consult the local authority's health overview and scrutiny function.

1.48 Land transactions should be properly addressed by the organisation's board, decisions properly authorised, and relevant paperwork completed.

1.49 Standing orders and financial instructions may limit arrangements for the agreement and execution of documents relating to the acquisition or disposal of capital assets. The former will set out:

- limits of delegated authority from the board;
- expenditure approval processes;
- levels of expenditure requiring tender action;
- decision-making processes;
- delegated authority to sign contracts and agreements, make appointments, agree sales or purchases of land and property;
- processes for affixing the organisation's or the Secretary of State for Health's seal when required.

Important

Any person signing a contract in respect of a land and property transaction must be authorised to do so, must be fully informed about the transaction, and must have the clear support of professional advisers.

Separation of duties is required to ensure probity: for example, the same person should not sign a contract that he/she has negotiated, nor should anyone sign a contract where that person has an interest in the outcome of the transaction.

Abuse of power

1.50 NHS organisations should undertake a comprehensive consultation to avoid judicial review proceedings. However, there are occ-asions when NHS organisations have misused their discretionary powers, in particular where there is a legitimate expectation from an individual.

1.51 In *R* v. *North and East Devon Health Authority*, *ex p. Coughlan* [1999] EWCA Civ 1871, Ms Coughlan was a resident of Mardon House in Exeter and had been given a "home for life" promise by the then health authority. The Court of Appeal held that that promise gave rise to a public law obligation on the health authority and its successors, which could not be defeated in the absence of an overriding public interest requiring the health authority to close Mardon House.

1.52 Another area where policy statements may well give rise to legitimate expectations is the application of the Crichel Down rules (see paragraphs 4.16–4.21).

Procurement of new facilities and services

1.53 This section examines formal procurement requirements for NHS organisations in relation to the ownership of land and property, including freehold and leasehold arrangements.

1.54 Brief guidance is given on EU rules governing procurement and their effect on land and property transactions and acquisition of management services. This will clarify issues arising in Chapters 2 and 4–8.

EU rules on procurement

1.55 NHS organisations are subject to the European Procurement Rules ("EU Rules") – EC Directive 2004/24/EU and the Public Contracts Regulations 2006 – when procuring contracts for works, goods or services over specified financial thresholds. Even below these thresholds, principles deriving from the Treaty on the Functioning of the European Union (TFEU) will also apply, namely: equality of opportunity and treatment, transparency, proportionality, and a sufficient degree of advertising.

1.56 The procurement of new buildings is highly likely to fall under the EU Rules.

1.57 Where the sale of an asset (land and/or property) is directly linked to the procurement of new facilities or buildings, the EU Rules will usually apply because the construction of the new facilities or building will be regarded as a public works contract.

1.58 If an NHS organisation has any input to define the type of work, or has a decisive influence into the specification or specification of a new facility that is being constructed and which the NHS organisation is going to lease or part-lease, it is highly likely that the lease will fall under the EU Rules.

Note that Directives 2014/24/EU and 2014/23/EU on public procurement and concession contracts were approved by the European parliament in January 2014 and the UK government will need to implement many of the provisions within 24 months of the publication of the new Directives in the OJEU. This guidance does not take into account the forthcoming changes.

Land and property transactions

1.59 Land disposals are not affected by EU Rules unless the land and property is used in lieu of cash as consideration for the procurement of new facilities.

1.60 In general, EU Rules do not apply to land purchases and/or rights related to land. This includes straightforward purchasing or leasing of land with existing buildings or speculatively built new buildings. However, there are exceptions to this general principle and so, when planning a property transaction, it is important to check that none of these exceptions apply.

1.61 If EU Rules do apply, the transaction must be advertised in the *Official Journal of the European Union* (OJEU) and specific timescales and rules of procedure must be observed. Professional advice should be sought.

1.62 Even if the EU Rules do not apply, the procuring body still needs to ensure that it has considered various alternatives and can demonstrate that the proposed transaction is the best way forward and represents value for money (for example by completing an option appraisal as part of its business case).

Public works contracts

1.63 Some land transactions may be classified as public works contracts and may therefore be subject to the EU Rules. In particular where, as part of the transaction, a new facility is being built to meet an NHS organisation's specified requirements, the contract is likely to be classified as a public works contract to which the EU Rules will apply (subject to the value of

the contract being above the relevant financial threshold).

1.64 Classification as a public works contract may be made regardless of the type of land transaction, who owns the land, and whether the works are paid for through rental payments or a single lump sum.

1.65 For example, where an NHS organisation agrees to take a 20-year lease of new offices to be built by a developer, on the developer's own land, to the NHS organisation's specified requirements, the contract is likely to be classified as a public works contract. It should be noted that a contract to deliver public works where the consideration consists of or includes the right to exploit the work from third-party customers (as a way of financing the scheme rather than through payment from the NHS organisation) may also be subject to EU Rules as a public works concession contract.

1.66 If, however, the lease is for existing offices or new offices where the NHS organisation does not specify any element of the new build (apart from usual tenants' fittings), it is likely that it will constitute a land transaction and fall outside the EU Rules.

1.67 This is a potentially complex area, and professional advice, especially legal, should always be sought if there is doubt over whether the EU Rules will apply. It is essential that EU rules are properly taken into account.

1.68 NHS organisations should be aware of probity issues in negotiating with a single developer rather than tendering, as this may raise governance questions.

Public services contracts

1.69 Some land transactions may be classified as public services contracts and may therefore be subject to the EU Rules. This may arise where additional services are provided as part of the land transaction.

1.70 For example, an NHS organisation may agree to take a lease of an existing building but may ask the landlord to provide additional services – over and above those usually provided under a standard full repairing and insuring (FRI) lease.

1.71 If the value of the additional services exceeds the value of the payments purely attributable to rent, and/or the value of the additional services are above the relevant financial threshold applicable to public services contracts, the EU Rules will apply. A typical example of such additional services would be services provided as part of a lease-plus agreement under NHS LIFT. Again, professional (especially legal) advice should be sought if there is doubt over whether the EU Rules will apply.

1.72 Before using a LIFTCo, the OJEU under which it was procured should be checked to ensure the type of transaction now envisaged is covered by the procurement so that a further procurement process would not be needed.

Procuring works, goods or services – asset maintenance

1.73 Many of the day-to-day operations of the estates/facilities department require the purchasing of resources, whether service contracts or plant, equipment or stores items (for the latest information on available framework agreements, visit the Crown Commercial Service website).

1.74 Many purchases require professional advice and support from the NHS organisation's purchasing and supplies department or the NHS Supply Chain. The asset manager must lead professionally but use this support and expertise wisely.

1.75 The EU Rules apply to many day-to-day purchasing activities.

1.76 Tendering procedures as set out in standing orders and financial instructions need to be observed.

1.77 Professional advice should be sought from legal advisers, the NHS organisation's purchasing and supplies department or NHS Supply Chain if there is any doubt whether a procurement is subject to EU Rules.

2.0 Management of land and property

Buildings and the way they are used can have a strong influence on health and well-being of all users. NHS organisations should ensure that the design and use of their estate maximises opportunities for these users to adopt healthy behaviours. This could be through the layout of the estate to encourage physical activity and providing healthy eating options in shops, cafeterias and vending machines (see paragraphs 6.41–6.47).

NHS organisations should ensure that facilities are available to encourage staff to use active means of travel (such as cycling and walking), and encourage people to adopt active means of moving around the estate (using stairs instead of lifts), in line with NICE guidelines on promoting physical activity in the workplace.

These can be incorporated into the day-to-day running of their estate as well as through estate strategies.

Introduction

2.1 Active management of land and property is fundamental to the overall success of an organisation.

2.2 The opportunities to achieve efficiency savings and reduced running costs in the estate can be considerable in most cases and these must be undertaken to meet the challenges to the funding of the NHS. A significant step change in the way the NHS estate is managed and delivered has to be achieved. This will be a challenge for FTs, Trusts and commissioners. They will need to work together to achieve the required efficiencies. The collective objective is to provide a safe, compliant and sustainable estate that is fit for the provision of good quality health and social care services.

2.3 Clinical service strategies from commissioners, FTs and Trusts should lead the future development of the estate. FTs and Trusts should achieve lower operating costs without compromising patient safety. This is achievable through many of the topics covered in this guidance, especially the understanding of the estate and analysis of its performance.

2.4 This section looks at the efficient and effective management of land and property (whether freehold, leasehold or subject to other contractual arrangements). Specifically it considers:

- leadership and governance;
- understanding the estate;
- preparation of an estate strategy;
- efficiencies in running the estate;
- general management of the estate.

Leadership and governance

2.5 Chief executives are accountable for the management of services provided by their organisations. With regard to estate and facilities, they have three distinct responsibilities:

- strategic management of assets – regular review of their productivity, cost and

fitness for purpose, and subsequent rationalisation and investment;

- operational maintenance of assets – ensuring that the condition of the estate is assessed and reported on regularly, and assets are high-quality, appropriate and safe for day-to-day use;
- ensuring that all statutory obligations are identified and met.

2.6 Estate and facilities managers (in-house, external or shared services) should provide a service that enables the other managers in the NHS organisation to know:

- the organisation's land and property holdings;
- the cost to run and maintain the assets;
- that accommodation is constantly reviewed to ensure optimum use;
- that the estate is maintained to minimise the risk of claims from third parties or statutory regulators;
- that staff and patients enjoy a secure and attractive environment;
- that tenancy arrangements with third parties are properly documented, monitored and contractual obligations honoured;
- that environmental impacts are identified and proposals are in place to reduce/limit harm to the environment;
- the statutory designations (listed buildings etc) and special planning consents required for developments, including alterations;
- town planning policies relating to the property and development of new planning documents;
- that the asbestos register is up-to-date;
- that information is available from strategic service development strategies or commissioners five-year plans;
- that the accommodation complies with all relevant legislation and regulations.

Understanding the estate

The current estate

2.7 FTs and Trusts should carry out a comprehensive analysis of their current position and performance in relation to the estate they use. The key objective here is to establish a baseline against which estate development planning can take place. This will include an assessment of all land and buildings owned, occupied, let or shared by the organisation, legal title documents, deeds, and documentation relating to any leases, licences or other types of occupation by a third party. Fundamental to this is having an up-to-date and accurate electronic database containing this data.

2.8 It is recommended that the following information should be collated:

- the current service profile;
- the current property schedule;
- the current estate value;
- a breakdown of estate occupancy costs;
- a short history of the estate;
- an analysis of current estate performance and utilisation using data from the Estates Return Information Collection (ERIC) and NHS Premises Assurance Model (NHS PAM);
- an analysis of environmental impact assessments;
- the findings of Patient-Led Assessments of the Care Environment (PLACE) surveys;
- a breakdown of backlog maintenance costs and risks;
- a summary of the priorities to be addressed and the plans in place to address these;

- other information (as outlined in the "General management of the estate" below).

2.9 All this information should be used to develop an estates strategy (see paragraphs 2.15–2.19).

2.10 The main property performance measures that should be used are:

- NHS PAM, incorporating compliance audit and ERIC;
- six-facet survey reports;
- lifecycle investment planning;
- CQC reports relevant to the estate;
- PLACE.

See Part A for further guidance on these resources.

NHS Premises Assurance Model (NHS PAM)

2.11 The purpose of the NHS PAM is to identify opportunities where actions are required to improve the safety or the quality of the premises. One of its benefits is that it allows for the comparison of data across years, so that the organisations can easily track performance. It also allows for benchmark comparisons with peers.

Estates Return Information Collection (ERIC) data

2.12 ERIC should be treated as the standard first step when analysing estates data.

2.13 Total occupancy costs can be a good indicator when benchmarking the overall cost of the estate against other organisations. It is also useful when calculating the costs or savings that can be achievement in the management of the estate.

2.14 Data is collected for the following areas:

- Organisation-wide basis:
  - organisation profile
  - contracted-out services
  - finance
  - staff
  - transport services
  - fire safety
  - cleanliness
  - food and laundry and linen.
- On a site-specific basis:
  - areas
  - function and space
  - age profile
  - quality of buildings
  - combined heat and power
  - energy
  - water service
  - waste
  - car-parking.

Where there are any deficiencies or serious concerns outlined by the ERIC data, then the organisation will need to analyse the data and outline ways to improve performance in these areas.

The preparation of an estate strategy

General principles

2.15 Once a comprehensive analysis of the condition and performance of the existing estate has been completed, the organisation will have the baseline data used when developing an estate strategy.

2.16 An estate strategy should represent the vision for the future of an FT's or Trust's estate across all of its freehold and leasehold property in order to deliver and satisfy the current and perceived business plans, the

expected operational service requirements, aligned with joint objectives of commissioners and contributors to health and social care delivery. This often involves partnerships with local authorities, charities, universities and research.

2.17 The purpose of an organisation's board-approved estate strategy is to provide the strategic framework for the provision of an efficient, sustainable and fit-for-purpose estate that is both safe and secure. Current drivers include improving efficiency and rationalising occupancy whilst reducing ongoing revenue and capital commitments.

2.18 Commissioners' outcomes frameworks necessitate that services are delivered from the right locations to facilitate and support the new and existing services and to optimise maximum benefit from existing assets. This can be achieved by:

- ensuring that the estate is aligned to the organisation's clinical service and business objectives and that it supports the achievements of its business plan;
- providing a clear positive statement to public and staff on the organisation's plans to maintain and improve facilities in support of clinical services;
- aligning the capital investment programme with the organisation's clinical service strategies and allowing future business cases for capital to be measured in a strategic context;
- enabling the estate to operate flexibly, economically and efficiently, providing and maintaining appropriate and affordable healthcare facilities that are fit-for-purpose, value for money, complement statutory requirements and support the provision of good quality clinical care;
- supporting the alignment of the organisation's strategies (IT, HR, financial/ performance, sustainability) with the assurance that asset management costs and occupancy costs are appropriate and that future action is taken to address those that fall outside savings targets;
- giving assurance to staff that they will have appropriate working environment/s and that any transition to new facilities will be managed well with minimal disruption to their working lives and services.

2.19 The estates strategy should reviewed annually using ERIC and NHS PAM data. The clinical strategy should be the driver of the estate. If this strategy is being formulated or changed, the estate should be managed so as to be able to react quickly when change is being sought.

Improved efficiencies in running the estate

2.20 FTs and Trusts should adopt best practices and targeted skill mixing of resources for the estates and facilities function, encouraging business acumen whilst reducing costs. They should therefore set appropriate efficiency measures as part of annual planning.

Demand Side Response schemes

2.21 FTs and Trusts are encouraged to support balancing of the national grid through Demand Side Response schemes, which provide sites with a revenue stream in return for responding to calls at times of system stress for periods of up to an hour at a time, several times a year. Estates can utilise and optimise existing assets through:

- back-up generation to drop total demand from the grid;
- shedding non-essential load; and
- back-up generation to supply to the grid.

See paragraph 3.33 in Part A for further guidance.

The costs of holding land and buildings

2.22 The main costs associated with property assets (excluding capital costs) include maintenance, cleaning, energy and utility costs, capital charges (where relevant), rates and rent (where applicable).

2.23 Freehold land and buildings costs include:

- capital charges;
- planned and unplanned maintenance expenditure.

2.24 Capital charges comprise depreciation and interest charges, which vary according to the age of the asset. They represent respectively the cost of "using up" the asset and the cost of tying up capital in the asset. NHS organisations should understand the different types of valuation upon which capital charges are calculated, that is, market value (MV), existing use value (EUV) and depreciated replacement cost (DRC).

2.25 Leasehold land and property costs include the following:

- where the landlord is another NHS organisation, a rental, often equivalent to a "capital charge" plus a service charge;
- where the landlord is a non-NHS organisation, and additionally for the civil estate, a market rent, which will normally be subject to regular review plus, in most instances, a service charge;
- VAT, which cannot be recovered in all cases;
- repairing and decorating obligations – often on a fixed-period basis;
- potential dilapidation claims on expiry of the lease.

In addition to these, the landlord may wish to recover a proportion of:

- the unitary charge (under a PFI arrangement); and
- the lease payment (under a LIFT arrangement).

2.26 Whatever the tenure, liabilities often include:

- uniform business rates;
- charges for utilities (such as gas, water, sewerage and electricity);
- security costs;
- insurance premiums (pooled and/or commercial arrangements);
- special expenses where buildings are listed or the property is in a conservation area;
- costs incurred to comply with statutory requirements.

2.27 In leases, the items may be paid directly by the tenant or by the landlord and recovered as rent and a service charge.

Lifecycle costs

2.28 Understanding the lifecycle costs of assets is critical to minimising costs and making effective investment, maintenance and replacement decisions.

2.29 Assets have different cost structures at different points of their lifecycles. For example, maintenance costs become proportionately higher as an asset ages. Understanding the position of an asset within its lifecycle and the trade-off between different costs is important in effective asset management.

Managing those costs

2.30 Periodic budgeting will include:

- a review of occupied space, to see whether surplus space can be identified for internal use, for sale (where applicable), for income generation or for beneficial re-use within the NHS;

- consideration of the various contracts, whether for supplies or services, relating to the estate;
- consideration of the efficiency of the existing land and property, the cost of their replacement and value in the market;
- monitoring and review of service charges in leased accommodation.

2.31 Where an NHS organisation is a tenant, it is advisable for landlords to follow the latest edition of the Royal Institution of Chartered Surveyors (RICS) (2014) code of practice 'Service charges in commercial property'. This guidance promotes best practice in terms of service charges for commercial property in new or renewed leases. It is used to interpret service charge provisions in existing leases unless the lease specifies an alternative approach. The parties to a lease should be transparent when dealing with service charges through regular communication about the provision, relevance, cost and quality of services provided.

2.32 The RICS guidance identifies what should and should not be included in the service charges and methods of apportionment. Proposed budgetary charges by the landlord or his/her managing agents should be reasonable and "cost neutral" (that is, the landlord quality service makes neither a profit nor a loss).

2.33 Minimising asset costs does not necessarily mean having only the cheapest assets. Such costs should be considered in the context of the quality of the service required, and costs need to be assessed over the asset lifecycle, including maintenance costs and resale value, not just on the basis of the purchase cost.

General management of the estate

2.34 The organisation's database should also include the general estate data that is needed to be able to understand the current condition of the estate (see paragraphs 2.7–2.14).

Land and property records

2.35 FTs and Trust should have an up-to-date and accurate property asset register and site plans. This should include details of all leases and other property-related agreements taken by the organisation, similar transactions to third-party organisations in respect of freehold and leasehold property, and donated assets.

2.36 Records should be computerised and open to audit, especially if maintained by a third party.

2.37 They should include an events diary for all leaseholds (whether taken or granted by the organisation) as a reminder for action on notices, rent reviews, rent renewals, break notices, review of service charges etc. Failure to adhere to timescales (for example planned maintenance) can lead to major occupation problems as well as costs. Recent case law has highlighted the need to ensure that any break notices must be served strictly in accordance with any requirements specified in the lease and that all conditions must be met for the break to be effective.

Legal title documents and deeds

2.38 All legal documents relating to an NHS organisation's land and property, including Establishment Orders, Transfer Orders and Directions as well as any legal charges, should be kept in a secure fireproof safe with a policy for registering when they are removed and returned. This service may be provided in-house or externally by, for example, solicitors.

2.39 NHS organisations should ensure that all legal title is registered in their name, especially after assets are transferred to them, for example under a Transfer Order.

2.40 Where property is unregistered, NHS organisations are encouraged to register such interests at the Land Registry, whether or not they are required to do so under Land Registry rules. This should assist in avoiding uncertainties around the enforceability and/or

relevance of covenants, easements or other provisions.

2.41 On registration of title, it is advisable to retain original deeds that give details of rights and easements to help to resolve disputes in the future. Advice regarding this matter should be sought from a solicitor.

2.42 Deeds to historic buildings, particularly if listed, should be retained for possible research use. Pre-registration deeds should not normally be destroyed or sold. If arrangements cannot be made in-house for their safekeeping, they may be stored by the local authority or other interested organisations such as The National Archives.

Maintenance

Land and property

2.43 Records should indicate the condition of land and buildings, location or suspected location of asbestos and maintenance schedules. They should clearly identify the location of cables, pipes, ducts etc. Where that knowledge is lacking, a survey should be commissioned. Health and safety legislation sets out stringent requirements in relation to issues such as asbestos and fire inspections. There are criminal sanctions for failure to comply. Inspections must be carried out at intervals specified by the legislation.

2.44 Property managers should undertake budgeting and space utilisation exercises to identify where existing standards are adequate and where improvements can be made.

2.45 An assessment of lease liabilities will be a factor in planning maintenance programmes.

2.46 Having assembled the basic information, a planned maintenance schedule should be drawn up for a particular time period – usually between three and five years. For historic or listed buildings a quadrennial/quinquennial conservation survey is required.

2.47 Changes in service provision as well as legislation will require regular reviews of the maintenance programme. A routine for carrying out such reviews should be established.

Boundaries

2.48 In general, boundaries should be regularly maintained and notices posted saying that this is "the private property of an NHS organisation [owner]".

2.49 Deeds are often unclear on the issue of boundary ownership. It is therefore usually necessary to inspect boundaries. In the absence of documentary evidence, there are indications that can be helpful but are seldom conclusive:

- "hedge and ditch" rule – a ditch will usually belong to the landowner whose land includes an adjacent hedge;
- retaining wall – usually built by the party whose use of land created the need for it;
- whoever has maintained them in the past.

2.50 The cost of boundary maintenance should be weighed against the required security and resulting benefits (see also paragraphs 2.77–2.82).

2.51 Organisations need to be aware of the procedures and rights contained in the Party Wall etc. Act 1996 (as amended). If in doubt, a solicitor should be consulted.

Under PFI and LIFT contracts

See paragraphs 3.50–3.53 in Part A on 'Achieving value for money from existing PFI contracts'.

2.52 Under PFI and LIFT contracts, the private sector (contractor) is responsible for maintaining NHS premises. However, NHS organisations should ensure maintenance is carried out properly.

2.53 The normal contractual provisions are set out below, although these may differ on a scheme-by-scheme basis.

2.54 The contractor should schedule the necessary maintenance in the most effective way. Before the start of each year of the contract, it must provide a proposed maintenance programme for that year. At the same time, it must provide an up-to-date five-year maintenance plan.

2.55 If the contractor follows the maintenance programme, usually no deductions will be made for any resulting underperformance of services.

2.56 The maintenance programme is subject to review by the relevant NHS organisation. It may object to the contractor's proposed maintenance programme on the grounds that:

- it would interfere with its operations in a way that could be avoided or reduced by rescheduling the works;
- the proposed hours of maintenance are not acceptable (for example, maintenance involving dust or loud noise in areas that are being used for surgery at that time);
- it is not in accordance with the service specifications in the contract;
- the safety of patients or other users of the premises would be adversely affected by the proposed programme;
- the period proposed for the maintenance works exceeds that reasonably required to carry them out.

2.57 NHS organisations should retain the right to instruct their contractors to accelerate or defer planned maintenance. However, contractors should be compensated for any additional costs (up to an agreed amount) incurred as a result of the requested changes.

2.58 No performance deductions should be made if the reason for the contractor's non-performance is deferral of the maintenance works in accordance with the NHS organisation's instructions.

2.59 Where the need arises (other than in an emergency) for maintenance works not set out in the agreed programme, the contractor must agree the time and duration of these works with the NHS organisation.

2.60 Where an emergency occurs that requires immediate maintenance, the contractor must notify the NHS organisation of the action it is taking and seek to minimise any disruption caused.

2.61 If emergency maintenance is needed or planned maintenance requirements are not complied with, financial deductions may be made.

2.62 NHS organisations should reserve the right to periodically inspect the ongoing maintenance. A separate inspection of the facilities should take place towards the end of the contract to ensure the assets are handed back in a satisfactory condition.

2.63 The NHS organisation will have the right to carry out a survey where it reasonably believes that the contractor is in breach of its maintenance obligations, and ultimately to step in and carry out remedial work where the contractor fails to do so. There will be a separate right to carry out a survey prior to expiry or termination and, where disrepair is identified, for deductions to be made from the service payment and held in a retention fund account as security for the cost of the remedial work.

Risk management

2.64 Management of risk is a vital aspect of land and property management. Measures should be introduced that:

- identify the risks arising from the ownership/rental and use of assets;
- assess those risks for potential frequency and severity;

- eliminate high and significant risks associated with substandard assets. Moderate and low-risk elements should be addressed by effective management in the medium to long term;
- monitor the effectiveness of risk control measures.

2.65 Areas that should be addressed include:

- statutory compliance;
- health and safety requirements including the control of asbestos in buildings;
- security arrangements;
- pooled insurance arrangements;
- fire risks;
- risks arising from the maintenance of assets and the consequence of breakdowns;
- waste storage and disposal;
- environmental management;
- transport plans;
- contingency planning.

Security arrangements

2.66 NHS organisations should produce and implement a security strategy in accordance with NHS Protect's national standards and guidance for providers on security management. The strategy should address all security risks for the protection of personnel, patients, property and assets and include site-specific risks with the following issues covered:

- improving and maintaining the physical security of grounds and buildings;
- controlling the access and movement of all users and preventing illegitimate users from gaining access to the site and buildings;
- the ability to lockdown or control access and movement within a specific part of a building or site in response to an escalating scenario;
- raise staff awareness of the importance of security in their area and promote personal responsibility;
- inform staff of what to do in the event of a security incident, how it should be reported and to whom.

The security strategy and any related work should be overseen by the local security management specialist (LSMS) or qualified person undertaking/overseeing the delivery of security management in accordance with NHS Protect's standards.

2.67 Security proposals must be tailored to each site, considering its location, use, design and the perceived risk. Advice should be sought from the LSMS and the local crime prevention design adviser (CPDA) or designing out crime officer (DOCO) on specific security risks at local level.

2.68 The types of security risk (assault, theft, vandalism, terrorism, trespass and arson) must be assessed and analysed, and appropriate measures identified and implemented.

2.69 Certain areas (for example vacant property, car-parks, medical gas storage, pharmacies and hospital/clinic drugs stores) will have specific security risks that should be highlighted when carrying out the overall security review.

2.70 The security and protection of staff, patients and visitors can often be improved. This can be achieved with relatively low investment by improving lighting, changes to the landscaping, fitting of closed-circuit television (CCTV) camera systems, staff identity badges, access control systems and improved staff awareness of security issues.

2.71 Methods of access control and security patrols should be considered. In the long term, relocation of rights of way should be considered as this can provide individuals with a legitimate

reason to be on a site, such as with through-routes, cycle routes and footpaths that cut across or run alongside the site. Advice should be sought from the local CPDA or DOCO on addressing this type of risk. See also paragraphs 2.48–2.51 on boundaries.

2.72 A checklist of vacant land and property issues (for example key holder, mothballing/ maintaining services, perimeter security, building security etc) will help ensure that most problems are avoided. The case for demolition on grounds of savings on security, capital charges or rates should be assessed against other options including alternative use and planning.

2.73 Informal arrangements for the use of vacated land and property should be avoided. It is generally preferable to have land and property kept in use through formal arrangements (lease or licence), in part and/or temporarily, rather than left unused.

Prevention of trespass

2.74 Trespass and encroachment problems may be alleviated by a regular inspection of boundaries, gates and accurately signposted rights of way. Notices at boundary locations should inform that the site is private property and that "legal action will be taken against trespassers".

2.75 Regular checks of the site should be made to ensure that:

- no third party is encroaching. Any encroachments must be addressed or, over time, they could give rise to a claim that the trespasser has a right to be registered as the owner of the land (10 years' adverse possession can in some circumstances give a person possessory title to land);
- rights of way on foot or with vehicles are not being established. Check for garden gates being opened into boundary fences. The practice should either be stopped, or be permitted by way of a revocable licence.

2.76 Regular use of a particular thoroughfare or path can give rise to the acquisition of rights by the public at large. A notice should be erected and maintained stating "PRIVATE LAND – No right of way" in a position clearly visible to potential users. If problems persist, consider taking steps under section 31 of the Highways Act 1980.

How to deal with illegal occupation

2.77 The following steps should be taken to deal with illegal occupation:

- ensure that all managers know to whom the presence of trespassers should be reported;
- in the case of squatters, the appropriate manager from the NHS organisation (responsible manager), with police support if possible, should visit the offenders and ask them to leave. It is recommended that names of any occupiers are not sought, as this makes the service of court proceedings more onerous;
- there are provisions in section 61 of the Criminal Justice and Public Order Act 1994 which enable senior police officers to direct trespassers to leave premises in certain circumstances. The police should be involved as early as possible, although they often take the approach that trespassers should be removed by the landowner using his rights under the civil law;
- if the illegal occupation is of residential property then the police have the power, under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, to raid the property and remove the squatters;
- alert the local housing department and social services if action is likely to cause homelessness, and if children, disabled or older people are involved;

- make a written record of all conversations and consultations, types of vehicle and registration numbers (discreetly). This will serve as useful evidence should the trespassers leave following a court order for possession and then return soon afterwards.

2.78 If the illegal occupation persists, solicitors should be instructed to initiate possession proceedings. They will take the following actions:

- initially, a "bluff notice" may be served (if appropriate) giving the trespassers 24 or 48 hours' notice to leave, failing which court proceedings will be instigated against them;
- take a witness statement from the responsible manager stating the owner's interest in the land and property (details of title should be supplied to the solicitor), any relevant details concerning the offending parties, and confirm the fact that the land and/or property is occupied without consent;
- the statement should be signed by the responsible manager, having obtained all the necessary information on the matter. The statement should (if appropriate) also confirm that the names of the occupiers are not known;
- issue proceedings in accordance with the Civil Procedure Rules. If the claim is brought within 28 days of the date on which illegal occupation was first known about or ought reasonably to have been known about, the proceedings may include an application for an interim possession order;
- seek a date for hearing the matter in court, which will be at least two clear working days from service of the court proceedings or, in the case of residential premises, at least five clear working days from service, but usually longer than that period. If the claim includes an application for an interim possession order, the court will list an interim hearing to consider that application as soon as practicable but not less than three days after the day on which the claim is issued. Where service is not effected personally on the occupiers but is left in a prominent part of the site in accordance with court rules, service would not be deemed to be effected until the following day.
- arrange for the proceedings to be served personally by a process server (a company that serves legal documents correctly) or in accordance with court rules.

2.79 In the case of trespassers, the court has no discretion other than to order immediate possession, and such an order can be enforced by formal eviction by the sheriff or bailiff. However, the court must be satisfied that the proceedings have been properly served and the occupiers are in occupation without the licence or consent of the owner.

2.80 In exceptional circumstances, the housing department may re-house people, but they will only get involved when a court order for possession has been obtained. Sometimes they may only do so once a date for eviction has been given. Squatters or travellers will often not seek re-housing.

2.81 Once possession has been obtained, the NHS organisation should take steps immediately to secure the site to prevent further incidents of unlawful occupation. This often requires the erection of fencing or other measures to prevent vehicles getting onto the site (see paragraphs 2.74–2.76).

2.82 If squatters return following the execution of a court possession order, it may be possible to issue a warrant of restitution. Such a warrant instructs the bailiff to re-execute the court order to avoid the need to issue fresh possession proceedings. However, this procedure is not available in all cases, and legal advice should be sought in each individual case.

For further guidance on trespass and illegal encampments, see the Department for Communities and Local Government (DCLG) (2013) guidance 'Dealing with illegal and unauthorised encampments'.

Health and safety requirements

2.83 NHS organisations should have a written health and safety policy and procedures document, which should be issued to all staff.

2.84 A health and safety consultant may be appointed to advise on statutory health and safety regulations relating to the use, occupation and management of land and property. This is not a substitute for properly trained and experienced in-house staff, but rather should add value to in-house expertise.

2.85 When NHS organisations contract with third parties they must pass on responsibility for health and safety regulations to the contractor. Records of tests must be maintained and monitored to ensure they are being completed.

2.86 The differing needs of staff, patients, visitors and contractors should be taken into account when considering fire safety, security, general safety and welfare, and dealing with the disposal of clinical and other hazardous waste. Access for all, but especially for people with disabilities, must be addressed.

Insurance arrangements

2.87 The NHS Litigation Authority (NHSLA) provides a number of risk-pooling schemes for the NHS. The property expenses scheme (PES) covers loss and damage in respect of property (buildings and contents) and NHS organisations are expected to subscribe to a PES.

2.88 An exception applies to FTs, which may subscribe to the scheme and/or purchase insurance commercially.

2.89 The PES does not provide reimbursement for significant damage. Maximum limits apply depending on the organisation's size and turnover. For example, if a hospital were seriously damaged by fire and had to be demolished and rebuilt, the PES would not cover all of that cost.

2.90 The purchase of commercial insurance may be justified in certain circumstances. For example:

- in the case of buildings insurance – where insurance is a condition of the lease and the landlord will not accept an indemnity. Insurance is usually taken out by the landlord, who then demands reimbursement of the premium or a proportion of it if the building is occupied by a number of tenants;
- where sites are shared with others and/or where the shared cost is small. Commercial insurance may be cheaper than each party insuring or self-insuring;
- in respect of lifts and boilers that involve periodic expert inspection designed to reduce the risk of loss or damage;
- in respect of indemnity insurance for restrictive covenant or chancel repair liability.

Sustainability management

2.91 Each NHS organisation should make an assessment and manage its own impact on the environment by encouraging all staff to play an active part in carbon reduction, sustainability and environmental stewardship.

2.92 NHS organisations should be aware of the current legal, statutory, government mandatory policy and guidance for sustainability.

2.93 The NHS Sustainable Development Unit (NHS SDU) is a good reference point for resources, tools and policy. The NHS SDU works across health, public health and social care in England to help health and social care organisations fulfil their potential as leading sustainable and low carbon organisations.

2.94 Active sustainability management would include:

- compliance with legal requirements such as the Climate Change Act 2008 and the Carbon Reduction Commitment (CRC);
- the reduction of carbon emissions and a sustainability strategy;
- carbon reduction including investment to reduce carbon footprint, waste management etc;
- sustainable design;
- good corporate citizenship;
- governance.

Wayleaves and easements

2.95 An easement is a right over land that benefits another owner's land (for example, a right of way). A wayleave is a right to use land for a defined purpose (for example, running cables) where the person using it does not necessarily own adjoining land. An easement may be permanent or temporary. In the latter case, it may be for a fixed term or terminated on giving notice. This will be evidenced in the legal documentation.

2.96 An easement/wayleave may be created, for example, when a utility company supplies services to NHS-owned land and/ or buildings, or more generally to facilitate its operations. In such cases there will be a payment by the utility company to the NHS organisation (where it is not the beneficiary of the installation), in respect of which valuation advice should be taken.

2.97 Before the utility companies were privatised, standard national agreements existed for electricity, gas and telecommunications easements. These no longer exist.

2.98 Utility companies have their own agreements to deal with easements/wayleaves and a solicitor's advice should be taken on these agreements.

2.99 FTs and Trusts should identify all utility facilities on their site, note their exact location, and negotiate a new agreement if no legal documentation exists.

2.100 Major pipelines for gas, water and sewerage together with high-voltage electricity cables will cause land on either side to become sterile: the extent of the sterilization will depend on the size of the pipes and cables.

2.101 Points for NHS organisations to consider and take appropriate professional advice when negotiating easement agreements include:

- prior to negotiations, it is worth considering the development potential of the site. Pipes, sewers and cables (and any other utility facilities) on NHS-owned land should be located, designed and installed so as not to restrict the current use of the site or any planned or potential development;
- obtain the right to require diversion of pipes, cables etc at no cost to the NHS organisation, that is, by use of "lift and shift provision";
- obtain confirmation of the grantee's responsibilities regarding maintenance, improvement and renewal of permitted pipes and cables (or other utility facilities);
- ensure the grantee pays the NHS organisation's reasonable advisers' fees;
- ensure indemnity from the utility companies against any claims arising;
- ensure that all draft documents are checked by solicitors before they are completed;
- ensure that the main terms of the agreement are included in the estate terrier and the completed documentation placed with the deeds of the property.

2.102 Where it is necessary for an FT or Trust to lay utility services over third-party land, negotiations should take place on the understanding that if agreement cannot be reached, the utility company may use its statutory requisitioning powers. They should

take valuation and legal advice over the level of any compensation payments to be sought in these circumstances.

2.103 Particular care is needed if an FT or Trust is considering entering into a lease with a telecommunications company given the extensive statutory protection these arrangements enjoy.

Compulsory purchase of NHS property by a local authority

2.104 NHS organisations may (like other landowners) be the subject of compulsory purchase order (CPO) powers exercised by a local authority.

2.105 If an NHS organisation becomes aware of the possibility of any part of its landholding being compulsorily purchased, or if a notice is received from the local authority in relation to a CPO, specialised legal and valuation advice should be obtained immediately.

2.106 Land held in the name of the Secretary of State for Health, either directly or on behalf of NHS organisations that cannot hold land in their own name, is Crown land, and as such cannot be compulsorily acquired. In these cases, the local authority should be informed accordingly; normally, any sale to it is by agreement.

2.107 FTs and Trusts may be able to obtain relief from compulsory purchase under section 16 of the Acquisition of Lands Act 1981. If as a result of the CPO the organisation would not be able to carry out its statutory function, the Secretary of State for Health's support should be obtained for the discontinuance of the CPO. Again, specialist advice must be obtained in respect of this matter.

2.108 NHS organisations should cooperate with the local authority promoting the CPO to achieve a negotiated settlement.

2.109 The CPO process for National Significant Infrastructure Projects is different (see the Planning Act 2008). Here the rules regarding Section 16 relief as described above are different. NHS Organisations should seek professional advice in these cases.

Town and village greens

2.110 The NHS estate includes many areas of open space, which may be freestanding or located within a hospital site. These open spaces may have belonged to the hospital estate for many years and may be integral to the site or surplus to requirements. Alternatively, they may have been acquired for the provision of a new facility that has not been built.

2.111 Such areas of land may be vulnerable to an application being made to the Commons Registration Authority by local people for registration as a town or village green. It is not necessary for land to have the appearance of an archetypal village green. An area of wasteland is just as vulnerable to a town or village green application and local residents who object to a new development often use the town or village green registration process as a tool to delay or scupper the development.

2.112 If a town or village green application is successful, the land in question will become incapable of development and may not even be capable of being used for access purposes, which will have consequences both for future healthcare service development and for disposals.

What can be registered as a town or village green?

2.113 The Commons Act 2006 (as amended) identifies the basis upon which a town or village green registration application may be made. It states that an application can be made to register land as a town or village green where the land has been used by a significant number of local inhabitants who have indulged in lawful sports or pastimes "as of right" for at least 20 years prior to the date of the application.

2.114 Lawful sports or pastimes include dog exercising (using linear footpath across the land is usually insufficient), walking, football, cricket, bird-watching, picnicking and playing with children. "As of right" means that the

recreational activities have been carried out without the permission of the landowner and without being stopped by the landowner. Case law is still evolving in this area. NHS organisations are recommended to take professional advice.

2.115 There has been a large amount of litigation regarding when an application can be made, and amendments to the Commons Act 2006 and provisions in the Growth and Infrastructure Act 2013 have clarified the position. Sections 15(2) and (3) of the Commons Act 2006 state that an application can be made either where:

(a) the lawful sports and pastimes are continuing at the date of; or

(b) the lawful sports and pastimes ceased no more than a year before the date of the application, i.e. if recreational activities are prevented by the landowner, local residents have one year which to submit a town or village green application.

2.116 Under the Commons Act 2006, the right to apply to register land as a town or village green ceases if certain trigger events occur, which include:

a. where an application for planning permission is made to redevelop the land;

b. where a draft of a development plan that identifies the land for potential development is published;

c. where a development plan that identifies the land for potential development is adopted;

d. where a neighbourhood development plan identifies the land for potential development is adopted; or

e. where a proposed application for development consent under the nationally significant infrastructure project regime is first publicised by the applicant.

2.117 For each trigger event, there are a number of corresponding terminating events also set out in Schedule 1A. For example, the corresponding terminating events for the publication of a planning application in relation to land are (a) withdrawal of the planning application; (b) a decision to decline to determine the planning application is made under section 70A of the Town and Country Planning Act 1990; (c) where permission is refused; and (d) where the grant of planning consent time expires before development has commenced. In relation to plan-making, the corresponding terminating events are if the relevant policy in the plans and draft plans is withdrawn or superseded.

2.118 Note there are no trigger events in relation to permitted development rights. Therefore the exclusion will not apply to land on which permitted development has taken place, unless a trigger event has occurred in relation to that land for another reason. If a trigger event has occurred on land then the right to apply to register it as a green is excluded. Therefore a commons registration authority cannot accept any application to register that land as a town or village green.

Procedure to register a town or village green

2.119 An application to register a town or village green may be made by anyone who has an interest in the issue, including the owner (subject to obtaining the consent of any leaseholder or mortgagee). The application should be made to the commons registration authority for the area, which will usually be the county council or unitary authority in the area as appropriate, under the provisions of the relevant Act.

2.120 An applicant is expected to prove his/her case on the balance of probabilities and submit evidence that supports the claim that the land has been used by a significant number of local inhabitants for a period of more than 20 years as of right. There may be a public inquiry to consider the application if it is opposed.

2.121 If the commons registration authority accepts the application, it will register the land as a town or village green and must give notice of the fact to each person who objected to the application.

2.122 If the application is rejected, the commons registration authority must inform the applicant and each person who objected to the application of the reasons for the rejection. The applicant (or anyone else) may then make a fresh application.

2.123 If an NHS organisation becomes aware that a town or village green registration application is likely to be, or has been, made in respect of its land, it should seek urgent legal advice.

Effect of registration

2.124 Registration of land as a town or village green provides the right for local inhabitants to exercise the recreational rights described in the application over the land that has been designated as a town or village green.

2.125 Prospective new landowners should be made aware of the established recreational function of the land that has been registered as a town or village green land. This will prevent future development of the land where this would be incompatible with its recreational use.

Practicable preventative steps

2.126 Any NHS organisation's estate should regularly be assessed to ascertain whether there is any risk of a town or village green application being made. Precautions should be taken to prevent recreational use of the land without the NHS organisation's permission. If any land is being proposed for redevelopment or disposal it would be advisable to assess whether any actions could be taken to stop any recreational activities that are ongoing on the relevant land, and start the clock running on the one-year grace period for making an application. The following measures may be appropriate to prevent a town or village green application being made but legal advice should be sought on the individual circumstances of each site.

1. Erection of notices

2.127 The public should be prevented from having recreational access to the NHS-owned land. Temporary access for a specific purpose should be documented by way of a licence.

2.128 Notices should be erected and maintained around the perimeter of any land that is at risk, particularly at access points and throughout the site.

2.129 Photographs of the erected notices, details of their location, dates of their instalment and records of any damage to the notices must be kept. Damaged or removed notices must also be photographed and replaced as soon as practicable.

2.130 If a prohibitory notice is used, the NHS organisation will need to ensure that it take steps to prevent use which is in contravention of the notice if it is to avoid a successful application by people who have used the land without permission notwithstanding the existence of the sign. The following are suggested examples of notices:

- "THIS IS PRIVATE LAND – Access to the hospital only for patients, staff and visitors";
- "This is private land and is for the use of staff, patients and those with the permission of the xxxx NHS Trust only";
- "The walking of dogs, playing games or other recreational activities are not allowed on the property of xxx NHS Trust/this field".

2.131 If appropriate, the notice could grant a revocable permission to use the land with wording such as: "This land is privately owned. The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time."

2.132 It is advisable to close off vulnerable areas for a few days each year and erect a sign that indicates the area is closed to prevent the deemed dedication of the land as a town or village green. Records of such closures must be kept and preserved.

2.133 A statement and a map can be lodged with the commons registration authority that brings to an end any period of recreational use as of right over the land to which the statement applies and is described in the map. The statement will either interrupt the prescribed 20-year period for a successful application occurring; or in relation to land which has been subject to recreational use as of right for 20 years or more before the statement is deposited, the deposit of such a statement would trigger the one-year period of grace allowed for town or village green applications for each site.

2. Maintenance of boundaries

2.134 The maintenance of boundaries is very important. Wherever practicable, open areas of land that could be used for recreational activities by members of the public should be fenced off to prevent access. See paragraphs 2.48–2.51 for further details.

3. Leasing or licensing land for public use

2.135 Where NHS organisations decide to allow public use of their land by way of a lease or licence, a copy of the relevant lease or licence and accompanying correspondence must be kept as evidence of the private nature of the land.

2.136 NHS organisations that permit public use of their land should make it clear that any such use is by permission only.

Assets of community value

2.137 The Community Right to Bid was introduced in Chapter 3 of Part 5 of the Localism Act 2011. This gives voluntary and community groups and town and parish councils the opportunity to nominate local land or buildings to be included on a list of assets of community value (ACV). There is no prescribed list of land or buildings that may quality as ACVs, but any building that furthers the social interests and well-being of the community either currently or in the recent past, and that is capable of continuing to do so, could be registered as an ACV. Typical properties could include pubs, village shops, sports facilities and village halls.

2.138 The Community Right to Bid can be used to pause the sale of buildings or land to allow the community time to develop a bid to buy the property. In order for this to apply, the land or property in question needs to be nominated by parish councils or community groups so that it is recorded on the register of assets of community value maintained by local authorities.

2.139 The right to bid only applies when an asset's owner decides to dispose of it. There is no compulsion on the owner of that asset to sell it. The scheme does not give first refusal to the community group and it is not a community right to buy the asset, just to bid. This means that the local community bid may not be the successful one.

2.140 FTs, Trusts and NHS PS should consider whether any land or buildings within their estates earmarked for disposal have attracted public interest. They should be proactive with any interest groups so as to give them a minimum of six months to work up any bid during the disposal programme so as not the delay the ultimate sale of any land or buildings.

2.141 ACV registration can be revealed in the register of local land charges. The procedure relating to the registration and future disposal of ACVs is set out below:

- On receipt of a completed nomination the relevant council will make a decision on whether to list the property as an ACV within eight weeks. The organisation will be given notice of the application and an opportunity to make representations.

- If the property is listed as an ACV, the organisation will have the opportunity to ask the council to review its decision to list the property as an ACV, and there is also a right of appeal against the council's listing review decision.
- If in the future the organisation decides to dispose of a property that has been listed as an ACV, the community group who made the original application will be notified and will have a six-week period in which to decide whether to submit a bid to purchase and run the ACV.
- If the community group decided not to submit a bid, then the organisation will be free to dispose of it on the open market. If the community group confirms that it does wish to submit a bid, it then has a six-month moratorium (from the initial notification) in which to develop its bid to the NHS organisation. Unless it is to the community group, the asset cannot be disposed of during this period but the property can be advertised on the open market.
- The legislation does not affect the value of any property that has been registered as an ACV. The NHS organisation will be free to accept what it considers to be the best offer for the property, whether it comes from the community group or a third party.
- If a bid is not received or accepted in the moratorium six-month period, then the NHS organisation will be free to dispose of the asset on the open market for a further period of 12 months, at the end of which time (if no sale has been achieved) the whole process begins again.

Town planning

2.142 NHS organisations should have procedures in place to monitor and influence (1) national and local planning policy and (2) significant planning applications. See Chapter 3 for full details.

Management of tenancy and other agreements

2.143 Tenancy and other agreements should be properly managed (whether the NHS organisation is acting as landlord or tenant).

2.144 There are specific management issues in relation to the following:

- minor user rights;
- Section 256 Agreements;
- donated assets;
- use of non-NHS premises for treatment of NHS patients.

2.145 These are discussed below. Other contractual obligations will arise from PFI and LIFT projects.

Minor user rights

2.146 The occupation of some premises still depends on user rights governed by Article 5 of the NHS (Transferred Local Authority Property) Order 1974 following the 1974 local government reorganisation when land and property used for healthcare was transferred to the NHS.

2.147 Disputes are now comparatively rare, but where they do arise it is often because the major occupier, that is, the local authority, wants the minor user, that is, an NHS organisation, to vacate: for example, where a local authority wishes to refurbish a multi-storey property and an NHS organisation is only occupying a small part.

2.148 Where disputes happen, it is almost always sensible to adopt a practical approach, as the minor user will probably have acquired statutory rights to occupy, and obtaining vacant possession through a legal process is likely to be time-consuming and costly.

2.149 The following points should be noted:

- rights are enjoyed on the basis of the parties sharing running costs and

outstanding loan charges on a fair basis (floor area is the most usual);

- user rights were not intended to be of infinite duration, and if either party wishes to terminate the arrangement or convert it to a fixed-term lease or licence (where there is no exclusive occupation of space), it can negotiate appropriate terms. Disputes should be resolved locally;
- where the NHS organisation is the major occupier, it is advisable to document the arrangement in the form of a lease and set rent charges to cover the relevant capital charges;
- where a local authority wishes to dispose of its interest in land and property that is the subject of minor user rights in favour of an NHS organisation, it must negotiate appropriate arrangements (usually re-provision or financial compensation) before the NHS organisation is obliged to give up its user rights;
- user rights are only assignable to the statutory body created to fulfil the function and use of the property prior to 1974;
- where any dispute arises, it is generally accepted that user rights are now subject to landlord and tenant law.

Payments towards expenditure on community services

2.150 NHS England and CCGs (grantors) may make payments to certain non-NHS organisations under sections 256 and 257 of the Act to enable them to acquire premises for certain purposes, and for other expenditure in accordance with the Act. This power is subject to compliance with the Directions issued by the Secretary of State[1]. CCGs also have power to make payments to voluntary organisations under section 14Z6 of the Act. Although there are no directions in place for these payments, the above-mentioned Directions should be used as a guide to repayment provisions.

2.151 The agreements making these payments (known as grant agreements) should stipulate that if the capital asset is disposed of or ceases to be used for the specified purpose, an amount equal to the value of the asset attributable to the payment made under section 256 should be paid to the grantors.

2.152 For example, if a payment of £400,000 is made for the purchase of NHS premises worth £600,000 (that is, two-thirds the value of the premises), and 15 years later the premises are worth £1,500,000 (as assessed by a suitably qualified valuer), the amount repayable will be two-thirds of £1,500,000, that is, £1,000,000.

2.153 Where premises have been acquired using payments under section 256, 257 or 14Z6, or the funds are used for capital purposes such as an extension or construction works, a legal charge should be registered against the premises to protect the grantor's right to repayment. Legal advice should be sought where an organisation has no legal powers to accept a legal charge on its property.

2.154 As a result of NHS organisational changes in 2013, all rights and liabilities in respect of past payments of the strategic health authorities and primary care trusts were transferred to NHS PS. This included the benefit of grant agreements and legal charges associated with these grants. Arrangements are being made for these to be transferred to NHS E. Accordingly, any requests to amend past payments and legal charges together with new payment requests should be directed to NHS E.

2.155 Where the legal documentation is registered in the name of the Secretary of State for Health and no audit trail is available to ascertain the current NHS beneficiary, contact the DH's Estates and Facilities Division.

2.156 NHS E and CCGs should seek specialist advice when considering applications under Section 256. They should be clear on the purpose of these payments when briefing their legal advisers to document the correct legal charge. The brief should state (1) how any

[1] Current versions are dated 17 May 2013

repayments are to be determined and whether the payment is to be transferable (that is, portable) and (2) whether any flexibility regarding subordination will be allowed, that is, allowing the organisation that received the payment to raise further monies based on the value of the property and diluting NHS E's or the CCG's powers of recovering their proportion of the value of the property.

Donated property and charity issues

2.157 Donated land or property is likely to have been given for a specific charitable purpose, as opposed to a donation or gift, which can be used for any purpose. Alternatively, land or premises may have been purchased with donated charitable money.

2.158 Where NHS organisations own such assets, the assets will be subject to Trust and charity law and must be distinguished from other assets. The ability to transact with donated assets depends on the terms of the Trust and its enforceability.

2.159 If the donated asset is land, the following points need to be taken into account:

- evidence of the purposes for which the land was given must be maintained, and any restrictions imposed by the donor on its use or disposal must be observed;
- the Land Registry issues guidance on the registration of charitable land to ensure that suitable restrictions are noted on the Register;
- separate trustees of the land may be appointed under various sections of the Act depending on the type of NHS organisation;
- the Charities Act 2011 lays down the steps that need to be taken to dispose of such land;
- if any change of use is required, advice must be sought and the consent of the charity commissioners will probably be needed;
- if such land (or part of it) is sold, the NHS organisation may not be able to deal with the proceeds freely, as they may be subject to the same restrictions as were originally imposed on the land or money used to buy it. Legal advice should always be sought on these types of issue;
- there is special treatment of such property for capital charging purposes.

2.160 There are no exempt charities in the NHS. Any fund has to be separately registered with the charity commissioners if it relates to the use or occupation of donated land. It will be subject to all accounting requirements and other provisions of the Charities Act 2011.

Use of non-NHS premises for NHS patients

2.161 Commissioners of NHS services are entering into a variety of new contractual arrangements for the delivery of healthcare from premises owned by independent providers of healthcare services.

2.162 Before entering into such contracts, appropriate due diligence should be carried out in relation to the premises from which the services are to be provided. This should relate to, for example, its condition, repair, statutory compliance, health and safety, and accessibility. As occupiers of premises, due regard should be given to extant guidance and regulatory policy (for example, inspections by the CQC and compliance with NHS PAM).

2.163 Appropriate provisions should be put into the contract regarding the maintenance of these premises, provision of a safe and secure environment for patients, compliance with all statutory duties and obligations, and emergency preparedness.

2.164 Commissioners should have the ability to make random periodic checks to ensure that these provisions are being adhered to.

Joint schemes with local authorities

2.165 The principles of understanding need to be clearly set out, agreed and documented at the outset. Each party should consider the benefits and risks realised from joint working and develop a clear strategy for delivery. This will need to include a programme for the life of the arrangement considering how different eventualities would be managed including the possibility of either party needing to exit the arrangement and agreement on dispute resolution.

2.166 It is becoming increasingly common for CCGs and other NHS organisations to enter into joint arrangements with local authorities for the commissioning and provision of joint services in order to meet the drive towards better integration of health and social care services. Partnership Agreements under section 75 of the Act are a good example.

2.167 Where existing premises are used, it would be normal for the partner who owns (or leases) the premises ("owning partner") to grant a lease or licence to the other partner ("sharing partner").

2.168 The decision to lease or license will depend on a number of factors including whether the sharing partner is in "exclusive" or "non-exclusive" occupation of premises.

2.169 In the former case, a lease will probably be appropriate, whereas in the latter case a licence will probably suffice. Legal advice, however, is always needed (because of the dangers of inadvertently granting security of tenure).

2.170 Additional considerations apply if the premises are leased by the owning partner (for example under a lease-plus agreement in an NHS LIFT scheme) because any such sharing arrangement will need to comply with the terms of the owning partner's lease.

2.171 Where new premises are acquired, specific arrangements will need to be agreed between the partners. Due to the complexities that can arise on termination of the partnership scheme, joint ownership rarely happens. It is preferable for one party to own and apply the approach set out above.

2.172 Where joint funding of a capital project is required, the use of powers under sections 256 and 76 of the Act, which allow the transfer of capital monies between NHS organisations and local authorities, is the preferred route. The grant agreements will include provisions for repayment if the relevant premises are sold or their use changes.

Use of NHS land and property by local authorities

2.173 The Secretary of State has a duty under section 80(6) of the Act to make available to local authorities (a) services or other facilities provided by the Secretary of State under the Act (b) services provided as part of the health service by any person employed by the Secretary of State, an SpHA or a local health board, so far as is reasonably necessary to enable local authorities to discharge their social services, education and public health functions.

2.174 A formal lease, on terms recommended by a suitably qualified valuer, is generally appropriate for the use of land and property under such circumstances.

2.175 If an NHS organisation is using the services of staff from other organisations (for example, social care providers or local authorities) to support healthcare provision, accommodation should be provided at no cost to that organisation. However, if the NHS organisation is using another landlord's premises (for example, those of NHS PS) to accommodate those staff, the NHS organisation will be required to meet the cost of that accommodation.

Management of the historic estate

2.176 A heritage asset is defined in the National Planning Policy Framework (NPPF) as "a building, monument, site, place, area or landscape identified as having a degree of

significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage assets and assets identified by the local planning authority (including local listing)". The NHS historic estate may include various types of heritage assets, some of which are officially designated (including listed buildings), while others are undesignated.

2.177 Good management of the historic estate improves patient environments, increases disposal values and decreases repair costs.

2.178 Early contact with a local authority conservation officer will identify heritage issues and avoid potential conflicts between the NHS and local authorities with regard to consent to carry out work on buildings and trees.

Legislation and guidance relating to the historic estate

2.179 Current legislation is contained within the Planning (Listed Buildings and Conservation Areas) Act 1990, the Enterprise and Regulatory Reform Act 2013, the Town and Country Planning Act 1990 and the Ancient Monuments and Archaeological Areas Act 1979.

2.180 The NPPF provides guidance on the historic environment in relation to the planning system (see paragraph 2.176).

2.181 Any decisions relating to listed buildings and their settings and conservation areas must address the statutory considerations of the Planning (Listed Buildings and Conservation Areas) Act 1990 (see in particular sections 16, 66 and 72) as well as satisfying the relevant policies within the NPPF and the Local Plan. See also the government's Planning Guidance website.

2.182 See 'Health and Welfare Buildings' (English Heritage, 2011) for a guide to the selection criteria used when designating these buildings.

The care and management of the historic estate

2.183 The management of heritage assets in government ownership is informed by 'The protocol for the care of the government historic estate' (DCMS, 2009).

Copies of the protocol may be obtained from the Government Historic Estates Unit (GHEU) at English Heritage, 1 Waterhouse Square, 138–142 Holborn, London EC1 2ST. Alternatively, it can be viewed on the English Heritage website.

The GHEU in English Heritage provides central advice on, and monitoring of, all conservation matters for the government's estate. NHS organisations may refer to this Unit for general advice on their historic estate.

From 1 April 2015, English Heritage is separating into two organisations: a new charity that will retain the name English Heritage and a non-departmental public body, Historic England. See the English Heritage website for details.

The management of burial grounds and war memorials

1. Burial grounds

2.184 Special considerations apply to the management and development of consecrated land and burial grounds. Sections 238–239 of the Town and Country Planning Act 1990 apply.

2.185 Such sites need to be dealt with in a sensitive way to take account of local circumstances. Sites may, for example, be fenced off to create "gardens of rest", especially when there are known relatives of the deceased who might visit the grave from time to time.

2.186 See paragraphs 4.180–4.181 for guidance on the disposal of burial grounds.

2. War memorials

2.187 War memorials feature within the estates of FTs, Trusts and NHS PS, and range from plaques to small buildings. Many are publicly recognised and in a good state of repair, but some have been neglected or are within sites earmarked for disposal. It is important to recognise the need for sensitivity when war memorials feature on NHS land. See paragraphs 4.182–4.185 for guidance on the relocation and disposal of war memorials.

2.188 FTs, Trusts and NHS PS should follow the Ministry of Justice's (2007) 'War memorials in England and Wales: guidance for custodians'. Under this code of practice, any physical object erected or installed to commemorate those killed as a result of conflict or military service should be regarded as a war memorial. Memorials to civilian casualties should be included.

2.189 FTs, Trust and NHS PS should undertake a survey of the location, description and condition of memorials within their estate. Records should be regularly reviewed and updated. Interested local or national voluntary groups may be willing to assist in this matter (see the War Memorials Trust website for further details).

2.190 Some war memorials are protected as listed buildings, and many more are likely to be listed over the centenary period (2014–18). Further information is available on the English Heritage website. Advice should be sought from the relevant LPA whether proposed works to a listed memorial require consent under the Planning (Listed Buildings and Conservation Areas) Act 1990.

2.191 Memorials in Church of England churches or churchyards owned by the NHS may come under the faculty jurisdiction of the church authority rather than the LPA. This depends on which jurisdiction the NHS has adopted.

2.192 Although responsibility for maintaining, preserving and restoring war memorials falls on whichever individual or organisation originally established the memorial, NHS organisations are recommended to meet the maintenance or restoration costs themselves. In most cases, these are modest.

2.193 In certain cases, grants may be available to assist with these costs, and advice regarding the availability of grants should be sought from the War Memorials Trust or the local authority.

2.194 Under the War Memorials (Local Authorities' Powers) Act 1923, local authorities have the power, though not a duty, to maintain, repair and protect war memorials.

2.195 National grant schemes for war memorials are administered by the War Memorials Trust.

2.196 FTs, Trusts and NHS PS should not attempt to repair or restore damaged memorials without the assistance of appropriate conservators or other suitably qualified persons (contacts provided by the War Memorials Trust). Cleaning memorials should be avoided unless professional advice has been obtained. Detailed guidance on the conservation, repair and management of war memorials has been published by EH with the War Memorials Trust.

Contact details:

War Memorial Trust, 42a Buckingham Palace Road, London SW1W 0RE.
Phone: 020 7233 7356
Email: info@warmemorials.org

War Memorials Archive, Imperial War Museum, Lambeth Road, London SE1 6HZ.
Phone: 0207 207 9863/9851
Email: memorials@iwm.org.uk

3.0 Town planning and the NHS

Introduction

3.1 This chapter provides an overview of the town and country planning system at national and local level and its impact on the provision of healthcare facilities.

3.2 It explains how and why NHS organisations should get involved in the development of local planning policy, and the processes involved in making planning applications.

3.3 Where planning applications affect the demand for healthcare services (for example a major housing development), commissioners should consult with their local planning authority (LPA) to seek financial contributions for additional healthcare facilities as a consequence of new developments from developers. NHS involvement in local policy development should ensure local planning guidance supports this approach.

Legal background

3.4 Town and country planning is governed by a range of legislation and government guidance.

Primary legislation

3.5 This includes:

- the Town and Country Planning Act 1990;
- the Planning and Compulsory Purchase Act 2004;
- the Planning (Listed Buildings and Conservation Areas) Act 1990;
- the Planning (Hazardous Substances) Act 1990;
- the Planning and Compensation Act 1991;
- European legislation;
- the Planning Act 2008;
- the Localism Act 2011.

Secondary legislation

3.6 There is a tier of subordinate (secondary) legislation comprising Regulations, Orders and Circulars (known as Statutory Instruments), which amend or provide detail on the primary legislation outlined above.

Refer to www.legislation.gov.uk for further information on secondary legislation.

Government planning guidance

3.7 The National Planning Policy Framework (NPPF) was published in March 2012 and sets out the government's planning policies for England. The NPPF is a key part of the government's reforms to make the planning system less complex and more accessible.

3.8 The NPPF must be taken into account in the preparation of local and neighbourhood plans and is a material consideration in planning decisions.

Other legislation/policy

3.9 There are many other areas of legislation and policy that may affect the planning process, including:

- highways, transportation and other infrastructure issues;
- compulsory purchase;
- green travel plans;
- sustainable development and environmental issues;
- energy efficiency and supply including renewable energy;
- administrative law.

Summary of the planning process

3.10 The planning process affecting NHS organisations may be divided into a number of broad categories:

- The NPPF, which sets out the government's planning policies for England and how these are expected to be applied (see paragraphs 3.7–3.8).
- The local planning system whereby each LPA, following public consultation, produces a framework for land development in its area. Public consultation is a key element of the Local Plan process, and engaging with the plan preparation as early as possible is fundamental.
- Neighbourhood planning introduced by the Localism Act 2011, which may be carried out by Neighbourhood Forums (unelected organisations designated by local authorities) or town and parish councils.
- Planning control, which determines whether planning permission is required and, if it is, how it should be obtained.
- Special interests, which includes the system for protecting special trees (tree preservation orders), important buildings (listed buildings), areas of special interest (conservation areas) and preventing urban sprawl (green belt).
- Enforcement, which includes procedures for ensuring planning control systems are followed.

Local planning

3.11 Each LPA must prepare a Local Plan which sets planning policies in a local planning authority area. Local Plans must be positively prepared, justified, effective and consistent with the NPPF.

3.12 Each Local Plan is made up of a series of development plan documents (DPDs). DPDs set out the policies used to manage development within the local authority's area. As they are adopted, DPDs will replace existing Local Development Plans and Unitary Development Plans.

3.13 Each Local Plan must provide a strategic framework for development (core strategy) and specific allocations and policies for determining planning applications (Site Allocations/ Development Management DPDs), which together shape the future development in the local area. Policies in Local Plans should follow the approach of the presumption in favour of sustainable development so that it is clear that development which is sustainable can be approved without delay. The policies should be a clear guide of how the presumption will be applied locally.

3.14 LPAs must work collaboratively with other bodies to ensure that strategic priorities across local boundaries are properly coordinated and clearly reflected in individual Local Plans.

3.15 County councils may also participate in the preparation of DPDs (in matters other than minerals or waste, for which they are solely responsible) by becoming part of a joint committee with one or more LPAs.

3.16 NHS organisations are advised to engage with Local Plan preparations as early as possible in the process. As part of this engagement, commissioners will need to work initially with local public health directors to promote healthy communities, and then with FTs and Trusts to support the assessment of appropriate health infrastructure by the LPA. The latter will ensure that local plans adequately reflect the land use implications of identified healthcare requirements in accordance with commissioners' existing and emergent five-year plans. Also, commissioners, FTs and Trusts, working collectively and individually, should ensure that their healthcare and property interests – as well as projected future demands/ requirements – are properly reflected and protected at all stages in the preparation, adoption and revision of Local Plans. For further information, see the NPPF website.

3.17 If Local Plans do not reflect NHS requirements, it will be more difficult to obtain planning permission for the development of new or existing premises to meet future healthcare needs. There are four key stages in the preparation of a Local Plan. A brief description of each stage is provided in the column to the right.

1. Pre-production

This stage in the plan preparation offers NHS organisations an early opportunity to suggest and put forward sites that may be suitable for development (this is often referred to as a "call for sites" exercise) and to help identify the "preferred options" and agree priorities for the sustainable development of the area.

It is advisable that all NHS organisations submit representations at this stage in the plan process.

2. Formal consultation and submission

Publication – This stage involves a formal six-week public consultation to allow people to comment on the soundness of the Local Plan. Failure to submit a representation at this stage in the plan preparation will preclude participation at a later stage.

Submission – Following the close of the consultation, the local authority will send a copy of the Local Plan, its supporting documents and all the representations relating to its soundness to the Secretary of State.

3. Examination

An independent inspector will be appointed by the Secretary of State to assess whether the plan has been prepared in accordance with the "duty to cooperate" and with legal and procedural requirements, and whether it is sound. NHS organisations will only have the opportunity to participate in the examination if a representation has been submitted during the previous stages of the plan preparation, and is considered to be duly made.

4. Adoption

Following receipt of the inspector's report, the local authority must as soon as practicable adopt the Local Plan.

3.18 It is up to the appropriate NHS organisation to find out from its LPA where it is in the timetable of preparation and how to become involved. A timetable for submission of comments should be published. This

information should be available on the local authority's website. NHS organisations are advised to regularly check details on the local authority's website for updated Local Plan information.

3.19 A good relationship with a senior planning officer in the LPA is essential.

3.20 NHS organisations need to influence the development of local policy on planning conditions and obligations in order to secure contributions towards the cost and provision of healthcare facilities (land or completed buildings) or financial monetary contributions, particularly where major development proposals result in population increases. For example, this could relate to:

- a planning condition in a new housing development to provide a site for a local primary care centre;
- a contribution under a section 106 agreement; or
- influencing the identified range of infrastructure projects that will be considered for funding through the Community Infrastructure Levy (CIL) so as to include additional healthcare capacity.

3.21 See paragraphs 3.58–3.71 for further details on planning conditions and planning obligations, and paragraphs 3.72–3.78 for information regarding CIL.

3.22 FT, Trust and NHS PS owned sites that may become surplus to requirements should be protected by securing specific land-use policies for these sites in the relevant DPDs. This is particularly important when considering future disposals of hospital sites in out-of-town locations or green belts, where alternative uses can be difficult to secure unless previously identified by the LPA.

3.23 Onerous planning designations in DPDs (such as NHS-owned land being designated outside of the settlement boundary) will affect the sale price of surplus NHS property and should be resisted by the relevant NHS organisation wherever appropriate.

3.24 Involvement in the development of local transport plans is also important, since this could have an impact on on-site or off-site requirements for transport improvements in relation to new developments.

3.25 Where LPAs do not respond satisfactorily to proposals from NHS organisations, specialist planning advisers should be appointed as soon as possible to negotiate with the LPA and, if necessary, make public representations.

Neighbourhood planning

3.26 The Localism Act 2011 introduced new rights and powers to allow local communities to shape new developments by coming together to prepare neighbourhood plans. Visit the government's website for further information:

- 'Giving people more power over what happens in their neighbourhood'
- 'Giving communities more power in planning local development'

3.27 Neighbourhood planning can be taken forward by two types of body: town and parish councils or neighbourhood forums. Neighbourhood forums are community groups that are designated to take forward neighbourhood planning in areas without parishes. It is the role of the LPA to agree who should constitute the neighbourhood forum for the neighbourhood area.

3.28 NHS organisations should be alert to any neighbourhood planning initiative within their areas, with a view to engaging with this process, especially if there are implications for the provision of healthcare or for the future development prospects of a specific NHS site(s).

Planning control

3.29 The NHS estate is subject to planning control, and planning permission is usually required for any change of use, new build or development, for example building and engineering works.

NHS involvement

3.30 FTs, Trusts and NHS PS should take an active role in the development of planning applications they are to submit. In addition, all NHS organisations should be aware of significant planning applications that will have a direct impact on the provision of healthcare services.

3.31 As soon as FTs, Trusts and NHS PS identify land and/or property as surplus to NHS requirements and have approval to explore the scope for disposal of these assets for development purposes, they should discuss potential changes of use with their LPA (see also paragraph 4.5). Most LPAs have developed formal procedures for providing pre-application advice, and details are usually available on their websites. It may be advisable to contact a specialist planning adviser to help with any pre-application submission, dependent upon the complexities of the site.

3.32 Engagement prior to any planning application being formally submitted is critically important and provides the opportunity to highlight the aspirations and objectives of the development to the LPA. Wider engagement with other stakeholders, including the local community, is strongly advised. This provides an opportunity to explain the underlying reasons for the proposed development within the context of an NHS organisation's wider delivery plans and comments received can help to inform design development so as to achieve a better outcome for all parties. All major applications will be expected to include a statement of community involvement as part of supporting documentation, summarising the actions taken and how this has influenced the proposals.

Town and Country Planning (Use Classes) Order 1987

3.33 FTs, Trusts and NHS PS should be familiar with uses permitted within their estate under the Town and Country Planning (Use Classes) Order 1987 (the use classes order) and its subsequent amendments. The classes of particular relevance are C2, C2A, C3 and D1.

The Town and Country Planning (General Permitted Development) Order (GPDO) 1995

3.34 The GPDO 1995 sets out a list of types of development for which the order effectively grants planning permission. FTs and Trusts should be familiar with this list, particularly Part 32, which grants limited rights for developments on hospital sites. Part 32 was last amended in 2010.

3.35 Part 32 is made up of two classes: Class A which allows for the erection, extension or alteration of a hospital building, and Class B which deals with providing and replacing hard surfaces within the curtilage of any hospital to be used for the purposes of that hospital.

3.36 It is advisable that FTs and Trusts seek the advice of the LPA with regard to permitted development rights to establish whether planning permission is required.

Planning applications

3.37 The principles set out in the NPPF must be taken into account in the preparation of planning applications.

3.38 General guidance is that:

- it is advisable to engage with the LPA and any relevant interest groups/organisations at an early stage in the development of the proposal/s as this may achieve a faster and more effective application process;
- where the development proposal is more complex or contentious, consideration should be given to employing specialist

planning adviser at an early stage to provide advice on planning strategy, prepare the application and negotiate with the LPA.

3.39 Any permission given will relate to the precise details described in the application, so it is important to make sure the application is clear.

3.40 There are various types of planning application but it is likely that an NHS organisation will seek to submit either an outline or a full application. The type of application will depend on the extent to which the details of the development have been formulated. If the proposed development affects a designated heritage asset, such as a listed building, then an application for listed building consent will also be needed (see paragraphs 3.104–3.119).

3.41 Advice should be sought from the LPA at the pre-applications stage (and planning consultants, if employed) about the type of assessments required and documentation to be submitted with the planning application. Supporting information will have to be submitted, for example noise and transport assessments, and environmental information. See paragraphs 3.50–3.57 for further information on the supporting documentation that is likely to be required to be submitted with any planning application.

3.42 One of the objectives of the planning system reforms introduced by the Planning and Compulsory Purchase Act 2004 is to introduce greater certainty regarding the outcome of planning applications. This is partly being achieved by a requirement that planning applications should be accompanied by a range of supporting documents, which together explain and provide appropriate justification for the proposals. (See paragraphs 3.50–3.57 for further information on ensuring that an application is valid.) It will therefore be necessary to allocate time for the preparation of these documents.

Planning performance agreements

3.43 FTs, Trusts and NHS PS should consider the potential of entering into a Planning Performance Agreement (PPA) with the LPA, where this might achieve a smoother and more effective application process.

3.44 PPAs are a project management process and tool to improve the quality of major planning applications through close engagement between LPA and applicant during the period leading up to the submission of the application and to its determination. This can assist in providing greater certainty and transparency in the design development of major schemes, in the assessment of the planning applications and in the decision-making process. It will be appropriate for some larger and more complex planning applications to be dealt with through a PPA.

Full application

3.45 Full details of the development are submitted to enable construction to go ahead, although some matters may be dealt with by conditions attached to the planning permission. These matters will be approved by the LPA at a later stage (for example, a requirement to submit details of landscaping for approval at a certain stage). Many of the conditions are likely to be "conditions precedent", meaning that development cannot proceed until information or material required to discharge the condition has been submitted to and approved by the LPA (see paragraphs 3.58–3.61).

Outline application

3.46 An outline application will set out the size, purpose and type of development and, if granted, will permit the proposed development "in principle" subject to full details being submitted.

3.47 The following information must be submitted with an outline planning application:

- information on the use of the proposed development;

- location plan;
- indicative amount of development, for example floor space;
- indicative layout;
- scale parameters, that is, upper and lower limits for height, width and length for each building;
- indicative access points.

3.48 Certain matters may be reserved for approval later, including:

- site layout and its relationship to buildings and spaces outside the site;
- scale – the height, width and length of each building proposed;
- appearance;
- access;
- landscaping.

3.49 The above matters will usually have to be approved within three years of granting outline planning permission, otherwise the permission will lapse.

Supporting documentation

3.50 Advice should be sought from the LPA (and specialist planning advisers, if employed) about the type of assessments required and documentation to be submitted with the planning application in order for it to be validated.

3.51 All LPAs are required to maintain a validation checklist designed to help developers, applicants and individuals identify information required to be submitted in support of a planning application. The validation checklist includes:

- the statutory information required under the Town and Country Planning (General Development Procedure) Order 2010 – (the national list of requirements); and
- the additional information that an LPA requires to validate an application – (the local list of requirements).

The local requirements may vary according to the type of application (full, outline, listed building consent etc).

3.52 It is likely that a wide range of supporting documentation will be required to be submitted to support any application. If an application is submitted without the necessary information (statutory national requirements and local requirements), the LPA is entitled to declare it invalid.

3.53 Through early engagement with the LPA, FTs, Trusts and NHS PS should be alert to the requirements of the validation checklist in terms of the range and scope of supporting documentation required to support any planning application. This will depend on the complexity of the proposals and the characteristics of the site. All these factors will have a bearing on the length of time it takes to prepare any planning application.

Environmental impact assessments

3.54 Consideration should be given to whether a proposed development will require an environmental impact assessment (EIA) pursuant to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2011.

3.55 The term EIA describes a procedure that must be followed for certain types of project before they can be given development consent. The procedure is a means of assessing the project's likely significant environmental effects and the scope for reducing them.

3.56 Advice should be sought from the LPA and/or a specialist planning adviser at an early stage to establish whether an EIA is required. A request can be made to the LPA for a screening opinion. This will determine whether an EIA needs submitting with the planning application.

3.57 If an EIA is required, then a request for a scoping opinion can be made to the LPA so that the scope of an EIA can be agreed.

Planning conditions

3.58 Planning conditions are generally applied to the granting of planning permission and limit and control the way in which the planning permission may be implemented.

3.59 Planning conditions can cover a wide range of matters, but often require certain works to be done at specific phases of the development or require further details of the development to be submitted to, and approved by, the LPA prior to the development proceeding.

3.60 For example:

- further details of any highway works will usually have to be submitted prior to the start of the development and constructed prior to occupation of the development;
- landscaping and ecological mitigation measures may be required prior to the start of the development. Mitigation measures will need to be taken into account in the overall programme for the project, as certain measures can only be implemented at certain times of the year;
- any land remediation will usually have to be completed prior to the start of the development;
- car-parking arrangements will usually have to be constructed prior to occupation;
- a green travel plan will usually have to be implemented prior to occupation.

3.61 The number and scope of conditions attached to a planning permission can vary. However, it should be noted that the more supportive information provided at the application stage, the less onerous and fewer conditions there are likely to be.

Note

All necessary ecological surveys must be submitted as part of the planning application and cannot be included as a condition.

3.62 Once planning permission has been granted subject to conditions, it may be possible to lodge an appeal or submit an application to vary the conditions. If appealing a condition, an application to vary the condition should be submitted in the first instance and an appeal then submitted against that refusal. This approach should lessen the risk of an inspector revisiting the whole of the application again.

Planning obligations (section 106 agreements)

3.63 Planning obligations under section 106 of the Town and Country Planning Act 1990, commonly known as S106 agreements, are a mechanism which make a development proposal acceptable in planning terms, which would not otherwise be acceptable.

3.64 Planning obligations might prescribe the nature of the development, secure a contribution to compensate for loss or damage created by the development or mitigate the impact of the development. They are focused on site-specific mitigation of the impact of the development.

3.65 NHS organisations should seek to influence the imposition of requirements upon developers to provide facilities or pay monies for the provision of local healthcare services (where a new development affects local healthcare needs) so that existing facilities are not over-burdened.

3.66 Planning obligations may also be secured through a unilateral undertaking. This is a deed entered into by the developer (alone) under S106 of the Town and Country Planning Act 1990. Unilateral undertakings are often used in an appeal situation where agreement cannot

be reached with the LPA regarding planning obligations.

3.67 LPAs are increasingly encouraging applicants to submit a unilateral undertaking with their planning applications. In general this should be resisted, since it is better for the applicant if both parties are involved in the negotiations. This way the LPA is required to enter into specific covenants (for example, only use contributions for the purpose intended and return any monies that have not been spent within a specified period).

3.68 Where there is a choice between an LPA imposing a planning condition or entering into an S106 agreement (planning obligations), government guidance states that the imposition of a planning condition is preferable. This is because an applicant can appeal against onerous planning conditions that may have been imposed on a planning permission but it cannot appeal against planning obligations once an S106 agreement has been completed. In addition, the enforcement powers relating to planning conditions are more straightforward.

3.69 S106 agreements can be varied by agreement with an LPA following completion, but if agreement cannot be reached, the NHS organisation or developer will have to wait five years before it can make a formal application to vary the S106 agreement. There may be exceptions and specialist planning advice should be sought.

3.70 Planning obligations are unlikely to be required on all developments, but there are no definitive rules about the size or type of development that should attract such obligations. With the introduction of the Community Infrastructure Levy Regulations 2010 (CIL Regulations 2010), S106 agreements have not been replaced but the legal tests for determining when planning obligations may be sought by way of an S106 agreement have been tightened. Regulation 122 of the CIL Regulations requires that planning obligations are:

- necessary to make the development acceptable in planning terms;
- directly related to the development;
- fairly and reasonably related in scale and kind to the development.

3.71 Where FTs, Trusts and NHS PS are selling surplus property, care should be taken not to agree to planning obligations that are unreasonable. Professional (especially legal) advice should be sought before accepting any liability or entering into an S106 agreement.

Community Infrastructure Levy

3.72 The Community Infrastructure Levy (CIL) Regulations 2010 allow LPAs to introduce CIL as a charge on new buildings and extensions to help pay for supporting infrastructure. CIL is a standardised non-negotiable local levy placed on new developments. Its purpose is to help raise funds to support the delivery of the infrastructure within the wider area that is required as a result of new development.

3.73 Under CIL, developers can still be required to directly provide both off-site infrastructure through S106 contributions and on-site improvements through planning conditions to mitigate the direct impact of the development proposed (for example, landscaping and access roads).

3.74 The balance between the use of S106 and CIL will be different depending on the nature of the area and the type of development being undertaken, but as a rule, they should not overlap. Further guidance on CIL and its relationship with S106 is set out in Planning Practice Guidance.

3.75 The CIL Regulations require two distinct aspects to be considered. First, a “charging authority” (the local authority) needs to demonstrate that new development necessitates the provision of new, or improved, infrastructure. Second, the rate of the proposed levy must not make development proposals unviable, in particular with regard to expected

costs that would be associated with the provision of on-site infrastructure. For example, for the purpose of CIL, affordable housing is regarded as an on-site requirement and will continue to be secured through S106 agreements.

3.76 The levy will be expressed as £ per m^2 and is collected on the commencement of development. CIL will be charged on the gross internal floor space of any new development, apart from affordable housing and buildings used for charitable purposes.

3.77 The processes for preparing a charging schedule are similar to those that apply to DPDs. Charging authorities must consult local communities and stakeholders on their proposed rates for the levy in a preliminary draft of the charging schedule. Then before being examined, a draft charging schedule must be formally published for public comment and representations invited for a period of at least four weeks. The charging schedule must then be examined in public by an independent person appointed by the charging authority.

3.78 NHS organisations should ensure that they are in close contact with LPAs to ensure they engage in the consultation process in drawing up CIL, especially in terms of new infrastructure that may be required to support new development in the LPA's area.

Determination of planning applications

3.79 LPAs should determine planning applications in accordance with national and local planning policies.

3.80 LPAs will consult with the public and a wide range of statutory bodies regarding each application. NHS organisations should be involved in the public consultation in order to influence decisions that impact on healthcare provision.

3.81 Once the application has been considered, it may be determined under powers delegated to planning officers. If it is a major application or has attracted a number of objections, the relevant planning officer will make a recommendation to the planning committee. The planning committee is not, however, bound to follow the planning officer's recommendation.

3.82 The final decision will be one of the following:

a. Refuse the application.

b. Grant the application – subject to conditions.

c. Grant unconditionally.

d. Defer approval to allow an S106 agreement to be completed.

3.83 Generally, full planning permission will be valid for three years. If outline permission is obtained, a "reserved matters" application must be made within three years.

3.84 It is very important to implement a consent within the correct timescale, otherwise it will lapse. Once lapsed, the LPA is not obliged to renew permissions, although it should have a good reason for not doing so (this could, for instance, be where local planning policies have altered).

3.85 FTs, Trusts and NHS PS should make sure that any conditions imposed are not onerous and can be complied with.

Planning appeals

3.86 Where a planning application is refused, or a decision is not made within the statutory period allowed, or conditions are imposed that are unacceptable, it is advisable to seek specialist advice concerning potential options. The options include:

- negotiating amendments with the planning officer and following this up with a revised application;
- submitting an application for an alternative scheme;
- appealing against the decision.

3.87 An appeal against refusal or the imposition of conditions must be lodged within six months of the LPA's decision or if a decision has not been made, six months from the date the decision should have been made.

3.88 There are three types of appeal procedure: written representations, an informal hearing and a public inquiry.

Written representations

3.89 This is the cheapest and quickest type of appeal and is most appropriate where the issues being disputed are straightforward.

3.90 The appeal is dealt with in the form of written statements of the case, which are exchanged. The inspector will then visit the appeal site and make a decision accordingly. No opportunity is allowed for an oral presentation of the arguments.

3.91 This type of appeal will typically take a few months from lodging the appeal to receiving the inspector's decision.

Informal hearing

3.92 This procedure is intended for fairly straightforward appeals where the appellant wishes to debate the issues at stake in front of an inspector. No legal representation is normally allowed, although consultants are allowed to present the case in a debate, which is led by the inspector.

3.93 The appeal process may typically take four to six months.

Public inquiry

3.94 This procedure is most appropriate for complex or controversial schemes, where witnesses on the applicant's behalf, and those on behalf of the LPA, can be cross-examined by legal representatives. This procedure is the most costly and time-consuming, although it is the most thorough.

3.95 An appeal decision may take up to a year from lodging the appeal for a typical proposal and may be significantly longer for particularly complex or contentious appeals.

3.96 The inspector's decision is usually final. In some major cases the Secretary of State makes the final decisions. Appeal decisions are subject to challenge through the judicial review process, but only on points of law.

3.97 A careful evaluation of the cost benefits must be taken by an NHS organisation before undertaking an appeal.

3.98 Where early information indicates that there may be a conflict with local or national government policies, this should be resolved through discussions with the LPA. Discussions should take place before a planning application is made.

Other planning control issues

3.99 The following planning issues should also be considered:

- while all utilities companies and bodies responsible for roads and drains will be consulted by the LPA as part of the planning process, it is advisable to make a direct enquiry to them on a scheme of any substance before preparing plans for the scheme or applying for planning permission. This should establish whether there are any problems of capacity with services that may prevent any proposed development from proceeding;
- building regulation consents may be required; the architect/building surveyor/ project manager should deal with these points;
- other agreements may need to be concluded before implementing planning consent, for example relating to off-site highways work, on-site highways, sewers etc;
- advice should be sought concerning infrastructure charges levied by water authorities. Credits are available on the redevelopment of existing built sites.

Special interests

Conservation areas

3.100 Where the LPA considers that an area has special character that ought to be preserved or enhanced, it may, after due consultation, designate it as a conservation area. There are no rights of appeal against this decision, although representations (before the decision is made) will be considered by the LPA.

3.101 Once a conservation area has been designated as such:

- there will be extra controls on the demolition of any property on that land;
- any new buildings must preserve, and should aim to enhance, the character of the area;
- trees, whether or not protected by a tree preservation order (see paragraphs 3.120–3.121 for details), cannot be felled without consent being first obtained;
- more limited development rights will apply, meaning that more types of development will require planning permission;
- outline applications will not normally be accepted.

3.102 If designation as a conservation area will adversely affect future developments, representations to the LPA should be prepared by a planning consultant with conservation experience.

3.103 Once a conservation area has been designated, FTs, Trusts and NHS PS will need to apply for conservation area consent before undertaking most developments, including demolition and works to trees. Specialist advice from a planning consultant should be sought if development or demolition of buildings is proposed.

Listed buildings

3.104 The Planning (Listed Buildings and Conservation Areas) Act 1990 (the 1990 Act) contains provisions for the protection of buildings of special architectural or historic interest.

3.105 Chapter 12 of the NPPF provides guidance on the historic environment in relation to the planning system. Protecting and enhancing the historic environment is an important component of the NPPF's drive to achieve sustainable development (as defined in the NPPF).

3.106 Any decisions relating to listed buildings and their settings and conservation areas must address the statutory considerations of the 1990 Act (see in particular sections 16 and 66) as well as satisfying the relevant policies within the NPPF and Local Plan.

3.107 In England, details of listed buildings and other designated heritage assets can be found on the National Heritage List for England (NHLE).

3.108 Decisions about listing are based on published selection criteria which are used by English Heritage in assessing new requests for listing and making recommendations to the DCMS. The final decision rests with the Secretary of State for Culture, Media and Sport.

3.109 If an unlisted building of possible historic or architectural interest is located on a site where development is proposed or in prospect, an application may be made to English Heritage for a Certificate of Immunity (COI), to prevent listing from adversely affecting future development intentions.

3.110 The 1990 Act allows anyone to apply for a COI regardless of whether they own the site in question. The COI provides a potentially useful mechanism for securing a building's immunity from listing for a period of five years and thereby provides the owner and/or developer with a potential means of

pre-empting any attempt by a heritage group to apply for listing during that time.

3.111 There is a risk, however, that an application for a COI may lead to a formal listing.

3.112 Specialist historic buildings advice should be sought concerning this procedure.

3.113 The LPA may require the owner of a listed building to carry out essential repairs by serving a repairs notice. It is therefore advisable to keep listed buildings in good repair.

3.114 Listed building consent is normally required for any alteration work (including internal alterations) of any listed building or structure which would affect its character, appearance or setting, in addition to ordinary planning permission. Failure to obtain such consent is a criminal offence.

3.115 Listed protection can extend to structures within the curtilage of a listed building such as garden walls and statues, where these were in place prior to 1948. For further information about the need for listed building consent, visit English Heritage's website.

3.116 Whenever an FT, Trust or NHS PS wishes to alter or dispose of a listed building, or seeks permission for development that would affect the setting of a listed building, it should appoint a consultant with specialist historic buildings experience to advise and negotiate the most beneficial planning and listed building consents.

3.117 Permission to demolish a listed building is only granted in exceptional circumstances. Mounting a case to achieve this may be expensive, but should not be presumed to be impossible. Consideration of this action should only be taken after seeking specialist legal and planning advice.

3.118 Local authorities also maintain a Local Heritage Asset Register known as the local list. This can include buildings that do not have the statutory weight of a designated heritage asset included on the NHLE, but nonetheless are considered by the local authority to make a significant contribution to local heritage within the area.

3.119 Local planning policies are likely to impose restrictions or caveats upon developments affecting a locally listed building. As for buildings that are statutorily listed, FTs, Trusts and NHS PS should seek specialist advice when advancing proposals involving the alteration or demolition of a locally listed building.

Trees and hedgerows

3.120 The Town and Country Planning (Tree Preservation) (England) Regulations 2012 set out a procedure for the protection of trees, whether individually or in groups, through the issue of tree preservation orders (TPOs). These orders prevent the lopping, felling and cutting down of trees without LPA permission.

3.121 On receipt of a notice of a TPO, an organisation has 28 days to object. The following procedures should be followed:

- if the trees are manifestly unsuitable (that is, dead or dangerous), the organisation should inform the LPA that they should not be included in the TPO and make arrangements for removal of the trees;
- if in relation to future developments, the location of the trees will not be an issue, regardless of the TPO, there may be no need to object;
- if the imposition of the TPO will adversely affect potential developments, the organisation should object to the order. A specialist arboriculturalist experienced in appeals work should be instructed to prepare a report on the condition of the trees. If the trees are not worthy specimens, he/she may be able to persuade the LPA to change its mind;
- be aware of the penalties for breach; it is a criminal offence, and personal liability may apply. The fine may be considerable, and replanting will probably be required.

3.122 Organisations may find it beneficial to develop a tree/woodlands management scheme with their LPA.

3.123 The Hedgerows Regulations 1997 set out the regulations for the protection of "important hedgerows" from removal. These are defined in the regulations as being in existence for 30 years or more and as having value from a historic, archaeological, wildlife and/or landscape perspective.

3.124 The regulations apply to a wider class of hedgerow including those growing in, or adjacent to, any common land, protected land (local nature reserves and SSSIs) or land used for agriculture, forestry or the breeding or keeping of horses, ponies or donkeys if it:

a. has a continuous length of, or exceeding, 20 metres; or

b. it has a continuous length of less than 20 metres and at each end meets another hedgerow.

The regulations do not apply to hedgerows within the curtilage of, or marking a boundary of the curtilage of, a dwelling house.

3.125 An application for a Hedgerow Removal Notice needs to be submitted to the LPA prior to the removal of a hedgerow that is covered by these regulations. The LPA has a period of six weeks to determine whether the hedgerow is "important" and whether:

- there are grounds for removal of the hedgerow and therefore issue a Hedgerow Removal Notice;
- there are no grounds for its removal and therefore issue a Hedgerow Retention Notice.

3.126 It is a criminal offence to remove a section of hedgerow in contravention of the regulations, which are enforced by the LPA.

The green belt

3.127 The fundamental aim of green belt policy is to prevent urban sprawl, merging of settlements and encroachment on the countryside, by keeping land permanently open. Development within green belts is therefore severely constrained.

3.128 National planning policy on green belts is contained within Chapter 9 of the NPPF. Paragraphs 79–92 of the NPPF reaffirm the fundamental aims of green belt policy, which is to prevent urban sprawl by keeping land permanently open. The NPPF, as per previous national green belt policy, states that "inappropriate development is, by definition, harmful to the green belt and should not be approved except in very special circumstances".

3.129 However, a change in national guidance that FTs, Trusts and NHS PS should be aware of is the removal of the designation "major developed sites" in the green belt. National policy is broadly worded so as to allow "limited infilling or the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuous use (excluding temporary buildings), which would not have a greater impact on the openness of the green belt and the purpose of including land within it than the existing development" (NPPF paragraph 89).

3.130 As such, infilling or the partial or complete redevelopment of any previously developed site in the green belt is considered not inappropriate in principle, subject to other policies and material considerations.

3.131 The best route is to persuade the LPA to include redevelopment proposals within the Local Plan, and this should be done early in the plan preparation process.

3.132 Planning consent for the redevelopment of sites within green belts should be sought before demolishing buildings or clearing the site. This will preserve the mass, height etc of the existing buildings and enable a better case to be made for alternative use where this will

reduce the mass, height etc of existing buildings, and thus enhance the green belt.

3.133 Once a site has been cleared, it will be difficult to obtain planning permission to develop the site, as it will revert to being an undeveloped part of the green belt.

Enforcement

3.134 It is unlikely that the LPA will take enforcement action against an NHS organisation without warning and considerable discussions. If disputes cannot be resolved amicably, it is essential to take the advice of planning solicitors and consultants as soon as possible.

3.135 There are a variety of enforcement powers that are open to an LPA:

- enforcement notice;
- stop notice;
- temporary stop notice;
- planning contravention notices;
- breach of condition notices;
- injunctions.

3.136 On receipt of any of the above notices or injunctions seeking compliance with planning regulations, a lawyer should be instructed immediately. There are very strict time limits for lodging an appeal if required. Once the notice becomes operative, it is a criminal offence not to comply with it.

3.137 The swift procedure for ensuring compliance with conditions annexed to a planning permission should be noted. Here, the LPA may issue a breach of condition notice whereby compliance can be imposed immediately; failure to comply is a criminal offence. There is no right of appeal against a breach of condition notice. There is a chance that personal liability could ensue in these situations, and fines can be considerable.

4.0 Disposal of freehold land and property

Introduction

4.1 This chapter deals with the disposal of surplus freehold land and property.

4.2 Only land and property that is required to enable FTs and Trusts to fulfil their function of healthcare provider should be retained.

4.3 The estate should be reviewed regularly to identify surplus property; at least annually, a report should be submitted to the board. FTs have more freedom to deal with their estate but should still demonstrate value for money.

Principles of disposal

4.4 A surplus property should be sold as soon as possible and not be retained in the expectation that the market might improve.

4.5 NHS organisations are obliged to enter details of the property onto the e-PIMS register to enable other public-sector organisations to come forward to purchase the land and/or property. Once land and/or property has been identified as surplus to a particular NHS organisation, it should:

- check what legal interest it holds and whether the property is registered in its name at the Land Registry;
- check whether property is not required to be returned to the Secretary of State for Health where it was part of a Transfer Order carried out as part of the NHS reforms of 1 April 2013;
- circulate details to nearby NHS organisations, NHS PS, providers of NHS services and local authorities and register details of the land and/or property on e-PIMs. This notification should allow six weeks to two months for a purchaser to emerge before placing the property on the open market.

4.6 If not required for healthcare use, the organisation may need to offer the land and property back to the former owners or their successors under the Crichel Down rules (see paragraphs 4.16–4.21 for further details).

4.7 Where an FT or Trust expresses an interest to buy the land and/or property (or part of it) for ongoing health use, the selling organisation is encouraged to cooperate with the proposed purchaser for the benefit of the local health economy.

4.8 Once the NHS organisation is satisfied that there is no public sector requirement for the land and/or property, it should be sold as soon as possible, unless there are unusual circumstances preventing this. Ideally, the sale should be completed as soon as the property is vacant in order to avoid security risks and costs. This means that the disposal process should be planned as early as possible.

4.9 Powers are available to NHS organisations to obtain an income from land and property (see paragraphs 1.29–1.33), where it is not possible to secure an early sale, and such income may assist in reducing holding costs during the disposal process.

4.10 All disposals should be fully supported by a business case for the transaction (see paragraphs 4.22–4.28 for details). A cost-benefit analysis of the disposal options should inform the business case. This will include consideration of stamp duty land tax (where applicable).

4.11 Full and appropriate records of all matters relating to the disposal must be kept on file. This should include relevant telephone conversations and discussions at meetings, and should show a prompt response to incoming correspondence and enquiries.

4.12 The performance of the disposal team should be recorded, together with an evaluation of final sale price and timescale for completion against expectations.

4.13 The file should record:

- when the property became or becomes surplus;
- the name of the selling agent and date of appointment;
- the date the planning application was made, if applicable (if not, that a decision was made that a planning application was not required and why);
- when planning consent was obtained (date of issue);
- the date the property was formally placed on the market;
- the date/dates when offers were received;
- the date when an offer was accepted by the vendor and the purchaser notified;
- the date when contracts were submitted/signed/exchanged;
- the date when sale was completed.

4.14 Where surplus land and property is being sold and the infrastructure (for example roads, drains, landscaping, and open space) for that land and property also serves the retained land and property, the purchaser should be obliged to carry out any necessary infrastructure works in an agreed timescale.

4.15 The vendor should reserve the right of entry onto sold land and property to carry works. Such obligations can be secured by, for example, imposition of a restriction on disposal until the obligations have been completed, parent company guarantees and bank guarantees.

Former owners' rights (Crichel Down rules)

4.16 The Crichel Down rules require NHS organisations to offer land and property that has become surplus to NHS requirements back to the original owner under certain circumstances.

4.17 The rules apply to land and property that was originally acquired under a CPO or "under a threat of compulsion", in the case of a voluntary sale if the power to compulsorily acquire the land existed at the time.

4.18 The rules do not apply to:

- land that was up for sale at the time of the acquisition;
- agricultural land acquired by a government body prior to 1 January 1935;
- agricultural land acquired on and after 30 October 1992 which became surplus and available for disposal more than 25 years after the date of acquisition;
- land and property acquired more than 25 years before disposal;
- land and property whose character has changed during the period of ownership, for example by development or extensive alteration (the cost of reinstatement will be a factor in determining this issue);
- disposals comprising a site which has not materially changed since acquisition and comprises a development site of two or

more former land holdings, or part of a site that has been changed and where a sale in parts would not achieve best value;

- disposals that are, effectively, de minimis;
- various circumstances, with specific ministerial approval, where the land is still required for some other public-sector purpose.

4.19 A solicitor or suitably qualified property surveyor should be consulted to determine whether the Crichel Down rules apply.

4.20 If the Crichel Down rules do apply, the NHS organisation should:

- establish the identity and location of the former owner or successor;
- assess the terms of the offer and method of fixing the price;
- give the former owner two months to agree the basic terms and a further six weeks to agree the price (with such extensions as appropriate). If agreement is not reached within the timescale, the land and property may be sold on the open market.

4.21 Under section 66 of the Planning and Compensation Act 1991, if land and property acquired compulsorily or sold to an authority possessing compulsory purchase powers after 25 September 1991 benefits from planning permission for an alternative use within 10 years of acquisition, the original owner should be reimbursed with any added value arising from the new planning permission.

The business case

4.22 All decisions regarding land and property should be supported by a robust business case. Due diligence will form part of the process alongside market conditions, planning, financial implications and legal title in the context of the planned disposal, and timescales. The estate records of all land and property for disposal must be checked so that the potential proceeds from sales and savings in overheads from the disposal of different sites may be compared.

4.23 If the sale of land and property is a key part of meeting reprovision costs, consideration should be given to obtaining a preliminary report covering market conditions, planning constraints and legal title in the context of the planned disposal, and timescales, before the business case is finalised.

4.24 Covenants affecting the land and property may prevent its sale at the anticipated or higher price. Legal advice should be sought.

4.25 Whenever a property is identified as potentially surplus to requirements, the business case should identify the holding costs, including any exceptional maintenance, security or other costs.

4.26 An assessment should be made of the property's suitability for sale in its present state, and what (if any) work may need to be done to prepare it for sale.

4.27 A clear statement of responsibilities should be developed that identifies the roles to be played by individuals in the disposal team – such as management of the process and specific areas of work needed to complete the sale.

4.28 The business cases should identify the need for receiving a receipt within any particular financial year, and evaluate any exceptional risks that might arise which may delay completion of the transaction.

Managing the disposal team

4.29 Whenever a disposal is contemplated, a technical team appropriate to the size and complexity of the transaction should be appointed from the outset through to completion of the scheme.

4.30 The team should be led by a project manager (in-house or external) who should act

as the informed client to ensure that NHS interests are protected and managed at all times. The disposal team should be suitably qualified, experienced and competent in the field of land and property transactions with good market and NHS knowledge.

4.31 The project manager should have knowledge and experience of NHS policies and procedures, particularly in relation to land and property transactions, together with a thorough knowledge of the NHS estate.

Routine disposals

4.32 The sale of small self-contained sites (for example houses, clinics or stores) may require only the appointment of a solicitor and selling agent. Both should be appointed at the outset and will be able to advise on any development potential or potential sale with adjacent landowner(s).

Major/complex disposals

4.33 Where a sale is complex or the most valuable alternative use is unclear (including joint ventures, deferred payments and contiguous payments that cumulatively may be more valuable), it is good practice to obtain independent valuation advice. A suitably qualified valuer may provide this advice and should be appointed, together with the solicitor and selling agent, at the beginning of the project.

4.34 A planning consultant and highways/ transport consultant may need to be appointed.

4.35 The disposal team should produce preliminary reports on the following:

- title (to identify title problems or adverse covenants);
- planning constraints;
- value;
- infrastructure constraints (highways, water, drainage etc);
- ecological surveys for protected species such as bats and newts;
- ground conditions;
- contamination.

4.36 Using this information, the disposal team should be able to identify any obstacles, and the costs and timescales involved in overcoming these obstacles. The required tasks should be established and timetabled, and regular meetings set up to review progress.

4.37 At this stage, it should be decided whether further specialist help is required. If the site includes historic buildings, there may be a requirement for a conservation adviser. There may also be a need for a consultant on contamination or environmental issues.

4.38 A short-term lease on the property (a) to maintain security and/or the property in the short term or (b) to receive an income until the property is sold, should be considered. Professional advice must be taken to ensure that security of tenure is not accidentally granted to the lessee.

4.39 It is advisable to regularly monitor potential sale receipts against potential sale costs (for example, the cost of a planning inquiry against the chances of success and the potential added value) as well as changing market conditions.

Town planning

4.40 The planning option to be adopted will depend on the type of property being sold. The disposal team should recommend the best course of action. It may be advisable to seek outline or full planning permission or develop a planning brief with the LPA (see Chapter 3).

Decommissioning

Note

Decommissioning is an important part of the disposal process and should be considered and planned appropriately. It is important to set out a programme for decommissioning and allocate responsibilities to the disposal and operational team. Due regard must be given to sensitive information and contents; this is especially relevant to mortuary premises to ensure that all records, samples including human tissue etc are appropriately removed or destroyed. This should form part of the governance workstream ensuring nothing is left in the building(s) when vacated and after disposal.

4.41 Where a site has ceased to be operational, consideration should be given to decommissioning/demolition. The extent of the works required will depend on the future plans for the site and legal requirements.

4.42 Practical considerations include:

- prevention of damage by the elements;
- avoidance of damage by dry rot, woodworm etc;
- prevention of incursion, access and damage by vandals;
- storage of keys and records concerning the management of the site, and mechanical and electrical installations within it;
- revaluation for rating purposes;
- reduction of running costs by adapting plant or renegotiating service supply agreements;
- the provision of an appropriate level of heating to prevent physical deterioration;
- retaining some occupation and use of the site whilst waiting for completion of the disposal process;
- the maintenance of essential security and fire detection systems;
- the isolation of all but essential electrical circuits;
- removal of all hazardous, clinical and other waste from the site;
- updating fire risk assessments.

4.43 Legal considerations include:

- removal of all files, samples (especially relevant for mortuaries) and other sensitive contents;
- avoidance of injury to third parties coming on to the site, legally or otherwise;
- compliance with health and safety legislation, which remains applicable even though the site is vacant;
- compliance with the Defective Premises Act 1972;
- compliance with any requirements for conservation of buildings under the Planning Acts, particularly if the property is listed;
- compliance with legislation in respect of storage of petroleum products;
- terms of supply of gas, water and electricity;
- rights of third parties in respect of access and services crossing the site, including fire escape routes; and
- giving due warning to third parties of the presence of asbestos.

Asbestos

4.44 When disposing of sites, FTs, Trusts and NHS PS should ascertain whether asbestos (other than asbestos cement products, such as roofing and guttering) is present and, if it is, whether it constitutes a significant potential health hazard. Any asbestos investigations carried out as part of the disposal process

should be actively updated on the existing asbestos register.

4.45 Accessible asbestos insulation should already have been identified.

4.46 If asbestos is known or suspected to be present, potential purchasers must be warned by a specific reference in the sale particulars. They should be given such relevant information as is known, and their attention should be drawn to their obligations under the health and safety legislation for dealing safely with asbestos, especially if demolition is envisaged.

4.47 Prominent warning notices should be fixed immediately inside the entrance(s) to buildings when they are vacated.

4.48 Always obtain professional advice in respect of this matter, especially regarding the wording to be included in any sale particulars where asbestos may be hidden within the fabric of the building or other non-accessible areas and how to deal with this issue throughout the disposal process. Consult the Health & Safety Executive for the latest information.

Contamination issues

4.49 Whenever FTs, Trusts and NHS PS sell surplus land, with or without buildings, it is essential they address the issue of contamination.

4.50 Specialist professional advice should be sought on the best approach to be taken in respect of complying with Part IIA of the Environmental Protection Act 1990. Further guidance is set out in Defra's (2012) 'Environmental Protection Act Part 2A: contaminated land statutory guidance'.

4.51 Where it is recommended that the purchaser should carry out any future remedial works, it will be necessary to decide whether the seller or the purchaser should carry out any site investigation to inform the prospective purchaser of the potential contamination of the site.

4.52 In conjunction with the legal consultant, the professional adviser should tell the organisation how to minimise the risks in this instance, transfer them to the purchaser and obtain the appropriate indemnities in the legal documentation.

4.53 If an organisation sells land that is later found to be contaminated, the organisation may be liable for the costs of clearing the contamination if it failed to provide the purchaser with sufficient information and/or did not secure suitable indemnities.

4.54 A simple standard clause inserted in each sale contract may not protect the organisation from future liability.

4.55 It is essential that the organisation keeps a record of the contamination audit, how any contamination was dealt with, what information was given to prospective purchasers, and what indemnities were sought.

Overage or clawback provisions

4.56 Where the sale price (obtained by any sale method) may not reflect the potential increase in value during development, the inclusion of overage or clawback provisions in the sale documentation should be considered.

4.57 Overage and clawback provisions reserve to the vendor the right to further payments if certain circumstances occur – effectively "sharing" in any future increase in value of the site.

4.58 Overage is generally described as a form of profit share on actual or potential sales over an agreed sum. Clawback is generally described as the right on some future specified event for the original owner to have a share in that future value. Although this is how overage and clawback are generally described, there are many types and varieties of clawback and overage provision so care should always be taken when reviewing or imposing such provisions.

Note

Overage may be particularly appropriate where the value of land sold for residential development is based on an agreed projected sale value of the completed development. Where the final sale price of a development exceeds this figure, the vendor secures an agreed share of the increased value.

Clawback may be appropriate where an organisation sells land for an agreed price but reserves the right to receive an additional payment if the land is sold on for a profit (regardless of whether a more valuable planning permission is obtained). However, if a subsale is prohibited under the terms of the sale agreement, then buyers will often seek to argue that they take the risk of the market falling as well as it rising.

Overage and clawback agreements should be as simple and easy to understand as possible. The trigger point and assessment of the uplift in value should be set out clearly and workable from the outset. It is advisable to take advice and seek assurance from a suitably qualified valuer that the overage or clawback is fair and reasonable in the context of the market at the point of sale. It is important that the provisions do not affect the initial market price paid but ensure that any significant uplift is shared.

4.59 Professional advice should be taken on overage and clawback options throughout the disposal process to ensure that it is relevant and appropriate for the transaction.

4.60 It is important to be realistic on overage and clawback provisions. The legal documentation for such clauses is complex, and monitoring development costs can be difficult. It is important ensure the trigger events for exercising the overage provision are clearly understood.

4.61 Overage and clawback provisions should be clear, quantifiable, secure and legally binding. Exceptional cost deductions should normally be avoided (risks should be transferred to the purchaser rather than retained by the vendor). If poorly drafted, the purchaser may significantly depress the final receipt. There are a range of options to protect overage payments; these include taking a legal charge over the property or part of it, a parent company guarantee and bank bonds.

4.62 The vendor should ensure that the overage or clawback clause would generate sufficient additional receipts to cover the cost of negotiations, documentation and monitoring.

4.63 The overage or clawback provision should be for a sufficient period to prevent the purchaser deferring the development to avoid making further payments.

Disposal of partially surplus sites

4.64 Where only part of a site is declared surplus, consideration should be given to disposing of that part of the site provided:

- it does not remove flexibility for future operational developments;
- it does not limit the achievement of best value from selling the rest of the site.

4.65 The sale of property on a site's frontage, or close to its access, could for example prevent or limit any redevelopment of the retained site.

4.66 Should it transpire that an outright sale is undesirable, the organisation should consider granting a lease (see Chapter 6 for details).

4.67 Where a sale of part of a site is to go ahead:

- make provision for the separation of services;
- consider imposing restrictive covenants to prevent uses that would be incompatible

with the operational use of the retained site;

- make provision for maintenance of shared facilities such as access roads and services;
- ensure that the purchaser is not given any control over the future use and development of the retained land, or ransom potential; for example, ensure that the contract provides that the purchaser cannot object to or hinder any future redevelopment proposals on the retained site; and
- provide for the creation of new boundaries and their future maintenance.

Ransom strips

4.68 Where FTs, Trusts and NHS PS are selling land that adjoins land with future development potential, they should consider retaining strips of land (ransom strips) on their site to retain access to the adjoining land. Legal advice should be taken on this issue.

4.69 Any future development of the adjoining land can then only take place with their consent. Such consent may be subject to a monetary payment.

4.70 A ransom strip may be retained around the entire site earmarked for disposal to prevent its future amalgamation with an adjoining site without the organisation's consent where this action is felt to have development potential.

4.71 To prevent ownership disputes, ransom strips should be:

- of sufficient width to be recognised as such;
- easily identifiable on a plan of an appropriate scale; and
- fully documented at the Land Registry to prevent ownership disputes.

Joint venture with neighbours

4.72 Where a greater sale price from the disposal of NHS-owned land and property may be realised by combining it with land and property of an adjoining owner (NHS organisation or third party), a joint disposal should be considered.

4.73 Value for money and risk must be carefully considered by the disposal team, which should make recommendations on how to proceed in these cases.

4.74 Consideration should be given to the following:

- where possible, a legally-binding arrangement to avoid one party withdrawing unilaterally;
- cross-options to purchase (each party may acquire the other's interest under specified circumstances);
- where the third party's land and property is relatively minor, the NHS organisation should consider buying it outright, or purchasing on the basis that the vendor receives an agreed percentage of the total proceeds; and
- the allocation of proceeds should reflect any ransom value that the NHS organisation enjoyed over the third party's land and property.

Sale and leaseback

4.75 Any sale and leaseback arrangement should provide value for money and be supported by a fully documented audit trail on how the decision was reached.

4.76 The FT or Trust should ensure that its right to continue to use the facility is preserved for as long as it is likely to be required.

4.77 A comparison between the government's cost of capital and the lessor's likely cost of capital should be made. In most cases, it is

unlikely that sale and leaseback would provide value for money.

Sale of surplus property in PFI and LIFT schemes

4.78 Any such transfer should represent value for money and not compromise the long-term delivery of NHS services. Information on the principles covering the transfer of surplus land in PFI and LIFT schemes is available at www.dh.gov.uk.

Provision of new facilities in exchange for surplus land and property

4.79 A purchaser may provide a replacement healthcare facility in lieu of cash, as consideration for an NHS organisation's surplus land and property. Professional advice should be obtained to ensure that the procurement of the project complies with European Union procurement rules (see paragraphs 1.55–1.77).

4.80 Such schemes are complicated by the need to tie in planning on both the replacement facility and the NHS organisation's surplus land and property.

4.81 Considerable effort should be made to ensure best value is obtained. However, this may be difficult given the relatively limited number of purchasers in the market who are both developers and contractors. A robust business case is required.

4.82 An exchange of assets seldom provides best value against an outright sale of land and property and a new build.

Forward sale of land and property

4.83 "Forward sale" refers to the circumstances where an organisation sells land but remains in occupation for a period of time (possibly years) afterwards. They are more complex than conventional sales and appropriate professional advice should be taken.

4.84 Value for money and risk must be carefully considered in a business case seeking approval for a forward sale. The following issues, in particular, should be addressed.

When is the sale price assessed?

4.85 The sale price is usually assessed at the time the property is sold. Accounting rules apply to disposals: the disposal team should involve financial colleagues on the disposal process and ensure that there is a clear approach and understanding regarding financial treatment and effects of disposal.

4.86 Consideration should be given to the possibility of the property value increasing by the time it is vacated. Such an eventuality should be covered by an overage or clawback provision (see paragraphs 4.56–4.63 for details).

4.87 The sale should reflect:

- the benefit to the vendor of an earlier receipt of money;
- the risk the purchaser is taking over the fact that the property value may fall during the period it is occupied and in financing payments in advance of the site becoming vacant.

When is payment made?

4.88 The money for the property is usually received when it is sold but payment may be made at different times, for example if the vacation is to be phased or planning approval is already available for part of the site.

Enhanced planning

4.89 At the time of the sale, planning permission may not have been obtained or, if it has, there may be the prospect of an enhancement. Such an eventuality should be covered in overage or clawback provisions (see paragraphs 4.56–4.63 for details).

Sales on

4.90 If the contract allows the purchaser to sell the site on (to another buyer or buyers) prior to vacation, adequate provisions should be included to ensure that the organisation obtains a share of any gain made (see paragraphs 4.56–4.63 for details).

Rent and other lease terms

4.91 The purchaser may seek to charge rent during the period of occupation. Such a payment will be a net outgoing and (as opposed to capital charges) the cost should be fully reflected in the value-for-money calculations.

4.92 Extreme care should be taken to ensure that the terms of any leaseback do not include onerous conditions, for example in relation to repairs, and do not restrict the day-to-day operation of the property.

Giving up possession

4.93 The contract will include a date by which time vacant possession has to be given. If possession is not given by that date, penalty clauses are almost certainly going to come into force.

4.94 The organisation must therefore be certain that it will be able to give possession by the due date and have contingency arrangements should it fail. To avoid unnecessary site security costs, attempts should be made to ensure that early possession may be given.

4.95 Adding a long-stop date may help the organisation to avoid penalties (that is, penalties will not be payable until after a long-stop date).

In all cases, value for money should be rigorously assessed for audit purposes. There should be sound financial reasons why the NHS organisation should not wait to sell the property at the time it is to be vacated.

Disposals that seek participation in development profit

4.96 This may arise when planning permission is not available at the time of selling.

4.97 Where land has a potential high value for alternative use but gaining planning permission for this use is high-risk, a sale may be achieved at a base value subject to additional payment(s). These payments can be based on the uplift in development values arising from the planning permission obtained.

4.98 The eventual payments may be paid in one payment or, on larger sites, phased over a number of years.

Contracts conditional on planning permission

4.99 Where planning issues are complex, or an outcome too uncertain for the FT, Trust or NHS PS to risk its own money in pursuing planning permission, the disposal team should consider a sale by way of a contract conditional on the purchaser obtaining planning permission.

4.100 An example is where offers for land for residential development have been received and all are conditional upon receiving planning consent for their particular scheme. In this instance, the disposal team would analyse all the offers and choose a prospective purchaser whose proposal is judged as achieving the best return and having the most likely chance of success in gaining planning approval.

4.101 A contract would be signed between the two parties whereby the agreed sale price is paid on an agreed date after the planning approval has been obtained.

4.102 The disposal team should advise:

- whether a deposit should be paid and whether or not it should be returnable (with or without interest);
- how specific the contractual conditions should be (for example, should housing

numbers be specified or a detailed planning application for a food store be required?);

- how long the developer should be given to obtain permission;
- whether the organisation should retain some control in the planning process to ensure that irresponsible behaviour by the purchaser does not irredeemably prejudice the land and property value;
- who judges the acceptability of planning conditions or obligations (see paragraphs 3.58–3.71 for details of planning conditions and obligations);
- whether the application can be in joint names so that the organisation could take over should problems arise;
- whether the purchaser should be obliged to appeal if the planning application is refused or no decision made within the statutory time limit;
- whether the contract should specify a timeframe for action;
- whether the contract is conditional on planning agreements being in an acceptable form to both parties. There will also need to be an indemnity from the purchaser if the vendor agrees to implement any obligations under a planning agreement;
- whether the responsibility for repair, maintenance and/or insurance should pass to the purchaser (the organisation will still need to continue to monitor and enforce, if necessary, any repair/ maintenance issues); and
- on the inclusion of any overage or clawback provisions (see paragraphs 4.56–4.63 for details).

Phased-sale contracts

4.103 This normally relates to extensive sites where completion of the new development will take over two years and is likely to take place in distinct stages – that is, a phased development.

4.104 A contract will be entered into whereby the developer pays the agreed sale price over a set number of years and may well include overage or clawback provisions (see paragraphs 4.56–4.63 for details).

4.105 The disposal team should provide conclusive evidence that the net present value (NPV) of the deal represents better value than an outright sale.

4.106 The NHS should not provide a “loan” to the developer in such cases.

4.107 Account should be taken of all holding costs including loss of interest on capital not received, capital charges and the cost of administering and monitoring the scheme. This amount should be deducted from the NPV of the sum of the staged payments in order to compare this with an outright sale. If the site has been sold, there will be no holding costs.

4.108 The disposal team should address the following:

- comparison of the proposed phased sale with a sale in separate lots over a similar or shorter period;
- retention of the title to the land and property not paid for in full by granting a building licence to the developer prior to completion. Title to the land and property should only transfer to the developer upon payment in full for each plot or phase. This option should be tested against the use of a legal charge, which may achieve a more satisfactory result;
- the creditworthiness of the purchaser. Where the viability of the project is dependent on compliance with planning obligations or conditions (see paragraphs 3.58–3.71 for details), it is vital that the purchaser has the ability to meet these obligations;

- whether a performance bond, bank guarantee or initial legal charge should be sought – the cost of the bond or guarantee being a major factor in the decision; and
- whether it is cost-effective to transfer security arrangements for the property to the purchaser.

Setting the sale price

Transfer value to another FT or Trust

4.109 Where the land and property is required for use by another FT or Trust, it should be transferred at net book value.

Valuation in preparation of sale of land and property

4.110 When a sale of surplus land and buildings is being scheduled, FTs and Trusts should take professional advice on how and when the value of the asset should be change in their accounts.

4.111 Where external changes result in a change to the value of the site during the disposal process (for example, due to changes in market conditions and the firming up of planning requirements), the site should be revalued. The new valuation and reasons for the change should be recorded.

4.112 In all cases, valuations should be regularly updated at least every six months throughout the disposal process.

4.113 It may be appropriate to produce a range of valuations dependent on different outcomes (for example, if there is uncertainty over the use to which the surplus property will be put). The range of values should be regularly reviewed.

4.114 Where only part of a site is being disposed of, changes in the valuation of the surplus area might affect the decision on which part should be retained for development.

Role of suitably qualified valuer

4.115 The suitably qualified valuer (Valuation Office Agency (VOA) or private-sector valuer) should work with the disposal team to:

- establish the initial price;
- advise, in consultation with the selling agent, on the final reserve price in sales by auction or tender;
- advise on the acceptability of bids received within the sale deadline;
- advise on any authentic late or revised bid received after the closing date but before the sale has become legally binding, which is higher than bids received within the deadline; and
- where the final sale price is below the initial price, certify, jointly with the selling agent, that it is the best offer reasonably available.

Sale at best price

4.116 Ensure that surplus land and property is sold at the best price reasonably obtainable in the open market. The sale process should demonstrate that this is the case.

4.117 The best price should take account of all the factors (market conditions, planning position, legal constraints etc), especially holding costs and other costs required to achieve the sale.

4.118 Any “special purchasers” should be identified. A special purchaser is anyone willing to pay over the “normal” market value. This may be because he/she has a special interest in the property due to its location or development potential or other financial reasons.

4.119 Organisations need to be aware of rogue “high bids” from those likely to negotiate concessions and a lower price after their offer has been accepted.

4.120 Sites with potential “marriage value” should also be identified. Marriage value refers

to the enhanced value as a result of combining sites. The acquisition of adjoining sites or joint disposals with neighbours should be considered where an enhanced value may be realised (see paragraphs 4.72–4.74 on joint ventures). However, "speculative" purchases should not be made.

4.121 The value of voluntary conditions imposed by the vendor should be taken into account where they produce a direct or indirect benefit to the vendor that can be quantified in monetary terms.

4.122 These are, for example, retention of an easement over the land, a pre-emption clause allowing the vendor to repurchase on specified terms if the purchaser decides to sell, or covenants that benefit other land in the vendor's ownership. Restrictions on the use of the land may also be included, although this may affect the sale price.

4.123 Land and property with potential for development should normally be sold with the benefit of planning permission for alternative use. Where this is not possible, paragraphs 4.96–4.102 explain the options to maximise the sale proceeds.

4.124 Care must be taken to consider an applicant's need for planning permission that is judged by the professional advisers as unlikely to be forthcoming.

4.125 For the sale of historic buildings, see paragraphs 4.177–4.178.

Sale to a selected purchaser (solus transaction)

4.126 Where a disposal involves a negotiated sale, without testing the market, to a selected purchaser – for example a charity or a local authority – the probity of such a sale must be demonstrable.

4.127 A "solus" transaction should be used only where necessary.

4.128 FTs, Trusts and NHS PS wishing to dispose of property in this way should first secure valuation advice from two suitably qualified valuers. If both agree to the price, the sale can proceed.

4.129 Both valuers should confirm that the offered price would be unlikely to be exceeded in a sale by tender or auction and is not a concessionary sale. Otherwise, the property should be placed on the open market.

4.130 The recommended price should be regularly assessed should the transaction sale period exceed the norm.

4.131 A selected purchaser may be a purchaser with a special interest (see paragraph 4.118 for details).

Sale at concessionary price

4.132 In some circumstances it may be reasonable to accept a price below market value, for example where the sale would achieve operational and/or wider public benefits that outweigh price considerations alone. The benefits must be clearly identified in the supporting business case.

4.133 For example, a prospective purchaser may offer to provide services or other benefits to the NHS such as a charity using a property for a hospice. Where these benefits can be quantified in monetary terms and added to the "price", and the total then exceeds the market value, the best price has been secured and the sale can proceed.

4.134 The organisation's board must approve any concessionary sales with full knowledge of the business case for the concession.

4.135 Approval is then required from DH if the concession exceeds certain specified limits in case the sale is classified as a "gift" and has to be reported to Parliament. Where approval is required from DH, it will brief the Minister, if required.

Note

Currently the specified limit is £300,000, but the latest limit should always be checked.

4.136 An overage or clawback provision (see paragraphs 4.56–4.63 for details) should be included in case the purchaser subsequently sells at a higher price, provided the accountable officer and, where appropriate, a health minister are prepared to defend the sale as a deliberate concession.

Sale methods

4.137 Land and property should normally be sold by competitive marketing. However, the method of sale adopted will depend on the type of property, planning considerations, state of the market and type of purchaser.

4.138 Professional advice must be sought on alternative methods of sale. Advisers should comply with public accountability requirements.

4.139 Land and property should be openly marketed other than in exceptional circumstances.

Formal tender

4.140 The property should be widely advertised for a proposed minimum of eight weeks depending on the size of the property and complexity of the sale, prior to the tender date, and be open to all potential bidders.

4.141 Based on the advice of the selling agent (in consultation with suitably qualified valuer for complex sales), a reserve tender price should be set.

4.142 All interested parties should be sent an information pack covering legal, planning and infrastructure issues and, if available, a ground condition report. On acceptance of the best tender offer, a binding contract for sale will be put into effect.

4.143 Advantages include:

- the land and property is available to a wide market;
- public accountability is self-evident;
- a purchaser with a particular interest may submit a high bid (for example, one bid may be considerably greater than the others, whereas at auction the price bid will only be one bidding step above the last highest offer);
- a price above the estimated market value may be achieved (the best possible price obtainable);
- the sale is certain in that a contract is established on the day.

4.144 Disadvantages include:

- the tender procedure, involving large numbers of interested parties, may be time-consuming and expensive;
- some potential purchasers do not like tendering and may not bid because of the costs involved in bidding and uncertainty of success.

4.145 This option is likely to be used for the sale of land and property with beneficial uses and no obvious constraints to development, and for which there is an active market.

Limited formal tender

4.146 This option is useful where the site is very large and complex or where best value will be obtained by marketing to a few selected prospective purchasers where a specialist market exists.

4.147 Based on the advice of the selling agent (in consultation with a suitably qualified valuer for complex sales), a reserve tender price should be set.

4.148 The land and property should be advertised, focusing on the most likely purchaser group. The list of potential

purchasers should be based on the recommendation of professional advisers.

4.149 Advantages include:

- reduced tendering costs compared with formal tender;
- opportunist bidders with inadequate financial standing can be excluded;
- the bids are more likely to be meaningful as potential purchasers know that they have a reasonable chance of success;
- the sale is certain in that a contract is established on the day.

4.150 Disadvantages include:

- having a limited number of potential purchasers means there is no certainty that the best price has been achieved;
- questions of public accountability may arise over the selection of potential tenderers.

Informal tender

4.151 The procedure is very similar to a formal tender. However, the purchaser does not make a binding offer, and negotiation can take place regarding the terms and conditions of the offer. The successful bidder is invited to sign a formal contract for the purchase within a short period of the offer being accepted.

4.152 Advantages include:

- greater flexibility (to the purchaser) over the terms of the offer;
- greater flexibility (to the vendor) to clarify and, if required, negotiate the final terms of the sale (particularly with large complex sites where a simple cash offer may not produce best value, for example where overage or clawback provisions need to be negotiated – see paragraphs 4.56–4.63);
- possible increased offers through post-tender negotiations or by asking for best and final offers;
- following up approaches previously made to the vendor, usually as part of a private sale;
- demonstrating in a fairly quick way that an attractive offer from a specific individual does indeed offer good value.

4.153 The disadvantage is that the purchaser is not bound to proceed at the price offered.

Private sale

4.154 The selling agent should widely advertise the site for sale for a reasonable period of time.

4.155 The sale should then be negotiated between the selling agent and prospective purchaser(s), culminating in a best price offer.

4.156 The agent should recommend which offer should be accepted.

4.157 Advantages include:

- administrative costs are minimised;
- a quick sale may be achieved;
- in a difficult market the selling agent will have more scope to negotiate;
- flexibility;
- the selling agent is obliged to report all offers received.

4.158 If marketing results in keen competitive interest, a formal limited tender or informal limited tender may be commenced.

4.159 Disadvantages include:

- questions of public accountability can arise over the selection of the potential purchaser (hence the need for written professional advice and recommendations in all cases);

- there is no firm contract at the point of offer and acceptance.

4.160 Suggested uses include:

- single houses or flats: low-value land and property;
- concessionary sales.

Public auction

4.161 Land and property should be widely advertised. They should do this before any disposal is progressed (as mentioned in paragraph 4.5). A reserve price will be known only to those involved in the sale and not to those bidding. The reserve price will be determined through consultation between the auctioneer, suitably qualified valuer and NHS organisation, and informed by feedback in the pre-sale period.

4.162 Advantages include:

- the land and property are available to a wide market;
- conditions of public accountability are seen to be satisfied;
- the vendor can be satisfied that, on the day, the best possible price was obtained;
- the element of competition can lead to a price in excess of the estimated market price;
- the sale is certain in that a contract is established on the day.

4.163 Disadvantages include:

- some potential purchasers dislike auction procedures and their bid might therefore be lost;
- "rings" can be formed by interested parties who then deal with the land and property between themselves after one party has purchased the required property in the auction room (this may eliminate competition, and thus reduce the selling price).

4.164 Public auctions are best suited to disposals where it is reasonable to expect keen interest from prospective purchasers and it is difficult to establish a clear idea of value, or to disposals that present difficulties (for example, where no planning consent has been forthcoming). It is possible to use overage and clawback provisions in conjunction with public auctions.

Late bids

4.165 A late bid may be received after a closing date but before the sale has become legally binding.

4.166 If the offer is significantly better than those received before the deadline, careful consideration should be given to it, with professional advice on whether the bid should be taken into account.

4.167 Account should be taken of the requirement to secure the best possible price when disposing of surplus assets against the possibility of the original bidders withdrawing their offer.

4.168 If it is decided that an authentic late bid should be taken into consideration or the land and property has been sold subject to contract but contracts have not been exchanged, all bidders (including the current prospective purchaser) should be given the opportunity to improve their bids.

4.169 Sufficient time should be allowed for the necessary enquiries into any late bidders' financial credentials to be completed.

4.170 Clear documentation of the reasons for pursuing a late bid, or not pursuing it, should be in the transaction file. Accepting a late bid where a contract for sale has been sent out (but not exchanged) can result in bad publicity for the NHS organisation.

Post-completion

4.171 In straightforward sales, when a disposal has been completed, the NHS organisation should:

- update its asset register records and estate terrier, giving reference details of any Land Registry entry;
- ensure that all contracts for the supply of services to the sold property have been cancelled and the local authority has been advised of the new ownership for rating purposes.

4.172 For other sales, in addition the NHS organisation's solicitor should summarise:

- all future payments and dates when payments are due;
- any conditions that may trigger a future payment;
- any legal charges;
- any rights or easements granted to the NHS organisation over the property sold as well as any to the purchaser that affect the retained land of the NHS organisation;
- any obligations that will affect the retained land, such as infrastructure works, together with the agreed timescales for completion of these works.

Financial credentials

4.173 The creditworthiness of bidders should be examined in disposals by private sale, formal or limited formal tender and, where feasible and appropriate, in sales by auction before any bid is accepted.

4.174 Where agents are used to establish the creditworthiness of bidders, recommendations should be obtained in writing, including the basis for the recommendation.

4.175 This is important, in respect of both the recommended bid and any higher bids that are rejected because of doubts about the bidders' financial credentials.

4.176 As bids accepted at auction result in a binding contract and the purchaser has to pay a 10% deposit immediately, it is not normal to check on bidders' creditworthiness except for very large disposals. Even in these cases it will only be feasible to carry out such checks where the identity of bidders is known in advance.

Sale of surplus historic buildings

4.177 When selling surplus historic buildings, the best return for the taxpayer should be obtained. Account should be taken of the following:

- local planning policy (see paragraphs 3.11–3.25 for details);
- government policy for conserving and enhancing the historic environment, including historic buildings (set out in paragraphs 126–141 of the NPPF);
- the most appropriate long-term use for the building;
- the building's current state and likely costs of future maintenance and repair;
- non-financial and wider regeneration benefits from the future use of the historic building including environmental, cultural and long-term economic impact.

4.178 'The disposal of heritage assets: guidance note for government departments and non-departmental public bodies' (DCMS, 2010) sets out the following recommendations:

- Accepting the highest purchase offer is not always appropriate. Maximisation of receipts should not be the overriding aim in cases involving the disposal of heritage assets.
- Any options for reuse should be considered before deciding to sell. It may be possible to retain and adapt a historic building for a different use, instead of selling it.

- Unused heritage assets need to be actively protected. All vacant and non-operational historic buildings should be regularly inspected and maintained in a secure, safe and stable condition pending disposal; important archaeological sites should be actively managed.
- English Heritage should be consulted at an early stage. English Heritage should be given the opportunity to comment regarding any site where there is potential for a significant heritage issue. Guidance on the handling of disposal cases is available from the Government Historic Estates Unit (GHEU).
- FTs, Trusts and NHS PS should provide clear information for purchasers. Disposals should always be accompanied by information regarding the significance of any heritage assets and any constraints on change due to their significance. Information about any repair, maintenance or management liabilities should also be made available, including an up-to-date condition survey.
- Heritage assets need sustainable ownership. FTs, Trusts and NHS PS should take reasonable steps to ensure that purchasers of vulnerable heritage assets have the resources to maintain them. Alternative methods of disposal other than open market sale may need to be considered to ensure appropriate ownership.
- Large historic sites should be considered as a whole. The disposal of large sites should be handled holistically, to avoid isolating heritage assets and potentially damaging their setting.

Disposal of burial grounds and war memorials

4.179 It is important to recognise the need for sensitivity when contemplating the sale of sites that include burial grounds and war memorials. These need to take account of local circumstances.

Burial grounds

4.180 It is inappropriate for the NHS to retain such land if it is no longer operational. It should be included in any sale of the principal site or sold to the local authority or local interest groups who would maintain it.

4.181 Specialist advice should be sought from a suitably qualified valuer regarding the sale value of these sites.

War memorials

4.182 Careful consideration should be given to the disposal of sites that contain war memorials. A purchaser may maintain and preserve the memorial. Otherwise, the memorial could be relocated on NHS-owned land or land owned by local authorities or other interested local groups.

4.183 Where it is proposed to relocate or dispose of war memorials, at least six weeks' written notice should be given to the War Memorials Trust, which may be able to assist in finding new suitable locations.

4.184 Six weeks' written notice should also be given to the local authority so that checks may be made as to whether the memorial is listed or listable. Once a memorial has been relocated or disposed of, the organisation should inform the Imperial War Museums' War Memorials Archive.

4.185 See Note after paragraph 2.196 for contact details of the above organisations.

5.0 Disposal of leasehold land and property

Introduction

5.1 This chapter deals with the disposal of surplus leasehold land and property.

5.2 Disposal options include assigning the lease to a new tenant, surrendering the lease back to the landlord or subletting all (or part) of the leased property to a subtenant.

5.3 Restrictions on disposal will usually be contained in the lease itself. These may dictate procedures for dealing with permitted disposals.

5.4 In most cases, the consent of the landlord will be required in advance of a disposal, usually in a formal written licence agreement. The terms of the lease will usually require the NHS organisation to meet the landlord's reasonable legal and professional costs in providing the licence.

5.5 Professional advice from solicitors and suitably qualified valuers should be taken in respect of landlord and tenant issues.

Assignment

5.6 Assignment is the standard form of disposal for leasehold interests where the NHS organisation no longer requires the leased property and there are a sufficient number of years remaining on the lease term.

5.7 An assignment is a transfer of the unexpired term of a lease to another party. The new tenant (assignee) takes full responsibility for compliance of the lease terms. NHS organisations should not enter into an authorised guaranteed agreement (AGA) for other NHS and public sector organisations. An AGA is a form of guarantee by an outgoing tenant of its assignee's obligations under the lease.

5.8 The financial standing of the proposed assignee will dictate the preconditions the landlord is likely to demand when granting consent to the assignment. The NHS organisation will probably be required to guarantee the continuing performance of the assignee in respect of its lease obligations.

5.9 An assignment is not without risk as, if the proposed assigned is financially unstable, and the transaction involves the assignment of an "old lease" (that is, granted before 1 January 1996) or "new lease" (granted after 1 January 1996) where the NHS organisation has given an AGA, the continuing liability under the transferred lease could come back to the NHS organisation.

Assignments – liability of original landlord and tenant: leases granted before 1 January 1996

5.10 Where the lease is an "old" lease (that is, granted before 1 January 1996), the original parties remain liable for the full duration of the lease even after they have disposed of their interests. However, the original tenant is not liable for any additional obligations that subsequent assignees agree with the landlord.

5.11 In most cases, the landlord will look to enforce the tenant covenants against the current tenant (rather than the original tenant). However, if the current tenant were considered

financially incapable of complying with the tenant covenants (for example if the current tenant is insolvent), the landlord would wish to pursue the original tenant.

5.12 As a result it is essential that, on assignment, the original tenant obtain an indemnity from the assignee against all future breaches of covenant.

5.13 Therefore, when assigning an "old" lease, an NHS tenant should ensure that the assignee (1) is of good covenant strength and (2) provides an indemnity against all future breaches of covenant.

Assignments – liability of original landlord and tenant: leases granted after 1 January 1996

5.14 On assignment of a "new" lease (that is, granted after 1 January 1996), the tenant is automatically released from the tenant covenants in that lease unless they have entered into an AGA.

5.15 NHS organisations should resist giving an AGA unless it is unavoidable.

Surrender

5.16 A surrender is where the lease is disposed of by returning the premises to the control of the landlord. In the majority of cases the tenant has to make a payment to the landlord for the surrender to be completed. However, it is strongly recommended that the surrender be correctly documented to avoid potential disputes.

5.17 Surrenders sometimes take place where the tenant is acquiring the property from the landlord. This form of surrender will be completed at the same time as the completion of contracts for the acquisition, as part of the sales contract.

5.18 A date for surrender may be agreed with the landlord and documented by means of an "agreement to surrender". This gives both parties certainty concerning the terms and timing of the vacation of the property.

5.19 The agreement can also usefully record any terms agreed between the NHS organisation and landlord (for example, how any dilapidations are to be dealt with or any agreement for repayment of rent and service charge for the period after the surrender has completed).

5.20 A surrender may be beneficial to the landlord if it enables him/her to re-let the premises at a better rate to an alternative tenant.

5.21 On the other hand, it may represent the most cost-effective way for the NHS organisation to dispose of a leasehold interest, particularly one that only has a short time to run or where there are ongoing liabilities that the NHS organisation would retain on assignment of the lease.

5.22 Early advice from suitably qualified valuers and other professional advisers should be sought on the terms of the surrender and the calculation of payments to be made in either direction.

Subletting

5.23 If neither assignment nor surrender is possible, NHS organisations may dispose of leasehold property by means of a sublease where the lease permits it. The granting of a sublease does not exonerate the NHS organisation from liability under the lease, but rather passes those liabilities onto the sublessee.

5.24 Ideally, as many of the obligations in the lease should be stepped down into the sublease to ensure that, whilst the NHS organisation remains liable to the landlord under its own lease, it is in a position to enforce them against the sublessee. A schedule of condition or photographic survey should be carried out at the start of the agreement.

5.25 If the sublessee is reliable and financially sound, this arrangement can be beneficial, particularly if the premises are only temporarily

surplus and may be brought back into use by the NHS organisation on expiry of the sublease.

5.26 However, there may be significant management and administrative burdens if the sublessee proves to be unreliable.

5.27 Depending on the terms of the lease, the NHS organisation may be required to meet the landlord's legal and other professional costs incurred in connection with the granting of consent to the sublease, unless these costs can be passed onto the sublessee.

5.28 The length of the sublease is flexible provided it does not exceed the length of the NHS organisation's lease.

5.29 If only part of the leased premises is surplus and the lease permits it, the NHS organisation may wish to sublet part only. Additional consideration should be given to the contribution required from the sublessee to service charges, utility costs and business rates payable under the lease, and the allocation of shared areas in the premises.

How marketable is the lease?

5.30 Key issues affecting marketability, and hence the disposal options, include:

- the length of the lease (lease term);
- rent level (compared with current market rental value) and arrangements for rent review;
- nature of other payments due under the lease (for example service charges, insurance costs etc);
- alienation provisions;
- user provisions and other specified user restrictions;
- development potential (for long leaseholds);
- freedom to carry out alterations and adaptations (for short leaseholds);
- extent of the tenant's repair and maintenance liability (repairing obligations);
- rights and reservations associated with the lease (for example car-parking, access etc).

Disposal of long leasehold land and property

5.31 Long leasehold property (over 70 years remaining on the lease) should be treated as though it were freehold property; all the general provisions affecting the sale of freehold land and property apply to the disposal of a long leasehold property.

5.32 Long leases are likely to have less restrictive user and alienation provisions and greater development potential than short leases. Long leases should also not contain a right (found in FRI leases) for the landlord to end the lease in a number of situations such as the tenant's insolvency or non-compliance with the lease.

5.33 The normal method of disposal of long leasehold land and property is by assignment. The NHS organisation should be able to demand a premium payment from the incoming tenant, which will reflect the capital value of the leasehold property.

5.34 Subletting of long leaseholds is not usual. Short-term sublets may be granted, subject to alienation provisions, for example where accommodation is not required in the short term or when letting part of a site for retail purposes.

5.35 Surrender of long leaseholds is unusual unless:

- the landlord is willing to pay a high price for the leasehold; or
- the tenant wishes to extend the lease term to allow for redevelopment and/or extensive refurbishment.

In the latter case, subject to satisfactory financial terms being agreed, the remaining term of the lease would be surrendered to the landlord in return for the granting of a new longer lease.

5.36 The factors affecting the marketability of the lease are described in the following paragraphs.

Lease term

5.37 There normally needs to be at least 70 years remaining on the lease to allow an incoming tenant to raise finance against the security of the long lease interest.

Rent level and rent reviews

5.38 A nominal ground rent will normally be charged for the duration of the lease. The key issue is whether or not the ground rent is fixed. If it is not, the terms of any rent reviews, for example frequency and method, will be important.

Alienation provisions

5.39 The landlord may be required to approve the financial standing of an incoming tenant or license an assignment by means of a formal licence.

User provisions and specified user restrictions

5.40 How flexible are these provisions? Are there any user restrictions that may affect the marketability of the lease?

Developmental potential

5.41 If an incoming tenant is looking to redevelop the site, the lease will need to be checked to assess the degree of control that the landlord retains in approving new development works.

5.42 If the landlord's consent is required, this is likely to be by means of a formal written licence agreement, which will be the responsibility of the incoming tenant.

Rights and reservations

5.43 This could be important to an incoming tenant who wishes to carry out significant works to improve or demolish and rebuild the premises.

Disposal of short leasehold land and property

5.44 For the purpose of this guidance, a short leasehold is defined as having at least two but less than 30 years remaining on the lease.

5.45 The marketability of the short lease and disposal options adopted, that is, assignment, subletting or possibly surrender, will be affected by the following.

Lease term

5.46 If there is insufficient time remaining on the lease, it may be possible to negotiate, with the landlord, the option of taking a further lease at the end of the current lease. This can then be passed onto the incoming tenant.

5.47 If the remaining lease duration is too long, the incoming tenant may be given the right to assign the lease back to the NHS organisation before the expiry of the lease.

5.48 Another factor is whether the lease benefits from statutory security of tenure rights, that is, the right to renew an existing lease, arising from the Landlord and Tenant Act 1954. It is important to realise that tenure rights may be defeated by the landlord under section 30 of the 1954 Act.

5.49 If the lease term is short, a surrender may be accepted by the landlord subject to an agreed monetary settlement.

Rent level

5.50 If the passing rent is above current market rental levels, it may be difficult to sublet the premises if the lease does not permit sublettings for less than the passing rent.

5.51 Under these circumstances, if the property is to be assigned, a reverse premium may have to be paid to the assignee and may be subject to VAT.

5.52 If the passing rent is below current market rental levels and the property is to be assigned, a premium may be offered by the assignee. Alternatively, a similar or higher payment may be available from the landlord, who may find it more beneficial financially to re-let the premises themselves.

Rent reviews

5.53 Is a rent review imminent or outstanding? Uncertainty in this respect can put off a prospective assignee or sublessee. Seek to resolve the review issue at the earliest possible time.

Alienation provisions

5.54 Restrictions and preconditions (sought by landlords) on assignments are likely to be more onerous in a short lease than in a long lease. Preconditions commonly found in commercial leases include the right for the landlord to require:

- evidence of the financial standing of the proposed assignee;
- a third party to guarantee the assignee's obligations in the lease;
- a rent deposit from the assignee to underwrite his/her lease obligations;
- an AGA from the NHS organisation in respect of the proposed assignee's covenants and obligations in the lease.

5.55 The stronger the financial standing of the proposed assignee, the fewer preconditions the landlord is likely to insist upon.

User provisions

5.56 The marketability of the premises may be reduced because of a narrow user clause. The landlord may permit alternative uses, but may also be entitled to withhold consent provided it does so reasonably.

Freedom to carry out alterations and adaptations

5.57 If alternative use of the premises is not possible without significant adaptation, restrictions in the lease on alteration works could seriously affect the attractiveness of the lease to a prospective tenant.

Rights and reservations

5.58 If the lease offers benefits (for example car-parking rights) in addition to the standard rights of access required to operate from the premises, this may be a positive attraction to a prospective tenant.

Repairing obligations

5.59 The extent of the tenant's repair liability in a short lease may be a significant issue in assessing its marketability.

5.60 If the tenant has a full repairing liability and significant repair works will be required in the short time that remains of the lease, unless these works are carried out before marketing the lease it may be very difficult to attract a new tenant.

Existing breaches

5.61 A prospective tenant is likely to inspect the premises and make enquiries before completing the assignment or sublease to ascertain, among other things, whether the NHS organisation has already fully complied with the tenant's obligations in the lease.

5.62 If there are outstanding breaches:

- the prospective tenant or landlord (as a precondition of permitting the assignment) may require that the NHS organisation remedies the breaches before the assignment or sublease completes; or

- the landlord may require security from the prospective tenant (for example, in the form of a bond or third-party guarantee) that it will remedy the breaches.

5.63 On an assignment, the assignee is likely to require that the NHS organisation meets these liabilities either by means of a reduction in the premium paid by the assignee (if any) or a reverse premium paid to the assignee on completion of the assignment.

5.64 For subletting, a direct payment or rent-free period to compensate for these works would be demanded by the sublessee. Check that such incentives are permitted by the lease.

Future breaches

5.65 The NHS organisation should ensure that the assignee and any person acting as guarantor for the assignee will be good for rent payments and other tenant liabilities under the lease.

5.66 NHS organisations should seek to take direct covenants from the assignee's guarantor and in an "old lease" (that is, a lease granted before 1 January 1996) reserve the right to consent to any further assignment by the assignee (again, to protect against the possibility of default by that tenant, giving rise to a claim from the landlord).

5.67 In the case of subletting, the NHS organisation has greater control over its tenant through exercising rights reserved under the lease provisions.

Contractual expiry of leasehold interests

Vacant possession

5.68 Ensure that vacant possession and compliance with all lease terms is accomplished before the lease expiration date.

Repairing obligations

5.69 Check the repairing obligations and whether they have been complied with. Ensure that any dilapidation works (for example, repairs required under the lease terms) are completed prior to the lease expiration date. There are circumstances where dilapidations do not have to be carried out, or where a cash payment in lieu of dilapidations can be made.

5.70 Professional advice should be taken when negotiating a schedule of dilapidations.

Other breaches

5.71 Often, alterations may have been made without formal consent, and those made with formal consent may have been done so subject to the landlord's requirement that they are reinstated at the end of the lease. Although a lease may permit alterations without consent, where the lease requires formal consent before alterations are made, such consent should be obtained, as otherwise the NHS organisation is exposed to a claim from the landlord that it has breached its lease. The terms of the lease should be followed.

5.72 Tenant improvements may have to be removed and/or the land and property returned to the same condition as existed when the lease commenced, although the landlord may agree to take over tenant improvements. Professional advice should be sought before negotiating with the landlord in relation to how tenant breaches of the lease should be dealt with, as there may be significant repercussions

Effect of subtenancies or licences

5.73 Sublessees or licensees may require notice from the NHS organisation to give up possession. It is better to secure possession from sublessees and licensees earlier than required by the head lease to ensure that the NHS organisation does not have difficulty in giving vacant possession to the landlord at the end of the term. Legal advice should be sought before serving notice on sublessees or licensees.

Post-completion

5.74 Details of assignments, sublets and surrenders should be recorded on the estate terrier, and the asset register records should be amended.

5.75 The NHS organisation's solicitor should provide a summary of:

- any assignment and guarantees provided;
- the main terms of the sublease.

5.76 The solicitor should also provide details of the location of the legal documentation should any problems arise from a defaulting assignee.

5.77 Procedures should be in place in NHS organisations to ensure that the terms of any sublease are clearly known and monitored to ensure compliance with the sublease terms.

6.0 Granting of leases (and licences to occupy)

Introduction

6.1 This chapter deals with the granting of (new) leases to third parties (whether other NHS organisations, voluntary groups or the private sector) and other forms of occupational arrangement.

6.2 Examples include the letting of temporarily vacant space, surplus property pending disposal, and income-generation transactions such as letting units for banks, shops, cafes, hairdressers and voluntary organisations.

NHS organisation as landlord

6.3 Care must be taken when FTs and Trusts are considering becoming landlords. Tenancy agreements should not interfere with the provision of health and social care. Property management is a core role for NHS PS and CHP.

6.4 This and the following paragraphs are intended to cover the grant of leases to third parties for operational and income-generation purposes (see paragraphs 1.29–1.33). The aim to obtain good commercial terms should be balanced with the need to operate effectively. The financial benefits of a lease should be considered carefully, as the role of landlord is often management-intensive.

6.5 For detailed information on income generation, see paragraphs 1.29–1.33.

6.6 Planning permission may be required if a new facility is created and its use is not regarded as ancillary to the NHS organisation's function.

6.7 Leases should only be entered into once the landlord is satisfied that the tenant has the required financial status to meet the obligations of the lease. A guarantee or deposit may be sought.

6.8 Care should be taken when granting a licence to avoid creating a lease (though licences to NHS organisations may still be appropriate).

6.9 Licences to occupy for the exclusive use of property for a defined period in return for a rental payment should be avoided, since this might well give rise to a tenancy with security of tenure under the Landlord and Tenant Act 1954. The same is true even if the licence to occupy does not purport to give the right to exclusive occupation of the property but this is the reality on the ground. However, genuine licences to occupy, where the occupier does not have exclusive occupation, do not fall within the security of tenure provisions of the 1954 Act.

6.10 Tenants should not be given possession of the property before the lease terms have been agreed and lease documents signed and exchanged, otherwise a tenancy may be established by law that is different from that which was intended.

6.11 Property and legal advice should be taken in relation to the above and the following matters.

Code of commercial lease practice

6.12 FTs, Trusts and NHS PS should be aware of the Joint Working Group on Commercial Leases (2007) 'The code for leasing business premises in England and Wales 2007', especially in relation to rent review and lease term options to be offered to prospective tenants.

Lease term

6.13 The duration of the lease will depend on individual circumstances, but should be restricted to the life of the property, or a time when the landlord will require the property again, or it is to be disposed of.

6.14 If the precise date on which the landlord will require the property again is not known, the lease may provide for the early termination by serving an agreed notice period on the tenant. Note that including a landlord-only break clause may have a negative impact on the rent achieved for the property.

6.15 This arrangement avoids the need to grant further leases after the original lease term has expired. Care does need to be taken to ensure that the landlord serves the termination or "break" notice correctly. Legal advice should be sought.

6.16 Except for short fixed-term contracts (up to six months), the tenancy should be excluded from the security of tenure provisions of the Landlord and Tenant Act 1954 to retain full control over the tenancy and restrict the term to that agreed with no right to automatically renew the lease.

Rent level

6.17 Unless the tenancy benefits the provision of healthcare, the tenant should be charged full market rent on normal commercial terms, with rent reviews at specific intervals (usually every three or five years) or increased by a suitable index.

6.18 The imposition of terms (for example, to protect the landlord's business) may reduce the rent that prospective tenants are willing to pay.

Alienation provisions

6.19 It is important to clarify what assignment or subletting will be permitted. Landlords need to have a clear policy on which tenants they require in order to achieve the right tenant mix in terms of use of the premises and type of company or individual tenant they wish to attract. Restrictive covenants may be required to implement this policy.

6.20 Limitations on alienation may restrict rents received.

VAT implications

6.21 It is important to bear in mind VAT implications. A tenant will not be obliged to pay VAT on the rent charged under the lease unless the landlord opts to charge VAT.

6.22 Advice should be taken from VAT advisers on the merits of opting to charge VAT. If VAT is not recoverable by the prospective tenant, this would add the current value of VAT to the tenant's real rental costs.

Repairing obligations and insurance arrangements

6.23 Except in the case of short-term leases or leases of land and property in poor condition, the lease will normally require the premises to be kept in good repair and adequately insured at the tenant's expense.

6.24 Specialist advice should be taken in respect of insurance arrangements in these instances, especially in respect of existing NHS insurance arrangements, indemnities required for the NHS, loss of rent insurance and the proposed tenant's insurance policies. Much depends on whether the subject premises to be let are a stand-alone building or part of a larger complex.

Compliance with statute

6.25 The tenant should be required to comply with the requirements of all relevant statutory acts and regulations including the Town and Country Planning Act 1990. This may require the tenant to secure planning permission for a change of use.

Landlord's responsibilities

6.26 A schedule of condition, including photographs, will be required where the tenant has to keep the building in no worse repair and condition. It needs to be signed by both parties and appended to the lease to avoid disputes.

6.27 Regular inspections should be made to ensure that the tenant complies with the terms and conditions of the lease (particularly in relation to repairs).

6.28 Any notices in connection with rent reviews, tenant defaults, termination of the lease etc must be issued in good time and strictly in accordance with the written terms of the lease.

Freedom to carry out alterations and adaptations

6.29 Permitted alterations to the property should be detailed in the lease.

6.30 It should be ensured that the works will not harm the structural integrity of the property and that they are completed in accordance with the provisions in the lease. For example, internal non-structural alterations may be permitted subject to the tenant obtaining the landlord's approval of the works before they commence.

6.31 Solicitors should prepare the appropriate form of landlord's approval for tenant works, and this is usually a formal licence for alterations.

6.32 The Landlord and Tenant Act 1954 may entitle the tenant to compensation at the end of the lease to acknowledge any increase in the letting value of the property as a result of carrying out works, but landlords usually seek to exclude this.

Lease expiry or renewal

6.33 If the land and property will become surplus to requirements at the lease expiry, vacant possession should be secured. It is highly inadvisable to allow any third party into possession without clear documented occupational terms.

6.34 If the tenant does not have security of tenure under the Landlord and Tenant Act 1954 and the parties want the lease arrangement to continue, fresh terms for a new lease period should be agreed before the current lease ends. The new lease should be put into place immediately after the current lease has expired.

6.35 If this is not possible, the safest course is to write to the tenant once the lease has expired making it clear that they are being permitted to remain in occupation purely as a tenant at will pending the grant of a new lease. Otherwise, there is a risk that the tenant may acquire security of tenure under the Landlord and Tenant Act 1954.

6.36 Where the lease does not provide for renewal on stated terms, and where it is intended that the lease be to be renewed, advice from a solicitor should be taken to ensure that the landlord's interests are protected.

6.37 Rent payment (cash or in kind) should not be accepted after the expiry of the lease, as a new periodic tenancy may be created inadvertently, giving the tenant security of tenure.

6.38 A schedule of repairs (dilapidations) should be prepared, if required, before the end of the lease term. This should be submitted to the tenant in good time so that an accepted plan of action can be agreed before the lease term ends. The lease may contain provisions relating to the timing for service of the landlord's notice of dilapidations etc and therefore the lease terms should be checked.

6.39 On termination of the lease, it is usual for the land and property to be reinstated to its

original condition. Alternatively, if appropriate, the landlord may negotiate a cash settlement in lieu. Such negotiations will usually need to be completed in a timely manner.

6.40 The legal system governs how terminal dilapidations should be handled by both landlord and tenant through a "pre-action protocol".

Letting retail outlets

6.41 There are many ways of delivering and procuring retail outlets and it is advised that both legal and professional advice is sought when considering transacting with developers or retailers (see paragraphs 3.21–3.25 in Part A).

6.42 In some circumstances retail outlets can generate competitive returns for operators and developers. FTs and Trusts should ensure that any negotiations are tactical, well informed and deliver the objectives that are set out in the business case.

6.43 It is important that the FT or Trust obtains a fair and reasonable return from the commercial activity on its land and property.

6.44 The business case should include both a qualitative and quantitative appraisal with a robust assessment of the likely income to be earned from retail activity.

6.45 When letting retail outlets, or similar, the following should be considered:

- corporate and social responsibility in promoting health and well-being in line with DH policy (healthy food offering);
- fast food chains and other operators that would reflect negatively on the NHS should be excluded;
- avoiding exclusivity clauses on retail activity;
- restrictions on items to be sold;
- mandatory opening times in order to provide an appropriate service to patients, staff and visitors;
- all-inclusive rents rather than service charge arrangements, which may be contentious and will impose an additional management burden on the NHS organisation;
- concessionary rents where the service is of value to staff, visitors and/or patients (for example banking, hairdressing or services provided by voluntary organisations) but would not be viable if a full market rent were charged;
- turnover rents (possibly in addition to basic rent), as this may better reflect the commercial value of the lease;
- insurance arrangements (see paragraphs 6.46 and 6.47);
- the need for special fire precautions or other precautions to minimise risk;
- avoiding adverse publicity.

Insurance arrangements

6.46 If the retail unit is stand-alone and independent of the rest of the property, it may be beneficial for the tenant to take out commercial insurance cover and use insurance proceeds to repair or reinstate the property.

6.47 Where the retail unit is part of a larger building that is already insured under the NHSLA's PES, the FT or Trust should discuss and arrange the insurance with the NHSLA. The tenants may have to insure liabilities not under PES, for example public liability insurance.

Joint ventures

6.48 When letting land and property where joint ventures with others (for example laundry, computer suite, boilerhouse, incinerators, car-parks, nurseries) are involved, the following points should be noted:

- the terms of any lease should be consistent with the terms of the service contract;
- the lease should terminate on or before the expiry of the service contract;
- it may be advisable to include a landlord's break clause in the lease in case the service contract terminates early;
- special insurance arrangements may be required (such costs should be passed on to the tenant).

Car-parking

6.49 Legal advice should be taken on whether a lease or licence of car-parking areas should be granted in conjunction with a car-park management service contract.

6.50 Car-parking schemes in partnership with developers and operators should be considered with professional advice giving due regard to the terms of the proposal. Decisions should be supported by an option appraisal and business case with robust financial analysis. Car-parking charges and enforcement on NHS estate is a sensitive topic; therefore, arrangements should be appropriate for the users of car-parking facilities (see paragraphs 3.26–3.30 in Part A).

6.51 FTs and Trusts will need to ensure that the service provider does not inadvertently acquire a security of tenure of all or part of the car-parking areas, as this may restrict their ability to manage the estate flexibly.

Telecommunications leases

6.52 Leases fall within the provisions of the Telecommunications Act 1984 and the Communications Act 2003 (the so-called "code powers").

6.53 In deciding whether to grant a lease, FTs and Trusts should take specialist advice and weigh the short-term financial benefits of the rental income against future estate management issues.

6.54 The key consideration should be the organisation's medium- and long-term estate requirements, and the need to ensure that in granting a lease to a telecommunications operator it is not inadvertently sterilizing part of its estate or creating a future ransom situation.

6.55 Leases or licences to telecommunications operators are regulated under the code powers, which means that operators have rights in addition to those given under the Landlord and Tenant Act 1954.

6.56 Contracting out of the Landlord and Tenant Act 1954 rights and including in the aerial lease a landlord's break clause (to be exercised when the land and property becomes surplus or the aerials begin to prejudice the NHS organisation's operational requirements) may not be sufficient to ensure that the organisation can regain possession of the land and buildings subject to the aerial lease.

6.57 The process for obtaining possession under the code powers through the courts (if no settlement can be negotiated) can be lengthy, expensive and uncertain.

6.58 Significant difficulties have been experienced in obtaining possession of land from telecommunications operators because of the operators' protected rights, and in some cases substantial payments have been made to regain possession.

6.59 This problem can be acute where the organisation has surplus estate for disposal and a telecommunications operator is aware of the ransom position it holds, or where the geographical location of the property means that it is a highly prized site for an aerial.

6.60 Other considerations include:

- the premises let will include the air-space occupied by the aerials plus any equipment storage area;
- the lease should require the tenant to ensure that the aerials are not readily

accessible by members of the public, and are appropriately located and secure;

- long-term leases should be avoided (five years is normally sufficient);
- all equipment should be compatible with the organisation's electronic apparatus and provision should be included in the lease that the equipment can be removed/moved if it interferes with the FT's or Trust's equipment;
- the operator's standard lease documentation should be used with extreme caution, as it is often written in favour of the operator;
- there is a need to ensure that the tenant complies with all statutory regulations, including securing appropriate planning permissions;
- specialist valuation advice should be taken especially in respect of any site-sharing arrangements and its management;
- it is not possible to contract out of an operator's right to stay on land under its code powers. However, it is advisable to include an indemnity in the lease which would oblige the operator to compensate the FT or Trust for its losses as a result of the exercise of code powers.

Letting of advertising hoardings

6.61 When letting space for advertising hoardings:

- impose restrictions on advertising texts to avoid politically sensitive or controversial areas or health risk products such as alcohol;
- ensure that the tenant complies with all statutory regulations, including securing appropriate planning permissions;
- take specialist valuation advice on market rents and terms of the proposed tenancy. The prospective tenant's first offer should seldom be accepted, since they will be prepared to negotiate.

6.62 Sections 220–225 of the Town and Country Planning Act 1990, and specific regulations (The Town and Country Planning (Control of Advertisements) (England) Regulations 2007), govern these matters, and care should be taken to ensure that any lease of a hoarding site is properly tied in with the planning requirements. Again, breach of the relevant legislation is a criminal offence.

6.63 Ensure that all necessary consents are in place, as a landowner can be held liable for the display of unauthorised advertisements.

Letting of noticeboards

6.64 NHS organisations should have a clear policy on the use of posters on noticeboards within their premises or premises where NHS services are being carried out.

6.65 Posters should contain non-offensive information.

6.66 Monitoring arrangements should ensure that inappropriate advertisements or fly-posters are not put up or are removed promptly.

6.67 Careful consideration should be given to the content of posters, which might be politically sensitive or controversial, including advertisements for any health-risk products such as alcohol and those likely to undermine morale or the relationship between staff and patient. For example, advertising by claims management or other legal services within premises that provide NHS services should be avoided and not permitted.

6.68 Where posters or advertisements are permitted as an income-generation activity, a clear policy about suitable text, pictures and content should be established. This must not be contrary to government or NHS policy.

6.69 Consent given to the erection of any advertising poster should have an expiry date, and consideration should be given to

designating separate boards for staff as opposed to general patient/visitor information.

Arrangements with other NHS organisations

6.70 There are many transactions and transfers taking place between NHS organisations as a result of the commissioning climate and short-term service contracts. NHS organisations are encouraged to sensibly approach arrangements and formalise occupancy in a way that reflects the individual circumstance. Standard forms should be considered in an attempt to efficiently manage the NHS estate.

6.71 Occupation arrangements between NHS organisations should be coterminous with clinical service contracts where the building is used for that purpose (of three to five years' duration in the case of office and administration facilities). These arrangements may be documented:

- by means of a written memorandum of terms and conditions; or
- by way of a lease.

The critical issue is to ensure that the occupation is documented, whether by way of a lease or a memorandum of occupation. Alienation provisions should not normally be allowed or be subject to a landlord's consent. If the NHS organisation is granting a form of occupancy to another NHS organisation in leasehold property, the terms of lease should be checked to ensure the granting NHS organisation can enter into an agreement and to establish whether any consents might be required. For example, some leases do not permit the granting of licences or memorandums of terms.

6.72 Arrangements with FTs should be documented by means of a formal lease, as contracts may be disputed in court and obligations formally enforced. Every effort should be made to resolve disputes before proceedings are undertaken through the courts.

6.73 Arrangements between NHS organisations that need (for operational reasons) to be longer than five years are best documented by a formal lease. This will be helpful if one or both of the parties later become an FT or the freehold interest is transferred to a non-NHS organisation.

6.74 Accommodation within part of a building should be made available to other NHS organisations on the basis of a capital charge, plus a service charge.

6.75 However, parties may agree that the capital charges (based on an apportionment by floor area of the capital charge), plus a service charge, should be payable by the occupier. For self-contained buildings, the tenant may take full responsibility for all services etc.

6.76 Where it is appropriate to adopt a memorandum of terms of occupation, the memorandum should:

- apportion responsibility for repairs, insurance and compliance with statutory requirements;
- restrict the use of the premises and the ability of the occupier to assign its rights to a third party;
- provide details of the agreed rental arrangements;
- where the freehold or leasehold interests subsequently pass into the private sector, ensure beforehand that the rights recorded in the memorandum are surrendered and that a formal lease is put in its place providing for a rent to be paid that is reasonably close to market rent or "capital charge" rent.

6.77 The key terms of any such memorandum should be recorded in the NHS organisation's respective estate terriers. Key documents must be kept in a safe place, perhaps with the organisation's solicitors.

Disputes between NHS organisations

6.78 Disputes between NHS organisations (not including FTs) on the interpretation of memoranda, or any land and property-related matter, should be resolved within the NHS without reference either to formal arbitration or the courts.

Arrangements with non-NHS organisations

6.79 Leases to housing associations, charities or other voluntary care groups or nursing homes will be business leases. Where premises are required for exclusive occupation by local authorities for social services, education, or public health functions, it is generally appropriate for a business lease to be granted on market terms.

6.80 To ensure that the tenant in question does not acquire security of tenure, the FT or Trust should exclude the relevant provisions of the Landlord and Tenant Act 1954.

6.81 Note the following:

- where a lease is granted to a service provider, the lease should be coterminous with the corresponding management or service agreement;
- concessionary rental terms can only be given to voluntary organisations where equivalent healthcare benefits are obtained (see paragraphs 6.93–6.100);
- it will usually be advisable to make the user clause specific and restrictive;
- leases subject to restricted user clauses may reduce the rental value of the land and property, and should be the subject of scrutiny. If adopted, monitoring is necessary to ensure that the occupier uses the land and property in accordance with the user clause, or pays additional rent (price) to bring it back to the unrestricted market value. Where it is agreed that the user clause will be changed to make it less restrictive, legal advice should be taken and this should be formally documented as otherwise there may well be adverse repercussions.

6.82 Whether a local authority is able to build new premises on NHS-owned land will depend on the future use and development of the land. The development should not hinder the NHS use of the site. Therefore the appropriate option for the NHS organisation will depend on the answers to these questions.

6.83 Where other organisations provide services on-site on a sessional basis, it is not normally appropriate to create a landlord-and-tenant relationship. A licence for the specified times should be created as part of a service level agreement. FTs or Trusts should ensure that exclusive possession of premises is not granted in these circumstances, or the occupier may inadvertently acquire security of tenure.

Arrangements for university medical school facilities

6.84 It is important to clearly set out principles of understanding and agreements at the outset. This must be well-documented and approved so it can be used as a reference point throughout the life of the arrangement. Any capital contributions to be offset against future rental payments should be assessed against fair and reasonable revenue costs. The length of time where the contribution is accepted in lieu of rent should be calculated and agreed. The issue of VAT on capital contributions will need consideration.

6.85 Where a joint hospital and university medical school development takes place, the arrangement with the university will vary as follows:

- where an FT or Trust purchases a new site for development, the university should pay either a share of the site purchase costs plus a nominal rent, or market rent together with a proportional share (usually based on floor areas) of the total building costs (including utility costs);

- where the development is on the organisation's existing site, the university should pay a proportional share of the building costs (including utility costs) and a market rent for the land;
- where existing premises are to be used, the university should pay an open market rent, which may be capitalised if the parties so desire.

6.86 The university should always pay a contribution towards the service charge and running costs for the life of the agreement. In respect of the terms of the lease, normal commercial considerations will apply. Account should be taken of the benefits and services the FT or Trust receives from the university.

6.87 The FT or Trust should match the lease terms with the purpose of the occupation. For example, if it is tied to its teaching function, the lease should be tied into the education contract, so that if the education contract ceases, the organisation can terminate the lease (so that the premises would be available for another provider).

Arrangements with educational establishments (embedded accommodation)

6.88 Property transactions involving the use of NHS sites by universities are not generally exempt from the requirement to be on commercial terms, except "embedded" university accommodation in NHS-owned buildings that are being redeveloped by the NHS. See 'Joint NHS/University capital projects – a guide to the treatment of embedded accommodation in joint projects' (DH/Higher Education Funding Council for England (HEFCE) 2006).

6.89 Considerable academic accommodation has always existed in NHS-owned and funded facilities. Where this accommodation is being re-provided as a result of NHS reconfiguration, any increase in cost should be funded by the NHS.

6.90 Where the new accommodation offers benefits (for example extra floor space or better equipment), the additional cost should be funded by the party receiving those benefits, which may be the university.

6.91 Each scheme will require local agreement. Where the NHS is planning to replace buildings that include university accommodation, there must be clear agreement at an early stage of the university's requirements and any cost-sharing principles, including where applicable the onward charging of VAT.

6.92 Cost-sharing principles should be agreed before the outline business case to provide a greater degree of financial certainty to all parties during the procurement.

Concessionary leases

6.93 A lease may be granted at a rental level below market value to any organisation proposing to use all or part of an NHS-owned site for services that complement the NHS service or would otherwise have to be provided by the NHS.

6.94 A business case should be prepared for a concessionary lease. The value of the concession must be justified by the expectation that any financial loss will be matched by an equivalent financial or service benefit.

6.95 A concessionary lease should generally not be considered for:

- government-funded organisations, which should seek adequate funds from their sponsoring department to pay market rents;
- local authorities, which should be covered by joint financing arrangements;
- commercial undertakings, unless they provide a service to staff and/or patients (for example a bank) and can demonstrate that the service would be uneconomical if a market rent was charged.

6.96 A concessionary lease may be granted to a housing association for the provision of staff residential accommodation, where this is the most cost-effective solution. A value-for-money exercise should be undertaken to prove this is the case.

6.97 Before granting a concessionary lease, a full financial appraisal of the proposal should be made, which should include:

- a current market valuation of the land and property;
- a statement of the reasons for recommending a concessionary lease, including why the prospective tenant cannot afford to pay full market rent;
- a calculation of the value of the concession;
- any additional relevant information.

6.98 The concessionary lease should be as short as possible and not exceed seven years unless there are sound healthcare service reasons. Otherwise, terms should be as for a normal lease but with the addition of the following:

- the tenant should permit regular checks to ensure the terms of the lease are being adhered to;
- the lease should state clearly what the land and property is to be used for, and that the premises will revert to NHS use if they are no longer used for the purposes stated or any attempt is made to change the use;
- the lease should not be capable of assignment or subletting;
- if a concessionary lease is to be renewed, a re-evaluation of the proposal and a fresh authorisation should be sought. Any renewal should be considered well in advance so that a firm decision is available before the time the lease expires.

6.99 Any concession must be approved by the organisation's board, which will want to consider the business case in order to make an appropriate decision.

6.100 Where the concession has a value of £300,000 or more (see paragraph 4.135), approval should also be secured from DH Estates and Facilities Division before it is agreed. Proposed concessionary leases that may be novel or contentious should also be referred to DH for consideration. If the concession is seen to be a "gift", it may need to be reported to Parliament.

Post-completion

6.101 Details of any leases and licences granted by FTs or Trusts should be recorded on the estate terrier and the asset register records should be amended.

6.102 A summary of each lease and licence should be prepared, and copy documents retained to enable the let premises to be properly managed.

7.0 Acquisition of freehold land and property

Introduction

7.1 Surplus land and property within the NHS or central or local government departments should be acquired by NHS organisations before considering acquisition from the private sector unless there are good reasons for this option. Sustainability should be a consideration in the acquisition of freehold land buildings.

Delegated limits

7.2 Trusts should be aware of any relevant delegated limits before proceeding with any property-related transaction (see paragraphs 1.37–1.39 for details).

Principles of acquisition and due diligence

7.3 There are often changing requirements, guidance, policies and regulations on acquisitions of property for all public sector organisations. This applies to NHS E (see paragraph 1.22); however, it is advisable for CCGs, FTs, Trusts and NHS PS to keep up to date on these requirements (see the Cabinet Office controls on the government website).

7.4 Once an FT or Trust has identified a need for additional land and/or property, it should:

- first check whether another NHS organisation has surplus land and property that it could use;
- check with the local authority and e-PIMS for surplus public sector land (defined as "vacant land or property that is no longer required for the purposes of the public body"). For details, see the e-PIMS website;
- if no public sector land is available, conduct a thorough search of private land and property through direct and indirect enquiries either by themselves or through a property agent.

7.5 Generally, the re-use of existing property owned by NHS organisations, government departments and local authorities is more cost-effective and sustainable than new builds or adapting/refurbishing private-sector properties.

7.6 When acquiring land with existing buildings or for new buildings, the following points should be observed:

- check how the site meets your established searched criteria and assists to meet business/service objectives;
- check the availability and likely price of the land;
- check general accessibility to the site for all users, especially in respect of public transport;
- check legal title and restrictive covenants that might prevent the proposed development;
- check the business rates for the development options under consideration;
- ensure that the site is capable of being developed as required (that is, services available, ground conditions suitable,

density adequate etc) or that the buildings are suitable for the required conversion;

- check that the utilities capacity is sufficient without expensive upgrades;
- check assessments of energy use (for example, energy performance certification) and directives on future compliance targets;
- check that the scheme is capable of implementation – for example, check with the LPA that planning consent for the required use will be granted, and with the local highway authority that access arrangements for the proposed development are adequate;
- generally ensure that there is thorough and proper due diligence carried out during the whole process as part of active estate management. The due diligence should include an investigation of ground conditions and the historic uses of the site to flag up any potential environmental issues.

The business case

7.7 A robust business case should be prepared to support a well-informed decision to acquire land or buildings that is aligned to overall organisational objectives. It should account for relevant mandatory policy and guidance. A detailed option and financial appraisal comparing all available sites should be carried out alongside a summary of the legal matters to allow an informed decision to be made. This information should be included in the final business case for the preferred option. FTs and Trusts should comply with governance and delegated limits, where applicable, when obtaining business case approval.

Managing the acquisition team

7.8 Whenever an acquisition is contemplated, a technical team proportionate to the size and complexity of the transaction should be appointed from the outset through to completion of the scheme.

7.9 The team should be led by a project manager (in-house or external), who should act as the informed client to ensure the organisation's interests are protected and managed at all times. The project manager should have knowledge and experience of NHS policies and procedures, particularly in relation to land and property transactions, together with a thorough knowledge of the NHS estate.

7.10 The team should advise on many issues, for example strategic direction setting, identification, selection and management of appropriate consultants and monitoring/ management of the entire process, including governance and probity.

7.11 A major new site may require legal, engineering, property, town planning and environmental input, with the necessary competencies and experience required to carry out their tasks, and this should be established at the outset.

7.12 Any legal constraints, such as covenants on the use of the land or other legal restrictions, should be addressed by the solicitor, or the purchase should be abandoned, thus avoiding high abortive costs.

7.13 In cases where compulsory purchase is being considered, as much time as possible should be allowed for the necessary approvals and procedures (see paragraphs 7.60–7.70 on compulsory purchase powers).

Town planning

7.14 Planning is an early consideration in the acquisition process. The approach to planning should be pragmatic with an assessment of the level of complexity, timescales, costs and risks involved. See Chapter 3.

7.15 Outline planning permission should have been secured prior to purchase, although in certain circumstances an FT or Trust may then have to obtain full planning permission following acquisition (for example, where planning permission for a change of use is required). It may also be appropriate to obtain full planning

permission prior to purchase, but the type of application will depend on the extent to which the details of the development have been formulated (see paragraphs 3.37–3.49 for details).

7.16 Prior to submitting a planning application, FTs and Trusts should ensure that the vendor cannot withdraw from the transaction (for example by taking an option to purchase or entering into a conditional contract – see paragraphs 7.39–7.40).

7.17 The acquisition team should assess the impact of any planning conditions and/or obligations (section 106 Agreements/CIL). See paragraphs 3.58–3.78 for details.

Site investigation report

7.18 Before acquiring land for a new building, a site investigation report should be commissioned to ensure that the site is "clean" in environmental terms and has no characteristics (such as poor ground conditions, asbestos or other contamination, in-fill, Japanese knotweed, badgers, newts etc) that would increase building costs.

7.19 Where a site investigation is not clear, advice should be taken on what further investigative work is needed. The cost of any remedial work should be considered. This work should be completed by the vendor before the site is purchased. The vendor may offer cash in lieu of doing the work or reduce the asking price. The acquiring body should ensure that any offers are sufficient to cover any works.

7.20 A chartered minerals surveyor is able to provide reports on mining subsidence. It should be ensured that any adverse conditions are fully reflected in the price and construction estimates.

7.21 Where existing buildings are to be demolished to allow the implementation of a new-build scheme, demolition costs should be ascertained, particularly if the building contains asbestos or other deleterious materials.

Services/utilities report

7.22 It is important to check whether the intended building works (including access arrangements) will involve diverting existing services, as this can be costly.

7.23 If services cross the site and need to be diverted, check the terms of any relevant wayleaves (see paragraphs 2.101–2.102). They may stipulate that the utility company has to divert these at its own cost on notice, but is more likely to be an expense for the developer.

7.24 Check the availability of services without the need for expensive off-site works. Are the services of sufficient capacity to serve the proposed development? Explore availability of utility authorities for connections to services before expensive payments are made to third-party landowners for easements.

Structural survey

7.25 When acquiring land with existing buildings intended for use, a structural survey of all accommodation should be carried out before any commitment is made. The survey should include a separately commissioned desktop study into previous site use as well as potential risks from past or existing use of the surrounding land.

7.26 This should ensure that realistic estimates of repair costs are included in the business case.

7.27 The following topics could be included within a survey but it is important not to limit the surveyor's remit to identify issues that may be of concern:

- the structure of the property, including the walls, foundations, roof etc;
- the condition of the woodwork, including window frames and structural timbers;
- mechanical and electrical installations;
- drainage and other services;
- compliance with building regulations and planning permission;

- compliance with fire regulations and health and safety issues;
- condition of boundary walls and internal access ways;
- presence of asbestos or other contamination;
- presence of bats and other protected species;
- new energy directives;
- implications of the Equality Act.

7.28 The survey should be addressed to the FT or Trust, otherwise it will not be possible to make a claim for losses arising from a surveyor's negligence.

7.29 When acquiring a new building, professional legal advice should be obtained from a construction specialist regarding collateral warranties and the appropriate protection against latent defects (that is, whether any structural defects liability insurance is in place or other means of protection is available).

Valuations

7.30 While expenditure on formal valuations normally should not be incurred until the business case has identified which purchase is to be pursued, the acquisition figures used in the business case should be the best possible estimates. It may be helpful to include a suitably qualified valuer with good local market knowledge in the business case team.

7.31 It is important to be aware of changes that might affect the options explored in the business case, such as vendors offering price reductions, the opportunity of securing land using an option contract (see paragraphs 7.41–7.45) and the effect on prices of changing market conditions.

7.32 The price being paid for any acquisition should be kept under review, with help from the organisation's valuer, until contracts for the purchase have been exchanged.

Negotiating the purchase

Freehold covenants

7.33 The solicitor's investigation of title will uncover all positive or negative covenants attached to the site to be acquired. At this stage, further legal advice may be required.

7.34 A "positive covenant" is an agreement to do something relating to the use of land (for example build and maintain a fence), the benefit and burdens of which are not readily capable of being passed on to successors in title to the original contracting parties.

7.35 A "restrictive covenant" is an agreement restricting the use of land, and is capable of benefiting and binding the successors to the original contracting parties.

7.36 If FTs or Trusts are concerned about covenants relating to the property, they should seek legal advice as to the options available to them. This may include obtaining commercial insurance to cover the risk, seeking agreement with the beneficiary of the covenant or applying to the Lands Chamber of the Upper Tribunal to modify or discharge the covenant under section 84 of the Law of Property Act 1925.

7.37 When acquiring freeholds, avoid imposition of restrictions on use. They should only be accepted where:

- the price is reduced to reflect the restriction;
- on the acquisition of part of a landholding, some restriction is genuinely required to protect the use or value of the vendor's retained estate;
- the restrictions are part of a scheme to regulate the management of, say, a trading estate or business park.

7.38 Where the site is subject to existing restrictive covenants, these will be binding unless the site is newly acquired by compulsory purchase (see paragraphs 2.104–2.109 on compulsory purchase powers). It may be prudent to seek an indemnity from the seller in

respect of any compensation due to a party whose property and rights have been compulsorily acquired.

Conditional contracts

7.39 The purchase of a site may be dependent on the availability of planning permission for healthcare use, and often on the acquisition of improved access or drainage rights etc. To ensure that a site can be purchased on the terms and conditions on which the business case is based, a conditional contract should be considered.

7.40 In negotiating such contracts, ensure that:

- the steps required to satisfy the condition are clearly stated;
- the condition(s) can be waived by the purchaser;
- there is an agreed period to obtain satisfaction of the conditions, and that they are sufficiently well described that, if they cannot be met or the purchaser decides not to waive the condition, the contract can be terminated;
- the purchaser determines whether or not the conditions have been satisfied, not an independent third party or the vendor. If the conditions of the purchase cannot be met, the purchaser may not wish to proceed with the contract, so they need to control the conditionality issues.

Option contracts (option to purchase)

7.41 Under an option contract, the landowner receives an agreed amount of money from a person who in return is given exclusive rights to buy the land over a specified period. Once the specified period is over, the landowner is free to sell the land to others.

7.42 The vendor may prefer the commitment involved in a conditional contract, but an option contract gives the purchaser greater discretion on whether or not to proceed.

7.43 An option contract is particularly useful when:

- there are several sites available;
- the full business case for the proposed new development has not been completed or approved;
- there are doubts over whether the purchase will proceed;
- a major capital project is to be carried out on a site not currently in NHS or civil estate ownership; or
- the timescale from identification of the target site to approval of the business case may be protracted.

7.44 In these situations, it is prudent to seek an option to purchase from the landowner, although the seller may seek an option fee which may be lost if the purchaser decides not to proceed. Much time and money is involved in preparing a business case and securing planning consent and, while the negotiation of an option involves cost, the reduction in risk may make it good value for money. An option to purchase should be approved at outline business case stage.

7.45 Points to watch for in negotiation are:

- period of option – while it must cover the time for business case approval for the proposed new development, the longer it is, the higher the likely option payment and the more uncertain the price payable;
- option payment – seek to have this offset against the land price if the option is exercised;
- land price – in the context of a short-term option (say up to two years), it may be possible to fix the price. If the vendor wants the payment linked to inflation, this may be preferable to linking to market value. Market values can be volatile, and excessive rises in the land cost could abort the project.

Heads of terms

7.46 Non-legally binding "heads of terms" should be agreed. Legal advice should be sought on these before agreeing them, as they will form the basis for the legal contracts. The final set of agreed "heads of terms" will need to be sent to a solicitor. The heads of terms should include:

- the full address of the property (including postcode) and a scale plan of the property;
- a location plan, showing the property in the context of the local area;
- the names and addresses of the parties and their solicitors;
- the tenure;
- the price (if VAT or tax inclusive);
- the timescale for exchange of contracts and completion;
- any conditions (for example, subject to obtaining planning permission or subject to a ground condition survey, both should be to the purchaser's satisfaction);
- any obligations on the vendor (for example, works to be carried out prior to completion, obtaining vacant possession);
- any known rights to be granted over other property;
- any known rights to be reserved over the property being sold.

The solicitor's role

7.47 The solicitor's role includes checking and reporting on the following with advice on how any issues may be overcome/risk-evaluated:

- the vendor has the proper title to transfer the site;
- all planning permission and building regulation consents are in place and conditions complied with;
- roads and sewers serving the site are maintained at public expense;
- there are no major infrastructure proposals in the immediate vicinity (for example, motorways) which might affect the suitability of the site for its intended use;
- boundary/fence ownership and maintenance responsibilities are known and understood;
- the required rights of access are available;
- there are no unforeseen third-party rights affecting it (for example, public footpaths, rights of light or other covenants);
- the negotiated terms are incorporated in the contract;
- registering the transaction at the Land Registry;
- the transfer is completed on the required date.

7.48 Although the solicitor will provide a copy of local searches, it is still beneficial to contact the LPA to check for development proposals that might adversely affect the site at an early stage.

Key points

7.49 Written confirmation of the terms of a transaction should specifically state that they are not intended to be legally binding on the parties rather than relying on the inclusion of the words "subject to contract", for example:

"These heads of terms are not intended to be legally binding between the parties except as specifically set out in this [letter]."

7.50 Once a solicitor is instructed, all legal matters should be negotiated with reference to him/her.

7.51 Once contracts are exchanged, both sides are committed to the terms of the contract as signed. Even an accurate written expression of an agreed variation can have unforeseen

consequences on the rest of the contract; therefore legal advice should always be sought before agreeing any variation.

7.52 Seek guidance from a capital allowances expert in order to understand whether there are any capital allowances that need to be protected within the contract.

7.53 From the date of exchange of contracts to the date of completion, the vendor should be required to insure the building. Whether this cost is recharged to the purchaser will be a matter for negotiation.

7.54 Make sure that when documents are signed and/or sealed, standing orders are observed.

7.55 Signature by an unauthorised officer can bind the purchaser if it seems to the other party that he/she has the authority to do so. Signatories should hold proper signature authority, have a full understanding of the detail regarding the acquisition and have assurance that due process has been followed. They should check the accuracy of the completion statement (a draft of which should be prepared prior to completion) and ensure that there are sufficient security provisions for the site and an agreed process for handover.

Withdrawal of property from the market

7.56 Whenever an agreement to purchase has been reached, it should be stipulated that the vendor withdraws the property from the market.

Timetable

7.57 The conveyancing process will normally take a minimum of eight weeks. If either party wishes to depart from this timetable, they can either negotiate a variation at the outset or rely on their property and legal advisers to accelerate the process.

7.58 Negotiation of the detail of the conditions in a conditional contract can protract transactions. This can be avoided by agreeing details at heads of terms stage. Other factors that can cause the process to become more protracted include:

- the vendor's ability to give vacant possession;
- problems arising from the survey;
- the willingness of parties to negotiate;
- unforeseen issues arising from local searches; and
- problems on the title.

Post-completion

7.59 When the purchase has been completed, an FT and Trust should:

- update its asset register records and estate database, giving reference details of the Land Registry entry;
- obtain from its solicitor a summary of the title information for estate management purposes;
- apportion uniform business rates, and advise the local authority of the new ownership for rating purposes;
- take meter readings (photographs);
- review the rating assessment.

Compulsory purchase powers

7.60 When a preferred site has been identified and appropriate planning permission obtained, if satisfactory terms for acquisition cannot be agreed with the owner, a Trust may, as an exception, consider acquiring the site under a CPO.

7.61 Paragraph 27 of schedule 4 of the Act enables a Trust to purchase land compulsorily for the purposes of its functions subject to confirmation of the Order by the Secretary of State. The procedure is governed by the Acquisition of Land Act 1981:

(1) An NHS trust may be authorised to purchase land compulsorily for the purposes of its

functions by means of an order made by the NHS trust and confirmed by the Secretary of State.

(2) Subject to subparagraph (3), the Acquisition of Land Act 1981 (c 67) applies to the compulsory purchase of land under this paragraph.

(3) No order may be made by an NHS trust under Part 2 of the Acquisition of Land Act 1981 with respect to any land unless the proposal to acquire the land compulsorily-

(a) has been submitted to the Secretary of State in such form and together with such information as he may require, and

(b) has been approved by him.

7.62 The prior approval of the Secretary of State for Health must be sought before the Trust proceeds with making a CPO. A robust business case giving full details of why such powers are required should be submitted to DH as soon as it is envisaged that it is likely to be required.

7.63 Approval will only be given when absolutely necessary; hence, it is unwise to incur substantial costs before approval has been granted. Nonetheless, the existence of these powers may ease the process of negotiation with affected landowners and assist in making a purchase by agreement. If approval is granted by DH, the Trust may make the CPO, which will have to be submitted to, and confirmed by, the Secretary of State for Health. See the government website for further information.

7.64 In relation to the compulsory purchase of land by FTs, paragraph 46 of schedule 4 to the Health and Social Care (Community Health and Standards) Act 2003 states:

(1) An NHS foundation trust may be authorised to purchase land compulsorily for the purposes of its functions by means of an order

(a) made by the trust, and

(b) confirmed by the Secretary of State.

(2) The Acquisition of Land Act 1981 is to apply to the compulsory purchase of land under this paragraph.

(3) But no order is to be made by an NHS foundation trust under Part 2 of that Act with respect to any land unless the proposal to acquire it compulsorily

(a) is submitted to the Secretary of State in such form, and together with such information, as he may require, and

(b) is approved by him.

7.65 A Trust or FT could use the powers described at paragraphs 7.61 and 7.64 (as appropriate) to purchase land compulsorily for the purposes of its functions where a third-party developer is to be used to provide the healthcare facilities.

7.66 The basis for assessing compensation payments for affected landowners is complicated. Professional advice should be taken at an early stage of the option appraisal process regarding the likely quantum of compensation. Negotiations should, however, be conducted on the basis that compulsory purchase powers are available.

7.67 Once an Order has been made, the organisation is not committed to actually acquire the land included within the Order, but once it has served notice to acquire the relevant land, the organisation will usually be committed to complete a purchase irrespective of the price, which might ultimately be determined by the Lands Chamber of the Upper Tribunal.

7.68 The Crichel Down rules (see paragraphs 4.16–4.21) do not apply where an FT or Trust transfers land and property acquired by way of compulsory purchase to a PFI partner (nor where the PFI partner later transfers the land to another party). It is therefore open to the PFI partner or the later transferee to use the land for a purpose other than that for which it was acquired.

7.69 Responsibility for the costs of promoting a CPO in the context of a PFI arrangement should be detailed in the PFI contract together with the valuation method to assess the value of the land when it is transferred to the PFI partner.

7.70 Similar arrangements would apply where land and property acquired by way of compulsory purchase is transferred to a LIFTCo in respect of a NHS LIFT scheme.

8.0 Acquisition of leasehold land and property

Introduction

8.1 This chapter deals with acquisitions of leasehold land and property. Many of the provisions for freehold acquisitions apply to leasehold acquisitions. For example, sustainability should be a consideration for the acquisition of this type of property (see paragraphs 2.91 to 2.94 for details). As with the acquisition of freehold land, transactions should be carried out with due regard to the robust business case process and necessary due diligence.

Code of commercial lease practice

8.2 NHS organisations should be aware of the Joint Working Group on Commercial Leases (2007) 'The code for leasing business premises in England and Wales 2007', especially in relation to rent review and lease term options to be offered to prospective tenants.

Delegated limits

8.3 Trusts should check their delegated limits before proceeding with leasing arrangements (see paragraphs 1.37–1.39 for details).

Principles of leasing

8.4 An NHS organisation may enter into a leasehold agreement provided it is the best course of action in accordance with the business case. Relevant professional advice should always be to ensure that the transaction represents value for money. The financial analysis and commercial terms are important to inform the decision-making process. The level of professional advice should be appropriate for the size and complexity of the transaction.

8.5 Property should be fully optimised and the NHS must make the best use of estate utilisation, occupying efficiently and effectively where possible while maintaining future flexibility. Acquiring organisations should consider the whole lifecycle of leased premises including future planning and exit strategies.

8.6 Leasing is usually the preferred option where:

- the premises are required for a short-term service contract delivery;
- the premises are in a location that provides equitable access for services and no other existing NHS or public sector estate is available;
- the proposed function is more suitable in leased premises than on land that would be used for core clinical services;
- it provides a means of transferring risk, and provides best value;
- the leasehold acquisition assists to meet business or service delivery objectives.

The option appraisal

8.7 An appraisal of the various options should be carried out to identify the preferred option. This should consider:

- the "do nothing" option;
- purchase versus build versus lease options;

- availability of suitable premises or accommodation within the NHS, civil estate, local authority and open market;
- savings from disposal of surplus premises or accommodation resulting from the proposed acquisition;
- cost/benefit evaluation;
- risk/sensitivity analysis;
- location analysis, for example accessibility for staff and visitors, travel times, and any cost implications;
- efficiencies and optimisation achieved;
- sustainability.

8.8 Once the preferred option has been agreed, a business case with sound economic and financial reasoning should be developed to inform the decision and approval.

8.9 Financial appraisals should be carried out to assist in the choice of the preferred option. These should include:

- capital and revenue implications alongside overall affordability;
- acquisition costs and any opportunity costs of existing accommodation if it is to be retained, or holding costs until it is disposed of;
- the cost of upgrading or refurbishing the space including IM&T and equipment;
- maintenance costs and other expenses – for example gas, water, electricity, telecommunications, security, rates, cleaning or service charges etc;
- relocation or redundancy costs where appropriate;
- travel costs;
- liabilities such as dilapidations, repairs etc at the outset, and an estimate of future costs upon the lease expiration;
- additional potential expense of using a listed building;
- savings from rationalisation (where achievable).

8.10 The approved business case should contain the agreed heads of terms and an assurance that a written professional opinion had been secured confirming that the terms represent value for money. This is normally provided by a solicitor for the legal side of the agreement and a suitably qualified valuer in respect of value.

Negotiating the lease

8.11 The strength of a Trust's covenant is good and this fact should be used for the Trust's benefit in any negotiations.

8.12 The position of CHP and NHS PS is different in that they are private law companies and are dependent for covenant strength on their balance sheet, and the extent to which reliance can be placed on policy letters concerning funding issues by the Secretary of State.

8.13 In commercial negotiations at heads of terms stage, an NHS organisation should seek to agree the following terms:

- flexibility to support service demands and changes;
- recognition of the tenant's covenant strength;
- favourable rental levels;
- rent-free periods/contributions to fitting-out works;
- break clauses giving flexibility of occupation;
- break clauses following rent review, enabling the NHS organisation to terminate the lease (without penalty) to relocate to alternative premises if at review the revised rent is higher than acceptable;
- assignment to other NHS organisations or statutory bodies contracted to carry out NHS services.

8.14 The following factors should be considered when negotiating the lease.

Lease term

8.15 Leases of over five years should be avoided unless there are exceptional circumstances (supported by the business case), appropriate break clauses and assignment provisions, and the user clause is not overly restrictive. However, leases longer than five years may be required for new builds or community health buildings. It will be important that funding is secured for the length of the lease and that all stakeholders including commissioners are agreed to the longer term commitment. NHS PS and CHP as property landlords may need to grant leases longer than five years.

8.16 Where the acquisition is the result of an award of service contract or for service delivery purposes, then (where possible) the lease terms should be coterminous or include a lease break at contract end and should be permitted to assign to the new provider without consent of the landlord and should not be expected to assign any authorised guarantee agreement (AGA).

Rent reviews

8.17 Upwards-only rent reviews should be avoided wherever possible.

8.18 Reviews should ideally be no more frequent than every five years.

8.19 For any reviews not based on the open market rent, organisations should seek professional advice especially where commercial landlords may be unwilling to agree to upward and downward rent review provisions.

8.20 Where there is an open market rent review, any tenant's improvements to the property should be disregarded. Improvements need to be recorded and agreed by both parties.

Break clauses

8.21 Break clauses should be at regular intervals (for example every five years) or rolling, or at service contract end dates, and capable of exercise only by the tenant, although commercial negotiation with the landlord may be necessary.

8.22 If the break clause is to be capable of exercise by either party, then the tenant must ensure that the notice period that the landlord has to give is sufficient to enable it to find and move to alternative accommodation.

8.23 The lease should contain clear notice provisions, including details of where and on whom the notice should be served to effect the exercise of the break clause.

8.24 It may be useful to negotiate a break clause after each rent review to guard against substantial or excessive rent increases.

8.25 The tenant's right to exercise the break clause should be unconditional. It should not be conditional upon compliance with the tenant's covenants, as the landlord has alternative legal remedies for breach of the tenant's covenants.

8.26 The break provisions should not even be subject to the tenant's "material", "reasonable" or "substantial" compliance with its covenants, as even a relatively minor breach could render the tenant's attempt to exercise the break clause invalid. The tenant's right to break should not be conditional on payment of sums due under the lease. If a condition has to be agreed, the requirement should be limited to payment of the passing rent and not any other sum (whether reserved as rent or not).

User provisions and other specified user restrictions

8.27 Leases with overly restrictive user clauses should be avoided, particularly where long-term leases are being considered, as this may prevent the lease from being assigned (see paragraphs 5.6–5.15 for details of assignment).

8.28 If the use is limited, tenants should look to include any ancillary purposes within the definition of permitted use. The lease should also provide that the tenant may, with the landlord's consent (not to be unreasonably withheld or delayed), use the premises for an alternative purpose to that originally specified.

8.29 The legal adviser should check that the permitted use is authorised by planning permission, as the lease will usually provide that the landlord gives no warranty in this regard.

Alienation provisions

8.30 Ideally, a lease should permit assignment without the landlord's consent to any body that carries out NHS services. The lease should always allow an assignment to another NHS organisation or government department (which should include NHS PS). Leases should always provide that where assignment takes place due to an NHS reorganisation, or involves a transfer to another NHS organisation or government department, the landlord's consent is not required – thus saving legal costs in obtaining formal consent.

8.31 The lease should permit subletting of the whole building and, where the building allows, subletting of part or parts of the leased area.

8.32 Sharing accommodation with other bodies providing complementary services to the tenant (for example, midwives at a health centre) should be permitted provided that no relationship of landlord and tenant is created.

Freedom to make alterations and adaptations

8.33 Non-structural alterations should be permitted subject to the landlord's consent. Obtain qualification on this so that the landlord cannot unreasonably withhold his/her consent.

8.34 Tenants should ensure they have the right to erect demountable non-structural partitioning without the need to obtain the landlord's consent.

8.35 Where the landlord's consent is required and given, the tenant is likely to be responsible for the landlord's costs. Ensure these are reasonable and where landlords' costs are requested, it is advisable to cap or limit such costs.

8.36 Tenants should resist any obligations to reinstate the premises to their condition prior to any tenant's alterations and improvements at the end of the term. If this obligation is required, the tenant should clarify the precise extent of any liability for reinstatement at the start of the term with a schedule of condition and photographs. This issue can be a major cause of dispute and cost at lease expiry.

8.37 Structural alterations are likely to be prohibited. If they are required, ensure that a licence for alterations is entered into at the same time as the lease is granted.

Repairing obligations and separate service charges

8.38 As a tenant, the NHS organisation should ideally seek to be responsible for internal repairs only.

8.39 On a full repairing and insuring (FRI) lease (usually applicable for whole stand-alone buildings), it is advisable to not take responsibility for any structural or inherent defects. There should be a corresponding responsibility on the part of the landlord to remedy any inherent defects.

8.40 In the case where an FRI lease is non-negotiable and the property is in a poor state of repair, then the decision to take the lease should be considered carefully accounting for the risk of the repairing obligations and costs.

8.41 A remedy may be to negotiate that the landlord carries out the repair works prior to lease acquisition or a cash payment is made by the landlord in lieu of the works. Alternatively, a schedule of condition will be necessary where the tenant is responsible to keep a property in no worse condition as

agreed by the schedule of condition. Legal advice should be sought for the most appropriate repairing covenant.

8.42 It is important to obtain a copy of all statutory testing and inspection certificates as part of the acquisition process and to inform the estates and facilities management teams if any works are required to be carried out.

8.43 Where the leased premises form part of a larger building, the landlord is likely to be responsible for the repair of the exterior of the building and common areas, sometimes recovering the cost from tenants as part of a service charge.

8.44 The NHS organisation should insist that the landlord complies with the code of practice on 'Service charges in commercial property' (RICS, 2014) (see paragraphs 2.31–2.32).

8.45 NHS organisations need to ensure that the method of apportionment of such costs between the tenants is fair.

8.46 In addition, they could seek to cap or limit the service charge costs. Future charges or costs for major items of repair and replacement should be disclosed by the landlord. The NHS organisation should avoid paying significant contributions for such major items.

8.47 NHS organisations also need to check whether any major item of work (for example a new roof) is anticipated before entering into the lease so that account can be made of potential costs. The structural survey (see paragraphs 7.25–7.29) should highlight such costs.

8.48 Repairing obligations should be limited by reference to a schedule of condition, particularly when the property is in a poor state of repair at the start of the term. It needs to be ensured that the schedule is sufficiently detailed (including colour photographs) and signed by both parties as an accurate record of the property's condition. Ideally the schedule should be annexed to the lease for ease of reference. This should mitigate any disagreements at the end of the lease.

8.49 While a full structural survey is not required where premises are acquired on an internal repair and decoration-only basis (that is, the landlord is fully responsible for all other repairs and these are not charged to the tenants), the internal condition should be surveyed to determine the likely expenses that the tenant may incur during the term of the lease.

8.50 Prospective tenants should be aware that repair works carried out by landlords may disrupt use of the property. It is helpful to be aware of what work, if any, the landlord intends to carry out.

Insurance

8.51 NHS organisations should always consider insuring under the NHSLA's PES. Lease terms should allow for this as long as the tenant is an NHS organisation.

8.52 Specific exceptions include where the NHS organisation leases space in a multi-occupancy building or office campus and the landlord demands control of insurance for the whole estate.

8.53 If, as a tenant, the NHS organisation is to effect public liability insurance, the lease should allow it to insure under the NHSLA's Liabilities to Third Parties Scheme (LTPS).

VAT liability

8.54 It is important to ascertain at the earliest opportunity whether the landlord proposes to charge VAT on rent, by electing to waive exemption.

8.55 VAT recovery is a complex area: NHS organisations should seek independent tax advice on this issue.

Contracting out of the Landlord and Tenant Act 1954

8.56 If the lease is not contracted out of Part 2 of the 1954 Act, at the end of the term the tenant will have the right to request a new lease, which the landlord will only be able to resist if he/she is able to establish one of the grounds set out in paragraphs (a) to (g) of section 30(1) of the 1954 Act. Where the NHS organisation is a tenant and the lease is for a long period and/or the NHS organisation is contributing capital, then it should seek to contract in to the 1954 Act.

8.57 If the lease is contracted out of Part 2 of the 1954 Act, the tenant will have no automatic right to request a new lease at the end of the term. The landlord can agree or disagree to grant a new lease; therefore, it is advisable to enter into dialogue at an early stage and consider alternative options.

Notices

8.58 If the lease is in the name of an NHS organisation, it may also want to consider stipulating that any notices in relation to the property are also sent to its legal adviser, who will be able to advise on the implications of such notices and the action that needs to be taken in response.

Signing and sealing the lease

8.59 Each NHS organisation should carefully check its standard financial instructions and its standing orders to ensure that it is correctly signing or sealing leases.

8.60 In all cases, the person signing the lease should be fully informed about the transaction and should not have been involved in the negotiations for the lease nor have any interest in the outcome of the transaction. The lease should only be signed when all proper procedures have been complied with, including approval of the terms and conditions of the lease by the organisation's property and legal advisers.

Post-completion

8.61 Procedures should be in place to ensure that the terms of the lease are clearly known and complied with, by all within the NHS organisation.

8.62 The legal and property adviser/surveyor should provide a summary of the main terms of the lease, although reference to the lease (or, if appropriate, legal adviser) should take place if a specific query arises in respect of the lease.

8.63 Once a lease has been entered into, the NHS organisation must ensure that its terms and conditions are complied with.

8.64 Rent review, break and renewal notices must be promptly referred to professional advisers and responded to within the time limits. Failure to respond appropriately within time limits may be very costly.

Renewal of leases

Note

It is important that the NHS organisation actively manages lease portfolios and there is an agreed strategy for lease renewals with enough time to negotiate a favourable position or to relocate.

8.65 NHS organisations should be proactive in any renewal negotiations in order to protect their interests and strengthen their position.

8.66 If a lease has security of tenure under the 1954 Act, a landlord can serve a notice under section 25 of the 1954 Act giving between six and 12 months' notice to terminate the current arrangement and stating that it does not oppose the grant of a new tenancy. The landlord's proposals for the terms of the new lease must be set out in the notice.

8.67 If, at the end of the contractual term of a lease which has security of tenure under the 1954 Act, a tenant wishes to take a new lease of the premises, it can serve a request for a

new tenancy on the landlord under section 26 of the 1954 Act at least six but not more than 12 months before the proposed commencement date of the new lease (which cannot be earlier than the date on which the current lease expires).

8.68 The tenant's section 26 request must set out the tenant's proposals for the new tenancy including details of the property to be included in the demise, the proposed rent, and any other terms. If the landlord wishes to oppose the grant of a new tenancy, it must serve a counter-notice on the tenant within two months of the tenant's section 26 request. Either the landlord or the tenant can apply to court following service of a section 26 request to determine whether a new lease is to be granted and, if so, on what terms.

8.69 If the landlord is not prepared to grant a new lease, it will serve a section 25 notice on the tenant specifying the ground or grounds on which it intends to oppose any application by the tenant for a new lease.

8.70 If the legal adviser's advice is that the landlord is likely to succeed in opposing the application for a new tenancy on one or more of the grounds set out in paragraphs (a) to (g) of section 30(1) of the 1954 Act, the NHS organisation should actively pursue the option of finding alternative accommodation. In certain circumstances, a tenant will be entitled to statutory compensation.

8.71 If an NHS organisation is aware that its current lease will be ending and wishes to request a new lease from the landlord, it should take advice from its legal advisers at the earliest opportunity to ensure that the correct procedures are followed to protect its right to a new lease.

Glossary of terms

Estate terrier

An estate terrier is a record system for an organisation's land and property holdings. It differs from a land registry in that it is maintained for the organisation's own needs and may not be publicly accessible. Typically, it consists of written records related to a map. Modern practice involves the use of geographic information systems.

NHS Local Improvement Finance Trust

NHS LIFT is a public–private partnership (PPP). It has at its core a company (LiftCo), in effect a property development company, acquiring and developing land and property and leasing them to NHS organisations on a fully-serviced basis through a lease-plus agreement. In this context, fully serviced means that the landlord carries out internal and external repairs to the building but does not provide reception or security services.

LiftCo is a partnership between the public and private sectors. Normally, LiftCo owns the land and property in order to obtain finance against these assets unless the NHS partner determines otherwise. Much depends on the long-term service delivery strategy of the Trust involved. For further details on NHS LIFT go to www.dh.gov.uk

Private Finance Initiative

The Private Finance Initiative (PFI) is a contract for the provision of services by a private-sector partner (namely serviced accommodation and sometimes "soft" facilities management (FM) services, for example portering and catering) to an NHS organisation. For further details on PFI go to www.dh.gov.uk

ProCure21+

ProCure21+ is a procurement method for publicly-funded NHS capital schemes. It is based on four principles:

- introducing long-term partnering frameworks between NHS organisations and construction companies (principal supply chain partners);
- enabling the NHS to be a best client;
- achieving excellence in healthcare design;
- benchmarking and performance monitoring.

For further details on ProCure21+ go to:
www.procure21plus.nhs.uk

Special purchaser	A particular buyer for whom a certain asset has special value because of advantages arising from its ownership that would not be available to general buyers in the market.
Strategic estates partnerships (SEPs)	An SEP is a long-term joint venture where a private sector partner is engaged to provide an intelligent long-term estates strategy to assist an NHS body with estates rationalisation and planning its capital programme. The SEP partner would be expected to arrange finance for the NHS body and to plan, develop and deliver the capital programme, which typically involves delivering new facilities, refurbishing existing facilities and seeking to maximise the value of the estate. An advantage of an SEP is that it enables an NHS body to benefit from expertise in planning for and delivering long-term estate needs and in driving efficiencies rather than having to procure individual schemes as the needs arise. SEPs can take a variety of forms depending on the needs of the NHS body. The SEP's role may include delivering the construction elements of the schemes or it may be restricted to competitively procuring (and then managing) contractors to deliver each subsequent scheme. SEPs can also incorporate responsibilities for delivering or coordinating FM services, IT and back-office services to support the operation of the facilities. As with other forms of commercial partnerships, the EU Rules nearly always apply to the appointment of such providers.
Suitably qualified valuer	Person who possesses the necessary qualifications, ability and experience to execute a valuation and who is independent from the credit decision process. This could be the VOA or a private-sector provider with good market knowledge.

References

Acts and regulations

All legislation is available (but usually unamended) from legislation.gov

Acquisition of Land Act 1981

Ancient Monuments and Archaeological Areas Act 1979

Bribery Act 2010

Charities Act 2011

Climate Change Act 2008

Commons Act 2006

Communications Act 2003

Community Infrastructure Levy Regulations 2010

Companies Act 2006

Criminal Justice and Public Order Act 1994

Defective Premises Act 1972

Enterprise and Regulatory Reform Act 2013

Environmental Protection Act 1990

Growth and Infrastructure Act 2013

Health and Medicines Act 1988

Health and Social Care (Community Health and Standards) Act 2003

Health and Social Care Act 2012

Hedgerows Regulations 1997

Landlord and Tenant Act 1954

Law of Property Act 1925

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Localism Act 2011

National Health Service Act 2006

Party Wall etc. Act 1996

Planning (Hazardous Substances) Act 1990

Planning (Listed Buildings and Conservation Areas) Act 1990

Planning Act 2008

Planning and Compensation Act 1991

Planning and Compulsory Purchase Act 2004

Public Contracts Regulations 2006

Telecommunications Act 1984

Town and Country Planning (Control of Advertisements) (England) Regulations 2007

Town and Country Planning (Environmental Impact Assessment) Regulations 2011

Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2010

Town and Country Planning (General Permitted Development) Order (GPDO) 1995

Town and Country Planning (Tree Preservation) (England) Regulations 2012

Town and Country Planning (Use Classes) Order 1987

Town and Country Planning Act 1990

War Memorials (Local Authorities' Powers) Act 1923

EU Directives

Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

Department for Communities and Local Government guidance

DCLG (2013). Dealing with illegal and unauthorised encampments.

National Planning Policy Framework (NPPF) website

Department for Culture, Media & Sport guidance

DCMS (2009). The protocol for the care of the government historic estate.

DCMS (2010). The disposal of heritage assets: guidance note for government departments and non-departmental public bodies.

Department for Environment, Food & Rural Affairs guidance

Defra (2012). Environmental Protection Act Part 2A: contaminated land statutory guidance.

Department of Health guidance/ resources

Estates Return Information Collection (ERIC).

NHS Premises Assurance Model (NHS PAM).

Ministry of Justice guidance

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