



Department
of Health &
Social Care

NHS Property

**Guidance for NHS Trusts and Foundation Trusts on
requesting transfers of estate in the ownership of NHS
property companies**

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1. Introduction

1.1 It is now over five years since the 2012 Health and Social Care Act came into effect and Primary Care Trusts (PCTs) were abolished. As part of that reorganisation the land and property assets of the Primary Care Trusts were either transferred to Trusts or vested in NHS property companies, namely:

- NHS Property Services (NHSPS) who took on freehold ownership and leasehold obligations for this estate.
- Community Health Partnerships(CHP) who took on PCT head tenancy obligations relating to NHS Local Improvement Finance Trust (LIFT) agreements.

This policy refers to these organisations collectively as the NHS property companies.

1.2 The original principles underpinning these arrangements are set out below:

- Protecting assets and maintaining future flexibility

The ownership arrangements should ensure that relevant estate is available for the provision of NHS services and should not prevent future changes in the delivery of services and the chosen provider.

- Ensuring Efficiency

Properties should be placed with the owner who has the best incentive to utilise them most effectively and invest in their development.

- Supporting the provision of safe, fit for purpose buildings

The estate in which health and social care is provided must be safe, secure and fit for purpose.

- Ensuring value for money

Surplus properties and those that are likely to have only a short remaining operational life should be identified, so that they can be made available for disposal within an appropriate timeframe.

- Observing effective estate management

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

- 1.3 Although these principles remain valid today, local circumstances may have changed, for example, the introduction of Sustainability and Transformation Partnerships has helped to drive a more collaborative local approach to planning clinical provision and by association future estate needs. The NHS property companies have been integral in helping to establish a national 'Strategic Estates Planning' function now a joint function of NHS Improvement and NHS England.
- 1.4 In some instances, NHS providers have made representations to the Department of Health and Social Care that local ownership of property may better enable effective delivery of the objectives set out above. This policy document sets out the basis on which applications for transfer of assets to NHS Trusts or Foundation Trusts ("Trusts") may be made and on what criteria they will be assessed.

2. Assets eligible for transfer

- 2.1 The NHS property companies do not own the freehold for all the estate they are responsible for managing. Of its current 3,500 properties, NHS Property Services holds the freehold in about half of this estate with the remainder being held through a combination of leasehold, license and Private Finance Initiative agreements.
- 2.2 CHP is currently head tenant in 305 NHS LIFT buildings which are contracted either under a Lease Plus Agreement or a Land Retained Agreement and only in the case of the latter will the asset automatically revert to CHP at the end of the agreement.
- 2.3 Where the NHS property company does not own the freehold of the asset, it may not be permitted to assign a lease or license to a provider without the express consent of the landlord. Before a business case is prepared for consideration the applicant will need to consult with the relevant property company to establish the potential feasibility of such a transfer.
- 2.4 Only properties that are expected to remain in long-term NHS use are eligible for transfer. Properties that have been declared surplus to NHS requirements by the local Clinical Commissioning Group or facilities where areas have been handed back and are vacated under the vacant space handback scheme of each of the NHS property companies will be exempt from the scope of this policy.

3. Application process

3.1 Prospective applicants (NHS Trusts or Foundation Trusts) will be required to make a formal business case for each property they wish to be transferred, setting out the rationale for the transfer and how the principles set out above in paragraph 1.2 will be addressed under their ownership.

3.2 In summary, the 'five case model' should also address the following points (and be accompanied by a completed NHS business case checklist):

- Strategic case

Alignment to local health and social care plans (STP and supporting capital/estates strategies) and the clear support of all the relevant local stakeholders. The case will also need to set out how Trust ownership will enable more effective use of the property and benefit the local health system.

- Economic case

How the proposals demonstrate value for money (cost/benefit/risk analysis) over the whole planned life of the asset and how they better deliver flexibility and service outcomes, compared to continued NHS property company ownership.

- Commercial case

A clear understanding of the liabilities associated with the asset, e.g. any contracts that may need to be novated, staff with TUPE rights, etc, which Trusts will be able to obtain from the relevant property company during business case development.

- Financial case

The long-term affordability, over the whole planned life of the asset, of the proposals for the Trusts and commissioners and how the new ownership model will be funded.

- Management case

The Trust's estates capability and its capacity to manage the site operationally (with sub-tenants, suppliers, etc.) and any further site development required to accommodate NHS service requirements.

3.3 The business case should be endorsed by the Board of the applicant Trust, the relevant Clinical Commissioning Group and the NHS England or NHS Improvement regional team, prior to consideration by the Department of Health

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and Social Care. The relevant property company will also be invited to confirm its accuracy (e.g. payments owed) and provide comment on their own plans for the property.

- 3.4 Where reservations about the proposed transfer are expressed by any the above bodies, these will be carefully considered by DHSC officials in making their recommendations.
- 3.5 Where a business case meets the agreed criteria, the Department of Health and Social Care will consider the application and usually make a determination within six weeks of formal acknowledgement of receipt.
- 3.6 Where a business case is rejected a formal letter setting out the reasons for this will be provided to the applicant. The applicant will then have a further period of two months to resubmit an updated business case or it will be deemed to be withdrawn and no further application will be permitted within that calendar year.
- 3.7 It is accepted that there may be some exceptional cases that arise which are not covered by this guidance and any proposed variation should be highlighted for discussion with the policy team within DHSC at the earliest opportunity.
- 3.8 To find out more about the business case requirements and discuss your interest in a property transfer, Trusts should email: property.transfers@dhsc.gov.uk

4. Terms and form of transfer

- 4.1 In the case of freeholds or long leaseholds, transfers will be made at the Net Book Value (NBV) shown in the NHS property companies' accounts at the point of transfer. It is envisaged that this will be accounted for as a transfer of function and more detailed guidance regarding to the accounting treatment for these assets will be issued shortly.
- 4.2 To prevent fragmentation, the norm will be for the entire title to be transferred. There may be exceptions where a split of title is being proposed and in such instances, it will be essential that the asset is capable of separate beneficial occupation.
- 4.3 The receiving Trust will become landlord to any third-party occupiers and, having regard to the nature of any existing occupiers and their terms of occupation, will be required to accept appropriate terms for the continued occupation of such occupiers and would be expected to document them in an appropriate occupancy agreement.
- 4.4 No transfer will be enacted until there is a binding agreement in place between the relevant property company and each of the occupiers of that property for the settlement of any outstanding debt relating to the property. The applicant Trust will be held responsible for any failure to meet the terms of such an agreement by any occupier and therefore should be party to all such agreements.
- 4.5 The NHS property companies would also be expected to ensure that all liabilities, indemnities, guarantees or other of their obligations relating to the estate are transferred to the applicant where possible, or that the applicant indemnifies NHSPS for any liabilities, indemnities, guarantees or obligations which cannot be transferred.
- 4.6 Examples of the above include:
- Any contracts for estates and facilities management services and the cost of works associated with the buildings
 - Any liability to compensate a tenant, or provide some sort of benefit to a tenant or undertake some works
 - Any ongoing litigation with a former tenant in respect of one of the premises
 - Any overage payment due to the original owner of a property

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- Any guarantees in relation to a tenant's payment obligations under a contract for fit-out works
 - Any indemnities in service contracts (e.g. where a supplier has been indemnified against cost increases arising from Agenda for Change pay rate increases)
- 4.7 Specific legal advice (to be incurred at each party's own expense) may be required in connection with the treatment of some of the contracts and liabilities to be transferred or indemnified.
- 4.8 Subject to approval of the business case, the Secretary of State will make either a transfer scheme (under section 302 of the Health and Social Care Act 2012) or a shareholder's resolution directing the company to transfer assets. In the latter case, the transfer of the property would not automatically transfer associated contracts, such as ongoing maintenance or works contracts, which would need to be addressed by a separate agreement between the parties.
- 4.9 Properties will transfer in their current condition. All responsibility for compliance will transfer with the property, as will any requirement for NHSPS to provide services on the building or to its occupiers, save as specifically agreed between NHSPS and the transferee.
- 4.10 Whether under a transfer scheme, or by assignment or novation, the transferee will take on the remainder of any contracts let by NHSPS to third parties to provide facilities management or other services on the site, or indemnify NHSPS against any termination costs where transfer is not possible.
- 4.11 On certain transfers, for example where NHSPS has already opted to tax a property, the recipient Trust may be liable for VAT on the transfer. It is recommended that applicant Trusts explore the tax treatment of the transfer early in their business case development.
- 4.12 There will be an overage requirement in the event of any subsequent sale (or other disposition, in whole or in part) to return 50% of any uplift in value (any disposal should be at market value, in accordance with HBN 00-08) from the sale to the NHS property company. This will be without deduction for any indexation or marketing costs unless by prior agreement with the NHS property company and will be secured by a restriction at the Land Registry and a legal charge.

5. Staff transfers

- 5.1 There may be TUPE implications if any employees are wholly or mainly assigned to maintaining and managing any property to be transferred. This could include any 3rd party employees. The parties will need to conduct a TUPE analysis to determine the position. If TUPE applies the employees will transfer into the Trust and all liabilities, rights and obligations will transfer with them. Similarly, the Trust will need to consider the pension position and determine if there are any associated costs in relation to pension provision.
- 5.2 There are legal obligations if TUPE applies on information and consultation which need to be adhered to. Organisations employing NHS staff also have clear obligations when it comes to consulting their workforce over service change, and in any tendering or business transfer processes. Consultation with staff representatives should be based on the principles set out in Agenda for Change.

6. Future of the property companies

- 6.1 Both NHS property companies are committed to ensuring that the estate owned by them on behalf of the NHS is developed and used in a way that supports the delivery of clinical strategies and is adaptable to locally changing demand, new models of care and the integration of clinical services.
- 6.2 NHSPS and CHP will continue to provide the strategic asset management, facilities management and capital investment/financing functions that they offer currently, their core roles being:
- To continue to hold, manage and safely maintain, on behalf of the NHS, significant portfolios of operational NHS property
 - To provide professional support to the optimise the estate, including office strategies for national NHS bodies and other national programmes, as well as local health systems
 - To make strategic investments on behalf of the local health system in those assets which are identified as being a fixture of the local health economy
 - To sell assets which are no longer required by the local health system in a timely and efficient manner
 - To ensure that the local health economy stands behind long term contractual commitments entered into prior to the abolition of PCTs and those arrangements which have subsequently been requested by commissioners
- 6.3 In return it is expected that the NHS will work with the property companies by:
- Reaching formal occupancy agreements with the property companies
 - Paying agreed charges within payment terms and identifying and resolving billing disputes quickly
 - Resolving property cost funding disputes between commissioners and providers
 - Notifying the relevant property company of formal changes in occupancy in a timely manner (in accordance with each company's change control processes)
 - Facilitating estates rationalisation opportunities and maximising utilisation for the benefit of local health economies

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